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Nepali Constitution-Making After the Revolution

Damian Williams

After the emergence of a popular resistance movement to direct rule by an absolutist monarchy, and several years of civil war, King Gyanendra of Nepal yielded power to an elected Congress in 2006. Within one year, Nepali citizens saw the signing of a Comprehensive Peace Accord, the establishment of a Constituent Assembly, the declaration of the Nepali state, and the declaration of the Nepali Republic a year after that. An Interim Constitution was adopted by 2007, which endowed the Constituent Assembly with the authority to draft Nepal's permanent Constitution, and established the limitations under which the Assembly must operate — all apparently legitimate steps in establishing a Constitutional order. Yet to date, Nepal has not adopted a permanent constitution; in fact, the first Constituent Assembly failed in the endeavor, improperly assumed authority to move imposed deadlines, was admonished by the Nepali Supreme Court, and was later dissolved altogether for missing an extended deadline. That is, what initially appeared to adhere to an established model of post-sovereign constitution-making has thus far failed. Indeed, the drafting and ratification of a permanent constitution is no easy task, and of course, the endeavor goes on in the second, democratically elected Constituent Assembly elected on November 19, 2013.¹ However, the question remains: why did the first Constituent Assembly fail? Where did the constitution-making process divert from the post-sovereign model, and what caused it?

To answer this, I examine the process from the establishment of Nepal's first Constituent Assembly to the short-lived deliberations of the Assembly, followed by the dissolution of the Assembly for failing to achieve its mandate. I also trace Nepal's constitution-making process along the post-sovereign model, and assess whether they adhered to or diverted from the model. It is understood that no political models are fixed in the sense that adherence or divergence is necessarily incompatible with success or failure. However, I use Andrew Arato's post-sovereign model as a guide for identifying the stages in the constitution-making process, and for a background to the discussion on where the first Assembly failed. My aim is not only to determine the causes of Nepal's failure to yield a permanent Constitution after a rather speedily divesture of royal powers and the establishment of a federal republic, but also to gain insight into how the democratically elected Second Constituent Assembly may successfully undertake the

drafting of Nepal's permanent Constitution. In the first part of this essay, I discuss the foundational theories of constituent power and constitution-making to establish the yardstick by which the Nepal case can be measured and I analyze Nepal's existent state under an Interim Constitution against an existent theory of constitution-making as is being developed in contemporary scholarly work.

I

Under current legal notions, the constituent power is the possibility for the remediation of existent legal problems through the revision of the constitution.² It is *the* power to create a constitution, for it is the originator of "juridical norms."³ In contemporary democracies, the constituent power is predicated on a participatory norm: where a society wishes to form, enact, and be governed by a new constitution that society ought to do so.⁴ Indeed, where the process of constitution-making is not organic, or where a constitution is instituted in a top-down, executive claim to embody the constituent power, the product of this perversion of the process can be characterized as democratically illegitimate.⁵ The constituent power symbolizes a *unified* will among diverse and typically divided groups in a society, which in turn, provides for the exercise of that will.⁶ To be clear, the manifestation of the constituent power, by virtue of it being representative of a collective, is in no way that of "commonness," — rather, it is that of a profound *exception*. In its presence, claims of state-instituted authority are permanently subject to revision, dissolution, or vanquishment.⁷ The collective is typically referred to as the people or the multitude — a fiction if the definition is predicated on widespread consensus or a social contract among diverse groups bearing diverse interests. For one to conceptually fill the space of the collective for the purposes of analysis, one must define the collective in relative terms, taking into account the existing relationship of state institutions with individuals within the domain of those institutions' powers. For example, in an established constitutional order, the collective are those who are governed in accord with the institutional framework set out in the Constitution. In the post-sovereign constitution-making phase of a nation, the collective are those who are represented by the assembly in its task to establish a future constitutional order. In the end phase of a previous sovereign, the collective are the

progenitors of the constituent power; the force that ruptures the previous order and establishes the new.

In the case of Nepal, the collective are those who, individually, were the previous subjects of the Nepali Crown, but are now citizens of the unfolding constitutional democracy. At any given time, the collective may participate, comply, or resist. It is in resisting that the constituent power arises. Hence, the collective is endowed with power to effect change within and of an existing state structure. Such power is not a formulaic, predictable, or sustained manifestation and expression of popular sovereignty. Rather, it manifests surprisingly, being unforeseen by the collective; and legitimately, in that its sufficiency for challenging the existing political order is incontestable.⁸ It is: “[a] moment of invention in history-in-the-making,” — “[a] sudden emergence,” that manifests “only within th[e] perspective of immediacy.”⁹ The sudden, exceptional moment in which the constituent power manifests itself serves as the impetus for constitution-making and constitution revision.¹⁰ In other words, the constituent power comes first, and then the constitutional order follows — the Constitution is that which captures the process in which the constituent power has manifested, and that generates the form of state power, instituted by the collective as a product of the collective’s will.¹¹

A Constitution is intended both to organize the form of the state and establish the domain or boundaries in which state power may manifest itself.¹² The constituent power is the generating force that gives rise to the characteristics of the constitutional order.¹³ To this end, the constituent power is foundational, and is the eventuality of the law that is embodied in and flows out of a Constitution.¹⁴ While it reflects the foundations from which juridical norms flow, it is neither a continuation of a pre-existing constitutional order, nor the product of legal positivism.¹⁵ This distinction separates the constituent power from constituted power.¹⁶ The constituent power emerges extra-legally through a displacement or estrangement in the existent political order;¹⁷ that is, constituted power is instantiated after the establishment of the constitutional order, and is, indeed, the output of the expressed constituent power. As such, the Constitution is emblematic of the event in which the collective ascended to democratically establish a new state form.¹⁸ It is representative of a collaborative archetype and is foundational to all resulting political action within the framework it sets.¹⁹

It is the constituent power, however, that situates the Constitution relative to the collective that has ordained it, and is indicative of power that ultimately exceeds that of the established constitutional order.²⁰ In the act of constitution-making, the framers engage in a kind of *legal* power — the power to establish law;²¹ it is the constituent power that gives rise to the act

of establishing law vis-à-vis the constitution-making process. Further, there remains a sort of reflexivity between the constituent power and the power to constitute law in a recently established constitutional order. Acting within the law generated out of the constituent power, framers concede to law that embodies the norms under which the expressed constituent power *incited* the constitution-making process.²² It is when constitution-making is *of* the constituent power that the process retains democratic legitimacy.²³

Thus, the constitution-making process can be measured by its faith to the constituent power; its origins, which are generative both of the norms under which the constitution-making process is embarked upon, and the archetypes against which the resultant constitutional order is measured.²⁴ As such, the constituent power is representative of a democratic archetype, whereby all outflowing actions and events are ultimately assessed with regard to its approximation to that archetype.²⁵ Further, the link between constituent power and constitution-making makes it implicit that the collective, as representative of all who acquiesce to the constituted power, holds the power to validate the Constitution in terms of its authority. If it does not represent all who acquiesce, it is implicit that the Constitution — the result of the constitution-making process, is therefore illegitimate.²⁶ The collective is the bearer of the impetus in which the constituent power emerges, reflexively prompting the collective to embark on the establishment of a new constitutional order, carefully put forth by the measured, deliberative process of constitution-making.²⁷ Post-constitution-making, the sovereign state — in contemporary terms — is established.

The order of power, embodied in the state structure and established by the Constitution, replaces the constituent power; the arising constituent power fades away, or is perhaps reconstructed into the individuals who will be so governed by that state that is newly formed.²⁸ Post-Constitution, the end product is a juridical framework, in which the boundaries of state power are formally set in relation to the individual citizen.²⁹ Implicit in this framework is that state structures enjoy limited powers. This follows from the logic that the Constitution, being formed under the norms in which it was created and generated by the constituent power, establishes legitimate state power that is limited by the constituency: the collective by which the constituent power emerges. This is the logic behind the theory of constitutionalism.³⁰ Whereas the constituent power signals an oncoming establishment of law and a manner of governance in the future, constitutionalism is an ongoing reflection on the principles assumed during the extraordinary moment in which a Constitution is established.³¹ The resultant relationship pits state power against constituent power, for it is the constituent power that implicitly holds the

collective authority subordinate to that of the state; it is the mediation between the power of the state and the ultimate power of the collective.³² For, the collective's power to resist: ". . . stands as a revolutionary extension of the human capacity to construct history, as a fundamental act of innovation, and therefore as absolute procedure."³³ The challenge, therefore, is for the established constitutional order to maintain a place beyond the juridical in which the constituent power can re-emerge. That is, the model in which the Constitution is predicated must remain faithful to its origins, leaving the potential for the ultimate authority of the collective to re-emerge.³⁴ This potential lies at the core of a democracy's legitimacy.

II

Andrew Arato has advanced notions of constituent power and constitution-making and has offered a model for a successful constitution-making process, based on recent examples of successful attempts at constitution-making, such as in South Africa.³⁵ He has identified within the constitution-making process the stages in which a constitutional order is formed, and suggests that when various problems have not been addressed at respective stages of the constitution-making process, the constitution-making endeavor is likely to fail.³⁶ Given the multiplicity of events that occur during the constitution-making process, the process must proceed in stages.³⁷ Since the 1970s, it has proceeded in two stages, starting with an Interim Constitution, which in turn, establishes the legal order in which the final Constitution will be drafted and ratified. According to Arato, the interim constitution is paramount in importance to the constitution-making process.³⁸ It is by virtue of the provisional order embodied by the interim constitution that the deliberative process of drafting the final constitution can proceed successfully.³⁹ Through democratic means, a limited assembly with a precise mandate and enjoying limited vestiture of power to fulfill its mandate is formed for the purposes of drafting and ratifying the final constitution.⁴⁰ The democratically elected assembly is not autonomous in its commission; it is not self-regulating, and therefore, it is subject to dissolution when it has deviated from its mandated path.⁴¹ Key to maintaining legitimacy in the assembly's proceedings is its adherence to established procedural rules, which in turn, ought to establish safeguards for retaining the interim constitution if a final constitution is not successfully drafted and ratified.⁴²

Further, the constituent assembly ought not to imitate the structure of the previous regime's legal order, since if it does, it allows for the possibility that the previous regime or reiterations of the previous regime's form may re-emerge.⁴³ Moreover, rules and procedures must maintain continuity during the different stages of

the constitution-making process.⁴⁴ Essentially, the lack of such continuity poses risks that the assembly will lose credibility, and therefore, legitimacy. The faithful execution of the interim constitution is essential for maintaining the assembly's task in establishing a constitutional order that is faithful to its origins. The process must remain representative of what the collective had actually set in motion: the formation of a constitutional framework in which democracy is facilitated.⁴⁵ To achieve this end, this model requires the existence of a Constitutional Court so that the constitutionality of the final Constitution can be assured and the Court can determine the constitutionality of the constitution in draft form, and provide guidance to the assembly where revision is needed.⁴⁶ Arato traces the evolution of the constitution-making process in the following manner:

From the 18th century to the present, constitution-making with democratic claims has taken the form of elected or delegated conventions (as first in the USA), revolutionary or elected constituent assemblies (as first in the USA and then more famously in France), executives using plebiscites (as first in the version of Bonapartism), regular parliaments (again first in some US states), and now, most recently, from Spain and Poland to South Africa and Nepal, multi-stage efforts involving round table negotiations, interim constitutions and non-sovereign elected assemblies.⁴⁷

A significant issue that may present an obstacle to the assembly's faithful execution of its task is that of legitimacy. Where there is ad hoc utilization of plebiscites and referenda, the assembly, in essence, employs "shortcuts . . . to democratic legitimacy" which, given the constraints under which the assembly is authorized to operate, transmits the opposite: illegitimacy.⁴⁸ Arato attributes this to either a lack of perception of the legitimacy issue by the assembly, or misguided attempts to remedy deviations from procedure in an impromptu manner.⁴⁹ Nevertheless, misguided acts undertaken by the assembly remain capable of producing constitutional law, and therefore, a mechanism for judicial review of the assembly's actions is necessary for maintaining the assembly's legitimacy.⁵⁰ It is the task of the Constitutional Court to assure that provisional governments and assemblies adhere to their limitations, and not overstep or taint the constitution-making process.⁵¹ The Court itself is also subject to questions of legitimacy; where the court overreaches and interrupts the constitution-making process, or improperly assumes itself to be directly representative of the constituent power, it too runs the risk of transmitting illegitimacy.⁵² In essence, where any constituent part of the constitution-making process absconds or oversteps its authority, its legitimacy — and indeed the entire constitution-making process — is called into question.

III

Elections for the first Nepalese Constituent Assembly were held on April 10, 2008, and resulted in the United Communist Party of Nepal (Maoist) (“UCPNM”) winning 40% of the vote — a majority of the 601-seat assembly. It is the UCPNM that initiated the Nepalese Revolution by mobilizing militarily and serving up demands for democracy to the previous Government, which, having not been met, served as the basis for starting the People’s War in 1996. It is in large part due to the UCPNM’s efforts that Nepal became democratic, and thus, the electoral outcome in the first Assembly was representative of the party’s popularity at the time. However, issues over facilitating a fully representative assembly that was adequately representative of the many diverse groups in Nepalese society arose early in the Assembly’s deliberations. At the center of the debate was whether the Assembly sufficiently represented Nepal’s ethnic minorities in its makeup, immediately casting doubt onto the Assembly’s legitimacy.

The assembly very much mirrored Nepal’s Hindu-dominated character, but also presented issues of representation along ethnic, gender, and caste lines. In essence, equal representation in the assembly, coupled with residual issues over Maoist rebels who were at the time sequestered after the war, loomed over the Assembly’s first attempts at performing its mandate in accord with the Interim Constitution.⁵³ Thus, the second stage in Nepal’s constitution-making process after the Interim Constitution was immediately faced with problems with legitimacy as issues arose. The first was whether the Assembly’s formulation was truly representative, that is, democratic enough. The second was that the initial stage in which the provisional governmental authority was established had not taken into account the status of rebel soldiers still living under pre-democratic conditions. At that time, around mid-2008, UCPNM members of the Assembly were attempting to swiftly resolve the Maoist rebel issue by integrating them into the Nepalese military. However, resistance to this integration by the minority parties delayed this process, and remained a divisive issue for the remainder of the first Assembly’s proceedings.⁵⁴ Further, while the UCPNM had gained the most seats during initial elections, divisions within the Assembly remained, making the establishment of a coalition government difficult, and even leading to intense divisions in filling symbolic ceremonial positions in the new government.⁵⁵

While formally, all proceedings by the Assembly appeared to have been democratically achieved, with the failure to achieve consensus within the proceedings, the fate of the future Nepalese government was continually undermined. Essentially, the Assembly was in a legislative impasse and it was questionable whether

the strongest party — the UCPNM — would continue to cooperate with other parties, as the divisions that played out in Nepal’s civil war were still palpable in the Assembly. It is as though, despite a strict procedural adherence to a post-sovereign model, divisions based on memories of the revolutionary disruption of the previous regime presented a significant hindrance to democratically achieved nation-building. Chief among those opposed to the UCPNM party was the oldest Nepali political party and the second strongest party in the Assembly, the Nepali Congress, whose memory of previous grievances against the Maoists had been the cause of their absolute opposition in the Assembly. The government was thus dependent on UCPNM’s agreement in the coalition, while the various parties were in chronic disagreement. The multiple changes in the incumbents of the prime ministerial post through democratic means in a game of musical chairs are illustrative of the uncertainty and instability in the Assembly at that time.⁵⁶ By August 2008, the UCPNM was successful in establishing the coalition that went on to elect the former leader of the Maoist insurgency during the war, Pushpa Kamal Dahal, as Prime Minister. Within ten months, however, the Prime Minister, known as Prachanda, was forced to resign for his unilateral, unconstitutional attempt to remove the Nepalese Army Chief of Staff. This was viewed as a brazen attempt to circumvent the constitutional order by surreptitiously integrating Maoist rebels, who were still sequestered in camps monitored by the United Nations, into Nepal’s army. The move was admonished and the Assembly’s task to establish the new government was again delayed.⁵⁷ This led to the UCPNM leaving the government, and later “stag[ing] demonstrations, seiz[ing] land and symbolically declar[ing] that certain areas, including Katmandu, [were] autonomous zones outside the purview of the government.”⁵⁸ The UCPNM contention was that the admonishment of the Prime Minister by the President was in of itself unconstitutional and beyond the President’s powers.⁵⁹

Furthermore, the Assembly’s deadline for completing its draft of a final constitution was quickly approaching — exactly one year after Prachanda’s resignation in May 4, 2009. In this we can clearly see the problem of legitimacy discussed by Arato. The failure for the Assembly to act in accordance with the Interim Constitution, coupled with the perception that the Assembly was dysfunctional, incapable of reaching consensus, and unlikely to draft a final constitution, made it evident that in the second stage of the constitution-making process, the Assembly would fail — indeed its legitimacy was being chronically called into question. This dysfunction lay at the root of the first Assembly’s failings. This was not due to an executive’s false claims

of constituent power by to an improperly coordinated democratic representation of the diverse Nepali peoples in the Assembly. Even with its approximate adherence to the democratic model, the Nepali Assembly simply could not sustain the push for it to fulfill its mandate. The cooperation required for the Assembly to successfully draft a permanent constitution was obstructed by lingering divisions between groups over unaddressed grievances tracing back to the civil war. As a result, the initial deadline for drafting the final constitution was missed. The Assembly narrowly avoided a shut-down of the entire government, and perhaps worse, a return to violence. In the early morning after midnight on the May 29, 2010 deadline, the UCPNM and minority parties were still unable to come to agreement over several issues. All sides began casting the Assembly's task in terms of a peace process, and inevitably, preconditions to an interim agreement were put forth in a very unstructured, ad hoc manner, again signifying that the Assembly was unaware of its own illegitimacy.

Finally, and much to the relief of many, an agreement was reached for a one-year extension of the process exactly one hour after the deadline.⁶⁰ Of particular importance here is the Assembly's exercise of authority; its self-acclaimed right to change the deadline on its mandate. Again, from its very inception, the dysfunction in the Assembly signified overwhelming failure in Nepal's constitution-making process. Under the Interim Constitution, the Assembly was vested the power to extend the process by six months, not one year. Moreover, established procedure required that a state of emergency be declared prior to enacting an extension. Essentially, due to the divisive issue about what should be done with the sequestered Maoist fighters, which should have been agreed during the first, interim government, the Assembly simply could not function.⁶¹ To add insult to injury, Maoists reinitiated their strikes and the interruption of deliveries of consumer goods to the capital in May, 2010, suggesting to citizens that civil war was once again imminent. Accordingly, the United States, China, and India began pressuring parties to reach a deal to avoid a collapse of the new Nepali government.⁶² The UCPNM continued to contend that coalition leadership was illegitimate and thus, there was sufficient cause to maintain intense disagreement.⁶³

Even where the Assembly abided by procedures established prior to its deliberations, it was completely unable to secure agreement on myriad issues. For example, during the deadline crisis, it took seventeen separate votes to choose yet another prime minister, causing another nine-month delay, and ultimately, a new prime minister was not installed until February 2011. With such an impasse in the Assembly, and the broader view that the groups represented were far more divided than had been presumed, the constitution-making process

was increasingly de-legitimated, and continually stalled in the Assembly. Interestingly, the UCPNM maintained that they acted on behalf of the nation's poor,⁶⁴ who, at the rate of 1000 per day, were fleeing Nepal to seek work in more stable economies, such as Saudi Arabia.⁶⁵

Finally, in early 2012, there appeared to be a glimmer of hope: there was an agreement to release approximately one-third of the Maoist fighters sequestered in the UN encampments. The former militants were released and given checks "ranging from \$6,357 to as much as \$10,235" in value in order to facilitate their re-assimilation into society. This was hoped to mark an important step for assuring lasting peace in the nation.⁶⁶ However, this hope was short-lived, as within several days of the release of more than 7000 militants, division across ethnic lines began to re-emerge, which ultimately led to an act of terrorism by the United Ethnic Liberation Front on February 27, 2012.

This, given the oncoming, extended deadline of May 28, 2012, again dealt a significant blow to the constitution-making process. This time, the Constitutional Court made clear that the Assembly would not be allowed to extend the process any longer.⁶⁷ With less than three months before the deadline, and with divisions now emerging along ethnic lines, the Assembly eventually failed to complete its task, resulting in a declaration by the then Prime Minister Dr Baburam Bhattari that the Assembly would be dissolved.⁶⁸ Ultimately, the Assembly had failed to do in four years what it initially had been given two years to do. The dissolution was decried by some as a "power grab," as the Prime Minister and the UCPNM party would maintain control of the interim government while new elections were held.⁶⁹ The response to this was increasing divisiveness, as the nation teetered towards violent confrontations along ethnic lines. Indeed, for some, the upcoming elections represented a chance for representation they had not had under the previous, Maoist-dominated Assembly.⁷⁰

Matters were further complicated by emerging divisions within the UCPNM party: moderates and hard-liners began to split, threatening the UCPNM majority. The issue now central to debates was whether the Assembly had sufficiently recognized the lower classes, who historically, had been given no recognition at all by the Nepali Government,⁷¹ although these classes were a component part of the collective that had previously ascended to establish a federated republic. They had fought in the civil war and accepted peace with the promise of being democratically represented in the new government. The UCPNM, after having achieved the release of many Maoist fighters, now vied for equal representation along ethnic lines, since, given the Hindu past of Nepal, many minorities were not adequately represented in the Assembly. Of course, the end result of a

non-representative Assembly is the failure to adhere to democratic principles by not recognizing all groups in the new constitutional order. In its attempts to restart the process and to instill the stability that the second Assembly needed to proceed, the nation's Chief Justice stepped in as interim Prime Minister until new elections could be held.

On the latter issue alone, new divisions emerged. For approximately a year the UCPNM opposed agreement on this; contending that amnesty for war crimes during the civil war was central to the agreement. As late as February 2013, nine months since the first Assembly was dissolved, an interim Prime Minister had not been appointed. Nepal had regressed from being a nation in the making to becoming a nation that was about to fight another civil war. Further, the Maoist interim Prime Minister in place continually rejected attempts to hold new elections. Thus, it appeared that the UCPNM had achieved a new stranglehold on the democratic constitution-making process. As well as benefiting from the divisions along ethnic or religious lines, the UCPNM were again benefitting from stagnation on decision-making — this time, on the basis of an amnesty for Maoist crimes that at the least contributed to the loss of more than 13,000 lives during the war. Seeking freedom from prosecution, the UCPNM demanded that more conciliatory procedures than prosecution for war crimes be put in place to deal with past crimes by Maoist militants. Given the failing interim government, the UCPNM struck at the moment when they had maximum leverage in order to achieve this aim: the stalled establishment of the newly democratic nation.⁷² Eventually, Chief Justice Khil Raj Regmi was sworn in as interim Prime Minister in mid-March 2013.

While the UCPNM did not win on the amnesty concession, all parties compromised in some way. Nevertheless, little had been achieved for the minority parties. Under the agreement, Regmi would have until November 2013 to see that elections were held in order to institute the Second Assembly and make another attempt at drafting a final constitution.⁷³ It is true that the Interim Constitution served as a fallback position in which some stability in the nation was maintained.⁷⁴ As such and as previously stated, the Second Constituent Assembly was recently elected, resulting in the Nepali Congress winning 105 seats in the Assembly and the Communist Party of Nepal winning 91. However after its more hard-liner faction splintered off, the UCPNM won only 26 seats — far less than in the previous Assembly.⁷⁵ This represented a clear shift in Nepal: the collective had expressed a wish to alter the course in which the constitution-making process had previously undertaken.⁷⁶

IV

There are two obvious ways of reading the failures of the first Nepali Constituent Assembly. The first was that it was the result of Maoist intransigence. The second is the view that there are so many cultures, ethnicities, and political ideologies in Nepal that any expectations of consensus in the constitution-making process are misguided and naive. However, these reasons seem shallow in light of the fact that after a ten-year civil war, the people of Nepal did in fact assent to a new democratic order. In this act, the constituent power exposed itself, emerging to disrupt the old order. It arose to bring about the installation of the Interim Constitution, the interim government and a democratically elected Assembly with the broad support of the international community. The multitude had spoken, and as a result a legitimate democracy emerged in Nepal to be, for a time, a crown jewel among emerging constitutional societies. The revolutionary beginnings that ultimately led to the king's divestiture of powers were reminiscent of the sort of beginning that Hannah Arendt describes; that is, the ramifications of a *new* beginning — the birth of a new political structure — was one of a legendary, historic nature. Indeed, it appeared as that “legendary hiatus between end and beginning, between a no-longer and a not yet.”⁷⁷

During the Nepalese Revolution, the Maoists had previously knowingly undertaken to bring about the end of a prior order — a political way of life shared by an unwittingly co-dependent and participating collective — and to establish society anew. This was no minor feat; on the contrary, it aimed to confront the past and separate it from *its* future.⁷⁸ Bringing about an end to the past and establishing a new foundation via a revolution, thus prompting the establishment of a new political order predicated on bestowing greater freedoms upon the people, was a moment of the truly revolutionary beginnings that Arendt speaks of in *On Revolution*.

Given such grand conceptions of the power in which the collective establishes a new state structure — after a bright new Arendtian beginning — it seems absurd that the first Nepali Assembly simply could find no way of operating. Indeed, in terms of Arato's model, the origins of the democratic movement signaled the manifestation of the constituent power — not merely of drafting a Constitution but of drafting a legitimate constitutional order using democratic means. Under these exceptional circumstances, the reasons for the Assembly's failure seem insufficient to stall or abort the birth of a democratic order. By this, it appears that we might better understand the first Assembly's failings by correlating the structure of events to form. That is, by assuming that the post-sovereign, two-stage model was valid, the Nepali Assembly struggled with issues of legitimacy from its very inception.

The cracks did not occur during the drafting of the Interim Constitution, nor with the election of the Assembly. Instead, they occurred when the Assembly tried to complete very specific tasks. To start with, it was handicapped by the issue of what to do with the 19,000 Maoist fighters who remained in UN-controlled camps. By failing to address this issue immediately after the cease-fire or by relegating their fate to a decision in a divided Assembly, this remained a contentious issue in which the UCPNM majority was met with continual internal opposition from other parties. Second, the promise of egalitarian representation in the new democratic order was faced with ethnic and religious divisions — perhaps the most virulent forms of division in any given society. Whereas in the past divisions had been along the lines of political ideology, the attempts at the politicization of ethnic and religious differences exposed new rifts in the society, and contributed additional reasons for the impasse in the Assembly. Third, the lingering distrust of the Maoist regime and the lack of adequate coalition-building, left all non-Maoist citizens faced with the threat of violence — a situation the UCPNM exploited to its fullest capacity, short of actually igniting another civil war. Fourth, successive prime ministers continuously failed to promote or facilitate consensus in the Assembly, and the frequent changes of incumbents of the post also began to symbolize the Assembly's illegitimacy. Fifth, lingering war crimes and human rights abuses were left unaddressed. There were no trials and no Truth and Reconciliation Commission. Instead, the issue was sidestepped in the rush to establish the Assembly.

The failure to adequately address claims of war crimes and human rights abuses lies at the heart of why elections for the second Constituent Assembly were delayed for more than a year. This suggests that the adherence to democratic form was not at fault in this case. The causes were manifested in the substance of the Assembly's proceedings. Despite having satisfied the requirements laid out by western democracies, this post-Revolution achievement was empty and the reality is that the issues that gave rise to civil war in Nepal remain to this day. The first Assembly's failings are representative of the deep divisions that remain in the society. Although the first stage of the process appeared valid, too much was left unaddressed. It was as though forms reminiscent of the prior way of political life lingered in the collective memory, thereby raising obstacles to the sort of progress seen to emerge from the American Revolution. The constituent power was constituted in too limited a form; the interim set-up relegated all internal division to the Assembly, which was quite incapable of fulfilling its task. Lingering divisions that survived the call for peace remained a source of division and inaction in the second stage of the process and, from

the outsider perspective, the Assembly's fumbling signaled the illegitimacy of the entire process. Notions of majority or the multitude were absent in the democratically established organ. Instead, this rebirth of Nepal remained under threat.

If it is a sort of faithfulness to origins that assures success, then the constitution-making process in Nepal thus far seems more pertinent to the facilitation of a cease-fire in the war than the outcome of a Maoist revolution in the name of democracy. The only relevant and indeed believable account for this type of failure is that the illegitimacy of the Assembly bled out to delegitimize the entire second stage of the process. Short cuts and unnoticed blind spots instilled this illegitimacy, which came about because of the myriad issues that remained between particular groups and sub-groups within the Assembly (that is, along political, ethnic, or religious lines). The Assembly simply failed to establish a pathway for these issues to be dealt with under a UCPNM majority.

Thus, post-constituted power: the willingness to establish a democratic order, has thus far failed to produce a permanent Nepali Constitution. No juridical realm has since been formed, nor have the rights of Nepali citizens been established in any permanent, foundational way. No constitutional framework for the state's authority has been proffered, nor has there been any strict adherence to procedure. Instead, the nation is left in limbo, and threatened by incompetence rather than a sudden break in constitutionalist theory. As such, the Maoist revolution has lost its permanence, the Leviathan had not emerged, nor has there been a top-down exercise of authority. Rather, an impoverished, divided and immanently violent public has come to live in perpetual institutional uncertainty. The grab for a newly formed state identity has descended into a baffling exercise of instituting civil division — indeed civil war — into democratic, theoretical institutions. By this, and by virtue of crippling divisiveness, the first Assembly's failure was inevitable. Given the lingering residual memories of the divisions of the past, the second Assembly may too suffer the same fate.

V

So how might the second Constituent Assembly succeed? The Maoist rebels who were not paid off to re-assimilate into society were eventually assimilated into the Nepalese Army. The Maoist party has been greatly reduced in the second Assembly, as a result of a backlash against it by voters. The lack of a single-party majority in the second Assembly will require coalition-building between the parties, as in the first Assembly. Also, although it had not been completely instituted at the time of writing, a Truth and Reconciliation Commission has

been established vis-à-vis the Ordinance on the Investigation of Disappeared Persons.

While divisions along ethnic and religious lines remain, the high level of voter turnout in the recent elections has signaled voters hope that the problems in the first Assembly may be remedied and that the second Assembly will be better equipped to formulate a permanent Constitution. Moreover, although the Maoists have claimed there were irregularities in the last elections held in November 19, 2013, international observers of the process have declared that the elections proceeded in an orderly and fair manner, and that the outcome is indeed representative of the voters' wishes. Thus, a seemingly legitimate second Assembly has been constituted. Assembly members have been sworn in and the first meeting occurred on January 22, 2014, though lasting only a paltry seventeen minutes. Thus after years of delays attributable to the first Assembly, the second Assembly was established and positioned for completion of its mandate rather expediently — a sign of progress thus far. If the second Assembly progresses successfully, the entire process since the civil war cease-fire will appear legitimate in retrospect to some observers. That is, once a permanent Constitution is established and its outcomes appear faithful to its origins, then the issues that bedeviled the first Assembly may come to be thought of as transitory, growing pains subsequently alleviated through democratic means.

However, there is at least one voice that calls the second Assembly illegitimate: the UCPNM. While somewhat diminished in size, the UCPNM will be the third largest party in the Assembly. Thus, there is likely to remain a voice within the Assembly which will continually call its legitimacy into question — a double-edged sword for all to contend with. If the Assembly can appease the Maoists this may come to signal the legitimacy of the Assembly, and Maoist intransigence may come to signal its illegitimacy. This is not inconsistent with the events surrounding the first Assembly. After all, the Maoists were the first to demand democracy, the formation of a republic, and a constitutional framework for governance. Maoist resistance remains closely linked to the origins of a democratic Nepal, and thus, it is unlikely that their claims of illegitimacy will be easily discredited.

However, there are signs that the UCPNM party is undergoing its own divisions on ideological grounds, with recent splits between hard-liners and moderates resulting in the formation of the CPN-Maoist party, who decry the UCPNM party as neo-revisionist. The UCPNM is in a weakened state and its survival after the splinter into additional parties remains precarious at best. This will undoubtedly be seen in the Assembly's future proceedings, marking a clear distinction from the first Assembly's proceedings.

With strict adherence to procedure, transparent voting, and focused attention on consensus-building, the second Assembly can succeed. It must avoid the ad hoc utilization of plebiscites and referenda and its members must resist lingering tendencies to allow the proceedings to descend into chaos. Further, Assembly members must remain keenly aware of outside perceptions of illegitimacy, and remedy these perceptions quickly and consistently. Also, the Assembly must avoid attempts at mediating human rights claims out of the civil war through Assembly proceedings.

These matters must be resolved through the Truth and Reconciliation Commission, which in turn, must account for its own legitimacy. Lastly, in accord with the Interim Constitution, the Assembly must complete its task within a two-year term and resist calls for extensions or delays. The temporal aspect of the constitution-making process must be met to maintain its credibility. In sum, the second Assembly must remain committed to embodying, inhabiting, transmitting and instilling legitimacy by diligently remaining focused on the task at hand: the formal establishment of the new Nepali Republic. By proceeding thus, the Assembly can maintain legitimacy in the eyes of the Nepali voters and outside observers, finally fulfilling ongoing and long-awaited pleas for democracy.

NOTES

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