

Comparing the 2007 and 2015 constitutions

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Nepal is a multi-ethnic, multi-lingual and multicultural country with a population comprising diverse social groups. Among the multitude of castes and ethnicities, certain communities have been marginalised for centuries, namely Dalits ('low caste'), Madhesis (from the southern Tarai plains), Janajatis (indigenous groups) and Muslims, along with women from all sections of society.

The decade-long Maoist insurgency and the Madhes movements of 2007 and 2008 made significant steps in addressing the issue of marginalisation of under-represented communities, which was reflected in the principle of proportional inclusion in state structures enshrined in the 2007 Interim Constitution of Nepal and its various amendments.

Following the election for the second Constituent Assembly (CA) in 2013, Madhesi and Janajati forces urged that the Interim Constitution provide the basis for the new constitution, to expand on the rights of the people already granted by it. By contrast, the more traditional of Nepal's political parties, the Nepali Congress (NC) and the Communist Party of Nepal-Unified Marxist-Leninist (UML), viewed the Interim Constitution as only a temporary arrangement that could not dictate the terms of the CA.

Many Madhesis and Janajatis feel that the new constitution promulgated in September 2015 backtracked on important aspects of social justice in the Interim Constitution. This article compares Nepal's 2007 and 2015 constitutions in terms of commitments to social inclusion, focusing on key issues of reservations (quotas) for marginalised communities, guarantees of representation for the Tarai region, and implementation.

Institutional inclusion: reservations

The 2006 *Comprehensive Peace Accord* (CPA) between the government and the Unified Communist Party of Nepal-Maoist (UCPN-M) called for an end to discrimination and exclusion based on caste, ethnicity and gender, but also

for state reform. Echoing the CPA, the Interim Constitution emphasised the state's responsibility to carry out 'an inclusive, democratic and progressive restructuring of the state ... by eliminating class, caste, linguistic, gender, cultural, religious and regional discrimination' (Article 34.5).

Marginalised groups had lobbied for reservations during the 1990 constitution-making process but were ignored at the time. The only form of reservation provided for some communities under the 1990 Constitution of the Kingdom of Nepal was in the 60-member Upper House of the Parliament, whereby Article 50 guaranteed reservations for three women, three Dalits and nine representatives from 'backward' minorities. None of the four previous constitutions (1948, 1951, 1959 and 1962) had provided for any kind of reservations for marginalised groups either in government jobs or political positions.

The Interim Constitution introduced the right to social inclusion for the first time in Nepal's constitutional history. Under Article 21 on the 'Right to Social Justice', it specified that: 'Women, Dalits, Adivasi Janajati, Madhesi, oppressed groups, poor farmers and labourers, who are economically, socially or educationally backward, shall have the right to

participate in state structures on the basis of principles of proportional inclusion.’

Many, although not all, Nepali laws were subsequently amended to provide reserved quotas for marginalised communities, beginning with the 2007 amendments to the Civil Service Act, which resulted in increased representation of marginalised groups in the public sector. The Government of Nepal also introduced a number of measures for the inclusion of marginalised groups in its plans, policies and programmes. The recommendations from the various thematic committees of the first Constituent Assembly further reinforced the agenda of making the state more inclusive.

Reservations and the Khas Arya

Citizens’ rights to equality, justice and non-discrimination are ingrained principles that reaffirm the idea of inclusion in Nepal’s 2015 Constitution, which in some areas has carried over relevant provisions from the Interim Constitution. For instance, the new constitution guarantees 33 per cent representation for women in the House of Representatives, the lower chamber of Parliament, and also in provincial legislatures. It also provides for ‘proportionate inclusion’ in government service (Article 285), which, in principle, would mean that the government would begin to reflect the country’s social diversity.

However, the new constitution also dilutes important commitments to greater inclusion by increasing the number of groups qualifying for reservations, and by using vague language that can be interpreted in different ways. Some marginalised communities have been pushing for revisions that can better uphold their interests. But the provision on the ‘Right to Social Justice’ in the new constitution identifies many more ‘clusters’ for reservation, a significant proportion of which are poorly defined, while the incorporation of the Khas Arya (a historically advantaged, ‘upper caste’ group) among the new groups qualifying for reservations adds a more specific complication.

Initially, a total of 17 groups were mentioned in the new constitution as deserving special attention: ‘Women, Dalit, indigenous people, Adivasi Janajati, Madhesi, Tharu, minorities, persons with disabilities, marginalised communities, Muslims, backward classes, gender and sexual minorities, youth, farmers, labourers, oppressed or citizens of backward regions, and indigent Khas Arya shall have the right to participate in state bodies on the basis of principles of inclusion’ (Article 42).

Heeding the demands of Madhesi and Janajatis, the first amendment of the constitution in January 2016 changed ‘principles of inclusion’ to ‘principles of proportional inclusion’. Previously, ‘proportionate inclusion’ had been guaranteed only to women (Article 38) and Dalits (Article 40). The amendment also removed ‘youth’ and the superfluous ‘indigenous people’ (already covered by Adivasi Janajati), and re-ordered the groups as: ‘Women, Dalit, Adivasi Janajati, Madhesi, Tharu, Muslims, backward classes, minorities, marginalised communities, persons with disabilities, gender and sexual minorities, farmers, labourers, oppressed or citizens of backward regions, and indigent Khas Arya’. Article 42 also includes the qualifier ‘who are economically, socially or educationally backward’ for the above groups, although it is not clear to which groups such a description applies or if it meant for all.

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Besides cluttering the list with undefined groups such as ‘backward classes’, ‘minorities’ and ‘marginalised communities’, all of which terms are also applicable to the historically marginalised, Article 20 shows how the 2015 Constitution has also provided reservations to the already dominant Khas Arya, a group that is overwhelmingly represented in all state structures. The addition of the Khas Arya stands against the principle of proportional inclusion and implies a potential reduction of positions reserved for marginalised communities as well as for women. Further, none of the communities other than the Khas Arya has been defined under the Constitution of 2015 (Article 176.6), effectively giving constitutional validity to the four groups described as belonging to this category while denying such validity to the more than a hundred that belong to the marginalised. This was a blatant instance of the Khas Arya, who were in leading positions in all the major parties represented in the Constituent Assembly, misusing their power to fulfil their own needs.

Hence, under the new constitution, the Khas Arya community can lay claim to the reservation facility under five of the 15 eligible categories – as women, as labourers, as farmers, as belonging to backward regions, and as ‘indigent’ Khas Arya (as well as disabled people and gender and sexual minorities). It is true that poverty affects all communities, including the Khas Arya, but rather

than address this through a programme aimed at poverty reduction, the 2015 Constitution has instead envisaged the reservation policy as a means towards that end, instead of recognising reservations as being aimed at empowering marginalised communities.

The 2015 Constitution has also provided for a National Inclusion Commission whose ‘functions, duties and powers’ state that it is to engage in various activities for the welfare of ‘the Khas Arya, backward classes, persons with disabilities, senior citizens, labourers, farmers, minorities and marginalised communities, people from Karnali and the poor’. Once again, the Khas Arya have been clearly identified whereas more excluded groups have been lost in a long list of undefined categories of people.

Representation and the Tarai

The Interim Constitution had ensured that the Tarai, which is home to half of Nepal’s population, would secure seats in the CA in proportion to the region’s population under the first-past-the-post (FPTP) part of the election. Nepal’s electoral system is split between FPTP and proportional representation (PR). In relation to inclusion more broadly, under the terms of the Interim Constitution, 58 per cent of the membership of both Constituent Assemblies was elected through PR – a deliberate design meant to increase the representation of marginalised communities. The new constitution has reduced this proportion to 40 in the federal parliament as well as the provincial legislatures.

The mandate given to the Constituency Delimitation Commission under the Interim Constitution was to ‘determine the number of members to be elected on the basis of the population of each district ... maintaining as far as practicable proportionality between the

number of members and the population of the districts’ (Article 154A.6). Under the present constitutional dispensation, the number of constituencies has a higher significance since 60 per cent of the legislative seats at both the federal and provincial levels will be elected directly through the FPTP system.

The new constitution weakened this commitment, whereby the Constituency Delimitation Commission would ‘consider geography and population as the basis for representation, and maintain as far as practicable the equal ratio or proportionality between geography, population and the number of members’ (Article 286.5). The equal weight given to geography and population would mean the Tarai, which covers only 17 per cent of the country’s territory but holds 50 per cent of the population, would lose out. The first amendment made the basis of delineation to be population first, and only then geography, in order to provide more seats to the Tarai. But because each district is also to have at least one electoral constituency and with the hills and mountains accounting for 55 of the country’s 75 districts, it is yet unclear whether or not the southern plains will get seats in proportion to their population [see *article on federalism, p.75*].

Further, the time period to re-delineate electoral districts has also been doubled from every 10 years in the Interim Constitution, following the decennial census, to every 20 years in the new statute. This arrangement is likely to reduce representation from the Tarai over time, given the migration patterns of people from the hills to the Tarai; the percentage of Pahadis (people of hill origin) living in the Tarai rose from six to 36 per cent between 1952 and 2011.

Representation in the Upper House of Parliament (National Assembly) is also a challenge. The new

Table 1: Social diversity in the judicial sector (until March 2016)

Courts	Total Judges	Women	Bahun-Chhetri	Dalit	Madhesi	Muslim	Janajati
Supreme Court	21	3 (14%)	15 (71%)	0	2 (10%)	0	4 (19%)
Appellate Court (Chief Judge)	16	1 (6%)	12 (75%)	0	1 (6%)	0	3 (19%)
Appellate Court (Justice)	80	4 (5%)	58 (73%)	1 (1%)	7 (9%)	4 (5%)	10 (13%)
District Court	180	1 (1%)	163 (91%)	0	3 (2%)	1 (1%)	13 (7%)

Note: The percentage totals add up to more than 100 due to the fact that women belong to all the social groups mentioned in the subsequent columns.

Source: Judicial Council, *Bulletin* (in Nepali), Push 3, 2072, Year 12, Issue 12 (December 18, 2015), and Judicial Commission’s nomination of new justices to Supreme Court on 1 March 2016.

constitution states that each of the agreed seven federal provinces shall send eight representatives to the National Assembly (including, encouragingly, at least three women, one Dalit, and one representing people with disabilities or a minority community). But it also means that Province 2, the only province that comprises exclusively Tarai districts and which has a population size of 5.4 million, will have the same representation in the National Assembly as Province 6, with just 1.5 million people.

Implementation of the constitution

The new constitution appears to guarantee proportionate inclusion in all state structures. But commitments to implementing this provision are still very limited, while actual performance since the constitution was promulgated does not instil confidence for the future. 'Proportionate inclusion' is referred to only twice in general, in Articles 42 and 285, and then twice specifically with regard to women and Dalits, in Articles 38 and 40. In relation to the government, the new constitution simply states that both federal and provincial cabinets shall be formed 'in accordance with the inclusive principle'. But the two governments established since its promulgation have not promoted this principle, suggesting that it will not, in fact, be followed faithfully in the future.

The new constitution at least declares that the 'inclusive principle' would be followed in appointments to constitutional organs and in nominating ambassadors, while political parties would also be required to follow it. But even this weak assurance has not been mentioned in the case of the judiciary, and the nomination of justices to the country's Supreme Court in March 2016, six months after the promulgation of the constitution, was an example of utter disregard of the 'inclusive principle'. This is particularly stark given that the judiciary displays a distinct lack of diversity, as illustrated in Table 1.

Conclusion

Nepal's quest for a new constitution needs to be understood in the context of its people's long struggle for democracy that started in the 1940s, and for inclusive democracy that started in the early 1990s. The 2015 Constitution of Nepal was needed because previous statutes did not meet the aspirations of the citizenry. But the fact that Madhesis and Tharus boycotted the recent constitution-making process,

while Janajatis have also opposed various provisions, exposes the major shortcomings with the new constitution as a guarantee of social inclusion.

Important assurances of inclusion that were enshrined in the Interim Constitution have subsequently been clawed back in the new statute. The Directive Principles are illustrative of this regression. In the Interim Constitution, the Directive Principles asserted that one of the objectives of the state was to enable marginalised groups to 'participate in all organs of the State structure on the basis of proportional inclusion' (Part 4 – as agreed in the first amendment). The Directive Principles of the 2015 Constitution, however, simply declare that the objective of the state shall be 'a just system in all aspects of the national life through the rule of law, values and norms of fundamental rights and human rights, gender equality, proportional inclusion, participation and social justice'. Further, the Preamble in the new constitution mentions building 'an egalitarian society founded on the principles of proportional inclusion and participation'. This dilutes the provision of social inclusion from a legal perspective, because a proportionally inclusive *state* carries an *obligation* for the state, whereas proportionally inclusive *society* has no such connotation.

There are deep divisions over special constitutional provisions to help excluded groups – between on the one hand, the Khas Arya group, which broadly enjoys greater access to power, and on the other, Madhesis, Tharus, Janajatis, Dalits and women, who do not. Influential leaders of some major political parties are against the system of reservations. But it will be very difficult for the major parties to refuse reservation policies in the long term, as the prospect of strong and prolonged opposition from marginalised communities would pose a challenge to the survival of the constitution itself.

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