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# Democratization of Nepal: Towards Consolidation? Perspectives on Rule of Law & Civil Liberties

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DEMOCRATIZATION OF NEPAL: TOWARDS CONSOLIDATION?

PERSPECTIVES ON RULE OF LAW AND CIVIL LIBERTIES

by

Anil Jung Shahi

A master's thesis submitted to the Graduate Faculty in Liberal Studies in partial fulfillment of  
the requirements for the degree of Master of Arts, The City University of New York

2019

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This manuscript has been read and accepted for the Graduate Faculty in Liberal Studies in satisfaction of the thesis requirement for the degree of Master of Arts.

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## ABSTRACT

### Democratization of Nepal: Towards Consolidation? Perspectives on Rule of Law and Civil Liberties

by

Anil Jung Shahi

Advisor: Mark Ungar

After popular uprisings that started in 1989, Nepal declassified the 200-year old absolute monarchy to a constitutional monarchy in 1990 and entered into an era of parliamentary democracy. The road to democratization was to be proven tumultuous when the Maoists launched an insurgency in 1996. In 2003, citing democratic government's inability to end the bloody insurgency and political parties' utter ineptitude in governance, King Gyanendra dismissed the parliament and retook the reign in an attempt to re-establish absolute monarchy. Just three years after, the Maoists and an alliance of seven political parties reached an agreement to end the insurgency, abolish monarchy and re-write the country's constitution declaring Nepal a Federal Republic, and launched yet another peaceful movement against the monarchy. In the face of formidable protests against which the military refused to use lethal force, the king relented and Nepal was declared a democratic republic in 2016.

The process of democratization in one of the poorest countries in the world has proven to be an arduous task. The lingering feudal social mindset from the era of absolute monarchy, initial absence of proper institutions to foster democracy, rampant corruption, lack of order, to name a

few factors, have raised questions about Nepal's prospects for democratic consolidation. This thesis will apply theories on democracy, democratization, and democratic consolidation to explore Nepali democratization and assess where Nepal stands in the process. In particular, this thesis will delve into *rule of law* and *civil liberties* – two critical indicators of democracy - in the current Nepali context to see how strong the case for democratic consolidation in that country can be made.

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**DEMOCRATIZATION OF NEPAL: TOWARDS CONSOLIDATION?  
PERSPECTIVES ON RULE OF LAW AND CIVIL LIBERTIES**

**CHAPTER 1: INTRODUCTION**

After 200 years of direct absolute rule by the kings of Shah dynasty, Nepalis went to the streets to protest against the regime in 1989. After just about 2 months of mostly peaceful protest – violent only in terms of minor vandalisms – the monarchy relented and negotiated with the heads of two major political parties who were banned until then a new constitution, declaring Nepal a constitutional monarchy. Within six years of many unstable governments, erratic haphazard elections, and poor governance on various levels, the Communist Party of Nepal (CPN – one of the parties to the 1990 agreement) split and the new (CPN – Maoists) presented to the government a 40-point demand which mostly included rights of the minority ethnic and caste groups. When the government didn't seem as responsive as they would have liked, they declared war against the state and the Maoist rebellion would last for nearly ten years leaving 13,000 dead. When the then king staged a royal coup against the democratic government citing Maoist war, corruption and general mismanagement of the state by the elected government and steered it back towards absolute monarchy in 2003, the Maoists and other political parties would band together to fight to take the country back from the monarch. 2006 would herald an entire new, completely unthinkable era in the entire history of Nepal – monarchy would be defeated and dethroned and the country would be declared a Democratic Republic.

Since then, Nepal has been on a very tumultuous path towards democracy. Wide-spread poverty, minimal literacy, confused society with lingering feudal mentality, and power-hungry corrupt politicians would make the path to democracy seem impossible. The most difficult task in the

new democracy would be addressing the demands of dozens of ethnic and caste groups who were previously suppressed under the monarchy for greater identity recognition and political and social participation. Despite all these conundrums and continuing chaotic political quagmire, Nepal still has not given up on democracy. Unlike many emerging democracies that have either reversed the course at different levels, or at least questioning the promises of democracy, the country continues to move forward. There have been some improvements now on the political and economic fronts, but many questions still linger. Is democratic consolidation real and achievable? Or are the people losing hope and showing signs of losing faith in democracy?

### **Democracy, democratization, & democratic consolidation**

Just as there is not an easy, monolithic definition of democracy, the measurement to assess the level of democracy – or to determine the purity of it – is, at the very best, a matter of debate. Within a particular choice of governance there too are various sub-choices, styles and sets of principles that make democracy itself not consistent with a single unique set of policies and institutions. Provided that a society chooses to be governed by democratic principles, a form of democracy that would benefit that society would be dependent on their specific socio-economic conditions, cultural values, and the entrenched history and political structure (Schmitter & Karl, 1991). Nevertheless, if the basic foundation of a broad, general understanding of democracy is individual's right to self-governance (Schmitter & Karl), there has to be certain universal principles that can be said to guide the discourse. Those are the principles that – at least in the perception of the governed – ensure legitimate representation and, if that is not the case, his or her right to replace the representative. This differentiates a person from being a subject to a citizen, responsible for oneself, included equally in the political process. This fundamental basis

then leads to whole host of policies and principles that recognizes, protects, and promotes the concept of individuality in governance.

After prolonged thoughts, deliberations and trials, democracy is now – despite still being subjected to interpretations – generally defined as “...a system of governance in which rulers are held accountable for their actions in the public realm by citizens, acting directly through the competition and cooperation of their elected representatives...and that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote” (Schumpeter, 1943, p 269). Notwithstanding the fact that democracy is never perfect – and that it carries with it its own set of flaws and fallacies – some of which will be broached into later in this thesis – what this means is that in order to have proper, legitimate representation, there needs to be a series of supporting elements that make the concept of democracy whole. Some of these basic principles that augment the definition of democracy are: regular, free and fair elections; equality and inclusion; majority rule; independent judiciary and bureaucracy; robust civil society; rule of law; and upholding certain civil liberties of the citizens (Linz & Stepan, 1996).

Exactly why and how a previously non-democratic regime begins to embrace transformation into a rule that upholds democratic principles – termed *democratization* – is another matter of speculative theories and debates. Neither has there ever been a single, absolute answer to the questions of if, when and how that process is considered complete – how do we determine if a process of democratization is fulfilled and a *democratic consolidation* has been achieved?

Accurately measuring abstract ideas like democracy is a difficult task. Nonetheless, keen observers have drawn up few theories on *democratization* and *democratic consolidation*. We can at least conjure up some ideas on how and why democratizations happen, and if any of those

processes are sustainable enough to validate democratic consolidation.

*Democratic consolidation* is considered fulfilled when parties concerned agree to hold periodic free and fair elections; and that the government elected by this process will have enough authority to draw and implement policies of governance; and that there is proper checks and balances between the branches of the government (Linz & Stepan). It is a process in which a newly democratic regime is considered sufficiently durable so as not to make the return to non-democratic rule likely any longer (Gasiorowski & Power, 1998). This is not to say democratic consolidations are non-reversible – consolidations can overturn just as much as the process of transformations can be reversed or halted at any point for various reasons.

Conflicts are not absent in consolidated democracies, but it differs in the way it handles conflicts.

Adhering to certain rules are critical in consolidated democracy, thus accountability is also important. Those who violate the rules – both government officials and other citizens – are punished peacefully with due process of the law (Burton, Gunther & Higley, 1995). Peaceful resolutions of conflicts via previously agreed-upon democratic rules are one of the norms of consolidated democracies. In contrast, unconsolidated democracies mean “elites and citizenry have failed to reach a consensus... universalistic limits on the state cannot be sustained...

substantive disagreements among the citizenry about procedural and substantive limits on the state, citizenry unwilling to defend limits on government, and expectation among rival political parties that each is at best incompletely committed to rules (Burton, Gunther & Higley, 1995, p. 260).

### **Three waves of democratization**

According to Samuel P. Huntington (1991), the historical periods in which significant numbers

of nations initialized democratization can broadly be divided into three waves. The First Wave was in the early nineteenth century when voting rights in the United States, which were then limited to wealthy, land-owning elites, were extended to common men. This suffrage that was granted only to white men, along with few other flaws like eviction of native Americans from their lands to expand the US territory, would not be considered as democratic by today's standards; but the expansion of political power to common men through the system of direct and secret balloting to elect the president, and subsequently substantially increasing the power of the president, meant increased political empowerment of common men. Termed "Jacksonian Democracy," this phenomenon also limited the involvement of the federal government in economy (McCormick, 1960).

The Second Wave, as stipulated by Huntington, started after the Allied victory in World War II, and would have lasted for about twenty years. This was when much of what is now Western Europe opened up to democratic principles of governance. After a brief ebb, decolonization would start the Third Wave in the mid-1970's and would affect Southern Europe, Latin America, and Asia. This wave is considered to have continued into late 1980's and 1990's, the era after the collapse of the Soviet Union.

### **Structuralist & institutionalist – two approaches to study democratization**

As mentioned earlier, there are no absolute answers to causes of democratization – neither can one assuredly claim to know the sustainability of the process. Then there is the important question of how can one determine when a democracy is consolidated in terms of it not being likely to revert back to being non-democratic? There are multiple theories, however, that make an attempt to study this field. And two of the most prominent contending theories are

### *Structuralist and Institutionalist.*

The foundational understanding of a structuralist approach to democratization is that it correlates development with democratization (Geddes, 2011). The basic cause of democratization is modernization – growth in education, income equality, urbanization, greater individual mobility, etc., the modernization theorists contend, inevitably lead the citizenry to become more participatory and demand a voice in government (Lipset, 1959). Rueschemeyer, Stepan and Stepan (1990) also argue that democratization is a product of competition between classes – that as the subordinate working classes become bigger and stronger through socioeconomic development, they begin to challenge the status quo that benefitted the interests of the higher classes. It erodes the power of the landed aristocracy via commercialization and industrialization, thus begins the process of democratization. This may also give credence to the fact that mostly richer countries are democratic.

The political, institutional approach to democratization, on the other hand, tend to focus less on structure and more on agency and its role in democratization process. These approaches are less deterministic than the structuralist and they emphasize contingency, strategic interactions and agency to instill democratic values into citizens build institutions to promote and internalize democratic principles (Ajagbe, 2016).

### **Is Nepali democracy on the path to consolidation?**

After having evolved out of absolute monarchy in 1990, and then renouncing monarchy altogether in 2006 to become a democratic republic, Nepali political system is one of the newest democracies. Fluidity of the situation of a nascent democracy that is rapidly evolving makes it extremely hard to study and analyze it with a greater degree of assertions. Nevertheless, for a

democratic transition to continue for as long as it has – despite extreme poverty and developmental difficulties, and social and political ills that has tempted many to give up hope on democracy – begs an attention that perhaps has not been given to it by scholars of democracy. Reverting back to authoritarian monarchy seems unfathomable now, but can the democratic process be considered to be on the right path, or would the sense of hopelessness steal some of the faith that people had in democracy?

There may be some variations as to what constitutes democracy. The basic principle is freedom to choose or replace a government out of free conscience through free and fair elections, and have one's basic rights well respected by the governing system. That would entail few important elements that can have broad platform with multiple sub-elements, which can, in turn, sometimes overlap each other. Nevertheless, the broad understanding of basic elements of democracy include: equality, accountability, tolerance, transparency, civil liberties, balance of power, independent judiciary, citizen participation, and rule of law.

Due to the limited scope, this thesis will take a much closer look at Nepali democratization from the point of view of institution-building. In particular, it will try to gauge two critical indicators of democracy – *rule of law* and *civil liberty* – to assess if democratic consolidation is still plausible in the context of emerging Nepali democracy. The detailed understanding of those terms will be addressed in the respective sections where they will be discussed, but it may be necessary to highlight the difference between them as I see it because a lot of times some of their respective elements can overlap too. For the sake of this thesis, *civil liberty* and *rule of law* will be understood as concepts of *rights* and *responsibility* respectively. Civil liberty is what the citizenry can expect to have guaranteed as their fundamental democratic rights, such as freedoms of expression, assembly, religion and movement. And rule of law would be seen as what the

citizenry – and the governments – must accept as their respective responsibilities that would limit their rights so that order can be maintained.

## CHAPTER 2: NEPAL'S TROUBLED DEMOCRATIC JOURNEY

### **Statehood & modern Nepal**

The history of Nepal as a political entity begins with the expansionist dream of the king of Gorkha, a small principality in western hills of Nepal. Prithivi Narayan Shah, the direct ancestor of the modern monarchy of Nepal, engaged in battles all his life since his accession in 1743 AD., conquering much of Eastern Nepal into Sikkim, which is now in India (Whelpton, 2005). He is credited with forming a single, viable state out of many principalities which itself is a source of contention between the nationalist ruling class and other minority groups. The former prefers to call the expansion “unification,” crediting the Shah king with great vision and impeccable war strategy to unify and form the state of Nepal, creating a strong, sovereign state between British India and Tibet, thus a strategic power balance in the region; whereas for the various ethnic groups that succumbed to the goals of the king of Gorkha, the expansion was brutal, vicious conquests that tried to annihilate the local ways of lives and subject them to cruel suppressive regime (Pradhan, 2002). Linz and Stepan’s the most basic structural requirement for democracy – statehood, a territory with defined borders with and organized political – in the case of Nepal, therefore, was established long before the quest for democracy even began. And after the coup by Jung Bahadur Kunwar (later the Ranas) in 1864, the system of hereditary prime ministers of the Rana clan – although they maintain monarchy as a symbolic figure – would rule until a little after the end of World War II.

In 1950, the main political party of the time, the Nepali Congress, in coordination with newly-liberated India and the monarchy, would topple the Rana regime and establish democracy with constitutional monarchy. The monarchy, in cohorts with the regrouped Ranas, the Nepali Congress Party and India, who were sympathetic the Nepali Congress, and for whom the issue of

Nepal was primarily about border security, would play critical roles in the dynamics of Nepali politics until the revolution of 1990 that heralded a lasting democracy (Whelpton, 2005). The first stint on democracy, right after the overthrow of the Ranas, would last only for nine years when King Mahendra usurped power by staging a coup against a democratic government that was elected freely in 1959, accusing political parties of corruption, gross mismanagement of the state, and being too close to India which he claimed was a threat to Nepali sovereignty (Sharma, 1973). The “party-less democracy” – termed the Panchayat system – in which the king held absolute power would remain secure by virtue of the king’s ability to play into the geopolitical rivalry between India and China (Whelpton, 2005).

### **The Panchayat**

One of the stronger traits of the era in which king Mahendra held absolute power was the development of national identity as he saw it, especially to distinguish Nepal from the political realm where what he feared was the increase of Indian influence in Nepali affairs. What this led to was a highly centralized hegemonic power based on a constructed “Hindu identity” that sought to forcefully homogenize the Nepali society through numerous ethnic groups (Riaz & Basu, 2007). The cultural and religious identity of one group (Khas – the unified identity of the two of the highest castes in the system – Brahmans and Chhetris) was adopted as the singular identity of Nepal and Nepalis. Nepali language was to be the official language of Nepal, Khas attire was adopted as official national outfit of Nepal, Hinduism became the national religion of the country, etc. Thus, the “Hindu Kingdom” under the Shah dynasty with a supposed homogenous identity was what was to be perceived as Nepal.

This shaped the dynamics of Nepali political and social order in a number of profound ways that

would affect the affairs of Nepal even long after monarchical system would be abolished. First, it subjugated the many indigenous ethnic groups whose culture, language and religion ( many of them were shamanists), to lesser citizens by virtue of their identity not recognized as part of the national identity; second, because of the language and cultural barriers, those ethnic groups would be severely under-represented in the state bureaucracy and security apparatus; and highly centralized system meant that ethnic groups other than the ones that held dominant power would be deprived to many services like education that further rendered them weaker and less capable (Riaz & Basu). The Hindu Kingdom, therefore, was constructed within the vision of a dictatorial figure, in the absence of whom continuation of the coerced system would be less secure.

After king Mahendra's death in 1972, his son Birendra would have a harder time maintaining the reign even though he succeeded in prolonging the life of the system with few difficult maneuvers. "Rapid change in Nepali society, including in particular the regime's own success in expanding education, coupled with failure to increase opportunities in line with expectations, produced growing resentment tension" (Whelpton, 2005, p. 86). The difficulty was precipitated by India's dominance in the region was cemented with its victory over Pakistan. However, it is hard to imagine education and any other source of empowerment be raised to a level that would have been enough to challenge the rigid, iron-fisted regime especially when the education itself was full of propaganda to brain wash the population to worship the king as an incarnation of a Hindu god. Indian pressure, which was always existent because they were never fully in favor of monarchical regime, and always tacitly supported the underground political parties (Riaz & Basu), seems more plausible.

After a disturbance against the Panchayat in 1979, king Birendra agreed to hold a referendum on the Panchayat system which the opposition lost. However, despite the fact that the referendum

was severely rigged, the fact that the opposition garnered 45% of the vote prompted the king to relax the grip a little and introduce elections to Rashtriya Panchayat (national assembly of the Panchayat) though the system would still remain party-less. Eventually, a dispute with India prompted the latter to impose economic blockade (almost all of Nepal's trade in and out of the country depended on India due to its landlocked situation) and the effects of the collapse of Eastern European autocracies – the Third Wave of democratization – would finally make inroads to Nepali politics. Primarily due to the crippling effect of the Indian blockade, the monarch was compelled to relent to a constitutional monarchy in 1990. The external, regional factors would ultimately be responsible for Nepal's major transformation into democracy.

### **The turning point: People's movement of 1990**

The popular agitations against absolute monarchy began to fan in 1989. Within few weeks, seeing an opportunity to topple a regime that they considered unfriendly even though they still maintained strong ties with it, India imposed an economic blockade against Nepal under the pretext of Nepal violating the trade and transit treaty of 1950 which allowed for open borders between the two countries. As almost all of Nepal's trade was dependent on India which borders the land-locked country on three sides, the blockade's effect would be unbearably crippling. The monarch would finally give in and was forced to negotiate with two major political forces, the Nepali Congress Party (NC) and the alliance of several leftist communist parties of which Communist Party of Nepal (CPN) was the largest, to promulgate a new constitution that declared Nepal a constitutional monarchy. Tested only for about nine years after the fall of the Ranas, democracy was completely unknown to many Nepalis – most of the Nepalis had known nothing but Panchayat all their lives. Thus, critics point out, path to democracy was bound to be acutely

tumultuous especially in the beginning. Lila Mani Pokharel, who was a central committee member of the CPN, and who is now a member of parliament from the Maoist faction of the party, laments the fact that many politicians of his times were not able to rid themselves of feudal mindset that was ingrained into them through decades of monarchical rule (Pokharel, 2018). It was this inability to comprehend, let alone maneuver, the intricacies of democracy that he says made the political parties look weak and incapable of governing. Feudal tendencies such as hierarchical power structure, patronization, favoritism, nepotism, still persists in politicians of older generations, he contends. “The process may be slow, but we are learning. And given time, our society will learn and break out of this vicious cycle sooner or later,” he expresses hope.

### **The Maoist rebellion**

Six years after the country embarked on a path to democracy, the entirety of which was defined by chaos and instability and power struggle between individual leaders within political parties, Communist Party of Nepal – Maoists (CPN-Maoist), one of the parties to the left alliance broke away and embarked on a violent movement to achieve what they called social and economic justice, particularly for the minorities and the poor. Pointing to the similarities between Nepali Maoists and Peruvian Sendero Luminoso, the only other Maoist rebellion group in the world at the time, Nickson write:

“...in a country emerging from a long period of authoritarian rule during which the standard of living of those inhabiting the poorest rural areas had stagnated despite the official rhetoric of priority concern for these sectors.... the subsequent growth of (communists) can largely be attributed to the failure of successive democratically elected governments to address the historic neglect and discrimination of the (rural) peoples and the widespread disillusionment which this

has engendered, especially among a growing body of semi-educated youth from those communities” (Nickson, 2003)

The Maoist insurgency started in Nepal in February 1996 with small-scale attacks on security forces in rural districts of western Nepal. When the state refused to honor the Maoists’ 40-point demand and instead embarked on a violent crackdown, the violence escalated into a war that lasted for ten years and cost over 13,000 lives. The infamous 40-point demand by the Maoists was categorized into three parts – on nationality, on people’s democracy, and on people’s livelihood. The demands were mostly populist calls such as assuring Nepali sovereignty from foreign influence, particularly India; ending patriarchal, feudal laws that reek of discrimination at multiple levels; and people’s right to livelihood and development. Pokharel explains that the ideological basis of the Maoist war was based on two main ideas: first, the change must come from transforming the state mechanisms and that the underdogs of the society must be included in the process of governance; and second, the centralized governance based on privileges to a single family (the monarch), or a class, or an ethnic group, must be brought to an end (Pokharel, 2018). A member of the Dalit (formally untouchable) caste who was one of the few lucky ones to get an opportunity to education and now is a prominent journalist in Kathmandu also credits the Maoists for at least igniting an awareness among the underclass who had been made to believe that their low position in the society was a natural phenomenon that they had to live with. Whether the Maoists were genuinely concerned with the upliftment of the poor and the oppressed would begin to be questioned too later when they got the opportunity to enter the government. Shyam Shrestha, a prominent civil society activist who initially sympathized with the Maoist agenda, and who was also a party to negotiating an agreement that ended the rebellion now believes the Maoists were no less of opportunists than any other political party, and that

they adopted the principles of empowerment and development of the rural poor only to advance their own selfish desire to rise to power (Shrestha, Shyam, 2018). He points to the fact that after several years in the government, the Maoist actions have only enriched the party elites and their cronies, leaving the poor and the down-trodden empty handed. It was all about power and money after all, Shrestha concurs to popular belief nowadays.

Despite some of the obvious misgivings of the movement, though, one cannot deny the fact that there has been significant progress especially on the equality front due to the Maoist rebellion. Shashi Shrestha, a prominent women's rights activist since the time when even conceptualizing women's rights was inconceivable, let alone a woman be politically active, claims that the communist parties of Nepal have always been at the forefront of struggles for equality. Central committee member of the CPN-Maoist party, and chairman of Maoist's women's caucus in the parliament, Shashi points to great achievements that women's rights movement has made in the past decade or so including, but not limited to, occupying 33% of parliament by women. Similar requirements to better women's representation are also being worked out in the bureaucratic structure, and women are now entitled to same property rights as their brothers, to name few of the achievements. Shashi's contention is that all of those could not have been possible if the Maoists were not there to break open the gate to begin with twenty years ago. She admits, though, that fighting against the historically entrenched patriarchal society has not been easy and that we still have a long, long way to go. The fact that Maoists do deserve some credit for instigating and propelling rights issues, be that of women, or Dalits, or various ethnic and racial groups is agreeable to many observers too. The evil part aside, it is true that we could not have got to where we are in terms of recognition of rights has something to do with the awareness that Maoist movement started (Gautam, Banskota & Manchanda, 2003).

### **Royal coup of 2003**

On June 13<sup>th</sup>, 2001, in what was dubbed the Nepalese Royal Massacre, the then crown prince went on a shooting spree at a family gathering and killed ten of his family members, including both of his parents, king Birendra and queen Aishwarya, and critically wounded four others. The crown prince himself was killed too by self-inflicted gunshot. Gyanendra, king Birendra's brother Gyanendra, who apparently was not at the gathering, was then ascended to the throne. He had a reputation of being a much harder liner than his older brother when it came to power plays. The ensuing stalemate in the Maoist rebellion and perpetual ineptitude on the part of the political leaders provided Gyanendra with a perfect pretext to stage a coup to retake the reign and push the country back towards absolute monarchy once again. Or so he thought. Three years after he became the king, Gyanendra declared a state of emergency, dismissed the democratically elected parliament and issued decrees curtailing fundamental rights and freedoms. He cited unending political instability and no sight of an end to Maoist rebellion as the reasons for Nepal to have a greater authoritarian guidance. What he promised was a "guided democracy," careful and gradual path towards freedom in order to avoid chaos that had been prevailing in the Nepali society for the past decade or so. However, after few months into the coup, it became clearer that he was using the fear of Maoists and exploiting the weaknesses and differences of political parties to totally scrap the constitution of 1990 and bring back absolute monarchy in the long run (Dixit, 2005). During the three years of his attempt to sustain the coup, detention of political leaders, journalists and human rights activists, suppressing freedom of the press and greater power to the Royal Nepalese Army were key indicators of democratic institutions erosion (Dixit).

However, majority of the Nepali youth who would be at the peak of their political activism grew up after 1990 and knew nothing but parliamentary democracy and valued freedom to the point that they were not going to relinquish it at any cost (Dixit). Resistance was strong despite the mobilization of the army to quell any opposition. Attempt to create a façade of progressiveness by holding local elections in February 2006 was foiled by mass boycott. It was Then finally, on November, 2005, the Seven-Party (opposition) Alliance (SPA) signed a 12-point agreement with the Maoists, under the auspices of the Indian government, to launch a movement to restore the parliament and hold elections for the constituent assembly to write a new constitution (Riaz & Basu, 2007). After weeks of agitations, and Nepalese army's reluctance to confront the populace with all out lethal force, the king capitulated and was relegated to being a figurehead once again. The elections for constituent assembly which was to operate as an interim legislative parliament too was held in April 2007 which the Maoists won decisively – perhaps the first time a rebel group joined main stream politics by winning an election. On December 28, 2007, the Interim Parliament declared Nepal a Federal Democratic Republic, which was then implemented on May 28<sup>th</sup>, 2008. That would end the 200 years of “glorious” history of Shah dynasty in Nepal.

### **Multi-ethnicity: The greatest conundrum**

Perhaps the most difficult issue to address in the context of Nepali democratization has to be about deeply multi-ethnic nature of the Nepali nation-state. Within the 57,000 sq. miles area, there exist about 125 different ethnic and caste groups with almost equal number of languages and dialects spoken between them. Such deep cleavages in ethnic composition of a state makes democratic consolidation extremely complex and difficult (Kymlicka, 1998). This is because when a state is composed of multiple national, ethnic, linguistic, religious, or cultural group, the

political dynamics of coming to an agreement on the fundamentals of democracy become more complex and difficult, which does not mean it is impossible (Linz & Stepan, 1996).

Linz and Stepan also contend that consolidated democracy and nation-state are not possible simultaneously – it is imperative that nation-states first become states by voluntary cultural assimilation, exit or peacefully agree to new political boundaries, supported by the international community. Or, as it was in the case of Panchayat Nepal, a homogenous state is created by imposing subtle or not-so-subtle sanctions against those not complying with the linguistic, cultural or religious practices of the titular nation. Schools, civil services, military, and other state apparatus have mandated policies of enforcing such fabricated homogeneity. This practice had proven dangerous and unsustainable in the context of Nepal. The “peace” that is projected or made-believe is not out of genuine compliance and submission by the suppressed communities – rather, that compulsion is the only the result of fear which will collapse at an opportune time (Lawoti, 2005). and suppression is not a reflection of democratic principles – democratic consolidation, by definition, must mean end to suppression and finding peaceful, amicable solutions to differences via democratic process.

One of the prominent theories on power-sharing in multi-cultural societies, “consociational democracy” was proposed by Lijphart (2008). Unlike in the majoritarian rule where the sole importance is given to an individual and the minority groups are expected to integrate into the society of the majority, consociationalism seeks to regulate the sharing of power between diverse societies with distinct ethnic, cultural, national or linguistic characteristics by giving them specific collective rights like proportional representation, veto rights and perhaps autonomy for minority groups (Lijphart). And consociationalism may not necessarily have a particular standard

form for all circumstances – it can take different forms and methods of power-sharing as is appropriate for a given context.

Nepal's unstable democratic journey of nearly thirty years since 1990 has seen multiple elections at random intervals, forced changes in governments, and sometimes violent confrontations between opposing parties both in the parliament and on the streets. And most of the time those contentions involved issues of constitutional guarantees of recognition and equal representation. The differences on demands by various ethnic and caste communities was so ferocious that the elections for Constituent Assembly to draft the new constitution had to be run twice., and at a long interval (2008 and 2013) because they could not even agree on terms and conditions for the next election. This kind of unrelenting obstruction to democratic process has, in fact, contributed to hopelessness in the minds of many. Once the can of worms was opened and the ethnic groups were incited by the Maoists whose real intention was to seek an excuse to hold on to in order to continue to create problems for the opposition, the whole new game of identity politics began to muddle the process, says Hari Sharma who is a leading scholar of Nepali politics and has served as a senior advisor to Nepali Congress' first Prime Minister of post-Panchayat Nepal. The politics of identity has to be taken into context as well, he says, asserting that many of the tactics of an impossible task of "counting the trees in order to manage a forest" were imposed by the outside forces. Sharma claims further that pluralism and diversity were recognized by Panchayat too, and by the constitution of 1990 too. And our internalized method of managing those differences were by creating a hegemony – there is nothing wrong with that as long as everyone is living in peace and harmony.

Tula Narayan Shah, a Madheshi (the largest minority group that hail from the southern plains of Nepal and have the most distinctive cultural and linguistic traits from the dominant group)

lawyer-activist questions that theory by stating that that hegemony deprived his people of jobs and even minor government services because they were not fluent in Nepali language.

Thousands of them are denied citizenship because they cannot prove “Nepaliness” because they are akin to communities from across the border in India. They are subjected to taunts and bullying, and all sorts of social discriminations just because they look and talk differently. That is not peace or harmony, Shah asserted – that is humiliation and a direct attack on human dignity. “We tolerated that for decades, but we cannot do that anymore. We are empowered, we are aware, and we need and demand equality now. Nothing less.”

Lawoti (2005) says that the problem with exclusionary politics in Nepal is that it is institutionalized:

“Further complexity is added into this already fluid situation by the institutionalization of exclusion. In democracies, groups that articulate and mobilize get concessions as the government and society responds to their demands and needs; however, in Nepal, due to institutionalization of exclusion, increase in organizational capability and mobilization of the marginalized sociocultural groups have not led to better inclusion. The paradoxical situation of increased mobilization but continued or even higher exclusion may produce dire consequences for Nepali society” (p. 21).

Once of the dire consequences of perpetual inequality and injustice is large-scale violence. Citing examples from around the world, Lawoti suggests that increase in ethnic mobilization and deepening of cleavages inevitably lead to violence which would, in turn, can destabilize the society with severe consequences for the entire society including the dominant groups themselves. And if this gets worse, event disintegration of the state cannot be ruled out.

The extremely fluid situation, though, means what seems impossible today might turn possible tomorrow. What we are fighting for now may suddenly become reality at any given moment, or maybe not. But in the case of Nepal, some progress despite ugly fights seem to be happening. In the last elections, for instance, Nepal adopted a mixed system (First Past the Poll and proportional) that ensured increased representation of minorities in the parliament. Women's group seems to have benefitted the most with 33% representation in the parliament. Central Committee Member of Communist Party of Nepal and a women's rights activist, credits that result to patience and perseverance with assertive but reasonable campaign. She blames the Madheshi and Janajati (indigenous groups) of being ultra-extreme in their demands and tactics that demand everything right here, right now for them not being as successful and the women's groups in achieving their goals.

After what once seemed like hopelessly comic and uncivil confrontations between groups with different contentions, a negotiated settlement on Federalism to decentralize and distribute power to minority groups has also been achieved for the time being (it may require further adjustments in the future). The initial demands of the ethnic groups were federalism based on ethnicity, to which the opponents' argument was that that could potentially lead to disintegration of the state in the future should an ethnic federal unit decide to break away if there is an irresolvable dispute with the center. They proposed, instead, federal units based on geography that would ensure economically viable units with mixed ethnic groups wherein mechanisms to protect each group's identity would be adopted. The compromise included division of a unitary ethnic units (particularly that of Madheshis) into two to ensure that no single community is privy to a large, powerful unit with more than their fair share of resources. Also, the federal units would not be named after ethnic groups. Where this agreement will be sustainable well into the future or not is

yet to be seen, but at least the last election that has finally heralded a stable government so far for the first time has shown signs of a peaceful transition.

### **The structural & institutional contexts of Nepali democratization**

The structural approach to democratization, as stipulated by Seymour Lipset (1959) lists causes of democratization as: a. increase in wealth; b. industrialization; c. urbanization; and d. education.

By associating the above four elements to democratization, the structural approach uses modernization theory to judge democratic development. As the society becomes more modern with increase in wealth, it empowers the individual, and so does industrialization and urbanization by providing an individual with jobs and opportunities to detach oneself from rural settings. Education makes the individual more capable of reasoning and expressing a voice. An empowered individual then begins to question the state and begins to participate more in the affairs of the state, which inevitably leads to democracy. A Euro-centric idea that was born in the age of Enlightenment that focused on “equality, liberty, social justice and limited government,” it also embraces the pluralist theory of “procedural conditions” of democracy such as periodic, free and fair elections, freedom of the press, etc. (Chadda, 2000)

Bruce Russett (1994) associated the democratic peace theory – that democracies do not go to war with each other – with structuralist theory of democracy too. “Elite bargain” theory combines national consolidation with democracy – that democracy is more about forming an inclusive state through bargains between concerned actors to incorporate ethnic, religious, or caste identities to formation of a consolidated state. This is pertinent and prominent to Nepal throughout its history of democratization, from bargains between ruling elites and political leaders, or between political

leaders of various factions, or between political leaders and members of ethnic, gender, or caste groups. Member of the society's elites making strategic choices to either remain in power, or to undermine another's power, or to give up power in order to preserve projected dignity (Chadda) were classic elements of democratization of Nepal from the outset till the present.

Another structuralist approach to democratization – regional or international geopolitical conditions that warrants wanted or unwanted foreign intervention to promote democracy is also highly pertinent in the case of Nepal. In particular, the Indian interventions has always been instrumental in political dynamics of Nepal (Jha, 2012), from political shifts to major agreements between different factions, like the 12-point agreement between political parties and Maoists to end the rebellion and join main stream politics to formulate a new constitution. This influence is particularly acute because of India's desire and capability to intervene as a regional super power and a backbone of Nepali economy.

Regardless of how much some sectors in the Nepali political and social circles decry foreign interventions and imposition of what they consider Western ideas into Nepal context, it is apparent that such interventions and influences are inevitable given Nepal's heavily aid-dependent economy (Chadda). Numerous foreign governments, especially Switzerland and the Scandinavians, and various NGOs and INGOs, UN agencies, and Carter Center, provided advice or assistance in various phases of Nepali political transition from autocratic kingship to democratic Republic, including peace negotiations with the Maoists. For that reason too, perhaps we can expect some of democratic reforms in Nepal happen much quicker than elsewhere.

Another geopolitical factor – that of rivalry between India and China, and Nepal being right in the middle of the two – is also a major factor in Nepali political dynamics, King Mahendra in particular, had played this card very adroitly to sustain his autocratic rule.

Even though Nepali democratization seems predominantly structure-oriented, we cannot ignore the fact that institution building also plays a key role in democratization. There is a counter concept to modernization theory: rather than economic development causing democracy, democratic institutions foster economic growth (North, 1990). Autocracies do not cause economic growth of society; rather, economic empowerment of the society would be counterproductive to autocrat's own rule. So, logically, it would be in the interest of an autocrat to limit the benefits of economic growth so that the society can remain unquestioning. Also, it is perhaps in the nature of autocrats to enrich themselves and those close to them, rather than share that growth with the society.

On the other hand, if democratic institutions are instituted prior to economic growth, the members of a free society can engage in free competition that would reap benefits for the society as a whole. I am not sure how this would be plausible in the exceptional cases of three of the four Asian Tigers – Singapore, South Korea, and Taiwan (Hong Kong was a democracy as a British colony) – where autocrats heralded remarkable economic growth that benefited the whole societies, though, but free economy in a free society should logically yield the most growth. In that sense, the institutional approach to democratization theorizes that after a prolonged status of conflict, the agencies seek amicable solutions, which then leads them to establish institutions that promote certain values that are conducive to desired peace, which then introduces certain principles that are habituated by continued practice over time (Rustow, 1970). That internalization then constitutes a democratic consolidation. Perhaps even if democratization may have been caused primarily for structural reasons, like in the case of Nepal, institutionalizations must follow in order to sustain the process and guide it towards consolidation. It is unimaginable

to consider internalization of democratic values without institutions safeguarding such values and constantly instigating the society to adhere to them.

Democratic consolidation is defined by Linz and Stepan as:

“A democratic transition is complete when sufficient agreement has been reached about political procedures to produce an elected government, when a government comes to power that is the direct result of a free and popular vote, when this government *de facto* has the authority to generate new policies, and when the executive, legislative and judicial power generated by the new democracy does not have to share power with other bodies *de jure*.” (p. 3)

Albeit slow, turbulent, and lots of room for doubts, Nepal seems to be moving towards the right direction in general, at least for now. Or, it is at least not on a reverse course, nor does it look like it might be at least in the near future. The most recent elections that had 67% participation rate and that was considered by and large peaceful, free and fair by every observer – foreign and domestic – also heralded a stable government for the first time since the start of democratization. Nevertheless, the time is far from apt to be confident about consolidation. Of the few indicators of democratic consolidation, the next two chapters will focus on *rule of law* and *civil liberties* respectively to assess how Nepal is doing on those fronts vis-à-vis its democratization.

## CHAPTER 3: RULE OF LAW IN DEMOCRATIZING NEPAL

### **Rule of law: The Nepali context**

Every emerging democracy is bound to face great many difficulties in their quest to consolidate the process of becoming a freer society. Freedom is, perhaps, harder to maneuver than the opposite. When one is not free, one is confined to a space that is known. Being controlled means one is made aware – perhaps by force or intimidation, or both – of his or her limitations of what is appropriate. With that, one is also clearly aware of severity of consequences if one breached those understandings. It may be unpleasant, but it is not hard because one knows the answers already. When free, on the other hand, one is faced with so many unknowns because freedom, by definition, means not to be bound by limitations. Not knowing what is next or not having pre-made answers to rely upon when one is faced with those unknowns can be an exciting thought, but it definitely is more challenging than living in a pre-set environment. Political freedom is even more complex – for what we are told of as freedom at one point is actually not so at another. Ironically that freedom comes with many restrictions even in a democracy because the meaning of being free in a free society also means responsibility not to encroach upon the freedoms that one seeks for oneself, of others.

Rousseau proclaimed, “Men are born free yet everywhere are in chains,” in his famous *The Social Contract*. What he meant by that was that our birthrights are suppressed by civil society in myriad of ways that we are actually rendered not free. In reality, we are constrained by rules and laws so that every member of the society can be guaranteed a peaceful space within it. Dorsen & Gifford (2001) say, “Law in the very act of distributing social power in the form of legal power also sets the legal limits of social power” (p. 27). The irony of freedom in a democratic society is perhaps best described by the famous quote by Montesquieu in his *Spirit of Laws*: “Liberty is

the right to do anything which the law permits, (for) if a citizen were to be able to do what the law forbids, he would no longer have liberty since all other citizens would have the same ability.”

One of the key elements that can decide the fate of democracy in a given society is the relevancy and the strength of rule of law. As a matter of fact, rule of law perhaps can be considered the stellar pillar that can make or break democracy. While democracy is thought of as promoting the principles of personal freedom and subverting totalitarianism, once that is achieved and path to democratic consolidation has started, the focus shifts towards building institutions that develop, preserve and sustain democracy. And promoting rule of law is the most powerful mechanism that can ensure democracy continues to flourish (Norman, 2001). Stable democracy that fuels sustained economic growth can only be secured if legal codes that are “transparent, equitable, efficient, and free of arbitrary manipulation” are adopted and enshrined in the dynamics of functioning societies (Norman, 2001). Rule of law is also paramount in a sense that it helps to ensure other indicators of democracy.

It is in this sense that the central idea of democracy is actually the rule of law than the rule of those who claim to represent the people (Norman, 2001). While law distributes social power to individuals, it also puts constraints to the same, without which the natural consequence would be anarchy, not democracy.

### **Principles & values – context matters**

Like the broader values of democracy, rule of law, as an integral part of it, is also a philosophy that emerged, developed and solidified in the West. While agreeing to the fact that to be governed by rules is the most important aspect of stable, peaceful society, one must also consider

the fact that the dynamics of how that plays out in different societies and cultures is of essence. Just having laws and believing we need to abide by them is not enough. In a society those laws do not function in a vacuum. “In advancing specific constitutional devices and laws, we need to be sensitive to the anthropological bases of indigenous rulemaking (Norman, 6). In a modern era where the flow of information has become natural aspect of global political realm, societies are increasingly sharing experiences and learning from each other. One cannot help but be affected by the world view of others. Nevertheless, it is always prudent to be aware of differences and the impacts the convergence of those differences would have upon different societies.

In terms of cultural context of rule of law, there is no denying that being governed by rules helps to ensure a predictably peaceful co-existence, both between the members within the same group, and with the outside group. As societies are becoming more aware of human rights and recognizing others’ rights as valuable as one’s own, “laws are becoming intermediary between human power and human ideas – it transforms our natural power into social power, and it transforms our self-interest into social and vice versa” (Norman, 20). After all, the foundational values of what defines humans are the same – various cultural practices and norms are just an acquired identity through exposures to different environment. Also, a lot of times repressive governments who decry human rights and democracy as alien Western concepts, and claim those values do not reflect who they are and who they aspire to be, their intentions may just be to hide their guilt and secure their own privileged positions in their respective societies. All that said, though, it is always much more effective to convey the messages if we are more aware and sensitive to the normative others live by. Our goals may be the same, but we may have different ways to get there; or, even have different outlooks of the same goal. In other words, running few training seminars in societies that are foreign to principles of democracy and rule of law is not

going to establish a functioning judiciary. They need not only open up to strangers and strange ideas, but recognize their values and benefits to them and, more importantly, internalize those principles and incorporate them into their psyche as well. This is the same idea that Rustow (1970) fostered in his genetic model of democratization. Genetic theories of democracy take the institutional (or political, or dynamic) approach to democratization and it focuses on politics and human agency. He postulates a form of democratization that encapsulates four stages, the last of which is habituation, or internalization.

In the context of Nepal, a particular example from India is worth considering because Nepal shares a great deal of cultural, religious and linguistic similarities with it. And although Nepal is very tiny compared to India, it also shares with India a critical geopolitical aspect vis-à-vis social and political convergence that has proven to be one of the most difficult to resolve when we consider democratization: multi-ethnicity. And in the following example (Gillmartin, 2010) attempts to introduce (perhaps impose) the concept of free and fair election in a society that was acutely distinct from their European counterparts is worth mentioning here.

Unlike democratizations of European states, Indian democratization – after independence – had to not only incorporate democracy, but simultaneously engage in the process of creating a unified statehood by bringing together dozens of ethnic, religious and racial groups (Chadda, 2003). India, at the time of embarking on the path to democracy, was very much unlike European states that were already established political units with relatively educated population and industrialized society at similar stages of democratization. Thus, the model of democracy that the Europeans adopted seemed to have worked for them. That was not the case with India. When the colonial British left, India was poor, disunified, less educated, unit that lacked a singular, unified national identity (Chadda, 2000). So, while incorporating democratic principle of free and fair

election in Indian political system, they were also faced with a huge difficulty of bringing together all those different groups and find a unifying identity that was “Indian.”

The educated class who were at the upper echelons of society – and who had some degree of interactions with the British – did not need to be explained the value of democracy – they were familiar with them by virtue of being close to the British. Free and fair elections being part of that system was, the educated ruling elites believed, the best way to move forward. Little did they know that when the time came for elections, that would hardly be free and fair.

Stalwarts of Indian politics at the time, like Nehru who went on to become the first prime minister and Ambedkar, the father of Indian constitution, were utterly frustrated with the fact that the rural population who obviously were less educated, if not at all, were casting their votes purely on caste lines. The founders of Indian democracy had a huge conundrum in their hands: on the one hand, as free and fair elections that required maximum civic participation, the rural class could not be denied their rights to vote. Yet, by voting strictly along caste lines regardless of which candidate they believed was going to deliver on their promises to help them, they gave the elections an outlook that was not really free and fair. As it turns out, when the case reached the Indian Supreme Court, it ruled that voting along caste lines was as democratic as people choosing to vote along their interest groups like trade unions or political parties. It was a free choice – and if those population were told not to vote the way they pleased, that would go counter to the democratic norms instead.

Nepal too share similar geopolitical reality like India – as mentioned in the introduction, it has numerous ethnic, sub-ethnic, caste, sub-caste groups that democratic process would have to deal with. Apparently, though, in Nepal’s case, even though caste and ethnicity do play a huge role on who people chose to vote for, the voter affinity leans more towards political parties (Bell, 2017).

Party-ism is so deeply ingrained in Nepali voting population that sometimes it makes one wonder if having elections makes sense at all.

In order to assess if rule of law, as it is progressing in Nepal, is indicative of democratic consolidation or if that is pointing towards the opposite, I have chosen two sub-indicators of rule of law to look into in the context of Nepal: independent judiciary and electoral democracy.

Independent judiciary is perhaps of the most critical value in democracy. The judgements on every action by the state and the citizenry, including the actions that fall within the realm of other elements of democracy itself, are made by the judiciary. And it is of utmost importance that that body is guaranteed to make unbiased decisions, free of any influence from any sector.

Electoral democracy is vital too specially for a multi-ethnic state like Nepal. Elections as an indicator of democracy can be tricky because of it's potential to be what Zakaria termed illiberal democracy – a case where the victors end up implementing undemocratic values. But when they are done right – as absolutely free and fair – they ensure equal participation and representation of a multi-ethnic composition of a state, which can be one of the strongest indications of democracy going right.

### **Judiciary independence in democratic Nepal**

What is written in the constitution, and whether the rules that are inscribed in the constitution are being followed or not, and who is responsible for reprimanding and punishing those who breach the rules are critical factors in determining the independence of judiciary. Even if a fair rule is prescribed in the constitution, but if it is not being complied with, or if the violators are not being held accountable, it would not matter what the origins of those rules were meant to influence.

Nevertheless, the rules that were drafted, agreed upon, and inscribed into the document would be

a good place to start to determine if the judiciary in Nepal is truly independent.

In terms of judgement on separation of powers based on action, perhaps a look at two epic events regarding the relationship between the executive branch and the judiciary in recent times would be a good start to see if what transpired adhered to democratic norms, and were constitutional.

In 2008, just before the first elections for Constituent Assembly, the political parties were intent on having an interim independent government not affiliated with any political parties to ensure fair elections. Although the intention seemed noble, the parties, after difficult deliberations, agreed to appoint the then Chief Justice Khil Raj Regmi to the post of interim Prime Minister as the head of council of ministers to oversee the election (Sharma, 2013). To have the Chief Justice as an interim Prime Minister, especially when he was only temporarily replaced by an acting Chief Justice (Regmi was to return to his previous post after the elections were over) was the most egregious and blatant violation of the separation of executive and legislative branches of the government. This constituted the most dangerous precedent that undermined and made a mockery of democracy, contends Upadhyaya.

Second such outlandish episode of violation of separation of the judiciary and the executive was with regards to Sushila Karki, who was sworn in as the 25<sup>th</sup> Chief Justice of the Supreme Court on July 11<sup>th</sup>, 2016 (Dahal, 2016). The appointment was widely celebrated as a new high in gender equality – she was the first female to be the Chief Justice not only in Nepal, but in all of Asia. She was regarded as a tough, fearless justice who had not been afraid to render unbiased verdicts on several high profile politically sensitive cases, prompting ire from many powerful politicians, including former and present Prime Ministers. On April 30<sup>th</sup>, 2017, the ruling coalition of Nepali Congress Party and Communist Party of Nepal (Maoist-Center) jointly filed an impeachment motion against her alleging she had encroached upon the authority of the

executive branch, fundamentally demonstrating their total disregard for independent judiciary. It was obvious that she was being targeted because she had revoked government's appointment of a new Inspector General of police, citing that the government had violated regulations guiding the selection process.

Chief Justice Sushila was immediately suspended pending the conclusion of the case. A separate investigative committee was set up and, if found guilty of wrong doing, the Members of Parliament could have proceeded with her impeachment proceedings. She would have retired due to age limit anyway just before the hearing date, so effectively the suspension meant she would have been prevented from hearing any more cases until she retired. There was an immense outcry from the public, the intellectuals, and even UN OHCHR got involved. UN Human Rights Commissioner released a statement supporting her and calling the actions of the government gross violation of independent judiciary. She was then allowed to return to her office just days before she retired – perhaps a face-saving option for the MPs and the parties who initiated this action.

Regardless of whether the MPs and the parties were within the bounds of the constitution in their actions, the very fact that she was targeted for political reasons was appalling already, and that struck a dagger through the democratic constitution of Nepal.

Part 11 of the constitution of Nepal governs the judiciary. In it is written that Constitutional Council Act, 2066 (2018 AD), Act #8, grants the Constitutional Council the right to hire or fire Supreme Court judges by making recommendations to the ceremonial president. And that council consists of the prime minister as the head, chief justice of the supreme court him/her self, Speaker of the House of Representatives, National Assembly Chairman, opposition leader, and the deputy leader of the lower house. In other words, bar the Chief Justice, they are all political

figures, some of them appointed by the prime minister. That means essentially the ruling political party (not even the parliament) holds the key over the appointment and hiring and firing of judges. That obviously is a far cry from judiciary that is granted independence. Thapa, who is a senior advocate at the Supreme Court says that although it is improving with time, the judiciary is still the remnants of old undemocratic era – full of rampant corruption, nepotism, political vengeance, political favoritism, etc. Nevertheless, Thapa noted that apart from the fact that things are better than before even though it is as bad it is now, the difference between then and now is that now things will be made public sooner or later. The democratic process, the freer media, the empowered bureaucrats, etc., dare to bring the stories like that out. That means they will be exposed. Things don't happen in the dark anymore. They will be shamed and, in some cases, they are forced to take appropriate action and even revert their decisions that were deemed illegal like in the case of Sushila. Other than that, apart from convoluted terminologies, contradictory laws (of which there are plenty), the judiciary is pretty much independent at least in the constitution. It's the practical behavior that is making the difference, Thapa contends.

### **Electoral democracy in democratic Nepal**

Again, in states with deep ethnic and cultural cleavages, it is that much more difficult to manage democracy. Every step on the path to democratization would have to be very carefully assessed before one can set his-her foot on the ground. As it is, it's always hard for the government to satisfy a set of citizens who are always demanding more. And the pressure to be accountable to those demands is immense in democracies. And when one has to be accountable to various different groups possibly on various different levels as per their respective perceptions of what is right, the task of being accountable becomes herculean. Lijphart (2008) & Norris (2008) suggest

governance with peaceful co-existence is possible with crafty mechanisms of government that reflects the diversity in an honest and sincere ways. While some have argued democracy is actually not feasible, or extremely hard, in multi-cultural societies, Lijphart points to some success stories and tries to draw examples and models after them. In particular, he cites Belgium, Switzerland and Netherlands regularly. However, the geo-political and economic developmental differences between those three countries and some of the recently emerging democracies is vast and obvious. Many of the emerging democracies today with multi-cultural or multi-ethnic settings are not as wealthy and as developed as those countries are. Neither are their populations as educated. European states are fortunate to have been surrounded by equally wealthy, educated and democratic populations. The structuralist approach to democratization theorizes that wealthy, well-established, stable states with educated population and stable neighbors are more conducive to democratic process. The places that are poor, uneducated, and divided are where democracy is most needed and perhaps where democracy is most likely to fail. Situation becomes even more dreadful when one group is suppressed or dominated by the other, and the suppressed group is denied privileges. One such extremely important privilege is representation – being able to fully participate in the state affairs equally.

Many minority groups in Nepal were brutally marginalized during the Panchayat years of absolute monarchy. Marginalization in the context of Nepal is more complex, based both in culture and politics (Lawoti, 2005). It's not only about one group against the other – it had multiple layers of discrimination based on numerous ethnic, caste, gender, sub-caste groups. “*Haamro raajaa, haamro desh...praan bhandaa pyaaro chha! Haamro bhaashaa haamro bhash...praan bhandaa pyaaro chha!*” (“Our king, our country... is dearer than life! Our language, our identity, dearer than life!”) used to be one of the first motto taught in schools.

Many were even unaware of the real diversity that constituted Nepal. Forcefully homogenized Nepali state has been the source of all problems with regards to potential ethnic violence (Jha, 2018).

Even the popular movement that brought down absolute monarchy in 1990 didn't change much in terms of suppression. Even until now, vast majority of the government bureaucrats hail from the Brahmin high caste, Chhetris, another high caste, make up the composition of state security forces. The Nepali identity based on Nepali nationalism reflects high-caste-hill-men. Things have begun to change finally, thanks to nearly thirty years of relentless struggle by the marginalized even in the face of utmost difficulties. Representation in the national stage is becoming more colorful. If there is one area Nepal has made the most progress on in terms of democratization is electoral representation, despite the fact that there still is a lot of work to be done (Reynolds, 2010). And Nepali populace, as much as they are perceived to be uneducated, have shown remarkable ability to make rational choices exhibited by their voting tendencies in each successive election. They have shown clear bias in favor or against what they see as good or bad for them, says Upadhyaya who was the Editor-in-Chief of The Kathmandu Post, the most popular English daily.

One of the major features of Nepali elections in recent times is the mechanism to make it more representative without using outside model or help – it was designed indigenously after lengthy – and sometimes nasty – deliberations that lasted for over two decades. Before the 2008 election, Nepal used FPTP (First Past the Post) system – a simple majority vote. The problem with that was that in a one-man-one-vote scenario, especially in a scenario where most of the politically active citizens hailed from previously dominant class, would vote their own kinds and render the parliament as equally unequal as before. During the 2006-2007 negotiations, the three major

political parties – Nepali Congress, Maoists, and United Marxist-Leninist – agreed to a “mixed” electoral system. While there still would be FPTP candidates up for elections, a significant number of them would come from “proportional” system. For the total proportion of the popular votes a party can garner on FPTP elections, equal proportion of more seats would be given to that party to be filled by representatives appointed by the party. The only caveat (a very positive one, I might add) is that the total representatives from 2 parallel systems (FPTP and proportional) would have to have certain percentage of marginalized groups (Dalits, Janajatis, Women, and Madheshis). If they didn’t have enough representation of the minority groups from FPTP, they would have to ensure that they nominated enough of them in the proportional seats. It worked. Although the representatives from the marginalized groups who came through PR system cannot be guaranteed to genuinely represent their own groups (they are mostly loyal to political parties than their respective ethnic groups, for instance). Whether they are only being used as a token service is yet to be seen; but just the fact that significant number of representatives from those groups are present in the assembly hall makes Nepali democracy promisingly diverse. The number of women represented in the current national assembly is 33%, for example. That’s the highest in Asia and 15<sup>th</sup> highest in the world (Reynolds, 2010). Voter participation was at 67% too – much higher than most other countries. Significant gains were made by Dalits, Janajatis, and Madheshis too. It does have some drawbacks, though. The first being already mentioned above – how much a PR candidate not having to campaign would really represent the respective marginalized group? Wouldn’t they be more loyal to their party bosses who nominated them? Reynold lists three major issues that we must look at in future PR elections: first, we need to be careful not to entrench ethnic polarization by defining electoral policies in terms of ethnic interests only; b. we need to wait and see how genuinely those PR candidates will serve the

interests of those they are supposed to represent, and c. would the party elites find an excuse not to care about ethnic issues anymore by having nominated some of them to the assembly and claim they have done their part? (p, 517)

Despite the progress in individual representations vis-à-vis diversity, though, one critical flaw in Nepali elections is reflected in the fact that Nepalis do not have viable, distinctive alternatives to choose from. There are different political parties, of course, but they are different in their names only. All the major political parties that have a grip on power are similar in terms of their lack of principles (they all function on ad hoc basis and fluctuate between different principles that suit the situation at hand, and their insatiable yearn for amassing as much fortune as they can both for the party itself and their leaders (Bishworkarma, 2018; and Upadhyaya, 2018). Therefore, despite elections which would choose different party leaderships, the result of those elections in terms of benefits or loss to the citizenry remains the same. The media freedom – which will be discussed in the next chapter – however, sort of mitigates the effect of those ill-governance on democracy in general in terms of exposition of them to some extent. But the actual physical accountability of those in power remains questionable.

Besides election and independence of judiciary, adherence to the law by the general citizenry is also very important for a safe, orderly society. The following example of how a legitimate right to protest has turned into mob-like street justice due to the lack of government's responsiveness to people's voices is pertinent to mention here.

Apart from a handful of legitimate peaceful protest, there are mainly three forms of illegal public protests that have become prevalent: *Dharna* (sit-in), *chakka jam* (freeze-wheels), and *bandhs* (shutdowns). Of the three, *bandhs* are the worst. A group, political or otherwise, calls for a shutdown as a general strike. Then hooligans (mostly hired) roam the streets forcefully shutting

down shops and forcing vehicles off the streets. If anyone disobeys, they become victims of vandalisms, sometimes major like burning of the vehicles that defy bandhs, or stoning of windows of shops and vehicles. The agitating group forces everyone to comply with the *bandh* regardless of if they support the cause or not. Schools are forced to close, public transportation is completely shut off, all because of fear of violence. The state seems utterly incapable or unwilling to do anything about it, maybe because they were called by the political parties themselves, such lawless ness has cost the state billions of rupees over the years. They are especially bad when they are called for nationwide – the entire country comes to a near complete standstill. *Chakka jams* have similar effect – “freeze wheel” means no vehicles are allowed on the streets or they face vandalism. The dilemma is that they are used to achieve both legitimate demands or sometimes utterly ridiculous ones. Legitimate causes are forced to resort to such tactics because the government doesn’t seem to listen to them otherwise. But they are being used to fulfill mob’s demands as well. When the government tries to break up a syndicate of local bus services that were forcefully (with violence if need be) preventing buses that are unapproved (by the mob) to operate in certain routes, the syndicate members resorted to bandhs and chakka jams as well, leaving the government with no choice but to relent in the face of potentially large-scale violence. There have been some positive signs in recent months – people are beginning to revolt against such bandhs and the numbers of bandhs are dropping every year. Nevertheless, signs of such lawlessness are hardly appealing to democratic consolidation – they are breakdowns in public security that resembles anarchy. Another piece of hopeful sign is illustrated by the chart on the next page. It shows that Nepal’s indexes on perceived corruption, rule of law and judicial independence have been steadily going up over the years. This shows at least the trend has been headed in the right direction so far.

The following figure and note are adapted from Transparency International (for Perceived Corruption Index); World Justice Project (Rule of Law Index); and The World Bank (for Judicial Independence Index) websites respectively.

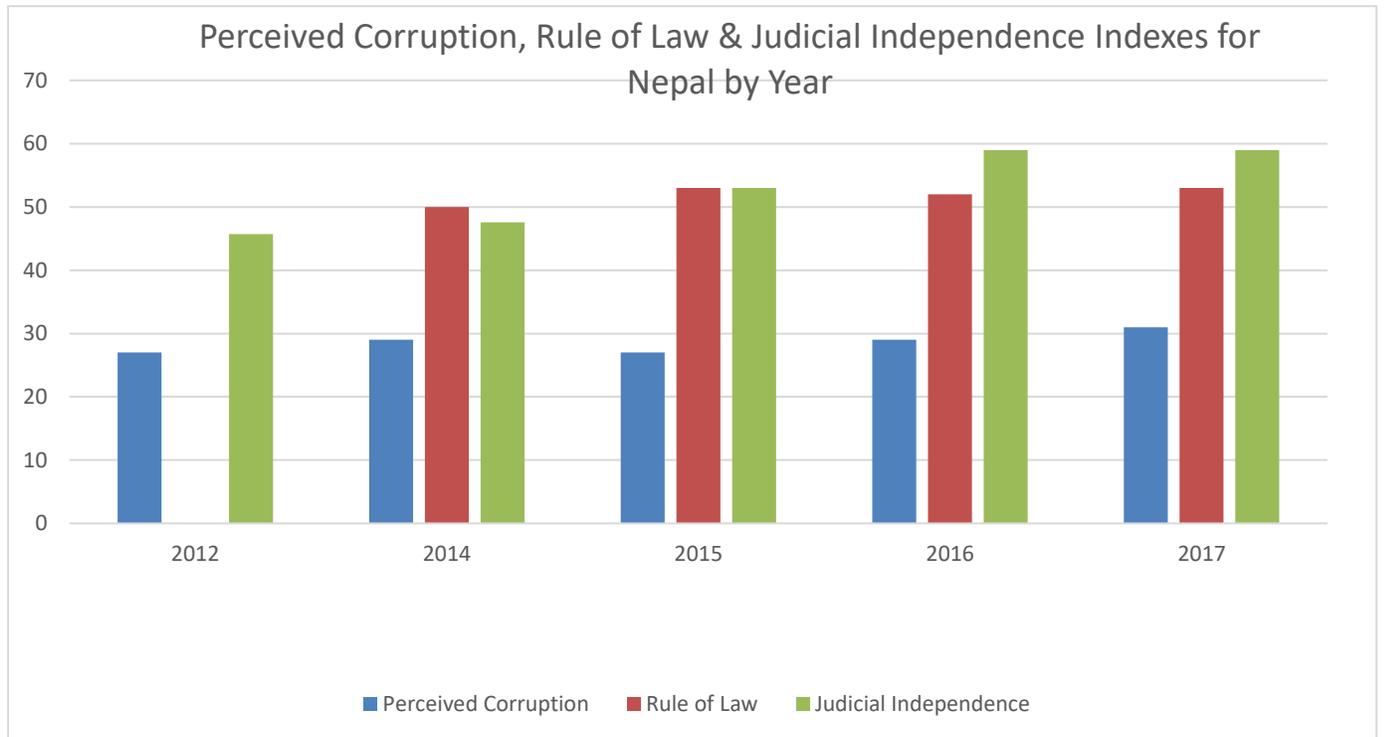


Figure 1. All the numbers were rounded up to 1-100 scale, 1 being the worst and 100 being the best. And the number for Rule of Law for the year 2012 was not available.

## CHAPTER 4: CIVIL LIBERTIES IN DEMOCRATIZING NEPAL

### **Civil liberties and democracy**

If democracy is associated with individual freedom at the base, then civil liberties are perhaps at the very core of any idea of democracy. The pursuit of a free society where one is governed by principles of equality, freedom, and choice begins with basic personal freedom. Without respect for foundational elements of freedoms that guarantees a person's sovereignty, there would be no path to democracy. If one does not have freedom of speech, for instance, one cannot have a say in how one wants to be governed; without the freedom of assembly, one cannot partake in a meaningful protest to petition the government; if one is denied the right to have an opinion and to express it, one cannot have a choice in how one wants to be represented. Therefore, a democratic government where the citizenry is expected to fully participate in the system and make oneself heard, it is paramount that certain basic freedom of the citizenry be protected.

There aren't fixed lists of freedoms that make up civil liberties – they can vary according to each person's opinion on what the basic component of a free governance should be, and what are the thresholds that distinguish different levels democracy form authoritarianism. But it might be safe to assume there must be a consensus in the basic, universal set of freedoms or rights that one must have in a free society. They can be either negative rights – rights that one is supposedly born with – natural rights that a government cannot (at least in a free society) take away' or positive rights, which are given to a citizen to guarantee his or her life is not only free but protected as well.

There are a number of different kinds of freedoms that are set to as examples of civil liberties, and some of them seem to overlap too. Freedoms of speech, opinion, conscience, religion; or the rights to peaceful assembly, security, privacy, etc. Since there cannot be an absolutely consensus

on what kinds of fixed set of freedoms or rights must constitute civil liberties, I will concentrate on the ones that are: a. potentially capable of encompassing some other rights in the list; b. the ones that have prominent space in the context of Nepali democracy. For example, freedom of expression can also mean freedom of speech, so I will just use freedom of expression in the discussion. Accordingly, the ones that I have chosen to discuss are: freedom of expression, freedom of assembly and association, and freedom of religion.

### **Freedoms of expression, of assembly and association, & of religion as measurements of democracy**

Whenever there is an attempt to measure democracy, there is a tendency to favor some notions of over the others. It is as if democracy is defined only – or more so – by certain freedoms than others. Generally free election comes to mind when one thinks about democracy, so electoral rights are thought of as good indicator of democratization; and the same goes to the rights that are associated with physical integrity such as torture, imprisonment, disappearance, etc. But freedoms of expression, assembly & association, and of religion, which (Skaaning & Moller, 1070) terms “First Amendment-type” that are part of civil liberty “have mostly been treated as parts of other overarching concepts, such as liberal democracy, and when they have in fact received separate attention it has been in the guise of a composite concept of civil liberties” (p. 1070). Although freedoms of expression, of association, and of religion are vibrant and important elements in struggles for democracy, they seem amiss in calculations that measure democracy and democratization (p. 1070). Treating these rights as separate indicators from some other rights would certainly give a clearer and detailed picture of democratization around the world. Most of the time even before elections are withheld, or political prisoners are taken, authoritarian

regimes begin their quest to rule by decree by cracking down on freedom of expression. The mediums of expression, like the media begins to get monitored or protests are banned before further physical actions begin to take place. Whereas elections alone have been determined not to measure democracy accurately, participation in governance through free and fair elections are still one of the primary observations that analysts make to measure democratization. Many non-democratic regimes do have elections, or the democratic leaders slide towards becoming undemocratic after having come to power through elections. Some even win elections on non-democratic, populist platforms – non-democracy by popular choice. Those kinds of regimes that are labeled “Illiberal Democracies” can be mistaken to be democratic if so much attention is given to elections to determine the level of democracy.

### **Freedom of expression in democratic Nepal**

Freedom of expression is defined as to what extent do citizens, groups, and the press have the right to hold views freely and to seek, obtain, and pass on information on political issues broadly understood without being subject to actual limitations or restrictions? (Siegle, 2012)

In the Nepali constitution, freedom of expression is explicitly guaranteed under Part 3, Section 17 (Right to Freedom). Freedom of expression, indeed, is the first in that list of freedoms under Section 17. However all of those freedoms in the list are preceded by the phrase, “Except as provided for by law no person shall be deprived of her/his personal liberty” with an exception as stated below:

Nothing in section (a) [Freedom of Expression] shall be deemed to prevent the making of an Act to impose reasonable restrictions on any act which may undermine the nationality, sovereignty, independence and indivisibility of Nepal, or federal units, or jeopardizes the harmonious

relations subsisting among the people of various caste, ethnicity, religion, or communities, or incites racial discrimination, or untouchability, or disrespects labor, or any act of defamation, or contempt of court, or an incitement of offence, or is contrary to decent public behavior or morality. (The Constitution of Nepal, 2015)

Although one can obviously claim that freedom of expression is guaranteed by the constitution of Nepal, the legal, constitutional restriction imposed on it apparently creates more questions than answers. The explicit exception clause is controversial as it is; and to further imagine the possibility of wide range of interpretations of that exception makes the original guarantee almost moot.

Parts of the phrase on restriction seems to imply hate speech is unconstitutional. Anything that promotes disharmony among caste or ethnic groups, or incites ill practices against a group, for example, are mentioned as exception to freedom of speech. The intention might be good – hate speech can be extremely dangerous especially in a country like Nepal with numerous ethnic and caste groups, although the question of hate speech vs free speech is still debatable, and has been an issue of intense controversy even in advance democracies. However, even without indulging in the debate of hate speech vs free speech, the restrictions imposed on free speech on the pretext of hate speech seems open to very wide, controversial interpretations.

When a prominent Madheshi (an ethnic group from the southern plains of Nepal) activist recited a poem denouncing discrimination and merely asking the “good citizens” from the dominant group to join the minorities in their struggle for equality, for instance, he was sought after by the security forces for “inciting disharmony,” complained Tula Narayan Shah, a human rights lawyer based in Kathmandu. Similarly, when another Madheshi youth stepped on a Dhaakaa Topi (traditional hat worn by people of dominant group and made into a “national” hat as part of an

official Nepali outfit) as a symbol of protest against oppression and marginalization, he was jailed for 17 days before being released under intense pressure of various rights groups and for fear of protests getting larger and more violent.

This hasn't happened too often, and specially not on an appalling level, said Akhilesh Upadhyaya, Editor-in-Chief of The Kathmandu Post, the most prominent English daily of Nepal. However, those signs are very scary and, if challenged in the court of law, would most like win because the clause in the constitution is so vague and open to many interpretations. Another journalist, Girish Giri of Setopati, a Nepali daily, also expresses alarm at the possibility of government's ability to curb freedom of expression at the slightest of offense. People have not cared much about it right now because they are happening on small scales and mostly to minorities, Giri said, but if this continues, who can guarantee the government will not act in an authoritarian manner? The Constitution doesn't seem like a full protection against violations of freedom of speech.

Media is always at the forefront of freedom of expression, and is the most powerful (often regarded as the "fourth branch of the government") tool in a functioning democracy. It is the outlet through which ordinary people can express their view, and, on a higher level, it can be used to hold government officials accountable. In an ideal democracy, investigations of corruption and other transgressions on the part of government officials are subject to media scrutiny. Apparently, media in Nepal is as vibrant and as free as it seems from the outside. This was confirmed by both Upadhaya and Giri. Whether or not actions were taken against those exposed by the media of wrong doing is a different matter altogether, said Upadhyaya, but there has hardly been any restriction on what they can report. "We do the job of reporting and exposing, but what happens after that is beyond our prerogative," said Upadhyaya. Nevertheless,

just reporting criminalities within the government, regardless of whether the culprits are taken action against or not, does the job of exposing them to the public and making them aware. One great sign of media's proliferation and prosperity is the hundreds fold increase in the outlets in all sectors of the media – radio, newspapers (both paper and online versions) and TV. By comparison, in 1990 there was only one radio and one TV stations in Nepal, and both of them owned by the state.

What is more worrisome with regards to media freedom is that media itself has the tendency to go overboard a lot of times. Most of the reporters and other lower-tier media personnel are not professionally trained, and are young zealots who thrive on gossips, tabloids and sometimes blatantly driven by personal or associational interests. Political parties, as in almost every other sector of Nepali society, have a hand in media too. They are free to be free, but their own biases would put some restrictions on their behavior

### **Freedom of assembly and association in democratic Nepal**

This too is in the same group of rights as freedom of expression, guaranteed with the same provisional clause. Freedom of association is explicitly broken into two subjects – freedom to form political parties and freedom to form unions and associations. There haven't been any high-profile incidents of breaching this freedom on the part of the government. However, association with political parties and trade unions on the part of the public, instead, have been used as a social and political leverage to engage in illegalities to varying degrees. They are capable of easily resorting to physical threats and intimidations whenever they deem necessary. Vandalizing private properties of those they see as enemies of their associations used to be a common practice although they may have subsided a bit in recent times (Bishwokarma, 2018).

## **Freedom of religion in democratic Nepal**

This is perhaps among the most contentious issues in Nepali democracy. On the one hand, freedom of religion is regarded as one of the fundamental rights by international community; and yet on the other hand, Nepal is very sensitive to the issue of proselytizing. This conflict is reflected clearly on in the constitution too.

Article 26 addresses the issue of religion directly and exclusively. It states that each person is free to profess, practice, and preserves his/her religion according to his/her faith; and the next sub-article also professes religious freedom in the country:

“Every religious denomination shall, maintaining its independent existence, have the right to manage and protect its religious places and religious trusts in accordance with law. Provided that it shall not be deemed to have hindered to make law to operate and protect a religious place or religious trust and to manage trust property and regulate land management.”

But then the caveat is in the next sub article:

“While exercising the right as provided for by this Article, no person shall act or make others act in a manner which is contrary to public health, decency and morality, or behave or act or make others act to disturb public law and order situation, or convert a person of one religion to another religion, or disturb the religion of other people. Such an act shall be punishable by law”

The age-old Nepali disdain for conversion, especially when they are done by exploiting the poor and the vulnerable, cannot be wiped out of Nepali mindsets. The right to freedom of religion, as it is broadly understood, however, includes proselytizing. Although the laws against conversion

existed long before (during the Panchayat era), it became a matter of urgency after the advent of democracy multiplied conversions in massive numbers. And although the Nepal is no longer a “Hindu Kingdom,” and it has been declared a secular state, there is a caveat on that too in the constitution. The original document just said Nepal was a secular state, period. There was a massive pushback from the nationalists who claimed Hinduism should be part of Nepal’s identity. After intense negotiations, the constitution drafters agreed to add an explanation right underneath the clause that declares Nepal secular:

“Explanation: For the purposes of this Article, ‘secular’ means religious, cultural freedoms, including protection of religion, culture handed down from the time immemorial”

Without mentioning Hinduism, the explanation subtly refers to it as “...religion, culture handed down from the time immemorial.” That is essentially maintaining Nepal’s Hindu identity in codes.

Among the examples Sharma (2018) points to the issue of secularism as an unnecessary encroachment by Western philosophy into Nepali norms in the name of democracy. This is an issue that doesn’t make that big of a deal, he says, and there should be no harm in recognizing and honoring Nepali cultural idiosyncrasy in this non-issue. Democracy and human rights are great, he contends, but the West goes a bit too far at times in trying to impose their versions of democracy in a completely alien society.

## **Conclusion**

The remnants of feudal mindset from 200 years of monarchy is still a powerful force in the Nepali political and social psyche. That makes democratic consolidation that much more difficult for Nepal. The politicians especially who were born and bred during the panchayat era seem

incapable of escaping feudalistic tendencies which keeps creating frequent hindrances in Nepal's path to democratic consolidation, if not push it back occasionally. Democratic consolidation by standard definition seems dubious in terms of rule of law and civil liberties in Nepal. On the one hand, civil liberties seem very strong; but the lack of rule of law has taken the meaning of liberty to a level where near-anarchy seem plausible. Sheer lack of accountability on the part of those in power, the elites, and those who enjoy political patronage and kinship to them with them seriously threatens the prospects of democratic consolidation in Nepal. Nevertheless, if we are to be optimistic based on the fact that Nepal is still in a slow learning process, we can only hope that the process picks up a faster pace, and towards a positive end. Also, the fact that with all the impeding circumstances such as absolutely no prior experience of democracy, Maoist rebellion, extreme poverty and illiteracy, and multi-ethnicity conundrum that makes transition extremely difficult, the country at least does not seem to be on a path of deconsolidation. Not in terms of return to absolutism. And all the scientific indicators such as indexes to measure various elements of democracy point towards progress too. After all, 200 years of subjugated collective psyche is not going to dissipate quickly and without major problems. One thing is sure to give optimism some credence: Nepal has been very resilient so far.

All that said, there are plenty of rooms to be cynical too. The lack of positive alternatives to existing political parties that are hopelessly corrupt and inept to make elections meaningful is one of the greatest threats to Nepali democracy. The path to *oligarchic rule*, if not absolutism, might render Nepali electoral democracy to be one of the versions of Zakaria's *illiberal democracy*. And the kind of utter lack of rule of law amongst the citizenry could mean anarchy in the name of democracy. The democratization process is bound to get tougher due to many unresolved issues surrounding ethnic rivalries too. If the path towards consolidation is made to

be more secure, a huge leap towards rule of law is paramount. Nepal has considerable and commendable liberty – now it needs a check to ensure that will not continue towards excesses that can prove to be a peril for its own cause.

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