


ORIGINAL ARTICLE

## Nepal's Constitutional Foundations between Revolution and Cold War (1950–60)

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The 1950s represent a foundational decade in Nepal's constitutional history. In the wake of decolonization in British India, the “year 7 revolution” (1950–51) grew out of the alliance between King Tribhuvan Shah and Nepal's democratic political parties created in India against the Rana autocratic regime in Kathmandu. Eventually the pro-democracy forces prevailed, and a crucial political transition began. Two constitutions were promulgated, the 1951 Interim Constitution and the 1959 Constitution. Both short lived and only partially implemented, these documents, however, laid the foundations of Nepal's constitutional edifice for years to come. Constitution building became a marker of sovereignty understood in terms of independence and an assertion of popular sovereignty. However, in the fraught Cold War context, the preoccupation with securing political stability by constitutional means that centered around the Shah monarchy prevailed, even at the expense of democracy. As such, the shift from a traditional notion of sovereignty from above to a modern concept of sovereignty from below remained incomplete. These aspirations, however, were not extinguished even by 30 years of royal autocracy under the Panchayat regime (1960–90) and lived on to this day to inform demands for constitutional reform, democratization, and inclusion. The present analysis is based on Nepali primary legal sources, archival material from the United Kingdom and United States National Archives, and the Ivor Jennings Private Papers.

Nepal's constitutional history in the modern sense of the term began in the wake of the “year 7 revolution” (lit. *sāt salko kranti*); that is, 2007 BS (Bikram Sambat), 1950–51 CE. After protracted military confrontations along the Indo-Nepali border, the alliance between King Tribhuvan Shah (1906–55) and Nepal's political parties created in India succeeded in ending more than a century of indigenous autocratic rule under the Ranas (1846–1951). Thus, the 1950s represent a “crucial transitional period” as the country's first experiment with modern constitutional democracy in the fraught context of the decolonization

of South Asia and the Cold War heating up in the Himalayas.<sup>1</sup> In fact, Nepal's first ever implemented written constitution, the Interim Constitution, came into force in March 1951.<sup>2</sup> It was a short transitional document designed to pave the way for the country's permanent constitution. After a drawn-out and embattled constitution-making process involving local actors and British expert Sir Ivor Jennings, this new constitution was promulgated in February 1959 giving great powers to the monarch, while also establishing the coordinates of parliamentary democracy.<sup>3</sup> Nepal's first attempt at democratic constitutional governance, however, was short lived. In December 1960, King Mahendra Shah (1920–72) suspended the new constitution, banned all political parties, and installed a form of monarchical autocracy known as the Panchayat system (1960–90) under the newly framed 1962 constitution.

This article's central argument is that the 1950s represent a foundational constitutional decade for Nepal with long-term consequences, even if both the 1951 and 1959 constitutions had a short shelf life. These documents established the long-lasting coordinates of modern sovereign authority in Nepal in both its *external* and *internal* connotations. The threat of the Cold War, in particular the Chinese invasion of Tibet, catalyzed profound political anxieties in Nepal about preserving its external sovereignty (i.e., independence) vis-à-vis its powerful neighbors. In turn, these preoccupations shaped the internal notion of sovereignty at the constitutional level, both in expressive foundational terms and in the frame of government. The net result in the medium and long term have been deep forms of constitutional instability and recurrent bouts of authoritarianism anchored in structural executive dominance.<sup>4</sup> Weaving legal historical analysis with comparative constitutional law and international politics, this article builds on these arguments through a deep engagement with an array of Nepali primary legal sources, archival material from the United Kingdom and United States National Archives, and the Ivor Jennings Private Papers.

### **The Internal and External Dimensions of Sovereignty in Nepal's Cold War Context**

Nepal's domestic process of constitution building in the 1950s was inextricably intertwined with the broader regional and international context, namely the decolonization of South Asia and Cold War dynamics. The international political context in which Nepal's modern constitutional founding in the 1950s took place brought into sharp focus the question of reasserting and preserving the country's *external* sovereignty, and ultimately its status as an independent nation in a threatening geopolitical scenario. The wave of decolonization that swept across South Asia at the end of World War II transformed the

<sup>1</sup> B.L. Joshi and L. Rose, *Democratic Innovations in Nepal: A Case Study of Political Acculturation* (Berkeley: University of California Press, 1966, 2004 reprint), ix.

<sup>2</sup> *The Interim Government of Nepal Act*, 2007 BS (1951 CE).

<sup>3</sup> *The Constitution of the Kingdom of Nepal*, 2015 BS (1959 CE).

<sup>4</sup> Mara Malagodi, "The Locus of Sovereign Authority in Nepal," in *Unstable Constitutionalism: Law and Politics in South Asia*, ed. Mark Tushnet and Madhav Khosla (Cambridge: Cambridge University Press, 2015), 45–85.

constitutional sphere into a key site of political contestation where competing actors fought to achieve their vision of the institutional structures and political identity of the newly sovereign states.

In this context, constitution building became a marker of sovereignty understood both in terms of independence from the colonial oppressor (*external*) and as an assertion of popular sovereignty entailing a shift in the legitimation of political power from below (*internal*). Here I adopt Martin Loughlin's definition of *internal* state sovereignty as being the relationship between the state and the people.<sup>5</sup> I argue that this constitutional relationship in Nepal was shaped by the Cold War threat to *external* sovereignty and as such, constitution-makers emphasized the concept of national unity to preserve Nepal's independence. As a result, the Shah monarchy became both the central symbol and the institution around which this unity was built in constitutional terms. More specifically, the constitutional articulation of Nepal's *internal* sovereignty, which was centered on the crown in foundational terms, shaped the country's frame of government. These constitutional choices made in the 1950s have profoundly affected the trajectory of the country's constitutional developments to this day.

Nepal's constitutional developments in the 1950s ought to be analyzed within the spectrum of South Asia's experiences in decolonial constitutional transitions. As a precondition to remaining within the Commonwealth, India and Pakistan acquired independence from Britain as Dominions in 1947, with externally imposed constitutions that were a combination of Acts of the Imperial Parliament,<sup>6</sup> while Ceylon acquired independence in 1948 via an Act of the Imperial Parliament that allowed the Colonial Office to draft the country's Dominion constitution with a degree of local inputs.<sup>7</sup> Then, more or less expeditiously, sovereign republican constitutions were drafted domestically and came into force respectively in 1950 (India), 1956 (Pakistan), and 1972 (Sri Lanka) to mark a complete break from the colonial period. Burma, instead, repudiated the colonial link entirely, left the Commonwealth, and immediately acquired independence as a fully sovereign republic in 1948 by adopting its first locally drafted constitution in 1947. In these jurisdictions, constitution building was both a facet and a byproduct of decolonization. All these South Asian foundational experiences, including that of Nepal, shared the common goal of manifesting their sovereignty in constitutional terms.

Nepal was never colonized but had been long situated within the sphere of influence of the British Empire, even if at its periphery. The revolution of 1950–51 and the regime change that ensued placed Nepal on a chronological continuum with other South Asian jurisdictions that underwent decolonial political transitions underpinned by constitution-making processes. These deep regional connections have shaped Nepal's constitutional trajectory and

<sup>5</sup> M. Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010), 285.

<sup>6</sup> Rohit De, "Theory and Practice of India's Dominion Status," *International Journal of Constitutional Law* 17 (2019): 1213–34; and Mara Malagodi, "Dominion Status and the Origins of Authoritarian Constitutionalism in Pakistan," *International Journal of Constitutional Law* 17 (2019): 1235–57.

<sup>7</sup> Rehan Abeyratne, "Uncertain Sovereignty: Ceylon as a Dominion 1948–1972," *International Journal of Constitutional Law* 17 (2019): 1258–82.

continue to reverberate in contemporary debates. In particular, Nepal's intimate relationship with British India shaped its economic development, security agenda, oppositional politics, and even its "non-colonial" national identity around the Shah monarchy, Hinduism, and the Nepali language, which was directly forged in opposition to colonial India.<sup>8</sup> The temporal proximity of these founding moments within the region is also underscored by constitutional cross-pollination and borrowing among South Asian jurisdictions, given their geographical vicinity, shared history, and interconnected geopolitical challenges.

The Cold War context impacted Nepal's constitution-making process in an obliquitous manner. When India and Pakistan acquired independence, South Asia "appeared far removed from the major theatres of Cold War confrontation" as the conflict heated up in other parts of Asia.<sup>9</sup> While India pursued a non-aligned foreign policy, Pakistan became progressively closer to the United States, and in September 1954, joined the Southeast Asia Treaty Organization (SEATO), an anti-communist military alliance in Asia mirroring the North Atlantic Treaty Organization (NATO). Nepal has historically tried to balance its precarious geopolitical position as a small landlocked country sandwiched between India and China.

On the one hand, under these increasingly threatening circumstances following the Chinese military invasion of Tibet that began in 1950, the opening up to the world after centuries of relative isolation, and the pursuit of a diversified foreign policy were designed to preserve Nepal's independence. In fact, in the 1950s Nepal established diplomatic relations with a growing number of countries beyond the United Kingdom (1816), the United States (1947), India (1947), and France (1949).<sup>10</sup> On the other hand, Western powers in alignment with independent India sought to deepen their influence in Nepal to counter the threat of communist expansion in the Himalayas, and succeeded in remaining Nepal's key strategic allies. The People's Republic of China (PRC) and the Soviet Union (USSR) also actively worked to increase their influence in the Himalayan kingdom, primarily through development assistance.

While military preoccupations always loomed in the background, in the early 1950s the competition among Cold War players manifested itself in Nepal primarily as competition for the provision of development aid as a mean to exert influence and "win the hearts and minds," a strategy similarly adopted in India by both the United States and USSR.<sup>11</sup> The desire for development (*bikās*) in Nepal came to shape the country's aspirations for modernity

<sup>8</sup> Mary Des Chene, "Is Nepal in South Asia? The Condition of Non-Postcoloniality," *Studies in Nepali History and Society* 12 (2007): 218–19.

<sup>9</sup> R. McMahon, *The Cold War on the Periphery: The United States, India, and Pakistan* (New York: Columbia University Press, 1996) 5–6.

<sup>10</sup> In the 1950s, Nepal established diplomatic relations with the following countries: PRC (1955), USSR (1956), Japan (1956), Sri Lanka (1957), Egypt (1957), Federal Republic of Germany (1958), Austria (1959), Italy (1959), Serbia (1959), Switzerland (1959), and Poland (1959). <https://mofa.gov.np/foreign-policy/diplomatic-relations/> (August 21, 2021).

<sup>11</sup> D.C. Engerman, *The Price of Aid. The Economic Cold War in India* (Cambridge: Harvard University Press, 2018).

(*ādhunikṭā*) and its relationship with the outside world.<sup>12</sup> In this context, modernity also had clear political connotations and included aspirations for democracy and emancipation. The Cold War, however, also acquired a security dimension in Nepal in the second half of the 1950s. The progressive incorporation of Tibet by the PRC led Nepali politicians, alongside Indian and American policy makers, to fear potential Chinese encroachment from Nepal's northern border. Thus, Indian, American, and British security interests converged in the region. As such, Nepal acquired key strategic importance for India as a buffer zone against the PRC in the Himalayas and for the United States as a bulwark against a feared communist expansion.

This foreign policy shift translated into fostering Nepal's internal political stability at all costs, even at the expense of democracy, by favoring the unelected executive that had effective control of the military and the bureaucracy, similar to earlier developments in Pakistan in the mid-1950s.<sup>13</sup> India, the United States, and the United Kingdom identified the king as Nepal's only sufficiently stable political interlocutor and dependable ally. Their approach strategically responded to the primary preoccupation of Nepali political elites with preserving the country's independence by the late 1950s, as the hostility between India and the PRC deepened. This panic resulted into a near obsession with strengthening national unity through the creation of a strong executive at the center that was capable of providing firm leadership in an emergency. Throughout the 1950s, the royal palace had become "the effective centre of government" and acquired an even greater role after the coronation of King Mahendra, who actively sought to concentrate further power in his hands.<sup>14</sup>

The new king was determined to exercise control over the new constitution-making process as well. Eventually India, the United States, and the United Kingdom chose to support the monarchy also in terms of constitution building based on their geopolitical calculus in Nepal. As a result, the constitutional settlement of the 1950s translated the king's political hegemony into legal dominance, while retaining a democratic veneer and deploying the language of modern constitutionalism. Nepal's constitutional framework articulated an ambiguous notion of *internal* sovereignty. As such, the shift from a traditional notion of sovereignty from above to a modern concept of sovereignty from below remained incomplete.<sup>15</sup> On the one hand, the 1950s crystallized the dominance of the unelected segment of the executive legitimized by neo-traditionalist forms of constitutional nationalism.<sup>16</sup> These features proved resilient and remain to this day key obstacles to fostering inclusive constitutional democracy in the country. On the other hand, Nepal's constitutional founding held out the revolutionary promise of modern democracy. Decolonialization

<sup>12</sup> Stacey Pigg, "Inventing Social Categories through Place: Social Representations and Development in Nepal," *Comparative Studies in Society and History* 34 (1992): 497.

<sup>13</sup> A. Jalal, *The State of Martial Rule: The Origins of Pakistan's Political Economy of Defence* (Cambridge: Cambridge University Press, 1990).

<sup>14</sup> J. Whelpton, *A History of Nepal* (Cambridge: Cambridge University Press, 2005), 86.

<sup>15</sup> Malagodi, "The Locus of Sovereign Authority in Nepal," 45–85.

<sup>16</sup> M. Malagodi, *Constitutional Nationalism and Legal Exclusion-Equality, Identity Politics, and Democracy in Nepal*, (Oxford: Oxford University Press, 2013).

had created profound aspirations for sovereignty, self-determination, and political emancipation, not just as independence from the colonial master, but also as rule by the people for the people. These aspirations were not extinguished even by 30 years of royal autocracy, and continue to inform demands for constitutional reform, democratization, and inclusion in the country.

### The Revolution of 2007 BS and the 1951 Constitution

Nepal's only historical episode referred to as a "revolution" began with the most unusual of catalysts. On November 6, 1950, King Tribhuvan Shah and his entire family (with the exception of his 4-year-old grandson Gyanendra) left the royal palace in their cars supposedly headed for a hunting expedition. However, as they drove by the Indian Embassy in Kathmandu, they abruptly entered the diplomatic compound and sought sanctuary to escape control by the Ranas. Four days later, an Indian Air Force plane flew Nepal's royal family to New Delhi. Nepali political parties that had formed in India during the anti-colonial struggle rallied around the exiled monarch. They were modeled on the Indian National Congress and Communist Party and included educated elites and lower-class Ranas. After a failed attempt to persuade King Tribhuvan to return to the palace, the Rana government crowned Prince Gyanendra, but both India and the United Kingdom refused to recognize the new monarch.<sup>17</sup> Military confrontations began along the India–Nepal border between the Rana forces and the pro-democracy militias supported by independent India, while negotiations took place in Delhi.

A compromise was eventually reached and on February 15, 1951, King Tribhuvan returned to Kathmandu; his restoration to the throne marked the formal end of the Rana regime. On February 18, the king issued the historic Royal Proclamation that formed an interim government with Rana and Nepali Congress representatives. The proclamation remained "the sole legal basis for the new government" and granted special status to the king by reinstating his royal prerogative powers, but also promised a radical overhaul of Nepal's political system "based on a democratic constitution framed by elected representatives of the people."<sup>18</sup> Symbolically, an autochthonous constitution-making process was the modern marker of sovereignty understood as independence. With the promise of a directly elected constituent assembly and the move toward representative politics, the constitutional arena officially became a crucial battleground for political engagement and emancipation in the country throughout the 1950s. It was for these reasons that the events that led to the regime change of 1950–51 were termed "revolutionary," as this moment continues to be considered the most significant critical juncture in Nepali history.

In the wake of the revolution, Nepal's internal politics were greatly shaped by the coordinates of the political compromise brokered by India, the most influential foreign power in Nepal. As such, Indian security concerns

<sup>17</sup> Joshi and Rose, *Democratic Innovations in Nepal*, 73–74.

<sup>18</sup> *Ibid.*, 83–84.

vis-à-vis the PRC and Pakistan shaped its foreign policy in the Himalayan region, and Nepal started to play a crucial role in India's defense plans as a buffer zone especially since in 1949, the PRC immediately made clear its intention to incorporate Tibet fully.<sup>19</sup> In fact, on November 19, 1949, the Tibetan foreign bureau asked the United States State Department for extensive civilian and military aid as the Chinese People's Army (PLA) entered Eastern Tibet.<sup>20</sup> American fears of communist expansionism in the Himalayas coupled with the escalating Sino-Indian border dispute accelerated the convergence of Indian and American strategic interests in the region. This led to a degree of coordination in aid policies and defense initiatives in view of containing the PRC, which also included Nepal.

Since independence, India had taken over Britain's leading diplomatic role in Kathmandu and sought to influence the crafting of Nepal's first implemented constitutional charter. Promulgated on March 30, 1951, the interim constitution was drafted by a small unelected commission under the guidance of Professor Ram Ugra Singh of Lucknow University.<sup>21</sup> In my view, the framework of government under Nepal's interim constitution reflected the structures of the colonial-era Government of India Act 1935 as adapted under the 1947 Dominion constitutions of India and Pakistan, rather than India's independent constitution.<sup>22</sup> Nepal's interim constitution was engineered to be transient and featured a high degree of unaccountable executive dominance (a sort of adaptation of the powers of the governor general to those of the king in Nepal), lacked enforceable constitutional rights, and was devoid of a blueprint for constitution making.<sup>23</sup> Moreover, the interim constitution articulated a notion of state sovereignty based on monarchical authority, which structured the entire constitutional edifice. Article 22 vested the executive power in the king and made it exercisable by the king directly or through his officers. Moreover, the open-textured and vague nature of the dispensation was ultimately underpinned by political expediency. This framework mirrored the preoccupations and goals of both the Nepali elites and the Indian government: the new constitution was designed to facilitate a swift and smooth political transition and secure Nepal's political stability in the Cold War context, but at the expense of both democracy and popular sovereignty, even if it held out the promise of both.

The interim constitution centered both the executive and legislative functions in the King-in-Council, and only gave very limited powers to the legislature, pointedly named as the Advisory Assembly General (Part 3, Chapter 4). In fact, the 1951 constitution preserved the king's power to issue ordinances even without the involvement of either the Council of Minister and the legislature

<sup>19</sup> Melvyn C. Goldstein, "The United States, Tibet, and the Cold War," *Journal of Cold War Studies* 8 (2006): 148.

<sup>20</sup> J.K. Knauss, *Orphans of the Cold War. America and the Tibetan Struggle for Survival* (New York: PublicAffairs, 1999), 44.

<sup>21</sup> B. Khanal, *Regeneration of Nepalese Law* (Kathmandu: Bhrikuti Academic Publications, 2001), 34.

<sup>22</sup> Joshi and Rose, *Democratic Innovations in Nepal*, 488.

<sup>23</sup> Mara Malagodi, Luke McDonagh, and Thomas Poole "The Dominion Model of Transitional Constitutionalism," *International Journal of Constitutional Law* 17 (2019): 1283–300.



(Part 3, Chapter 2) and to withhold royal assent (Part 3, Chapter 4). The few rights contained in the document were included either under the non-justiciable Directive Principles of State Policy (Part 2) or framed as special privileges of the members of the Assembly (Part 3, Chapter 4). The interim constitution created an independent judiciary and established the *Pradhan Nyayalaya* (High Court) as the highest court of appeal in the country, but left all the details of the powers, composition, and functioning of the court to ordinary legislation (Part 3, Chapter 3). The preamble recognized the transient nature of the document, and explicitly referred to the framing of a new permanent constitution, but with no provisions for the constitution-making process anywhere. Part 6 instead provided for general elections, established an election commission, and introduced universal adult suffrage. No mention of political parties was made throughout the document, even if Article 68 clearly stated that “the aim of the Interim Government shall be to create conditions, as early as possible, for holding elections for the Parliament.”

The framing of Nepal’s interim constitution exemplifies the tension at the heart of this embattled transition. The process of democratization involved a constitutional move toward popular sovereignty and the creation of modern structures of government. However, since “the 1950 revolution was primarily an intellectuals’ revolt against an archaic political system and involved the common people to only a limited degree,” the infrastructure of modern government had to be created almost entirely from scratch and was eventually modeled on India.<sup>24</sup> It is in relation to this process of political modernization that foreign development assistance acquired an important practical and ideological role. In this respect, Nepal’s 1950s constitutional history and its outcome can only be explained through the interaction of the key political actors in Kathmandu: the king, the political parties, and foreign donors.

### King, Parties, and Donors

The decade following the restoration of King Tribhuvan to the throne was characterized by profound political instability, with an endless succession of governments punctuated by bouts of direct royal rule. The interim constitution made the Royal Palace the effective center of governmental authority in Nepal. The king often acted as the ultimate arbiter of political disputes while progressively becoming the primary interlocutor of foreign powers operating in the country who were seeking to support stabilizing political forces. As early as January 1952, on India’s suggestion, Nepal’s government repressed the Raksha Dal revolt—a paramilitary wing of the Nepali Congress—and banned the Communist Party of Nepal.<sup>25</sup> Following the collapse of the first Nepali Congress-led government under M.P. Koirala’s premiership (November 16, 1951–August 14, 1952) and with the beginning of a period of direct rule by King Tribhuvan (August 14, 1952–June 15, 1953), “New Delhi had decided

<sup>24</sup> Joshi and Rose, *Democratic Innovations in Nepal*, 488.

<sup>25</sup> Whelpton, *A History of Nepal*, 89.



that the throne was the only institution in Nepal capable of achieving some degree of stability and economic progress. The political party system was considered too volatile to be a dependable agent of modernization.<sup>26</sup> By 1953, the Indian strategy of marginalizing political parties and concentrating political power in the throne was “initiated with considerable reluctance by King Tribhuvan on New Delhi’s advice” and led to a widespread anti-India sentiment.<sup>27</sup>

In line with this new policy, on January 10, 1954, King Tribhuvan issued a Royal Proclamation that established the crown as the source of all state authority in legal terms:

(1) It has been the established tradition and practice in our country since My august forefathers that by virtue of the inherent sovereignty and the Royal prerogatives, the supreme executive, Judicial and legislative authority vests in the Sovereign. For some time this authority was, in accordance with the delegation made by some of Our distinguished predecessors, exercised by their Prime Ministers. This delegation was, by virtue of Our Proclamation of 7<sup>th</sup> Falgun, 2007 [18 February 1951], revoked where by the supreme authority in all the spheres vests solely in Us.<sup>28</sup>

This trend continued unabated with King Mahendra’s ascension to the throne following the death of his father in March 1955, as he immediately assumed direct rule aided by the Council of Royal Advisors (March 25, 1955–January 27, 1956).<sup>29</sup> In the late 1950s, the Shah monarchy acquired an even more central position and active role in Nepal’s government with profound effects on the making of the permanent constitution.

The regional and international dimension of Nepali politics also played a fundamental role in charting the trajectory of the country’s constitutional developments. Whereas in the early 1950s, only the United Kingdom and India had embassies in Kathmandu, foreign presence in Nepal began to increase due to the mushrooming of development aid projects. In January 1951, the Americans persuaded King Tribhuvan while in exile in India to sign the General Agreement for Technical Cooperation between Nepal and the United States, which led to the establishment of the United States Technical Co-operation Mission in Kathmandu a year later.<sup>30</sup> This was part of the American strategy of combating communism by promoting economic development and democracy, especially in countries like Nepal, which they considered “front line” for Cold War purposes, especially following the Chinese invasion of the Tibetan region of Chamdo in October 1950.<sup>31</sup> In 1952, the Nepali

<sup>26</sup> L. Rose, *Nepal-Strategy for Survival* (Berkeley: University of California Press, 1971), 200.

<sup>27</sup> *Ibid.*

<sup>28</sup> Jennings/ICS/B13/1.2, Royal Proclamation, 7 Māgh 2010 BS (January 20, 1954).

<sup>29</sup> Rose, *Nepal-Strategy for Survival*, 208.

<sup>30</sup> Bandana Gyawali, “From Development to *Bikas*: Nepal’s Transition to Democracy and the Emergence of a Concept’ *Studies in Nepali History and Society* 21:1 (2019), 19.

<sup>31</sup> Thomas Robertson, ““Front Line of the Cold War”: The US and Point Four Development Programs in Cold War Nepal, 1950–1953” *Studies in Nepali History and Society* 21:1 (2019), 41–72.

government also requested development assistance from India, which was pre-occupied with retaining its primary role in South Asia and considered Nepal its own backyard.<sup>32</sup> In this context, King Mahendra understood well the intimate relationship between domestic and foreign policy and sought to diversify his support basis.<sup>33</sup>

On August 1, 1955, Nepal established diplomatic relations with the PRC, which in turn promised development aid. As American archival sources reveal, the establishment of closer ties between the PRC and Nepal was already cause for concern to both the United States and India in October 1955:

GOI [Government of India] considers economic improvement Nepal of utmost importance to stabilize GON [Government of Nepal] politically. GOI wants to retain influence in Nepal and is helping economically to extent its ability. Situation now complicated by establishment relations between Nepal and ComChina [PRC] and ComChina has offered aid to Nepal [...] it is evident GOI wants to maintain its preferred position in Nepal and is fearful of wooing of Nepal by ComChina through aid offers.<sup>34</sup>

Barely a month later, these preoccupations continued to intensify and extended to the potential deployment of Chinese development personnel in Nepal: “GOI stressed US and India’s objectives in Nepal identical; i.e. to keep Red China’s influence in Nepal at minimum and to help Nepal build up its economy in order permit them withstand pressure from North [...] Necessary to prevent RedChina from forcing GON accept Red Chinese Development Personnel.”<sup>35</sup>

In this light, the alliance between India and the United States vis-à-vis Nepal consolidated further.

Domestically, King Mahendra also did not waste time, and on August 8, 1955 announced that general elections would be held in October 1957. This marked the beginning of frantic political moves by both domestic and foreign actors operating in Nepal. The king continued its policy of internationalization, and on December 14, 1955 Nepal joined the United Nations. King Mahendra sought to insulate the monarchy from the political upheaval and appointed royalist Tanka Prasad Acharya as prime minister (January 27, 1956–July 14, 1957), who also courted Chinese support. On February 3, 1956, the Chinese ambassador to India visited Nepal and offered further economic assistance, while also emphasising Nepal–Tibet relations.<sup>36</sup> Unsurprisingly, in April 1956, the ban on the Communist Party of Nepal was rescinded amidst rumours that the party leaders had secretly pledged not to oppose the monarchy.<sup>37</sup>

<sup>32</sup> Gyawali, “From Development to Bikas”, 22.

<sup>33</sup> Rose, *Nepal – Strategy for Survival*, 209.

<sup>34</sup> United States Embassy, New Delhi to Department of State (DOS), October 14, 1955, Telegram, File 790C.5-MSP/10-1455, United States National Archives II, College Park, Maryland, United States (hereafter NARA II).

<sup>35</sup> United States Embassy, New Delhi to DOS, November 23, 1955, Telegram, File 790C.5-MSP/11-2355, NARA II.

<sup>36</sup> Rose, *Nepal-Strategy for Survival*, 210.

<sup>37</sup> Whelpton, *A History of Nepal*, 91.

King Mahendra's lavish coronation took place in May 1956, marking both a symbolic and a substantive strengthening of the position of the monarchy. Thus, King Mahendra pressed on with constitution making and in May 1956 sought to engage through the British Foreign Office (FO) the services of renowned British constitutional expert Sir Ivor Jennings, a veteran of constitution building in South Asia, to assist with the drafting.<sup>38</sup> On May 13, 1956, Jennings replied to the FO letter illustrating two concrete options for constitution building in Nepal: "settling a constitutional draft with the Government would take only a few months, while getting a draft through a Constituent Assembly would take much longer."<sup>39</sup> Predictably in June, a controversy arose over a statement by Prime Minister Acharya attempting to change the scope of the forthcoming elections from a constituent assembly to a parliament with limited powers operating under a constitution granted by the king.<sup>40</sup> The preoccupation with the constituent assembly route centered on the fear of Indian interference contrary to Nepal's national interest and integrity.<sup>41</sup>

Due to growing fears of Chinese expansion in the Himalayas and the intensification of the Khampas resistance in Eastern Tibet, in July 1956, the United States proposed a regional road project between India and Nepal to counter the perceived communist threat:

The proposal [...] can be justified on economic grounds as a big potential boost to the economy of Nepal by providing means of readier exchange of goods both within Nepal and between India and Nepal. Militarily it means that troop and logistic support could more easily be transported into the Central Valleys of Nepal in case of a Communist invasion. Politically it seems to agree with the general policy objectives of our foreign aid program and with the aim of the regional development fund as well as contributing to internal cohesion and stability.<sup>42</sup>

The American Embassy in Delhi also emphasized the advantages of the alliance with India in Nepal: first, the ability to present the "best democratic front versus the Communists if they attempt unilateral action in Nepal" and, second, that Nepal "is too remote furnish complete protection and India closely linked geographically and historically."<sup>43</sup>

The signing of a treaty between Nepal and the PRC on September 20, 1956 allowing Nepal to establish a consulate general in Lhasa and the PRC in Kathmandu greatly preoccupied both India and the United States.<sup>44</sup> On

<sup>38</sup> FO letter to Jennings, May 11, 1956, ICS 125/B/xiii/4, Jennings Private Papers, Institute of Commonwealth Studies, London, United Kingdom (hereafter ICS).

<sup>39</sup> Jennings letter to FO, May 13, 1956, ICS 125/B/xiii/4.

<sup>40</sup> Joshi and Rose, *Democratic Innovations in Nepal*, 189–90.

<sup>41</sup> Hora Prasad Joshi, 1958. *The Way to Political Stability—An Analysis*, ICS 125/B/xiii/1.4.

<sup>42</sup> SOA to SOA, July 30, 1956, Office Memorandum, File 790C.5-MSP/7-3056, NARA II.

<sup>43</sup> United States Embassy, New Delhi to DOS, August 31, 1956, Telegram, File 790C.5-MSP/8-3156, NARA II.

<sup>44</sup> Rose, *Nepal—Strategy for Survival*, 210–11.

October 7, the signature of an economic agreement ensued, with no Chinese development personnel in Nepal and no conditionality, intensifying pressure on India and the United States to increase their aid budget for Nepal and deliver tangible results with their projects especially before the general elections, but also without getting into a bidding war with the PRC.<sup>45</sup> In the meantime, the CIA had stepped up its efforts in Tibet to counter Chinese forces as reports started coming in that Tibetan resistance to Chinese actions had intensified along the Yangtze River.<sup>46</sup> Meanwhile in Nepal in late February 1957, the Chinese Premier Chou En-Lai visited Kathmandu and paid less attention to Indian sensibilities. He stressed the cross-border links of “Bhotia Raj” as a reference to the Buddhist and blood ties between the PRC and Nepal (especially with so called “Mongoloid” communities, Newar, Limbu, Kirati), in contrast to India’s focus on “Hinduized” communities, and proposed a road link between Kathmandu and Tibet.<sup>47</sup>

Amidst the international turmoil and threatening environment, King Mahendra sought to strengthen the cultural and religious coordinates legitimizing the authority of the monarchy. Here, law proved to be an incredibly useful tool. In October 1956, the Law Commission published the draft of the new Penal Code, which, while heavily based on the colonial-era 1860 Indian Penal Code, contained significant departure with respect to religious freedom. Against Indian advice, the Nepal government sought to criminalize even voluntary religious conversion, ostensibly in an effort to protect Hinduism, or more accurately to promote the idea of Nepal’s identity as the world’s last Hindu kingdom.<sup>48</sup> The king also sought to deepen his political connections and further his prestige across the country through walking tours. The monarchy was clearly in ascendancy.

### Controversy over the Nature of the First Elections

By March 1957, the question of the purpose of the impending elections had become more pressing, and the position of the king had become increasingly embattled, as a constituent assembly could potentially threaten the position of the monarchy, while the parties increasingly demanded a constitution drafted by elected representatives.

Under the present system the ultimate decision rests with King Mahendra, who has yet indicated his decision. However much the King may desire to be a constitutional monarch, the prospect of creating a real Constituent Assembly, in which it is likely that no party would have a majority and which could create chaos rather than a constitution, must give the King

<sup>45</sup> DOS to United States Embassy, New Delhi, November 23, 1956, Instruction, File 790C.5-MSP/11-2256, NARA II.

<sup>46</sup> Knauss, *Orphans of the Cold War*, 138.

<sup>47</sup> Rose, *Nepal-Strategy for Survival*, 213.

<sup>48</sup> United States Embassy, New Delhi to DOS, November 9, 1956, Foreign Service Dispatch, File 790C.34/11-956, NARA II.

pause. The odds appear to be in favour of a constitution by decree, with elections only for parliament. [...] Not only is the King in possession of the ultimate legal power in the country at present under the Interim Government of Nepal Act 1951; he appears to be the central stabilizing force and the only figure having real country-wide influence at present. [...] Indian Ambassador Sahay [...] indicated, in response to a question, that the constitution might be drawn as to leave certain emergency powers in the hands of the King, however unusual such a provision would be for a “constitutional monarchy” [...] the Indian government is still supporting the monarchy, which it placed in power in 1951, but that it is using what influence it possesses to encourage the Nepalese government to achieve a wider political base, as well as aiding its attempts to assure some economic development.<sup>49</sup>

As India shored up the monarchy, the prospects for a constituent assembly began to appear remote. In fact, on April 24, 1957, Jennings was informed by the FO that his services in Nepal were no longer required.<sup>50</sup> It appears from British archival records that India “bullied [Nepal] out of asking for Jennings’s services” at this time.<sup>51</sup>

By early June 1957, the American embassy in Delhi was concerned that King Mahendra had not sufficiently consolidated his position and that no existing political party fully supported the crown. Moreover, the question of the purpose of the elections had to be settled, because it had important legal ramifications for the institution of the monarchy and the personal position of the king:

Ex-Commander-in-Chief General Kiran (now Minister of State and close to King) said announcement would come in a month but it would be announcement for postponement of elections; said such announcement must give firm date to “mitigate confusion”. Said government had decided no firm date yet. In response query re type of elections (i.e. Constituent Assembly or Parliament) [Foreign Minister] Sharma said no decision yet but technical committee in government considering question whether (as alleged by some including Nepali Congress) elections for Constituent Assembly would require King’s abdication of [b]road powers so Constituent Assembly could start with a clean slate in defining King’s powers under the new constitution. Kiran confirmed this.<sup>52</sup>

Unsurprisingly, by early July, the king had decided against a constituent assembly, but his plans were met with internal opposition: “TPA [PM Tanka Prasad

<sup>49</sup> United States Embassy, New Delhi to DOS, March 8, 1957, Foreign Service Dispatch, File 790C.13/3-857, NARA II.

<sup>50</sup> FO letter to Jennings, April 26, 1957, ICS 125/B/xiii/4.

<sup>51</sup> British Ambassador to Nepal J.A. Scopes letter to FO, June 16, 1958, FO 371/135966.

<sup>52</sup> United States Embassy, New Delhi to DOS, June 4, 1957, Telegram, File 790C.5-MSP/6-457, NARA II.

Acharya] met with increasing criticism as the date for Nepal's first general elections approached (October 1957). The major issue was the character of the elections. The King, supported by Tanka Prasad, pressed for parliamentary elections, holding that a constitution should be promulgated by royal decree. The major opposing parties sought elections of a constituent assembly to be followed by parliamentary elections."<sup>53</sup>

On top of the delays with the elections, Nepal's political opening towards the PRC and the USSR and the increasing aid and cultural exchange offers by both communist powers under Prime Minister Acharya's watch had displeased both India and the United States.<sup>54</sup>

Prime Minister Acharya's resignations in mid-July and the appointment of K.I. Singh at the helm of the Cabinet (July 15–November 14, 1957) led to a sharp realignment with India in foreign policy. The new premier immediately announced that the PRC and the USSR would not be allowed to establish embassies in Kathmandu, while supporting India vis-à-vis Pakistan and on the Kashmir question.<sup>55</sup> King Mahendra, however, remained wary of exclusively relying on India, as the fear of annexation always loomed into the background, and his position had ramifications for Nepal's constitutional developments as confirmed by Nepal's ambassador to India in a conversation with United States Embassy personnel:

[H.E. Mr.] Daman [Shumsher J.B. Rana] commented he is not anti-Indian but for Nepal free of Indian hegemony. In his opinion GOI since 1951 has hoped GON would be unable run itself and would ask India step in and help. Mention of Sikkim in general context conversation though indirect conceivably may be that Daman fears India may be considering attempt establish protectorate to fill political vacuum. [...] quite explicit that if and when elections are held they will be for a Parliament which will operate under constitution King will promulgate. This is in line with categorical statement Nepal Chief Justice's statement.<sup>56</sup>

The reasons for the king's preoccupations with the constituent assembly route revolved around the possibility of undue foreign influence on the drafting process.

A close ally of the king, Hora Prasad Joshi, who later acted as secretary for the Drafting Commission for the 1959 Constitution and then drafted the 1962 Panchayat Constitution, made the king's case against the constituent assembly clear:

There is a time lag between the election of the conembly [constituent assembly] and the drafting of the constitution. It can not also be said

<sup>53</sup> United States Government, July 15, 1957, Office Memorandum "Fall of the Nepalese Ministry," File 790C.13/7-1557, NARA II.

<sup>54</sup> United States Embassy, New Delhi to DOS, June 13, 1957, Foreign Service Dispatch, File 790C.5-MSP/6-1357, NARA II.

<sup>55</sup> Rose, *Nepal-Strategy for Survival*, 216.

<sup>56</sup> United States Embassy, New Delhi to DOS, July 24, 1957, Telegram, File 790C.13/7-2457, NARA II.

that it will usher in parliamentary democracy. We have before us the history of Pakistan, Indonesia, and other Asian countries. Ten or more years have elapsed yet political stability has not dawned upon them. Taking into account the political situation of the country and the nature of the political parties, it would be folly to imagine that election to the conembly will solve the problem. [...] there exists, though on a small scale, elements inimical monarchy, nationalism, and the religion culture and tradition. [...] The constitution drawn upon by the elective constituent assembly need not necessarily reflect the will of the people, for in its making foreign interests may play a part contrary to the national interest. [...] Nepal and her people need political stability. In order to ensure political stability what we need is written constitution embodying the principles of parliamentary democracy and a parliament to function within the orbit of the constitution. [...] the King alone, who is the object of our loyal fealty and symbol of unity, can answer our needs.<sup>57</sup>

As a result, on October 4, 1957 Prime Minister Singh announced an indefinite postponement of the elections without clarifying the object of the elections; the king confirmed this position 2 days later.<sup>58</sup> Nepal's internal political instability preoccupied Indian and American donors. On November 14, 1957, King Mahendra eventually fired Prime Minister Singh and assumed direct powers (November 14, 1957–May 15, 1958) and again pursued a diversified foreign policy to limit the constraints of operating along a single international axis.<sup>59</sup> He then seized the opportunity to gain control of the drafting of Nepal's permanent constitution and to complete the process under his leadership.

## The 1959 Constitution

Nepal's permanent constitution was promulgated on February 12, 1959 after a drawn-out drafting process involving both local and foreign actors. The outcome was full of contradictions: the prominence of the king was re-established in both legal and political terms, while the language of constitutional democracy was also affirmed. As such, the shift from sovereignty from above to sovereignty from below remained incomplete. The history of the making of this document and an analysis of its framework illuminate the political dynamics that gave rise to the text and the long-term impact of this kind of constitutional framing.

### *Constitution Making*

As soon as he assumed direct powers, King Mahendra moved to finalize the drafting of the new constitution. On December 13, 1957, the British FO again contacted Jennings, encouraging him to accept King Mahendra's renewed invitation to travel to Nepal. He was tasked with assisting with the constitution-making process "to strengthen the goodwill" between the United Kingdom

<sup>57</sup> Joshi 1958, *The Way to Political Stability—An Analysis*, 17–19, ICS 125/B/xiii/1/iv.

<sup>58</sup> Joshi and Rose, *Democratic Innovations in Nepal*, 199.

<sup>59</sup> Rose, *Nepal—Strategy for Survival*, 217.



and Nepal and to “straighten the confusion of ideas now disturbing the Nepalese political scene.”<sup>60</sup> Then on December 15, the king issued another royal proclamation announcing that the elections were to begin on February 18, 1959, but remained silent on the goals of elections.<sup>61</sup>

On January 19, 1958, Jennings eventually confirmed his availability to visit Nepal in the spring.<sup>62</sup> He believed that his appointment was made by keeping India in the dark:

The Indians were evidently very annoyed and were blaming H.G.M. for something like sharp practice. They knew nothing of my appointment until I was actually in India [after visit to Nepal], and evidently thought that it had been kept secret in order to steal a march on them. They had taken at face value the King’s request for an Indian adviser, and had appointed Mr. B. Malik, who was my colleague on the Malayan Constitutional Commission. Had I known about it, I would have pressed for his being sent to Kathmandu forthwith. For he is easy to get on with and my Draft would have had Indian and well as United Kingdom support. [...] There is some danger in the Indian view that the monarchy is not very stable [...] My impression—please do not take it as more than that—is that the Indians are in close touch with the Nepali Congress, are not aware of a strong anti-Indian current of opinion in Kathmandu, over-emphasise opinion in the Terai (where Indian influence is no doubt strong) and underestimate opinion in the hill villages (where Royal influence is said to be very strong), and feel that the King is not sufficiently grateful for Indian support in 1950–51.<sup>63</sup>

The FO, instead, maintained that Delhi had known of Jennings’s visit at least since March 13.<sup>64</sup> Regardless, the episode sheds light on the king’s preoccupation with Indian interference and his goal of preserving Nepal’s independence, which shaped the constitutional settlement of 1959.

On February 1, 1958, King Mahendra swiftly issued another royal proclamation to establish the Constitution Drafting Commission and made it clear that no elections for a constituent assembly would be held.<sup>65</sup> Save for the communists, all other parties accepted the king’s announcement, including the Nepali Congress, on the grounds of political expediency.<sup>66</sup> Congress leader B.P. Koirala commented on the proposed arrangements: “I relaxed when it was suggested that Sir Ivor Jennings would draft the constitution. I told the King that the person who had drafted Ceylon’s constitution would not give us a document that would help finish off democratic rights.”<sup>67</sup>

<sup>60</sup> FO letter to Jennings, December 13, 1957, ICS 125/B/xiii/4.

<sup>61</sup> Joshi and Rose, *Democratic Innovations in Nepal*, 210.

<sup>62</sup> Jennings letter to FO, January 19, 1958, ICS 125/B/xiii/4.

<sup>63</sup> Jennings letter to FO, April 27, 1958, FO371/135966.

<sup>64</sup> FO to British Embassy, Kathmandu, May 12, 1958, FO371/135966.

<sup>65</sup> Joshi and Rose, *Democratic Innovations in Nepal*, 210.

<sup>66</sup> *Ibid.*, 272.

<sup>67</sup> B.P. Koirala, *Atmabrittanta-Late Life Recollections*, (Kathmandu: Himal Books, 2001), 182.

Regrettably for the democratic political forces, Jennings deployed in Nepal the so-called “Pakistan formula” in his crafting of Nepal’s frame of government, rather than the Ceylonese model.<sup>68</sup>

Jennings visited Nepal for 1 month between March 28 and April 24, 1958. He worked closely with the Drafting Commission that included five members with different political affiliations: the Chairman, Bhagvati Prasad Singh (Chairman of the Public Service Commission); three ordinary Members, Ramraj Panth (Principal of the Law College), S.P. Upadhyaya (Nepali Congress), Randhir Subba (Gorkha Parishad), and the Secretary, Hora Prasad Joshi.<sup>69</sup> He prepared three drafts in English and joined the commission regularly to discuss his drafting. Another draft penned by Joshi and rumored to originate from the Palace was also unofficially circulated, but it did not make much of an impact then.<sup>70</sup> Jennings assessed his work in the following terms:

The draft is quite short and comparatively simple. Since there is nobody, apart from the King, around whose authority the Constitution could be built, the draft gives the King unusually wide powers, especially in the event of a partial or complete failure of the constitutional machinery. I explained to the King that some of the proposed arrangements would be criticised as “undemocratic”, but that I thought them necessary to prevent breakdown. I also said that given the personal prestige which he seems to enjoy in the villages, it was possible to contemplate his playing a more active part than, say the Queen in the United Kingdom or the President in India, without running the risk of placing the Throne in jeopardy.<sup>71</sup>

After Jennings’s departure, the question was whether the political parties would get behind his draft and whether the palace would attempt to make even further gains.

On May 15, 1958, King Mahendra relinquished direct rule and formed an Interim Coalition Council of Ministers headed by Nepali Congress politician Suvarna Shamsher (May 15, 1958– May 27, 1959) to lead the country into the general elections. With the political parties engaged in their first electoral campaign, the finalization of the constitution was delayed. Eventually, the draft constitution was approved by the Cabinet and then submitted for promulgation to the king, who sought to delay the process. Following Jennings’s departure, the finalization of the draft took a considerable length of time, as the British Ambassador to Nepal explained in June 1958:

The Constitution Drafting Committee has worked very hard since Jennings left. The first task was to translate his draft into Nepalese. A Nepalese drafting expert was then called in and the subsequent discussions

<sup>68</sup> Jennings Explanatory Memorandum, April 21, 1958, ICS 125/B/xiii/2/iv.

<sup>69</sup> *Ibid.*

<sup>70</sup> Jennings Confidential Notes on Nepal for FO, 1958, ICS 125/B/xiii/5/ii.

<sup>71</sup> Jennings letter to FO, April 27, 1958, FO371/135966.

frequently revealed that what had seemed clear when expressed in English and with Jennings' lucid explanations to help, became obviously foreign and more difficult to comprehend when expressed in Nepalese and regarded from the standpoint of the Nepalese mind. I do not know to what extent these difficulties will result in fundamental changes to Jennings' draft, nor indeed what changes may be made on other grounds. I have however repeated my offer to send home for early answer by Jennings any problems that they may care to formulate and put on paper.<sup>72</sup>

A comparison between Jennings's third draft<sup>73</sup> and the promulgated constitution reveals that substantive additions were made to the text, most likely by the king and his entourage, especially regarding the foundational aspect of the document with ethnocultural references to Hinduism, the Indo-Aryan nature of the monarchy, and the Nepali language, while the frame of government engineered by Jennings to give prominence to the crown remained intact.

The international context in which the drafting took place sheds light on the outcome of the process. The security concerns of the Nepali political elites vis-à-vis the Chinese invasion of Tibet led them to approach Western powers for closer cooperation. In January 1958, Nepal and the United States agreed to establish resident embassies in their respective capitals, while on April 17, King Mahendra renewed the agreement with the United Kingdom for their recruitment of Gurkha soldiers from Nepal.<sup>74</sup> On November 21, 1958, Nepal also directly asked for American military assistance:

[Nepal's] Foreign Minister [Purendra Bikram Shah] stated that they were most desirous for assistance which would enable Nepal to defend itself and maintain its internal security. Both gentlemen spoke of the threat from the North. On a map of Nepal, Mr. Thapa [Foreign Secretary] indicated three areas which he felt were particularly vulnerable to penetration from Tibet. These areas were Mustang, the area directly north of Kathmandu, and the area in the immediate vicinity of Mount Makalu [...] the Government of Nepal hoped that the United States Government would be able to provide assistance in the form of training for Nepalese officers in mountain warfare and in airborne operations.<sup>75</sup>

The issue of the "danger from the north" also arose during the work of the Drafting Commission as recorded by Jennings.<sup>76</sup> It seems that national security concerns felt sufficiently pressing for most actors across Nepal's political spectrum involved in constitution building to prioritize the search for internal

<sup>72</sup> British Ambassador to Nepal J.A. Scopes letter to FO, June 16, 1958, FO 371/135966.

<sup>73</sup> Jennings Third Draft, April 20, 1958, ICS 125/B/xiii/2/iv.

<sup>74</sup> Rose, *Nepal-Strategy for Survival*, 218.

<sup>75</sup> DOS, November 21, 1958, Memorandum of Conversation "Nepalese Desire for Assistance by the United States," File 790C.5/11-2158, NARA II.

<sup>76</sup> Jennings Confidential Notes on Nepal, 1958, ICS 125/B/xiii/5/i.

stability. The coming into force of the document only 6 days before the elections effectively left the contesting political parties in the dark about the constitutional settlement under which they were going to run the country.<sup>77</sup> It was anyway too late for the parties to take any decisive action on the draft constitution, and they ended up accepting it. The document was eventually promulgated by the king on February 12, 1959.

### *Key Features of the Constitution*

The frame of government designed by Jennings and retained in the promulgated 1959 constitution was centered on the crown, with the preamble vesting state sovereignty solely in the king. To legitimize the supremacy of the monarchy, Nepali drafters added clear ethnonationalist connotations to the institution, describing the king as “Father of the Nation and revered descendant of the illustrious King Prithvi Narayan Shah, adherent of Aryan Culture and Hindu religion.” Paternalistically, the document treated Nepali citizens as royal subjects, making it clear that the democratic shift from sovereignty from above to sovereignty from below had not taken place symbolically and that substantively it was at best incomplete.

The new dispensation crafted a constitutional system entirely skewed in favor of the hereditary executive (the monarchy) with very limited scope for the representative executive (the Cabinet arising from, and responsible to, a directly elected Parliament).<sup>78</sup> Under Article 10, executive authority was vested in the king, who was to exercise it directly or through ministers or other officers. Unusually wide powers were granted to the monarch. The combinations of Articles 10(2), (3), and (5) distorted the British constitutional convention that the King-in-Council must act on the advice of the prime minister; Articles 13(1) and (3) injected an element of royal discretion into the convention regulating the appointment of the prime minister; and Article 42 allowed for the king to withhold royal assent from legislation validly passed by Parliament at his discretion in clear contravention of Westminster constitutional praxis.<sup>79</sup> It also granted unusually wide emergency powers to the king under Articles 55, 56 and 77. Jennings drew from his experience in Pakistan to craft these provisions, and incorporated into the document the legal formula to constitutionalize a royal takeover.<sup>80</sup> John Whelpton emphasizes that the constitutional text was given teeth by the political fact that “public servants, and in particular the army, continued to look to the king rather than any party politician. However, the wording did ensure that if the king chose to impose his will on other actors, he could claim his actions were perfectly legal.”<sup>81</sup>

<sup>77</sup> Joshi and Rose, *Democratic Innovations in Nepal*, 285.

<sup>78</sup> Mara Malagodi, “Constitution-Drafting as Cold War Realpolitik: Sir Ivor Jennings and Nepal’s 1959 Constitution,” in *Constitution-Making in Asia*, ed. Harshan Kumarasingham (London: Routledge, 2016), 167.

<sup>79</sup> *Ibid.* 168–69.

<sup>80</sup> Jennings Confidential Notes on Nepal, 1958, ICS 125/B/xiii/5/i. Mara Malagodi, “Dominion Status and the Origins of Authoritarian Constitutionalism in Pakistan,” *International Journal of Constitutional Law* 17 (2019): 1235–57.

<sup>81</sup> Whelpton, *A History of Nepal*, 93.

The new constitution also contained a chapter of justiciable fundamental rights and reaffirmed the existence of an independent judiciary. Jennings assessed the role of this innovation as such: “a Chapter on Fundamental Rights was forced upon me, but it will be easy for the King (but not the politicians) to suspend them if they prove too restrictive.”<sup>82</sup> The 1959 constitution also recognized the role of the Supreme Court, and expressively provided for constitutional review of legislation under Article 54 and for the right to constitutional remedy under Article 9. Notably, the right to religion under Article 5 contained a peculiar arrangement: only “religion handed down since time immemorial” (*rākhi sanātana dekhi*) was constitutionally protected. The expression *sanātana*, however, is politically loaded in the Indian subcontinent as it denotes a specific orthodox version of Hinduism adopted by Hindu nationalist organizations since the 1920s.<sup>83</sup> As a result, the language of rights was subverted to afford protection effectively to the majority religion, the linchpin of the justification of the king’s sovereign authority. Moreover, Article 5 also contained an explicit ban on religious conversion, seeking to protect the boundaries and national identity of Nepal as the last Hindu kingdom, rather than the religious freedom of its citizens.

The 1959 Constitution institutionalized patterns of executive dominance centered on the king, but also contained the seeds of parliamentary democracy and provided for multiparty governance. In this respect, B.P. Koirala pointedly commented on the document: “Even today I feel that the constitution given by Ivor Jennings is a peculiar document. It has protected the king’s powers and at the same time maintained the legislature’s authority. The expectation it holds is that the king will act responsibly; only then would the constitution work. [...] Ganesh Manji pointed out the flaws in the document, but I thought it was workable. The document drafted by Jennings was then approved. The elections were held, and we won.”<sup>84</sup>

Immediately after the promulgation of the new constitution, voting in national elections began on February 18, 1959 and continued until April. The escalation of hostilities in Tibet with the escape of the Dalai Lama from Lhasa to India put further pressure on Nepal’s government. On April 3, 1959, two senior Nepali Congress politicians criticized the Chinese actions in Tibet and suggested that the PRC should apply the Leninist principle of self-determination to Tibet; they said: “the Tibetans events have provided a warning to all the nations of Asia.”<sup>85</sup> A month later, B.P. Koirala himself repeated the call for Tibetan autonomy, but reiterated Nepal’s foreign policy of neutrality and non-alignment.<sup>86</sup>

Shortly afterwards the electoral results were declared, and it was a clear victory for the Nepali Congress, which gained 37% of the total votes and 75 out of

<sup>82</sup> Jennings Confidential Notes on Nepal for FO, 1958, ICS 125/B/xiii/5/ii.

<sup>83</sup> John Zavos, “Defending Hindu Tradition: Sanātana Dharma as a Symbol of Orthodoxy in Colonial India,” *Religion* 31 (2001): 109–23.

<sup>84</sup> Koirala, *Atmabrittanta*, 182–83.

<sup>85</sup> Rose, *Nepal-Strategy for Survival*, 220.

<sup>86</sup> *Ibid.* 220–21.

the 108 seats in Lower House.<sup>87</sup> On May 27, B.P. Koirala was invited by King Mahendra to form the government. Under the new constitution and on the strength of a robust parliamentary majority, the new premier initiated a rather bold radical program of land reform, increased taxation, and nationalization, causing alarm among Nepal's economic elites.<sup>88</sup> The new constitutional framework appeared indeed workable in terms of democratic governance. The Nepali Congress's electoral success also meant that B.P. Koirala could be bolder in terms of foreign policy. On June 13, Nehru discussed with King Mahendra strengthening Nepal's border posts, if necessary with Indian military personnel, and in June, the government announced a 100% increase in defense expenditure.<sup>89</sup> Eventually in September, the prime minister requested further military assistance from the United States in order "to develop a modest air force" as "he was concerned over the defenceless state of the country [...] and the general problem of protecting mountain passes and observing developments along the border."<sup>90</sup> This was confirmed by B.P. Koirala's statement to Parliament on September 17 in response to the growing anxiety in Kathmandu about Chinese troops along Nepal's northern border and the increasing number of Tibetan refugees entering Nepal.<sup>91</sup> Significantly, as B.P. Koirala prepared for his visit to the PRC, King Mahendra prepared for his visit to the United States. American archival sources reveal "the desirability [of] impressing King with US military might," thinking about what the king would have seen on his visit to the USSR by way of comparison.<sup>92</sup> Clearly, the monarch was becoming the preferred interlocutor in the increasingly tense Cold War scenario in the Himalayas.

## Conclusion

Perhaps unsurprisingly, on December 15, 1960, King Mahendra put an end to Nepal's brief experiment with parliamentary democracy. With the support of the Royal Nepal Army, the king fired the prime minister and used the emergency powers under the constitution to suspend the constitution and arrest B.P. Koirala and other party leaders. He then imposed direct royal rule unmoored by any constitutional limitations. In a way, the story of Nepal's 1950s constitutional history and its abrupt, dramatic end represent a "chronicle of a death foretold." The king deployed the constitutional mechanism of vast and vague emergency powers devised by Jennings for him to suspend the constitution technically by lawful means. This constitutional experience taught important lessons in constitutional design to both autocratic and democratic

<sup>87</sup> Whelpton, *A History of Nepal*, 95.

<sup>88</sup> *Ibid.*, 96.

<sup>89</sup> Rose, *Nepal-Strategy for Survival*, 221-22.

<sup>90</sup> United States Embassy, Kathmandu to DOS, September 9, 1959, incoming Airgram, File 790C.5/9-959, NARA II.

<sup>91</sup> United States Embassy, Kathmandu to DOS, September 23, 1959, Embassy Telegram N.20, File 790C.21/9-2359, NARA II.

<sup>92</sup> DOS to United States Embassy, Kathmandu, November 25, 1959, Outgoing Airgram, File 790C.11/12-459, NARA II.

forces that would influence Nepal's later constitutional demands and settlements. First, executive dominance offers the tantalizing perspective of "winner takes all" and the potential rewards of a zero-sum constitutional game. Second, the constitutional recognition of multiparty democracy instils and legitimizes political plurality and popular representation within the constitutional framework, principles that are difficult to displace by constitutional means with an appearance of legality. Third, constitutions fulfil a crucial identity-making function and the constitutionalization of markers of cultural nationalism is often successful in obscuring a democratic deficit and forms of discrimination within the document itself. As a result, Nepal's constitutional experience in the 1950s shaped the coordinates of later constitutional developments in the country.

As I have argued, the 1950s were a foundational decade because the 1951 document was Nepal's first ever implemented constitution and, in tandem with the 1959 Constitution, represents the country's first attempt both at asserting its *external* sovereignty in the decolonizing world and at articulating a modern notion of political authority through constitution building. The ambivalent constitutional articulation of *internal* sovereignty during this decade hindered Nepal's democratic developments, but did not extinguish the aspirations to popular sovereignty of many Nepalis. These aspirations lived on to inform later political and constitutional struggles. In this vein, a similar argument can be made for other South Asian jurisdictions, like Pakistan and Afghanistan, whose founding constitutions did not survive the test of time.<sup>93</sup> Through the seeds of political change that they help to sow, and the obstacles that they place before political actors, foundational constitutions acquire long afterlives. They both conjure past scenarios that political actors want to avoid (or emulate) and provide the imaginary for future political emancipation.

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<sup>93</sup> Ebrahim Afsah, "Afghanistan: An Aborted Beginning," in *Constitutional Foundations in South Asia*, eds. Kevin Y.L. Tan and Ridwanul Hoque (London: Hart Publishing, 2021), 231–61.

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