

## **NEPAL: OBSTACLES TO PEACE**

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## TABLE OF CONTENTS

<b>EXECUTIVE SUMMARY AND RECOMMENDATIONS .....</b>	<b>i</b>
<b>I. INTRODUCTION .....</b>	<b>1</b>
A. UNDEMOCRATIC PEACE? .....	2
B. THE KING'S QUANDARY.....	4
C. THE STATE OF PEACE TALKS .....	6
<b>II. CONSTITUTIONAL CONSIDERATIONS.....</b>	<b>11</b>
A. SHOULD THE CURRENT CONSTITUTION BE SAVED? .....	13
B. CONTROL OF THE ROYAL NEPALESE ARMY .....	13
C. ROYAL PRIVILEGE .....	15
D. MINORITY RIGHTS, THE ELECTORAL SYSTEM AND DECENTRALISATION.....	16
1. Proportional Representation? .....	17
2. Reservations about Reservations .....	18
3. Religion and Language .....	19
4. The Case for Decentralisation .....	21
<b>III. MANAGING THE PEACE PROCESS.....</b>	<b>23</b>
A. MONITORING THE CODE OF CONDUCT .....	23
B. FACILITATING TALKS? .....	24
C. A ROLE FOR THE PARTIES? .....	25
<b>IV. CONCLUSION.....</b>	<b>27</b>
 <b>APPENDICES</b>	
A. MAP OF NEPAL.....	29
B. GLOSSARY OF ABBREVIATIONS .....	30



## NEPAL: OBSTACLES TO PEACE

### EXECUTIVE SUMMARY AND RECOMMENDATIONS

Despite King Gyanendra's appointment of a new prime minister in June 2003, Nepal remains in a deepening political crisis. By turns conciliatory and confrontational, its royalist government, the Maoist insurgents and the recently ousted political parties have all proven capable of derailing the peace process if their concerns are not addressed. With political parties shut out of peace talks and the palace continuing efforts to keep them off balance and marginalised, party activists have increasingly taken to the streets. This has left the king in an awkward position: wishing to retain control of the government without appearing to be doing so. Such an approach is ultimately untenable, as the controversial appointment of Prime Minister Surya Bahadur Thapa makes clear.

A large number of constitutional issues will have to be tackled if Nepal hopes to resolve either the war with the Maoists or its constitutional crisis. However, it will not be possible to forge a broad consensus on these issues if the king remains the supreme decision-maker and the peace talks remain solely a dialogue between palace representatives and the Maoists. Establishing an all-party government is an essential step in beginning the march back toward a genuine democratic process regardless of the Maoists' relative sincerity about peace.

It is also incumbent upon the political parties to act more responsibly. They should forge an agreement on the composition of an all-party government and present this to the palace before an all-party

government is formed. Only by curtailing their perpetual internal feuding can they demonstrate to the people of Nepal that they are serious about governance and to be trusted with a seat at the negotiating table.

With the broad range of issues that have been opened by the war and the constitutional crisis, a lasting solution demands the support and input of an array of social forces well beyond the king, the parties and the Maoists. Efforts to tackle the country's deep economic and social disparities should be paramount in constitutional reform. Consensus must be developed on several broad issues: the need for substantial and well-structured decentralisation of power and budgetary authority; stronger civilian control over the Royal Nepalese Army (RNA); a more representative electoral system; and ensuring that no one, including the king, is deemed above the law. All these are areas where reasonable compromise can create a broad convergence of opinion not only between the Maoists, the parties and the palace, but across society as a whole.

It is also crucial that the peace process itself be managed more professionally. The unsteady pace of negotiations, changes in personnel, failures of communication and lack of adequately trained negotiators and facilitators all have the potential to unravel an already uncertain process. Yet another change of both government and negotiators in the middle of talks has only hardened suspicions and further slowed matters. The government and the

international community should explore ways to provide negotiators with the tools they need to make talks successful. Small numbers of UN experts from neutral countries could be deployed to assist local groups observe the code of conduct signed by the government and the Maoists to govern their behaviour during the ceasefire, and trained facilitators could be brought behind the scenes to ensure that negotiations proceed in a more orderly and professional manner. Peace can only be made and secured by the Nepalese, but the international community can and should play an important supporting role.

## **RECOMMENDATIONS**

### **To King Gyanendra, the palace and the royalist government:**

1. Make clear that as part of any negotiated peace settlement or constitutional revision the monarch and the royal family will no longer be considered above the law, and that specific actions by the king can be questioned by the parliament or the courts.
2. Reconvene an all-party meeting and indicate that the king will accept the formation of an all-party government if the political parties represented in the last parliament reach an agreement on power-sharing within such a government.
3. If progress is made on forming an all-party government, ensure that the composition of the delegation negotiating with the Maoists includes all the major political parties.
4. Endorse the notion of small numbers of UN experts – drawn from neutral and non-controversial nations – assisting in monitoring the code of conduct, working directly with the National Human Rights Commission and providing that body the technical assistance it needs to carry out independent, impartial and credible monitoring in areas controlled by both the Maoists and the government.

### **To the political parties represented in the former parliament:**

5. Build pressure to restore democracy by again forwarding a joint selection for the post of prime minister, and agree on a specific power-sharing proposal for an all-party government including a detailed plan identifying both party officials and skilled technocrats who would serve.
6. Agree to assign the Home Ministry to a neutral technocrat.

### **To the Maoists:**

7. Take firmer steps to ensure that extortion efforts – even under the guise of “donations” – are discontinued at the village level.
8. Make clear efforts, including in their mass communications, to educate cadres about and otherwise demonstrate the seriousness of their new commitment to multi-party democracy and open markets.
9. Continue with efforts to meet senior members of the Western diplomatic community as part of a process of mutual education.
10. Articulate clearly to the public how they envision a national roundtable conference and constituent assembly would work in practice.
11. Prepare cadres for the inevitable compromises that a serious peace negotiation must entail.

### **To the royal palace, the Maoists, political parties and Nepalese civil society:**

12. To assist the peace process and eventual constitutional revisions, develop a basic minimum consensus on a program for constitutional change and institutional reform involving:
  - (a) a formula for the substantial devolution of power and financial authority (perhaps establishment of a federal system);
  - (b) efforts to reduce the number of districts to a more manageable scale and to draw reconstituted districts along geographic and not ethnic lines; and

- (c) steps to remove the current ambiguity concerning the role of the monarchy with regard to “emergency” powers and oversight of the Royal Nepalese Army.

**To the International Community:**

13. Steadily increase pressure on the king and the royalist government to form an all-party government and set a clear timetable for a return to democracy.
14. Make clear, quietly, but firmly, especially to the government, that international mediation or facilitation for the peace talks would be useful and made available, including a range of technical assistance such as the training of negotiators and help in establishing a more effective secretariat for talks.
15. Regional powers India and China should lift opposition to international technical assistance for Nepalese groups designated to monitor the “code of conduct” – the agreement between the Maoists and the RNA governing their behaviour during the cease fire.
16. India, the United States and United Kingdom should make clear that the further provision of military assistance to the government of Nepal will remain contingent upon good faith efforts at the negotiating table and a clear timetable for restoring democratic order.

**Kathmandu/Brussels, 17 June 2003**



## NEPAL: OBSTACLES TO PEACE

### I. INTRODUCTION

With the 5 June 2003 swearing in of Prime Minister Surya Bahadur Thapa, Nepal appeared to continue a relentless series of political reshuffles that has failed to provide the conditions for lasting peace or stability. The 75-year-old Thapa, who has served as prime minister four times previously,<sup>1</sup> was hand-picked by King Gyanendra over the strenuous objections of the mainstream political parties and amid increasing concern by the Communist Party of Nepal (Maoist) that the political machinations were designed to derail the peace process.<sup>2</sup> In effect, the appointment – other than generating a great deal of general animosity and concern that the king is looking to cement his hold on power – did little to change the current dynamic and may only further encourage both the parties and the Maoists to take to the streets.

Even before Thapa's appointment, an uneasy back and forth between negotiators from the Nepalese royalist government and the Maoists over the pace, agenda and substance of peace talks seemed to suggest that any deal struck solely between them

would not stand the test of time. By the reckoning of almost all involved, any peace deal will require some form of constitutional amendment, or even the preparation of a new constitution. Without the broad buy-in of society, constitutional revision will be less a social compact than another short-term expedient for the palace and the Maoists. Nepal's experience since 1990 has already demonstrated that unless the broad forces in society act in the spirit of the constitution, its implementation will be uneven and problematic, making it all the more difficult to establish the rule of law.

The mainstream political parties, currently excluded from both government and peace talks, have become increasingly vocal regarding what they call "regressive" steps by the king on 4 October 2002 in suspending the democratic process. They have backed up their expressions of discontent with an active and escalating agenda of social protest. The king's decision to appoint Thapa rather than a consensus candidate backed by five major parties only seemed to harden resolve. A European ambassador described the situation as, "a rather lethal combination of stalled negotiations, national strikes and paralysis in the centre, compounded by traditional complacency among the Kathmandu elite who think the Maoists have come out of the jungle with their hands up".<sup>3</sup> In short, even if the two-way talks between palace and Maoists were to resume quickly after the break caused by the political upheaval, such a negotiating structure appears poorly suited for

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<sup>1</sup> Thapa served as Prime Minister three times during the *panchayat* era (1963-1964; 1965-1969; and 1979-1983), and once after democracy was instated (1997-1998).

<sup>2</sup> For purposes of this report, the Communist Party of Nepal (Maoist) is referred simply to as "the Maoists". For extensive background on the genesis of the war in Nepal, see ICG Asia Report No. 50, *Nepal Background: Ceasefire – Soft Landing or Strategic Pause?*, 10 April 2003.

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<sup>3</sup> ICG interview, Kathmandu, 24 April 2003.

reaching concord on fundamental issues of governance and state institutions.

All this makes clear that the issues in Nepal are complex and deeply interlocked, and that thoughtful and pragmatic leadership will be needed by both the Nepalese and the international community if the situation is to not spin out of control again. This report looks at the key substantive and procedural issues that pose a direct threat to a very fragile peace, and makes practical and specific recommendations to help all sides move forward.

## A. UNDEMOCRATIC PEACE?

Before the 30 May 2003 resignation of Prime Minister Lokendra Bahadur Chand, widespread student protests directly backed by the Congress Party and the Unified Marxist Leninists (UML) repeatedly brought much of the country to a standstill. These have largely consisted of *bandhs*, or general strikes, that businesses and the government observe by simply closing for the day. Large numbers of police and military have been deployed to counter any potential violence. A number of college campuses have seen the burning of government vehicles by angry students and altercations with security forces. A handful of student leaders have disappeared or been killed.<sup>4</sup> While these protests were originally launched in response to rising fuel prices and delayed student elections, they were quickly used by the political parties to demonstrate that while they lack the armed force of both the government and the Maoists, they can still play a major spoiler role if their views are not taken into consideration.

At a mass rally in Kathmandu on 4 May 2003, the Congress Party and the UML (joined by several smaller parties) announced a series of protests beginning on 8 May that have included the boycott of government functions, torch-lit rallies, blocking of government vehicles and even, on 28 May, convening of a “shadow” session of the dissolved parliament.<sup>5</sup> Portraying their actions as a second phase of the “people’s movement” that led to the acceptance of the multi-party system by King Birendra in April 1990, the parties have increasingly made the royal palace the target of their rhetoric. At the 8 May rally, Congress Party leader Girija Prasad Koirala went so far as to claim that the “Palace is the root cause of all the instability that has beset the nation in the past many years”.<sup>6</sup> He added, “This movement is directly targeted against the king and such activities”.

Koirala’s comments rather conveniently overlook the share of blame that the political parties, including his, deserve for the continuing crisis. However, they underscore the fact that it will be difficult to achieve a lasting peace if Nepal’s democratic forces feel they are completely marginalised by both an assertive monarch and Maoist forces who have always made their contempt for party leaders well-known.

Reaction to the move by the parties to step up street demonstrations has been mixed and often highly critical. Former Prime Minister Lokendra Chand lambasted them for “fomenting trouble at a time when the government and the Maoists are engaged in the peace process”, blamed them for most of the country’s difficulties since 1990, and insisted that it was their brinkmanship that forced the king to restore an environment of law and order.<sup>7</sup>

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<sup>4</sup> Student protests over price hikes in kerosene erupted with increasing violence after the Chairman of the Nepal Progressive Student’s Union, Devi Ram Poudel, was shot and killed by police during a demonstration on 8 April 2003. After the protests widened and a number of student leaders were detained, the decapitated bodies of two such leaders, Prit Kumar Moktan and Bhupendra Timalina, associated with the All Nepal National Independent Student’s Union (Revolutionary) – a Maoist aligned group – were found. The government has denied any links to the killings.

<sup>5</sup> At least twelve former parliamentarians were injured when police mounted a baton charge at protestors headed for the parliament.

<sup>6</sup> *The Kathmandu Post*, 5 May 2003.

<sup>7</sup> Prime Minister Chand’s address to the nation, 1 May 2003. As has been noted by a number of political commentators, his comments gloss over the fact that he has long been active in party politics and served as prime minister in a democratically elected government during the 1990s.

While it is easy to dismiss these comments as somewhat self-serving, many Nepalese do appear concerned that street protests could get out of control and spark entirely unpredictable violence. The public has widely and rightly decried property destruction by students, and many in Kathmandu and across the country are simply weary of the seemingly unending barrage of *bandhs*, with their associated costs and inconveniences.<sup>8</sup> However, the king's continuing resistance to an all-party government may well be generating increased backing for street protests in support of democracy.

The party activities have also received a cool reception in the diplomatic community. A senior Western diplomat observed, "The parties are not playing a very helpful role. They are spoilers at this point. Peaceful protest is fine, but leaders should lead and they should come out against violence".<sup>9</sup> This diplomat also suggested that the greatest failure of the parties was their inability to galvanise public and international support for elections after the King suspended the democratic process.

Part of the problem with the parties remains their consistent inability to articulate a clear vision of where they want to take the country. One international democracy expert explained:

The parties here still want to win over every voter in Nepal, and so they only express their views in the broadest generalities, being for "peace", "development" and "equality". They have no sense of targeting a specific platform to specific constituencies, and consequently there is no real debate about issues and no

mandate for pushing forward specific policies.<sup>10</sup>

Yet, as the street protests have demonstrated, the parties – while often quite poor at moving a positive agenda – are quite good at being obstructionist. This also suggests that they retain a measure of support among the public.

An international democracy expert was taken aback by the effectiveness of recent party protests at the local level, even in areas where mainstream political activists have often been intimidated by Maoist cadres in recent years. This expert observed:

In all the districts I travelled through, and in many more, there were well-coordinated events with an impressive turnout of ex-local officials and political cadres. These activities included sit-in protests in each Village Development Committee and Municipality, sit-in protests in each District Development Committee and picketing at District Administrative Offices.<sup>11</sup>

In some locations protests have been largely peaceful, while in others police crackdowns only seemed to generate local sympathy for the protestors. According to this expert, participants in the district movements were much more representative than protestors in the capital and were putting forward a common message that "we are local officials elected by the people and our power has been usurped".

While creating a three-way peace deal – parties, palace and Maoists – may involve seemingly endless headaches, it is increasingly apparent that a deal without the parties may simply be impossible.

One senses that part of the international reluctance to speak more forcefully for democracy in Nepal is driven by the sheer frustration of diplomats in dealing with party leaders. While such an hypothesis is obviously impossible to prove objectively, the sense of exasperation among diplomats who cite corruption, doublespeak and petty self-interest as frequent sins

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<sup>8</sup> On 21 April 2003, students set the varsity printing press building at Tribhuvan University ablaze with considerable property damage. The image of students burning a printing press quickly became emblematic for those objecting to the protests. In addition, a survey by the Nepalese Chambers of Commerce and Industry claims that the country loses about .3 per cent of gross domestic product during each *bandh*. While this figure is likely somewhat inflated, it does speak to the scope of the problem at a time when there were four *bandhs* in less than a ten day period in late April 2003.

<sup>9</sup> ICG interview, Kathmandu, 29 April 2003.

<sup>10</sup> ICG interview, Kathmandu, 30 April 2003.

<sup>11</sup> ICG correspondence, 27 May 2003.



among party leaders is plain. Many of these embassy officials speak more kindly of the king, his desire for reform and the general efficiency exuded by the palace. However, it would be a shame if the international community gave short shrift to a young and fragile democracy simply because the palace “runs a better meeting”.

Nepal’s political parties remain discredited in many eyes for their often-dysfunctional performance while in office, but as an influential journalist argued, “the long-term solution is with the political parties. The diplomatic community has painted itself into a corner by bad mouthing the parties for so long. The parties are not as bad as they are made out to be”.<sup>12</sup> This comes at a time when two of the Nepalese facilitators engaged in the peace process have directly warned that the talks could fall apart in 2003 as they did in 200. “Much like the previous time, there are chances that the talks may founder. The reason is there is no role for political forces, civil society and human rights activists”, argued Padma Ratna Tuladhar.<sup>13</sup>

## B. THE KING’S QUANDARY

The king’s handling of the recent switch in prime ministers underscores the inherent danger in having all government policy flow from within the palace walls. When Prime Minister Lokendra Chand announced his “resignation” on 30 May after eight months in office, it was widely assumed that he had been pressured to step down by the king. There was also widespread anticipation that the monarch would use the resignation as an opportunity to form an all-party government.

The impression that the king was eager to reach out to the parties was heightened when he hosted an all-party meeting at the palace on the evening of 30 May during which he asked the five parliamentary parties to forward a common candidate for prime minister within 72 hours. Although the parties engaged in much of their usual infighting, they did agree on UML General Secretary Madhav Kumar Nepal as their choice to run the new government. It

is also of note that two members of the government’s negotiating team at that time, who each head other parties, threw their hats into the ring, calling into question their ability to focus on the peace talks.<sup>14</sup>

Despite the agreement on a common candidate among the five parties that have been leading the protests against the government, the king appointed Thapa. The palace also announced that it would restore full executive powers to the prime minister, in what appeared to be a half-hearted step to encourage the parties to join the government.

Thapa’s appointment brought intense speculation within Nepal that foreign forces – particularly the United States and India – had directly intervened to block the parties’ choice because they were uncomfortable with a government headed by a Marxist-Leninist party leader, despite the fact that the UML is far more centrist than its name would imply. Some also hypothesised that the king dangled the prospect of an all-party government in front of the parties as part of a failed effort to encourage greater divisions between the Congress and UML, or simply as part of a larger strategy to take a “go-slow” approach both to negotiations and the restoration of democracy.

Thapa is the former head of the Rastriya Prajantra Party (RPP), the same party as his predecessor. He had made a six-day visit to India immediately after an audience with King Gyanendra in late April, fuelling speculation that he was angling for the prime ministerial post at that time. Despite his efforts to pull members of the UML and Congress into his cabinet, the mainstream parties have made clear that they still view the government as an unconstitutional puppet of the palace and that they will continue street protests.

Shortly after Thapa’s appointment, the Prime Minister announced the formation of a new negotiating team on 12 June 2003. This reconstituted team includes Finance Minister Dr. Prakash Chandra Lohani and Minister of Communications Kamal Thapa. It is anticipated

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<sup>12</sup> ICG interview, Kathmandu, 29 April 2003.

<sup>13</sup> *Kathmandu Post*, 11 May 2003.

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<sup>14</sup> Minister for Physical Planning Pun and Deputy Prime Minister Badri Prasad Mandal

that this team will be expanded in the coming weeks. Maoist officials indicated a willingness to continue talks with this new team, but the overhaul of the government negotiating team will surely delay what already appears to be a protracted peace process.

In private conversations, both party officials and diplomats suggest that before Chand's resignation the king had repeatedly made overtures to bring the leaders of the Congress and UML parties into government – even offering the post of prime minister job as an incentive.<sup>15</sup> However, party leaders were and are reluctant, fearing that it would give the royalist government a broad stamp of legitimacy without securing genuine executive authority for democratic leadership. One Western ambassador suggested that while the king had been “toying with” the notion of an all-party government, “demonstrations have convinced him that he needs more breathing room”.<sup>16</sup> The accelerated investigations into the parties by the Commission for the Investigation for the Abuse of Authority (CIAA) may also be a sign that the palace is eager to keep the parties off balance for some time.<sup>17</sup>

King Gyanendra's quandary appears to be that he wishes to remain in control but not look like it. This has led to a series of changes within the cabinet at his behest that ultimately culminated with Chand being out a job. On 11 April 2003, three ministers were dismissed: Home Minister Dharma Bahadur Thapa; Education Minister Devi Prasad Ojha; and Minister for Industry, Commerce and Supplies Mahesh Lal Pradhan. This was announced in a press release issued by the palace, implying that King Gyanendra had acted in keeping with his emergency powers under the constitution. It was widely suggested that the home minister was dismissed for opposition to the peace talks, while the other two were dismissed for poor handling of the student protests and the kerosene price hikes

that helped give momentum to the initial demonstrations.

But changing prime ministers without bringing in either the UML or Congress has done little to belie the notion that the king maintains absolute authority within the government. As one journalist said, “It is baffling that the king maintains the façade that he is not in control”.<sup>18</sup> This fiction is quite useful in keeping international support for the struggle against the Maoists. However, the longer the king retains control over the political system, and the longer the period without elections, the more difficult it will be for major international actors to continue largely unconditional military and development assistance.

While those currently in government often say the correct thing about the need for a restoration of democracy and the importance of including the parties in the peace process, their true feelings sometimes emerge from behind closed doors. A former member of the government negotiating team maintained, “His Majesty has made it very clear that he supports democracy and constitutional monarchy”, but added, “If the parties are only concerned about the legitimacy of the government, and not the peace process, and they weaken themselves, they will only hurt the country”. And more bluntly: “Nobody really cares about multi-party democracy; they want peace”.<sup>19</sup> The re-emergence of several hardline advisors from the *panchayat* era in the king's inner circle – “very nasty characters” as one veteran Nepal expert commented – has also raised concerns about the king's attitude toward multi-party government.<sup>20</sup>

Although the king controls the military and the commanding heights of the government, his hold on power is in many ways precarious. Observing that he has no real organisational support in the way that the parties do, a journalist said, “the king's power is brittle, and despite their weakness the

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<sup>15</sup> ICG interviews, April-May 2003.

<sup>16</sup> ICG interview, Kathmandu, 24 April 2003.

<sup>17</sup> The CIAA was established in the constitution to conduct inquiries and investigations into improper conduct or corruption by any person holding public office.

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<sup>18</sup> ICG interview, Patan, 4 May.

<sup>19</sup> ICG interview, Kathmandu, 24 April 2003.

<sup>20</sup> ICG interview, 13 June 2003.

parties are not as brittle as the palace and the Maoists".<sup>21</sup>

Ironically, by seizing control of the state through what has been widely and rightly seen as a series of extra-constitutional measures and twice appointing a hand-picked prime minister, King Gyanendra has made his own constitutional rights and responsibilities central to the demands of both the Maoists and the political parties.<sup>22</sup> The king's role as Commander in Chief of the Royal Nepalese Army (RNA), the legal and financial privileges enjoyed by the royal family, the nation's status as a Hindu kingdom and even its existence as a constitutional monarchy are all now central to the debate about war, peace and potential institutional restructuring in a negotiated settlement.

This is striking given that the Maoists began their insurgency in 1996 against a democratically-elected government, and that most of the issues they initially highlighted – corruption, political disenfranchisement, ethnic and caste discrimination, foreign influences and economic exclusion – were of concern when that government was in place. For example, although the Maoists have long supported making Nepal a republic (a demand they have muted considerably in

negotiations), the issue of resolving the constitutionally ambiguous influence of the king over the armed forces was brought to the fore relatively recently by the political parties and is now championed by the Maoists as well.

Clearly, the power and prerogatives of the crown are crucial considerations for the palace, the Maoists and the parties. Yet, it would seem important to underscore that addressing these issues, in and of themselves, will be insufficient to alter the broad political, social and economic inequities that have fuelled conflict. It is striking that sentiment among Nepal's civil society, media and intelligensia seems increasingly to favour constitutional reform far more sweeping than that envisaged by the king.<sup>23</sup>

### C. THE STATE OF PEACE TALKS

The peace process continues to move in fits and starts. The drama surrounding the selection of a new prime minister has slowed what little momentum had been achieved at the table, as has the formation of a new government team. The situation was initially dominated by the dramatic – and very public – appearance of a senior level Maoist negotiating team in Kathmandu at the end of March 2003. For most members it was the first time they had moved “above ground” since the conflict began in 1996. Dr. Baburam Bhattarai, the lead ideologue and number two in the chain of command, leads this team. Ram Bahadur Thapa, the group's military commander and Dev Gurung among others, have joined him. At a rowdy press conference in Kathmandu on 29 March, Bhattarai insisted that the Maoists were sincere about peace talks but also made clear that they would resume violence if the King refused to play a constructive role.

Since that initial press conference, the Maoist leadership has been on a whirlwind public relations tour, attending a large number of public events and holding mass rallies in Kathmandu and Nepalganj. By most estimates, more than 20,000 people turned

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<sup>21</sup> ICG interview, Patan, 29 April 2003.

<sup>22</sup> While the Supreme Court has defended the king's action in seizing control of the government under the provisions of Article 127, the independence of the court is deeply in question. On 1 May 2003 the court denied a writ seeking to have elections called, insisting that the king's open ended-order to the Chand government to hold elections – without actually setting any timetable – was sufficient. No public instructions were given by the king to Prime Minister Thapa to schedule elections. It is difficult to read the Nepalese constitution as allowing an indefinite suspension of the democratic process while virtually all functions of the government flow directly from the king under Article 127. Such sweeping royal powers seem directly contrary to the spirit of the constitution and its preamble, the first words of which note, “We are convinced that the source of sovereign authority of the independent and sovereign Nepal is inherent in the people, and, therefore, we have, from time to time, made known our desire to conduct the government of the country in consonance with the popular will”. Numerous lawyers and international officials interviewed by ICG have generally concurred that the king is operating beyond the bounds of the constitution.

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<sup>23</sup> ICG interviews, April-May 2003.

out for the rally in the capital – although it remains open to debate how many were supporters and how many were simply drawn out of curiosity. Maoist cadres have also been quite active organising political roundtables and discussions at the district and village level in areas under their control. In some respects, the fact that the Maoists have come above ground can be viewed positively. A direct return to military action is unlikely while these individuals are still visible in Kathmandu. The process of holding rallies and explaining their platform can be seen as a logical precursor for entering a more mainstream role in political life. It is also useful for the leaders to hear a broader spectrum of views than they likely did while underground.

There are also some clear risks to the high-profile strategy of the Maoists. Unfortunately, the frequent public appearances and intense local media coverage has at times degenerated into name calling and finger pointing between the royalist government, the political parties and the Maoists. All have frequently used contradictory and personalised rhetoric. Interestingly, the king has also held several public rallies around the country, acting more like a politician than many in the mainstream parties. That the parties, the palace and the Maoists all feel compelled to take their case frequently to the court of public opinion has made it more difficult to engage in serious discussion, but does demonstrate the importance of public opinion in shaping the political landscape.

The Maoists also risk encouraging unrealistic expectations among their cadres. By insisting that talks are ongoing between the “old regime” and the “new state” they claim to embody, the Maoists may be creating pressure among their cadres at the village level not to accept any compromise of their maximum demands. While the Maoists have been very well organised, the talks are clearly producing strains. There have been repeated suggestions that the Maoists would be willing to compromise on a number of core demands, but nothing suggests that they have begun to prepare their rank and file. They need to think seriously not only about the deal they are willing to accept, but also about how they can make this palatable to their own people. Unfortunately, the political turmoil in the capital

may well encourage them to a wait and see approach

Some progress appeared to be made on 16 April when the government finally announced its negotiating team, a six-member group led by Deputy Prime Minister Badri Prasad Mandal, and including Lt. Col. (Retd.) Pun, who had served as government coordinator for the talks that produced the ceasefire. Four other government ministers joined the team: Ramesh Nath Pandey, Dr. Upendra Devkota, Kamal Chaulagain and Anuradha Koirala (the only woman on either delegation). It reflects poorly on the government’s seriousness about peace talks that it took close to three months to establish a full negotiating team when the Maoists had quite quickly assembled a senior group that included the heads of their political and military wings.

Plans for “official” negotiations that were to be launched on 21 April 2003 quickly stalled as the Maoists complained that government negotiators were poorly prepared, and discussions should take place directly with the king. At a public rally in Dhangadhi, Baburam Bhattarai complained, “The old establishment should stop playing tricks from behind the curtain to make the talks a success. The King should attend the talks”.<sup>24</sup> This led a former government negotiator to say, “Everybody is trying to drag the king into this, and it shouldn’t be done”.<sup>25</sup> While it is understandable why the palace – for both protocol and appearance – does not wish to see the king directly involved, there will be continued pressure from a number of quarters to bring him to the table as long as he remains the ultimate decision maker on the government side.

Indeed, it remains unclear how empowered government negotiators are to make binding decisions. The fear in many quarters is that even though the team has been overhauled, the palace will still have final say on all major substantive issues, making normal give and take at the negotiating table more difficult. A Scandinavian diplomat noted of the earlier government team,

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<sup>24</sup> *The Himalayan Times*, 23 April 2003.

<sup>25</sup> ICG interview, Kathmandu, 24 April 2003.

“They don’t have any decision making ability”.<sup>26</sup> Again, this underscores the inherent difficulties of the king wishing to retain a close hold on the current political process while attempting to create a contrary public image.

The hiccup of delayed talks was resolved fairly quickly, and on 27 April, the first “official” round took place at the Shanker Hotel in Kathmandu. During over four hours, the Maoists provided a revised set of demands. In presenting their written demands to the government, Dr. Baburam Bhattarai argued, as he has repeatedly since coming above ground, that the 1990 constitution was effectively defunct and that a new constitution would have to be drafted by a constituent assembly. A member of the government negotiating team, while insisting before the meeting that “everything is negotiable”, countered that, “if everyone accepts the [constitutional] amendments, there is no need to move toward a constituent assembly”.<sup>27</sup>

The central Maoist demands included:

- ❑ return of the RNA to its barracks;
- ❑ information on detained and missing Maoist cadres;<sup>28</sup>
- ❑ a roundtable conference with representatives from the Maoists, the political parties and other democratic forces to establish an interim, all-party legislature under Maoist leadership;
- ❑ formation within six months by this government of a constituent assembly to produce a new constitution;
- ❑ integration of Maoist fighters into an RNA under civilian control;
- ❑ declaration of Nepal as a secular state;
- ❑ a high-level committee to investigate human rights abuses between 1996 and 2002;

- ❑ the right of self-determination and ethnic and regional autonomy for disadvantaged caste, ethnic and other minorities;
- ❑ abrogation of the 1950 Peace and Friendship Treaty with India and implementation of a non-aligned foreign policy; and,
- ❑ regulation of the border with India.<sup>29</sup>

Notably, the issue of a republic and abolishment the monarchy was considerably muted in this presentation. The Maoists suggested that the issue of the monarchy be “put to the people” with whatever decision was made (presumably either in a constituent assembly or some form of referendum) to be binding. This is not surprising since the Maoists signalled flexibility toward the monarchy during the 2001 talks, and they are negotiating with a royalist government team. When this “concession” received a great deal of press in Nepal, the Maoists felt compelled to declare that they were not giving away any ground, insisting simply, in the words of their spokesperson, Krishna Bahadur Mahara, “We have kept the question of the monarchy open”.<sup>30</sup>

The tone of the demands also seems to reflect less of traditional Maoist communist orthodoxy. This is also not surprising since as two Nepalese officials noted, efforts to “impose a system that has failed all over the world” would simply not be realistic.<sup>31</sup>

The negotiators agreed on a number of procedural steps. Four facilitators were announced for the talks: Padma Ratna Tuladhar; Daman Nath Dhungana; Shailendra Kumar Upadhyay and Karnadwoj Adhikari.<sup>32</sup> Both delegations also agreed to establish a joint “homework” team to

<sup>26</sup> ICG interview, Kathmandu, 2 May 2003.

<sup>27</sup> ICG interview, Kathmandu 24 April 2003.

<sup>28</sup> A recent Amnesty International report claimed that more than 1,000 Maoists activists remain in prison. See <http://web.amnesty.org/library/Index/ENGASA310152003>

<sup>29</sup> The Nepal-India border is an open border.

<sup>30</sup> *Kathmandu Post*, 29 April 2003.

<sup>31</sup> ICG interviews, 24 April 2003, 20 May 2003.

<sup>32</sup> Padma Ratna Tuladhar and Daman Nath Dhungana both served as facilitators during the abortive 2001 peace talks. They are former members of parliament and were nominated by the Maoist side. Kumar Upadhyay is a former government minister, and Karnadwoj Adhikari served as chief secretary. They were nominated by the royalist government.

discuss key issues<sup>33</sup> and suggest means to implement and oversee the code of conduct signed by the government and Maoists to govern their behaviour during the ceasefire.<sup>34</sup>

A second round of talks was conducted on 9 May, again at the Shanker Hotel and again largely on procedural issues. Afterwards, government negotiators appeared to agree to restrict RNA forces within five kilometres of their bases. This would have been an important tactical victory for the Maoists, given their long insistence that the RNA be returned to barracks, and would have provided them a potential military advantages since there would not have been a parallel restriction on their own cadres.

However, five days later, an RNA spokesperson indicated that the military would not restrict its movements until the Maoists returned weapons looted from it during the war.<sup>35</sup> This set off confusing and continuing exchanges regarding whether the notion of restricting RNA movements was merely a proposal or had actually been accepted. There has even been suggestion that the king sacked former Prime Minister Chand as a face saving gesture after the RNA directly objected to the king's willingness to restrict its movements.<sup>36</sup>

A thirteen-member team was also established to monitor the code of conduct, drawn largely from Nepalese civil society groups. Major political issues were not discussed, although all parties insist they will be on the agenda for future sessions. A third round was tentatively scheduled for late May 2003, in Rolpa or Rukum, but was delayed by the political intrigues around the appointment of Prime Minister Thapa that appeared to sour the environment. The government's decision to replace

its entire negotiating team further added to the general atmosphere of confusion and mistrust.<sup>37</sup>

The Maoists expressed direct concern that those manoeuvres were designed to undercut the talks, and their tone toward the palace became decidedly sharper. Dr. Bhattarai said of Thapa, "There is no elemental difference between his predecessor and him. He [the king] would do better to continue the four-month-old peace process".<sup>38</sup> In a separate interview (appearing in *The Times of India*), Bhattari claimed, "Americans have total control over the army and palace in Nepal", but had promoted Thapa because his pro-Indian sentiments would appease New Delhi.<sup>39</sup> The Maoists indicated that they would be willing to continue talks with the new government team, but suggested that they would expect the government to fulfil all agreements made by the previous team. Both the Maoists and the parties argue that the latest moves by the palace are indications that the king remains intent on securing and expanding his powers.

The Maoists also indicated in early June that they would launch a national "people's movement" and pursue dialogue with the parties about initiating a joint movement built around street protests. If this came to pass, it would mark a major escalation: with the government arrayed against both the parties and the Maoists in the streets, the potential for violence would be significant.

As the mounting pressure for street protests demonstrates, progress at the peace talks has been limited, and the parties and the Maoists have increasing reasons to find common ground against the palace. While it is encouraging that the ceasefire has lasted since January 2003, the Maoists have made clear that they will not entertain an indefinite process. They appear eager to consolidate any possible gains at the peace table quickly, since their field organisation will be difficult to hold together, and the palace may be less willing to compromise as the memory of fighting becomes

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<sup>33</sup> The homework team has two representatives from each delegation: Deputy Prime Minister Ramesh Nath Pandey and Minister Narayan Singh Pun on the government side; Krishna Bahadur Mahara and Ram Bahadur Thapa from the Maoist side.

<sup>34</sup> For a fuller explanation of the code and a copy of its text see ICG Asia Report, *Nepal Backgrounds*, op. cit., p. 7.

<sup>35</sup> See *Kantipur*, *The Himalayan Times* and *The Kathmandu Post*, 15 May 2003.

<sup>36</sup> Chitra Tiwari, "Nepal turmoil unabated", *Washington Times*, 7 June 2003.

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<sup>37</sup> It has been indicated that the four facilitators will maintain their role in the talks despite the overhaul of the government team.

<sup>38</sup> *Kathmandu Post*, 5 June 2003.

<sup>39</sup> *The Times of India*, 10 June 2003.

more distant. The Maoists have repeatedly expressed concern that the government is simply stalling. While it appears unlikely they have any immediate plans to cut off talks unless a specific issue such as returning the RNA to barracks spirals out of control, the king's willingness to ignore the political parties may embolden them to strike against a government that is increasingly seen as illegitimate.

In many ways, the Maoists appeared somewhat torn by the street protests of the political parties before Chand's dismissal. At one level, they clearly welcomed the mounting pressure on the palace, and a continuing atmosphere of crisis could be to their benefit whether or not they want peace. The forces that evolved into the current Maoist organisation were active in the 1990 street protests that led to democracy being established. One journalist observed that with "street fearlessness and organisational skills [the Maoists] tipped the balance last time, so much depends on if they want to participate".<sup>40</sup>

Yet, one also senses wariness toward the increasing activity of the parties. At a fundamental level, the Maoists may be calculating that if negotiations broaden into a three-way dialogue, their own piece of the pie will be that much smaller. Further, if the Maoists are serious about entering mainstream political life, it would be dangerous for them to be seen as collaborating with the palace while the major political parties were assailing the monarchy for "regression" and no timetable for elections had been set. It is also somewhat ironic that the Maoists have occasionally appeared perturbed that the parties are serving as a disruptive social force – as if that were a function they wish to reserve for themselves. The Maoists may also fear that the parties are poised to regain a hold in some of the districts where they have been less active during the war.

Many remain deeply sceptical about the democratic credentials of the Maoists. As the same journalist suggested, "The Maoists are the only dynamic force left, everyone is making it up as they go

along. They are the only ones who know where they are going, and it is *not* bourgeois democracy".<sup>41</sup> This was echoed by a senior Western diplomat: "The Maoists haven't given up on their long term goal, and their long term goal is a one-party republic".<sup>42</sup> To help allay these concerns, the Maoists should take further steps to demonstrate the seriousness of their intentions. They should take firmer steps to ensure that extortion efforts – even under the guise of "donations" – are discontinued at the village level. If the group is indeed serious about accepting multi-party democracy and open markets as it has indicated, there should be clear efforts to educate the cadres as to this seemingly new reality, and Maoist mass communications should reflect this fact.

One senior UML leader described the current situation:

We are at a stage where we are facing great challenges. It is the king versus the parties and the Maoists versus the present state. All are very good players, all want to use each other and all fear each other.<sup>43</sup>

The Maoists also continue to remain quite wary of the palace and the influence of the U.S. on its decision-making, and are deeply concerned by U.S. efforts to assist the RNA. Two incidents highlight how the American role can often have a disproportionate impact, even in matters that seem routine to Washington's diplomats. For example, the U.S. and Nepal signed a fairly standard anti-terrorism pact in late April 2003, the 127<sup>th</sup> Washington has done. The Memorandum of Intent did not single out the Maoists for specific attention, or even mention them by name. However, Baburam Bhattarai quickly protested: "On the one hand, the government is pretending to be serious for talks, while on the other it is conniving with the United States to crush the people's war waged by the Maoists".<sup>44</sup>

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<sup>40</sup> ICG interview, Patan, 3 May 2003.

<sup>41</sup> ICG interview, Patan, 3 May 2003.

<sup>42</sup> ICG interview, Kathmandu, 29 April 2003.

<sup>43</sup> ICG interview, Patan 30 April 2003.

<sup>44</sup> *The Himalayan Times*, 27 April 2003.

Similarly, the decision by the State Department to place the Maoists in the second-tier of terrorists groups in its annual "Patterns of Global Terrorism" report released that same month also sparked an angry reaction and accusations that Washington was trying to scuttle the peace talks.<sup>45</sup> A Nepalese government official suggested that the strong reaction may have come in part because, "The Maoists want to give the impression that they are negotiating from a position of strength, and not create an impression that they were pressurised to come to the table".<sup>46</sup> While the Maoists have often over-reacted to U.S. steps, the Americans have not been particularly sensitive to the timing of their actions or how they would play out in the context of a very uncertain peace process. The international community should continue efforts to meet with Maoist representatives as part of a process of mutual education.

## II. CONSTITUTIONAL CONSIDERATIONS

After thirteen years of uncertain democracy, constitutional considerations are again front and centre. The Maoists, political parties, the monarchy and broad swathes of the public all seem to agree that some alterations in the basic guiding principles of the state are necessary to achieve peace and greater equity and political participation across the nation. Yet, there are many signs that the potential process of revising the constitution has not been fully thought out. As a Nepalese constitutional lawyer suggested, "when the Maoists say it is a dead constitution, and there is no alternative but to write a new one, they have not been clear what the real alternatives are".<sup>47</sup> This same lawyer noted, "Nepal is a very complicated country from a constitutional perspective, and the constitution needs to reflect the social reality".

Drafting a sound constitution would need to be a political and cultural process as much as a legal one. This section explores some of the most important considerations, while recognising that each item will demand fuller analysis by all Nepalese interests. Clearly, any revision should be guided by an understanding of why the existing constitution has never fulfilled its promise. There appears to be wide agreement that the flaws of the 1990 document are more in its implementation than its particulars, although there are some strongly dissenting views.<sup>48</sup> One scholar observed: "The main problem isn't the constitution, it is people not following the rules that exist".<sup>49</sup>

This broad failure to embrace the spirit of the constitution can be traced directly back to 1990. Forged after intense confrontation and street protests by the political parties against the palace, much of the actual drafting was conducted as a "gentlemen's agreement" between King Birendra, the Congress Party and a coalition of communist parties. The process was largely restricted to a

<sup>45</sup> See <http://www.state.gov/s/ct/rls/pgtrpt/2002/> for a copy of the report.

<sup>46</sup> ICG interview, 20 May 2003.

<sup>47</sup> ICG interview, Patan, 11 March 2003.

<sup>48</sup> ICG interviews, March-May 2003.

<sup>49</sup> ICG interview, Kathmandu, 24 April 2003.



close-knit group, and the palace managed to push through a number of major revisions from the original draft.<sup>50</sup> The parties and the palace maintained deep mutual suspicion during this period, and there was little effort to broaden this process into a more meaningful discussion across society or to create a general consensus on the institutions of state beyond the importance of multi-party democracy. Although establishing democracy and the rule of law are obviously dependent on complex factors, the drafting process did not help set the tone.

In part because the constitution did not serve as a genuine social compact, all sides appeared to be willing to play fast and loose with the rules of the game once democracy was established. Political parties became increasingly corrupt and saw fit to bend the constitution to their parliamentary advantage; Maoists, frustrated by lack of electoral success, turned to violence; the palace manipulated politicians throughout the 1990s before assuming power in what amounted to a bloodless coup in 2002; and the Supreme Court kept its finger to the political wind, remaining reluctant to challenge the power structure by showing genuine independence.<sup>51</sup>

There appears to be broad agreement among experts that constitutions need the general buy-in of large segments of society if they are to be effectively implemented and observed, particularly in a culture as richly layered as Nepal's. As the Swiss constitutional lawyer Walter Kalin suggests, "The question of inclusion is especially relevant in countries with a high degree of cultural, linguistic and ethnic diversity, i.e. with fragmented societies. Their biggest challenge is to create unity without denying that diversity".<sup>52</sup> Sadly, this sense of common vision never occurred in Nepal. The country is now at the threshold it should

have crossed in 1990: having a fundamental discussion among broad segments of society about the rules that should govern the political and legal process. In looking at the range of extraordinarily complex major issues now on the table – religion, language, representation, decentralising political and economic power, control of the security services, royal privilege and minority rights – one can almost understand why the framers of the 1990 constitution were eager to keep close control over the process. But 1990 should also stand as a clear warning that a backroom deal arranged solely between Maoist and palace negotiators will not achieve the social consensus needed to make a new or revised constitution a living document.

This suggests that how Nepal tackles its full plate of constitutional issues will be vital. Striking a balance between inclusiveness and basic efficiency will be crucial. Just as an overly insular process was highly problematic in 1990, an entirely wide-open process could be equally flawed. This helps explain why the fuzzy constituent assembly concept articulated by the Maoists would be a very difficult vehicle for forging a sound constitution. Gathering hundreds of representatives with literally a blank sheet of paper before them and no basic understanding between them on the broad contours of an institutional structure would seem to be a recipe for deeply divisive and almost endless wrangling. That said, constituent assemblies have helped craft constitutions in a number of countries around the globe.

Preferably, and as discussed in greater detail below, a broadly representative group would mutually consult on potential constitutional changes, but the individuals would be guided by a broad agreement on certain fundamentals that would help shape the superstructure of the constitution and the goals of any potential revisions. Such consensus would need to be forged by the political parties, broad segments of civil society, the palace and the Maoists for the sake of the national interest. While not easy to achieve, this would likely provide the most viable means for moving beyond Nepal's continuing cycle of crises. A number of scholars have drawn lessons from the post-apartheid experience in South Africa, where the goal of the de Klerk government, the Africa National Congress (ANC) and all other

<sup>50</sup> For an interesting, but decidedly pro-royalist, perspective on these events see Jan Sharma *Democracy Without Roots* (Book Faith India), Delhi 1998.

<sup>51</sup> In defence of the Supreme Court, one lawyer noted, "The Supreme Court cannot provide a political solution to Nepal's problems". ICG interview, Nepalganj, 6 March 2003.

<sup>52</sup> Walter Kalin, "Inclusive Constitutional Law", paper presented 24 April 2003 at The Agenda of Transformation. Inclusion in Nepalese Democracy organised by the Social Sciences Baha, Kathmandu.

political parties was to reach “sufficient consensus” on the broad strokes of a constitution.<sup>53</sup> “Sufficient consensus” was used to allow input from all parties without giving any single group the power to derail the process.

#### **A. SHOULD THE CURRENT CONSTITUTION BE SAVED?**

The Maoists have declared the current constitution a dead letter but this may well be posturing. There have been repeated suggestions that the Maoists would be willing to accept a substantial package of constitutional revisions.<sup>54</sup> Yet, the constitution itself may pose some problems in this regard, in that the preamble – which establishes some of the most important fundamentals – is not subject to amendment.<sup>55</sup> Thus, it follows that if drafters wish to change any of them, it will require establishing an entirely new constitution.

Some of the most contested measures are within that short preamble. While adult franchise, multiparty democracy and the vesting of sovereignty in the people are largely non-controversial, several other aspects are not, particularly the clear statement that Nepal exists as a constitutional monarchy and that the authority of the constitution is promulgated and enforced by the king. Following this logic, it would appear to be impossible to establish a republic by merely amending the constitution.

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<sup>53</sup> See Nicholas Haysom, “Negotiating the political Settlement in South Africa – Are there lessons for other Countries”, *Track Two*, Vol. 11, No. 3, May 2002.

<sup>54</sup> As a source close to the Maoist leadership explained, “The Maoists have maximum flexibility and a package of amendments is possible, but they are not going to put all their cards on the table without some movement from the government”. ICG interview, 10 April 2003.

<sup>55</sup> Part 19, Article 116 of the constitution states, “A bill to amend or appeal any part of this constitution without prejudicing the spirit of this constitution, may be introduced in either house of parliament”. However, given the elasticity with which the current constitution has been treated, it is perhaps better to “never say never” as to the legality of amending the preamble – despite the fact that it is expressly forbidden within the constitution.

There are divergent views as to whether the palace would prefer a set of amendments or a new constitution, and much of this speculation cuts directly to the role in public life envisioned by the king. Some argue that he would rather shape an amendment process because fewer issues would be placed on the table and there would be less chance that the drafting process would go beyond his direct influence. A republic would not be in the cards, and drafting would likely tinker around the edges rather than address fundamental changes. This relatively closed drafting process would allow the king to push revisions until late in the game, just as the late King Birendra did in 1990.

In contrast, one lawyer argued that if the existing constitution were to be taken seriously, it would serve as a considerable brake on the monarch’s power: “The king has an interest in scrapping this constitution. If he wants to redefine his role, a new constitution is in his interest. If you take the basic structure of the current constitution seriously, the king can only have less power, not more”.<sup>56</sup> This reflects thought within many quarters in Nepal that the parties are partially to blame for an increasingly assertive monarch. A prominent member of the Nepalese National Bar Association claimed, “The parties were unwilling to exercise the power they have” within the existing constitution, and consequently the palace felt more and more emboldened to become interventionist as the country’s difficulties deepened.<sup>57</sup> The bottom line seems to be this: if there is broad agreement between the king, the Maoists and the parties to push through a set of amendments – even ones that run counter to the spirit of the preamble – constitutional niceties will likely be set aside.

#### **B. CONTROL OF THE ROYAL NEPALESE ARMY**

Strengthened civilian control of the military has emerged as an increasingly central demand for the Maoists and the political parties. Both now want, as one commentator observed, to “take the ‘Royal’ out of ‘Royal Nepalese Army’”.<sup>58</sup> The parties and the

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<sup>56</sup> ICG interview, Patan, 10 April 2003.

<sup>57</sup> ICG interview, Kathmandu, 19 March 2003.

<sup>58</sup> ICG interview, Nepalganj, 6 March 2003.

Maoists have painted a picture of the RNA serving only the king and being unwilling to take direction from elected leaders. Control of the RNA is of growing importance to the Maoists given that they want to merge their own forces into a national army as part of a peace deal, and placing their cadres under the king could simply be too much to swallow. It is also noted that former Prime Minister Koirala was so frustrated by what he considered RNA obstructionism that he resigned in protest in July 2001 (although intra-party squabbles also heavily influenced his decision).

The constitutional status of the RNA is ambiguous. Technically, it comes under the control of a National Defence Council consisting of the prime minister (as chairman), the defence minister and the commander in chief of the army.<sup>59</sup> The constitution states, “His majesty shall operate and use the Royal Nepalese Army on the recommendation of the National Defence Council”, and it makes the king the “Supreme Commander” of the RNA with the power to appoint the commander in chief of the RNA “upon the recommendation of the prime minister”.<sup>60</sup>

This organisational scheme has often been problematic in practice. Most frequently the post of defence minister has been kept by the prime minister, and as a Western diplomat commented, “The defence ministry doesn’t play much of a role over the RNA; it serves as more of a procurement agency”.<sup>61</sup> This has left the Defence Council to consist solely of the prime minister and a commander in chief of the army whose loyalty is often tied strongly to the palace. Clashes of institutions and personalities within such a structure are not surprising. Royalist government officials continue to insist that the current system functions well. A member of the government negotiating team claimed that the issue of the RNA is “misunderstood by many” and that the army can only be deployed under civilian command.<sup>62</sup> The vehement insistence by government officials that

civilian control of the RNA is already a reality push one to conclude just the opposite; if civilian control already existed, the palace would have no reason to oppose measures to strengthen it. Certainly, the RNA’s recent practice of offering running commentary on the peace talks via press conferences has been less than helpful. It adds weight to the perception that it is playing its own game, as does the continuing dispute over returning the RNA to barracks.

A constitutional lawyer makes a good case that the difficulties between the elected governments and the RNA ran deeper than just constitutional arrangements. “The civilian government has not been able to gain the confidence of the army”, he argues, and “government should have been honest, careful and transparent, they should not have given the army reason to doubt their intentions, but they haven’t been able to do that”.<sup>63</sup> He maintains that the practice of having the king determine the commissioning of officers early in their careers is an important link in building a bond of loyalty between the officer corps and the palace, and that some younger officers have begun to question its appropriateness in what is supposed to be a constitutional monarchy. The senior ranks of the army continue to be filled with loyal Rana families, in a long tradition, and those ties to the palace remain largely solid.<sup>64</sup>

A system that places the RNA more directly under the parliament would seem to make sense, and Nepal will likely need to gravitate to a model where the influence of the king over the military is largely ceremonial. If the military is to grow comfortable with civilian leadership, there will also need to be direct steps to limit the ability of elected leaders to use the police or armed forces for partisan activities. All this is to suggest that none of those involved in the current situation have begun to look seriously at the need for broad reform across the security sector. Nepal will likely require a smaller

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<sup>59</sup> Part 20, Article 118, subsection 1.

<sup>60</sup> Part 20, Article 118, subsection 2; Part 20, Article 119, subsections 1 and 2.

<sup>61</sup> ICG interview, Kathmandu, 29 April 2003

<sup>62</sup> ICG interview, Kathmandu, 24 April 2003.

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<sup>63</sup> ICG interview, Patan, 10 April 2003.

<sup>64</sup> From 1846 to 1950, members of the Rana family dominated Nepalese politics through a hereditary line of prime ministers. While the kings of the Shah dynasty remained on the throne during this period, they were largely reduced to figureheads.

and more professional military over time and a police force that is better able to maintain internal order without engaging in widespread abuses. Discussions about constitutional reform and potentially demobilising large numbers of former Maoist cadres would present an ideal time to address these issues systematically. More research and analysis is badly needed.<sup>65</sup>

### C. ROYAL PRIVILEGE

The king and much of the royal family enjoy sovereign immunity that precludes suits against them without the monarch's consent. Essentially, none who have the status of *shree panch* (literally "five times illustrious") can be subject to either a civil or criminal hearing. This also means that the sovereign cannot be called upon to give evidence or appear in court unless of his own choosing, primarily because he is seen to act as a "defender of the established law" – including the constitution promulgated under his late brother's name.<sup>66</sup>

While almost every monarchy enjoys some form of privilege, the extent of such immunity has been a matter of growing controversy in Nepal. The king's suspension of the democratic process and frequent use of broad emergency powers has led to the impression that the crown exists virtually without legal check. For example, Crown Prince Paras was widely reported to have killed a popular Nepalese musician, Pravin Gurung, in a hit and run car accident, and suffered no consequences, further fuelling the image of a monarchy that is above the law and accountability.<sup>67</sup> In other countries such as

Malaysia, clear abuses of sovereign immunity helped propel the overhaul of the legal system.<sup>68</sup>

The king and royal family do enjoy a number of protections ranging from the benign to the extraordinary. Like many parts of the constitution, a failure by the parties, the palace and society as a whole to agree on the "rules of the road" for day-to-day governance have led to an almost complete collapse in understanding of those powers legitimately held by the crown. Unfortunately, the language used to describe the powers of the king in the constitution is broad, and at times ambiguous, creating a serious potential for abuse, misunderstanding and continuing power struggles. An iteration of some of the constitutional powers held by the king underscore this point:

- ❑ "no question shall be raised in any court about any act performed by the king";<sup>69</sup>
- ❑ "no law shall be made having the effect of reducing the expenditures and privileges" already enjoyed by the king under existing law;<sup>70</sup>
- ❑ "no discussion shall be held in either house of parliament on the conduct of his majesty, her majesty the queen and heir apparent";<sup>71</sup>
- ❑ the king shall appoint the Royal Nepalese Ambassadors;<sup>72</sup>
- ❑ property owned by "His majesty shall be inviolable";<sup>73</sup> and
- ❑ the now somewhat infamous Article 127, "if any difficulty arises in connection with the

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<sup>65</sup> Dhruba Kumar argues that expanding the army through demobilised Maoists would be both economically problematic and encourage the RNA to undermine talks. Dhruba instead suggests funding a scheme for the training and civil employment of 13,000 soldiers and 25,000 Maoist cadres to bring the army down to pre-war levels. See "Solution to the Crisis: Military Cuts", *Himal Khabar Patrika*, 18 April 2003.

<sup>66</sup> Lucy Sullivan, "The Perils of Republics", *Policy*, Centre for Independent Studies, Autumn 1998.

<sup>67</sup> See BBC's: "Nepal's Errant Crown Prince", at [http://news.bbc.co.uk/1/hi/world/south\\_asia/1371524.stm](http://news.bbc.co.uk/1/hi/world/south_asia/1371524.stm).

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<sup>68</sup> Malay rulers have had a long tradition of abusing their criminal and civil immunity. Various examples include the clubbing to death of a golf caddy by the reigning *agung* in 1987, demands for excessive timber and land concessions and a refusal to pay debts and comply with contractual obligations. See Prof. Mark R. Gillen, "The Malay Rulers' Loss of Immunity", Victoria University Occasional Papers, no. 6, Canada, 1995.

<sup>69</sup> Part 5, Article 31.

<sup>70</sup> Part 5, Article 29.

<sup>71</sup> Part 8, Article 55, subsection 1.

<sup>72</sup> Part 20, Article 120, subsection 1.

<sup>73</sup> Part 5, Article 30, subsection 2.

implementation of this constitution, his majesty may issue necessary orders to remove such difficulties and such orders shall be laid before parliament”.<sup>74</sup>

Most experts believe that the king is currently operating beyond the bounds of Article 127, a fact that the constitution and the debate on the merits of royal privilege should take into consideration. Some other countries provide useful models of reform that might be welcome in Nepal as part of any constitutional revision to clarify the legal status of the monarchy. There has already been talk of limiting those who hold *shree panch* to either the king solely or the king, queen and crown prince.

For example, while both the Spanish and Belgian constitutions contain articles defining the inviolability of the monarch, the king is not vested with power.<sup>75</sup> In Belgium, Article 102 states that: “Under no circumstances may a written or verbal order of the King diminish the responsibilities of a minister”, and Article 106 also stipulates that “no actions of the King may take effect without the counter-signature of a minister, who, in doing so, takes responsibility upon himself”.<sup>76</sup> Similarly, the Spanish Constitution specifies that the Monarch “exercises the functions expressly attributed to him in the Constitution and the laws”, that he/she “is not subject to any responsibility” and that sovereign actions “shall lack validity without countersignature”.<sup>77</sup> The clear logic underscoring the assigning of responsibility is to ensure that an elected figure who is subject to public oversight bears responsibility for the acts of government. The adoption of such language in Nepal would ensure that open-ended emergency powers are not used to supersede the democratic process.

Given the uncertainty of the current situation and the direct benefits they enjoy, a number of palace loyalists may be reluctant to see the king surrender

any control. Yet, if the monarch is indeed serious about both peace and reform, he needs to recognise that without some genuine gestures of good will, his own actions will seem every bit as self-serving as the political party activities he has repeatedly criticised. As a political scientist remarked, “Any system that starts with immunity at the top sets a bad precedent”.<sup>78</sup>

King Gyanendra should make clear that as part of any negotiated peace settlement or constitutional revision, the monarch and the royal family will no longer be considered above the law, and that the parliament or courts could question actions by the king. This would send a profound message that the king supports accountability across society and is serious about supporting the rule of law as the fundamental underpinning of Nepalese life. Such an action would also go a long way to ensure that the institution of the monarchy survives. If the palace continues to be dominated by hardliners who feel that the monarchy can remain the driving force in public life, ever greater public support for a republic may emerge over time. Further, if the king continues to maintain an increasingly transparent fiction that all his actions have been constitutional, both the parties and the Maoists may be pushed to more extreme positions.

#### **D. MINORITY RIGHTS, THE ELECTORAL SYSTEM AND DECENTRALISATION**

Control of the RNA and royal privilege pale in complexity and scope when compared to the tangled nest of issues raised by ethnicity, caste, religion, language and minority rights. While all involve far-reaching considerations, they are bound together by a common notion: many Nepalese feel that they are denied access to the full fruits of the state within the current system, whether education, jobs, self-expression or political power. There is broad agreement that power and privilege have been narrowly distributed across society, but how best to redress this is a matter of significant debate.

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<sup>74</sup> Part 20, Article 127.

<sup>75</sup> Constitution of Belgium, Article 88 [Responsibility]; Constitution of Spain, Article 56, subsection 3 [Head of State].

<sup>76</sup> Constitution of Belgium, Articles 102 [Exclusive Responsibility] and 106 [Counter signature].

<sup>77</sup> Constitution of Spain, Articles 56, sub-sections 1 and 2 [Head of State], 64 [Counter signature].

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<sup>78</sup> ICG interview, Kathmandu, 24 April 2003.

The gulf of privilege is all the more acute because of Nepal's low standard of living and limited economic opportunity, and the experience since 1990 has fuelled cultural tensions. It appears that religious and cultural identities are being more forcefully asserted as time goes by, in part because they were long suppressed in the Rana and *panchayat* eras.<sup>79</sup> Mahendra Lawoti comments:

In Nepal, the Bahun-Chetri (combined population of 31.6 per cent) and the Newar (5.6 per cent population) are the groups that are enjoying disproportionate access to resources. Jointly, these communities are 37.2 per cent of the population, but in 1999 they were holding more than 80 per cent of the leadership positions in the important arenas of governance such as the judiciary, executive, legislature and public administration. A comparison of 1959 and 1999 shows a widening of the gap.<sup>80</sup>

This has the potential to be highly divisive in a country where roughly half the population is under the age of twenty and sizable numbers of young people have already taken up arms for the Maoist cause.<sup>81</sup> This very young population may also be less wed to traditional institutions, including the monarchy, than their predecessors.

With more than 60 caste and ethnic groups and more than 70 languages and dialects, there are bound to be tensions within Nepalese society. Critics of the current constitution do not need to look far to find ammunition for their arguments that the text seriously disadvantages certain ethnic, caste and linguistic minorities. Constitutional clauses drawing the most attention in the current debate include:

- establishment of Nepal as a “Hindu and Constitutional monarchical kingdom”;<sup>82</sup>
- establishment of Nepali as the “official” language, with all other mother tongues “national” languages, and the determination that “each community shall have the right to operate schools *up to* the primary level [emphasis added] in its own mother tongue”.<sup>83</sup>
- restrictions that “no person shall be entitled to convert another person from one religion to another”, and,<sup>84</sup>
- prohibition against forming any political party on the basis of “religion, community, caste, tribe or region”.<sup>85</sup>

Even the words of the national anthem have come under scrutiny for their less than democratic tone.<sup>86</sup> Many concerns about the current system and the domination of a traditional Bahun, Chetri and Newar elite have led to debates about overhauling the electoral system.

## 1. Proportional Representation?

Electoral systems are of particular importance in divided societies. At best, they can be designed to help mitigate conflict within diverse and divided societies. At worst, in the words of Giovanni Sartori, they can be the most “specific manipulative instrument of politics”.<sup>87</sup>

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<sup>79</sup> See Harka Gurung in “Nationalism and Ethnicity in a Hindu Kingdom: The Politics of Culture in Contemporary Nepal”, ed. By D. N. Gellner, J. Pfaff-Czarecka and J. Whelpton, Amsterdam: Academic Harwood Publishers, 1997.

<sup>80</sup> Lawoti, Mahendra, “Defining Minorities in Nepal”, *Nepali Journal of Contemporary Studies*, Vol. II. No. 1., March 2002. “Bahun” is synonymous with Brahmin.

<sup>81</sup> See <http://www.panasia.org.sg/nepalnet/socio/pop.htm>.

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<sup>82</sup> Part 1, Article 4.

<sup>83</sup> Part 1, Article 6, subsections 1 and 2; and Part 2, Article 18, subsection 2.

<sup>84</sup> Part 2, Article 19, subsection 1.

<sup>85</sup> Part 17, Article 112, subsection 3.

<sup>86</sup> The English translation of the national anthem is: “May glory crown you, courageous Sovereign, You, the gallant Nepalese, Shri Pansh Maharajadhiraja, our glorious ruler, May he live for many years to come and may the number of his subjects increase. Let every Nepalese sing this with joy”.

<sup>87</sup> Giovanni Sartori, as cited in Ben Reilly and Andrew Reynolds (Eds.), *Electoral Systems in Divided Societies*, National Academy Press, Washington D.C., 1999. The multiple variations possible broadly fall into three main categories: plurality-majority; semi-

In Nepal, there is increasing discussion about adapting some form of proportional representation and even setting aside seats for women, ethnic minorities and caste groups. Nepal is currently structured as a “first past the post system” where a representative is chosen on the basis of a plurality within a district. In a system of proportional representation, parliamentary seats would be distributed among the parties on the basis of the proportion of the vote received by each party.

Both systems have advantages and drawbacks. Proportional representation is often seen by its critics as encouraging a proliferation of parties, forcing extensive negotiations over coalitions, fostering fringe parties based on ethnic or geographic considerations, and slowing the overall legislative process as parliamentarians try to forge consensus. The complexity of the proportional system could also pose problems for a country where the political understanding remains rudimentary in many locales.

Yet, it is also clear that Nepal’s experience with the first past the post system has not been entirely happy. Historian John Whelpton argues that given the electoral arithmetic over the past twelve years, and with single-party governments being elected with the support of only just over a third of the electorate, parliamentary majorities may find it difficult to achieve their policy agenda in a highly polarised political environment.<sup>88</sup> Along the same lines, another political scientist notes, “The big advantage of proportional representation is that you don’t get a situation where you have a government with only one-third support of the public holding an absolute majority in parliament”, as was repeatedly the case since 1990.<sup>89</sup>

The greatest advantage of proportional representation for Nepal, in terms of levelling the playing field in public policy, would be that such a system would allow minority votes to be taken into

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proportional and proportional representation. For detailed discussion, see *The International IDEA Handbook of Electoral Design*, Handbook Series 1/97, 1997.

<sup>88</sup> John Whelpton, “Nepalese Democracy and its Discontents”, paper presented in Kathmandu 24 April 2003.

<sup>89</sup> ICG interview, 24 April 2003.

consideration and would encourage political development outside the Kathmandu valley. Also, by forcing a greater sense of consensus building, larger and larger numbers of individuals and communities could feel that they had a stake in the political process. Yet, the potential drawbacks of a purely proportional system should not be dismissed lightly, and the political parties themselves have expressed some reluctance to embrace such a system. A senior UML leader observed, “There could be some combination of first past the post and proportional, but we can’t go for a full blown proportional system”.<sup>90</sup>

A compromise that could likely find support among the different power centres may well be a mixed member/proportional electoral system, along the lines of those practised (with some variation) in New Zealand, Germany, Hungary and Bolivia.<sup>91</sup> In such a system, citizens have a ballot that allows them to vote for both an individual local representative and a political party. Contests for local representatives are determined by the first past the post system, party seats proportionally. Thus, the parliament is made up of both local representatives and members pulled from party lists. Such systems are designed to ensure that both local and party interests are represented in a balance fairly closely resembling the will of the voting public and may well be a good point around which to build a constitutional consensus in Nepal.

## 2. Reservations about Reservations

In the frequent discussions of overhauling the electoral system, the issue of setting aside parliamentary seats for women or disadvantaged ethnic and caste groups has repeatedly cropped up. In other countries, including neighbouring India, reservations have been made for women and other segments of society traditionally seen as disadvantaged. The 74<sup>th</sup> Amendment of the Indian Constitution requires that 33 per cent of the seats in local municipal bodies be reserved for women. In

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<sup>90</sup> ICG interview, Patan, 30 April 2003.

<sup>91</sup> See <http://www.elections.org.nz/elections/esyst/govtelect.html> for an official description of New Zealand’s system.

the national parliament more than a fifth of seats are set aside for the lowest ranking in the caste system. In the Lok Sabha and State Legislative Assembly approximately 15 per cent of seats are reserved for such scheduled castes and 7 per cent for scheduled tribes.<sup>92</sup>

At first glance, quotas to ensure more balanced representation would seem to be a powerful tool for promoting a greater sense of equality, and using the force of law to grant broader representation might appear an attractive way to break the hold of traditional elites. Yet, the Indian experience would also seem to point out the many dangers of reservations for Nepal, despite the striking differences between the two countries. It has demonstrated that instead of serving as a short-term boost to mainstream traditionally disenfranchised groups as originally intended, the reservation system can also be transformed into a near-permanent institution. The reservation has become deeply sensitive in India. Periodic adjustments in reservation numbers have been highly controversial and even sparked violence.

Trying to use the reservation system to adjust the political balance in Nepal would involve extraordinarily complex social engineering. Who would be best positioned to decide which of the scores of ethnic, linguistic, caste and regional groups deserve special electoral set-asides? How would these set-asides be adjusted over time as demographics invariably shift? Equally important, would reservations achieve their goal of ensuring greater political and economic equity across the society over time? In the absence of wholesale investments in basic education and health needs for traditionally disadvantaged groups, there would be little chance for their situation to improve even with greater political representation.

Reaching agreement on reservations as part of a constitutional reform package would be particularly difficult. Every side would likely try to manipulate quotas to its advantage, and it is difficult to imagine

a constitutional process not quickly degenerating amid negotiations over such a divisive issue. It would also be quite striking were a constitution that expressly forbids political parties on the basis of religion, community, caste or tribe to turn so dramatically in order to set aside parliamentary seats on such a basis.

Reserving seats for women could find broader support and would likely prove somewhat less contentious. However, such efforts have also been highly controversial in locations as diverse as India, France and Indonesia. An additional option would be to set aside reservations *within* parties in terms of candidates allowed to contest seats. All this would seem to suggest that there is no “magic bullet” for constitutionally ensuring broader political representation and the follow-on goal of translating this representation into greater economic and educational opportunity across society. As suggested below, the surest route may be to decentralise power so that Nepal’s diverse communities can more closely design and direct their own development.

### 3. Religion and Language

Religion and language loom as important constitutional issues, and both will be thorny. Religion may be the more difficult of the two. It is linked closely to the nation’s status as a Hindu Kingdom and the very existence of the monarchy. It can be a very emotional issue in Nepal, which is far less monolithic than its rather skewed census data would make it appear. As Sudhindra Sharma argues, “When the census of Nepal indicates that a majority of people in the country are ‘Hindu’, it has to be clear that they are so only within a broad understanding of the term, with the type of Hinduism practices in large measure being closer to folk religion or shamanism/animism than to the form of Hinduism that has been dominant in present-day north India”.<sup>93</sup>

That Nepal is not a secular state presents a clear case of discrimination to those religious groups that

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<sup>92</sup> “India: A Blow for Women (Parliamentary Quotas are not the Answer)”, *The Economist*, 19 December 1998.

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<sup>93</sup> Sudhindra Sharma, “The Hindu state and the state of Hinduism”, *State of Nepal* (Himal Books, Nepal 2002).



consider themselves out of the mainstream. One Nepalese advocate for ethnic rights asserts that, “A Hindu Kingdom cannot be deemed as a truly multicultural state or multicultural society. Associating the state with a particular religion is a recipe for conflict and hampers development”.<sup>94</sup> This same advocate argues, “Just because we have a democratic state doesn’t mean we can participate”.

Religion is not only a vital issue for those who consider themselves non-Hindus, but also for those lower caste Hindus who have often been the victims of some of the worst inequalities of the current system. Dalits continue to suffer considerable discrimination, and despite the lofty language of much of the constitution, official discrimination continues to be largely tolerated. This is in large part due to the fact that the government has determined that “traditional religious practices” should not be viewed as discriminatory. While changing the lot of lower caste groups will require cultural as much as legal changes, it certainly is reasonable to question the pace of change in a government that is now directly governed by a Hindu monarch.

But the notion of declaring Nepal a secular state often hits a nerve among even reform-minded Nepalese, and the palace will very likely resist any such effort. Having a Hindu king within a secular state does border on oxymoronic, but should not be beyond the question. A Nepalese religious scholar suggested that the status of a kingdom should be preserved because it represents great potential benefit for Nepal: “There are 600 million Hindus in India, and this is the only Hindu kingdom in the world. In the same way Vatican City has special meaning for Catholics all over the world, Nepal should take advantage of having the only Hindu king”.<sup>95</sup> This same scholar argued that Nepal would be particularly vulnerable to Muslim and Christian proselytising if it were to lift the ban on conversions or otherwise lessen its status as a Hindu kingdom, although the practice of conversion is already widespread. In addition, one

Nepalese political scientist argued, “In many ways, Nepal is already more secular than India – even though India is a secular state”.<sup>96</sup>

Bridging the large divide between those who see Nepal’s identity as a Hindu kingdom as fundamental to its existence and those who argue that only a secular state will ensure fairness to all citizens will be no easy task. Given the prominence of Bahuns, Chetri and Newars within the power structure, those who oppose the formation of a secular state are certainly largely dominant. The easiest way to square the circle may be to preserve a Hindu kingdom that is entirely ceremonial while guaranteeing greater legal protections to religious minorities and outlawing onerous “traditional practices” that have kept Dalits and others desperately disadvantaged. The king could also help change a culture of discrimination by making symbolic gestures to demonstrate that Dalits should have equal treatment.

Nepal’s diverse linguistic landscape has also been quite contentious, and even more so as a number of ethnic groups have become more assertive since 1990. Minority groups have decried the establishment of Nepali as the official language. In addition, the notion that each linguistic community has the ability to operate schools only up to the primary level has been cited as disadvantaging non-Nepali speakers. Unfortunately, in Nepal, as in many other nations, language policies are a reflection of broader issues of power and status. As a language scholar noted, “To elevate a language to the status of national language is almost always based on factors beyond language”.<sup>97</sup>

Given the dominant position of Nepali speakers and the low overall economic development, a more enlightened language policy will be daunting. Those calling for broader language policies will face powerful constraints. Nepal struggles simply to provide even basic education to most of its citizens. For schools to offer Nepali, English and a varied menu of local ethnic languages at all levels of education simply does not appear feasible at this

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<sup>94</sup> ICG interview, Kathmandu, 25 April 2003.

<sup>95</sup> ICG interview, 2 May 2003.

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<sup>96</sup> ICG interview, Kathmandu, 2 May 2003.

<sup>97</sup> ICG interview, Kathmandu, 25 April 2003.

time, and central authorities will strongly resist any effort that would make Nepali elective. While this obviously discriminates against many less widely spoken languages, the notion that Nepalese officials would try to further establish a single language is an experience replicated in many countries.

#### 4. The Case for Decentralisation

For many Nepalese, particularly those in rural villages, democracy remains more theoretical than practical. Little in the day-to-day lives of most villagers changed with the inception of multi-party democracy in 1990. While supporting democracy as a concept, many are simply consumed by surviving on subsistence agriculture. They do not understand how their vote translates into change in their daily lives, and they see little meaning in the enthusiastic discussions of electoral reforms or constitutional amendments in Kathmandu. A career Nepalese government official noted, "Most Nepalese vote and they don't know who they vote for. They don't know what they are doing. We have to educate them".<sup>98</sup> Nepalese are no different than the citizens of any other nation: voting means a lot less when you cannot see the impact of your vote.

One of the fundamental reasons that democracy remains abstract in much of Nepal is that governance itself is highly centralised despite some modest steps toward decentralisation during the 1990s, including the Local Self-Governance Act of 1999. Less than 4 per cent of the national budget goes directly to local governments. During the civil war, government functions often collapsed inward, as officials operated with a bunker-like mentality in district headquarters. Some argue that it is a paradox of modern Nepal that despite the weakening of the central state by instability, local bodies and market institutions have not become correspondingly more empowered.<sup>99</sup> They also note that without strong central support, effective decentralisation will be impossible. The argument continues that decentralisation would not only

entail a major institutional shift, but a cultural one as well:

A deeply rooted patrimonial political culture and patronage-based development practice in Nepal has often made the protection of public interest a highly contested terrain. A patrimonial culture places the government as a giver and the people as a receiver of development benefits, not the claimants of Constitutional rights and duties. It does not treat people as co-producers of development but only consumers.

Yet, Nepal would appear to be an ideal environment for decentralisation (or at least a very poor place for centralisation) given the remoteness of many villages, the general lack of internal infrastructure and the incredible diversity of culture and language. This would also allow for the greater involvement of citizens at the local level and in theory provide for development programs more suited to local need. Substantial decentralisation would also permit some steam to escape from the issues of language, ethnicity, class and representation. Traditionally disadvantaged groups, while still being a minority on the national stage, could play a substantial and sometimes even a majority role at the local level.

The importance of giving power to local structures – and beginning to show that the institutions of government can actually work as part of the peace process – cannot be overstated. In many parts of the country, already minimal government has stopped functioning altogether. There is little political activity, police and the RNA sit in their district headquarters, village development committees have been disbanded and development programs work around government more than with it. Decentralisation would also allow local governments to serve as a breeding ground for talented politicians to emerge nationally, and would encourage local communities to serve as laboratories for forging effective public policy and more diversified economic development. While most villagers may care little about proportional representation, there is every reason to believe that they can make forward looking decisions about local development needs, educational priorities and

<sup>98</sup> ICG interview, 20 May 2003.

<sup>99</sup> Dev Raj Dahal, Hari Uprety and Phanindra Subba, "Good Governance and Decentralisation in Nepal", The Centre for Governance and Development Studies, Kathmandu. 2002.

how to generate income. As one member of an NGO working in the western part of the country, conflict in Nepal is often “not so much about politics as much as where the new well will be located”.<sup>100</sup>

However, any decentralisation will have to be backed by both a genuine revenue stream and a clear understanding that the central government will let local governments govern. Genuine decentralisation should be welcomed by the parties (the UML took a lead in this regard when it was in power), the Maoists and even the palace. Donors, frustrated by central bureaucracy and persistent corruption at the national level, have also increasingly advocated working more with empowered local institutions.

However decentralisation is time-consuming, costly and difficult and needs to be managed with care. Any process would have to consider issues of establishing standards for government services, tackling corruption and establishing systems for resolution of disputes between central and local governments. Decentralisation would need considerable popular and political support, the backing of donors and technical assistance from outside. Many issues relating to the risks of conflict that can come from shifting power away from the centre would also have to be considered.

A number of models could prove effective, including even a federal system. But important principles should guide this effort. Most advocates of decentralisation stress that the current division of the country into 75 districts is not effective, and that the number should be in the range of ten to twenty.<sup>101</sup> While some commentators have suggested redrawing the districts along ethnic lines, this would seem to be a potential source of confusion and divisiveness. New administrative lines should be drawn geographically, following ridgelines and not rivers (as has often been done in the past). This would allow regions that are already serving as areas of economic and social integration to remain intact and not be artificially divided.

Most importantly, new units of local government would need to be given the money and authority to ensure that “decentralisation” was not merely a paper tiger.

By including fairly sweeping decentralisation as part of any constitutional package, the Kathmandu elite could also take sting out of some issues where it might be less willing to compromise, such as secularism and teaching in minority languages beyond the primary level. As a journalist argued, giving districts control over their own funding would give them “power over their identity”.<sup>102</sup>

All Nepalese forces today need to move toward agreement on the broad strokes of how society should govern itself, and decentralisation, a mixed member proportional electoral system, a monarch not viewed as acting above the law and greater civilian control of the RNA may be some of the starting points for consensus and power sharing.

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<sup>100</sup> ICG interview, 28 March 2003.

<sup>101</sup> Nepal is further divided administratively into five development regions and fourteen zones.

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<sup>102</sup> ICG interview, Patan, 29 April 2003.

### **III. MANAGING THE PEACE PROCESS**

How then does one begin to reconcile very contentious divisions between palace, Maoists and political parties within a peace process that could produce a viable and inclusive series of constitutional reforms? Obviously, there is no simple answer and building confidence and designing a sound institutional structure cannot be done either painlessly or by fiat. That said, three important areas stand out for beginning a process that can help move the country forward: effectively monitoring the ceasefire code of conduct before relations between the royalist government and the Maoists further erode; finding a way to facilitate negotiations more smoothly; and developing a mechanism to include the alienated political parties in a multi-party government that allows elected leaders a substantial voice in questions of war and peace.

Progress on all of these fronts will require some sacrifice from government, parties and Maoists alike. It will also likely require a more broad minded and forward looking approach from an international community that needs to understand a sense of flexibility and pragmatism is essential to securing a lasting peace. Putting a more effective process in place is fundamental to the peace effort. Otherwise, it may be impossible to tackle the many substantive issues that loom on the horizon.

#### **A. MONITORING THE CODE OF CONDUCT**

The announcement by the government and Maoists that they had reached agreement on a “code of conduct” 13 March 2003 to serve as ground rules during the ceasefire was a significant breakthrough. However, how this code will be implemented and monitored continues to be a matter of some concern. At the peace talks, royalist negotiators and the Maoists agreed to form a monitoring committee of thirteen members. It will be chaired by a representative from the National Human Rights Commission and include delegates from the Federation of Nepalese Journalists, the Nepal Women's Commission, the national bar association, the Federation of Nepalese Chamber and

Commerce and Industry, the National Dalit Commission and the Federation of Nationalities.

These monitors are to help observe the situation across the country, and independently report violations, either mediating to reduce tensions at the local level or reporting clear violations when they cannot be mitigated. Negotiators established a three-point approach that the committee should employ: establishing monitoring bodies in all 75 districts, establishing a uniform definition for observing the code, and actually monitoring compliance with the ceasefire. In the words of a former government negotiator, the monitoring teams “need to be an independent body at the people level”.<sup>103</sup>

While the effort to involve a large cross section of civic groups is welcome, there are reasons to question the efficacy of the design. In far flung locations across the country, small groups of human rights activists may not be well positioned to do the crucial work of determining when violations take place and who is to blame. At the district and village level, code of conduct monitors may well be subject to intimidation from either Maoist or government forces, and they may become unduly enmeshed in the local political situation. Neither the Maoists nor the government have been particularly enthusiastic about anyone determining if they are violating the code of conduct, but it is equally clear that self-policing will do little to generate a greater sense of mutual trust. It is also not clear how more serious issues will be arbitrated at a national level through the monitoring teams.

Having small groups of experts from the UN assist the National Human Rights Commission, as the Commission itself has suggested, would be a welcome step. The UN could provide much needed technical assistance that would strengthen the Commission's capabilities at the central level as well as in the field. By establishing a relationship with the UN, the Commission would be far better positioned to receive both the training and resources needed to carry out its mandate. In

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<sup>103</sup> ICG interview, Kathmandu 24 April 2003.

addition, international experts might help insulate monitors from undue pressure from either government forces or the Maoists. Bringing modest international expertise to the challenge of monitoring would also be quite useful in helping establish broader confidence in the situation on the ground, particularly at a time when there is so much suspicion between Maoists, government and parties. As a UML party leader argued, “If we are for transparency, why hide the process?”<sup>104</sup> Deploying small squads of international experts to work with the monitors could provide a “built in cooling down period” when tensions arise in a fashion that might not be possible with teams solely composed of Nepalese civic groups.

The idea of bringing in international experts has thus far been still-borne for several reasons, the most of important of which would appear to be Indian opposition. A Western diplomat observed that India has adamantly opposed international monitors for the code of conduct and international mediation of the peace talks because “all roads lead to Kashmir”. New Delhi worries that any such involvement would set a precedent for that disputed region. However, there is little objective reason to believe that Nepal would establish any type of precedent for Kashmir. Norwegian mediation in Sri Lanka has not noticeably produced more pressure to internationalise the Kashmir situation, for example.

Choosing the right international experts to help the existing monitoring structure, and making sure that their numbers remain small, could go a long way toward mollifying Indian concerns. For example, several key nations should *not* be involved with monitoring the code of conduct, including India, the U.S., Pakistan and China. Nationals from any of these powerful states would raise concerns of foreign meddling and set off alarm bells about efforts to play a larger regional role.

Fortunately, successful monitoring of the code of conduct does not require extensive military strength or advanced intelligence capabilities. Instead, it demands the help of the UN in fielding small numbers of technical experts to assist Nepalese

groups on the ground and so create a greater aura of fairness and serve as a buffer between disputants. The infusion of technical expertise could go a long way to reassure the donor community that both the government and the Maoists were taking the peace process seriously and so would likely speed provision of humanitarian assistance to conflict-affected areas while building the capacity of Nepalese human rights groups. While the government has complained about the relatively modest pace of humanitarian assistance deliveries in western Nepal, its own deliberate pace on the peace talks is partially to blame.

With the infusion of international technical assistance, one of the first tasks for the National Human Rights Commission and the other designated monitoring groups – working in conjunction with the negotiating teams – would be to spell out a sound method for adjudicating disputes over the code of conduct. Security and preventing intimidation of the monitors remain foremost concerns, and these will be difficult to address as long as a more significant international presence remains deeply contentious in both Kathmandu and New Delhi.

## B. FACILITATING TALKS ?

Suggestions that the peace process might be accelerated by bringing in outside facilitators or mediators remain controversial. Nationalism and pride seem to be common threads that bind palace, parties and Maoists, and many have claimed almost defiantly that “Nepal can make peace by itself”, and “We are all Nepalese; we know how to talk to each other”. That Nepal is a relatively small nation between China and India has fuelled a certain defensiveness in dealing with the outside world and an environment where suspicion of foreign intentions is widespread and sometimes well-grounded. These attitudes have helped shape a decidedly cool reaction to the notion of outside mediation or facilitation of the peace process in some quarters.

Yet, there is a very complex, interlocking set of issues on the negotiating table and a clear need to expand the negotiating process beyond simply

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<sup>104</sup> ICG interview, 30 April 2003.

palace representatives and the Maoists. A frustrated Western diplomat complained of both: “They don’t have a clue about the negotiating process”.<sup>105</sup> Another Western diplomat aired similar concerns: “They need facilitation. I don’t think the people are really up to the task. It takes a special set of skills”.<sup>106</sup> As a Scandinavian diplomat argued, mediators would also be helpful so that “walking out of the room won’t derail the process”.<sup>107</sup> The heated disputes that have already occurred over the issue of returning the RNA to barracks indicate that a truly neutral figure or figures in the room could well improve the general sense of communication, prioritise the negotiating agenda and ensure that the overall process proceeds in a more orderly fashion.

One individual involved in the talks stated plainly that he was “personally very concerned” that a lack of experience and professionalism among the negotiators was a dangerous sign and that “because of this lack of seriousness, the war could again escalate”.<sup>108</sup> A former member of the government negotiating team, departing from the delegation’s public position, privately conceded, “The peace process is a very complex process and there is room for mediation in these circumstances”.<sup>109</sup>

Obviously, like the notion of deploying small teams of international monitors to help assist in overseeing the code of conduct, only the right kind of mediation or facilitation makes sense. Any international help in this regard should be as low-key as possible, could take place entirely behind the scenes and focus primarily on establishing a sound procedure and agenda for moving negotiations forward. It need not come in an official government form. No one wants the U.S., the UK or India to broker a peace in Nepal. However, there are a number of international organizations and NGOs specifically trained in mediation, facilitation and conflict resolution that could help the talks advance in a more professional manner.

Part of the reason the government appears to have resisted mediation (aside from India’s concerns), is a belief in some Nepalese quarters that any mediator or negotiator would actually serve as a de facto negotiator – which should clearly not be the case. Yet, the difficulties encountered during the 2001 talks – when even some of those involved in the process admitted that they had little training or background for properly conducting talks – should be instructive. Recent comments by the current facilitators, who also served in 2001, have made clear that there is room for improvement. Padma Ratna Tuladhar said that the role of the facilitators had not been spelled out clearly, and objected to their exclusion from some negotiating sessions.<sup>110</sup> Damannath Dhungana also complained that the role of the facilitators has never been made clear and that they were not allowed to attend some negotiating sessions, leading him to wonder, “If we are not allowed to be present at the talks venue, how can we resolve the problems?”<sup>111</sup>

While the Maoists continue to welcome mediation, the government has resisted. The international community should quietly and firmly express its support for the notion to the government of Nepal, and help in this or other ways to facilitate the talks.

### C. A ROLE FOR THE PARTIES?

The royalist government approach of negotiating with the Maoists first and then forming a multi-party government appears to be the reverse of what is required. The appointment of Prime Minister Thapa was seen by the parties as a further betrayal, and clearly chilled the environment with the Maoists. Any impression that the king could rapidly get the country back on track and neatly restore democracy has effectively been dissipated.

The king would be far better served by bringing the political parties back into government so that the

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<sup>105</sup> ICG interview, 24 April 2003.

<sup>106</sup> ICG interview, Kathmandu, 29 April 2003.

<sup>107</sup> ICG interview, Kathmandu, 3 May 2003.

<sup>108</sup> ICG interview, Kathmandu, 23 March 2003.

<sup>109</sup> ICG interview, Kathmandu, 19 April 2003.

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<sup>110</sup> *The Kathmandu Post*, 5 May 2003.

<sup>111</sup> *The Himalayan Times*, 5 May 2003. However, Dhungana seemed to blur the line between facilitator and advocate, by adding, “I am in favour of a constitutional assembly and if I cannot forward my views, I will feel my presence meaningless”.

parties and the palace could present the Maoists with a unified and expanded negotiating team. Hoping that the parties will support a peace deal from which they have been entirely excluded simply does not seem realistic. Nor is it realistic to think that the king will soon simply reinstate parliament. A Nepalese government official said, "The political parties should be accommodated and given a role in the process", while making clear that calls for the restoration of parliament were a non-starter: "This is where the country is now; you can't wish something that isn't there".<sup>112</sup>

Neither the street protests by the parties nor the palace's continuing efforts to keep the parties off balance are productive. A journalist observed that the government has taken an approach of "rubbishing the parties as they go" during the negotiation process, and that this is both somewhat unseemly and ineffective in that it makes the king's rhetoric in support of democracy seem increasingly hollow.<sup>113</sup> A senior UML party leader complained that the king's go-slow approach was part of a broader effort to "create a political vacuum everywhere".<sup>114</sup> For all their flaws, the political parties have a legitimate place in public life and should be at the negotiating table.

To reach such a point will demand constructive steps by both the parties and the king. As a means to build pressure to restore democracy, the parties should once again forward a joint selection for the post of prime minister, and go even further by agreeing to a specific power-sharing proposal for an all-party government, including a detailed plan identifying both party officials and skilled technocrats who are prepared to serve. The parties should agree to assign the Home Ministry – a key position that has often been used to secure political advantage – to a neutral, technocrat. Such a step would send a welcome signal that the parties are serious about governing and able to overcome their internal divisions. It would also help shame the international community into more robustly supporting the restoration of democracy.

Upon formation of an all-party government, the government negotiating delegation could be reconfigured to include party representation. This would force the parties to accept greater accountability for issues of war and peace, and force them to tackle subjects with greater substance than simply objecting to royal "regression". Establishing an all-party government would have several other advantages. The notion of simply suspending democracy until peace is achieved essentially gives both king and Maoists an indefinite veto over democracy they can use if they see it in their tactical interests. This runs directly counter to the long-term interests of both the people and the international community. Creating an all-party government would also allow a more orderly process of moving toward eventual elections, either for local bodies or parliamentary seats, security permitting.

There has also been discussion of including the Maoists in an all-party government, but this appears premature, particularly as they have made clear that they would expect to lead such a government. A Western diplomat said he would be "shocked" if the prime minister slot was to go to a senior Maoist.<sup>115</sup> International concerns are just one of the many obstacles to resolving the situation with the Maoists, and having an all-party government in place to help move through the thicket of procedural and constitutional issues seems to be an invaluable part of moving Nepal back toward normalcy.

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<sup>112</sup> ICG interview, 20 May 2003.

<sup>113</sup> ICG interview, Patan, 3 May 2003.

<sup>114</sup> ICG interview, Patan, 30 April 2003.

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<sup>115</sup> ICG interview, Kathmandu, 29 April 2003.

## IV. CONCLUSION

With pressures mounting on the peace talks from all directions and the parties and the Maoists more willing to express their opposition to the palace in the streets, it would be easy for Nepal to slip back toward violence. The deep fissures within society will only widen if the three sides remain focused solely on a search for a greater share of power. While the political parties, the palace and the Maoists have all made clear that peace cannot be achieved *without* them; they have yet to demonstrate that peace can be made *with* them. All deserve a reasonable share of blame for the failure to include broad segments of society beyond their respective power bases in the search for peace and in a broad effort to forge a new or revised constitution.

Yet in many ways, Nepal is better positioned than ever before to reach a basic consensus on its institutional architecture. There is widespread agreement that much of the current system does not work and that the state need to be reoriented fundamentally to provide more equitable opportunity for broad swathes of the population. In addition, the experience since 1990 has helped create a much wider, more active network of social groups representing virtually all elements of society that could play a vital role in shaping a reformed constitution and viable peace process.

A number of steps are vital to get the situation back on track. First and foremost, the royalist government, and the king himself, need to take a more credible and serious approach to both the peace talks and governance as a whole. The current arrangement of having a government that is hand-picked by the palace yet operates under the fiction that the king is not active in its day-to-day management is simply not feasible over time. Nor is presenting a choice between peace and democracy acceptable. The king needs to work directly and constructively with the political parties to establish a multi-party government, and the parties themselves must demonstrate that they are willing to act responsibly within such a power sharing arrangement. India, the United States and United Kingdom should make clear that the further

provision of military assistance to the government of Nepal is contingent upon far more substantial efforts at the negotiating table and a clear strategy and timetable for restoration of democratic order.

In terms of the peace process itself, a more professional approach to negotiations appears vital. The frequent confusion, slow timetable, changes in personnel and lack of practical confidence building measures are all growing threats to the talks. International technical assistance could be directed toward helping establish a more orderly secretariat for the talks, providing mediation training and offering behind-the-scenes legal advice. The latter would be useful in the drafting of potential constitutional revisions and encouraging accountability for human rights abuses during the conflict. A clearer process of agenda setting, genuinely empowered negotiators, the inclusion of representatives from a multi-party government and international technical assistance to help those Nepalese groups monitoring the code of conduct governing the ceasefire would also be extraordinarily useful.

There remain serious and legitimate questions about the sincerity and ultimate intentions of the Maoists, and a clear reluctance in some international quarters especially to believe they are bent on anything short of total state domination. However, it would be tragic if the peace process unravelled because of incompetence, unanticipated delays or a failure to place broadly representative and empowered negotiators at the peace table. Establishing a credible peace process and putting Nepal back on the road to democracy are ultimately the only effective means to end the conflict and are necessary no matter what the ultimate intentions of the Maoists.

With the fundamental issues of governance and the state now on the table, the challenge is for the major forces within society to coalesce around a constitutional model that will work for Nepal's culture, society, geography and history. This would be an immense challenge even for the most stable societies. Yet, within Nepal's remarkable diversity and frequent hardships there are also tremendous strengths. No peace process or constitutional reform will bring speedy change to the difficult



lives of many Nepalese but they can provide much needed signs that change is possible and that central authorities are willing to think of the national interest in the broadest sense.

**Kathmandu/ Brussels, 17 June 2003**

## APPENDIX A

### MAP OF NEPAL



Courtesy of The General Libraries, The University of Texas at Austin

## **APPENDIX B**

### **GLOSSARY OF ABBREVIATIONS**

CIAA	Commission for the Investigation for the Abuse of Authority
RNA	Royal Nepalese Army
RPP	Rastriya Prajantra Party
UML	Unified Marxist Leninists Party