Legislating inclusion

Post-war constitution making in Nepal
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Agreement on a new constitution has been a key objective of the Nepali peace process and a measure of progress on inclusion. The trajectory of constitution-making during the first and second Constituent Assemblies (CAs I and II) in Nepal in 2008–12 and 2013–15 has been determined by the nature of the social contract and the political compromises reached. This article traces the four main dimensions to the drafting of the constitution: context, participation, negotiation and outcome.

Context
The Interim Constitution of 2007 (and its various amendments) conceded that the Nepali state had been exclusionary in terms of caste, ethnicity, language, religion, region and gender. It provided directive principles for the new constitution to lay the foundations for substantive equality among Nepal’s diverse social groups. This unprecedented admission by the state arose from four main events that marked a manifest change in Nepal’s dispensation: 1) the Maoist insurgency (1996–2006); 2) the April 2006 popular uprising (the People’s Movement); 3) the November 2006 Comprehensive Peace Accord; and 4) the post-war explosion of ethnic movements, particularly the successful Madhes uprisings of 2007 and 2008 [see article on social movements, p.97].

The April 2008 election for CA I brought a sea change in the balance of power, in favour of new political and ethnic forces. The Communist Party of Nepal-Maoist (CPN-M – later the Unified Communist Party of Nepal-Maoist, UCPN-M) emerged as the largest party with 238 of 601 seats. The traditional parties, the Nepali Congress (NC) and the Communist Party of Nepal–Unified Marxist-Leninist (UML), came a distant second and third, with 115 and 108 seats respectively. The four Madhes-based parties together had a substantial 87 seats.

There was also a distinct shift in the social composition of the CA. Representation of the dominant Khas Arya group (comprising the ‘upper caste’ Hindu groups with origins in the hills) declined from the nearly two-thirds it enjoyed in the three parliaments of the 1990s, to around one-third in CA I. Representation of many marginalised groups increased: for Janajatis (indigenous groups) from approximately 25 to 36 per cent; Madhesis (excluding Janajati from the Tarai plains) from 12 to 24 per cent; and Dalits (‘low caste’) from practically nil to eight per cent. The biggest jump was seen in women’s representation, from five to 33 per cent.

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The presence of so many advocates for change in CA I was also reflected in its agenda, which deliberated many progressive, inclusive and even radical issues. These
included, among others, secularism, multilingualism, identity-based federalism, self-determination, collective rights for ethnic groups, preferential rights for marginalised groups, inclusive electoral design and proportional representation. But, despite the extension of its tenure from the original two years to four, CA I could not find an acceptable compromise between progressive and conservative priorities and failed to deliver a new constitution.

In the meantime, the context had changed. The caste, ethnic and political composition of CA II was quite different to its predecessor, due to developments such as the rise of ethnic movements led by Bahun-Chhetris to counter Janajati and Madhesi influence. The Khas Arya (which refers collectively to Bahuns and Chhetris along with the other ‘high-caste’ communities, Thakuris and Sanyasis) increased their seats from around 33 to 42 per cent in CA II. Concomitantly, representation of Janajati, Madhesi, Dalits and women went down quite substantially – from 215 to 189; 145 to 120; 49 to 41; and 197 to 176, respectively [see article on the electoral system, p.72].

The November 2013 CA II election upheld the trend in Nepal of voting against incumbency. During CA I, the government had changed four times before a non-party government was put in place to hold the CA II elections. The UCPN-M and the UML roughly split leadership of those governments between them, while Madhes-based parties were represented throughout. However, given the hopes for tangible progressive change with which the UCPN-M and the Madhes-based parties had been elected, disenchantment with their performance was stronger and was manifested clearly in the CA II election results.

The traditional parties, the NC and the UML, shared a common position on major contentious issues on the proposed constitution and stormed back to power in CA II with a combined 389 seats (NC 206 and UML 183) – just 12 short of the ‘magic number’ needed for a two-thirds majority that would allow them to pass the new constitution themselves. Some other parties that are considered equally or more conservative on issues of ethnic identity and inclusion secured among them 52 seats. The newer political forces that had gained ground after the end of the war got only 146 seats: UCPN-M 84, Madhes-based parties 50, and parties representing Janajatis 12.

Participation
There was a marked drop in public participation in the constitutional process between the first and second Constituent Assemblies. Among Nepalis seeking a break from the past, CA I had engendered hope of a kind not seen previously. Its mission of creating a ‘New Nepal’ and institutionalising the transformation of the basic attributes of the Nepali state – from a kingdom to a republic; from Hindu to secular state; from a unitary to a federal system; and from an exclusionary polity to inclusive democracy – generated enthusiastic engagement of people from different walks of life, especially from marginalised communities. CA I also made concerted efforts to engage civil society and experts in both the content and process of constitution-making. For instance, 549,763 written submissions were received by CA I during a 25-day nationwide public outreach in February-March 2009.

All of this was missing in CA II: public participation was negligible, and there were no serious initiatives to engage either expert opinion or civil society.

Whereas CA I had been open to comparative knowledge on constitution-making from other parts of the world, over time international support was increasingly portrayed as nurturing ethnic activism and, by extension, societal discord. By the time of CA II, mirroring changes in Nepal’s political settlement, there was a palpable shift in international priorities to favour stability over inclusion.

CA I was more receptive to the collective voice of its members and allowed a role for both a formal women’s caucus, and informal caucuses of Janajatis and Dalits. Positions taken by especially the Janajati caucus at times defied the wishes of senior leaders of the political parties. For instance, when the Committee for Restructuring of the State and Division of State Powers sought to take decisions by majority vote, the Janajati and Madhesi committee members representing the UML went against the party line. They voted in favour of an identity-based federal model for Nepal comprising 14 provinces, along with the right of the titular ethnic group to the post of chief minister of the respective province for the first two terms. In fact, in May 2012 the Janajati caucus, chaired by prominent UML leader Prithvi Subba Gurung, revolted against a political understanding of the major parties, including his own, and stalled an initiative to demarcate and name the federal provinces.

CA II prohibited caucuses altogether while the sudden acceleration of the constitutional process following the earthquakes of April 2015 imposed constraints on participation and deliberation. A first draft of the new constitution was submitted on 28 June 2015. Only two days were set aside for public consultations, on 20 and 21 July. A revised draft was then submitted on 22 August. General discussions on this lasted just five days (23–27 August), after which only seven days (30 August to 5 September) were given for the submission of proposed amendments. ‘Voice voting’ on a total of 308 articles was completed in
four days (13–16 September), and then the new constitution was finally promulgated on 20 September 2015.

**Negotiation**

The procedure for drafting the constitution was laid out in the 2007 Interim Constitution: decision by consensus, and failing that by a two-thirds majority of the CA. There was also a space in between these two processes for parliamentary party leaders to intervene to seek consensus. Ultimately, though, decision-making lay with the senior leadership of the major political parties – NC, UML, UCPN-M and the Madhes-based parties – outside the purview of either of the CAs. Both the 22-Point Agreement of 15 May 2012 (CA I), which nearly led to a constitution, and the 16-Point Agreement of 8 June 2015 (CA II), which actually did, resulted from such high-level bargaining.

In the CA itself, consensus proved elusive from the very beginning. Apart from the Committee for Protection of Fundamental Rights of Minority and Marginalised Communities in CA I, and the Review Committee (formally known as Committee on Constitution Records Study and Determination) of CA II, all the other committee reports resulted from a majority decision. The removal of the monarchy as a common enemy after the end of the war made it much harder to forge a mutual position. Polarisation among political parties further contributed to the failure to achieve consensus, including over power sharing during the making and unmaking of governments, and key constitutional issues, such as the type of government, federalism and the electoral system.

Although both the CAs broadly reflected Nepal’s social and ideological diversity, negotiations were largely split between one (more conservative) side led by the traditional parties (NC and UML) and the other (more progressive) side led by the UCPN-M in alliance with Madhes-based parties, and, in the case of CA I, the Janajati caucus. This neat bifurcation began with the thematic committees, and moved up through the Constitutional Committee of CA I, and the Committee on Constitutional–Political Dialogue and Consensus (CCPDC) of CA II – both of which comprised representatives of all political parties in the respective CAs and included their senior leadership.

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Differences between the two sides came to a head around major contentious issues: the form of government – parliamentary versus presidential versus a mixed system; the electoral system – first-past-the-post (FPTP) versus proportional representation (PR) versus a mixed system; territorial federalism versus identity-based federalism; whether or not to maintain a Constitutional Court; and provincial representation in the Upper House of the national parliament – an equal number from each province or based on population size.

The Constitutional Committee of CA I and the CCPDC of CA II both formed sub-committees to resolve points of contention between the parties in the thematic committees. The five-member Dispute Resolution Sub-Committee of CA I was headed by Pushpa Kamal Dahal Prachanda, UCPN-M Chair, and included the senior leaders from the NC, UML, the Madhes-based parties, and one small party, the CPN (United). It was able to resolve some differences, such as on a bicameral parliament at the national level and unicameral assembly at the provincial, and overall reduced the number of contentious issues from 288 to 117.

The remaining 117 contentious issues were handed over to the CCPDC in CA II, headed by senior UCPN-M leader Baburam Bhattarai. The new nine-member Dispute Resolution Sub-Committee was headed by Laxman Lal Karna from one of the Madhes-based parties, and consisted of second-tier leaders of both big and small parties. It was able to come up with recommendations to resolve many of the outstanding issues – for example, proposing equal weight to FPTP and PR in the distribution of parliamentary seats, maintaining a Constitutional Court for a limited period, and proportional representation of all the aggregated social groups in both elected and non-elected state apparatus, including the judiciary. But still it could not suggest a solution to the federal design.

In any case, the CCPDC rejected these recommendations and tensions between progressive and conservative agendas continued to undermine progress. For example, in November 2014 the NC and the UML, along with some smaller parties, presented an alternative proposal that pushed for FPTP instead of a mixed electoral system, for a parliamentary system, and for territorially based federalism with seven provinces.

In CA I, the different caucuses comprising CA members across political parties were able to include identity-related rights in the reports of the CA committees. But CA II effectively disallowed any kind of caucusing, for instance by the NC, the UML and the UCPN-M issuing party whips against proposing amendments to the draft constitution and also during voting. This was despite the fact that, although the party whip was recognised in the CA’s function as the Legislature-Parliament, the CA rules had no provisions for the whip in the constitutional business of the CA. Some CA members from the NC initially defied the whip but later had to relent. Hence, the role of Madhesi, Janajati and Dalit CA members along with women representatives was confined to serving as lobbying groups within their respective parties.

Outcomes
The May 2012 22-Point Agreement had sought compromises on key disputed issues, specifically: a mixed government system; a mixed electoral system with greater weight for FPTP (60 per cent) compared to PR (40 per cent); and the provision of a Constitutional Court for limited period. On federalism, the agreement suggested 11 provinces while deferring decision on names and boundaries to a federal commission. However, the ruling UCPN-M subsequently backtracked on the agreement, under pressure from the Janajati caucus and the Madhes-based parties over the failure to decide on the federal structure, as well as from Maoist hardliners over an associated deal to hand over leadership of the government to the NC after promulgation of the new constitution.

The 16-Point Agreement of June 2015 upheld many of the terms of its May 2012 predecessor, while diverging on key issues such as the adoption of a parliamentary system, and reducing the number of federal provinces to eight – although again it deferred decision on demarcation and denomination respectively to a provincial assembly and a federal commission. Since this deferral contravened Article 138 of the Interim Constitution, which states that the CA ‘shall determine the number, boundary, names and structures of the autonomous provinces’, and which was also confirmed by a Supreme Court decision, the senior leaders of the major political parties eventually agreed on seven provinces.

Subsequent negotiations in the circuitous journey to the 2015 Constitution further compromised constitutional commitments to support inclusion [see article comparing the 2007 and 2015 constitutions, p.64]. This trend has been especially stark in the progress of federal design. Identity as the primary basis for constituting federal units was retained up to the June 2015 agreement, but was subsequently severely weakened. The provision of autonomous regions as ethno-political territories, previously listed as ‘agreed’ by the Committee for Study of Constitution Records and Determination, was not considered at all in the draft of 2015 Constitution, while the jurisdiction of provinces was also reduced. The agreement of June 2015 succeeded where previous attempts had
failed, largely because the ruling coalition of the NC, the UML and other like-minded parties had a combined strength of 407 seats in CA II, more than required to push through a constitution, whereas the coalition of the UCPN-M and Madhes-based parties in CA I had only 325 seats, or 54 per cent.

The new constitution of Nepal is paradoxical. It was adopted by 85 per cent of the CA membership, far beyond the threshold of formal and legal legitimacy, but many Janajatis and Madhesis feel strongly that the charter is restrictive on questions of identity, minority rights and inclusion. The breadth of ownership of the constitution is also highly contested for the following reasons:

1. An alliance of 33 registered parties led by the CPN-M, a splinter group of the UCPN-M, boycotted the CA II election.

2. Nine of the 31 parties with representatives in the CA II dissociated themselves from the constitution-making process from the moment of the 16-Point Agreement.

3. A total of 64 of the 73 members of the Committee on Constitution Drafting registered dissenting opinions individually and collectively: some of these were against republicanism, secularism and federalism, but most related to ethnic rights, identity-based federalism, proportional representation and other issues to do with inclusion.

4. The constitution was promulgated during major unrest over the constitution in the Tarai, home to more than half the country’s population, which was characterised by violent agitation, curfews, declaration of riot-hit areas, the deployment of security forces, including the army, and shootings.

5. The constitution was actually drafted by a small group of 15 influential men from the three major parties, all of whom bar one were from the Khas Arya group. This group consisted of a troika of senior leaders plus two politician-cum-legal experts each from the NC, UML, and UCPN-M, with the rest of the CA membership having no say in the drafting.

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For some, the promulgation of the new constitution is the final destination of Nepal’s peace process. This has some limited veracity in relation to the Maoist insurgency – although major gaps are evident even here, in relation to transitional justice, for example. But there remains significant risk of the revival of ethnic movements by Janajatis and Madhesis in the future. Hence, despite its apparent formal legitimacy, the new constitution needs to be amended to respect the voices of identity and inclusion – in order to broaden that legitimacy and consolidate peace for all Nepalis.

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