# On the Constitutional Crisis of Nepal and the "Power to Remove Difficulties"

By *Ville Kari*[*]

**Abstract**: *This Article examines the recent constitutional crisis of Nepal in 2012-2013. The crisis refers to a time period between the dissolution of the first Constituent Assembly and the election of the second. The constitution-drafting process (begun in 2007) dragged on for several years and eventually exhausted the mandate of the Constituent Assembly despite several extensions. The dissolution of the Assembly in May 2012 led to a political impasse – a crisis of constitutional calibre from where the Interim Constitution seemed to provide no exit. In effect, Nepal had no constituent body to finalise the constitution, and no constitutional framework nor parliament to facilitate the re-establishment of such a body. It seemed that the constitutional process had been overcome by the complexities of post-conflict politics, which in the case of Nepal largely revolves around ethnic politics and federalism. In addition to explaining the course of the crisis, the Article introduces the key provision of the Interim Constitution applied to resolve the situation: the presidential "Power to Remove Difficulties" provided in its Article 158. Far from uncontroversial, this uncommon remnant of former royal prerogatives nonetheless enabled the post-conflict politics to return back to the track of constitution-making. To shed light on the nature of this Power, this Article explains the provision in its constitutional context and provides an overview of the jurisprudence of the Supreme Court of Nepal concerning it. The Article concludes by pointing out the contradictory result of the use of the Power to Remove Difficulties. While on the one hand it has indeed led into new elections and the recovery of the constitutional process, it may at the same time have opened up new avenues of political exceptions the kind of which are very likely to follow in the future of the process.*

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## Introduction

The constitution of Nepal has been in the making for some eight years by now, and the work remains unfinished in the beginning of 2015 (or late 2071 in Nepali reckoning). In this article, I shall examine one of the latest developments in the story, namely the resolu-

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tion of the constitutional crisis of 2012–2013. The crisis refers to the period between the dissolution of the first constituent assembly and the election of the second.

The crisis began when the constitution drafting – which began in 2007 and dragged on for years –eventually exhausted the mandate of the Constituent Assembly despite several extensions. The expiry of the Assembly led to a more or less complete political and constitutional impasse from where the Interim Constitution seemed to provide no exit. In short, Nepal had no constituent body to finalise the constitution, and no constitutional framework nor parliament to facilitate the re-establishment of such a body. It seemed that the calm, formal process originally envisioned for the Assembly had been decisively defeated by the tangible complexities of post-conflict politics.

This crisis reached its turning point on the 14th of March 2013, when the President of Nepal chose to exercise his unusual "power to remove difficulties", a sort of remnant of the royal prerogatives from the past.[1] Through the power, the president managed to appoint a new interim electoral government as well as certain other vital state functionaries. However, the rather infamous history of the constitutional power he invoked – a history of abuse in the hands of a previous monarch reluctant to submit to the supremacy of the constitution – gave rise to concerns about the constitutionality of his acts. Ultimately though, new elections were successfully held, and the Second Constituent Assembly of Nepal continues the work of its predecessor today.

I will in this article primarily limit my role to explaining this tumultuous period for legal scholars interested in post-conflict constitution drafting. As a whole, the constitutional crisis of Nepal urges us to discuss the limits of constitutional transplantation and "constitutional design", as often exercised by foreign legal experts and organisations in the context of post-conflict state-building. Such issues have been discussed extensively elsewhere, by critics and defendants alike, some seeing post-conflict constitution-making as a craft rivalling the making of Fabergé eggs, and others as a prosaic marketplace of routined IKEA salesmen trading promises of modernity and peace.[2] I will not try to add much to the already vast theoretical knowledge about these complexities; rather, by exploring the unusual power to remove difficulties, I hope to provide something for such theoreticians to talk about.

## The Power to Remove Difficulties

In an international comparison, the power to remove difficulties of the Nepalese constitution is an unusual but not entirely unique provision. Genealogically speaking, it is a

1 The Order of the President of Nepal to remove Difficulties under Article 158 of the Interim Constitution, 2013 (2069), march 14th 2013 [henceforth: "*Order of March 14*th"], (separate press statement, on file with author). Also available in full at the Nepal Constitution Foundation website, http://www.ncf.org.np/?page=article&id=7 (last accessed 1.1.2015)..

2 Cf. Günter Frankenberg (ed.), Order From Transfer: Comparative Constitutional Design and Legal Culture, Northampton 2013.

present-day South Asian variant of a so-called "Henry VIII clause".[3] In a general sense, a Henry VIII clause may refer to any statutory provision to a bill which enables the executive to repeal or amend it through delegated legislation after it has become an Act of Parliament. Its classical formula, however, is composed approximately in the form "[i]f any difficulty arises in connection with the application of this Act", followed by a provision according to which a "Minister may by order remove the difficulty".[4]

A probable antecedent of this clause in Nepal – as well as its remarkably broad formulation in the constitutional domain – is Article 392 of the 1949 Constitution of India.[5] In Nepal, the constitutional power to remove difficulties makes its first appearance in Article 77 of the short-lived Constitution of 1959, from which it passes on (in a more brief and open-ended form) to Article 96 of the Constitution of 1962.[6] It then survives with the (re)addition of a requirement of parliamentary endorsement in Article 127 of the Constitution of 1990, until we finally find it in the present-day form in Article 158 of the 2007 Interim Constitution of Nepal, first allocated to the Council of Minsters but, since the abolition of the monarchy, relocated to the President upon the Council's recommendation.[7]

This article examines the power to remove difficulties as it has been used and contested in Nepal during the civil war and the subsequent constitution-making process. Consequently, the most relevant instances of the power for this article shall be those found in Article 127 of the 1990 Constitution and Article 158 of the present Interim Constitution.

3 In particular, the topic had a moment of fame under this name during the inter-war years. See *Cecil T. Carr*, British Isles, Journal of Comparative Legislation and International Law 13 (1931), pp. 1–2; The Effect of the Great War on English Criminal Law & Procedure Solicitors' Journal and Weekly Reporter 71 (1927), p. 593; *W.P.M. Kennedy*, Aspects of Administrative Law in Canada, Juridical Review 46 (1934), p. 211; *C.T. Carr*, Administrative Law, Law Quarterly Review 51 (1935), p. 66.

4 *Christopher Forsyth* and *Elizabeth Kong*, The Constitution and Prospective Henry VIII Clauses, Judicial Review 9 (2004), pp. 17–18.

5 According to Article 392 ,"[t]he President may, for the purpose of removing any difficulties, particularly in relation to the transition from the provisions of the Government of India Act, 1935, to the provisions of this Constitution, by order direct that this Constitution shall, during such period as may be specified in the order, have effect subject to such adaptations, whether by way of modification, addition or omission, as he may deem to be necessary or expedient: Provided that no such order shall be made after the first meeting of Parliament duly constituted under Chapter II of Part V." Paragraph 2 provides that "[e]very order made under clause 1 shall be laid before Parliament", and paragraph 3 allots the powers also temporarily to the Governor General of India.

6 Moved to Article 90A with the Second amendment. Before the amendment, the power was meant to cease upon the adoption of the Panchayat; afterwards, this limitation was removed. The power itself in both forms reads as follows: "If any difficulty arises in bringing this Constitution into force His Majesty may issue such orders as He deems necessary, to remove that difficulty and such orders shall be deemed to have been included in this Constitution.".

7 Fifth Amendment to Interim Constitution of Nepal, 2006, paragraph 22.

In its Article 127 form, the power is formulated as follows:

> *If any difficulty arises in connection with the implementation of this Constitution, His Majesty may issue necessary Orders to remove such difficulty and such Orders shall be laid before Parliament.*

In the form in which it is presently in force, it reads thus:

> *158. Power to remove difficulties. If any difficulty arises in connection with the implementation of this constitution, the President on the recommendation of the Council of Ministers may issue necessary Orders to remove such difficulties, and such Orders require endorsement by the Legislature-Parliament within a month.*

While I examine the power in the particular context of Nepal, it remains true that the fundamental controversy there remains the same as in other similar circumstances: namely, how to ensure that the power is not abused? A power to remove difficulties is contradictory to the core. On the one hand, it exists to provide a flexible mechanism of last resort to apply in exceptional and unforeseen circumstances. On the other hand, it punctures the integrity of the law as it grants a valid legal form to a seemingly arbitrary and frighteningly indeterminate competence. An attempt to find a balance is typically sought through the requirement of a parliamentary revision – but what happens when a power to remove difficulties is granted at the very constitutional level, thus seemingly bypassing the supremacy of the most fundamental of all laws in a state? This case brings forth such problems for other scholars to ponder.

The first step is to provide an examination of the two contrasting modern uses of the power to remove difficulties in Nepal. The first of them is the use by the King prior to his abdication as a vehicle for consolidating power by advancing certain autocratic interpretations of the needs of the people. The second of them is the recent use by the President to enable the election of a second constituent assembly and to break the constitutional deadlock – a constitutionally more benign purpose, perhaps, but far from unproblematic as well.

Before proceeding to these cases, two brief points need to be made. First, the power to remove difficulties should not be confused with constitutional *emergency powers*, as those have been provided for elsewhere in both the 1990 Constitution and the Interim Constitution. The power to remove difficulties is a separate competence, which has typically been invoked as a last resort after the exhaustion of emergency powers or when such powers have not been available. Second, it shall here be assumed that in Nepal during the 21st century, the core doctrine of the constitutional power to remove difficulties forms a continuum. The consistent reliance on the "if any difficulty arises" formula in both the Constitution of 1990 and the Interim Constitution shall be taken to denote a likeness. Thus the underlying core principles and limits of the power will be assumed the same or at least comparable. This is deliberately done so as to enable the evaluation of the events of 2013 in the light of earlier precedents. Obviously, any subsequent scholarship aiming to question this assumption by comparing the Nepalese case to historical or present-day examples in Nepal as well

as other countries would be most welcome. Such an examination, however, shall be beyond the reach of the present paper.

## A History of Abuse: The Power to Remove Difficulties in the Constitution of 1990

To properly understand the legal controversies underlying the recent resolution of the constitutional crisis, we must begin with the history of regression and abuse associated with the power to remove difficulties. This will take our attention to the final years of the civil war, when the last King of Nepal, Gyanendra, resorted to centralising political power on himself in a succession of events culminating in what has later been called the Royal Coup of 2005. In short, the King dissolved the national parliament and repeatedly sacked his ministers, first exhausting his constitutional emergency powers and then ultimately invoking his power to remove difficulties under Article 127 of the 1990 Constitution. These events led to the tumultuous political and legal turns that eventually culminated in the complete abandonment of monarchy in Nepal.

At a very general level, the story of the power to remove difficulties is also tied to the fundamental tensions within the Nepalese state and legal system at the time. These events reflect a final escalation between the last vestiges of a traditional Hindu monarchy and the liberal aspirations for a constitutional democracy.[8] While an in-depth examination of Nepalese legal history in any broader sense is beyond the scope of this article, it must be highlighted that the question of whether or not the King of Nepal was bound by the constitution (and his actions subject to judicial review) was a recurring theme of dispute throughout the last decades of monarchy.[9] At the same time, the circumstances were also directly connected to the civil war and the ever-expanding Maoist insurgency, as the war was in many ways the catalyst for the exceptional measures taken.

The Constitution of 1990 had originally been promulgated in response to a massive societal upheaval, the famous *Jana Andolan*, in which mass protests and general strikes convinced the King and his government first to legalise the political opposition and then to pass a modernised Constitution based on democratic representation, popular sovereignty

8 Cf. *Michael Hutt*, King Gyanendra's Coup and its Implications for Nepal's Future, Brown Journal of World Affairs 12 (2005-2006), pp. 111 and 113.

9 In the traditional days of the Malla and Shah kings, of course, the matter would have obviously been beyond question; also during the period of the Rana prime ministers, the codification of Nepalese law and government occurred on a firm basis of absolute monarchy. Only during the first democratic period of 1951–1960 did the matter of judicial review arise and gain recognition in the famous case of *Bisheshwar Prasad Koirala* vs *Commissioner Magistrate*, see, *Bhimarjun Acharya*, My Essays in Law, Media Freedom and Politics, Kathmandu 2012, p. 3; subsequently however, the partyless Panchayat system under the Constitution of 1962 again abandoned the supremacy of courts over the King. The Constitution of 1990, which was in force at the time of the civil war, had in response to the *Jana Andolan* again enshrined the superiority of the constitution over the monarch, with the Nepalese legal system often following old UK precedents in its language.

and the constitutional rule of law.[10] While at the time the constitution was understood as a triumph of democratic state form, it nonetheless retained a constitutional monarchy and has in retrospect been characterised as still furnishing the monarch with unusually strong discretionary powers.[11] Of these, the power to remove difficulties, our present subject, was the most indeterminate and unpredictable.

The pathway to the abuse of royal prerogatives was paved by the use of of constitutional provisions regarding the state of emergency. In 2001, the Maoist insurgency in Nepal (begun in 1996) had already escalated into a heated civil war. On the 26th of November that year, amidst the rising global tide of efforts against terrorism, King Gyanendra proclaimed a state of emergency, declared the Maoist insurgents "terrorists", and mobilised the Royal Nepal Army against them.[12] Less than six months after his ascension to the throne,[13] his decision was the first time that Article 115, concerning the state of emergency, was invoked since the Constitution was promulgated in 1990.[14] The act paved way to the suspension of various civil liberties and increasingly intensive security policies over the following years. The state of emergency was extended into controlling political gatherings by April 2002 and a broad Terrorism and Disruptive Activities Ordinance was given in 2001, and recast as an Act in 2002.[15] Also a so-called Special Court with jurisdiction to investigate *inter alia* matters concerning corruption and crimes against the state was established in 2001. A writ petition was made to the Supreme Court arguing that the establishment of the Special Court was inconsistent with the constitutional provisions securing an independent judiciary and prohibiting *ad hoc* tribunal courts. The Supreme Court, however, ultimately let the Special Court stand.[16]

Year 2002 brought about the first exercise of Article 127 in the period. As the state of emergency was reaching its constitutional one-year limit, discussions for extending it eventually began. As the main parties of the parliament expressed reluctance to permit an exten-

10 e.g. *Sebastian von Einsiedel, David M. Malone* and *Suman Pradhan*, Introduction, in: Sebastian von Einsiedel, David M. Malone and Suman Pradhan (eds.), Nepal in Transition: From People's War to Fragile Peace, Cambridge 2012, pp. 6-7; *Deepak Thapa*, The Making of the Maoist Insurgency, in: Sebastian von einsiedel, David M. Malone and Suman Pradhan (eds,), Nepal in Transition: From Peolpe's War to Fragile Peace, Cambridge 2012, pp. 40-41; *Catinca Slavu*, The 2008 Constituent Assembly Election: Social Inclusion for Peace, in: Sebastian von Einsiedel, David M. Malone and Suman Pradhan (eds.), Nepal in Transition: From People's War to Fragile Peace, Cambridge 2012, pp. 233–234.

11 e.g. *Sebastian Erckel*, The Prospects of Democracy in Nepal, Norderstedt 2008, pp. 7–8.

12 *Hutt*, note 8, p. 118; *Acharya*, note 9, pp. 268–269..

13 Gyanendra became king at unusual circumstances after King Birendra and his family were killed in the Royal Massacre on June 1st 2001. The official investigation later commissioned by Gyanendra concluded that the massacre had been committed by Prince Dipendra, heir to the throne, who also committed suicide at the end of the shootings.

14 *Acharya*, note 12, p. 268.

15 *Acharya*, note 12, pp. 286–288.

16 Id., pp. 263–264.

sion, the Prime Minister somewhat unexpectedly dismissed the entire parliament on May 22nd. The dissolution was challenged fruitlessly in the Supreme Court by some sixty MPs.[17] Finally, on October 4th 2002, King Gyanendra turned on the Prime Minister and sacked him on the grounds of "incompetence" as the latter had requested the postponement of the general election of a new parliament.[18] Somewhat ironically, the Prime Minister's request had been formulated as a request to the King to use the Article 127 powers, and the outcome was the use of those powers to both dismiss him *and* postpone the elections indefinitely. Following the sacking, the King would henceforth appoint his own Cabinet of Ministers at his discretion.

The order dismissing the Prime Minister had a particularly ominous tone in Nepal as it resembled the sacking of the past Prime Minister Koirala in 1960, an event which then denoted the end of the first era of democratic constitutionalism in Nepal and led back to the centralised Panchayat system for the next thirty years.[19] In 2003, King Gyanendra attempted to clear out the unrest mounting against his exceptional takeover by appointing a new Prime Minister – again, through the power in Article 127. But a divide between the King and his people kept growing under an atmosphere where the exercise of executive powers was seen as occurring apparently without any particular legal restraint or procedure.

The "Royal Coup" itself took place on February 1st, 2005, via a proclamation by the King to the general public.[20] Speaking once again in a repetitive language of peace and security and the reproachment of ineffective politicians, the King with immediate effect dismissed the entire government and declared a new state of emergency under Article 115 of the Constitution. Numerous political leaders were placed under house arrest, communications to the outside world were severed, and stringent travel restrictions imposed.[21] The next day, leaning on his Article 127 power to remove difficulties, the King declared himself the head of a new Council of Ministers and appointed the members via a press release.

Following the coup, the government of Nepal intensified its crackdowns on the opposition in the name of anti-terror (anti-Maoist) necessities, leading to another escalation in the already deplorable human rights record of Nepal at the time.[22] Of particular interest to the present article is the formation of the Royal Commission for Corruption Control (RCCC),

17 Id., pp. 281–284.

18 Address of HM King Gyanendra to the Nation, 4 October 2002 (Available at http://www.nepalresearch.org/politics/background/gyanendra_021004.htm) (Accessed on April 3rd 2015).

19 *Hutt*, note 8, pp. 155–117 ; *Acharya*, note 12, p. 294.

20 Proclamation to the Nation from his Majesty King Gyanendra Bir Bikram Shah dev, (1 February 2005), available at http://www.satp.org/satporgtp/countries/nepal/document/papers/05emergencyking.htm (Accessed on April 3rd 2015).

21 *Hutt*, note 8, p. 112; *Acharya*, note 12, pp. 318 and 328–331.

22 See generally Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her Office, including technical cooperation, in Nepal (16 September 2005), UN Doc. A/60/359; Amnesty International, Nepal: Human rights abuses escalate under the state of emergency, April 2005; Human Rights Watch, Clear Culpability - 'Disappearances' by Security Forces in Nepal, 28 February 2005.

which took place on February 16th as part of the state of emergency. The RCCC was an organ with a more or less parallel competence with the constitutional anti-corruption body CIAA, but it was manned by trusted men of the King and exercised largely uncontrolled investigative and detentive powers against members of the opposition, including former ministers. Formed under the auspices of the state of emergency, the RCCC should have, according to the constitution, expired at the end of the emergency later in 2005, but instead the King declared the commission to continue on a permanent basis – again under the Article 127 power to remove difficulties.[23]

This abusively broad application of Article 127 seems to have marked a watershed in the previously tolerant Supreme Court's position towards the King. As politicians and even judges were being investigated or held in detention, the Nepalese legal community took to the Supreme Court a flood of petitions for *habeas corpus*, the dissolution of the RCCC and the revocation of the King's unconstitutional acts.

A culmination of sorts was reached in the *Parajuli* decision of January 5th 2006.[24] In the case, thirty-nine prominent Nepali advocates joined together to litigate for the writ of *habeas corpus* on behalf of a former Minister who at the time was being held in detention and interrogated at the Lalitpur police district. Mr. Parajuli's dealings had previously been investigated by the regular state anti-corruption bureau CIAA, which had found no sufficient evidence for prosecution and had thus ceased its investigations. It was under these circumstances that Mr. Parajuli (among others) was now being investigated by the RCCC, evidently being arbitrarily detained and investigated *bis in idem*.

The issues dealt with in the *Parajuli* case were manifold and complex, starting at the very question of whether a king's decisions could be subjected to judicial review in the first place, and whether they should in fact be subject to constitutional constraints at all. The Court affirmed both.[25] In addition to this fundamental assertion of the supremacy of the constitution over the monarch, the Court also found that the King's use of the Article 127 powers to perpetuate the RCCC had been unconstitutional. The Court declared the RCCC "annulled effective from today", issued the writ and ordered Mr. Parajuli released.[26] As a whole, Bhimarjun Acharya sums up, "the SC in its landmark judgment declared that all the acts relating to the formation of RCCC and functions carried out by it were unconstitutional and against the rules of law and natural justice".[27]

The Royal Coup had an overall effect of portraying the King as imposing a rigid "either us or them" division between the monarch and the Maoist rebels, a matter leading into a final alienation of the general public from the monarchy as well as to a wide international

23 *Acharya*, note 12, pp. 326–327.

24 Supreme Court of Nepal case *Rajeev Parajuli and Others v. Royal Commission on Corruption Control and Others*, Writ No. 118 / 2062 (2005), National Judicial Academy Law Journal 1/2007, pp. 247–300. The journal is available online at http://njanepal.org.np/ (accessed 3.4.2015).

25 *Parajuli* v *RCCC*, p. 283–288.

26 *Parajuli* v *RCCC*, p. 300.

27 *Acharya*, note 12, p. 327.

condemnation.[28] This alienation would soon lead to the end of the monarchy. As it happened, the formerly dominant political parties, now displaced, found themselves outside the cabinets of power together with the Maoist insurgents. Soon, a seven party coalition of the traditional parties found itself in agreement with the CPN(M)[29] about the need for a peace agreement and the promulgation of a new constitution via a constituent assembly. At the same time, a new protest movement – known as *Jana Andolan II* – escalated into a large-scale popular movement, its mass protests and general strikes finally forcing the King to restore the parliament.

In November 2006, with UN assistance[30] the Maoist insurgents and the Government of Nepal signed the Comprehensive Peace Accord.[31] The Interim Constitution of Nepal was passed in the parliament on January 15th 2007, after which the parliament transformed into an interim legislature-parliament.[32] After the elections held on February 10th 2008, the Constituent Assembly in its first session amended the Interim Constitution to declare Nepal a "Federal, Democratic, Republic State by legally ending (or abolishing) the monarchy", and established the office of the President of the Republic in the wake of the monarchy.[33]

The era of the King was over. Yet the power to remove difficulties survived, for as the King was replaced by the President in the Interim Constitution, the power to remove difficulties was retained in the new Article 158 of the Interim Constitution and was passed on to the new head of state.

28 *Bipin Adhikari*, The Status of Constitution Building in Nepal, Kathmandu 2012, p. 1; *Harsh V. Pant*, Trouble in Paradise - Nepal's Tryst with Insurgency and Despotism, Georgia Journal of International Affairs *7* (2006), p. 123; *Brad Adams*, Nepal at the Precipice,Foreign Affairs 84 (2005), pp. 129–132.

29 Communist Party of Nepal (Maoist); later to become Unified Communist Party of Nepal (Maoist) or UCPN(M). This mainstream Maoist party is not to be confused with the present-day hardline faction CPN-M, which broke off from the main party in 2012. In 2014, this breakaway CPN-M has apparently also split into two identically named parties, and thenceforth the present author confesses his inability to keep track of the factions.

30 *Teresa Whitfield*, Nepal's Masala Peacemaking in: Einsiedel et al (eds.), note 10, pp. 155-174; *Ian Martin* The United Nations and Support to Nepal's Peace Process: The Role of the UN Mission in Nepal, in: von Einsiedel et al (eds.), note 10, pp. 201–231; UNSC "Report of the Secretary-General on the request of Nepal for United Nations assistance in support of its peace process" (9 January 2008), U.N. Doc. S/2007/7, Annexes I-III; UNSC Res. 1740 (23 January 2007), UN Doc S/RES/1740.

31 Comprehensive Peace Accord concluded between the Government of Nepal and the Communist Party of Nepal (Maoist), November 21, 2006.

32 Crisis Group Asia Report N°128, Nepal's Constitutional Process, International Crisis Group 2007, pp. 5-8; Yash Ghai & Jill Cotterell (eds.), Creating the New Constitution: A Guide for Nepali Citizens, Stockholm 2008, p. 49. The full name of the Nepalese representative organ is commonly translated as "Legislature-Parliament". The name is the result of a compromise between the democratic parties and the Maoists. For simplicity, I will in this article commonly refer to "parliament".

33 Quote from the Interim Constitution's preamble as amended by the Fourth Amendment (May 29th 2008).

**The Constitutional Crisis of 2012–2013**

The Interim Constitution of Nepal designated the promulgation of a new democratic constitution as the primary task for the future Constituent Assembly. It was to be completed within two years.[34] The drafting of the Committee proposals for the constitution proved a long and quarrelsome process, and ultimately left the most difficult questions unanswered. [35] The need for some kind of an extension had become evident already long before the end of the term.[36]

As the deadline was not met, the Constituent Assembly extended its own term (among other things through constitutional amendments) at least four times,[37] until finally the Supreme Court of Nepal concluded that the interpretative leeway of the Interim Constitution had been exhausted.[38] This decision set the final deadline for the Constituent Assembly

34 Interim Constitution, Article 64 (prior to amendments).

35 It is widely acknowledged that the main substantial reason for the failure of the Constituent Assembly is the question of state restructuring or, more commonly, *federalism*. The promise of an ethnically equitable federal state structure was grafted into the peace agreement and later into the Interim Constitution, but its actual realisation in one of the most diverse states on the planet (the 30-million population of the nation is made up of more than a hundred caste and ethnic groups) has turned out to be quite inconceivable. The seemingly perpetual impasse between the traditional liberal-democratic parties and various ethnic, caste and leftist factions has ensured that no credible degree of consensus would be achieved in the Constituent Assembly throughout its existence. The public discontent mounting over the matter may have also been accentuated by the fact that there have been no local elections in Nepal for more than sixteen years, thus extenuating the sense of a lack of participation among the peripheral and less dominant fragments of the society. See *generally* UN Monthly Update - May 2012, UNRCHC Office Nepal (All United Nations Resident Coordinator's Office Monthly Updates and Reports are available at the UNDP Nepal Information Platform, www.un.org.np (last accessed 30.12.2014)); UN Field Bulletin: "Confrontation over federalism: emerging dynamics of identity-based conflict and violence", UNRCHC Office Nepal 2012; *Adhikari,* note 28; *Bipin Adhikari*, Nepal Constituent Assembly Impasse: Comments on a Failed Process, Kathmandu 2012; *Deepak Thapa*, The Making of the Maoist Insurgency, in: von Einsiedel et al. (eds.), note 10; *Mahendra Lawoti,*: *Ethnic Politics and the Building of an Inclusive State*, in: von Einsiedel et al (eds.), note 10*;* Federalism and State Restructuring in Nepal: The Challenge for the Constituent Assembly: Report of a Conference organied by the Constitutional Advisory Support Unit, UNDP 23-24 March 2007, Godavari 2007, edited by Yash Ghai and Jill Cottrell; Nepal Central Bureau of Statistics, Statistical Pocket Book Nepal 2010, http://cbs.gov.np/?page_id=1079 (last accessed 31 December 2014); *Pitamber Sharma*, Unravelling the Mosaic: Spatial aspects of ethnicity in Nepal, Lalitpur 2008.

36 *Bipin Adhikari*, "The hundred-day deadline has just passed for the promulgation of Nepal's long-awaited new constitution – but there is little optimism that this date will be met", Nepal Constitution Foundation, www.ncf.org.np (last accessed 31.12.2014).

37 28 May 2010 for a year (Eighth Amendment), 28.5.2011 for three months (Five-point agreement), 29 August 2011 for three months, and 29 November 2011 for six months. See *Adhikari*, note 35, pp. 157–161.

38 *Adhikari*, note 35, pp. 72–73.

in May 2012. The negotiations stretched all the way to the last possible evening, [39] until they were ultimately abandoned as unresolved and the Constituent Assembly dissolved itself at midnight on the 27th of May 2012. The constitutional crisis had begun.

The constitutional impasse was partially grafted already in the Interim Constitution itself, as the document does not seem to have taken into account at all the possibility that the Constituent Assembly could not conclude the new constitution within its two-year time limit.[40] The Interim Constitution was thus originally a single-use mechanism. Whether or not this was intentional (in order to press the Assembly to make haste), it did mean that the creation of a second assembly would require the circumvention of this problem. As we know, the means to this end was finally found in the President's power to remove difficulties.

Another point of tension is that the Constituent Assembly co-functions simultaneously as a fully competent legislature-parliament.[41] This is in many ways a necessary provision; a country emerging from the clutches of a civil war was arguably in need of a legislative body that could immediately begin to address the nation's vital, long-neglected needs. But what this also meant was that in reality, the first and foremost purpose of the Assembly – the promulgation of a constitution – did *not* take first priority in its activities. [42] A third difficulty in the Interim Constitution is its exceptionally thorough legislative procedure for constitutional bills, which requires considerable levels of consensus amidst the notoriously fragmented political field.[43]

**A Way Out: The Power to Remove Difficulties in 2013**

Let us return to 2013 and the resolution of the Crisis. Once the Constituent Assembly had been dissolved, there was no parliamentary organ available to remedy the situation through legislative enactments. Nepal found itself in a situation where its constitution itself was silent, contradictory, and deadlocked, providing no easy way out. Finally, President Ram Baran Yadav made the decision to lean on Article 158 of the Interim Constitution and the

39 See generally *Ian Martin*, The United Nations and Support to Nepal's Peace Process: The Role of the UN Mission in Nepal, in: von Einsiedel et al (eds.), Nepal in Transition, Cambridge 2012, pp. 201–231; *Bipin Adhikari*, Nepal Constituent Assembly Impasse, Section V: "The Final Eleven Days", pp. 99–128; *The Kathmandu Post* 30.3.2012: "Statute promulgation by May 27"; *The Kathmandu Post* 23.5.2012: "Statute by May 27 still possible: Mahat"; *República* 25.5.2012: "Ban urges parties to ensure statute"; *The Himalayan Times* 26.5.2012: "Talks persist to issue statute by Sunday"; *The Himalayan Times* 27.5.2012: "Statute likely, says minister".

40 See Part 7 of the Interim Constitution.

41 Interim Constitution Article 59.

42 The tension between competitive politics and consensual politics is examined in detail in *Markus Heiniger*, Elections in Fragile Situations – When is the Time Ripe for Competitive Politics? The Case of Nepal in 2008, in: Andrea Iff (ed.), Ballots or Bullets: Potentials and Limitations of Elections in Conflict Contexts, Swisspeace Conference Paper 1/2011, pp. 52-58.

43 Interim Constitution, Art. 70.

infamous power to remove difficulties enshrined therein. On the 14th of March 2013, the President ordered the election for a new constituent assembly to be held, as well as a new interim government to be formed for preparing and conducting the election.[44]

The election preparations proceeded over the summer in dialogue between the interim government and the party leaders comprising the so-called High Level Political Committee ("HLPC"), an informal political dialogue of their own, which began to act as a *de facto* remnant of the dissolved Constituent Assembly. As the elections drew near, political tugs-of-war emerged between the government's Electoral Commission and the HLPC parties for example with respect to the number of assembly members to be elected as well as constituency delineations. As if a Pandora's box had been opened through the power to remove difficulties, the Interim Constitution was subjected to increasing political negotiations as some of its electoral provisions seemed broken or deadlocked in the newly reformed circumstances. [45]

But despite such tensions, the elections were eventually organised and carried out rather successfully. It was not a seamless process, as the autumn was shadowed by constant conflicts of interests, challenges of the government's constitutionality, imposed *bandh*-strikes and threats of violence (especially by the breakaway Maoist fringe party CPN-M[46]), and even some concerns over the decision to mobilise the Nepalese Army to oversee the elections.[47] Nonetheless, the Second Constituent Assembly was elected in November 2013 and the constitution-drafting process was revived by the spring of 2014.

The presidential order of March 14th, which made this return to track possible, displays various creative characteristics, which may – and did – raise serious doubts among legal observers. Despite the successful outcome, and especially in the first days after the order

44 The Order of the President of Nepal to remove Difficulties under Article 158 of the Interim Constitution, 2013 (2069), march 14th 2013.

45 Interim Constitution, Articles 63 and 154A; *The Kathmandu Post*, 16.7.2013: "Political parties now mull over three options"; *The Himalayan Times*, 12.9.2013: "UCPN-M pushes amendment to constitution".

46 Not to be confused with the main Maoist party now known as UCPN(M). See footnote 29 above.

47 UN Monthly Updates – July 2013 and August 2013, UNRCHC Office Nepal; *República* 9.6.2013 "Dalits assaulted in Rautahat over temple use"; *The Himalayan Times* 11.7.2013: "Tharuhat party warns of agitation over murder"; *The Kathmandu Post* 14.7.2013: "Armed men strike 10 Siraha houses"; *República* 13.9.2013: "At least 12 injured in Sarlahi blast"; *República* 17.9.2013: "8 injured in clash as police fire shots in air"; *República* 5.8.2013: "EC registers 16 more parties". *The Himalayan Times* 2.7.2013: "CPN-M to deploy disruption dastas at polling booths"; *The Himalayan Times* 3.7.2013: "CPN-M poll disruption programmes soon"; *The Himalayan Times* 7.7.2013: "CPN-M wants its demands fulfilled before talks"; *The Himalayan Times* 13.7.2013: "Ashok Rai warns of decisive anti-govt stir"; *República* 13.8.2013: "Govt, 33-party alliance talks ends inconclusively"; *República* 5.9.2013: "CPN-Maoist conducts combat training in Rukum"; *The Kathmandu Post* 5.9.2013: "33-party bloc warns govt, HLPC against Nepal Army deployment"; *The Himalayan Times* 12.9.2013: "CPN-Maoist seizes land"; *República* 13.9.2013: "Banda cripples life in Far-Western districts"; *The Himalayan Times* 13.9.2013: "CPN-M strike cripples city life, people rise against *bandh"*; *The Himalayan Times* 21.9.2013: "CPN-M warns of fresh rebellion".

when the outcome was not at all clear, the invocation of the infamous power to remove difficulties carried all the potential for yet another abusive takeover. Furthermore, even assuming that the measure was overall necessary or legitimate, the order was still full of glaring ambiguities.

First of all, Article 158 requires that orders to remove difficulties "require endorsement by the Legislature-Parliament within a month". As the Constituent Assembly had dissolved itself, there was no parliament to do so – nor a parliament from among the members of which the prime minister would appoint the ministers for the provisional government.[48] Second, the Order was based on no "recommendation of the Council of Ministers" or even of a caretaker ministry whatsoever. Instead, the origin was legally speaking *ad hoc*. The previous day, a political "11-Point Agreement" had been signed by the four largest political parties of Nepal.[49] The same Agreement included the establishment of the HLPC. The basic problem with the HLPC was that such a committee was entirely unknown to the Constitution. The role of a parliamentary element in the resolution of the crisis was thus carried out by a group of leaders who no longer had any clear mandate. After all, they maintained their *ad hoc* position through political power derived from the two-year mandate they had been given in an election five years earlier.

A third ambiguity, of specific importance for the present article, was that the Order assigned Chief Justice Khil Raj Regmi of the Supreme Court of Nepal as the leader of the new interim government. The problem here was that according to Article 106 of the Interim Constitution, members of the Supreme Court "shall not be engaged in or deputed to any other assignment except that of a Judge", and cannot even after leaving the judicial office be eligible for appointment "in any Government Service" apart from the National Human Rights Commission.[50]

Both the Order of March 14th and the 11-point agreement behind it were widely denounced and challenged by the community of Nepalese legal professionals. At the head of this these challenges was (and continues to be) the Nepal Bar Association, which in an emergency session expressed "regret at the attempt leading the nation towards unconstitutional direction through signing an unconstitutional understanding" and called "all ... who favor democracy to oppose and refute this unconstitutional and undemocratic step taken up by a limited number of leaders of few political parties in the name of political understanding, and through fraudulent use of Article 158 of the Constitution to remove difficulties".[51] In other words, the Association saw the Order of March 14th as a takeover by a handful of non-elected party leaders acting through the President's unusual (and problematic) powers.

48 According to the Interim Constitution Article 38(5), ministers are to be appointed from among the members of the Legislature-Parliament.

49 This basis is also disclosed in the second paragraph of the preamble to the presidential Order of March 14th.

50 Interim Constitution, Article 106.

51 Nepal Bar Association Press Release (14 March 2013), paras 1, 2 and 4. Available at http://www.nepalbar.org (Accessed 4 April 2015).

Above all, the NBA denounced the appointment of CJ Regmi as the head of the new interim government. This was seen as a flagrant breach of the separation of powers and a threat to the independence and credibility of the judiciary. The Association declared the 14th of March a "black day in the history of Nepali judiciary" and demanded the immediate resignation of Regmi on the grounds of breaching his oath of office.[52] Twelve days later, the NBA elaborated its criticism, reiterating the constitutional prohibitions to the judiciary from acting in any other capacity and quoting Article 3(3) of the Supreme Court's code of conduct, according to which judges "should also be seen to be free of [inappropriate] contact and influence in the eyes of a perceptive observer".[53]

On March 18th 2013, the day Regmi appointed his Cabinet (as provided for in the presidential order), the Supreme Court of Nepal ordered him to act only as chairman of the interim election government and to step aside as chief justice for the duration of his position as the head of government.[54] Apart from the temporary solution, the question remained unresolved until after the elections, as Regmi apparently planned to return to the Supreme Court after fulfilling his exceptional ministerial duty. On February 11th 2014, as the new Constituent Assembly had begun its work and a new government took over, Regmi announced his retirement also from the judiciary.[55] Both the decision of the Supreme Court in 2013 and the final resignation of Regmi from the position of Chief Justice were associated by the press directly with the pressure by the Nepal Bar Association.[56]

**The Power to Remove Difficulties in Judicial Review**

The primary aim of this Article was to introduce the presidential power to remove difficulties and its role in the resolution of the constitutional crisis of Nepal. For the most part, the story of the Power has now been explained in the contexts of both the King and the President. I will in the rest of this article examine the doctrine and jurisprudence concerning the power to remove difficulties and consider the challenges associated with producing a general assessment of the constitutionality of the Order of March 14th.[57]

52 Ibid, paras. 3 and 4.

53 Nepal Bar Association Press Release (26 March 2013), esp. para 4. Available at http://www.nepalbar.org (Accessed 4 April 2015).

54 *The Kathmandu Post* 19.3.2013: "SC ruling: Regmi can't hold dual positions"; *República* 19.3.2013: "SC tells Regmi to limit role to head of election govt".

55 *The Kathmandu Post* 12.2.2014: "SC Regmi steps down as CJ". Upon his retirement, Regmi gained the status of a retired prime minister with full benefits.

56 See newspaper articles in preceding footnotes above.

57 Despite the limited number of sources available, I remain confident in their representativeness of the dominant line of interpretation among mainstream Nepalese lawyers, with the probably exception of hardline Maoist or Royalist interpretations. Nonetheless, the reader ought to bear in mind that the following is likely to be a mere sketch, as from this point on the research ought to be carried out with a fluent competence in the Nepali language and sources.

As explained before, I shall proceed with the assumption that the core of the doctrine remained the same between the Constitution of 1990 and the Interim Constitution. In other words, I assume that while the use of the power may be procedurally different, the power itself is the "same" in both constitutions. This opens the possibility to examine analyses about the King's power to remove difficulties and to reflect them upon the use of the power in 2013.

In his collection of legal essays and comments, Bhimarjun Acharya provides two variants of a scholarly doctrine concerning the limits of the power to remove difficulties. The first of these is shared with an authoritative commentary on the Constitution of 1990[58] and can be summarised as a set of three conditions which the use of the power must meet in order to remain constitutional:

> *"The first is that a difficulty would have actually to arise which makes the exercise of the power objectively necessary and not merely desirable on some subjective ground stipulated by the government. The second condition is that any order made to remove a difficulty must be no more than necessary to remove it. The third is that an order made to remove a difficulty must not be incompatible with any other provision of the constitution."*[59]

The second variation, which Acharya employs himself in most of his essays, is otherwise identical to the first one, but the three criteria are preceded by a need

> *"... to show that the issue in question is more of a technicality and that no other mechanisms for removing the difficulty in question (like the Supreme Court) had any meaningful role, or that even if it had, it had been tried and exhausted, leaving intervention under Article 127 as very much the last resort."*[60]

For the purposes of this article, these four requirements can be summarised in common parlance as the requirements (or tests) of *last resort*, *necessity*, *proportionality,* and *integrity*.[61] Last resort, as in the requirement of the absence of any alternative remedies; the principles of necessity and proportionality as they are commonly understood by administrative and constitutional lawyers, and integrity as in the strict prohibition to contradict with the constitution. Conversely, the power must not be used to bypass other available instruments, nor an order given at a subjective whim or in excess of what is absolutely needed, and under no circumstances can they be used to circumvent, avoid, overturn, or alter the constitution.

58 Surya Prasad Dhungel et al. (eds.), Commentary on the Nepalese Constitution, Kathmandu 1998, p. 680.

59 *Acharya*, note 12, p. 179–181.

60 *Acharya*, note 12, pp. 152, 312 and 326.

61 The last of the four could also be called "constitutionality", but this might prove circular when debating the constitutionality of an order to remove difficulties with respect to a criterion of "constitutionality" in a sense of its accordance with the constitution.

In the landmark case of *Parajuli and Others* v. *RCCC and Others* described earlier in this article, the Supreme Court of Nepal ascertained several considerations that fit well in this four-fold doctrine. The significance of the *Parajuli* decision is not merely in the Court's outcomes, but also in the way how the Court used the opportunity to draw together much of its jurisprudence and earlier opinions on the topic. This is indeed the reason the Nepalese Judicial Association found it worth translating in full in their review.

In its decision, the Court cited at length and in detail its own advisory opinion from 1993, and doing so it also succinctly reflected the criteria of necessity, proportionality, and last resort:

> *"[I]f a void or a constitutional stalemate is created due to the failure of any constitutional mechanism to function as provided in the Constitution, the power of removing any obstacle or difficulty may be exercised to prevent such a situation by making suitable and necessary arrangements for its immediate resolution in order to activate the constitutional mechanism. The extra-ordinary power of removing any obstacle or difficulty may be exercised only if there was no other constitutional or legal alternative to end the constitutional stalemate or lacuna which has emerged unexpectedly." [emphasis added]*[62]

A requirement of integrity, in turn, received support in the Court's pronouncement that

> *"Article 127 ... cannot be so exercised as to create a situation where the constitutional system becomes inactive or the constitutional mechanism undergoes a change."*[63]

The Court specifically pinpoints the prohibition to encroach upon the fundamental rights of citizens with the use of the power to remove difficulties.[64] Elsewhere in the decision, the Court engages in a thorough examination of its own jurisprudence concerning the doctrine of necessity[65] and again underlines the prohibition to contradict the constitution in any other sense than by activating otherwise paralysed provisions:

> *"To put it more clearly, it is the spirit and objective of Article 127 to conduct systematically the constitutional provisions by providing nectar (life saving drug) to the existing constitutional provisions if there arises any obstacles to the implementation of the constitutional provisions."*[66]

Very well, then. In the light of such a doctrine, did the presidential Order of March 14th stay within the constitutional limits to the power to remove difficulties? Clearly, the Nepal Bar

62 Supreme Court of Nepal, Special Constitutional Directive No. 1 (2050) [1993]. Quoted in English in *Parajuli* v *RCCC*, p. 297.

63 *Ibid*.

64 *Ibid.*

65 *Ibid.*, p. 292-293.

66 *Ibid.*, p. 296.

Association thought it did not. Assuming the NBA's perspective, it is valid to argue that the Order had difficulties meeting the requirements of proportionality and integrity. The clearest point of breach would have been the appointment of the Chief Justice as the new Prime Minister, as this decision was in clear conflict with the constitutional prohibition of the members of the judiciary to appear in executive roles. Even if the overall establishment of an interim government, knowing that the elections would be successful, were to be accepted as "necessary", then surely the smaller choice of prime minister could have been done in accordance with the constitution?

Even if the choice of prime minister were to be ignored, the Order might still be criticised for breaching the requirement of integrity. After all, there *was* no parliament and no Council of Ministers as required by Article 158 of the Interim Constitution. In that sense, the very invocation of the power led to a clear contradiction with the Constitution. The power to remove difficulties is in and of itself a very unusual and discretionary provision; its danger lies precisely in expansive over-abuse. With such high stakes, it would indeed be reasonable to claim that, while it may be politically unfortunate, the power to remove difficulties simply did not apply to resolving constitutional crises of this calibre. This argument could question the presence of a measure of last resort as well; if the appointment of an interim government would be beyond the limits of the power to remove difficulties, then unfortunately, the applicable "last resort" would be found somewhere else and under some other framework.

Of course, the very same principles may be deployed to defend the Order of March 14th as well. Even though the appointment of Khil Raj Regmi was in breach of the principle of integrity, we can still argue that it was necessary due to the extreme difficulties between the political parties. As for the appearance of the informal and non-constitutional HLPC at the core of power, that too could be argued to be a necessary measure following the dissolution of the Constituent Assembly. The HLPC might be argued to be vital for securing proportionality and oversight, as otherwise the President would have had to stipulate an even more autocratic basis for the Order. Indeed, while individual provisions of the Interim Constitution may have had to be circumvented, is it not true in the aftermath of the elections that the Order *did* as a whole "provide nectar" to the entire constitution by bringing it back into functioning?

It is perhaps not the task of a foreign scholar to pass absolute judgment about the constitutionality or non-constitutionality of a way a nation resolved its fundamental constitutional crisis. In pursuit of an external view, we may once again be bound to oscillate between a pair of contradictory views with which we must cope and exist.[67] I will therefore disengage from the question at this point with the hope of having shared enough work for others to continue from.

67 Such a view represents a standard Helsinki school analysis. For more, see generally *Martti Koskenniemi*, The Politics of International Law, Oxford 2011.

## Conclusion

At the end of the day, there is no way to conclusively measure whether a particular situation presents an "objective necessity" as required by the necessity criterion to the power to remove difficulties. The Supreme Court's own, quite illustrative "providing nectar" elaboration of the constitutional limits to the power illustrates this ultimate indeterminacy by actually borrowing elements from each of the four criteria and thus combining them to one overall test of equitable appropriateness of the action. In accordance with the integrity criterion, the "nectar" doctrine appears to limit the use of the power to a minimalistic revival of suffocated provisions, or the filling of empty lacunae. But it is difficult to imagine any use of the power that would not at all contradict with the constitution, because various empty spots and silent provisions are also *part* of the constitution. In the context of the *Parajuli* case, the King had seen a "lacuna" in the fact that the Constitution would not allow him to perpetuate the RCCC beyond the state of emergency, which he – unlike his victims – argued as necessary. The "nectar" doctrine also limits the use of the power to furthering the overall goals and functions of the Constitution rather than altering them; but this was precisely what the King declared he was doing as he sacked his government, acting as the highest servant of the people and against the dissatisfactory political parties. And so on.

And yet, at some fundamental level, we know that there is a difference between the Royal Coup and the Order of March 14th 2013, as the former acted in the direction of centralising power to a monarch and preventing elections, while the latter merely sought to bring to existence a new democratically elected legislative body. The former deliberately hindered the process of constitutional politics, the latter sought to rejuvenate it. Future historians are likely to assess the events of 2013 in a very different light from those of 2005. Despite the frustrating ambiguities, all but the most dedicated Royalists or the most stubborn revolutionaries simply *know* that the Order of 2013 did provide "nectar" to the Constitution in a way that the Royal Coup did not.

To admit the ambiguous nature of the problem does not mean that an examination on the jurisprudential background of the power to remove difficulties would be futile or useless. Despite the fact that legal ambiguities remain, it can nonetheless be ascertained that the power to remove difficulties is a genuine (if highly controversial) constitutional legal doctrine, argued and opposed by many lawyers, but nonetheless part of the ongoing Nepalese constitutional tradition. As it is part of the language of law, it is through that language that it can also be tamed and mastered. Whatever its outcome is, we shall do well to identify it from among the stream of events and turns in the constitutional process of Nepal and study it in its appropriate legal context. I hope to have advanced that purpose with this article.