

CONSTITUTIONAL CRISIS IN NEPAL

**Ensuring democratic governance during the transition to a
new constituent assembly**

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Foreword

This extraordinarily useful and interesting book will be welcomed by the world community of comparative constitutional scholars and practitioners and in particular by those who work in the fields of peace-building, constitution making and constitutional transition and change.

Most obviously, the book provides an authoritative account of an important phase in the constitution building process in Nepal, from 2007 to 2012. As is well known, the election of a Constituent Assembly in Nepal, under the Interim Constitution of 2007, was one of the important outcomes of the peace process. As is so often the case, the Constituent Assembly also functioned as a legislature from which the government was drawn. Despite the inclusivity of the process and four years of hard work, no final Constitution was agreed before the Constituent Assembly expired by effluxion of time on 27 May 2012. This event presented Nepal with at least two dilemmas: how to revive the constitution making process so as to produce a final constitution and how to govern the country in the interim. Both required effective resolution so as to preserve the fragile peace and to provide a basis for stable democratic government in the future.

This book explains how the original Constituent Assembly was conceived and structured; how, in the view of the author, the impasse leading to the stalemate arose; and the difficult choices that political leaders then faced in organising a transitional administration that did least violence to the principles of democracy and the rule of law. As the book explains, the choices were invidious but resolution of some kind nevertheless was essential. The election of a new Constituent Assembly will position Constitution building in Nepal to enter its next and hopefully final phase, before the challenges of implementation. Even so, the period covered by this book is a critical part of the story, which provides the backdrop against which a new Constituent Assembly will work.

The events recounted in this book are almost as relevant outside as within Nepal. While a process for making a new Constitution need to be planned and designed in advance such plans, by their very nature, rarely proceed smoothly or as originally intended. Deadlocks occur and must be overcome. Transition, often involving conditions that call for an administration in caretaker mode, is a common phenomenon. For these purposes, Nepal is a case study, which now forms part of the global stock of understanding of constitution building processes. The manner in which these problems arose and the solutions adopted to resolve them were unique to Nepal, framed by Nepal's own constitutional instruments and by social and political conditions on the ground. But the general lessons that can be derived from these events, in terms of the need for perseverance, compromise, innovation and good-will, have application everywhere.

The author of this important work is Bipin Adhikari. He writes as an insider: a Nepalese lawyer, scholar and commentator who followed the first Constituent Assembly and its aftermath closely, was actively involved in the process in various ways over time and is deeply committed to a successful outcome to constitution building in Nepal. We are all indebted to him for his work. I am honoured to have been invited to write a foreword to the book and I commend it to other readers.

Cheryl Saunders
Laureate Professor
Melbourne Law School
January 2013

Preface

This book, 'Constitutional Crisis in Nepal: Ensuring democratic governance during the transition to a new constituent assembly', examines the ongoing constitutional crisis in Nepal. The crisis ensued after the Constituent Assembly (CA), which was elected to draft a new constitution for Nepal, completed its term without producing a new constitution. The CA, a multi-dimensional representative body, functioned as both a constitution writing body and a parliament. The Interim Constitution of Nepal, which was promulgated in 2007 to govern the country during its transition to a new constitution, did not contemplate the situation where the CA expired without producing a new constitution. The crisis springs from this situation.

The current situation has brought about an urgent need for a common understanding of the roles of the president and the prime minister and the relationship between the two. The dissolution of the Constituent Assembly on 27 May 2012 has left the president and the prime minister responsible for managing the transition toward new elections and a new constitution. Unfortunately, the Interim Constitution does not explicitly spell out the relationship or the power structure that exists between the president and the prime minister. Further complicating this relationship is the fact that, currently, there is no legislative body in Nepal. The dissolution of the CA means that one of the key branches of the government is no longer functioning. This brings up questions about how much power the president or the prime minister should be allowed to exercise without a legislative branch in place to operate as a check on that power.

This is the second time in Nepal's history that the country is under an Interim constitution without elected representatives; the first time was in 1951. The critical difference from the past is that now the head of state of the republic is elected by the parliament, whereas in 1951 the country had a hereditary monarch replacing a hereditary premier (the so-called Rana rulers). The institution of president was introduced through the Fourth and Fifth Amendments to the Interim Constitution and the president's

constitutional role is not explicitly defined in the Interim Constitution. This has caused confusion and could lead to added pressure on the president to increase his role in managing the transition. The timeframe for the drafting of a new fully-fledged constitution is also unclear. This book was written to assist actors in defining the way forward and building a consensus for a road map towards resuming constitution writing and organising the next elections.

In order to ensure that this transition period goes as smoothly as possible, a consensus or common understanding of the relationship between the president and prime minister would be highly valuable. Examining the roles of each office as they have operated in Nepal in practice and as they have been defined in the Constitution, as well as in other relevant systems, will help shed light on this issue. It is also vital to understand the role that the legislature has played under various constitutions in balancing the government. Examples are given from other countries that have gone through a similar constitutional crisis in order to properly understand the need for appropriate constraints to be placed on the president and prime minister in the absence of a legislature.

The objective of this book is to suggest options for managing the transition to elections and the new constitution. In particular, this book looks at the exercise of legislative powers, including the issuance of ordinances, and the limits pertaining to such powers. The power to remove difficulties in implementing the constitution is an exclusive and unique constituent power that the president may exercise in the absence of a parliament. This book examines the relationship between the president and the prime minister in the exercise of this power and the democratic checks on the exercise of such extraordinary powers.

The demise of the CA on 27 May 2012 without promulgating a new constitution has placed the constitutional vision of the Interim Constitution under stress and the quality of democracy has suffered as a result of the declining legitimacy of representative institutions. There are, however, a range of possibilities for the management of this transition period. Giving due regard to the spirit of the Interim Constitution and the agenda for change, it is possible to ensure democratic governance during this transition, despite the absence of elected representatives. What is required is a positive outlook and a collective plan for the future.

Under the democratic framework of the Interim Constitution, the executive power rests with the council of ministers. It is the responsibility of the president to protect the Constitution, on the advice and recommendations of the council of ministers. In the current constitutional crisis following the dissolution of the Constituent Assembly-cum-Legislature-Parliament, the council of ministers has been given the status of caretaker government. In principle, a caretaker government is not supposed to take decisions on the constitutional crisis that the country is going through on its own. A national government, led either by the incumbent prime minister or any other person, is now necessary for the collective appraisal of the constitutional crisis and how it can be resolved and to set standard norms and practices for the operation of the government during this transition period.

The national government must be taken as a comprehensive arrangement for running the system according to the principles of constitutionalism, i.e., based on the rule of law and with limits on the exercise of power. Such an arrangement will also make sure that elections are held for the new CA and that officials of independent constitutional bodies (such as the election commission) are appointed so that these bodies can continue to function during the transition. The first task of this national government would be to chalk out a detailed transition strategy and legitimise this strategy by way of a crisis ordinance (recommended by the council of ministers and issued by the president) to operate for a fixed period. An understanding must be created as to how the Interim Constitution can be protected while the president is exercising his power to issue ordinances and remove difficulties until a fully accountable government is elected. It is contended that a broad-based, national government is the only available tool for ensuring political legitimacy in this situation.

The national government will also have to make decisions on all contentious constitutional issues at the political level, including federalisation, inclusion and identity. If there are issues that must be handled phase wise, this understanding must be reached at a political level in advance. In the opinion of the author, the quick formation of a High Level Constitution Finalisation Commission to work on the technical aspects of constitution writing and its finalisation, taking stock of all the efforts of the former CA, is the next step to generate public trust and create a positive environment for holding

elections. In all of these exercises, the mission of the Interim Constitution stated in the Preamble, to restructure Nepal to build an inclusive state “to resolve the existing problems of the country relating to class, caste, region and gender” must take priority.

The announcement of elections is the next step towards ending the constitutional crisis. The newly elected constituent assembly will produce a government with a fresh mandate, which will be able to endorse the crisis prevention measures applied during the transition period by way of crisis ordinance and amend the Interim Constitution as required. The new constituent assembly will also set the procedures for dealing with the draft of the new constitution finalised by the proposed High Level Constitution Finalisation Commission.

This framework for transition will not only ensure democracy during this difficult time, it will also ensure that the problems Nepal is facing are tackled comprehensively (as opposed to on a piecemeal basis) and that the constitution making process is re-invigorated. With new elections, the government will receive a fresh mandate to handle subsequent political developments and, most importantly, to complete the constitution making process at hand.

The author has been immensely benefited from discussions with constitutional lawyer Dr Surya Dhungel, Associate Professor of Tribhuvan University Law Faculty Ganesh Datta Bhatta, Advocate Purna Man Shakya and Joint Secretary of the Ministry of Law and Justice Tek Dhungana, who commented on an earlier draft of this book. The comments received from Advocate Krishna Man Pradhan, Advocate Dinesh Tripathi, Advocate Raman Shrestha, constitutional lawyer Dr Bhimarjun Acharya, Advocate Surendra Mahato, Advocate Phurpa Tamang, Yam Bahadur Kishan and Advocate Khushee Tharu were also valuable in finalising the analysis. Comments were also received from Advocate Khim Lal Devkota and Advocate Ek Raj Bhandari – both former CA members and representatives of the Unified Communist Party of Nepal (Maoist).

Similarly, the author would like to acknowledge the inputs on the first draft of this book from experts abroad including Professor Yash Ghai, Professor Ms Jill Cottrell, constitutional expert Subhash C. Kashyap, constitutional

lawyer Dr Rajeev Dhavan, Professor Cheryl Saunders, legal experts Nicole Topperwein and Leena Rikkila Tamang, and International IDEA professional Andrew Ellis. I am also grateful to Professor Saunders for kindly writing a foreword to this book. Advocate Bishweshwar Prasad Bhandari and my legal associate Umesh Gautam have also provided careful support throughout. All of their comments and perspectives were extremely helpful and I thank them all. The first draft of this work was kindly commissioned by International IDEA. I also take this opportunity to thank it for permitting the publication of this work in the form of a book by the Nepal Constitution Foundation.

Any mistakes or lapses that remain are mine own. The experts and institutions that gave their opinions and published this book need not agree with what has been recommended and I would appreciate any further comments in this regard. Finally, I believe that this book will be helpful in depicting the current situation and will continue to have relevance even after the country overcomes present impasse.

Bipin Adhikari

January 2013

Acronyms

CA	Constituent Assembly
CPN (Maoist)	Communist Party of Nepal (Maoist)
CPN (UML)	Communist Party of Nepal (Unified Marxist-Leninist)
IIDEA	International Institute for Democracy and Electoral Assistance
NC	Nepali Congress
UCPN (Maoist)	Unified Communist Party of Nepal (Maoist)

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