

Inclusive state and Nepal's peace process

Yam Bahadur Kisan

Issues of inclusion and affirmative action have entered the public discourse in Nepal alongside major political changes, notably the end of the Rana dynasty in 1951 and the restoration of democracy in 1990.

But such matters failed either to engage the ruling classes or impact the political system, and in reality little changed in the lives of most Nepalis, particularly those from oppressed and marginalised communities. It therefore came as no surprise to many when the Maoists tapped into popular feelings of anger, dissatisfaction, hopelessness and rebellion to launch the 'People's War' in 1996.

Inclusion and the People's War

Article 11.3 of the 1990 Constitution, on the *Right to Equality* in the section on Fundamental Rights, recognised the concept of affirmative action. It provided 'special provisions ... for the protection and advancement of ... those who belong to a class which is economically, socially or educationally backward'. But the state took no steps towards implementation, and in fact the Supreme Court even repeatedly quashed a number of petitions requiring the government to formulate laws needed to operationalise such provisions.

The Maoist insurgents talked of bringing excluded and marginalised communities into the mainstream, but they went further to try to address the different kinds of exclusion that people faced and to understand the disparate reasons behind their unhappiness. This approach meant that the excluded came to believe that their demands, feelings and sources of dissatisfaction were at one with the party's own. Large sections of marginalised communities were attracted to the 'People's War', where the desire of the oppressed for emancipation converged with the Maoists' objective of capturing state power.

The Maoists organised and armed the angry and discontented, including women, Dalits ('low caste'), Janajatis (indigenous groups) and people from 'backward regions', reflecting the extent of people's rage and courage. As the war intensified and the role of the excluded groups in it became increasingly apparent, the government began rethinking its stance, and ultimately those in power were forced to accept that the traditional unitary, centralised and discriminatory system could not last. The next step was to formulate policies that would help address grievances.

On the eve of peace talks with the Maoist rebels in 2003, the government under a newly active monarchy began

to open a path towards affirmative action – for example by declaring quotas in government institutions and elsewhere. One example was to set aside a fixed number of places for Dalits, Janajatis, women, and persons with disabilities in medical and engineering education courses. Notwithstanding the fact that the Supreme Court overturned this particular provision (it was reinstated through another court order only recently), it is clear that the Maoist rebellion contributed directly to changes in policy to support affirmative action even as the war continued.

The progress of inclusion accelerated alongside the emergence of the peace process – from the *12-Point Understanding* of November 2005 between the Maoists and the state, to the Second People's Movement of April 2006 and the *Comprehensive Peace Accord* (CPA) of November that year. Principles of non-discrimination, inclusion and secularism were established through a parliamentary declaration of the House of Representatives – reinstated following the success of the Second People's Movement. After the CPA, the spirit of affirmative action and inclusion was subsequently reflected in a number of agreements reached between the state and different caste, ethnic, linguistic, religious, gender and regionally based groups and communities, usually following a period of agitation by the respective identity group [see the article on negotiating an inclusive Nepali state, p. 13].

Legislative change

The 2007 Interim Constitution, which was agreed by consensus, further advanced commitments to inclusion: Section 21 on the *Right to Social Justice* mentioned the principle of proportional participation in state structures; and Section 154 provided for the establishment of commissions 'to safeguard and promote the rights and interests' of various marginalised groups. Federalism as a means of advancing inclusive representation

was introduced as a result of the Madhes Movement, a major protest by groups representing the Madhesi and Tharu populations predominant in Nepal's southern Tarai plains, which erupted following the promulgation of the Interim Constitution.

The 2007 Constituent Assembly Election Act set aside 56 per cent of the total seats of the Constituent Assembly for marginalised groups (with the exception of the disabled) on a proportional basis. The Interim Constitution further provided the basis for the Amendment of the Civil Service Act in 2007, which allotted 55 per cent of vacancies for open competition and the remaining 45 per cent to be allocated as follows: women (15 per cent), Dalits (4 per cent), Janajatis (13 per cent), Madhesi (9 per cent), people with disabilities (2 per cent), and people from nine hill and mountain districts of the mid- and far-west regions ('backward regions' – 2 per cent). It was this revision to the Civil Service Act that served as the benchmark for other acts to be amended. In December 2008, the government formed the National Inclusion Commission to formulate additional policies on inclusion. The Commission submitted its report in April 2009, outlining detailed recommendations on the basis, the process and benchmarks for inclusion of different population groups in various state structures, but the government took no action to implement the report.

Resistance to change

A lot of progress was made in the first three years following the re-establishment of democracy in 2006, in principle as well as in the constitutional and legal sense. These related to affirmative action, proportional participation and representation, inclusion, secularism, federalism and republicanism. But dominant groups continued to create institutional hurdles to inclusion. For instance, in practice vacancies were announced in small batches so that fewer positions fell into the reserved category: if six vacant positions were advertised at once, three would be in open competition and three in the reserved category; but if the same six were advertised in batches of three, there would be two seats in the open competition each time and so for six vacancies the reserved category would end up with only two seats. Similarly, the results of the reserved category were sometimes declared early, with the vacancies that went unfilled then re-advertised quickly in the open competition category.

The new Constitution of Nepal agreed in 2015 largely continued this pattern of institutionalising gains in inclusion and affirmative action while at the same time diluting them through ambiguity and contradiction. A form of institutional inclusion has been assured

through the provision of rights-based constitutional commissions for women, Dalits, Janajatis, Madhesi, Tharus and Muslims, as well as one more dealing with inclusion itself. The representation of women has been guaranteed at a minimum of 33 per cent in elected bodies, but the overall proportion of reserved seats has in fact gone down [see *article on the electoral system, p. 72*]. Inclusion in executive bodies is discretionary, and there is no provision for mandatory inclusion in the judiciary.

The new constitution is full of aspiring phrases such as 'proportional inclusion', 'positive discrimination', 'special provisions' and 'principle of inclusion', but without defining clearly what these mean. Therefore, interpretation of these terms can differ among institutions and structures, creating additional barriers to advancing inclusion in practice. Further, listing of all groups in Nepal, including existing influential groups such as the Khas Arya that have a long history of dominance in Nepali state structures, as beneficiaries of affirmative action and a target group of bodies like the National Inclusion Commission contradicts the basic norms of affirmative action policy and will certainly create further problems in the future implementation processes [see *article comparing the 2007 and 2015 constitutions, p. 64*].

Future of the inclusive state

The evolution of the inclusion agenda has sparked public debate on both the pluses and minuses of affirmative action. Progressives have welcomed increases in the presence of women, Dalits, Janajatis, Madhesi, Muslims, people with disabilities and people from 'backward areas' in the state, in policy-making and in political parties at different levels. But there has also been pushback, albeit often disingenuous, for example through claims that quotas have impacted negatively on 'communal harmony', or that productivity has diminished because recruits from reserved categories are less capable – an assertion that is in fact used to discriminate against employees in the workplace.

The promulgation of the new constitution brought to a close one chapter of the peace process. Statutory safeguards to protect progress on inclusion, such as Part 18 on *The Right to Equality*, provide some hope that misconceptions about policies on affirmative action or to counter discrimination can be resolved. But complications such as the incorporation of Khas Arya among the list of beneficiary groups show that the roots of the problems that have contributed to the continuation of a non-inclusive state in Nepal have not totally disappeared. Continued progress on peace requires that the extent of popular discontent continues to be



Police take into custody a demonstrator from the Dalit community of Badis during a protest rally in Kathmandu, August 2007. © Kiran Panday

reduced: by steadily addressing constitutional challenges through amendments; and by building trust among people that amendments will in fact lead to tangible change through effective implementation.

[Translated from the original Nepali by Manesh Shrestha]

Yam Bahadur Kisan is a writer, researcher, lawyer, civil rights activist and social inclusion expert. He received his PhD in Political Science from Tribhuvan University and is currently a faculty member of its MPhil in Education programme. He was a member of the National Dalit Commission from 2007 to 2009. He has published several books and articles on Dalits, federalism, the electoral system, legal reforms, social exclusion/inclusion, education, affirmative action and Dalit social movements.