

**TOWARDS A LASTING PEACE IN NEPAL:  
THE CONSTITUTIONAL ISSUES**

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## TOWARDS A LASTING PEACE IN NEPAL: THE CONSTITUTIONAL ISSUES

### EXECUTIVE SUMMARY

Nepal is in the grip of a constitutional crisis. The drafters of the 1990 Constitution hailed it as "the best constitution in the world", ending three decades of absolute monarchical rule by enshrining a multi-party system under a constitutional monarchy. But the nine-year-old Maoist insurgency has cruelly exposed the inherent weaknesses in that settlement, and the royal coup of 1 February 2005 has dealt it a near fatal blow. Constitutional change is a necessary, if not sufficient, element for producing lasting peace. The conflict's root causes can only be addressed by structural change in the state and its governance system. Constitutional issues and the political means by which they are dealt with are crucial to a peace process.

Unfortunately, there is no sign of agreement between the king, the political parties and the Maoists on key topics. Three areas need to be considered:

- *what substantive changes should be made to the constitution?* Although the role of the monarchy lies at the centre of constitutional discussions, other important issues include democratic inclusion, sub-national government, electoral reform and civil-military relations;
- *what is the vehicle for political transition?* There are various possible mainstream entities -- such as an all-party government -- that could eventually negotiate a transition but there are also Maoist and royal roadmaps; and
- *what is the process for modifying the constitution?* Amendment of the current constitution by parliament or through referendum has been proposed but debate now centres on a constitutional assembly, a central Maoist demand which is now backed by mainstream parties and analysts.

Constitutional issues are at the crux of Nepal's military, political and social crises. The Maoists have called for radical restructuring of the state, including establishment of a republic, since the start of their insurgency in 1996. The mainstream political parties opposed fundamental revision of the constitution until recently but are now

willing to envisage greater change, although their policies are still a subject of debate.

Even before the royal coup, the 1990 Constitution had been undermined by the May 2002 dissolution of parliament and King Gyanendra's repeated dismissals of prime ministers. Subsequent governments had little chance of conducting successful negotiations with the Maoists as long as real power rested with the palace. If the king hoped that his unambiguous seizure of full executive authority would bring the Maoist to talks, he was mistaken.

The re-introduction of democratic institutions remains central to establishing a government that can negotiate with the Maoists and initiate a consensual process for constitutional change. But the palace is more concerned with consolidating royal rule, while a broader alliance of Kathmandu-centred interests has long opposed a more equitable distribution of power.

Three vehicles for breaking the political deadlock in the capital remain:

- *an all-party government without a parliament:* the royal coup has increased the previously slim likelihood that the mainstream political parties might manage to form such a government. But if it is constituted by royal fiat, it would lack the legitimacy and authority to negotiate effectively with the Maoists;
- *a government formed after new parliamentary elections:* the Deuba government was tasked to hold parliamentary elections but this was never realistic. The king has announced municipal elections by April 2006 but there is no clear prospect of a general election; and
- *a government formed after restoration of the parliament elected in 1999:* the king or the Supreme Court could restore parliament, although neither seems willing. This option was seen as a partisan measure that brings no guarantees of effective governance but it has now been endorsed by a coalition of mainstream parties. A parliament

restored with the limited mandate to negotiate with the Maoists on constitutional change might advance the peace process.

A government negotiating with the Maoists would have three basic options for constitutional change: parliamentary amendment via Article 116 of the 1990 Constitution; a referendum; or a constitutional assembly. In Nepal, constitutional amendment is typically understood to preclude consideration of the role of the monarchy, while a constitutional assembly is equated with republicanism. In fact, either method allows flexibility. By contrast, a referendum on constitutional issues would likely destabilise the state, rather than identify an acceptable political compromise.

Any viable tripartite process would need to allow the Maoists to argue to their cadres that republicanism was at least on the table and permit the king to feel confident the monarchy was sufficiently secure. A process in which key stakeholders have already reached critical informal agreements may be a way of delivering constitutional change peacefully, although it would have to be balanced with the need for transparency and accountability.

Allowing for easy subsequent amendment would enable future adjustments.

For the time being, however, the royal roadmap -- thinly disguised by the rhetoric of "protecting the 1990 Constitution" -- appears to be one of systematically dismantling multi-party democracy while pursuing a purely military strategy against the Maoists. The options for democratically negotiated change are severely constricted. If the "constitutional forces" of monarchy and parties cannot form a common position, there may be no viable basis for negotiation with the Maoists. In this context, the Maoist roadmap of an interim government, ceasefire and freely elected constitutional assembly is likely to become the focus of increased attention. This would test Maoist sincerity but also that of the parties and the palace. Each side claims to speak for the Nepali people but none has shown much appetite for allowing the people to have a real say. Unless and until this happens, there is little chance of finding a lasting peace.

**Kathmandu/Brussels, 15 June 2005**

## TOWARDS A LASTING PEACE IN NEPAL: THE CONSTITUTIONAL ISSUES

### I. INTRODUCTION

Nepal's civil conflict has three interlocking elements: the Maoist insurgency, a battle between the palace and the mainstream political parties over executive authority, and a challenge to the marginalisation of women, lower castes and ethnic groups.<sup>1</sup> These elements mutually reinforce each other. The Maoists, for example, have highlighted and mobilised around longstanding ethnic and caste cleavages. Successive governments' failures to address the insurgency have played a role in undermining democratic institutions, allowing the king to seize more power. A solution for each aspect of the conflict must take into account the dynamics of the other two.

Constitutional change of some kind may prove a partial solution to all three. The Maoists see constitutional transformation as essential. In contrast, King Gyanendra presents himself as guardian of the 1990 Constitution and resists most change. Nevertheless, in reforms suggested during the 2003 peace negotiations, a government selected by and representing the king proposed selective amendment as part of a settlement.<sup>2</sup> The platforms of the mainstream political parties also acknowledge the need for constitutional change. Excluded ethnic minorities and castes see such change as central to achieving equality. However reluctantly, all the major players have acknowledged a role for some constitutional reform in the peace process.

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<sup>1</sup> The conflict, which dates to the launch of the Maoists' "people's war" in February 1996, has claimed the lives of over 11,000 people and led to widespread human rights abuses. Civilians have borne its brunt. See Crisis Group Asia Report N°50, *Nepal Backgrounder: Ceasefire -- Soft Landing or Strategic Pause?*, 10 April 2003; Crisis Group Asia Report N°57, *Nepal: Obstacles to Peace*, 17 June 2003; Crisis Group Asia Briefing N°28, *Nepal: Back to the Gun*, 22 October 2003; Crisis Group Asia Report N°91, *Nepal's Royal Coup: Making a Bad Situation Worse*, 9 February 2005; Crisis Group Asia Briefing N°36, *Nepal: Responding to the Royal Coup*, 24 February 2005; and Crisis Group Asia Report N°94, *Nepal: Dealing with a Human Rights Crisis*, 24 March 2005.

<sup>2</sup> See "Highlights of proposals of forward-looking reforms proposed by His Majesty's Government of Nepal", 17 August 2003, p. 1.

This report considers what that role might be. The substantive issues are increasingly well rehearsed, especially in the wake of the royal coup. They include the role of the monarchy and the distribution of executive powers, questions of democratic inclusiveness, sub-national government and electoral reform, and civil-military relations. An outline of some key topics and an indication of the contours of debate on them is given in section IV. Questions relating to process -- how to carry out constitutional change and how to get to the point where it is possible -- have, however, generally received less detailed attention. There is a wide spectrum of options, from amendments by a parliament to a popularly-elected assembly tasked with preparing a new founding document from scratch.<sup>3</sup> Different modalities bring different conflict-related risks and would create varying levels of legitimacy for a changed or new constitution. Managed correctly, and with imagination, constitutional change could be an integral part of a sustainable negotiated peace. The varieties of strategies for managing change, therefore, are worth considering as possible subjects of and goals for peace negotiations.

Two process-related problems must be addressed. First, the post-February 2005 environment has reduced the possibility of constructive negotiations. Even if direct talks were to take place between the king and the Maoists, they would be unlikely to lead to a durable settlement in the absence of participation by the mainstream political parties.<sup>4</sup> A preliminary but vital step in any constitutional process is to move from the present political situation to one in which the political parties have a central place at the negotiating table.

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<sup>3</sup> Except when the latter term appears in direct quotation, "constitutional assembly" is used in this report rather than "constituent assembly", a term also in circulation, to reflect the unambiguous reference to "constitution" in the Nepali term *samvidhan sabha*.

<sup>4</sup> The mainstream parties are primarily those that won parliamentary seats in the 1999 election: Nepali Congress (hereafter Congress), which has split, adding Congress (Democratic); Communist Party of Nepal (Unified Marxist and Leninist, UML); Rashtriya Prajatantra Party (RPP); Nepal Sadbhavana Party (NSP); Nepal Workers and Peasants' Party (NWPP); and Samyukta Janamorcha Nepal (Janamorcha, also known as the People's Front Nepal).

Secondly, party, palace and insurgent positions are largely determined by calculation of the strategic advantages. No side is looking primarily to what is most likely to achieve peace. The risk of increased conflict associated with various modalities of constitutional change has yet to be considered by any side.

This report analyses how constitutional change might be achieved given Nepal's legal and political framework after the king's twin power-grabs of 4 October 2002 and 1 February 2005. It reviews the major options for breaking the Kathmandu political stalemate and achieving political transition (an all-party government, general elections, and restoration of the 1999 parliament) and outlines ways of achieving substantive constitutional change (including amendment under Article 116 of the 1990 Constitution, a referendum and a constitutional assembly). It also explores two alternative "roadmaps": the Maoist proposal for conflict resolution combined with constitutional reform, and the possible longer-term plans underlying the royal rhetoric of "protecting the 1990 Constitution".

While this report limits itself to the formal process of constitutional change according to the interests and positions of the major political power centres in Nepal, two other significant factors not discussed in detail must be borne in mind. They are related, as both draw attention to the fact that the significance of constitutional change, and the reality of any constitution's operation, depend on dynamics more complex than those immediately suggested by a straightforward structural account.

First, Nepal's emerging civil society has been active in helping frame and develop the debate on constitutional change.<sup>5</sup> Academics, journalists and other commentators have generated considerable literature on constitutional issues and numerous conferences, workshops and seminars have been devoted to discussing them.<sup>6</sup> The progress of such wider public debates and the ways in which they could feed into future negotiations is a topic worthy of separate consideration. Given the dynamics of

Nepal's conflict, it is unlikely civil society opinions will at this stage be decisive in shaping developments but it is important to work toward a negotiation process that will be more inclusive and provide opportunities for a range of voices to be heard.

Secondly, the relationships between political and socio-economic structures are crucial to the functioning of a constitutional settlement. Yet, these are never straightforward, particularly in a society as complex as Nepal's. Neighbouring India's experience since its independence in 1947 shows how the formal structures of a Westminster-style democracy have interacted with existing networks of social and economic power, regional interests, religious affiliations and traditional systems of government. This, too, is a major -- and largely unexplored -- area that deserves serious investigation. For example, the way in which the top-level structural reforms of 1990 were simply laid over existing hierarchies, power configurations and patronage networks without necessarily displacing them is illustrative: Nepal's recent history underlines the dangers of assuming that formal legal and political arrangements will in themselves translate into fundamental transformations across society. The ability of existing hierarchies to replicate themselves under different guises, and the resistance of powerful elites to change, should not be underestimated.

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<sup>5</sup> "Civil society", a problematic term with many possible significations, is loosely used here in the basic sense of non-governmental and non-political structures and networks such as academia, the media, NGO's, community associations and the like.

<sup>6</sup> There have been a multitude of initiatives, including the innovative Plusmedium online debate, which resulted in the publication of "Constitutional Dynamics of Impasse: Diagnosis and Dialogue", Integrated Organisation Systems, Kathmandu, 2004. The increased use of web-based discussion has been a notable development in Nepali political debate, although patterns of access, participation (involving large numbers of non-resident Nepalis) and medium (overwhelmingly English) in themselves raise questions about the widening stratification of Nepali society.

## II. CONSTITUTIONAL HISTORY

### A. THE RANA AND SHAH ERAS

Nepal emerged as a nation-state when Prithvi Narayan Shah, king of the Gorkha area west of Kathmandu, expanded his dominion in 1768 by conquering the Kathmandu Valley. The Gorkha expansion ceased only in 1816, when Nepal clashed unsuccessfully with the British East India Company and was forced to accept a treaty that reduced its territory.<sup>7</sup> Although in theory the monarchy retained absolute power, politics were dominated by conflicting factions within the royal family and a few elite families. Administrative power resided with a small group of royal officials, the Bharadars.<sup>8</sup> Even today, a small knot of noble families close to King Gyanendra play a disproportionate political role as unofficial royal advisers, bureaucrats or politicians.<sup>9</sup> This is only one way in which feudal structures have persisted since the advent of democracy.

In 1846 a member of a noble family, Jang Bahadur Kunwar (who later adopted the title Rana), seized control through massacres of rival notables. For more than 100 years, hereditary Rana prime ministers wielded absolute power, rendering the Shah monarchy mere puppets.<sup>10</sup> Jang Bahadur made the first effort to bring Nepal under a uniform judicial system in 1854 with the promulgation of the Muluki Ain, a nationwide legal code. In 1856 King Surendra signed an order transferring all political power to the Ranas.<sup>11</sup> The Rana prime ministers maintained strict control of the military, keeping the title of Supreme Commander-in-Chief. Family members also monopolised the army's higher ranks.<sup>12</sup> The Ranas were sustained in power primarily by the patronage of British India, which valued the uninterrupted supply of Gurkha recruits and only formally recognised Nepal's sovereignty in 1923.

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<sup>7</sup> Bhuwan Lal Joshi and Leo E. Rose, *Democratic Innovations in Nepal: A Case Study of Political Acculturation* (Berkeley, 1966), pp. 23-26; Joanna Pfaff-Czarnecka, "Vestiges and Visions: Cultural Change in the Process of Nation-Building in Nepal", in David N. Gellner, et al., *Nationalism and Ethnicity in a Hindu Kingdom: The Politics of Culture in Contemporary Nepal* (Amsterdam, 1997), p. 427.

<sup>8</sup> Joshi and Rose, op. cit., pp. 23-26.

<sup>9</sup> Crisis Group interview with former minister of law, September 2004. For a depiction of the palace secretariat and circles of influence around the monarch, see Jonathan Gregson, *Massacre at the Palace* (New York, 2002).

<sup>10</sup> Martin Hoftun, William Raeper and John Whelpton, *People, Politics & Ideology* (Kathmandu, 1999) pp. 2-3.

<sup>11</sup> Joshi and Rose, op. cit., p. 33.

<sup>12</sup> Crisis Group interview with Dhruva Kumar, Tribhuvan University, Kathmandu, 20 October 2004; Joshi and Rose, op. cit., p. 36.

In January 1948 Rana Prime Minister Padma Shamsher proclaimed Nepal's first written constitution in an effort to accommodate pressure for a political opening while preserving the family's political monopoly.<sup>13</sup> The constitution envisaged a council of ministers holding all executive power but controlled by the prime minister and a weak bicameral legislature exercising only limited jurisdiction.<sup>14</sup> It made scant reference to the king and did not cite Hindu symbols as sources of the state's authority. It was never implemented because the Rana regime collapsed in 1950-1951, its end precipitated by independent India's unwillingness to support continued autocratic rule when its own princely states had been brought -- some forcibly -- within the ambit of a republican democracy.

### B. THE FIRST DEMOCRATIC INTERLUDE AND THE PANCHAYAT ERA

In 1951 the Ranas finally ceded their absolute grip, agreeing to share government with the monarch, King Tribhuvan, and the Nepali Congress party, which had developed in India. Tribhuvan promised a "fully democratic political system functioning in accordance with a constitution prepared by a Constituent Assembly"<sup>15</sup> But the promised assembly never met. The second constitution was the transitional Interim Government Act of 1951, designed to last two years, but destined in fact to last eight. Promulgated by Tribhuvan, it divided power between the king and Council of Ministers, while reducing the prime minister's authority. With power to proclaim laws and veto legislation, the king gained substantially.<sup>16</sup> This arrangement, however, proved unstable when Tribhuvan declined to appoint a prime minister, repealed constitutional provisions concerning the cabinet and sought to rule directly with the aid of a royal council.<sup>17</sup>

The third constitution suffered a similar fate. Reneging on his father's promise of a constitutional assembly, King Mahendra announced the formation of a palace-appointed, constitution-drafting commission. It prepared a constitution, which was approved by the Council of Ministers, then promulgated by the king on 12 February 1959, a week before the first parliamentary elections.<sup>18</sup> It balanced monarchical power and democratic institutions

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<sup>13</sup> Joshi and Rose, op. cit., pp. 63-64.

<sup>14</sup> The Government of Nepal Act, 1948, reprinted in Ram Kumar Dahal, *Constitutional and Political Developments in Nepal* (Kathmandu, 2001), p. 286.

<sup>15</sup> Joshi and Rose, op. cit., p. 91.

<sup>16</sup> The Interim Government of Nepal Act, 1951, reprinted in Dahal, op. cit., p. 306.

<sup>17</sup> Joshi and Rose, op. cit., pp. 103-107.

<sup>18</sup> Ibid, pp. 212-213, 282, 292.

uneasily, tilting heavily toward the former. It explicitly vested executive power in the king, allowing him, "acting in His discretion", to appoint the prime minister, dissolve the cabinet, summon parliament, and reject legislation.<sup>19</sup> The king, moreover, retained control of the army and had extensive emergency and residual power, including a vaguely worded "power to remove difficulties".<sup>20</sup> Yet even this proved too restrictive for Mahendra, who in December 1960 had the Congress government, formed through the 1959 elections, arrested and assumed absolute political power.<sup>21</sup>

Drawing inspiration from the "guided" democracies of Egypt, Pakistan and Indonesia, and from the Rana constitution of 1948, Mahendra's 1962 constitution instituted a four-tiered structure of "Panchayats" (councils), from the village and town, through the district and zonal to the national level.<sup>22</sup> These were actually unrepresentative extensions of the palace. By barring political parties and vesting appointment for many Panchayat positions in the central government, the system concentrated political power while conveying a superficial impression of devolution.<sup>23</sup> In addition, the 1962 Constitution established a series of "class organisations" for peasants, youth, women and other groups, which sought to co-opt or preempt class-based social movements.<sup>24</sup> Like the 1959 document, the Panchayat constitution was promulgated by the king and vested in his hands all executive authority including the ability to issue ordinances and appoint the national Panchayat leaders, emergency powers, and control of the army.<sup>25</sup>

Unlike its predecessors, the 1962 Constitution manifested a distinct sectarian bias. Article 20 described the king as an "adherent of the Aryan culture and Hindu religion". Article 3 specified Nepal as a "Hindu" kingdom. Hindu symbols, like the cow as national animal, were embedded in the text and the provision that guaranteed religious freedoms consistent with "traditions" and barred conversion was understood as a way of protecting Hindu numbers.<sup>26</sup> These references to Hindu norms were designed partly as an effort to claw back legitimacy lost through abrogation of popular rule in December 1960 and partly to reinforce the historical conception of Nepal as the last refuge of Hindu purity, in contrast to oft-colonised and constitutionally secular India.

### C. THE 1990 CONSTITUTION

The Panchayat regime collapsed in 1990 when confronted with a "people's movement" that organised street protests in the Kathmandu Valley and major towns. The people's movement was inspired in part by the Eastern European transitions to democracy and provoked in part by economic hardships caused by a March 1989 Indian trade embargo.<sup>27</sup> Under pressure from the Nepali Congress party and the seven-party alliance of the United Left Front (ULF), King Birendra first eliminated the ban on political parties and then agreed to the dissolution of the national Panchayat and constitutional reform. He did not acquiesce easily to the latter but on recommendation of the Council of Ministers, he created a nine-member Constitution Recommendation Commission (CRC). Made up of lawyers affiliated with the parties and the palace, and led by a Supreme Court Justice, it prepared the draft constitution and presented it to the Council of Ministers. The CRC sought public opinion by visiting throughout the country but most feedback concerned religious, language and ethnic rights, topics that received only ambiguous endorsement in the final draft.<sup>28</sup> The closed manner in which the 1990 Constitution was drafted was a significant factor in the calls for constitutional change that followed the Maoist insurgency.<sup>29</sup>

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<sup>19</sup> Articles 10, 13(1), 17, 26 and 42 of the Constitution of Kingdom of Nepal, 1959, reprinted in Dahal, op. cit., p. 326.

<sup>20</sup> Articles 64 and 75-77 of the Constitution of Kingdom of Nepal, 1959, *ibid*, pp. 367-370. The provision concerning removal of difficulties is a precursor to Article 127 of the 1990 Constitution, used by King Gyanendra to dismiss and appoint prime ministers of his choice since 4 October 2002.

<sup>21</sup> Hoftun, Raeper and Whelpton, op. cit., pp. 70-72; Joshi and Rose, op. cit., pp. 384-385.

<sup>22</sup> Although King Mahendra justified the Panchayat system on historical grounds, Panchayats were traditionally "instruments of caste administration...or judicial bodies in the implementation of Brahmanic social regulations", and largely ceased to function during the Rana regime. *Ibid*, p. 397; Articles 31-34 of the Constitution of Nepal, 1962, reprinted in Dahal, op. cit. p. 371.

<sup>23</sup> Richard Burghart, "The Political Culture of Panchayat Democracy", in Michael Hutt (ed.), *Nepal in the Nineties: Versions of the past, visions of the future* (Delhi, 1994), p. 10; Joshi and Rose, op. cit., p. 400.

<sup>24</sup> Article 10A of the Constitution of Nepal, 1962, reprinted in Dahal, op. cit., pp. 379, 383-384; Hoftun, Raeper and Whelpton, op. cit., p. 76.

<sup>25</sup> Preamble and Articles 20, 39-40, 81A and 83 of the Constitution of Nepal, 1962, reprinted in Dahal, op. cit., pp. 379, 383-384, 433-435.

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<sup>26</sup> Articles 6 and 14 of the Constitution of Nepal, 1962, *ibid*, pp. 379, 383-384.

<sup>27</sup> See Hoftun, Raeper and Whelpton, op. cit., pp. 115-186; Martin Hoftun, "The Dynamics and Chronology of the 1990 Revolution", in Hutt, *Nepal in the Nineties*, op. cit., p. 14.

<sup>28</sup> Crisis Group interview with Nilamber Acharya, former law minister, Kathmandu, 28 September 2004; Hutt, "Drafting the 1990 Constitution", op. cit., pp. 36-37.

<sup>29</sup> Some commentators and politicians still make a strong case against constitutional reform, arguing that the 1990 Constitution was effectively endorsed by the participation of people and parties in three general elections and constitutional bodies. The most sustained and detailed presentation of this point of view is

The CRC operated with a clear, limited mandate to design a constitutional monarchy with a parliamentary system.<sup>30</sup> Throughout the drafting process, however, the king and his allies, including the army, exerted pressure to slow any shift toward democracy. Palace allies approached members of the CRC privately and introduced an alternative "palace draft" after the CRC had submitted its work to the Council of Ministers.<sup>31</sup> According to a CRC member, senior army officers approached him directly and emphasised that the army should be under the king's control, and sovereignty should also reside with the monarch.<sup>32</sup>

On 9 November 1990, Birendra, "with a strained face", announced the new constitution on television.<sup>33</sup> On a majority of issues, the democratic political parties had resisted pressure to dilute the document's democratic credentials. An extensive set of fundamental rights that are relatively rare in other nations' constitutions, such as privacy, was included.<sup>34</sup> There was also a bicameral legislature with a prime minister and cabinet selected on the basis of lower-house majorities. The monarchy was left mainly a symbolic role, with some residual authority over the line of succession and palace expenditures.<sup>35</sup>

Ambiguity, however, remained about sovereignty and military control. Although the king remained nominal

head of the army, operational control was transferred to the National Defence Council, which had a democratically elected majority.<sup>36</sup> Nevertheless, the efforts of members of the CRC affiliated with the ULF to change the army's designation from "Royal" to "Nepalese" failed in the face of military intransigence.<sup>37</sup> The constitution's allusion to sovereignty also captured the unresolved tension between popular will and royal prerogative.<sup>38</sup> The preamble, like those of 1959 and 1962, states that the king, not the people, promulgated the document. Nevertheless, Article 3 vests sovereignty in "the Nepalese people". Throughout the 1990s, the palace exploited this ambiguity to retain power in areas such as the appointment of ambassadors. Such efforts were only weakly and inconsistently resisted by the parties but the tension was only resolved eleven years later, when Gyanendra dismissed Prime Minister Deuba, instigating a series of palace-appointed governments with no democratic sanction. His seizure of absolute power in the royal coup of February 2005 confirmed the rupture of the always fragile contract between the palace and the democratic parties.

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probably Mukunda Regmi, *Samvaidhanik vikas ra nepal adhirajyako samvidhan 2047* (Kathmandu, 2005). Regmi also demonstrates that the palace was not the sole source of conservative influence in the constitution-making process: party representatives themselves rejected various progressive measures that had been in earlier drafts of the 1990 Constitution.

<sup>30</sup> Crisis Group interview with Biswanath Upadhyay, Chair of 1990 Constitution Recommendation Commission and former Chief Justice of the Supreme Court, Kathmandu, 29 September 2004; Krishna Hachhethu, "Transition to Democracy in Nepal: Negotiations behind Constitution Making, 1990", *Contributions to Nepalese Studies*, vol. 21, no. 1, January 1994, p. 101.

<sup>31</sup> Crisis Group interviews with members of Constitution Recommendation Commission, Kathmandu, September and October 2004; Hachhethu, "Transition to Democracy in Nepal", *op. cit.*, p. 102.

<sup>32</sup> Crisis Group interview, Kathmandu, September 2004; Michael Hutt, "Drafting the 1990 Constitution", in Hutt, *Nepal in the Nineties*, *op. cit.*, p. 38.

<sup>33</sup> Hachhethu, "Transition to Democracy in Nepal", *op. cit.*, p. 112.

<sup>34</sup> Crisis Group interview with lawyer, Kathmandu, October 2004. Articles 11-23 of the 1990 Constitution of Nepal. Article 22 announces a right to privacy, which has yet to be invoked successfully in Nepali courts.

<sup>35</sup> Crisis Group interview with former legal adviser to King Birendra, 29 September 2004; see also Articles 27-33 of the 1990 Constitution of Nepal. Crisis Group interview with Taranath Ranabhat, Speaker of the House of Representatives, 6 October 2004.

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<sup>36</sup> Articles 118 and 119 of the 1990 Constitution of Nepal. These and other relevant Articles are reproduced in Appendix B.

<sup>37</sup> Crisis Group interview with member of CRC, Kathmandu, 15 October 2004.

<sup>38</sup> Crisis Group interview with law professor, Lalitpur, 25 October 2004.

### III. THE STATUS OF THE 1990 CONSTITUTION

#### A. FROM DISSOLUTION TO DEUBA'S SECOND DISMISSAL

No legislature has met since Prime Minister Sher Bahadur Deuba's decision in May 2002 to dissolve the House of Representatives, the lower house of parliament, pending fresh elections slated for November 2002. A prime minister may dissolve parliament only "pursuant to the provisions of [the] Constitution".<sup>39</sup> The relevant constitutional provision explains that upon dissolving the House of Representatives on the prime minister's recommendation, the king "shall...specify a date, to be within six months, for new elections to the House of Representatives".<sup>40</sup> Two members, Hari Nepal of the Nepali Congress party and Ganesh Pandit of the UML, appealed the dissolution to the Supreme Court. Relying on a 1995 precedent, that body upheld the dissolution.<sup>41</sup>

In October 2002 Prime Minister Deuba, faced with a nationwide surge of Maoist violence, sought King Gyanendra's endorsement for a one-year postponement of elections. The king, describing the prime minister as "incompetent" because of his inability to hold the constitutionally-mandated elections, removed him on 4 October and replaced him with Lokendra Bahadur Chand of the Rashtriya Prajatantra Party (RPP). Chand, the first of three palace-appointed prime ministers, was succeeded on 4 June 2003 by Surya Bahadur Thapa, another RPP politician, who lasted until 7 May 2004. Deuba was reinstalled on 2 June 2004 with a mandate to initiate general elections by April 2005. He slowly patched together a coalition government incorporating his Congress (Democratic), the UML, RPP, Nepal Sadbhavana Party and a royal representative.

In appointing three prime ministers in succession, the king purportedly acted under the 1990 Constitution, Article 127 of which states that should "any difficulty aris[e] in connection with the implementation of [the] Constitution", the king shall have power to "issue necessary orders to remove such difficulty and such orders shall be laid before Parliament".<sup>42</sup> It is only by virtue of Article 127 that prime ministers are appointed and lawmaking, by orders from the palace, continues. The constitution's continuing vitality thus hinged at this

stage on whether the king's interpretation and use of Article 127 was defensible.

Due to the controversial manner of their appointment, Deuba and his cabinet lacked credibility. Other political actors, including the Maoists, viewed the coalition as the king's "puppet".<sup>43</sup> Governing under the pervasive threat of Article 127 dismissal deprived the Deuba government of freedom to make independent policy choices. All decisions had to be approved by the palace.<sup>44</sup> The government's fragility was acknowledged by donors, who nevertheless insisted that gambling on its survival was the best option in the wake of three failed administrations.<sup>45</sup> To maintain minimal international legitimacy and insulate the palace from responsibility for military and political settlements, the king sought to maintain a semblance of constitutionalism. This consideration initially appeared to foreclose the possibility of direct rule.<sup>46</sup>

Opinions on the vitality of the 1990 Constitution varied from it being at "a dead end"<sup>47</sup> to it remaining a "living" document with broad popular support,<sup>48</sup> but its influence could be detected only faintly in the mechanics of the Deuba administration. The continuing vitality of the 1990 constitutional dispensation was hanging by a thread that could hardly bear the heavy weight of King Gyanendra's three replacements of prime ministers. The consequent dearth of legitimacy was undermining the government's ability to negotiate or effect political change. The Deuba government had announced a deadline of 13 January 2005 for the Maoists to come to talks but there were no signs they would oblige, nor that the threat of going ahead with parliamentary elections without them could be carried out.

Some kind of political transition was unavoidable. Information and Communications Minister Mohammed

<sup>39</sup> Article 45(3) of the 1990 Constitution of Nepal.

<sup>40</sup> Article 53(4) of the 1990 Constitution of Nepal.

<sup>41</sup> Crisis Group interview with Yubaraj Sangroula, Dean of Kathmandu School of Law, Kathmandu, and counsel for Hari Nepal and Ganesh Pandit, 21 October 2004.

<sup>42</sup> Article 127 of the 1990 Constitution of Nepal.

<sup>43</sup> Crisis Group interview with political leaders, Kathmandu and Bhaktapur, October 2004. The Maoists declined to speak with the Deuba government, demanding instead to talk directly with its "masters". See Maoist press statement, 24 September 2004.

<sup>44</sup> Crisis Group interview with senior Nepali journalist, October 2004. A stark example of the Deuba government's ineffectiveness was given on 4 October 2004, when the High-Level Peace Committee sought public affirmation of palace support before offering to negotiate with the Maoists. "King grants audience to peace committee members", nepalnews.com, 4 October 2004.

<sup>45</sup> Crisis Group interviews with representatives of donor governments, Kathmandu, October 2004.

<sup>46</sup> Crisis Group interviews with Nepali lawyers and businessmen, Kathmandu, October 2004.

<sup>47</sup> Crisis Group interview with Sarita Giri, NSP, Kathmandu, 26 October 2004.

<sup>48</sup> Crisis Group interview with Taranath Ranabhat, Speaker of the House of Representatives, 6 October 2004.

Mohsin, a royal nominee, had warned of an imminent authoritarian regime on 10 November 2004. Exactly a month later the *Rajparishad* (Royal Council), demanded a more active role for the monarch. Nevertheless, Nepal's most influential allies believed they had persuaded the king to strengthen the democratic centre rather than take precipitate unilateral action.

## B. THE ROYAL COUP OF FEBRUARY 2005

On 1 February 2005 King Gyanendra used a royal proclamation to dismiss the Deuba government, impose a state of emergency and seize absolute power.<sup>49</sup> The royal coup had openly acknowledged parallels with King Mahendra's dismissal of the elected government in December 1960. Gyanendra also imitated his father in following Pakistani precedents: while Mahendra had drawn on General Ayub Khan's example, Gyanendra tried to emulate General Pervez Musharraf. But the most notable parallels and continuities were not with any external example but with the indirect royal rule which had been instituted since October 2002.

The coup was a dramatic -- and, at least initially, effective -- demonstration of royal will but it did little more than formalise the earlier assumption of de facto power and give more teeth to the state's repression of the political mainstream. A prescient Nepali writer had observed almost two months earlier, "By now everyone has heard rumours that King Gyanendra is going to take over. (Actually, the word on the streets is that he took over on 4 October 2002, and will soon quit pretending otherwise)".<sup>50</sup>

As in his first dismissal of Deuba, the king sought to project an image of constitutional propriety by invoking his Article 127 powers to "remove difficulties". But his extensive use of that provision since October 2002 had already found little support in the constitution's text or expert legal opinion. The article is ambiguous, its scope not clearly delimited. This is perhaps deliberate: as a professor of Nepali law noted, its precise origins are "shrouded in mystery", although clues can be gained from its wording.<sup>51</sup> The requirement for after-the-fact parliamentary ratification of the king's actions is key. This condition cannot be satisfied as long as the king appoints administrations rather than allowing a democratic parliament to meet, suggesting that the constitution's

framers hardly had in mind the kind of crisis Nepal has faced since October 2002. The absence of a parliament, moreover, does not mean the king has general powers. The 1990 Constitution designates the Supreme Court as the body authorised to settle "any constitutional or legal question involved in any dispute of public interest or concern" through its "extraordinary power to issue necessary and appropriate orders to...settle the dispute".<sup>52</sup>

CRC members agree Article 127 does not include the power to appoint and dismiss prime ministers after dissolution of an elected parliament and failure to hold elections. Still less does it entitle the monarch to dismantle the democratic structure envisaged by the constitution and rule without checks. According to the CRC chairman, retired Justice Biswanath Upadhyay, speaking before February 2005, "the king has misinterpreted Article 127", which was modelled on transitional elements in the Indian Constitution.<sup>53</sup> "Article 127 was supposed to be a weak saving clause", explained another member of the CRC. "In the case of an obstacle, a recommendation is needed from the prime minister, and [the measure] must be within the constitution".<sup>54</sup>

Unsurprisingly, those close to the king disagree. They describe Article 127 as a broad grant of discretionary power, unique in the constitution's text. Any blame for constitutional breakdown, they argue, is due to Deuba's premature dissolution of parliament in May 2002.<sup>55</sup> Their account, however, cannot explain Article 127's reference to parliament, or how the king's expansive use of it can be squared with the parliamentary edifice established in the 1990 Constitution. The imposition of a state of emergency is similarly problematic: the king is indeed entitled by Article 115(1) to proclaim a state of emergency "if a grave crisis arises in regard to the sovereignty or integrity of the Kingdom of Nepal or the security of any part thereof, whether by war, external aggression, armed rebellion or extreme economic disarray". But such a

<sup>49</sup> See Crisis Group Report, *Making a Bad Situation Worse*, op. cit. and Crisis Group Briefing, *Responding to the Royal Coup*, op. cit.

<sup>50</sup> Manjushree Thapa, "The word on the streets", *Kathmandu Post*, 10 December 2004.

<sup>51</sup> Crisis Group interview, Kathmandu, 25 October 2004.

<sup>52</sup> Article 88 of the 1990 Constitution of Nepal; S.P.S. Dhungel et al., *Commentary on the Nepalese Constitution* (Kathmandu, 1998), pp. 679-680. That commentary contends any order must be "no more than necessary to remove" a difficulty and cannot be incompatible with any other constitutional provision. Neither of these conditions is satisfied by the king's use of Article 127.

<sup>53</sup> Crisis Group interview with former Justice Biswanath Upadhyay, 29 September 2004.

<sup>54</sup> Crisis Group interview with Daman Nath Dhungana, CRC member, Kathmandu, 15 October 2004. Another CRC member has agreed in print. Bharat Mohan Adhikari, "Constitutional Assembly is not a panacea", in Mukti Rijal (ed.), *Constitution & Its Application (1990-2004 A.D.)* (Kathmandu, 2004), p. 24. A saving clause is an exception inserted into a constitution or statute to preserve a residual power the document otherwise eliminates.

<sup>55</sup> Crisis Group interviews, Kathmandu, October 2004.

proclamation must be endorsed by a two-thirds majority of the House of Representatives within three months (115(2, 3)) or, if the lower house is dissolved, by the upper house (115(6)).<sup>56</sup> The lifting of the state of emergency on 30 April 2005 was welcomed as a possible first step towards re-establishing democratic norms but the question of whether constitutional rights are protected will still depend on the behaviour of the administration and security forces, and the willingness of the courts to hold them to account.

In most respects, the 1990 Constitution now exists more as a rhetorical point of reference than as a functional template for governance. No elected or judicial official provides any check on executive excesses. Chief Justice Hari Prasada Sharma has argued that as the judiciary is incapable of judging the threat to national security, "it should have respectful deference to executive wisdom".<sup>57</sup> If the king's recent interview with *Time* magazine is an indication, current "executive wisdom" does not appear to have much respect for legal niceties: "No law abiding citizen in Nepal should feel any pain. Yet those who do not abide by the law, who do not accept the majority's choice, they will feel pain".<sup>58</sup>

The constitutionally mandated Commission for the Investigation of Abuse of Authority (CIAA)<sup>59</sup> has been sidelined by a newly established Royal Commission on Corruption Control, which is being used to discredit political leaders. Its legal authority and constitutional legitimacy is dubious.<sup>60</sup> But the Supreme Court refused to consider a writ challenging the Commission's legality, its registrar explaining that "no court has the authority to question any decision made by the King under Article 31 of the Constitution".<sup>61</sup> The chairman of the Nepal Bar Association has concluded that, given the Commission's

patent unconstitutionality, a legal challenge is futile: "It is completely a political battle, not a legal one".<sup>62</sup> The balanced governance structures of the 1990 Constitution are effectively defunct.

### C. TOWARDS A "ROYAL ROADMAP"?

In key respects, the king appears to have disregarded or discarded the 1990 Constitution in both letter and spirit. But as he relies on the argument that he has acted to preserve it, the rhetoric of protecting the constitution has, paradoxically, gained all the more significance. Defending the 1990 settlement also gives the impression of safeguarding the legacy of King Birendra, whose widespread popularity was only heightened by the palace massacre of 2001 in which he died. This public commitment thus allows Gyanendra to strengthen his position by linking his policies to the memory of his brother's achievements. The post-coup royalist position may, therefore, become all the more opposed to constitutional change in the short term. And quite apart from rhetorical legitimacy, the current constitution, with all its ambiguities, has served the palace well while guarding against the threat of open discussion about the monarchy.

Nevertheless, there are many indications that the king's true goal is a return to Panchayat-style governance. Every positive reference to multi-party democracy in the 1 February proclamation was qualified with an adjective such as "meaningful", "effective" or "successful".<sup>63</sup> Talk of popular representation was conspicuously not linked to political party representation. Subsequently, the king has more explicitly indicated that parties are only an optional part of democracy: "Look, democracy is here to stay. No one will be able to get rid of it. And the institution of the monarchy will see to it that no one can get rid of it. But the parties are a vehicle in that progress, and you can always change vehicles. The people have to decide what vehicle they want".<sup>64</sup> Further comments likewise hinted at a democratic system unmediated by parties: "We want to see mass participation in the democratic set-up, where the masses are given the opportunity to have a say in their own welfare. We want to see transparency, openness and communication flourish. The people must be their own masters".<sup>65</sup>

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<sup>56</sup> The post-coup state of emergency also appeared to contravene international law, a subject beyond the scope of the present report. See Crisis Group Report, *Dealing with a Human Rights Crisis*, op. cit. and "Nepal: The Rule of Law Abandoned", International Commission of Jurists, 17 March 2005.

<sup>57</sup> Speech delivered on 20 March 2005 at the 11th Conference of the Chief Justices of Asia Pacific.

<sup>58</sup> "It's a Question of Survival", interview with King Gyanendra, *Time Asia*, 25 April 2005, available at [http://www.time.com/time/asia/2005/nepal/int\\_ganendra.html](http://www.time.com/time/asia/2005/nepal/int_ganendra.html). The king further clarified his views on the rule of law: "Perseverance, honesty and moral values must be part and parcel of our daily lives. A little law is required".

<sup>59</sup> The CIAA is established by Articles 97 and 98 of the 1990 Constitution.

<sup>60</sup> "RCCC is an unconstitutional body: Koirala", *nepalnews.com*, 20 April 2005.

<sup>61</sup> "Writ challenging royal commission rejected", *www.kantipuronline.com*, 4 May 2005.

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<sup>62</sup> "Legal debate on RCCC meaningless", *Kathmandu Post*, 24 May 2005.

<sup>63</sup> Proclamation to the Nation from His Majesty King Gyanendra Bir Bikram Shah Dev, 1 February 2005.

<sup>64</sup> "It's a Question of Survival", interview with King Gyanendra, op. cit.

<sup>65</sup> Ibid.

Indeed, the king seems satisfied that the people can have their say in national affairs through him and that their representation -- through unspecified channels -- is already quite sufficient: "As far as being in touch with the people, do people's voices reach me? Are their aspirations being fully represented? I think we have developed the correct mechanisms and representatives to get that across to us. I am fully satisfied that I am hearing the voice of the people".<sup>66</sup> The king has also offered insights into his "values and ideals". These are focused on economic development and make no mention of democracy: "Peace must reign. Then we can get on with the business of advancement of the system, of economics, of industries, of the wise use of our natural resources, and this will bring us to prosperity. I am also confident that all our friends will understand and support us in the pursuit of these values and ideals".<sup>67</sup> As a senior envoy in Kathmandu concludes, "It's pretty clear that whatever the king means by 'democracy' is pretty different from what we would understand by the term".<sup>68</sup>

Concrete actions taken by the royal government have reinforced suspicions that the administration derives its inspiration from the heyday of King Mahendra. For example, Education Minister Radha Krishna Mainali has announced the development of a new "nationalist" school curriculum. Nepal's textbooks have never been noted for lack of national sentiment but Mainali has reportedly engaged in a crash program to roll out the new curriculum in the higher secondary grades as soon as possible.<sup>69</sup> On 11 April 2005 the king appointed five regional and fourteen zonal administrators,<sup>70</sup> an unmistakable, and no doubt deliberate, revival of Panchayat administrative structures. Under the Panchayat, the zonal commissioner (*anchaladish*) was a powerful and feared official who reported directly to the palace. The new system gives the administrator a different title (*anchal prashashak*) but embodies the same substance. In the words of a Nepali coalition of human rights bodies, "The state is systematically dismantling the structures of democratic polity and constitutional bodies".<sup>71</sup> British Ambassador Keith Bloomfield adds: "Some of the people the king has surrounded himself with do not encourage us

to believe him when he says he's interested in returning to democracy".<sup>72</sup>

The composition of the royal "inner circle" also adds to the impression of Panchayat revival. As Kul Chandra Gautam has observed, "In plotting his coup, the King had reached out and enlisted the support from some of the old-guards from the Panchayat era of his father's absolute rule. Many of these old political cronies fill the King's cabinet and serve as his trusted advisers".<sup>73</sup> This is not lost on the public, nor on the many Panchayat politicians who entered democratic politics and still nurse grudges against certain hardliners. "The King seems to have miscalculated the utility of these old loyalists' advice and support", says Gautam. "In one extreme case, a widely despised personality who had literally been chased out of the country during the heyday of the democratic people's movement in 1990 has resurfaced in Kathmandu in the King's inner circle of advisers".<sup>74</sup> First Vice Chairman of the Council of Ministers Peter Giri has done little to reassure doubters with comments such as, "I don't believe in democracy; the king does".<sup>75</sup>

Nevertheless, some features of an emerging royal roadmap, and longer-term options, are becoming discernible. First, the palace is determined to bring the security situation under some degree of control but may see advantages in continued instability. The intensified conflict across the country beyond the Kathmandu Valley has been accompanied by a cooling of rhetoric. In place of upbeat talk of a quick victory, the king is now preparing for a long haul: "It's not a question of winning or not winning. It's a question of taming".<sup>76</sup> Conflict-induced disarray was in fact an asset to the palace as long as it could be blamed on ineffective political parties. That is no longer the case but continuing rural insecurity, perhaps further complicated by the activities of ethnic fronts and village militias, could be used to justify extending the period of tight autocratic control.

Secondly, some sort of elections will be necessary to provide continuing legitimacy for royal rule. Initially, the call for municipal polls serves three purposes: (i) it puts pressure on the political parties to decide on a response and ensure there is a solid common position; (ii) it offers the international community a way of normalising the situation and reducing pressure on the king; and (iii) it

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> Crisis Group interview, Kathmandu, May 2005.

<sup>69</sup> Crisis Group interview with journalists, Kathmandu, 26 March 2005.

<sup>70</sup> "King appoints regional and zonal administrators", *www.kantipuronline.com*, 11 April 2005.

<sup>71</sup> "Human Rights Community Resists Authoritarian Regime", press statement of the National Coalition of Human Rights Defenders, Kathmandu, 5 June 2005.

<sup>72</sup> Interview with British Ambassador Keith Bloomfield, *Nepali Times*, 18 March 2005.

<sup>73</sup> Kul Chandra Gautam, "Mistakes, Miscalculations & Middle Ground", *www.blog.com.np*, 4 April 2005.

<sup>74</sup> Ibid.

<sup>75</sup> Quoted by Narayan Wagle, *Kantipur*, 8 April 2005 and translated in *Nepali Times*, 15 April 2005.

<sup>76</sup> "It's a Question of Survival", interview with King Gyanendra, *Time Asia*, op. cit.

may help to attract the support of royalist politicians who have so far been conspicuously unenthusiastic about the royal takeover.

The government is pressuring the parties to participate and insisting the polls will be free and fair. "The government expects cooperation and participation of the political parties in the elections", stated Minister Tanka Dhakal. "We request all the political parties to stay prepared for the elections".<sup>77</sup> Local elections and "decentralisation" plans offer the king a veneer of democratic respectability. This was the route adopted by Mahendra and has been the tried and tested method of successive Pakistani military dictators, including Musharraf.<sup>78</sup> The calculation that the call for local polls will split the diplomatic community is already proving justified: U.S. and British diplomats have been urging the parties to view this as a positive step towards incremental re-establishment of democracy and take part. Other diplomats are more sceptical and share the parties' initial response that the call for elections is merely a cynical subterfuge.<sup>79</sup> Some who have to support the election call in public are scathing in private: "The parties insist this is a ploy by the king, and they certainly seem to be justified in that", a senior diplomat said.<sup>80</sup> A widening rift in the international response to the royal coup is likely.

Finally, the elections call may be the best way for the king to expand his support among royalist politicians. Most big names from the Panchayat period and the royalist RPP have maintained silence or ambivalence on the 1 February takeover.<sup>81</sup> There is palpable doubt among even the staunchest palace supporters that the king's strategy is viable and worth investing in. Many hardline Panchayat leaders opted for a quiet retirement after 1990 and will think hard before committing themselves to public involvement in the new royalist administration. Moreover, Panchayat politicians who entered the multi-party system have become accustomed to, and adept at,

working within the democratic set-up. They have developed grass-roots links, and many are unconvinced that the palace strategy will displace now established habits of party representation and loyalty.

As a party-less and palace-centred system, Panchayat politics revolved around personal intrigue and rivalries. For all the king's justified complaints about petty party bickering, the royalist RPP has been the most consistently fractious democratic party. While its leader refuses to back the royal coup, other prominent activists are urging support and threatening yet another split if their views go unheeded.<sup>82</sup> There is also pressure from activists who are tempted by the prospect of appointment to influential positions on local bodies. There is bad blood between senior royalists, with grudges dating back decades. This is partly responsible for the sidelining of the more competent and experienced monarchists. A ministerial reshuffle combined with the temptation of polls and elected office may go some way towards consolidating the palace's political base by encouraging supportive politicians to take a more active role.

If the king is successful in building a solid base for palace rule, questions of constitutional reform along royalist lines will slowly but surely find their way onto a more public agenda.<sup>83</sup> In late 2004 senior mainstream politicians believed the king had probably already drafted a new constitution to spring on the country but this seems an unlikely option.<sup>84</sup> The temptation to institutionalise a more active role for the monarch may grow but any proposed reforms are likely to be articulated by sympathetic politicians rather than attributed directly to the palace. Royal plans for constitutional change might include three distinct models or, more likely, a combination of approaches:

- *parliamentary elections leading to amendment*: if municipal polls are held, the logical next step would be some form of general election which, with or without mainstream party participation, might return a largely royalist legislature. The Article 116 route for amendment could then be pursued and the 1990 settlement could be modified in a fashion that reinforced royal commitment to constitutional norms;
- *a constitutional commission*: if there is no progress towards national elections, the establishment of a special commission is a possibility. Its membership

<sup>77</sup> "Govt. pledges free and fair municipal polls", nepalnews.com, 21 April 2005.

<sup>78</sup> See Crisis Group Asia Report N°40, *Pakistan: Transition to Democracy?*, 3 October 2002 and Crisis Group Asia Report N°77, *Devolution in Pakistan: Reform or Regression?*, 22 March 2004.

<sup>79</sup> Crisis Group interviews with Kathmandu-based diplomats, journalists and political activists, April 2005.

<sup>80</sup> Crisis group interview, Kathmandu, May 2005.

<sup>81</sup> For example, RPP Chairman Pashupati Shamsheer Rana's response to the events of 1 February is that "the alternative was to change the Prime Minister or to try another multi-party coalition....The constitution visualises an emergency under multi-party norms, not without those norms. It has changed all equations. If a compromise is not brought about, the consequences are inconceivable", in "Was February 1 necessary?", www.liberaldemocracynepal.org, 12 May 2005.

<sup>82</sup> "RPP dissident faction warns of schism in party", www.kantipuronline.com, 5 June 2005.

<sup>83</sup> The possible options outlined here are drawn from numerous Crisis Group interviews with royalists, other politicians, journalists and analysts in Kathmandu, February to April 2005.

<sup>84</sup> Crisis Group interviews, 13-15 December 2004.

could be carefully selected to represent a range of interests while remaining vulnerable to concerted palace and military pressure; and

- *a referendum*: palace sources are already talking of a referendum as a possibility. The power to define its terms would give the palace a strong hand. If the electorate's options were reduced to choosing between "terrorism" or "democracy under an active monarch", the king might secure some form of mandate for amending the constitution to reflect a more active approach.

These remain for now hypothetical options. As a senior journalist commented on palace thinking, "it's a *khichadi* model",<sup>85</sup> a reference to a rice and lentil hotch-potch that perhaps most accurately describes the royal strategy to date. The palace has yet to give a convincing picture of its agenda, and the public statements of the king and his ministers leave an impression of some confusion. The palace may develop a roadmap that goes beyond consolidating royal power to addressing more of the fundamental issues outlined below. But if such a roadmap is gradually elaborated, it will be subject to the same questions of process, inclusion, legitimacy and durability that apply to all other models. It is doubtful that either continued palace rule under the current circumstances or selective, royally-sponsored amendments to the constitution will provide answers to Nepal's deep, underlying problem.

#### D. THE NEED FOR A DEMOCRATIC WAY OUT

On the Maoist side, willingness to re-enter democratic politics will hinge in part on the perceived costs and benefits.<sup>86</sup> A government subject to royal fiat with a fig-leaf of constitutional legitimacy is not attractive to a far-left party like the Communist Party of Nepal (Maoist)<sup>87</sup> but anecdotal and polling data suggest the Maoists would command a respectable vote in a democratic election.<sup>88</sup> Because support for Maoist goals apparently

exceeds support for their violent methods, they could benefit if they were to re-enter democratic politics and renounce the use of violence.<sup>89</sup> Yet this depends on the existence of democratic politics. If governments and cabinets remain at the king's pleasure, limited CPN(M) options will be dependent on the king's goodwill. In short, without a restoration of the democratic process, the Maoists have little reason to negotiate, unless to weaken the mainstream parties further by reaching a temporary deal with the palace.

The king and the Maoists cannot negotiate a stable solution without the parties' involvement. The latter, notwithstanding the involvement of a handful in the Deuba administration, have been systematically marginalised since October 2002 and directly repressed since February 2005. Nevertheless, they retain considerable support across the country. Recent polling demonstrates that, despite a certain scepticism, about one third of Nepalis retain affiliations with them.<sup>90</sup> Any attempt by the Maoists and the king to lock the mainstream parties permanently out of power would lead to growing instability. Moreover, a solution reached by negotiation between Nepal's two non-democratic power centres would be unlikely to reflect the interests of most of the population.

The country's long-term interests are also most likely to be served by a return to democratic politics. Despite their flaws, it is the political parties who can best mediate popular interests, not the unelected monarchy or Maoists. Although the parties now tend to be unrepresentative of Nepal's diversity, they are the best hope for incorporating that diversity into democratic politics. Recent polls indicate that around 60 per cent of Nepalis still consider democracy under a constitutional monarchy the best form of government.<sup>91</sup>

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and Dynamics of the Maoist Revolt in Nepal's Rapti Hills", Report submitted to Mercy Corps International, October 2003, p. 79, available at <http://www.mercycorps.org/items/1662/>.

<sup>89</sup> Greenberg Quinlan Rosner Research Inc., "Faith in Democracy Endures, in Spite of Disappointments: Report on the Baseline Survey and Focus Groups", Washington, 16 August 2004, p. 8.

<sup>90</sup> A recent nationwide survey concluded that more than 28 per cent were not afraid to say they were close to a mainstream party, in spite of Maoist violence and intimidation. Crisis Group interview with Krishna Hachhethu, Kathmandu, 4 October 2004. Another found 41 per cent willing to affiliate with a mainstream party. Greenberg Quinlan Rosner Research Inc., op. cit., p. 10. The methodology of this poll has not been published.

<sup>91</sup> A July 2004 nationwide poll found that 60 per cent of respondents favour a democracy with a constitutional monarchy, 17 per cent democracy without a monarchy; 9 per cent a return to the Panchayat system, and 2 per cent an

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<sup>85</sup> Crisis Group interview, 20 April 2005.

<sup>86</sup> Crisis Group interview with international conflict specialist, Kathmandu, 25 October 2004.

<sup>87</sup> The Communist Party of Nepal (Maoist) is abbreviated to CPN(M). The Maoist movement consists of the party, the "people's liberation army" and the "united front". For the purposes of this report, however, "the CPN(M)" and "the Maoists" may be understood as loose equivalents.

<sup>88</sup> One analyst of July 2004 polling data suggested that the CPN(M) would obtain at least 8 per cent of the vote. Crisis Group interview, Kathmandu, October 2004. Another detailed field survey of the Maoist movement predicted that it might win about 15 per cent. Robert Gersony, "Sowing the Wind: History

## IV. SUBSTANTIVE CONSTITUTIONAL ISSUES

Any structured debate on constitutional reform will have to encompass a multitude of substantive issues, on each of which a wide range of positions exists, some more easily reconciled than others. The following sections outline a few of the central topics, and the arguments and policy positions that will shape the debate.

### A. THE MONARCHY

The 1990 Constitution attempts to create a constitutional monarchy without substantive political power. The king is part of both the executive and the legislature<sup>92</sup> but his roles are formally constrained. Except in limited circumstances, he is to act only "upon the recommendation and advice, and with the consent of the Council of Ministers", as submitted through the prime minister.<sup>93</sup> The king is to appoint an individual with a parliamentary majority as prime minister, although there seems to be some discretion when more than one coalition is conceivable. He must assent to new legislation, and on the prime minister's recommendation, he also nominates one-sixth of the National Assembly (upper house), and appoints the army's commander-in-chief.<sup>94</sup>

By contrast, "there must be a reference to an exclusive power [in the constitution] for the king to have a privilege".<sup>95</sup> Under this interpretation, the king retains independent authority in matters of royal succession and royal expenditure.<sup>96</sup> Article 127, discussed above, was further included to allow the king to smooth disruptions in the democratic system. The king can also issue ordinances with "the same force and effect as an Act" when parliament is not in session.<sup>97</sup> Moreover, the palace is sheltered from criticism by broad judicial

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absolute monarchy. Greenberg Quinlan Rosner Research Inc., op. cit., p. 6. A separate survey conducted in November and December 2004 found 53.4 per cent in favour of a "fully constitutional monarchy" with 5.5 per cent in favour of an absolute monarchy and 4.9 per cent of a republic, "Nepal: Contemporary Situation", Sudhindra Sharma and Pawan Kumar Sen, The Asia Foundation/Interdisciplinary Analysts, Kathmandu, 2005, p. 30.

<sup>92</sup> Articles 35(1) and 44 of the 1990 Constitution of Nepal.

<sup>93</sup> Article 35(2) of the 1990 Constitution of Nepal.

<sup>94</sup> Articles 36, 4, 46(1), 69 and 119(1) of the 1990 Constitution of Nepal.

<sup>95</sup> Crisis Group interview with Nilamber Acharya, former Law Minister, Kathmandu, 28 September 2004.

<sup>96</sup> Articles 28 and 29 of the 1990 Constitution of Nepal.

<sup>97</sup> Article 72 of the 1990 Constitution of Nepal.

immunity and a restriction on discussion of the royal family in parliament.<sup>98</sup>

Both Birendra and Gyanendra have leveraged these limited constitutional opportunities with an informal, extra-legal support base in the army and traditionally powerful families. Eliminating constitutionally-granted royal prerogatives could not in itself establish a functioning constitutional monarchy. Legal change alone will not erase the familial connections and ties of caste and patronage which shape the distribution of power in Nepal, as the experience of the 1990 CRC suggests. A transition to a genuine constitutional monarchy would require more fundamental change but Nepal's history suggests such a shift will prove difficult.<sup>99</sup>

In light of these obstacles, and in particular following the king's power-grabs in October 2002 and February 2005, it is unsurprising that some are sceptical of the possibilities of retaining both a monarchy and a democracy.<sup>100</sup> Nepal has twice obtained a democratic constitution with the king's active involvement in the drafting. On both occasions, the palace was instrumental in undermining democratic mechanisms and restoring royal authority.<sup>101</sup> The Maoists' republican stance had until 2002 been a clear point of difference with the mainstream parties, which have traditionally supported a constitutional monarchy. But growing calls for a revision of this policy -- most vocally from republican students within the Congress and UML -- have been bolstered by more cautious party leaders' suspicions of the king's intentions.

"The door for unity and national reconciliation has been blocked now", says Girija Prasad Koirala. "The future of [the] monarchy is at stake after ending the consensus of [the] 1990 people's movement". Madhav Nepal has similarly warned that "if the king doesn't need political parties and their leaders, we will also review our policy [towards the monarchy]".<sup>102</sup> Reference to constitutional monarchy is conspicuously absent from post-February 2005 mainstream political rhetoric. Instead, even moderate political leaders are now demanding that the king choose between complete democracy or republicanism.

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<sup>98</sup> Articles 31 and 56 of the 1990 Constitution of Nepal.

<sup>99</sup> Crisis Group interview, Kirtipur, October 2004.

<sup>100</sup> Crisis Group interviews, Kathmandu, Lalitpur and Kirtipur, October 2004.

<sup>101</sup> In a poll of Kathmandu Valley residents, almost half said the king was in charge of the nation. Hari Sharma, "What Kathmandu Valley thinks", *Nepali Times*, 15-21 October 2004, p. 4.

<sup>102</sup> "Policy towards monarchy may be reviewed: leaders", nepalnews.com, 5 May 2005.

Moreover, the institution of a monarchy generates potential governance problems, especially for an ethnically fragmented society. It operates in some ways like the presidential system, which has been criticised as a model for young democracies.<sup>103</sup> The palace is an alternative, destabilising power centre claiming to "represent the nation", notwithstanding the democratic pedigree of the parliament.<sup>104</sup> By providing an avenue for appeal for unsuccessful factions and minorities, it competes with parliament. No system has been identified yet to resolve that instability. Moreover, the monarchy is not an institution that naturally represents a variety of ethnic groups, despite the self-serving rhetoric of palace allies. To the contrary, monarchical rule is associated with the continuing control of a narrow elite that has been entrenched historically. Even with broader representation of ethnic minorities in democratic institutions, it may give deeply resented advantage to traditional ethnic elites.

An argument frequently made in favour of the continuation of the monarchy in Nepal is that it provides an element of stability in a country which lacks the institutional ballast of a mature parliamentary system, judiciary and bureaucracy. But this depends on the monarch refraining from destabilising actions and remaining aloof from day-to-day politics. The widespread sense that the king himself has become a serious source of instability is one reason for the strong international response to the royal coup. As a prominent Indian security analyst observes, "the reason for New Delhi's sustained pressure on the king is that almost everyone now sees him as part of the problem rather than part of the solution".<sup>105</sup>

Meanwhile the stability of the monarchy itself is dependent on a smooth transition between kings, a condition that the June 2001 royal massacre and its aftermath have shown to be far from guaranteed. The nature of a hereditary kingship is such that it leaves the country to be ruled by heirs whose political leanings and capacities may vary greatly.

A constitution that limits royal power appears to be the goal of most Nepali citizens,<sup>106</sup> but the exigencies of the political crisis caused by the insurgency may hinder development of a stable constitutional monarchy that can co-exist with democracy. To break the political deadlock

and move forward in the peace process, the king should ideally be on board. But he is unlikely to accept any transitional process that risks diluting his power significantly, as would be necessary for long-term democratic stability. The short-term imperative of a transition to a more democratic government in order to give life to the moribund peace process may, therefore, limit opportunities for long-term reform of the monarchy. This could be addressed by providing a revised or new constitutional document with a broad amendment clause that would facilitate periodic re-adjustments to the balance of power. If even this proves too much for the palace to accept, the efforts already underway to broker peace between the parties and the Maoists regardless of the king's position will probably gain more momentum.

## B. SOCIAL AND POLITICAL EXCLUSION OF ETHNIC AND CASTE GROUPS

Though Nepal's population of approximately 23 million encompasses a tremendous ethnic, linguistic and religious diversity, administrative and political power has been held by a small fraction, principally Brahmins, Chhetris and Newars.<sup>107</sup> *Dalits* -- those at the very bottom of the caste system -- face particular cultural and social stigmatisation, often even a bar to education and basic resources like water from public taps and public accommodations.<sup>108</sup>

The constitution contains scant recognition of Nepal's diversity or its history of ethnic, caste and gender inequity.<sup>109</sup> Both the chairman of the CRC, Biswanath Upadhyay, and its most prominent communist member, Nirmal Lama, opposed special provisions for ethnic groups, citing fears of communalism and invoking a desire for "national unity".<sup>110</sup> Although Nepal is described as a "multiethnic" and "multilingual" kingdom, the term "multireligious" is absent. Rather, the monarchy is

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<sup>103</sup> A classic critique is Juan J. Linz, "The Perils of Presidentialism", in Larry Diamond and Marc Plattner (eds.), *The Global Resurgence of Democracy* (Baltimore, 1993), p. 108.

<sup>104</sup> Crisis Group interview with former Panchayat politician, 7 October 2004.

<sup>105</sup> Crisis Group interview, New Delhi, 6 May 2005.

<sup>106</sup> See polling data in fn. 91 above.

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<sup>107</sup> Crisis Group interviews with ethnic leaders, Kathmandu and Lalitpur, October 2004. In 1999, the elite high-caste Hindu groups of Brahmins and Chhetris held 66.6 per cent of "higher positions of politics, judiciary, bureaucracy, and civil society". Newars had 13.2 per cent and *dalits* none. Harka Gurung, "Affirmative Action in Nepalese Context", p. 3, unpublished paper delivered at conference on affirmative action and electoral reform, Kathmandu. A comprehensive description of Nepal's exclusive polity and prescription for inclusive political institutions is presented in Mahendra Lawoti, *Towards a Democratic Nepal* (Kathmandu/New Delhi, 2005).

<sup>108</sup> Crisis Group interviews with international donor agency staff and *dalit* activists, October 2004.

<sup>109</sup> Crisis Group interviews with ethnic activists, Kathmandu, September, October 2004.

<sup>110</sup> S.P.S. Dhungel et al., *Commentary on the Nepalese Constitution* (Kathmandu, 1998), p. 39.

"Hindu" by definition.<sup>111</sup> Nepali is the "official" language, with other indigenous tongues designated only as "national" languages.<sup>112</sup> Citizenship by naturalisation is contingent on learning Nepali.<sup>113</sup>

The 1990 Constitution disfavours assertions of ethnic identity. Despite guaranteeing the freedom to organise political parties, it does not allow the registration of parties organised "on the basis of religion, caste, tribe, language or sex".<sup>114</sup> However, the restriction on ethnic parties has been applied inconsistently. In 1991, the Mongol National Organisation was barred from the polls, but the Nepal Rashtriya Jan Mukti Morcha, which represented hill ethnic groups, and the Tarai regionalist Nepal Sadbhavana Party (NSP) were allowed to register and contest the election.<sup>115</sup> In 1999, the Election Commission allowed Shiv Sena Nepal, a party with clear Hindu sectarian affiliations, to register and contest the election.<sup>116</sup>

The constitution's equality provision permits, but does not guarantee, compensatory measures for "economically, socially or educationally backward" classes.<sup>117</sup> Post-1990 governments have mostly failed to address minorities' grievances, despite campaigns by a multitude of new pressure groups. Government action has involved a token reservation policy<sup>118</sup> and creation of commissions, like the National Foundation for the Development of Indigenous Nationalities and the National Dalit Commission.<sup>119</sup> The Supreme Court ruled efforts to allow the administrative use of languages other than Nepali illegal and invalidated attempts to loosen the criteria for citizenship.<sup>120</sup>

The Maoist conflict created an unexpected opportunity for minorities and women to press for meaningful inclusion. The Nepal Federation of Indigenous Nationalities (NEFIN) has called for constitutional changes, including proportional representation, restructuring of the state (federalism or provincial autonomy), reservations and language rights.<sup>121</sup> Perhaps hoping to undercut Maoist claims to speak on behalf of a dispossessed majority, almost all political parties and the palace have endorsed some compensatory and remedial measures, like regional autonomy, electoral reform and reservations. The August 2003 position paper issued by the Thapa government in the context of negotiations with the Maoists, for example, endorsed proportional representation, inclusion of minorities in the upper house of parliament, education and employment reservations, and reserved seats for women.<sup>122</sup> The UML has long had minority rights, including reservations and language rights, in its manifesto.<sup>123</sup> Congress, which disfavours electoral reform and federalism, would endorse a reservations system.<sup>124</sup> Although the designation of the state as Hindu and the bar on conversion are deeply unpopular among *janajatis* (ethnic minorities) and *dalits*, the mainstream parties other than the UML, are unwilling to challenge this aspect of monarchical legitimacy.<sup>125</sup> Notwithstanding this loose and partial consensus, complex technical issues pertaining to implementation need to be resolved with compensatory and related reform measures.

### C. SUB-NATIONAL GOVERNANCE

Dispersion of representation, policy-making authority and fiscal responsibility among sub-national units, such as provinces, zones or districts, is one mechanism for

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<sup>111</sup> Article 4 of the 1990 Constitution of Nepal. The national colour, anthem and symbol all reflect Hindu symbolism. Article 7 of the 1990 Constitution of Nepal.

<sup>112</sup> Article 7 of the 1990 Constitution of Nepal.

<sup>113</sup> Article 9(4)(a) of the 1990 Constitution of Nepal.

<sup>114</sup> Article 113(3) of the 1990 Constitution of Nepal.

<sup>115</sup> John Whelpton, "The General Elections of May 1991", in Hutt, *Nepal in the Nineties*, op. cit., p. 50.

<sup>116</sup> Crisis Group interview with local government specialist, Lalitpur, 13 October 2003. Shiv Sena obtained 0.02 per cent of votes and no seats. "The Fourth Parliamentary Election: A Study of the Evolving Democratic Process in Nepal", Institute for Integrated Development Studies (Kathmandu, 2000), p. 45.

<sup>117</sup> Article 11(3) of the 1990 Constitution of Nepal.

<sup>118</sup> See fn. 203 for a brief definition of "reservation" in this context.

<sup>119</sup> Both commissions were formed in 2002. Sujeet Karn, "Nepali dalits and reservation", *The Kathmandu Post*, 11 August 2004.

<sup>120</sup> It reasoned that Article 9 of the constitution provides immutable and exclusive citizenship criteria. Crisis Group interview with political analyst, Kathmandu, 30 September 2004; *Balkrishna Neupane v. His Majesty's Government, Cabinet Secretariat and others*, reprinted in Ram Krishna

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Timalisina (ed.), *Some Landmark Decisions of the Supreme Court of Nepal* (Kathmandu, 2003), p. 50.

<sup>121</sup> Crisis Group interview with Om Gurung, Chairman of Nefin, Lalitpur, 20 October 2004; "Draft Indigenous Peoples/Nationalities Kathmandu Declaration -- 2004", Kathmandu, 9 August 2004.

<sup>122</sup> "Highlights of proposals of forward-looking reforms proposed by His Majesty's Government of Nepal", 17 August 2003, pp. 1-2.

<sup>123</sup> Krishna Hachhethu, "Nepal: Party Manifesto and Election", *Nepali Journal of Contemporary Studies*, vol. III, no. 1, March 2003, p. 34. The most recent UML manifesto also commits the party to remedying social exclusion, albeit in vaguer terms. "The Proposal for the Resolution of National Problem", Central Committee of the UML, January 2004, pp. 9-11.

<sup>124</sup> Crisis Group interview with Ram Sharan Mahat, Congress Central Working Committee member, Kathmandu, 5 October 2004.

<sup>125</sup> Crisis Group interviews with *dalit* activists, Kathmandu and Lalitpur, October 2004. The UML supports a secular state. Central Committee of the UML, op. cit., p. 9.

breaking the political monopoly of the Kathmandu-based elite. This could be done in various ways. An important distinction can be drawn between systems in which each constituent unit has symmetrical powers, like Switzerland and Australia, and systems in which certain units have heightened autonomy, like Quebec in Canada.<sup>126</sup> Another critical question concerns the criteria for boundary demarcation, which can include ethnicity, language and administrative convenience.<sup>127</sup> A third consideration is the precise allocation of responsibilities -- fiscal and policy-making autonomy and representation -- between centre and region, and the extent of over-ride power that the centre might have.

The debate on regional autonomy and federal structures is undeveloped, with little attention yet on the practicalities of instituting novel, complex and expensive governmental institutions across Nepal's challenging terrain. One prominent idea involves "ethnic homelands", and the Maoists' "autonomous governments" have been demarcated along supposedly ethnic lines. This notion, although a response to valid concerns about historical injustice and continuing ethnic subordination, could generate new conflict. If radical ethnic demands shape mainstream *janajati* politics, they would almost certainly trigger deep unease, if not violent pre-emptive action, by the dominant ethnic and caste groups. Territorial division along ethnic lines, moreover, risks consolidating new injustice, rather than more fairly allocating political power.

A system of sub-national units with substantial, constitutionally guaranteed taxation, spending and public policy powers could, however, be achieved without using explicitly ethnic lines. The committee that drafted the 1990 Constitution considered a zonal administrative system but was discouraged by Prime Minister Krishna Bhattarai.<sup>128</sup> Elections within sub-national units, particularly with proportional electoral mechanisms, would give communities that previously lacked representation in Kathmandu more forums in which to compete without entrenching ethnic and caste differences or favouring territorially concentrated groups over geographically dispersed ones.

Many such divisions are possible. An analyst notes that the Panchayat-era system -- five zones running north to south to match geography -- could be applied in a new federalism.<sup>129</sup> However, India's post-independence experience is also instructive: despite Nehru's determined opposition, the somewhat arbitrarily demarcated provinces inherited from British rule were largely redrawn along linguistic lines in 1959, following mass popular campaigns. The process of division of larger states into smaller, more linguistically or culturally homogeneous units continued throughout the rest of the twentieth century. This continual revision has at least demonstrated the value of the Indian Constitution's flexibility and successive central governments' willingness to bow to political pressure and consider revising arrangements in the light of changing circumstances.

Whatever model is chosen must match Nepal's limited administrative capacities and fiscal realities. A system that could not deliver services would hardly further social inclusion. Any new government would risk becoming a new vehicle for corruption and patronage.<sup>130</sup> Moreover, a sub-national system of governments cannot function without sufficient fiscal resources, which entails a national system of fiscal redistribution. Of Nepal's 75 districts, 64 are in deficit.<sup>131</sup> In the wake of Prime Minister Deuba's dissolution of local governments, sub-national structures are weak, with district government emasculated by state security forces, who wield *de facto* control. A geographic division that ignored these administrative and fiscal weaknesses, as the ethnic homelands scheme does, would deliver neither representation nor economic development.<sup>132</sup>

There are numerous models for distribution of powers between national and regional levels. India's experience of cooperative federalism has not been a paragon of administrative virtue, given New Delhi's tendency to seize political control of provinces, but some Indian mechanisms for coordinating policy and fiscal redistribution bear study. Its 1947 Constitution (Part XI) lists central and provincial competences; the distribution of authority, however, can be radically shifted from federal to unitary by emergency powers, a provision

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<sup>126</sup> For elaboration, see Yash Ghai, "Ethnicity and Autonomy: A Framework for Analysis", in Yash Ghai (ed.), *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States* (Cambridge, 2000), pp. 8-25.

<sup>127</sup> India reconfigured its federal classifications in 1956 due to violent linguistic protests. T.V. Sathyamurthy, "Impact of Centre-State Relations on Indian Politics: An Interpretative Reckoning 1947-1987", in Partha Chatterjee (ed.), *State and Politics in India* (New Delhi, 1997), pp. 238-242.

<sup>128</sup> Crisis Group interview with former Justice Biswanath Upadhyay, Kathmandu, 29 September 2004.

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<sup>129</sup> Crisis Group interview, Lalitpur, 20 October 2004.

<sup>130</sup> See Joanna Pfaff-Czarnecka, "High Expectations, Deep Disappointments: Politics, State and Society in Nepal after 1990", in Michael Hutt (ed.), *Himalayan People's War* (Bloomington, 2004), pp. 175-177.

<sup>131</sup> Harka Gurung, *Fragile Districts, Futile Decentralisation* (Kathmandu, 2003), p. 19.

<sup>132</sup> The optimistic response of ethnic homeland advocates is that homelands will discover hitherto untapped resources that will allow them to be fiscally independent. Crisis Group interview with ethnic activist, Kathmandu, October 2004.

Nepal would have to consider carefully.<sup>133</sup> India also has a constitutionally-mandated Finance Commission, "a quasi-arbital body whose function is to do justice between the Centre and the states".<sup>134</sup> It is supplemented by a Planning Commission, which lacks a constitutional mandate. While both bodies are much criticised for their centripetal influence, commentators suggest that without the finance commission, at least, "the distribution of revenues would have degenerated into something close to open warfare".<sup>135</sup>

The South African model of cooperative government does not promote ethnic division or strong regionalism but gives provinces a powerful voice in national law-making through a presence in the second house. As in India, the constitution provides a body for federal fiscal co-ordination, the Financial and Fiscal Commission.<sup>136</sup> By contrast, systems that have had centuries to develop cultural and social roots are less useful as models for Nepal, where a system of sub-national units must overcome a history of centralisation. The Swiss system of cantons -- "de facto independent mini-states politically dominated by the elite of their capital cities" -- developed over centuries.<sup>137</sup> Equitable treatment of linguistic groups could develop by informal arrangements, rather than constitution-making. Nepal would benefit more from looking to countries with a history similar to its own.

Local government is another resource for sharing power. Until the end of the Panchayat era, monarchical government stymied efforts to distribute authority.<sup>138</sup> Local self-government has been promised by the centre since the never-enacted 1948 Government of Nepal Act, which envisaged village and town councils.<sup>139</sup> It was

followed by the moribund 1956 Panchayat Act.<sup>140</sup> Laws purporting to decentralise were passed in 1965, 1975, 1979, 1982, and 1984 but they were actually vehicles for central control, rather than genuine opportunities for local decision-making. Post-1990 five-year development plans also promised decentralisation but implementation and the distribution of funds fell short.<sup>141</sup>

Most recently, the government passed the 1999 Local Self-Government Act, which has allowed village development committees to decide on some development spending and begun to shift responsibility away from line ministries.<sup>142</sup> Experts in local government also view the 2002 legislation as an incremental, but positive, change,<sup>143</sup> though the Maoist insurgency has driven out most local-level government, impeding its implementation and any assessment of whether it could be a basis for further devolution.<sup>144</sup>

Most decentralisation has been cosmetic, and political will remains weak,<sup>145</sup> so scepticism about local government is understandable. Nevertheless, reform of local government, the level with which most people interact, will be a critical part of dispersing political power to communities traditionally outside politics. Devolution of power may also appeal to strategic analysts who worry about Nepal's longer-term political stability. As an important way of moderating the "all or nothing" nature of power struggles in Kathmandu it could reduce the risks involved in future political transitions.

#### D. ELECTORAL REFORM

Nepal's 205 constituencies elect one parliamentary representative each. Redistricting to account for population shifts occurs decennially, most recently in 2001.<sup>146</sup> Suggestions to reform the first-past-the-post system have

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<sup>133</sup> Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (New Delhi, 2002), pp. 195-203, 207-208.

<sup>134</sup> Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* (New Delhi, 1999), p. 615; Constitution of India, Article 280. Article 263 authorises India's president to establish a council to inquire and make recommendations about disputes between the states and between a state and the central government.

<sup>135</sup> Austin, *Working a Democratic Constitution*, op. cit., p. 618. For further details of the revenue-sharing provisions, see Austin, *The Indian Constitution*, op. cit., pp. 217-234.

<sup>136</sup> Heinz Klug, "How the Centre Holds: Managing Claims for Regional and Ethnic Autonomy in a Democratic South Africa", in Yash Ghai (ed.), *Autonomy and Ethnicity*, op. cit., pp. 113-117.

<sup>137</sup> See Andreas Wimmer, *Nationalist Exclusion and Ethnic Conflict: Shadows of Modernity* (Cambridge, 2002), pp. 225-249.

<sup>138</sup> Pfaff-Czarnecka, "Vestiges and Visions", op. cit., p. 436.

<sup>139</sup> Articles 16-21 of the Government of Nepal Act, 1948, reprinted in Dahal, op. cit. pp. 290-291. The 1951 Interim Government Act of Nepal also promised village Panchayats. See *ibid*, p. 309. A 1919 regulation establishing some

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powers for Kathmandu municipality is the earliest example of devolution. Gurung, op. cit., p. 1.

<sup>140</sup> Joshi and Rose, op. cit. p. 397.

<sup>141</sup> Crisis Group interview with lawyer, Kathmandu, October 2004; Dev Raj Dahal, Hari Uprety and Phanindra Subba, *Good Governance and Decentralisation in Nepal* (Kathmandu, 2002), pp. 71-79.

<sup>142</sup> Crisis Group interview with Harka Gurung, New Era Foundation, Kathmandu, 18 October 2004.

<sup>143</sup> Crisis Group interview with local government expert, Lalitpur, October 2004.

<sup>144</sup> Crisis Group interview with Nepali anthropologist, Kathmandu, 16 October 2004.

<sup>145</sup> Gurung, op. cit., p. 5.

<sup>146</sup> Crisis Group interview with Ram Sharan Mahat, member of Nepali Congress Central Working Committee, Kathmandu, 5 October 2004.

been aired by academics and ethnic activists,<sup>147</sup> who say it allows a mere plurality, not necessarily a majority, to rule<sup>148</sup> and argue that a proportional system would better reflect the country's ethnic diversity.<sup>149</sup> Multi-member districts elected by proportional representation have been proposed<sup>150</sup> as has the German double-ballot,<sup>151</sup> in which each voter selects a candidate from a single-member constituency and then makes a second choice of a closed party list in his or her region.<sup>152</sup>

Hopes that a proportional system will draw previously excluded ethnic groups or castes into the electoral system may be overstated. The post-1990 electoral dispensation did not collapse voters' choices entirely or shut out minority voices. In the 1991 election, twenty parties ran and seven obtained seats in the House of Representatives.<sup>153</sup> In 1995, 24 parties ran, with five succeeding; in 1999, seven of 25 obtained seats.<sup>154</sup> The proportion of ethnic representatives varied between 30.2 per cent in 1991 and 23.9 per cent in 1999.<sup>155</sup> The post-1990 system thus made it difficult but far from impossible for smaller parties to enter parliament. Those like the NWPP and the NSP, which have regional strongholds, were able to retain a parliamentary presence notwithstanding the pressure the plurality-vote system imposed.

The reasons for the political weakness of ethnic groups must be sought elsewhere. First, they have been weak in political mobilisation. Leaders of caste groups in Janakpur, for example, concede that ethnic communities have yet to mobilise blocs of votes effectively to bargain

with political parties.<sup>156</sup> The first-past-the-post system, in fact, gives an advantage to a determined, numerically concentrated ethnic group if it can keep its vote together. This has been amply demonstrated in Indian politics, not least in the populous states of Uttar Pradesh and Bihar, bordering Nepal, where the rise of low-caste parties based on the careful construction of "vote-banks" has been one of the most notable features of electoral politics in the last two decades.

Secondly, the transition to a more proportional system would not necessarily loosen the grip of the major national parties. With almost a decade and three rounds of parliamentary elections to have established geographically dispersed cadres, they are likely to retain significant organisational advantages in any election not marred by Maoist or state-sponsored violence.<sup>157</sup> Ethnic parties, even if permitted by a change in the constitutional ground rules, might be unable to make up ground lost in the first decade of democracy. Indeed, a proportional system that used lists drawn up by the party leadership would further centralise control and advantage the existing parliamentary parties and the elites within them.<sup>158</sup>

No clear link has been shown internationally between proportionality and minority group satisfaction with electoral systems.<sup>159</sup> Some fare well under first-past-the-post because territorial concentration facilitates parliamentary representation. The Plaid Cymru party in Wales (UK) is an example. A shift to proportionality would not necessarily improve representation of geographically concentrated Nepali ethnic groups.

Moreover, there is little evidence to support the optimistic assessment of some social scientists that proportionality would encourage responsible, stable coalitions in parliament.<sup>160</sup> To the contrary, it might reduce the already precarious stability of governments.<sup>161</sup> The experience of

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<sup>147</sup> Crisis Group interview with Tek Tamrakar, lawyer, Pro Public, Lalitpur, 13 October 2004.

<sup>148</sup> Candidates winning with more than 50 per cent of the vote decreased from 79 in 1991 to sixteen in 1999. Krishna Khanal, "Election Procedures and Malpractice: Problems of Ensuring Free and Fair Election", *Nepali Journal of Contemporary Studies*, vol. III, no. 1, 2003, p. 73.

<sup>149</sup> Crisis Group interviews, Kathmandu, October 2004.

<sup>150</sup> Krishna P. Khanal, "Consideration of possible model of Proportional Representation for Nepal", updated, unpublished paper.

<sup>151</sup> Crisis Group interview with Krishna Khanal, Tribhuvan University, Kirtipur, 7 October 2004.

<sup>152</sup> Pippa Norris, *Electoral Engineering* (Cambridge, 2004), pp. 56-57. Adjustments are made to ensure "that seats are proportional to second votes cast for party lists".

<sup>153</sup> Ram Kumar Dahal, "Election and People's Participation in Nepal", *Nepali Journal of Contemporary Studies*, vol. IV, no. 1, March 2004, p. 97.

<sup>154</sup> *Ibid.*, pp. 98-99.

<sup>155</sup> Sant B. Gurung, "The Indigenous Nationalities of Nepal: Social Setting and Institutional Efforts", in Mukti Rijal (ed.), *Readings on Governance and Development*, vol. III (Kathmandu, 2004), p. 21.

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<sup>156</sup> Crisis Group interviews, Janakpur, October 2004.

<sup>157</sup> Standing alone, "the introduction of PR *may not* produce more parties" for "pure PR is a *no-effect* electoral system", Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes* (New York, 1997), pp. 46-47 (emphasis in original).

<sup>158</sup> The party-list system can help preserve party control. It was introduced in 2004 for the Russian federal Duma, combined with a 7 per cent threshold, presumably to ensure that only parties acceptable to the Kremlin succeeded in federal elections. Jonathan Steele, "Doing Well out of War", *London Review of Books*, 21 October 2004, p. 29.

<sup>159</sup> Pippa Norris, *Electoral Engineering* (Cambridge, 2004), pp. 224-227.

<sup>160</sup> Khanal, "Consideration on possible model of Proportional Representation", *op. cit.*, p. 12.

<sup>161</sup> According to Justice Biswanath Upadhyay, Chair of the 1990 Constitution Recommendation Commission, fear of

the 1995 parliament, which witnessed nine governing coalitions, hints at heightened costs<sup>162</sup> that may actually undermine consensus-building, the putative benefit of a proportional system.<sup>163</sup> Coalitions between 1995 and 1999 evinced little ideological coherence. Rather, they appeared to be largely opportunistic. Under such circumstances, more proportionality might bring about "heterogeneous coalitions between partners or, indeed, non-partners that play a veto game against each other".<sup>164</sup>

Electoral reform, therefore, should not be accompanied by expectations of a radical shift in the political landscape. But this does not mean that the agenda should be abandoned. The present system is widely perceived as reinforcing high-caste Hindu dominance. Keeping it in place would signal a failure of political will for change. Electoral reform, in contrast, would telegraph a commitment to broadening popular involvement in politics, adding legitimacy to any new constitutional order. Insistence on retaining the first-past-the-post system may be perceived similarly as a tool for excluding the traditionally marginal *janaajati* and caste groups. The election for a constitutional assembly, should one be convened, might be an opportunity to introduce a revised system that could fall between total first-past-the-post and total proportional representation. An expansion of candidacy and seat reservations for women would also be a logical option.<sup>165</sup>

One important and simple measure could be a repeal of the ban on ethnic parties in Article 113(3) of the 1990 Constitution, which, as noted, has been applied unevenly and has not functioned as the drafters expected. According to then Minister of Law Nilamber Acharya, it was believed minorities would be better off trying to gain influence through the major political parties.<sup>166</sup> Those parties, however, have failed to take ethnic and minority issues seriously. Allowing ethnic parties to compete might force mainstream parties to change by increasing competition for minority votes. Ethnic parties, even

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instability was why the first-past-the-post system was chosen, even though the drafters knew a proportional model would be more representative. Crisis Group interview, Kathmandu, 29 September 2004.

<sup>162</sup> David N. Gellner, "Transformations of the Nepali State", in Gellner (ed.), *Resistance and the State: Nepalese Experiences* (New Delhi, 2003), p. 14.

<sup>163</sup> Commentators often assume that because governance in a proportional system needs compromise and consensus-building, that will occur, e.g., Wolf Linder, "Political Structures and Multicultural Conflict", in Mukti Rijal (ed.), *Readings on Governance and Development*, vol. III (Kathmandu, 2004).

<sup>164</sup> Sartori, op. cit., p. 60.

<sup>165</sup> This and other electoral system questions will be addressed in a forthcoming Crisis Group report on political party reform.

<sup>166</sup> Crisis Group interview, Kathmandu, 28 September 2004.

if relatively ineffective on a national level themselves, give minorities more leverage within mainstream parties. Furthermore, permitting minority parties might also relieve some of the pressure for ethnic homelands.

## E. CIVIL-MILITARY RELATIONS

The problematic issue of control over the Royal Nepalese Army (RNA) has been brought to the fore by the Maoist insurgency. RNA reluctance to respond to the orders of the elected government came to a head in the summer of 2001. Since the army's deployment under the November 2001 state of emergency, its role in military and political affairs has become progressively entrenched, initially through the creation of a unified command that gave it control over civilian police and most prominently since February 2005, when its support for the palace and the royal coup was both essential and explicit.

The drafters of the 1990 Constitution intended to vest control of the military entirely with the civilian, democratic institutions. Senior army officers resisted, telling the CRC chairman they preferred to remain under the king's control.<sup>167</sup> According to the chairman, they suggested (unsuccessfully) a National Defence Council with two civilians and up to eleven military officials.<sup>168</sup>

Under the 1990 Constitution, the king remains supreme commander of the RNA, who, on advice of the prime minister, can "operate and use" the RNA and appoint its commander-in-chief. Operational control lies with the National Defence Council, which includes the prime minister, the defence minister and the commander-in-chief.<sup>169</sup> In theory, elected officials dominate but in practice the RNA has resisted, most openly in July 2001, when the army declined to obey Prime Minister Girija Prasad Koirala's orders to move on Maoists in Rolpa district, precipitating his resignation. Under the current administration, of course, there is no prime minister, and the king has retained the defence portfolio himself.

RNA officers justify their resistance to parliamentary control by raising concerns that civilian governments might corrupt and politicise the army.<sup>170</sup> The post-1990 civilian governments, in the army's view, never accepted

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<sup>167</sup> According to Justice Upadhyay, the commander-in-chief had two suggestions: that the army be under the king's control, and the country's sovereignty be vested in the king. Crisis Group interview, Kathmandu, 29 September 2004.

<sup>168</sup> Ibid.

<sup>169</sup> Articles 118 and 119 of the 1990 Constitution of Nepal.

<sup>170</sup> Crisis Group interview with retired colonel, Kathmandu, October 2004, who also blamed the civilian governments for not challenging the RNA's allegiance to the king.

the need to regulate it in a non-partisan way. The roots of this distrust go back to the 1950s and concern over "Congressisation of the administrative machinery".<sup>171</sup> Members of the Mukti Sena, the Congress' insurgent army formed in Indian exile in 1950, were drafted into the police, resulting in continuing close ties between the party and that force.<sup>172</sup> The army seems to assume it would meet the same fate were it to submit to civilian governments. Its resistance to civilian control continued even after the beginning of the Maoist insurgency, justified by the argument the government had no "socio-economic program" to accompany its military strategy.<sup>173</sup>

Stronger mechanisms for parliamentary control of the RNA will be a precondition for progress in peace negotiations and for future governmental stability. The absence of such control was one of the reasons given by the Maoists for refusing to talk to the Deuba government.<sup>174</sup> Until civilian negotiators can make credible commitments on the RNA's behalf, the Maoists have reason to be doubtful of talks. Moreover, countries in which the military remains dominant, like Pakistan, are hardly models for stability and good governance.<sup>175</sup> Substantial institutional changes are necessary for Nepal's long-term stability.<sup>176</sup>

Since 1990, prime ministers have tended to keep the defence portfolio for themselves, with the ministry remaining little more than a "procurement agency".<sup>177</sup> As long as this practice continues, institutional reform will be difficult.<sup>178</sup> In addition to strengthening the defence ministry, a non-partisan mechanism of parliamentary control might be considered in the process of constitutional change. For example, a parliamentary committee with opposition representation could be empowered to take key decisions about the RNA.<sup>179</sup>

Some analysts argue that a transition to civilian control of the RNA must be handled delicately, lest it precipitate more aggressive military intervention in politics. They suggest the king could play a useful role as a figurehead and symbol of unity.<sup>180</sup>

Other national institutions could help supervise and restrain the RNA. The 1990 Constitution restricts civilian courts from intervening with military courts except in limited circumstances,<sup>181</sup> and they have been reluctant to do so. The insurgency, and the accompanying acceleration in human-rights violations by the state, have only added urgency to reform in this area. The United Nations is establishing a human rights monitoring mission in accordance with an April 2005 memorandum of understanding between the Nepali government and the UN High Commissioner for Human Rights. Although this may help address immediate issues, the fundamental tensions will have to be dealt with in any process of constitutional change.

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<sup>171</sup> Joshi and Rose, op. cit. p. 320.

<sup>172</sup> Crisis Group interview with Nepali military analyst, Kathmandu, 14 October 2004.

<sup>173</sup> Crisis Group interview with former army officer, Kathmandu, October 2004; Bhusal, op. cit., p. 130.

<sup>174</sup> See "Conditional", *Kantipur*, 26 September 2004 (quoting CPN(M) spokesperson Krishna Bahadur Mahara).

<sup>175</sup> See, for example, Crisis Group Asia Report N°40, *Pakistan: Transition to Democracy*, 3 October 2002.

<sup>176</sup> Support given in particular by India and the U.S. to the RNA may, in the long-run, be counter-productive for stability unless coupled with adequate support for democratic institutions. See Crisis Group Report, *Dealing with a Human Rights Crisis*, op. cit.

<sup>177</sup> Crisis Group interview with Western diplomat, April 2003.

<sup>178</sup> Felipe Agüero, "Toward Civilian Supremacy in South America", in Larry Diamond et al. (eds.), *Consolidating the Third Wave Democracies* (Baltimore, 1997), p. 199.

<sup>179</sup> Crisis Group interview with human rights activist, Kathmandu, 14 October 2004.

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<sup>180</sup> Crisis Group interview, Lalitpur, October 2004.

<sup>181</sup> Article 88(2)(a) provides that "[t]he Supreme Court shall not be deemed to have power...to interfere with proceedings and decisions of the Military Court except on the ground of absence of jurisdiction or on the ground that a proceeding has been initiated against, or punishment given to, a non-military person for an act other than an offence relating to the Army". This appears not to restrict the Court's power to void a law under Article 88(1).

## V. BREAKING THE STALEMATE: KEY ACTORS' POSITIONS

Just as evaluations of the constitutional situation vary widely, so do views on how to move forward. The palace, parties and Maoists have offered different roadmaps for resolving the political and military crisis. Intentions shift as political fortunes change. The eighteen-point agenda drawn up by parties in the aftermath of King Gyanendra's October 2002 move had faded well before his second takeover.<sup>182</sup> 2004 saw increased support for a constitutional assembly within several parties, including Congress and UML, largely driven by younger cadres.<sup>183</sup> In particular, the nine-day imprisonment of three student leaders on sedition charges was a "radicalising moment" for student groups.<sup>184</sup> The increased frequency of anti-monarchy slogans in student protests since late 2003 suggests that King Gyanendra, through unwillingness to relinquish power, may have seeded a generational shift towards a republic.

The royal coup of February 2005 has, unintentionally, played a major role in uniting the political parties and hardening their position towards the monarchy. With the development of a common minimum program shared by seven mainstream parties, a clear program has at last emerged from the centre ground. It calls for restoration of the 1999 parliament, negotiations with the Maoists and then the election of a constitutional assembly. In the words of UML leader Jhalanath Khanal, reinstatement of the dissolved parliament is the "entry point" to a stable peace process and a constitutional assembly the "exit point".<sup>185</sup> Congress President Koirala has reiterated that the king must choose between complete democracy and a republic. For him, the agenda of the seven-party alliance is a comprehensive roadmap for all who want democracy and peace.<sup>186</sup> If the parties remain united, they will not only put pressure on the palace but also undermine that

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<sup>182</sup> Even opposition parties such as the NSP and Congress placed little weight on the eighteen-point agenda, Crisis Group interviews with opposition politicians, Kathmandu, October 2004. Its main features included curtailing the king's powers, bringing the RNA under parliamentary control, redressing exclusion by ending discrimination against women, ethnic and caste groups, resolving the citizenship problem in the Tarai, formulating a comprehensive, forward-looking political agenda to resolve the Maoist conflict peacefully, and introducing concrete anti-corruption programs.

<sup>183</sup> Crisis Group interview with democracy expert, Kathmandu, 28 September 2004.

<sup>184</sup> Crisis Group interview with Congress student leader, Kathmandu, 5 October 2004.

<sup>185</sup> "Parties have put constituent assembly on agenda: Khanal", [www.kantipuronline.com](http://www.kantipuronline.com), 28 May 2005.

<sup>186</sup> *Ibid.*

Maoist case for continuing the armed struggle. Consensus on a constitutional assembly agenda would require complex bargaining over scope and modalities but could offer the best hope for a negotiated peace.

### A. THE PALACE

The palace has a simple bottom line: it will resist any constitutional change that could endanger the monarchy or reduce its powers. Beyond this, it can be flexible but the basic condition of self-preservation leaves little room for compromise. Until the dismissal of the Deuba-led coalition in February 2005, King Gyanendra's stated preference was for general elections to be held before April 2005. A source close to the palace explained his rationale in these terms: "From the king's point of view, holding elections would put the 1990 Constitution back on track...the king feels that once parliament is back, the spectre of Article 127 will go away".<sup>187</sup>

The king's focus on elections, however, was always open to less charitable interpretation. He may have been looking to February 1959, when, after eight years of pressure on the palace to fulfil its 1951 promise of democratic government, King Mahendra finally agreed to hold the first democratic elections.<sup>188</sup> At the time, it was widely believed he did so in the belief a hung parliament would result, and he would maintain effective control.<sup>189</sup> In the event, the Nepali Congress party obtained 37.2 per cent of the vote and 74 seats out of 109.<sup>190</sup> Dissatisfied with his limited role, the king began issuing veiled warnings in January 1960 and at the end of the year took power after arresting the cabinet.<sup>191</sup> Like his father, Gyanendra could have been hoping for either a hung parliament, which would have allowed him to play an instrumental role in endorsing coalitions, or one dominated by parties close to the palace.

Alternatively, the February 2005 royal coup has added weight to the argument that the king had deliberately tasked Deuba with an impossible challenge.<sup>192</sup> By setting the government to fail, the king guaranteed himself a further opportunity to justify extending his powers. Even

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<sup>187</sup> Crisis Group interview, Kathmandu, October 2004.

<sup>188</sup> Hoftun, Raeper and Whelpton, *op. cit.*, pp. 23-26, 59. The interim government of 1951 had been charged with conducting a smooth transition to a new political order "based on a democratic constitution framed by elected representatives of the people", Joshi and Rose, *op. cit.*, p. 83.

<sup>189</sup> Hoftun, Raeper and Whelpton, *op. cit.*, pp. 59-60.

<sup>190</sup> *Ibid.*

<sup>191</sup> Joshi and Rose, *op. cit.*, pp. 378-379, 384-386.

<sup>192</sup> Crisis Group interviews, Kathmandu, June, July 2004 and March, April 2005.

as Deuba refused to indulge in the pessimism of his own cabinet members about the unpromising security situation, the chief of army staff was hinting to the diplomatic community that the RNA was making no plans to secure the supposed polls.<sup>193</sup>

In his proclamation of 1 February 2005, the king spoke of restoring multi-party democracy within three years but talk of elections was notable by its absence. Subsequently the royal government announced that it will hold municipal elections by April 2006,<sup>194</sup> and Council of Ministers Vice Chairman Peter Giri told the press that municipal elections will lead to full parliamentary polls.<sup>195</sup> The modalities of such elections -- such as whether there will be party participation or candidate pre-qualification restrictions -- have not been clarified, and the initial response of the mainstream parties has been dismissive.<sup>196</sup>

The effective suspension of the 1990 settlement has only intensified the king's need to insist that his actions are aimed at protecting it. This may increase royal resistance to any constitutional change because of the fear that acknowledging the weaknesses of the 1990 dispensation may undermine the argument that its protection warrants a royal takeover. Nevertheless, there have previously been indications that some constitutional amendment would be acceptable to the king.<sup>197</sup> For example, the Thapa government's 17 August 2003 concept paper, prepared during talks with the Maoists, endorses this. Gyanendra may have more reservations about the method of changing the constitution, particularly the idea of a constitutional assembly. Pro-palace politicians suggest he fears that such a body "would be a method of introducing a republican system".<sup>198</sup> But some evidence suggests that the king could accept the notion if a constitutional assembly's purpose was not to usher in a republic.<sup>199</sup> Indeed in the longer term, the palace may even seek amendments if it feels they might increase the role of the monarchy, as outlined in Section III.C above.

## B. NEPALI CONGRESS

The Nepali Congress party, led by Girija Prasad Koirala, has long contended that neither the political nor the military conflict can be resolved without a return to representative government by restoration of the 1999 parliament and formation of an all-party government from that body.<sup>200</sup> The all-party government would negotiate with the Maoists and organise a process of constitutional change. The royal coup has not altered the fundamental stance of the party on the restoration of parliament. It has, however, emboldened those within it, especially within the student wing, the Nepal Students Union, who were already arguing for a republic. Despite Koirala's release from house arrest, the continued detention of pro-republic Congress leaders such as Narahari Acharya suggests that the palace deems them a real threat. Meanwhile, Koirala himself has hinted that the Congress commitment to constitutional monarchy should not be taken for granted. When asked in a newspaper interview if his party was divided over the choice between a constitutional monarchy and a republic, his response was terse: "[Congress] has always adhered to constitutional monarchy. But I don't know where we will stand now. It would be better if you asked the king this question".<sup>201</sup>

In contrast to those of its main rival, the UML, Congress election manifestos from 1991 to 1999 did not feature suggestions for constitutional amendment.<sup>202</sup> The party dislikes electoral reform and federalism but would endorse a reservations system.<sup>203</sup> It posits three alternative routes for that change: a constitutional amendment, a referendum or a constitutional assembly.<sup>204</sup> As a principal actor in the 1990 "people's movement" that paved the way for the current constitution, it "does not want to be seen as the party that walked over that constitution".<sup>205</sup> Therefore, it prefers the amendment route. Congress officials have

<sup>193</sup> Crisis group interviews with senior diplomats, Kathmandu, January and February 2005.

<sup>194</sup> "Municipal elections within this year: King Gyanendra", kantipuronline, 14 April 2005.

<sup>195</sup> "Municipality election forerunner of general election: Dr Giri", kantipuronline, 15 April 2005.

<sup>196</sup> "NC may boycott municipal elections: Koirala", nepalnews.com, 15 April 2005, "UML puts conditions to take part in election", nepalnews.com, 18 April 2005.

<sup>197</sup> Crisis Group interview, Kathmandu, October 2004.

<sup>198</sup> Crisis Group interview with RPP politician, Kathmandu, October 2004.

<sup>199</sup> Crisis Group interview, Kathmandu, October 2004. Akhilesh Upadhyay, "New Cabinet and Old Problems", *The Nation*, 18 July 2004, p. 21.

<sup>200</sup> Crisis Group interviews with Congress central working committee members and party members, Kathmandu and Janakpur, September-October 2004.

<sup>201</sup> *Deshantar*, 3 April 2005, translated in "Ask the king", *Nepali Times*, 8 April 2005.

<sup>202</sup> Krishna Hachhethu, "Nepal: Party Manifesto and Election", *Nepali Journal of Contemporary Studies*, vol. III, no. 1, March 2003, p. 28.

<sup>203</sup> Crisis Group interview with Ram Sharan Mahat, Congress Central Working Committee member, Kathmandu, 5 October 2004. The term "reservation", following Indian usage, refers to a system of reserved positions, or quotas, for government jobs, school and university scholarships targeted at disadvantaged groups. Broadly speaking it may be categorised as a form of positive discrimination or affirmative action.

<sup>204</sup> See Congress, "Resolution Passed by Central Working Committee", 6 August 2004.

<sup>205</sup> Crisis Group interview with former Congress minister, Kathmandu, 4 October 2004.

generally rejected moving directly to a constitutional assembly, arguing that "would give a tremendous boost to the Maoists, who will be seen as the victorious power".<sup>206</sup> The royal coup has, however, encouraged some within the party, as in other mainstream parties, to be more flexible on the possibility of accepting a constitutional assembly.

Party workers acknowledge that other parties fear parliamentary restoration is a way for Congress to reassert itself.<sup>207</sup> The 1999 House of Representatives, which succeeded the hung 1994 parliament, was dominated by a united Congress party that won 111 of 205 seats.<sup>208</sup> Congress officials, however, protest that their interest lies in a return to legitimate, constitutional rule. They put forward the referendum option as a means to allow reconsideration of "rigid features" of the 1990 Constitution that cannot be reviewed via an amendment process.<sup>209</sup> While the 1990 Constitution has no referendum mechanism, Congress argues that the reference to popular sovereignty in the preamble could justify a referendum on questions such as the need for a constitutional assembly or maintenance of multi-party democracy.<sup>210</sup>

Despite the party line, discord over the consequences of different strategies persist within the leadership and the rank and file. A lawyer who participated in internal meetings in 2004 concerning peaceful solutions to the conflict observed disarray on diagnosis of the conflict and a wide divergence in proposed solutions.<sup>211</sup> Student leaders endorse not only a constitutional assembly, but also republicanism.<sup>212</sup> Before the royal coup, even some members of the party elite had argued strongly for a constitutional assembly and predicted that their position would be endorsed by the party convention, scheduled

for March 2005 but now indefinitely postponed.<sup>213</sup> At a local level, members' desire for constitutional change outruns that of their leaders. In Janakpur, for example, members of district committees insist on the importance of constitutional change to clarify citizenship rules, a matter of local importance in the Tarai.<sup>214</sup>

### C. THE COMMUNIST PARTY OF NEPAL (UNIFIED MARXIST-LENINIST)

Like Congress, the UML has argued that "until [the country goes] back to the democratic process, it can't resolve the party/king conflict".<sup>215</sup> Until early 2005 the UML did not view restoration of the 1999 parliament as the preferred avenue for renewing the government's democratic pedigree. Rather, it favoured formation of an all-party government, followed by establishment of a common minimum program as a framework for peace negotiations. Upon reaching a consensus with the Maoists, a roundtable conference would be convened with "[d]elegates of political parties represented in the dissolved House of Representatives, the CPN (Maoist) and other individuals" to decide on "whether to go for the amendment of the constitution or to opt for a new constitution".<sup>216</sup> That interim government then would hold elections for a constitutional assembly or a parliament to amend the constitution.<sup>217</sup>

Nevertheless, in late 2004 several senior UML office-holders openly expressed a willingness to accept restoration of parliament. They included central committee member and Minister for Labour Raghuj Pant<sup>218</sup> and his colleagues Bamdev Gautam and Pradip Nepal.<sup>219</sup> Following expiration of the 13 January 2005 deadline for the Maoists to join talks, General Secretary Madhav Nepal proposed reactivating parliament's upper house and reinstating former elected representatives on local government bodies as a compromise first step.<sup>220</sup>

The UML has thus long been open to various modalities of constitutional change. The party, moreover, has expressed dissatisfaction with sections of the constitution since 1991.

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<sup>206</sup> Crisis Group interview, Ram Sharan Mahat, Congress central working committee member, Kathmandu, 5 October 2004.

<sup>207</sup> Ibid.

<sup>208</sup> Election Commission, House of Representatives Election-1999, Kathmandu, p. 14.

<sup>209</sup> The 1990 Constitution provides for legislative amendment in Article 116 but precludes aspects of the preamble, including multi-party democracy and constitutional monarchy, from being amended. See Preamble and Article 116 of 1990 Constitution of Nepal and discussion below.

<sup>210</sup> Crisis Group interview with Ram Sharan Mahat, member of Congress Central Working Committee, Kathmandu, 5 October 2004. Article 3 of the 1990 Constitution also provides that: "The sovereignty of Nepal is vested in the Nepalese people and shall be exercised in accordance with the provisions of this Constitution".

<sup>211</sup> Crisis Group interview, Kathmandu, 29 September 2004.

<sup>212</sup> Crisis Group interview with Congress student leaders, Kathmandu, March 2005.

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<sup>213</sup> Crisis Group interview with Narahari Acharya, Kathmandu, 7 October 2004.

<sup>214</sup> Crisis Group interviews with Congress District Development Committee members, Janakpur, October 2004.

<sup>215</sup> Crisis Group interview with K.P. Sharma Oli, Kathmandu, 3 October 2004.

<sup>216</sup> Central Committee of the UML, op. cit., pp. 5-6.

<sup>217</sup> Ibid, p. 6; Crisis Group interview with Madhav K. Nepal, General Secretary of CPN-UML, Kathmandu, 5 October 2004.

<sup>218</sup> *Kantipur*, 6 December 2004.

<sup>219</sup> "Revive House or withdraw", *The Kathmandu Post*, 29 November 2004.

<sup>220</sup> *The Kathmandu Post*, 24 January 2005.

While it remains committed, at least on paper, to a secular state with linguistic equality for all communities, it had by 1994 retreated from republican demands and adopted almost social democratic positions.<sup>221</sup> According to Madhav Nepal, although the UML is open to proposals on how to accomplish constitutional change, it "does not think there's a need for a new constitution or a constitutional assembly. But for the sake of [bringing in] the Maoists, we would agree to a constitutional assembly".<sup>222</sup> Such flexibility, argues another central committee member, also "helps other parties by keeping all the options open".<sup>223</sup>

The UML's endorsement of the seven-party program incorporating a constitutional assembly is, therefore, not so surprising. But there are signs that the post-February 2005 environment is bringing to the surface long-standing tensions within the party. While Madhav Nepal remained under house arrest, standing committee member Jhalanath Khanal became acting general secretary. Many party activists suspect that Madhav Nepal may be made a scapegoat for the failures of the party to put its mark on the Deuba government.<sup>224</sup> Since his release on 1 May 2005, he has been slightly bolder in calling for "total democracy and full-fledged sovereignty of the people" but has hedged his bets by urging all political forces to "remain under the constitution".<sup>225</sup> If the seven-party agenda gains momentum, it will strengthen the position of Nepal personally and his party but if it falters, he will be accused of having submitted to a Congress agenda for no political benefit.

#### D. OTHER POLITICAL PARTIES

Five other parties were represented in the 1999 parliament: Congress (Democratic), the RPP, Nepal Sadbhavana Party (NSP), Janamorcha, and Nepal Workers and Peasants Party (NWPP). Before February 2005, Congress (D) argued that a government without periodic elections would be impossible, so a poll within the timeframe established by the king had to be the priority.<sup>226</sup> At the district level, however, party workers admitted their inability to reach many areas due to the Maoists. Given

the party's organisational weaknesses, low national presence in comparison to the mainstream Congress and signal lack of achievement in government, its workers may have been relieved at the reprieve from an election. The royal coup also appears to have added momentum to efforts to patch up Deuba and Koirala's differences and reunite the two Congresses.<sup>227</sup>

With regard to the insurgency, Congress (D) had seen the new High-Level Peace Committee (HLPC)<sup>228</sup> as a vehicle for negotiations and settlement. Sufficient common ground for talks existed, party officials argued, because the Maoists had recognised the king's authority in demanding to speak with "the masters" rather than the Deuba government.<sup>229</sup> Their view always appeared overoptimistic. Maoist recognition of the king as the embodiment of the "old" state does not preclude their desire to do away with that old state in favour of a new people's democracy. Moreover the HLPC, which had shown little signs of efficacy, was swiftly disbanded by the new royalist government.

While in government, the Congress (D) proposed an amendment process, rather than a constitutional assembly. It was always, however, prepared to adjust to circumstances: Deuba, for example, supported a constitutional assembly until June 2004, when he entered government, and he declined to rule out such a body even while prime minister.<sup>230</sup> As with the UML, Congress (D)'s support for the seven-party agenda for change via a constitutional assembly is not entirely surprising. Perhaps more significant is the question of whether public commitment to the same program will boost chances for Congress' reunification.

Congress (D)'s former ally in government, the RPP, also endorsed the continuing vitality of the 1990 Constitution under the Deuba government. Its spokesperson explained that the party opposed restoration of parliament or a constitutional assembly because of the king's opposition to both.<sup>231</sup> It argued that a government formed of all

<sup>221</sup> Hachhethu, "Party Manifesto and Election", op. cit., pp. 28-29, 35.

<sup>222</sup> Crisis Group interview with Madhav K. Nepal, General Secretary of CPN-UML, Kathmandu, 5 October 2004.

<sup>223</sup> Crisis Group interview with UML Central Committee member, Janakpur, 2 October 2004.

<sup>224</sup> Crisis Group interviews with UML activists, Kathmandu and New Delhi, February to April 2005.

<sup>225</sup> "MK Nepal urges for full-fledged sovereignty", nepalnews.com, 2 May 2005.

<sup>226</sup> Crisis Group interview with Congress (D) members, Kathmandu and Janakpur, September and October 2004.

<sup>227</sup> "The environment for reunification is becoming positive", Ram Sharan Mahat stated after an 11 April 2005 Congress Central Working Committee meeting. "NC mulls reunion with NC (D)", nepalnews.com, 12 April 2005.

<sup>228</sup> On the HLPC, see Section VI below.

<sup>229</sup> Crisis Group interview with Minendra Rijal, Congress (D), Kathmandu, 5 October 2004.

<sup>230</sup> Crisis Group interview with Nepali opposition politician, Kathmandu, October 2004. In an interview after his appointment, Deuba had stated that "if there is national consensus on holding constituent assembly elections, I will have to give in to the public demand". "My First Priority is Holding Elections", *The Nation*, 13 June 2004, p. 21.

<sup>231</sup> Crisis Group interview with Roshan Karki, RPP spokesperson, 12 October 2004.

parties represented in the 1999 parliament could simultaneously negotiate and prepare for elections. In 2003, however, the party's third general assembly had endorsed constitutional change.<sup>232</sup> Its national council in December 2004 endorsed a constitutional assembly as one possible option, a line advocated by certain senior RPP members for some time.<sup>233</sup> Khem Raj Pandit, for example, has argued that because neither parliamentary restoration nor elections are possible, the government should talk to the Maoists with the goal of initiating a constitutional assembly -- the only vehicle for bringing the insurgents into the mainstream. By creating a public impression of internal debate, the RPP may have deliberately kept its options open as a deal-maker in case other parties decided to back a constitutional assembly, as they now have.

The position on constitutional reform of the new Rastriya Janashakti Party (RJP), formed by RPP founder Surya Bahadur Thapa after he quit his old party, is not yet entirely clear. The RJP's first policy paper calls for certain major changes, such as an effective reservations system, proportional representation and decentralisation. It strongly endorses the need for the monarchy as a symbol of national unity while at the same time endorsing an unspecified process of "constitutional change/rewriting and modernisation".<sup>234</sup> Neither the RPP nor the RJP has joined the seven-party alliance.

The NSP's main faction, which did not join the Deuba government, identified an all-party consensus as central to progress. With a common position on the constitution, NSP officials argue, the parties could negotiate with the king. NSP places less emphasis on restoring parliament, despite having stood with Congress in opposition to the Deuba coalition, because it doubts parliament's ability to reach a consensus.<sup>235</sup> According to its officials, there must be talks with the Maoists before constitutional changes. While it rejects the parliamentary amendment route as too cramped and the referendum path as favouring the larger parties, the NSP favours adopting a new constitution. At its grass-roots level, agitation for constitutional change -- most vocally via constitutional assembly -- is more pronounced.<sup>236</sup>

The NWPP and Janamorcha, despite being furthest from Congress ideologically, share the same prescription for dealing with the crisis: parliamentary restoration followed by formation of an all-party government. Both also endorse a constitutional assembly.<sup>237</sup> Their leaders place more emphasis on the kind of constitutional changes they envisage, rather than on the method but they have backed the seven-party proposal.

In short, party positions on immediate political transition and constitutional change have long been influenced by perceptions of short-term interest. Such self-interest, however, has its advantages. The parties' recognition that democratic governance is in their common interest -- indeed, the only justification for and basis of their authority -- has helped persuade them to rally around a common position to break the political stalemate. To this extent, King Gyanendra has greatly aided the political parties by bringing their shared interests into sharper focus. As many observers have pointed out, the royal coup achieved the seemingly impossible task of uniting Nepal's fractious parties and giving them the basis for a common agenda. Whether they will be able to bring their agenda to fruition, and whether there will be any consensus on the substance as well as process of reform, remains to be seen. But the common adoption of a constitutional assembly route for change offers the parties their best hope of forcing the palace and the Maoists to pay attention to them and their call for a democratic peace settlement.

## E. THE MAOISTS

The Maoist agenda, which from inception included transformation of the state, has increasingly emphasised a process of constitutional change -- the holding of a constitutional assembly -- as a goal in itself. However, the Maoists resist suggestions that they have diluted their ultimate goal of a "New Democratic/People's Democratic Republic", which will be a "people's democratic dictatorship".<sup>238</sup> Their support of a constitutional assembly must be treated with some scepticism in light of that ultimate aim.

On 4 February 1996, before declaration of the "people's war", party ideologue Baburam Bhattarai sent then Prime

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<sup>232</sup> Crisis Group interview with RPP politician, Kathmandu, October 2004. RPP, "Common Minimum Program: Concept Paper to Move Ahead" (no date).

<sup>233</sup> Crisis Group interview with Khem Raj Pandit, RPP Central Committee, Kathmandu, 8 October 2004.

<sup>234</sup> RJP policy document, available at [www.rjpnepal.org](http://www.rjpnepal.org).

<sup>235</sup> Crisis Group interview with Sarita Giri, spokesperson, NSP (Anandi), Kathmandu, 26 October 2004.

<sup>236</sup> Crisis Group interviews with NSP local officials, Janakpur, 1 October 2004.

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<sup>237</sup> Crisis Group interviews with Lila Mani Pokharel, Vice Chairman of Janamorcha, Kathmandu, 14 October 2004, and Narayan Man Bijukchhe "Rohit", Chairman, NWPP, Bhaktapur, 19 October 2004; Comrade Rohit, "Monarchy for the interest and benefit to the entire people", *University Student Bulletin* (March 2003), p. 1.

<sup>238</sup> "Common Minimum Policy & Program of United Revolutionary People's Council, Nepal (URPC)", *The Worker*, no. 8, January 2003, p. 56.

Minister Sher Bahadur Deuba 40 demands, warning that armed struggle would begin unless "positive indications" were forthcoming. The tenth demand was for a new constitution "drafted by representatives elected for the establishment of a people's democratic system".<sup>239</sup> Until late 2001, when negotiations with a government headed by Deuba were ongoing, the Maoists continued to focus on a new republican constitution framed by the people. On 13 November 2001, they dropped this demand and shifted emphasis to the process-related call for an interim government followed by a constitutional assembly.<sup>240</sup>

During the 2003 talks and again in February 2004, the CPN(M) insisted on the same framework for progress: "[a] roundtable conference, an interim government and election to a Constituent Assembly".<sup>241</sup> Such an assembly would effect the transition from a capitalist democracy to a "full-fledged" democracy, or, in Bhattarai's words, "a democratic republic".<sup>242</sup> According to the Maoists, "in a free and fair election the mandate of the Nepalese people would be in favour of a republic".<sup>243</sup> The Maoists have detailed some of what they want in a new constitution, including land reforms, nationalisation of industries, a unified national army, and regional autonomy for ethnic groups.<sup>244</sup> According to those close to the CPN(M), its focus on process does not represent a change of goals, but only their postponement in light of geopolitical concerns.<sup>245</sup>

In the aftermath of the royal coup, the Maoists reached out to the mainstream parties with the suggestion of a united anti-monarchical front.<sup>246</sup> The standard reaction of the parties has been that reconciliation remains possible but only if the Maoists renounce their armed

struggle. Nevertheless, the actions of the king have added weight to the Maoist analysis of the 1990 settlement's inherent flaws. "[T]he October 4 [2002] action and subsequent developments have given validity to the Maoist theory that the 'people-based sovereignty' enshrined in the present constitution is just an illusion, and that the ultimate power remains with the King as long as the army is under his effective control", observes senior Congress leader Ram Sharan Mahat. "[T]he insurgency and regression have re-enforced each other for different reasons".<sup>247</sup>

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<sup>239</sup> Reprinted in Deepak Thapa with Bandita Sijapati, *A Kingdom under Siege: Nepal's Maoist Insurgency, 1996 to 2003* (Kathmandu, 2003), pp. 189-191, 195.

<sup>240</sup> Deepak Thapa, "Erosion of the Nepali World", in Deepak Thapa (ed.), *Understanding the Maoist Movement of Nepal* (Kathmandu, 2003), p. 240. According to a journalist close to them, the Maoists debated the idea of compromising on a constitutional assembly as early as February 2001. Crisis Group interview, Kathmandu, October 2004.

<sup>241</sup> Comrade Prachanda, "A Brief Introduction to the Policies of the C.P.N. (Maoist)", *The Worker*, February 2004, p. 14; Thapa and Sijapati, op. cit., p. 201.

<sup>242</sup> Crisis Group interview with former mediator, Kathmandu, October 2004; "Maoists seek a Democratic Nepal: Interview with Baburam Bhattarai", in Thapa, op. cit., p. 331.

<sup>243</sup> Prachanda, op. cit., p. 15.

<sup>244</sup> Ibid, pp. 15-16; Crisis Group interview with Padma Ratna Tuladhar, former mediator, Kathmandu, 9 October 2004.

<sup>245</sup> Crisis Group interviews, Kathmandu, September, October 2004 and January, March 2005.

<sup>246</sup> See Crisis Group Report, *Making a Bad Situation Worse*, op. cit., p. 10, and Crisis Group Briefing, *Responding to the Royal Coup*, op. cit., p. 3.

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<sup>247</sup> "Was February 1 necessary?", [www.liberaldemocracynepal.org](http://www.liberaldemocracynepal.org), 12 May 2005.

## **VI. THE OPTIONS FOR POLITICAL TRANSITION**

In approaching substantive constitutional questions, the initial challenge is to break the political deadlock. There are three main options: an all-party government, which would operate like a round-table conference; nationwide elections; and restoration of the 1999 parliament. The aim of any political transition along these lines would be to reopen democratic space, allowing parties to introduce policies and fashion a consensus negotiating strategy. These options follow the logic that moves towards peace require two distinct stages: first, resolving the power tussle in Kathmandu between the so-called "constitutional forces", and only then negotiating with the Maoists. There is also, however, a fourth option which may be termed the "Maoist roadmap": to recognise that the resolution of executive power distribution, discussion of constitutional change and negotiation of a lasting peace are interlinked issues that could be addressed within a single-stage process if the Maoists could be persuaded to participate. Finally, the palace may well have its own vision of future constitutional arrangements: indications of what these might be have been outlined in Section III.C above.

Until the royal coup there was one further possible vehicle for transition: the High-Level Peace Committee (HLPC), which was disbanded by the king following his seizure of power. The associated peace secretariat has now been handed responsibility for investigating the needs of internally displaced persons.<sup>248</sup> The history of the HLPC offers important lessons for any future efforts at negotiation. Established by the Deuba government on 22 September 2004, it was to be a permanent governmental structure to provide technical support and a political mechanism for facilitating talks with the Maoists. However, it did not fulfil initial civil society hopes for a non-partisan vehicle that could bridge party differences and negotiate effectively. The HLPC was compromised from birth by partisan bickering, while its bureaucratic structure and staffing failed to draw on conflict-resolution expertise outside the public sector, antagonised donors and diminished effectiveness.

The government initially tried to make the HLPC an all-party body but Congress refused to join, contending that "the HLPC is a technical body; peace is a political problem".<sup>249</sup> Shorn of bipartisan support, it lacked the stability for successful, inevitably protracted, negotiations. An advisory and assistance sub-committee was tasked

with generating initiatives and maintaining momentum but it would have had to change under a new government. Thus, the HLPC replicated a critical flaw of the government's 2003 negotiation team, which was replaced after Prime Minister Chand resigned in June 2003.<sup>250</sup>

The HLPC's weaknesses illustrate the futility of a government negotiating institution that lacks a political consensus among the democratic parties. Any move by the palace to negotiate under the current circumstances would replicate some significant structural flaws of the HLPC, including the absence of consensus and the use of institutional formalities in lieu of political will.

### **A. AN ALL-PARTY GOVERNMENT WITHOUT A PARLIAMENT**

The UML, RPP, NSP, NWPP and Janamorcha have proposed variations on an all-party or roundtable government bringing together representatives of the parties with seats in the 1999 parliament.<sup>251</sup> Formation of such a government, however, would require overcoming significant process-related problems.

While such a government could be constituted in "shadow" fashion as a symbolic challenge to royal rule, it would only be effective if accepted by the king, whether willingly or under pressure. Creating an all-party government would also require a minimum consensus among the parties themselves -- something that was not possible before February 2005 -- and treating its formation as a prerequisite to peace talks would give each party a de facto veto on progress with the Maoists.

Further, it is not clear that an all-party government could overcome the credibility gap from which the Deuba government suffered. The king's use of Article 127 has hampered the ability of any post-October 2002 government to act. Rather than making decisions based on perceptions of the public good, ministers in the Chand, Thapa and Deuba administrations had to engage in a complex balancing of their party's interests, their coalition partners' positions, and their perception of the king's wishes. An all-party government would not in itself address the underlying problem of an assertive monarchy determined to retain a stranglehold on the political process and the possibility of peace.

In practical terms, an all-party government might have no more tools to change policy than the Deuba government had. Without a more fundamental change in institutional arrangements, the king could still retain veto power over

<sup>248</sup> Crisis Group interview with international humanitarian staff, 21 April 2005.

<sup>249</sup> Crisis Group interview with Ram Sharan Mahat, Congress Central Working Committee, Kathmandu, 5 October 2004.

<sup>250</sup> Crisis Group interview with former government negotiator, Kathmandu, 8 October 2004.

<sup>251</sup> A roundtable government might also include CPN(M).

policy and legislative changes, undermining prospects for the peace negotiations. Although an all-party government appears attractive because it involves no legal hurdles (unlike restoration of parliament) or security concerns (unlike elections), it would have little increased credibility or leverage to negotiate with the palace or the insurgency.

## B. A GOVERNMENT FORMED AFTER NEW PARLIAMENTARY ELECTIONS

The Deuba government was set the impossible task of holding general elections. While its failure was used by the king as an excuse to seize power, the new royal administration has not committed itself to parliamentary elections, preferring to raise the prospect of municipal polls. With a monarch implacably opposed to helping the political parties regain legitimacy and the Maoists insisting they will disrupt any attempt at elections, the prospects for a new parliament look poor. Elections are more likely to be deployed as a hollow rhetorical tool or, from the palace's perspective, seen as a means embedding a more Panchayat-style government.

As noted, since the inception of their insurgency, the Maoists have targeted cadres of other parties. Deuba's dissolution of local governments further deprived many party workers of their most important grass-roots contact. The withdrawal of police from rural areas has forced many village politicians to retreat to district centres. The security situation cannot be improved overnight, even though the Maoists have since February 2005 encouraged the workers of other parties to resume working in the villages. As long as the threat of armed violence -- whether before, during or after polls -- remains credible, a free and fair election is hard to envisage.

Furthermore, the Maoists are not the only threat to a democratic election. Voting in the current environment would be concentrated in urban areas -- especially if the call for municipal polls goes ahead -- and conducted under the close supervision of an army allied to the king. Mistrust of the army runs high among local politicians. Certain Congress activists contend that soldiers "know only the language of king and country and don't understand democracy". They would have to return to barracks before elections could be fair.<sup>252</sup> Even before February 2005, peace activists report meeting soldiers posted in Jhapa who told them that politicians had failed, so the military would not hand back power.<sup>253</sup> The situation has only worsened since the royal coup.

It is true that elections have been held in less-than-ideal security environments: Sri Lanka and Jammu and Kashmir are cited as examples.<sup>254</sup> But recent elections in those areas show a high human cost in the context of a continuing insurgency. Elections in Sri Lanka have been marred by violence throughout the polling cycle.<sup>255</sup> The 2004 parliamentary elections saw five murders, fifteen serious injuries and more than 2,000 cases of violence.<sup>256</sup> In 2002 in Jammu and Kashmir, more than 800 people were killed prior to balloting; in some areas, including Srinagar itself, turnout was as low as 11 per cent. That election's surprising result -- the defeat of incumbents -- was "no panacea", but did mark "an important step forward".<sup>257</sup> But in Nepal, where three relatively free and fair elections have been held since 1991, a new round would not have any dramatically new demonstrative effect.

Even if polls were phased and security measures taken, the Maoists would have no shortage of opportunities to disrupt the process. Elections generate soft targets ideal for their low-intensity, asymmetrical warfare: campaign workers, voters, candidates, administrative staff, monitors, elected officials and their families are all vulnerable before and after. Nepal's geography, which impedes the RNA's counter-insurgency efforts, would hinder efforts to ensure safety of candidates and voters. Maoist capacity to attack targets before, during or after an election would make regional phasing a less than effective security device.<sup>258</sup> If an election were held in phases, with the RNA moving from one district to another, the army would lack means to consolidate temporary improvements in security. Free and fair elections cannot be guaranteed simply by providing security at the moment of voting. Genuinely unhindered participation requires dramatic increase in faith in the state's ability to protect citizens against violence and intimidation.

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<sup>254</sup> Crisis Group interviews with Nepali politicians, Kathmandu, October 2004. The Nepali situation, in which elections might be a step toward conflict resolution, is distinct from instances in which elections have been held after a peace agreement, such as El Salvador (1994).

<sup>255</sup> Presentations by Arujuna Parakrama and Shakuntala Rujasingham, Sagun Conference, Kathmandu, 26 September 2004.

<sup>256</sup> European Union Election Observation Mission, Final Report, at <http://www.delka.cec.eu.int>.

<sup>257</sup> Crisis Group Asia Report N°41, *Kashmir: The View from Srinagar*, 21 November 2002, p. 24; see also Surinder Rana, "Post-Election Jammu and Kashmir", *Strategic Insight*, 5 March 2003.

<sup>258</sup> Crisis Group interview with elections expert, Kathmandu, October 2004. Presentation by Arujuna Parakrama, op. cit.

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<sup>252</sup> Crisis Group interview, Janakpur, 1 October 2004.

<sup>253</sup> Crisis Group interview with peace activist, Kathmandu, 10 October 2004.

### C. A GOVERNMENT FORMED AFTER RESTORATION OF THE PARLIAMENT ELECTED IN 1999

Parliamentary restoration is viewed as a partisan agenda and confronts significant legal and political obstacles. Nevertheless, it may represent the best of Nepal's poor options for breaking the impasse and offering a return to constitutional democracy. It is also the only option that has notably gained ground across a range of constituencies. Influential commentators without affiliations to Congress started to argue for restoration from late 2004,<sup>259</sup> and it is an option that had also by then begun to gain ground among influential diplomats.<sup>260</sup> Indications are that the proposed Common Minimum Program of the mainstream parties in response to the February 2005 royal coup may well endorse restoration as the preferred option for re-establishing democratic institutions.<sup>261</sup> This position has already been taken by a group of party representatives in New Delhi,<sup>262</sup> although their views do not necessarily reflect the final consensus of party leaderships. More significant is the recent support statement of Nepali Congress (Democratic), a reversal of previously stubborn opposition.<sup>263</sup>

A cabinet and prime minister selected by the 1999 parliament would have a demonstrably democratic mandate and so be entitled to a more than nominal role in negotiations. The speaker of the dissolved House has observed that a parliament also could voice "the national consensus on peace", putting more pressure on the Maoists to come to the table than the RNA can by military means.<sup>264</sup> Moreover, unlike an all-party government, a restored parliament would have power to legislate, and its bills arguably would have legal force even if not signed

by the king.<sup>265</sup> By considering legislative measures to draw the RNA and the security services at least partially under civilian control, for example, it could begin to address Maoist concerns about control of the army.<sup>266</sup>

Furthermore, the House of Representatives has a pivotal role in the functioning of constitutional bodies. The prime minister, the House's speaker and the leader of its opposition sit on the Constitutional Council, which is central to appointment of the Election Commissioner.<sup>267</sup> The National Human Rights Commission's appointment mechanism also assumes the legislature's existence and requires the participation of the prime minister and leader of the opposition.<sup>268</sup> Through such appointments, the House has a critical responsibility for consolidating democratic principles and ensuring the independence of constitutional institutions. When the mandate of the National Human Rights Commission expired on 25 May 2005, the royal government appointed new commissioners via a modified mechanism. Human rights experts have described this process as illegitimate and in contravention of the "Paris Principles" that guarantee autonomy, independence, impartiality, efficiency and professionalism.<sup>269</sup>

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<sup>259</sup> See Kanak Mani Dixit, "Exit Strategy: Nepali Quagmire", *Kantipur*, November 2004, available at [www.kantipuronline.com](http://www.kantipuronline.com). Other influential commentators have endorsed parliamentary restoration. Crisis Group interview with Nilamber Acharya, former minister of law, 28 September 2004; Nilamber Acharya, "Building Political Capital", *The Kathmandu Post*, 24 September 2004, p. 4.

<sup>260</sup> Crisis Group interviews with senior diplomats, Kathmandu and New Delhi, December and January 2005.

<sup>261</sup> Crisis Group interviews with party leaders and activists, Kathmandu and New Delhi, April 2005.

<sup>262</sup> Statement issued on 1 May 2005 and signed by Krishna Sitaula, central committee member, Nepali Congress; Rajan Bhattarai, International Department, UML; Pradip Giri, Nepali Congress (Democratic); Rajendra Mahato, General Secretary, Nepal Sadbhavana Party; Dila Ram Acharya, Janamorcha Nepal; C.D. Joshi, central committee member, CPN (United).

<sup>263</sup> "NC (D) backs house reinstatement demand", [nepalnews.com](http://nepalnews.com), 5 May 2005.

<sup>264</sup> Crisis Group interview, Taranath Ranabhat, Speaker of 1999 House of Representatives, Kathmandu, 6 October 2004.

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<sup>265</sup> Arguably, the House of Representatives has power to legislate independent of the National Assembly (the upper house) and the king. Article 69(5) provides that if it does not receive a response on a bill, it may "by a resolution passed by a majority of more than 50 per cent of the sitting members, present the Bill to His Majesty for assent". Although the constitution gives no unequivocal answer as to what happens if the king and parliament disagree, parliament should prevail. The king can return a bill for reconsideration but parliament can pass it a second time "as it was or with amendment"; then the king "shall give assent to that Bill within thirty days of such presentation". That is, royal failure to assent violates the constitution, allowing the bill to be deemed signed. Article 69(5), Constitution of the Kingdom of Nepal, 1990.

<sup>266</sup> Crisis Group interview with human rights activist and labour dispute mediator, Kathmandu, 28 September 2004. At least partial civilian control of the RNA and security services is critical for a peace process due to the spoiler role they could play, as the army did at Doramba in August 2003. Crisis Group Briefing, *Back to the Gun*, op. cit.

<sup>267</sup> Articles 103(2) and 117(1) of the 1990 Constitution of Nepal; see Hari Roka, "Militarisation and democratic rule in Nepal", *Himal*, November 2001, p. 59.

<sup>268</sup> See Crisis Group Report, *Dealing with a Human Rights Crisis*, op. cit.

<sup>269</sup> "Human Rights Community Resists Authoritarian Regime", press statement of the National Coalition of Human Rights Defenders, Kathmandu, 5 June 2005. The Paris Principles refer to the "Principles relating to the status and functioning of national institutions for protection and promotion of human rights", which were endorsed by UN General Assembly resolution on 20 December 1993. They describe characteristics national human rights bodies must have to ensure their integrity and independence and can be found at <http://www.unhchr.ch/>

Parliament's restoration would also present an opportunity to reconsider Prime Minister Deuba's May 2002 dissolution of local elected bodies, the Village Development Committees (VDCs) and District Development Councils (DDCs). Described by one analyst as "a colossal blunder", the dissolution eliminated a power base for the rival UML but also deprived the people of their most immediate and accessible contact with democracy.<sup>270</sup> Under the 1999 law, local government was for the first time receiving limited funds for development projects.<sup>271</sup> Although it may have been too little, this was a significant break from the practice of development directed by line ministries in Kathmandu.<sup>272</sup> Even if VDCs and DDCs cannot function in all locations, their renewal would give mainstream parties a vehicle to reassert their presence and democratic order at a local level.

Parliamentary restoration also has significant drawbacks. The notion features most prominently in Congress' agenda, so it takes on a partisan hue and is resisted by Congress (D) and the king. The Maoists also oppose it as "the idea of reactionary forces to dupe the people".<sup>273</sup> A restored parliament, moreover, could descend all too easily into the internecine, parochial bickering that has characterised previous sessions. From the start of the "people's war" in 1996 to 2002 dissolution, parliament failed to cope with the insurgency. Even if the royal coup has focused minds on a common agenda, the parties are still fractious. Reconvening parliament would not in itself make compromise easier nor deliver a coherent agenda.

Such problems could be addressed by restoring parliament with a mandate limited in time and scope. For example, it might meet for three to six months with specifically defined tasks such as to fix an agenda for constitutional change and to negotiate, based on that agenda, with the Maoists. It also could decide how to change the constitution. The sole basis for extending its mandate would be to allow more time for negotiations.<sup>274</sup> The aim of such talks would be a transitional arrangement -- for example, elections for a constitutional assembly -- that

would involve the Maoists and end the life of the parliament. These transitional measures would be more sustainable because they would have democratic legitimacy. The restored parliament would be an intermediate body: although it would operate under the 1990 Constitution, its restoration would imply no commitment to that legal regime.

A parliament understood as transitional would be less likely to be perceived as a vehicle for Congress resurgence. A compromise on duration and purpose might strengthen the case for restoration within other parties. However, there does not appear to be a legal mechanism to limit a parliament's agenda. The constitution places no constraints on parliament except for banning discussion of certain issues,<sup>275</sup> thus implying parliament otherwise has freedom of action. No other institution is vested with power to limit its term or debate. Nevertheless, there are two ways to achieve such a restricted parliament. First, an informal, but public, agreement between parties on a strictly delimited mandate could be part of the negotiations for restoration. This is the implication of the seven-party agreement, which states that restoration of parliament is a route to negotiations with the Maoists by an all-party government.<sup>276</sup> Secondly, the Supreme Court has "extraordinary power to issue necessary and appropriate orders" to resolve any constitutional or legal questions.<sup>277</sup> Using that open-ended authority, it could reconstitute the House of Representatives with a limited mandate. A judgement setting forth the goals of restoration would be an institutional check on free-wheeling partisan debate since the Supreme Court could consider petitions if the parliament strayed beyond negotiations and political transformation.<sup>278</sup>

Parliament can be restored either by the king, upon recommendation of the prime minister and cabinet, or the Supreme Court.<sup>279</sup> As a practical matter, either route would probably require palace sanction, as the instinctively conservative judiciary would be unlikely to go against its wishes. The first option would have been feasible before February 2005 if Deuba's cabinet had been able to agree on submitting a recommendation. Even following the dismissal of that government, the king

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<sup>270</sup> Gersony, op. cit., pp. 41-42.

<sup>271</sup> For details of VDC and DDC functioning, see "Decentralisation in Nepal: Prospects and Challenges. Findings and Recommendations of Joint HMGN-Donor Review", March 2001, pp. 2-3.

<sup>272</sup> Crisis Group interview with NGO local governance expert, Lalitpur, 12 October 2004.

<sup>273</sup> CPN(M) spokesperson Krishna Bahadur Mahara, cited in "Conditional", *Kantipur*, 26 September 2004.

<sup>274</sup> A government negotiator in 2003 observed that party politicians had expected immediate results, and the pressure had complicated negotiations. Crisis Group interview with former government negotiator, Kathmandu, October 2004.

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<sup>275</sup> Most importantly, criticism of the king, queen and heir to the throne is barred. Article 56(1) of the 1990 Constitution.

<sup>276</sup> "Parties put support for House revival on paper", [www.kantipuronline.com](http://www.kantipuronline.com), 8 May 2005.

<sup>277</sup> Article 88(2), Constitution of the Kingdom of Nepal, 1990.

<sup>278</sup> The Court lacks strong sanctions if parliament strays but it could heighten the cost of exceeding the mandate.

<sup>279</sup> A less common opinion, held by at least one senior Congress official, is that the National Assembly (the upper house) has the power to restore the House of Representatives. Crisis Group interview, Kathmandu, 7 October 2004. But it is difficult to see what legitimacy gain this would bring.

could still invoke Article 127 to restore parliament: there might be a debate over the legal niceties of such a move but it would possess more acceptability, both de jure and de facto, than his 1 February move.

The second path runs through the Supreme Court, a full bench of which in 2002 endorsed dissolution of parliament.<sup>280</sup> Pivotal to that judgement was a 1995 precedent concerning Man Mohan Adhikari's attempt to dissolve the House, in which the Supreme Court had held that if a quarter of the members tabled a no-confidence motion, the prime minister could not dissolve the House until that motion was addressed.<sup>281</sup> In 2002 the Supreme Court said little beyond noting the absence of such a no-confidence motion.<sup>282</sup>

The constitution allows the Court to reconsider its own judgements; the Judicial Administration Act clarifies that this must be done by the same bench that initially heard the case.<sup>283</sup> According to a lawyer involved in 2002, only two of the participating judges have retired and been replaced.<sup>284</sup> A motion for reconsideration might be made by those who brought the original 2002 action or parties could file a public-interest case.<sup>285</sup> The 1995 judgement demonstrates that the Court has authority to revoke a prime minister's dissolution decision. Moreover, sound

legal grounds exist for revising the 2002 judgement.<sup>286</sup> The constitution specifies that the king, upon dissolving the House, "shall...specify a date, to be within six months, for new elections..."<sup>287</sup> In other words, "holding an election is a condition subsequent for dissolving the parliament".<sup>288</sup> Absent the stipulated elections, the argument that the proper remedy is restoration of the 1999 parliament gains strength.

Again there would be a debate over technicalities, not least the question of whether the parliament's term expired irrevocably in 2004, five years after its election. But the challenge is primarily that of finding a politically acceptable way out. Any attempt to restore parliament through royal fiat or the Supreme Court would confront significant political obstacles.

In practice, the Supreme Court route would almost certainly be dependent on royal approval. Initially, the Court was dominated by individuals with strong party loyalties, particularly to Congress. The main such voices having left the bench, most judges now are former bureaucrats "with no loyalty except to the establishment of the day", that is, the palace.<sup>289</sup> Unsurprisingly, the bench has adopted "a soft touch" toward the military, declining to issue contempt citations on the detentions issue.<sup>290</sup> In January 2005 it refused to register a petition for parliament's restoration<sup>291</sup> and in May it similarly rejected an effort to convene a sitting of the House to consider royal orders issued under Article 127.<sup>292</sup> The new Chief Justice, Hari Prasad Sharma, has gone out of

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<sup>280</sup> Crisis Group interviews with Supreme Court advocate, Kathmandu, October 2004.

<sup>281</sup> Ibid. *Ravi Raj Bhandari v. The Rt. Honourable Prime Minister Mr. Man Mohan Adhikari*, reprinted in Ram Krishna Timalsena, ed., *Some Landmark Decisions of the Supreme Court of Nepal* (Kathmandu, 2003), p. 18. Article 59(2) of the 1990 Constitution envisages no-confidence motions: "One-fourth of the total members of the House of Representatives may table in writing a no-confidence motion against the Prime Minister"; that motion is subject to majority vote. Article 59(3) of the 1990 Constitution of Nepal.

<sup>282</sup> Crisis Group interviews with Supreme Court advocate, Kathmandu, October 2004. According to a commentator, Deuba brought the dissolution motion to King Gyanendra late one evening. Although King Birendra's practice had been to consult with legal experts on a dissolution request, Gyanendra authorised it that evening. Crisis Group interview, Kathmandu, October 2004.

<sup>283</sup> "The Supreme Court may review its own judgement or final orders subject to the conditions and in the circumstances prescribed by law". Article 88(4) of the 1990 Constitution of Nepal.

<sup>284</sup> Crisis Group interview with Yubaraj Sangroula, Dean of Kathmandu School of Law, Kathmandu and counsel for Hari Nepal and Ganesh Pandit, 21 October 2004.

<sup>285</sup> Ibid. Professor Sangroula posited that Deuba's appearance before the Court arguing for reinstatement of the 1999 parliament would have a powerful effect. It seems unlikely, however, that he could be persuaded to concede that changed conditions warrant reconsideration of his May 2002 decision.

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<sup>286</sup> Crisis Group interviews with lawyers, Kathmandu, October 2004.

<sup>287</sup> Article 53(4) of the 1990 Constitution of Nepal.

<sup>288</sup> Crisis Group interview, Nilamber Acharya, former Law Minister, Kathmandu, 28 September 2004. Former Chief Justice Biswanath Upadhyay made a similar observation.

<sup>289</sup> Crisis Group interviews with lawyers, Kathmandu, October 2004.

<sup>290</sup> Crisis Group interview with law professor, Kathmandu, October 2004. The Court has censured officers for failing to respond in habeas corpus proceedings. Jogendra Ghimire, "Court Calls", *The Nation*, 4 July 2004, p. 11. In a meeting with the Chief Justice on 22 November 2004, Chief of Army Staff Pyar Jung Thapa promised that the RNA would respect court orders, "SC asks RNA to obey orders", nepalnews.com, 26 November 2005. Nevertheless, an environment of legal impunity for the security forces remained in place. See Crisis Group Report, *Dealing with a Human Rights Crisis*, op. cit., 24 March 2005 and Amnesty International, "Nepal: Killing with impunity", 20 January 2005, ASA 31/001/2005.

<sup>291</sup> *Kantipur*, 17 January 2005.

<sup>292</sup> "SC rejects writ asking House session", nepalnews.com, 19 May 2005.

his way to support the royal coup and denigrate the democratic process.<sup>293</sup>

The Attorney General argues that once the king assumes power through Article 127, no parliamentary restoration is possible.<sup>294</sup> This bare assertion, however, runs contrary to Article 127's text, which requires parliamentary approval of royal measures taken under that provision of the constitution. Nor does the article express any preference between restoration and fresh elections in the unanticipated situation Nepal now finds itself in. Council of Ministers Vice Chairman Peter Giri has underlined the powerlessness of the courts by pressing the parties to take their demand for restoration to the Supreme Court while simultaneously noting that the parliament is "already dead".<sup>295</sup> He had previously called the demand for restoration of democratic institutions itself "undemocratic".<sup>296</sup> A judicial challenge to dissolution thus may require the same political pressures on parties and king as the overtly political route.

The king has steadfastly opposed parliamentary restoration but it may yet offer the best hope for salvaging his own interests. His primary concern is survival of the monarchy, which requires a modicum of public support.<sup>297</sup> The most significant blows to King Gyanendra's legitimacy have been self-inflicted. By late 2004 polls showed a two to one disapproval of his October 2002 dismissal of Deuba.<sup>298</sup> The popularity of the February 2005 coup has not been put to the test but there are no concrete signs that nationwide opinion has altered significantly. By initially declining to rule directly, the king appeared to recognise that there is scant support for an absolute monarchy. But the February 2005 takeover has entirely

removed the notional separation between king and political power.

Responsibility for addressing the insurgency, and for all other government policy, is now attributed directly to the king. Restoring parliament may be one way the king can separate himself from daily politics and recapture some of his lost legitimacy. For those who support the palace but also insist on the parties' continuing significance, parliamentary restoration would furnish an opportunity to encourage meaningful partnership between the two power centres. Given the heightened mutual suspicions since the February coup, this may well be the last chance to salvage a compromise which an increasing number of observers suspect may already no longer be viable.

#### D. THE "MAOIST ROADMAP"

The Maoists have long put forward their own roadmap for ending the conflict: a roundtable conference, followed by an interim government and an elected constitutional assembly.<sup>299</sup> There are many reasons for questioning whether Maoist assurances that they would follow such a process were it to be initiated can be taken at face value. Nevertheless, the idea of accepting the modality of a constitutional assembly as a means of encouraging -- or even forcing -- Maoist participation has gained wide acceptance among non-Maoist parties and opinion-formers, including some in the royalist RPP, since the failed 2003 talks. United Nations Assistant Secretary General Kul Chandra Gautam recently insisted that "ways can be found to accommodate the Maoist demand of a round-table conference, an interim government and some form of constituent assembly that is consistent with [democratic] principles".<sup>300</sup> It should not, therefore, be dismissed out of hand. Nor should it be accepted uncritically.

Even if the Maoists opt for negotiations, their writings provide grounds to doubt that they would accept any unfavourable outcome of a constitutional assembly. In particular, the Maoists' insistence that they favour democracy should be viewed with caution given the understanding of that term in the Marxist-Leninist and Maoist traditions.<sup>301</sup> They have expressed scepticism

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<sup>293</sup> Speech delivered on 20 March 2005 at the 11th Conference of the Chief Justices of Asia Pacific.

<sup>294</sup> "No constitutional basis for House reinstatement: AG", nepalnews.com, 11 May 2005.

<sup>295</sup> "Knock the door of court instead of protest: Giri", www.kantipuronline.com, 5 June 2005.

<sup>296</sup> "Giri lashes out at parties, marks 100 days since Feb 1", www.kantipuronline.com, 12 May 2005.

<sup>297</sup> Gyanendra's efforts to shore up legitimacy are particularly important in light of the inauspicious way he came to the throne, following Prince Dipendra's 1 June 2001 massacre of King Birendra and members of the royal family, and the unpopularity of his son, Paras, who has a reputation for violent and dissolute behaviour. Crisis Group interviews, Kathmandu, October 2004. Amy Waldman, "Kathmandu Asks: Is Gyanendra Smoking as Nepal Burns?", *The New York Times*, 25 April 2004.

<sup>298</sup> A nationwide survey and one limited to the Kathmandu Valley yielded similar results: about 50 per cent condemning the king's action, and about 25 per cent approving. Greenberg Quinlan Rosner Research Inc., op. cit., p. 5 (nationwide); Kunda Dixit, "Yes and No", *Nepali Times*, 15-21 October 2004, p. 5 (Kathmandu Valley only).

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<sup>299</sup> Prachanda, op. cit., p. 14. Maoist political goals will be discussed in detail in a forthcoming Crisis Group report.

<sup>300</sup> Kul Chandra Gautam, "Mistakes, miscalculations & middle ground", www.blog.com.np, 4 April 2005.

<sup>301</sup> The Maoists' debt to Leninism further counsels caution regarding endorsement of a constitutional assembly. Previously scheduled elections to a Russian constituent assembly were held after the Bolsheviks seized power in November 1917. In terms strikingly similar to those of the Nepali Maoists, Lenin endorsed

about the validity of the adult franchise as long as institutions like the army, bureaucracy and judiciary exist.<sup>302</sup> They eulogise the Paris Commune of 1871, which, according to Marx, achieved a government of "plain working men" by tearing down the foundations of the bourgeois state -- police, army, churches and courts.<sup>303</sup> Mao in turn defined new democratic constitutional government as "the joint dictatorship of several revolutionary classes over the traitors and reactionaries" and rejected "bourgeois democracy" as practised in Europe and the U.S.<sup>304</sup> The Maoist Chairman, Prachanda, recently reminded an international audience that "there will be free competition among political parties, [provided they] oppose feudalism and imperialism and work for the service of the masses", a definition that could in practice be highly restrictive.<sup>305</sup> Indeed, attacks on other parties' cadres, most recently Janamorcha's, suggest a commitment to multi-party democracy that is only contingent and instrumental.<sup>306</sup> The softening of their line since February 2005, to the extent that even the RPP is gradually restarting political activities in rural areas,<sup>307</sup> may be only a tactical manoeuvre.

The Maoists have explained that negotiations and military actions are complementary means of achieving the same end-goal of a people's republic.<sup>308</sup> Recent documents relating to the CPN(M)'s third plenum, in August 2004, make no mention of a constitutional assembly or any political compromise. Rather, they depict an insurgency that has not suffered significant military setbacks, even after the 2001 deployment of the Royal Nepalese Army,

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the assembly as a "perfectly legitimate part of the program of revolutionary Social-Democracy", because it "represents the highest form of [bourgeois] democracy", "Theses on the Constituent Assembly", in V.I. Lenin, *Resistance and the State* (Sydney, 2001), p. 113. Once defeated in the elections, however, the Bolsheviks dissolved it. Lenin gave an extended explanation of why the elections could not be trusted. Ibid, pp. 117-135. Mao's approach to alliances under "democratic" banners was similarly pragmatic. See Mao Zedong, "On the Chungking Negotiations", Beijing, 1967.

<sup>302</sup> Prachanda, op. cit., pp. 12, 26.

<sup>303</sup> Karl Marx, "The Civil War in France", in Robert C. Tucker (ed.), *The Marx-Engels Reader*, 2d. ed. (New York, 1978), pp. 631-632, 636.

<sup>304</sup> Mao Tse-Tung, "New-Democratic Constitutional Government", Beijing, 1967, p. 3.

<sup>305</sup> "We are trying to crush feudal autocracy", Interview with Prachanda, *Time Asia*, 25 April 2005, available at [http://www.time.com/time/asia/2005/nepal/int\\_prachandar.html](http://www.time.com/time/asia/2005/nepal/int_prachandar.html).

<sup>306</sup> Crisis Group interviews with Janamorcha activists, Baglung, 20 January 2005; Binod Tripathy, "Maoists attack PFN activists", *The Kathmandu Post*, 2 October 2004.

<sup>307</sup> Crisis Group interview with RPP leader, Kathmandu, 25 April 2005.

<sup>308</sup> See "Interview with Comrade Prachanda", in Thapa, op. cit., pp. 215-216.

and promise a "strategic offensive raising the process of revolutionary transformation to a new height".<sup>309</sup> In its post-coup crackdown, the RNA has inflicted heavy casualties on the rebels, for example killing an estimated 150 Maoists in a single battle at Khara, in mid-western Rukum district, on the night of 7-8 April 2005. Yet these casualties were suffered in the context of a Maoist attack. The Maoist capacity and appetite for offensive military action is apparently unabated.

Any stated Maoist commitment to democratic politics can thus hardly be taken for granted. The Maoists have also insisted from the outset that the greatest sin of true revolutionaries is to abandon the struggle without achieving the ultimate goal.<sup>310</sup> Nonetheless, renewed Maoist involvement in the political process is not impossible. There are precedents for moving from armed struggle to peaceful mass movement according to circumstances and without abandoning overall aims.<sup>311</sup> The Maoists did take part in the 1991 election. Other leftist politicians who once espoused violent change, like the leaders of a 1971 uprising in the eastern district of Jhapa, have found their way back to democratic politics.<sup>312</sup>

According to those in contact with the party, it stresses willingness to accept "the people's mandate" as expressed through a constitutional assembly.<sup>313</sup> Maoist leaders have

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<sup>309</sup> CPN(M) Central Committee, "Press Statement", 31 August 2004, available at <http://www.cpnm.org>.

<sup>310</sup> "We are firm that it is a crime against the proletariat and the general masses of the people to start an armed struggle without the firm conviction of carrying it out to the end. We shall never allow this struggle to become a mere instrument for introducing partial reforms in the condition of the people, or terminating in a simple compromise by exerting pressure on the reactionary classes", "Theoretical Premises for the Historic Initiation of the People's War", in *Some Important Documents of Communist Party of Nepal (Maoist)*, (Janadisha Publishers, 2004).

<sup>311</sup> The mainstream of the Indian Naxalite movement, for example, has rejected the armed struggle for some three decades. The Communist Party of India (Marxist-Leninist), which views itself as the inheritor of Naxalite leader Charu Mazumdar's legacy, has long argued in favour of grassroots work to develop a mass political base rather than adopting "left-adventurist" tactics of taking up arms prematurely. Baburam Bhattarai's reference to Engels' critique of Bakuninist revolutionaries in nineteenth century Spain (fn. 319 below) might indicate potential parallels in the Nepal context.

<sup>312</sup> For a brief account of the Jhapa uprising, modelled on the Naxalite movement of neighbouring West Bengal, see Hoftun, Raeper, and Whelpton, op. cit., pp. 83-84. One of its leaders, Radha Krishna Mainali, has now completed his traverse of the political spectrum by becoming a minister in the post-February 2005 royal government.

<sup>313</sup> Crisis Group interviews, New Delhi, September, November 2004.

insisted on the record that they would abide by the outcome of a freely elected constitutional assembly,<sup>314</sup> while repeatedly expressing a conviction that the electoral process would deliver the results they desire.<sup>315</sup> Since the royal coup, Prachanda has explicitly reaffirmed this position, urging other parties to join in the struggle for a "multi-party people's democratic republic" in order to safeguard their own future.<sup>316</sup>

More sceptical observers suspect the Maoists are at least as wary as other forces of putting their popularity to the test in a free and fair poll.<sup>317</sup> But by the end of 2004, Prachanda was speaking a language that offered hope for some common ground with the parties. In two separate published interviews he emphasised the "completion of the bourgeois democratic revolution" while staying silent on the ultimate progression to communism.<sup>318</sup> In April 2005, Baburam Bhattarai similarly had recourse to Engels to explain "why a proletarian party needs to uphold the program of a bourgeois republic in a country like present-day Nepal".<sup>319</sup>

It is certainly possible to treat the Maoist demand for a constitutional assembly as a peace opportunity rather than a mere ploy. As in the case of human rights monitoring,<sup>320</sup> but with broader significance for a peaceful resolution of the conflict, this could be an effective way of calling the Maoists' bluff and challenging them to deliver on their promises. They would then also face the challenge of developing a more precise negotiating position on concrete constitutional change and using force of argument rather than force of arms to advance their goals.

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<sup>314</sup> For example, Prachanda stated that "We are convinced that the result of elections to a constituent assembly would be on the side of full democracy, in other words republicanism. Nevertheless, we are committed to respecting the outcome of the constituent assembly whatever it is". Interview, *Nepal Samacharpatra*, 20 December 2004.

<sup>315</sup> Crisis Group interviews with Maoist sympathisers, Delhi, November and December 2004, March and April 2005.

<sup>316</sup> Prachanda, press statement, 12 April 2005. The term used in Nepali is *bahudaliya loktantrik ganatantra*.

<sup>317</sup> Crisis Group interviews with political activists and analysts, Kathmandu and Delhi, February to April 2005.

<sup>318</sup> "Hami agragami rajnaitik nikas dinasakne vartako pakshama chhaun", *Janadesh* 14(3), 7 December 2004; interview with Prachanda, *Nepal Samacharpatra*, 20 December 2004.

<sup>319</sup> Baburam Bhattarai, "Royal Regression and the Question of a Democratic Republic in Nepal", *Economic and Political Weekly*, 9 April 2005, available at <http://www.epw.org.in>.

<sup>320</sup> See Crisis Group Report, *Dealing with a Human Rights Crisis*, op. cit., pp. 12, 20-21.

## VII. HOW CAN THE CONSTITUTION BE CHANGED?

All parties, the palace and the Maoists have acknowledged the need for constitutional reform. As the previous section has made clear, however, differences arise not only over the type of reform needed but also over how to accomplish it. Three major models have been put forward: amendment as prescribed in Article 116 of the 1990 Constitution; a referendum; and a constitutional assembly.

Preferences are dictated largely by the degree of change a stakeholder wishes. Thus, the palace, Congress (D), and the RPP have in the past endorsed amendment through Article 116, which involves the tightest restrictions. Congress and UML have now committed themselves to the joint seven-party position of accepting a constitutional assembly but many within both parties have previously preferred amendment. The Maoists have stated firmly that a constitutional assembly is a non-negotiable bottom line. The choice of vehicles for constitutional change thus has implications for the substance of an amended or new constitution.

Three critical considerations arise in the selection of methodology. First, the Maoists will not accept a process in which their signature demand cannot be considered. They must persuade their cadres to accept a negotiated settlement. Having never been militarily defeated and wielding local power, CPN(M) cadres are unlikely to agree to a process that does not appear to offer even the possibility of considering a republic. The Maoist demand for a constitutional assembly reflects a perception that it would be the sole forum in which republicanism could be considered.<sup>321</sup> The leadership's ability to command continuing support of its political and military constituencies is critically important. Otherwise the government would be confronted with a fragmented, multi-front guerrilla war less amenable to a negotiated outcome. Recent tensions between Prachanda and Baburam Bhattarai do not appear to have fractured the movement but they underline the faultlines that exist within the leadership and the possibility of more serious rifts developing. Given Bhattarai's role as the leader of previous negotiating teams, his apparent demotion may affect Maoist capacity and enthusiasm for talks.

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<sup>321</sup> Crisis Group interviews with former negotiators and political analysts, Kathmandu, October 2004. As explained below, this is not necessarily correct. The issue could be raised in an extraordinary constitutional amendment process.

Secondly, the king requires minimal "implementation guarantees",<sup>322</sup> which are in tension with the democratic element of any process of constitutional change. Gyanendra prioritises preserving the monarchy as an institution and is unlikely to endorse a process seemingly destined to end it. His antipathy to a constitutional assembly model derives from this. Guarantee of a continuing role for the palace may be a condition for a constitutional assembly. This would be difficult to disclose publicly and might undermine the legitimacy of the process. In short, a process of constitutional change must balance substantive compromises acceptable to major players with transparency and legitimacy considerations. The degree to which the palace is willing to compromise will be critical in determining whether any genuine tripartite process can go ahead.

Thirdly, the process of constitutional change would occur in the context of negotiations between the key political stakeholders. Twice abandoned already, talks would be delicate and time-consuming.<sup>323</sup> Although the interaction between constitutional change and negotiation has many aspects, a critical one that would have to shape the major decision on modalities would be the risk of walk-out: a constitutional process likely to precipitate that by a major player should be avoided.

A related question concerns issues too contentious to be decided by constitutional amendment in the near term, the role of monarchy being an obvious example. If a new text leaves open broad possibilities for amendment, there would be less pressure to achieve an ideal document immediately. The trade-off between the present democratic deficit and the need for future stability may thus be mitigated by the text of the constitution.

## A. CONSTITUTIONAL AMENDMENT

The 1990 Constitution (Article 116) provides that bills "to amend or repeal any Article of [the] Constitution, without prejudicing the spirit of [the] Constitution, may be introduced in either House of Parliament; Provided that this Article shall not be subject to amendment". The "spirit" of the constitution is assumed to reside in its preamble, which enshrines "Adult Franchise, the Parliamentary System of Government, Constitutional Monarchy and the System of Multi-Party Democracy", along with basic human rights and rule of law.<sup>324</sup> The

interaction between preamble and Article 116 thus limits the legislature's power to amend the constitution with regard to the monarchy.

Limits on parliamentary amendment power reflect the drafters' concern to distinguish between ordinary parliamentary authority and the extraordinary authority of a body like a constitutional assembly.<sup>325</sup> In incorporating this into the constitution, they followed a principle articulated by the Indian Supreme Court, which in a 1973 case held that amendments by the legislature could not alter the "basic structure" of the constitution.<sup>326</sup> The Indian Supreme Court has been restrained in applying this doctrine but has twice subsequently used it to strike down constitutional amendments.<sup>327</sup>

Nepal's Supreme Court would likely follow this rule. It has stated that Article 88, defining its jurisdiction, gives "extraordinary powers to examine the validity of each and every act carried out in exercise of powers under the Constitution".<sup>328</sup> Although it has never faced the question, interpretation of Article 116's limits on constitutional amendment seems to fall squarely within this mandate.

The combination of an unambiguous bar on reconsideration of the monarchy and the Supreme Court's ability to enforce that restriction, makes the Article 116 amendment route attractive for the palace and unacceptable for the Maoists. It would also require the CPN(M) to compete first in ordinary parliamentary elections, which it rejected in 1994 and 1999.<sup>329</sup> The Maoists argue that failure to amend the constitution during eleven years of parliamentary rule shows an absence of political will among mainstream parties. To seek amendment now would be to prescribe "old medicine".<sup>330</sup>

<sup>322</sup> Crisis Group interview with Shiva Hari Dahal, National Peace Campaign, Kathmandu, 11 October 2004.

<sup>323</sup> For recommendations on negotiations in the context of constitutional change, see Nicholas Haysom, "Negotiating the Political Settlement in South Africa. Are There Lessons for Other Countries?", *Track Two*, vol. 11, no. 3, pp. 35-44.

<sup>324</sup> Preamble of 1990 Constitution of Nepal.

<sup>325</sup> S.P.S. Dhungel et al., *Commentary on the Nepalese Constitution* (Kathmandu, 1998), p. 147.

<sup>326</sup> *Ibid*, pp. 647-648. *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Another*, AIR 1973 SC 1461, 1973 (4) SCC 225 ff.; Austin, *Working a Democratic Constitution*, op. cit., pp. 260-269.

<sup>327</sup> *P. Sambamurthy v. Andhra Pradesh*, (1987) 1 SCC 362; *L. Chandra Kumar v. India*, (1997) 3 SCC 261; S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (2<sup>nd</sup> ed., New Delhi, 2002), pp. 88-89.

<sup>328</sup> *Ravi Raj Bhandari v. The Rt. Honourable Prime Minister Mr. Man Mohan Adhikari*, reprinted in Timalsona, op. cit., p. 7. Article 88 gives the Court "extraordinary power...to declare [a] law as void either ab initio or from the date [of the Court's] decision if it appears that the law in question is inconsistent with the Constitution".

<sup>329</sup> See Laldhoj [Baburam Bhattarai], "Proverbial blind men's portrayal of an elephant", *The Worker*, February 2004, p. 65.

<sup>330</sup> Crisis Group interview with former leftist politician, Kathmandu, 15 October 2004.

The amendment process, however, should not be summarily disregarded. Article 116 does not prevent the legislature from increasing or decreasing the monarch's substantive powers, for example by eliminating his function as supreme commander of the RNA.<sup>331</sup> Further, the seemingly conclusive restrictions on Article 116 amendment might be circumvented in two ways that are at least worth considering as potential vehicles for compromise between the palace and the Maoists.

First, the constitution could be interpreted to vest the legislature, but not the Supreme Court, with the power to decide what is, or is not, consistent with the preamble. Article 116 explains that only a bill that does not "prejudic[e] the spirit of the Preamble of this Constitution" can be passed. Read literally, this means that it is the parliament that must first ascertain the consistency of any amendment with the preamble. By implication, once it has decided that there is no conflict, that question may no longer be open to debate. The Norwegian Constitution has been interpreted to contain a similar directive only for the legislature's direction.<sup>332</sup> The general notion that such legal interpretations may be consigned to the legislature for resolution is common to many constitutional systems.

Secondly, parliament could ignore the restriction on amendment of Article 116 and replace that article with a provision allowing wider amendment authority. The existence of the U.S. Constitution is a model for arguably illegal -- but remarkably effective -- constitutional change. The convention of state representatives in Philadelphia in 1787 had the limited task of improving the Articles of Confederation, the existing document.<sup>333</sup> It not only produced an entirely new document, but also declined to follow the ratification procedures in the Articles of Confederation, instead seeking approval of nine of thirteen states through special constitutional conventions.<sup>334</sup> The continuing legitimacy of the American document suggests that formalism in drafting procedures is not necessary, particularly when the regime being superseded is understood to fall short of popular needs.

At best, this might be a last-ditch option, if all other avenues to change were obstructed. Nepali constitutional lawyers doubt it would be politically or legally

acceptable.<sup>335</sup> Nevertheless, if the Maoists are willing to participate in elections for a legislative body with power to amend the constitution beyond that granted by Article 116, amendment could prove a mode of constitutional change acceptable to all parties.

## B. REFERENDUM

The possibility of a referendum has received comparatively scant attention, and there is little agreement on what question or questions it might include. It is, however, one of the options being considered by cross-party working groups developing a joint position on the royal coup and ways to end the insurgency.<sup>336</sup> Congress has suggested a restored parliament could legislate a referendum on whether to hold a constitutional assembly. Use of a costly device like a referendum to decide on a further process issue, however, seems unwarranted.<sup>337</sup> The Maoists might push for a referendum on monarchy versus republic. Indeed, one commentator, citing Australia's 1999 referendum on its constitutional monarchy, has suggested a referendum with two questions: first, whether Nepal should be a monarchy or republic; secondly, what kind of monarchy (active or constitutional) or republic (democratic or communist).<sup>338</sup>

A referendum on such a fundamental choice, however, would risk political breakdown and increased conflict. It would be an all-or-nothing calculation for Maoists and king, without institutional guarantees. Unwilling to risk losing entirely, both would likely use every means at their disposal, including violence, during the campaign. The losing side would have little incentive not to dispute or reject the result. A referendum process alone does not create mechanisms for building the inclusive governance framework, even transitionally, that is necessary for a stable peace.

The hazards of an all-or-nothing enterprise are suggested by Angola's 1992 presidential elections.<sup>339</sup> On 31 May 1991, after more than fifteen years of civil war, the opposing Movimento Popular de Libertação de Angola

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<sup>331</sup> Crisis Group interview with Purna Man Shakya, professor of law, Tribhuvan University, 25 October 2004.

<sup>332</sup> Richard Stith, "Unconstitutional Amendments: The Extraordinary Power of Nepal's Supreme Court", *American University Journal of International Law and Policy*, vol. 11, 1996, pp. 73-76.

<sup>333</sup> Edmund S. Morgan, *The Birth of the Republic 1763-1789* (Chicago, 1977), p. 129.

<sup>334</sup> Bruce Ackerman, *We the People 1: Foundations* (Boston, 1991), p. 41.

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<sup>335</sup> Crisis Group interviews with Nepali constitutional experts, Kathmandu, October 2004.

<sup>336</sup> Crisis Group interviews with donors and political leaders, Kathmandu, 25-26 April 2005.

<sup>337</sup> Crisis Group interview with Ram Sharan Mahat, Congress Central Working Committee, 5 October 2004. As an example of a substantive question a referendum could deal with, Congress has cited whether to keep the multi-party system.

<sup>338</sup> Kiran Chalise, "Nepal's Roadmap", *The Nation*, 27 June 2004, p. 40.

<sup>339</sup> See Marina Ottaway, "Angola's Failed Elections" in Krishna Kumar, *Postconflict Elections, Democratization & International Assistance* (Boulder, 1998), p. 133.

(MPLA) and the Uniao Nacional para a Independencia Total de Angola (UNITA) signed the Bicasse Agreement. In addition to a ceasefire, cantonment, and formation of a joint army, it envisaged presidential and parliamentary elections. In September 1992, after a relatively peaceful campaign and with more than 90 per cent of registered voters participating, the MPLA's Eduardo dos Santos secured 49.57 per cent of the vote against Jonas Savimbi's 40.07 per cent. The sudden closure of the transition with the MPLA's victory shifted power too suddenly, and UNITA returned to the battlefield. It is all too easy to imagine the Maoists acting similarly if faced with a referendum defeat.

### C. CONSTITUTIONAL ASSEMBLY

Support for a constitutional assembly has grown rapidly, especially since the beginning of 2004. Within parties the idea has spread from the republican student fringes to the mainstream. Former Congress Finance Minister Ram Sharan Mahat, for example, has stated that "[t]he country must be prepared for a radical political solution including election for a constitutional assembly as demanded by the Maoists, if that can make them renounce violence and lay down arms".<sup>340</sup> At an April 2005 conference in New Delhi on Nepal's constitutional crisis organised by the Indian Supreme Court Bar Association and Human Rights Law Network, representatives from most major Nepali parties took this position: "The clear and unanimous view of all the representatives of the political parties was the consensus was unambiguously in favour of [a] constituent assembly and for the need for support from the international community. The ways towards the formation of the constitutional assembly need to be explored".<sup>341</sup>

Even more conservative political analysts are willing to entertain the idea. Nishchal Nath Pandey, for example, observes that "[t]he Maoist demands of an election to a Constituent Assembly could actually start afresh a whole new set of debates to address the political, economic, social and ethnic reinvigoration of the country". But he cautions that in the absence of a mature democratic

culture, it could "open a Pandora's box of self-determination and separatism among various ethnic groups and tribes".<sup>342</sup> Understanding of what exactly a constitutional assembly would entail also remains vague.<sup>343</sup> The constitutional assembly route has now been endorsed by the seven-party alliance but only as one possible option and without detailed consideration of modalities.<sup>344</sup>

If momentum for a constitutional assembly continues to grow, it may be difficult to oppose the idea. For the time being, however, the palace remains deeply suspicious and is employing crude methods to try to stifle debate. Former Supreme Court Justice Laxman Prasad Aryal, Nepal Bar Association President Shambhu Thapa and constitutional lawyer Bhimarjun Acharya were scheduled to address the New Delhi conference but were unceremoniously removed from their flight as it was about to leave Kathmandu.<sup>345</sup> Lok Raj Baral, a professor of political science and former ambassador to India, was arrested in the wake of the 1 February royal coup and has similarly been prevented from travelling to academic seminars. He has observed that "those who had argued for a constituent assembly for ending the present crisis are hounded and punished. In our case, our opinion has been taken seriously as if it is going to pose a threat to the regime".<sup>346</sup> But a constitutional assembly, like constitutional amendment, is a flexible mechanism that would allow parties to select the issues on the table and those beyond debate. As a result, it could form part of a negotiated solution to the conflict in which all parties' interests were respected.

The promise of a constitutional assembly derives from Nepal's first days of democracy. On 18 February 1951, following the Ranas' fall and negotiations in Delhi, King Tribhuvan declared that the country would be governed in accordance with a democratic constitution formulated

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<sup>340</sup> "Was February 1 necessary?", [www.liberaldemocracynepal.org](http://www.liberaldemocracynepal.org).

<sup>341</sup> See "Constitutional Crisis in Nepal: The Way Forward", available at <http://insn.org/?p=909#more-909>. The conference was held on 23 April 2005, and the Nepali political party representatives were Krishna Sitaula, central committee member, Nepali Congress; Rajan Bhattarai, International Department, UML; Pradip Giri, Nepali Congress (Democratic); Rajendra Mahato, General Secretary, Nepal Sadbhavana Party; Swanaam, spokesperson, Communist Party of Nepal (Unity Centre-Mashal); C.D. Joshi, central committee member, CPN (United).

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<sup>342</sup> Nishchal Nath Pandey, "The Crisis in Nepal", Institute of Peace and Conflict Studies Issue Brief No. 26, New Delhi, October 2004.

<sup>343</sup> Detailed discussion of options for a constitutional assembly has been helped by a number of newspaper and magazine articles, particularly from early 2004, and edited collections of essays such as Rajendra Maharjan (ed.), *Rastriya sankat ra samvidhan sabha* (Kathmandu, 2004) and Rajendra Maharjan (ed.), *Kasari banchha sambidhan sabha?* (Kathmandu, 2004).

<sup>344</sup> "Rashtriya sankat samadhanka lagi sajha sahamati ra pratibaddhatako ghoshana", statement signed by seven party leaders, Kathmandu, 8 May 2005.

<sup>345</sup> "Former justice, lawyers barred from flying abroad", [nepalnews.com](http://nepalnews.com), 22 April 2005.

<sup>346</sup> Professor Lok Raj Baral "How does the February 1 royal move affect the academic freedom in Nepal?", [www.liberaldemocracynepal.org](http://www.liberaldemocracynepal.org), 8 April 2005.

by an elected constitutional assembly.<sup>347</sup> What form that assembly would take was never articulated and the promise never fulfilled. On 1 February 1958 his son, Mahendra, proclaimed establishment of a commission, not an assembly, to prepare a draft constitution.<sup>348</sup> The commission, appointed a month later, was advised by British constitutional expert Ivor Jennings, and the resulting constitution was promulgated a mere week before multi-party elections were held on 12 February 1959.<sup>349</sup>

The idea of a constitutional assembly did not die. Members of the original Communist Party of Nepal who broke from the main body, like Mohan Bikram Singh and Nirmal Lama, persisted in underlining the importance of an assembly through which the sovereign will of the people could be exercised.<sup>350</sup> Although subsequently repudiated by the CPN(M), Singh was instrumental in developing popular support for communist ideas in Thawang, a village in northeast Rolpa that has come to be seen as the Maoist "capital".<sup>351</sup>

That a constitutional assembly's appeal had not abated became apparent during the 1990 people's movement. In early 1990, parties in the United Left Front (ULF) and radical left parties in the United National People's Movement (UNPM) demanded a constitution prepared by a popularly elected assembly. Although the ULF retreated because of lack of support from its Congress ally, the UNPM, which included many of today's CPN(M), continued to press the demand, raising also the possibility that an elected parliament would approve the final constitution.<sup>352</sup> However, a nine-member committee of lawyers prepared the 1990 Constitution, and King Birendra promulgated it.<sup>353</sup>

A constitutional assembly has been part of the Maoist agenda since well before 1996 and has become increasingly popular among student wings of mainstream parties and some mainstream politicians. Neither the Maoists nor the others detail how it would function. The Maoists have stated it would be elected and would embody

"the sovereign rights of the Nepali people".<sup>354</sup> But Maoist publications give no hint as to what they expect from a constitutional assembly. "The Maoists have merely said that the new constitution must be written by the people", noted a human rights activist who maintains contacts with the CPN(M).<sup>355</sup>

Mainstream political parties offer no more clarity. According to a lawyer who has participated in debates within Congress, there is little understanding of how a constitutional assembly would work.<sup>356</sup> Congress and UML politicians with whom Crisis Group spoke also were unable to explain. A September 2004 poll in the Kathmandu Valley found, unsurprisingly, that more than 60 per cent of respondents did not understand what a constitutional assembly would entail.<sup>357</sup>

A larger survey of Nepali public opinion carried out in November and December 2004 attempted to gauge popular understandings of the concept with more revealing results:<sup>358</sup> 49 per cent of respondents had heard of a constitutional assembly, of whom 59 per cent claimed to have some or very good knowledge of the notion.<sup>359</sup> While the pollsters claimed that only half of these correctly identified the true function of a constitutional assembly, their definition of "correct" and "incorrect" answers was too narrow.<sup>360</sup> Given the sample population, of whom 21 per cent were illiterate and a further 17.3 per cent had no formal education, the level of understanding was perhaps

<sup>347</sup> See Swarnim Waglé, "Constitutional craft then and now", *The Nation*, 31 July 2004, p. 30; Thapa, op. cit., p.15.

<sup>348</sup> Joshi and Rose, op. cit. pp. 212-213.

<sup>349</sup> Ibid, pp. 282, 292.

<sup>350</sup> Philippe Ramirez, "Maoism in Nepal: Towards a Comparative Perspective", in Hutt, *Himalayan People's War*, op. cit., pp. 231-232. Thapa with Sijapati, op. cit., p. 22.

<sup>351</sup> Gersony, op. cit. pp. 23-25.

<sup>352</sup> Thapa with Sijapati, op. cit., pp. 33-34.

<sup>353</sup> Crisis Group interview with former Justice Biswanath Upadhyay, 29 September 2004; Krishna Hachethu, "Transition to Democracy in Nepal: Negotiations behind Constitution Making, 1990", *Contributions to Nepalese Studies*, vol. 21, no. 1, January 1994, p. 101.

<sup>354</sup> Comrade Prachanda, "A Brief Introduction to the Policies of the C.P.N. (Maoist)", *The Worker* (February 2004), p. 14.

<sup>355</sup> Crisis Group interview, Kathmandu, 9 October 2004.

<sup>356</sup> Crisis Group interview, Kathmandu, 29 September 2004.

<sup>357</sup> Hari Sharma, "What Kathmandu Valley thinks", *Nepali Times*, 15-21 September 2004, p. 4.

<sup>358</sup> "Nepal: Contemporary Situation", Sudhindra Sharma and Pawan Kumar Sen, Kathmandu, The Asia Foundation/Interdisciplinary Analysts, 2005. As with all opinion polls in Nepal, this study had significant limitations but, although the margin of error is not estimated, its authors made a useful evaluation of the history of opinion polls in the country and the limitations of their own survey, pp. 11-12, 16-17. The poll's 3,059 respondents were selected by random sampling from 46 of Nepal's 75 districts.

<sup>359</sup> Sharma and Sen, op. cit., p. 28.

<sup>360</sup> Ibid, p. 29. The authors offered a closed set of statements among which only "Assembly of elected representatives that will draft a new constitution" was accepted as "correct". Those who opted for statements referring to "selected" rather than "elected" representatives or "amend" rather than "draft a new" constitution were deemed not to have understood the concept. But 97 per cent of these respondents agreed that a constitutional assembly was a representative body that would effect constitutional change -- a reasonable definition. In this case, 28.2 per cent of all respondents could be said to have a fair idea of what "constitutional assembly" means.

not so unimpressive.<sup>361</sup> Nevertheless, this poll, too, underlined the definitional confusion in the debate. Its findings reflected the fact that proponents will have to work harder to develop detailed policies and communicate them to the electorate. Furthermore, the survey found that only 16.7 per cent of respondents felt the need for a new constitution while 34.7 agreed with the statement that "amendment to the present constitution is required". The 41.5 per cent who did not know or could not say may well be open to persuasion.

Ambiguity in the definition of a constitutional assembly may encourage dangerous misconceptions. Many whom Crisis Group interviewed, particularly from ethnic and lower caste groups, expressed hope that a constitutional assembly could represent their long-suppressed interests.<sup>362</sup> As an elected body, however, it likely would be dominated by the same political parties that controlled parliament between 1991 and 2002, even if the first-past-the-post election system was not used. Even with augmented representation, previously disadvantaged groups would have to bargain and compromise to achieve results with no guarantee their interests would be reflected in an end product. "There is a misconception of the constitutional assembly as a substantive outcome", explained a former law minister, and many have a flawed understanding of the difficulties of process and representation that it entails.<sup>363</sup>

Despite the efforts of some political scientists and more diligent political activists, comparative cases are often cited uncritically. When pressed, civil society activists and student leaders point to the South African assembly that met between 1994 and 1996.<sup>364</sup> Others point to the Indian experience.<sup>365</sup> Examination of those models, however, suggests that their translation to the Nepali context would not be straightforward.

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<sup>361</sup> Even better educated poll respondents are often strikingly ill-informed on political and constitutional questions. For example, an official European Commission survey, also carried out in November 2004, found that 50 per cent of British voters had never heard of the European Constitution their government had signed earlier in the year, "The Future Constitutional Treaty", Eurobarometer, available at [http://europa.eu.int/comm/public\\_opinion/index\\_en.htm](http://europa.eu.int/comm/public_opinion/index_en.htm). The sophistication of the Nepali electorate should not be underestimated.

<sup>362</sup> Crisis Group interviews, Kathmandu and Janakpur, October 2004.

<sup>363</sup> Crisis Group interview, Kathmandu, 28 September 2004.

<sup>364</sup> Crisis Group interviews with peace activists and student leaders, Kathmandu, October 2004.

<sup>365</sup> Crisis Group interview, Janakpur, October 2004.

## 1. The South African constitutional process

The formal constitution-making process in South Africa began in 1990. Critical talks between an imprisoned Nelson Mandela of the African National Congress (ANC) and the National Party (NP), however, started in 1985, gradually building a shared belief that negotiations were the solution to the conflict.<sup>366</sup> Such a pre-negotiation appears to have no parallel in Nepal. Even after these pre-negotiations, the formal process was divided into an initial phase of "talks-about-talks", a second phase involving a constitutional assembly, and a final review by the South African Constitutional Court. The multiple stages reflect the importance of slowly building common ground between key players on fundamental issues of process and substance.

"Talks about talks" began in May 1990, and the first formal negotiations -- the Convention for a Democratic South Africa ("Codesa") convened in December 1991. In May 1992, the second session of Codesa broke down over federalism and the composition and role of the senate. Facing escalating political violence, the ANC and NP resumed talks in April 1993, and an interim constitution was adopted by "sufficient consensus" on 18 November.<sup>367</sup> Besides a transitional government of national unity, it set forth 34 principles for a final constitution and a framework for that document's adoption. Hence, the democratically-elected constitutional assembly had a mandate limited by negotiated political settlement. This reflected a compromise between the minority NP's need to safeguard its position and the ANC's desire for a constitution based on democratic principles. Despite this compromise, the final constitution has not lacked legitimacy or support. The South African example thus demonstrates that a constitution-making process need not be impeccable in its democratic pedigree to obtain popular support.

On 27 April 1994, a 490-member assembly was elected for a two-year term under a proportional representation system and tasked with both drafting a new constitution and acting as a legislature. A 46-member Constitutional Committee coordinated the former. The interim constitution required that the finished product be certified by the Constitutional Court for compliance with the 34 principles. On 6 September 1996, that tribunal

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<sup>366</sup> Hassen Ebrahim, "The Making of the South African Constitution: Some Influences", in Penelope Andrews and Stephen Ellman (eds.), *Post-Apartheid Constitutions* (Johannesburg, 2001), p. 94.

<sup>367</sup> The following account is based on Siri Gloppen, *South Africa: The Battle over the Constitution* (Aldershot, 1997), and Haysom, "Negotiating the Political Settlement in South Africa", op. cit.

concluded that the finished draft fell short in nine respects.<sup>368</sup> Rapid amendment and resubmission led to the Court approving a new draft in late 1996, which came into force in February 1997.

The South African experience shows that a constitutional assembly is hardly a short-cut to political change. Rather, a constitution-making process is a vehicle for the long, hard road towards achieving such change. The balance of interests that was developed is a long way off in Nepal. Without a similar process of laborious behind-the-scenes and formal negotiations, it may be difficult for the political parties, the palace and the Maoists to agree on a set of shared principles. Moreover, experience suggests such an agreement could not be made public, due to pressures from hard-liners on both sides.

## 2. The Indian constituent assembly

Proposed by the Indian National Congress in 1934, an assembly to frame a new constitution was accepted by the British government in September 1945.<sup>369</sup> It had members elected by provincial assemblies (one seat per million of population), with Hindus, Muslims and Sikhs chosen separately in each province, and 93 princely state representatives. The assembly was dominated by the Congress party, which swept the 1945 provincial elections with a 69 per cent majority.<sup>370</sup>

However, Congress was "socially and ideologically diverse"; minorities like Christians and Parsis had a voice. More than 300 of its members participated in the constituent assembly (legislative), which acted as a parliament under the 1935 Government of India Act. Although the assembly's committees included Congress party chiefs like Jawaharlal Nehru, Maulana Azad, Rajendra Prasad, and Vallabhai Patel, there were also notable opponents of Congress, like Bhim Rao Ambedkar and Saiyed Mohammed Saadulla. Minorities filled

important positions: the *dalit* rights campaigner Ambedkar, for instance, headed the drafting committee.<sup>371</sup>

The Indian experience highlights the importance of strong, nationally-minded leadership and a process that gives space to minorities. Institutional design must take into account that Nepal cannot assume a constitutional assembly would throw up leaders of the calibre of Nehru and Ambedkar. Further, although the Indian case shows that minority interests can be drawn into constitution-making without formal mechanisms, Nepal's political party history of division and rancour and the absence of a broad-tent grouping like the Indian Congress party suggest such mechanisms would be needed for minority representation.

## 3. Implementing a constitutional assembly

Although the Indian and South African cases offer some important insights, innumerable practical questions would arise in designing a constitutional assembly. Three that initially would need answers are: (i) how to secure the palace's involvement; (ii) what electoral mechanism should be used and how minorities could be represented; and (iii) how the assembly would function.

The threshold consideration for advocates of a constitutional assembly is how to use implementation guarantees to obtain the king's cooperation. Some evidence suggests that Gyanendra is not entirely hostile to a constitutional assembly. One of his confidants explained that the critical issue would be the body's purpose. If it was to advance a republic, the king would oppose it "totally"; if it was committed to constitutional monarchy and multi-party democracy and focused on considering other constitutional issues, he could accept it.<sup>372</sup> Of course such statements have not been tested and must be judged in light of the palace's other actions.

Those involved in the 2003 negotiations hint that they explored such a compromise but were unable to conclude it. According to former negotiators, the possibility of a tacit understanding on a constitutional monarchy between the palace and the Maoists was raised that would have secured the palace's consent for a constitutional assembly, even without pre-negotiated principles as in South Africa.<sup>373</sup> By contrast, a formal arrangement on these lines could not work, as the Maoists would have difficulty persuading their cadres to

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<sup>368</sup> *In re Certification of the Constitution of the R.S.A.*, 1996, (4) S.A. 744 (Constitutional Court, 6 September 1996).

<sup>369</sup> The following account is based on Austin, *The Indian Constitution*, op. cit., pp. 1-25.

<sup>370</sup> Under the Independence Act of 1947, Pakistan obtained its own constituent assembly, which was also the legislature. Hamid Khan, *Constitutional and Political History of Pakistan* (Karachi, 2002), p. 67. Although able to frame an Objectives Resolution in March 1949 that set forth the new state's goals, the assembly was dissolved by Governor General Ghulam Mohammad when it attempted to strip him of the power to dismiss ministers. *Ibid.*, pp. 130-131, 136. For discussion of the Pakistani experience, see Crisis Group Asia Report N°86, *Building Judicial Independence in Pakistan*, 9 November 2004, pp. 3-5.

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<sup>371</sup> Devanesan Nesiah, *Discrimination with Reason? The Policy of Reservations in the United States, India and Malaysia* (New Delhi, 1999), p. 60.

<sup>372</sup> Crisis Group interview, Kathmandu, October 2004.

<sup>373</sup> Crisis Group interviews with former government and leftist negotiators, Kathmandu, October 2004.

accept a constitutional monarchy. The post-February 2005 environment makes it all the more unlikely that even an informal agreement on protecting the monarchy could be reached.

A second question to be answered before a constitutional assembly could be convened concerns the system to select delegates. One point of consensus is that the body would be elected. But this consensus does not extend to the kind of elections. Nepal's first-past-the-post system, used for parliament, is seen by some as producing social exclusion.<sup>374</sup> In the Tarai, NSP politicians contend that unfair apportionment dilutes the region's vote.<sup>375</sup> If the electoral system is perceived to exclude sectors of the population, particularly those who already feel excluded from politics, the legitimacy of the body will suffer.<sup>376</sup>

A debate on electoral reform, therefore, would have to precede a constitutional assembly, even if that assembly had to consider again what kind of electoral system to write into a new constitution. Prominent political scientist Krishna Khanal has proposed a more proportional model with multi-member districts.<sup>377</sup> If a proportional model was difficult to establish and administer in the run-up to a constitutional assembly, seats could be set aside for certain social groups, like the ethnic communities and castes which have been traditionally excluded from government, and women.

For example, in the Ugandan Constitutional Assembly of 1994-1995, 214 of 284 delegates were elected through universal adult franchise. The remaining 70 were selected by national bodies for discrete interest groups -- women, trade unions, the army, and youth.<sup>378</sup> Negotiations over what group representation would supplement the directly elected seats could, of course, be problematic. Other devices exist for guaranteeing minority rights, including pre-negotiated principles as in South Africa, or a requirement that provisions concerning cultural and

linguistic rights and devolution of power obtain the support of minorities for passage.<sup>379</sup>

Finally, there are numerous questions pertaining to the practical mechanisms of an assembly:

- Should a constitutional assembly also function as a legislature, as in India and in South Africa? Given the complexity of the constitutional issues, an assembly lasting several years, like South Africa's, might be necessary.<sup>380</sup>
- What would be the agenda? Would the 1990 Constitution be the departure point for analysis and discussion? A constitutional assembly does not necessitate radical change: an assembly might make relatively minor adjustments to the 1990 Constitution.
- Would all parties be represented on a technical drafting body? Government bureaucrats and lawyers tend to be conservative. In Afghanistan in 2002 and Uganda in the early 1990s, drafts were prepared by a committee of experts and handed over to an elected assembly that debated them.<sup>381</sup> Would foreign experts play a role?
- What public consultation would be undertaken? In Uganda, the committee conducted considerable public outreach and education. In Afghanistan, by contrast, this was limited and appeared to have little impact on the eventual product.
- What would be the procedural mechanics, such as how the agenda would be set and decisions taken? Mechanisms should be designed to encourage consensus, avoiding the winner-takes-all atmosphere of a referendum. Some matters could be decided by a simple majority while others might require a super-majority, for example two-thirds. A division of subjects by sensitivity might be elaborated. Also, how would deadlocks be addressed?<sup>382</sup>

<sup>374</sup> Crisis Group interviews with politicians, student leaders and *dalit* activists, Kathmandu, October 2004.

<sup>375</sup> Crisis Group interviews, Janakpur, 1 October 2004.

<sup>376</sup> One commentator has suggested returning to democracy's ancient Greek roots with a lottery system for a constitutional assembly election. See Shiva Gautam, "Contours of constituent assembly", *The Kathmandu Post*, 6 August 2004, p. 5.

<sup>377</sup> Crisis Group interview with Krishna Khanal, Tribhuvan University, Kirtipur, 7 October 2004; also Krishna P. Khanal, "Consideration on possible model of proportional representation for Nepal", unpublished paper in the possession of Crisis Group.

<sup>378</sup> John Waliggo, "The main actors in the constitution-making process in Uganda", in Goran Hyden and Denis Venter (eds.), *Constitution-Making and Democratisation in Africa* (Pretoria, 2001), pp. 457-458.

<sup>379</sup> A former politician observed that ethnic and caste groups would be better off securing a commitment to minority rights before a constitutional assembly, as broad consensus exists on those issues, at least superficially. Crisis Group interview with former Law Minister Nilamber Acharaya, 28 September 2004.

<sup>380</sup> Uganda's constitutional assembly inherited a draft from a prior commission but found four months "totally inadequate" to complete its task. James Wapakhabulo, "Managing the constitution-making process in Uganda", in Hyden and Venter, *op. cit.*, p. 120.

<sup>381</sup> See Crisis Group Asia Report N°56, *Afghanistan's Flawed Constitutional Process*, 12 June 2003; Waliggo, *op. cit.*, pp. 45-56.

<sup>382</sup> South Africa, for example, maintained the threat of a referendum in case of deadlock, Gloppen, *op. cit.* p. 208.

A constitutional assembly would be tasked both with negotiating a solution acceptable to the sides in the present crisis and producing a stable governance framework for the long term. These goals may not be compatible in every respect. The selection of amendment mechanisms for a new constitution thus becomes an important element in considering how much must be decided immediately. The more open to amendment a new constitution is, the less the pressure to achieve a "perfect" document.

In short, a decision to use a constitutional assembly to resolve the present troubles would be only the beginning. An assembly would need to be prefaced by considerable negotiation to ensure that all parties, particularly the palace, accepted the process. Such acceptance would more easily be secured through an informal, rather than a public, agreement. If that happened, the constitutional assembly route, despite raising many technical issues, might offer a promising exit strategy for Nepal's conflict.

## VIII. CONCLUSION

A comprehensive settlement of Nepal's conflict cannot be achieved by military means alone nor by cosmetic changes -- in whatever direction -- in the Kathmandu-based government. Ultimately, sustained negotiations will have to allow a full range of representatives to deal with the major questions on the structure of the state and polity that the Maoist insurgency has brought into such sharp focus. This will inevitably involve revisiting the 1990 Constitution and, most likely, amending or rewriting it.

As this report has outlined, questions of both process and substance are significant and require further consideration. But a further political transition will be required in Kathmandu to reach a point at which meaningful and inclusive discussions on constitutional issues can take place. Given the apparent determination of the new royal government to continue its campaign against mainstream political parties, it is probable that such a transition will only happen under pressure. It is primarily for Nepal's political parties to exert such pressure but this is a challenge that will require both steadfastness and a willingness to reform themselves and win back public confidence. It is not for the international community to dictate options for constitutional change. Nevertheless, constructive engagement may speed the arrival of an environment conducive to substantive negotiations and a process of consensual reform.

Any new government aiming for a resolution of the conflict must be willing to consider the most effective form of constitutional change. Both constitutional amendment and a constitutional assembly are far more flexible vehicles for legal change than they may at first appear. Whatever process is selected, the king will require guarantees -- formal or informal -- about how it is to be implemented if he is to participate. Any process also must be sensitive to the Maoist leadership's need to sell a negotiated settlement to its cadres. While initial negotiations to prepare the ground for substantive talks may have to be conducted discreetly, the primary condition for successful revision of the constitution will be the participation of the Nepali people. The durability of any new dispensation will depend on a legitimacy that can only be granted by a transparent demonstration of popular will.

**Kathmandu/Brussels, 15 June 2005**

## APPENDIX A

### MAP OF NEPAL



## APPENDIX B

### KEY ARTICLES OF THE CONSTITUTION OF THE KINGDOM OF NEPAL, 1990

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The following articles of the 1990 Constitution, provided here for ease of reference, are particularly relevant to the issues discussed in this report. Certain articles have not been presented in full.<sup>383</sup>

- 1(1). This Constitution is the fundamental law of Nepal and all laws inconsistent with it shall, to the extent of such inconsistency, be void.
2. Having common aspirations and united by a bond of allegiance to national independence and integrity of Nepal, the Nepalese people irrespective of religion, race, caste or tribe, collectively constitute the nation.
3. The sovereignty of Nepal is vested in the Nepalese people and shall be exercised in accordance with the provisions of this Constitution.
- 4(1). Nepal is a multiethnic, multilingual, democratic, independent, indivisible, sovereign, Hindu and Constitutional Monarchical Kingdom.
- 6(1). The Nepali language in the Devanagari script is the language of the nation of Nepal. The Nepali language shall be the official language.
- 6(2). All the languages spoken as the mother tongue in the various parts of Nepal are the national languages of Nepal.
- 27(1). In this Constitution, the words "His Majesty" mean His Majesty the King for the time being reigning, being a descendant of the Great King Prithvi Narayan Shah and an adherent of Aryan Culture and the Hindu Religion.
- 27(2). His Majesty is the symbol of the Nepalese nationality and the unity of the Nepalese people.
- 27(3). His Majesty is to preserve and protect this Constitution by keeping in view the best interests and welfare of the people of Nepal.
31. No question shall be raised in any court about any act performed by His Majesty: Provided that nothing in this Article shall be deemed to restrict any right under law to initiate proceedings against His Majesty's Government or any employee of His Majesty.
- 56(1). No discussion shall be held in either House of Parliament on the conduct of His Majesty, Her Majesty the Queen and the heir apparent to His Majesty.
88. Jurisdiction of the Supreme Court:
  - (1) Any Nepali citizen may file a petition in the Supreme Court to have any law or any part thereof declared void on the ground of inconsistency with this Constitution because it imposes an unreasonable restriction on the enjoyment of the fundamental rights conferred by this Constitution or on any other ground, and extraordinary power shall rest with the Supreme Court to declare that law as void either ab initio or from the date of its decision if it appears that the law in question is inconsistent with the Constitution.
  - (2) The Supreme Court shall, for the enforcement of the fundamental rights conferred by this Constitution, for the enforcement of any other legal right for which no other remedy has been provided or for which the remedy even though provided appears to be inadequate or ineffective, or for the settlement of any constitutional or legal question involved in any dispute of public interest or concern, have the extraordinary power to issue necessary and appropriate orders to enforce such rights or to settle the dispute. For these purposes the Supreme Court may, with a view to imparting full justice and providing the appropriate remedy, issue appropriate orders and writs including habeas corpus, mandamus, certiorari, prohibition and quo warranto:  
Provided that:

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<sup>383</sup> The full text of the constitution, in English, is available at [http://www.nepaldemocracy.org/documents/national\\_laws/constitution1990.htm](http://www.nepaldemocracy.org/documents/national_laws/constitution1990.htm).

- (a) the Supreme Court shall not be deemed to have power under this clause to interfere with the proceedings and decisions of the Military Court except on the ground of absence of jurisdiction or on the ground that a proceeding has been initiated against, or punishment given to, a non-military person for an act other than an offence relating to the Army.
- (b) except on the ground of absence of jurisdiction, the Supreme Court shall not interfere under this clause with the proceedings and decisions of Parliament concerning penalties imposed by virtue of its Privileges.
- (3) The Supreme Court shall have original and appellate jurisdiction as defined by law.
- (4) The Supreme Court may review its own judgement or final orders subject to the conditions and in the circumstances prescribed by law.
- (5) If His Majesty wishes to have an opinion of the Supreme Court on any complicated legal question of interpretation of this Constitution or of any other law, the Court shall, upon consideration on the question, report to His Majesty its opinion thereon.
- 112(2). Any law, arrangement or decision which allows for participation or involvement of only a single political organisation or party or persons having a single political ideology in the elections or in the political system of the country shall be inconsistent with this Constitution and shall be void.
- 112(3). The Election Commission shall withhold recognition from any political organisation or any party formed either with the objectives mentioned in clause (2) above or on the basis of religion, community, caste, tribe or region.
115. Emergency Power:
- (1) If a grave crisis arises in regard to the sovereignty or integrity of the Kingdom of Nepal or the security of any part thereof, whether by war, external aggression, armed rebellion or extreme economic disarray, His Majesty may, by Proclamation, declare or order a State of Emergency in respect of the whole of the Kingdom of Nepal or of any specified part thereof.
- (2) Every Proclamation or Order issued under clause (1) above shall be laid before a meeting of the House of Representatives for approval within three months from the date of issuance.
- (3) If a Proclamation or Order laid for approval pursuant to clause (2) is approved by a two-thirds majority of the House of Representatives present at that meeting, such Proclamation or Order shall continue in force for a period of six months from the date of issuance.
- (4) If a Proclamation or Order laid for approval pursuant to clause (2) is not approved pursuant to clause (3), such Proclamation or Order shall be deemed ipso facto to cease to operate.
- (5) Before the expiration of the period referred to in clause (3), if a meeting of the House of Representatives, by a majority of two thirds of the members present, passes a resolution to the effect that circumstances referred to in clause (1) above continue to exist, it may extend the period of the Proclamation or Order of the State of Emergency for one other period, not exceeding six months as specified in such resolution, and the Speaker shall inform His Majesty of such extension.
- (6) During a dissolution of the House of Representatives, the National Assembly shall exercise the powers of the House of Representatives for the purposes of clauses (2), (3), (4) and (5) above.
- (7) After the State of Emergency has been declared pursuant to clause (1), His Majesty may issue such Orders as are necessary to meet the exigencies. Orders so issued shall be operative with the same force and effect as law so long as the State of Emergency is in operation.
- (8) His Majesty may, at the time of making a Proclamation or Order of a State of Emergency pursuant to clause (1), suspend sub-clauses (a), (b), (d) and (e) of clause (2) of Article 12, clause (1) of Article 13 and Articles 15, 16, 17, 22 and 23 of this Constitution for as long as the Proclamation is in operation:  
Provided that the right to the remedy of habeas corpus under Article 23 shall not be suspended.
- (9) In circumstances where His Majesty has suspended any Article of this Constitution pursuant to clause (8), no petition may lie, nor question be raised in any court for the enforcement of the fundamental right conferred by such Article.
- (10) If, during the continuance of a Proclamation or Order under clause (1), any damage is inflicted upon any person by an act of any official which was done in contravention of law or in bad faith, the affected person may,

within three months from the date of termination of the Proclamation or Order, file a petition for compensation for the said damage and if the court finds the claim valid, it shall cause compensation to be delivered.

(11) A Proclamation or Order of a State of Emergency issued pursuant to clause (1) may be revoked by His Majesty at any time during its continuance.

116. Amendment of the Constitution:

(1) A bill to amend or repeal any Article of this Constitution, without prejudicing the spirit of the Preamble of this Constitution, may be introduced in either House of Parliament:

Provided that this Article shall not be subject to amendment.

(2) If each House, with a two-thirds majority of its total membership attending, passes a Bill introduced pursuant to clause (1) by a majority of at least two thirds of the members present, the Bill shall be submitted to His Majesty for assent; and His Majesty may, within thirty days from the date of submission, either grant assent to such Bill or send the Bill back for reconsideration with His message to the House where the Bill originated.

(3) A Bill sent back by His Majesty pursuant to clause (2) above shall be reconsidered by both Houses of Parliament; and if both the Houses, upon following the procedures referred to in clause (2), resubmit the Bill in its original or amended form to His Majesty for assent, His Majesty shall grant assent to such Bill within thirty days of such submission.

117. Constitutional Council:

(1) There shall be a Constitutional Council, for making recommendations in accordance with this Constitution for appointment of officials to Constitutional Bodies, which shall consist of the following as Chairman and members: (a) the Prime Minister Chairman; (b) the Chief Justice Member; (c) the Speaker of the House of Representatives Member; (d) the Chairman of the National Assembly Member; and (e) the Leader of the Opposition in the House of Representatives Member.

118. Provisions Regarding the Royal Nepal Army:

(1) There shall be a National Defence Council of Nepal consisting of the following as Chairman and members: (a) the Prime Minister Chairman; (b) the Defence Minister Member, and (c) the Commander-in-Chief Member.

(2) His Majesty shall operate and use the Royal Nepal Army on the recommendation of the National Defence Council.

(3) The establishment and management of the Royal Nepal Army, and other matters relating thereto, shall be as determined by law.

(4) The National Defence Council shall have the power to regulate its working procedures on its own.

119. Supreme Command of the Royal Nepal Army and Appointment of the Commander-in-Chief:

(1) His Majesty is the Supreme Commander of the Royal Nepal Army.

(2) His Majesty shall appoint the Commander-in-Chief of the Royal Nepal Army on the recommendation of the Prime Minister.

127. Power to Remove Difficulties:

If any difficulty arises in connection with the implementation of this Constitution, His Majesty may issue necessary Orders to remove such difficulty and such Orders shall be laid before Parliament.