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**NEPAL: Risks and Challenges of Building a Democratic and  
Constitutional State**

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## **About the Author**

Dinesh Tripathi, LL.M is a human rights and constitutional lawyer in the Supreme Court of Nepal. Against King Gyanendra's oppressive rule Mr. Tripathi filed a series of public interest law-suits to protect rule of law, defend individual liberty and challenge autocratic direct rule of the king. He also represented and pleaded successfully to free more than 300 political detainees from the Supreme Court of Nepal. He mobilized national and International public opinion against absolute, direct and repressive rule of King Gyanendra.

He is also a forceful proponent of voting rights for the Diaspora on the upcoming constitutional assembly election. His petition drive attracted thousands of signatures. He is a firm believer in the rule of law and constitutional democracy. Currently, he is trying to build international support and mobilize international public opinion in favor of human rights and a constitutional democracy in Nepal. He has published various articles and books including a book on international protection of human rights.

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**Background**

Nepal has had a turbulent history. Democracy and rule of law have not been allowed to take root. The military was used several times to dismantle the democratic institution as well as to suppress the democratic movement and aspirations of the Nepalese people. During 1960, King Mahendra used military power to dismantle the democratic process and institutions. He dissolved the elected parliament and acted against the mandate of the 1950 revolution. He imposed his direct authoritarian rule through the help of the military. All of the elected representatives, including the Prime Minister and his entire cabinet, were imprisoned. A partyless authoritarian system was imposed in the country for 30 years. King Mahendra was able to accomplish this through the direct mobilization of the military. The democratic aspirations of the people were always suppressed in Nepal by its rulers. Nepal has had a long and painful past of democratic struggle, facing several ups and downs through out its history. The desire for democracy, freedom, and liberty is deeply rooted in the hearts and minds of the Nepalese people, as they want to be governed under a rule of law and aspire to establish genuine democracy based on the notion of equality and justice.

The 1990 movement was the watershed event in Nepalese history. The people of Nepal launched a mass movement against the direct and undemocratic rule of the king. The people completely rejected and stood against the traditional notion of the divine rights. The people's movement of 1990 symbolized the beginning of a new era in Nepal and the

people wanted to get rid of the misrule, political mismanagement, and political suppression that had been imposed for more than thirty years. The Nepalese masses took to the streets to an unprecedented scale. This was the first mass uprising against the authoritarian political rule in Nepal in the face of considerable political suppression. The people asserted their sovereign rights and the ultimate right to rebel. Under the immense pressure of the movement, the King stepped down and agreed to curtail his power. The unprecedented movements of the masses compelled King Birendra to reconcile with the democratic will and aspirations of the people.

A new constitution was written in Nepal under which the King was merely a figurehead. He was not supposed to exercise any executive power. Under the new constitutional scheme, executive power could only be exercised by elected representatives of the people. The constitution of 1990 envisaged a parliamentary form of government with multi-party systems and adult franchise. Basic human rights were made a permanent fixture of the constitution. The Supreme Court was accepted as the guardian of the constitution and protector of the fundamental rights and liberties it guaranteed. The Court was empowered with the wide and expansive authority of judicial review, which it could exercise not only against the executive branch of the state, but also against the legislative branch, as well. Like the American Supreme Court, the Supreme Court of Nepal was privileged under the constitution to invalidate or strike down the laws passed by the majority of the parliament on the grounds of inconsistency with the Constitution. It was a counter-majoritarian measure and an additional safeguard to protect the supremacy of the Constitution.

However, the 1990 Constitution was not allowed to function properly. Despite having some very positive democratic elements, it had an inherent weakness: it was essentially a compromise between the King and political parties. The political actors mistakenly believed that the King would abide by the norms of the Constitution in good faith and would accept the supremacy of the people in the governing process. They failed to take a lesson from the events of 1960, when it became clear that polity based on the supremacy of the people had not incorporated well with the Nepalese monarchy. It is the simple lesson of history which needs to be internalized by all the democratic political actors

today. Monarchy and democracy simply cannot co-exist on Nepali soil. There were two basic reasons for the failure of the 1990 constitution. On one hand there was an ongoing conspiracy against the new constitution from the outset by the palace and its coterie. On the other hand there was poor governance and political mismanagement on the part of the political functionaries.

The current monarch, King Gyanendra, took the throne under very mysterious circumstances. The entire family of King Birendra was killed in the Royal Massacre on 1 June 2001. In fact, the Royal Massacre was the death of the monarchy in the hearts and minds of the Nepalese people. King Gyanendra's enthronement was extremely controversial and it was not accepted by people of Nepal.

From the very beginning King Gyanendra had shown an authoritarian tendency. Prime Minister Deuba was fired by Gyanendra: prima-facie, it was an unconstitutional move. Under the Constitutional scheme he had no authority to take this action. The King completed the coup on 1 February 2005, when he appeared on national television and made a lengthy speech, imposing his direct and authoritarian rule on the people of Nepal. Total censorship was imposed on the media, and freedoms of speech and expression were eliminated by his executive order. In addition, a total ban was imposed on all forms of peaceful assembly. The military was deployed to all the media houses, the entire cabinet was placed under arrest, and mass arrests and political detentions were undertaken across the country. Even the Internet and telephones were shut down. The 1990 constitution was totally violated, subverted and undermined. It was a total crackdown. In a death blow to the Constitution, the new cabinet was announced under the King's own chairmanship. King Gyanendra showed total disregard for democratic values and the rule of law. He had virtually no respect for people's rights and liberties. A new, unconstitutional body called the Royal Commission was set up to persecute opposition leaders.

Maoists were waging an armed struggle in the country against the existing political set up as well as against the parliamentary political parties. A huge number of people were killed during the Maoist armed conflict. A peace deal was struck between the seven mainstream political parties and the Maoists, called the "Twelve Point Understanding."

Under the agreement, the Maoists agreed on a multi-party democracy and were ready to launch a nonviolent mass struggle against the authoritarian rule of King Gyanendra. It was the turning point in the history of the nation. This paved the way for launching a nonviolent mass movement for restoration of democracy in Nepal.

## **Present challenges**

The April revolution was a huge success. The people of Nepal showed a tremendous amount of courage in the face of mounting political suppression. There was an unprecedented and spontaneous mass uprising in Nepal. Nepalese people had set a living example in the contemporary world, showing how a nonviolent, peaceful movement can topple a ruthless and brutal military regime. King Gyanendra's rule was a one-man rule based on stark military power. It had no popular support or political legitimacy. It totally undermined the notion of the rule of law, supremacy of constitution and self-governance of the people. The downfall of King Gyanendra was one of the milestone events in the history of the nonviolent democratic movement in Nepal. The brave and courageous political action on the part of the Nepalese people established a historic precedent.

King Gyanendra is down but not out. He has the help of unscrupulous elements hatching a series of conspiracies against the democracy-building process. Nepal cannot afford to fail in this process under any circumstances. It is an historic and unprecedented opportunity for the people of Nepal to get rid of the monarchy and establish a true, genuine, and people-centered democratic political order. Historically speaking, monarchy and democracy have never been able to coexist in Nepal. In this context, democracy and monarchy are, quite literally, sworn enemies. The Palace has always acted against the democratic will and aspirations of the people. The democratic process was obstructed time and again by the monarchy. King Gyanendra is totally discredited and Nepal now needs a radical departure from the past—a kind of fresh beginning. The very presence of a king would always pose a serious threat for democratic stability and sustainability in the nation. To do away with the monarchy would pave the way for true and genuine democracy, as it would enable the supremacy of the people to flourish. The people must be at the center of the polity. Nepal is at a critical juncture in its history and it is

imperative that it successfully complete a democratic transition and pave a way for lasting peace and sustainable democracy.

## **Role of the Maoists**

There are exciting and far-reaching changes taking place in Nepal now that the Maoists are part of the interim government. This is one of the most important political developments in contemporary Nepalese history. Now Nepal needs a credible peace process. The political process needs to be demilitarized, and there must be a free exchange of ideas. The gun should not be allowed to decide and dominate the political course of the nation. The free and democratic political will of the nation shall be allowed to prevail. The Maoists must respect the democratic will and aspirations of the people and accept the drive toward democratic pluralism. Thus, the Maoists need to transform themselves into a legitimate political force and get rid of the politics of violence, terror and coercion. They have to reorient their cadre and act according to democratic norms and values. Nepal's democratic future depends, to a large extent, on the Maoist's transformation to a democratic political party that renounces violence.

The Maoists of Nepal should accept the changing facts and realities, and they need to fully internalize the democratic norms and values. They must understand one simple fact: that politics of violence have no place in the new Nepal. They should accommodate and reconcile themselves with the democratic will and aspirations of the Nepali population.

## **Holding a Constituent Assembly election**

Nepal is now pushing for a new and democratic constitution. Holding a peaceful and fair Constituent Assembly election is the key to a successful transition to democracy the establishment of a constitutional state. The Constitution is the only source for the exercise of legitimate state power. On one hand the constitution limits the power and authority of the state organ and on the other hand it maximizes and guarantees the freedom and liberty of the people.

This is the first time in the history of the nation that the Nepalese people have the opportunity to make their own constitution. People's ownership in the constitution process is extremely important to the survival and sustainability of any subsequent documents or institutions. The previous constitutions were never directly ratified or adopted by the people themselves. In order to establish and transfer sovereignty to the people, the Constitution must be written and adopted by the chosen representatives of the people or the people at large.

Unfortunately, there is serious uncertainty regarding the Constituent Assembly elections, which were originally scheduled for June 2007. They did not take place, as the Election Commission claimed that holding the election by mid-June had become nearly impossible. The exact date for the election has not been officially announced, though the stated goal is to hold them in November.

The ground work for conducting the elections must be laid immediately. The necessary laws and regulations must be enacted as a matter of urgency. The security situation in Nepal is very precarious and unstable. There are growing uncertainties and complexities as lawlessness increases and spreads. The new November deadline must not be missed under any event or circumstances, as this would produce a disastrous result. Moreover, all political actors must show their willingness to hold the elections in a free and fair manner. This should be at the top of the national agenda.

The successful holding of a Constituent Assembly would change the course of history. This would be the hallmark for a successful democratic transition in Nepal. No groups or communities should feel left out of the process and it is important that every group, community, and member of civil society be able to articulate their vision and agenda. The Constituent Assembly must be a freely elected representation of the populace, just as the Constitution must be a document of national unity, vision and empowerment. It should also be the document of nation-building, reflecting the democratic values of the country. Failure to hold a constituent assembly election in a free, fair and timely manner would lead to the ultimate failure in establishing a constitution and, in turn, would usher Nepal into an era of state failure.

## **Ending impunity**

The culture of impunity is inimical to the rule of law. The foundation of a democratic Nepal cannot be built on the basis of lawlessness and the tradition of impunity. Perpetrators of grave and serious human rights violations must be held accountable for their crimes and wrongdoings. Previously, massive crimes against humanity were committed in Nepal on an unprecedented scale. Torture, rape, disappearance and extrajudicial killings were committed and those perpetrators must to be brought to justice no matter who they are. There should be zero tolerance for crimes against humanity in law or practice

The Nepali government should immediately ratify the Rome statute of the International Criminal Court, an international mechanism for the rule of law. The faith in rule of law is a critically important element to building a democratic institution. The law must be allowed to take its proper course, both domestically and internationally.

## **Agenda for new Constitution**

The Constituent Assembly will produce a new constitution for Nepal based on the people's genuine sovereignty and democratic accountability according to the norms of modern constitutionalism. The new constitution will build the basis for political as well as economic and social democracy. It will lay the foundation for a full-fledged democracy in Nepal. Human rights, people's sovereignty, and polity based on the rule of law must be the central theme and the guiding principle for the new constitution. The constitution would chart a new course of history in Nepal; it would create a legal framework for political as well as economic and social democracy. The pressing issue of social and political exclusion and marginalization needs to be addressed by the new constitution.

### **Full fledged sovereignty vested in the people**

The new Constitution must guarantee the full fledged sovereignty of people in Nepal. Democracy means supremacy of the people. Without the full guarantee of sovereign rights of people there can only be an illusion of democracy. Under the genuine democracy, people must be able to exercise their full sovereign rights. There should not be any limitation on sovereignty of people and sovereignty must not be divided. The people are the master of their fate and must be allowed to determine the fate of the nation. Democracy values the wisdom of the masses and assumes that people are competent in determining the best course of action for them and their country. The Constitution of 1990 created a mere illusion of sovereignty for the people because the people were not made fully autonomous. The constitution of 1990 placed several limits on the exercise of sovereign rights by the people. The presence of the monarchy, for example, proved to be a serious limitation on the exercise of sovereign rights. The monarchy was made a permanent fixture under the constitution, in which there was no provision for referendum. Under the constitution of 1990 there was not a full fledged transfer of sovereignty to the people. Now, history has provided an unprecedented opportunity to ensure full-fledged sovereignty for people in Nepal.

### **Republican form of government**

The core mandate of last year's Spring Movement was to end the monarchy and establish a republican form of government. The new Constitution of Nepal must carry out the dictates of the Spring Movement and the architects of the new constitution should be under obligation to comply. The monarchy, as an institution, has always remained a bottleneck for the democratic aspirations of the Nepalese people. The democracy-building process was continually crushed by the monarchy and thus, the institution should be abolished in order to establish genuine democratic political order and accountability. A continued monarchy would always remain a threat for democracy and the people of Nepal must integrate what they have learned from history. Nepal cannot afford to be caught in a vicious cycle of its tragic history. It must seek a radical departure from the past and a fresh start.

## **Guarantee human rights**

Human rights should be central to the new constitution-making process. The basic purpose of any constitutional state is to ensure and maximize the fundamental rights of people and limit the power of the government since unlimited, undefined and unregulated power of the state is always a threat to basic rights and liberties. The guarantee of basic and fundamental rights is the very soul and purpose of any constitution. Without such guarantees, the Constitution is a lifeless document. The Bill of R in the United States was adopted immediately in its Constitution in order to conjure popular support. Mere written words of the constitution do not guarantee constitutionalism. The constitution which does not guarantee the fundamental rights of the people and limit the power of the state cannot satisfy the norms of constitutionalism.

The new Constitution of Nepal should not only guarantee the civil and political rights, but should also incorporate the so-called second and third generation rights such as economic, social, and cultural rights as well as collective and environmental rights. The new constitution of Nepal must encompass an expanding jurisprudence of human rights to remain relevant and on the forefront of international norms. The complementarity of these human rights is currently a basic notion of international jurisprudence. A full spectrum of human rights is extremely important to ensure the dignity of human persons in all part of the world.

Mere paper guarantees of human rights are not enough. A set of institutions to effectively implement those rights which are guaranteed under the Constitution is required in any functioning democracy. Independent and competent judicial institutions are necessary for effective and meaningful protection and enforcement of fundamental rights. The judiciary branch must be a nonpartisan counter-majoritarian measure and must be able to protect citizens not only from undue encroachments of the executive branch, but also from encroachment of the legislative branch. Brute majority in the legislative branch can often creates havoc for the exercise of fundamental rights by the people. The judiciary should be able to protect citizen's rights from poor legislation as is the case with the American constitution.

A human rights commission needs to be established by the Constitution as an organ of the state. It should be an independent and autonomous body. It must be empowered by the Constitution to carry out its function without undue interference from the executive branch of the state.

### **Federalism and decentralization of power**

Nepal needs a federal structure of governance in order to check centralized government power, create a more accessible government, ensure fair representation, and establish the ownership of resources. The federal government is essential for the creation of a national unity among diverse cultural groups, ethnic communities and identities. The new constitution must show a deep respect for diversity. Diversity should be considered as the strength and beauty of the nation. Different groups and communities need to be empowered and must be allowed to participate in the nation-building process. Under a federal governance structure, the state government needs to be fully empowered and the federal government's powers should be limited and well defined. State governments shall have full control over their resources and must be able to enjoy their autonomy. Federalism is essential in the country like Nepal in order to create national unity and empower different geographical areas and diverse communities.

### **Inclusive democracy and restructuring of state**

Nepal needs a broad-based and inclusive democracy. The vast majority of the population is excluded from the polity and governance, as they have been excluded from the development process. The problem of exclusion, disempowerment, and marginalization is deeply rooted in Nepal. The culture of exclusion and non-participation needs to be replaced by an inclusive and participatory political culture. The new constitution should provide the basis and framework for this culture by providing fair and equitable representation. Specifically, the issues of dalit, madhesi, Janjatis and women need to be effectively and realistically. Nepal faces vast inequality and extreme deprivation. The democracy should not create privilege and luxury for few and misery, deprivation, and marginalization for the rest. Democracy must be able to ensure the dignity of all people.

It should strive to create maximum opportunity for happiness for the maximum number of people in Nepal.

The restructuring of the state is the immediate need. This is the time to initiate a meaningful process of state restructuring and create a social dialogue among the diverse groups and communities. Without restructuring, the people's aspiration for genuine political democracy, accountability and desire of socioeconomic justice cannot be materialized. The Nepalese people are now aspiring for a genuine and radical transformation of the socioeconomic and political structures in order to achieve genuine empowerment; not just a superficial and cosmetic change.

### **Democratization of the military**

The loyalty of the military toward the elected and civilian government is the very hallmark of a democratic society. The upcoming constitution needs to address this issue properly and effectively. Detailed constitutional arrangements need to be made in Nepal in order to bring the military under the control of the elected leadership of the country. The military must be accountable to the elected political government. The track record of the Nepalese military is not positive in this regard. It needs a radical transformation. A politically neutral and professional military is sine qua non for the survival of democratic political order in any society. To this end, the Nepali military requires a radical restructuring, as well.

### **Conclusion**

Nepal is at a significant crossroads. On the one hand there is a historic opportunity to build a new and democratic Nepal. On the other hand there is huge risk and peril. Through the strong political will, hard work, vision and statesmanship, the risk and challenges can be transformed into a great opportunity. Nepal has enormous untapped social capital which needs to be harnessed effectively. It has all the potential to become a vibrant and successful democracy, but its leaders must show a political wisdom and long term vision to rebuild the nation. The political actors of Nepal need to think critically about the future of the entire nation rather than their own personal career. Civil society

and media should be watchful and vigilant. They should work as a conscience keeper of the nation.

The international civil society and community should also play a supportive role. This is the era of the globalization of human rights and democracy. Human rights and democracy are transnational issues; they are also a legitimate concern of the international community, which has a stake in the democratic future and sustainability of Nepal. The international population should come forward and show its unflinching support and solidarity for Nepal's democracy-building process. Nepal should be part of the global movement for democracy.

Democracy and human rights are universal aspirations of mankind and, thus, the global efforts for democracy-building must be intensified. Nepal's efforts at building democracy require a credible peace process. The peace process of Nepal should be inclusive and participatory. Building peace is multi-dimensional and complex. Civil society must play the central role in this regard. The top down approach in the peace process simply does not work. All the stakeholders must engage in deep and meaningful dialogue.