DEMOCRATIC CONSTITUTION MAKING
Experiences from Nepal, Kenya, South Africa and Sri Lanka

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Preface and Acknowledgement

Nepal South Asia Center, Collective Campaign for Peace, Nepal Federation of Indigenous Nationalities, Martin Chautari and International IDEA (Institute for Democracy and Electoral Assistance) organized a two-day long seminar and a three-hour public lecture entitled “Towards Inclusive and Participatory Constitution Making” on 3-5 August, 2004. The main objectives of the dialogues were:

• Sharing of national and international experiences of constitution making processes; and

• Drawing lessons from those experiences for future constitutional reform processes in Nepal.

This book is an outcome of that dialogue. Some of the papers in this collection were presented at the seminar and public lecture. After the popular April uprising, the political situation of the country changed drastically. The armed conflict was peacefully resolved. A new interim constitution was promulgated and all political parties agreed to elect a constituent assembly to draft a new constitution. All political actors have accepted the fundamental question of restructuring the state. Still madhesi and janajati communities are not satisfied with the interim constitution and they are demanding that it be amended to make the CA more inclusive. These events necessitated the inclusion of three new papers (chapters 3, 4 and 5), which analyze these new political and constitutional developments. The book, we hope, will help us understand the issues, constraints, challenges and opportunities of democratic constitution making.

We would like to thank all the contributors as well as the participants of the workshop and public lecture for sharing their views and ideas. We would like to thank Mr. Anil Bhattarai, the then Director of NESAC, for initiating the dialogue, compiling the papers and making initial preparation for the publication of this book. We would like to thank our NESAC colleagues Dr. Devendra Raj Panday and Prof. Birendra P. Mishra and Ms Leena Rikkila from International IDEA, who time and again encouraged us to publish the book. We thank Mr. Ajit Baral for his editorial support. Mr. Netra Acharya, Ms Sunita Roka and Ms Shanta Ghimire of NESAC are duly acknowledged for their respective supports.
Abbreviations

CA Constituent Assembly
CBS Central Bureau of Statistics
CPN Communist Party of Nepal
CPN (UML) Communist Party of Nepal Unified Marxist-Leninist
CIAA Commission for Investigation of Abuse of Authority
IDEA International Institute for Democracy and Electoral Assistance
MNO Mongol National Organization;
NESAC Nepal South Asia Center
NGO Nongovernmental Organization
NC Nepali Congress Party
NSP Nepal Sadvawana Party
NDP Nepal Democratic Party
NEFIN Nepal Federation of Indigenous Nationalities
NPWP Nepal Peasants and Workers Party
RJP Rastriya Janajati Party
SPA Seven Party Alliance
UNDP United Nation Development Program
Introduction

Inclusive and Participatory Constitution Making

Hari P. Bhattarai

A constitution is the supreme legal document on which all the laws, acts, delegated legislations and regulations of a country are based. Therefore, constitution making is an important part of the process of ensuring justice, peace, security and good-governance. Constitution making is also an exercise in democratic empowerment and can contribute significantly to nation-building. In order to ensure and incorporate the marginal voices, majority articulations and minority aspirations, a large number of key stakeholders at all levels must be involved in the making of a constitution. There should also be a reconciliation between mainstream and conflicting forces, and consensus among all the political forces on the constitution making process. Without this the constitution thus formed will have little legitimacy.

Past Experiences

The history of constitutionalism in Nepal chronicles a failure. In the last sixty years, five constitutions have been formulated. The first written constitution was drafted and promulgated in 1948 by autocratic Rana rulers as a response to growing popular demand for democratic rule in the country. The constitution envisioned a council of ministers holding all executive power but controlled by the prime minister and a weak bicameral legislature exercising limited jurisdiction. It made scant reference to the king and did not cite Hindu symbols as sources of the state’s authority. This constitution did not identify any marginalized or disadvantaged groups as needing special provisions. This constitution was drafted by a committee composed of three constitutional experts each from India and Nepal and promulgated by the Ranas without any public consultations.

The Interim Legislation of 1951 came into effect from mid-April 1951 and was promulgated by the then King Tribhuvan. This constitution ensured some fundamental rights such as the equality of wages between men and women, the rights to justice and humanitarian provisions like education
and economic upliftment of the weaker sections of society, equal rights to citizenship irrespective of religion, caste, ethnicity, birth-place. But no concrete measures were identified to address the needs of the marginalized groups. As in the previous constitution, people’s participation was not sought while drafting the constitution. This constitution was amended six times. The interim legislation was to be replaced by the constitution proposed by an elected constituent assembly (Joshi and Rose, 1966). But the constituent assembly was never formed.

In March 1957, King Mahendra formed a six-member constitution drafting commission. The draft was then promulgated in February 1958. Though this constitution made provisions for equality of citizenship irrespective of religion, caste, ethnicity and gender, and other basic fundamental rights, it was not drafted through the popular participation of the common people and was an imposed document (Brown, 1996). Sovereignty was vested in the king and the king had the power to impose an emergency if he thought the situation demanded it. The communists criticized this draft as being anti-democratic and demanded that the power to impose a state of emergency be wrested from the king. This constitution lasted until King Mahendra imposed an emergency and dissolved the popularly elected government of BP Koirala through a military coup in December 1960.

A constitution drafting commission was formed by the king in April 1962. The draft prepared by the commission was promulgated in December 1962. This constitution was drafted to ensure the autocratic regime of the king. No wonder all the powers of the state, including sovereignty, lay with the monarchy. The constitution was amended three times, and a few public consultations were done during the amendments, but these processes were token exercises (Dahal, 2001). So, despite the amendments, it turned out to be even more regressive than the previous ones.

The 1990 Constitution was drafted after the popular movement overthrew the autocratic Panchayat regime. A constitution drafting commission was formed by King Birendra on the recommendation of the then interim cabinet. The majority of the members of the commission were selected by the political parties which led the movement for the restoration of democracy. As compared to the previous constitutions, this one was drafted after wider consultations with the people. The commission members went to all of the 75 district headquarters of the country seeking submissions on the contents of the forthcoming constitution—both
written and oral—from ordinary citizens. Public discussions about the new constitution were held, even if mainly in the headquarters and among the elites. People were publicly asked to submit their suggestions regarding the new constitution in the boxes placed in various public places. Dalit groups submitted their demands for, among other, the establishment of a secular state, reservation, participation of dalits in the preparation of the law. But their demands were not included in the constitution. Moreover, the draft was not publicly discussed after it was prepared (Hutt, 1991).

The Constitution of 1990 had as its guiding principles the responsibilities of the state in safeguarding the needs of women, the elderly, children, the disabled and other marginalized groups. Untouchability was made punishable (Dhungel et al, 1998). But these provisions were not properly implemented. The political issues got inordinate attention, while specific issues of dalits, women, janajatis and other marginalized groups remained unaddressed.

**Lack of Inclusion and Participation: Rationale for a New Constitution**

A constitution is not just a legal document; it has to reflect the aspirations of all segments of society. People need to have a sense of ownership in the constitution. They should be able to say that it is their own document and not something handed to them by somebody in power. The 1990 constitution failed to properly represent all sections of Nepali society and could not gain support from the general public. The Constitution of 1990 therefore rightly came under sharp scrutiny. Questions were raised about the lack of people’s participation in its making, and exclusionary and discriminatory provisions in it. Women, dalits, janajatis, religious minorities and people from remote geographical regions began to assert that the 1990 Constitution was not representative and, therefore, a new constitution was needed. The debate gained greater salience as the Communist Party of Nepal (Maoist), which was waging the people’s war against the state, started to demand that a new constitution be made through a democratically elected constituent assembly as a way out from the current impasse.

Now the constitution has become perhaps the most publicly debated issue today. And proposals and counter-proposals have come from different quarters about the process of making a new constitution. All the political forces have, even if lately, realized that the Maoist conflict cannot be
resolved without addressing the constitutional processes. The constitution making process, therefore, has increasingly become a means of negotiating a political settlement in Nepal. Consequently, the major political forces in Nepal have agreed to make a new constitution through the election of a constituent assembly.

**Challenges**

The making of a democratic constitution is an important but difficult task. It has to incorporate aspirations and demands of the people of different socioeconomic status and backgrounds. Sometimes, it must pursue the conflicting goals of representing the peoples’ wills and forging a consensus regarding the future of the state. Besides, it must respect the universal principles such as human rights and the basic norms of democratic governance.

We have to overcome numerous challenges while designing and executing an inclusive and participatory constitutional process in Nepal. First and foremost is the challenge of creating popular pressure to make the constitutional process inclusive and participatory. Different civil society groups have publicized this issue and tried to get ordinary citizens involved in the process. But the political parties have shown only a lukewarm response to make the constitutional process more inclusive and participatory.

The second challenge is to incorporate and reflect the voices, aspirations, articulations of the diverse groups of people. But Nepal’s tremendous cultural diversity and wide socioeconomic variation make the issue of proportional representation more complicated. However, involvement of a large number of people in the making of a constitution can promote and strengthen the legitimacy of the constitution. The urgent need is to set out the basic principles governing the constitution making process (for example, the constituent assembly) and ensure that one group doesn’t dominate the process.

The third challenge is that of building a consensus among the existing political forces on the content and structure of the constitution. This is a hard task, given that the main actors in the Nepali polity doesn’t feel the need for such a consensus. The king’s supporters are demanding space for the monarchy while other political parties, excepting the Nepali Congress (which has yet to declare its position on the monarchy), are trying to build a consensus on democratic republic. Still there is distrust between
the Maoists and the mainstream political parties. The international community, which is very influential in Nepal, appears divided about the constitutional modality.

The fourth challenge is of making a democratic constitution in a multicultural state. How does one reconcile the central values of constitutionalism with the diverse aspirations of different linguistic, cultural and religious communities which are increasingly changing the formerly relatively harmonious profiles of citizens?

There is then the challenge of agreeing on principles. While the constituent assembly as a mechanism of making a new constitution is generally accepted now, what has not been discussed in detail is the question of principles that would underpin the constituent assembly. And also the existing political forces have not fully agreed on the processes and contents of the constituent assembly.

This volume is an attempt to address these and other inherent challenges of democratic constitution making, drawing experiences from Nepal, Sri Lanka, South Africa, and Kenya.

Outline of the Volume

This volume contains the papers presented during a two-day long seminar and a three-hour public lecture entitled “Towards An Inclusive and Participatory Constitution Making” held on August 3-5 2004 and four articles which we decided to include later to make it comprehensive and to incorporate recent political developments and discourses on constitution making in Nepal.

The book contains seven papers. The first paper by Mahendra Lawoti provides an overview of the 1990 Constitution with all its flaws and a proposal for a more inclusive and democratic constitution in a multicultural, multiethnic, multilingual, and multireligious society like Nepal. More specifically, he proposes electoral reform, a powerful upper-house and the federalization of the state.

The second paper by Hari P. Bhattarai, an anthropologist, discusses the issues of identity and the representation of different groups while making an inclusive constitution in a multicultural state. He mainly argues that the major problems of democratic constitution making in multicultural societies are diversity with disparity and the issue of meaningful
representation, which can only be addressed if the political culture is strong enough to hold political parties and civil society together, and a policy of inclusion sensitive to socioeconomic and cultural differences and variations is in place.

The new constitution cannot be made inclusive enough only by granting liberal participatory rights. The constitutional/legal provisions must also sanction a mutual recognition of different cultures and identities and provide the legal/constitutional and social security that will allow citizens to exercise their social and cultural rights.

Bhattarai concludes the article by saying that a constitution cannot reflect the real essence of multiculturalism if it recognizes several and diverse cultural groups only in the normative sense. He argues that it must accept a common political culture sufficiently represented by the aspirations of separate identities.

The third paper by Jhalak Subedi, a political analyst, deals with the political developments after the royal coup of February One, 2004. He critically summarizes the constituent assembly debates since 1950. The paper also presents a picture of the people’s movement of 2006 and describes events which forced the political actors to come together to overthrow the direct rule of the king and establish a new Nepal.

The fourth paper by Bhim Prasad Bhurtel is about the Interim Constitution 2007. The paper discusses the context and contents of the constitution. The author analyzes the contents of the interim constitution to see if they will be useful in making a new constitution through a constituent assembly.

The fourth paper by Nicholas Haysom, one of the main negotiators in the South African transition from apartheid to democracy, deals with the need for agreeing on principles before designing any constitution building processes. He outlines a number of concrete principles on which a successful constitutional process can be organized. Drawing on his experience of South Africa, he describes how parties with diverse and at times contradictory positions can arrive at common principals, howsoever tortuous the road they might have to take. The South African roadmap envisaged a two-phased negotiation process. In the first phase, the conflicting parties agreed on a set of non-negotiable principles. In the second phase, a constituent assembly was elected. All the parties involved were assured that their views and aspirations will be safeguarded
in the constitution to be drafted by the constituent assembly. After the constitution was drafted by the constituent assembly, it was sent to the constitutional court to examine if the draft was faithful to the set of agreed constitutional principles.

Haysom also describes the elements that are necessary for legitimizing the process and outcomes such as the need of multilateralism, benefits to all sides, legal continuity, transparency and confidentiality. In South Africa, initiatives of both citizens and political parties played a significant role in bringing major issues for discussion. He writes, the role played by various women’s groups was clearly reflected in the final constitution which affirmed non-sexist position in almost every page.

The process was not an easy one though and was characterized by “a roller coaster of hope and despair.” The issue of inclusiveness was the main preoccupation in the South African process. The electoral system was designed to be simple and inclusive.

In another paper, Yash Ghai, a noted constitutional expert, presents the Kenyan experience. At the core of his presentation is people’s involvement in setting the agenda of the constitutional process. He writes that the major political actors in Kenya were against the idea. He emphasizes the need of a participatory approach in constitution making. The demand for constitutional reform began in Kenya in response to the increasingly authoritarian tendencies among the rulers. This coincided with the end of cold war and emerging wave of democratization in the late eighties. The constitutional issues were raised by citizens’ groups and they themselves took the lead in initiating the process of drafting a new constitution. Through many national conferences, an inclusive coalition of citizens’ groups—religious communities, NGOs, social movements, professional groups—was able to identify concrete agenda for the new constitution. As the process rolled on the government was forced to set up a constitutional commission.

He also highlights the tension between political parties and civil society. As the process started, the parties in Kenya began to see the process going out of their control. They were not happy with the outcomes. They were only concerned with the issue of power whereas civil society was concerned with other societal concerns.

However, the task is not done once the constitution is adopted. Political engagement is necessary to regularly follow up on the implementation of
constitutional provisions. Moreover, the process of constitution making in itself can be a process of renewing the national identity, he states.

In his paper, Rohan Edrisinha’s writes how a constitution itself can became the biggest source of conflict and how in Sri Lanka the constitutional process is increasingly being seen as a way out from the current violent conflict. He emphasizes the need for scrutinizing the motives behind the constitutional reform proposed by President Chadrika Kumaratunga. According to Endrisinha, the President proposed constitutional amendments through a constituent assembly with the aim of consolidating her power rather than genuinely solving the crisis.

At the end, Jhalak Subedi presents the emerging issues of democratic constitution making in Nepal. Growing aspirations of disadvantaged people and their demand for proper representation in the constituent assembly, federalism are the emerging issues in current Nepali politics. The relation between the monarchy and democracy has not been clearly spelled out by the political parties. The interim constitution has not clearly defined the modality of restructuring the state. The political parties and civil society haven’t discussed the redistribution of the resources which provides the basis for equality and social justice. He says, long lasting peace and prosperity of the country is impossible if things remain the same.

Reference


Section One
Nepalese Experiences and Issues
Constitution as a Source of Exclusion: An Overview of the 1990 Constitution\textsuperscript{1}

Mahendra Lawoti

Introduction

The marginalized socio-cultural groups have repeatedly protested against various articles of the 1990 Constitution that they claim discriminate against them (NEFEN 2000\textsuperscript{a}; NSP 2050 v.s.; FWLD 2000; Khapangi 2058 v.s.). The dissatisfaction against the constitution began right after it was promulgated in November 1990. Even the moderate leftist groups, who were involved in the constitution engineering process, accepted it only with qualifications. The Communist Party of Nepal – 4th Convention (CPN – 4th Convention) and other radical communist parties and ethnic groups and parties rejected it outright or many articles of it (Hutt 1991; Baral 1998; Thapa and Sijapati 2003). The Nepal Sadawana Party (NSP) burned an article of the constitution in December 1999. Since 1996, the Maoists have begun an insurgency whose major goal is to replace the 1990 Constitution with a new one. The indigenous nationalities, dalit, and women have high participation in the insurgency, indicating their alienation from the state, including the constitution that governs it. Dominant group intellectuals have also pointed out various shortcomings, such as absence of decentralization in the constitution and non-establishment of effective corruption control mechanisms (Gyawali 2055 v.s.).

However, proponents of the constitution have argued that it is one of the best in the world, if not in South Asia\textsuperscript{2}. Many of the framers and their

\textsuperscript{1} A slightly different version of this article has appeared in Lawoti (2005). This article is meant for policymakers and intellectuals. Thus I have avoided academic jargons and theoretical discussions as much as possible. I would like to thank Sanjaya Serchan and an anonymous reviewer for comments and feedbacks.

\textsuperscript{2} See news coverage of speeches and seminars during the Constitution Day celebrations in November every year. Newspapers also often carry interviews with constitution drafters as part of the celebrations.
supporters still make the claim, even though the number is dwindling in recent years.\(^3\) Till 2003, the major mainstream political forces, such as the Nepali Congress (NC), Communist Party of Nepal–United Marxist–Leninist (CPN-UML), and National Democratic Party (NDP), supported the constitution almost totally, indicated by not even a single attempt to amend it. The question then becomes why some praise the constitution while others consider it highly problematic, so much so that they even consider that amendments would not be enough to salvage it? This paper will explore these questions. Before that, however, a survey of scholarly literature on the 1990 Constitution and constitutionalism in Nepal is warranted.

**The 1990 Constitution: Scholarly Reviews**

The scholarly critiques of the 1990 Constitution is mixed. Some good sides of the constitution have been identified, such as putting sovereignty on the people, the incorporation of human rights, right to information, privacy, and so on, especially by early reviewers (Ellingson 1991; Shakya 1995; Baral 1998)\(^4\). Compared to the Panchayat Constitution, it has recognized the cultural plurality of the country to a higher degree. Hardly any scholar questions that it is not better than the previous Panchayat Constitution. But the relevant question is how democratic is it, especially in terms of other contemporary democracies in developing world?

Critics have shown its weakness in several aspects: the procedural aspect where the constitution was formulated by a select group of people—representing the king, NC, and United Left Front (ULF) politically and caste hill Hindu elite males (CHHEM) socially—within a short period of time (Hutt 1991; Lawoti 1999; Hoftun, Raeper, and Whelpton 1999; Mikesell 1999). Others have shown its ignorance of the minority issues, non-recognition of marginalized socio-cultural groups equally, and articles that discriminate against women, indigenous nationalities, and madhesi (Gurung 2000; Lawoti 2002b; Bhattachan 1995, 1999b; Yadav

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\(^3\) See Upadhaya (2003) for a recent dominant intellectual perspective on the issue. He is blissfully ignorant of the opposition of the constitution by the marginalized socio-cultural groups, Maoists and others.

\(^4\) See (Upreti, Shrestha, and Thapa 1997; Dhungel et al. 1998) for reviews of different aspects of the constitution. The collected works are very elaborate and wide in their scope.
Marxist scholar Mikesell (1999) has argued that the constitution only serves the interests of the entrepreneurs and bureaucrats and does not serve the urban poor and rural mass. Still, others have shown its shortcomings indirectly by proposing alternate state structures such as federalism and proportional electoral system (Khanal 2003; Bohora 2002; Bhattachan 2003a; Lawoti 2003b). Critics have also pointed out that the king still retains power, especially in terms of influence over the army (Mikesell 1999). Others have argued that the 1990 change did not hand over power to the people. Instead, the king’s power was taken away but kept with the top political leaders by concentrating it at the center (Brown 1996; Lawoti 2002b).

The review of the literature on the constitution makes it clear that there are both positive and negative aspects. No review has, however, focused specifically on the impacts of the constitution on the socio-cultural groups. Baral (1998) does review the constitution in terms of ethnicity but his analysis praises the positive aspects of the constitution but fails to notice the discriminatory articles, except for the absence of secularism. He also fails to note the widespread discontent toward it from the women, indigenous nationalities, madhesi, and dalit. This work will attempt to fill the gap by particularly focusing on impacts of both aspects of the constitution on the marginalized groups. How are the different aspects affecting the marginalized socio-cultural groups? How have the discriminatory articles affected the marginalized groups? Have the positive aspects of the constitution contributed in the inclusion? Needless to say, the argument of this work is not that every aspect of exclusion can be explained by the constitution. Social and historical factors are also at work but my argument is that the constitution is playing a significant role in the continued exclusion of the marginalized groups. Likewise, I would like to make clear that this study does not look at the exclusion aspect from a pure class perspective.

This article will base its evaluation on the role constitutions are supposed to play. It assumes, based on theories of constitution and constitutionalism, that a ‘constitution contains two basic elements: a “plan (or frame) of government,” and a “bill of rights”’ (Sartori 1962: 856). Specifically, the question I ask here is: has the 1990 Nepali Constitution provided a frame of government that can include different socio-cultural groups and does it protect the social, cultural, and political rights of all socio-cultural groups of the country?
The 1990 Constitution and Exclusion

The role of the 1990 democratic Constitution in the exclusion of the socio-cultural groups can be understood more fully if we analyze the political institutions it has adopted and its various articles that deal with language, religion, culture, and gender, going beyond its general articles that declare equality and freedom to all. I will elaborate on them to demystify the claims of people who praise the constitution. Box 1 summarizes the discussions that follow and lists additional ways in which the constitutional discrimination has impacted the various socio-cultural groups.

Majoritarian Political Institutions in a Multicultural Society

The last 13 years have clearly demonstrated that the political institutions in Nepal have failed to include the diverse socio-cultural groups. The political exclusion, in fact, increased in different sectors after the adoption of the democratic political institutions. Thus, the institutions are a major reason for the exclusion (Lawoti 2002b). The majoritarian democratic political institutions, such as a unitary state (instead of a federal structure) and first past the post (FPTP) electoral system, adopted by the constitution, are a major reason for the political exclusion in Nepal (Lawoti 2002b). These structures set the rules of the game that favors the dominant group. Majoritarian institutions have been found to exclude non-dominant socio-cultural groups in multicultural societies (UNDP 2000; Horowitz 1994). Scholars have also found that violent conflicts occur more often in countries with majoritarian institutions (Saideman et al. 2002; Cohen 1997)\(^5\). The majoritarian institutions may work in homogenous or non-plural societies but not in multicultural societies. They give most of the power to whoever gets a bare majority and nothing substantial to minorities (Lijphart 1984). In multicultural societies, it results into the monopoly of power by the dominant group. This often facilitates the tyranny of the majority.

The institutions that work in culturally plural established democracies are called consensus institutions.\(^6\) The consensus institutions, as opposed

\(^5\) Culturally plural societies are those that have significant cultural cleavages that affect politics whereas non-plural societies are those where political mobilization based on cultural cleavages is not significant.

\(^6\) Lijphart (1977; 1969) called an earlier variant of it as consociational democracy.
to majoritarian institutions which concentrate power, diffuse and share power. This is achieved through explicit power division (power divided among more than one level of government), sharing (involvement of more than one group in the executive, administration etc.), recognition of differences, and the protection of minority rights. The consensus institutions compensate disadvantaged groups for the disadvantages they face in the polity. The consensus institutions work in multicultural societies because they can address both class and cultural cleavages found in multicultural societies.

The majoritarian principle, though sound theoretically, has been found to fail in multicultural societies because of two reasons. First, the majoritarian institutions do not address cultural cleavages that exist in multicultural societies. It can only address class cleavages. A unitary state, which is a principal majoritarian institution that concentrates power in the center, deprives socio-cultural groups with autonomy and self-governance, which is essential for the self-development of socio-cultural groups. Recognition of group differences and group autonomy are essential to address cultural cleavages. When power is concentrated in the majority, the non-majority cultural groups in a multicultural society may not have much say in governance for a long period of time. In cultural issues, they may always lose. Such problems do not arise in homogenous or non-plural societies because the societies are not divided along cultural lines. The contested issues in non-plural societies are mostly political and economic, which are not permanent. People often change their attitudes toward political and economic issues. Thus, the political and economic majority keeps on changing. Today's political/economic minorities become tomorrow's majority. Thus, everybody has a chance to become a majority. On the other hand, in multicultural societies, cultural cleavages are durable and majority-minority dynamics along cultural cleavages is more or less permanent. Thus, the cultural minorities will perennially remain minorities in cultural matters if the polity is based on strict majoritarian principles (Dahl 1989; Lijphart 1984; Horowitz 1994; Gurr 1993; Guinier 1994).

Second, majoritarian institutions do not protect group rights of the minorities. Heavy reliance on the principle of universal individualism undermines group rights. The notion of individualism assumes that if every individual is treated equally or provided with the same formal equality, equality will be achieved. However, such principles can create problems in multicultural societies (Young 1989; Kymlicka 1995 a). Socio-cultural
groups have different values, norms, lifestyles, and worldviews whereas rights guaranteed by the constitution based on universal individualism are often based on the values and norms of the dominant group. Thus, it facilitates imposition of the dominant values and norms on the rest of society. When competition for resources occurs among members of different groups, norms and standards based on dominant values favor members of the dominant group. The formal equality guaranteed in the constitution based on individualistic principles, hence, cannot ensure equal rights among individual members of different socio-cultural groups. When groups are not equal, members of the unequal groups cannot become equal. Thus, despite the formal equality guaranteed to individuals, the members of different socio-cultural groups face differential consequences. For instance, despite the guarantee of equal individual rights in the constitution to all Nepali citizens, a madhesi, because of his/her identity, is either unable to acquire a citizenship or faces sever difficulty in acquiring it (details of the constitutional discrimination will be discussed in a later section). Likewise, the formal guarantee of equality in the constitution has not ensured equality to women in citizenship distribution. Nor has the guarantee of formal equality ensured equality among members of different linguistic, religious, and cultural groups. Individual members of indigenous nationalities and madhesi and Muslim community face many hurdles in their everyday life. For instance, in a Hindu state where more than 70 percent of public holidays are on Hindu festivals, the indigenous nationalities and Muslim get holidays during the Hindu festivals while they do not get a single public holiday during their own festivals. Likewise, when the political institutions are adopted, the dominant group’s choices prevail and the institutions thus adopted are imbued with the dominant values and norms (Kymlicka 1995a; Brass 1991; Tully 2001). In Nepal the state institutions are imbued with the CHHEM values. This means that the group rights of the dominant group are protected but not of the minorities. Such a subtle discrimination has contributed to the exclusion of various socio-cultural groups.

Members of different groups cannot become equal if groups are treated unequally by the state. A person whose language is discriminated and whose religion is not equally recognized cannot compete in equal footing

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7 After 1990, members belonging to some ethnic/ caste groups have been provided the right to take off holidays during their major festivals. But it is not equivalent to public holidays. Here it should be noted that the dominant group is not a numeric majority.
with a member of the dominant group whose religion, language, and culture is promoted by the state. In such circumstances, declaration of formal individual equality in fact discriminates because it does not recognize ethos and norms that are different.

Oftentimes, the problems may occur because the state has to select one option among different alternatives. For instance, if the state has to adopt one medium language, it will probably end up adopting the dominant language. The process will hurt groups speaking other languages. The solution in such cases might be to make several medium languages, as in Switzerland, Belgium, and India. Or to compensate other groups for the disadvantages they might have to face. When the group rights of the minorities are recognized and the disadvantages they face are compensated, the playing fields will become level. Individual members of the minority groups get equal opportunities. Hence group rights can promote individual equality among members of different groups.

Racist and Sexist Elements in the Constitution

The second reason for the exclusion of various socio-cultural groups due to the 1990 Constitution is the racist and sexist nature of many of its articles. The 1990 Constitution (HMG Nepal 1990) is racist because many of its articles promote one language (Khas-Nepali, the native language of the dominant group), one religion (Hindu), one community (hill ‘upper’ caste Hindus), and one culture (that of CHHEM) and discriminates, constrains, or does not recognize other cultures and groups. Here I follow the UN definition of racism, which is supported by academic literature. According to the UN Convention, ‘racial discrimination’ is ‘any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political,
economic, social, cultural or any other field of public life’ (Convention on the Elimination of All Forms of Racial Discrimination 1969).

Many of the discriminatory articles are tucked behind nice charade of rights and freedoms. Hence, they are often not observed by untrained eyes. Discussion of the articles that deal with language can illustrate this. The article 11.1 of the constitution (hereafter the constitution articles will be termed as articles) says that ‘All citizens are equal before law.’ Article 18.1 states that ‘Each community residing within the Kingdom of Nepal shall have the right to preserve and promote its language, script and culture.’ Likewise, the Kingdom is recognized as ‘multilingual’ in article 4. These provisions convey a broad sense of equality among native languages of Nepal and their speakers. However, other articles of the constitution discriminate against non Khas-Nepali native languages and communities. For instance, the constitution explicitly constrains the development of non Khas-Nepali native languages. According to article 18.2, communities are permitted to operate schools in their own mother tongue up to primary level only. This article constrains the right to operate native language schools beyond primary level. The article can also be construed as not permitting non-community members to operate schools in various Nepali native languages. Additionally, article 6.1 gives Khas-Nepali special recognition by calling it ‘the language of the nation of Nepal’ while article 6.2 calls other native languages as ‘national languages.’ Article 6.1 also declares only the Khas-Nepali as the official language. These articles have clearly created inequality among native Nepali languages. Further, it may be no coincidence that articles 11.2 and 11.3 that define the right to equality, omit ‘language’ as a basis on which the state would not discriminate (‘religion, race, sex, caste, tribe or ideological convictions’ are clearly mentioned as basis for non-discrimination)\(^{10}\). Likewise, language is also a ground for discrimination in the acquisition of citizenship by foreigners. Only those who ‘can speak and write the language of the nation of Nepal’ or Khas-Nepali are eligible for acquiring Nepali citizenship. Similar privilege is not awarded to persons who learn other native Nepali

\(^{10}\) Here it should be noted that the term ‘Nepali’ to denote mother tongue of the dominant group itself is a political move. It used to be called ‘parbate’ or ‘Khas-kura’ till the early twentieth century. Ethnic activists argue that by calling one language ‘Nepali,’ it sends a signal as if other native languages are not of Nepal.
languages\textsuperscript{11}. When native languages are not recognized, treated equally, or are discriminated against, the language speakers also face non-recognition and discrimination. Hence, equality guaranteed in various articles (11.1, 4, 18.1 and others) becomes meaningless due to other articles that discriminate (18.2, 6.1, 6.2, 11.2, 11.3). In such circumstances, articles, such as 11.1, that say ‘All citizens are equal before the law’ have failed to provide equality to non Khas-Nepali native languages and their speakers.

Likewise, the constitution is sexist because it does not treat men and women equally in fundamental issues like citizenship. The constitutional provisions (article 9.1 & 9.2) that allow the acquisition of citizenship through father’s lineage only discriminate against women. The children of Nepali women married to foreign citizens cannot obtain Nepali citizenship. In fact, this article is more regressive than the Panchayat Constitution, which did not discriminate on the right to citizenship based on gender (Mikesell 1999; Lawoti 2000a). Women are also discriminated by the more stringent eligibility requirements for citizenship acquisition by foreign spouses of Nepali women compared to Nepali males’ foreign spouses (Article 9.5)\textsuperscript{12}. Additionally, hordes of laws flowing from the constitution discriminate against women in property inheritance, penal laws, marriage, divorce, and so on (FLWD 2000).

The racist and sexist nature of the constitution can be assessed indirectly also. If we analyze the ethnicity/caste of the people who have called the 1990 Constitution as ‘one of the best in the world,’ there is little surprise. Most of them are male Bahun (the hill ‘high caste’ group)\textsuperscript{13}. It

\textsuperscript{11} Article 11.2 states that ‘No discrimination shall be made against any citizen in the application of general laws on grounds of religion, race, sex, caste, tribe or ideological conviction or any of these.’ Article 11.3 states that ‘The State shall not discriminate citizens among citizens on grounds of religion, race, sex, caste, tribe or ideological conviction or any of these.’ As noted in the text, ‘language’ is omitted in these articles.

\textsuperscript{12} One could as well say that by making it easy for the wives than husbands to become citizens, the provision discriminates against men. However, this does not hold ground when we are discussing the rights of the citizens: the men who are discriminated against are not Nepali citizens.

\textsuperscript{13} Some have said that male Bahun have revolted against the constitution as well (The Himalayan Times Editorial 2003). The Maoist male Bahun have revolted because of their ideological disagreement, not because of their cultural dissatisfaction. The people who praise the 1990 Constitution are those whose political ideology as well as ethnic interests are in congruent with the constitution.
is understandable why they praise the constitution: it is promoting their interests, protecting their privileges, and continuing their domination. And, it is being done with a democratic façade and legitimacy. The following sections will demonstrate the various exclusionary consequences of the racist and sexist articles of the 1990 Constitution.

**Explicit Discrimination and Political Exclusion**

The discriminatory articles operate at several levels. Explicit discrimination is the first level. Many articles explicitly discriminate against marginalized socio-cultural groups, their cultures, and ways of life. The Nepal Federation of Nationalities (NEFEN)\(^{14}\) (2000) says that the constitution has more than 25 discriminating articles toward the indigenous nationalities. The madhesi, women, dalit, and minority religious groups have also deplored articles that discriminate against their groups, culture, religion, and languages (Yadav 1997, NSP 2050, FLWD 2000).

**Discrimination in Citizenship Acquisition:** As discussed earlier, discrimination occurs even at a fundamental aspect such as citizenship right. The impacts of discriminating citizenship articles toward the women (article 9.1 and 9.2), which was discussed earlier, may not deny citizenship to many, even though the symbolic impacts are huge. The children can acquire citizenship from the father’s side also. However, the restrictive citizenship clauses have much broader impact along identity lines. Article 8.a makes it almost impossible for people whose parents had not obtained citizenship certificates earlier to acquire it now. Many Nepali, especially the poor and illiterate in rural areas, did not obtain citizenship certificates when they were distributed because citizenship certificates had no use then. Now, the off springs are facing difficulties in acquiring citizenship certificates because their fathers do not have the citizenship certificates, through which the children become eligible to acquire citizenship certificates\(^{15}\). This article has denied citizenships to more than 3 million adult Nepalis, mostly from the madhesi community (NSP 2050 v.s.; Burkert 1997; Upadhaya 2052 (1995)), but also to indigenous nationalities and dalits (Bhattachan 2056 (1999)). When people are

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\(^{14}\) The name was modified to Nepal Federation of Indigenous Nationalities or NEFIN in 2003.

\(^{15}\) Madhesis face greater problems because the hill-people dominated administration suspects the madhesi who do not have citizenship certificates as recent migrants from North India.
denied or have difficulties in obtaining citizenship certificates, which is needed in everyday transactions, ranging from obtaining employment to purchasing land and houses to acquiring passports for traveling abroad, they are deprived of their basic rights as citizens and it contributes toward excluding them politically.

**Hindu State:** A major source of racism and sexism in the constitution is the declaration of the state as Hindu. Articles 11.2 and 11.3 state that the constitution is against discrimination on the basis of religion but article 4 explicitly declares Nepal as a Hindu state. By declaring one religion as the state religion, it treats other religions and their followers unequally. The declaration has symbolic as well as practical consequences. Symbolically, the Hindu religion followers might perceive that they have more rights to the state and its resources and may consider themselves superior to other religion followers. The non-Hindus, on the other hand, might feel themselves as second-class citizens because they have to live in a society where some other religion is the state religion.

The declaration of the state as Hindu has many negative practical consequences for the ‘low caste’ Hindus, madehsi Hindu, women, and secular people. How can non-Hindus feel equal and included in a Hindu state? How can ‘low caste’ Hindus expect to be treated equally in a Hindu state with prevalent caste system? The Hindu traditions and norms prevalent among the ‘upper caste’ group usually consider the ‘low caste’ as inferior, subconsciously if not consciously. The declaration provides sustenance and support to the discriminating Hindu traditions and values and contributes in the continuation of the social and legal discrimination. The declaration has facilitated the state institutions and policies to be imbued with CHHEM norms and values.

Likewise, how can women expect to become equal legally and socially in a Hindu state where the laws are influenced by patriarchal Hindu

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16 Even the claim that Hinduism is a religion of the majority is suspect because of questionable methods and techniques used in the enumeration process. For instance, the census did not provide ‘secular’ or ‘atheist’ variable as a choice in the religion category. Nepal would in all likelihood have a big pool of secular people due to the large numbers of communist cadres and voters. Around 40 percent of voters voted for the communist parties in the general elections of 1990s. The communists, even today’s moderate ones like the CPN-UML, have gone through radical socialization, and secularism has always been an important issue in their socialization.
dharmasastra (religious texts)? Since Hindu is defined in Nepal as parbate Hindu, the madhesi Hindus may also perceive of being discriminated against (for instance, the 1854 Civil Code put the madhesi Brahmin below hill Chhetri). Similarly, the constitutional provision banning religious conversion has been used against the Muslim and Christian communities to harass them on charges of canvassing for conversion. When their religions are not recognized equally and are, in fact harassed, or are treated as ‘inferior’ by the tradition of the state religion, people of different religious faith are disadvantaged. The inequality disadvantages them in competition with members of the dominant group in social, economic, and political sectors, contributing in their political exclusion.

In Nepal, some commentators from the dominant group argue that as many countries have declared themselves as Muslim states, there is nothing wrong in declaring Nepal as a Hindu state. The Muslim countries cited, however, are not democratic and Nepal should not aspire to follow the footsteps of undemocratic countries. Likewise, others argue that despite being secular, India has not been able to avoid religious conflicts. However, a pertinent question is how much more religious conflicts would India have faced if it had not been declared secular? India may have disintegrated. If not, it may have encountered more religious conflicts. Additionally, the quality of Indian democracy would have been much lower if minority religions and their followers had faced more discrimination. On the other hand, declaring the Nepali State as secular will not restrict the rights of the Hindu religious followers. They can continue to practice it. The appropriate issue is that people may need religion but why should a state adopt one?

**Restrictions on Associations:** As an underprivileged group oppressed based on their identities, oppressed socio-cultural groups have reasons to mobilize themselves around the issue of identity. Scholars have pointed out that caste associations and political mobilization based on them have helped to empower the traditionally oppressed groups in India (Rudolph and Rudolph 1960; Rudolph and Rudolph 2002). However, in Nepal, the marginalized socio-cultural groups’ freedom of association has been restricted. Two types of formal restrictions exist.

First, the constitution bans political parties based on ‘religion, community, caste, tribe or region’ (article 112.3). Accordingly, the Election Commission denied registration to the Mongol National Organization (MNO) and Nepal Rastriya Janajati Party (RJP). Because
of the registration denial, among other things, the MNO had to field candidates formally as independents, not as a political party’s candidates. Additionally, it was not awarded a permanent party symbol for elections (Hangen 2000). These constraints disadvantage ethnic parties like the MNO. Other ethnic parties obtained registration by presenting a non-ethnic facade. These maneuvers to bypass the constraints have blunted the political effectiveness of ethnic parties as their operations are hindered, their vulnerability increased, and their freedom restricted. The ban has constrained the oppressed socio-cultural groups to politically mobilize for collective welfare and empowerment. These restrictions, on the other hand, also limit the universal adult franchise guaranteed by the constitution by denying voters wider choices of political parties.

The fear held by dominant members that formal ethnic oriented parties would foster communal conflicts is without merit, as demonstrated by experience of other countries. ‘Christian’ parties, the Muslim league, the Telegu Desam, and so forth operate freely in a host of established democratic countries like Germany, Belgium, Holland, Switzerland, and India etc. The communally and religiously named parties in democracies have not created problems but, in fact, such parties have contributed in aggregating and articulating the aspirations of different groups, regions, and segments of societies. It has contributed in helping to meet some of the demands and preventing violent ethnic conflicts. Powell (1981: 862 and 870) found that among different party systems around the world, representational party system, where ‘strong and distinct linkages between different parties and social groups’ exist, performed better than majoritarian party systems (similar to current the Nepali party system) in terms of higher participation, executive stability, and preventing violence (riots, deaths, and suspension or overthrow of democracy). In fact, the assumption for banning ethnic parties in Nepal exposes racist attitudes. The dominant assumption is that all members of ethnic groups will vote for respective ethnic parties that claim to represent them. This hardly happens in reality.

Second, the constitution articles 12.2.1, 12.2.3, and 12.2.4 permit restriction of fundamental rights such as the freedom of association, assembly, and expression if the state perceives threat to ‘harmonious relations subsisting among the peoples of various castes, tribes or communities.’ The restrictions are, interestingly, longer than the articles that describe the rights (Ellingson 1991). The mention of ‘castes, tribes or communities’ in clauses that permit legislation of laws to restrict
fundamental rights has unnecessarily targeted the disadvantaged socio-cultural groups. If the intention is to manage peace and harmony in the society, any law that does not mention ‘castes, tribes or communities’ can achieve that. The irony in Nepal is that the communal state (because one community controls it and governs based on its values) considers activities that demand linguistic, religious, and cultural equality as ‘communal’ (Gurung et al. 2000; Gurung 1993; Bhattachan 1995). Because the administration is overwhelmingly dominated by the CHHEM, and because of it the laws are often interpreted with the dominant perspectives, the socio-cultural groups’ activists have to work with threats of their freedom and civil liberties being taken away and prosecuted for being ‘communal.’ These clauses that restrict the fundamental political rights and civil liberties based on ‘castes, tribes, or communities’ constrain the socio-cultural groups from enjoying full freedom. Needless to say, they restrict their political aspirations, activities, and effectiveness, which in turn have contributed toward their political exclusion.

Omission of Minority Rights: Implicit Discrimination and Exclusion

In established multicultural democracies, minority rights are enshrined in the constitution. A country is not considered a democracy if it does not safeguard minority rights. In Nepal, however, minority rights are not protected in the constitution. This is strange because protecting minority rights is one of the most fundamental aspects of democracy in multicultural societies. Without protecting minority rights, minorities in societies may face ‘the tyranny of the majority.’

The 1990 Constitution does not recognize or acknowledge customary and personal laws of minority religions and communities like Muslim, Buddhists, and indigenous nationalities nor the land rights of the indigenous people (Subba, Pradhan, and Angbuhang 2000). Some of the customary laws of the non-Hindu communities, which are not recognized by the laws, are in fact egalitarian and progressive. For instance, some forms of inheritance rights to women exist in Buddhist, Muslim, and some of the indigenous nationalities communities. However, since the legal system, following the Hindu tradition, favors males in inheritance rights, relatively progressive customs and practices of non-Hindu groups and communities are under threat.

Instead of recognizing progressive customary and personal laws, the constitution has helped to impose regressive laws (such as discriminatory
citizenship rights and inheritance laws) based on the Hindu traditions on the whole society. The ‘upper caste’ Hindu biased constitutional provisions and laws have forced non-dominant groups to conform to the dominant values systems and customs. In issues such as inheritance, marriage, divorce, criminal laws and so on, minority communities have been forced to abide laws based on Hindu norms (Ansari Forthcoming; Lawoti 2000 a).

Further, in established democracies once the minority rights are enshrined in the constitution, the amendment procedures are made very difficult to protect the rights. In Nepal, on the other hand, the rigid constitutional amendment procedures exist but they are working in a perverse way. The rigidity in amendment procedures has made abolishing the discriminatory articles very difficult. Thus, the rigidity in the amendment procedure is perversely safe guarding the domination.

The absence of minority rights has facilitated exclusion in at least two ways. First, in absence of minority rights the discriminating constitution articles undermine the socio-cultural and political rights of marginalized socio-cultural groups in an unhindered manner. The CHHEM dominate the marginalized socio-cultural groups juridically. Second, since the normal majoritarian processes facilitate domination of the dominant group, the absence of group rights of the minorities means that the marginalized socio-cultural groups face disadvantages in everyday life. Members of groups which are treated unequally by the state and its constitution cannot compete with dominant group members who are favored by the state, its institutions, and laws.

Biased Laws and Public Policies

Discriminatory common laws, acts, and public policies derived from the discriminatory constitutional articles further reinforce discrimination of the marginalized socio-cultural groups.

**Box : Constitutional Discrimination and their Impacts**

1. Declaration of the state as Hindu (Article 4). Promotion of Hindu religion; unequal treatment of other religions by the state.
1.1 Excessive propaganda of Hindu religion by Royal Nepal Academy, Radio Nepal and other state agencies while neglecting other religions.

2. Inequality between native languages
2.1 Nepali or Khas-Nepali has been declared ‘the language of the nation’ and official language; other native languages have been called ‘national languages’ (Article 6).

2.2 Constitutional provision for teaching non Khas-Nepali native languages up to the primary level only, but not beyond it (Article (18.2).

2.3 Compulsory imposition of Sanskrit in schools till 2003 (being planned to offer as an optional course).

2.4 Large & disproportionate state subsidy for promotion of Khas-Nepali and Sanskrit.

2.5 Unequal treatment between Khas-Nepali and other native language literatures and between devangiri and other native scripts.

3. Discrimination in citizenship distribution.
3.1 Based on gender: acquisition from mother’s lineage is not allowed & foreign spouses of Nepali women are not eligible for acquiring Nepali citizenship (Article 9.1, 9.2, & 9.5).

3.2 Based on language: only foreigners who learn Khas-Nepali language are eligible (Article 9.4a); foreigners who learn other native languages are not extended the privilege.

3.3 Based on community identity (application of Article 8a); more than 3 million adult Nepalis without citizenship certificates.

4. Restriction on registering political parties on the basis of religion, community, caste, tribe or region (Article 112.3).

5. Restriction on freedom of opinion and expression: laws can be made to impose restrictions on acts that may disturb relations between ‘castes, tribes and communities’ (Article 12.2.1).

6. Restriction on freedom to form unions and associations: laws can be made to impose restrictions on acts that may disturb relations between ‘castes, tribes and communities’ (Article 12.2.3).

7. Minority symbols and heroes not included as national heroes and symbols.
8. Overwhelming public holidays declared on dominant-group festivals. Some groups do not have any public holidays on their festivals.

9. Annexation of native place, river, mountain names and other titles by the dominant names.

10. Laws based on parbate Hindu male ideology.

10.1. Laws are based on patriarchy.

10.2. Divorce, marriage, inheritance laws are based on Hindu norms.

10.3. Criminal laws based on Hindu values, e.g. 12 years imprisonment for killing cows.

11. Discrimination in accessing education based on caste, community and religions.

11.1. State subsidized free residential education (up to Ph.D) in Sanskrit schools & University. Accessed mostly by male Brahmin.

11.2. The lack of state support to native language educational institutions.

11.3. The lack of recognition of education provided by madrasaas and Buddhist monasteries.

12. Discrimination in preserving different cultures.

13. Manufacturing and tampering of the census data.

14. Excessive stereotyping based on caste, region, gender, ethnicity and religion.

14.1. Derogative sayings, morals, proverbs, and songs that denigrate women and minorities.


15. Restrictions on conversion (Article 19.1) but Hindus are free to claim others as Hindus.

16. Transmission of disproportionate radio programs in Khas-Nepali language.

17. Under representation and misrepresentation of minorities in media.

18. Public service exams based on dominant values and norms and in Khas-Nepali language.

Source: Lawoti (2002). Article numbers indicate articles of the constitution.
Biased Laws: According to NEFEN (2000a) there are more than 40 legal provisions on marriage, citizenship, criminal punishment, land rights, election codes, associations and meetings, forests, alcohol, education, land taxation and so on that are harmful to the indigenous nationalities. More than 100 legal provisions discriminate against women in citizenship, inheritance, penal, marriage, divorce, trafficking, rape, employment and so on (FWLD 2000). The dalit, Muslim, and madhesi have also complained against various discriminatory laws. The foundation of these discriminating laws is the constitution.

Additionally, some common laws work against some of the positive spirits of the constitution. For instance, there are several loopholes in the Civil Code and other laws that have been exploited to continue the practice of untouchability17. On the other hand, even though the constitution is clear on ending some of the social discrimination, laws have not been legislated to implement them. For instance, even though the constitution has ended untouchability and made provisions for punishing untouchability practices, no laws have been legislated. Absence of laws that make the state responsible for initiating actions against untouchability has also allowed the practice to continue. The dalit are often too weak economically, socially, and politically to wage legal battles.

17 For instance, adal 1 and 10 of mahal 19 stipulate imprisonment and fine for disturbing religious places, activities and social practices. In adal 1 the term used is kunai (any). If the provision is intended for not disturbing other religious groups’ sacred places and practices the term used should have been kasaiko (others) instead of kunai. Then the law could have prohibited disturbing religious places and practices of other religions. The current word used, kunai, can be misinterpreted to mean that any religious place and practice may not be disturbed, even if it is of ‘high-caste’ groups within the Hindu religion, implying that Hindu dalit may not disturb worship places of the ‘high-caste’ Hindus. Chief District Officers in several districts have cited this provision to prohibit dalits from entering temples (INHURED International 2000). Their argument is that the law prohibits them from entering temples, even if they are Hindus, if the local society does not want them to because temple entrance has traditionally been limited to the ‘high caste’ group members, interpreting the law to prohibit disturbances of traditions of ‘any’ group of people, including the ‘high-caste’ Hindus. The preamble, adal 10 of mahal 19 of the Civil Code are other laws that are instrumental in discrimination. Dalit activists fear that the Local Self Governance Act (2055 v.s.) which gives local governments authority to provide cremation grounds is a potential source of discrimination as local leaders may use it to exclude the dalits since untouchability is pervasive in rural areas and often perpetuated with the complicity of the local elite.
Biased Public Policies: At the policy level, the discriminatory constitutional articles have provided the basis for biased public policies, such as imposition of Sanskrit and the exclusion of socio-cultural groups in symbolic realms (national heroes, stamps, place names, road names etc.), public holidays, and so on (Lawoti 2000a; Neupane 2000). The irony is that the state spends millions of rupees to promote Khas-Nepali language while many native languages face the threat of extinction due to lack of support. The state owned Radio Nepal and the Royal Nepal Academy excessively promote Hindu religion and Khas-Nepali language. In a study conducted in 2001 on Radio Nepal, Yatru (2058 v.s) found that 14 native indigenous nationalities and madhesi languages that were broadcast accounted for only 7.84 percent of the broadcast time while Khas-Nepali alone accounted for nearly 90 percent, the remaining time allocated to broadcast in English, Hindi, and Urdu. Scholars have also recorded replacement of indigenous place, river, and mountain names by Hindu and Khas-Nepali names (Malla 1996). Likewise, ethnic/caste and religious scholars accuse the state of tampering the census data to project higher domination of the Hindu religion, Khas-Nepali speakers, and CHHEM group (Bhattachan 2003b; Mabuhang 1999 b; Gurung 1998). The suspicion of the census tempering was so high that prior to the 2001 census, different ethnic/caste, religious, and linguistic organizations launched awareness movements to minimize the tempering. Likewise, the disproportionate public holidays on Hindu festivals promote the Hindu culture. The lack of holidays during festivals of other groups, meanwhile, undermines their cultures because they cannot celebrate their festivals.

Absence of Affirmative Action Policies: The policies of the state (article 26.10) does say that the state ‘shall pursue a policy which will help to promote the interests of the economically and socially backward groups and communities by making special provisions with regard to their education, health and employment.’ This directive could have paved the way for formulating special policies toward the marginalized socio-cultural groups. However, for more than a decade no special provisions were made for the marginalized groups18. On the other hand, even though the directive seems progressive, it has several weaknesses. First, it does not recognize castes, tribes, religious, and linguistic groups as economically

18 In 2003, the government declared that it would create 10, 10 and 20 percent reservations for dalits, indigenous nationalities and women respectively in the civil service. The policy has yet to come out at the time of writing.
and socially backward groups. This is interesting because the constitution specifically mentions castes, tribes, religious, races, communities, and linguistic groups in restrictive articles. For instance, the articles that discuss restrictions of fundamental rights (article 12) and the subarticles in the directive principle and state policy that discuss establishing harmony (article 25.3) through control of conflicts (article 26.3) in the society specifically mention identity characteristics. The mention of socio-cultural groups specifically while discussing restrictions but not mentioning them while discussing affirmative policies further demonstrates racist tendencies toward the marginalized socio-cultural groups. Second, the directive principle and state policies are not enforceable. This, at least, shows the lack of far sight of the constitution engineers. They should have realized that the polity, which is overwhelmingly dominated by CHHEM, would probably not enforce affirmative action policies. Hence, they should have made it enforceable, as in India. Third, following on the second point, the state policies do not mention specific programs. Some might argue that such details are not warranted in a constitution itself. However, in India, the constitution made specific reservation policies for the dalit and tribal groups (similar to indigenous nationalities in Nepal). In India, the constitution makers were far sighted enough to realize that without laying specifically in the constitution, such policies may not come about. The Nepali experience demonstrates that their fears were not unwarranted. In the absence of specific provisions and enforceability of the policies, the Nepali State did not formulate special policies toward the marginalized social groups for more than a decade.

The Consequences of Exclusionary Institutions and Articles

When the constitution and other laws of the land discriminate against groups of people in cultural, religious, social, and citizenship realms, they cannot fully develop to their full potential and abilities (Lawoti 1999). Citizens constrained culturally, socially, and politically, and disadvantaged by public policies and practices cannot compete with those who are favored by the laws and policies. The majoritarian institutions and racist and sexist articles’ of the constitution are the bedrock of the continuation of exclusion and oppression in Nepal.

19 The constitution favors CHHEM because they dominated the constitutional engineering process that enabled them to influence its outcome in their favor (Lawoti 1999).
Some might argue that the constitution cannot be held responsible for the exclusion, even if it discriminates against some groups in some respects. A simple comparison of Nepali and Indian constitutions will show the weakness of this defense. If the Nepali constitution had adopted the reservation policy like the Indian constitution, dalit and other socio-cultural groups’ representation, like in India, would have been significant in the Lower House, public service, and educational institutions. Thus, the claim that the constitution cannot be held responsible for the mistakes of leaders in not including diverse groups does not hold ground. The leaders may also be responsible for not including the marginalized socio-cultural groups but the constitution cannot escape the blame.

The impact of racist and sexist constitution is devastating. If the discrimination had been in some minor matter, some other factors in everyday life could have compensated for it. But here the state institutions adopted by the constitution favors the dominant group. The constitution has many discriminating articles and is also the source of many biased laws and public policies. Racism in Nepal has become prevalent with the aid of formal structures and juridical means. The impacts of these articles are far reaching because they affect the people everyday.

The impacts of these institutions are further reinforced because the domination of the legislature, administration, judiciary, and other state agencies and influential societal positions by CHHEM. They interpret the constitution articles, common laws, and public policies based on their values and worldviews. They implement them (or not) based on their understanding. This often adds further bias at the implementation level where people are directly affected.

The Best or the Worst Constitution

The 1990 Constitution is far better than the undemocratic Panchayat Constitution in most respects. A few of its articles have even paid lip service to multiculturalism. However, we should take note of a few things. First, do the positive aspects of the constitution, such as the guarantee of political rights and civil liberties, provide equal rights to members of the dominant and marginalized socio-cultural groups? Second, a democratic constitution should be compared with other democratic constitutions and not with undemocratic ones like the Panchayat. Only then can it be properly evaluated in terms of its democratic depth and breadth. Third, has the constitution contributed or hindered the consolidation of democracy?
In this section, I will demonstrate the failure of even the positive elements of the constitution in providing equal rights to the marginalized socio-cultural groups and governance of the polity.

Unequal Consequences of the ‘Positive’ Articles

In the previous sections we saw that the constitution is responsible for the exclusion of madhesis, dalits, indigenous nationalities, and women who collectively form around 85 percent of the population. In this section, I will demonstrate that even the positive elements of the constitution like the guarantee of human rights, political rights, and civil liberties have not been able to extend equal rights to the marginalized socio-cultural groups.

The positive articles of the constitution have not been able to lessen the exclusion of the marginalized groups because other articles negate the positive ones. For instance, the guarantee of human rights in the preamble has not prevented the laws of the land for jailing members of the marginalized socio-cultural groups for 12 years on charges of killing cows, the deity of the dominant group but traditional food of the indigenous nationalities, Muslims, Christians, and some dalits (Ministry of Law and Justice 2054 v.s.). Likewise, the constitution guarantees fundamental political rights but the rights are meaningless to ethnic/caste groups who are denied registration of ethnic political parties. Similarly, the constitution guarantees civil liberties but, as discussed earlier, the constitution itself treats socio-cultural group unequally by declaring the state as Hindu and discriminating against non-Khas-Nepali native languages. In similar vein, the constitution has declared sovereignty to the people but it has not made the ethnic groups sovereign by providing autonomy for self-governance.

The provision of judicial review has been hailed as a positive aspect of the constitution as well but in Nepal it has become an instrument of discrimination against the marginalized socio-cultural groups. The Supreme Court has ruled against dual language policy of local governments, Public Service Commission’s decision to dump Khas-Nepali as a subject in its examination (Semanoff 2000), and distribution of citizenship certificates to Nepalis who did not have them. These verdicts hurt the aspirations of the marginalized socio-cultural groups. Likewise, Nepal has endorsed many international human rights instruments and treaties but has disregarded them in various constitution articles. For
instance, despite Nepal’s endorsement of the Convention for Eliminating Discrimination Against Women (CEDAW), more than a hundred discriminatory constitution articles and laws discriminate against women in Nepal (FWLD 2000).

These examples clearly show that even the positive elements of the constitution have failed to treat members of the dominant and marginalized socio-cultural groups equally. Nor have the positive elements of the constitution compensated for the consequences of discriminating provisions. The positive articles of the constitution may be providing full formal guarantees to the dominant group members but have failed to provide the same to the members of the marginalized socio-cultural groups. Thus, the positive aspects of the constitution are often meaningless to the marginalized groups. On the other hand, these positive elements of the constitution may have ironically helped to perpetuate inequality and discrimination indirectly by presenting a deceptive façade of equality. They have deceived many people into thinking that the 1990 Constitution is what it never was. The method of parading positive façade in the front while stabbing in the back is a typical dominant group operating style in Nepal. The 1990 Constitution is another modern day example of that practice.

If Nepal was a homogenous and genderless society, the constitution might not have been problematic with regard to the issues discussed till now. However, for a multicultural society, it is perhaps one of the worst democratic constitution because it discriminates against the rights of socio-cultural groups in fundamental aspects such as citizenship, civil liberties, political rights, culture, language, religion, and so forth.

The 1990 Nepali Constitution, however, can be “one of the best in the world” for CHHEM (15 percent of the population), if it is not problematic to them ideologically. It not only guarantees their political, civil, and cultural rights but also facilitates their continued domination in the polity and society! It is no surprise that the people who laud the constitution are mostly male Bahun. For the remaining 85 percent of the population, on the other hand, the constitution has become a hindrance in their aspiration for inclusion, equality, and justice.

The problem of the constitution is not limited to the marginalized socio-cultural groups, however. In the following sections, I will demonstrate the additional shortcomings of the 1990 Constitution and argue that the
constitution and the institutions it has adopted are the underlying causes behind some of the major problems faced by the country, such as the Maoist insurgency, prevalence of corruption, the lack of consolidation of democracy, etc.

**Problem in Democratic Consolidation and Instability**

The majoritarian institutions have caused several other negative consequences. First, it has hindered the consolidation of democracy. Scholars have shown that the lack of congruence between societal conditions and democratic structures can lead to instability (Almond and Verba 1963). The lack of congruence between the diverse society (culture, geography) and the majoritarian institutions that concentrate power (within a region and socio-cultural group) is an important factor for the lack of consolidation of democracy in Nepal. Democracy in multicultural societies cannot consolidate without power sharing and accommodation among different groups and regions.

Second, the majoritarian institutions adopted by the 1990 Constitution may have contributed in generating violence and instability. As social forces mobilize, if the political institutions are slow to develop to institutionalize the changes, violence and instability are likely to follow (Huntington 1968). The irony of the 1990 Constitution is that it gave considerable freedom to the marginalized socio-cultural groups to organize and mobilize but failed to accommodate their aspirations rising out of it. According to Huntington, such a scenario creates political instability and disorder because the political institutions are not capable to incorporate the social forces. We see such a trend in Nepal. The marginalized socio-cultural groups have mobilized considerably but the majoritarian political institutions are incapable to accommodate them. Scholars have empirically shown that violent conflicts occur more often in states that have adopted majoritarian institutions like the FPTP electoral system and unitary state (Cohen 1997; Saideman et al. 2002), which Nepal has adopted. The Maoist insurgency and Khumbuwan National Front (KNF) insurgency are evidence as well as warning signs of possible other violent conflicts.

The continued exclusion of the socio-cultural groups is a potential threat to the unity of the country as well. If the exclusion continues, some of the groups may adopt more extreme positions. They may no longer feel bound to abide by the collective decisions and rules they perceive as exclusionary. If the groups perceive that they may not get equal rights without a state of
their own, they may adopt secessionist options. As of now, even the so-called ‘extremist’ groups have not demanded secession. But one cannot deny the possibility if the problems continue. Such movements, even if they are unsuccessful, may generate more violence and incur heavy cost.

**Over-Centralization and the Crises of Governance**

The 1990 Constitution is also the foundation of the crises of governance in Nepal. The unchecked power abuse, widespread corruption, frequent government changes, and the growth of the Maoist insurgency are some manifestations of the crises of governance. The cause for the crises of governance is the over centralization of power in one branch of the government: the executive.

**Over-Centralization:** Democratization scholars have observed that new democracies often lapse into the un-rule of law when the executive undermines the power of other state agencies such as the legislature, judiciary, and central constitutional bodies and concentrates most of the power onto itself. O’Donnell (1996) has called this phenomenon as delegative democracy, which occurs when elected executives (President or Prime minister) concentrate power in the executive arguing that the people have delegated them the authority to rule with their wisdom. They see themselves less as peoples’ representatives, who are to reflect the peoples’ preferences. Once power is concentrated, they rule without being restrained by any other agencies. It has resulted into massive abuse of power.

The problem in Nepal is that the constitution itself has concentrated excessive power to the executive. In fact, Nepal is much more majoritarian (power concentrating) than the majoritarian prototypes like the UK, New Zealand, and Botswana. The over concentration of power is due to the unitary state (and non-sharing of power with the regions), concentration power in one branch of the government (executive), and weak central

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20 Please see Lawoti (forthcoming b) for more extensive discussion of centralization in Nepal.

21 See Baral (2000a; 1993), Dhurba Kumar (1995; 2000) and others for discussions of crises of governance in Nepal. They do not identify centralization as a cause of the crises, as I argue here.

22 Please see chapter 5 of Lawoti (2002) for detailed evaluation of 10 Nepali political institutions in a comparative perspective.
institutions (except the cabinet) that resulted into the absence of effective horizontal accountability mechanism at the center. The executive at the center wields most of this concentrated state power. It has facilitated extreme power abuse.

The constitution declares the people as sovereign but it does not devolve power to empower the people. All the power that affects people regularly (policy making and administration) is concentrated in the executive. Even parliament is weak. It does not have much effective role beyond electing a prime minister. Parliaments in many parliamentary democracies, on the other hand, are strong. In those countries the involvement of the parliamentary committees in formulating legislation and oversight of the executive is extensive. Belgium has a rough balance of power between the cabinet and parliament (Lijphart 1999: 127) while the German Parliament is considered very powerful (Schmidt 2003). The role of parliament would have increased in Nepal if the legislature was entrusted with oversight and legislative power, beyond discussing and voting on what the government introduces. However, according to the 1990 Constitution, only the government side can introduce legislation with budgetary provisions. This provision has effectively constrained the Parliamentarians from introducing legislation because most legislation intended to affect the people is bound to include budget. On the other hand, even the few private bills (non-government side) that were initiated were rejected without even proper discussion (Shakya 1995; Uprety, Shrestha, and Thapa 1997). The Nepali Parliament has mostly worked as a reviewing body rather than initiator of legislation (Shakya 1995). On the other hand, even in that aspect it has not performed well because the government pushes the legislation hurriedly giving insufficient time for discussion (Baral 1998).

The judiciary is powerful but it cannot restrain power abuse by the executive in everyday policy and administrative matters. It can influence the actions of the executive only in constitutional matters and only when they are brought to its attention. These are rare events23. On the other hand, the executive in Nepal can influence the judiciary because the executive has discretion over the judiciary’s budget and personnel24. Thus, the executive can influence even the powerful judiciary.

23 During the interviews some lawyers said that the lack of the accountability mechanism within the judiciary is also increasing power abuse and corruption inside it.

24 The judiciary has often complained that under funding has constrained its work.
Crisis in Governance: The over centralization resulted into two types of consequences. First, the extreme level of power concentration has led to extreme level of power abuse. After all, absolute power corrupts absolutely. If the state power had been divided, diffused, and shared among various political agencies, groups, and different levels of governments and their branches, check and balances would have reduced the outright power abuse to a considerable degree.

Second, the over centralization of power led to extra-constitutional intervention in the democratic polity when the only powerful institution failed to perform. Huntington (1968) argues that polities are more stable if the political institutions are complex, meaning that a number of strong institutions are needed in any country. If only one institution is made powerful, when it does not deliver, the country may face a crisis and it may lead to interventions by extra-constitutional forces. Huntington cites the example of France. During the 1950s an extra-constitutional force, the military, intervened in France when the only powerful political institution, the assembly, failed to handle the crises arising out of the dissolution of the French Empire. No other strong institutions existed in France at that time to address the problems when the assembly failed to address the crises.

In Nepal, similarly, the over centralization of power in the cabinet has invited interventions of extra-constitutional forces. Since only the central executive has the power of introducing important policies in Nepal, when it failed to deliver, no other institutions addressed those issues. Other institutions did not have the authority. Due to the failure of the democratic polity after 1990, the Maoists and monarchy intervened.

The issue can be understood if we present it from a counter factual angle. If parliament had been made strong in Nepal or powerful regional governments existed, they may have come up with legislation and policies that might have addressed some of the problems facing the country that the executive did not address. In such a scenario, even if the executive had failed, we might have seen some positive initiatives and policies. It would have reduced alienation and frustration among the people and perhaps would have lowered the attraction toward the extra-constitutional forces like the Maoists and active monarchy. In the following sections, I will elaborate on specific instances of the governance crises and establish over centralization of state power as their causes.
Power Abuse: Abused Election and Widespread Corruption

Abused Elections: Power abuse has undermined the rule of law and democratic institutions like elections. The two local elections demonstrate how state power and resources have been abused to influence the election results. In both the local elections, the party that controlled the government obtained landslide majorities. There is consensus among political observers and even politicians that elections are unethically influenced by those who can in the areas of their influence. The ruling party can influence more because it can abuse the state machinery and resources. The extreme desire of the political parties and leaders to conduct the elections while they are in the government, as evidenced by the frequent dissolution of the House of Representatives (HOR) to hold snap polls, implicitly acknowledges the advantages of being in power during elections. The general elections are also affected by the abuse of state power but the impacts are less because the administration does not aggressively behave in partisan manner due to the less certainty of the future government.

The undermining of the democratic elections has broken down the vertical accountability mechanism, the main function of periodic elections. As muscle (largely abuse of state administration) and money power affect elections, politicians have begun to rely on them more. On the other hand, the abuse of state institutions for partisan purposes and personal aggrandizement has weakened the capabilities of the state institutions.

The undermining of democratic norms and state institutions by the executive became possible because the horizontal accountability mechanisms are weak. Horizontal accountability is necessary to hold public officials accountable in between the elections. Independent central agencies can perform this duty. They check each other as well as the cabinet, thus the term horizontal accountability. Horizontal accountability mechanism is weak in Nepal because the central agencies such as the Election Commission and the Commission for Investigation of Abuse of Authority (CIAA) were made dependent upon the cabinet. Since, the cabinet can influence the nomination of commissioners and funding and staffing of these agencies, the constitutional agencies are often not in positions to check the power abuse of the cabinet.

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One anecdotal example: a losing CPN-UML candidate accused the winner, who was from the NC, of rigging voting in certain villages. The winner responded by pointing out villages where the CPN-UML allegedly rigged the elections.
Widespread Growth of Corruption: The increase in power abuse due to the lack of horizontal accountability can be illustrated with the case of the weak CIAA. A weak and not independent CIAA was another reason for the wide spread of corruption. In countries with successful anti-corruption drives, the anti corruption agencies are independent and strong (Klitgaard 1988). In Nepal, since the cabinet plays an influential part in the nomination of the commissioners, the commissioners for a long period did not act effectively against their powerful but corrupt benefactors. As the nomination process for the commissioners is a closed-door process and does not require approval by parliament, the cabinet often nominated people who were loyal or amenable to it (in the US, the Senate approves the president’ nominees in public hearings). Further, in the absence of oversight provisions, no institution monitored or held the commission accountable for its lack of actions. In the US, the congressional committees have oversight responsibilities over central agencies. They hold the central agencies accountable. An absence of an oversight body in Nepal resulted into a long period of inaction by the agency. The inaction toward corrupt activities fuelled the perception that as long as one made the power wielders happy (by sharing corrupt bounty or in other ways), actions against corruption may not be forthcoming. In the absence of actions against corruption, it skyrocketed.

Some might argue that the CIAA has been made strong in 2002 and it has acted against the politicians, and thus the constitution need not have made the CIAA strong; the cabinet could have done it earlier if it wanted. This defense of the constitution has a number of holes. First, the CIAA and other constitutional commissions are still not functionally independent and no institution other than the executive oversees their activities. Second, under normal circumstances the power elite may not make laws (strengthen CIAA in this case) that may act against them. It is widely believed that the 2002 bill that strengthened the CIAA was brought under the donors’ pressures. Third, if the CIAA had been made strong and independent in the constitution itself, then corruption may not have grown to such a level. Effective actions against corruption would have been carried out earlier. It is fair to assume that such actions would have discouraged the growth of corruption. Fourth, any agent (the constitution in this case) cannot escape the blame by saying that others can address the problem. This is more so with the constitution, which is the basic document that lays guidelines for political norms and behaviors. Thus, it is safe to say that the creation of a weak and executive dependent
anti-corruption agency by the constitution facilitated the widespread growth of corruption.

The Absence of Power Sharing and the Governmental Instability

Opposition parties have significant role in governance through legislation in many parliamentary democracies (e.g., Germany and Belgium). Further, in established democracies, even in majoritarian countries like the UK, the opposition and others can access and influence the governments through the media, corporative mechanisms, and lobbying. The 1990 Constitution in Nepal, however, has not given any significant power to the opposition in parliament. As discussed earlier, only the government can introduce legislation with budgetary provisions. The Parliamentary committees are powerless as well. The role of the opposition is thus limited to raising issues when parliament is in session. The ruling parties often ignored them because of the political culture that mistakenly assumes that the majority has the mandate to do what it pleases. This culture has led the ruling party to introduce policies and legislation without much regard to opposition’s views. Further, the ruling party often uses the administration to harass the opposition in the districts, distributes perks to supporters, and encourages defection from opposition parties by dangling carrots at them.

Here it would be useful to point out a popular misconception about democracy, that the majority’s job is to rule and the opposition’s job is to oppose. Majoritarian democracies like the UK have such characteristics but consensus and power sharing democracies do not. Many countries have frequent coalitions cabinets where many parties share power. Switzerland, Italy, Belgium, Papua New Guinea, Israel, Finland, Mauritius, the Netherlands, Denmark, Germany, and Belgium have frequent coalitions (Lijphart 1999: 110-111). No effective parliamentary opposition existed in some of these countries for long periods but democracies flourished.

The lack of power to the opposition has created an awkward position for them in Nepal. They have no power to contribute constructively (through the introduction of legislation, for instance) and they cannot do much while the ruling party abuses power to consolidate itself. The lack of power with it and the abuse of the administration for partisan purposes by the ruling party have created desperation in the opposition parties. This has often led to two types of activities by the opposition. One, the opposition frequently resorts to the street protests as they are often the
only way through which it can hope to make the government listen. The forced closures of educational institutions, roads, markets, and towns have become regular scenarios. Two, the extreme level of power imbalances has created a situation whereby the opposition often goes to any length in toppling the government while the ruling party, knowing the advantages of being in power, also goes to any length to stay in power\textsuperscript{26}. Both sides have resorted to naked unethical practices such as bribing Parliamentarians or hiding them during vote of confidence motions. The consequences of the power at any price culture were evident during the hung Parliament of 1994-1999. In five years, there were 7 cabinets. The hung Parliaments may lead to frequent changes of governments but it alone is not a sufficient condition. Hung Parliaments are not aberration in democracies and stable coalitions have been formed in many countries. Instead, the power hunger or desperation for power among political parties and leadership played very significant role in the frequent government changes in Nepal. If power had been distributed among different political institutions (executive and opposition in Parliament) or different level of governments (regions and the center under a federal system), different political actors would have accessed power. It would have reduced the desire to capture (or retain in the case of ruling party) the central government at any cost, reducing governmental instability. Other appropriate institutional mechanisms can also help reduce instability even in hung Parliament\textsuperscript{27}.

Here, it should be noted that Nepal is bound to encounter frequent hung parliaments in the future because of ideological and cultural diversity of the country. Up to now, the cultural diversity has not impacted the party system very much but it is bound to have more impact in the future, as the excluded socio-cultural groups get more mobilized. Even if we disregard the impact of the cultural diversity for the time being, if Nepal were to conduct a general election in the near future that is acceptable to the major political forces, Nepal would have at least four major political

\textsuperscript{26} Here it should be noted that such dynamism exists between the establishment and opposition sides within political parties as well. The majority governments did not serve their full term both times when the NC got the majority in parliament because of the internal wrangling.

\textsuperscript{25} The constructive vote of no confidence, as in Germany, is an example. The constructive vote requires that for a no confidence motion to pass, an alternate majority coalition needs to be formed. The no-confidence motions will not pass if the opposition cannot form a majority coalition before the vote.
parties: NC, CPN-UML, NDP, and CPN-Maoist. The presence of the four parties would lead to frequent hung Parliaments for some time to come. However, the current political structures and institutions are not designed to tackle hung Parliaments. They are designed to operate with a ruling majority party and a strong opposition. The ground reality and the designed institutions are incongruent. Thus, the institutional mechanisms adopted by the 1990 Constitution are not going to contribute toward fostering governmental stability in the country.

On the other hand, if the oppositions had significant role in parliament, the do or die situation for forming a government would not have evolved to a desperate level. They would have become engaged in positive activities, such as formulating legislation or restrain the executive through oversight power. It would have given them less time and reasons to protest in the streets and employ unethical means to topple the government. The government side would also not have used all legal and illegal resources at its disposal to remain in power because being in the opposition would not have looked that bleak.

The Centralized Polity and the Growth of the Maoist Insurgency 28

The centralized state also contributed in the initiation and growth of the Maoist insurgency. Specifically, the centralized polity alienated the people and facilitated the abuse of administration for partisan purposes by the central ruling party 29. The repression in Rolpa, Rukum, and elsewhere pushed the Maoists into the insurgency. The centralization of the state facilitated the repression as the local administrations, under the direction of the center, took the side of the NC in the local political conflicts between the NC and the Maoists. Many Maoists cadres went underground as the administration began to imprison and torture them. Eventually, they initiated the insurgency. If the local administrations had been under the local governments, the severe repression against the Maoists may not have occurred, simply because the Maoist controlled some of the district governments.

28 This section largely draws from (Lawoti Forthcoming a, Forthcoming b). Please see it for elaborate discussions of the issues.

29 See INSEC (1999) for abuses against the Maoist cadres in Rolpa and Rukum that forced them to go underground before they formally initiated the insurgency.
The over centralization of the polity alienated the people in several ways. First, the centralization contributed toward the powerlessness of the state institutions, especially the local governments and agencies. The local governments depended for budget, manpower, and programs to the central agencies. In the Indian context, Atul Kohli (1994) has observed that centralization increased personal power of the leaders but led to overall powerlessness because the centralization decreased the institutions’ capabilities. In the absence of capable institutions, the leaders could not push through their policies, increasing the powerlessness. In Nepal, the result of centralization was powerless local governments and administration. If the local bodies had been empowered through devolution, they would have been in a better position to initiate more development projects and served the rural people more effectively. It could have contributed in lessening the people’s alienation. Powerful local bodies probably would have been more effective in resisting the Maoists. The absence of viable local government bodies (due to lack of power) made it easy for the Maoist to attract the rural people and subsequently capture and control the rural areas (Lawoti forthcoming).

Second, extreme centralization alienated the rural people from the state because the centrally deputed administrators, being accountable to the center, were less sensitive to the needs and aspirations of the rural people. The local people would have become less alienated if the local administrations and police had been under the local/regional governments because that might have produced more responsive administration. Likewise, if the local administration had been under the elected regional/district/local governments, the administration would have received more support from political parties and cadres. As of now, the local administration receive little support from the local population, as evidenced by the absence of prior information of the impending raids on the district headquarters by large groups of Maoists, whose presence would have been conspicuous in the sparsely populated hills (Lawoti 2001 c).

The centralization also alienated the people by dismantling the traditional norms and institutions that were means of self-governance of the rural communities without providing new ones in their place that could address their needs and aspirations. Likewise, ethnic/ caste centralization of the state and continuation of cultural and gender discrimination alienated the indigenous nationalities, dalit, and women. Once the insurgency began, the Maoists received widespread support from the alienated people.
Conclusions

An evaluation of the 1990 Nepali Constitution in a broader perspective has exposed its discriminating articles and exclusionary role. We also saw how the political institutions it adopted cannot include the socio-cultural groups. In fact, some of them are responsible for exclusion. The 1990 Constitution made a fundamental mistake of adopting political institutions that are not compatible to a multicultural society. This work has also shown how the progressive elements of the constitution, like the guarantee of human rights, are not able to safeguard the rights of marginalized socio-cultural groups in some realms.

Further, we also saw how the constitution is responsible for the crises of governance in the country. The constitution did not empower the sovereign people. Instead it contributed in the initiation and the growth of the Maoist insurgency, facilitated governmental instability, and fostered widespread corruption by over-centralization of power. A constitution that excludes 85 percent of the people and which has contributed in the crises of governance cannot be one of the best in the world. However, some people still make the claim. Which claim is more plausible?

Both the positions have elements of truth in them, depending upon to which group the constitution is applied. The 1990 Constitution can be “one of the best constitutions” for members of CHHEM because it permits them to continue their superior position in the society and polity. In fact, the democracy label attached to the constitution legitimizes their privileges. Therefore, when the CHHEM members claim that the 1990 constitution is one of the best in the world, they are in effect saying that it is the best for them. On the other hand, the constitution cannot be the best for groups who are excluded. In fact, the huge majority of the excluded people can argue, with at least a similar level of plausibility as the dominant group, that the 1990 Constitution is one of the worst democratic constitutions in the world because it is responsible for their exclusion.

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Making an Inclusive Constitution in a Plural State: Issues of Identity and Representation

Hari P. Bhattarai

‘Democracy in a pluralist society should accordingly not mean the end of cultural diversity, but rather its guarantee, accomplished on the secure basis of justice and equality’--Justice Albie Sachs, Constitutional Court of South Africa

Introduction

Nepal is a multiethnic, multireligious and multilingual country. This diversity has however turned out to be a bane for Nepal because political actors have favored or excluded another particular group on the basis of ethnicity, religion, language, etc, creating wide socioeconomic disparities among different ethnic, religious and linguistic groups. So state institutions, political actors and academics, who want the present constitution making process to be truly based on fundamental principles of democracy, need to think strategically to make the new constitution truly inclusive. This paper is an exercise towards furthering the debate on inclusive constitution making.

The article begins with a brief discussion of Nepal’s cultural diversity and its socioeconomic disparity. The second section presents a review of the past state laws and constitution makings and their implications in historical perspectives. The third section examines the contemporary discourses on inclusive constitutions from the perspective of marginalized groups. The fourth section focuses mainly on the challenges of diversity, disparity and identity politics in constitution making. The last section concludes that a constitution prepared on the basis of the spirit of multicultural coalitions and based on mutual confidence and power-sharing will be more functional in a multicultural state characterized by a remarkable cultural diversity with disparity and high level of ethnic consciousness.

State of Pluralism in Nepal

Nepal is a multicultural state having 102 distinct ethnic and caste groups, and 92 living languages (CBS, 2001). These caste, ethnic and language
groups are further divided into eight major religious groups: Hindu, Buddhist, Islam, Kirat Jain, Sikh, Christian and Bahai. The following categories of people more or less represent the population composition of the diverse groups in the country.

1. Pahadis- Hill and mountain groups considered caste Hindus (twice-born, ascetic castes as well as so called ‘untouchables’) speaking Nepali as their mother tongue comprise about 39%
2. Janajatis- Tibeto-Burman language speaking hill and mountain ethnic groups comprise about 22%
3. Newars- Various caste Hindus and Buddhists comprise about 5%
4. Madhesi- People of plain origin comprises about 32%. Among them about 18% are caste Hindus; about 10% janajatis (plain ethnic group); about 4% Muslims; and a few others.
5. Marwaris, Bengalis, Sikhs, Christians and the ‘others’ category of the census add up to about 2%.

According to the 2001 census, Pahadis (including the hill janajatis and the Newars) constitute 66% of the population, madhesis 28%, and ‘others’ (including religious groups such as Muslims and Sikhs and the other groups like Marwaris and Bengalis) constitutes 6%. The caste groups (9 in the hills and 43 in the tarai) comprise 57% of the population, the ethnic groups (25 in the hills and 19 in the tarai) 37% and ‘others’ 6%. No single caste or ethnic group forms a majority in Nepal. The largest group, Chhetris, who have the population of 3.5 million, constitute only 15.8%, followed by the hill Brahmins (Bahun) with 12.7%. The other major groups are Magars (7.1%), Tharus (6.7%), Tamangs (5.6%), Newars (5.5%), Kamis (3.9%), Yadavs (3.9%), Rais (2.8%), Gurungs (2.4%), and Limbus (1.6%). The smaller groups have a population of less than 1,00,000. Moreover, 23 other even smaller groups have a population of less than 10,000.

The exact number of dalits is not clear but one estimate has it that they constitute about 13% of the population of which 55% live in the hills.

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30 Percentages of the total population (2,27,36,934) are taken from the 2001 census data (Population Census 2001: National Report, Central Bureau of Statistics and UNFPA 2002, Table 16 of Form 1). Because the numbers have been given in round figures, the aggregate may not add up 100.

31 The National Dalit Commission defines dalits as those communities who, by virtue of caste based discrimination and so called untouchability, are most backward in the social, economic, educational, political and religious spheres, and are deprived of human dignity and social justice.
There is no agreement concerning the exact number of dalit castes making it difficult to estimate the exact population of dalits. For example, the National Dalit Commission lists 28 dalit castes, whereas the 2001 Census lists only 16. Such anomalies arise because some Newar dalit castes refuse to call themselves dalits. The largest dalit caste is Kami (blacksmiths), who comprise 30% of the dalit population, followed by Damai (tailor cum musicians), Sarki (cobblers) and Chamar (sweepers) comprising 13%, 11% and 10% respectively.

One of the most common ways of classifying these groups is to cluster them in three major overlapping divisions: (i) the hierarchical caste structured groups (jats) and the egalitarian ethnic groups (janajatis); (ii) the high caste or the ritually ‘pure’ castes and the low, ritually ‘impure untouchable’ castes (dalits); and (iii) Pahadis and madhesis. There are significant cultural differences between caste and ethnic groups as there are between pahadis and madhesis. The caste groups, known as jats, are Caucasoid Hindus speaking various Indo-European languages such as Nepali, Maithili, Bhojpuri. The ethnic groups, currently known as janajatis, are of Mongoloid stock and speak various Tibeto-Burman languages, such as Tamang, Gurung, Newari and Magar. And they follow Buddhism, animism and Kirant besides Hinduism. While the caste groups are hierarchically structured in terms of ritual purity, the ethnic groups are more egalitarian in their social structure—the Newars, an ethnic group, who are internally structured by castes, are an exception. Among the caste-structured groups, there is a fundamental division between the ritually ‘pure’ castes, such as Brahmin, Chhetri, Kayastha and the ‘untouchable’ castes such as Kami, Sarki, Chyame/Chamars and Damai. The ‘untouchable castes’ are now known as dalits and many ethnic groups influenced by Hindu caste ideology consider dalits ‘untouchables’. In other words, the division between dalits and other groups (‘upper’ castes and ethnic) is as fundamental as the division between caste-structured Hindus and ethnic groups (Pradhan and Shrestha, 2005)

Pahadis consist of diverse groups such as the Nepali-speaking parbatiya castes as well as ethnic groups such as Tamangs, Magars and Rais, each of which has its own language, culture and religion. Similarly, madhesis are composed of various castes such as Brahmins and dalits, linguistic groups such as Maithilis and Bhojpuris, ethnic groups such as Tharus and Danuwars, and religious groups such as Hindus and Muslims. Pahadis consider themselves culturally distinct from the madhesis even though there are many similarities among the caste groups who are Hindus and
speak Indo-European languages. Thus, the Pahadi Brahmins and dalits as well as the ethnic groups consider themselves culturally distinct, especially from the madhesi caste and ethnic groups. Finer distinctions could be made between hill ethnic groups who live in the mountains, such as Sherpas, Byansis and Thakalis, and others who live in the hills, such as Limbus, Magars and Tamangs; as well as between ethnic groups who live in the inner tarai, such as Botes, Danuwars and Majhis, and others who live in the tarai proper, such as Tharus, Dhimals and Satars (ibid).

Nepal in essence is a cultural mosaic comprising different caste and ethnic groups belonging to the Tibeto-Burman and Indo-Aryan linguistic families, which is indicative of the waves of migrations that have occurred for over 2,000 years from the north and south. Although different groups have intermingled with each other, culturally they differ widely and they have adapted differently, and the sense of belonging to a particular culture, group and religion has remained prominent throughout the history (Pradhan and Shrestha, 2005).

Despite its cultural diversity, Nepal is predominantly a Hindu kingdom with a Hindu polity, though not necessarily a Hindu society (Pradhan, 2002). Since the birth of modern Nepal in the late 18th century political power has remained largely in the hands of the high caste pahadi Hindu people (members of Thakuri, Chetri and hill Brahmin castes). Therefore Hindu culture enjoyed state patronage. This prompted some ambitious members of other groups to practice Hindu culture. Core elements of this pahade culture, in particular the Nepali language and Hinduism, no wonder, formed the basis of a Nepali national identity during the years before 1950. With the end of the Rana regime and the subsequent advent of mass education and development of the mass media or what Benedict Anderson (1983) called ‘development of print capitalism’, the state was in a much stronger position to inculcate this sense of identity amongst the general population (Hoftun et al., 1999). Thus the history of nation building in Nepal clearly appears to be a history of imposing uniformity rather than embracing diversity (Pfaff-Czarnecka, 1997, 1999). In this context, Richard Burghart has rightly observed that

…there are many ethnic groups in Nepal, each with its own customs, language, and homeland. At the turn of the nineteenth century each of these groups was thought of as a country and in 1854 as a species; now they are all registered in the census as language groups. Of all the language groups in Nepal, only the language and custom of Hill Country are identified with the Nepalese way of life (Burghart, 1984:121).
Even the more than a decade democratic practice has changed little the power structure in terms of social composition. The 1990 Constitution, which states that all Nepalese are equal, failed to distribute resources equally among diverse groups of people and empower women. Neither did it help bring marginalized castes and janajatis in the political decision making positions. Still, the elite pahadi Bahuns and Chhetris and elite Newars enjoy better access to resources. In 1999 these communities jointly held more than 81.7% leadership positions in important areas of governance such as the judiciary, legislature and public administration (Neupane, 2000).

The human development indices by caste and ethnicity (1996) showed that there is a close correlation between ethnicity and the human development index (HDI). The overall national human development index accounts for 0.325. While the Bahuns (0.441), Newars (0.457) and Chhetris (0.239) exceeded the national average, the madhesis (0.333), janajatis (0.299), dalits (0.239) and Muslims (0.239) fall below the national average (NESAC, 1998). Such variations in the HDI show that janajatis, dalits, Muslims and madhesis do not have adequate access to education and they therefore have the least chance of going into the civil service, bureaucracy and judiciary. In this context, Brown’s (1996) observation of the situation appears still noteworthy:

There is no strong pan-tribal organization of Nepal’s hill minorities, and nor is there a secessionist tarai movement— but the prospect of either, or both, is very real if the democratic system is unable, or unwilling, to incorporate their political demands and, just as importantly, if it proves unable to alleviate their absolute poverty.

Nepal is usually projected as a Hindu kingdom where different castes as well as ethnic, linguistic and religious groups have co-existed peacefully. The state and the ruling elite take pride in what they see as ‘unity in cultural diversity’ and never get tired of repeating King Prithvi Narayan Shah’s famous statement: ‘This country is a flower garden of four varnas and thirty-six jats’ (Sharma, 1992, 1997). There is some truth in this claim because Nepal, unlike so many countries in South Asia, has remained relatively free of ethnic, religious, linguistic and caste violence (Gellner, 1997). However, one cannot deny the fact that the historical process of nation building was based on the cultural orientation of the dominant groups, and others rarely had the option of shaping and redefining it (Kraemer, 1994).
State Laws, Constitutions and Forms of Plural Society

The process of nation building, more specifically the ways the rulers in the past tried to ‘manage’ cultural diversities and pluralism, has had far reaching consequences for different groups. One of the pervasive consequences remains the political, economic and cultural dominance of the ‘upper’ caste parbatiya people (Pradhan and Shrestha, 2005). The other groups might regard the country as a pluralistic society, but one that is characterized by hierarchy, dominance and oppression. This section presents an overview of the forms of multicultural societies envisioned by the past state laws and constitutions.

Old Civil Code and Particularized Hierarchy (1854–1950)

The form of multicultural societies that existed before 1950 was the outcome of governmental attempts to grapple with the country’s remarkable ethnic diversity and people’s responses to the system the government created (Levine, 1989). According to Hofer (1979), territorial unification of the country in 1789 was only a first step. The government also had to unify Nepalese society, which consisted of three historically and regionally autonomous caste hierarchies (the parbatiya, Newar and tarai caste systems), culturally distinct Tibeto-Burman speaking populations and the people of Tibetan ethnicity on the northern border. The approach was to create a national caste system where every caste had a place according to the ruler’s own notion of caste.

The diverse caste and ethnic groups were incorporated into a holistic framework of a ‘national caste hierarchy’ by promulgating the Muluki Ain (legal code) in 1854 that prescribed different kinds of right and duty based on a religiously sanctioned caste hierarchy (Hofer 1979). The Code was prepared by the then Rana ruler under the advice of Brahmin scholars from Mithila, without the popular participation of the people. And it established the socio-political supremacy of hill high caste Hindus. Out of the 212 people who signed it, 95.2 percent were high castes (Gurung, 2006). It classified the people into high, medium and low status groups. The ethnic communities were classified as matwali (alcohol-drinking groups), with some assigned as enslaveable. The artisan castes—dalits—were classified as untouchables and barred from public places and activities. In effect, the Code categorized all the people of Nepal into the following five distinct hierarchical orders, without seriously considering the diversity and complexity of the peoples of Nepal. The orders were:
From the point of view of the rulers, the plurality of Nepalese society was conceived within a uniform socio-political framework. But the diversity was conveniently used to perpetuate inequality and ascribe ranks on the basis of caste/ethnic division. Rather than seeking to establish national unity through a vision of culturally diverse population, the rulers sought to define a national identity with Hinduism as its major pillar (Pfaff-Cazarnecka, 1999). The economic policies of the government also took caste ranking and group membership into account, so that different groups were granted different sorts of land tenure and trading rights.

The strict imposition of the Muluki Ain for more than a century created a discriminatory social, political and cultural landscape. The rulers consolidated their powers by arranging all groups in a hierarchical framework of the Hindu caste structure. The Hindu concept of morality and merits were enforced to provide a support base for the autocratic regime. Within this framework of an emerging Hindu polity, ethnic

<table>
<thead>
<tr>
<th>Hierarchy</th>
<th>Category</th>
<th>Social Group</th>
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<tbody>
<tr>
<td>1st (Top)</td>
<td>Caste groups wearing sacred thread known as tagadhari</td>
<td>Parbate upper caste, Newar Brahmin, tarai Brahmin, Newar upper caste</td>
</tr>
<tr>
<td>2nd</td>
<td>Groups of ‘non-enslaveable’ liquor consuming caste called namasine matwali</td>
<td>Mager and Gurung (associated with Gorkhali army, Sunuwar (Hinduized), Non-Hindu Newar</td>
</tr>
<tr>
<td>3rd</td>
<td>Groups of ‘enslaveable’ liquor consuming caste, called masine matwali</td>
<td>Bhote(Buddhist), Chepang, Kumal and Hayu, Tharu (tarai ethnic) Gharti (progeny of freed slaves)</td>
</tr>
<tr>
<td>4th</td>
<td>Impure but ‘touchable’</td>
<td>Lower caste Newar, Muslim, Christian</td>
</tr>
<tr>
<td>5th (Bottom)</td>
<td>Impure &amp; ‘untouchable’</td>
<td>Parbate artisan caste, Newar scavenger caste</td>
</tr>
</tbody>
</table>

Source: Adapted from Hofer, 1979
populations, notably ethnic elites, responded by adopting the specific cultural symbols of those in power. Thus the caste schema of the Muluki Ain was based on religious, regional and political considerations with the hill high caste supremacy as the guiding principle in all spheres of life.

The multicultural society that emerged after the Old Civil Code clearly resembled the ‘particularized hierarchy that is characterized by a dominant community to which other community are subordinated in a hierarchical relationship’ (Bhargava, 2002). Differences between cultural communities were maintained but only within the subordinated relationship. The ‘lower’ castes, women, ethnic communities and non-Nepali speaking linguistic communities were socially excluded from state administration and land rights. The Hindu religious law and, increasingly, customary law also supported such inequities and exclusion. In short, diversities and differences were sustained by treating communities unequally.

**Panchayat Regime and Universalistic Equality (1962-1990)**

The Panchayat regime was an outcome of the 1962 Constitution. Drawing inspiration from the ‘guided’ democracies of Egypt, Pakistan and Indonesia, and from the Rana Constitution of 1948, King Mahendra’s 1962 Constitution instituted a system of government composed of the king (absolute monarchy) and the four tiers of elected councils (panchayats) at the village, district, zonal and national levels. The panchayats gave a superficial impression of devolution, but it was actually a tool to concentrate political power (Burghart, 1994).

Unlike previous constitutions, the 1962 Constitution particularly declared Nepal as a Hindu Kingdom. It appeared exclusionary and bias towards diverse cultural groups other than Hindus. Article 20 described the king as an ‘adherent of Aryan culture and Hindu religion’. Article 3 specified Nepal as a ‘Hindu’ kingdom. Hindu symbols, like the cow as national animal, were embedded in the text. The provisions that barred conversion and guaranteed religious freedom consistent with ‘traditions’ were included. These were understood as a way of ensuring that the number of Hindus doesn’t decrease.

In spite of these, the state abolished the legally sanctioned hierarchy and discrimination based on caste, ethnicity and religion by enacting the New Legal Code (Naya Muluki Ain) in 1963. According to this Code, all were equal before the law irrespective of their race, caste and creed.
(Dahal 1995). Thus, the relevant legal category in the Constitution of 1962 and the New Civil Code of 1963 was no longer caste but citizen, and as citizens all Nepalese, irrespective of their social identity, could claim equality before the law (Pradhan and Shrestha, 2005).

No doubt many of the strictures of the caste system such as the ‘defiling’ of food and water by the low castes and religious sanctions against anticaste behavior have weakened after the introduction of the new code but the caste system is alive and, in some cases, has become more distinct and prominent over the years. Caste forms the basis of social interaction among the majority of Nepal’s diverse ethnic population and there is a fairly uniform order of caste ranking even today. This is because ethnic/ caste groups who are ranked higher in the traditional hierarchy appropriate much of the power, influence, wealth and prestige available within the system. Thus ‘high caste’ values have become a model to raise one’s socio-economic status and even to identify oneself in the existing social and political structure. David Gellner (2005) rightly asserts that the Panchayat regime tried to address the cultural diversity of the country by

...combining (a) formal legal equality without any measures of positive discrimination as in India, thus ensuring continued dominance of the establishment by Bahuns, Chetris and Newars, (b) endorsement of traditional customs and religion, and (c) an aspiration to national integration by means of the adoption of Parbatiya culture on the part of minorities. It was evident with the collapse of the regime in 1990 that this had been no solution to the problems of cultural diversity, but had simply deferred them (p 2).

Rather than developing a new model of ethnic pluralism, the Panchayat rulers sought only to promote modernization (e.g., through abolition of the Muluki Ain of 1854, land reform, standardization of the education system) by advocating homogenization—one nation sharing one culture. Pfaff-Czarnecka (1997) calls this model of cultural integration

32 The educational system encouraged nationalism and the creation of a unified national society by enforcing the use of Nepali and building loyalty to the king, country and Panchayat system (Pigg, 1992). But the emotional identification with the state of the marginalized groups of the tarai as well as the mountainous regions was tenuous (Whelpton, 1997). The northernmost valleys, though politically within Nepal, are ethnically and culturally Tibetan. Similarly, in the tarai that political and cultural boundaries have failed to coincide (Gellner, 1992).
as the ‘nationalist model’. Beyond forging national identity in a changing geopolitical environment, the requirements of modernization, as understood worldwide during the 1960s and 1970s, called for national unity, particularly in the sense of sharing one culture. Within the process of creating a nation, the Panchayat government adopted an assimilationist policy, insisting upon creating a homogenous development society (Pfaff-Czarnecka 1999, Gaige 1975). In official rhetoric, however, the Nepali nation was presented as being made up of equal citizens sharing a common culture, that is, sharing cultural elements of parbatiya Hindus (Burghart 1984). Hence, equality was proclaimed but apparently it could only be achieved by suppressing differences. In addition, cultural unity was perceived as a means of value integration. Any claim to ethnic identity was considered as a political rebellion during the Panchayat period.

Thus the Panchayat regime, through its constitution and state policies, envisaged a mono-cultural society based on ‘universalistic equality’ (Bhargava, 2002). The only way of sustaining equality was to deny the significance of cultural differences. People are equal because their membership in a cultural community is deemed unimportant. Rather, what matters is their status as individual and their membership in an abstracted political community. Consequently, monolithic political narration like ‘All panchas (Panchayat political cadres) are Nepalese and all Nepalese are panchas’ was made politically legitimate during the Panchayat era.

The 1990 Constitution and Particularized Equality

After a long struggle, Nepal was able to form a democratic government in April 1990. This government enacted a new constitution, which defined Nepal adhirajya as a multiethnic, multilingual, democratic, independent, indivisible, sovereign, Hindu and constitutional monarchical kingdom. But this definition is not inclusive enough: the various ethnic groups of Nepal are not Hindus and their mother tongue is not Nepali. However, seen from the perspective of national integration it could be considered as a breakthrough as it promised to ‘maintain the cultural diversity of the country’ and to promote ‘healthy and cordial social relations amongst the various religions, castes, tribes and communities and linguistic groups’ by aiding ‘to conserve and promote their languages, literatures, scripts, arts and cultures (Constitution of the Kingdom of Nepal, 1990).

Unlike previous constitutions, the 1990 Constitution, though not adequate, had a popular base. The constitution was drafted after
consultations with stakeholders. The issues of identity and representation on the basis of language, culture, and religion, region were prominently raised during the drafting of the constitution. The ethnic, caste, religious and regional communities had voiced their concerns to the Constitution Recommendation Commission. But the issues of dalits, women, janajatis and other marginalized groups were not addressed by the constitution. Dalit groups had submitted their demands for, among others, a secular state, reservation, the participation of dalits in the making of the law. But they were not included in the constitution. Moreover, draft was not publicly discussed after it was prepared.

However, the constitution guaranteed citizenship to the people. It granted equal rights to all citizens before the law, and prohibited any form of discrimination based on religion, sex, race, caste, or ethnicity. The ethnic groups and dalits aspired to an egalitarian and plural society in which they would be treated on equal terms (Pradhan and Shrestha, 2006). The minorities (janajatis, dalits, madhesis) are now coming together to institute internal reforms and take public action breaking away from the former modes of accommodation based on homogenization. The rise of ethnic languages newspapers, among others, have helped to articulate ethnic aspirations. As a reaction to assimilationist cultural policy of the Panchayat regime, a number of ethnic groups are publicly demanding for the preservation and protection of their cultural traits. An increasing number of people now dare to assert publicly that their cultures are not inferior, but different.

After centuries of homogenization, the 1990 Constitution, to some extent, acknowledged cultural diversity and pluralism. As a result, people started to differentiate themselves from others through constant references to language (often seeking to invent a new script), narratives of ethnic origin and debates on valid religious forms (Pfaff–Czarnecka 1999). But despite this official model of cultural pluralism and equality, attempts towards creating a national culture and the continued dominance of the parbatiya culture (religion and language) over other groups were clearly visible. For example, Pradhan and Shrestha (2005) noted that

…Dalits, especially in rural areas, are still considered ritually polluting, and face numerous discriminations even from the janajatis. These range from bans on entry into temples and homes, having to wash their dishes in restaurants, refusal by the ‘upper’ castes to eat or drink with them, and exclusionary practices faced while using common property resources such as springs and
water taps, attending schools, selling milk to other castes, or even in several instances, being included in user groups or cooperatives. The Madhesis, whose nationality and nationalism are questioned by the Pahadis, face difficulties in getting their citizenship certificates, without which they are unable to buy land, get loans from banks, apply for civil service jobs, study in universities, or vote during elections. While the janajatis, in general, do not face such discriminations, they, like the Dalit and Madhesis, experience political and cultural exclusion, which in many cases translates into economic exclusion. All the major political parties, dominated as they were by the ‘upper’ caste Parbatiyas, responded only partially to the demands of the various ethnic and linguistic groups regarding respect for diversity and the promotion of more inclusive development (pp 8).

The post-1990 governments have mostly failed to address the grievances of disadvantaged groups (dalits, janajatis, women and madhesis) despite campaigns by a multitude of new pressure groups. Government action was only confined to token reservations for disadvantaged groups in government jobs, school and university scholarships and the creation of commissions, like the National Foundation for the Development of Indigenous Nationalities, National Women Commission and the National Dalit Commission. The Supreme Court ruled the efforts to allow the administrative use of languages other than Nepali illegal (Timelsena, 2003) and invalidated attempts to loosen the criteria for citizenship (Bhattarai, 2005).

The above discussion clearly demonstrates that state policies and past constitutions were inadequate to socially and culturally accommodate the diverse groups and, instead, they promoted a monolithic and homogenous Nepali national identity. The pluralistic and heterogeneous nature of Nepali society and the multiple identities that characterize its people and their culture have produced enormous political pressure to make it more inclusive and responsive to cultural diversity. The ten years of the Maoist armed conflict can be reviewed and analyzed in terms of discriminatory state policies that resulted in the marginalization and exclusion of a large number of people.

Consequently, the post-1990 Nepal saw a rise in new forms of political claims by ethnic groups and disadvantaged castes. Feeling discriminated and marginalized, these groups banded together to voice their grievances and demand changes in state policies and the law in two areas: state protection and development of their cultures and languages, and affirmative
action to ensure a more equitable share of economic and political resources (Pradhan and Shrestha, 2005).

Post-1990 Identity Politics and Quest for an Inclusive Constitution

Identity politics in the Nepalis context can be defined as a claim to represent and further the interests of particular groups, the members of which often share and unite around common experiences of actual or perceived social injustice, discrimination and exclusion. However, identity politics means more than the sole recognition of social identity such as religion, ethnicity or culture. Rather, identity politics seeks to carry social identity forward, beyond mere self-identification, to a political framework based on that identity. In this way, the identity of the oppressed group gives rise to a political basis around which they then unite.

In Nepal, especially after the restoration of democracy in 1990 in general and after the April Revolution (2006) in particular, established social, political and cultural identities are being questioned, revised, contested and reformulated. The politics of identity has become a prominent and, for some, an alarming issue in present day Nepal. It has reshaped the political discourse by persistently challenging the previously accepted dominant view of national culture, religion and language, and by demanding the restructuring of the state as a multicultural, multilingual and multireligious nation. As a result an increasing number of people are being more and more self-consciousness about religious, ethnic, class, regional and gender identities. Notions of subject, citizenship and universal human and minority rights are increasingly being debated. Multiple, contextualized, historically rooted, and/or recently invented local, regional, national and transnational identities are growing ever more complex. Language became the most visible issue around which the ethnic groups came together. They objected to the use of the Nepali language in the civil service exams because it reduced their chances of entering into the civil service and demanded that Nepal be declared a secular state. Some activists even went on to demand separate states based along the traditional homelands of the major ethnic groups. While the majority of ethnic leaders do not want that, fears have been expressed.

Ethnic and other social identity formation in Nepal results from a complex interplay of different social processes aimed at diverse social and political goals (see Hofer, 1979, Pfaff-Czarneka, 1999, Fisher, 2001 and Guneratne, 2002).
that such demands for autonomy may lead to ethnic tensions and weaken development efforts (Pradhan and Shrestha, 2005).

However, the emerging identity politics in Nepal is not an arrival of a new phenomena but rather the expression of what had remained latent. The identities that remained submerged during the Shah (1769-1846) and Rana (1846-1951) regimes and were suppressed during the Panchayat period (1960-1990) have asserted themselves after 1990. The monopolistic social norms of the state are being questioned and the established pattern of dominance is being challenged by activist groups based on ethnic, linguistic, religious and regional allegiances. Harka Gurung, a noted geographer and development expert, rightly noted that

*Social demographic data of the last decade clearly evidence a strong tendency towards identity assertion based on ethnicity, language and religion (Gurung, 2003:34)*

In this way, emerging ethnic, cultural, social, regional and caste identities have been bringing about shifts in ‘established’ identification. Janajatis\(^{34}\) dalits\(^{35}\) and madhesis\(^{36}\) are some of the dominant groups who feel that they have been ‘excluded’ in the overall development process. The current academic discourses take macro level approach and identify janajatis (of both hill and tarai), madhesis (of both caste Hindus and janajati groups) and dalits (of both hill and tarai) as the excluded groups on two major grounds: One, their disadvantaged position in the national human development index and, two, their lower representation in the integrated national governance index vis-à-vis hill Bahun-Chhetris\(^{37}\) and Newars\(^{38}\) (see page 53).

Kumar (2000) correctly claims that identity politics in Nepal has nothing to do with secession or an urge to replace the dominance of state power by a particular group, but it has to do with the sharing of state power equitably—and with distributive justice. In other words, identity politics

\(^{34}\) Ethnic community (a newly popular term for originally non-Hindu or ‘tribal’ ethnic groups).  
\(^{35}\) Dalits are those Hindu castes who were categorized as untouchables in the Old Civil Code of 1853 until the promulgation of the New Civil Code of 1962.  
\(^{36}\) People of tarai origin.  
\(^{37}\) General term to refer the Brahmans and Kshatriyas of Hill origin.  
\(^{38}\) An ethnic group based in the Kathmandu Valley.
in Nepal is against the excessive centralization of state power in the hands of a few that has continued to weaken the social fabric of the state. Such articulations are primarily the manifestation of citizen’s sense of denial of the rightful place (Gurr, 1993, Gurr, 1997) and the perception of the oppression of ‘indigenous voices’ (Wilmer, 1993) through the state’s deliberate design of assimilation in the name of ‘national integration’ (Birch, 1978 cited in Kumar, 2000). Their demands are related to the process of reorienting the social forces (Migdal, 1994), to secularize the state, which provides the latter with the needful societal cohesion and coherence to build a multicultural and multinational, pluralistic state in its content and meaning (Kumar, 2000). These are the structural problems related to the exclusionary ideology of the state which demands a new democratic constitution to address the aspirations of all cultural groups in the country. Besides, the Maoist conflict created an unexpected opportunity for minorities and women to press for meaningful inclusion. All the political parties, civil society organizations raised voices for a constitution with provisions for proportional representation, the restructuring of the state (federalism or provincial autonomy), reservation and language rights.

Women, dalits, janjatis and madhesis have raised voices in the constitution making process. The more assertive voices have called for an inclusive constitution and law as well as the proper implementation of the existing legal provisions. These voices have also demanded changes in policy and program emphasis for the development of the marginalized groups and the improvement of their economic status. The demands of the madhesi people and janajatis have focused on the promotion of collective and individual identities, political and cultural equity and on the improvement of their capabilities. The concerns and articulations of dalits, janajatis, madhesis and women are briefly described below:

**Dalits**

Dalits have been socially, economically and politically marginalized since a long time. They are fighting against untouchability, which is deeply entrenched in Nepal. They are demanding for a truly democratic constitution with provisions to protect dalit men, women and children, their right to live with dignity and without fear. They have also demanded that at least 20% of them be represented in the constitute assembly. The new constitution should guarantee the fair representation of dalits in all layers of state organizations.
Janajatis

The main concern of janajatis is the constitutional recognition of the identities of diverse groups. Although the word janajati covers a multitude of diverse and disparate groups, whose specific aims are sometimes in conflict, most of the janajatis agree that Nepal should be a federal state and that the minorities should have significant job quotas. The major political demands of janajatis include the call for the formation of a federal democratic republic with ethnic regional autonomy, inclusive governance, equitable representation in the constituent assembly and the restructuring of the state.

Madhesi

The madhesi people are the residents of the tarai (low lands of Nepal). They are hardly represented in national institutions and are seen by many hill-dwellers as not true Nepalese because of their socio-cultural links to Indian communities across the border (Bhattarai, 2000). Thus, the main demand of the madhesi people revolves around their identity and recognition as Nepalese. They claim that a large number of madhesi have been denied citizenship and demand that they be granted citizenship certificates without any prejudice. Besides, they assert that the centralized state has not listened to the ‘silent cry’ of madhes and demand a ‘federal system with regional autonomy’.

Women

Women are now demanding at least 33% reservation in all constitutional and decision making bodies so that they can influence rules and laws affecting the lives of women. Female political leaders and NGO activists have been developing united fronts to press their demands for greater political representation and the abolition of discriminatory laws and constitutional provisions. The Interparty Women’s Alliance (IPWA) recently formed by women politicians from across the political spectrum is an example. As a response, parliament passed on 30 May 2006 a resolution that guaranteed women 33 percent of all positions in state bodies until they attained proportional participation. However, the May resolution has not been implemented, and women politicians are threatening to boycott the polls if it’s not put into effect.

The disadvantaged people (dalits, janajatis, madhesis and women) haven’t been able to articulate their interests collectively, though they all are
discriminated against, because of factionalism (Bhattarai, 2004b). They have certainly improved their ability to campaign for their interests and have made the issue of rights their political agenda. Their chief demands are coherent and backed by increased organizational capacity but they have a limited voice in the upper ranks of political parties, including the Maoists. Besides, their efforts have been divided along various fault lines. Dalits, for example, are divided into hill and tarai dalits and various sub-caste groupings. Many janajatis and madhesis are divided along class, language, religious and ethnic lines. So they have not been able to address their common problems collectively. Different political and economic interests have exploited the dalit and janajati movements to divide them and prevent them from challenging the status quo. The politics of ‘cultural difference’ is affecting the evolution of an organized, integrated and consolidated struggle against poverty, exploitation and exclusion.

Challenge of Diversity with Disparity and Identity Politics in Constitution Making

One of the most pervasive problems of constitution making in Nepal has been the difficulty of reconciling cultural diversity, economic disparity and high level ethnic consciousness. The core issue is of creating and maintaining a sense of national unity in a state that is inherently transnational, that is, multiethnic and multicultural through constitutional measures. Thus along with democracy and constitutionalism, issues of diversity relating to ethnic, caste, linguistic, religious and other ‘communities’ are crucial factors in the new constitution. It is not just a matter of recognizing the existence and identity of various ethnic groups, but of recognizing the very make-up of Nepali society, without prejudice to the unity of the nation and the state.

The socioeconomic variation and cultural diversity have raised fundamental questions about reconciling the central values of constitutionalism with the diverse aspirations of different linguistic, cultural and religious communities which are increasingly changing the formerly relatively homogenous profiles of citizens (Bhattarai, 2004a). Now these issues have become part of our constitutional order and questions are being asked about the explicit constitutional measures aimed at the accommodation and protection of community rights and aspirations. Apart from a few non-mandatory provisions in the Constitution of 1990 and the establishment of the Janajati, Dalit and Women Commissions, no provisions have been made for other significant bodies to carry out state programs and policies.
A constitution is not just a legal document. It has to reflect the aspirations of all segments of society because it profoundly impacts the lives of all citizens. People should feel the sense of belongingness in the constitution. They should be able to say that it is their own document and not something thrust on them by the power that be. Therefore, it is important to have an inclusive and participatory constitution making process.

Thus one of the major challenges of making a democratic constitution in a multicultural state seems to be the reconciliation of the pursuit of the central values embodied in the very notion of constitutionalism with the aspirations that arise in the settings determined by clashes between competing identities. The question is how to create a balance between the safeguarding of the individual rights of citizens in accordance with commonly accepted principles and the accommodation of the peculiar aspirations of different communities. How to apply, adjust or further deepen these principles so that they make sense in a changing world are questions at the center of current constitutional debates.

The discussion above amply indicates that the plural Nepali state is facing numerous problems in forging its own identity and preserving its national integrity. This multicultural society has no common myths, traditions or historical experiences that it can share. Therefore, there must be rigorous efforts from the government, academics and all Nepalese to meet the great challenge of establishing a true Nepali identity based on national pride and sense of belonging. The plural nation like Nepal can keep intact its unity and preserve its diversity only if it does not confuse unity with uniformity and seek comprehensive cultural uniformity among its members. It should forge unity out of its diversity by encouraging its cultural communities to evolve a ‘plural national culture’ that both reflects and transcends them. Such a pluralistically constituted and constantly evolving common culture unites them and gives them a secure space to grow. Such a plural culture would permeate all areas of life in order to develop a distinct national ethos. Different communities would be able to identify with and be proud of such culture, as it would be created by them (Bhattarai, 2002a). The forthcoming national charter must reflect all the aspirations and articulations of the people of Nepal.

Conclusion

There is an urgent need to uphold some guiding principles of the constitutional state—democratic rule, protection of fundamental rights...
and cultural tolerance—as minimum safeguards or starting points in the search for answers to the issues of cultural diversity, economic disparity and ethnic/regional interests and aspirations. Such principles are not the expression of our political legacy in the historical process of state-formation. How to apply, adjust or foster these principles so that they make sense in our context—these are the questions at the center of current debates on democratic constitution making.

The major problems of democratic constitution making in multicultural societies are diversity with disparity and the issue of meaningful representation. These problems can be addressed if the political culture is strong enough to hold political parties and civil society together, and a policy of inclusion sensitive to socioeconomic and cultural differences and variations is in place. The former requires a common political language and conventions of conduct in terms of which participants of diverse backgrounds and orientations will be prepared and allowed to negotiate for the things that give meaning to their lives. The latter means that culturally sensitive issues such as language, education, religion, ethnicity, customary legal practices, family matters and many others must be separated from the orientations and judgments of the majority culture and they should be made effective by the application of universal principles within and in accordance with culturally different contexts of understanding.

The new constitution, however, will not be inclusive enough by the granting of liberal participatory rights alone. Constitutional/legal provisions should guarantee a recognition of different cultures and identities and provide the legal/constitutional and social security that will allow citizens to exercise their social and cultural rights.

Now, it can safely be argued that a constitution cannot reflect the real essence of multiculturalism if it recognizes several and diverse cultural groups only in the normative sense. If it is to reflect the real essence of multiculturalism, it must accept a common political culture sufficiently represented by the aspirations of separate identities. An alternative electoral system could ensure the better representation of the plurality of interests in Nepal. However, electoral systems do not operate in a vacuum and the reformation of electoral systems alone will not bring about more broad-based representation if it is not supported by other legislative reform. This could be reforming party laws and party structures and bringing about attitudinal changes in politicians so that they become committed to broader representation (Bhattarai, 2002b).
To achieve an ideal form of state, all the political forces should clearly indicate that they can make constitutional/legal adjustments to take care of the needs and aspirations of diverse cultural groups and other identities. Besides, political leadership should demonstrate that it can spread the costs and benefits of development equitably among all groups.

Thus a constitution prepared on the basis of the spirit of multiethnic coalitions will be more functional in a state characterized by a remarkable cultural diversity with disparity and high level of ethnic consciousness.

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February First and Nepali Discourse on New Constitution Making

People’s Struggle for a Loktantrik Nepal after February 1 2005

Jhalak Subedi

“Declaring the end of the armed conflict prevailing in the country since 1996 and beginning the new era of peace and co-operation as per the understanding reached between both the sides for guaranteeing the sovereignty of the Nepalese people, progressive political solution, democratic restructuring of the state and social, economic and cultural transformation of Nepalese society through the constituent assembly, committing to transform the ceasefire between the Nepal government and the Maoists into permanent peace, the following comprehensive peace agreement has been reached between the Nepal government and the Communist Party of Nepal (Maoist).” (Kantipur November 22 2006)

In 1990, the people’s movement put an end to the party-less Panchayati System. After that, a constitution reform advisory commission was formed and according to its recommendation, a West Minister model of parliamentary democracy was established in Nepal. The Nepali Congress (NC) came to power by winning the most number of seats in the parliamentary election in 1991 while the Nepal Communist Party (United Marxist and Leninist), with the second highest number of seats, became a strong opposition party. But the then government failed to bring about land reform and address Nepal’s multicultural, multiethnic realities and regional inequalities because of the centralized state structure. The neoliberal economic policy taken by the government increased the inequalities between the center and the periphery. In the mean time, the CPN (Maoists) initiated a people’s war, which quickly spread all over the country and took the form of a civil war. Racial, gender, regional and class issues, which the Maoist raised, were instrumental in the quick success of the movement.

As the revolt spread throughout the country, the troubles of the central government increased. The parliamentary parties, palace and foreign
forces tried to suppress the movement by declaring a state of emergency but unsuccessfully. Then the king Gyanendra wrested all the powers in a military coup. This gave impetus to the Maoist movement to abolish the monarchy and establish a republic. And the Seven Party Alliance (SPA) reached a 12 point agreement with the Maoists (Devkota, 2063 v.s.).

People came under the slogans of ‘Democracy’ and ‘Peace’, the core theme of the 12 point agenda, and launch the April 2006 movement, which forced the king to cave in. And after the April 24 announcement of the king (Kantipur, 12 Baishakh, 2062 v.s.), a coalition government of the SPA was formed. The government curtailed all the privileges of the despotic king through a parliamentary declaration in May and commenced peace talks with the Maoists.

Now a peace accord has been signed between the Nepal government and the CPN (Maoist). This has paved the way to build a new Nepal through a participatory constituent assembly. We can now be hopeful that the agenda of the constituent assembly election and inclusive democracy raised strongly in 1951 and after 2002 respectively will be addressed properly.

The Structure of the Article

This article is based on the ongoing struggle of the Nepali people for democracy and a new inclusive state. In this context, attempts have been made to analyze the political activities and developments, their political-economy, the characteristics of the rule of the king, struggle against the king’s rule and the political developments after the April movement. A general background, introduction to the nature of the article, the background of the February 1 takeover and the movement against it, the SPA-Maoist alliance against the monarchy and the issue of CA, the people’s movement of 2006, peace talks between the government and the Maoists and the journey towards a new constitution are also incorporated in this article. The article concludes that a participatory constituent assembly election is essential to restructure the state.

The Royal Coup: Background and Reaction

On February 1 2005 King Gyanendra dissolved the government nominated by himself and arrested the then Prime Minister Sher Bahadur Deuba along with other members of the council of ministers, leaders of the political parties and civil society movement. Many others were put under
house arrest. In his address to the nation he spent most of his time to condemn the 12 years of democratic rule and the Maoists and to assert his commitments to multiparty democracy. (Gorkhapatra, February 2 2005). He also declared an emergency, sent army personnel to media houses to censor news and views inimical to the interest of the king. Telephone lines were cut and a sort of white terror was created by the deployment of the army throughout the country.

To the political analysts, the royal coup didn’t come as a surprise (Subedi, 2061 v.s.). Till then, America and India had negative attitude towards the Maoist movement and seen it as a threat. Ditto the elite groups (feudal and bureaucratic) who were in power. The king and his aides were always on the look out for every opportunity to grab power. The palace did it best to make the political parties seem unsuccessful. It refused to mobilize the army during Dunai incident of 2057 v.s. and the Holeri incident of 2058 v.s. (Bijaya, Rajaram & Dhruba, 2058 v.s.). The royal takeover was successfully carried out because of the strong influence of the elite groups (Thapa, Rana and Shaha) over the Nepal Army and Nepal Police and their loyalties towards the palace.

The dirty political game that the parliamentary parties indulged in, frequent dissolution of the government, unethical coalitions and widespread corruption had frustrated the people. That was perhaps why the people didn’t immediately react against the royal takeover of October 4 2002. This might have led the king to believe that the people were with him. He might have been further emboldened later when the larger political parties like the Nepali Congress (Democratic) and CPN UML joined the government. Also the USA and other countries wanted the political parties to support the king to create a common front against the Maoist movement. Thus the quick spreading of the Maoist movement was another factor that prepared the ground for the royal takeover.

The Maoist movement, launched in 1996, was built on three major foundations. First, the massive poverty created by the unequal distribution of wealth and resources. In 1996 the per capita income of Nepal was $210. According to the Nepali criterion, over 42% of the total population

39 In Aswin 2057 BS. the Maoists attacked Dunai, the district headquarters of Dolpa. The then Home Minister Govinda Raj Joshi later accused the RNA of not coming to the aid of the police. After he made this remark he was forced to resign from his post.
was living below poverty line. Unemployment was around 14.4% and semi-unemployment was around 47%. The centralization of the wealth was very high. The Gini-coefficient was 0.34 (NESAC, 1998). The poorly developed agricultural sector and landlessness (1 million farming families were landless) had massively ruined the rural economy.

Second, the wide gap between center and periphery created by centralization. The state, as it was heavily centralized, neglected the multilingual, multiracial and regional issues. The participation in the state mechanism of people from different castes and regions was negligible. Thus the only way for indigenous people, people from the Madhes, Karnali and far western region was to rebel.

Third, women and dalits were exploited because of the feudal characteristic of the Hindu caste system. And it was only natural for women and dalits to desire revolutionary social change.

It was on these grounds that the Maoists, though influenced mainly by classical Marxist ideology, later incorporated racial, regional, gender and dalit issues in their class struggle. As the crisis of the feudal, bureaucratic and comprador-capitalist classes increased, it was natural for some sort of military despotism to emerge. In this situation, the king grabbed power from the parliamentary parties. But countries like America and India, as they were more interested in protecting their own strategic interests, were supportive of the king’s takeover.

But after February 1, things didn’t go as the king might have expected. The Maoists dismissed the royal announcement as invalid (Devkota, 2006) and declared a two week long Nepal bandha. They also appealed to the people who were against the monarchy, and especially the parliamentary parties, to launch a people’s movement. The leaders of the parliamentary parties also expressed their commitment to fight against the king’s takeover of October 4 2002.

America, India and other countries also opposed the king’s move. America, however, was always in favor of the king-parliamentary party alliance. And India was firmly committed to its two pillar policy (constitutional monarchy and multiparty democracy). But China, as usual, said it was Nepal’s internal affair. Many considered it as a kind of support for the king. India somehow postponed the SAARC Summit that was about to take place in Dhaka and gave the message that the king cannot move ahead without heading India’s counsel. Many European and, particularly,
Scandinavian countries gradually decreased their aid to Nepal and began to pressurize the king.

Alienated and cornered, the king started to appoint regional administrators (Gorkhapatra, Falgun 6 2061 v.s.) and formed a high level royal commission for the control of corruption and had a few former minister arrested. He also embarked on propaganda visits to different districts. These activities showed that he was seeking an active role for himself. Alarmed, the parliamentary parties and the Maoists came to an understanding and started a joint movement against the king.

SPA-Maoist Alliance against the Monarchy and the Issue of CA

The CPN Maoists launched its armed struggle to abolish the monarchy and establish a ‘people’s republic’ (Prachanda, 2063 v.s.) in 1996. At that time Nepal was five years into parliamentary democracy. The Nepali Congress and the CPN UML had ruled the country for four years and nine months respectively. The attraction for parliamentary democracy was still intact. The political front of CPN Maoists, the United People’s Front, was in parliament, having own the third highest number of seats in the 1991 election. But by then it had already concluded that the parliamentary system can not provide solutions to a host of problems related to race, language, region, class, gender, livelihood and nationality. It submitted a list of 40-point demands to the government on February 2 1996 with the warning that it would go underground and launch an armed struggle if the demands were not met within two weeks. But before the ultimatum could expire it waged the ‘people’s war’ against the state.

Started by less than 100 committed political revolutionaries in some parts of the country, the Maoist struggle spread all over the country. Within five, six years it became stronger. The Maoists started killing local level leaders and cadres of the parliamentary parties. The police was forced to beat a retreat from the villages. Gradually, the Maoists even began to influence the formation and dissolution of parliamentary governments.

A ceasefire was announced between the state and Maoist rebels on the third week of July 2001. Three rounds of peace talks were held. In each round, the Maoists put forth three conditions for a political settlement:

1. Round table conference
2. Interim government
3. Election to a Constituent Assembly
The Maoists proposed to restructure the state through a constituent assembly election. They were willing to postpone their demand for a republic if the political parties were willing to go for a constituent assembly election. But the parliamentary government and parties flatly rejected the proposal—and the peace talks ended.

The question of the constituent assembly was raised in Nepali politics in November 1950, when the then Indian Prime Minister Jawaharlal Nehru sent a letter to Prime Minister Mohan Shamshere referring it as one of the conditions for the political agreement between the king and the Rana ruler (Pradhan and Rose, 2004). Mohan Samsher rejected it and the Nepali Congress declared a civil war against Rana rule. In his address to the people after Delhi agreement, in February 1951 King Tribhuvan said that the new system in the country would be built by the people through a constituent assembly. Later the palace consolidated power and political parties were compelled to accept a new constitution drafted by a commission formed by King Mahendra. In this way, the Nepali people were denied an opportunity to participate in the constitution making process. After the people’s movement of 1990 also, the constitution was drafted by a committee formed by the king.

In the beginning, the ruling class and parties were not in favor of the constituent assembly and were at the most willing to make a few changes in the 1990 Constitution. The Maoists backed out of the peace talks and in November 2001 attacked some army barracks for the first time. Then an emergency was imposed. The Maoists were tagged as terrorists and the army was mobilized throughout the country. The Maoist rebellion, however, kept gathering force.

The rift between the parliamentary parties widened. The intraparty struggle in the Nepali congress led to the dissolution of parliament and a fresh election was declared for November 2002. But the people’s war by then had reached a new height and it was impossible to conduct an election without any political settlement with them. When the parliamentary parties and the government reached a consensus to postpone the election for a year, King Gyanendra dissolved the elected government led by Sher Bahadur Deuba and took executive power, accusing the government for failing to conduct the election in time and establishing peace in the country.

The new government of King Gyanendra also initiated peace talks with the Maoists. But the Maoists stood firm in the demands that they had put
forth during the previous rounds of peace talks. The government didn’t agree to their demands and they broke the ceasefire. On February 1, 2005, the king dissolved the government headed, again, by Sher Bahadur Deuba whom he had nominated as prime minister. As the king sought an active role for himself, the parliamentary parties and the Maoists, though ideologically poles apart, formed an alliance. The political parties expressed their commitment to the constituent assembly election and other democratic processes in a statement issued out on May 6, 2005. This paved the way for the NC and CPN UML (Devkota, 2062 v.s.) to work, for the first time, with the Maoists. The next day Maoist Chairman Prachanda in a statement said that, ‘The acceptance of at least the constituent assembly by the political parties has opened the possibility for the progressive political development against the despotic King Gyanendra... As the constituent assembly election and the establishment of multiparty democratic republican state is the only way from the existing crisis, we appeal to all to make a wide forum for the same.’

The talks resumed between the SPA leaders and the Maoists. Girija Prasad Koirala, Bamdev Gautam, Comrade Prakash, Madhav K. Nepal went to Delhi to meet Maoist leaders Prachanda and Baburam Bhattarai and they came to some kind of understanding. The SPA declared the constituent assembly election as its major agenda through a press statement on Asar 4, 2062 v.s. The statement said that all the forces should be united against the despotic king for the ‘formation of an all party government, responsible to the reinstated parliament, peace talks with the Maoists for the peaceful solution to the ongoing violent conflict and abolition of the despotic monarchy through the election of a constituent assembly and the establishment of complete democracy along with the progressive restructuring of the state.’ This is how the parliamentary political parties formally accepted for the first time the issue of the restructuring of the state through the election of a constituent assembly (Devkota, 2062 v.s.).

The CPN (Maoist) announced a unilateral ceasefire in September 2005 to prepare the ground for cooperation and dialogue with the SPA. It emphasized on the need for taking the people’s movement to a greater height. Civil society and the media supported the ceasefire, which put pressure on the SPA to cooperate with the Maoists. On the other hand, King Gyanendra declared a municipality election for February 8, 2006. This was a challenge to the SPA and the Maoists, as the successful completion of the election would have given an indication that the people were behind the king. Keeping this in mind, the SPA decided to strongly boycott the
election. In the mean time, the Maoist and the CPN UML signed the famous Rolpa agreement in November 2005. The agreement emphasized the need for a constituent assembly and a democratic republic to bring the country out of the present crisis (Devkota, 2062). Consequently, the SPA and the Maoists reached a 12-point agreement to launch a united peaceful people’s movement.

**People’s Movement 2006**

The historical agreement between the SPA and the Maoists was welcomed by everyone. And the people were hopeful that this agreement would bring peace and free the country from the king’s despotic rule. In the mean time, the Maoists on Magh 1 2062 attacked the police post in Thankot. This attack came after a long time; the last attack they carried was in Pili on August 2006. As King Gyanendra was proclaiming that the Maoist activities were being reduced to a few stray incidents, the Maoists attacked Tansen, the headquarters of Palpa, thwarting the king’s ambition to hold the municipality election. Fearing the movement against the king gathering movement, the government started arresting people who were in the forefront of the movement. Their telephone lines were cut and some of them were put under house arrest. Clashes with the government forces became frequent in the major cities. The municipality election turned out to be a farce. The people whole heartedly supported the movement led by civil society and political parties.

On April 6 2006, the SPA and the Maoists launch a joint nationwide general strike. Millions of people from various walks of life and all parts of the country came onto the streets for 19 days and demanded the end of king’s rule. Just for a one-point demand for a republican state, people undermined the curfew announcement and continued the mass demonstration and strike. After the death of more than 20 people in the demonstrations, the king called political parties to form a government on April 22 2006. This call, as it was an obvious attempt to alienate the Maoists and bring the SPA and the king nearer in a power-sharing arrangement as desired by America and India, was bluntly rejected by the people and the SPA. Bigger demonstrations took place later. Finally, King Gyanendra was compelled to leave power on April 25. After five days, the first meeting of the reinstated parliament was called and all party government was formed and the CPN (Maoist) announced ceasefire on April 28. Then the talks between the state and the Maoists commenced. As the logical conclusion of this many phased talks, a comprehensive
peace agreement was reached between the Nepal government and the Communist Party of Nepal (Maoist).

Inclusive Democracy and CA: Nepali Experiment

The ten-year long people’s war had raised the consciousness of the people to an unimaginable height. It tore the traditional feudal mindset and its cultural value system completely. The exploited rural poor and low level farmers started to crave for revolutionary change. The issues raised by various races and dalits, and gender inequalities were established as the common agenda. The people’s war commenced by the Maoists ultimately brought about transformation in Nepali society. It created a strong pressure to restructure the centralized state structure of the nation.

But the people’s war was not strong enough to usurp power and they needed the support of the middle class people and the urban poor. On the other hand, the urban middle class was always in favor of absolute peace. The neoliberal economic policy that successive governments followed after the reestablishment of the multi-party democracy in 1990 (and even before) had raised the marginalized class of the urban poor as a powerful group in the cities (Subedi, 2063 v.s.). This class was demanding revolutionary changes in the socio-economic structure. These causes forced the SPA and the Maoists agreed to come to an agreement, which ultimately led to the success of the movement.

Only by understanding the political-economic realities of our society, one can understand the essence of the ongoing political change, which is the dynamic condition created by the fusion of the existing capitalist power and laborers or, in other words, liberal capitalism and progressive Marxist ideologies. So the state system that is going to be established through the election of a constituent assembly will be completely different from the prevailing capitalist model of neoliberal democracy and the people’s dictatorship model of communists. This is also the essence of the ongoing people’s struggle and the agendas of social transformation in Nepal. Such a system will resolve the contradictions that exist in multiracial, multicultural realities and the conflict between the center and the periphery. It will abolish gender discrimination, will create the foundation for the freedom of dalits and, at the same time, weaken the relationship between the alliance of the elite class, and bureaucratic and comprador capitalism and thereby ensure laborers and farmers access to
resources. This will take place in accordance with the established rules and regulation of democracy.

Before all this, the SPA and the Maoists should agree to replace the Constitution of 1990 by an interim constitution, establish an interim parliament and form all party government including the Maoists and then held the constituent assembly election within June 2007 (SPA-Maoist peace accord, Nepal Saptahik, Mangsir 3 2063 v.s., page 34, 35). If this kind of agreement comes to effect, the king will be excluded from all the affairs of the state. And finally, the first meeting of the constituent assembly will decide the fate of the monarchy. This has been understood as steps towards a republican Nepal.

All these political developments, despite the protest from some sections, have ensured the participation of the common people in the making of a participatory democracy through the election of a constituent assembly.

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Context

In 1996 the CPN (Maoist) launched their “Peoples War” claming that the Constitution of the Kingdom of Nepal 1990 was inadequate in making the Nepalese people sovereign and the owner of the state authority. After the royal massacre in June 2001, king Gyanendra ascended the throne and on October 4 2002, he dismissed the democratically elected Deuba government. The political parties carried out agitations against the king, but their agitations petered out, as the Nepalese people didn’t come out in the streets disappointed by political malpractices after the restoration of democracy in the country.

King Gyanendra then toyed with different governments. He first asked Lokendra Bahadur Chanda to form a government. The Chanda government tried to negotiate a political settlement with the Maoists, but unsuccessfully. The Chanda government was dissolved and another headed by Surya Bahadur Thapa was formed. All these happened while the political parties were continuing with their agitation. The king dismissed Thapa and appointed Sher Bahadur Deuba as prime minister who cobbled together a coalition of splintered groups and the CPN (UML). The Deuba government also tried to negotiate with the Maoists, but they refused to come to the negotiating table. King Gyanendra dismissed Deuba again and took control of the government and imposed a state of emergency on February 1 2005 through a military coup. All the political parties were banned, many leaders were put under house arrest and some others were detained and the media was censored.

The February 1 takeover violated the political contract made in 1990. And the SPA tried to start a dialogue with the Maoists and reached a
12-point agreement. The three main issues of the agreement were the formation of an interim government, interim parliament and the election to a constituent assembly. The agreement gave the people hope and they rallied behind the parties to launch a movement which later came to be known as Janaandolan II. The movement forced the king to kneel-down.

Now Nepalese are in the process of making a new constitution. The difficult task, at this stage, is how to permanently solve all the sources of conflict and make Nepal more inclusive. Many Nepalese find it difficult to consider themselves the citizens of Nepal, as they have always been treated as aliens and second-class citizens. The sole objective of the Janaandolan II was to make the state more inclusive and people feel that they belong to the state. The Janaandolan II (which the Maoists call April revolution) is the source of the Interim Constitution of Nepal 2063.

**Negotiation and a Political Settlement**

Things have started to move faster on the Nepali political scene. The interim constitution was promulgated (on January 15, 2007), following the many political agreements between the SPA and the Maoists, particularly the comprehensive peace agreement (CPA). This paved the way for the formation of the interim legislature, which is already in place. The verification of the Maoist combatants and the cantonment of their weapons have begun. The UN has given itself a year to complete its mission of a sustainable political settlement. At the pace the UN is working, the cantonment of weapons should be over by the first week of March 2007, paving the way for the formation of the interim government comprising the CPN (Maoist). This will mark the completion of the first phase of the peace process and political reconciliation, turning the rebels into partners. This however won’t be the logical conclusion of the Maoist people’s war and the historic Janaandolan II, even though getting there itself would be a remarkable feat given that the kind of helpless state we were in only a year ago.

The editors of this volume asked me to appraise the future of loktantra (people’s democracy) in Nepal on the basis of the Interim Constitution of Nepal 2063. Though it is very difficult to predict the future course of political developments because of the fast changing and fragile political scenario, we can generalize it. In this paper I will try to do precisely that, in a critical, comprehensive and analytical manner.
Philosophical and Theoretical Rationale of the Janaandolan II

The current course of political development is based on the spirit and philosophy around which Janaandolan II evolved and came to a logical end. The lighthouse of the feudal monarch was built right after the so-called unification through the process of Grokhaizatiation\textsuperscript{40} and the centralized state mechanism in Nepal. Following the breakdown of the Rana\textsuperscript{41} regime, the Shah dynasty found an opportunity to give the so-called national dimensions to the mission their founding fathers had bequeathed to them: to be the ‘beacon on the hill’, they launched the idea of nationalism with a call to every nationalities, janajatis, aadibaasis, dalits and madhesis to follow in their footsteps. Since then the relations between feudal monarch and raiti\textsuperscript{43} have been cast in this mould: ‘Nepalese nationalism’ provided the fundamental frame of reference for that mixture of generosity, bribery and oppression which has characterized the policies toward its peoples. The Shah dynasty’s political legitimacy was laid on the foundation of this virtual nationalism. Today the lighthouse is starting to crumble. The idea of the older suppressive so-called glorious history of the shah dynasty is in ruin. Nepalese nationalism has failed. Moreover, the historical conditions, which catapulted the idea into prominence, have vanished: the older suppressive feudal monarch has become outdated (Sachs, 1997)\textsuperscript{42}. Above all, the hopes and desires, which made the idea fly, are have not lost currency: older suppressive regime’s nationalism has grown obsolete. This is the ripe time to write the obituary of the monarchy in our land.

There has been a progressive transformation of relations between the state and its citizens in the last two and a half century after the formation of the centralized state mechanism or the so-called unification of Nepal. This transformation has taken many forms. The initial period of territorial unification involved the subjugation of the vanquished people within the fold of an expanding Gorkha empire. The setting up of administrative, military, judicial structures and taxation on natural resources, specially land, led to the gradual unfolding of a process in which people were tied to the state system through their role as tax payers, providers of unpaid

\textsuperscript{40} Process of unification of Nepal by King Prithvi Narayan Shah.
\textsuperscript{41} Rana family rule for 104 years.
\textsuperscript{42} Sachs used the concept to analyze development, but I have used it here to metaphorically talk about the nationalism of the Shah dynasty.
labors and subjects conforming to the religious, political system defined in the context of the caste-based Hindu hierarchical system.

The political change of 1950 ruptured those relationships and unleashed two processes. First, the process of political change which, for the first time in Nepalese history, transform the old relations between the state and its subjects. But this process saw a serious setback when king Mahendra usurped power in 1960 through a military coup.

Second, the modernization process which tried to transform the ‘traditional’ people into ‘modern’ consumers of development. The state adopted Nepali as the lingua franca and tried to integrate the nation through education, language and the Nepalese currency. Therefore, democracy became a must for legitimizing the king’s absolute rule (hence the coining of Panchayat Democracy). That was the time in world history when dictators had to rule as democrats!

The modernization of Nepal took place after the signing of an agreement of cooperation between the US and Nepali governments under the Point IV program. This necessitated giving the extremely centralized and monolithic state system a democratic makeover. The political, monetary and educational structure was set up during the period of 1950-59 as a step towards modernization. A new system of governance was put in place in the form of a new development machinery, a new language in public discourse and a new set of expertise. The political subjects were converted, in this process, into the consumers of ‘development’.

Past political movements kept alive the aspiration of transforming the subject-state relation into the one based on equality and sovereignty of the people. But the people had to wait till 1990 to realize that aspiration (the 1990 Constitution defined people as sovereign for the first time in Nepali history). The political openness that resulted from a new social contract written in 1990 led people from different social locations to assert like never before.

The peoples’ struggle for transformation is a unique one in that it tried to transform raiti, duniya and praja into janata, that is, dignified

45 he partyless autocratic rule of King Mahendra and called ecofriendly democracy
46 Subjects were called by King Tribhuvan
47 Peoples were called praja during the Panchayat regime
sovereign nagarik. It is the history of the struggles for the emancipation of the Nepalese people from slavery and serfdom. It is also the history of the antislavery movements. In retrospect, Nepal evolved itself into a modern state on the basis of Hindu philosophy, mythology. Nepal became a monolithic and centralized state through the two dynamic processes of Hinduization (Sharma, 1975) and Gorkhaization (English, 1989). This process was totally guided by Hindu philosophy and mythology. Nepalese political history began after the unification. Before unification, Nepal was fragmented into many small petty principalities. Each principality had their own state authority, political leadership, form of government, and the rights and duties of its member were based on tribal practices. The western concept of citizens and state, even state as a form of social contract was unheard of then. Nevertheless, the Nepalese state formation is unique in two ways. First, the process of state formation as a centralized state machinery, making it a viable state till date, despite accepting British domination during the colonialism in India. Second, the struggle for the sovereignty of the people.

The popular movement of 1950 was the first progressive leap towards making Nepalese sovereign. However, the feudal force, led by the royal palace, subverted that effort in 1960. The Nepalese people then had to again fight against the royal palace, the leader of traditional reactionary, regressive and pre-capitalist and feudal elements, in 1990 and in 2006. The promulgation of the interim constitution in 2007, a new comprehensive social contract, was the result of the struggle between Nepalese and the all pre-capitalist and feudal elements.

Objectives of the Interim Constitution

The current interim constitution is the product of a political consensus reached between the SPA and the CPN (Maoist) to jointly lead the Janaandolan II. Despite uncertainties and suspicions, the constitution was promulgated because of the strong pressure from civil society, political parties and other pressure groups. The interim constitution has two objectives.

48 Similar to meaning the Masses
49 Synonyms of citizen or sovereign
50 Process by which non Hindu caste adopt the Hindu cultural
1. Interim or transitional management of state affairs and transitional justices in the country.

2. Election to a constituent assembly and making of a new constitution in a participatory and inclusive way.

This is a temporary, but crucial, constitution. This constitution legitimizes the dissolution of the regime and the formation of a new one. The international community has also welcomed the constitution and approved the whole process.

Salient Features of the Interim Constitution of Nepal 2063

The Interim Constitution of Nepal 2063 is a great achievement in the sense that it was promulgated for the first time in the history of Nepal by the representatives of the people (chapter one discusses constitutional development in detail). The preamble of the Interim Constitution of Nepal 2063, which says “We the Nepalese people have sovereignty and state authority”, is revolutionary and a milestone in the political civilization of Nepal. The salient features of the interim constitution may be summarized as follows:

1. The constitution was promulgated by the representatives of the Nepalese people and approved first by the reinstated parliament and then the interim legislature including the Maoists. The result of the janaandolan II, this constitution is the symbol of people’s rising power in the Nepali polity. So it is a path breaking and revolutionary constitution.

2. **Source of sovereignty and state authority**: Sovereignty and supreme state authority is vested in the Nepalese people. The constitutions which were enacted in the past (see the first chapter) vested sovereignty and state authority in the king. Even in the Constitution of the Kingdom of Nepal 1990, sovereignty was not fully vested in the Nepalese people, thanks to a ruse by the king Birendra. Instead of reading out the preamble written in the constitution, he read out, on the day of the proclamation, from a paper that he took out from his pocket\(^51\).

3. **The source**: The constitution, which was promulgated by the representatives of the Nepalese people through the approval of the

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\(^51\) Preamble and article 2 of the Interim Constitution of Nepal 2063
reinstated parliament and newly formed interim legislature, is the outcome of janaandolan II. This is the symbol of rising people’s power in the Nepali polity. So, it is a path breaking and revolutionary constitution.

4. **The nation:** The constitution has defined Nepal as a multicastrse, multilingual, multireligious, multicultural and multiideological nation. The previous constitutions were biased towards certain sections, cultures, languages, castes and ethnicities.

5. **The state:** The Interim Constitution of Nepal 2063 defines Nepal as a state which is secular, inclusive and democratic and guarantees equality and social justice.

6. **Language:** The Interim Constitution of Nepal 2063 recognizes all the languages as national languages and is not biased towards a certain language.

7. **Fundamental rights:** The Interim Constitution of Nepal 2006 has embraced other fundamental rights like right to life, right to education, right to live in clean environment. These rights have been guaranteed by articles 12 to 32. The interim constitution also guarantees social protection right, rights for women and right to get employment.

   Article 12 guarantees the right to freedom, under which every citizen has right to life. It also guarantees that no provision will be made in the law for death sentences. One can exercise one’s right to the freedom of speech and thought, the freedom of peaceful assembly, the freedom to form political parties and organizations, the freedom to move from one place to another and to take up any profession or run any business or industry. Similarly, article 13 states that the state shall not discriminate people on the basis of religion, race, caste, tribe or gender. Article 14 makes untouchability and caste based discrimination illegal.

   Article 15 guarantees the right of publication and broadcasting and bars the state from censoring any news reports or articles. Article 52 Article 3 of the Interim Constitution of Nepal 2063 Article 4 of the Interim Constitution of Nepal 2063 Article 5 of the Interim Constitution of Nepal 2063
16 guarantees the right to the environment and health. Article 17 guarantees the right to education. It also ensures basic education in one’s mother tongue. The state will be responsible for providing free primary education to all. Under article 18 the state is obliged to provide social protection to women, laborers, the disabled and the aged. Article 19 guarantees the right to property. Everyone can buy, possess or sell property and the state cannot acquire the property of its citizens without providing adequate compensation. Women’s rights have been guaranteed under article 20. Women will now have the right to inherit their parent’s property.

Article 21 guarantees social justice for women, dalits, indigenous people, madhesis, farmers, laborers, the poor and the downtrodden. Article 22 guarantees juvenile justice. This ensures social protection for children, among others. No one can exploit children. The disabled, conflict victims and displaced children will have the right to get special protection from the state. No one can hire children for dangerous jobs. Article 23 guarantees the right to adopt any religion and follow one’s culture. Article 24 guarantees people’s right to criminal justice and makes arrest or detention without prior notice illegal. Article 25 states that no one will be kept in preventive detention unless he or she poses a threat to the sovereignty and integrity of the state or the law and order situation. Article 26 guarantees right against any kind of torture in detention centers or jails. Every citizen will have the right to information as per article 27. But no will be forced to divulge the information that has to be kept secret as per the law.

Similarly, every citizen will have the right to privacy. The state or any other agent cannot violate this right unless the law requires it. Article 29 guarantees the right against exploitation. No one can keep bonded laborers or slaves. No one will be compelled to work against his or her wishes. Article 30 guarantees the right to form labor unions. Article 31 guarantees right against exile, while article 32 guarantees the right to constitutional remedies, that is, anyone can go to the court if one’s fundamental rights are violated.

8. **State’s duty, directive principles and policies:** In part 4, articles 33, 34 and 35 of the Interim Constitution of Nepal 2007 clearly lays out the state’s duty, directive principles and policies. They are the moral and ethical duties of the state and the formal ideology of the state.
Though article 36 prohibits the law suit regarding this provision; it is the moral responsibility of the government for social justice and socialist orientation.

9. **Constituent assembly:** The Interim Constitution of Nepal 2063 has made a provision for constituent assembly elections. Article 63 (2) states that the date for the constituent assembly election needs to be declared as early as possible and article 63 (3) states the composition of the constituent assembly will be as follows:

i) Two hundred and five members directly elected based on one candidate one vote and the candidate who gets the most number of votes wins the constituency (majoritarian electoral system).

ii) Two hundred and four members elected on the basis of partial proportional representation

iii) Sixteen members from different areas of national life nominated by the council of ministers.

There is a provision for a maximum representation of women, dalits, janajatis, aadibaasis, madhesis and backward regions.

Besides these, the Interim Constitution of Nepal 2007 contains many other special features of the democratic constitution, which have not been discussed here.

**Is the Interim Constitution Democratic and Inclusive Enough?**

This is the most important and crucial question facing Nepal today. What makes a constitution democratic and inclusive? The interim constitution has many shortcomings. However, it is democratic in the sense that the source of this constitution is the people of Nepal. So it can be considered as a milestone. The monarchs promulgated all the previous constitutions. As a result sovereignty and supreme state authorities were vested in the feudal monarch. However, this constitution was promulgated by the people and it reflects the spirit of the janaandolan II.

This however does not mean that the Interim Constitution of Nepal 2007 is inclusive. Article 138 of the interim constitution assures that the state will be progressively restructured on the basis of caste, class, language, gender, culture, religion and regionalism. The centralized and monolithic structure of the state is the source of all kinds of discriminations. So it should be demolished to establish an inclusive and democratic state.
And the constituent assembly should finalize when and how the state would be restructured in consultation with a high level state restructuring consultative commission after it is formed.

Article 139 stresses decentralization and local governance while article 130 emphasizes the restructuring of the state. So article 130 and 139 are contradictory. An inclusive democracy can only be realized through the inclusion of all sections of society in the affairs of the state. A state can be made inclusive, participatory and democratic by handing power to local governments or through federalism. Only the elimination of social exclusions can guarantee an inclusive and progressive democracy. And the formation of local governments or federal states can eliminate the problems of exclusion. But inclusion and decentralization and local governance is hypothesized by the interim constitution simultaneously. Two mutually exclusive events i.e. the decentralization and local governance on the one hand and local government or federalism on the other cannot happen at once.

The issue today is of inclusiveness and the monolithic and extremely centralized structure should be dismantled and new more inclusive structure of the state should be built. The interim constitution should have provided the foundation to build such a structure. But sadly, it hasn’t. This has hindered the participation of janajatis, aadibaasis, madhesis, dalits, women and all regions.

Participatory and inclusive democracy cannot materialize without federalism or the local government system the bases of which are political economic as well as natural resource and geographical proximity. But article 63 of the interim constitution hinders the representation of all sections of society in the CA. To be explicit, article 63 says there will be two kinds of representation in the CA: the old majoritarian electoral mode and the partial proportional representation. This is the contradiction that crept in in the constitution because of the inaction of the SPA and the Maoists

Only proportional representation can guarantee an inclusive democracy. Political leaders are harping on inclusive democracy but what they are actually doing is creating an un-inclusive state. The electoral system provisioned in the interim constitution doesn’t allow the full representation of the poorly represented section. The source of madhesi aandolan in the tarai and the grievances of janajatis is the electoral system. The electoral
system and the composition of the constituent assembly still hinder the representation of janajatis, aadibaasis, madhesis, dalits and women. Article 63 (4) says 33 percent of total number of candidates fielded by parties should be women, but this alone doesn’t ensure that women are fairly represented. We have the experience of parties fielding women candidates in constituencies in which they are sure to lose. Presently the Madhesi Janadhikar Forum is agitating for the federal state and the autonomy of Madhes and two factions of the Tarai Janatantrik Morcha are waging a guerrilla war. Janajatis and dalits organizations are also starting their aandolans for proportional representation.

Problem of Janajatis, Madhesis and Dalits

For the first time in Nepali history it has become possible for us to speak of our Nepal. But the possessive noun reveals a deep ambivalence because though ‘our’ implies participation and ownership and emphasize one’s right to run the state, the political parties have been running the state in a hegemonic way. Consequently, the image of ‘our’ Nepal conveys a contradictory message; it can call either for moderation or for megalomania.

At a time when the country is passing through a crucial phase of history, the SPA government has failed to think of the threats various elements and groups pose. Even a minor splintered group, the Tarai Janatatrlik Mukti Morcha, has created havoc. The parties in the government have not been able to come to an agreement on different issues and at times they have even acted in opposition to each other. For example, the Nepal Sadbhawana Party (Anandi Devi), one of the SPA partners in the government, declared a tarai bandh. This bandha triggered the pahade-madhesi conflict in Nepalgunj. The NSP seemed to have acted in haste in order to show that it was still committed to its stand on federalism and two types of elections. It need not have called for a bandh, as it had already written a note of dissent when the two issues failed to get a mention in the interim constitution.

Federalism is going to be an important agenda in the CA, as it has now been realized that there should be some sort of division of power and functions to address regional demands. The madesh in increasingly becoming volatile, but the responses of the political parties have been very lukewarm. The Maoist insurgency dragged on for 10 years because successive governments considered it as a simple law and order problem.
The madhesh issue will also turn serious if the major parties continue to consider it as stray incidents engineered by some disgruntled groups. The tarai problem is uniquely different from the problems of the hill-based ethnic groups. For ethnic hill people the major issues are social exclusion and suppression of cultural, linguistic and religious rights but for the people from the tarai it’s the more basic question of Nepali identity—that is, a sense of belonging to the state. Panchayat Nationalism was founded on three major characteristics and symbols of Nepali identity: fair-skin color, ability to speak Nepali and the cultural orientation that fitted the frame of hill culture. The madhesi people lacked all these three and many of them were treated as aliens. So the major challenge of the future will be to correct the past mistakes and restructure the Nepali state to address the grievances of different ethnic groups and the identity issue of the madhesi people.

The upper caste-lower caste divide, the demeaning state of women and deeply entrenched feudalism and the culture of violence are some of the problems that only madhesi can tackle. But the current madhesi movement lacks a real leader who can dare to say “we too have problems that we need to deal with” (Dhakal:2007).

Only the upcoming constituent assembly election can adjudicate the truthfulness of the claim that the madhesi people have already lost faith in the mainstream parties. But if the claim is true, we are heading for real trouble that can shake the very foundation of the Nepali state (Dhakal, 2007). All major writings on democracy mention ethnic diversity as the biggest challenge to the consolidation of this form of governance. Robert H. Dahl55, the prominent American political scientist, argues that democratic institutions are more likely to develop and endure in a country that is culturally fairly homogeneous. However, we are a society with strong subcultures and cultural cleavages. Cultural conflict complicates matters because it brings cultural attributes such as religion, language, people’s belief system into the political equation. More often, these are non-negotiable issues and yet democracy demands negotiations, conciliation and compromise. The solutions to the problems that madhesi, janajatis and dalits are facing are discussed in table 4.1 I have assessed the interim constitution based on late Harka Gurung’s scheme of social inclusion.

55 On the Critique of Democracy
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<td>Social/Cultural i) Secular state ii) Official national status of janajati language Economic ii) Education targeting iii) Affirmative action Political iv) Proportional representation v) Ethnic autonomy</td>
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<td>Source: From Exclusion to Inclusion by Harka Gurung, May, 2006 (italics supplied).</td>
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Problem of Democratic Consolidation

The launching of a popular mass movement, janaandolan, alone is not enough. Its spirit needs to be consolidated, legitimized and institutionalized. The year 2006 turned out to be remarkable in many respects—history was made and democracy was rediscovered. Now the people are eagerly waiting for the leaders to take the janaandolan II to its logical conclusion—a consolidated and blooming loktantra. The political parties had missed the opportunities to institutionalize a participatory and inclusive democracy in the past. The 1951 change, the 1990 janaandolan and Constitution had failed to consolidate the spirit of the movement (Baral, 2007). And Nepal had to pass through the agonizing period of monarchial authoritarianism, the Maoist insurgency in which about 15,000 people were killed. The political leaders should now show prudence. Otherwise the present momentous course might be overtaken by another set of events. History might repeat itself.

Democracy will not survive without the empowerment of people. More so in a country like Nepal where an overwhelming number of people have grievances against the discriminatory nature of the state. And left to themselves, the parliamentary parties and leaders alone could not have engineered the changes we have witnessed (Baral, 2007). These changes are: First, despite making many mistakes in the past, leaders of the political parties, cornered by the regressive action of King Gyanendra, displayed an unprecedented acumen and farsightedness in launching the janaandolan II, after entering into an agreement with the Maoists, to end the absolute rule of the king and make people sovereign. But they have failed to reach a consensus on a democratic model for a new Nepal because of the pressure from different national and international actors and their inability to understand the true nature of the current Nepali politics and its in-built regressive trends. However, the country has inexorably moved towards change, in consistent with the spirit of janaandolan II. It’s time the parties, particularly the Nepali Congress, took the lead in the transition to a republican Nepal. The participation of the Maoists in the government and in the constituent assembly election is significant for any substantive changes. The Maoists were mainly responsible for creating a new environment for radical change. The monarchy is unlikely to survive in the wake of a strong republican wind blowing across the country.

Second, ideological polarization has lead to the establishment of the supremacy of pluralist democracy and freedom and to an end to the 10-year long Maoist war.
Third, the politics of consensus on major issues has been accepted until the election of a constituent assembly, which is tentatively scheduled for June 2007.

Fourth, the Nepal army has come under the control of the government. And finally, the support the movement has drawn from the entire international community has legitimized the objective of the movement (Baral, 2007)

**The Future State of Loktantra**

Brazilians used the word ‘no’--pois nao--to say ‘yes’, to approve, to accept. However, no one gets confused. That’s because they enrich their conversation by culturally rooting their speech, by playing with words to make them speak in their contexts (Esteva, 1997). However, when Nepalese leaders talk about inclusive democracy they mean just the opposite. And everyone gets confused. All the political parties are talking about inclusive democracy but are actually practicing exclusivity. By using uncritically such a loaded word, and one doomed to extinction, they are making the political situation of the country more acute. From the unburied corpse of the so-called ‘inclusiveness’ every kind of pest has started to come out. The chaos and problem of the tarai is the result of the contradiction between what the political parties are saying and doing. The time has come to unveil the secret of older so-called participatory democracy. The possible agitation of janajatis and madhesis problem should be looked into. Sharing the South African experience Niculus Haysom said in a program that in a situation of sharper intra-state tensions, there has been an unprecedented constitutional interest in creating political frameworks which capture the ownership of all citizens (especially in nation states with religious, racial, linguistic and regional diversity). This interest stems from the concern to develop a notion of nationhood which admits diversity, provides for a national identity which is compatible with the assertion of sub-national identities. That is perhaps why in Nepal also there has been greater interest in the systems of power sharing that ameliorate some of the features of a ‘winner-takes-all’ liberal democracy and promote a wider stake-holding especially by minorities. Such systems typically focus on the establishment of a fairer distribution of political power and the entrenchment of fair economic opportunities across the group fault lines. They also acknowledge a new imperative for inter-group tolerance, promote wider participation in and ownership
of state structures and insist on at least proportional representation in political decision-making (see page 105).

There’s no perfect constitution as such, a good one guarantees the rights of every man woman and child, not only to life but also to everything that makes life meaningful. A good constitution is the one that adequately represents all sectors of society. A constitution is a legal parameter for governing and creating a healthy society. Every citizen should be involved in the writing of a constitution because he or she had to abide by it. The future of loktantra depends on the future constitution and future constitution, in turn, depends on the election of a constituent assembly, the restructuring of the state, the nature of the federal state and local government, social justice, equal access to the opportunities of state affairs and political economic resources (Panday, 2007).

Ordinary people, political activists, rights activists, lobbying groups, pressure groups and interest groups working at the grassroots level are now coping with various types of conflict and devising the process of change. But they need agents of change—information, skills, organizations, networks and resources. To change the structural causes of underdevelopment, poverty, backwardness, exclusion and oppression, the organization of the poor must have critical mass of change agents to reform the political order which does not bring freedom, prosperity and which doesn’t articulate a vision for things higher than those offered by today’s interim constitution. As Yesh Ghai has said, ‘I would say no because I think our process created great awareness in public and genuinely gave them a sense of their own authority. We constantly talked about the people-driven process and that people are sovereign. It is the people who decide. A constitution is not a compact between people and rulers. It is a compact among the people. Government is just a delegate. It is the partner to the document. It is document of the people. That was very empowering for them. Our constitution has reflected that. So this was a very important process to make people aware of their own authority’ (see page 129).

Conclusion

Nepal needs its people to forge a single national identity which is representative of dalits, janajatis, aadibaasis, madhesis and other minorities and marginalized groups and which is sustained by a democratic partnership among the stake holders-state, market, civil society and citizens. The greatest strength of the polity lies in its capacity to enlist the confidence
of ordinary citizens to shape society. Without a legitimate social contract, it is well nigh impossible to unify the torn state, strengthen the national integrity system and prepare a proper form of local government or federal state and thus create a transparent and responsive government. The issues that link citizens to governance, such as the legislature, political parties, civil society and a myriad of mediating social and economic institutions, now require a coherence, trust, cooperation and collective action based on human essence (Dahal, 2006).

Despite many weaknesses, the Interim Constitution of Nepal 2063 has laid the foundation for an inclusive, multicultural and plural democratic republican state in the future. The future course of political development will be shaped and reshaped by the will power, honesty, strength and capacity to forge the trust of all Nepalese. The focal point is a free and fair constituent assembly election in 2007.

References


Section Two
Experiences from South Africa
Kenya and Sri Lanka
Negotiating a Sustainable Political Settlement: Lessons from the South African Transition

Nicholas Haysom

Introduction

The focus of this presentation concerns the democratic legitimation of the outcome of a negotiated settlement. The type of “negotiated settlement” with which this presentation is concerned is a negotiated settlement in a situation of intra-state political conflict and violence. It needs to be clarified that the concerns the paper addresses primarily deal with the processes by which the settlements are actually achieved, concluded and implemented rather than the substantive provisions of such a negotiated settlement. There is however an obvious linkage, a common thread, between both process and substance in peacefully negotiated settlements. It is the process questions, however, that are most commonly neglected by analysts of such settlement.

In a situation of sharper intra-state tensions, there has been an unprecedented constitutional interest in creating political frameworks which capture the ownership of all citizens. This is especially so with regard to nation states with religious, racial, linguistic and regional diversity. This interest has been expressed in the concern to develop a notion of nationhood which admits diversity, provides for a national identity which is compatible with the assertion of sub-national identities. For the same reason, there has been greater interest in systems of power sharing in political systems which ameliorate some of the features of a ‘winner-takes-all’ liberal democracy, and which promote a wider stake-holding in the system especially by minorities. Such systems typically focus on establishing a fairer distribution of political power, entrenching fair economic opportunity across the group fault lines, acknowledge a new imperative for inter-group tolerance, promote wider participation in and ownership of state structures, and insist on at least proportional representation in political decision-making.
What animates the new debate on the substance of constitutions now animates considerations of process. The substantive elements of an inclusive nation-building social compact, for example federalism, are designed precisely to offer wider stake-holding, responsive and accountable government within an integrated national framework. Yet an imposed solution to a divisive political conflict, for example a federal framework, will not be a solution if it is an imposed framework. This point was recently made clear to the author during an engagement with political actors in the Philippines on federalism as a solution to the problem of Moro Mindanao. In short, the right answer through the wrong process will not usually yield an acceptable solution. Indeed, the very reason for preferring a negotiated settlement to a military one is that voluntarily agreed outcomes are more stable and more lasting than imposed ones. What is true for the political elite who negotiate an end to internal strife is true for the ordinary citizen. They need to consent voluntarily to the deal.

The call for democratic legitimation of a negotiated settlement is not so much rooted in the grand theories of Hobbes, Locke, Hume or Rosseau. It is rooted in the practical imperative to make negotiated solutions popular and, hence, durable and lasting. There are good reasons why democratic legitimation is crucial to the durability of a negotiated solution particularly because negotiated solutions may, at least at the outset, take the form of elite pact. It is critical that the settlement and its core values should eventually take root in the political culture. Negotiated settlements are an attempt to embark on a new social contract, not only between citizens inter se but also (in cases of inter-community conflict) between groups within a nation state. The product of the negotiations may eventually take the form of constitutional principles or even a new constitutional framework. It may also embrace a diverse set of arrangements emanating from a long process of negotiations. These may include international guarantees and the involvement of international actors; ceasefire provisions including the establishment of a new set of security institutions; the development and entrenchment of new political and minority rights; the rebuilding of a democratic state; and guarantees relating to amnesty and reconciliation. It is obvious that this compact requires legitimation if it is to be viable and respected.

There is another reason why democratic legitimation is an important element for the successful implementation of a negotiated settlement. A negotiated solution or settlement to a deep-rooted conflict frequently enshrines new values such as inter-community tolerance, a respect for
fundamental rights hitherto neglected and a de-demonisation of members of the antagonist parties. If these new values are to be absorbed into the political culture, then it is critical that they be embraced by ordinary men and women—the citizenry at large. Democratic legitimation is the key to this process.

In this presentation, I will be canvassing the South African experience. While the presentation tends to simplify the South African model, it is necessary to point out that, in reality, the road to a negotiated settlement was more bumpy and precarious than is often recognized. Those of us who participated in it referred to it as ‘a rollercoaster of hope and despair’. The dividing line between success and failure is a thin one. South Africa, nonetheless, offers examples from which the interested comparative scholars can draw lessons and learn from our mistakes.

South African Experiences

Extracting key lessons from the South African negotiated settlement is best done thematically rather than through a chronological narrative. However, in order to engage in a thematic treatment of the South African experience, it is necessary to set out briefly the sequence of events between the beginning of the negotiations in 1990 and the adoption of the South African final constitution in 1997.

Making the Beginning

Although there had been an engagement between leading members of the then South African Government and Nelson Mandela prior to 1990, for present purposes, we will take the beginning of the process of negotiating a peaceful solution to the South African conflict as starting in February 1990 when President F.W. De Klerk repealed the proscription on the African National Congress and other liberation movements, and released Nelson Mandela. Between 1990 and the end of 1991 there followed a protracted set of negotiations over political preconditions for negotiations. These ostensibly sought to effect a “level political playing field” between the principal protagonists (that is the National Party Government supported principally by white South Africans and the African National Congress supported principally by black South Africans). It was characterized by sporadic incidents of violence, which threatened to overwhelm the main peace process. This was so particularly because formal interparty talks on a final political solution had not as yet commenced. During this period
there was a process of normalizing South Africa’s security and public law landscape by repealing racially inspired and repressive legislations. In addition, political prisoners were released and political exiles allowed to return to the country.

In order to protect the main political process, the two major parties as well as the Kwa-Zulu based Inkatha Freedom Party, a wide range of civil society groupings, other interested political parties, churches and businesses embarked on an initiative to curb the growing levels of violence and to facilitate the participation of even a wider group of stakeholders in the process of peacemaking during mid-1991. This initiative came to be known as the National Peace Accord, and would eventually see the establishment of district level peace committee led by civil society stakeholders.

At the end of 1991, the first formal attempt at an all-party convention to broker a settlement collapsed amidst mutual recrimination. The government had challenged the ANC to decommission its fighters. The ANC accused the government of supporting a violent third force as part of a double agenda. The process of reaching a comprehensive solution would flounder until agreement on the process of building a road map by which a negotiated solution would be achieved. That road map was agreed in 1992 in the Record of Understanding. That process envisaged the adoption of a two phase negotiated solution. In the first phase, a multiparty process operating on the basis of sufficient consensus, or consensus would adopt constitutional principles, which would guarantee basic rights and structures of the government in any final settlement. These constitutional principles constituted a confidence-building measure, guaranteeing the outcome of the second part of the constitution making process, which would be a majoritarian, democratically elected constitutional assembly, whose mandate would be to draft a final constitution for South Africa.

The multiparty talks got underway under the name of CODESA but it too broke down because of its clumsy way in which the talks were engineered and in which the negotiations were carried out. In due course, a second all-party convention was convened which essentially met throughout 1993. The multi-party negotiating process was a re-crafted negotiating process, which allowed a single text to be produced for the plenary committee of all the participating political parties. This single text process allowed for the more rapid development of consensus on:
The text of an interim constitution;

The framework under which elections would be held for a constituent assembly (which would also serve as a democratically constituted interim government);

The binding constitutional principles, which would have to be enshrined in the final constitution.

It was in this manner that the South African process was able to unlock the gridlock created by the need for an inclusive process guaranteeing the rights of political minorities, while at the same time giving effect to the need for a majoritarian constitution making body.

The first democratic elections were held in 1994. Between 1994 and 1996, the Constitutional Assembly (which was simultaneously the National Assembly) drafted a final constitution. The first draft text was adopted in 1996 and submitted to the Constitutional Court for certification of compliance with the constitutional principles. The Constitutional Court rejected the first draft but accepted the subsequent second draft as being in compliance with the constitutional principles. The final constitution came into being in February 1997.

Key Elements of Democratic Legitimation

In this presentation it is argued that democratic legitimation of the settlement involves much more than a plebiscite or referendum on a new constitutional text. There are vital elements to the way the negotiations are conducted, environmental and structural elements, that serve to legitimate the peace process as a whole, and ensure that its character and results are inclusive. It is the absence some of these elements that has eroded other peace processes with which the author has had first hand experience: Burundi, Sri Lanka and Sudan.

From Bilateralism to Multilateralism

The South African process was fortunate in having two prominent parties take responsibility for the success of the project of securing a negotiated settlement yet both sides and especially their leaders, were insistent on an approach, which would see the broadest range of stakeholders implicated in the project. This shift from bilateralism to multilateralism is evident most conspicuously in the negotiation and conclusion of the National
Peace Accord. The National Peace Accord took the form not only of a deliberate inclusion of (or at least an invitation to) all significant political players but also the presence of churches, businesses and civil society organizations in its deliberations and its implementation.

In the critical CODESA and multiparty processes, the two preeminent parties, the National Government and the African National Congress, were insistent on including as broad a range of political parties and political viewpoints (in the form of traditional leaders for example) as was feasible. This inclusivity in approach was a significant step in broadening the stakeholding and ownership of the process as a whole. The South African process was governed by the repeated invocation that it was better to have potential deal breakers inside the process than confront them afterwards outside the process intent on sabotaging the fruits of the negotiations.

To be sure, multilateral processes are more difficult to manage than bilateral ones, and the South African process succeeded because at the heart of the process stood the two principal parties, led by uncontested leaders, both confident enough to take risks. The device of ‘sufficient consensus’ was also a key factor in ensuring the manageability and hence success of the multiparty talks.

Advantages to all Sides

The South African process recognized at the outset that the participation of the main actors in a negotiated settlement should be manifestly justifiable and the rewards should not only go to the party but also to its supporters. In this regard the South African negotiations followed an elaborate “tit for tat” dance in which each party agreed to reciprocal compromises and concessions. These allowed the other side to produce evidence for its supporters of the advantages of a negotiated settlement. This process significantly aided both parties in justifying their participation in the talks as well as the compromises that they themselves were then required to make in order to achieve a settlement. Thus the release of political prisoners was matched by a unilateral cease-fire by the ANC. The repeal of legislation by the government was matched by the ANC’s lead in the lifting of a sporting and cultural boycott on South Africa. An agreement to the road map of negotiations together with definite timeframes by the government was met with a call for the lifting of economic sanctions by the ANC.
What is true for the principal parties is true for the ordinary citizens. Recent events in Sri Lanka have suggested that if there is rising unemployment and economic hardship during the negotiation of a peace process popular frustration will be deflected towards the peace process itself. In short if the peace process is to have broader legitimacy ordinary people should see the quality of their life improving. It needs to be emphasized that peace (the mere absence of violence) is itself a bread and butter issue for people living in a conflict zone. There is an immediate improvement in the texture of everyday life in war-torn societies once a ceasefire or a cessation of hostilities comes into being. It is necessary, however, to back such a development with the necessary humanitarian and development aid to secure popular approval for the outcome.

**Legal Continuity**

Democratic legitimation should not be reduced to legal legitimation or the need to meet the demands of legal continuity and legal certainty of the post-settlement administration. However, this is an aspect, which should not be undermined. The absence of formal legal legitimacy and statutory/constitutional authority for the arrangements as agreed to in a peace settlement can provide legal confusion at the outset. At the worst, there may be debilitating legal and judicial confrontations, and an erosion of popular legitimacy flowing from the absence of legal legitimacy. Thus in South Africa (and in Burundi) steps have been taken to ensure that the arrangements agreed to in peace talks also find effect in a seamless and necessary legal legitimacy. This is so even if one of the contending parties denies the legitimacy of the governing regime. In Sri Lanka and in Sudan the forces of the rebellion have been reluctant to concede weight to the imperative of legal continuity and formal legal legitimacy. In part this is a realistic apprehension of being held hostage by their opponents legal and constitutional process requirements. In general however, it is far better to respect the need for legal continuity and to found at the outset a respect for the rule of law rather than to establish new institutions on the basis of power relations alone.

**Balancing Transparency and Confidentiality**

Negotiated transitions inevitably or usually commence with confidential exploratory behind-the-scene discussions. In many cases this is necessary. Without such confidentiality some negotiations would simply not take place. Indeed the absence of confidentiality in political negotiations can
and does lead to allegations of bad faith, double agendas or opportunism. This occurs particularly when negotiations are carried out in the glare of the media spotlight and in which the contending parties talk not to their negotiating partners but to the media. However, there comes a time in when the absence of transparency leads to a loss of faith in the negotiations and accusations that private deals are being brokered. It is necessary then to balance the need for transparency and confidentiality in the negotiation process. As the negotiation process unfolds, there is an increasing demand for transparency both in regard to the road map—the way forward—as well as the substance or outcome of the negotiations. Negotiations in deeply divided societies take place in a corrosive atmosphere of uncertainty and insecurity.

**Bringing Supporters to the Table**

Indeed mature negotiations require more than transparency. Mature negotiations require a constant interplay between public and negotiators, between constituencies and leadership. It is precisely this relationship that vests the negotiations with a degree of democratic legitimacy and encourages the rank and file to better understand both the deals that are being done, the compromises that must be affected, as well as the strategic thinking which underlines such negotiations. If the product of the negotiations is taken to the populace for endorsement later, the environment for such endorsement will be soured if the negotiators have kept everyone in the dark during the talks. It would be of little use if the deal signed by negotiators is rejected by their supporters. In South Africa the negotiations were structured to allow for report backs and consultations especially between the ANC and its allies and supporters. On the National Party’s side F.W. de Klerk insisted on a prior mandate to negotiate from the white community and for this purpose successfully conducted a referendum confined to the white community. In retrospect, even though the ANC had reservations about the referendum, which would allow whites a veto over the confirmation of the negotiations; the referendum was an important element in securing the legitimacy of both the process and the outcome amongst white South Africans who had the most to lose in the process.

**The Depth of Support**

It was a pre-condition for a successful outcome to the talks that the final constitution, the product of the peace process, should be one endorsed
directly by and reflect the aspirations of the majority of South Africans. This was particularly so in South Africa because of the long history of white minority rule. Any constitution developed and sanctified without the approval of the black majority would lack the necessary legitimacy. It is for this reason that the ANC insisted on an elected or mandated democratic forum for the drafting debate and adoption of a final constitution. While such popular endorsement of constitutions can take place through mechanisms such as plebiscites and referenda, these are blunt and clumsy instruments for endorsing complex proposals on the structures of the state and the formulations of fundamental rights. They are in any event post facto devices for testing support. They would not allow for the weighing of popular support in the exercise of constitutional choice. The necessity for depth of support in South Africa required a forum in which democratically elected representatives could give effect to a popular mandate and allow the weight of popular support to be reflected in the final text. A simple and absolute minority veto would have entrenched white power and minority interests.

The constitutional assembly thus became the single most important mechanism of securing the democratic legitimacy of the negotiated settlement. This is not to suggest that other mechanisms cannot achieve a similar result. Of particular currency in certain recent national constitutional reforms is the ‘Constitutional Commission’ – partly or wholly appointed by the government (Kenya, Thailand, Philippines, and Zimbabwe). In some cases the support for this otherwise ambiguous route to democracy has arisen in contexts where there exists a pervasive distrust of opaque parliamentary wheeling and dealing (Kenya).

The Need for the Breadth of Support

It is also true however that depth of support or majoritarian support alone may not be enough to firmly found a modern constitution or for the adoption of a new set of political arrangements. Minorities in particular will have little faith in majoritarian goodwill and will be loath to enter a process in which the majority can simply dominate linguistic, religious, ethnic and other minorities. Indeed it is precisely for this reason that decision-making majorities and procedures or amendments to a constitution are universally required to be exceptional and special. In South Africa the reluctance of minorities to accept the ANC’s insistence of a majoritarian constitution making process became manifested in intense violent conflict in Kwazulu Natal between 1990 and 1994. This impasse was only broken
through the device of the binding constitutional principles’ by which minority fears could be allayed through a process, which would guarantee that political minority concerns would be addressed regardless of the majoritarian nature of the process.

The general imperative of inclusivity found effect in the South African case through the CODESA forums, the multiparty process and the adoption of the constitution of the ‘binding constitutional principles’. The requirement that the constitutional assembly adopt certain central provisions by exceptional majorities (75%) and the subsequent political compromises undertaken to ensure the eventual adoption of a constitution should be by an even greater consensus indicate the importance with which the breadth of support was viewed by the principal parties.

The notion of inclusivity however finds much broader expression than in the decision-making requirements of the various fora. It is also to be found in the openness of the process to all parties including civil society and the encouragement, support and opportunity granted to them to participate.

**Direct Participation**

In South Africa, notwithstanding the emphasis on inclusivity regarding to participation in the main decision-making forums and the emphasis on an elected constitutional assembly, it was felt that there should be maximum opportunity for direct participation of ordinary citizens during the constitution-making process in addition. This took the form of ensuring that the media reported on the deliberations and decisions of the various committees of the assembly. It also took the form of village, town and community meetings in which members of the constitutional assembly were required to listen to—not address—ordinary villagers. It took the form of soliciting written submissions from the people at large on the content of the new constitution. Even if many of these submissions were not, on the face of it, constitutional in nature the initiative allowed an opportunity for ordinary people to participate in the process and to raise issues important to them. These—such as spousal abuse—on closer inspection do indeed relate to constitutional values and questions of responsive government even if they appeared to some to be symptomatic of the frustrations of daily life. To the surprise and astonishment of the management of the Constitutional Assembly, a full two million South Africans contributed their views on the content of the constitution. These
contributions were collated, summarized, published and responded to. This process had a significant impact in giving ordinary men and women a sense of participation and ownership in the constitution-making project.

**No Place for Triumphalism**

It is clear that there is no place for triumphalism in a negotiated settlement which seeks as an outcome ownership of it which traverses political ethnic or cultural fault lines. Upon the adoption of the South African constitution President Nelson Mandela could quite correctly claim that each and every party had contributed parts to the constitutional text. The negotiators took care to allow formulations into the draft, which had emanated from the parties raising particular anxieties. This ensured it reflected the concerns raised by them in their own words. This promotes a document which no party can claim as its own and in which all parties can legitimately claim to have played (to a lesser or greater degree) some part in creating. What is true for the text is also true for the conduct of the negotiators. The negotiators in the South African case tried not to claim individual clauses as a partisan victory or that they had ‘won’ the negotiation. Self evidently such an approach excludes the other parties from a sense of ownership and hence responsibility for the product.

**Drafting Style**

The approach to the drafting of the constitution by South Africa’s founding mothers and fathers was that the text should be as lucid and as readable as possible. It should also be seen to address the ordinary concerns of men and women. That latter was done through the express project of addressing economic cultural and social rights in the text. The former was achieved through the engagement of experts capable of reducing complex constitutional jargon to simple text. Although the ‘plain language’ advocates had their detractors the eventual product contributed to a constitution which is in general more accessible than most. Upon adoption, the constitution was translated into the 11 official languages, and over 2 million copies distributed to the public.

If there is a need for plain language, this does not mean there is no space for poetry. The language of the preamble and other analogous provisions need more than the dry tone of the constitutional lawyer. For example, the ringing call of the US Declaration of Independence is an indispensable and continuing element of the popular appeal of the US Constitution.
Dealing with the Past

Just as there are process elements or features of a negotiated settlement that enhance its popular acceptance and democratic legitimation, so there are elements that undermine its legitimacy. One such aspect is the way in which the treatment of past human rights violations and other abuses are treated. In post-conflict situations there are usually victims and perpetrators of such abuses on both sides. Zealous punishment of only one side’s fighters can jeopardize the agreement. Yet a failure to do anything can lead to charges that the negotiated settlement contributes to a culture of impunity and will leave lingering resentments amongst ordinary people. In South Africa the treatment of this question through a Truth and Reconciliation Commission has been much publicized. The Commission was able to grant amnesty only via truth telling process. It was also able to hear victims and to propose compensation for them. Although the latter promise has not been fulfilled and although there were accusations of biasness against the former regime, TRC played no small part in laying a foundation for reconciliation in South Africa. Is not a model that is necessarily exportable. East Timor accepted it only in small parts and Burundi not at all.

Reconciliation

Apart from human rights violations, one of the inevitable consequences of intergroup conflict is the mutual demonization and stereotyping by antagonistic communities. This legacy of intercommunity hatred must also be dealt with if an environment is to be created that is conducive to the acceptance of a negotiated settlement and, beyond that long-term reconciliation. Although the respect and admiration Nelson Mandela attracted by his conduct and stature has put South Africa in good stead, there is still insufficient intergroup socialization outside educational institutions. In other conflict situations such as the Balkans, the Middle East and the Great Lakes Region of Africa, NGO’s have done pioneering work in promoting people to people contacts, especially amongst children. These are important initiatives in building understanding between members of rival communities. It is unthinkable that any national reconstruction can take place in post conflict situation, such as Rwanda, without such reconciliation. I would single out the Sri Lankan NGO ‘Mothers of Soldiers Missing in Action’ as a bipartisan women’s initiative that has brought women of the south into contact with their Tamil counterparts.
Continuing Constitutional Education

Every year South Africa celebrates ‘Constitution Day’ as a public holiday. On this day, public lectures are held and festivals are organized around themes connected to the constitution. It is argued that constitutional education, the grounding and popularization of the values of the constitution are part of an on-going project whose aim is to create a political and civic culture based on the need for tolerance, respect for human rights, and an appreciation of a hard won democracy. It is ordinary men and women, it is argued, who are the beneficiaries of the constitution, its surest guardians and its most reliable defenders.
I would like to speak about some aspects of the participation of people in constitution making. I would like to illustrate the process of participation by examining the process in Kenya which was concluded just recently. The constituent assembly finished its work in March 2004.

Getting the Process Started

The first question I would like to discuss is how one gets a process started. This, I am sure, is the problem you are much concerned with particularly, as you don’t have the primary constitutional organs including parliament in existence at the moment, which might otherwise have been either the forum for making the constitution or body which could have established the road map for the process of constitution making. In Nepal, it seems the major challenge is to get the process started. Sometimes, it could also be that a critical organ of the state may not be interested in constitutional reform while people generally regard some reform as essential for various purposes in the country.

In Kenya the pressures for reform started and accelerated when, through a series of amendments, the government acquired more and more power and restricted the right of people to association, restricted the freedom of expression, and relied increasingly upon authoritarian mode of government. They did it to the extent that Kenya was officially, by amendment of the constitution, made into a one-party state. The movements in Latin America, Asia and Eastern Europe towards democratization particularly after the fall of Berlin Wall triggered off a kind of global movement which was reflected in accelerated demands for institutional reforms. The government in Kenya was very resistant to any review of the constitution.

The lead was taken by civil society—a coalition of a large number of organizations drawn from different sectors. The religious communities
played a very critical role and they set up a kind of ecumenical council where all the religious communities worked together very closely to put pressure on the government to start a review process. They were joined by a host of professional organizations—of lawyers, doctors, accountants and many other professionals. They were joined by trade unions, traditional NGOs, Human Rights NGOs, and NGOs specializing in areas such as land and electoral reforms. A very large coalition got together to put pressure on the government. The government still resisted it.

This coalition then started organizing marches and protests, which became in many cases very violent because the government responded by bringing out its police and troops. We had something like the situation that had happened a few years previously in the Philippines when there were regular marches and regular engagement with the police and the army. The law and order was breaking down. At that stage the pressure was brought to bear on our president by the US and the UK. They, by this time, had no need to protect tyrants. I have to say that the tyranny in my country was strengthened by the support given by the US and the UK to our president. This support has to be seen in the context of the cold war. But once the communist regimes, particularly the Soviet Union collapsed, the need to support tyrants decreased and enormous pressure was brought on our president by the US to respond to these demands of the public.

Meanwhile, civil society decided that the government was not going to respond to demand for reform process, and it had to initiate a process. They did this principally by setting up a citizen’s constitutional review commission called the People’s Commission of Kenya. They were given the mandate to consult the people and to draw up a draft constitution for the consideration of the people, leaving for the time being a decision on exactly how the draft constitution would be brought into effect.

Considerable public support was shown to the commission. As the commission traveled around the country, lots of people came forward to make their submissions. This worried the government that they could be perhaps marginalized as this process took its own life and picked up momentum. As a result of the pressure from below and external pressure, the government was ready to start a process of reform. Through interparty discussion, an act was passed by parliament—a very lengthy 33 pages long act—showing our road map for the constitutional reform process. It set out the different stages of the process. It identified institutions which would
be responsible in different stages of this process. It set out the obligation of principally the constitutional commission in addressing the process to the point where there would be a draft constitution for consideration by the constituent assembly.

In course of times, the commission set up by civil society and the commission set up under the legislation were merged and we had a common process of review. That is the history of how this process got started. One lesson we can draw from this is that a determined and well-organized civil society can indeed trigger off the process. You may not always have to wait for the government to agree to start the process.

**Developing Reform Agenda**

Another question I want to comment on briefly is about defining the agenda of reform. Realistically one can not expect any society to embark on what can be extremely stressful, lengthy and expensive process unless there is fairly clear understanding as to why one wants to review the existing constitution. This is perhaps the principles that South Africans adopted before moving towards the definitive part of their constitution.

In our case, the reform agenda was developed through a series of national conferences once the government showed its willingness to start a review process. Three major national conferences were held which brought together all these coalitions that I mentioned earlier--civil society, parliament and political parties. The government itself was involved in these conferences. Over the three months, reform agendas were developed as well as the process for the review. Eventually, this consensus about the goals of the review procedure was included in the Review Act that parliament passed.

The process and goals, therefore, represented a kind of national consensus, which the parliament passed and provided very generous funding for. So I think it is important to have some understanding--however broad--on why the whole nation should engage in what can be a very stressful and sometimes very divisive process.

There are some tasks that are necessary for the review process. I have identified these as defining the agenda, defining the process and within that there are very specific tasks. The agenda can be defined initially through some process--in our case it was these national conferences.
It has become a kind of African approach now. It could also be the South African model where political parties essentially developed the agenda. But, one should have openness, for the agenda can be refined and expanded as the process goes on. Whether the agenda can be refined and expanded may well depend on the procedure that we adopt.

In the Kenyan context, there was a very strong emphasis on participation by the people. Our process was described as ‘people-driven-process’. It became a kind of cliché. But I think there was a lot of substance behind this claim. I want to contrast this a little bit with the South African process that professor Haysom described.

**People-centred Process**

Our process was much more participatory than the South African one. The ultimate product—the draft constitution—was much more reflective of public opinion that the South African constitution draft was. You may disagree. In part we arrived at that stage because the views of the people were much more influential than the view of the political parties. The political parties didn’t take the process seriously. Political parties fundamentally were not interested in the process. They were only interested in retaining power or acquiring power. The concern of the people was very much about ‘what use we make of power? and what state power is for?’ This was much more focused on how the state power be legitimately exercised or must be exercised.

Because the politicians were not so concerned with these issues, they had less influence during much of the process. The draft constitution which was prepared by the constitution commission reflected very much the public views rather than the views of the political parties. That in the end became a problem.

I want to alert ourselves to some of the dangers of very public-driven process. The politicians don’t engage properly. My experience both in Afghanistan and in Kenya is that if you follow such participation process, the reform agenda gets expanded and redefined. Social issues become much more critical than straight forward political issues. There is much more emphasis on social justice, and on the co-existence of communities. A lot of special interest groups make their claims. The politicians generally are not very comfortable with these broad agendas.
Method of Adoption

If there is this situation, the highly participatory process produces agendas and a set of recommendations to which there is no great commitment on the part of politicians. In that situation the method of adoption of the constitution becomes the critical factor. Who is going to adopt the constitution? If it is parliament, at the end of the process which has become highly participatory, then you are going to have trouble when you go to parliament. A constituent assembly may be more accommodating of a broad agenda if the constituent assembly is broadly representative.

We have run into difficulty in Kenya because our politicians only took interest in the process when the draft went to the constituent assembly. They did not like what they saw in the draft. The method of adoption, therefore, is quite critical. I now realize that it would have been much better if the review act (our roadmap) had said that the constitution becomes effective after it is adopted by the constituent assembly.

The method that we had chosen was a result of a somewhat clumsy compromise in that we went to a constituent assembly but the constituent assembly then had to send the constitution to parliament for formal enactment. This was the compromise because the president did not want to broaden the review process. He wanted to tightly control it and he had a majority in parliament. People did not trust the president. They wanted a much more participatory process. Neither party could push ahead without the other.

At that time we had a functioning constitution and in the interest of legal continuity, we really felt we need to have an enactment either through parliament or by a constituent assembly authorized by parliament to do so. And the president would not do the later. So we had no option but to go to parliament after the constituent assembly. Already there were conflicts and tension between the two bodies both of which claimed to speak on behalf of the public.

I don’t think you should follow our clumsy compromise whereby the draft constitution first goes to the constituent assembly and then goes to parliament. I had initially felt the parliament of 212 persons cannot defy a constituent assembly which had 629 persons, which included every member of parliament, every sector of society, every region in the country. But they have managed to do so. My expectation is that the moral authority of the CA--especially if they got a real consensus--should
be sufficient to override any hesitation on the part of parliament but it did not turn out to be the case.

**Forming a Representative Constituent Assembly**

What kind of division of labor should you have in a review process? What are the limits of public participation? What is the best constitution that can be made through public participation? Here we have to strike a balance between experts and public. Public may be very good at giving broad direction. Experts have to translate that into legal texts into a manageable document. Then there is also a balance to be struck between the politicians and other sector interests as I have been hinting at. There may be a role for independent, semi-autonomous body. We have called this the constitution commission which had the responsibility of managing the process up to the point when the draft constitution had been prepared and submitted either to parliament or to the constituent assembly for decision making. So you have experts and independent commission. The formal decision making body--by its nature it has to be a political body--in the sense of representing the public.

On the whole it is preferable to have an elected body. But there are other methods of constituting the decision making body. In our case, every member of parliament was automatic member of the constituent assembly. But we also provided for the election of three representatives for each province in our 72 provinces. So the number of elected members from these provinces was as many as the elected members of parliament. Then we had about 125-130 members, who represented civil society in a broad sense--religious communities, women, trade unions, disabled communities, minorities and so on. Some were directly elected, others indirectly. In certain cases there were representatives from umbrella bodies, like the confederation of Trade Unions and the association of a professional society. We asked them to give names but also asked them to make sure that women were represented and the disabled were represented. If they could not select, then we were to do that ourselves. In each case, the umbrella bodies were able to agree on names provided there was a proper balance between minorities, women and other sections of society.

In this way, we were able to get a very representative body. We were also able to get a lot of very highly qualified persons in that constituent assembly. My view was that if we had left the entire membership to
electoral processes, we would have missed out some very talented people who wouldn’t have bothered to stand in the election and who were highly reluctant to join political parties. We were able to strike quite a good balance between the directly elected, who of course were very important and other sectors with stake and expertise in the system. I was certainly quite happy with that kind of process.

Forms of Participation

The participation of people can take many forms. It can take the form of making submissions. If you have a constituent assembly or constitutional commission as we did and as you did in 1990, of course you should encourage people to meet the commission and present their views. That’s a form of participation. But participation can go beyond that. It can include participation in the decision making process itself which we tried to do through a large constituent assembly. You can also have participation through a referendum. That’s a very vivid and striking form of participation in decision making even though people have the choice of ‘yes’ or ‘no’. My view is that if I have to choose between a referendum and the participation of the people in early stage the way we did in Kenya, I would certainly go for the latter. Forget about referendum because, if we can involve people from the very beginning in the process and if we have mechanism which reflects their views, then you don’t need a referendum. In multiethnic, multilingual, and multireligious society, a referendum can also be very disturbing exercise. Constitution in many of these instances is a negotiated document. Once you have a negotiated agreement and have a consensus, stop there. Don’t take further risks and go to a referendum, which might as some people have said become an ethnic census—the voting might be entirely ethnic or caste based and would offset the negotiated settlement.

We encouraged people to give submissions. We did not get as many as in South Africa. We got 38,000 written submissions including many oral ones. We videoed and transcribed the records for our analysis. But once we had produced a draft constitution on the basis of what we thought people told us, we submitted that document to further public scrutiny and debates. Lots of meetings were held to discuss the draft constitution particularly to see if it sufficiently reflected what the public told us. We put on websites all the written submissions and the transcript of all the meetings we had up and down the country. When eventually we analyzed all these views (with the help of computer programs and huge support
staff, we put all our results on websites, distributed it widely to the people so that they could see if the commission had included their views. Almost everyone said that the draft reflected their views. Therefore, it got a lot of legitimacy.

The government and the president were unhappy with many aspects of the draft constitution. It is the people who have taken over the defense of the document adopted by the constituent assembly. For me, one success of the process was that I no longer had to to speak for the constitution. People marched up and down the country putting pressure on the government to start implementing the constitution. We were able to secure this degree of public support because we were very sensitive to what people told us.

**Encouraging Participation**

One problem we had was, because of 25 years of a really authoritarian government, which employed detention without trail, and many other repressive methods, people were very nervous and were scared to speak out. It took us quite some time to get the public to accept that we were for real and that they mattered, that there would be no reprisals and I had to keep on reassuring people that anybody who participates in our process were immune to arrest. It was only after sometime we were able to get the people to really participate in the process.

We also spent over six months in a program of public education about the process itself. We focused on where people will get engaged in the process and what role they would play in decision making We also provided public education in constitutional history, the problems with the existing constitution and some basic constitutional concepts. Then we left them alone for six months. We encouraged our staff to go to villages and towns to encourage people to start the debate among themselves.

Six months after this we went back to them. ‘Now you give us your views,’ we said. This was when we got all their views and very informed views. But I discouraged people in giving me their views in terms of separation of power or the rule of law. I just said give me your life stories. We encouraged people in talking about their domestic problems. I encouraged people to talk about their relationship with local chiefs or local clinic, or the local agriculture department. It was our responsibility to translate these stories into legal terms. Nicholas has also said similar things about the process in South-Africa. It was for us to draw that out. It is very important to
encourage people to talk in their own terms and in terms of their own life stories, as a way of communicating with the commission.

**Decision Making Process of Adoption**

Once we have gone through this process of consultation and synthesizing the views of the public, what do we do with that? Synthesizing the views is extremely important. I have talked throughout about ‘the people’. But we have to disaggregate the concept of the people. There is no such thing as ‘the people’. There are doctors and lawyers, engineers, dentists, Christians, Muslims, Hindus, people from the northern part, people from the south, women, youth, disabled, dalits, ethnic groups, farmers, workers, and so on. Each group has its own interest, its own moral perspective and views. How do you harmonize that? It is, therefore, extremely important to get a system which can harmonize in a very sympathetic, creative and at the same time objective way. For this, the body which was charged with the handling of these materials has to enjoy a great deal of respect in the community.

Therefore, we put all we had received on web site, carried them in newspapers, so that people would know how we had interpreted their views. We went to every constituency—210 of them—in the country. We had two-day meeting in each these constituencies. Then we went back to our headquarters. For each constituency we prepared a 20-page report on what they had told us and how we had interpreted their views. We sent it back to every constituency and gave one month for them to scrutinize it. Only one out of 210 opposed and that too over a minor point. That was very encouraging too. Therefore who interprets and how it is done is very important.

**Adoption of the Constitution**

Adoption of the constitution is a challenge. It depends on the system of voting mostly. Our act said that we in the commission and constituent assembly later on must seek consensus. If you cannot get consensus then an approval by a two-thirds majority would also be okay. But what does consensus mean? Consensus is not unanimity. Not everybody should agree. Not every group can agree. If you have that rule, then you ensure that you will not have a constitution at all. You will always find a trouble-maker. Some of the delegates were saying consensus means unanimity. They were saying, ‘Our party is not with it. Therefore there is no consensus.’ The
South African court said it did not know what amounts to a consensus. We just need to have a broad sense of what people were thinking. If 70-80% were for anything, that was enough. But I was often prevented from moving forward on that assumption. So we have to be very careful when we say we need a consensus. You don’t want a very small group to sabotage a very broadly accepted consensus.

If you have to move to voting, what degree of support must be expressed? In our case, a two-thirds majority was accepted as necessary for making decisions. A two-thirds majority seem to be probably enough from our experiences. Most of our decisions were made with much higher percentage of support and many were made almost by unanimity. The higher the voting requirement, the more you have to work hard to bring everybody around. There is that advantage in a higher voting. But you don’t want to immobilize yourself. There is a grave danger that if you have a higher voting requirement, you may not get a result at all.

**Putting the Constitution to Good Use**

Mostly we spend time on structuring the process for adopting the constitution, and making it, but not on what happens afterwards. In many parts of the world, quite good constitutions are not often implemented. Therefore, we should give as much attention to implementation as other aspects of it. We in Kenya recommended and this was adopted.

Every new institution, every new procedure that is in the constitution should have been put into effect. We were told by Mahendra Lawoti that, despite the constitution, which talks of equality, there are many laws in Nepal which are discriminatory. We have proposed in our draft constitution that within two and a half years of the new constitution, the ministry of justice working with this commission of implementation must review all the laws and amend them where necessary to bring them into line with the constitution. We have required report every year to document the progress of this exercise. We have identified the new institutions, to be set up, and we have specified a time limit within which that particular institution must be established.

We have also indicated a role for civil society in disseminating knowledge of the constitution and putting pressure for its implementation. We believe that unless something like this is done, the government which comes into power will not have much interest in implementing those provisions of the constitution which are directed towards the accountability of the
government, but will implement only those provisions which will give more power to the government. So it is very important to have a kind of mechanism to ensure that all the provisions of the constitution are in place within a reasonable time. Our reasonable time is 5 years, which is the life span of a parliament.

Judging the Success of a Process

How does one judge the success of a process? Clearly a good new constitution which commands wide respect in the community and the key sector is an obvious indication of success. I would like to suggest that even if there is no new constitution, in some sense, we may be able to say that the process has been successful.

After I agreed in Kenya to chair the process, I read an article, which said that more than half of the constitutional processes have failed in producing a constitution globally. If I had read the article, I would not have accepted the job. I read it too late. Our own constitution was in some jeopardy. The president was determined not to enforce it. Was that a failure?

I would say no because I think our process created great awareness in public and genuinely gave them a sense of their own authority. We constantly talked about people-driven process and that people are sovereign. It is people who decide. A constitution is not a contract between the people and the rulers. It is a contract among the people. Government is just a delegate. It is not the partner to the document. It is document of the people. That was very empowering for them. Our constitution has reflected that. So this was a very important process to make people aware of their own authority.

I believe that the process has created a kind of awareness among Kenyans so that they will never put up with the kind of oppression that they had put up with for 35 years. New ideas have germinated. They will continue to be debated even if the constitution is not put in place by this government. In due course, I feel confident that if this government sabotages this, it cannot do it for long. Sooner or later this document or something similar to it will become our governing document.

Healing the Past Wound and Building a National Identity

I think therefore the process is very critical because it may not achieve the new constitution immediately, but it may lay the basis for it. Another
purpose we saw for the review process was to heal the wounds of the past. We didn’t have a justice commission as in South Africa. My own view was we didn’t need it. We didn’t have the same kind of history they had. Our own process was in a way the audit of the government. It in itself was an act of healing. People were able to express towards it their anger and bitterness on past policies.

We felt that was important. Indeed, we had the mission from International Institute for Transitional Justice from New York. They said we didn’t need this kind of process because our own review process itself was very cathartic—people spoke out and they were able to attack the government.

Our objective was to redefine a Kenyan identity. People all over the country were debating the same issue, and discussing same problems. It gave them a sense of being participants in the national debate. I do believe that after the process, Kenyans began to think of themselves a little bit differently in a broader way. One of our tasks was to develop, acknowledge, recognize and therefore implement a Kenyan identity without at the same time losing sight of the fact that Kenyans had many sub-identities.

The biggest challenge from my point of view of the constitution was how to accommodate this national identity with the regional, ethnic and religious identity. I believe it can be done. We should not be carried away by narrow particular identity and lose sight of the national identity. A balance can be struck. We certainly need to work very hard at striking a balance and if you ask any minority groups in Kenya today—disabled, women, or ethnic minority, they will say—-they got a fair hearing and happy with the result. I hope this can be sustained.

Cost of Constitution Making

Costs can depend on the length of the process and institutional procedures. But it is hard to cost a constitution. It depends on the size of the population, the salary level, infrastructure and so on. You cannot be very precise in the costing. But you can also do some savings—by repealing some institutions. In Kenya, the centralized institutions had to change as people wanted power closer to where they live—resources to be transferred to districts and below, strengthening local elected bodies. The economists discussed about costs involved, but did not calculate the cost saved in the process of changing the centralized structures, less bureaucratic procedures and many other things.
A constitution is also not a zero-sum game; it is about addressing a civil war, human sufferings, investment lost as a result of war and so on. So much is lost in that and we cannot calculate the price of human lives saved. During the process, one also has to think of not only of getting a constitution at the end, but many other objectives that a process can achieve because the constitution would only be effective if these other objectives are also achieved—that of national unity, endorsement, legitimacy. Therefore the designing of the process can be very complicated but important stage of the whole process.
My paper might suggest how one should not engage in constitution making. You might want to learn from the bitter experiences of Sri Lanka. Sri Lanka since it became independent in 1948 has never had an inclusive and participatory constitution making process. The ethnic conflict and Sri Lanka’s political problems that we are seeing today are primarily as a result of that.

We have had three attempts at constitution making since we became independent in 1948. In 1972 and 1978 the attempt to produce constitution were successful. But both constitutions were partisan, non-consensual and alienated the minorities. This also entrenched majoritarianism in the constitution itself and it also entrenched—which has been the feature of Sri Lanka’s constitutions—the executive convenience. These constitutions made it easier for those in political power to exercise power as freely and as uncontrolled a manner as possible. The non-inclusive process contributed to the bad constitutions in terms of substance. The most recent attempt—third attempt—was in 2000. That was also an unsuccessful attempt. The constitution finally couldn’t be adopted. But there, too, it failed to engage two very important stakeholders in the Sri Lankan polity—the Tamil Tigers and the main opposition political party. Therefore, it was not surprising that the process ended in a failure.

In Sri Lanka, all appointments to the institutions are heavily politicized. There was a campaign to ensure that a bipartisan or multipartisan approach with regard to appointments of key offices. So in 2001, the Sri Lankan parliament actually passed a 17th amendment of the constitution which incorporates the provisions of the constitution council.

The second thing that we look to Nepal for is independence of the judiciary. In Sri Lanka, judges to the supreme courts and high courts are appointed solely at the discretion of the president. No qualifications are spelt out and we recognize that in the Nepali constitution at least some qualifications have been spelt out.
Constitution and Peace Process

From November 1995 to 2000, the government of President Chandrika Kumaratunga, tried to embark on a peace process, which included the constitutional reforms to deal with Sri Lanka’s ethnic conflicts, by marginalizing the main Tamil political actor, the LTTE. In other words, the government took the approach of trying to isolate the LTTE and to address the aspirations of the Tamil people directly. The government even embarked on a ‘war for peace’ campaign so that LTTE would be weakened and compelled to come to the negotiating table. That strategy failed completely, and this created more bitterness and antagonism. In 2001, there was what we could call a military stalemate and also the political stalemate. The military stalemate was that the LTTE controlled certain parts of the island but it was not able to actually build on that and carve out a separate state. There were lots of developments, the primary one was of course when the LTTE embarked successfully on a military campaign., It seemed poised to capture the whole of the Northern peninsula, which is what they claim as their homeland. But the Indian government made it absolutely clear that they would not allow the LTTE to militarily capture the whole of Northeast and establish a separate state. There was also 9/11. All those factors made the LTTE a little bit more conciliatory, less maximalist than they might have been under normal circumstances. The Sri Lankan armed forces also could not defeat the LTTE. On the contrary, they suffered a number of defeats at the hands of the LTTE.

On the political front, the unsuccessful attempt at introducing a new constitution in 2000 created a political stalemate. The government could not go ahead with the new constitution to bring about some sorts of meeting of the aspirations of the Tamil people. There was a total breakdown in communication. There was a lot of bitterness as a result of ‘war for peace’ campaign.

And then in 2001, there was a change of government and the new government embarked on a completely different approach. Their approach was to recognize the military strength and territorial control of the LTTE. It was a strategy motivated by pragmatism. The second point is that because of the bitterness and distrust between the two sides, the government and the LTTE both accepted a foreign facilitator to try and build lines of communication. I notice in some of the articles that the UN has been mentioned as possible mediator in Nepal. In Sri Lanka, the UN would have been totally unacceptable to the government of Sri Lanka.
because it would have had all sorts of implications with regards to national sovereignty. But the government of Sri Lanka was far more comfortable accepting a third country as a facilitator. And as you know, Norway was selected because it was seen to be reasonably neutral by the two parties and also because it was believed that they had certain capacity in the area of conflict resolution.

Lots of fairly remarkable things happened after that. Within three months of the parliamentary election, the new government and the LTTE signed a cessation of hostilities agreements in February 2002. There was no war situation. There certainly wasn’t peace. But this gave immediate relief to the people who were affected by conflict. It took everyone in Sri Lanka by surprise. In a couple of months, there were direct talks between the government of Sri Lanka and the LTTE, again facilitated by the Norwegians. The talks were held in countries where the LTTE could participate without any fear to their security. The talks achieved a lot of international support as they made quite a lot of progress. And the ceasefire continued throughout that process of political dialogue.

The talks entered a crisis phase in mid-2003. There were then divisions within the Government of Sri Lanka. It was a cohabitation government. The president came from one party. The prime minister came from another party. It was the prime minister who had really led the peace initiatives, not the president. There was a bitter tussle for power. That has been the story of Sri Lankan politics for many years. The two main political parties were unable to work together which eventually led to the dissolution of parliament. There was a third parliamentary election in four years in April 2004. The prime minister’s party was defeated. Now we have a new government which does not have the same sort of cordial relationships with the LTTE. There is now therefore a period of uncertainty and lack of communication.

Issue of Constituent Assembly

Recently we are also talking about the constituent assembly in Sri Lanka. But in Sri Lanka the campaign for a constituent assembly, which is led by the government in power, is really quite different from the campaign for a constituent assembly in Nepal. In Sri Lanka, many civil society groups including my own are totally opposed to the idea of a constituent assembly. If the constituent assembly is being considered to bring about a final solution to Sri Lanka’s ethnic conflict, if the LTTE was on board, if
it was an attempt to draft a new constitution to bring about peace and to symbolize new beginning and a new social contract between the people of Sri Lanka, then, perhaps, it would have been justified.

But there are very partisan motivations for the constituent assembly idea in Sri Lanka. The constituent assembly is sponsored by the government in power to change the constitution without a two-thirds majority vote, as is constitutionally required so that the government in power, particularly the president, who is constitutionally barred from continuing in politics after second term, can continue to rule, perhaps as prime minister. This, I think, distinguishes it from the idea of constituent assembly in Nepal.

The lessons is, if we are going for a constituent assembly, and are going outside the law and you are adopting extra-constitutional and extra-legal methods, you must have justifiable objectives and you must have a reasonable amount of political consensus across the political divide and across the ethnic divide to justify such an extraordinary and radical measure. This is not the case in Sri Lanka.

**Doing Away with Majoritarianism**

The campaign for separate homeland really began in Sri Lanka after the then government put in the word ‘unitary’ in that very obnoxious constitution of 1972 which introduced various centralizing features. Proportional representation, I think most of us in Sri Lanka believe, is inherently a fairer system than the first past the post system. But two dangers exist.

First, proportional representation sometimes results in the dominance of a political party. In Sri Lanka, this has been a huge problem. The quality of debate and scrutiny in parliament has declined significantly after we introduced proportional representation because the members of parliament see themselves primarily as ambassadors of their parties, rather than representatives of the people. I would suggest for a mixed system, very much like the German proportional representation system, which also constitutionally allows the members of parliament to vote and behave according to their conscience rather than following orders from their parties.

Second, the proportional representation system fragments parliament, and, therefore, requires coalition politics. In Sri Lanka, after our election in April 2004, nothing has happened in parliament. Parliament has not
passed a single piece of legislation, has met only a couple of times, because the party, which has the most number of seats, has not been able to form a majority. The PR system may make the situation worse.

**Federalism**

Most people in Sri Lanka who believe that it is possible to solve our conflict within the framework of one-country are pushing very much for federal system. That would be territorial federalism. The discussion about strengthening the local government has to be part and parcel of federalism so that it strengthens democratic accountability. In Sri Lanka, that would be very important in dealing with the Muslim minority in the North and the East so that the third tier can be used to protect minorities within minority areas.

About non-territorial federalism, I would just like to, from the Sri Lankan experience, share a note of caution. It is very important to strike a balance between the particular and the national. Federalism with this element will lead to further fragmentation. In Sri Lanka we are struggling with this at the moment. While arguing for a Tamil identity, Sinhala identity, Muslim identity, we are also struggling to refashion a supra ethnic national identity. I think in Sri Lanka, we have left it until far too late and it is causing a huge problem now in the negotiation process. It is necessary, therefore, to work out both local and national identities simultaneously. It is necessary not to lose sight of the national identity, because after all federalism is all about shared rule as well as self-rule.

The Sri Lankan constitution gives Buddhism, which is the religion of the majority, the foremost place, and this is very sensitive and difficult issue. The Sri Lankan experience has been that the Tamil community and the religious minority groups have basically accepted that once we put something in the constitution it is very difficult to remove it. Some of the groups have been divided. Some sections have said that as long as it does not have practical impact, we might have to compromise and go along in the spirit of reconciliation, whereas the others have said no, it is the fundamental issue of principle that the state promotes equality for all religions and religious identities. In Sri Lanka, the Buddhism clause did not have much impact for about thirty years, but in the last year it had an impact, and that is with regard to a very controversial piece of legislation to prohibit religious conversion. That is actually going to be challenged in our supreme court. I was very struck by the fact that this is
an important issue in Nepal as well. The Buddhism clause has been used by Buddhists in support of this legislation because they argue that the constitution requests or demands that the government has an obligation to protect Buddhism, that the conversions are taking place and that people are leaving the Buddhist religion and joining Christianity.

The issue of group rights and personal rights is a complex and difficult one in Sri Lanka. The human rights community in Sri Lanka is dissatisfied with with a provision in our constitution which validates all the personal laws even though the features of those personal laws violate the bill of rights. Women’s groups in particular in Sri Lanka have campaigned very vigorously for the repeal of this section. Even though there may be ways of dealing with this issue, at the end of the day one has to ask this question: which one do we want—individual rights or religious group rights? We can’t get away from that. You have got to deal with that and perhaps have a lot of discussion within the human rights community in Nepal before one actually advocates acceptance of constitutional recognition of personal laws.

In Sri Lanka we have a lot of religion-based parties and this might be the reason for the decline in the level of political debates and discourses. Debates are no longer on issues of ideology. We don’t have parties consisting of people across the ethnic divide united because of a belief or a set of political principles. We have moved in this direction towards communities just forming parties to look after their own interests. I think there is something inadequate in a multiparty democratic political system, which is based purely on identity rather than on non-fixed identity like political belief. We had a very vibrant multiparty political system in the fifties and sixties based on political ideology. We have gradually moved in the direction of religion-based political parties.

Conclusion

The Sri Lankan experience is that we have a lot to do in the area of constitutional reform with respect to substance, but because of the problems of the process the Sri Lankan community has not been able to get to the issues of substance. My question to you is, shouldn’t we look a little bit more on the process of how we are going to have talks between various stakeholders in Nepal? How are we going to facilitate that process? I have just thrown up a couple of ideas from the Sri Lankan experience.
Conclusion

Emerging Issues in Democratic Constitution Making

Jhalak Subedi

The role of the state has been divided among the state, civil society and the market after the end of Divine theory. A constitution is a supreme law which regulates the contradictions of interests among different social groups, individuals, the state and the market. It is a comprehensive contract among competing political ideologies which represent the existing politico-economic as well as socio-cultural positions of citizens with respect to their desire for better life, liberty and social justice. A democratic constitution also represents the meeting point or agreement between various classes, interest groups, communities as well as various religious, ethnic, racial and regional groups of any state. Thus, a democratic constitution could be defined as a contract for co-existence between the conflicting forces.

Nepal is in the new process of redefining the state. The ten year-long Maoist People’s War has exposed the contradictions of the Nepali state and society. When the then ruler of Gorkha, a tiny hilly principality of Midwestern Nepal, conquered various principalities in 1789 and brought a fragmented country into a centralized feudal political set up and established a powerful central state, he gave hilly Khasas and Brahmins a dominant role. Also their religion (Hindu), their language (khas Nepali) and their culture were imposed on other ethnic, religious and regional groups. This type of Hindu Hilly Khas-Brhamin male dominated state (see the article by Lawoti) perpetuated feudalism and thwarted people’s aspirations for a liberal democracy and for the progressive restructuring of the state. The Constitution of 1990 couldn’t address the multiethnic and multicultural characters of Nepali society. Now, after the popular people’s uprising and a peaceful settlement of arm conflict, Nepal has entered the new stage where all the stakeholders--ethnic, caste, regional groups and women--are demanding that they too should have an equal say in the new
constitution making process. The state and parliament headed by eight political parties including the rebel Maoists have declared a constituent assembly poll in June 2007.

Paradigm Shift

The present discourse on democratic constitution making in Nepal started in 2058 v.s. after the CPN Maoists put forward three major conditions for a peaceful political settlement of the conflict. When the dialogue between the state and the rebels broke down and a great political catastrophe seemed imminent, civil society led the discourse. In the beginning the main parliamentary political parties were not even ready to listen to the idea of changing the constitution. Only when the king started to concentrate all the powers of the state and the political parties found themselves being slowly sidelined from politics did they start to consider the inevitability of change and they joined hand with the Maoists and other civil society groups to further the discourse.

This book is the product of the discourse on constitutionalism initiated by NESAC with the support of International IDEA. The papers of Nicholas Haysom, Mahendra Lawoti, S. Ghai and Rohan Edrisinha were presented in the workshop organized by NESAC in cooperation with other organizations. Its main purpose was to bring together the experiences of South Africa, Kenya, Sri Lanka to bear on the inclusive democratic constitution making process in Nepal. It was the first civil society initiative. The political situation of the country has radically changed since the workshop was organized. A large number of people took part in the historical movement of April 2006, which forced the king to give power back to the people and the Maoists joined the peaceful political process. These lead to the promulgation of an interim constitution.

But these changes have not been adequate enough and various interest groups like madhesis, janajaties, dalits, women and people from backward areas have come out onto the streets to pressurize the state to represent them proportionally in the constituent assembly by changing the proposed electoral system. This has created a new political space for them and shifted the paradigm of previous constitutional discourses. But we hope the papers included in this collection are still relevant to the current constitutional discourse.

History has proved that there is no single model of constitution making. The constitution of Kenya failed to address its political reality. South
Africa, on the other hand, witnessed stability for 12 years. But the lack of social justice in the question of land reform and social services is creating social unrest in South Africa. The protection of individual property by the constitution has created obstacles in the redistribution of resources mainly controlled by the ruling classes of the past. The constitution in Sri Lanka has failed to eliminate the Sinhalese fear of disintegration and address the Tamil minorities’ fight for equal rights. The peace process, consequently, has nearly failed.

The Nepali discourse on constitution making, which goes back to 1950, has focused on the political struggle between palace and political parties. The question of the constituent assembly in Nepali politics was raised in 1950. But the palace always thwarted the demand for it. Even after the people’s movement of 1990 the king didn’t listened to the demand for a constituent assembly and the major political parties accepted the king’s proposal to draft a constitution with the help of a handful of experts. The political parties came around to the idea of a constituent assembly only after the Maoists kept saying that the constituent assembly is the only solution to the conflict and the king took power and marginalized the political parties.

**Emerging Issues**

Nepal has seen political upheavals time and again. The growing political consciousness in the people and the status-quoist character of the state have revealed various socio-economic and political contradictions in Nepali society. Socio-economic disparities, repression, economic inequalities and the domination of certain socio-cultural groups in the decision making process of the state have prevented the transformation of society into a pluralistic democratic form.

Even after the restoration of parliament through the 19-day long uprising the political actors of Nepal have not been able to address *agrajami* demands. The recent movements of madhesis and janajatis have proven how shortsighted the leaders of the eight party alliance, which is running the government, are. The amendments made in the newly promulgated interim constitution also have not been accepted by the concerned people.

A participatory constituent assembly, federal state and proper representation of all caste/ethnic groups, dalits and women in the state are the emerging
issues in the current Nepali politics. The question of a ceremonial king and republic has not been answered clearly by the political parties. The interim constitution has not clearly defined what model we should follow while restructuring the state. Both political parties and civil society have remained mum over the crucial issue of the redistribution of resources. Without solving these problems we cannot hope to bring lasting peace and prosperity to the country.

**Challenges for a Sustainable Political Solution**

The coming together of the Maoists, who had been waging a people’s war to establish a communist republic, and liberal democratic forces, which culminated in the people’s movement of 2006, has paved the way for a republican state—with Nepali characteristics. The task now is to develop a new model of democracy which considers all socio-cultural groups as equal stakeholders of the state and create a more equitable economic condition by redistributing the resources. What kind of participatory democracy and what kind of sustainable solutions to social contradictions we want depend on the consensus among the political parties, civil society and various interest groups. A constituent assembly might provide a forum for developing a consensus. But there are some internal and external challenges that the political leadership needs to grapple with while making a democratic Nepal.

1) Geo-Politics and External Players

From the beginning of the modern age Nepal has been a strategic playground for foreign powers. At first British India used to dictate Nepali politics, from the Sugauli treaty of 1816 onwards to the rest of the Rana period. Independent India also followed the colonial policy toward its neighbors. India has been shaping the Nepali polity since 1950. China and the USA are other major external players in Nepali politics. The interest of the USA and India in Nepal particularly in relation to the growing Maoist strength is so high that it is hard to avoid them in the course of establishing a republic and giving the Maoists a leading role in the government. The USA will try to prevent the Maoists from gaining absolute power, for that they can even support a military coup in the command of a moderate bourgeoisie. Assuring the USA and India that the inclusion of the Maoists in the government will not threaten their strategic interests is one of the difficult tasks that Nepali political leaders have to face in days
to come. The Indian ruling class is afraid that the increasing Maoist influence on Nepali politics could spillover to poor Indian states of Northeast, Bengal, Bihar and UP. So India can use its influence to create instability in Nepal especially in the Tarai region; we have already seen some indications of it.

The role of India in Nepali politics especially in relation to the Tarai people of Indian origin is taken as a conspiracy against Nepali sovereignty by hill tribes and the majority of the Nepali speaking people. The roles played by India in the past—for example, in the creation of Bangladesh, annexation of Sikkim and in imposing suzerainty over Bhutan—have always created a psychology of fear in Nepal. Now the ruling section of the political parties and the intelligentsia fear the slogan of self-determination raised by madhesis.

2) Role of the Palace and Regressive Forces

Although the interim constitution has suspended the king, the loyalty of the army and feudal elites of Kathmandu is still with the king. The hue and cry of Hindu fundamentalists, the activities of the army, public address by an army general defending the king’s policy towards the political parties and the message given by the king on the occasion of Democracy Day defending the royal coup of February 2005 show that the ousted ruling clique is yet to fully accept defeat and it will try to recapture power. The ongoing political turmoil, clashes between the madhesi activists and the Maoists, and political unwillingness on the part of the seven party alliance may tempt the military to intervene. This can disturb the constitution making process.

3) Party Politics and its Degeneration

The soul of Democracy lies in the smooth functioning of the political parties. Parties not only lead the people but also unite them under the banner of an ideology. But in Nepal, most of the political parties, besides the Maoists, have not created a space for the equal representation of all social groups. It has, more or less, started to degenerate the parties. The participation of the madhesi and janajati leaders of all parties in the recent movement for proportional representation in the constituent assembly, going against the SPA’s decision to hold the constituent assembly on the basis of mixed electoral system, is indicative of this degeneration.
On the other hand the ruling political parties like the Nepali Congress and CPN-UML are not clear about how to address the demands of indigenous people, madhesis, women, dalits and people in the backward regions for fair representation in the state and political institutions. This is why various social groups are protesting the interim constitution. It is impossible to go to the constituent assembly poll without restructuring the state and without solving the question of the modality of the federal state. The modality of elections should also be discussed. The social and regional groups are strongly objecting the interim constitution. The revision made in the constitution to increase the number of constituencies in the Tarai according to the population has not satisfied madhesis. Neither has it addressed the demand made by janajatis and dalits for a proportional election system.

These are the main constraints of the Nepali project of making a democratic constitution through a constituent assembly.
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