

Nepal's Struggle for Rule of Law and Political Legitimacy

"Animals eat one another without qualm; civilized men consume one another by due process of law."
Will and Ariel Durant, from the *Lessons of History*.

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Introduction

Nepal entered the second phase of political transition in May 2012 with the dissolution of 601-member elected Constituent Assembly (CA) without promulgating a new constitution even after four years of weary political rehearsal, two years more than the stipulated deadline, by using the 'doctrine of necessity.' The political tumult of April 2006 opened the first political transition with a revolutionary hope and super-structural reforms by declaring the country secular, federal, democratic republic. These reforms, however, remain far from consolidated. The top leaders of ruling parties-- Unified Communist Party of Nepal (Maoist), Nepali Congress (NC), Communist Party of Nepal Unified Marxist-Leninist (CPN-UML) and United Democratic Madhesi Front (UDMF) – could neither agree on key constitutional issues including federalism nor engaged citizenry deeply in the deliberative process of law-making as required for constitutional enlightenment. This has made national politics completely deadlocked tarred by the brush of failure of one government after another. As a result, mainstream parties favored the formation of technobureaucratic interim election council of ministers in March 2013 chaired by Chief Justice of Supreme Court Khil Raj Regmi to hold the second CA election on November 19. The ruling parties frankly admitted that they have to accept this dispensation by 'necessity,' rather than a matter of principle and determined will. Still, they feel comfortable with the control of the government through High-Level Political Committee (HLPC) rotationally governed by their leaders to create election-friendly environment, muster support from the obstreperous opposition, distribute ministerial and constitutional posts among themselves and steer the governance. The selective elevation of party cadres and bureaucratic elites in the constitutional bodies in a patrimonial manner, however, spurred the re-feudalization of public sphere. It has offered a false remedy to the problematic condition of democracy in Nepal. One wonders whether the second CA election can be expected to create universal rationality of electoral legitimacy, include the neglected into the public realm and revitalize the nation's representative institutions to escape enduring political transition if it has integrative potential.

The CPN-Maoist led 33-party alliance, 22 member of NC central committee, civil society and Nepal Bar Association perceive the regression of constitutionalism in the new dispensation. They consider that the new political dispensation lacks necessary political will to build trust among the political parties of various spectrum, garner legitimacy to enforce their will and open a creative moment for the citizens to express their political choice in the CA election, enable them to exercise their increased rights, realize aspirations through various participatory mechanisms and renew the democratic impulse of society for self-governance. Opponents of the government argue that Regmi's assumption of executive power without resignation from Chief Justice undermines the principles of constitutionalism, popular sovereignty and democratic separation of power which prompted them to unleash election-boycott campaign and float the idea of roundtable dialogue of all politically significant forces for a new party-led government. How can the mainstream leaders prevent the radicalization of opposition when they continue to enjoy the advantages of incumbency? Can the second CA election be free and fair and allow the citizens to exercise their free judgments or remain conditioned by the judgments and actions of those who control the reins of governance while those outside it do not have stake in it, resist it and continuously negotiate other's bottom line such as no postponement of November election and no change of government? Can it inspire opposition groups to electoral participation when their bottom line for talk is the roundtable dialogue for the formation of a party-led government? Does it guarantee peaceful progress when the Nepali state's Weberian "legitimate monopoly on power" to create election-friendly environment, enforce rule of law and deliver essential public goods has been significantly weakened? This article describes the constitutionalization of state and Nepali society characteristic of a civic culture, institutional closure and political order, transformation of law with the innovation of substantive

democracy, the need for democratic equity, weaving the web of peace and active citizenship in the country through rights-oriented discourse and needs-based fairness in the distribution of goods and services.

The Constitutionalization of State and Society

The restoration of Nepali state's legitimate monopoly on power is essential to subdue chaos, strengthen coordination among all constitutional bodies, create legitimate political order and turn political aspirations of citizens into legitimate course of action. The state should be powerful enough to defeat any anarchic agents in its domain (Schofield, 2003:92) and work toward the realization of its Directive Principles and Policies. In a constitutional state, the separation of power among the constitutional bodies and the state and society guarantee each other's autonomy and freedom. But a democratic state unites the general will of all citizens into a sovereign power to abolish disorder, corruption and inefficiency and reduces the perils of society harbored by unreasonable human nature, nature of state based on power monopoly, and the state of global anarchy where nation-states are increasing their defense buildup and generating a security dilemma, competition and conflict affecting democratic evolution of society. "A society has an anarchic polity to the extent that it lacks society-wide rule-making and rule enforcing institutions" (Brown, 1992:29) while citizens daily reflect their location in the state's distribution of power. In this context, the quest for an inclusive "community is timeless and universal" (Nisbet, 2004:34) for the achievement of political stability, economic development and social peace.

Many developed states have already resolved the problem of building a community through democratic-will formation, harmonization of laws with the fundamental rights of citizens, establishment of the rightfulness of law, legislative and judicial autonomy, active watchdog agencies, robust civil society groups engaged in eradicating archaic social and cultural prejudices and establishing the constitutionality of state-society collaborative action. Similarly, they have formulated public policies in the spirit of constitution and mustered the loyalty of citizens in constitutional patriotism considering that modern society can be integrated mainly by secular laws based on public reason and approved by sovereign citizens. Caste hierarchy, patriarchy and instrumental domination of nature in Nepal are the traits of a pre-capitalist society which are now being eroded by the new awareness of democracy, modernity and human rights while forces of economic globalization and post-modern forces flatten the constitutional boundaries. The post-modern turmoil of identity politics and its logic of fragmentation has, therefore, become self-defeating (Bronner, 1997: 13). It seeks to subvert civic nationalism and emancipatory aspirations of Nepali citizens from constraining conditions and traditionalizes the society according to pre-existing social stratifications and division of labor clogging an opportunity for social mobility of under classes of citizens at the rock-bottom of poverty.

As a decision-making system, the autonomy and integrity of politics in Nepal are, therefore, central to create a responsive rule and unite Nepalese to each other through a faith in binding social contract, a workable constitution. Modern laws formulated through discursive consensus have the potential to separate the impersonal law from the personalized hukumi sashan (rule by fiat) and modern legitimacy based on what Max Weber calls "legal-rational authority" from traditional leadership rooted in patrimonial culture. Social solidarity based on modern laws holds the ability to unite all citizens in national framework and abolishes the "unwritten" transcript of society which inclines to control the social mobility of under-classes of people. The autonomy of politics as a public sphere is essential to link the state with society and improve the quality of social existence. Juergen Habermas argues, "Mutual societalization of the state and stateification of society destroys the condition of possibility of the public sphere and separation of state and society" (1989:141).

John Rawls believes that in a democracy the "idea of public reason is integrated to the law of peoples, which extends the idea of a social contract to the society of peoples and lays out the general principles that can and should be accepted by both liberal and non-liberal (but decent) societies as the standard for regulating their behavior toward one another" (1999:vi). Constitutionalism, in this sense, presupposes correct disposition of rule, power, rights, institutions, laws and policies. And all conflicts—identity, interest and ideology-based—are resolved within its realm (Bleie and Dahal, 2010:40-41). Constitutionalism requires legislative enlightenment of both Nepali leaders and ordinary citizens in which their political action can be judged legitimate and broader ownership is allowed through public participation

in the constitution-making, policy making and peace building for their fulfilling life. Both Aristotle and Hegel are convinced that “society finds its unity in the political life and organization of the state” (Habermas, 1997:1). But, in Nepal, this unity has now become increasingly unstable due to the erosion of constitutional tradition of politics. The system of nation’s natural environment, society, polity and economy is suffering from incongruity as leaders have used contesting universal ideologies to deconstruct the historical identity of the nation, its sovereignty rooted into popular aspirations and fraying the state-society coherence. No general consensus exists among the political parties about society’s common social and economic goals and means. In the post-conflict setting, a model of winners and losers can easily flag the idea of social solidarity and cultural memory of national identity construction through the formation of “we.”

The Comprehensive Peace Agreement (CPA) 2006 and Interim Constitution 2007 define the broad framework of peace and constitution envisioning the authority of state based not on power equation of only powerful actors, like in 1950, 1990 and 2006, but on democratic principles and reconciliation. The Nepalese leaders’ sudden shift from volts of Maoist’s People’s War and agitation of parliamentary parties to votes presumed to reduce violence by eradicating the structural injustice of society, bringing social transformation and setting off post-conflict reconstruction of damaged infrastructures and lives, rebuilding relationships, rehabilitation of conflict victims, reconciliation of divided peoples and communities and peace-building process. One can, however, see a clear disjuncture between the revolutionary expectation of public for post-conflict peace dividends and the leaders’ deficiency to fulfill their promises and create an open-access public order that proscribes the use of violence and prescribes citizens to pursue their rights, duties and enterprises. “In open-access societies, access to organizations becomes defined as an impersonal right that all citizens possess” (North, Wallis and Weingast, 2009: 6). The emergence of clientalist politics, however, marks the absence of this order in Nepal leaving the national goals of drafting constitution, social transformation and durable peace limping.

Institutional Closure and Political Order

An open-access order of democracy cannot survive without certain institutional closure. The Nepali state needs an institutional closure in a number of areas to resolve all contesting issues within the national bounds of the state and replace chaos with legitimate political order based on rule of law. Nation-states themselves are “the product of four closely interconnected processes of institutional closure (Wimmer, 2002:9).

First, democracy is tied to national self-determination of citizens in all national initiatives including politics, constitution-making and development policies. Unreasonable external penetration on constitution drafting process and public policy in Nepal has, however, undermined the public ownership on them. Public policy making is the prerogative of the national parliament as it is regarded political microcosm of national representation. This implies that any measure to formulate laws through extra-parliamentary means offends popular sovereignty and undermines its legal-rational legitimacy. The demise of the Constitution of 1990 is precisely attributed to the insertion of neo-liberal policies into liberal constitution and its divorce from the public expectations of social justice. It has also undermined the institutional capacity of state to cope with illegitimate demands of those political forces who have signed various peace deals but refused to abide by and implement them fitting for the conditions of modern life.

Second, citizenship as a member of state is bound with it by reciprocal rights and duties which is also a basis of nationalism, the ideology of the state. The genuine equality of citizenship reduces hereditary privileges and development gaps among the older sub-national ethnic, cultural, religious, gender and geographic identities and enhances their common national identity. Research reports reveal that “where sub-national identities predominate, it is more difficult for people to cooperate in providing public goods” (Collier, 2009:1). National identity also liberates the society from feudalism, special legal immunity of certain dominant classes, colonialism and imperialism. This means citizens’ loyalty to the state overrides other loyalties to subsidiary identities, such as class, caste, gender, ethnicity, and territoriality enabling them to enjoy constitutional and human rights to achieve universal emancipation.

Third, recruitment of army is tied to national citizenship, not those who attack nationalism through the instrumentalization of primordial and communal passions and weaken state-bearing institutions such as cohesive elements of diverse society and professionalism of bureaucracy, police and Nepal Army acting in a

national spirit de corps. In a condition of security and authority vacuum and a lack of strong national center it is difficult to mobilize centripetal forces of society for nation-building. Similarly, rule of law can achieve the desired level of effectiveness only when the imperative of administrative and civic power is attached to the accountability to the general will of all citizens.

Fourth, the creation of social welfare state is linked to the control of the immigration of foreigners because native citizens are legitimate claimants of welfare gains. The welfare state condition expands the social base of democracy by removing the ongoing clinalization of citizens and restoring localization of democratic process. The spread of globalization beyond the writ of Nepali state and continuous denationalization of society, like economy, have however blurred the boundaries between domestic and foreign policy, weakened the concept of national citizenship (even Nepali diaspora demand double citizenship) and increased geopolitical interests and influence in its constitutional issues. It has put Nepal under the cross-pressure of centrifugal forces breeding the crisis of stable political order. The cosmopolitan requirements, however, have increased the constitutional opening of Nepali state to external environment, public international law, commitment to human security and rights with the ability to complement governance effectiveness including its role in the balance of geopolitical interests. Now, the state-centric constitutional thought has to embrace post-state domain through the denationalization of labor market, capital investment, culture, travel and communication media (Walker, 2003:17). It is diffusing the loyalty patterns of Nepalese to multiple domains of power. It continues to weak the process of national constellation of the state, economy and citizen.

Problem of political order in Nepal can be solved through the combination of institutional closure with other four measures: first, by nurturing the historically existing centripetal, integrative values and forces of society and law-based solidarity; second, by increasing the policy and program outreach of the state in the entire national territory through strengthening of the coordination of state institutions, political parties and non-state forces; third, by fostering overlapping interests and values and creating the capacity of government bodies to provide necessary services to citizens; and lastly, “reinvigorating the idea of community,” (Bronner, 1997:3) the state, through effective civic education, law-abiding habits and ethical character of the private sector, civil society and community organizations to resolve collective action problems. The clash of socially and spiritually disembodied ideologies--communism and capitalism—espoused by Nepal’s political parties and their instrumentalization to weaken the cohesive spirit of Nepalese society embedded in syncretic culture have aimed to transform its historical social formation into class power opened to world markets, competition and profits and turned history into a stellar conflict between market materialism and dialectical materialism gravitating the drivers of geopolitical conflict to erode its golden mean, the middle way. Building this middle way presupposes a robust partnership between capital, labor and the state (Mishra, 2013:13).

“Today, as the nation state finds itself challenged from within by the explosive potential of multiculturalism and from without by the pressure of globalization, the question arises of whether there exists a functional equivalent for the fusion of the nation of citizens with the ethnic nation” (Habermas, 2001:117). In the absence of broader moral and civic framework, the implementation of law and policies in Nepal, however, faces major structural and cultural barriers. The operation of laws under the condition of structural injustice (poverty, inequality, joblessness and denial of opportunity) amounts to its oppressive nature and cannot make the poor citizens stakeholders of polity. Minimum level of property rights to each citizen (or minimum wage guarantee for wage workers) is prerequisite to their freedom, dignity and fulfillment of basic needs and it is also necessary condition to create their stake in the law of the land.

In the post-conflict context, the constitutional state of future Nepal has to be designed in a way to enable its governance to realize its goals—national security, law and order, voice of citizens in policy making, civic participation in ecological, economic and political initiatives, delivery of essential public goods and services and peaceful resolution of multi-polar and multi-layer conflicts (Dahal, 2010:3-4). Constitutional control cannot become a ground rules for coexistence in a society obsessed with utopia, radicalism and unattainable goals facing the resurgence of caste, class, gender, ethnicity and territorially determined politics. Legitimate public order entails the optimization of their interests into the national spirit of constitution. The maximization of these factors in Nepal is increasingly discrediting democracy, eroding

national perspective and breaking democratic equilibrium of the polity. Noisy byways of politics have risked the ascent of public cynicism undercutting citizens' opportunities for fulfilling life through wealth redistribution according to accepted standards. "Distributions—whether of goods and services, wealth and income, health and illness, or opportunity and disadvantage—are at the heart of public policy controversies" (Stone, 2002:39). It is precisely these controversies around which power struggle is waged reflecting so many signs of system dysfunctions at the top level of leadership in Nepal.

Transformation of Law

Laws are enforceable rules by which a state compels its citizens to behave according to impersonal codes, regulation and social contracts mutually agreed by its citizens and nation's obligation to meet global humanitarian standards, resolve the tension between individuals and society and abolish the state of nature—a state of injustice, lawlessness and violence through the legitimate *raison d'être*, the reasons of state. Citizens as author of law find the state acceptable as it abolishes the state of nature which is also a precondition for freedom, cooperation and peace. Transformation of law occurs with the new aspiration of citizens, evolution of new rights and the *zeitgeist*, the spirit of the age, defined by democracy, human rights, popular sovereignty and ecological justice. Legitimacy seeks both empirical and normative ground for political obligations to laws, policies, and leaders for political office and validated with required level of institutional process and performance. Legitimacy springs from below, from love, consent and compliance of ordinary citizens to the lawful authority. "Normative compliance is spontaneous rather than engineered" (Parkin, 2002:76).

Law can prevail only under rule of law, a law that socializes citizens and leaders to act according to constitutional tradition of politics, transcends the irrationalism of excessively utilitarian political obsession and embraces the principles of judicial review. Citizens obey the covenant so long as they consider that it is basis of social justice and enables the state, private sector and civil society to perform in the areas of public goods. The moral fiber of law loses its vitality as its institutional capacity for sanction is fatally weakened due to disconnection between discursive formation of law and incapacity of politics for its transformation. In a society of minority like Nepal constitutional laws based on power equation of powerful actors becomes irrelevant for the powerless, minorities and dispossessed and non-actionable when the source of power changes. Nepal's history attests the fact that minority of yesterday has become majority of today and the same pattern will follow in the future. This means future laws should be based on the heritage of its enlightenment and universal reason enabling it restore justice and reciprocity as ecological, social, gender and intergenerational levels and minimizing the possibility to turn democracy into a victors game.

In Nepal, crisis of law springs from many sources. First, interest of political parties to implement competing ideologies rather than agreed laws and public policies in the country is flagging the common identity of law makers and citizens. Inheritance of discretionary power from previous regimes and ideologies has marked a coming crisis of common political socialization of Nepali people into citizenship with common stake on law, public institutions and public policies. Second, the basis of laws on property ownership, not public reason, has made laws of no consequences for the improvement of the lives of poor and the development of free self-expression. Third, democratic law requires de-linking violence from politics. In Nepal, perpetuation of impunity for powerful elites has eroded the impersonality of law incarnated by enlightenment principles and moved law making process outside the sovereign domain of Nepali citizens. The rise of family-friendly politics and business continues to put critical doubt on crude legal rationalism's capacity to resolve all the problems of Nepali society. And finally, inability of rule of law to establish human rights of citizens as sacred and inviolable has created trust deficits and generated crisis of law which can be rectified only through a negotiated social contract between leaders and citizens based on rational will, emancipatory interests, moral reciprocity and the consent of all those affected by the outcome of deliberative lawmaking process. Judicial verdict, in this sense, presupposes wisdom, not only individual passion and reason.

To make law a robust medium of social and system integration in Nepal presupposes its grounding into the heritage of its enlightenment and universal public reason, a reason which has inter-subjective roots and can provide all citizens an equal access to institutional resources of the state by breaking the walls of

undemocratic privileges. In contrast, the lawless struggle for power through either exclusion, or subordination or even elimination of opposition limits the scope for existential security and freedom of others and radicalizes the public spheres making the operation of democracy difficult. Legal technocrats' vehement arguments in defense of known culprit against innocent citizens in no way amounts a fair justice in a country like Nepal where legal literacy among Nepali people is pathetically low, majority of citizens cannot afford to buy the service of lawyers, a culture of impunity favors the powerful sections of society and removes the propensity to constitutional habit. If a hefty fee makes legal technocrats unconscious of the corruption of their self-interest, interpretation of law suffers from the manipulation of instrumental reason and fails to become a conception of common good posing the enforceability of rule of law problematic. There is a correlation between law and justice, not tradeoff. "Justice, though requiring the force of law for effectuation, surpasses and holds all positive laws, and also putative rules or principles of justice, open to ongoing interrogation as to their justice" (Coker, 2003:57).

Similarly, law wholly based on the instrumental use of reason cannot capture the ownership of ordinary citizens in it. Historicist-contextualist theorists argue that "reason does not, and cannot, have a comprehensive universal domain precisely because it is always a product of a particular history, and is thereby contextually anchored in a specific form of cultural life" (Porter, 2006:22). Family, civil society and the state are, therefore, ordered on different principles of affinity, morality and legality of life. Immanuel Kant offers a formula: "the foundation of all practical law-making lies in conceiving the will of each as universal, legislative will," and further adds, "For every one of us, morality lies in transferring his/her consciousness from individuality to universality" (Benda,2002:27-28). To be truly sovereign in the implementation of law, Nepali state has to elevate itself autonomous from the dominant interest groups of society, address the distributional struggle of the poor for social justice and formulate a conception of higher law above regime interest, necessary to liberate the country from unending causes and effects of agitation in favor of a stable peace. Rights-based reasoning is necessary but not sufficient unless it combines with need-based fairness in the distribution of things of essential values and overcomes social vacuum created by declining functions of family in security, affinity and emotional attachment and its connection to a larger society, community and nation-state. In this context, Habermas argues that judicial system based solely on "legal positivism ignores social context and is insensitive to the threat of vested interests, rendering the approach unresponsive to the needs of substantive democracy" (McCormick, 2009:142). This means the law needs to be responsive to human condition as it is the latter that generates demands to the former. This is the way law prevents the operation of human life as mere "selection of the fittest" and elevates it at higher level of morality to empower citizens through reformist spirit of law.

Democratic Equity and Self-Governance

"Self-governing communities, not individuals, are the basic units of democratic society" (Lasch, 1995: 8). Some key challenges to democratic equity in Nepal are: first, citizens are demanding the fulfillment of the necessity of life process through the realization of basic needs which is a precondition for freedom. Democracy would dissolve if citizens' eschatological hope of better life and liberty remains unfulfilled. Already Nepalese citizens are claiming more social representation than representation through political parties thus marking an erosion of ideological politics. Second, the emergence of cross-party social coalitions and caucuses reflects a decline in partisan political interests opening the flow of demands for re-distributional measures. Third, increased social movements informed by information revolution are demanding participatory democracy which is contesting representative democracy and its values, institutions and political culture. And fourth, organized groups such as Janajatis, Aadiasis, Dalits, Madhesis, women and workers are demanding group rights and nourishing identity politics while armed groups are caught in multiple impulses thus weakening democratic equality and equal rights for every Nepali citizen. "Poor governance, rising insecurity and political instability are greatly hindering human development and poverty reduction in Nepal" (Shrestha and Bhattarai, 2004:121). Steady economic decline of the country has wrecked the lives of Nepalese and ripped open fresh inequality, poverty and crisis of livelihood which demands crisis-responsive and long-term solution-oriented legal and development policy, not one-size-fits-all universal policy prescription.

The downward spiral of Nepalese state and underachievement of both MDGs and PRSP are mainly attributed to “the appropriation of huge chunk of nation’s wealth by “brokers of donor agencies, native corrupt elites and commission agents” (Pokhrel, 2010:47). Extortion, tax-evasion and annual capital flight in tune of half billion dollar by comprador classes add other woes for the peasants and workers of Nepal as they are facing poor choices about life induced by low income, low wages, high inflation, predation of armed groups and viciousness of conflict. It is withering away Nepal’s public sphere and its wisdom and heritage of tolerance of diversity. The weakening tax-base of the state is, therefore, shaking the economic foundation of Nepali state’s constitutional system and stripping off the power of democracy as a means of empowerment of powerless citizens through economic redistribution, combined with green economic growth, foreign direct investment in productive sectors of the economy and low inflation. Nepal’s safe political future requires sustainable management of environment, energy, economy and labor market opportunities anchored on robust heritage of civil society’s volunteerism (Shrestha, 2012:6).

Democratic institutions are entitled to play the role of policy making presuming that they reflect the real interests of citizens and also bear accountability. In Nepal, however, this role is not assumed by the parliament but by the planners with poor social learning lacking reflective consciousness of human condition of Nepalese caught in various forms of life. As a result, the absence of context-based development policies spawned the shortfall of democratic equity and poor implementation of welfare programs. An acute scarcity of food in remote areas and among the marginalized poor tribal communities reflects the growing deficits of poverty-reducing resources. The nation’s chronic poverty of 25 percent, joblessness of about 40 percent, environmental deterioration and destruction of life-supporting means are degrading the dignity of Nepalese while white crimes have embittered the functioning of Nepal’s democratic institutions even disabling the poor to exercise their free and autonomous choice about politics and public affairs. Education, a prime catalyst for opening opportunity for citizens at all stages of life, is increasingly becoming anarchic. It has weakened the concept of full equality of citizenship promised by the Constitution and their right to development. Fostering of vertical equity requires positive “treatment of people in different ranks” (Stone, 2002:43), decentralization and devolution of power, ownership of assets, resources and opportunities and building the foundation of political economy from below for the robust local self-governance. Democratic localization process requires rebuilding the democratic infrastructures and encouraging “inner party democracy by making the leadership more accountable to the rank and file” (Parkin, 2002:108), liberating society from the false consciousness of ideologies and shaping underlying preferences in the changing social stratification.

Free conscious activity is the goal of human beings for enlightenment. This requires Nepalese planners to undergo transformative learning and citizens’ productive resources for participation in changing public and private lives induced by constantly evolving ecological, social, economic and technological change. The Interim Constitution has promised more social rights to Nepali citizens including the right to work that pays a livable wage for the workers. The main challenge is to create a broad labor market for the poor and youth within the country, to improve democratic qualities in the work place and guarantee social security. Nepalese history has proved that concentration of economic power is a threat to social development (Pokhrel, 2010:110). Nepal’s great leap in social development and social integration through the sharing of profits either through tax which contributes only 12 percent to the nation’s GDP, blood and sweat money of remittance which contributes 23 percent or foreign aid whose contribution is 4.7 percent to GDP simply become unsustainable. The welfare benefits require the government to rethink whether the “triadic” economy—public, private and cooperative-- will be good choice for the citizens and society and capture their synergy. It will not be durable unless the nation fosters agro-based, climate-sensitive, diversified and adaptable production system. Nepal’s revenue-based, service and finance oriented current economic system has to be transformed into production-oriented agricultural and industrial policy to address the scarcity of basic needs and strike a balance in trade deficit where the nation’s imports are 8 times higher than exports.

Similarly, perpetual free market-based growth is not possible without destroying environment, commodification of essential needs and the life of the poor. Free market governed by “invisible hand” does not generate political stability and better social outcomes unless visible hand of politicians play a role and give the citizens the deepest meaning of their voting to them. Peaceful social transformation (the

atomization of family, late marriage, gender equality, social inclusion, etc) and economic change (the daily migration of 1,800 youths from agriculture to money economy of urban areas and abroad) in Nepal have tremendous costs for family, children and agriculture through it has stimulated new demands and services for consumer items often advertised by commercial media. In this context, the state's share of its power and policy to private sectors, civil society and donors marred the former's capacity to create security, social discipline and nationwide outreach. The lobby of NGOs and civil society is important for the alignment of interests with the ordinary citizens but they need to "generate donations" (Collier, 2009:3) for the improvement of down-trodden rather than become image-conscious, paternalistic and self-elevating across the ties to the national affinity and society of origin. It is possible to ward off powerlessness of majority of Nepalese through social security if intermediary institutions pro-actively nurture social capital across various empirical divides of the nation and socialize their leadership in the virtues of politics as a public sphere engaged in the production of common good to be distributed across all sections of society even at the community level. "Justice begins with recognition of the need of all persons to take part in the life of a community in order to be fully human, by being united with one another in mutual activity and, finally, mutual love" (Bellah,2000:86). As opposed to war economy which thrives on predation, the peace economy honors property rights of individuals and encourages rule-based, incentive-compatible desire for joint projects between the former foes (Dahal, 2011:3) for a shared future.

Weaving the Web of Peace

The democratic peace Nepalese leaders devised was meant to cease conflict, eradicate structural injustice of society, bring social transformation and begin post-conflict peace building process to eliminate the future sources of conflict. There are five approaches to peace building—immediate post-conflict intervention, transitional management, reconstructive, transformative and reconciliatory ones. Crucial aspects are security, norm-based governance, economic recovery and the attainment of truth, reconciliation and dealing with of structural injustices. The CA's failure to draft constitution and imposition of syndicate rule indicate that Nepal's politics is based more on power- greed, not justice and rule of law. It is based on the subordination of weaker ones, not coordination of mutual interests, the proliferation of new revolutionary rhetoric in every generation of citizens notwithstanding. The integration and rehabilitation of Maoist combatants have been successfully concluded but many of conflict residues and transitional justice are waiting for proper response. NC and CPN-UML add other demands-- return of property seized during People's War to rightful owners and a commitment of Maoist parties to democratic process while UCPN (Maoist) is demanding the old parties' commit to transform procedural into substantive democracy. Economic recovery of Nepal requires not only investments in productive sectors of the economy but also a recovery from the internal effects of conflicts and from the negative effects of global economic crisis on its trade, aid, tourism, remittance, agriculture and investments.

The deviation of leadership from the stable course of peace building demonstrates the gap between commitment and accountability to CPA. The obvious denouement is: deadly deadlock over various constitutional issues such as dilemma on priority between peace and constitution, and the inability of leadership to set up Truth and Reconciliation and Disappeared persons and High Level Peace Monitoring Commission. The TRC bill endorsed by the President has been objected by conflict victims, civil society, human rights organizations, the Supreme Court and international community as they consider that the provisions inherent in it do not meet international standards. Emergence of non-state armed groups, Madhesi parties and identity groups and strong social movements is mainly attributable to the unfulfilled promises of governing power and its failure to manage conflict-generated energy. This also indicates that resolution of non-linear development path of Nepal's conflicts (Austin, 2011:13) requires systemic approach. The power-centric linear approach to conflict resolution has delayed the process of transforming negative peace into positive peace as neither the Maoists nor the non-Maoist parties are willing to attain the conception of common good embedded in the CPA above personal interest of top leaders. It precisely tells the failure of political leadership to draft a constitution through the CA process and apply the art of good governance.

Dialogue among the leaders of the major parties has failed to open up a common ground, provide room for each other's legitimate interests and bridge the ends and means of peace. In a situation of

protracted political instability, peace building requires reducing transaction costs imposed by the ruling hierarchy by activating multi-track dialogues, offering peace dividends, curtailing the risks of violence and democratizing the pyramids of undemocratic structures (Wagner and Dahal, 10-14: 2010). Nepalese citizens are hoping for the restoration of morally-imbued national leaders who can produce responsive politics as a public responsibility and possess the ability to link the society to the public sphere for opinion-formation, aggregation of interests, articulation and effective public action. Mediation of politics is possible only by fostering an active citizenship aligned with the public spirited institutions, networks and movements in a genuinely constitutional tradition of politics. A sustainable peace can be built from the bottom-up means that grassroots actors should be in the driver's seat.

The current challenge is to strengthen bridges across the gaps between the ruling parties and the opposition, society and groups and among individuals through healing and reconciliation with spiritual, social, economic, and political resources of the nation. This, however, requires a self-reflective learning of leadership about the wisdom of ordinary folk, public opinion, and the spiritual and cultural heritage of this nation's tolerance of diversity nurtured assiduously by sages, citizens and statespersons. But, for this purpose, the national identity of Nepalese historically crafted on the common background condition, nationalization of consciousness, action oriented to understanding and mutual expectation of a shared future must be reinforced by shoring up the national spirit and the fortitude of international cooperation. National self-awareness can only emerge from the informed and inspired search for a more inclusive identification with the state, not the negation of its historical statehood.

Making aid conditional on government's performance legitimacy should "relate to the accountability of government to citizens rather than the adoption of economic policies, which was the past practice of donors. Policy conditionality detracts from the accountability of government to citizens because it relieves government of responsibility for some economic decisions" (Collier, 2009:7). Nepal's structural difficulties in providing public goods are mainly attributable to infrastructural underdevelopment, underproduction of basic goods, syndicate system of transport, lack of strong local public action, problems of coordination among the state, private sector, NGOs, CBOs and cooperatives and regular political strikes aggravating business-friendly environment. The role of state lies in pushing private sector generate more wealth and itself engage in rightful distribution of wealth (Bhatta, 2011:171).

Building productive relationship with the cultural industries such as media, civil society, public intellectuals, intermediary institutions and social movements can alone awaken the leaders to their accountability towards drafting a social contract through the fresh CA election, structural reforms and sustainable peace through a rational consensus on constitutional issues—federalism, form of governance, election system, citizenship, international relations, etc. All this can also help to weaken the confidence of the spoilers and free-riders of peace. Building bridges of peace between individuals and groups of the society is a key to national reconciliation. In Nepal, the CPA signed by the Maoist rebels and the government defines the architecture and operational framework of peace and aspires to include all affected by the conflict. It needs strong national political will which at the moment is absent.

Active Citizenship

Popular sovereignty and its institutionalization in citizenship rights entail the sovereignty of Nepali state in political, legal and policy matters. Active citizenship enables individuals to become aware of their changing ties with the family, community, institutions, society, laws, the state and international system and cultivate their civic virtues. The role of organic intellectuals lies in educating the citizens about their rights and duties, values and institutions of democracy and preventing the deviation of Nepalese leadership from both state-bearing institutions and local governance and their bids for executive power through social closure of opposition, minorities and unprivileged. These factors have weakened the concept of democratic politics and market relations in Nepal governed by "purely impersonal considerations" (Parkin, 2002: 101). One can see its effects on the lack of any clear division between the public and the private sphere straining the devolution of power and any zeal for the transformation of negative peace into positive peace. The restoration of consensus politics has been paled into insignificance after the CA election and begun to erode the nation's civic spirit itself undermining moral and political checks of national polity. The proliferation of factional

politics devoid of national purpose has produced continuous deadlock over power-sharing and constitutional issues diminishing the reciprocity between the state and society. None of the parties in Nepal are able to inspire confidence in each other for the vision of a common good and address the anarchy of armed outfits, anti-nationals, dons and criminals who oppose state sovereignty and impose challenges for law-abiding citizens.

In this context, autonomy and fairness of judiciary and watchdog functions of civil society, media and public institutions are necessary for trust building in national governance and citizens' civic competence. Continuous and informed dialogues among the leaders of major parties with citizens and among themselves are essential means to open up a common ground, provide room for the fulfillment of each other's legitimate interests and work for the creation of a democratic system. The task of statespersons is not to criticize who is right and who is wrong because Nepalese citizens are tired of their political correctness but synthesize contesting constitutional perspectives into a common national vision of the constitution acceptable to all sides. Civil society has to instill an enlightened perspective so that democracy refuses to recognize the monopoly power of class, ethnic, territorial, gender and caste interest of leadership over its own citizens who are equal members of the state entitled with equal rights and duties. Similarly, the government has the responsibility and obligation to protect minority, orphans, disabled and weaker sections of society. The "historical duty of the democratic state is to protect the poor from the rich" (Parenti, 1995:2) and stand above the society as "an impartial umpire adjudicating between the warring factions below" (Frank, 2002:105), not remain ethically neutral between supply and demand and allow 'invisible hand' to do all the jobs. The latter part would devalue the meaning of voting, role of government and political leaders.

In a situation of utter contempt for the powerless, peace building requires inventing proper means to reduce the level of structural injustice by offering peace dividends to the conflict affected people and reducing both direct and structural violence so that drive to civic autonomy and self-realization makes citizens informed, enlightened and active. But this ultimately means that Nepalese leaders have to be accountable to politics as a public responsibility and link the society to the public sphere making it active and openly articulate. But this presupposes an 'active citizenship' in conformity with the public political culture (Tanigawa and Dahal, 2010:22) and collective imagination of the nation.

Active citizenship, based on the ethos of enlightenment values of national heritage, is a powerful deterrent against the leaders' exclusionary character and undemocratic drift enabling them to become answerable to their power. It is also expected to control the increasing commodification of family, education, health, culture and nature and division of citizens into loyal and disloyal to the state. Shared citizenship rights provide a framework to live together as a community rather than look for special rights and provisions underlying federalism's contesting provisions—One Madhes, One Pradesh, self-determination, autonomy, preemptory or prerogative rights and prior use rights on land, river and water claimed by ethnic and indigenous people. The view of special rights except in the case of poor and marginalized is a challenge to legitimate democratic order. Given negation of the other pattern of political culture of Nepal, even identity politics only inflates the ego of power elites, not the needy citizens. Arthur Schopenhauer is right in arguing that human beings cannot be exhausted in either biology (Mann, 2002:28) or ideology. This means sectoral ethnicity, class, caste and territorial passions must be transformed into impersonal demos (Dahal, 2010:9). The sovereignty of demos embedded in participatory or substantive democracy presupposes the activation of self's autonomy as individual and civic autonomy as citizens with the ability to transform law and policy making culture through inner vigilance, reflection on human condition and deliberative process.

Conclusion

The challenges before the upcoming fresh CA election to draft a new constitution lie in the creation of election-friendly environment for the renewal of legal-rational legitimacy of law making process, building bridges across the gaps between the state and citizens, institutions and aspiration and groups and individuals through healing and reconciling with the spiritual, social, economic, and political resources of the nation and putting brake on the dissolution of law and politics into administration through compromise of the values of democracy and constitutionalism. This, however, requires a self-

reflective learning of the leadership about the wisdom of ordinary folk, public opinion and cultural heritage of the nation's tolerance of diversity nurtured by its sages, statesmen and citizens for long and responding to the grievances of justice-demanding forces and muster their obligations. Ironically, Nepal's political parties are locked in their own frames and are in the loops of self-interested impulse lacking systemic awareness for cooperative action and the necessity of middle path for political and constitutional stability.

Similarly, the instrumentalization of cultural differences of the nation for the expansion of political constituency has widened the differences over national norms, reasons and understanding for peace while increased convergence over their self-interest in monopoly rule trampling popular sovereignty, constitutionalism and denial of equal condition for the well-being of poor in Nepal. A rational consensus based on public interest shuns the concept of winner and loser and makes political leaders accountable for the benefit they cleverly enjoyed from democratic shortfall, political instability and impunity. It is absurd to think about democratic state without an acknowledgement to historical identity of its nation and tolerate external intervention in whatever the name. For Immanuel Kant, such intervention in other's constitution is tantamount to the violation of the rights of independent people (Reiss, 2008:266). It does not help Nepali citizens and leaders to orient to the practical ends of national life. National identity of Nepalese established on the basis of national self-determination, education and expectation of a common future has to be beefed up by shoring the national spirit and the fortitude of international cooperation for post-conflict peace building through fostering the national integrity system of constitutional bodies, strengthening mechanism of coordination and institutional trust and building their capacity of order maintaining, freedom-enhancing, service providing, discipline enforcing and reconciliation spirit.

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