

**The Rejection of the Minority Approach in the 1990 Constitution
Making Experience: A Reflection on the Influence of Foreign
Institutional Models**

**Mara Malagodi
SOAS, University of London**

A paper presented at an international seminar on
"Constitutionalism and Diversity in Nepal"
Organized by Centre for Nepal and Asian Studies, TU
in collaboration with MIDEA Project and ESP-Nepal
22-24 August 2007
Kathmandu, Nepal

The Rejection of the Minority Approach in the 1990 Constitution Making Experience: A Reflection on the Influence of Foreign Institutional Models

Mara Malagodi (SOAS, University of London)

The present paper aims to investigate the reasons and modalities for the rejection of the minority approach in Nepal's 1990 constitution making experience. The 1990 constitution making process was articulated into two phases: the drafting of the document by the nine-member Constitution Recommendation Commission (CRC) between the 31 May and 10 September 1990 and the finalisation of the draft by a three-member Cabinet Committee leading to the promulgation of the document on 9 November 1990. Thus, the paper is divided into two sections analysing each phase respectively. These sections investigate the institutional choices made by the constitution drafters in 1990 with regard to the structure of the state, the electoral system, the regulation of the party system, and the absence of positive discrimination. It seems plausible to argue that the 1990 approach to Nepal's internal diversity is expounded by the formulation of the article guaranteeing the right to equality and the articles defining the three elements at the core of the state-constructed Nepali identity: the Shah kingship, Hinduism, and the Nepali language.

The present analysis relies upon the interviews conducted in Kathmandu between 2006 and 2007 with the main actors involved in the constitutional process and the proceedings of the CRC held in the National Archives. With regard to the interviews, I have included a table with the complete list of the names, political affiliation and caste of the members of the CRC and of the Cabinet Committee. The names in bold indicate the people with whom I managed to successfully complete in-depth interviews. For methodological accuracy I have to highlight that my informants are all Bahuns, with the exception of a Chetri gentleman. For this reason I was told by a well-known ethnic activist that my data is unreliable as I had only interviewed high-caste Hindus. The choice of my informants, however, was not based on their caste affiliation and I have interviewed the people who are still alive and had first-hand involvement in the 1990 constitution-making process. I should also point out that none of them is a woman. While, on the one hand, I feel that it is worth mentioning such information, on the other hand, I am still not sure about the implications – if

there are any – of the caste affiliation of the CRC and Cabinet Committee members in the institutional outcome of the 1990 constitution-making experience.

Table 1 – Composition of the 1990 CRC

NAME	TASK	AFFILIATION	CASTE
1. Bishwa Nath Upadhyaya	<u>Chairman</u>	King's nominee	Bahun
2. Ramananda Prasad Singh	Member	King's nominee	Tharu +
3. Pradyumna Lal Raj Bhandari	Member	King's nominee	Newar +
4. Daman Nath Dhungana	Member	Nepali Congress	Bahun
5. Laxman Prasad Aryal	Member	Nepali Congress	Bahun
6. Mukunda Regmi	Member	Nepali Congress	Bahun
7. Bharat Mohan Adhikari	Member	United Left Front	Bahun
8. Madhav Kumar Nepal	Member	United Left Front	Bahun
9. Nirmal Lama	Member	United Left Front	Tamang +
10. Surya Nath Upadhyaya	<u>Secretary</u>	King's nominee	Bahun

Table 2 – Composition of the Three-Minister Cabinet Committee

NAME	TASK	AFFILIATION	CASTE
1. Yog Prasad Upadhyaya	Home Minister	Nepali Congress	Bahun
2. Nilamber Acharya	Labour Minister	United Left Front	Bahun
3. Keshar Jung Rayamajhi	Education Minister	King's nominee	Chetri

The present paper aims also at discussing the implications and modalities of the phenomenon of institutional ‘borrowing’ in the constitution-making process. Such analysis requires broader reflections on the modalities of political transformation occurred in the Himalayan kingdom over time and the influence of external legal and political concepts. Imported models have been progressively implanted into autochthonous juridical-political structures and the interplay of different systems has generated a situation of ‘legal pluralism’ in the country. This seems to be the most appropriate theoretical framework to analyse the outcome of the 1990 constitutional experience. As Chiba highlights, the term ‘legal pluralism’ comprehends:

the working whole structure of law of a people, constituted not of a single system of state law, but rather a complex of various systems of law called customary, religious, local, primitive, tribal or whatever, on the one hand; and many ideational factors specifically relevant to the function of the law, such as ideas, values, beliefs, philosophies, attitudes and so forth, on the other.¹

The present article aims, in the first place, at investigating the process of reception of the aforementioned elements in Nepal's 1990 constitutional system, especially with reference to the treatment of minorities. Secondly, the broader scope of the article is to reflect on the manner in which exogenous juridical and political structures are renegotiated and adapted into a context faraway from their 'birthplace'. More specifically concepts like constitution and nation-state are rooted in Western modernity and bear a historical specificity which should not be overlooked when attempting to assess how such concepts 'travel' outside their homeland. It seems appropriate to carefully consider the epistemology behind such institutions in order to fully understand the implications of their adoption and the aspirations they purport to fulfil in a context like the Nepalese 1990 constitutional experience.

THE 1990 ESTABLISHMENT

At the beginning of 1990, most of the banned political parties united in a pro-democracy alliance² and launched a *Jan Āndolan* (People's Movement) to seek the restoration of multi-party democracy in the country.³ After two months of protests, strikes and mass demonstrations, on 15 April, the King dissolved the government and the National Parliament: it was the end of thirty years of Panchayat regime. Few days later, the monarch allowed for the creation of an Interim Government under the Premiership of Krishna P. Bhattarai, the General Secretary of the Nepali Congress. The Cabinet included other Congress members, delegates of the United Left Front (ULF), independents, and royal nominees. The political overture and the climate of

¹ Masaji CHIBA, 1989. *Legal pluralism: towards a general theory through Japanese legal culture*. Tokai: Tokai University Press, p. 172.

² On 15 January 1990 seven Communist parties united under the United Left Front (ULF) and formed a tactical alliance with the Nepali Congress against the Panchayat regime.

³ For a detailed account of the democracy movement see: Martin HOFTUN and William RAEPER, *Spring Awakening. An account of the 1990 Revolution in Nepal*, New Delhi: Penguin Books, 1992.

dialogue allowed for a meaningful debate about the drafting procedures and features of a new constitution to establish a functioning democracy in the country.

THE CRC DRAFTING PROCESS

The process of drafting the new democratic constitution of Nepal sheds light on the political interactions between the Palace and the various parties. It also helps to appreciate the nature of the 1990 document as a legal-institutional compromise between the different political forces.⁴ It is essential to point out that the process of constitution making was, once again, not carried out by an elected Constituent Assembly, but by a small Commission nominated by the political elites of the country. Some of the more radical Communist parties, like the CPN (Masal) and CPN (Mashal),⁵ were adamantly advocating for the immediate promulgation of an Interim constitution to pave the way for the elections of a Constituent Assembly. These groups, however, were outside the ULF and did not have much political leverage. Their view was largely ignored and opposed both by the Palace and the Congress. The Congress had adopted a policy of ‘national reconciliation’ with the monarchy and was not willing to run the risk of jeopardising the achievements of the movement.

After an unsuccessful attempt by King Birendra to nominate a Commission without consulting the Council of Ministers, on 31 May 1990 the King, upon the recommendation of the Council of Ministers, formed a new nine-member Constitution Recommendation Commission under the Chairmanship of Chief Justice Bishwa Nath Upadhyaya. The Commission was given the task of drafting in three months a new constitution explicitly within the mandate of constitutional monarchy and parliamentary democracy.⁶ Although the Royal Communiqué did not specify the political affiliation of the Commission members, it was understood that the Palace, the

⁴ For detailed accounts of the 1990 constitution-making process see: Michael HUTT, ‘Drafting the 1990 Constitution’, in Michael HUTT (ed.), *Nepal in the Nineties: Versions of the Past, Visions of the Future*, New Delhi: OUP, 1993, pp. 28-47; and Krishna HACHHETHU, ‘Transition to Democracy in Nepal: Negotiations behind Constitution Making, 1990’, in *Contributions to Nepalese Studies*, 21:1 (1994), pp. 91-126.

⁵ The CPN (Masal) seceded in 1983 from the CPN (4th Convention) and the CPN (Mashal) separated in 1985 from CPN (Masal) itself. The leader of Mashal faction was ‘Prachanda’ (‘the fierce one’, aka Pushpa Kamal Dahal), the future supreme leader of the Maoist insurgents.

⁶ The Royal Palace Communiqué issued by the Palace Chief Secretariat on 31 May 1990 [16 Jest 2046] formed the Constitution Recommendation Commission (CRC) under the Chairmanship of Supreme Court Chief Justice Bishwa Nath Upadhyaya. The other eight members were: Pradyumna Lal Raj Bhandari, Ram Nanda Singh, Laxman Prasad Aryal, Mukunda Regmi, Daman Nath Dhungana, Nirmal Lama, Bharat Mohan Adhikari and Madav Kumar Nepal. Surya Nath Upadhyaya was the Secretary of the Commission, but he did not enjoy voting powers.

Nepali Congress and the ULF had three delegates each in the Commission. It is interesting to highlight that the formation of the Commission excluded many other political actors operating in Nepal and segments of society which had come into the public eye with the democratic opening. Ethno-linguistic, regional, religious minorities and women were not represented in the Commission.

As recounted by the informants, only the three ULF representatives were well coordinated. Nirmal Lama, Bharat Mohan Adhikari and Madav Kumar Nepal were political leaders and understood well the importance and effectiveness of collective action. The other members of the Commission were well-respected and well-known professionals in the legal field, thus they tended to act in their professional capacity more so than with an exclusively political rationale.⁷ Chairman Upadhyaya suggested to the Commission members to work under Committees composed by two members each. Each Committee was assigned a different topic and was requested to prepare a report to be discussed by all the members of the Commission together.

Table 3 – Commission Subcommittees⁸

N.	MEMBERS	TOPIC
1	Bishwa Nath Upadhyaya Laxman Prasad Aryal	Judiciary, Attorney General, Citizenship, Political Organisation
2	Pradyumna Lal Raj Bhandari	Auditor General, Public Service Commission, Commission for the Investigation of Abuse of Authority, Election Commission
3	Ramananda Prasad Singh Bharat Mohan Adhikari	Fundamental Rights, Directive Principles and Policies of the State
4	Mukunda Regmi Madav Kumar Nepal	State of Emergency, Transitional Period, Amendment Procedure, Miscellaneous
5	Daman Nath Dhungana Nirmal Lama	Parliament Form, Constitution, and Conduct of Business, Legislative Procedure

⁷ Interview with Surya Nath Upadhyaya, Kathmandu, 22/03/2007.

⁸ Mukunda REGMI, *Samvaidhānik Vikās ra Nepāl Adhirādyako Samvidhān 2047* [Constitutional development and the Constitution of the Kingdom of Nepal, 1990], Lalitpur: Millennium Press, 2004, Vol. 1, p. 152.

Secretary Surya Nath Upadhyaya set up a Secretariat to aid the Commission with legal research and the preparation of the various drafts. Every article was then discussed by the Commission and if agreement was not reached, in that case a majority vote would take place. Once a decision was taken, it could not be reopened.⁹

Constitutional Models

The Secretariat of the CRC had collected more than 150 constitutions from all over the world to gather inputs and positive influences for the new document. The Commission based the formal structure of the new constitution draft on Nepal's previous constitutional documents, especially the 1962 Panchayat constitution. From the point of view of its contents, the CRC draft relied heavily on the 1959 constitution of Nepal which was perceived as the institutionalisation of the achievements of the 1950-51 revolution and the beginning of the democratic era in Nepal.

In 1990 the intent of most members of the CRC was to ameliorate the 1959 document, especially in regard to the institutional boundaries and limitations to the powers of the King. The Westminster model represented, once again, the institutional framework and point of reference for the drafting process. The constitution of India as well greatly influenced the 1990 Nepalese document. Many of the CRC members explained during the interviews that Nepal had experienced a long-term exposure to the British model of government and institutions and the common law system as renegotiated in the Indian context. Most of the democracy movement leaders had also formed politically in the context of the Indian anticolonial struggle; and the Anglo-Indian model of government was the institutional framework they were most comfortable working within. Moreover, the CRC mandate explicitly provided for the establishment of constitutional monarchy and the British model was considered the archetype and most successful instance of such form of government.

Chairman Bishwa Nath Upadhyaya recounted an interesting incident during the interview.¹⁰ When King Birendra contacted him to chair the work of the Commission, the Chief Justice told His Majesty that he could have only drafted a liberal constitution following in the footsteps of the Westminster model. The King replied: "That is why I called you!" The British-style system of constitutional

⁹ Interview with Daman Nath Dhungana, Kathmandu, 09/04/2007.

¹⁰ Interview with Bishwa Nath Upadhyaya, Kathmandu, 16/05/2007.

monarchy was the point of compromise between the three main political forces involved in the 1990 constitution-making experience.

The CRC draft¹¹ vested state sovereignty exclusively in the people of Nepal¹² for the first time in Nepali history, and ultimately aimed at establishing a constitutional monarchy. It set up a bicameral legislature, a Cabinet of Ministers responsible to Parliament under the Premiership of the leader of the party holding the majority in the lower house. The document established an independent judiciary and the Supreme Court was granted extraordinary jurisdiction to enforce the Fundamental Rights enshrined in the constitution. The apex court was also given the power of judicial review, of settling any legal question in issues of public concern (PIL), and of issuing the necessary orders to enforce such rights.¹³

Minorities' Demands and Right to Equality

The efforts of the CRC members were also directed towards devising an institutional framework which was suitable to their own country and maintained an essentially 'Nepali flavour'. To achieve this, eight of the CRC members travelled around Nepal to collect propositions from the general public. Suggestions were also sent directly to the Commission in Kathmandu in form of letters and proposals. The success of the People's Movement had raised great expectations from all parts of Nepali society. Ethno-linguist and religious minorities had become increasingly vocal about their demands and active in the public sphere.

In 1990 the various groups united under the umbrella organisation of the Nepal Janajati Mahasangh (Nepal Federation of Indigenous Nationalities).¹⁴ The minorities were advocating for a constitutionally-established secular state and for the full recognition of their cultural and religious rights. Interestingly, most of the suggestions received by the Commission were concerned with such issues.¹⁵ As Padma Ratna Tuladhar explained, "During the drafting of the constitution, there were great expectations from the minorities because the constitution was supposed to

¹¹ For the CRC draft, see: Mukunda REGMI, *Samvaidhānik Vikās ra Nepāl Adhirādyako Samvidhān 2047* [Constitutional development and the Constitution of the Kingdom of Nepal, 1990], Lalitpur: Millennium Press, 2004, Vol. 2, pp. 1771-1846.

¹² Article 3 of the Constitution of the Kingdom of Nepal, 1990.

¹³ Article 88 of the Constitution of the Kingdom of Nepal, 1990.

¹⁴ See: William F. FISHER, 'Nationalism and the Janajati', *Himal*, Mar/Apr (1993).

¹⁵ Michael HUTT, 'Drafting the 1990 Constitution', in Michael HUTT (ed.), *Nepal in the Nineties: Versions of the Past, Visions of the Future*, New Delhi: OUP, 1993, pp. 35-36.

reflect the aspirations of the people, those aspirations raised by People's Movement. [...] People expected that with the democratic change secularism was going to be a given, they were convinced that it would have been guaranteed in the constitution.”¹⁶ For the minorities democracy ultimately meant a radical break from the top-down nationalistic rhetoric of the Panchayat system, anchored in the culture and values of the Parbatiya high-caste Hindus.¹⁷ The question was how prepared were the Nepali political leaders to do away with ideological narratives established by thirty years of Panchayat regime.

The CRC draft also included an extensive section on Fundamental Rights with much emphasis on the right to equality and non-discrimination on grounds of religion, race, sex, caste, tribe or ideological conviction.¹⁸ The CRC members' awareness of the disadvantaged position in economic and social terms of many ethnic minorities, lower castes, and women was acknowledged in the Article pertaining to the right to equality. In the part referring to non-discrimination from the part of the state, the following sub-clause was added:

“Provided that special provisions may be made by law for the protection and advancement of women, children, the aged or those who are physically or mentally incapacitated or those who belong to a class which is economically, socially or educationally backward.”¹⁹

Such formulation was devised to allow for future enactments of special legislation for the advancement of the unprivileged segments of Nepali society. It is very similar to Article 15 (4) of the Indian Constitution introduced by the First Amendment, even if in Nepal there are no Scheduled Castes and Tribes. The aforementioned provision of the CRC draft opened the door for some form of future positive discrimination as defined by the legislator. The CRC members rejected the ‘minority approach’ and refused to include in the draft any provision for an Indian-style reservation system. Nirmal Lama, himself a member of an ethnic minority, forcefully condemned the

¹⁶ Interview with Padma Ratna Tuladhar, Kathmandu, 12/04/2007.

¹⁷ For a discussion on ethnic identity, issues and demands see: Marie LECOMTE-TILOUINE and Pascale DOLLFUS, *Ethnic Revival and Religious Turmoil. Identities and Representations in the Himalayas*, New Delhi: Oxford University Press, 2003.

¹⁸ Article 11 of the Constitution of the Kingdom of Nepal, 1990.

¹⁹ Article 11 (3) of the Constitution of the Kingdom of Nepal, 1990.

minority approach as a path leading to communal tension.²⁰ The Indian experience of communal violence and the findings of the Mandal Commission Report made public at the time of the CRC work greatly influenced the Nepali constitution-making process in regard to minorities' affirmative action. Moreover, a few Indian lawyers travelled to Nepal to provide advice and assistance to the CRC work. In regard to the reservation system they urged: "Don't commit the same mistakes we made!"²¹

State Structure and Political Organisation

The formal recognition in the constitution of the inner plurality of Nepali society was not translated into the institutional framework of the country. In 1990 there was no discussion about federalism and the inclusiveness of state structures.²² In the course of the debates on the constitutional establishment the preoccupation of strengthening national unity prevailed. Nepal's internal diversity was perceived as a potential weakness and divisive factor in the small Himalayan kingdom.

A mix of security concerns and a Kathmandu-centric approach to politics led to the adoption of a highly centralised unitary state structure and a British-style first-past-the-post majoritarian electoral system. Moreover, the desire to strengthen national unity translated into the constitutional provision banning any political party and organisation formed on the basis of religion, community, caste, tribe or region.²³ The constitution drafters, on the one hand, feared that political organisations centred on 'communal' identities could have led to centrifugal separatist movements and sectarian violence. On the other hand, they had faith in the fact that a functioning democratic establishment based on liberal values would have overcome and in the long term solved all of Nepal's social imbalances and inequalities.

As highlighted by most of the CRC members interviewed, at that time there was great anxiety about the security and independence of Nepal, especially vis-à-vis India. Due to the general political instability on the international exchequer in the wake of the fall of the Berlin wall, India was gravely concerned about its own defence and wanted to ensure that its security border was constituted by the Himalayan range.

²⁰ Surya DHUNGEL with Bipin ADHIKARI et al., *Commentary on the Nepalese Constitution*, Kathmandu, 1998, p. 39.

²¹ Interview with Laxman Prasad Aryal, Kathmandu, 09/04/2007.

²² Interview with Daman Nath Dhungana, Kathmandu, 09/04/2007.

²³ Article 112 (3) of the Constitution of the Kingdom of Nepal, 1990.

In this vision Nepal was of paramount strategic importance.²⁴ Thus, on 31 March 1990, the New Delhi government sent an extremely unfair new treaty proposal to King Birendra to sign in exchange for Indian support to his regime against the agitating political parties.²⁵ The King refused to comply and handed over power to the parties. The ‘small country syndrome’ has affected Nepal since Prithvi Narayan Shah’s times with the notorious definition of the position of the Himalayan kingdom between India and China as “a yam between two rocks”.²⁶ In this regard, the Commission draft provided for ratification by Parliament with a two-thirds majority of all treaties and agreement with foreign countries pertaining to peace and friendship, strategic and security matters, boundary, and natural resources.²⁷ These concerns were raised especially in relation to the many agreements concluded by Nepal with India.²⁸

Nepali Identity in the 1990 Constitution

In terms of the Nepali identity promoted by the new constitution, the CRC members wanted to include in the constitutional text the recognition of Nepal’s internal diversity, but – at the same time – wished to enshrine in it the inner unity of the Nepalese people. The three pillars of the Panchayat-era nationalism, namely Hinduism, the Nepali language, and the Shah monarchy, remained virtually unchanged in the new constitutional document.

The draft made it clear that the King had to be Hindu, but the Commission could not agree whether the state as well was going to be again declared Hindu. For the first time in Nepali history, however, the state was declared “multiethnic and multilingual”, but the term “multireligious” was omitted.²⁹ Moreover, the national anthem, the national colour and the national flag all reflected Hindu symbolism.³⁰ Bharat Mohan Adhikari recounted an interesting story.³¹ When the Commission discussed the issue of secularism vis-à-vis the re-definition of Nepal as Hindu, the

²⁴ Interview with Surya Nath Upadhyaya, Kathmandu, 22/03/2007.

²⁵ Saubagya SHAH, ‘A Himalayan Red Herring? Maoist revolution in the shadow of the Legacy Raj’, in M. HUTT (ed.), *Himalayan “People’s War”: Nepal’s Maoist Rebellion*, London: Hurst & Company, 2004, pp. 203-4.

²⁶ See: Ludwig STILLER, *Prithvi Narayan Shah in the Light of Ditya Upadesh*, Kathmandu: the author, 1968.

²⁷ HACHHETHU, 1994, pp. 102-3.

²⁸ For a detailed analysis of Indo-Nepal relations, see: Surya SUBEDI, *Dynamics of Foreign Policy and Law. A Study of Indo-Nepal Relations*, New Delhi: Oxford University Press, 2005.

²⁹ Article 4 of the Constitution of the Kingdom of Nepal, 1990.

³⁰ ICG 15 June 2005. *Towards a Lasting Peace in Nepal: the Constitutional Issues*. Asia Report N. 59. International Crisis Group, pp. 13-14.

³¹ Interview with Bharat Mohan Adhikari, Kathmandu, 18/05/2007.

United Left Front members managed to secure a pro-secularism majority vote with the support of the Nepali Congress delegate Daman Nath Dhungana and the royal nominee Ramananda Prasad Singh. When news reached the Palace and certain conservative segments of Nepali society, there was an outcry and Chairman Upadhyaya exerted pressure on the Commission to reopen the decision, which was against the working procedure adopted by the Commission earlier on. It was then decided to leave the constitution silent on that issue.

The right to religion, however, was again limited to “religion as handed down from ancient times and having due regards to traditional practices”, and the ban on conversion was also reiterated.³² It has been argued that the objective of the restrictive formulation of the right to religion in the 1990 Constitution was to “to discourage forceful conversion and to protect the nation from religious invaders”.³³ During the CRC debate on the right to religion, the position of Laxman Aryal, one of the Nepali Congress delegates to the Commission, sheds light on the purpose of Article 19.

It is not appropriate to include secularism in the Fundamental Rights, securing the right to profess any religion. We have to ponder this issue. It is important to protect the existence of our country, social peace, social unity, feelings of fraternity and nationality. Our country is small. That much for believing in secularism, since 24 Caitra 2046 24,000 people have been made Christian. Like this, conversion to another religion was made. There will be a situation where the Nepali ethnicity will disappear, there will be no Hinduism and everyone will be made Christian; we call immigrant someone who comes from the outside, but there will be a situation in which we will all be immigrants in our own country. This is what will happen to our national culture. Our ‘Nepali-ness’ will be destroyed. Therefore, none can convert from one religion to another.³⁴

Two points need to be made: first, the concepts of ‘Nepali-ness’ and ‘Hinduism’ seem inextricably intertwined; second, it is frequently argued that Nepal’s ‘social peace’ is best protected by upholding the *status quo* of the Hindu mode of secularism which maintains the primacy of Hinduism, but guarantees the freedom to profess any of the ‘ancient religions’.

Nepali was again declared both the language of the nation (*rāshtrako bhāsā*) and the official language, while the other mother tongues were defined as national

³² Article 19 of the Constitution of the Kingdom of Nepal, 1990.

³³ DHUNGEL et al., 1998, p. 181.

³⁴ 10 Bhadra 2047, 54th meeting of the 1990 Constitution Recommendation Commission (my translation)

languages (*rāshtriya bhāṣā*).³⁵ In the Fundamental Rights an Article was included to guarantee cultural and educational rights allowing the various communities of Nepal to promote their languages and cultures and to run their schools up to primary level in their own language.³⁶ Most of my informants claimed that there was little debate about the position of the Nepali language amongst the Commission members. The position of Nepali as the lingua franca and official language of the country remained unchallenged, although it was agreed that the country's other languages deserved the space to flourish.³⁷

In the Commission there was passionate debate regarding the position of the monarchy and the extent of its powers. The principle of 'King in parliament' was adopted, executive powers were vested in the King and in the Council of Ministers, no issue concerning any action of the monarch could be raised in any court nor discussed in Parliament, the King's name was included in the name of most constitutional bodies, and he was made Supreme Commander of the Army.³⁸ Although the ULF members professed a republican ideology, at that time it was not possible to do away with the monarchy and they had to compromise. However, the Communists aimed at reducing considerably the powers of the King. Madhav Nepal had in mind the framework of the Spanish constitution which inspired him to adopt what he defined a 'republican monarchy' system with the King as a mere figurehead.³⁹ The Nepali Congress and the Palace delegates managed to impose a "constitutional monarchy with higher status and privileges" through a majority vote.⁴⁰

Moreover, the monarchy is defined in Nepali as 'rājtantra' in the new constitution. This term is directly connected to the type of democracy the 1990 Constitution establishes: 'prajātantra'. The term 'prajā' (people) retains a sense of subject-hood: there can not be a 'prajā' unless there is a 'rājā'. Notably, leftist political parties have usually preferred the term 'ganatantra' because a 'gana' can be defined as a 'community characterised by internal equality on any given issue'. So, the 1990 constitution, while establishing Fundamental Rights for all Nepali citizens, implicitly still makes them the King's subjects. This is reflected in the provisions relating to His Majesty. While Article 27 (2) makes the King "the symbol of Nepalese

³⁵ Article 6 of the Constitution of the Kingdom of Nepal, 1990.

³⁶ Article 18 of the Constitution of the Kingdom of Nepal, 1990.

³⁷ Interview with Surya Nath Upadhyaya, Kathmandu, 22/03/2007.

³⁸ Article 119 of the Constitution of the Kingdom of Nepal, 1990.

³⁹ Interview with Madhav Kumar Nepal, Kathmandu, 10/04/2007.

⁴⁰ HACHHETHU, 1994, p. 103.

nationality and the unity of Nepalese people”, Article 27 (1) makes it clear that His Majesty must be “a descendant of the Great Prithvi Narayan Shah and an adherent of Aryan culture and Hindu religion”. This article, by making indirect reference to the model of Hindu kingship, aimed at providing religious and historical legitimacy to the Shah monarchy.

Ultimately, all the CRC members found an agreement and signed the constitution draft, but the ULF members submitted a Six Points of Dissent document in which they accepted the draft but with some reservations.⁴¹

THE WORK OF THE CABINET COMMITTEE

On 10 September 1990, Chairman Bishwa Nath Upadhyaya submitted the draft prepared by the Commission to the King who handed it over to PM Bhattarai for finalisation. The Prime Minister set up a three-Minister Cabinet Committee under the coordination of the moderate ULF Minister Nilamber Acharya to fulfil that task. The other two members of the Committee were the Congress Home Minister Yog Prasad Upadhyaya and the Royal nominee Dr. Keshar Jung Rayamajhi, the Minister of Education. The three Ministers went outside Kathmandu and worked for eight days in Godavari to finalise the document.⁴²

The Committee made three significant changes to the CRC draft. Firstly, it settled the debate about secularism vis-à-vis the Hindu state. The CRC draft formulated the provision in a manner that made being Hindu only a prerequisite for the monarch. The Cabinet Committee inserted a comma in the Article specifically defining the state as Hindu. In the interview with Yog Prasad Upadhyaya, the former Home Minister – looking back at the notorious ‘incident of the comma’ – said that he was still not sure if the insertion of the comma was a stroke of genius or a childish gesture. He maintained that the character of the 1990 document was undeniably secular. In his view, the definition of Nepal as a Hindu state had a mere symbolical value and that the majority of Nepalis desired it. When asked how the idea of a democracy could be reconciled with the idea of a Hindu state, he said: “The Queen is the Head of the Church of England, but who could say that the UK is not secular?”⁴³

⁴¹ The main points of the ULF dissatisfaction with the draft regarded the position of the monarchy.

⁴² Interview with Keshar Jung Rayamajhi, Kathmandu, 15/04/2007.

⁴³ Interview with Yog Prasad Upadhyaya, Kathmandu, 11/04/2007.

Secondly, according to the draft, every provision was amendable by Parliament with a two thirds majority. The Ministers introduced a limitation and allowed for amendments which “do not prejudice the spirit of the Preamble”.⁴⁴ The introduction of the Indian derived ‘basic structure doctrine’ in Nepal’s constitution was advocated both by the Congress, aiming to safeguard democracy, and by the Palace for its own self-preservation. Lastly, the Cabinet modified the provision regarding treaty ratification and specified that treaties of an ordinary nature concerning peace and friendship and natural resources could be ratified by simple majority.⁴⁵ The Committee also received from the Palace Chief Secretary Reabatti Raman Khanal a list of approximately eighteen points to be revised in the CRC draft, mostly concerning the position of the monarchy.⁴⁶

The dissatisfaction of the Palace with the constitution draft manifested itself openly on 22 October 1990 when the Gorkhapatra, the Government-owned daily newspaper, published an article stating that Palace had prepared a separate draft. There was a public outcry and the King came under heavy criticism. The following day the Palace issued a statement claiming that the draft had been prepared in consultation with Prime Minister Bhattarai. The Prime Minister, however, denied any knowledge of the separate royal draft and put pressure on the King to promulgate the CRC draft as revised by the Cabinet. Thus, the new constitution was promulgated by King Birendra shortly afterwards on 9 November 1990.

CONCLUSIONS

The 1990 Constitution of the Kingdom of Nepal was devised to transform the Nepalese polity into a functioning democracy. The document formally recognised the plural and diverse nature of the country’s social fabric, but concretely put emphasis on individual rights, in line with the liberal tradition embraced by the constitution makers. The establishment of democracy was considered sufficient to guarantee every citizen’s fundamental rights, irrespectively of their ethnic, religious, and regional affiliation. To a certain extent, the institution of a democratic order was also considered the prerequisite for ‘modernisation’ and ‘development’.

⁴⁴ Article 116 of the Constitution of the Kingdom of Nepal, 1990.

⁴⁵ Article 126 of the Constitution of the Kingdom of Nepal, 1990.

⁴⁶ Interview with Nilamber Acharya, Kathmandu, 12/04/2007.

The Westminster model was adopted because considered the most successful institutional form in which a monarch could coexist with democratic forces. Moreover, the Indian experience of growing communal violence since the 1980s led the Nepali constitution makers to discard the minority approach. Historically, the ‘modernising’ tool of legal uniformity was introduced in the Himalayan kingdom by Jang Bahadur Rana with the promulgation of the Muluki Ain in 1854. The old Country Code was employed by the Rana ruler as a nation-building device: to be a modern nation a certain degree of internal homogeneity seemed to be required.⁴⁷ The new 1963 Muluki Ain kept in line with the old Code and rejected the idea of Indian-style personal laws.⁴⁸ The 1990 constitution followed in the footsteps of the country’s legal tradition as well by attempting to exert even a stronger central control to reinforce and consolidate state sovereignty.

Moreover, thirty years of Panchayat state-constructed nationalist discourse had long-standing effects on the Nepali psyche in defining what being Nepali was supposed to mean. During the 1990 constitution-making process, ethno-linguistic, religious, and regional diversity was perceived as richness of the Nepalese heritage, but – at the same time – as a disaggregating factor, a potential danger, and a structural weakness, especially vis-à-vis India. To a certain extent such diversity was considered a ‘traditional’ relic obstructing the modernising process envisioned by the constituents. Surprisingly, at the same time, the constitution makers chose to rely on the same narratives of the Panchayat era to define the essential coordinates of ‘Nepaliness’: Hinduism, the Nepali language, and the Shah monarchy as the unifying factors of the Nepalese polity. The process of institutional borrowing carried out during the 1990 constitution-making experience sheds light on the aspirations of the drafters for a democratic and more equitable Nepal. However, the dismissal of the 1990 Constitution in early 2007 proves that the institutionalisation of democracy and the effective inclusion of disadvantaged groups require more than carbon-copying foreign models. To achieve such goals a great deal of political responsibility and commitment to the constitutional values on the part political actors is essential.

⁴⁷ For a detailed discussion on the Muluki Ain see: Andras HÖFER, *The Caste Hierarchy and the State in Nepal*, Innsbruck: Universitätsverlag Wagner, 1979.

⁴⁸ Interview with Bishwa Nath Upadhyaya, Kathmandu, 16/05/2007.

BIBLIOGRAPHY

- CHIBA, Masaji, *Legal Pluralism: Towards a General Theory through Japanese Legal Culture*, Tokai: Tokai University Press, 1989
- DHUNGEL, Surya with Bipin ADHIKARI et al., *Commentary on the Nepalese Constitution*, Kathmandu, 1998
- DHUNGEL, Surya, Pushkar M. BAJRACHARYA and Bhuban B. BAJRACHARYA (eds.), *Reading in the Legal System of Nepal*, Delhi: Law Publications, 1986
- ELLINGSON, Ter, 'The Nepal Constitution of 1990: Preliminary Considerations', *Himalayan Research Bulletin*, XI: 1-3 (1991)
- FISHER, William F., 'Nationalism and the Janajati', *Himal*, Mar/Apr (1993)
- GELLNER, David (ed.), *Resistance and the State: Nepalese Experiences*, New Delhi: Social Science Press, 2002
- GELLNER, David N., Joanna PFAFF-CZARNECKA and John WHELPTON (eds.), *Nationalism and Ethnicity in a Himalayan Kingdom: the Politics of Culture in Contemporary Nepal*, London: Harwood Academics, 1997
- HACHHETHU, Krishna, 'Transition to Democracy: Negotiations behind Constitution Making, 1990', *Contributions to Nepalese Studies*, 21:1, 1994, pp. 91-126
- HACHHETHU, Krishna, *Party Building in Nepal. Organization, Leadership and People*, Kathmandu: Mandala Book Point, 2002
- HÖFER, Andras, *The Caste Hierarchy and the State in Nepal*, Innsbruck: Universitätsverlag Wagner, 1979
- HOFTUN, Martin and William RAEPER, *Spring Awakening. An account of the 1990 Revolution in Nepal*, New Delhi: Penguin Books, 1992
- HOFTUN, Martin, William RAEPER and John WHELPTON, *People, Politics and Identity. Democratic and social change in Nepal*, Kathmandu: Mandala Book Point, 1999
- HUTT, Michael, *Nepali. A National Language and its Literature*, New Delhi and London: Sterling Publishers and School of Oriental and African Studies, 1988
- HUTT, Michael (ed.), *Nepal in the Nineties: Versions of the Past, Visions of the Future*, New Delhi: OUP, 1993
- HUTT, Michael, 'Drafting the 1990 Constitution', in Michael HUTT (ed.), *Nepal in the Nineties: Versions of the Past, Visions of the Future*, New Delhi: OUP, 1993, pp. 28-47
- HUTT, Michael (ed.), *Himalayan People's War. Nepal's Maoist Rebellion*, London: Hurst & Company, 2004

- ICG, *Towards a Lasting Peace in Nepal: the Constitutional Issues*, International Crisis Group: Asia Report N. 59, 15 June 2005.
- ICG, *Nepal's Constitutional Process*, International Crisis Group: Asia Report N. 128, 26 February 2007
- Integrated Organisation System (IOS), *Constitutional Dynamics of Impasse*, Kathmandu: Plusmedium/IOS, 2004
- JOSHI, Bhuvan L. and Leo E. ROSE, *Democratic Innovations in Nepal*, Berkeley: University of California Press, 1966
- KHANAL, Bishal, *Regeneration of Nepalese Law*, Kathmandu: Bhrikuti Academic Publications, 2000
- KRAMER, Karl Heinz, 'Resistance and the State in Nepal: How Representative Is the Nepali State?', in David GELLNER (ed.), *Resistance and the State: Nepalese Experiences*, New Delhi: Social Science Press, 2002, pp. 179-198
- LAWOTI, Mahendra, 'Centralizing Politics and the Growth of the Maoist Insurgency in Nepal', *Himalaya*, XXIII (1) (2003), pp. 49-58
- LECOMTE-TILOUINE, Marie and Pascale DOLLFUS, *Ethnic Revival and Religious Turmoil. Identities and Representations in the Himalayas*, New Delhi: Oxford University Press, 2003
- MENSKI, Werner, *Comparative Law in a Global Perspective*, London: Platinum, 2000
- ONTA, Pratyoush, 'Ambivalence Denied: the Making of Rastriya Itihas in Panchayat Era Textbooks', *Contributions to Nepalese Studies*, 23:1 (1996a), pp. 213 – 254
- PANT, Shastra Dutta, *Comparative Constitutions of Nepal*, Kathmandu: SIRUD, 2001
- REGMI, Mukunda, *Samvaidhānik Vikās ra Nepāl Adhirādyako Samvidhān 2047* [Constitutional development and the Constitution of the Kingdom of Nepal, 1990], Lalitpur: Millennium Press, 2004, Vol. 1 & 2
- SARTORI, Giovanni, *Ingegneria Costituzionale Comparata*, Bologna: il Mulino, 2000
- SHAH, Saubaghya, 'A Himalayan Red Herring? Maoist revolution in the shadow of the Legacy Raj', in M. HUTT (ed.), *Himalayan "People's War": Nepal's Maoist Rebellion*, London: Hurst & Company, 2004, pp. 192-224
- SHAHA, Rishikesh, *Politics in Nepal 1980-1991*, New Delhi: Manohar, 1993
- SHARMA, Sudhindra, 'The Hindu State and the State of Hinduism', in K. DIXIT and RAMACHANDARAN (eds.), *State of Nepal*, Kathmandu: Himal Books, 2002, pp. 22-38
- STILLER, Ludwig, *Prithvi Narayan Shah in the Light of Ditya Upadesh*, Kathmandu: the author, 1968
- SUBEDI, Surya, 'Constitutional Accommodation of Ethnicity and National Identity in Nepal', *International Journal on Minority and Group Rights*, Vol. 6 (1999), pp. 121-147

- SUBEDI, Surya, *Dynamics of Foreign Policy and Law. A Study of Indo-Nepal Relations*, New Delhi: Oxford University Press, 2005
- TRIPATHI, Hari Bansh, *Fundamental Rights and Judicial Review in Nepal (Evolution and Experiments)*, Kathmandu: Pairavi Prakashan, 2002
- WORLD BANK/DFID, *Unequal Citizens: Gender, Caste and Ethnic Exclusion in Nepal* – Summary, Kathmandu: World Bank Nepal Office, 2006