PARTICIPATORY CONSTITUTION MAKING IN NEPAL
Issues of Process and Substance
Post Peace Agreement
Constitution Making in Nepal
Volume I
PARTICIPATORY CONSTITUTION MAKING IN NEPAL
Issues of Process and Substance

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Published by
United Nations Development Programme (UNDP)
Support to Participatory Constitution Building in Nepal (SPCBN)
2014
UNDP is the UN's global development network, advocating for change and connecting countries to knowledge, experience and resources to help people build a better life.

ISBN: 978 9937 8942 0 3

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Book Cover: The painting on the cover page art is taken from 'A Federal Life', a joint publication of UNDP/SPCBN and Kathmandu University, School of Art. The publication was the culmination of an initiative in which 22 artists came together for a workshop on the concept of and debate on federalism in Nepal and then were invited to depict their perspective on the subject through art. The painting on the cover art titled “System Unfolds…” is created by Bidhata KC.

DISCLAIMER:
The views expressed in the book are those of the authors and do not necessarily represent the views of UNDP/SPCBN.
A new Constitution for a new Nepal drafted and adopted by an elected and inclusive Constituent Assembly (CA) is a key element of the Comprehensive Peace Agreement (CPA) of November 2006 that ended a decade long Maoist insurgency. Elections were held under the Interim Constitution of 2007 and inclusive 601 member CA that also functioned as a Legislature Parliament was elected. It included 197 women and representatives from Nepal’s marginalized groups and diverse population. The CPA and the Interim Constitution mandated the CA to draft and adopt a constitution that eliminated the centralized, unitary state and introduce instead progressive state restructuring, inclusion and the empowerment of Nepal’s excluded communities.

The constitution making process of 2008-12 failed to draft and adopt a new constitution but did produce significant achievements. There is today in Nepal, broad agreement that Nepal should be a federal, secular and inclusive democratic republic. There has been a widespread public debate on complex constitutional issues and the various thematic committees of the former CA produced impressive reports on the main constitutional issues. The issues where consensus proved difficult included the basis for the demarcation of provinces (the balance between identity and viability) in a federal Nepal; the design of the electoral system and whether Nepal should adopt a presidential system, continue with the Parliamentary executive model, or explore a semi-presidential compromise.

The collapse of the Constituent Assembly in May 2012 created a crisis that was not anticipated by the framers of the Interim Constitution. The CA elected in 2008 was expected to continue in office until the adoption of a new constitution and there were therefore no provisions for a second CA election. After months of uncertainty a political consensus was reached by the main political parties in the country that an election for a new CA under the aegis of aspecial council of ministers chaired by the Chief Justice, was the way to resolve the constitutional crisis. Since there was no Legislature Parliament to amend the constitution, a provision that gave the President the power to issue orders to remove difficulties was used to give legal effect to the political consensus to conduct elections. Nepal went to the polls on 19 November 2013 to elect a new CA to resume the important task of constitution making.
This two volume publication seeks to describe and analyse the remarkable and ambitious participatory constitution making process in Nepal and its challenges both with respect to process and substance. It also seeks to critically examine the difficult issues that have prevented Nepal to date from reaching agreement on the substance of the new constitution. Authors were identified so as to capture the range of views and opinions on a variety of constitutional issues that have featured in the national debate on constitutional reform. We hope that the collection of essays will contribute to a more informed debate that will in turn, lead to a successful conclusion to the process.
INTRODUCTION TO VOLUME ONE

The first volume of the post-Comprehensive Peace Agreement (CPA) constitution-making process of Nepal gives an overview of the constitution making process of the first Constituent Assembly (2008-2012) and the key constitutional issues which dominated then and are to be resolved by the second Constituent Assembly in the drafting of Nepal’s new constitution including the protection of fundamental rights, the form of government and the issue of social inclusion, among other things.

In Chapter 1, Krishna Khanal gives a brief comparative perspective of participatory constitution making and overview of Nepal’s journey towards participatory constitution making process. Then he examines the constitution making process during Nepal’s first Constituent Assembly (2008-2012) vis-à-vis the framework of participatory approach.

In Chapter 2, Mohan Lal Acharya reviews the constitution-building process of the first Constituent Assembly and discusses the contribution it made to key contentious issues. He provides detailed information and analyses in chronological order on major events, including the Constituent Assembly’s development and obstacles. He also examines the challenges the Constituent Assembly faced during its four-year tenure and highlights the efforts made by political leaders to remove these obstacles. Finally, Acharya extracts lessons for the future including recommendations.

In Chapter 3, Purna Man Shakya dwells on the critical analysis of the process of constitution making in Nepal. He argues that the six constitutions that were made in the past did not endure because they were created by a top-down process and the ruling elites had the main (or only) say in these constitutions. He differentiates the making of the new constitution by the Constituent Assembly, which is following a bottom-up approach in which the people are the author of the constitution. Through this inclusive Constituent Assembly, the people can participate in the participatory and deliberative constitution-making process.
In Chapter 4, Yubaraj Sangroula discusses some key constitutionally significant cases before the Supreme Court of Nepal and the political implications of judicial interventions. He examines two house dissolution cases of 1990’s and points out the discrepancies of the Supreme Court in interpreting the constitution and its cost for the future of Nepal’s democracy. Then he discusses the cases the Supreme Court decided in the Interim Constitution’s several amendments to extend the tenure of the first Constituent Assembly (2008-2012), the discrepancies in interpreting the constitution and the failure of the Court to take the nuances and reality of post conflict constitution making into consideration.

In Chapter 5, Bhimarjun Acharya discusses the constitutional protection of fundamental rights since the 1948 constitution and posits that Nepal has in the past protected people's rights as expressed rights, rather than natural or inalienable rights. Acharya points out that a bill of rights is the ‘conscience’ of a constitution, as these rights can be enforced in a court of law and constitute a set of restrictions and limitations on government action. In the context of Nepal, the insertion of a bill of rights in the constitution would be the culmination of a long struggle by the people for rights and liberties. The bill of rights purported for inclusion in the new constitution includes a wide range of protections with a common theme and purpose: to define the scope of individual freedom in Nepal and to make the political system more democratic and pro-people. The list of new rights proposed in the draft, once adopted, may herald a new era in the struggle for rights and liberties.

In Chapter 6, Basant Adhikari reflects on the discourse on the recognition of international human rights norm and standards in the new constitution. He highlights some of the theoretical aspects of constitutional recognition of human rights norms and standards in modern constitutional democracies and links this with the constitutional discourse in Nepal. Adhikari focuses on the discourse of former Constituent Assembly’s Committees on Fundamental Rights and Directive Principals and makes some critical observations on its proposals on the subject.

In Chapter 7, Binda Magar, Luma Singh Bishwokarma and Indu Tuladhar analyse the proposed citizenship provisions by the first Constituent Assembly of Nepal, (2008-2012) with special emphasis on problematic provisions of Nepalese women’s right to convey citizenship independently to their children and children’s right to citizenship as provided for in the international human rights treaties to which Nepal is a party. The authors summarize the consequences of not guaranteeing this right in the new constitution. The authors also highlight the practices of different countries to granting citizenship to see the global trends of citizenship rights of women and children.

In Chapter 8, Uddhab Pyakurel deals with the issues related to forms of government, one of the key contentious issues the first Constituent Assembly
could not sort out. He gives a brief overview of the debate and discussions on
the issue of form of government and then goes to elaborate different models
practised around the world. Finally, Pyakurel discusses possible suitable models
of government in countries such as Nepal.

In Chapter 9, Kåre Vollan discusses representation in the parliament and the
changes that could be made to the electoral system adopted in the first and
the second Constituent Assembly elections in Nepal to target groups needing
special arrangements in a more efficient manner, while at the same time making
it simpler for parties to operate under. He argues that the improvements would
not only allow for a more inclusive parliament, but would also strengthen the
accountability of those elected and provide for better, more logical and more
geographical representation in Nepal’s future parliament.

In Chapter 10, Hari Phuyal discusses how a constitutional court functions as a
mechanism for adjudicating on constitutional issues and resolving disputes over
the exercise of powers between the different levels of government in a federal
system. He provides a brief overview of the constitutional courts of some other
countries. He showcases the arguments in favour and against the constitutional
court within and outside of the Constituent Assembly and also gives a brief
overview of the positions of different political parties over the subject.

In Chapter 11, Mara Malagodi analyses the issue of Nepal’s judicial reform in the
context of the ongoing constitution making from an academic perspective. She
provides theoretical and technical information to understand the contentious
issues during the first Constituent Assembly’s endeavours of delivering an
effective judicial reforms and also provides institutional options available to
Nepali constitution makers and other stakeholders in order to promote both the
independence and the accountability of Nepal’s judiciary.

Chapters 12, 13, 14 and 15 look at the issues related to social inclusion. In Chapter
12, Amanda Cats-Baril examines indigenous peoples’ struggle for effective and
meaningful participation in Nepal’s Constituent Assembly. She raises questions
about representivity in the Constituent Assembly and makes recommendations
for future legal and institutional innovations that could help ensure inclusivity in
Nepal’s forthcoming democracy from an indigenous peoples’ perspective.

In Chapter 13, Yam Bahadur Kisan looks at the upsurge in attention being paid
to the issue of social inclusion since the People’s Movement in April 2006 (Jana
Andolan II). The Interim Constitution of Nepal, 2007 and over a dozen of special
laws have adopted the concept of social inclusion and applied affirmative action
policies; however, quotas and implementing strategies have not been sufficiently
formulated or implemented. He points out that the Dalit community, one of the
most excluded groups of Nepal, needs special consideration and mechanisms for
social inclusion and affirmative action at all level and in all sectors and aspects of
State structures.
In Chapter 14, Keith Leslie contextualises and reviews indigenous peoples’ claims with special emphasis on Nepal’s first Constituent Assembly. Importantly, Leslie analyses the report of the first Constituent Assembly’s Committee for the Protection of the Rights of Minorities and Marginalised Communities. Leslie also considers how indigenous peoples’ issues have come to the fore of the national discourse around the new constitution, as well as the role of the Government of Nepal, members of the Constituent Assembly, activists, political parties and the international community in this ongoing and highly politicised debate.

In Chapter 15, Neeru Shrestha looks at inclusion debate in Nepal. She argues that inclusion is about ensuring participation in all state apparatus; access to all state resources, including the sharing of power and rights in proportionate to population; affirmative action for a certain period of time; equitable human development; proportionate representation in public entities; and respect for the identity and autonomy of people to participate fully in the life of national society. Shrestha lists the provisions related to inclusions in previous constitutions, laws and government plans of Nepal, which can be read as a substantial commitment to inclusion. She also provides a quick overview of Supreme Court decisions on cases relating to inclusion and positive discrimination.

In Chapter 16, Renu Kshetry discusses the media coverage during the first Constituent Assembly election and its four-year term. Chhetri highlights the positive role that the Nepali media played during the Constituent Assembly election and how it slowly lost interest over the next four years. Chhetri points out that there was a major shift in coverage from constitution making to government formation in the later part of this period. The author also analyses the factors behind the media’s failure to understand the gravity of constitution-making process and the role it could have played in the promulgation of the constitution.
NOTES ON CONTRIBUTORS

1. **Krishna Khanal** was a Professor in the Central Department of Political Science, Tribhuvan University from 1977 to 2010. He has written extensively on contemporary political issues of Nepal relating to democracy, governance, state restructuring, political system, constitution making, political parties, leadership, etc. He also worked as Senior National Adviser to UNDP’s Support to Participatory Constitution Building in Nepal (SPCBN) from 2010 to 2013.

2. **Mohan Lal Acharya** is a lawyer specialising in international law and Human Rights and has been working for UNDP’s Support to Participatory Constitution Building in Nepal project as Senior Legal Officer since December 2008. He holds an LL.M. in international law and has worked in the areas of international law and human rights in various national and international organisations including the National Human Rights Commission of Nepal, International Rescue Committee and Nepal Bar Association.

3. **Purna Man Shakya** is Professor of constitutional law in the Faculty of Law at Tribhuvan University and a lawyer. He holds LL.M. degrees from Faculty of Law in Delhi and Columbia University Law School in New York. He has published more than 50 research articles in national and international law journals. He was also a lead consultant of the drafting team for the rules of procedure of Nepal’s first Constituent Assembly.

4. **Yubaraj Sangroula** is the Professor Incharge in Kathmandu School of Law. He has Ph.D. in criminal justice system from Delhi University in conjunction with Danish Institute for Human Rights, Denmark. He served as the Attorney General of Nepal in 2011 for a period of seven months. He was also the convener of the High Level Taskforce for Reforms of Security Agencies of Nepal formed by the Council of Ministers. He obtained SAARC Law Scholarship Award in 2012 and has been a visiting faculty at Renmin University of China Laws School, Rajibgandhi National Law University and UNFAEI, Japan.

5. **Bhimarjun Acharya** is an advocate at the Supreme Court of Nepal and a constitutional scholar. He received his Ph.D. in constitutional law and holds an LL.M. He has also received a degree on special human rights course from International Academy, the Netherlands. Dr Acharya has authored 20 books including Comparative Systems of Judicial Review (2012) and My Essays in Law, Media Freedom and Politics (2012).

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9. **Indu Tuladhar** holds a Master’s degree in International Conflict Analysis from University of Kent at Canterbury, England and Bachelor of Law (B.L.) form Tribhuvan University, Nepal. She is a lawyer and independent consultant with a background working in access to justice for children and women victims of violence. She has more than 15 years of experience in working with a diverse range of national and international organizations, providing technical expertise in policy analysis and carrying out advocacy to strengthen the legal and constitutional protection of children and women rights in Nepal.

10. **Uddhab Pyakurel** holds a Ph.D. from Jawaharlal Nehru University, New Delhi, and an Assistant Professor of Political Sociology at the School of Arts, Kathmandu University, Nepal. He is the author of Maoist Movement in Nepal: A Sociological Perspective (2007). He is also a co-author of Dalit Representation in National Politics of Nepal (2012) and State of Conflict and Democratic Movement in Nepal (2013).

11. **Kåre Vollan** holds master’s degree (M.Sc.) from Institute for Mathematics, University of Oslo. He is an International Electoral Expert from Norway. He is a Managing Director and owner of the consultancy company Quality AS. He has been working on elections in 30 countries and territories including Nepal, Zimbabwe, Kenya, Iraq, Palestine, Sudan, Egypt, and Bosnia and Herzegovina. Currently he is assisting the Election Commission of Nepal on election law issues and providing advice to the Constitutional Assembly members on the electoral issues of the constitution through a project managed by IFES and sponsored by the Norwegian Embassy. He has published a number of articles and reports on electoral and decision making issues, including on, electronic voting.

12. **Hari Phuyal** has been practicing law in the Supreme Court of Nepal since 20 years. He holds LL.M. degrees from the National Law School of India University, Bangalore and the University of Essex, the UK. He has contributed articles on judiciary, fundamental and human rights in national and international journals.

13. **Mara Malagodi** is a British Academy Postdoctoral Fellow in the Law Department at the LSE. Her project (2012-15) investigates patterns of exclusion of Nepal’s ethnolinguistic, religious and regional groups, Dalits, women and LGBTIs in the constitutional arena following the re-democratisation of 1990 by mapping Supreme Court’s decisions
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14. **Amanda Cats-Baril** is an international lawyer (New York University ’11). She has worked extensively in South Asia, Latin America and the United States as an advocate, analyst and program design specialist. Specifically, in Nepal, Ms. Cats-Baril has worked with the Lawyers Association for the Human Rights of Nepalese Indigenous Peoples (LAHURNIP), UNDP’s Support to Participatory Constitution-Building in Nepal Project, the International Institute for Democratic and Electoral Assistance, and the International Labor Organization.

15. **Yam Bahadur Kisan** is an author, researcher, lawyer, civil rights activist and social inclusion expert. He received his Ph.D. in political science in “Dalits’ Inclusion in Nepali State: Prospects and Challenges” from Tribhuvan University, Nepal, in 2013. He has published several books and articles on Dalits movement, federalism, electoral system, legal reforms, education, social exclusion/inclusion, affirmative action policies and other contemporary issues.

16. **Keith D. Leslie** studied Philosophy/Religion at Amherst College, then completed a Masters in Organization Management. He has lived and worked in Nepal for the past thirty years. He was the Himalayan Country Director for Nepal/Bhutan, as well as the Asia/Pacific Director for Save the Children US, in 1987-2006. He then served as the Sr. Human Rights Advisor to the National Human Rights Commission in 2006-08 before joining the UNDP Support to Participatory Constitution-Building in Nepal (SPCBN) project as the Sr. Civil Society Advisor in 2009-11. He is currently working for a World Bank social accountability/budget transparency project.

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<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
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<tbody>
<tr>
<td>AA</td>
<td>Affirmative Action</td>
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<tr>
<td>AD</td>
<td>Autonomous District</td>
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<td>ADB</td>
<td>Asian Development Bank</td>
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<td>AR</td>
<td>Autonomous Regions</td>
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<td>ARC</td>
<td>Administrative Restructuring Commission</td>
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<td>BS</td>
<td>Bikram Sambat</td>
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<tr>
<td>CA</td>
<td>Constituent Assembly</td>
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<td>CA/LP</td>
<td>Constituent Assembly/Legislature Parliament</td>
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<td>CBC</td>
<td>Canadian Broadcasting Corporation</td>
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<td>CBS</td>
<td>Central Bureau of Statistics</td>
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<td>CC</td>
<td>Constitutional Committee</td>
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<td>CCCPO</td>
<td>Committee on Collection and Coordination of Public Opinions</td>
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<td>CCD</td>
<td>Centre for Constitutional Dialogue</td>
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<td>CCDRM</td>
<td>Committee on Capacity Development and Resources Management</td>
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<td>CCR</td>
<td>Committee on Civic Relations</td>
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<td>CDDBCSS</td>
<td>Committee on Determination of Bases for Cultural and Social Solidarity</td>
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<td>CDFG</td>
<td>Committee on Determination of Form of Governance</td>
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<td>CDFLO</td>
<td>Committee on Determination of the Form of the Legislative Organs</td>
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<td>CDNRFPR</td>
<td>Committee on Division of Natural Resources, Financial Powers and Revenue</td>
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<td>CDO</td>
<td>Chief District Officer</td>
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<td>CDSCB</td>
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<td>CEDAW</td>
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<td>CFRDP</td>
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<td>CHHEM</td>
<td>Caste Hill Hindu Elite Males</td>
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<td>CJS</td>
<td>Committee on Judicial System</td>
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<td>CKRC</td>
<td>Constitution of Kenya Review Commission</td>
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<td>CLAF</td>
<td>Constitutional Lawyers’ Forum</td>
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<td>CPA</td>
<td>Comprehensive Peace Accord</td>
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<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>CPN ML</td>
<td>Communist Party of Nepal (Marxist Leninist)</td>
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<td>CPN U</td>
<td>Communist Party of Nepal (United)</td>
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<td>CPN UML</td>
<td>Communist Party of Nepal (Unified Marxist Leninist)</td>
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<td>CPNI</td>
<td>Committee for Protection of National Interests</td>
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<td>CPNM</td>
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<td>CPRMMC</td>
<td>Committee for Protection of Rights of Minority and Marginalised Communities</td>
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<td>CRC</td>
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<td>CRC</td>
<td>Constitution Recommendation Commission</td>
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<td>CRSDSP</td>
<td>Committee for Restructuring of the State and Distribution of State Powers</td>
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<td>CSCPPD</td>
<td>Committee to Study Concept Papers and Preliminary Draft</td>
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<td>DANIDA</td>
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<td>DC</td>
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<td>FPTP</td>
<td>First-Past-The-Post</td>
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<td>Government of Nepal</td>
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<td>HLSRC</td>
<td>High Level State Restructuring Commission</td>
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<td>HLTF</td>
<td>High Level Task Force</td>
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<td>HMGN</td>
<td>His Majesty’s Government of Nepal</td>
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<td>IC</td>
<td>Interim Constitution</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICERD</td>
<td>International Convention on the Elimination of All Forms of Racial Discrimination</td>
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<td>ICJ</td>
<td>International Commission of Jurists</td>
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<td>ICSER</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>IIIDEA</td>
<td>International Institute for Democracy and Electoral Assistance</td>
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<td>ILO</td>
<td>International Labour Organisation</td>
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<td>IN</td>
<td>Indigenous Nationalities</td>
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<td>Indigenous Peoples</td>
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<td>LAHURNIP</td>
<td>Lawyers' Association for Human Rights of Nepalese Indigenous Peoples</td>
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<td>Lawyers National Campaign for the Elimination of Caste Discrimination</td>
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<td>LLSJC</td>
<td>Local Legislative Special Judicial Committee</td>
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<td>LP</td>
<td>Legislature Parliament</td>
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LSGA  Local Self-Government Act
MJF   Madhesi Janadhikar Forum
MMPR  Mixed-Member Proportional Representation
NAVIN National Association of Villages in Nepal
NBA   Nepal Bar Association
NC    Nepali Congress
NCARD National Coalition Against Racial Discrimination
NEFIN Nepal Federation of Indigenous Nationalities
NFDIN National Foundation for Development of Indigenous Nationalities
NGO   Non-Governmental Organization
NPC   National Planning Commission
OBC   Other Backward Class
PIL   Public Interest Litigation
PLA   Peoples Liberation Army
PLSJC Provincial Legislature Special Judicial Committee
PPI   Population Pressure Index
PR    Proportional Representation
RC    Regional Councils
RPP   Rastriya Prajatantra Party
RPPN  Rastriya Prajatantra Party Nepal
SDSA/N State of Democracy in South Asia/Nepal Chapter
SP    Sadbhavana Party
SPA   Seven Party Alliance
SPCBN Support to Participatory Constitution Building in Nepal
TAC   Tribes Advisory Council
THRDA Tarai Human Rights Defenders Alliance
TMDP  Terai Madhes Democratic Party
UDHR  Universal Declaration of Human Rights
UDMF  United Democratic Madhesi Front
UNDAF United Nations Development Assistance Framework
UNDRIP United Nations Declaration on the Rights of Indigenous Peoples
UNHCR United Nations High Commissioner for Refugees
UNMIN United Nations Mission in Nepal
USAID United States Agency for International Development
VDC   Village Development Committee
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CHAPTER 1

THE PARTICIPATORY CONSTITUTION MAKING PROCESS IN NEPAL


- Krishna Khanal
1. BACKGROUND

Nepal’s Jana Andolan 2, the People’s Movement of April 2006, was instrumental in bringing the decade-long Maoist insurgency (1996–2006) to an end. It brought the Maoists into the peace process, ended Nepal’s absolute monarchy, and began the political transition. A major landmark of the subsequent peace process was the election of a Constituent Assembly (CA) in April 2008.

These developments heralded Nepal’s first participatory constitution-making process. However, the process remained suspended up until January 2014 because of the expiry of the term of the first CA on 27 May 2012 without delivering a new constitution for the newly declared ‘federal republic’ of Nepal. The demise of the CA left the fate of constitution-making uncertain. A few minutes before midnight on 27 May 2012, Prime Minister Baburam Bhattarai informed President Ram Baran Yadav about the government’s decision to dissolve the CA and hold new CA elections on 22 November 2012, as if it was a periodic parliamentary election. But elections could not be held on that date due to the constitutional and political stalemate.

Eventually, following negotiations between the four major political parties represented in the first CA — the Unified Communist Party of Nepal Maoist (UCPNM), Nepali Congress (NC), the Communist Party of Nepal (CPN-UML) and the United Democratic Madhesi Front (UDMF) — elections were scheduled for the second CA and a caretaker government was formed under the chairmanship of Chief Justice Khil Raj Regmi. After agreement between the four political forces, on 13 March 2013 President Yadav issued a 25-point order to remove constitutional difficulties for holding CA elections for the second time (GoN, 2013). The Chief Justice-led government announced 19 November 2013 as the polling day. Accordingly, the elections had been duly held and results have been formally announced. The new CA is scheduled to start its business from 22 January 2014 assuring the resumption of the constitution making process once again.

Up until the promulgation of a new constitution the country is being run under an Interim Constitution (IC), which was promulgated in 2007 as part of the peace deal.

Constitution making by elected representatives is an old agenda that was revived after Jana Andolan 2. Back in 1951, after the political changes and the first attempt at democratic government, there were moves to frame a constitution through an
elected constituent assembly. However, such an assembly never materialised until 2008 due to the monarchical arrogance that it would undermine the royal prerogative (Joshi & Rose, 1966). The Nepali Congress, which led the 1951 revolution that overthrew the century-old Rana oligarchy, had to accept a constitution as a gift of the king. Nepal's first parliamentary elections were held in 1959. However, due to the royal ambition to govern the country unrestrained, the experiment with a parliamentary constitution did not last more than a year and a half. In December 1960 the elected government was dislodged, the parliament was dissolved, political parties were banned and political leaders, including the prime minister and his cabinet colleagues, were arrested. An absolute monarchy ruled the country for the following more than 30 years under the garb of 'partyless panchayat democracy' (Baral, 1977).

Following the restoration of democracy in 1990, a Constitution Recommendation Commission (CRC) was formed to draft a new constitution. Though some voices demanded that the new constitution be framed by an elected constituent assembly, political leaders chose an expert-led commission to draft the new constitution for a multiparty system. More than a decade later, the demand for an elected CA to draft a new constitution gathered momentum when the Communist Party of Nepal (Maoist) floated this idea as part of a peaceful political settlement of the insurgency. After the success of Jana Andolan 2, the Seven Party Alliance of the other main political parties (SPA) and the CPN (Maoist) formally agreed to hold elections for an assembly to write a new constitution. The provision for CA elections had always been a part of the deal in most of the understandings reached between the then CPN (Maoist) and the Government of Nepal (GoN), including in the Comprehensive Peace Accord (CPA) of November 2006. A central purpose of the Interim Constitution of Nepal, 2007 was to ensure CA elections and to get a new constitution adopted by it.

However, participatory constitution-making does not end once an assembly has been elected. In other countries constitutions framed by elected bodies like the CA have not been made through a participatory process. Several Asian and African countries, including India, after winning their independence, built their constitutions through elected assemblies; but these constitutions were not developed through a participatory process. In these cases constitution making was confined to the hands of a few powerful leaders who were considered to have superior knowledge of constitution making, politics and government.

Nepal's experiment with written constitutions goes back to 1948 when the country's outgoing Rana oligarchy introduced 'Nepal Sarkarko Baidhanik Kanoon' (the Official Act of the Government of Nepal) in a bid to safeguard the regime against growing popular protests. Since then the country has had six constitutions, both democratic and authoritarian. Two of them (1959 and 1990) were based on principles of democracy and could have paved the way for democratic constitutional practices in the country. However, they could neither
sustain nor garner popular support to defend them when they were violated by the then rulers — the Ranas or monarchs of the time. Nepal had never adopted a participatory constitution-making process before 2008.

The first constitution proclaimed by the Rana Prime Minister in 1948 was framed with the advice of Indian experts (Gupta, 1993: 31). The Interim Constitution of 1951 and the 1990 constitution were made according to the advice and recommendations of political parties, and proclaimed by the king. The Panchayat constitution of the partyless system was framed on the instructions of the king to legitimise absolute monarchy (Dhungel et al., 1998). However, the Interim Constitution of 2007 was jointly framed by the SPA and CPN (Maoist) following the success of Jana Andolan 2. And, for the first time, a Nepalese constitution was proclaimed in the name of the Nepali people as spelled out in the preamble to the Interim Constitution, 2007 (GoN, 2007).

Many commentators believe that previous constitutions could not sustain because the people were not given a role in writing them either through their elected representatives or by having a say in a referendum. Thus, the adoption of a participatory constitution writing process and election of constituent assembly for that purpose are very important. Besides, Nepali society is very diverse in terms of caste, ethnicity and geographic regions and it is a challenging task to reflect all the concerns and aspirations of the different groups in a constitution. Nepal is politically plural with political parties ranging from the extreme right through the centre to the extreme left, while other diverse concerns and interests range from ethno-regionalism to environmental issues. As a result, no party has ever been able to garner an absolute majority of popular votes in general elections. This further underlines the importance of having a participatory constitution writing in order to gain acceptance of a constitution by the broad spectrum of interest groups.

Constitution making is a fundamental part of the CPA signed between the CPN (Maoist) and the Government of Nepal in 2006. The adoption of a new constitution will be a logical end to the peace process. Although the CPA and the Interim Constitution envisaged CA elections as an “inherent fundamental right of the Nepali people”, there is no provision in the constitution that specifically provides for constitution-making to be participatory. However, the major political parties (UCPNM, NC and the UML) committed in their election manifestos for a participatory process to be followed for writing the new constitution by seeking submissions from the people and sharing the draft constitution with the people before it would be finally adopted. It was only after the adoption of the CA Rules in November 2008 that an explicit provision was made for people’s participation in making the constitution. The CA rules made the participation of the people mandatory by allocating time for public consultations on the draft and stipulating that relevant suggestions from the consultations should be accommodated in the constitution (CA Secretariat, 2008).
Participatory constitution making is new to Nepal. When the election of a constituent assembly was envisioned in the early 1950s, it was not to be a participatory process. All the subsequent constitutions were made without the direct participation of the people. This was against an international scenario where the idea of participatory constitution making had yet to gain ground. The makers of most post-World War 2 constitutions, including those of India, Indonesia, the Philippines and many other newly independent countries, did not consider the need for participatory constitution writing. And such an idea was never floated in Nepal before the 2008 CA elections. Even the Interim Constitution, 2007 mentions only about voting for CA members and is silent on people’s participation.

Against this background, this paper seeks to explain and analyse the idea and relevance of participatory constitution making in Nepal with reference to the first CA (2008-2012). This paper firstly discusses the concept of participatory constitution making; secondly, how the CA planned for it; and thirdly, what modalities and channels of participation were available when the CA was still there. Finally, it concludes with the prospects of participatory constitution making process with regard to the second CA elections.

2. PARTICIPATORY CONSTITUTION MAKING: A COMPARATIVE PERSPECTIVE

It is widely believed that a constitution should "[articulate] a new, broadly shared vision of society and [organise] the system of governance in a way that respects and protects the interests of diverse groups"... and "can play a crucial role in consolidating peace and democracy" (Solomon, 2010: xi). Therefore the change anticipated by a political movement or a peace process 'starts with the constitution-making' (Ghai & Galli, 2006: 232). These statements provide a connection between the substance of a constitution and the process of constitution making.

There is no fixed model for making a constitution. Over the last two hundred years, most constitutions have been made to the convenience of the actors involved and in line with the political context of the concerned countries. Public participation in constitution-making has been increasing in recent decades. Between 1975 and 2013, the draft contents of constitutions were consulted with the people as a requirement in more than 20 countries before the documents were officially adopted. Such a requirement is normally stated in interim constitutions, statutes, presidential decree, parliamentary acts, or rules and procedures of CAs (Brandt et al., 2011: 113).

Until the 1980s public participation in constitution making was generally limited to voting in a constitution-making body such as a constituent assembly or
parliament, or a constitutional convention, or ratifying the constitutional text in a referendum (Hart, 2003: 7). The first ever living written constitution of modern time, i.e. the constitution of the United States, was made by the delegates through a convention and came to existence after the ratification by the States. Likewise, the Indian constitution was made by the elected representatives through a Constituent Assembly, which also played the role of a legislative body. It has been observed that in the Indian assembly of about 200 members hardly 20 members actually had a role in it, otherwise an 'oligarchy' of the four top leaders of the Indian National Congress — Prime Minister Jawaharlal Nehru, Home Minister Sardar Ballabh Patel, Chairman of the Assembly Rajendra Prasad and Education Minister Abdul Kalam Azad, determined the whole process (Austin, 1966: 311-317). Those were the days of attaching more importance to the contents of the constitution rather than the processes. Thus, the idea of public participation was not floated and as a result constitution making process was confined to the hands of a few powerful politicians.

In recent decades the form of public participation has gone beyond voting for representatives or participating in a referendum. Instead, it provides a range of activities that facilitate people’s participation through civic education, media campaigns, the seeking of submissions, consultations on the draft, and other means (Brandt et al., 2011: 9). The concept of participatory constitution making is getting more attention for making new constitutions, particularly in post-conflict countries. In order to harmonise the conflicting interests of diverse parties and groups and to build consensus on key issues the contents of new constitutions and the processes through which they are made are equally important. Thus connecting the process and outcomes is crucial for assuring the acceptance of new constitutions. However, there is considerable debate as to whether constitution making is mainly a subject of expertise or a matter of popular concern involving the participation of the people (Ghai & Galli, 2006: 232).

The process part is being given equal importance in many countries in recent decades, with both substance and process considered crucial for constitution-making and its consolidation. Several case studies reveal that "well-conducted processes can, indeed, contribute to building stable, peaceful states, whereas poorly conducted processes must certainly undercut such efforts" (Solomon, 2010: xi). Most constitutional experts agree that the manner in which a constitution is constructed and ratified determines the fate of the constitution itself. Taking the larger public into confidence, especially in the context of prolonged intra-state conflicts, has become a priority while drafting a constitution with the hope that it can help consolidate the constitutional system and encourage people’s acceptance of the new constitution. A participatory process will give greater legitimacy to a constitution and will also be "a progress towards democratisation" (Ghai & Galli, 2006: 232). Thus, public participation is critical for public acceptance and the durability of a constitution.
It is an established principle that in a democracy every section of the population should have reasonable access to and opportunities to participate in constitution-making. This norm expects that cross-sections of society in groups and at the individual level should be able to ventilate their views and opinions on major issues and the contents of constitutions (Benomar, 2003).

Constitution-making through a popularly elected assembly could be seen as a kind of participatory process in itself because election campaigns provide the opportunity for people to engage in debates over constitutional issues and to vote for parties and candidates with the preferred constitutional agenda. Deciding on important constitutional issues through referendums also enables people’s participation. However, our concern here is not limited to such isolated events. Participatory constitution making has to follow certain universally accepted steps and measures. The process covers a broad arena from electing a representative body for deliberations, to finalising the draft constitution, to civic education, and finally in the adoption of the fundamental law. It entails how civic education on constitutional issues is planned and public debates are organised during the pre-draft and drafting phases and how the constitution is finally adopted. Sharing the draft constitution with the people and seeking and incorporating their views are crucial for participatory constitution-making.

Participatory constitution making has been widely acclaimed in the last three decades, particularly in post-conflict countries. Such a process began with the making of constitutions in Nicaragua, Brazil and Uganda in the late 1980s, and continued in South Africa and Eritrea in the 1990s and in Kenya and Bolivia more recently. This process provided greater space for public participation and ensured the people’s say in constitution drafting. In Nicaragua some 100,000 citizens commented on the draft constitution. Uganda and Brazil also followed this process in 1988 and an impressive response was received from the public. Between 1994 and 1997 the Eritrean people participated in constitution-making through songs, poems, and plays. In view of the low level of literacy, this technique proved effective in helping the people articulate their views. In 2002, Rwanda engaged in participatory constitution making for six months with public education and discussions on constitutional matters as an integral part of the process. Likewise, in 2003, Kenya followed ‘a people-driven review process’ aimed at producing a ‘people-owned constitution’ (CKRC, 2002). The failure to adopt the new Kenya constitution led to post-electoral violence in 2008. Through a series of protracted mediation efforts Kenya resumed its constitution making process in 2010 (Villet et al., 2012).

In 1994 South Africa adopted a process that is considered a model of participatory constitution-making. After the election of a constituent assembly in 1994, it offered the people a slogan — 'you have made your mark, now have your says'. It was a three-stage participatory process. In the first stage each thematic
committee invited submissions from the people to produce a kind of collective wish-list. Advertisements were placed in the media and workshops were held to facilitate public participation. About 1.7 million submissions were received (Ebrahim, 1998: 243-244). The submissions received were collated and processed for consideration by experts from the technical committees.

The second phase took place with a massive education and awareness campaign about the draft constitution and the importance of public contributions. It is estimated that the campaign reached 65 per cent of South African adult citizens. Public meetings, workshops, target group meetings for rural and disadvantaged communities, radio and TV programmes, telephone talk lines, websites and other means were used to give the general public every opportunity to have their say. Also, public hearings were held among the civil society organisations on selected themes such as the bill of rights, the judiciary, institutions of democracy and the public administration. More than 250,000 submissions were received in the second phase (Ebrahim, 1998: 247-248). After accommodating relevant suggestions, a refined draft was produced and sent to each person and party who had made submissions.

The third phase of public participation in South Africa began after the promulgation of the new constitution which took place in March 1997 as observed as 'National Constitution Week'. Seven million copies of the constitution in all eleven official languages were distributed to a wide range of civil society members, members of government services including the security forces, students, prisoners, and others. It aimed to ensure that the "constitution becomes a reference point for all South African as the foundation of their democracy" and to "create a sense of ownership and engender the respect for the new constitution" (Ebrahim, 1998: 249). Constituent Assembly members took the lead so that they were seen by the people as successfully delivering the new constitution as promised during the election campaign.

In today's globalised world the international dimension of constitution making is equally important. Over the last three decades many international agencies, including the United Nations, have been involved in constitution-making, particularly where it has been a part of building peace. Cambodia, Timor-Leste, Afghanistan and Iraq are examples of countries of this (Brandt, 2005). Such involvement has been targeted at enhancing the participation of marginalised groups, indigenous people, women, refugees and displaced people for them to demand their rights assured as per international law and conventions. Hart (2010) argues that the international human rights instruments such as the Universal Declaration of Human rights (UDHR) and the International Covenant on Civil and Political rights (ICCPR) have introduced international legal norms that provide people with the right to participate in constitution making in their countries (Frank & Thiruvengadam, 2010). United Nations agencies have been
involved in a wide range of support roles from providing economic assistance and legal and technical aid to negotiation and coordination, support to civic education, facilitating public access to the process, consultations on drafts and implementation. However, constitution-making is a sovereign national process and all supporting agencies, including the United Nations, should promote nationally-led and nationally-owned processes.

There is a good reserve of knowledge, experience and practice of participatory constitution making. Constitution making covers a wide range of activities and steps from the political context to negotiations on key issues and the mode of ratification. Constitution making has the steps of:

- preparatory work;
- educating the public;
- preparing a draft;
- public consultations on drafts; and
- adoption and implementation (UN, 2009; Bockenforde et al., 2011; Brandt et al., 2011; Miller & Aucoin, 2010).

Each step covers a range of activities and is crucial for the success of the endeavour. Therefore, the various activities should be seen as part of an integrated series of well planned activities and not viewed in isolation.

Before the actual process begins the key political actors and parties should agree on guiding principles, mechanisms and procedures of civic education and public consultations; the ways to process public submissions; the institutional mechanism to draft the constitution; a clearly stated roadmap and time frame; a deadlock breaking mechanism; and the minimum required majority votes and whether or not to hold popular referendum to adopt the constitution. In some cases, this process also entails post-constitution education, as happened in South Africa.

3. NEPAL’S ON-GOING CONSTITUTION-MAKING PROCESS

As mentioned earlier, all six of Nepal’s constitutions have been framed by a handful of people, and, with the exception of the Interim Constitution, 2007, each was promulgated either by the Rana Prime Minister (in 1948) or by the successive monarchs as the sovereign powers of the nation. For the first time, the Interim Constitution of Nepal, 2007, was promulgated in the name of the people, although it was drafted by a handful of experts selected by the political parties that had led Jana Andolan 2. In 1990, initiatives such as seminars, workshops and field visits were organised by the members of the Constitution Recommendation Commission in the countries five development regions to
sensitise the people about the making of the new constitution and to seek their opinions. As a result, thousands of suggestions were received from the general public, ethnic organisations and the political parties (CRC 1990). In the same way, in 2006, while making the Interim Constitution (2007) the Drafting Commission sought suggestions from experts and the general public. Around 700 written submissions were received from individuals and groups of citizens. Political parties also submitted their suggestions (Khanal, 2008). However, these instances could hardly be considered as participatory constitution-making process per se.

After the end of the armed conflict in 2006 it was agreed to elect a constituent assembly to write a new constitution. As in most post-conflict and ethnically diverse countries, constitution making in Nepal has proved very challenging both in terms of content and process. Many constitutions developed towards the end of the twentieth century, especially in multi-ethnic and multi-linguistic countries, have strongly challenged many of the long established norms, concepts and principles of modern liberal states. Over the last decade in particular, strong arguments have been made that adopting the homogenising values based on legal equality rooted in twentieth century constitutionalism — which itself had originated from late eighteenth century European practice — cannot fulfil the desire of multi-cultural and multi-ethnic societies for self-rule. There have been many recent examples of countries that have allowed the state system to be dominated by one group or another — whether dominant or not — leading to a failure of both the political and constitutional order. This has occurred in countries from Africa (Rwanda and Burundi) and Europe (Belgium) and many countries of Asia including Nepal. Therefore, it has been argued that the first political requirement for a multi-ethnic society is to create a constitutional framework wherein different cultural, ethnic, linguistic and social-cultural groups can, at minimum, share power so as to ensure adequate and equitable representation within the new state structure (Ghai, 2000). In Nepal’s context this has been paraphrased as 'restructuring the state.' As a result, many new issues such as the recognition of indigenous people and their collective rights, a multiplicity of languages, ethnic groups, inclusion, proportional representation, power-sharing, affirmative rights, and federalism, which were considered 'peripheral' issues in the 1990 constitution-making process¹, have become matters of primary concern.

Likewise, the presence of international agencies and their concerns over the country’s constitution-making process is yet another dimension that Nepal experienced for the first time around 2008. The last three decades have witnessed many other countries emerging from internal armed conflicts aided by peace processes that have emphasised reconciliation through the holding of national elections, often supervised by the international community, and the drafting of new more inclusive constitutions. This has been true for countries in Africa (Namibia and South Africa), Latin America (El Salvador, Columbia and Peru) and Southern Europe (Bosnia-Herzegovina). So too in Nepal the constitution writing
process is seen as the ‘logical end’ of the peace process that ended the 10-year armed conflict. The presence of the United Nations Mission in Nepal (UNMIN) from 2007 was a part of the peace process as both the parties, the Government of Nepal and the CPN (Maoist), had agreed to seek United Nations assistance to monitor the management of arms and armies (GoN & CPNM, 2006a; GON & CPNM, 2006b). Concerning the CA elections, the United Nations was requested only to observe its conduct (GON, 2006; CPNM, 2006).

The issue of constitution building should not be limited to the objective of ending the armed conflict. Indeed Nepal’s new constitution is expected to create a new political order that should guarantee democratic rule and address the long standing marginalisation of large groups of its citizens. While respecting constitution making as a sovereign affair, the international community is keenly observing and extending its support to see that the new constitution is successfully made and meets the minimum international standard and values of democracy, human rights, rule of law, justice and equality (Khanal, 2011).

Against this backdrop, Nepal’s constitution-making process is not an isolated affair. It should take into account international concerns for the above mentioned values and standards as well as to ensure the radical and democratic restructuring of the state. In this sense, constitution making is not merely a technical work of preparing a legal document related to the functioning of the state and its administration. Rather, it is a work of great political and civil importance. It must oversee peoples’ relations with the state and provide a framework for the democratic governance of the country while also ensuring citizens’ civil and political rights. A constitution also defines people’s access to and representation in the administrative structure and outlines the basic principles concerning relations between the state and its citizens. In this sense, constitution building is linked to the task of expanding and consolidating a popular base of support for democracy in its entirety.

3.1 The constitution-making process (2008-2012)

As per CA Rules 2008 Nepal’s constitution-making process (2008-2012) should have had the following seven phases:

1. The preparatory phase.
2. Seeking public opinion on the contents of the constitution.
3. The preparation of a preliminary draft constitution by thematic committees.
4. Negotiations to resolve differences on contentious issues.
5. The preparation of an integrated draft.
6. Public consultations on the integrated draft.
7. Adoption of the constitution.
However, the process did not go beyond the fourth stage up to May 2012 because the key political actors could not reach an understanding to produce the first draft of the constitution. This section analyses the various phases of Nepal’s constitution-making process up to the dissolution of the assembly in May 2012.

(i) Preparatory Phase

The preparatory phase began with the drafting of the CPA and the Interim Constitution soon after the success of the 2006 People’s Movement. A series of peace talks between the SPA and the CPN (Maoist) covered issues relating to the constitution such as respect for civil and political rights including right to property and religion, multiparty competitive politics, a democratic system of governance, the rule of law, an independent judiciary, and press freedom. These issues had become important because the Maoists had challenged these issues during their insurgency and had advocated for their own model of governance, which hardly respected these values. Later, the agenda became part of the formal agreement while signing the CPA and framing the Interim Constitution.

Nepal’s constitution-making process was broadly based on the bottom up approach since there were no ‘immutable principles’ as was the case in South Africa (Haysom, 2002), nor guiding ‘objectives’ as in India (Austin, 1966). However, looking at the agreements reached between the different political parties, especially the Comprehensive Peace Accord, the Interim Constitution, the 2008 election manifestos of the political parties, as well as key decisions made following the first meeting of the CA, it could be said that almost all the political parties had agreed to certain broad principles to be followed while framing the new constitution through the CA. Although the CA was not bound by these understandings, they served as a reference and formed the basis for the deliberations of the CA’s thematic committees and for the preparation of the preliminary draft reports.

Thus, broadly speaking, the new constitution is expected to meet the following objectives:

- To make arrangements for a federal democratic republic thereby ending the two and half century-old monarchy in the country.
- To end the centralised system of the state and restructure it in a progressive manner to ensure secularism, inclusion, and to end discrimination on the grounds of class, caste, ethnicity, region, gender, religion, language, and the like.
- To introduce a federal state and end the existing ‘unitary structure’.
- To adopt a political system that follows the values of universally accepted democratic governance i.e. multiparty competitive politics, an elected and accountable government, the separation of powers and institutional
checks and balances, the rule of law, an independent judiciary, a free press and the holding of periodic elections.

- To ensure universally accepted human rights, civil and political rights, economic and social rights, including social justice, equality and affirmative measures to hitherto marginalised and deprived communities and class.

A popularly elected Constituent Assembly was the commonly agreed formal constitution-making structure that also functioned as the 'legislature-parliament' of the country. After a series of negotiations between and among the key political actors it was agreed that the assembly would have 601 members of whom 240 would be elected directly from single-member constituencies on the basis of first-past-the-post (FPTP) ballots and 335 members would be elected from party lists based on proportional representation (PR). The PR seats assured inclusive quotas for various population groups including women. The remaining 26 seats were filled through nominations by the government based on political parties' recommendations. Elections for the CA were held in April 2008.

The election produced a CA that was inclusive in terms of representation and diverse in political views. During the election campaign the political parties had reiterated their commitments to enshrine democratic principles and values in the constitution. Most of the political parties outlined their views on the contents of the new constitution to be framed by the CA in their election manifestos. However, the parties had diverse and often contradictory views on the form of government, electoral system, judiciary, federal design, and other issues (Hachhethu 2008).

No political party achieved a majority of seats in the assembly. The former insurgents, the UCPN (Maoist) emerged as the largest party with 30 per cent of the popular votes and less than 40 per cent of the seats in the assembly. The traditionally dominant NC and UML were a long way behind in second and third positions. The Madhes-based regional parties – the Madhesi Jana Adhikar Forum Nepal (MJFN), the Tarai-Madhesh Democratic Party (TMDP), and the Sadbhavana Party (SP) — emerged as the fourth political force determining the fate of the ruling equations in the post-election power structures. The fragmented mandate further created challenges to provide stable government as well as to find consensus on contentious constitutional issues. The diverse composition of the CA (see Table 1) reflects the underlying challenge of forging a consensus amongst the 601 members.
<table>
<thead>
<tr>
<th>Population group</th>
<th>Proportion of Nepal's population, 2001</th>
<th>Representation in CA</th>
<th>Political parties*</th>
<th>Share of seats</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hill Chhetri, Brahman, Thakuri, Sanyasi</td>
<td>30.9%</td>
<td>33.2%</td>
<td>UCPN (Maoist)</td>
<td>238 (39.6%)ψ</td>
</tr>
<tr>
<td>Hill Dalit</td>
<td>7.1%</td>
<td>5.6%</td>
<td>NC</td>
<td>114 (18.9%)</td>
</tr>
<tr>
<td>Hill janajati</td>
<td>28.5%</td>
<td>26.9%</td>
<td>CPN (UML)</td>
<td>109 (18.1%)</td>
</tr>
<tr>
<td>Madhesi janajati</td>
<td>8.7%</td>
<td>8.1%</td>
<td>MJFN</td>
<td>53 (8.8%)</td>
</tr>
<tr>
<td>Madhesi castes</td>
<td>14.8%</td>
<td>20.8%</td>
<td>TMDP</td>
<td>21 (3.4%)</td>
</tr>
<tr>
<td>Madhesi Dalit</td>
<td>4.7%</td>
<td>2.3%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Muslim</td>
<td>4.3%</td>
<td>2.8%</td>
<td>Other minor parties including independent members</td>
<td>66 (10.9%)</td>
</tr>
</tbody>
</table>

Women 50.04% 32.7% Total 601

Source: Author's tabulation based on Election Commission 2008 and CBS 2002 census data.

* Originally 25 political parties were represented in the CA, but later on due to internal splits the number of parties went up to more than 30. But in this table the parties count includes only those represented at the time of the election results including by-elections.

ψ Includes 7 seats received by Jana Morcha Nepal, which integrated with UCPN (Maoist) soon after the 2008 elections.

### The Roadmap

The Constituent Assembly could only begin constitution-making after it had established some fundamental political functions such as adopting a resolution which formally transformed the country into a republic by abolishing the monarchy, and conducting elections for the president and vice-president of the new republic, as well as electing the prime minister. It performed other preliminary procedural works. Besides, the CA also had to adopt its rules of procedure as the Interim Constitution provided for the CA to decide on its own rules and procedures by adopting them and forming necessary committees. Accordingly, on 15 November 2008, the CA passed its rules and procedure that set the time frame for constitution making. On the following day (16 November) it adopted an 82-week calendar of works stipulating the activities and steps to be followed (See Annex 1). This timeline was set from 16 November 2009 to 28 May 2010, with the latter date constituting the original deadline for promulgating the new constitution. Between November 2009 and May 2010, the CA calendar allocated specific days and weeks for each activity from forming the thematic committees (TCs) to the president promulgating the new constitution. The interim constitution, the CA Rules and the calendar of activities outlined Nepal’s roadmap of constitution making as follows:
• Formation of the CA thematic committees.
• Seeking submissions and suggestions from experts and common citizens.
• Thematic committees prepare concept notes and preliminary drafts.
• Discussions on the preliminary drafts in the CA plenary.
• Preparation of the first draft of the constitution by the Constitutional Committee by incorporating the points raised by CA members in plenary and its directions.
• Initial debates on the draft constitution in plenary and its adoption.
• Public hearings and consultations on the draft constitution across the country and seeking suggestions on it.
• Preparation of the constitution bill by the Constitutional Committee and the incorporation of relevant suggestions.
• Clause-wise discussions in the CA and the passage of each clause of the bill, including the decision on amendment proposals received.
• The signing of the final constitution by all members of the CA after its passage through the assembly, and certification of the document by the CA chairperson.
• Promulgation of the constitution by the president in a formal ceremony organised by the CA.

The CA's rules and procedures provided for the formation of committees for constitution-writing, including 10 thematic committees, one Constitutional Committee, and three procedural committees. The Constitutional Committee was mandated to integrate and finalise the overall draft of the constitution after the submission of preliminary drafts by the thematic committees. It was also to work as a thematic committee for subjects such as the preamble, preliminary sections covering the definition of the state and nation, which were not assigned to a thematic committee. The thematic committees were assigned to develop concept notes and prepare preliminary drafts in their respective areas (See Annex 2 for details). The terms of references (ToRs) of the thematic committees included inviting the public to make suggestions and submissions in response to advertisements in the media, and holding consultations with experts and concerned government officials and seeking their opinions. The committees were also mandated to study reference material, seek expert opinions, obtain suggestions from the general public, study the manifestos of the political parties and concept notes and proposals related to the constitution. The primary function of the thematic committees was to prepare concept notes and come up with a preliminary draft of the new constitution covering their respective areas.
(ii) Seeking public opinions on the new constitution

Public participation in constitution-making in Nepal under the first CA had the three phases of pre-election civic education, CA outreach, and civil society/NGO mobilisation. In 2007/08, soon after the decision was made to go for CA elections, a massive civil society drive began to engage people in the process. This included pre-election civic education and mobilising popular opinion on the contents of the constitution. Activities focused on constitution-making and the contents of the new constitution. Issues relating to constitution-making became a key component of many donors’ and NGOs’ community level programmes. The donors were enthusiastic to support NGOs. However, these activities were not outside the ambit of the CA, and all the NGOs could do was to make suggestions.

In the pre-election civic education phase people were sensitised about the importance of the CA and inclusive constitution-making. In 2006 people and concerned groups started submitting their suggestions on the contents of the Interim Constitution (Khanal 2008). And in 2007/08 civil society organisations conducted interactions, workshops and discussion programmes at district and sub-district levels to inform local people about the CA elections and the key subjects of the new constitution and to advocate for inclusive representation in the assembly. By the time election of CA was held in 2008 public debate had already begun on the issues related to state restructuring, inclusion, electoral system, and the form of government, which eventually became the most contentious issues in producing the new constitution. At the same time the electronic and print media provided platforms for debate and discussion between and among political actors, experts and the general stakeholders.

CA outreach

Nepal’s open and bottom up approach to constitution-making also involved a media campaign to seek submissions directly from citizens. As soon as the thematic committees started working in December 2008 all citizens, political parties, civil society and other institutions and organisations were publicly appealed to submit their views, opinion and suggestions either directly to a thematic committee, or to the CA’s Civic Relations Committee, or to their local village development committees (VDC), municipality, district development committee (DDCs), or chief district officer (CDO) at the district level. Citizens were invited to make their submissions by email, fax, toll-free phone number, or by letter. Likewise, it also requested to make available the conclusions of seminars, workshops and publications related to constitution-making. Each committee prepared detailed questionnaires in their respective areas to collect opinions on specific areas of the constitution.

The ToRs and the calendar of operations required each thematic committee “to conduct public hearings, collect suggestions, organise seminars and workshops, and conduct field visits” in addition to seeking expert advice on thematic areas
To support and facilitate these processes two procedural committees — the Public Opinion Collection and Coordination Committee (POCCC), and the Committee on Civic Relations (CCR), were assigned specific responsibilities. The POCCC was responsible for facilitating the collection of public opinion on the draft constitution, conducting public hearings, and organising interactions, workshops, and seminars on the draft consultation. Besides, it was also assigned to keep the records of submitted suggestions and prepare a report of the suggestions and submit it to CA (CA, 2008: 67.2). The CCR was responsible for establishing a mechanism for citizens’ access to the CA, for disseminating information on the constitution-making process, and for monitoring and evaluating the conduct of government agencies, I/NGOs, civil society, and the media with regard to the CA and the constitution-making process (CA, 2008: 67.1).

According to the calendar of operations, the CA’s works had to be completed within two-years, by 28 May 2010. However, the works of the committees did not progress according to the calendar and the calendar had to be changed more than a dozen times. The CA term was repeatedly extended, eventually up to four-years. The calendar originally set two stages of public participation. In the first stage, nine-weeks were allocated for collecting opinions and suggestions from experts, civil society, and the general public. In the second stage, 12 weeks was slated for public consultations on the draft constitution.

The last date to make submissions was originally set for 28 March 2009. The CCR bulletin (CCR, 2011) stated that the suggestions it received until 13 April 2009 were categorised and referred to the concerned thematic committees. However, committees continued to receive suggestions until they prepared their concept notes and the preliminary draft reports were completed. For instance, the Committee on Minority and Marginalised Groups’ Rights received such suggestions until 19 May 2009, just two days before it completed its report.

The CA, however, planned for its members to first go to the people to collect suggestions in the (first) CA Outreach programme. For this purpose each thematic committee prepared written questionnaires. The 11 sets of questionnaires contained a total of 291 questions that ranged from 64 questions from the ‘Committee on Determining the Form of Governance of the State’ to 12 questions from the ‘Committee on Determining the Constitutional Bodies’. The public opinion collection drive that began on 27 February 2009 ended on 22 March 2009. The CA members were divided into 40 teams to collect suggestions from all 75 districts and 240 election constituencies. The teams were supported by CA Secretariat staff and the local field staff of district agencies depending on the number of districts and the population size they had to cover. The largest team (no. 15) was made up of 37 CA members to cover Kathmandu, Lalitpur and Bhaktapur districts. The smallest team (six members) covered Humla district. Most teams made their field visits as scheduled.
The teams, after reaching their assigned districts, held introductory programmes with local politicians, government agencies, media, civil society activists, NGOs and other stakeholders to sensitise them on the importance of the outreach programme and collecting public opinion for drafting the new constitution. Team meetings at the district headquarters planned ways to reach out to local people by fixing ways of organising meetings, while spreading the news about their arrival. The teams sent information to VDC secretaries about the outreach programme, and mobilised local FM radio stations and newspapers to appeal to the public to submit their suggestions to the teams. Depending on the size and number of districts to cover, the teams were divided into sub-teams to cover more parts of the assigned districts. Most teams followed the same pattern while collecting public opinion. Many teams targeted to reach all VDCs of their districts. In some districts the teams organised the programmes in locations where it was easy for people from adjoining VDCs to gather. It seems that this outreach fairly covered most parts of the country.

Altogether 559 CA members, excluding the prime minister, ministers and some top leaders, were involved in the outreach campaign. They altogether conducted 1,906 programmes that an estimated 500,000 people attended. Almost an equal number of submissions were received (see Annex 3 for details). The number of people participating in the programmes (as some of the teams admitted) was relatively low in comparison to the areas’ populations. However, the overall participation and response of local people was impressive. Until that point people had high hopes and were enthusiastic about the CA delivering a new constitution. Except for some isolated cases, the CA teams were well received by people across the country.

The verbal expression or the written submission of local people in the presence of CA members can be seen as a ‘wish list’. The CA members and the secretariat staff took notes of suggestions. Participating local people were asked to make their suggestions by filling in the questionnaires that they could either complete on the spot or return to the team in person later, or submit them through local government agencies. The ratio of the returned questionnaires was quite high. According to the CA Secretariat a total of 549,763 written submissions were received including 95,566 submissions received by the Committee on Civic Relations (CCR, 2011:63). Such a huge number of submissions were made possible by the separate thematic questionnaires. However, how many people actually submitted completed questionnaires is difficult to accurately assess as there were 11 types of questionnaires and respondents could respond to all 291 questions or only a few depending on their interests. Many citizens found the questions complex, difficult to understand, and too technical and it took most people a long time to complete the questionnaires. An informal discussion with CA members suggested that the questionnaires were originally targeted at experts, but were subsequently used on the general public in the outreach campaign.
The teams’ reports reveal that most of the concerns of the general public related to
day-to-day governance and service delivery such as price rises, unemployment,
lack of health care facilities, corruption, degrading law and order, the poor
condition of roads, the lack of irrigation facilities, violence against women and
other governance issues. It was quite natural for the people to raise such concerns
because problems relating to governance are acute in Nepal and people have
been suffering from them for a long time. Likewise, general strikes (Nepal banda),
extortion by political parties and other agitating groups, and prolonged power
cuts were other pressing concerns. Heavy punishments for heinous crimes such
as rape and the trafficking of women and girls were other suggestions received
from many parts of the country. The outreach campaign also provided a good
opportunity for direct interactions between political leaders and ordinary people.

The CA outreach programme appears to have been concluded fairly well in
terms of participation and the response of the general public. Men and women
of all ages including prisoners, people with limited literacy and the physically
impaired also participated in the programmes and made their suggestions for
the new constitution. Many teams visited prisons and collected suggestions from
inmates. The sub-team that visited Bhaktapur district reported the participation
of senior citizens above 90.

However, the outreach team members lacked orientation and training to conduct
the opinion collection. They admitted that they would have done better if they
had had some orientation about this work before they had set out. There was also
some scepticism as to whether the very many suggestions would be incorporated
in the draft. In some places, several parallel programmes had also been conducted
by NGOs, completely ignoring the CA outreach. This was the result of poor
planning and haphazard implementation.

Civil society outreach

Soon after the success of Jana Andolan 2 and signing of peace accord in 2006
many civil society organisations and NGOs were engaged in mobilising public
opinion on the contents of the new constitution. After the CA elections in 2008
such activities gathered further momentum which required proper planning,
resource mobilization and strategies in order to facilitate the public participation
in the constitution making process.

With the consent of the Government of Nepal a donor consortium was formed in
2008 under the auspices of the United Nations Development Programme (UNDP)
to support, coordinate and facilitate participatory constitution-making. The
Department for International Development (DFID), the Danish International
Development Agency (DANIDA), the Norwegian Embassy and the United States
Agency for International Development (USAID) were involved in this initiative.
The Support to Participatory Constitution Building in Nepal (SPCBN) project was
launched to channel international assistance for the constitution making process
In addition to providing infrastructure and logistics support to the CA Secretariat, this project aimed to support public participation in the constitution-making process.

Parallel to the CA outreach programme, a large number of donor-funded NGOs initiated public education activities on the contents of the constitution. A series of thematic papers, awareness booklets, and technical guides were produced in the common languages spoken in Nepal in order to facilitate people’s understanding of key parts of the constitution and the constitution-making process (CCD, 2009a; CCD, 2009b; CCD, 2009c; CCD, 2009d). Information was made available through SPCBN’s website. SPCBN aimed to reach out to all districts, electoral constituencies, municipalities and VDCs across the country. Its democratic dialogue programme facilitated various communities, including those considered marginalised such as women, Dalits, indigenous peoples, and Madhesis, to have their say in the new constitution. Submissions were collected from the different constituencies and handed over to the CA Chair.

Many NGOs were engaged in this process individually or in consortia. Some made submissions on women’s rights stressing the need for a woman-friendly constitution (Pro-Public, 2008), while others focused on child rights recommending how child rights should be enshrined in the constitution (CZOP, n.d). Other public submissions focused on issues related to Dalits, Madhesis, indigenous nationalities, women, youth, and disadvantaged regions such as the Karnali (LANCAU, 2010). Others focussed on the rights of people with disabilities (Khanal & Kushiyait, 2010). Most NGOs worked through networks so as to cover wider cross-sections of the population and geographic regions. Some individuals and organisations submitted model drafts of the constitution (NCARD, 2011; Bagchand, 2010; Adhikari, 2009; NLS & IDEA, 2012).

To sum up, despite poor planning, an extensive, transparent and accessible campaign was carried out to gather suggestions from the general public. Local people were enthusiastic and participated with interest in this exercise. However, this CA outreach was the only initiative of the state to facilitate participatory constitution making. Otherwise, this campaign totally depended on donor funding and NGO activities. It increased expectations, especially among civil society activists. However, during the tenure of the CA, due to diverse, divisive and often contradictory stands of political parties on key constitutional issues, the common people became sceptical about their aspirations being considered in the new constitution.

(iii) The preparation of preliminary drafts by thematic committees

Immediately after the completion of the CA outreach campaign in April 2009, the thematic committees began developing their concept notes and preliminary drafts for the new constitution, focusing on their specific areas. Alongside this the CA outreach submissions and NGOs’ suggestions were directly submitted
to the thematic and procedural committees. The first and foremost challenge for the thematic committees was how to process the thousands of suggestions they received from written questionnaires and other means. The thematic committees’ reports show that this was done manually by CA members and the secretariat staff. However, no uniform method was adopted as each committee and individual members applied their own methods.

The committees also invited experts to advise them on issues of concern. Almost 500 experts were reportedly consulted (Khanal 2010). The Committee on Fundamental Rights alone reportedly consulted about 300 experts. But the haphazard way with which experts were consulted can hardly be called expert consultation. With the exception of the Committee on the Natural Resources and Distribution of Economic Powers, there was no proper expert consultation. The committee members themselves prepared the concept notes and the preliminary drafts with the CA secretariat staff assisting them. The concept notes were based on commonly understood concepts, international practices, Nepal’s own experiences and the positions taken by the political parties. They also considered the demands of various interest groups and the submissions received by the CA, as well as the notes and other form of suggestions.

The committees began submitting their reports in the third week of May 2009. The Committee on Minority Rights and the Committee on the Preservation of National Interests submitted their report first, while the Committee on State Restructuring was the last to submit, on 21 January 2010. All the committees had completed their preliminary drafts by the third week of January 2010. The collated and tallied public suggestions were referred to in the reports’ annexes. All people and organisations who had made written suggestions were listed in the annexes.

Differing views of the political parties, and other stakeholders began to surface after the preliminary draft reports were made public. The media projected the major contents of the drafts according to their interests. The absence of informed debate and critical appraisal of the preliminary drafts was acutely felt. In order to bridge this gap, some donor funded projects and NGOs initiated debates on the draft reports. SPCBN initiated a series of dialogues on the issues pertaining to the reports at regional, district and local levels participated by local party leaders, civil society and NGO activists. The major contents of the preliminary drafts of the committees were summarised and briefed to them through such dialogues and workshops. Their comments and suggestions were later on compiled and shared with key CA members and political parties (CCD, 2011; SPCBN, 2011; SPCBN, 2012a; SPCBN, 2012b). Many NGOs were also engaged in this process (RDF, 2012; NFN, 2010; RMSM, 2011). This phase of informal public consultation provided an opportunity to the people and stakeholders to verify whether or not the preliminary drafts had incorporated their suggestions.
Negotiating the contentious issues

When the draft reports came out it soon became clear that there were large differences of opinion, contradictory positions, dissenting opinions, and gaps and overlaps within the preliminary drafts. For instance, it was found that most of the committees had begun their drafts from the preamble and included provisions of inclusion for women, indigenous people, and other marginalised groups that actually fell under the scope of other committees. Moreover, CA members had also made their comments and expressed their opinions on each of the reports during the deliberations in the CA’s plenary sessions. This necessitated careful scrutiny of such overlaps, contradictions and dissenting opinions. The CA chair set up a 15-member committee, often referred as Gaps and Overlaps Study Committee (GOSC), as provided for in Article 89 of the CA rules, to study the preliminary drafts and synthesise them as far as practicable. All the draft reports, except that of the State Restructuring Committee, were referred to this committee. The 15-member committee identified and scrutinised the overlaps, tried to minimise the gaps and differences and then listed 210 contentious points that needed settling at the political level (GOSC, 2010). Accordingly, the leaders of political parties represented in the CA informally held series of meetings and by January 2011 had resolved many of them, reducing the number to 78 (CCR, 2011).

In this way the Constitutional Committee deliberated on the contentious issues and in February 2011 eventually formed a five-member Dispute Resolution Sub-committee (DRS) for resolving the remaining disputes. This sub-committee consisted of the leaders of the major political parties represented in the CA. It was headed by UCPN (Maoist) Chairman Pushpa Kamal Dahal (Prachanda), with one member each from the NC, UML, the Madhesi Front and one of the smaller CA parties. The contentious issues related to state restructuring were also referred to this sub-committee. The sub-committee was assisted by a five-member task force and one additional senior leader from each party. The sub-committee was able to resolve most of the 78 contentious points leaving the most hotly disputed 14 issues. Most disagreements centred on designing federalism, the choice of the form of government and electoral system, the composition of judiciary and judicial appointments, the right to self-determination, citizenship, pluralism, and special political prerogatives for indigenous people in the leadership of provincial governments.

Some positive developments happened by mid-April 2012, generating hope that the CA would be able to deliver the constitution on time. Issues relating to the integration of Maoist combatants into the Nepal Army were more or less settled as the number of the combatants seeking integration had dramatically fallen and rank harmonisation had happened. Power sharing among political parties had been one of the most contentious issues; but it also appeared to have eased following the five-point deal reached on 3 May 2012 between the UCPN (Maoist), NC, CPN (UML) and UDMF, which together held more than 90 per cent of CA
seats. The deal made it clear that a consensus government would be formed under the leadership of Prime Minister Baburam Bhattarai, the contentious issues for constitution-making would be resolved, and then PM Bhattarai would step down to facilitate the formation of an NC-led national government. The deal was that this government would promulgate the new constitution and continue until new elections were held within one year (Fuyal, 2013).

(v) The preparation of an integrated draft

The solutions to the contentious issues first had to be endorsed by the Constitutional Committee after which the integration of the draft report could begin. In researching this account, the author found it difficult to understand what the Constitutional Committee actually did at this stage. The picture is confusing. According to informal sources, experts had been commissioned to produce the integrated draft. As the extended term of the CA was drawing to a close, the leaders were hard-pressed to resolve the remaining contentious issues so that they could agree on an integrated draft and the CA could formally accomplish its job with the parliament giving the finishing touches to whatever work was left. Accordingly, on 15 May 2012, the sub-committee reached a deal that the new constitution would have:

- a mixed system of government with a directly elected president and a prime minister elected by the parliament with the two sharing executive powers;
- a bicameral legislature in which the seats of the lower house would be elected according to the first-past-the-post and proportional system; and
- a constitutional court headed by the chief justice would look after disputes relating to federalism.

The shape of federalism remained one of the most contentious issues throughout the process. On 15 May 2012, the leaders agreed on an 11-province model with multi-ethnic identity, where citizens belonging to different caste and ethnic groups would have equal rights. They also agreed that a federal commission would be formed to deal with matters pertaining to the delineation of provincial boundaries, the merger or creation of new provinces, and that the parliament would finally decide the matter according to the recommendations of the federal commission. And it was agreed that the names of the provinces would be decided by the provincial legislatures (Legislature-Parliament, 2013). Although the Madhesi Front had expressed reservations in particular about federalism related issues, it stated that it would not hinder the constitution-making process in view of the approaching 27 May 2012 deadline. Accordingly, everything was set ready for drafting. But this understanding did not last. The Madhesi parties including the UDMF constituents started agitations in Tarai districts challenging the deal. The UCPN (Maoist) backtracked from the agreement, which stalled the constitution making process and eventually led to the demise of the first CA, creating a state of constitutional and political crisis.
4. CONCLUSIONS

The need for participatory constitution-making was recognised and provisions were made in the CA rules to facilitate people’s participation. The CA rules required each thematic committee to seek suggestions from the general public. Apart from making public consultations mandatory following on from the CA-approved draft constitution, the assembly was also required to incorporate relevant suggestions in the constitution bill. Like the South African model, the CA schedule called for attempts to be made to inform those who made suggestions individually about their submissions along with the response of the respective committees (See Annex 1). However, the public participation and the constitution-making process appears to have been done on an ad hoc basis. When the CA failed to make the desired progress as per its timeframe, the time allotted for public consultation was shortened each time the assembly revised the calendar. If the constitution had been promulgated on 27 May 2012, it would have happened without public consultations.

Nepal’s constitution making process was complex and delicate for several reasons:

- Firstly, it was part of the peace process and naturally depended on progress on peace building. The issues related to the integration of the former Maoist fighters into the Nepal Army caused difficulties.
- Secondly, the constitutional issues were complex and new to Nepal’s political experience as the country changed from a monarchy to a republic, and with the decision to switch from a unitary and highly centralised system to a federal setup. The country’s political forces had different priorities with regard to the peace process and constitutional issues, which were in many cases mutually exclusive.
- Thirdly, to make the situation even more complex, the CA elections produced a hung assembly of members with diverse political orientations, making the equation of power uncertain and fluid. Although the UCPN (Maoist) was the largest party, its popular vote was only 30 per cent. The previously leading political parties, the NC and CPN (UML), were reduced to being the second and third largest parties. The Madhes-based parties emerged as new ethno-regional forces. It was essential to accommodate their concerns to make the constitution making process a success.

Against this backdrop, there was a need for strong leadership to encourage the political forces to rise above partisan politics to come together for national consensus on the challenges facing the country. Octogenarian NC leader GP Koirala, who had played crucial role in bringing the Maoists to the peace process leading Jana Andolan 2, had relatively acquired that height. But he was rendered almost irrelevant in the post-election power equation because his party was reduced to second position with lesser number of seats in CA after 2008.
elections. He died in March 2010 and his absence was strongly felt amidst the subsequent political turmoil. After Koirala, UCPN (Maoist) Chairman Pushpa Kamal Dahal ‘Prachanda’ was supposed to play the lead role in settling the thorny issues relating to peace process and constitution making; but his shifting stand on almost all aspects of national politics undermined his position. Many commentators believed that, with the decade long insurgency behind him, his political moves seemed to be based on their propaganda value rather than on substance. Gradually he lost credibility not only in the political sphere but also faced challenges and dissent from within his own party. Whenever he was able to hammer out a deal his party colleagues scuttled it.

The unplanned massive drive by ethnic groups and civil society in mobilising their constituencies and making their demands led to political leaders becoming fearful and losing confidence in facing the people with a draft constitution. And the leaders of political parties started blaming international agencies for funding NGOs and raising the people’s expectations. Apart from creating uncertainties in the constitution making such tendencies of the leaders also undermined the participatory process.

The way the leaders acted on resolving the key issues of the constitution was very much narrow based. All the key leaders involved in the process were male and except for the Madhesi Front belonged to one caste/ethnic group meaning male hill Brahmins. As a result of this the group could neither engage in constructive negotiations nor take the broad spectrum of society into their confidence. An atmosphere of doubt and suspicion prevailed and most of the concerns of the people who considered themselves marginalised failed to be incorporated in the draft constitution. Thus the gap between the elites and the mass along with the non-recognition of diversity was strongly felt.

As the 27 May 2012 deadline approached, most of the contentious issues, including the form of government, the judiciary, the means of appointing judges, and the type of electoral system, seemed set to be resolved. The exception was the shape of federalism. However, since the proposed federalism issue was too much ethnicity oriented many suspected it would ultimately divide society on caste, ethnic and regional lines, challenging the foundation of social harmony and national unity. Moreover, the national parties had become mere spectators of the situation and were not acting to address the crisis facing the production of the new constitution. Some commentators suggested that geopolitical factors were also involved in scuttling the process. The federalism issue was seen as a security concern, particularly by the northern neighbour China. Close observers of Nepal politics often see the influence of China and India. In fact, Nepali leaders have a tendency to seek favour from outside the country whenever they faced a problem, especially from India. This suspected dependency on India and political leaders’ seeking of support from there were quite evident during the election of
Frequent changes in government, due to the lack of agreement on power sharing in the post-election period, seriously affected the progress of the first CA process. As in South Africa, the need of the hour was a clear constitutional provision for a national unity government, but the Interim Constitution does not have such a provision. All it provides for is the formation of governments on the basis of consensus. This was inadequate to define the consensus government. Instead after CA elections in 2008 an amendment was made to allow for majority government if consensus could not be achieved. This amendment set the scene for a game of making and breaking governments. It also set in motion splits in political parties, intra-party conflicts, and shifting alliances. Eventually in early May 2012 the parties agreed to form a national unity government in order to complete the constitution writing and held new election; but such a government did not materialise.

There were also procedural problems. In the first place, there was no drafting committee to assimilate the preliminary reports. The thematic committees were given the responsibility of drafting the parts of the constitution assigned to them in their ToRs. The 11 separate draft reports created a huge challenge for compiling and producing an integrated draft. Many former CA members who were involved in sorting out the differences admitted that it was a mistake to have let the thematic committees prepare the preliminary drafts. Although impressive in terms of social inclusion, most of the thematic committees were led by junior cadres of the political parties. The process went well until they developed the concept notes; but when they entered the phase of preparing the preliminary drafts of the constitution, the members switched to toeing their party or ethnic group’s line, and, the thematic committee chairs failed to moderate the process.

The Constitutional Committee, which was originally conceived as the principal drafting committee, was ultimately converted into an all-party assembly of 63 members. It could do virtually nothing due to internal constraints. The Interim Constitution states that a minimum of a two-thirds majority of the CA is needed to pass the constitution if consensus cannot be reached. But neither the Constitution nor the CA rules is clear about the process that should be followed in the case when the CA or Constitutional Committee failed to agree on the very first draft of the constitution. Although revisions were made in the CA Rules to go by majority decisions at the CA plenary to complete the drafting of the constitution, these revisions only helped a little to facilitate completion of the process.

The absence of a clear provision and procedures for resolving disputes was another lacuna. The Interim Constitution only says that if CA members fail to reach a consensus while passing the constitution bill then the leaders of political parties represented in the CA should hammer out a compromise. But as already mentioned this problem had cropped up at an earlier stage. Some alternative
solutions were sought by remaining within the ambit of CA Rules but its credibility and mandate was questioned. In the end, almost half of the CA’s term was spent trying to resolve differences.

The tendency to ignore the challenges and complexities of constitution making (both in term of the process and the contents) by the top leaders of the major parties was another reason that led to failure. The leaders were not serious about constitution making, either in the CA or in the meetings of their parties. The attendance of the influential leaders at the CA meetings was quite poor. Some of them almost failed to meet the minimum standard of attendance set in the CA Rules (Martin Chautari, 2010). Moreover, most of them had little awareness of the reports and preliminary drafts prepared by the thematic committees. Such was the indifferences of the top leaders towards the CA’s procedures.

Nepal’s constitution-making process of 2008–2012 failed as it could not deliver a new constitution. However, it had produced much of the content and the forthcoming second CA should not need to start from scratch but should build on what has already been achieved. For this, the CA Secretariat has to make it public what was agreed on at the political level, what was passed by the Constitutional Committee under the first CA, and what matters are yet to be endorsed. The second CA has also to recognise what contentious issues are yet to be resolved. This would help assure the people that the efforts of the previous CA are not wasted.

The elections for CA 2 were successfully held on 19 November 2013 to give a fresh people’s mandate for constitution making. Earlier in 2013 the holding of these elections had been uncertain as the CPN-Maoist led alliance had been demanding an all-party roundtable discussion to resolve the remaining contentious issues in order to produce the constitution, which could then either be endorsed by reviving the previous CA or by the newly elected parliament to conclude the constitution making process. But the dominant argument to go for new CA elections won out.

Whatever the developments around the second CA, it would be prudent to institutionalise and consolidate the achievements of the first CA. There is no need to redo many of the steps already undertaken by the first CA, such as seeking submissions from the people. The achievements of the first CA should not necessarily be binding for the newly elected CA but should serve as the basis for the new CA could move ahead from it. The first CA started its work from scratch, but the second CA does not have to. The works of the first CA should provide the basis as well as useful reference for the second assembly’s work. It should either endorse or reject the content developed by the previous CA. Thus, the second CA should see the resumption of constitution-making with a fresh mandate. It is still however, necessary to consult the people about the draft constitution once it is formally adopted in order to take the people into confidence and generate a sense of ownership among the people of Nepal.
REFERENCES


GOSC (2010). ‘Reports of CA Committee on the study of concepts notes and preliminary drafts of Thematic Committees’ 2067 (in Nepali). Kathmandu: Gaps and Overlaps Study Committee, CA Secretariat.


Annex 1: Constituent Assembly Schedule
As per Rule 149 of the Constituent Assembly (CA) Rules of Procedure.
Approved by the Constituent Assembly (CA) on 16 November 2008.

This schedule came into effect on 16 November 2008 (1st Mangsir 2065) for the first CA's remaining period of 18.5 months, or 82 weeks (after deducting 5.5 months from the date of the first meeting of the CA).

<table>
<thead>
<tr>
<th>No.</th>
<th>Activities</th>
<th>Duration of work</th>
<th>Responsibility</th>
<th>Parallel activities</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Election of the Vice-Chairperson of the CA</td>
<td>2 weeks (from 16 to 30 November 2008)</td>
<td>Plenary</td>
<td>The CA Secretariat shall begin disseminating the information on the constitution making process as scheduled in the Rules of Procedure of the CA, invite and request members of the civil society and the general public through mass media for their suggestions and request the members of the civil society and experts to conduct interactions and debates on (the concept of) the future constitution and related issues throughout the country, according to the CA schedule.</td>
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<tr>
<td>2</td>
<td>a. Formation of the CA committees</td>
<td>Until 15 December 2008</td>
<td>The plenary session shall form the CA committees by 15 December 2008. The Business Advisory Committee shall conduct an experts' need analysis. Finalize the TOR of experts as per the demands of committees</td>
<td>All committees to elect their chairpersons. Submission of a proposal to the Business Advisory Committee by all committees after conducting a needs identification of experts and human resources required by them, stating the work that experts have to perform (while remaining focused on concerned subjects within their jurisdiction). The CA Secretariat shall establish separate secretariats for all the committees and provide human resources, physical facilities and other resources. The Secretariat shall also present its views regarding experts to the Business Advisory Committee.</td>
<td>During this period committees under the Legislature-Parliament can also be formed. As per provision 51 of the Interim Constitution, the fourth session of the Legislature-Parliament will come to an end during this period.</td>
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<td></td>
<td>b. Election of the chairpersons of the committees</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>c. Identify the areas for which expert services will be required in the constitution making process and prepare detailed terms of reference (TOR) for them.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Activities</td>
<td>Duration of work</td>
<td>Responsibility</td>
<td>Parallel activities</td>
<td>Remarks</td>
</tr>
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</tr>
<tr>
<td>3</td>
<td>a. Each committee shall outline the subjects under their jurisdiction and prepare a schedule of the activities that they will conduct.</td>
<td>Two weeks From 16 to 30 December 2008 Until January 2009</td>
<td>Submit the schedules prepared by all the committees to the chairperson. The chairperson shall convene a meeting of all chairpersons of different committees, hold discussions, and give final shape to the schedules. Finalize experts’ TORs as per requests of the committees</td>
<td>All the committees shall perform their work on the basis of the CA’s schedule. The Committee on Civil Relations shall launch activities by preparing a programme to inform ordinary citizens about the constitution making process according to the regulations passed by the CA.</td>
<td>The CA Secretariat shall manage the human resources (personnel) to be involved in constitution making, and launch the preliminary training programme for them.</td>
</tr>
<tr>
<td>4</td>
<td>a. Hold extensive discussions and consultations on the concept of the new constitution and collect suggestions from members of the civil society, experts and the general public.</td>
<td>9 weeks (from 30 December to 26 February 2009)</td>
<td>The thematic committees shall work by focusing on the themes within their jurisdiction. All thematic committees shall be assisted by the procedural committees, the Government of Nepal, constitutional bodies, civil society, journalists, intellectuals, NGOs and the general public in this endeavour.</td>
<td>The Capacity Building Committee shall collect and distribute essential resource materials to all members of CA. The committee shall also organize interactions and conferences as per the needs of the assembly. The CA Secretariat shall launch a campaign and appeal to all Nepalis within the country and abroad through all forms of media for their suggestions to the CA and its committees regarding the (concept of) the new constitution. It shall also print pamphlets, posters and stickers to promote the campaign. The Public Opinion Coordination Committee shall take special initiative in this regard.</td>
<td>The CA Secretariat shall initiate and continue to record the activities of the CA and all its committees.</td>
</tr>
<tr>
<td>Activities</td>
<td>Duration of work</td>
<td>Responsibility</td>
<td>Parallel activities</td>
<td>Remarks</td>
<td></td>
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</tr>
<tr>
<td>5</td>
<td>The thematic committees shall prepare the preliminary draft of the constitution on the basis of their concept papers.</td>
<td>12 weeks (26 February to 23 April 2009)</td>
<td>The thematic committees shall prepare their preliminary drafts by focusing on the themes related to their jurisdiction and submit them to the Constituent Assembly.  The Outreach Committee and the Capacity Building Committee shall continue their work. These committees shall facilitate the participation of general public in the constitution making process.</td>
<td>As per Article 521 of the Interim Constitution, the fifth session of the Legislature-Parliament will begin in February 2009 and continue until 13 April 2009.</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>The concept papers and preliminary drafts prepared by the thematic committees shall be tabled and discussed in the Constituent Assembly.</td>
<td>8 weeks (21 April to 14 June 2009)</td>
<td>Table the report on the concept papers and the preliminary drafts of all committees in a plenary session, hold discussions over them, approve them with recommendations, if any, and send them to the CC.  The secretariats of all committees shall take notes of the issues raised in their respective reports during discussions at the CA.</td>
<td>The report of every committee shall be allotted five days for discussion in a plenary session.</td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>The Constitutional Committee shall prepare the first draft of the new constitution by integrating the recommendations of the CA and the drafts submitted by the thematic committees</td>
<td>8 weeks (15 June to 9 August 2009)</td>
<td>Responsibility of the Constitutional Committee. This task shall be done confidentially.</td>
<td>During this time the sixth session of the parliament will be held and conclude after passing the programme and budget of the government.</td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>Table and discuss the first draft of the constitution prepared by the Constitutional Committee at a plenary session.</td>
<td>4 weeks (to 10 September 2009)</td>
<td>Hold party-wise discussions on principle at a plenary session and make recommendations to the Constitutional Committee if any changes are needed on any theme.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Activities</td>
<td>Duration of work</td>
<td>Responsibility</td>
<td>Parallel activities</td>
<td>Remarks</td>
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</tbody>
</table>
| 9  a. Give final shape to the first draft of the constitution and publish it in the Nepal Gazette for suggestions and comments from the people.  
  b. The Public Opinion Coordination Committee shall develop an action plan to seek people's opinions on the first draft of the constitution. | 1 week  
(27 February to 20 March 2009) | The Constitutional Committee to give final shape to the first draft on the basis of the discussions and recommendations of the plenary session. |                                                                                  | By 16 September 2009 the first draft of the constitution should be published in the Nepal Gazette. |
| 10 a. Hold extensive discussions and interactions on the first draft of the constitution by organizing seminars and public hearings.  
  b. Accept all the suggestions that may come from different sources.  
  c. Honourable CA members return to their districts, constituencies and various parts of the country, and collect people's opinions and suggestions | 12 weeks  
(17 September to 10 December 2009) | This activity shall be based on the action plan of the Public Opinion Coordination Committee.  
  All the committees, members and staff of the CA shall be involved in this activity. | In addition to the Constituent Assembly, the Government of Nepal, civil society and NGOs shall also be actively involved in this activity. | The Public Opinion Coordination Committee shall initiate and continue to record the recommendations submitted by the people. |
<table>
<thead>
<tr>
<th></th>
<th>Activities</th>
<th>Duration of work</th>
<th>Responsibility</th>
<th>Parallel activities</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>11</td>
<td>Prepare and present a detailed report to the CA on people's suggestions and recommendations</td>
<td>4 weeks (11 December 2009 to 6 January 2010)</td>
<td>The Public Opinion Coordination Committee shall prepare the report.</td>
<td>All Committees of the CA shall assist in this task.</td>
<td>If possible, it will respond individually to all suggestions, along with the views of the Committee. Experts help can be sought in this regard.</td>
</tr>
<tr>
<td>12</td>
<td>Discussion on the report on people's suggestions in a plenary session.</td>
<td>2 weeks (7 to 21 January 2010)</td>
<td>Hold party-wise discussion in a plenary session and recommend with directions to the CC on the themes that need to be incorporated in the first draft.</td>
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</tr>
</tbody>
</table>
| 13 | a) Prepare and submit the Constitution Bill to the CA after improving the draft as per the suggestions of the people. 
   b) Distribute copies of the bill relating to the constitution to all CA members. | 5 weeks (22 January to 22 February 2010) | The Constitutional Committee shall prepare the bill relating to the constitution by making amendments to the first draft on the basis of discussions and recommendations of the plenary session. This work shall be carried out confidentially. |  | During this period the seventh session of the parliament will go on in parallel and will be concluded after completing the basic legislative business. |
<p>| 14 | General discussion on the bill relating to the constitution in accordance with the Interim Constitution and CA Rules of Procedure. | 1 week (23 February to 1 March 2010) | Theoretical discussions on the bill in the assembly. |  |  |</p>
<table>
<thead>
<tr>
<th></th>
<th>Activities</th>
<th>Duration of work</th>
<th>Responsibility</th>
<th>Parallel activities</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>15</td>
<td>Time for honourable CA members to propose amendments to the bill.</td>
<td>1 week (2 to 8 February 2010)</td>
<td></td>
<td></td>
<td>The Bill Section of the CA Secretariat shall prepare a report on the amendments.</td>
</tr>
</tbody>
</table>
| 16| a. Hold clause-wise discussions on the bill along with amendments in the assembly. Continue to make decisions on each and every article and sub-article.  
   b. The preamble and all other sections to be passed by the assembly. | 8 weeks (9 February to 28 April 2010)        | Extensive discussions in the assembly.       |                    | The leaders of all the parliamentary parties shall, in accordance with the Interim Constitution, give continuance (parallel to other activities) to the task of settling issues on which they failed to reach consensus unanimously during the clause-wise discussions in the assembly. |
<p>| 17| a. Prepare a certification copy of the ratified constitution and have it signed by members of the assembly. | From 29 April to 28 May 2010                 |                |                    |                                                                         |</p>
<table>
<thead>
<tr>
<th>Activities</th>
<th>Duration of work</th>
<th>Responsibility</th>
<th>Parallel activities</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>b. Certification by the chairperson.</td>
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<tr>
<td>c. The chairperson submits the approved constitution to the president amid a formal national ceremony organized by the CA, and the president shall proclaim, on the same occasion, the promulgation of the constitution by making it public to the Nepali people.</td>
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</tbody>
</table>

Note: This is an unofficial translation from the CA Rules 2008. This is the original calendar of activities as passed by the CA on 16 November 2008. This calendar was amended more than a dozen times as the work of CA could not progress as per this schedule.
Annex 2
Name of Committees and their Working areas as per Provisions 65, 66 and 67 of the CA Rules, 2065 BS

<table>
<thead>
<tr>
<th>Committee</th>
<th>Working areas</th>
</tr>
</thead>
</table>
| 1 Committee on Fundamental Rights and Directive Principles    | • Identification of fundamental rights.  
• Grounds of restrictions on fundamental rights.  
• Provisions relating to implementation of fundamental rights.  
• Directive principles and policies of the state.  
• Provision relating to special protection of rights of all minority communities including women, children, youths, labourers, peasants, Madhesi, indigenous/tribal communities, Dalit, backward regions, incapacitated persons, Muslims.  
• Provisions relating to citizenship.  
• Other necessary matters relating to the working areas of the Committee. |
| 2 Committee for Protection of the Rights of Minority and Marginalized Communities | • Definition of minority and marginalized communities.  
• Identification of downtrodden, isolated or excluded groups including tribal communities.  
• Provisions for the protection of minority and marginalized communities.  
• Measures for inclusion in the system of state affairs.  
• Other necessary matters relating to the working areas of the Committee. |
| 3 Committee for Restructuring of the State and Distribution of State Powers | • The structure of the federal democratic republican form of the state.  
• The principles and bases for determining the areas of the federal units.  
• Delimiting the boundaries and the naming of each of the federal units.  
• Division of legislative, executive and judicial powers among the governments in various levels of federal units.  
• Determining the contents of working areas of federal units of various levels and the common subjects.  
• Determination of interrelationship of legislative, executive and judicial powers among federal units.  
• Mechanism for adjudication of disputes that may arise between the federal units.  
• Other necessary matters relating to the working areas of the Committee. |
| 4 Committee on Determination of the Form of the Legislative Organs | • Structure and methods of formation of the legislature in the various federal units.  
• Inter-relationship among the legislatures of various levels of federal units.  
• Legislative procedures.  
• Financial management procedures.  
• Additional issues related to the working areas of the Committee |
<table>
<thead>
<tr>
<th>Committee</th>
<th>Responsibilities</th>
</tr>
</thead>
</table>
| 5 Committee on Determination of Form of Governance of the State | • Nature and outlines of system of governance.  
• Election system.  
• Format of executive organs at various levels.  
• Division of executive powers at various levels.  
• Inter-relationship between governments at various levels.  
• Formation and functioning of government services.  
• Bases of good governance.  
• Other necessary matters relating to the working areas of the Committee. |
| 6 Committee on Judicial System | • Format of the judicial structure.  
• Tiers, forms and jurisdiction of the judiciary.  
• Appointment, dismissal, other terms and conditions of service, powers, duties and responsibilities of the judges, and additional issues relating thereto.  
• Constitutional status, powers and duties of the Attorney General.  
• Other necessary matters relating to the working areas of the Committee. |
| 7 Committee on Determination of Structure of Constitutional Bodies | • Identification of constitutional bodies required for operation of the system of governance and determination of their forms.  
• Formation, functions, powers and duties of constitutional bodies.  
• Relationship of the Constitutional bodies with various levels of governments.  
• Other necessary matters relating to the working areas of the Committee. |
| 8 Committee on Division of Natural Resources, Financial Powers and Revenue | • Division of subject-matter of financial sources.  
• Measuring criteria for the division of income sources.  
• Financial relationships between governments at various levels.  
• Other necessary matters relating to the working areas of the Committee. |
| 9 Committee on Determination of Bases for Cultural and Social Solidarity | • The functional government languages in the federal units of various levels.  
• Preservation of other national languages and cultures.  
• Other issues related to language.  
• Determination of bases of social solidarity.  
• Other necessary matters relating to the working areas of the Committee. |
| 10 Committee for Protection of National Interests | • Identification and definition of national interests of Nepal.  
• Measures for constitutional protection of sovereignty, integrity and national unity.  
• Management of Nepal’s international boundaries.  
• Preservation of national heritage.  
• International relations.  
• International treaties.  
• National security.  
• Duties of the Nepal Army and its operation.  
• Other necessary matters relating to the working areas of the Committee. |
Constitutional Committee

- Prepare the preliminary draft of the preamble of the Constitution and identify such subjects as are not covered within the working areas of any of the TCs that need to be incorporated in the Constitution.
- Prepare the preliminary draft report on such subjects along with the concept paper and introduce them in CA.
- Prepare a draft of the Constitution on the basis of reports received from such committees, suggestions and directives given by the assembly upon having discussion on those reports, and introduce the draft to the CA.

Procedural Committees

<table>
<thead>
<tr>
<th>Committee</th>
<th>Working Areas</th>
</tr>
</thead>
</table>
| 1 Committee on Civic Relations | • Establishment of a mechanism for easy access of citizens to the Constituent Assembly, and its implementation.  
• Provision of an effective system for dissemination of information to citizens about the Constituent Assembly, the constitution-making process and its general activities, and coordination with other collaborators.  
• Monitoring and evaluation of all activities conducted by government agencies, NGOs and INGOs, civil society, media, with regard to the Constituent Assembly, constitution-making processes and its regular activities.  
• Informing citizens on the process for participation in the Constitution-making.  
• Monitoring the media centre. |
| 2 Committee on Collection and Coordination of Public Opinions | • Publicity, through various means of communication, of the draft constitution for collection of public opinion and suggestions on the draft constitution.  
• Conducting or causing to conduct public hearings on the draft constitution.  
• Organization of interaction programmes, seminars and workshops.  
• Maintaining records and managing the suggestions obtained through various means from within the country or abroad derived personally or institutionally.  
• Preparing a report of the suggestions and to submit to the Constituent Assembly |
| 3 Committee on Capacity Development and Resources Management | • Organizing interaction programmes for Constituent Assembly members on the constitution and the constitution-making process.  
• Conducting studies and researches on constitutional subject matters.  
• Making provision of resource materials for members and their distribution.  
• Developing and managing a resource centre. |
Annex 3: Committee-wise Distribution of Numbers of Suggestions (Submissions) Collected by the Public Opinion Collection Teams of the Constituent Assembly

<table>
<thead>
<tr>
<th>Team no. and related districts</th>
<th>Committee on Fundamental Rights and Directive Principles</th>
<th>Committee on the Protection of the Rights of Minorities</th>
<th>Committee on State Restructuring and Distribution of State Powers</th>
<th>Committee for Determining the Structure of Legislative Body</th>
<th>Committee for Determining the Form of Government</th>
<th>Judicial System Committee</th>
<th>Committee for Determining the Structure of Constitutional Bodies</th>
<th>Committee for Determining the Bases of Natural Resources, Financial Rights and Revenue Sharing</th>
<th>Committee for Determining the Bases of the Basis of Cultural and Social Solidarity</th>
<th>National Interest Preservation Committee</th>
<th>Constitutional Committee</th>
<th>Open Suggestions</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Jhapa, Ilam</td>
<td>180</td>
<td>187</td>
<td>195</td>
<td>178</td>
<td>201</td>
<td>186</td>
<td>192</td>
<td>180</td>
<td>201</td>
<td>209</td>
<td>172</td>
<td>2,082</td>
</tr>
<tr>
<td>2</td>
<td>Taplejung, Panchthar</td>
<td>600</td>
<td>1,287</td>
<td>2,616</td>
<td>2,724</td>
<td>2,222</td>
<td>1,966</td>
<td>1,132</td>
<td>1,085</td>
<td>1,345</td>
<td>1,940</td>
<td>700</td>
<td>16,637</td>
</tr>
<tr>
<td>3</td>
<td>Morang, Bhojpur</td>
<td>219</td>
<td>496</td>
<td>290</td>
<td>523</td>
<td>667</td>
<td>715</td>
<td>300</td>
<td>477</td>
<td>387</td>
<td>622</td>
<td>217</td>
<td>291</td>
</tr>
<tr>
<td>4</td>
<td>Sunsari, Dhankuta</td>
<td>1,048</td>
<td>1,227</td>
<td>1,175</td>
<td>1,185</td>
<td>1,156</td>
<td>1,134</td>
<td>1,044</td>
<td>1,050</td>
<td>1,095</td>
<td>1,162</td>
<td>963</td>
<td>731</td>
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<tr>
<td>5</td>
<td>Sankhuwasabha, Tehrathum</td>
<td>194</td>
<td>284</td>
<td>260</td>
<td>275</td>
<td>316</td>
<td>225</td>
<td>263</td>
<td>272</td>
<td>292</td>
<td>293</td>
<td>172</td>
<td>2,846</td>
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<td>6</td>
<td>Okhaldhunga</td>
<td>132</td>
<td>243</td>
<td>243</td>
<td>220</td>
<td>296</td>
<td>269</td>
<td>192</td>
<td>233</td>
<td>259</td>
<td>274</td>
<td>134</td>
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<td>7</td>
<td>Solukhumbu</td>
<td>491</td>
<td>1,017</td>
<td>857</td>
<td>757</td>
<td>1,130</td>
<td>870</td>
<td>655</td>
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<td>783</td>
<td>796</td>
<td>421</td>
<td>5</td>
</tr>
<tr>
<td>8</td>
<td>Saptari, Khotang</td>
<td>130</td>
<td>98</td>
<td>93</td>
<td>95</td>
<td>139</td>
<td>157</td>
<td>74</td>
<td>77</td>
<td>95</td>
<td>123</td>
<td>69</td>
<td>1,150</td>
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<tr>
<td>9</td>
<td>Siraha, Udayapur</td>
<td>476</td>
<td>674</td>
<td>609</td>
<td>725</td>
<td>706</td>
<td>658</td>
<td>599</td>
<td>581</td>
<td>500</td>
<td>716</td>
<td>397</td>
<td>6,691</td>
</tr>
<tr>
<td>10</td>
<td>Dolakha, Ramechap</td>
<td>812</td>
<td>1,648</td>
<td>1,739</td>
<td>1,828</td>
<td>2,099</td>
<td>1,883</td>
<td>1,231</td>
<td>1,482</td>
<td>1,625</td>
<td>2,248</td>
<td>848</td>
<td>300</td>
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<tr>
<td>11</td>
<td>Dhanusha, Mahottari</td>
<td>866</td>
<td>947</td>
<td>914</td>
<td>915</td>
<td>983</td>
<td>933</td>
<td>958</td>
<td>747</td>
<td>925</td>
<td>908</td>
<td>927</td>
<td>10,023</td>
</tr>
<tr>
<td>12</td>
<td>Bara, Parsa, Rautahat</td>
<td>215</td>
<td>169</td>
<td>103</td>
<td>96</td>
<td>283</td>
<td>53</td>
<td>174</td>
<td>188</td>
<td>65</td>
<td>60</td>
<td>124</td>
<td>1,530</td>
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<tr>
<td>13</td>
<td>Sarlahi, Sindhuli</td>
<td>1,320</td>
<td>1,529</td>
<td>1,706</td>
<td>1,541</td>
<td>1,848</td>
<td>1,607</td>
<td>1,491</td>
<td>1,295</td>
<td>1,536</td>
<td>1,902</td>
<td>1,387</td>
<td>5,039</td>
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<tr>
<td>14</td>
<td>Chitwan, Makwanpur</td>
<td>1,574</td>
<td>2,066</td>
<td>4,328</td>
<td>1,848</td>
<td>5,881</td>
<td>3,893</td>
<td>930</td>
<td>1,989</td>
<td>1,709</td>
<td>3,449</td>
<td>1,020</td>
<td>1,042</td>
</tr>
<tr>
<td>Team no. and related districts</td>
<td>Kathmandu</td>
<td>Bhaktapur</td>
<td>Lalitpur</td>
<td>Nuwakot, Rasuwa</td>
<td>Sindupalchowk, Kavre</td>
<td>Kaski, Syangja</td>
<td>Lamjung, Manang</td>
<td>Dhading, Gorkha</td>
<td>Tanahun, Nawalparasi</td>
<td>Rupandehi, Kapilvastu, Arghakhachi</td>
<td>Palpa, Gulmi</td>
<td>Parbat, Baglung</td>
<td>Myagdi Mustang</td>
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</tr>
<tr>
<td>Consequences on the Constitution</td>
<td>1,690</td>
<td>1,841</td>
<td>1,830</td>
<td>1,827</td>
<td>1,827</td>
<td>1,875</td>
<td>1,718</td>
<td>1,721</td>
<td>1,721</td>
<td>1,721</td>
<td>1,721</td>
<td>1,721</td>
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</tr>
<tr>
<td>Preservation of the Rights of Minorities</td>
<td>1,600</td>
<td>1,731</td>
<td>1,767</td>
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<tr>
<td>Determination of the Structure of Legislative Bodies</td>
<td>1,600</td>
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</tr>
<tr>
<td>Determination of the Form of Government</td>
<td>1,600</td>
<td>1,800</td>
<td>1,800</td>
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<tr>
<td>Determination of the Structure of Constitutional Bodies</td>
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<td>1,800</td>
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<tr>
<td>Cultural and Social Solidarity</td>
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<td>Total</td>
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<td>23</td>
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<td>Total suggested constitutional principles</td>
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Total: 9,039
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<thead>
<tr>
<th>Team no. and related districts</th>
<th>Committee on Fundamental Rights and Directive Principles</th>
<th>Committee on the Protection of the Rights of Minorities</th>
<th>Committee on State Restructuring and Distribution of State Powers</th>
<th>Committee for Determining the Structure of Legislative Body</th>
<th>Committee for Determining the Form of Government</th>
<th>Judicial System Committee</th>
<th>Committee for determining the Structure of Constitutional Bodies</th>
<th>Committee on Natural Resources, financial rights and Revenue Sharing</th>
<th>Committee for Determining the Bases... Cultural and Social Solidarity</th>
<th>National Interest Preservation Committee</th>
<th>Constitutional Committee</th>
<th>Open Suggestions</th>
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<td>31 Jumla</td>
<td>662 811 865 825 944 875 625 650 831 851 665</td>
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<td>33 Dolpa</td>
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<td>34 Mugu</td>
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<td>35 Humla</td>
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<td>38 Doti, Achham</td>
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<td>39 Baitadi, Darchula</td>
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<tr>
<td>40 Bajura</td>
<td>63 111 138 114 151 108 53 94 93 120 70</td>
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<td>Submissions received through Committee on Civic Relations</td>
<td>17,884 7,884 9,666 7 7,859 3 4,588 8 13 7,645 7,910</td>
<td>63,427</td>
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<td>Total</td>
<td>43,236 49,355 56,365 39,521 57,681 44,904 36,290 32,366 34,906 53,404 34,573</td>
<td>12,291</td>
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Source: CA Secretariat, 2009 April
CHAPTER 2

CONSTITUTION-MAKING PROCESS IN NEPAL: AN ASSESSMENT AND LESSONS FOR THE FUTURE

- Mohan Lal Acharya
BACKGROUND

The Nepali people’s 60-year long mission to write a constitution has again become uncertain with the demise of the Constituent Assembly on 27 May 2012. Nepal is in a state of socio-political transition, moving towards a regime that will have more respect for rule of law, human rights, and democratic norms and values. Agendas of social transformation and change are usually defeated in Nepal, as happened during the establishment of democracy in the 1950s, the 1979 referendum, and the writing of the 1990 Constitution, and also evidenced by the current failure of the constitution-making process. Nepal has a long way to go to resume its constitution-building process and to address the impacts of the decade-long civil conflict.

Following the demise of the Constituent Assembly in 2012 without promulgating a new constitution, most stakeholders opined that the huge investment of time and resources in the dissolved Assembly should not be allowed to be wasted. There was unanimity among constitutional experts that Nepal should adopt ‘minimum legality’ (while choosing political steps at least minimum constitutional/legal standard should be followed) with ‘minimum damage’ (without damaging constitutional and legal norms and values) in the constitutional practice by remaining within the ambit of the principle of rule of law and constitutionalism.

An interesting extra constitutional move was made on 13 March, 2013 when an 11 Point Agreement was reached between the four major political forces – the Unified Communist Party of Nepal (Maoist) (UCPN [Maoist]), Nepali Congress (NC), Communist Party of Nepal (Unified Marxist-Leninist) (CPN [UML]) and the United Madhesi Morcha – which was followed by a 25-point Order issued by the President to remove constitutional difficulties as the Interim Constitution of Nepal 2007 does not recognise such steps. Twenty-five articles of the Interim Constitution of Nepal 2007 have been amended using the ‘power to remove difficulties’ clause. “Power to remove difficulties” should only be used to remove difficulties exists in the constitution itself by which the constitution can run smoothly. Constitutional norms and values does not allows to amend the constitution itself.

It is true that, it was almost impossible to hold an election for a new constituent assembly/legislative parliament without amending the Interim Constitution and subsequent laws, but there was no legislature parliament to amend the
constitution and laws at that time. There is debate among the legal community and political parties as to whether or not the power to remove difficulties can be exercised unlimitedly to amend the Constitution. There was an election government headed by the Chief Justice of the Supreme Court of Nepal, which was formed with the objective of conducting a free and fair election of the second constituent assembly. The Interim Constitution 2007 does not envisaged such a situation as the Constituent Assembly will be dissolved without producing a new constitution and the government can led by a person or group of persons who is not the member of CA or LP. Interestingly, almost all political parties were unanimous to form an election government led by sitting Chief Justice.

Undoubtedly, the dissolution of the Constituent Assembly has led to political and constitutional turmoil. The Interim Constitution 2007 cannot run the country forever and a new constitution is needed. However, the question is: what process should be followed to promulgate the new constitution in light of the failure of the former Constituent Assembly? Almost all of the political parties have stressed the need to forge a political consensus to hold a fresh election and the 11 Point Agreement and 25-point Order to remove difficulties are only temporary measures.

Furthermore, the constitution-making process, being a historic event in itself, it is necessary to document the benchmarks of the process. This paper makes an attempt to fill the information gaps by neutrally capturing the achievements made so far in constitution building in Nepal. Likewise, as a close watcher of the entire process, the author attempts to highlight the key messages of the thematic committee reports, the challenges, options for the future and lessons learned.

PARTICIPATORY CONSTITUTION MAKING IN NEPAL

A good process leads to a good outcome

It is generally believed that a good process – one that is participatory, democratic and inclusive – leads to a good product with a strong sense of ownership by the people who participated in its making. A sense of ownership plays a vital role in the longevity of the outcome of any process, as well as in its successful implementation. A participatory process of constitution making is being followed in Nepal, also as a tool for conflict transformation. There are fundamental differences between a participatory and an expert-led constitution-making process. In the latter, the content of the constitution matters the most, whereas in the former the process and the content have equal importance. The success or failure of a constitution made through the participatory method does not only depend on the content of the constitution, but also on the process that was adopted to write it. Participation means a great deal more than voting to elect delegates to a constituent assembly. It encompasses the active engagement
of the people in defining the agenda for reform and the instruments for social and economic change through debate, argument and consultation, not only in the centre, but throughout the whole country. As pointed out by Prof Ghai, “A participatory constitution-making process should thus aim not only at raising awareness, but also at enabling the people to contribute to the outcome of the process” (Ghai, n.d.).

A participatory constitution-making process as a tool for lasting peace is not a unique experiment. It has been applied in several countries that have experienced conflict. The process has produced mixed results. In Kenya, which had one of the most participatory processes for making a constitution, the draft had to wait years to be promulgated (it has only recently been promulgated after a referendum). In countries like Iraq and Afghanistan, the promulgation of a new constitution did not resolve the conflict. South Africa, however, is the perfect example of participatory constitution making as a tool for conflict transformation as they were able to settle their past conflict accommodating the concerns of conflicting parties in the constitution itself.

Conflict transformation is only one aspect of participatory constitution building in Nepal. There are a number of other agenda to be settled through this process as a culmination of all conflicts between different interest groups over time in Nepal. Nepal has produced 6 different constitutions over the 60-odd years of its constitutional history since 1948. All of these constitutions were made by experts and reflected the interests of the then rulers. However, the Nepali people aspired to produce a constitution through a Constituent Assembly even in the 1950s, but the process was not initiated as a result of conflict between the king and the political parties.

The product of a participatory process is achieved through negotiations, what are called ‘best alternatives to negotiated agreement (BATNA)’ to make a single document nurtured from various ideologies. As Prof Ghai says in his writing:

> Negotiations mean participation, vigorous debates through the country, in numerous forms. They also mean acceptable rules for decisions on the constitution. In this way the constitution will serve as a social contract among the multiplicities of Nepal, not merely state building, but more importantly, nation building.

(Ghai, n.d.)

One can argue that Nepal failed to produce a new constitution mainly because of lack of proper negotiation among the political parties and concerned stakeholders. Political parties were merely thinking about the status of their parties in the forthcoming election and forgot that they were more broadly involved in a process of ‘nation building’ through participatory constitution writing.
E lecting an inclusive Constituent Assembly

The people of Nepal had high hopes of the historic Constituent Assembly constituted through an election in April 2008 to draft a new constitution through a participatory process. In addition to being a significant mechanism for resolving the decade-long armed conflict, the current constitution-making process has also received attention as a way of accommodating a wide range of people from different sections of society in writing the nation's constitution.

A mixed electoral system was adopted for the Constituent Assembly elections in 2007 (Section 4, Election to Members of the Constituent Assembly Act, 2007). Out of the total 601 seats, 240 members were to be elected through the first past the post (FPTP) system from single member constituencies, 335 members through proportional representation (PR) considering Nepal as a single constituency and the remaining 26 members were to be nominated by the Interim Council of Ministers (Section 7, Election to Members of the Constituent Assembly Act, 2007 and Interim Constitution of Nepal, 2007). Enshrining the principle of inclusiveness, the Interim Constitution of Nepal, 2007 ensures the proportional representation of women, Dalits, oppressed tribes/indigenous tribes, people from backward regions, Madhesis and other groups (Article 63 [4]). In addition, it ensured that at least one third of total representation is constituted by women (Article 63 [4]). In practice, 197 out of the 601 members of the Constituent Assembly were female, which is unique in the history of Nepal, and also in the world.

The Election to Members of the Constituent Assembly Act, 2007 divided the PR seats among the five major groups based on their existing population: Madhesis (31.2%), Dalits (13%), indigenous people (37.8%), people from backward regions (4%), and others (30.2%), out of which each group was required to have 50% women (Section 7.3). As a result, the Constituent Assembly election set an example for being inclusive with its broad representation of excluded communities and 33.2% representation of women. Table 1 shows the representation of marginalised communities in Nepal in the former Constituent Assembly.

Table 1. Constituent Assembly, 2008

<table>
<thead>
<tr>
<th>Population groups</th>
<th>Total representation</th>
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<tbody>
<tr>
<td>Hill Dalits</td>
<td>36</td>
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<tr>
<td>Madhesi Dalits</td>
<td>13</td>
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<tr>
<td>Hill janajatis</td>
<td>164</td>
</tr>
<tr>
<td>Madhesis/Tarai janajatis</td>
<td>50</td>
</tr>
<tr>
<td>Madhesis</td>
<td>128</td>
</tr>
<tr>
<td>Muslims</td>
<td>17</td>
</tr>
<tr>
<td>Others (hill Brahmins, Chhetris)</td>
<td>193</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>601</strong></td>
</tr>
</tbody>
</table>

CONTRIBUTION OF THE CONSTITUENT ASSEMBLY

The elected Constituent Assembly was simultaneously given two tasks: to write the constitution and also to function as a Legislative Parliament for the country (Article 83, Interim Constitution of Nepal, 2007). The Constituent Assembly faced various hurdles in achieving this task. Working to an initial two-year deadline, the Constituent Assembly took until November 2008 to pass rules of procedure to govern the constitution-making process. The work of writing the constitution was then divided among 14 committees, which started work in January 2009. Over the next 17 months, parliamentarians, civil servants and scores of experts worked hard to produce the concept papers and preliminary drafts on which the new constitution would be based. However, in the end, the constitution was not completed and a two-year extension was arranged through different amendments to Article 64 of the Interim Constitution of Nepal, 2007.

Notwithstanding that it did not promulgate the constitution, it is important to note that the Constituent Assembly accomplished many important benchmarks and made a sincere attempt to achieve its goal within the given deadline. Among its achievements include the formation of committees, the holding of public consultations and the production of preliminary drafts by the committees.

Formation of committees

The Constituent Assembly members were divided into a Constitutional Committee, 10 thematic committees, and 3 procedural committees to utilise the 601 Constituent Assembly members effectively in constitution writing (Table 2).

Table 2: Committees of the Constituent Assembly - I

<table>
<thead>
<tr>
<th>Thematic committees</th>
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</thead>
<tbody>
<tr>
<td>1. Committee on Fundamental Rights and Directive Principles</td>
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<tr>
<td>2. Committee for Protection of Rights of Minority and Marginalised Communities</td>
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<tr>
<td>3. Committee for Restructuring of the State and Distribution of State Powers</td>
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<tr>
<td>4. Committee on Determination of the Form of the Legislative Organs</td>
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<td>5. Committee on Determination of Form of Governance of the State</td>
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<tr>
<td>6. Committee on Judicial System</td>
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<tr>
<td>7. Committee on Determination of Structure of Constitutional Bodies</td>
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<tr>
<td>8. Committee on Division of Natural Resources, Financial Powers and Revenue</td>
</tr>
<tr>
<td>9. Committee on Determination of Bases for Cultural and Social Solidarity</td>
</tr>
<tr>
<td>10. Committee for Protection of National Interests</td>
</tr>
</tbody>
</table>
Procedural committees

11. Committee on Civic Relations
12. Committee on Collection and Coordination of Public Opinions
13. Committee on Capacity Development and Resources Management

Constitutional committee (operates as both thematic committee and Constitution drafting committee)

14. Constitutional Committee

Public consultations

Public consultations were another significant aspect of the participatory process adopted by the Constituent Assembly for drafting the new constitution. Opportunities were provided to grassroots people to voice their concerns through the Constituent Assembly public outreach programme, which started on 27 February, 2009. As part of this programme, 40 teams consisting of Constituent Assembly members and Constituent Assembly officials visited all of Nepal’s 75 districts over a four-week period from February to March 2009. All Constituent Assembly members returned to Kathmandu by 23 March with their respective findings.

The objective of this process was to enable the Constituent Assembly to garner people’s views on key issues to be included in the draft constitution. To facilitate the process, teams used questionnaires developed on the basis of contributions from the 11 thematic committees of the Constituent Assembly. The questionnaires contained almost 300 questions relating to various constitutional options and issues. The feedback from the first phase of the programme was incorporated into the draft Constitution.

Generally, people welcomed the initiative and, in many rural locations, the presence of senior political figures attracted large crowds. However, there were some criticisms of the first consultation including lack of familiarity with key constitutional concepts by the public at large; lack of sufficient preparation by the Constituent Assembly member outreach team (including briefings, provision of a common presentation, etc.); the short timeframe in which consultations were arranged, which led to confusion and lack of awareness about the timing and location of consultations; limited recording facilities of the discussions; and difficulties in processing written responses and providing input to the relevant thematic committees in a timely fashion.

There was a broad realisation among the Constituent Assembly members and others that the first round of public consultations was conducted without sufficient preparation; nonetheless, the very intention of the process and the achievements made by it were appreciated and proved significant in the initial
drafting of reports by the thematic committees. The public outreach programme
provided a partial basis for the preparation of concept papers and other inputs,
which helped in developing the first draft of the new constitution.

**Thematic committees**

The ten thematic committees and Constitutional Committee submitted their
preliminary draft reports after rigorous discussion on the issues and incorporating
the feedback of the people collected through various means, including the
first outreach programme, and expert opinion. Most of the issues that directly
affect the lives of the general public were agreed upon unanimously and other
issues were finalised through voting. Three committee reports were approved
unanimously by the committee members (i.e., the reports of the Committee on
Natural Resources, Committee on Minority Rights and Committee on National
Interests), whereas there were dissenting opinions in other committee reports.
The Committee on Determination of Form of Governance of the State made three
proposals for the form of government and electoral system, as none received a
majority in the voting. The Constitutional Committee voted on 98 different issues.

Similarly, the 14 province model proposed by the State Restructuring Committee
in its report was unacceptable, even though it was approved by a majority in the
committee. Debate on this report is ongoing, especially regarding the name,
number and boundaries of the proposed federal units and fuelled by the State
Restructuring Commission reports, which were hugely criticised by most of the
political parties and stakeholders. The Commission was established to settle
the debate on state restructuring, but it could not come up with a unanimous
proposal and ultimately produced two different proposals: The majority
proposal (6 members) proposed 11 provinces focusing on identity with a non-
territorial federal arrangement for Dalit communities; the minority proposal
(3 members) proposed 6 provinces focusing on viability. The Commission also
created new debate on some of the issues that had already been agreed on by the
political parties in the State Restructuring Committee and later days by political
parties through task force, sub-committee to the constitutional committee and
constitutional committee itself.

**KEY MESSAGES FROM THE PRELIMINARY DRAFTS**

This section looks at the key issues covered by the thematic committee reports.

**Fundamental rights**

In its report, the Committee on Fundamental Rights and Directive Principles
broadened the concept of the fundamental rights, recognising a total of 31
fundamental rights in the preliminary draft (CFRDP, 2010). The report proposes
some new fundamental rights such as the right to food, right to housing, right to family, rights of Dalit, rights of victims of crimes, rights of consumers, right to live with dignity and right of unemployed citizens to an allowance. The preliminary draft proposes not only the rights, but also the duties, of citizens. In the preliminary draft, the Committee also tries to address the issue of citizenship.

In relation to women’s rights, the preliminary draft carries forward the rights of women recognised in the Interim Constitution 2007 including the right against gender discrimination, the right to reproductive health, and the right against physical or mental violence. The draft provides that such acts shall be punishable by law and the victim entitled to compensation as determined by law. The draft also proposes that women shall have the right to inclusive proportional participation in all state machineries. Finally, it proposes that every woman shall be entitled to special opportunities in education, health, employment, and social security on the grounds of positive discrimination.

Restructuring of the state

The preliminary draft report of the Committee for Restructuring of the State and Distribution of State Powers (CRSDSP, 2010) acknowledges Nepal as a multi-ethnic, multi-lingual, multi-cultural, multi-religious and geographically diverse country. It proposes 14 autonomous states, putting an end to the existing unitary and centralised state structure. It also envisages three levels of government within the federal structure: federal, provincial and local. Apart from the 14 autonomous states, it also proposes special structures to address the issue of areas with a majority of one ethnicity/community or linguistic community or with a dense population within a province. The preliminary draft proposes an inter-state council to resolve disputes between federal units. In addition to this, a constitutional court is proposed to resolve disputes between the federation and a state, between two states, between a state and a local-level body, between a state and a special structure, and between a local-level body and a special structure. The constitutional court would consist of one chairman and five members and that the decision of constitutional court would be final.

The preliminary draft envisages the right to self-determination for indigenous peoples and special rights for Dalits, Muslims, communities on the brink of disappearance and women. Proportional representation of such communities is proposed, as well as political preferential rights to ethnic communities that are in the majority in the proposed autonomous regions and special structures. There is still debate over the name, number and boundaries of the proposed provinces, the constitutional court and autonomous regions.

Judicial system

The report of the Committee on Judicial System (CJS, 2009) proposes three tiers of courts in Nepal. It acknowledges the needs of certain groups and proposes
to constitute a separate court or bench to settle family disputes and disputes related to domestic violence, child rights, untouchability, Dalits, customary practices, religion and culture, and indigenous peoples, Muslims, janajatis and other minority groups. In addition to this, special types of courts or tribunals are proposed to hear special cases. The Committee's report highlights the importance of judicial independence along with judicial accountability.

**Cultural and social solidarity**

The report of the Committee on Determination of Bases for Cultural and Social Solidarity acknowledges Nepal as a multi-lingual society and proposes education in mother tongue, as well as the protection, maintenance and development of culture, language and script (CDBCSS, 2010). The Committee emphasises that social solidarity is built on the political, economic, social, cultural and linguistic rights of people living in different constituent units, which strengthens national unity. The Committee makes special provision for the protection, development, inclusion and maintenance of language and culture, and addresses diversity in terms of language, religion, and culture and as existing among groups with diverse norms and values. It proposes that all mother tongues spoken in Nepal shall be national languages and that it should be the responsibility of the State to preserve, promote and develop such languages. However, it proposes the Nepali language in the Devanagari script as the official language of the central government. In addition, it proposes that the central legislature, on the recommendation of the Language Commission, can make other languages official languages of the central government. The language of the central government shall be the language of proceedings in law courts.

**Structure of constitutional bodies**

The concept paper of the Committee on Determination of Structure of Constitutional Bodies (CDSCB, 2009) has given continuity to existing constitutional bodies such as the National Human Rights Commission, Commission for the Investigation of Abuse of Authority, Election Commission and Public Service Commission. Bodies such as the National Women Commission and Dalit Commission are also given the status of constitutional bodies. In addition, the committee proposes additional constitutional bodies such as a Muslim Commission, Madhesi Commission and Adibasi-Janajati Commission. It proposes the appointment of chairpersons to these commissions proportionately and according to the principles of inclusion. In its preliminary draft, the Committee has attempted to address the issues of all communities in Nepal.

**Rights of minorities and marginalised communities**

The preliminary draft report of the Committee for Protection of Rights of Minority and Marginalised Communities contained definitions for the terms 'minority',
'marginalised' and 'excluded' groups with justifications (CPRMMC, 2010). The report proposes many rights for the protection of minority and marginalised communities, which are recognised by international instruments. It acknowledges the need to protect the right to equality and promote cultural and educational rights, religious rights, and the rights of ethnic, linguistic and religious minorities in Nepal, as well as rights against discrimination and untouchability. It also proposes specific rights for minority, marginalised and excluded groups.

The Committee also proposes the proportional representation of minority and marginalised communities in the affairs of the State. It proposes the inclusive and proportional representation of all castes, tribes and religious groups, as well people of different colours, sexes and classes, including Dalits, Tarai people, Madhesis, Muslims and the disabled, in all state structures. This has been accepted as a prerequisite for achieving democracy, rule of law, sustainable peace and development in Nepal.

The Committee's report deals with the issue of language by treating all languages of Nepal as equal and recognising them all as national languages of the country. It says that provinces/states can use one or more language as their official language. In addition, languages for physically impaired persons, such as sign language for the deaf and Braille script for the visually impaired, must be provided for in the constitution itself. The report proposes the establishment of a National Language Commission for the protection, promotion, identification, study, research and standardisation of languages spoken in Nepal.

In addition to specifically prohibiting discrimination, the preliminary draft of the Committee provides for positive discrimination for the protection, development and empowerment of people from economically, socially, politically and educationally backward communities and classes. The report emphasises the need for equitable distribution of economic resources to all minority, marginalised and excluded communities.

**National interests**

The preliminary draft of the Committee for Protection of National Interests (CPNI, 2010) highlights the need to build a discrimination-free, equitable society while preserving the sovereignty, independence and national integrity of the country. It also mentions as issues of national interest the promotion of a democratic system, proportional and inclusive participation of people from all sections of society, and the development of social harmony among various ethnic/caste groups and classes. The Committee emphasises the need to promote national interests through the enhancement of the Nepali identity and the freedom of Nepal along with the dignity of the Nepali people.

The Committee proposes the pursuance of a policy of managing and controlling international borders in a scientific manner and regulating and managing
Nepal’s borders with neighbouring countries in the same way as Nepal has an open border with India. It proposes to identify, preserve and promote natural resources, traditional knowledge, skills, research and cultural resources. With regards to national security, the preliminary draft not only includes provisions for mobilising Nepal’s national army, but also paramilitary forces, intelligence agencies and the Nepal police.

**Legislative bodies**

The Committee on Determination of the Form of the Legislative Organs proposes a bicameral legislature for the centre and a unicameral legislature for the provinces, along with legislative processes and financial proceedings (CDFLO, 2010). The preliminary draft envisages a total of 151 members in the House of Representatives (lower house), 51 in the national assembly (upper house) and 35 members in the provincial assemblies. The 151 members in the lower house will be elected through a mixed electoral system (FPTP and PR) and the 51 members in upper house will be elected through a symmetrical system by each of the provinces. A mixed electoral system will be also be used for the provincial assemblies.

**Forms of governance**

The report of the Committee on Determination of Forms of Governance of the State proposes three different governance models (CDFGS). The UCPN (Maoist) (18 votes) party voted for the presidential system under which the president would be directly elected through FPTP as the head of the government with federal executive power vested in him/her and as the chair of the Council of Ministers. The Unified Marxist-Leninist (CPN-UML) and Nepali Congress coalition (16 votes) was in favour of the parliamentary system with the president elected from the members of both of the houses of the federal legislature. In this system the executive power would be vested in the president and the council of ministers. The third proposal (3 votes) was in the favour of a president as both the head of State and the government. Such a president would be elected by the legislature and be the chair of the council of ministers.

The Committee’s draft proposes that each province shall have a head of province who will be the representative of the central government appointed by the president in consultation with the respective chief minister. The provincial council of ministers will be constituted under the chairmanship of the chief minister. As per necessity, the local-level government shall consist of a metropolitan, sub-metropolitan, municipal and village level, with a chairperson and vice-chairperson at each level. Each local government shall have chairperson as the head of the executive.
Electoral system

In terms of the electoral system, the report of the Committee on Determination of Forms of Governance of the State proposes a federal legislature (upper and lower house) and provincial legislature, at the federal and provincial levels, respectively. It also proposes constituting local autonomous units based on the principle of decentralisation to ensure local people’s participation in the legislature.

Natural resources

The preliminary draft of the Committee on Division of Natural Resources, Financial Powers and Revenue (CDNRFP, 2010) covers natural resources, financial powers and the sharing of revenue, as well as Nepal’s commitment to international instruments. To some extent, the preliminary draft tries to address the protection of the rights of indigenous and ethnic communities. The Committee proposes the provision of economic rights at different levels of the government as per a list of competencies. It also recognises the important role of the federal, provincial and local governments and proposes that they may impose taxes and collect revenue from sources.

CONTENTIOUS ISSUES

The preliminary draft reports of the ten thematic committees and Constitutional Committee of the Constituent Assembly left some unresolved contentious issues. Some of the issues were resolved by the committees themselves and others were resolved by the High Level Task Force (an informal 5 members mechanism within the CA) which was created to resolve contentious issues and Sub-Committee to the Constitutional Committee (also called the Dispute Resolution Sub-Committee). This committee was also created to minimise the gaps on key constitutions issues and suggest Constitutional Committee. These issues were resolved by the four major political forces on 15 May, 2012 (Annex 2), but the parties backtracked on this agreement within two days. This section sets out the key contentious issues that need to be discussed in the future.

Name, number and boundaries of provinces

The Committee on Restructuring of the State and Distribution of State Powers proposed 14 provinces and 22 autonomous regions. This is the most contentious issue and is widely considered to be responsible for failure of the Constituent Assembly to promulgate a constitution. Later, a High Level State Restructuring Commission was formed, led by Dr Madan Prasad Pariyar. The Commission was mandated to work only on unresolved issues. The Commission presented two different reports each proposing a different number of provinces. The majority members of the Commission (6 members) including the chair proposed a
10+1 model (10 geographical provinces and 1 non-territorial province for Dalit community), including 22 autonomous regions, focusing mainly on single identity provinces. The minority members of the Commission (3 members) proposed a 6 province model, focusing mainly on capability.

As well as failing to come to a consensus, the Commission was blamed for raising some issues that had already been settled by the thematic committees. These issues, which are related to the name, number, and boundaries of the provinces, remain contentious. However, the High Level Task Force and Sub-Committee to the Constitutional Committee of the Constituent Assembly had settled this issue on 15 May by proposing an 11-province model, leaving the naming of the provinces to be finalised by the provincial assembly, although this agreement was backtracked on by the political parties 2 days later (see Annex 2 for text of 15 May Agreement).

**Political preferential rights**

With regards to political preferential rights for the dominant ethnic groups, the State Restructuring Committee proposed at least two terms for leadership positions in the provinces (Article 13 of the preliminary draft). Similarly, the High Level State Restructuring Commission report proposed a single term in the autonomous region and for local level government, whereas the minority report suggested deleting this provision. The debate is about whether or not it is appropriate to give such preferential rights in heterogeneous communities. Furthermore, does the provision support ethnic federalism? If so, is ethnic federalism the right choice for Nepal? The risk is that such a provision may discriminate against other communities, effectively preventing them from participating in top-level positions in the provinces.

The State Restructuring Committee also proposed political preferential rights to the provinces on the basis of ethnicity and to the executive bodies of autonomous regions. The preliminary draft proposes that the political parties should give preference to the members of dominant ethnic communities during elections and while forming provincial governments to make them the heads of the respective provinces. For example, 6 provinces (out of 14) were proposed on the basis of a single identity. Political preferential rights were meant for those communities only – and it was proposed that such preferential rights would be applicable for only two terms. This issue became contentious and some suggested removing the phrase ‘political preferential rights’ entirely.

The State Restructuring Commission (majority report) proposes that autonomous regions be created under the special structure (autonomous regions) only for a single term (HLCSR, 2011, Section 13). This refers only to those ethnic communities for whom autonomous regions are proposed. For example, 22 autonomous regions are proposed by the State Restructuring Committee of the
Constituent Assembly along with 14 provinces. In comparison, the report of the minority group of the Commission suggests the scrapping this provision.

Finally, major political parties and ethnic communities informally agreed to drop the political preferential rights if all political parties were prepared to accept the demand of ethnic groups for recognition of identity. However, this issue created divisions among the different political parties and stakeholders as proponents/supporters of this idea are still advocating for the preferential rights. Proportional representation at each level of state structures has already been accepted by all and some of the proposed rights-based commissions would also serve to ensure this objective.

Forms of governance

The Committee on Determination of the Form of Governance of the State made three proposals for the form of the executive government, but none with majority support. The issue was resolved by the high level political mechanism (an informal mechanism to resolve contentious issues created under the leadership of top leader of the biggest party – Puspa Kamal Dahal “Prachanda”- This mechanism was turned into the sub-committee to the constitutional committee later as there were criticism that, political parties are dragging the constitution building process towards informal mechanisms avoiding the Constituent Assembly itself), agreed on a mixed model, under which the president would be elected directly by the people and the prime minister would be elected by the legislative parliament. It was also agreed that the governance structure should be based on parliamentary supremacy (Section 13, majority report of State Restructuring High Level Commission).

Electoral system for federal and provincial legislature

The Committee on Determination of the Form of Governance of the State was also divided over the electoral system. The first proposal with 18 votes was in favour of direct proportional representation on the basis of proportional inclusion, to be determined according to the population, geography and social economy. Under this system voters would have to cast their votes according to the number of the candidates.

The second proposal with 16 votes was for a mixed-member proportional representation electoral system with 50% of the members elected through FPTP in a single member constituency. The candidacy was to be ensured on the basis of the principle of proportional inclusion, representing women, indigenous people, Dalits, Madhesis, and other groups and communities. The rest of the members were to be elected through proportional representation, representing women, Dalits, Madhesis, indigenous people, and other classes and community groups. In this system, the whole country is considered one constituency.
The third proposal, which received three votes, recommended the FPTP electoral system for the lower house by ensuring candidacy on the principle of proportional inclusion so as to represent women, Dalits, Madhesis, indigenous people, and other caste and community groups. The controversy was over the percentages under the different electoral systems (FPTP and PR) in the central legislature as some of the parties proposed 50% each and others were for a fully proportional system.

**Form of Legislature**

The Committee on Determination of the Form of the Legislative Organs proposed a bicameral legislature for the centre and a unicameral legislature for the provinces. However, some Constituent Assembly members from the same committee submitted different views, stating that a unicameral legislature would create confusion. On 15 May, 2013, the high level political mechanism (an informal mechanism as stated above) accepted a bicameral legislature for the centre and proposed a symmetrical model for the upper house. It also accepted that the lower house would be composed through a mixed electoral system with 171 member (55%) elected through the FPTP system and 140 members (45%) through proportional representation. The mechanism agreed that the upper house would be formed with a symmetrical model with 5 members elected from each of the provinces and an additional 10 members nominated by the president on the recommendation of the council of ministers. However, the agreement of 15 May, 2012 was backtracked on and the issue remains contentious.

**Land reform**

The Committee on Distribution of Natural Resources, Financial Powers and Revenue proposed that the State may acquire or take measures for the acquisition of land belonging to an individual or organisation that exceeds the legal ceiling according to the prevailing law, while also implementing a scientific/revolutionary land reform policy. There was debate as to whether or not there should be a scientific or a revolutionary land reform policy in Nepal. The debate was mainly focused on compensation and the situations when the state could seize land for national purposes. The UCPN (Maoist) proposed revolutionary land reform citing that the state is the sole owner of the land and, therefore, can seize it in times of need without compensation. Other political parties opposed this view claiming that the right to property is an individual right and that if the state did seize property in times of need, reasonable compensation should be provided to the landowner.

**Constitutional bodies**

The Committee on Determination of Structure of Constitutional Bodies proposed 11 constitutional bodies. There was debate over whether Nepal should have such
a large number of commissions with constitutional status or less commissions with more authority. Another major point of discussion was whether or not there can be more than one commission for human rights under the Paris Principle 1993, which provides the basis for the creation of national institutions for the protection and promotion of human rights. The Paris Principle provides guidelines for the creation of an independent and accountable human rights institution by ensuring inclusion/pluralism in their formation, providing sufficient power to the commission and ensuring its financial independence, among other things. It was suggested to address some of these issues through ad hoc commissions, legislative commissions, or other mechanisms. Some experts are concerned that other communities may start demanding constitutional status. Another issue is how to minimise the overlapping jurisdictions among the 11 proposed rights-based commissions. One solution would be to form an umbrella commission to address such issues with representations from each marginalised community.

Following extensive discussions, the High Level Task Force and the Sub-Committee to the Constitutional Committee headed by Puspa Kamal Dahal were close to reaching an agreement to propose only one commission called the Gender and Social Inclusion Commission, but the decision was never made public.

**Constitutional court**

A constitutional court was proposed by the State Restructuring Committee. Unfortunately, it was not proposed by the Judicial Committee. Article 11 of State Restructuring Committee report proposes that:

> …if any dispute arose among federation and state, state and state, state and local level, state and special composition, and local level and areas of special composition over the enlisted rights of constitution or on the topic of interpretation of the Constitution, the constitutional court shall have the right to initiate action and settle such dispute.

(CRSDSP, 2010)

The judicial community was not in favour of a constitutional court and argued that the Supreme Court would be able to perform the work proposed by the Committee. It was also argued that in a system that followed the common law, it was almost impossible to have conflict between the Supreme Court and the constitutional court. There was also the possibility of confusion as to which court was supreme owing to the nature of the work.

Supporters argued that the constitutional court would be a specialised court and that Nepal needs such specialised courts, especially in a federal set up. Regular courts would not be able to address political and technical issues. There may be a number of new issues in the future over boundaries, competencies and ownership over natural resources among the centre, the provinces and local tiers
of government, and these issues will be highly complicated and entirely new in a federal set up. A regular court might not be competent enough on such technical issues and the heavy caseload of the regular courts would be another factor to consider.

There is still debate on the need for a separate constitutional court and some have suggested that a constitutional bench within the Supreme Court could serve the same purpose. Eventually, the major political parties reached an agreement by four major political forces on May 15, 2012 to have a constitutional court for five years only, chaired by the Chief Justice of the Supreme Court of Nepal. Two senior-most judges of the Supreme Court of Nepal and two members from among lawyers who are eligible to be judges of the Supreme Court would be members of the court. The constitutional court would have the jurisdiction to look into the disputes between provinces, or between the Centre and the provinces, or between a province and local government. It was proposed that the court’s jurisdiction would be to interpret the list of competencies only.

So, such a provision would not fulfil the purpose of the constitutional court because there are a number of problems with this proposal. The first lies with the timeline. It is expected that cases would start to come into the constitutional court following the establishment of the provinces and local level government, which might take around five years. If the court were to be dissolved after five years it might be too soon for it to hear any cases. The second problem lies with the court’s composition: the chief justice and two senior Supreme Court judges would serving as the chair and members of the court.

**Official language**

The Committee on Determination of Bases of Cultural and Social Solidarity proposed that the Nepali language in Devanagari script should be the official language of central government. However, there were many differing views suggesting that Nepal should adopt a multi-lingual policy. There was even a proposal that Hindi with Devanagari script be one of the official languages of the central government. The issue was resolved with an agreement to introduce a two-language policy. This policy accepts that if the Language Commission recognises some other language(s) as per the set criteria then such language would also be accepted. However, it was decided that the formal language of the law courts and official language for communication between the centre and provinces would be Nepali. At least three languages have been demanded by different communities, which have been concerned about Nepali as the official language and demanded that their mother language be recognised even in the courts.

**Interpretation of the constitution**

The interpretation of the constitution is also a contentious issue. The Committee on Judicial System of CA – I proposes that the Federal Legislature Special Judicial
Committee should have the power to interpret the constitution, federal laws and matters relating to position of people of national importance along with matters that directly concern politics. Differing views were submitted by some of the members in the committee itself from CPN-UML and NC that the power to make final decisions on the interpretation of the constitution and other laws should vest in the Supreme Court.

**Retrospective laws**

The ex post facto clause generally prohibits states from enacting any law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when it was committed. In general, the making of a law that acts retrospectively to cover previous crimes is not permissible under international human rights law. However, Constitutional Conventions indicate that, the clause should cover the retroactive application of all laws, including civil laws. The only exception discussed at the Constitutional Convention was in the case of necessity and public safety. This provision was part of dissenting opinion proposed by Pradeep Gnavali and Gagan Thapa in relation to serious crimes as indicated by the Rome Statute 1998 (CFRDP, 2010). Nepal is going to be a member of the International Criminal Court and the country has witnessed some serious crimes on its soil including war crimes, genocide, crimes against humanity and crimes against aggression (Article 5, Rome Statute, 1998). The intention was to control such heinous crimes in future, but the fear among members of the UCPN (Maoist) and some other parties is that other political parties may intend to punish them for events during the decade-long armed conflict. This intention needs to be clarified among the concerned stakeholders.

**Qualification of chief justice**

The Committee on Judicial System proposes that the chief justice of the Supreme Court could be appointed from eligible persons who have no previous working experience as a judge of the Supreme Court. Some members proposed that the chief justice of the Supreme Court should be appointed from among the justices of the Supreme Court because s/he would already have experience of the judicial system. However, this has given rise to hot debate about the necessary qualifications of the chief justice. This issue was resolved by accepting the principles of independence of judiciary by ensuring that the CJ will be appointed on basis of career judge and separation of power will be maintained.

**Re-appointment of judges**

The Committee on Judicial System proposes that the chief justice and other judges working in the Supreme Court, Appellate Court and the District Courts shall cease to hold office if they are not re-appointed within three months after the commencement of the new constitution. The re-appointment of judges
remains a contentious issue. Some Constituent Assembly committee members submitted differing views stating that the issue of re-appointment does not fall under the jurisdiction of the Committee on Judicial System. This issue was also settled by the High Level Task Force and Sub-Committee of the Constitutional Committee by removing the proposed problematic provision.

Other issues

In addition to the abovementioned key contentious issues, there are several other important issues that need to be resolved at the political level. Almost all of these issues have been addressed by the political parties in various discussions, including discussions held in the meetings of the Constitutional Committee, Sub-Committee and the High Level Task Force. However, agreements reached on these issues have not been formalised in the draft constitution itself. One of the issues relates to the ability of a foreign national who marries a Nepali citizen to obtain Nepali citizenship. The others include: Should the principles of basic structures in the constitution as non-amendable provision be accepted as expressly stated? How would the council of ministers be formed? Who would be the chairperson of the council of ministers (the president or prime minister)? Would the head of the state be executive or ceremonial? Under what conditions would the head of the state and the prime minister cease to be in office?

EFFORTS BY POLITICAL LEADERSHIP

To hasten the constitution-making process, targets were set and Constituent Assembly members systematically mobilised to move the process ahead in the Constituent Assembly Rules of Procedure. As a result, all 10 thematic committees and the Constitutional Committee completed their preliminary drafts.

A Concept Paper and Preliminary Draft Study Committee was formed within a year of the election of the Constituent Assembly (on 13 May, 2009) with the mandate to review the thematic committee reports and identify overlapping and leftover issues, while also making recommendations for revisions, if any, to the committee reports. In view of the political deadlock, the Study Committee made an attempt to seek political consensus among the parties by developing around 15 questions on each committee report relating to disputed issues. Finally the committee was able to identify 210 questions in yes or no format for 7 of the thematic committees and 76 questions for the State Restructuring Committee. The Study Committee then submitted its reports to the Chairperson of Constituent Assembly and the Constitutional Committee and the high level political mechanism began to resolve the issues by identifying gaps and overlaps.

A seven-member High Level Task Force headed by President Puspa Kamal Dahal of the UCPN (Maoist) party was constituted with members from the seven main
political parties represented in the Constituent Assembly. The High Level Task Force was given the responsibility of making decisions on contentious issues. In addition, a support team comprised of people with a legal background was formed to assist the High Level Task Force in constitutional negotiations.

Later, a Sub-Committee of the Constitutional Committee (called the Dispute Resolution Sub-Committee) was formed to resolve the remaining contentious issues, as identified by the Report Study and Analysis Committee. The Sub-Committee to the Constitutional Committee and the High Level Task Force were able to resolve most of the contentious issues.

The three most contentious issues – federalism, form of government and electoral system – were resolved on 15 May, 2012 (see Annex 2) by the four main political forces, the UCPN (Maoist), Nepali Congress, CPN (UML) and United Madhesi Front. Regarding the most contentious issue, state restructuring, the parties had reached what they called a preliminary agreement to structure the country into 11 provinces, whose name and boundaries could be settled by future provincial assemblies and by the proposed federal commissions or through a referendum. There was also an agreement for a mixed-form of executive body (a directly-elected president and a prime minister elected by the legislature parliament) and mixed electoral system (a house of representatives with 171 directly-elected members and 140 members elected through proportional representation and a National Assembly with 5 elected members from each province and 10 members nominated by the president at the recommendation of the council of ministers from among esteemed personalities who have made significant contribution to society) (see Annex 2 for further details). Following protests by some of the Madhesi parties, janajatis and Brahmin/Chhetri groups who were not consulted by the party leaders in this regard, the agreement was later nullified.

The drafting of a constitution by consensus is a time consuming process. The constitution-making process of Nepal was stalled when a consensus could not be reached by 12 May, 2012. However, the need for consensus cannot be bypassed; it is important to make the process participatory to ensure ownership of the new constitution by the people and, therefore, a sustainable outcome.

**EXTRACTING LESSONS FOR THE FUTURE**

Despite the significant contribution of the political leaders and the former Constituent Assembly members, the fact is that they were unable to produce a new Constitution within the term of the former Constituent Assembly. Some lessons can be drawn from the constitution-making process so far as there were some process-oriented problems as well as polarised views on contentious issues. Dr Surendra Bhandari pointed out that the unfortunate failure of the Constituent Assembly was caused by four basic factors: the redundant role of the Constituent
Assembly (as Constituent Assembly and Legislative Parliament at the same time), faulty discourse, the crisis of constitutionalism, and democratic deficit (Bhandari, n.d.: 20 & Bhandari, 2012). There was also a dearth of the charismatic leadership that could steer the process. This section discusses some of the main factors that contributed to the failure to produce a new constitution.

**Unexpected result of the Constituent Assembly elections**

The Constituent Assembly election resulted in 9 political parties and 2 independents taking 240 seats and another 25 parties taking 335 proportional seats. The 26 remaining seats were filled by nominees of the Cabinet, thus, making a total of 601 seats. The results hinted at the need for political parties to build consensus to make the assembly a success. The then CPN (Maoist) had the highest number of seats, but short of an absolute majority. However, the party ultimately did have a strong enough voice based on the election results.

The CPN (Maoist) party had not expected to get so many of the assembly seats including from proportional representation. Similarly, the Nepali Congress expected the UML votes to split and go to the CPN (Maoist). The UML thought it would get an absolute majority because of the merger with its splinter party. At the same time, the Tarai-based parties emerged as the fourth political force in the country. The unexpected results surprised many political analysts around the globe. It was equally shocking and a severe blow, not only to the country’s major political parties, but also to donor agencies and our neighbour countries.

Apart from some of the leaders of the CPN (Maoist) and some Tarai-based parties, most of the senior leaders of major political parties (Nepali Congress and UML) were defeated in the first-past-the-post part of the election. Most of them were the major players in the 12 Point Agreement and the Comprehensive Peace Agreement signed in New Delhi in 2006. Unfortunately, they had no or little faith in the Constituent Assembly, despite the fact that some of them had played a substantive role in the constitution-building process. To ensure their inclusion in the Constituent Assembly, most of these major leaders were included through the proportional representation system.

**Setting the name of the game**

Of course the different political forces have different interests based on their political ideologies and past commitments. Some experts from Nepal’s legal community admitted that they were not sure whether they were going to frame a new Constitution based on a capitalistic form of democracy or based on socialism with a communist philosophy. Some of the debates in the committees were founded on these norms and values as the Nepali Congress and UML were advocating for pluralism and the UCPN (Maoist) against.
Similar debates were centred on land issues and whether a revolutionary land reform policy should be adopted or a scientific one. Some opposed and criticised the UCPN (Maoist) when they insisted on using the word ‘people’ and calling it a ‘people’s constitution’. A renowned constitutional lawyer and former Attorney General, Mr Badri Bahadur Karki, frequently shared (in various public programmes including one organised by UNDP/SPCBN jointly with Supreme Court Bar Association) that a lawyer can only write the rules of the game if you tell him/her the name of the game. The entire debate was concentrated on setting the constitutional principles in advance as much as possible in the initial phase (during the drafting of the Interim Constitution).

Constitutional principles played an important role in the development and implementation of the South African Constitution, which is a pertinent example of a constitution produced through a participatory process. In South Africa, they set out 34 fundamental and legally binding principles during the political negotiation (contained in Annex 3). These principles served not only as a foundation for the Interim Constitution, but also as a framework for negotiating and drafting the 1996 Constitution. Before the 1996 Constitution came into force, the Interim Constitution required the newly constituted Constitutional Court to certify that the 1996 Constitution complied with all 34 fundamental principles. The binding commitment made to these principles exemplifies how legal safeguards can entrench certain norms in the constitutional order: the 34 principles established by the Interim Constitution guided and, perhaps more importantly, limited the scope of negotiations concerning the final text of the 1996 Constitution. The South African Constitutional Court rejected the first draft of the 1996 Constitution because it did not fully uphold the 34 principles (Hedling, 2011: 6–7).

Designing a constitution-making process on the basis of such principles has a range of benefits, including providing a framework within which divided groups can work toward consensus to address the causes of conflict and a governance framework that promotes durable peace. The guiding principles also influence the content of the constitution by reflecting the concerns and rights of minorities; informing constitution-makers of the aspirations of the people; create political space for the emergence of new actors and strengthening civil society actors; build trust between communities and leaders through dialogue; educating the public about constitutionalism; improve public ownership of the resulting constitution; lay the foundations for democratic and participatory government and a culture that respects the rule of law; enhance public willingness to defend the constitution and achieve its implementation; and contribute to future conflict prevention and transformation by encouraging conflict resolution through constitutional means (Brandt et al., 2011).

The setting of the ‘name of the game’ did not entirely happen in Nepal. However, there was debate during the drafting of the Interim Constitution of Nepal in late 2006 as to whether or not the Constituent Assembly should be bound by certain
principles. Eventually, it was agreed that the Constitution Assembly was a unique body mandated to produce a new constitution and that it should not be bound by any conditions. It is also true that Nepal has had a long constitutional history and has already produced six constitutions including the Interim Constitution of Nepal, 2007.

The Interim Constitution had the mandate of the People's Movement II (Jana Andolan II) and of the decade-long armed conflict waged by the CPN (Maoist). Thus, it can be said that such principles had already been included in the Interim Constitution of Nepal. However, it would have been much easier to settle some of the key contentious issues, such as the form of government, federal units (name, number and boundaries), structure of legislative bodies, electoral system, and so forth, if the parties had agreed in advance during drafting of the Interim Constitution of Nepal, 2007. If this had happened Nepal never have had to pay the price of failure to produce a new constitution within the slated time.

**Formation of committees and leadership**

The thematic committees of the Constituent Assembly were not led by top political party leaders in Nepal. This created problems with leadership, particularly in forming a consensus on contentious issues. In India, Jwaharlal Nehru led at least three committees (National Infomatics Centre nd) and, in South Africa, Nelson Mandela headed some of the committees – and both India and South Africa are examples of countries with successful participatory constitution-building processes. The thematic committees’ terms of reference were another problem as there were many points of overlap between the terms of reference of the different committees. In addition, the procedural committees were fighting with each other and not able to identify their real task during the constitution-making process.

However, some committees were led by political leaders. Mr Madhav Kumar Nepal was the chairperson of the Constitutional Committee before he became the Prime Minister; afterwards Mr Nilambar Acharya headed the Committee. Interestingly, the Sub-Committee of the Constitutional Committee (the Dispute Resolution Committee), was chaired by the top leader of the largest political party and its members were the top leaders of the major political parties. However, even this committee, which definitely had sufficient political weight, was unable to resolve all contentious issues. The failure of the Constituent Assembly to promulgate a constitution exposed the weakness of the committee system and its leadership mechanism.

**Public expectations**

Raising the expectations of the public and then leaving these expectations unfulfilled left the people of Nepal frustrated and disillusioned. ‘Spoilers’ were becoming stronger day-by-day due to the complexity of some of the issues and
the way major political parties and actors dealt with such issues. It became clear that the promulgation of the new constitution by 27 May, 2012 was unlikely, if not impossible, yet the leaders of the main political parties were unwilling to admit this fact, fearing protests and agitation. Promises that federalism would address all of the country’s problems and then failure to deliver on these promises was a major flaw in the constitution-making process. Moreover, too many agreements had been signed between and among different groups, some of which were contradictory, for example, the agreement with the Tharu communities and Akhandha Far Western team were entirely opposite to each other.

**Looking for effective leadership**

Nepal is presently off the normal political and constitutional course. Concluding the peace process and writing a new constitution through a participatory process was a challenging task. For that, Nepal needed an effective political leadership. People expected such leadership from the existing political leaders. A participatory and inclusive constitution-making process requires strong political leadership, such as enjoyed by South Africa during its constitution-making process. Unfortunately, Nepal’s political leaders lack vision and statesmanship, and were not equal to the task at hand.

The failure of the Constituent Assembly has led to widespread disenchantment among the people. Toni Hagen points out that:

> …democracy as such, is neither good nor bad; but there are human beings behind the ruling political parties, and also behind the opposition, and they may use democracy for the good of the people or to their detriment. Parliamentary opposition can be constructive or destructive opposition. Political alliances may turn good or bad for the people.

*(Hagen, 2012)*

Ultimately, strong and charismatic leadership is needed to conclude the complicated constitution-making process.

**Geopolitical conditions**

Nepal’s strategic location, fragile state institutions and unstable politics have invited competitive geopolitical pressures, which have affected the constitution-making process and political stability in the country. India’s strategic interest is to reduce Chinese, European and American influence in Nepal. India herself is also facing demands for many new Indian provinces, such as Telangana (in the centre) and Gorkhaland (in the northeast), among others. The fear in Nepal is some of the political parties are proposing bigger number of provinces and there are chances that, people from different locations and ethnicities may demand more provinces later as identity based provinces may not be able to satisfy all communities as
once. India wants a minimal number of provinces in the Tarai, whereas China has openly opined that ethnic federalism is not fit for Nepal. The political parties have agreed to balance identity and viability while restructuring the state.

China has also expressed concerns over the rise of pro-Tibet activities organised by Tibetan communities, human rights NGOs and a few political leaders. It has expressed a desire to help strengthen the capacity of the Nepalese army and police. China has increased the frequency of its high-level visits and is up scaling investment in infrastructure and hydropower. Its immediate interest is to neutralise the converging interests of India, the European Union, and the United States on Tibet. The European Union is helping Nepal in its transition to peace and a constitutional democracy, while upholding human rights and social justice, but some of its projects have been heavily criticised for supporting ethnic and regional forces. The United States foreign policy differs from that of China and India, but emphasises the need for constructive engagement with both. There is a great deal of confusion in Kathmandu concerning how to deal with this increased geopolitical activity.

Different national and international stakeholders have expressed some genuine concerns about their security. However, Nepal has principally agreed to adopt democracy, rule of law, a participatory constitution-making process, respect for human rights and inclusion. While Nepal should respect the genuine concerns of its neighbours, it should not hesitate to decide on its internal affairs on the basis of popular will and national integrity.

**Myths and misconceptions on key constitutional issues**

Almost all political parties agreed on identity and viability as the two major bases of federalisation in Nepal and have not backtracked from this decision (Section 4.1.2 of the State Restructuring Committee Report: 20–21 & Committee Report, 2009). Identity and viability were also accepted by the majority and minority report of the Commission on State Restructuring. However, problems have cropped up as to how to balance identity and viability while determining the name, number and boundaries of the proposed provinces. Unanswered questions include: Should there be single or multiple identities or a common identity in each province? How should single, multiple and common identities be defined?

One of the main issues is the identification of the ‘ethnic peoples’ or ‘ethnic groups’. At present, there are 59 groups listed as adibasi/janajati in the National Foundation for Upliftment of Adibasi/Janajati Act, 2058 (2002). But do only these listed adibasi/janajatis come within ILO 169, or is the convention meant to globally cover all indigenous peoples to improve their status?

Looking at the United Nation definition of indigenous peoples, one can easily come to the conclusion that in our modern world only a few groups can claim to be indigenous. ILO Convention 169 identifies indigenous people as those people
who practice distinct social, economic, cultural, and political institutions. This definition emphasises describes indigenous peoples as (Article 1[1] and [2] of ILO 169):

- tribal peoples in independent countries whose social, cultural or economic conditions are distinguished;
- people whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
- inhabitants of a geographical region to which the country belonged at the time of conquest or colonisation and/or inhabitants of a country at the time of the establishment of present boundaries; or
- Self-identification.

Most of the parts of this definition also fit the Brahmins and Chhetris of Nepal. Hence it is debated whether or not this Convention really applies to Nepal.

Another hot debate is over the right to self-determination. This right has been accepted by the political parties, but has been defined differently by various interest groups. There is confusion about whether the right to self-determination referred to in the preliminary draft reports of the committees is the same as that defined in Article 1 of the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights 1966, or if it is more than that? Does it include the right to secession as provided by the Ethiopian and Russian constitutions as per ILO 169 and the United Nations Declaration on the Rights of Indigenous People? The answer is obviously no, but there is still a rumour among different communities that they may be entitled to secession. This needs to be clarified to those who are opposed to the idea of self-determination. The concept of self-determination was also misused in Kailali and Kanchanpur areas during the far western movement in April-May, 2012, which added to the confusion.

Federalism involves self-rule and shared rule; however, shared rule has not been highlighted during discussions. Advocates of self-rule were not able to convince other communities that federalism was also about shared rule. Potential spoilers portrayed federalism as being all about self-rule, which created tension in society and problems within political parties. Balancing between self-rule and shared rule and clarifying myths and misconception is the only strategy to provide the constitutional framework with a democratic identity that is coherent enough to counter-balance secessionist movements.

There are also misunderstandings about multiculturalism and some perceive it is a problem per se (Saxena, 2011), which is empirically wrong. Multiculturalism only becomes a problem if multicultural properties cumulate into segmentation, which is not the case in Nepal. Federalism, in other words, neither means that each will automatically be given according to his/her needs, nor that it is the survival of the fittest. It is an understanding of mutual rights and responsibilities,
enhanced and nurtured by a process of communication and negotiated agreement (Hueglin, 2011).

Similarly, the issue related to the form of government was also not conveyed neutrally. It is true that, there are pros and cons with each model. However, the political parties did not discuss the essence of each model; instead, they took positions. The presidential and parliamentary systems have both worked well in the United States of America and the United Kingdom, respectively, for a very long time. These systems are also working well in other countries. There advantages and drawbacks to each system. After much deliberation, the parties finally reached an agreement on a mixed model, which could be a disaster for a country like Nepal, as evidence by Sri Lanka, Russia, France and Finland, which have all adopted a mixed system and are facing huge problems inherent in the system.

The entire legal community was divided over the Constitutional Court proposed by the State Restructuring Committee. Ultimately, it was accepted to keep the judiciary independent and accountable as a compromise solution between the major political parties. Myths and misconceptions were created about the court, including that the court can override the jurisdiction of the Supreme Court of Nepal and there will be serious conflicts among the Supreme Court and the Constitutional Court on their status and the jurisdiction. These claims are unfounded.

Similarly, there was heated debate on the composition of the legislative parliament and issues related to inclusion. Even though there was much focus on proportional representation for inclusion, it was not practised even in the FPTP system. It was not communicated clearly that adequate inclusion could have been achieved by different means. The threshold in the electoral system to recognise parliamentary party was another problem; it was said that such a provision would exclude small parties, but would create an opportunity for likeminded parties to unite and become much stronger. These issues were not clarified by the major stakeholders.

Other myths surrounded citizenship, land reform, the number of constitutional bodies, and ex-post facto law, among other things. Not having dialogues on such serious issues was one of the major causes of the failure of the Constituent Assembly to produce a new constitution. It is clear that “consensus-based federalised democracy proves flexible and inclusive enough for far reaching reforms” (Saxena, 2011), but it was hard to convince all of the stakeholders of this idea.

**Striking a balance between different ideologies**

None of the 25 parties in the Constituent Assembly had a majority. The largest party, the UCPN (Maoist), won around 30% of seats through PR and 50% through
FPTP. The then CPN (Maoist) had joined mainstream politics after waging a decade-long armed insurgency with the agenda of ‘neo democracy’ (in Nepali, naulo janabad) and communism as the final destination. The UCPN (Maoist) party opposed the parliamentary system and advocated for a presidential system. The Nepali Congress and CPN (UML) advocated for a reformed parliamentary system, even though the UML was initially for a directly-elected prime minister. The Madhesi Janadhikar Forum, the third largest force in the Constituent Assembly, together with the other Madhes-based parties were advocating for ‘One Madhes One Pradesh’ (one Tarai province). Rastriya Janamorcha was against federalism, while the Rastriya Prajatantra Party (National Democratic Party) advocated for a constitutional monarchy and Hindu kingdom. Thus, some advocated for radical communism and others for moderate communism; some for republicanism and others for a constitutional monarchy. Similarly, some parties wanted federalism, while others were against it. The Constituent Assembly was made up of ultra left through to ultra right parties, royalist, federalist and anti federalist, and identity-based federalist through to viability-based federalists. This created a lot of division and was an obstacle to consensus.

Power politics versus constitution building

Frequent changes in the government exposed the degenerating nature of Nepali politics, which was engaged in ‘horse trading’, blackmail, the abduction of incumbent ministers and lawmakers, conspiracies, and the manipulation of constitutional loopholes, among other things. Democracy in Nepal has suffered from the weakening of political norms and values, the erosion of the quality of leadership, power-centric intra-party conflicts, unhealthy inter-party competition, the cynical manipulation of constitutional provisions, unstable and often changing governments, incompetent governance, excessive political intervention, particularly in the bureaucracy and educational institutions, pervasive corruption and mismanagement, and irresponsibility and lack of accountability in the public sphere (Hachhethu, n.d.).

According to the Interim Constitution of Nepal 2007 (Article 82, the Preamble and Chapter 7), the objective of the Constituent Assembly is to produce a new Constitution by adopting a participatory approach as set out in Article 70 of the Interim Constitution 2007 and Constituent Assembly Rules of Procedure. However, the leaders of the major political parties were more focused on the formation and dissolution of governments. There were four governments during the four-year term of Constituent Assembly/Legislative Parliament and 17 rounds of unsuccessful elections within the Constituent Assembly to elect a new prime minister. Stakeholders commented that Nepal would have produced a new constitution if the leaders of the major political parties had not focused so much on leading the government.
Role of judiciary

The timeline for producing constitutions varies from country to country. The constitutional convention in the United States took nearly 4 months and a further 40 months for all of the states to ratify it. The Indian constituent assembly lasted from 1946 to 1949. The Eritrean process took 38 months from the proclamation of the constitutional assembly to the ratification of the constitution. The South African process took five years from the beginning of multiparty negotiations to the adoption of the final constitution. The Ugandan commission worked from 1989 to 1993 to prepare a draft constitution and the final constitution was adopted in 1995. There were several reasons for the length of time the Ugandan process took, including the time needed to carry out extensive public consultations as required by law, the establishment of the commission, and lack of resources. In Timor-Leste the original timetable was completely unrealistic and had to be extended.

The timeline given to the drafters of a constitution should be carefully considered and set out in the constitution itself, because a short timeframe may limit public participation and give the impression that the process was manipulated. Similarly, a long timeline may unduly stretch the process out. The Interim Constitution of Nepal, 2007 sets out a clear timeline for the Constituent Assembly: “unless otherwise dissolved earlier by a resolution passed by the constituent assembly, the term of the constituent assembly shall be four years from the date of its first meeting”.

When asked to extend this term, the Supreme Court of Nepal considered three different precedents. In an earlier case, a special bench composed of Hon. Justice Balaram KC, Girish Chandra Lal and Prakash Wosti were in favour of extending the term of the Constituent Assembly by amending Article 64 by the legislature. However, another special bench composed of Chief Justice Khilaraj Regmi was against this earlier decision.

In earlier case, it was interpreted that the whole purpose and spirit of the Interim Constitution was that the Constituent Assembly would write the constitution. This spirit is reflected in the Preamble of the Interim Constitution. If the Constituent Assembly term had not been extended, it would have failed to uphold the spirit of the constitution and resulted in a constitutional crisis. The constitutional provision cannot be interpreted in a way that, may have a regressive impact on the Constituent Assembly’s constitutional obligations. SC further elaborates its decision by saying that, It cannot be argued that the constitution was not written in the specified timeframe means or results that constitution is not necessary or Constituent Assembly should be dissolved or it should be ended. Provision of a written constitution within two years of Article 64 was not mandatory, but directory, and that article 64 should be interpreted in relation to Article 33 and Article 82 in a purposive and harmonious way. While making amendments to the constitution in accordance with Article 148 of the Interim Constitution 2007,
the Legislative Parliament exercises its constituent power. Thus, making an amendment to the constitution is not a general legislative function.

However, in the later case, the Supreme Court of Nepal directed the Legislative Parliament to prevent the extension of the Constituent Assembly deadline through amendment to Article 64 of the Interim Constitution, as it had already been amended thrice and the term of the Constituent Assembly extended for one and a half years. The Supreme Court allowed a once off extension and gave three other options: fresh elections, a referendum, or any other appropriate measure. There is a serious constitutional question in Nepal as to whether the Supreme Court was within its jurisdiction to dictate a sovereign constituent assembly/legislative parliament on a constitutional amendment. The actions of the Supreme Court could be construed as judicial anarchism in the name of judicial activism. Although the decision of the Supreme Court was popular in Nepal as the people were very frustrated with the political party leaders, constitutional lawyers and politicians were divided over the jurisdiction of the Supreme Court to make such a decision. The decision of the Supreme Court was clearly against the principle of separation of powers (between the legislature and judiciary in this case) and, in one way or another, was responsible for the dissolution of the historic Constituent Assembly of Nepal.

OPTIONS FOR CONSTITUENT ASSEMBLY-II

Looking back at the Nepalese constitution-making process, the following four options are recommended for the Constituent Assembly-II (in order of priority):

Option 1: Form a task force and drafting committee to draft a list of agreed and contentious issues to put before the new Constituent Assembly, followed by public consultations and finalisation of the new constitution.

A task force and drafting committee should be formed simultaneously and immediately after (or before) the Constituent Assembly-II elections to draft a document to consolidate the gains made by the earlier Constituent Assembly. This document setting out the agreed and contentious issues should be put forward as an agenda for the first meeting of the new Constituent Assembly and approved as the guiding principles for its work. Key contentious issues could also be discussed in the task force and/or drafting committee. Both the task force and drafting committee should be supported by an expert team from different fields including constitutional law, human rights, political science, geography and economics. The committee system should be dropped as the earlier Constituent Assembly committees have already achieved their goal of writing the preliminary drafts, but Article 70 of the Interim Constitution of Nepal, 2007 could still be followed to ensure a participatory process.
After reaching an agreement between the major political forces in the task force and/or the drafting committee on contentious issues, the document could be put directly before the Constituent Assembly plenary to obtain the theoretical approval of the Assembly on the draft constitution. After approval of the draft by a two-thirds majority of the Constituent Assembly, the document could be published for public consultation. The draft constitution should be published as an official document in the different languages of Nepal and widely disseminated across the country. Teams should be formed from the members of the Constituent Assembly to conduct three months of public consultations on the draft constitution in the districts. One or two teams should cover each district, supported at all times by a team of experts formally constituted according to the Constituent Assembly Rules of Procedure.

The feedback from public consultations should be analysed transparently by expert teams mobilised to analyse the submissions. The feedback would then be incorporated by the drafting committee into another version of the draft constitution. Clause-wise discussions on the draft constitution and approval by a two-thirds majority should be conducted as per the previous rule.

Three to six months should be allowed for preparation of initial draft and to resolve contentious issues; three months for public consultations, and three months for granting of final approval of the constitution. In total, an ideal time for Option 1 would be one year from the election of the Constituent Assembly-II.

**Option 2: Differentiating the role of the Constituent Assembly and the Legislative Parliament, while following the same process as stated in Option 1.**

After the promulgation of the Constitution, the Constituent Assembly should be converted into a Legislative Parliament; alternatively, the status of the Legislative Parliament and Constituent Assembly could be defined in the new constitution itself. The role of the Constituent Assembly or Legislative Parliament may be differentiated either through an election or through the decision of the joint houses in their first meeting. Alternatively, this agenda could be put forward in the first meeting of the Constituent Assembly and approved by the Constituent Assembly Rules of Procedure as proposed by the drafting committee or task force. This could also be changed through another order under the ‘Power to Remove Difficulties’ clause in the Interim Constitution 2007, however, this option is not preferable.

After promulgation of the new Constitution, the Legislative Parliament may either be dissolved or extended a few times (2–4 years) as per the transitional arrangement set out in the new constitution. However, the Constituent Assembly needs to be immediately dissolved upon promulgation of the new constitution. The Legislative Parliament should not be continued for a long time because the new constitution will contain different arrangements and the country should not be run on the basis of old constitutional provisions as it will create problems...
in the implementation of the new Constitution. It will take about one year for constitution making under this option.

**Option 3:** *Follow the previous model, but start with the first draft of the constitution.*

Reduce the size of the Constitutional Committee and rename it the Drafting Committee. Ensure an efficient team in the Drafting Committee to draft the constitution and sort out contentious issues with the full backing of an official team of experts. Focus only on key contentious issues after sorting out other disputed issues. Then draft the constitution within 3 to 6 months. Another draft could also be prepared to consolidate the gains of the Constituent Assembly-I, which may be approved by a simple majority of the first meeting of the Constituent Assembly-II. Conduct public consultations on the draft constitution and hold clause-wise discussions on the draft before presenting it for final approval.

**Option 4:** *Start the constitution-making process through the Constituent Assembly from the very beginning, but with fewer and more effective thematic committees.*

Start from the very beginning and redraft the Constituent Assembly Rules of Procedure by amending the relevant provisions of the Interim Constitution 2007. Form fewer, but more effective, thematic committees with the full support of formal expert committees as per the nature of the committee and the given terms of reference. The number of committees should be reduced by merging related committees together (such as committees dealing with the forms of the executive government, legislature, judiciary and electoral system). Different sub-committees could be formed, rather than having many thematic committees. The terms of reference of the committees should be redrafted, taking reference from the earlier Constituent Assembly, and the work could be started from an entirely new perspective. However, lessons should be learned from past mistakes. A participatory approach should be adopted as defined in Constituent Assembly Rules of Procedure and Article 70 of the Interim Constitution 2007. This process may take three to five years, depending on the composition of the new Constituent Assembly and the political leadership.

Option 1 and 2 are highly recommended, and Option 3 may also work. However, Option 4 undermines four year's work by the former Constituent Assembly and risks opening a 'Pandora's Box'. Furthermore, this option could be equally as time consuming as the first attempt by the first Constituent Assembly and may lead to another failure in constitution making.

**CONCLUSION**

Nepal can learn from the experiences of other countries in constitution making. Bolivia, for instance, recently made its constitution in a 24-hour marathon session. South Africa initially failed to write an acceptable constitution, which
was tested by the Constitutional Court based on the 34 Constitutional Principles. Kenya identified an alternative way of removing its constitutional vacuum and came up with a new constitution. These are just a few examples of successes and failures in constitution making.

Lack of involvement of senior political leaders at the initial stages of the drafting process resulted in a failure to build consensus on critical issues. These contentious issues needed to be addressed and moved forward. The dual role of the Constituent Assembly as a Legislative Parliament and the inability on the part of the leadership to strike a balance between power sharing and constitution writing side-lined the constitution-writing process. There was neither a review process nor a mechanism to assess progress in constitution writing. Moreover, no measures were taken to address the gaps in the CA rules of procedure. Furthermore, in order to avoid the possibility of interference from national and international agencies, the thematic committees chose to work independently, focusing more on their own terms of reference. At the committee level, a number of meetings were held before the finalisation of the thematic committees’ reports, however, not many inter-committee meetings were held to discuss overlapping issues.

A number of factors were responsible for the failure by the elected Constituent Assembly to complete the constitution including the raising of the people's expectations by the political parties; failure to set out basic principles regarding some of the key areas of constitution writing; and the formation of too many thematic committees with overlapping terms of reference. The other factors that contributed to the failed process were too much focus on power sharing rather than on constitution building; the unexpected election result and composition of the Constituent Assembly with no party having a clear majority; the geopolitics of the region; lack of statesmanship on the part of the political leaders; myths and misconceptions created during the constitution-making process; and judicial activism.

There is still some doubt among political leaders, civil society and the general public as to whether or not the Constituent Assembly-II will be able to produce a new constitution. There is a fear that the situation may repeat itself and produce the same unresolved issues. There is also concern that there will be a continuation of the coalition governments in Constituent Assembly-II, as there is a slim chance of any party obtaining a two-thirds majority in the upcoming election. Thus, the former process should be seriously reviewed, as the Nepali people cannot bear the price of failure again. The question is whether the new Constituent Assembly will be bound to follow the agreements reached by the previous one? If not, what options are available to prevent the political parties from backtracking on issues resolved by the earlier Constituent Assembly? If the new Constituent Assembly starts from scratch, it is bound to fail again. What will happen if the new Constituent Assembly also fails to produce a constitution? These questions need to be reviewed and analysed carefully during the process ahead.
REFERENCES


*Union of Soviet Socialist Republics Law of Secession 1990*. 
Annex 1: Nepal Constituent Assembly election results 2008 (last updated 4 May 2008)

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Annex 2: May 15th Agreement: “The agreement reached between the political parties regarding the promulgation of the constitution before 2069 Jestha 14 (27 May 2012)”

An agreement has been reached between the political parties to settle the major contentious issues of constitution writing in the following way.

A. Regarding federal structure
   1. All the provinces of Nepal shall be multi-caste/ethnic. In all the provinces, the political, economic and socio-cultural rights of all citizens belonging to different caste/ethnic, religious, cultural and language groups shall be equal.
   2. It shall be the responsibility of the central, provincial and local governments to respect and protect the fundamental and human rights of every citizen.
   3. There shall be 11 provinces. The names of the provinces shall not be proposed now.
   4. A Central Federal Commission shall be constituted to deal with matters pertaining to nomenclature and delineation of provinces, or how provinces would adjoin one another, or how a new province would be created from one province, or how a part of a province would be merged with another province.
   5. The parliament shall make the final decision (in this regard) on the basis of the recommendation of the Commission.
   6. The decision of the provincial assembly shall be final with regard to the nomenclature of provinces.

B. Regarding governance system
   1. There shall be a mixed governance system
   2. There shall be a directly elected president as provided for in law.
   3. The prime minister shall be elected by the parliament. The prime minister shall form the council of ministers. The council of ministers and its members shall be collectively and individually accountable to the parliament.
   4. There shall be supremacy of the parliament in the governance system. There shall be a system of check and balance in the governance system.

C. Formation of parliament;
   1. The parliament shall be formed through a mixed election system.
   2. The House of Representatives shall have 171 directly elected members and 140 members through the proportional representation.
   3. The National Assembly shall consist of elected members five each from each of the provinces. On the recommendation of the council of ministers, the president shall nominate 10 members to the Assembly from among esteemed personalities who have made significant contribution to the society.
   4. The election of the members of the provincial assembly shall be done by dividing one central parliamentary constituency into two constituencies.
   5. The formation of local governments shall be done according the provisions made in law.
D. **The Court**

1. A provision shall be made according to which a judge may become the chief justice irrespective of the remaining term his office.
2. The appointment of the judges shall be done through the judicial council.
3. The judicial council shall be headed by the chief justice and consist of two senior most judges, the minister for law and a representative of the Bar Association.
4. According to the Interim Constitution, existing judges shall not have to be reappointed in accordance with the new constitution. However, they will have to take the oath of office according to the new constitution.

E. **Constitutional Court**

1. A constitutional court shall be formed under the chairmanship of the Chief Justice.
2. The constitutional court shall consist of two senior most judges of the Supreme Court and two legal experts from among those who are eligible to be the judge of the Supreme Court shall be appointed by the President based on consensus and on the recommendation the council of ministers.
3. The constitutional court shall deal with disputes between the provinces, the dispute between the center and the province, and the dispute between the province and local government. The tenure of office of the constitutional council shall be for five years.

F. With regard to the demand that all the nine districts of Seti and Mahakali should be included in one province, the Seti Mahakali Province shall be delineated on the basis of the statements made by the senior leaders of the three major political parties and the views expressed by them. Public opinion collection may even mean the holding of a referendum on the basis of the commitments made by the political leaders.

2069, Jestha 2 (15 May, 2012)

I
The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.

II
Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution.

III
The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity.

IV
The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government.

V
The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.

VI
There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

VII
The judiciary shall be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.

VIII
There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters’ roll, and, in general, proportional representation.

IX
Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government.

X
Formal legislative procedures shall be adhered to by legislative organs at all levels of government.

XI
The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.

XII
Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognised and protected.

XIII
1. The institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common
law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.

2. Provisions in a provincial constitution relating to the institution, role, authority and status of a traditional monarch shall be recognised and protected in the Constitution.

[Constitutional Principle XIII substituted by s. 2 of Act 3 of 1994.]

XIV
Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy.

XV
Amendments to the Constitution shall require special procedures involving special majorities.

XVI
Government shall be structured at national, provincial and local levels.

XVII
At each level of government there shall be democratic representation. This principle shall not derogate from the provisions of Principle XIII.

XVIII
1. The powers and functions of the national government and provincial governments and the boundaries of the provinces shall be defined in the Constitution.

2. The powers and functions of the provinces defined in the Constitution, including the competence of a provincial legislature to adopt a constitution for its province, shall not be substantially less than or substantially inferior to those provided for in this Constitution.

3. The boundaries of the provinces shall be the same as those established in terms of this Constitution.

4. Amendments to the Constitution which alter the powers, boundaries, functions or institutions of provinces shall in addition to any other procedures specified in the Constitution for constitutional amendments, require the approval of a special majority of the legislatures of the provinces, alternatively, if there is such a chamber, a two-thirds majority of a chamber of Parliament composed of provincial representatives, and if the amendment concerns specific provinces only, the approval of the legislatures of such provinces will also be needed.

5. Provision shall be made for obtaining the views of a provincial legislature concerning all constitutional amendments regarding its powers, boundaries and functions.

[Constitutional Principle XVIII substituted by s. 13 (a) of Act 2 of 1994.]

XIX
The powers and functions at the national and provincial levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency or delegation basis.

XX
Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public administration, and which recognises the need for and promotes national unity and legitimate provincial autonomy and acknowledges cultural diversity.

XXI
The following criteria shall be applied in the allocation of powers to the national government and the provincial governments:
1. The level at which decisions can be taken most effectively in respect of the quality and rendering of services, shall be the level responsible and accountable for the quality and the rendering of the services, and such level shall accordingly be empowered by the Constitution to do so.

2. Where it is necessary for the maintenance of essential national standards, for the establishment of minimum standards required for the rendering of services, the maintenance of economic unity, the maintenance of national security or the prevention of unreasonable action taken by one province which is prejudicial to the interests of another province or the country as a whole, the Constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the Constitution.

3. Where there is necessity for South Africa to speak with one voice, or to act as a single entity- in particular in relation to other states- powers should be allocated to the national government.

4. Where uniformity across the nation is required for a particular function, the legislative power over that function should be allocated predominantly, if not wholly, to the national government.

5. The determination of national economic policies, and the power to promote interprovincial commerce and to protect the common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government.

6. Provincial governments shall have powers, either exclusively or concurrently with the national government, inter alia-

7. Where mutual co-operation is essential or desirable or where it is required to guarantee equality of opportunity or access to a government service, the powers should be allocated concurrently to the national government and the provincial governments.

8. The Constitution shall specify how powers which are not specifically allocated in the Constitution to the national government or to a provincial government, shall be dealt with as necessary ancillary powers pertaining to the powers and functions allocated either to the national government or provincial governments.

XXII
The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces.

XXIII
In the event of a dispute concerning the legislative powers allocated by the Constitution concurrently to the national government and provincial governments which cannot be resolved by a court on a construction of the Constitution, precedence shall be given to the legislative powers of the national government.

XXIV
A framework for local government powers, functions and structures shall be set out in the Constitution. The comprehensive powers, functions and other features of local government shall be set out in parliamentary statutes or in provincial legislation or in both.

XXV
The national government and provincial governments shall have fiscal powers and functions which will be defined in the Constitution. The framework for local government referred to in Principle XXIV shall make provision for appropriate fiscal powers and functions for different categories of local government.

XXVI
Each level of government shall have a constitutional right to an equitable share of revenue collected nationally so as to ensure that provinces and local governments are able to provide basic services and execute the functions allocated to them.
XXVII

A Financial and Fiscal Commission, in which each province shall be represented, shall recommend equitable fiscal and financial allocations to the provincial and local governments from revenue collected nationally, after taking into account the national interest, economic disparities between the provinces as well as the population and developmental needs, administrative responsibilities and other legitimate interests of each of the provinces.

XXVIII

Notwithstanding the provisions of Principle XII, the right of employers and employees to join and form employer organisations and trade unions and to engage in collective bargaining shall be recognised and protected. Provision shall be made that every person shall have the right to fair labour practices.

XXIX

The independence and impartiality of a Public Service Commission, a Reserve Bank, an Auditor-General and a Public Protector shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.

XXX

1. There shall be an efficient, non-partisan, career-orientated public service broadly representative of the South African community, functioning on a basis of fairness and which shall serve all members or the public in an unbiased and impartial manner, and shall, in the exercise of its powers and in compliance with its duties, loyally execute the lawful policies of the government of the day in the performance of its administrative functions. The structures and functioning of the public service, as well as the terms and conditions of service of its members, shall be regulated by law.

2. Every member of the public service shall be entitled to a fair pension.

XXXI

Every member of the security forces (police, military and intelligence), and the security forces as a whole, shall be required to perform their functions and exercise their powers in the national interest and shall be prohibited from furthering or prejudicing party political interest.

XXXII

The Constitution shall provide that until 30 April 1999 the national executive shall be composed and shall function substantially in the manner provided for in Chapter 6 of this Constitution.

XXXIII

The Constitution shall provide that, unless Parliament is dissolved on account of its passing a vote of no-confidence in the Cabinet, no national election shall be held before 30 April 1999.

XXXIV

1. This Schedule and the recognition therein of the right of the South African people as a whole to self-determination, shall not be construed as precluding, within the framework of the said right, constitutional provision for a notion of the right to self-determination by any community sharing a common cultural and language heritage, whether in a territorial entity within the Republic or in any other recognised way.

2. The Constitution may give expression to any particular form of self-determination provided there is substantial proven support within the community concerned for such a form of self-determination.

3. If a territorial entity referred to in paragraph 1 is established in terms of this Constitution before the new constitutional text is adopted, the new Constitution shall entrench the continuation of such territorial entity, including its structures, powers and functions.
CHAPTER 3

REVIEW OF THE PAST CONSTITUTION-MAKING PROCESS AND LESSONS FOR THE FUTURE

- Purna Man Shakya
INTRODUCTION: SIX CONSTITUTIONS IN SIX DECADES

Nepal has had six constitutions in the past (1948, 1951, 1959, 1962, 1990 and 2007), none of which were made by the elected representatives of the people. The first constitution, the Government of Nepal Act 1948, was promulgated by the then Prime Minister Padma Samshere. It was the first formal and written constitution by the exercise of the authority conferred on the Rana prime ministers by the Shah King by a deed called a Panja Patra (an instrument delegating state authority to the Rana oligarchy to rule Nepal). This constitution did not survive long, as it did not reflect the will or expectations of the people of Nepal. The Ranas were also not happy with the Act, as they did not want to share power with the people. The Act was replaced three years after it was promulgated by the Interim Government of Nepal Act 1951.

The Interim Government of Nepal Act 1951 was promulgated by the King Tribhuwan after the war that toppled the Rana regime to facilitate a smooth transition to multi-party democracy. This constitution had the limited objective of creating a popularly elected constituent assembly to draft a new democratic constitution and hold elections for a new parliament under the new constitution. Later, the objective of the constitution was changed and the election was held to elect a parliament instead of a constituent assembly. As this constitution was only an interim arrangement, it was short and lacked detail; however, it end up surviving for over eight years, until it was replaced by the Constitution of the Kingdom of Nepal 1959 (2015 BS).

The Constitution of the Kingdom of Nepal 1959 was promulgated by King Mahendra and, again, there was no role for the elected representatives in the constitution-making process. This constitution tried, for the first time, to establish multi-party democracy and a parliamentary system of governance in Nepal (a council of ministers headed by a prime minister appointed by the king and a cabinet collectively responsible to the House of Representatives). However, there were many provisions in the constitution that conflicted with the basic concept of a parliamentary system. In the first general election held under this constitution the Nepali Congress won a two-third majority and BP Koirala was declared the first elected Prime Minister of Nepal.

King Mahendra dissolved the elected government and parliament on December 16, 1962, only a year after the Constitution of 1959 came into force. He declared a state of emergency under Article 55 of the Constitution; political parties were banned and their leaders arrested. Most of the provisions of the Constitution were suspended.
To run the administration of the country, King Mahendra promulgated (through Ordinance) the Special Arrangement Act of Nepal 1960. This Act created a council of ministers headed by the king. The country once again came under the direct rule of the King. Later, a constitution drafting committee was formed under the leadership of Rishikesh Shaha. A new constitution was promulgated on December 16, 1962 bringing in the feudal Panchayat system, which remained in place for the nearly 30 years.

In 1990, King Birendra gave into the demands of the people to reinstate democracy (Jana Andolan I) and the Constitution of the Kingdom of Nepal 1990 was promulgated. This constitution established a constitutional monarchy and multi-party parliamentary system of government. Although hailed a good constitution, it was again drafted with minimal participation of the people and was unable to fulfil the aspirations of excluded communities and ultra left parties. The Maoists' commenced an armed struggle for the abolition of the monarchy and a new constitution through constituent assembly. This civil war lasted ten years, from 1996 to 2006. Towards the end of this period, King Gyanendra dissolved the elected government and established direct rule under the leadership of the King by the issue of an ordinance. This united previously opposed democratic forces (political parties) and the Communist Party of Nepal (Maoist) in a popular uprising against the King (Jana Andolan II), which toppled the King in April 2006, bringing the monarchy in Nepal to an end.

The Interim Constitution of Nepal 2007 was drafted by a group of legal experts representing the various political parties that took part in the people's movement against the direct rule of King Gyanendra. The Interim Constitution was approved by the revolutionary government and ratified by the restored legislature parliament. The Interim Constitution was promulgated with the objective of facilitating the drafting a new constitution through elected constituent assembly.

THE PHILOSOPHY BEHIND THE CONSTITUTION-MAKING PROCESS

In 2008, for the first time in the history of Nepal, a constituent assembly was elected to write a new constitution for Nepal. This was a dream come true for the people of Nepal, who would for the first time author their own constitution and give themselves sovereignty over their own nation. The first task of the 601-member Constituent Assembly of Nepal was to design the constitution-making process. Some of the basic philosophies adopted for the design of the constitution-making process were to be very different from the ones adopted for the past six constitutions. Firstly, the Constituent Assembly was to adopt a bottom-up approach to constitution making; secondly, it was to be a highly participatory and deliberative process; and, thirdly, the process was to focus on consensus and inclusion.
**Bottom-up approach**

In the past, all six constitutional documents were made following a top-down approach and were all, one way or another, 'expert-led' constitutions. None of these constitutions ensured the involvement of the diverse array of people in Nepal. None of them has popular legitimacy as they were either authored by the king at the time or the ruling elite. As a result, the whole system was designed to ensure the centralisation of power in the hands of a few and the continuity of the monopoly of power in the hands of the ruling elites.

Drawing lessons from the past, the Constituent Assembly elected in 2008 decided to start the constitution drafting process with a zero draft. This time, experts would not be engaged to create a starting draft. Instead, the Constituent Assembly would go to the people at the grassroots to ask them what kind of constitution they would like to have. The outline for the new constitution would originate from the people at the grassroots and not from the power elites in Kathmandu. The Constituent Assembly members, as agents of the sovereign people, would go to their constituencies and ask what kind of constitution they would like to have. This was the idea behind the bottom-up approach; it was idealistic and highly ambitious and had never been tried before in Nepal or the rest of the world.

**Participatory and deliberative process**

The second most important philosophy adopted was that the entire constitution-making process would be based on a participatory and deliberative approach. The Constituent Assembly was not only to go to the people to solicit their views on the constitution, it was also to enter into broad consultations with experts, stakeholders and interest groups on various aspects of the constitution. Once the draft constitution was ready, it would be put before the full house of the Constituent Assembly for endorsement and public deliberation. The idea was that the Constituent Assembly members would go to their constituencies once again with a draft of the constitution and solicit their feedback. The members would ask their 'masters' (constituencies) if they had executed their mandate in the true spirit of the revolution and as per the expectations of the people. This was meant to reflect the fact that true sovereignty lies with people and no longer rest with any individual (king) or caucus of political elites.

**Consensus and social inclusion**

The third guiding philosophy behind the constitution-making process was the insistence on consensus and inclusion in decision-making processes. Previous constitutions in Nepal had been drafted according to the 'winner-takes-all' principle and based on 'majoritarianism', which could never have been acceptable in an elected constituent assembly. Nepal is known for its diversity and the only way to avoid conflict and ensure harmony is to ensure the making of the constitution through consensus and accommodation. Hence, the Interim Constitution of Nepal
2007 clearly emphasised the need for consensus, not only in the formation of the government (drawn from the Constituent Assembly), but also in the drafting and enactment of the constitution. The Interim Constitution states that the constitution is to be enacted according to consensus or, if consensus fails, by a two-third majority of the Constituent Assembly. The entire constitution-making process was designed in such a way so that the people of Nepal would have a sense of ownership of the new constitution.

CONSTITUENT ASSEMBLY RULES OF PROCEDURE

Soon after the election of the Constituent Assembly in 2008, the rules for constitution making and for parliamentary procedures had to be prepared. For this, a team of consultants was hired by the Asia Foundation at the request of the Constituent Assembly Secretariat to prepare the draft rules. The team consisted Senior Advocate Purna Man Shakya, Dr Bipin Adhikari and Dr Bhimarjun Acharya. The team submitted the draft rules to the Constituent Assembly Secretariat within one month. A special team of legal experts (bureaucrats) was created within the secretariat to review, improve and finalise the draft rules for presentation to the Constituent Assembly Procedure Rules Drafting Committee. At the Secretariat, a key role in giving final shape to the draft rules was given to Mr Tek Prasad Dhungana, the legal advisor to Constituent Assembly and secretary to Constitutional Committee.

The Constituent Assembly Rules 2008 was enacted after full deliberation in the Constituent Assembly Procedure Rules Drafting Committee (which consisted of 50 members from different parties in the Constituent Assembly, headed by Narayan Man Bijukchhe). The Rules were unanimously passed, without any concerns or dissent. The Constituent Assembly Rules were basically designed to draft a federal democratic republic constitution for Nepal. The Interim Constitution 2007 had already declared Nepal to be a federal democratic republic, although the country was yet to be restructured into a federal set up and a new federal constitution yet to be promulgated. So when the Rules of Procedure were designed, they were tailored to ensure the making of a federal constitution. This is obvious from the fact that the Rules provided for the creation of thematic (subject-based) committees to address issues such as the restructuring of the state, division of power between different levels of the state, and protection and promotion of minority rights.

COMMITTEES IN THE CONSTITUENT ASSEMBLY

The Constituent Assembly Rules (Rules 65, 66 and 67) created ten thematic committees, three procedural committees and one constitutional committee. The Constitutional Committee was assigned the responsibility for creating a consolidated draft of the constitution based on the preliminary drafts prepared
by the thematic committees. The Rules not only created the thematic committees, but also defined their terms of reference and areas of work. The idea was that every aspect of the new federal constitution would be deliberated in detail in the committees and proper recommendations would be made by the committees to the Constitution Committee as to the provisions to be contained in the new constitution, which would come up with a complete draft constitution. The Rules also assigned any residuary subjects (areas not covered by the thematic committee) to the Constitution Committee for deliberation and preparation of a report with recommendations.

A bottom-up approach to constitution making is basically a Nepali concept and was trialled for the first time in Nepal. In a bottom-up approach, the basic design and content of the constitution is to be sought from the public and, based on guidance and expert consultations, a draft constitution is prepared. For this, the Constituent Assembly divided 600 of its 601 members into ten thematic committees, three procedural committees and one constitutional committee. Except for the Chairperson, not a single member of constituent assembly was left out at the time of forming committees. The idea of involving all of the Constituent Assembly members in committees was to make sure that the members were properly mobilised in the constitution-making process and to ensure that a sense of ownership in the new constitution was created.

The committee system formed the basic foundation for the work of the Constituent Assembly and the committees conducted almost eighty percent of the work of constitution making. The Rules of Procedure were designed on the basis of the realities in Nepal and the expectations of the people. Reference was made, however, to the experiences of other countries around the world in constitution making. Out of all the international experiences, the experiences of India and South Africa were most relevant. The committee system was basically inspired by the Indian experience in constitution making from 1948 to 1950 (Rao, Menon, Kashyap & Iyengar, 1966).

**STEPS IN CONSTITUTION-MAKING PROCESS**

The Rules of Procedure 2008 provided 16 steps in the constitution-making process, from zero draft to promulgation of the final draft constitution:

- **Step 1**: Adoption of Constituent Assembly rules of procedure
- **Step 2**: Formation of thematic committees
- **Step 3**: Public hearings by Constituent Assembly members in their respective constituencies
- **Step 4**: Consultations with stakeholders and experts by each thematic committee
**Step 5**: Preparation of 11 reports by thematic committees
**Step 6**: Deliberation of thematic committee reports in full house of the Constituent Assembly
**Step 7**: Preparation of first draft by Constitutional Committee on the basis of the reports prepared by the thematic committees
**Step 8**: Presentation of first draft to the full house of the Constituent Assembly for discussion and approval for public deliberation
**Step 9**: Release of the first draft for public feedback through Internet, radio and other public media
**Step 10**: Revision of the first draft by Constitution Committee on the basis of public feedback (based on discussion and direction of full house of the Constituent Assembly on public feedback)
**Step 11**: Presentation of second draft to the full house of the Constituent Assembly for general discussion and acceptance in principle (basic features and structure)
**Step 12**: Presentation of second draft to the full house of the Constituent Assembly for clause-wise discussion and voting
**Step 13**: Preparation of third and final draft constitution after all clauses are voted and passed
**Step 14**: Approval of the third revised and final consolidated draft constitution by the full house of the Constituent Assembly
**Step 15**: Constituent Assembly members and chairperson sign the final draft constitution
**Step 16**: Promulgation of the constitution by the president of Nepal on appointed date

Of the 16 steps, the first Constituent Assembly completed the first 6 steps, which were the most important and most difficult; the rest were left incomplete.

**COMPLETED STEPS**

During its four-year term, the Constituent Assembly completed the most important foundation work for the creation of a federal democratic republic constitution. However, it failed to create a consolidated draft constitution and carry through the approval process for promulgation. It is important to note that a team of experts headed by Purna Man Shakya worked in close coordination with selected Constituent Assembly members from the major political parties and the Constituent Assembly Secretariat to prepare a consolidated draft constitution, and this informal draft was more or less complete by the end of the Constituent Assembly's term. The only issue left to be finalised was the number, names and territorial definition of the provinces that would constitute the new federal Nepal.
The steps completed by the Constituent Assembly basically consisted of the enactment of the Rules of Procedure, formation of thematic committees, holding of public hearings/consultations by the Constituent Assembly members in their respective constituencies, consultations with stakeholders and experts by the thematic committees and preparation of 11 reports (including preliminary draft provisions) by the thematic committees, and deliberation over the reports of the thematic committees in the full house of the Constituent Assembly and handover of the committee reports to Constitutional Committee for making of the consolidated draft. There were about eight committee reports that could not be passed in the full house as they contained contentious issues. Instead, the full house forwarded those reports to the Constitutional Committee after debate and instructed the Constitutional Committee to devise a mechanism to resolve these issues. In fact, the task force created by Constituent Assembly to study the preliminary drafts and reports of each of the thematic committees listed 210 disputed issues in relation to the form of government and other subject matter and 78 disputed issues in relation to state restructuring and the division of state powers (Constituent Assembly Secretariat, 2013: 299). The major differences basically concerned the forms of government, state restructuring, division of state power, official languages, citizenship, and right to self-determination of indigenous ethnic communities.

Once the thematic committee reports were handed over to the Constitutional Committee, the Constitutional Committee went on to list the issues that needed to be resolved and on which political consensus was needed. The Constitutional Committee created a high-level Dispute Settlement Sub-committee consisting of Constituent Assembly member Pushpa Kamal Dahal (Chairman of the Communist Party of Nepal (Maoist) party), Constituent Assembly member Ramchandra Poudel (Vice Chairperson of Nepali Congress party and leader of parliamentary party), Constituent Assembly member Madhav Kumar Nepal (senior leader of Communist Party of Nepal [Unified Marxist-Leninist]), Constituent Assembly member Laxman Lal Karna (party leader for Sadbhawana party), and Constituent Assembly member Kalpana Rana (Communist Party of Nepal – United). The Dispute Settlement Sub-committee included representatives from all of the major political parties. This sub-committee started dealing with the disputed issues one-by-one. Although progress was made on the resolution of most of the disputed issues, the forms of government and state restructuring seemed very difficult to resolve (the committee failed to resolve any of the disputed issues on state restructuring) (CAS, 2013: 260-261). The parties differed on the number, name and territorial alignment of the provinces to be created and they also differed on the form of government to be created at the central level (presidential, parliamentary or mixed). Meanwhile, time was running out and the tenure of the Constituent Assembly came to an end on 27 May 2012. The Supreme Court had issued a previous ruling against any further extension of the term of the Constituent Assembly (Bharatmani Jangam and Others v. The Office of the President and Others, n.d.). The political party leaders ultimately failed to come to a consensus on the issues related to state restructuring and forms...
of government and, therefore, the Constituent Assembly was unable to complete the task of making a consolidated draft.

REMAINING STEPS

On midnight of 27 May 2012 the first Constituent Assembly came to an end. The task of constitution making remained incomplete. Although the Constituent Assembly completed the major foundation work, much of the work on drafting, deliberating and voting on the consolidated draft remained incomplete. The list of remaining tasks in the constitution-making process include:

- Resolving differences between the political parties on constitutional matters by building consensus and approving the reports (through the Constituent Assembly) prepared by eight committees along with suggestions and directives.
- Preparation of the first consolidated draft of the constitution by the Constitutional Committee by integrating the draft reports prepared by all the Constituent Assembly committees on the basis of the suggestions and directives of the Constituent Assembly.
- Discussion and adoption of the first draft of the constitution prepared by the Constitutional Committee on the basis of the thematic committee reports.
- Discussion and adoption of the first draft of the constitution by the full house of the Constituent Assembly for public deliberation.
- Release of the first draft through mass media for public feedback.
- Revision of first draft by the Constitutional Committee on the basis of public feedback (based on the discussion and direction of the full house of the Constituent Assembly).
- Presentation of second draft of the constitution to the full house of the Constituent Assembly for general discussion and acceptance in principle for clause-wise discussion.
- Presentation of the second draft of the constitution to the full house of the Constituent Assembly for clause-wise discussion and voting (Interim Constitution of Nepal, 2007: Art. 70).
- Preparation of the final draft constitution based on the clause-wise discussion and approval of amendments.
- Signing of the final draft constitution by the Constituent Assembly members and chairperson.
- Promulgation of the constitution on the appointed day by the president of Nepal.
REFERENDUM TO RESOLVE DISPUTED ISSUES

Article 157 of the Interim Constitution of Nepal 2007 provides for a referendum to resolve disputed constitutional issues. It says that the Constituent Assembly may, by a two-third majority of total members, decide to refer any matter of national importance to a referendum. It also says that the result of the referendum will be binding on the Constituent Assembly. This constitutional option was never debated as a way of resolving major disputes related to the form of government and state restructuring. One of the smallest parties, the Rashtriya Prajatantra Party, which is represented by three members in Constituent Assembly, did advocate for a referendum on the issues of secularism and constitutional monarchy. However, its voice did not have any impact in the Constituent Assembly.

TIMETABLE OF CONSTITUENT ASSEMBLY

Rule 149 of Constituent Assembly Rules provided for the creation of a timetable for the timely completion of the constitution-making process. This timetable was to be designed by the full house of the Constituent Assembly after deliberation. The rule required the Constituent Assembly to define the timeframe for tasks to be completed by the full house and the committees and the timeframe for each of the activities. Originally, Article 64 of the Interim Constitution 2007 provided that the tenure of the Constituent Assembly shall be a maximum of two years from the day of first sitting of the Constituent Assembly. The tenure of the Constituent Assembly was to come to an end early if the constitution was promulgated before the expiry of the two-year term. Keeping this in mind, the first timetable approved by the Constituent Assembly designed the entire constitution-making process to be complete in 18 months. The Constituent Assembly, however, could not meet the deadlines set in its own timetable and, time and again, it had to be...
rescheduled and extended (the timetable for constitution making was changed ten times) (CAS, 2013: 19). To enable the Constituent Assembly to change the timetable, Article 64 also had to be amended thrice. The Article, as it stands today, provides for a four-year term. Article 64 also contains a proviso that enables the full house to extend the life of the Constituent Assembly by six months if the constitution-making process cannot be completed due to a state of emergency. A state of emergency never occurred during the term of the first Constituent Assembly and, hence, this proviso was never used.

**LESSONS LEARNED**

The past Constituent Assembly spent four years in the constitution-making process. In the end it failed to deliver a new constitution and its life came to an end unceremoniously in 2012. There are important lessons to be learnt from our past experience if the constitution is to be made on time by the new Constituent Assembly elected in 2013.

First of all, the priority of the senior political leaders in the first Constituent Assembly was never the making of the new constitution. Their focus was on formation of government and power politics. The instability and frequent changes in the leadership of the government had a toll on the constitution-making process. This has to change in the new Constituent Assembly if we are to avoid the past mistakes. It is important to ensure that a stable government is maintained and that there is continuity of leadership of government in the new Constituent Assembly.

Secondly, in the past, senior and influential political leaders did not prioritise their participation in the constitution-making process. These leaders did not intervene in major issues in the Constituent Assembly until it was too late. Intervention by the senior political leaders during the committee work could have changed the outcome of the first Constituent Assembly. However, the senior political leaders did not come forward to take the leadership of the thematic committees and did not monitor the outcomes of the work of the committees. The senior political leaders actually failed to realise that, in a bottom-up process, the shape of the constitution takes place not during the drafting phase, but during the earlier phase of preparing the thematic committee reports. The major disputes on ethnic federalism and the form of government could have been resolved at the committee level if there was timely intervention by the leaders of the major political parties.

Thirdly, the process of constitution making ultimately failed because there was a lack of coordination and consensus on major constitutional issues among party leaders, both at the inter-party and intra-party levels. Parties lacked democratic deliberation on major constitutional issues and differences emerged at the time
of voting in the committees. The opinions of the leaders did not necessarily match the opinions of the members in Constituent Assembly. This led to a split in some parties, including the Communist Party of Nepal (Unified Marxist Leninist).

Fourthly, the Rules of Procedure did not provide any space for constitutional experts to play a role in the constitution-making process. The initial draft Rules of Procedure prepared by team of consultants did provide for the appointment of constitutional experts to guide the Constituent Assembly. However, this provision was deleted in the final draft. The input of independent experts could have helped resolve many disputes, which had technical dimensions. The leaders of the Constituent Assembly failed to realise that bureaucrats have their own limitations and can never replace independent constitutional experts. Independent experts could have played a mediatory role and would have had the capacity to convince and negotiate with the political parties, which is not possible with bureaucrats. It is true that constitutional experts have their own political biases, but they would certainly be free from party whips and the bureaucratic culture of ‘non-resistance’ and ‘neutrality’ in relation to issues of merit.

Fifthly, the constitution-making process gave too much importance to social inclusion and consensus politics. It was practically impossible to accommodate the varied demands of the different communities in Nepal. The parties needed to agree to vote on the many contentious issues and accept the results of such votes without protest. Any design to hijack the decision-making power of the Constituent Assembly in the name of dispute settlement should be discouraged. Any dispute settlement mechanism has to be designed within the system of the Constituent Assembly to ensure the legitimacy of the constitution-making process.

Sixthly, the role of the chairperson of the Constitutional Committee is more important than the role of the Chairperson of the Constituent Assembly in working out a consensus and preparing the draft constitution. Unfortunately, the Constituent Assembly of 2008 did not have a strong person presiding over the Constitutional Committee. This mistake needs to be corrected in the new Constituent Assembly.

**ROAD MAP FOR THE NEW CONSTITUENT ASSEMBLY**

Now that the second Constituent Assembly is in place, it is high time to design a road map for the future constitution-making process. The guiding principles for the rules of the constitution-making process have to be defined. The procedural rules must be designed in such a way that they ensure quality in the new constitution-making, the legitimacy of the constitution and, finally, the acceptability of the constitution. In addition, the time factor has to be taken into consideration. Political parties have, by and large, made a public commitment
to deliver the new constitution within 12 months. Hence, it is not advisable or practical to draft the constitution from scratch and follow all the detailed processes of the bottom-up approach. There is no point starting the Constituent Assembly process from a zero draft. And, obviously, there is no point repeating the entire process of public consultations and thematic committee reports, which were completed by the previous Constituent Assembly. A better idea would be to design a short and effective procedure that recognises the need to capitalise on the past achievements of the former Constituent Assembly, focus on the resolution of disputed issues, and start the process with a consolidated preliminary draft.

**Figure 2: Road map for new Constituent Assembly**

**BASIC GUIDELINES FOR NEW RULES**

The Constituent Assembly will have to design the rules of procedure before it starts work. Obviously, it is useless to restart a process that has already been completed. The Constituent Assembly should rather focus on the processes that are yet to be completed. The basic guidelines for the new rules of procedure could be as follows:

- No need for formation of thematic committees
- No need for public hearings by Constituent Assembly members in their constituencies
• No need to revisit the issues that have been agreed upon and not clearly rejected by public opinion in the general election
• Focus on developing a dispute resolution mechanism for outstanding issues in relation to state restructuring, forms of government and citizenship
• Focus on preparing a consolidated draft from day one
• Focus on completing the remaining steps in the constitution-making process

MODEL COMMITTEE STRUCTURE IN NEW RULES OF PROCEDURE

The new Constituent Assembly does not need to create so many committees. Instead, a constitutional committee should be created representing all of the political parties. This committee will discuss and decide on the guidelines for drafting the new constitution. The constitutional committee will have to create a sub-committee representing major political parties and interest groups for dispute resolution. It will also have to create an expert drafting committee to finalise the first draft of the constitution based on its guidelines. The expert drafting committee should be small in size (no more than ten members) and should be a mix of politicians and experts from outside.

The next committee needed is a public deliberation committee. Once the draft constitution is ready for public deliberation, it has to be released through the mass media and national gazette for public feedback. Drawing up an action plan for public deliberation on the first draft of the constitution and execution of the plan to generate feedback and suggestions from the public would be the primary responsibility of this committee.

No other specific committees are foreseen, but may be formed if the need arises. As far as the Constituent Assembly members’ involvement is concerned, they can be mobilised for activities such as a review of the past achievements and listing of pending issues. They could also be mobilised to explain the draft constitution to the general public.
STEPS THAT NEED TO BE IN THE NEW RULES

There are at least 15 steps that need to be completed by the new Constituent Assembly to finalise the new constitution, as follows:

**Step 1**: Formation of an all party constitution committee in the Constituent Assembly

**Step 2**: Formation of an expert drafting committee to assist the constitutional committee to draft the constitution

**Step 3**: Formation of a dispute settlement sub-committee of party leaders to sort out differences on issues of state restructuring and forms of government

**Step 4**: Formation of committee on public deliberation

**Step 5**: Preparation of a consolidated first draft by the constitutional committee with the assistance of the expert drafting committee and Constituent Assembly (thematic committees’ reports,
expert opinion, and the decisions of the dispute settlement sub-committee to be used as reference material for the preparation of the consolidated draft)

**Step 6**: Approval of first draft of the constitution for public deliberation by the full house of the Constituent Assembly

**Step 7**: Processing of major recommendations from public feedback by committee on public deliberation

**Step 8**: Full house of Constituent Assembly to deliberate and approve the public deliberation committee report

**Step 9**: Preparation of second draft of the constitution based on public feedback

**Step 10**: Clause-wise discussion of new constitution and voting

**Step 11**: Preparation of third and final draft of constitution based on changes approved in clause-wise discussion and voting

**Step 12**: Final voting on constitution bill (final draft)

**Step 13**: Signing of constitution Act by the Constituent Assembly members

**Step 14**: Promulgation of new constitution by the president of Nepal on the day fixed by chairperson of the Constituent Assembly in consultation with the president

**CONCLUSION**

Nepal’s commitment to write a new constitution through constituent assembly can be traced back to 18 February 1951 when King Tribhuvan, in his royal address to the nation, declared: "Let there be republican constitution created by democratically elected constituent assembly" (Singh, 2057 BS: 660). However, King Mahendra reneged on the promise his father made to the nation and the dream of a constituent assembly was put on hold for over half a century. The people of Nepal finally succeeded in electing a constituent assembly on 28 May 2008. On this historic day of the first meeting of the elected Constituent Assembly, the full house passed a resolution abolishing the monarchy in Nepal once and for all and declared Nepal a federal democratic republic.

The Constituent Assembly struggled for four years to write a federal constitution, but it failed in this mission due to deep divisions (in the nation and among the political parties) on ethnic federalism. Now that the second Constituent Assembly has been elected, the people of Nepal look forward to writing and giving themselves their own constitution. The people expect the Constituent Assembly members and party leaders to work out an acceptable procedure for federal restructuring so that the constitution writing can be smooth and result oriented. This procedure cannot be an obstruction, unless the parties use the procedure
as an instrument to block the enactment of the constitution. The process of writing a constitution through a constituent assembly elected by the people and representative of all groups will provide legitimacy to the new constitution – if it is based on respect for the will of the people. So let the nation prepare to meet its destiny once again.

REFERENCES


CHAPTER 4

NON-EXTENSION OR NON-AMENDEMENT? THE SUPREME COURT’S ORIGINALIST APPROACH TO INTERPRETING THE TENURE OF THE CONSTITUENT ASSEMBLY

- YUBARAJ SANGROULA
CONSTITUTIONAL DEVELOPMENT IN NEPAL

The regime of King Briendra: Shattered hopes for democratic reforms

The 1980s and 90s were important decades in the history of Nepal because they witnessed a sharp rise in the public's political consciousness. National and international events caused a surge of popular expectations for the democratic development of politics in the country. But the people's hopes depended on an untested King Birendra, who proved an unwilling counterpart in enacting sweeping reform. Among the factors that caused popular dissatisfaction with the king's *panchayat* system was his failure to develop a democratic outlook and his reluctance to take anyone into confidence despite his education at some of the best institutions of democratic countries–Saint Joseph, Eton, Tokyo University, and Harvard.

Upon Birendra's ascendance to the throne, the public had high expectations for reforms they hoped would come to the system of governance and politics. But contrary to expectations, Birendra followed in his father’s footsteps and began to expand royal authority. Though many believed he was an ardent follower of liberal values and human rights, Birendra stunned the people when he said that 'the *panchayat* system is suitable for Nepal'. In an interview with *American Weekly* in 1973, he said, "In Nepal, the monarch and his subjects have been governed by *dharma*, as a system drawn from [the] Hindu religion. The king cannot change his value system. Therefore, he too is governed by ethical code. According to this code the king lives and has his being only to protect the people, to dispense justice to them and punish the wrong doers. Indeed, the king embodies the collective identity of the people and, as desired by the people, it is he who grants and amends the constitution'. In answer to the question, 'How do feel about being looked upon as God?’ he said, ‘It is not a question of how I feel about it. There are local customs and traditions. This relates to our religious background. I have responsibility [under the Vedic scriptures] to protect the people against injustice. The concept of God is there among the people'. Clearly, Birendra intended to rule the country under divine authority, and thus he placed himself above the law and the constitution because he believed both were his creations (Dangol, 1999: 110–111).

The hope that King Birendra would bring about democratic changes was quickly shattered. His efforts as a leader showed mercy to the poor but never actually
granted them the liberty or the right to become independent and self-reliant. While he passionately showed concern for the underprivileged and appeared to strive for the nation's development, he could not connect this interest to the expectation of the people that they be granted the right to participate in political processes. Most destructively, the king received advice only from power-seeking sycophants, popularly known as panchas, surrounding him, who encouraged his relentless consolidation of an authoritarian grip over the people. In fact, he meticulously expanded the power of zonal commissioners (anchaladish), enabling them to use draconian rules and powers to suppress people's legitimate concerns.

At this time the involvement of the royal family in political affairs became obvious from their engagement in social welfare activities (Reaper & Hoftun, 1992: 17). Queen Aishwarya was appointed patron of the Social Welfare Council, Prince Dhirendra became patron of the Sports Council, and several other members of the royal family were made patrons of organizations for the blind, disabled, lepers, children, women, the Red Cross, and the Scouts. Business leaders were later inducted into these organizations and corruption flourished. With members of the royal family in charge, no one could criticize operations and the organizations spiraled out of government control.

Meanwhile, a program called 'Back to the Village' was launched as an essential part of the king's mission to promote rural development. Its primary objective was to consolidate the panchayat system at the grassroots level, thereby preventing the spread of the democratic movement. This led to the widely held view that the monarchy actively sought total control, when suppression of non-supporters increased nationwide. The nation was pushed into unending feudal chaos, autocracy, corruption, and poor governance. The liberty of the people and the democratization of Nepal were forgotten.

Rise of the people's movement

The situation in neighbouring India, meanwhile, was fragile. The autocratic regime of Indira Ghandi faced rising opposition during 1970s and eventually a state of emergency was imposed. Ghandi failed to regain control and ultimately saw the downfall of the thirty-year government of the Indian Congress. In the following electoral contest in 1977, the Janta Party won the parliamentary elections by a landslide, and a new government with an anti-Congress alliance came to power. This development proved to be a setback to the burgeoning royal autocracy in Nepal. The Janta Party stood behind the Nepali people's struggle for democracy, and the new government urged the king to release B.P. Koirala and his colleagues who had been arrested and imprisoned upon their return from India (Agrawal, 1987: 112). The king was obliged to release Koirala and let him travel to the United States for medical treatment, which explicitly boosted the opposition's morale.
While such an atmosphere conducive to change was slowly emerging, on 6 April 1979 students in Kathmandu arranged a rally to protest the execution of former Pakistani prime minister Zulfikar Ali Bhutto. A crackdown by the police on the peaceful rally caused a spontaneous movement across the country to flare up, which ended with increased pressure on the king to declare a referendum to let the people choose between a reformed panchayat system and a multiparty system. It was a crucial moment in the political and constitutional development of Nepal. The 1962 Constitution was on the verge of change, as noted in this proclamation by the king on 24 May, 1979:

It has always been a tradition and duty with us to consider the affairs of the State in consonance with wishes of our people. We therefore proclaim hereby that in view of the situation as it obtains in the country today, in order to explicitly understand the kind of change our countrymen desire, we shall arrange to hold a national referendum on the basis of adult franchise through secret ballot. In this referendum, all eligible citizens will be asked to vote on one of the two choices: Whether we should retain panchayat system with suitable reforms or whether we should set up a multi-party system of government."

(His Majesty King Birendra Bir Bikram Shah Dev, 1982: 18)

But the referendum was rigged: the panchayat system was declared the choice of the majority of voters on 14 May 1980. With allegedly 54.7% of the votes, it beat out the multiparty system. This momentum was widely used by the monarchy to prove its legitimacy, and it became more assertive and commanding in the days to come. In the wake of the post-referendum jubilation, the 1962 Constitution was amended for a third time. However, the king’s power was left intact. Some important features of the amendment stated that

- the king would be able to dismiss the elected prime minister as well as the chairman of the rastriya panchayat, the so-called legislative body;
- the *rastriya panchayat* would be elected on the basis of adult franchise, and the Council of Ministers would be elected by the *rastriya panchayat* and would be accountable to it;
- class organizations would be established; and
- the Coordination Council (a supreme body) would be established to coordinate the executive, legislative, and judicial organs of the state. Most importantly, the operations of the council would be approved by the king.

In this way the king still held on to absolute power and thus could virtually control government activities. The post-referendum development of constitutionalism in Nepal did little for the needed democratic change or the enhancement of the rule of law. The referendum was a hoax, and it contributed to public apathy toward the monarchy. The Coordination Council proved to be an institution that caused the people to greatly distrust the monarchy.
The post-referendum era: Movement for democracy

The people’s struggle for democracy continued even after the bewildering result of the referendum. The ban on political parties persisted, while corruption became increasingly widespread. The government began a crackdown on political activities, and suppression of political leaders and workers increased as they were branded anti-national elements, thereby compelling the Congress and left parties to unite in a fight for democracy. On 18 February 1990, the popular movement for the restoration of a multiparty system was formally launched as thousands of students took to the streets of Kathmandu. The demonstrators openly carried the flags and banners of political parties. The people’s movement gained momentum gradually and intensified when professional groups, namely associations of professors, teachers, and lawyers, formally joined the movement. The swelling pressure ultimately compelled the king to surrender to the people. On 8 April 1990, King Birendra dissolved the monarchy’s thirty-year draconian rule and ended the ban on political parties. Restoration of the multiparty system was thus achieved, bringing with it a new era in the constitutional history of Nepal.

Immediately after the end of the thirty-year ‘dark era’ and the abrogation of the 1962 Constitution, the process of making a new democratic constitution began with the formation of the Constitution Reforms Recommendation Commission on 11 May 1990. The new constitution was adopted by the Interim Council of Ministers and endorsed by the king. The Commission submitted the draft constitution to the king on 10 September 1990, which the king handed over the interim government prime minister. After a series of meetings and wider consultation with leaders of the political parties and experts, the Interim Council of Ministers, which also wielded legislative power at that time, adopted the draft constitution and submitted it to the king on 11 October 1990 for promulgation.

Unfortunately, the palace tried its best to hold the constitution and press for changes in it as part of a ploy to undermine the vitality of the system that the constitution would to set forth. The following quote from the then prime minister reflects the intensity of the backroom politics that were taking place: “One day I had a telephone call in the office. Some generals and the Commander-in-Chief wanted to see me personally. All of them came—22 generals in uniform led by the Commander-in-Chief. They saluted and sat down. I gave them a cup of tea each. They gave me a file, which was the same thing again. Prerogatives and private purse all that should remain not with the people, but with the King. I replied that political changes were the result of the very big movement. How do you suppose that I can do these things or get these things accepted by people? . . . Then the King called me one day suddenly . . . the King said he did not agree with what commission was doing, I said it was beyond my power to change anything. I could not get it accepted by the Commission or by the Cabinet” (Reaper & Hoftun, 1990: 193).
On 15 October 1990, the principal secretariat of the palace announced that the proclamation of the constitution would be delayed until end of the Tihar festival (festival of lights). The constitution was supposed to be declared on 21 October. Though it was said to have been finalised in consultation with the prime minister, this was denied by the then Prime Minister Krishna Prasad Bhattarai (Dangol, 1999: 213–4). Finally, the constitution was declared on 9 November 1990 (Reaper & Hoftun, 1990: 197). It incorporated the following features:

- The guarantee of human rights, the consolidation of adult franchise, a parliamentary system of government, constitutional monarchy, and multiparty democracy
- The sovereignty of the people. This provision ended the divine authority of the king and made the people masters of the nation.
- The extraordinary jurisdiction to the Supreme Court to enforce fundamental rights
- The vesting of executive power in the king and the Council of Ministers. The king could exercise executive power upon the recommendation and consent of the Council of Ministers.
- The prime ministerial appointment, made by the king, of the leader of the majority party in the House of Representatives. The cabinet was responsible to the House of Representatives.
- A two-tier legislative body, namely the House of Representatives and the National Council
- An independent judiciary with the power of judicial review

A democratic system styled after the Westminster model of government was introduced by the 1990 Constitution. Shortly after the promulgation of the constitution, the first and long awaited general election was held. It gave a comfortable majority to the Nepali Congress, while the Communist Party of Nepal (United Marxist-Leninist) (CPN[UML]) became the strong opposition in the House of Representatives. The fledgling democracy was thus at work, though the intensity of the fight between the ruling and opposition parties was high.

On 10 July 1994, the parliamentary politics of Nepal took an unexpected turn when the policies and programs of the Congress government were defeated in the House of Representatives by the absence of 36 of its own members. Prime Minister Girija Prasad Koirala was forced to resign on moral grounds. In the midst of his resignation, he made a recommendation to the king under Article 54 (4) for dissolution of the House of Representatives, and called for a mid-term election. Agreeing to this, the king declared the date of the mid-term election. A feud over power and democratic values thus began while the newly established democracy was still in its infancy. It was a shocking and unfortunate blow.
Fostering a workable democracy demanded smooth and stable political course. But there was no such stable course in Nepal because of the arrogance of the Nepali Congress and the militancy of the CPN(UML). The two parties, partners in the movement for the restoration of a multiparty system, could not understand the importance of their roles and responsibilities sufficiently to allow them to work amicably toward the evolution of the constitutional conventions necessary for the consolidation of the newly established democratic system and the concept of rule of law. In the parliament, as well as outside it, they appeared as staunch enemies, ready to let each other down. The provisions of the constitution were disregarded entirely. Neither the ruling party nor the opposition was able to enforce the constitution in accordance with its letters and spirit. The constantly unfolding tension and rivalries between them, accompanied by political gimmicks, overshadowed the need for the pragmatic development of Nepal’s constitution.

JUDICIAL INTERVENTION AND ITS POLITICAL IMPLICATIONS

Resignation and dissolution

The constitutionality of the prime minister’s recommendation for the House dissolution was brought by two members of the dissolved House and two civil society members under the purview of the Supreme Court. This was a historical moment for the Court to correct the derailment of democracy and constitutionalism. A petition for the restoration of the dissolved House, through the writ of certiorari, was entertained by the Supreme Court larger bench, which comprised 11 judges. In the final rulings, the court was divided between 7 judges in favour and 4 against the constitutionality of the dissolution.

The petitioners claimed:

1. The policies and programs tabled by the government for the fiscal year of 2051/52 BS were rejected by the House with a majority of 86 to 74 members. The prime minister immediately resigned from office, but he also, unconstitutionally exercising power under Article 53 (4) of the Constitution, made a recommendation for the dissolution of the House of Representatives and declared the midterm election to be held on 27 Kartik 2052 (13/11/1996). The recommendation thus made is unconstitutional on the following grounds:
   - The dissolution of the House has adversely affected the sovereign rights of the people under Article 3;
   - the dissolution along with the resignation is contrary to the spirit of Article 36 (1) and 53 (4) of the Constitution because a resigned prime minister cannot exercise the right to dissolve the House;
the power of dissolution has been exercised by the prime minister fully ignoring the provision that requires a vote of confidence under Article 59 (1) in such a circumstance;

- the dissolution has been made irrespective of the fact that the ruling party has a comfortable majority of 114 members in the House of Representatives; and

- the constitutional provision for making a coalition government under Article 42 (1) has been fully ignored.

2. Hence, the privilege of the petitioners, that the elected members of the House serve for a period of five years, has been unjustly violated by the unconstitutional dissolution of the House.

3. The recommendation for the dissolution of the House is prompted by the ulterior motive of the prime minister. (Hari Prasad Nepal [member of the dissolved House of Representatives] v. Honourable Prime Minister Girija Parasad Koirala, writ no. 2304 of 2051, decision 2051/05/27 BS (13/11/1995)

In a number of explanatory clauses, the petition raised issues of the imminent danger the dissolution had posed to the consolidation of democracy by such an unconstitutional and premature exercise of power by the prime minister. It argued that the exercise of Article 53 (4) in this way would empower the prime minister, who is also a leader of the House, to resort to unconstitutional dissolution under any circumstance.

In response to the petition, the prime minister confessed that he had submitted his resignation to the king on 26 Ashad (10 June, 1994), who accepted it immediately. The prime minister's recommendation for the dissolution of the House and the holding of a fresh election was, however, submitted on 27 Ashad (11 June, 1994) in accordance with the decision of the Council of Ministers. The king initiated action for the approval of the recommendation, and accordingly declared the date of election on the same day. The fact was thus clear: the recommendation for the dissolution of the House was made by the prime minister who had already resigned and was acting as a caretaker prime minister.

Division in the Supreme Court

On 27 Bhadra, 2051 BS (12/09/1994) the Supreme Court, by a majority of the presiding judges, issued its ruling in favour of the prime minister's recommendation. The majority and minority judges gave the following reasoning in support of their rulings:

Justice Surendra Prasad Singh

The power to dissolve the House, under Article 53 (4), is a prerogative of the incumbent prime minister. As it is clear from the documents, the prime minister has taken the decision to dissolve the House in view of political reasons. The court cannot enter into, in view of the doctrine of the separation of power, the
rationality or adequacy of the political reason attached to the decision" (Adapted from *Nepal v. Koirala*, 1995).

**Justice Mohan Prasad Sharma**

I do agree with the Chief Justice’s opinion that there are no grounds to prove that the dissolution of the House was prompted by the ulterior motive of the prime minister. So far as the issue of whether a resigned prime minister can dissolve the House is concerned, Article 36 (5) has granted the right to the prime minister to resign from office. As has been established by the notice dated 2051/3/26 BS (11/06/1994), the prime minister moved the recommendation for dissolution before he had been relieved from office, and the prime minister holds the power to dissolve the House. It is, furthermore, inappropriate to delve into the issue of whether the prime minister must wish to dissolve the House only on the grounds of requisitioning a fresh mandate. He can dissolve the House in view of political reasoning, which is a political question to which the Court maintains self-restraint (*Nepal v. Koirala*, 1995).

**Chief Justice Bishwo Nath Upadhya**

The existence of an ulterior motive cannot be ascertained merely by assumption; it needs to be proved beyond a reasonable doubt. The recommendation for the dissolution of the House in question presents no proof that it was prompted by an ulterior motive. The prime minister was still in the post at the time of making the recommendation for dissolution. It is not always necessary that the prime minister move the resolution for the dissolution of the House for only the purpose of a fresh mandate. The statement that a ‘resigned prime minister cannot dissolve the House’ is not a principle that helps to determine constitutionality, it is rather a practice based on political convention. Hence, the prime minister’s act of recommendation for the dissolution of the House is not found to be unconstitutional (*Nepal v. Koirala*, 1995).

**Justice Laxaman Prasad Aryal**

To do an act that is not required to be done by the constitution does not amount to a constitutional act in itself. The Constitution has not required the prime minister to resign in order to exercise the power to recommend the dissolution of the House. In this sense, it is unreasonable to opine that the Constitution has not prohibited a resigned prime minister to move a recommendation for the dissolution of the House. The Constitution has implicitly stated that these two things are not parallel. This means that when the resignation becomes effective and the government has been reduced to a caretaker government, the recommendation for the dissolution will be automatically unconstitutional. It can be seen from the document that the prime minister’s resignation was accepted by the king on 26 Ashad, and the government was declared by the same notice to be a caretaker government. In such a situation, the recommendation for the dissolution of the House, under Article 53 (4), cannot be effectual. It is, therefore,
plainly seen that the prime minister’s resignation has been duly accepted, and the government has already been reduced to a caretaker government, so the act of dissolving the House is unconstitutional. In such a situation, the constitutional process of forming a new government must start. The recommendation for the dissolution of the House is therefore unconstitutional. Justice Keshab Prasad Upadhya has agreed with this opinion (*Nepal v. Koirala*, 1995).

*Justice Om Bhakta Shrestha*

According to Article 53 (4) of the Constitution, the prime minister has the power to recommend the dissolution of the House. However, the prime minister must not have already lost the privilege to do so. The prime minister has tendered his resignation on moral grounds in view of the defeat of his policies and programs in the House. The provisions concerning resignation under Article 36 (1) and the recommendation for dissolution under 53 (4) are made by the Constitution for different purposes in different contexts. On these grounds, I have no reason to concur with the ruling of the majority that renders the petition quashed (*Nepal v. Koirala*, 1995).

*Justice Kedar Nath Upadhya*

Resignation and dissolution cannot go together; hence, the recommendation for dissolution cannot be constitutional (*Nepal v. Koirala*, 1995).

**Principles of constitutionalism settled by the Court**

In this writ petition, the Supreme Court laid down among other things two important principles of constitutionalism. They are that (1) the exercise of power under Article 53 (4), to the effect of the dissolution of the House Representatives, is an exclusive, unfettered privilege of the incumbent prime minister, and (2) that this privilege or prerogative of the prime minister to exercise Article 53 (4) is not limited to seeking a fresh mandate; instead the incumbent prime minister can dissolve the House for any political reason, and the Court may not interfere because it is unconstitutional.

The majority of judges resolutely held the primacy of the political question and maintained that the judiciary had to exercise self-restraint in order to let the separation of powers function effectively. However, the Supreme Court departed from this decision the following year in its ruling on a similar case—that of *Rabi Raj Bhandari v. Prime Minister Manmohan Adhikari* (Writ no. 3105 of 2052, decision 2052/05/12 BS [1995/05/28]). In this case, the issue related to Prime Minister Adhikari’s recommendation for the dissolution of the House of Representatives, which was accepted by the king after consultation with political actors. A midterm election was then declared. The main plea of the petitioners was that the prime minister had moved the recommendation in order to defer the process of a no-confidence motion by some members of the House Representatives under Article 59 (1) of the Constitution.
In his response to the Court, the respondent prime minister argued that 'both the issue of [the] recommendation for [the] dissolution of the House and its approval by the king are political acts, and hence they are out of justiciability'. However, the court, while accepting the principle that political actions are non-justiciable, took another approach and argued that 'the court has jurisdiction to review judicially, pursuant Article 88 (1) and (2), the powers and functions of various organs established by the constitution'. While in the previous case, the majority held that to recommend the dissolution of the House was a privilege of the incumbent prime minister, and the Court could not enter into the political issue and hold whether the act of the prime minister was constitutional or not, in this case, the majority of judges held that 'the rationale of entrusting the power on the Prime Minster to recommend for the dissolution of the House is not to make the power of House of Representatives meaningless'. By entering into the rationality of the dissolution, the majority held that the 'act of dissolution will deprive a forum of considering the policies and programs of the government; hence the dissolution in question cannot be held constitutional'. Thus, the Court in this case did indirectly review the rationality of the political judgment of the political branch of the government.

CONFUSION, MISGIVINGS AND DILEMMAS: THE FALLOUT OF THE COURT RULING

The approaches adopted by the Supreme Court in the aforementioned cases presented discrepancies in interpreting the privilege of the incumbent prime minister to dissolve parliament. The discrepancies were costly for the future of democracy in Nepal. The error in the approach started with the first case. That error in turn proved to be the cause of the error in the judgment of the second case. The erroneous ruling in the first case resulted in the consolidation of democracy at large.

Democratic constitutionalism functions to help some important principles. The separation of power between the vital organs of the state is a pillar of democratic constitutionalism. Nothing should impair this doctrine otherwise it may result in serious harm to the functionality of the entire constitution. No system of democracy can thrive if the separation of powers is breached. The structure of the constitution itself is the most reliable guide in the interpretation of constitutional provisions; hence, the court maintains restraint from indulging in issues of political possibilities and impossibilities as a fundamental principle of constitutional interpretation.

The gap between political and constitutional issues is, however, exceptionally thin. Unconscious, speculative, and assumptive engagement on issues of constitutionality poses a danger, causing the interpretation to fall into a trap of the conflict between constitutionalism and political manoeuvring. The constitution
is a system of fundamental rules or norms intended to handle complex political and social phenomena. It devises a political framework for society and prescribes norms of fundamental policies for that given society. “[The] Constitution, set of laws or prescribed habits of acting, that citizens will live under, is the one which images their convictions—their faith, and what rights, duties, capabilities, they have there; which stands sanctioned therefore, by necessity itself then by seen one” (Carlyle, 1837).

The constitution also constructs organs to implement those polices and mechanisms to achieve its goals out of the prescribed fundamental policies. The fundamental policies and the prescriptive mechanisms are designed in a framework of alternatives. Some policies and mechanisms are defined as a general rule or a course of action, while others are defined as secondary or an exceptional rule or course of action. The provisions of the constitution are schemed accordingly, and some provisions lay down general rules and others the rules of exception. The cardinal principle in this regard is that a judicial review of the constitutionality of any act of government institutions or political bodies has to follow this principle strictly otherwise the judicial verdict may automatically fall into a political crisis. An equally important principle is that the constitution of a democratic society should rely on a communitarian objective, thereby invariably emphasizing its benefit to the people through the system devised. The guiding norms when considering the constitutionality of the acts of state political organs are the stability of the political organs in their function, the smoothness in the system of delivery by governance, and the prevention of erosion in the accountability of the political organs to the people.

**General course of rule and exception?**

The two cases discussed above did much to shape the constitutionalism of Nepal, yet they ultimately failed because of misgivings about the structural peculiarity of the political system devised by the 1990 Constitution. Fundamentally, the multiparty system, the parliamentary system, adult franchise, and the constitutional monarchy were regarded as the lifelines of the newly established constitution. These lifelines resolutely and explicitly laid down that:

1. The king could work only in accordance with the advice of the Council of Ministers; thus it had no role in and authority over consideration of the constitutionality of the decision made by the prime minister in political affairs of the state. The king was thus bound to accept the decision of the Council of Ministers and expected to act accordingly.

2. By pursuing a parliamentary system of government, the Constitution of the Kingdom of Nepal had accepted a conventional principle of constitutionalism that the prime minister, in commanding the majority in the parliament, was the leader of the House and head of the Council of Ministers with the authority to act as responsible executor of the government. In this dual capacity, the
prime minister first had the responsibility to preserve the sanctity of Article 45 (3) of the Constitution, which fixed the tenure of the House for five years. This means that, as an unstated but implicit constitutional obligation, the prime minister had the responsibility to let the House work for its full tenure. This obligation emanated from the principle of sovereignty laid down by Article 3 of the Constitution which bestowed the sovereignty of Nepal on its people. It implied that the incumbent prime minister was thus obliged to let the elected representatives continue representing their constituents unhindered and unobstructed for the constitutionally tenured period of the House.

3. Article 53 (4) of the Constitution was merely an exception to the rule for two reasons: firstly, it did not create the power for the prime minister to dissolve the House, rather it prescribed the process of dissolution because the article was a mechanism concerned with the summoning and prorogation of sessions and the dissolution of the House of Representatives. Secondly, the dissolution that was provided by Article 53 (4) is an exception in construction itself because the dissolution of the House of Representatives cannot be a normal phenomenon in a working democracy. The rule of exception thus imbued a serious probability of the political question.

4. The majority rulings of the eleven judges in *Hari Prasad Nepal v. Honourable Prime Minister Giri Prasad Koirala*, which upheld the constitutionality of the prime minister’s act of dissolution, failed to see the primacy of this typical structural framework of the 1990 Constitution, which apparently avowed that dissolution of the House is merely a rule of exception, and therefore cannot be resorted to without a situation of utter necessity. The majority judges, however, wrongly referred to the mechanism provided by Article 53 (4) as a prerogative of the incumbent the prime minister. With this wrong construction of Article 53 (4), the rulings of the majority judges conspicuously suffered from their ignorance of the primacy of the general rule.

5. The Supreme Court corrected this mistake in *Rabi Raj Bhandari v. Prime Minister Manmohan Adhikari*. The majority ruling emphasised the importance of the constancy of the House for its full tenure and urged those in power to seek an alternative government before dissolving the House. In doing so the Court entered into exactly what it said were political issues in the previous case. The misgivings floated in this ruling were not from the merits of the ruling in this particular case but were based on the perspectives set forth by the court in the previous case. The Court reversed its stand that the political question is non-justiciable. The House was restored by the Court’s ruling, but the Court failed to understand the primacy of the principle of general rule or course.
Communitarian construction of constitutional provisions

The communitarian aspect of constitutionalism is an equally important consideration for construction of the provisions of the constitution in question. In a democratic constitution, the welfare and interests surrounding the dignity and security of each individual are always paramount. The construction of the constitutional provision from the point of view of this principle requires attention to the following:

1. The constitution must safeguard the protected sphere of the individual, which defines some rights and liberties as inalienable, in any condition or circumstance. To exercise sovereign rights as a citizen is an inalienable right, and thus it cannot be negatively affected or constrained. The dissolution of the parliament negatively affects in general the inalienable sovereign right of the citizen. Obviously, the communitarian principle of constitutionalism requires restraint in the use of an exceptional mechanism.

2. Law and order are a primary concern of every citizen, and no constitutional interpretation can push society toward an infinite state of chaos and inclining disorder.

3. The third and most important principle of communitarian constitutionalism relates to the need to avoid discordance among citizens. Because the constitution is a social contract, it inherently emphasises the social solidarity of the people, and in this sense the construction of any provision of the constitution has to consider the necessity of promoting coordinated functions by the organs of the state to promote the interdependence of the people.

In both of the cases discussed above, the Supreme Court’s sensitivity with regard to the communitarian construction of the constitutional provisions in question seems to have been insufficient. Consideration for the possible impact of the ruling in the development of events was overshadowed by an academic debate, thus underscoring the importance of the provisions. Use of the problem-solving method in crisis management is an underlying thrust of communitarian constitutionalism. This method requires reflective and critical appraisal of the situation and the relevance of the proposed or conceived construction. A gap in this regard widens the level of indeterminacy of law, i.e. the disparity between the actual fact or the social problem, and the function of law (Sangroula, 2010).

The two cases discussed above erroneously cemented two important principles of constitutionalism. Firstly, the Supreme Court can review the powers and functions of the political organs of the state. This principle was adopted in the ruling of Rabi Raj Bhandari v. Prime Minister Manmohan Adhikari. The ruling implicitly blurred the significance of the principle that judicial review of the power structure of the nation’s political organs must assume self-restraint. Secondly, the meaningful relation between the petitioner and the issue in question empowers
the Supreme Court reviewing the constitutionality of the power of the prime minister with regard to the dissolution of the parliament. The principle that the dissolution of the House is not merely a political question subdued the judicial psychology of the Court and was reflected in other cases in the days come, in particular the tenure of the Constituent Assembly.

**POST-1990 POLITICAL AND CONSTITUTIONAL DEVELOPMENT**

As discussed previously, the process of democratization set forth by the referendum heralded a new era of political development in Nepal. In 1990, Nepal restored multiparty democracy and ended the 30-year-rule of divine royal authority. It was the beginning of the decline of the king's authoritarian regime, and it fostered rule of law and democratic governance. The quest for modern thinking amidst the impending forces of globalization was a vital undercurrent of the ubiquitous but cryptic process of change.

The restoration of democracy was welcomed with great rejoicing and delight. The cherished goal of popular political participation had materialised. Without a doubt, the people's movement ushered Nepal into a new political landscape. The Nepali Congress—ideologically a socialist democratic force, but practically a platform of liberal democrats, socialists, and some Marxist ideologues—and the leftist political parties, together with the Communist Party of Nepal (United Marxist-Leninist) as a dominant group within the left block, formed politically competing forces. The new political landscape was based on a multiparty system that rested on two pillars: the constitutional monarchy and its democratic polity.

Both politically and economically, it was a new beginning in Nepal. The political change was marked by deep-rooted euphoria. The people's desire for participation in governance with greater autonomy and accountability was a strong but subtle premonition of the future march for full democracy. The people of Nepal could foresee better prospects in their emergence as a vibrant nation if they could achieve the socio-economic development of society. People wanted these aspirations fully reflected in the new constitution that followed the movement. They looked for intense debate on the modality of the political system, electoral process, and distribution of powers between the organs of power. The Constitution Reforms Recommendation Commission recommended a new constitution, which would fulfil the people's aspirations through the institutionalization of the political achievements of the 1990 popular movement and the laying down of a concrete ground for socio-economic transformation, including welfare and social security for the deprived, suppressed, and downtrodden.

The draft of the 1990 Constitution was prepared amidst some suspicion and scepticism but with a firm hope for a better democratic and accountable polity. The integration and harmony demonstrated by the political actors was
encouraging, if not fully praiseworthy. Legal professionals, political scientists, members of civil society and politicians actively participated in the debate. While there was no widespread popular participation in making the constitution, the intra as well as inter political dialogues constituted important aspects of the process, though the Constitution Drafting Commission enjoyed its freedom. While the composition of the commission faced the criticism of legal professionals, who played an influential role, the draft of the constitution was accepted by the Interim Government. The new constitution proved to be a good political document in view of liberal democratic aspirations, but it had very little to offer to those who had been excluded, ostracised, and discriminated against.

The liberal democratic overtones were reflected silently but exaggeratedly, high-jacking the aspirations of the people who had been forced to live in a state of want, socio-cultural marginalization, and caste discrimination for centuries. Though the new constitution had received adequate intellectual and a professional input, the people’s voice was overlooked. The system of governance enshrined in the constitution did very little to mitigate the massive poverty, hierarchical societal structure, and feudal culture. Nevertheless, the general public stood in favour of the change by installing change makers in the government and opposition. They voted for morally strong leaders, who, unfortunately in the days to come, largely proved inefficient, imprudent, and occasionally corrupt.

The democratic government, along with the opposition in the House of Representatives, had a historic responsibility to institutionalise the newly restored democracy and generate an environment for good governance. Unfortunately, the political democratic forces that had once collaborated after the first democratic election in 1948 turned into rival forces, giving way to political conflict, insurgency, the murder of King Briendra and his family, and the rise of Gyaneendra, a true despot. The consistent failure of the democratic forces to cater to the desired changes of the people created a vent for emerging discontent towards liberal democracy. The power-centric politics, accompanied by internal party ploys to annihilate one another, made the political parties weaker and unable to bear the pressure of the people’s expectations. Amidst this chaos and instability, the first parliament was dissolved by Prime Minister Girija Prasad Koirala, representing a prelude to the abrogation of the emerging democratic constitutionalism of Nepal.

The dissolution of the House of Representatives was primarily triggered by a political feud between two factions within the ruling Nepali Congress party. Infested by a chronic and plaguing factionalism, one faction of the party openly disobeyed its own government by absenting in the House, which was going to adopt the government policies and programs. Morally, the prime minister was supposed to resign, and accordingly he did. But immediately after the resignation was tendered, he urged the king to dissolve the House. The prime minister’s dissolution submission and request for the mid-term poll was challenged in the Supreme Court by some members of the dissolved House. After a hectic, long and
unprecedented hearing of the case, the Supreme Court of Nepal, in a division of rulings, upheld the constitutionality of the politically disastrous dissolution. The mid-term poll went against the Congress. The CPN (UML), the opposition in the first House, emerged as the largest party and formed a government under Article 43 of the Constitution, which allowed for a government to be formed in the absence of consensus on a coalition government. After nine months, the Nepali Congress in partnership with the royalists moved a no-confidence motion against the UML government, thus opening the gate for collaboration with the authoritarian regime of the past. To evade the fall of his government, the incumbent prime minister submitted a resolution to the king for dissolution of the House and a new mid-term poll, copying exactly the actions of the previous prime minister. The resolution of the House dissolution and mid-term poll, against the wishes and will of people, seriously plagued the fledgling democracy. As in the past, the resolution for the dissolution was challenged in the Supreme Court, which, against speculation of the general population and fair minded intellectuals, and opposing its previous verdict, declared the resolution unconstitutional, thus restoring the dissolved House. With these unwanted political gimmicks in Parliament, the prospect of developing sound constitutionalism and democratic rule faded away.

Against this background of power politics, emerged the Maoist insurgency, a bloody civil war that took many lives and which over the course of a decade destroyed the fundamental democratic framework established by the 1990 Constitution. The fledgling democracy was forced into two currents of authoritarianism: the Maoist insurgency declared an open war upon the liberal democratic structure in favour of a proletariat dictatorship, and King Gyanendra, who became king after the massacre of his brother's family, plunged the nation into a state emergency, banning all political activities and incarcerating political leaders in a quest to regain the divine authority of the monarchy. The people, however, once again stood in favour of freedom, liberty, and a system of democratic governance, and ultimately the way for a peace process was paved, and the king's attempt to revive absolute monarchy was put an end.

Reflection upon this background explains two important reasons for the failed development of the viable or workable principles of constitutionalism in Nepal. Firstly, the Supreme Court, by happily agreeing to review the constitutionality of the House dissolution cases and by making contradictory rulings in those two cases, failed to streamline the controversy between the power of the prime minister to dissolve the House and the power of the House to complete its tenure as a constitutional representative body of the people. Secondly, the political morality of the political bodies established by the constitution degenerated in a way that the democracy failed to yield results, and the constitution could provide no dynamism to address the problem.
The 1990 Constitution in fact died quite early, before the Maoist insurgency occurred, from three main causes: 1) the power greed of the political parties and their ensuing inability to respect the basic structures of the constitution; 2) the failure of the Supreme Court’s rulings to understand the principles of communitarian constitutionalism due to its non-contextual and uncritical reliance on interpreting the controversy between the power of the prime minister and House; and 3) the shameful indulgence of the political parties in corruption and unholy alliances for immoral governance. Each of these political and constitutional failures gave moral and spiritual space to the bloody fight for change that followed.

LIMITING PARLIAMENT’S POWER TO AMEND THE INTERIM CONSTITUTION

The decade-long conflict between the state and the Maoist insurgents came to an end by peaceful negotiation, though not as a result of prudence on the part of the political parties to save democracy. It came as result of their realization of the danger of annihilation posed by a kind of coup d’état by the king. Faced with emerging unconstitutional royal power, the political parties and the leaders of the rebels were obliged to negotiate an agreement, namely the 12-Point Understanding, thus paving the way for the massive popular rebellion against the king, who wished to resuscitate the monarchy. The April upsurge put sovereignty once more in the hands of the people. The change brought the political parties and the Maoist rebels together to cooperate. They agreed to make a constitution through the representatives of the popular will, the Constituent Assembly (CA). The Comprehensive Peace Accord between the state and the rebels was concluded, transforming the insurgents into a legitimate political party. As per the terms of the Accord, the Interim Constitution of Nepal, 2007, was promulgated, and an election for the Constituent Assembly election was held. A respect for the rule of law, human rights, political pluralism, and a plan to form Nepal into a republic provided the blueprint for the future political system.

The Interim Constitution provided the details of the plan with a simple and adequate legal basis for the new constitution. It was the people’s wish that the transition period end quickly and that the nation undergo a socio-economic transformation as soon as possible, so Article 64 of the Interim Constitution tenured the Constituent Assembly for two years.

Unfortunately, the CA could not draft a constitution within the stipulated amount of time, and after two years a substantial part of the constitution was left undone. The circumstances necessitated that an amendment be made to Article 64 to extend the term of the CA. In accordance with Article 84 of the constitution, the CA had the power to amend the constitution if necessary. The amendment passed
with a two-thirds majority. However, the constitutionality of the amendment was challenged in the Supreme Court on the grounds that the tenure could not be amended by the CA as it could result in an arbitrary extension and could cause a huge economic burden to the people.

The Supreme Court’s Special Bench, presided over by Judge Balaram KC, rejected the writ petition on the grounds that ‘the amending power is a legislative power of the Legislative Parliament, and in view of the doctrine of separation, inter alia, the amendment carried out by the genuine authority, i.e. the Legislative Parliament, cannot be declared unconstitutional’ (Writ no. 066-WS-0050, decision 2067/07/18 [04/11/2010]). In addition, the KC Court held that the extension of the tenure of the CA by amendment of Article 64 is a matter of discretion of the legislative body. The Court laid down the following principles (Ibid.):

a. The issue of judicial review has to rely on the doctrine of the separation of powers. The lawmaking power belongs to the legislative body. The amendment of the constitution is a lawmaking or legislative function and as such pertains to the jurisdiction of the legislative parliament.

b. As a legislative function, the power to decide how long it will take to complete the process of making constitution lies with the legislative body. Hence, the Supreme Court, by overstepping its jurisdiction, cannot demarcate the tenure of the CA by indirectly denying its power to amend the Interim Constitution.

After some time, the remaining petition was heard by a special bench presided over by justice Kalyan Shrestha, which, with its disagreement over the previous verdict, referred the issue to a larger bench. The five judge bench finally decided the petition, in effect of quashing the previous judgement, lying down the following principles (Special Writ no. 066-WS-0056, decision 2068/02/11 [25/05/2011]).

a. In accord with Article 64 (2), the extension of the term can be made only in a state of emergency only for a period of six months as stipulated by the sub-article. If extension cannot be made exceeding the period of six months even in abnormal circumstances, there is no question of the tenure exceeding a period of six months in normal circumstances. The six month period is therefore a benchmark for extension.

b. The earlier extension of one year, being already expired, is not a matter of alteration. However, the extension of the period cannot be renewed after expiry of the present extension. This way, the Court put an end to the exercise of amending the power of the legislative body prospectively.

The making of the constitution could be completed in the given period of extension. The political parties could forge a consensus on certain issues, the restructuring of the state being the most important one. The prospect of voting could be a dangerous political move dividing political parties as well as the country. The political parties were afraid of taking the option of voting for a
decision in view of these dangerous political cleavages. The CA was ultimately automatically dissolved due to termination of its tenure.

**ANALYSIS OF THE SUPREME COURT'S APPROACH IN CA TENURE CASES**

The need for a new constitution arises for more than one reason. A few generally established experiences however show us that making a new constitution becomes inevitable in a situation when (a) a nation emerges from conflict and needs restructuring to accommodate the interests of conflicting parties, (b) a nation considers its previous constitution not functional for some reason and a new constitution is desired by the people, (c) a nation’s prevailing political system is changed diametrically making the previous constitution redundant, (d) a revolution is successful so that the new regime takes over the state, and (e) a nation has split or merged, requiring a new constitution.

**The need for peace building, the need for a constitution**

Nepal passed through a decade long bloody insurgency. The new constitution thus became an instrument of peace because it could broker a negotiation between the conflicting parties. The 12-Point Agreement and Comprehensive Peace Accord between the government and insurgents opted for massive changes in the country in all aspects, the restructuring of the state being the most important one. In this wave of change, Nepal opted for a new constitution. As indicated previously, the mounting political corruption and the failure of the Westminster model of democracy made it impossible as a future model since the Maoists wanted substantive changes in the structure of the state. The most important factor was that the Nepali people had long dreamed of making a new constitution through popular participation. A new social contract was needed so that the political system would be permanently stable.

A new constitution was also necessary for legitimising the unification of Nepal in 1876. The Constituent Assembly was thus a milestone for Nepal’s future as a nation state, transforming it into an emotionally integrated state and making it a new modern and developed nation. The new constitution was vital not only from the point of view of introducing a new political structure, but also from the perspective of ending the causes of latent violence. To end discriminatory political practices and transform the restrictive hierarchical structure of the society was an equally important goal of the constitution, as was the need to create an atmosphere for rapid socio-economic transformation.

In a state of transition caused by past conflict, a new constitution becomes desirable for many reasons. Functionally, however, the need to create an ambience on harmonious interaction among the people in order to end the past strife becomes the most important one. The new constitution in a post-conflict
situation also reflects a psychological departure from the past. Since many values of the past are changed, a new legal order becomes necessary. The new constitution in such a state lays down new normative order of society, and as such constitutes a source of new values and national culture.

The definition of constitution when reordering society

To look from these perspectives, definition of a constitution becomes really a hard work. Nevertheless, it is mandatory here to make attempt to lay some grounds for definition of constitution with a view to shape its 'demarcations' and 'legitimizing the principles it has to pursue for reordering of the society'. Broadly speaking a constitution, in the backdrop of the above discussion, is a body of fundamental rules or codes which are devised by people to regulate the system of government's affairs and interactions of people in future. As such the constitution establishes a national culture, in given specific set of circumstances, institutions, which form the part of the newly devised system; and it provides the powers to such institutions. In addition, the constitution determines the 'modality and approaches' such institutions are to apply for interacting and co-existing with each other. Constitution in this sense is a 'descriptive metaphor of State'. If a society fails to have such a constitution, it would be exposed to a danger of 'chaos begetting more circumstances of conflict'. The definition succinctly tells us why a society needs a fresh constitution in a post conflict situation of a nation.

Let us examine some other definitions in order to justify a necessity of a new constitution in a nation which has gone through massive changes owing to a conflict. Finer, in his popular book called Five Constitutions, defines constitution as 'codes of rules which aspire to regulate the allocation of functions, powers and duties among various agencies and authorities of government and define the relation between them and the public' (Finer, 1979). A stable and functional society need not make a new Constitution. A new Constitution therefore obviously indicates to a state or set of circumstances which need to be addressed by a new system with clear demarcation of agencies, their powers, functions and modalities of interacting with each other. Constitution making process in this sense is not a 'matter of judicial dictation and interpretation'. The interim judiciary is an institution to be restructured too, and as such it cannot decide the course of change dictated by the political process or needs.

In a post-conflict transition, which state body has authority?

An executive government in the interim period is not a government with the mandate to rule by its policies and programs. It is merely a custodian of the process of changes that need to be institutionalised by making of a new constitution. The accountable and sovereign institution during the interim period is the Constituent Assembly to which people have mandated all decisions concerning the restructuring of the state by devising a new constitution. Neither
the executive nor judiciary in the interim period can interpret or dictate the sovereign people body.

The new constitution, to look from Finer’s perspective, is ‘a body of new codes’ instituted to ‘evolve a new system’. The making of new constitution in this sense is typically and purely a ‘political process’. This assertion is justified by reference to the provision of the Constitution of South Africa (1996). It says, “This Constitution is the Supreme law of the Republic; law and conduct inconsistent to this is invalid and obligations imposed by it must be fulfilled” (Section 2). This definition, together with the former discourse, does bring out some clear picture of Constitution’. Constitution works as a ‘code of supreme rules’. When a new Constitution is established, all conducts in society has to confirm what has been laid down by the new Constitution’. Now we need to answer a question as to who makes these rules. There are two answers. One, we can say the ‘party which led the change and saw necessity of accommodating interests’ makes the constitution. This is, however, not the case of Nepal. Another, the body can make the constitution which has been chosen by the sovereign people for this purpose.

In the ancient and the medieval era, the kings claimed they had divine authority to rule the people, thus they made the constitutions. This is a modern era. No authority is divine. The sovereign people are the only legitimate body and source of authority of the state’s power. The sole objective of the sovereignty of the people is to protect the equality in worth of human person. No human being, despite his position, is superior to another. The social contract among the people is therefore the giver of the new constitution and the Constituent Assembly, in the context of Nepal, is the sole body that reflects and represents the social contract of the Nepali people.

Now the question is, can an interim judiciary or executive organ influence the works of the body which people have created for developing a body of new and supreme codes of nation? If the answer is no, then how can the Supreme Court say yes or no to the tenure of the Constituent Assembly in Nepal?

No, the court cannot do such things. Can the Court be criticised for having taken a political role? If the answer is yes, then we can ask where the power of the Court comes from to guide the political process, because constitution making is purely a political process, not a judicial one. If people are unhappy with the Constituent Assembly, does it mean that the Court can represent the people so as to dictate that the Constituent Assembly behave in a particular way? These questions demand multi-pronged philosophical enquires to reach a precise conclusion. The discourse below will attempt to understand the Supreme Court decision from analytical perspectives.

Let us explore the normative principles that provide a perspective for dealing with the controversy raised when an institution of the state exercises its power. It is natural that the organs of states may face a confrontation when exercising
their powers. An overriding exercise or inaction by one of the organs will pose this confrontation. The broken system of checks and balances will cause a serious problem in the functionality of the state's political system. In a post-conflict situation the stakes are especially high: such a confrontation could potentially destroy the entire peace process and cause the state to revert to a state of conflict.

i. In a post conflict situation, process of making a constitution is essentially as peace building (UNROL, 2009). Making a constitution in the post conflict situation has multi-fold objectives. It serves to transform the nation from transition into a political stability, and also addresses the wounds of conflict. Societies emerging from conflict face difficult task of channelling future political contestation through institutional paths. Their endeavours often takes place in the context of weak or even collapsed state institutions, weak political will for reconciliation, and distrust (Benomer, 2003). Constitution making process in a post conflict situation is marked by several features. Firstly, it has been driven by a ‘preceding agreement laying down some important aspects of the peace building process, which comprise of ‘mutually accepted obligations by conflicting parties’. Some of these obligations inserted into the agreement constitute the ‘basic structure of future constitution’. The terms and references agreed upon by the parties, indeed, constitute some important features of the forthcoming constitution. Secondly, the constitution making process in the post conflict situation is based on ‘burgeoning and broadening participation of people in debate which helps in resolution of the causes of the past conflict. The Constituent Assembly method in particular is a platform providing participation of ‘stakeholders, particularly those who are excluded in the past. Obviously, the Constitution making is ‘typically a peace building processes. The CA is considered as a mechanism to resolve inter-group disputes through debate for constitution making. Thirdly, Constitution making in the post conflict situation is a ‘process of negotiation between stakeholders for developing fundamental codes and institutions. The process is crucial for evolving some fundamental principles of power sharing among the ‘institutions of the State. It is also crucial for developing commitment of the State to the welfare and social security of people and the commitment of stakeholders, the former conflicting parties and other groups, to promote sustainable peace and social cohesion. The constitution making process in this shape promotes or strengthens a ‘multi-stakeholder’ negotiation culture in matters of national issues. Fourthly, the public debate in the process of constitution making is crucial or building ownership to the constitution. It adds indispensable legitimacy to the final document adopted. In course of debate, many issues latent in the past may arise requiring additional efforts on the part of conflicting parties to address, in order to shape sustainability of peace in future. Hence, the process of constitution making may extend or shorten depending upon resolution of ‘peace’. Most importantly, all these aspects involve a ‘political process’ as they are politically negotiated.
The ‘debate for constitution making in the post conflict process is therefore essentially a political dialogue which demands non-political issues in sideline’ because the ultimate solution depends on political agreement and commitment. The Constitution making as a matter of peace building process exhibits some characters (Benomar, 2003): (a) the preliminary process progresses from adoption of regulatory and drafting methods to discussion on substantive issues; (b) the success of negotiation on substantive issues depends on progress of the ‘resolution of conflict causes and factors’ and also the consequences of the past conflict, such as reconciliation process and so on; (c) the success of negotiation on substantive issues will push the concerned stakeholders to ‘framing of the State’s structure, which involves a serious competition and pressure to bring the structure to the favor of the main contesting parties; (d) the success of negotiation on structure of the State will lead to the negotiation of fundamental principles on ‘relationship and interactions’ between the proposed State institutions, which are also essentially marked by the characters of competition and pressure of the contesting parties; and (e) finally, the issues on principles and modality of participation in the institution occurs. Throughout this ‘process the role of political ideology, convictions on socio-economic principles and the political game for win-over’ constitute the rules of game between the negotiating parties’. This game is often tough and cruel. However, the solution cannot be had by departing from the political process. The situation is often fragile too. The success of negotiation depends largely on ‘external ambience’. Undue interference of nay institution, force or element will be disastrous.

ii. The discussion above fairly highlights a principle that the ‘Constitution making process in the post conflict situation is essentially a part of peace process and vice versa’ (Ghai, 2004). As a part of peace process, the constitution making process is achieved through negotiations on the re-design of the State and allocation of power—thus inevitably highlighting the status of the constitution (Ghai, 2004).

Yash Ghai notes in this regard are noteworthy:

Exactly when the constitution making stage of the process is reached depends on the context. In some cases constitution amending or making is the last stage, after the conflict has been more or less resolved and other measures to consolidate peace has been put in place (as in Namibia, Cambodia, East Timor and Afghanistan). In other cases, preoccupation with a new constitutional settlement starts early, as in Sri-Lanka, where the very genesis of the conflict lay in what was perceived by one party to be a faulty and unfair constitution. In the latter situation, the politics of Constitution play a critical role throughout the peace process.

(Ghai, 2004)
The constitution making process in Nepal was preceded by an agreement—the Comprehensive Peace Accord—which did lay down some crucial pre-conditions for achieving a new constitution. The ‘agreement to integrate the combatants in the national army’ was one of the crucial most pressing terms for early achievement of new constitution. The ‘modality, size and other terms and references of integration’ thus played a role of ‘crucial aspect of politics of constitution’. It was natural that the ‘CPN Maoists wanted to downplay others in this issue, and the others, on the other hand, were not only suspicious of the integration but also largely afraid of the ‘state takeover’ by faulty integration process. Moreover, the agreement between the state and Madhesi political movement added ‘federal structure’ of the nation as another important pre-condition. To by pass this pre-condition was never possible as ‘the peace process finally was seen to rest on massive devolution of the power’. The integration of combatants and federal restructuring of the State thus constituted ‘fundamentals issues to be properly addressed by the new constitution making politics in the CA’.

To encapsulate, the constitution making process as a part of peace process is pervasive in the following shapes:

a. Although, it is possible to distinguish the ‘one specific constitution making stage from other stages, the fact is that constitutional issues pervade all stages of the peace process, which is typically a political process.

b. Working out of possible structure of the respective institutions and their powers and duties would be driven by ‘an agreement of political agencies (parties and group stakeholders)’. Ignoring political intensity in determining the ‘fundamental principles concerning structure and powers’ would lead to a problem. This aspect of the making constitution is also basically a political work.

c. The two notes above amply highlight that ‘constitution is an instrument for dispute resolution. In a conflict like that of Nepal where no one is in complete victory, the constitution making process should be able to accommodate interests and wishes of all conflicting parties with a sense that the ‘constitution in its final shape is a victory of all in itself’ (UNROL, 2009). This is again a matter of ‘brilliance in political negotiation’. As pointed out by Yash Ghai, the constitution making serves conflict resolution in two principal ways—the procedural and substantive. The first aspect helps to identify the parties for negotiations and provides opportunity for them to meet in somewhat structural contexts. It sets the rules of procedure, including the process of decision making, with some consensus, which necessarily involves some agenda of politics. The more substantive aspect concerns outcomes, principally through the resolution of differences, which is typically political in nature (Ghai, 2009).
d. The process of new constitution making is used to ‘reorder the society or existing constitutional disorder’. In this way, it is a process of ‘restructuring of the State on which the resolution of the conflict is typically dependent on’. The fundamental issue the proposed constitution is going to address is thus an outcome of the ‘political negotiations’.

iii. Political questions are to be decided by political actors of the State, and especially in the post conflict state by the conflicting parties. The political role is thus crucial for several reasons—firstly, the constitution is to address the ‘issues of conflict’ (Ghai, 2009); secondly, building a sense of ownership in the process is vital for achieving the constitution (UNROL, 2009); thirdly, the process of making constitution is an opportunity for public debate on ‘nature of the proposed restructuring of the State (UNROL, 2009); and fourthly, the building of national institutions and their powers is inherently a political agenda of the society (Finer, 1979). What is fundamentally established question in constitutional law is that questions, in their nature of political questions, or which are, by the constitution and laws, submitted to executive and legislative body can never be made in the courts of law’ (Seidman, 2003-2004). This doctrine is basically propounded by the ‘American Supreme Court’. Nevertheless, the tendency of courts engaging themselves in political question is phenomenal and sometimes they give rise to a serious squabbling between the ‘State organs’. The engagement of the courts in political questions often arises due to (a) influence of politics in the partisan sense, as judges knowingly or unknowingly tend to fall in trap of their political ideology, (b) ambition of judges to assert overriding attention of the public in a context of wider dissatisfaction of people against the executive and legislative actions, (c) corruption of judges which are appointed in an atmosphere of political favouritism, and (d) inability of judges to separate the legal and political nature of the issue in question.

An established principle in this regard is, however, that the political questions operate outside of constitutional law, thus the political question doctrine must lead a secret life. In theory, the court’s abstention from deciding political questions insulates judges from politics so that they can resolve legal disputes. There are three important principles of ‘political doctrine. The ‘Faux principle’ underscores, based on the doctrine established in the Marbury v. Madison, that the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear that (his) acts are only politically examinable. This theory was taken by many as ‘official version’ of the political doctrine principle. Louis Henkin is the ardent supporter of this version of political doctrine theory (Henkin, 1997: 622-23).

‘Interpretative Theory’, in different version, believes that the Constitution vests in the political branches the final authority as to the meaning of some constitutional provisions (Barkow, 2002: 295-300). The ‘Secret Political
Question Doctrine’ takes seriously the fact that no normative principle can establish its own legitimacy. Hence, even if the answer to a constitutional question is clear, courts must always decide whether they should abide by that answer. These three doctrines provide a ‘normative guidelines’ on issue of political questions. The cumulative understanding is that ‘a court should not engage itself on interpretation of question which is political in nature or generates a political outcome’. The role of the court is confined to the ‘legal analysis of the issue in question’ and while doing it the ‘court must consider that ‘verdict is going to settle an issue of law’.

A brief discourse about Supreme Court’s intervention on issue of the amendment of the ‘tenure of the CA’ becomes relevant. Few reasons the Court advertently assumed jurisdiction and intervened with effect to disable the Legislative Parliament to amend the constitution can be outlined as follows: (a) firstly, the court in the parliament dissolution case developed a judicial psychology that the legislative works fall within the purview of the judicial review; (b) secondly, the court failed to distinguish between the normal and abnormal situation of politics; and (d) thirdly, the court underrated the works of the CA, which was essentially, though done in the name of Constitution making, political dialogue between the past conflicting parties. Most importantly, the court forgot to consider that the CA was the only final authority and all other organs were interim nature’.

According to the Faux, in political question doctrine, which rests on Justice Marshall’s pronouncement in the Marbury case, the court has to ask a question to itself whether the issue in question is mere political question. To put in other way, the court has to ask whether the act delivering or withholding a commission (is) a mere political act belonging to the political branches alone, for the performance of which, entire confidence is placed by the Constitution in the political branch (Seidman, 2003-2004), so that the court in such issue does not go into ‘merits’ while deciding the issue (Seidman, 2003-2004). The issue was substantially raised by the Rehnquist’s court in *Nixon V. United States*, in which a former district judge challenged his removal from office following his impeachment by the House of Representatives and conviction by the Senate. Purporting to avoid the merits of the case, Chief Justice Rehnquist majority opinion argued that the case posed ‘a non-justiciable political question’ (Henkin, 1997). The argument relied on the doctrine laid down in the *Baker v. Carr*, which held that ‘textually demonstrable constitutional commitment of the issue of coordinate political department would pose a ‘political question’.

It also held that ‘judicially discoverable and manageable standard has to exist for resolving the issue’ as a criteria for intervention. The court’s understanding in the Nixon’s case was that ‘Nixon’s constitutional rights were not violated’ (Seidman, 2003-2004), and whether the impeachment process was constitutional or not was ‘to be decided by the political branch.
(Legislative Body) as the constitution had vested the confidence on it to the legislative body. Moreover, it would not be possible to go into merits of the impeachment evidences. The interpretative theory, on the other hand, emphasise that ‘some constitutional requirements are entrusted exclusively and finally to the political branches of the government for self-monitoring’ (Henkin, 1997). It implies that ‘the court cannot intrude into the function of the political branch as it would virtually destabilise the entire structure of the ‘constitution and the system of government’. The difference between Faux and interpretative theory is that the former ‘only rejects deliberation on merits’ where the latter ‘believes some issues are exclusively set aside for interpretation of the political branch’. The secret political question doctrine has been founded in the context of the American Supreme Court’s pro-active role in ‘anti-discrimination’ drive starting from Brown v. Board of Education. The political question is hidden here. The test therefore is ‘the obviously established fact of discrimination’ posed by unauthorised acts of government in the eyes of Constitution. To demystify, the theory implies that ‘the constitutionality of the issue at least needs justification from anti-discrimination perspective’ (Seidman, 2003-2004).

Based on this discourse, the following normative guidelines can be identified for judging any ‘ruling of court’ from the political question doctrines’:

a. Roots tracing to Marbury v. Madison, and by the time of Carr and other subsequent cases, the political question doctrine has been a settled jurisprudence in constitutional law which vows that the court should refrains from resolving a constitutional issue that is better left to other department of government, mainly the national political branches. Attempts to cross or invalidate this norm would result in political crisis or disputes between State’s organs, thus disturbing the democratic constitutional—separation of power—structure of the government (Choper, n.d.). Looking from the lens of this doctrine, the process of making constitution is undoubtedly an act of the political branch of the government. Especially, in a situation of the country, which has been involved to use constitution making process as a tool of peace building, no other branch, the judiciary in particular, has to assert role to define issues such as timeframe, procedures and other pertinent issues. Under the Interim Constitutional, the task has been exclusively designated to the Constituent Assembly, which draws authority from political agreement such as ’12 points understanding between political parties and the Comprehensive Peace Accord between the State and the former rebels.

b. The court should not enter into interpretation of power structure, which, as laid down in Baker v. Carr, is textually demonstrable constitutional commitment of the issue to a coordinate political department or lack
of judicially discoverable and manageable standards for resolving it’ (Choper, n.d.). Court as an intelligibly prudent institution must respect the constitution and let it be invoked by other branches as schemed by the Constitution. This theory implies that the judiciary cannot assume role ‘director’ to other branches of the State. The Constituent Assembly was designated body established by the Interim Constitution for ‘making a new constitution’ and give the way out for sustainable peace and development of the country.

c. The anti-discrimination perspective is a ‘ground rule for intervention of the court in judicial review’. The court has less concern with merits of the issue. What the court intends to settle through judicial review is the ‘discriminatory act of the state’. Hence, the court has to maintain a judicial care when carrying out the ‘judicial review’ (Campos, 2008).

d. Most importantly, to infer from above-mentioned norms, the court should decide structural constitutional questions—those concerning the authority of the national government vis-à-vis the states or the respective powers of the legislature and the executive (Choper, n.d.; Tushnet, 2002).

e. No two branch of ‘government should be final arbiter of the disputes over each provision of the Constitution (or certain type of disputes arising under it), but it should not same branch for all such matters (Choper, n.d.).

f. Jesse Choper suggests that the Court should consider four criteria in determining whether to relegate questions of constitutional interpretation to political branches: First, the court should refrain from deciding questions where there is a textual commitment to a coordinate political department (Baker v. Carr, 1962). Second, pursuant to a functional rather than a textual approach, when judicial review is thought to be unnecessary for the effective preservation of the constitutional scheme, the court should decline to exercise its interpretative authority. Third, the court should not decide issues for which it cannot formulate principled, coherent tests as a result of ‘a lack of judicially discoverable and manageable standards’. Finally, it is also suggested that constitutional injuries that are general and widely shared are also candidates for being treated as political questions.

iv. The judicial review is a power to review legislative and executive powers within the ambit of constitution. Within this scheme, the Judiciary is capable of ‘testing the constitutionality of legislative act or the law making body and the conduct of executive branch, including its subordinates and other State institutions which work independently of executive branch’. Under this power, deciding whether a law or government conduct violates the Constitution is a part of the judiciary’s power which is called ‘judicial review’. 
Sometime people want to bring a case in the judiciary though it do not have a real problem or has not involved violation of a particular right. These kinds of cases often known as ‘friendly or testing law suits’. The judiciary generally do not entertain friendly law suits or test cases. The reason is that such cases are not real or they pose no controversy under the constitution. The political question is a substantive normative issue for the court which requires it to restrain from meddling in political issues, which is apt to be resolved by the political branches of the government.

Comparative inquiry shows that there are, basically, three forms of review of the constitutionality of laws. Political review is the ‘first type of review, in which the political branch (the legislative body) examines the validity of its own laws. Most European countries in the past have followed this ‘form’, and it is still a common rule in England’ and the Netherlands (de Andrade, 2001, May). The countries practicing this rule are often characterised as countries with legislative supremacy (de Andrade, 2001, May). Second is known as judicial review, in which the court of law is empowered to set aside statutes conflicting with the constitution (de Andrade, 2001, May). Third is a mixed system of review in which courts and legislative branch share the responsibility. The court is empowered to examine one type of statutes and the political branch the others. That is the method of review adopted in Switzerland, where federal statutes can be reviewed only through the political process established by Section 113 of the Swiss Constitution, whereas cantonal laws can be controlled by the judiciary branch (de Andrade, 2001, May). The countries which apply judicial review generally six methods while considering the ‘constitutionality of a statute’ (Malamud, n.d.). ‘Text Theory’ follows literal interpretation of the ‘plain text’ of the statute, and if it is in face seen contradictory to the ‘constitution’ is declared void. This theory generally believes on ‘originalism theory’ of Justice Scalia who ardently advocates for maintaining originality of the constitution frame. This theory rules out ‘any consideration for pragmatism and contexts’. This theory also emphasises that ‘the court should follow the text to come to the conclusion’. Prudentialism (interpreting the Constitution in order to get the best results) does focus on ‘context and needs’. To make the constitution best serve the society or people is what is looked into when interpretation of the constitution is carried out. History surrounding the adoption of the text is another method applied to come to conclusion. The core belief of this method is that ‘every law has its history or background’. So when legislation in question, it is tested against the ‘constitution’, thus the history of the constitution should be emphasised. Precedent (dispositive or only one factor among many) provides a guideline to the court in reaching uniformed judgment. Social science is rested on a belief that ‘every act or phenomenon has a cause behind it and it emerges in a particular context. It calls for ‘empiricism and rationality both’. 

Non-Extension or Non-Amendement? The Supreme Court’s Originalist...
The Brief discussion above helps us to encapsulate us some important aspects of the philosophy of judicial review.

a. The prime philosophy of judicial review is founded on ‘need of ensuring constitutionality of the legislation and decisions of the political branches of the government’ (Rostow, 1952). To protect the ‘sanctity of constitution’ is the only objective of the judicial review. The legislation is reviewed not with a view of ‘exploring its constitutionality’ but being examined ‘if it has broken the constitutionality’. The ‘unconstitutionality thus matters’. The presumption is that every legislation or decision of the government is ‘constitutional’. Hence, unconstitutionality has to be proved. The court, by its prudential interpretation and wisdom must show that the unconstitutionality has been established’.

b. The objective of judicial review is not to ‘politically interfere or guide the political branches of the government and educate them how they have to behave’. The constitution is the sole ‘guide of the branch’. Activeness on the part of any branch to educate other of its behaviors will intrude the ‘doctrine of separation of powers’ unequivocally disturbing the ‘constitutional scheme of government’ (de Andrade, 2001).

c. The ‘underlying objective of judicial review is not to assert supremacy by the court but to promote democratic system of government. The court should therefore not engage in ‘self-searching’ mission. The mission of ‘self-searching’ may boil up to a state of controversy between institutions schemed out by constitution. Growth of democracy with increased freedoms of people and enhanced social interactions among the citizens is what the ‘judicial review intends to achieve by examining the unconstitutionality of legislation and decision of the government’. The judgment of the court will achieve no such things the danger of court’s judgment turning into a ‘rule by court’ becomes apparent.

d. Judicial review of the constitutional amendment is now a pertinent issue to be examined here. The fundamental question is that how far the court can treat an ordinary statute and constitution amendment equally. Procedurally, they are different as ‘the constitutional amendment proposal is generally passed by the majority of two third, and it comprises of a ‘political consensus’, whereas the ordinary legislation is ‘merely a reflection of the political aspiration or agenda of political party with majority’. In this sense, the examination of the ‘constitutionality’ of the legislation has two factual perspectives politically. In an ordinary legislation, the subject of constitutionality test comprises of a legislation which ‘legitimises the political agenda of the political force which occupies the dominant (majority) position in the legislative body. On the other hand, the ‘amendment of the constitution’ is a ‘reflection of the political consensus as it involves non-partisan or collective will of the legislative body’. The legal stature of these ‘two legislation are different’ in face.
While talking about ‘judicial review of amendments of the constitution, we need to pay attention to three questions: (a) Do courts have competence to review constitutional amendments? (b) Can courts review the formal regularity of constitutional amendments? (c) Can courts review the substance of constitutional amendments? The simple answer to all questions is that ‘courts can do if the constitution allows them to do’. The term 'laws may or may not include constitutional amendments'. Some scholars have suggested that the maxim expression *uniuses texclusio alterius* may be invoked (Gozler, 1997). According to this canon of interpretation, the fact that the constitutional provision determining the competence of the court expressly enumerated legal acts, such as laws, decrees having force of law, which are subjected to the review of courts means that the legal acts, such as constitutional amendments, which are not enumerated in this constitutional provision are not subjected to this review. If the constituent power wanted to vest the courts with the competence to review the constitutionality, not only of laws, but also constitutional amendments, it could do it expressly. Hence, it is not prudent for courts to ‘self-search the jurisdiction by interpretation of the term laws includes ‘amendments of the constitution too’. This principle implies that ‘the constitution must have an expressed inclusion of the constitution amendments falling within the definition of the ‘term laws’.

Even the ‘constitution expressly includes constitution amendment within the purview of laws, it presents several weaknesses. First although *laws of constitutional amendments* and *ordinary laws* are similar to each other with respect to the procedure and the form in which they are enacted; their legal force is, nonetheless, different because constitutional amendments have a higher rank in the hierarchy of legal norms (Gozler, 1997). Secondly, the validity of the opinion stating that the constitutional amendments can be included in the term “law”, and consequently, can be reviewed by courts, depends on the question of whether the term “law” can be broadly interpreted. As a result, constitutional provisions vesting constitutional courts with the jurisdiction to review the constitutionality of legal norms are of an exceptional nature, and therefore they should be interpreted narrowly due to the principle of *exceptioe stricteis imae interpretationis* (Murphy, 1995).

The second question that can courts review the ‘substance’ of the constitution amendment is also problematic. The general principle is that ‘at least the amendment must have violated some immutable principle (basic structure) adopted by the constitution. According to Walter F. Murphy, “the word *amend*, which comes from the Latin *emendere*, means to correct or improve; amend does not mean ‘to de-constitute and re-constitute’. William L. Marbury, in 1919, affirmed that “the power to ‘amend’ the Constitution was not intended to include the power to destroy it (Murphy, 1995).” Parting from this meaning of word “amend”, some scholars (Murphy, 1995), and even a Supreme Court judgement, asserted that the power to amend cannot
replace one constitutional system with another or alter the basic structure or essential features of the constitution.

Likewise, some authors argued that the constitution has an “inner unity”, “identity” or “spirit” and the amending power cannot ruin this “inner unity”, “identity” or “spirit” of the constitution (Murphy, 1995).\(^8\) Finally, it is also contended that the amending power cannot modify constitution. These arguments are highly disputable. First, if the constitution does not prohibit its complete revision, does the power to amend can modify the constitution completely? Indeed some constitutions, such as the Constitutions of Austria (Article 44), Spain (Article 168) and Switzerland (Article 139) have expressly provided their total revision. Likewise, the concepts of “inner unity”, “identity” or “spirit” of the constitution are vague concepts which cannot be objectively determined. Constitutions do not define their “inner unity”, “identity” or “spirit” and they do not specify that their “inner unity”, “identity” or “spirit” is immutable.\(^9\) These concepts are deprived of positive legal validity. There are some principles in this regard.

Let us briefly examine them. According to the theory of Supra-Constitutionality, as some scholars, argue that there are some principles which are superior to the constitution. If a constitutional amendment violates these principles, it will be null and void, and it should be invalidated by the constitutional court. Therefore, the supra-constitutional principles form the substantive limitations on the power to amend the constitution. But, when it comes to making the list of the supra-constitutional principles, the supporters of this theory do not agree; each of them draws a different list according to his own perceptions. For example, Serge Arne, in France, asserted that the following principles must be figured among the supra-constitutional principles: “The respect of human dignity”, “non-discrimination and solidarity”, and “pluralism (Gozler, 1997).” But Stephane Rials (Rials, 1986), another supporter of the supra-constitutionality theory, gives these four principles as supra-constitutional, “(a) the constitution must be written; (b) the nation is the unique holder of supreme power and consequently constituent; (c) the principle of the separation of powers; and (d) the Fundamental rights are superior to the constituent will.” Theory of Hierarchy between Provisions of the Constitution, some scholars asserted that the norms of a constitution do not have the same legal value. There may be a hierarchy among the different provisions of the same constitution; some provisions of the constitution may be superior to the other provisions of the constitution. The power to amend cannot modify the hierarchically superior provisions of the constitution. Thus these provisions constitute substantive limits on constitutional amendments. In other words, some fundamental norms of the constitution are so fundamental and sacrosanct that they are beyond the competence of the amending power. It is generally asserted that the constitutional provisions relating to the human dignity (Gozler, 1997), some or all fundamental rights, the basic principles of the state, such as democratic state, rule of law, social
state, federalism or unitary state, popular sovereignty are superior to other provisions of the constitution. For example, Robert Badinter, the ex-president of the French Constitutional Council, in a colloquium, argued that, “there are, in our constitutional systems, intangible liberties that the constituent power cannot remove (Gozler, 2008: 75).” Dominique Turpin affirmed that human rights, such as liberty, propriety, personal security, and resistance to oppression are superior to other constitutional rights, therefore they cannot be abolished by the amending power. Maryse Baudrez asserted that “all constitutional provisions concerning human rights cannot be revised (Baudrez & Escarras, 1993).” Olivier Beaud contented that the provisions of the Constitution concerning the popular sovereignty are superior to the other provisions of the Constitution, therefore the amending power cannot modify these provisions (Gozler, 2008: 75).

It would be safe to conclude here saying that ‘amendment of the constitution is a political act and the powers to amend the constitution remains with the representative body of the people, which is known as legislature. The judicial review of ‘such amendment is not always but ordinarily welcome action’, until and unless it suffers from serious problem of unconstitutionality (Barak, 2011). Undoubtedly, constitutional amendment is a prerogative of the legislature. However, the legislature’s prerogative is not unlimited. The judiciary, subject to the provision of the Constitution, may review the constitutionality of the ‘amendments’ and strike down if found unconstitutional. The amendment must be unconstitutional on the ground that (a) ‘it has de-constituted the basic structure of the constitution’; (b) it has gone against some prudential immutable principles of constitutionalism, say democracy, and (c) has violated the principle of separation of power. The judiciary may prefer to intervene in these ground only; otherwise, the judiciary prefers to maintain restraints.

CONCLUSION: AMENDMENT OF ARTICLE 64 OF THE INTERIM
CONSTITUTION

Let us examine the ‘Supreme Court’ judgement that controls Legislative Parliament of Nepal to amend Article 64 with effect to ‘extend tenure of the CA’. Few conclusions need to be highlighted herein before in order to analyse the ‘judgment prudently’.

a. Making a new constitution in Nepal is a part of peace process. Nobody can argue otherwise. The final transformation of the conflict is fully dependent on the achievement of the ‘restructuring of the State and that is supposed by done by the new Constitution’. The formation of the CA has been a ‘process of transferring power for new regime which condition precedent for
materializing the peace processes by representatives of the people. The CA is therefore the sovereign body of the people of Nepal. It has, with no doubt, the power to make a new constitution ‘departing from certain principles adopted by the Interim Constitution’. While the procedures of the CA are determined by the Interim Constitution, it is not obliged to ‘follow principles enshrined into the Interim Constitution’ while making a new Constitution. As such the CA, in principle, has power to constructively alter the structure of the ‘institution established by the previous constitution’. The whole perspective suggests that ‘the making of a Constitution’ is a political process, and also essentially constitutes a part of the peace process. The peace process in turn is typically a ‘matter of political negotiation’. The political negotiation is based on interests, ideology and agreed ‘peace accord’ in the past. Conspicuously, the intervention of judiciary in such issues amounts to be an examination of the rationality of the political question.

b. Article 84 of the Interim Constitution empowers the CA to amend the Constitution, and this power seldom subjected to some ‘specific limitations’. While the CA, morally and prudentially, not expected to go against the spirit of peace process, it has been, as people’s representative body to make a new constitution, is able to work out ‘negotiations, design procedures or principles of negotiations, and also to reach an agreement through negotiations. It can thus amend the ‘Interim Constitution’ to facilitate the process of negotiations, if it is necessary to achieve the goal of peace process and constitution making acceptable to all.

c. While people are sovereign, they are, in accordance with the Interim Constitution, are supposed to exercise the right to sovereignty through CA in matters of new constitution. They have rights to express views and opinions on substance of the constitution. The CA cannot be abrogates just on the ground that it failed to make constitution in the original tenure. The judiciary is not an institution to represent the public opinion.

d. The rationality of amendment of Article 64 is matter of political analysis and debate. Hence, the court refrains from going into the merits of ‘rationality—the need of extending—of the extension of the tenure. The objective of the CA is to end the peace process in logical terms by making a new constitution. Not having constitution means a failure to ‘give the peace process a structural end’. The extension of the tenure should therefore be examined in view of the ‘peace process that has reached to this stage through different stages’.

e. Any design or suggestion for the restriction on extension of the timeframe must be able to give a complete and concrete alternative. The court has not been able to give such a concrete alternative in case of non-extension. The verdict of the court has thus resulted in collapse of the CA, thus complicating the entire constitution making process.
Court has been influenced by Scalia's Doctrine of Originalism

The theory of originalism requires interpretation of the 'provision of constitution be guided its 'original meaning'. It rejects contexts to help in the process of interpretation. Virtually, the originalism calls for 'literal interpretation of the provision'. According to this theory 'the CA has to finish making the proposed Constitution within 'two years of original tenure'. The extension of 'one year period' and subsequent extension for two times are consequently 'unconstitutional' in the eyes of originalists. According to this theory, the 'two years tenure is a social contract' which has been agreed already, and thus the election of CA is valid for only two years. Since, Interim Constitution precedes the CA, the people casted their votes for CA for a period of two years, hence extension would be unconstitutional as 'it has no authority to extend it tenure by itself through a process of amendment'. This theory is however contested theory and has widely rejected by the modern constitutionalism. Being confined to this theory will 'make the government or State a servant of dogmatism' because they cannot function to accommodate challenges occurred contextually. To apply this theory will infer the following:

a. The CA has been a creature of the Interim Constitution; hence it has been obliged to follow what has been established by the provisions of the Interim Constitution. The amendment of the Constitution would be unconstitutional in view of the obligation of the political forces to complete the constitution making process within two years of period.

b. It implies that ‘Constitution making is a procedural process; hence it cannot be aligned with the political process of peace building’.

c. Judiciary as a guardian of the Constitution has authority to ‘dictate the political process of negotiation and peacemaking processes.

These inferences cannot rest on acceptable principles of constitutional law and constitutionalism. Hence, the Supreme Court's judgment, although it visibly represents the popular opinion of a quarter of population, cannot find grounded on 'acceptable constitutional law theories and constitutionalism. Literally speaking, two important principles can be put forward in favour of this argument: (a) the Interim Constitution has nowhere in the Constitution has limited the 'scope of CA's power to amend the Constitution'; (b) the ‘tenure is not a substantive issue of politics but not a procedural one. Hence, the 'tenure of the CA as provided by Article 64 does not constitute the basic structure of the Interim Constitution. The procedural limitations may be altered by amendments to materialise the 'substantive objectives', which, according to the Interim Constitution, is to make a new Constitution.

Does it mean that the CA can evade the tenure by 'overriding exercise of its amending power under Article 84? The answer is 'unequivocally No'. Amendment power cannot be resorted to 'de-constitute the Constitution'. There are two major
One, the original provision of the Constitution should be allowed to function in its original form without disturbance. This is a 'principle of general rule'. Second, State's organs should consciously avoid 'putting two provisions of Constitution into competition or controversy': the exercise of Article 84 cannot be resorted in malice, or perceived inferiority, of Article 64. Does it then means that 'Article 64 is un-amendable basic structure of the Interim Constitution? The answer is again 'No'. Article 64 is amendable in view of 'urgency and objectivity'. The amendment give rise to a 'question of morality', for engaging frequency of amendments may generate suspicion about the ability of the given body. However, no constitutionality of an act of the law making body can be determined on the ground of the failure in moral obligation to behave in certain way. The extension of the tenure of the CA therefore does not arouse a violation of constitutional provision but implies degeneration of a moral obligation to complete works in a govern period of time.

**Pragmatism and Contextualism Ignored**

Pragmatism calls for the application of 'prudentialism and wisdom' in view of the intended result. To look from this philosophical premise, the 'Nepalese people wanted a constitution with (a) a federally constructed state system, (b) an executive body with balance of power between prime minister and the president, and a legislative body with enough power to legislate and oversee the executive body', but not a 'constitution written in a period of two years'. In other words, Nepal was making a constitution to bring the peace process to a logical end through a prudentially framed constitution. The desire of the Nepalese people was not a 'constitution in book which was written in a period of two years' but a 'constitution that would write prospective habits of the Nepalese people as a system'. The tenure of two years was a tentative projection of the timeframe, but not an absolute deadline.

A few logical arguments are needed to be explored in this regard. Firstly, the political instability in a state transition is always marred by turbulence and coarseness of events. The interests of people are rapidly changed in such transition. Changes in the dynamics of 'context' are rapid and sometime unpredictable. Thus, the dogmatism, which believes on formalist application of principles and rules, fails to produce fruits. The fluidity of events and context should therefore not be disregarded. Secondly, in a transition the 'act of generating values is not an easy job to do'. Every value is contested during transition, and the 'negotiation to build compromise and agreement is not always easier'. The process of 'negotiation cannot be strictly bound within a framework of time'. Constitution making in transition is decisively a political act. Hence, the 'timeframe is always taken as a part of procedure rather than substance'. Thirdly, the tenure of two years was not fixed by the CA itself. Rather it was a general projection of the 'framers of the Interim Constitution', who reasonably believed that it was possible to end the
task of making constitution within a period of two years. While projecting the framework, they could not foresee the 'confounding situation of peace process and constitution making'. The integration of the insurgents into Nepal army remained most pressing issue with extremity of scepticism on the part of political actors. The issue silently but effectively 'divided the political spectrum' in polarity and the problem did cast shadow over the 'entire process of constitution making'. In this situation, the prudentialism required to 'save the CA, though it was not effective as expected, to prevent a vacuum of legitimate political institution.

The Supreme Court could understand the niceties of the 'political dynamics' of negotiations and process of agreement. The pragmatism therefore lost its importance on overriding formalist approach of court buttressed by 'unorganised opinions of the civil society' and media chauvinism. The second CA election has thus been an outcome of the 'court’s originalist’ approach in interpretation of the original tenure of the CA.

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Court cases


CHAPTER 5

AN ANALYSIS OF THE PROPOSED BILL OF RIGHTS

- Bhimarjun Acharya
INTRODUCTION

A bill of rights as a guarantee of certain rights of the people rests on two foundations: that the rights are entrenched in such a way that they may not be violated, tampered with or interfered with by an oppressive government and that the rights can only be amended by an elaborate and formal process of constitutional amendment, rather than by ordinary legislation. It is in this way that a bill of rights confers justiciable rights on citizens that can be enforced in a court of law and constitutes a set of restrictions and limitations on government action.

The idea of a constitutional bill of rights as way of protecting civil liberties in Nepal dates back to 1948 and the first constitution of Nepal. The Government of Nepal Act, which was declared on 15 January 1948, guaranteed fundamental rights for the first time, notably, the right to personal liberty, freedom of expression, freedom of publication, freedom to form an association or organisation, freedom of religion, equality in the eyes of law, affordable and timely justice, free and compulsory elementary education, to vote and to property.

However, the Government of Nepal Act, 1948 did not survive for a long time because of internal conflict among the Ranas, the oligarchic rulers of the time. This first constitution collapsed without ever being enforced. In its place, King Tribhuvan promulgated the Interim Government of Nepal Act, 1951. In this constitution, the fundamental rights were contained under the directives principles and policies of the state and, hence, were merely directives to the government in the governance of the state, not protected rights. Accordingly, the violation of these rights could not be questioned in a court of law. The rights inserted under the directive principles of the state in the 1951 Constitution included, among others: freedom of speech and expression, freedom of peaceful assembly, freedom to form an association or organization, freedom of movement within the territory of the kingdom, freedom to reside and settle in any part of the kingdom, freedom to acquire, enjoy and sell property, and freedom to practice any trade, business, occupation or profession.

The Constitution of the Kingdom of Nepal, 1959 replaced the Constitution of 1951 and was the first constitution to guarantee fundamental rights and to ensure the power of judicial review to the judiciary. The rights guaranteed to the people under this constitution were, among others: the right to life and personal liberty;
right against human trafficking, slavery and forced labour; right against the use of ex-post facto laws; the right against double jeopardy; the right against self-incrimination; right to be informed of the grounds of arrest; right to consult and be defended by a legal practitioner (if detained in custody); right to be produced before a judicial authority within 24 hours of arrest; right against preventive detention; right to equal protection of law; and right against discrimination on grounds of religion, race, caste, sex, place of birth or any of them in the application of the general law; right to religion; right to property; right to political freedom (expression and publication); right to assemble without arms and to form unions and associations; and the right to move throughout the kingdom and reside in any part thereof.

Similar to the Constitution of 1951, the 1959 Constitution for the first time in the history of constitutional laws in Nepal, guaranteed the right to a remedy as a fundamental right of the people. The court was also granted the power to issue necessary and appropriate orders and writs including the writs of habeas corpus, mandamus, certiorari, prohibition and quo warranto for the enforcement of the rights conferred by the Constitution.

In 1960, the late King Mahendra suspended the Constitution of 1959 and dissolved the parliament. He promulgated a new constitution in 1962 based on a party-less system (the Panchayat system). The fundamental rights in this constitution included: the right to equal protection of law; right against discrimination on grounds of religion, race, caste, sex, and place of birth in the application of general law; right to life and personal liberty; right to freedom of expression and publication; right to assemble peaceably and without arms; right to form unions and associations; right to move throughout the kingdom and reside in any part thereof; right to acquire, own, sell and otherwise dispose of property; right against exile; right against exploitation; right to religion; right to property; and the right to constitutional remedy.

The Constitution of the Kingdom of Nepal, 1990 diverged from all preceding constitutions of Nepal. Compared to previous constitutions, it was considered both a democratic and liberal constitution. The right to freedom of the press and publication; right to criminal justice; right against preventive detention; right to culture and education; right to information; and right to privacy were incorporated for the first time. What was most striking was the inclusion of the twin fundamental, namely, the right to information and the right privacy, which was a unique and unparalleled feature of the Nepalese catalogue of fundamental rights, as these rights were not specifically available to the citizens of democratic nations such as the United States of America, India, Germany, and France. In addition to these rights, the 1990 Constitution also guaranteed the right to equality and equal protection of the law; the right against discrimination in the application of general laws on the grounds of religion, race, sex, caste, tribe or ideological conviction; the right against capital punishment; the right to freedom to form
unions and associations; the right against the closure or seizure of any press for printing any news, articles or reading materials; the right against cancellation of the registration of any newspaper or periodical for publishing any news, articles or reading materials; the right against the application of ex-post facto laws; right against double jeopardy; right against self-incrimination; right against physical or mental torture, or cruel, inhumane or degrading treatment; the right to be informed of the grounds of arrest; the right to consult and be defended by a legal practitioner (if detained in custody); the right to be produced before a judicial authority within 24 hours of arrest; the right to culture and education; right to religion; right against exploitation; and right against exile as fundamental rights of the people – and these rights could not be suspended even during times of emergency (Acharya, 2013).

The 1990 Constitution was replaced by the Interim Constitution of Nepal, 2007, which was promulgated by the then House of Representatives and approved by the then Interim Legislature. The Interim Constitution, 2007 guarantees, among other things, the right to life; right to (criminal) justice; right against preventive detention; right against torture; right against exploitation; and right against exile as basic human security rights. The Interim Constitution also establishes Nepal as a republic and vests state authority along with sovereignty in the Nepali people. Justice, peace and development are some of the perennial aspirations of the Nepali people that have endured throughout the saga of Nepal's existence as a nation. The Interim Constitution of 2007 aims to bring about the desired peace and development through the restructuring of the state.

Hence, it can be seen that Nepal has constitutionally protected fundamental rights since 1948. The idea of a bill of rights and forms of expression of people's fundamental rights have been evolving throughout the course of Nepal's constitutional history. This evolution is now continuing in the drafting of the new constitution by the Constituent Assembly in the form of the proposed bill of rights.

**PROPOSED BILL OF RIGHTS**

The thematic concept paper and preliminary draft of the Committee for Fundamental Rights and Directive Principles of the dissolved Constituent Assembly proposed a list of some 31 rights of the people. This draft bill of rights, ratified by a simple majority of the Committee, includes the right to live with dignity, right to freedom, right to equality, rights regarding mass communications, rights regarding justice, rights of victims of crime, right against torture, right against preventive detention, right against untouchability and racial discrimination, right to property, right to religious freedom, right to information, right to privacy, right against exploitation, right to environment, right to education, right to language and culture, right to employment, right to labour, right to health, right to food,
right to shelter, rights of women, rights of children, rights of Dalits, right to family, right to social justice, right regarding social security, rights of consumers, right against exile, and rights regarding implementation of fundamental rights and constitutional remedy. This is the first time in the constitutional history of Nepal that a long list of fundamental rights has been proposed to the Nepali people.

NEW RIGHTS

The report of the Committee for Fundamental Rights and Directive Principles has proposed a comprehensive list of fundamental rights including some new rights. The most notable new rights are discussed in this section.

Right to live with dignity

The 1990 Constitution guaranteed personal liberty to the people. The Supreme Court of Nepal, in its pronouncement in *Surya Prasad Dhungel v. His Majesty’s Government* (1992), interpreted the right to personal liberty as inherently including the right to live with basic human dignity and to security. The Interim Constitution of Nepal, 2007 clearly states every person shall have the right to live with dignity and that no law that provides for capital punishment shall be made. In the draft bill of rights, as a continuation of the protection of Interim Constitution, the right to live with dignity has been guaranteed and the making of any law that provides for capital punishment is prohibited.

In Nepal, the right to live with (human) dignity is a new right. This right implies that life is something more than mere animal existence and the prohibition of the deprivation of life extends to all those limits and faculties by which life is enjoyed. The International Covenant on Civil and Political Rights 1966, to which Nepal is party, recognises that the right to life is the supreme right from which no derogation is permitted, even during times of public emergency. It requires this right to be protected expressly by law by signatories to the Covenant. Moreover, it requires that in countries that have not abolished the death penalty, a death sentence may only be imposed for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the International Covenant on Civil and Political Rights or those of the Convention on the Prevention and Punishment of the Crime of Genocide 1948. It also stipulates that the death penalty can only be carried out pursuant to a final judgment rendered by a competent court.

Equal protection of laws and equality in results or benefits

There are at least two facets of the equality in constitutional protection: equality before law and equal protection of laws. The first concept ‘equality before the law’ is a negative concept which ensures that no special privilege is given in favour of any one, that all are equally subject to the ordinary law of the land and that no
person, whatever his or her rank or condition, is above the law. This is equivalent to the second meaning of the Dicean concept of rule of law (Dicey, 1885), which has four main aspects: (i) equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts, (ii) no exemption of officials or others from the duty of obedience to the laws that govern other citizens, (iii) no exemption of officials or others from the jurisdiction of the ordinary tribunals, and (iv) no existence of administrative law or administrative tribunals (which means no division between private and public law and private and public courts) (Dicey, 1885). This meaning envisages no special treatment or protection under law of a particular class of people, but equal treatment and equal protection to all (Acharya, 2001).

The second concept, ‘equal protection of laws’, is a positive concept. However, it does not mean that identically the same law should apply to all persons. This concept recognizes the fact that all persons are not equal by nature, attainment or circumstances, and that, therefore, the application of a mere concept of equality before the law in a mechanical way may result in injustice. Taking this into account, the draft bill of rights has gone even further and specifically guaranteed equality in terms of ‘results or benefits’. Although the basis of this right to equality in results or benefits is the equal protection clause, the clause that provides for equality in results or benefits can be interpreted as more than a guarantee of equal protection of laws. This clause could entitle people to claim the equitable distribution of resources and benefits of the state, as well as equitable access to state power. By the protection of these rights, the two basic requirements of an inclusive state: equal distribution of resources and benefits and equal access of people to the state powers could be achieved.\(^8\)

Rights of the victims of crime

The draft bill of rights has, for the first time, guaranteed victims of the crime the right to information about the investigation and any action taken in the case in which he or she was a victim. By virtue of this right, the victims of crime have the right to social rehabilitation and compensation in accordance with the law. However, there is no provision the convicted to claim compensation if his/her conviction is overturned or they are proved innocence.

Rights regarding mass communications

It was the 1990 Constitution that protected freedom of the press as a fundamental right in Nepal. No doubt the special treatment given to this freedom is backed by constitutional philosophy and the history of Nepal, which has seen continuous movements and struggles for the sake of this right. It is believed that if freedom of the press and publication is not guaranteed all other freedoms of an individual become are illusory. Freedom of the press and publication, as guaranteed by the 1990 Constitution, was expanded by the Interim Constitution to include
freedom of publication, broadcasting and the press. The draft bill of rights has also enumerated freedoms regarding mass communications. Under the freedom of mass communication, the following rights have been categorically protected:

- Right against prior censorship of publication, transmission (broadcasting) or information flows or printing of any news item, editorial, article, feature or any other reading, audio, audiovisual materials by any means including electronic publication, transmission (broadcasting) and the press.
- Right against closure, seizure or cancellation of registration of radio, television, online or any other type of digital or electronic, print or other media or equipment of communications on account of publication and transmission (broadcasting) or printing of any materials through the medium of audio, audiovisual or electronic equipment.
- Right against closure, seizure or cancellation of registration of any newspaper, periodical (magazine) or press on account of printing or publishing of any news item, article, editorial, feature, information or any other materials.
- Right against obstruction of press, electronic transmission and telephone and other means of communication, except in accordance with law.

This freedom supports the right to freedom of information, as the press is primarily there to serve the governed and not the governors. People’s right to know or to information is actualised only when the press is free. The people who drafted the Interim Constitution 2007 seem to be aware of the fact that the rulers of the earlier regime in Nepal frequently censored the press, cancelled the registration of the press, and sometimes even seized and closed the press. This freedom is thus a response against licensing laws, against a rigid system of censorship, against state approval, and against prosecutions for libel as seditious, all of which characterised the monarchical system in Nepal before 2006.

**Right to language and culture**

Under the Interim Constitution 2007, each community has the right to receive basic education in their mother tongue, the right to receive free education from the state up to secondary level as provided for by the law, and the right to preserve and promote its language, script, cultural civilisation and heritage.\(^9\) The draft bill of rights has protected not only the right to culture and education, but also the right to language as a fundamental right of the people. Under this right, every person and community will have the right to use its own language. Every person and community will also have the right to participate in the cultural life of their community. Furthermore, every citizen will have the right to access basic education. Primary education shall be compulsory and free of cost. Every citizen will have the right to obtain free education up to secondary level.
Right to labour

The draft bill of rights provides every worker with the right to proper work practices including the right to proper wages, conveniences and social security. It also provides that every worker shall have the right to form trade unions, participate in them, and engage in collective bargaining and strikes in accordance with the law. This right is guaranteed to workers engaged in any form of physical or mental labour and working in any organized or unorganized sector. Every worker shall be allowed to select a job that befits his or her will, ability, capacity, and level; to pursue proper work, entertain and rest; to not be compelled to pursue hazardous work; and to not be compelled to pursue substandard work. Moreover, children shall be protected from being employed as child labourers. The workplace should be dignified and disabled friendly; there shall be no discrimination of any form in the workplace; and work shall be pursued in accordance with a labour agreement. This provision has been made in order to ensure the provision of these rights as well as for the right of proper labour exercise.

Right to health

It is a fundamental right of every human being to enjoy the highest attainable standard of health. This right has two basic components: a right to health care and a right to healthy conditions. The right to health, therefore, contains both freedoms and entitlements. The freedoms include the right to have control over one’s own health and body as well as the right to be free from non-consensual median treatment and experimentation. The entitlements, on the other hand, include the right to access to an equitable system of health protection.

The draft bill of rights provides that every citizen shall have the right to free basic health services and no person shall be deprived of emergency health services. Every person shall have the right to reproductive health; to informed health services; to equal access to health services; and to access to clean (pure) drinking water and sanitation (cleanliness).

Right to food

In line with the obligation to fulfil the basic economic, social and cultural rights to which Nepal has shown commitment before the international community by signing, inter alia, the International Covenant on Economic, Social and Cultural Rights 1966, the draft bill of rights guarantees the right to food. Under this right, every citizen shall have the right to food, to protect him/herself from the vulnerable conditions of life owing to the scarcity of food, and to food sovereignty in accordance with the law.

Right to shelter

The right of every citizen to access to proper accommodation has been guaranteed in the draft bill of rights. Therefore, except in accordance with law or ordered
by the court, no person shall be evacuated from his or her place of habitation (residence) and no encroachment shall made on the same.

**Equal rights of women in descent**

Among others, the draft bill of rights makes provision for the equal right to descent of women, without gender discrimination.

**Rights of Dalit community**

The draft bill of rights guarantees special rights to the Dalit community in the nature of collective rights. Among others, it protects against discrimination, humiliation, intolerant behaviour against Dalits on the ground of caste, tribe and untouchability. It further states that such an act shall be regarded as a social crime and punishable in accordance with law. A person who is the victim of such act shall have the right to receive proper compensation.

**Right to family**

The other group of rights in the draft include the right to family. Under this right the individual is prohibited from having more than one spouse; every person has the freedom to marry and divorce in accordance with law; no marriage is allowed against the wishes of the parties being married or without their full and independent consent; and each couple has the right to property and in family affairs. The draft also protects the common rights and responsibilities of both parents and children for the nurturing, care and all round development of the children.

**Rights of consumers**

Every consumer shall have the right to quality goods and services. A person who incurs a loss from substandard goods and services shall have the right to receive proper compensation.

**WEAKNESSES IN THE DRAFT BILL OF RIGHTS**

**Restriction clause**

The draft bill of rights empowers the Government of Nepal to make laws imposing reasonable restrictions on any act that may undermine the nationality, sovereignty, independence and integrity of Nepal, or the harmonious relations among the federal units, or that may jeopardise the harmonious relations among the people of various castes, tribes, religions or communities, or on any act of defamation, contempt of court or incitement to an offence, or on any act which may be contrary to decent public behaviour or morality. Similarly, as a restriction on the enjoyment of the freedom of the press and freedom of speech and opinion,
the draft reads that:

...nothing shall be deemed to prevent the making of laws to impose reasonable restrictions on any act which may undermine nationality, sovereignty or integrity or which may jeopardize the harmonious relations subsisting among federal units or the harmonious relations subsisting among the peoples of different castes, tribes or communities, an act of treason, any act that may harm the social prestige of an individual through publication or transmission of false (fake) materials, or that leads to a contempt of court, or to discourage crimes or an act that may be contrary to public health, decent behaviour, or morality and to discourage untouchability and racial and gender discrimination.\textsuperscript{11}

According to national and international law standards, these restriction clauses are both vague and ambiguous. Usually, a reasonable restriction clause allows an authority to make laws that restrict the enjoyment of fundamental freedoms that are necessary to protect national security, public order, public health and the freedoms of others. For example, Article 19 (3) of the International Covenant on Civil and Political Rights clearly says that the restrictions so made to the exercise of rights shall only be such as are provided by law and are necessary: “...for respect of the rights or reputation of others; and for the protection of national security or of public order, or of public health or morals”.\textsuperscript{12}

It further states that:

...restrictive measures must be necessary in a democratic society for the protection of the purposes mentioned above; restrictive measures must conform to the principles of proportionality; restrictive measures must be under the authority of law; each restrictive measure must be reasonable; each restrictive measure must be related to the purposes mentioned in the law or the Constitution.\textsuperscript{13}

\textbf{Affirmative action}

Flaws in the draft bill of rights can also be seen in the concept of affirmative action, which has enabled the government/state to take positive steps in the name of caste or race. The major issues of inclusion may include: the equitable distribution of resources and their benefits among the people; the equitable access of people to decision-making powers, resources and their benefits. These things need to be in place to combat social exclusion (exclusion from rights, opportunities, and resources), and are designed to benefit the disadvantaged, marginalised, downtrodden and oppressed groups or communities (i.e., subordinate groups). As positives steps such as this are intended to promote access to education or employment for non-dominant groups and communities, the grounds of their implementation should be based on the social, economic, political, and cultural status of communities, regardless of their caste, race or religion. The draft is unclear on the issues of affirmative action.
Custodial torture

The draft bill of rights has defined torture as any act that causes torture, whether physical or mental, inflicted upon a person who is in detention for investigation, awaiting trial or for any other reason and this term includes cruel, inhumane or degrading treatment that a person is subjected to. This definition is not as wide as required by Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 as it only includes events of torture inflicted upon a person in custody or detention.

Under Article 1(1) of the Convention on Torture, the term ‘torture’ is defined as any act by which the severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for any reason by a public official or other person acting in an official capacity. From this definition, it is possible to extract three essential elements of torture:

- the act: the infliction of severe pain or suffering, whether physical or mental on a person;
- the purpose: that the act was committed for any reason (including, but not limited to, gaining information, punishment or intimidation)
- the actor: the act must be committed by a public official or any person acting in an official capacity.

Acquisition of property by the state

The United States Supreme Court has identified three categories under which the state can acquire private property for public use. First, the government may transfer private property to public ownership, such as for roads, hospitals, or military bases. Second, the government may transfer private property to private parties, often common carriers, who make the property available for public use, such as with railroads, public utilities, or sports stadiums. Third, the Court has more broadly defined public use as ‘public purposes’ in several rulings that allow the acquisition of property under certain circumstances, even if the property is destined for subsequent private development and use (for example, to redevelop a blighted neighbourhood or to redistribute land ownership).

A similar pattern and approach has been adopted by the Supreme Court of Nepal in respect of the exercise of power of eminent domain by the state. However, the draft bill of rights is problematic in this regard as it does not protect the right of people to enjoy the due process including the right to fair and just compensation if his/her property is taken by the state for public use.

Right to privacy, but not to private property

Since the 1990 Constitution, the protection of the right to privacy of property has been a crucial part of Nepali constitutional law. The Interim Constitution
2007 also clearly protects the right to privacy in relation to persons and their residence, property, documents, records, statistics and correspondence, and their reputation. However, the draft bill of rights does not protect the privacy of property, and this is a serious flaw in terms of protecting life, liberty and property of people.

**Right to employment**

The draft bill of rights confuses the demarcation between right to work and the right to employment. The draft has proposed the right to employment to the people. That means unemployment of any citizen would be contrary to the constitution. Guaranteeing the right to work would rather be in consistent with the international covenant on economic, social and cultural rights, 1966 to which Nepal is a party. Article 2 of the covenant obligates the state party to recognise the right to work which includes ‘the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate step to safeguard this right.’

**Right to strike**

The draft bill guarantees every worker the right to form trade unions, participate in them and engage in collective bargaining and strikes in accordance with law. Of the protections, the right to strike may, in the context of Nepal where the trade union has a political influence, be a problematic idea. It is useful here to cite a reference from the constitution of the democratic republic of East Timor, 2002, which strictly prohibits the ‘lock-out’ in any factories and industries.16

**Food sovereignty**

Another confusion in the draft lies with the protection of food sovereignty to the people. The draft says that every citizen shall have the right to food sovereignty in accordance with the law. However, it is not clear whether the power/right to food sovereignty is exercised by the state or by the people. Even if it is believed that the right to food sovereignty can be exercised by the people, the draft fails to define what food sovereignty exactly means for the purpose of constitutional protection and how the people are going to enjoy this right.

**Two years implementation plan**

The implementation of fundamental rights and the right to constitutional remedy is another serious flaw in the draft bill of rights. The draft is confused on the basic thesis and tenants of fundamental rights, which raises the question: Can rights be claimed as fundamental rights if such rights are embodied in the constitution as the expressions of commitments like directive principles of the state? And, if so, how do we distinguish fundamental rights from directive principles? The draft provision reads that the State shall make appropriate provisions for the
implementation of fundamental rights (e.g., rights regarding education, health, employment, shelter, food, social justice and social security). It further provides that the State shall make legal provisions, within two years as deemed necessary, for the implementation of the rights provided in the part on fundamental rights. Due to this provision, the obligation of state to respect, promote and fulfil the fundamental rights and commitment of the state as a part of progressive realisation in fulfilling commitments expressed in directive principles is unclear.

CONCLUSION

The fundamental rights are the conscience of the constitution. The insertion of fundamental rights in the constitution is the result of the continuous struggle of the people of Nepal and the manifestation and recognition of the cravings of the people for liberty and freedom. Despite some weaknesses, the bill of rights establishes basic Nepalese civil liberties that the government cannot violate. The bill of rights includes a wide range of protections with a common theme and purpose, i.e., to define the scope of individual freedom in Nepal and to make the political system more democratic. Anyway, the list of new rights proposed in the draft once adopted may create a new history in the struggle for rights and liberties.

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CHAPTER 6

CONSTITUTIONAL RECOGNITION OF HUMAN RIGHTS: A REFLECTION ON THE CONSTITUENT ASSEMBLY DISCOURSE IN NEPAL

- Basant Adhikari
INTRODUCTION

Human rights are the rights inherent to all human beings, whatever their nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or other characteristic. All human beings are equally entitled to enjoy human rights without discrimination. Human rights principles, norms and standards have been used for a variety of purposes: from resisting torture to countering the arbitrary encroachment of individual autonomy and discrimination; from demanding an end to hunger and starvation to the provision of medical services across the globe (Sen, 2009: 355). Worldwide, human rights discourse has become a powerful tool for enforcing accountability in governance (Kumar & Chockalingam, 2007: XXVII).

Most human rights are recognised in national constitutions. In fact, international human rights law has been increasingly domesticated in national legal systems through constitutional recognition of international treaties. In modern constitutional jurisprudence, the adoption of human rights norms and standards has been taken as a yardstick with which to judge a State’s commitment to democracy, rule of law and the independence of judiciary, among other things. The terms ‘human rights’, ‘fundamental rights’, and ‘bill of rights’ are generally used interchangeably in legal discourse, however, each of these terms has a specific meaning in a specific context. The rights of the human being prescribed by international human rights instruments are known as ‘human rights’. In international human rights law, the Universal Declaration of Human Rights 1948, International Covenant on Civil and Political Rights 1966 and International Covenant on Economic, Social and Cultural Rights 1966 are collectively known as the International Bill of Rights. When international human rights are incorporated into national constitutions, these rights are known as ‘fundamental rights’ (in Nepal and India) or basic rights (in Germany and Finland). Some countries have endorsed individual rights and freedoms through constitutional amendments in a separate ‘bill of rights’ (for example, the United States of America and United Kingdom). Therefore, for ease of understanding, the rights provided by international human rights instruments are known as human rights and those adopted in national constitutions as fundamental rights.

The inclusion of bills of rights in constitutions has become a global phenomenon in modern constitution making. This is partly because respect for, and the protection of, human rights provide a large share of the legitimacy of states
in the international arena. The recognition of a bill of rights while drafting a new constitution, through constitutional amendment or through judicial interpretation makes these rights enforceable through the national legal system. A country’s constitution is the supreme law of the land and, therefore, any law or conduct inconsistent with it is void or ultra vires. Accordingly, the constitutionalisation of basic human rights is not only an attempt to entrench such rights in the highest order of law, but also to flag the primary purpose for the existence of the state as to respect, promote and protect human dignity, equality and human rights.

Nepal has an extensive constitutional and judicial track record of protecting and promoting human rights. As a party to major international human rights instruments, Nepal has an obligation to respect international human rights principles, norms and standards. Nepal has an opportunity to demonstrate its strong commitment to uphold its human rights obligation by incorporating human rights norms and standards in its new constitution. Incorporation of such human rights norms and standards in the constitution will make these rights enforceable through national constitutional mechanisms.

The draft of the former Constituent Assembly Committee on Fundamental Rights and Directive Principles has made an innovative effort to expand the constitutional recognition of a wide range of human rights. However, the proposed draft has some significant flaws and diverges from international human rights standards. This Chapter reflects on the issues surrounding the constitutionalisation of human rights standards and examines the constitutional discourse on the inclusion of a bill of rights in the new constitution of Nepal.

CONCEPTUALISING HUMAN RIGHTS

The rise of international human rights standards

Human rights have become powerful tools for compelling states and non-state actors to be accountable to the people and fulfil their obligations to human rights treaties. International human rights organisations, including the United Nations, have become more active in promoting human rights in their member states (Kumar & Chockalingam, 2007: XXVIII). At the international level, the United Nations brings human rights to the centre of its activities by taking a rights-based approach.

In contrast to the formal understanding of international law based on the old doctrine of 'state sovereignty', modern international law recognises the individual as beneficiary by ensuring individual access to human rights protection mechanisms. International human rights law obliges governments to act, or refrain from acting, in certain ways to promote and protect the human rights and fundamental freedoms of individuals or groups. Many countries around the world include a section on human rights or fundamental freedoms
in their constitutions. This implies that modern international law is no longer exclusively concerned with only regulating state-to-state relations, but also with relations between individuals and states (Kumar & Chockalingam, 2007: XXVIII).

While discussing fundamental rights, a discussion of the term ‘generation theory’ is unavoidable. Generation theory refers to the evolution of international human rights principles and norms from the perspective of its historical sequence. However, the Vienna Declaration and Programme of Action, endorsed by the Vienna Conference in 1993, emphasised that all human rights are universal, indivisible, interdependent and interrelated and, furthermore, that the international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis (Vienna Declaration and Programme of Action, 1993, Para 5). The Declaration stresses that the generation theory of human rights is no longer relevant in the modern human rights regime. Nonetheless, the generation theory provides a useful framework for the purpose of conceptualising the pattern of the constitutionalisation of human rights. International human rights are considered to be the "offspring of the rights that are originally codified at national level" (Tomuschat, 2003: 25). In the past, the substance was codified first in the national legal framework and only later adopted in an international set of rules. Nowadays, in modern constitutional democracies, international human rights principles, norms and standards have gained universal legitimacy and have evolved as a topic for constitutional recognition.

With regard to the national level, Thomas Marshall conceptualised human rights by the notion of citizenship. He distinguishes between civil, political and social citizenship, denoting a range of rights ensuring a ‘basic minimum’ of economic welfare and security. Following this, the earliest version of citizenship was conceived of as collection of civil rights, which were subsequently supplemented by political rights and lastly by social rights (Marshall, 1950, cited in Milewicz, 2009). Like Marshall, the international law scholar Karel Vasak makes similar observations about the difference between three generations of international human rights, which he refers to as: ‘liberate’ (civil and political rights) – the first generation, ‘egalite’ (economic, social and cultural rights) – the second generation and ‘fraternite’ (solidarity rights) – the third generation (Vasak, 1977, cited in Milewicz, 2009: 430).

The constitutionalisation of human rights is not a new theme. The United States Constitution introduced human rights in its written constitution through the first 10 Amendments in 1789. The Petition of Rights in 1628 and Magna Carta of 1215 can be taken as attempts to constitutionalise individual liberties in England and were primarily designed to curb the arbitrary power of the government. The French Declaration of the Rights of Man and of the Citizen 1789 was a milestone in constitutionalising the notion of rights in France. Since then, in particular after the end of World War II, the constitutions of almost all countries around the world have incorporated some such rights in their constitutional text (Singh, 2007: 26).
World War II provided the impetus for internationalising human rights standards through United Nations initiatives leading to the adoption of the Universal Declaration of Human Rights in 1948. In pursuance of this, two Covenants – the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR) – were adopted in 1966. Together, these three documents are known as the International Bill of Rights (Singh, 2007: 26). The recognition of the human rights of individuals has been internationalised through the United Nations and human rights are now recognised as universally accepted norms and standard for states to adopt in their national constitutions.

**Constitutional protection and judicial enforcement**

Traditional legal positivist constitutional thought argues that the only rights that individuals have are those explicitly specified in the constitution of the sovereign state or enacted by the legislature. Legal positivism says that the only legal rights are those that are recognised by the sovereign legal authority. This approach influences the constitutional analysis of the legislature as the sovereign law making body. In modern constitutional democracies, the notion of ‘legislative supremacy’ has been qualified by the constitutional framework, which places judicially enforced limits on the legislature to ensure that the legislature, while exercising its law making authority, adheres to constitutional limitations and does not encroach on the authority of the other wings of state sovereign power.

Viewed from a positivist perspective, judges are authorised to recognise only such rights as are generated by the popularly elected legislature or contained in the written constitution (Barnett, 1987). A judge may never restrict the act of a duly-elected legislature unless such restriction is specifically authorised by the constitution. However, in modern constitutional law, the notion of independence of the judiciary requires judges not only to be accountable to enforce the constitution as it is, but also encourages the judiciary to be active in promoting universally recognised principles of justice, human rights and rule of law. For example, Article 100 of the Interim Constitution of Nepal 2007 empowers the judiciary to invoke the principle of justice while exercising judicial power. The power of the judiciary to review the legislation and hear cases related to human rights violations is given through the legislature as the supreme law making body; the constitution also puts some restrictions on the legislature in order to ensure the quality of the law.

Constitutions, in modern democratic regimes, not only recognise the rights of individuals and communities, but also provide a mechanism by which to ensure that these rights are effectively enjoyed. Constitutions provide an elaborate framework for the protection and promotion of human rights and fundamental freedoms. Conventional wisdom states that when rights and freedoms are written into constitutions, they are given a higher legal status and become central to the political discourse in a society. Constitutions, at their best, can provide a political
Constitutional Recognition of Human Rights

and institutional platform for such discourse. Constitutions are generally written at times of momentous political change in a country and the framers of a constitution are usually attempting to transform the society. The aspirations and hopes of the people should be reflected in the constitution as fundamental rights that are enforceable through the courts. Constitutional guarantees of human rights cannot be successfully enforced unless there are independent democratic institutions in place to ensure that the governance system adheres to the principles of rule of law, independence of the judiciary and constitutionalism.

The notion of constitutionalism, in the context of fundamental rights, should be understood to encompass all such institutions (justice sector institutions, national human rights institutions, the executive government and the legislature etc). The judicial system ought to ensure that the human rights and fundamental freedoms guaranteed under the constitution are vigorously protected and that any violation is duly redressed through an independent and impartial justice system (Kumar, 2003: 285). The independence of the judiciary is expected to overcome any intrusion upon individual rights by other branches of the government (Keith, 2002).

However, the experience of several countries has shown that the mere constitutionalisation of human rights is not sufficient to realise human rights in reality. The constitutionalisation of human rights must be supplemented by a high degree of judicial independence. Therefore, the constitutional protection of human rights and independence of the judiciary go hand-in-hand in modern constitutional jurisprudence. The international human rights framework has underlined the key principles underpinning independence of the judiciary that states are required to adhere to through constitutional guarantee. The Universal Declaration of Human Rights and ICCPR observe that an independent judiciary is one of the most important safeguards for protecting human rights (Universal Declaration of Human Rights, Article 10 and ICCPR, Article 2). The Basic Principles on Independence of Judiciary, endorsed by United Nations General Assembly in 1985, serves as a standard for the independence of judiciaries (United Nations, 1985). Although these standards do not have the authority of binding law, the United Nations has held these standards up as a model and encourages states to adopt them in their constitutions (United Nations 1985, Preamble).

The constitutionalisation of human rights creates a theoretical framework for the protection of human rights, and also requires a framework that ensures that legal, judicial, democratic and institutional mechanisms are in place to address human rights violations. When rights are guaranteed in constitutions, there are numerous implications (Ghai, 2000: 1095, cited in Kumar, 2003). The provision of such rights within the constitution demonstrates conceptual recognition of the importance of protecting such rights, however, even after being constitutionally recognised, such rights may not be protected in practice. This situation is applicable in countries such as Nepal where most modern human rights are incorporated in the constitution or expanded by judicial interpretation without
assessing the capacity of the state to fulfil the obligations this implies. Under such circumstances, other democratic institutions, such as the judiciary, national human rights commissions and civil society groups, may need to intervene to make the government accountable for respecting and protecting human rights. An independent and competent judiciary can implement human rights standards through constitutional interpretation.

The role of the constitution and judiciary in protecting and promoting human rights needs to be understood in relation to the political context. The judiciary is able to best perform its constitutional function only when the democratic system is stable and functioning through independent democratic institutions and the government willing to adhere to the principles of constitution. The formal mechanism of protection of human rights through the constitution and enforcement by the judiciary may fail, particularly when these institutions operate under limitations (in terms of autonomy, resources or stability). In such situations, there is the possibility of increasing public dissatisfaction and the frustration of people toward democracy and the political system.

The obligations of the state

The human rights principles, norms and standards enunciated in international instruments (resolutions, declarations, treaties, covenants) create an obligation on state parties to recognise these rights in their national laws and policies. Declarations, principles and resolutions are ‘soft’ law and not legally binding on states, but they are persuasive and have moral authority. International treaties and covenants, on the other hand, are legally binding on state parties. By ratifying binding international instruments, Nepal has accepted an obligation to recognise these rights in its constitution, national laws, and policies. Most of the international treaties related to human rights require states to take appropriate measures to recognise those rights in their national legislation. For example, Article 2 of ICCPR 1966 reads:

Where not already provided for by existing legislative or other measures, each State party to the present covenant, undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present covenant. (ICCPR, 1966, Article 2)

context means the obligation of states to put in place national mechanisms to recognise, protect and promote human rights.

CONSTITUTIONAL RECOGNITION OF HUMAN RIGHTS IN NEPAL: A BRIEF HISTORY

Nepal has ratified several international human rights instruments and laid down a comprehensive catalogue of human rights in the existing and previous constitutions. The prevailing Interim Constitution, 2007 (2063 BS) is considered the most progressive of all the constitutions promulgated in Nepal in terms of the provisions related to human rights.

Throughout Nepal’s history, the concept of human rights has progressed together with various political movements. The norms and values of the Hindu state and royal institutions prior to the year 1951 (2007 BS) were discriminatory against a large segment of the population. There was a formalised Hindu caste system in place in Nepali society and, even today, the legacy of that system remains a barrier to social transformation in relation to human rights and equality for the many indigenous, ethnic and Dalit communities. The situation of women is also the result of traditions that disempowered, marginalised and excluded them on the basis of their gender. The Civil Code (Muluki Ain) of 1854 (1910 BS) entrenched the hierarchical caste system by legally formalising it.

The recognition of human rights principles and norms through legislative measures only took place after the establishment of democracy in Nepal in 1950 (2007 BS). Since then, Nepal has adopted legislatives measures to protect and promote human rights, even before the international human rights regime took concrete shape. The Government of Nepal adopted the Citizen Rights Act in 1955 to guarantee certain human rights.

In the constitutional history of Nepal, the trend of guaranteeing fundamental rights commenced with the first constitution in 1947 (Government of Nepal Act 2004 BS), however the provision of fundamental rights was more elaborated in later constitutions. In the 1947 Constitution (Government of Nepal Act 2004 BS), there were only two provisions on fundamental rights, whereas in the Interim Government of Nepal Act 1951 (2007 BS), while there was no separate chapter on fundamental rights, a few more rights were incorporated, such as the right to equality, right against discrimination, individual freedoms, right against exploitation and the rights of the child (Interim Government of Nepal Act 1951, Articles 14–21).

The Constitution of the Kingdom of Nepal 1959 was the first constitution to incorporate fundamental rights in a systematic way with an enforcement mechanism through the extraordinary jurisdiction of the Supreme Court. The 1959 Constitution, Part 3, recognised the right to personal liberty, equality, religion, property and constitutional liberty (Constitution of the Kingdom of Nepal
Similarly, the Constitution of Nepal 1962 enshrined seven fundamental rights (of a civil and political nature) with a strong restriction clause. The Constitution of the Kingdom of Nepal 1990 guaranteed 13 fundamental rights and individual freedoms, mainly civil and political rights. However, economic, social and cultural rights were provided as directive principles and state policies and were not enforceable through court.

The protection and promotion of human rights and fundamental freedoms received a high degree of attention in the political negotiations and agreements during the peace process that brought the ten-year civil war to an end in 2006. From the Twelve Point Understanding to the Comprehensive Peace Accord (CPA) 2006 and other supplementary agreements and political understandings, the protection and promotion of human rights has been accepted as a core element. Point 4 of the Twelve Point Understanding between the Seven Party Alliance and the Communist Party of Nepal (Maoist) (CPN [Maoist]) on 22 November 2005 highlighted their commitment to rule of law and fundamental rights and freedoms. The Comprehensive Peace Accord concluded between the Government of Nepal and the CPN (Maoist) made specific provision in Article 7 for the protection and promotion of human rights and fundamental freedoms. Both parties to the Accord have expressed their strong commitment to respect the basic principles and standards of international human rights and humanitarian law, including the Universal Declaration of Human Rights and other international human rights instruments. The Comprehensive Peace Accord contains detailed provisions on various fundamental rights and freedoms, including the right to life, the right to individual freedom, political and civil rights, economic and social rights, and the rights of women and children. This Agreement is not only the foundation of the whole peace process in Nepal, but also formed the basis for the Interim Constitution of 2007.

The Interim Constitution of Nepal 2007 (2063 BS) has further expanded civil and political rights as well as economic, social and cultural rights. The Interim Constitution listed civil and political rights such as right to freedoms; equality and non discrimination; freedom of press, right related to religion, right to property; right against exile and exploitation etc. In addition, it has also guaranteed economic and social rights such as right to employment; environment and health; education and culture, social justice; labour; right against untouchability and caste discrimination and rights of certain group such as women and children. After the Constituent Assembly election in 2008, a Committee on Fundamental Rights and Directive Principles was formed with the mandate to prepare a concept paper and preliminary draft on fundamental rights and directive principles for the new constitution. This Committee has proposed an even more elaborated provision of fundamental rights in its preliminary draft (CFRDP, 2010). However, due to the termination of the Constituent Assembly tenure in May 2012 without producing a new constitution, this proposal has not come into force. The proposal by the Committee on Fundamental Rights and Directive Principles and the proposals of
other committees of the Constituent Assembly regarding fundamental rights are analysed in depth in the following section.

**CONSTITUENT ASSEMBLY PROPOSAL FOR FUNDAMENTAL RIGHTS**

After the Constituent Assembly election in May 2008, Nepali politics entered into a discourse on the new constitution. Unfortunately, the Constituent Assembly failed produce a new constitution before its termination on 28 May 2012. The constitutionalisation of human rights became one of the central focuses during Constituent Assembly deliberations. Among the 10 thematic committees of the former Constituent Assembly, the Committee on Fundamental Rights and Directive Principles and State Policy (the Fundamental Rights Committee) was mandated to prepare a concept paper and preliminary draft on the provisions of the constitution related to fundamental rights. During Constituent Assembly deliberations, the incorporation of fundamental rights in the constitution was considered to be a key step in addressing the hopes, aspirations and expectations of different groups of people. In addition to the Committee on Fundamental Rights, six other committees’ reports contained proposals for the incorporation of a wide range of human rights in the new constitution.

The proposal of the Committee on Fundamental Rights attempted to accommodate the aspirations of people by:

- **reaffirming** basic human rights and freedoms as they are laid down in international human rights instruments (these are basic rights that belong to everyone by their nature as human beings); the right to the freedom of residence in whichever part of Nepal and the freedom to move to every other part of Nepal has also been specifically recognised and no provincial or local government can take this right away;

- **recognising** several new rights, such as the rights of victims of crime, rights related to language and culture, the right to shelter, the rights of the Dalit community, the right to family, the rights of consumers, and the right to have access to safe drinking water, sanitation and health services;

- **separating** some of the composite rights enshrined in the Interim Constitution 2007 as independent fundamental rights, such as the right to a clean environment and the right to health, employment and social security;

- **incorporating** rights for specific groups such as women, children, and Dalits and allowing for special arrangements for addressing their specific needs (these rights are in addition to basic fundamental rights, which belong to everyone on the basis of equality); and

- **providing** extraordinary jurisdiction (writ jurisdiction) to the judiciary to hear cases of fundamental rights violations and enforce compliance (all state organs are obliged to protect and adhere to fundamental rights in the exercise of their functions).
Some of the specific rights provided for in the preliminary draft of the Fundamental Rights Committee are discussed here (CFRDP, 2010).

**Right to life, liberty and property**

The preliminary draft of the Fundamental Rights Committee guarantees the right to live with human dignity and individual freedoms including: a) freedom of opinion and expression; b) freedom to assemble peacefully; c) freedom to form unions and organisations; d) freedom to form political parties; e) freedom to move and reside; and f) freedom of occupation, employment, industry and business. These rights are subjected to reasonable restriction on the following grounds:

- if the action undermines the nationality, sovereignty and integrity of Nepal;
- if the action undermines harmonious relations among the federal units;
- if the action jeopardises harmonious relations among people of various castes, tribes, religions or communities;
- if the action is defamatory, in contempt of court or incites another to an offence; or
- if the action is contrary to decent public behaviour or morality.

Moreover, freedom to form a political party is restricted in the following situations:

- if the political party is spying against the country or revealing national secrets;
- if the political party is committing treason that affects the external security of Nepal; or
- if the political party restricts membership on the basis of caste, language, religion, community or gender.

The preliminary draft also guarantees the right against exploitation and ensures protection from human trafficking, slavery or bonded labour, as well as forced labour. If such exploitation occurs, the victim is entitled to compensation from the perpetrator.

For the protection of rights related to mass communication, the Fundamental Rights Committee draft foresees that no prior censorship of any news, article or feature, including audiovisual materials, shall take place. It provides that there shall be no closure, seizure or cancelation of registration or obstruction of any type of the media or of the means of communication.

The right to information is guaranteed to every citizen, under which they have the right to demand or obtain information on any matter of concern to him/her or of public interest except for any matter that requires confidentiality. These are great restrictions on the right to information, so much so that they could nullify the right. The right to privacy is also guaranteed with the objective to respect and
protect a person’s dignity. The right to property encompasses the right to acquire, own, sell and dispose of property. It also guarantees non-acquisition of property by the State, except in the public interest and with compensation in accordance with law. However, the draft has made an exception in relation to the acquisition of property acquired through illegal means.

**Right to equality, non-discrimination and positive discrimination**

The Committee on Fundamental Rights recognises the principle of equality and non-discrimination in its preliminary draft. It prohibits discrimination on the grounds of religion, colour, caste, tribe, gender, sexual orientation, biological condition, disability, health, marital status, pregnancy, economic condition, origin, language, religion, ideological conviction or any other similar grounds. The draft allows the state to make special arrangements for the protection, empowerment or advancement of weaker segments of society. Guaranteeing the right against untouchability and racial discrimination, the draft declares all forms of untouchability and discriminatory practices punishable by law and gives victims of such acts the right to compensation.

Rights relating to social justice are focused on the proportionate inclusion of women, Dalits, Madhesis, indigenous people, people from minority and marginalised groups, Muslims, people with disabilities, youth, people from backward classes, farmers and workers, and oppressed groups. The draft sets out that the State shall provide special privileges in education, health, accommodation, employment, food and social security, and so forth to people from marginalised and excluded communities. Similarly, the right to identity, the protection, promotion and development of language and culture, and special privileges for development and empowerment are guaranteed to adibasi-janajatis (indigenous nationalities, minority groups, Madhesis, citizens of oppressed regions, people with disabilities, youth and martyrs from the civil conflict).

**Rights related to justice**

In relation to rights related to justice, the Fundamental Rights Committee draft focuses mainly on the criminal justice system. This includes the right to be informed of the grounds of arrest; right to be informed about the proceedings of a trial; right to a fair trial; right to consult and be defended by a lawyer; right to free legal aid to indigent people; right to be assumed innocent until proven guilty; right to protection from double jeopardy; and right to remain silent (right against self incrimination). It also provides that victims of crime have the right to receive information about the investigation and any action taken, as well as the right to social rehabilitation and compensation in accordance with the law.

The draft further provides for the right against torture, which includes the prohibition of cruel, inhuman and degrading treatment, and the right against preventive detention. However, the draft allows preventive detention if there is
sufficient grounds to believe the existence of an immediate threat to sovereignty and integrity or to protect law and order. These grounds give space to arbitrary use of preventive detention clause. Victims of a violation of these rights are entitled to compensation.

**Economic, social and cultural rights**

The preliminary draft of the Fundamental Rights Committee also incorporates various economic, social and cultural rights as fundamental rights. The right to live in a clean environment, including the right to be safeguarded from the negative effects of climate change and the right of victims of environmental pollution to receive proper compensation has been guaranteed. The right to education provides for access to basic education and foresees free and compulsory primary education, free education up to secondary level, and free higher education to citizens from destitute class. Rights relating to language and culture are guaranteed to the individual and communities to protect, promote and use their language, culture, script, heritage, and civilisation.

The right to food, shelter, social security and health as well as consumer rights are some of the other important economic and social rights proposed in the draft. The right to access to adequate shelter provides protection against forceful eviction or encroachment on habitation. The right to employment entitles citizens to have either employment or an unemployment allowance, but this provision will only be effective after the enactment of the legislation. Similarly, the right to health entitles citizens to free basic and emergency health care. The right to access to safe drinking water and sanitation is also listed under the right to health.

The right to social security is guaranteed to citizens from destitute class, incapacitated and helpless people including single women, people with disabilities, children, and senior citizens. However, this right is also enforceable in accordance with law and will only be effective once enacted into law. Consumer rights focus on the quality assurance of goods and services.

The right to family prohibits the keeping of more than one spouse at a time and guarantees the freedom of every person to marry and divorce. It holds parents responsible for nurturing, caring and the development of their children and makes son/daughter responsible for respecting and nurturing their parents.

**Rights of specific groups**

The Fundament Rights Committee also proposes to incorporate the rights of specific groups such as women, children, and Dalit community in the constitution. Regarding the rights of women, the draft proposes guaranteeing equal rights to women over ancestral property as well as rights in matters related to reproduction. It also prohibits gender discrimination and physical, mental, sexual, psychological and other forms of violence or exploitation against women. Women are also guaranteed the right to proportional representation in all state agencies as a fundamental right.
To protect the rights of the child, the Fundamental Rights Committee guarantees the right to name, identity, birth registration, education and health; to be nurtured; and to proper care, sports and entertainment, child-friendly justice and personality development. It prohibits the employment of children in hazardous work; child marriage; trafficking, abduction or taking hostage; recruitment in the army, police or by armed conflict group; and any other type of inappropriate use of children.

In relation to Dalits, the draft prohibits discrimination, humiliation and intolerant behaviour against members of the Dalit community and entitles Dalits to proportional participation in all state agencies. In addition, the draft provides for special privileges and priority in education, health, employment and social security on the basis of positive discrimination.

Implementation and constitution remedies

The report of the Fundamental Rights Committee has created an obligation on the state to make appropriate provisions for the implementation of fundamental rights, particularly economic, social and cultural rights, and to enact legislation, as deemed necessary, within two years for the implementation of such rights. Provision is made in the remedial clause for invoking the extraordinary jurisdiction of the federal Supreme Court and State level high courts for the enforcement of fundamental rights.

CRITIQUE OF PROPOSAL FUNDAMENTAL RIGHTS

Reasonable restriction clauses

The preliminary draft of the Constituent Assembly Committee on Fundamental Rights provides certain individual freedoms to the citizens of Nepal. However, the proposed restriction clauses are not compatible with universally accepted principles and norms of human rights and fundamental freedoms. For example, in the ICCPR, freedom of opinion is absolute and freedom of expression is subject to reasonable restriction. Reasonable restriction clauses should limited to what is necessary and any restriction must be in proportion to what the state intends to protect by such restriction. International human rights norms and standards allow the restrictions on certain freedoms, however, such restrictions should be provided by law and are necessary in democratic society to ensure respect for the rights and reputation of others, for the protection of national security and for public order, public health and moral. The draft proposal by the Fundamental Rights Committee puts freedom of opinion and expression in the same basket and provides reasonable restriction clauses that are applicable to both. In addition, the grounds for reasonable restriction are extremely wide and ambiguous, including, for example, the nationality, national integrity of Nepal, harmonious relations among federal units, harmonious relations among people of different groups.
(castes, religions, tribes, etc.), an act of defamation, contempt of court, interest of general public, any act of spying against the state, and revealing national secrets. The reasonable restriction clause tried to make an exclusive list of the grounds on which the constitutional freedoms could be restricted, which has merely created ambiguity, and there is a real risk that some of the grounds could be misused by those in power.

Prohibition on retrospective effect of criminal law

One of the issues with the proposal on fundamental rights was whether to retain a blanket prohibition on the retrospective effect of criminal law or to include some exceptions in order to address the issue of impunity in relation to the gross violation of human rights and humanitarian law during past conflicts. The issue of impunity for gross violations of human rights and humanitarian law has become a pressing issue in human rights discourse in Nepal. The human rights groups intended to put an end to impunity by making a provision in the constitution allowing the enactment of retrospective laws for invoking criminal proceedings in cases related to the grave violation of human rights and humanitarian law during the armed conflict. However, the Fundamental Rights Committee proposed a blanket prohibition on the retrospective effect of criminal law, but there was strong dissenting opinion among the committee members.

Confusion about rights of citizens and rights of individuals

The Constituent Assembly Committee on Fundamental Rights prepared an extensive list of fundamental rights. As it includes not only individual freedoms, but also rights of a social and economic nature, the proposal focuses on the protection of marginalised and excluded communities. However, the draft is confused on what rights should be provided to citizens and what rights are to be guaranteed to all individuals residing in Nepal, irrespective of their nationality.

Article 25 of ICCPR 1966 has made very clear provision on this issue. Except for the right to take part in the conduct of public affairs and the right to vote and to be elected in genuine periodic elections, all other rights are to be provided to every individual. Similarly, Article 2 (3) of the ICESCR allows developing countries to determine whether or not economic rights should be guaranteed to non-nationals by giving due regard to human rights and the national economy. All other rights that do not fall under Article 25 of ICCPR and Article 2 (3) of ICESCR should be provided to all people irrespective of their state of origin or current nationality. In the proposal of the Fundamental Rights Committee most of the rights are provided only to citizens, not to all individuals. Freedom of expression, the right to equality, right to information, freedom of movement, right to legal counsel, freedom of opinion, right to education, health, food, property, housing and social security, and right against exile are only provided to citizens. In accordance with international law, fundamental rights should, by definition, belong to all people, except as provided for in Article 25 of ICCPR and Article 2 (3) of ICESCR.
Strength of state to deliver economic, social and cultural rights

The committees of the Constituent Assembly have proposed a wide range of economic and social rights. The proposal means to give economic and social rights (such as the right to food, housing, health, water and sanitation, social security, and employment) equal effect as individual freedoms by making these rights justiciable through a court of law. There is debate on the capacity of the state to realise these rights in reality. The implementation clause for fundamental rights creates an obligation on the state to take appropriate measures for the implementation of such rights and also makes provision for the enactment of legislation within two years for the enforcement of such rights. This has created confusion about the status of these rights and what will happen if the necessary legislation is not enacted within two years.

Debate on right to self-determination and political preferential rights

Self-determination has created heated debate, largely because of the consciousness among indigenous people of their rights and interests. The International Labour Organization (ILO) Convention 169 and the United Nations Declaration on the Rights of Indigenous People has contributed to this discourse on the right to self-determination. It is important to clarify that the right of self-determination (not the right to self-determination) is mentioned in Article 1 of the ICCPR and ICESCR. The International Bill of Rights guarantees the right of self-determination to all people to determine their own social, economic, cultural and political status.

The right to self-determination was not proposed by the Fundamental Rights Committee in its draft. The State Restructuring Committee proposed this right indicating that this rights is limited to certain groups of people (as opposed to all people as mentioned in the ICCPR and ICESCR), such as indigenous people, ethnic communities and Madhesi groups, but can only be enjoyed in a manner that does not harm the integrity, sovereignty and national unity of Nepal. This has created confusion as to whether or not the right to self-determination is to be exercised by all people (ICCPR, ICESCR) or by certain communities (collectively). The proposal has been portrayed in such a way that secession is not allowed while exercising the right to self-determination.

Political preferential rights have been used for two different purposes by two different committees. The Committee on Social and Cultural Solidarity has provided for preferential rights to indigenous communities for the utilisation of natural resources. However, the State Restructuring Committee has proposed this right to ensure that the executive leadership of a province or autonomous region that is named according to ethnic/community identity is in the hands of a person from the majority group for two consecutive terms. This proposal has been criticised as being against democratic principles and norms.
Derogation of rights in state of emergency

While it is standard to allow the minor curtailing of civil rights and liberties when an executive declares a state of emergency, the ICCPR has listed a number of rights that cannot be derogated. These include, among others, the right to life, the right against torture, the right against slavery, and the recognition of a person as a person before the law. The Fundamental Rights Committee has not dealt with the derogation of rights in detail. However, the report of the Constitutional Committee does contain a provision on the derogation of rights under its emergency clause, but it does not specifically list the rights that cannot be derogated.

Nepal's past experience has proved that blanket derogation clauses can be dangerous, as there is a high possibility of misuse. Rights that cannot be derogated should be listed explicitly and, for those rights that can be derogated, the rationale and objective identification of the circumstances under which such derogation can take place should be established while invoking the derogation clause. This can control the arbitrary use of the derogation clause during times of emergency.

CONSTITUTIONAL REMEDY IN CASE OF VIOLATION

The state as an institution may in some cases be the major violator of human rights, but it is by no means the sole culprit (Aditya 2003, in Adhikari 2003, p 59). It is not necessary that the violence be committed by the formal mechanisms of the state (security forces, the bureaucracy or government agencies), the violation may also be perpetrated by the political parties, organised groups or insurgents during conflict. Whoever the violator is, either the state or a non-state actor, the constitution is expected to address such violations through the provision of remedies to the victim and sanctions on the perpetrator.

There is a well-known Latin legal maxim, ubi jus ibiremedium, which means 'the rights come with the remedy'. It is generally indisputable that whenever there is a right, there is also a remedy by suit of action at law if that right is violated (Tripathi, 2002: 282). To reflect the importance of a constitutional remedy, Dr Ambedkar, in the course of the Indian Constituent Assembly debate, observed "it is the remedy that makes a right real. If there is no remedy, there is no right at all" (Constituent Assembly of India, 1966: 953, cited in Tripathi, 2002).

In the constitutional history of Nepal, although the Government of Nepal Act 1947 and the Interim Government of Nepal Act 1951 provided for some constitutional rights, unfortunately those constitutional enactments did not envisage remedial measures in the case of infringement. In 1959, for the first time in Nepal, Article 9 of the Constitution of the Kingdom of Nepal 1959 included the right to constitutional remedy and entrusted the Supreme Court with the power to hear petitions on the violation of fundamental rights. This right was also included in the Panchayat Constitution of 1962 and strengthened in the 1990 Constitution.
The Interim Constitution of Nepal 2007 retained the same provision related to constitutional remedy from the 1990 Constitution, which provides extraordinary jurisdiction to the Supreme Court to hear petitions related to the violation of fundamental rights. In addition, petitions related to the judicial review of legislation can also be brought before the Supreme Court of Nepal. The writ jurisdiction and jurisdiction over judicial review are milestones in the enforcement of fundamental rights through judicial intervention.

The Fundamental Rights Committee has also added an implementation clause in addition to the constitutional remedy. It is obvious that such an implementation clause needs to be provided, because of our past experience in Nepal of non-implementation of such rights due to state inaction. The implementation clause requires the state to make appropriate provision for the implementation of the rights enshrined in the constitution and requires the enactment of legislation for the implementation of fundamental rights within two years of the promulgation of the constitution (Article 31, Preliminary Draft of Constituent Assembly Committee on Fundamental Rights and Directive Principles).

**CONCLUSION**

Human rights are the foundational elements of most democratic societies. In general, recognition of human rights in a state’s constitution ensures the dignity and equality of citizens. Human rights delineate certain actions that a government cannot take against its citizens and ensure citizens a realm of freedom within their nation. A bill of rights defines the fundamental rights that are necessary to preserve freedom of action and expression for all. As Nepal transitions towards a fully-democratic governance system, it is important to discuss the constitutional recognition of human rights in the new constitution, the implications of such constitutional recognition, and its impact on the people of Nepal and state institutions. Nepal’s Constituent Assembly discourse has been focused on the constitutionalisation of a wide range of fundamental rights because these rights reflect the aspirations, hopes and expectations of people from diverse groups across Nepal.

The proposals of the Constituent Assembly thematic committees were extensive and wisely included a wide range of rights recognised in the international human rights regime. As Nepal is a party to many international human rights instruments, the Constituent Assembly tried to incorporate a wide range of human rights to give them constitutional effect. The drafts of the relevant committees have reaffirmed basic human rights and freedoms as they are laid down in universal human rights instruments, as well as recognising several new rights of an economic and social nature, including the rights of marginalised and excluded groups.

Despite this effort to incorporate a wide range of human rights in the new constitution, some of the proposed provisions are not compatible with
international human rights norms and standards and need to be revisited. The wide restriction clauses, confusion about the applicability of rights for citizen and non-nationals, the inclusion of economic and social rights and their implementation mechanisms, the application of the derogation of rights during an emergency, and confusion over the right to self-determination and political preferential rights are some of the key issues to be addressed by the next constituent assembly.

REFERENCES


CHAPTER 7

CITIZENSHIP IN THE CONSTITUTION MAKING PROCESS OF NEPAL

- Binda Magar, Indu Tuladhar and Luma Singh Bishowkarma
1. INTRODUCTION

In international law the term ‘citizenship’ refers to the legal relation between a person and a state. This status is often also referred to as ‘nationality’, particularly in international legal documents (Vink & de Groot, 2010: 1). Citizenship is a right of paramount importance, as it grants persons the formal protection of a state and serves as the prerequisite for enjoying basic social, economic and political rights. It is difficult to imagine what life is like for people who are living without being considered a national or citizen of any country. Most people take their citizenship or nationality for granted.

Since states possess sovereignty and jurisdicational powers and consist of a collection of individual human beings, it is essential that a link between the two is legally established. The link connecting the state and the people it includes in its territory is provided by the concept of nationality (Shaw, 2008: 659).

The formal acceptance of an individual as a member of a state through the bestowal of the legal bond of nationality is not a random act — it is the recognition of an existing factual link with that state (Van Waas, 2008: 32). Such a right should be founded on a genuine and effective link between an individual and a state. Such genuine and effective links, made manifest by birth, residency, and/or descent, are reflected in the provisions of most states’ nationality legislation and in international instruments relating to nationality (UNHCR-IPU, 2005: 9).

The International Court of Justice has described nationality as a legal bond having as its basis a social fact of attachment; a genuine connection of existence, interests and sentiments; together with reciprocal rights and duties. Nationality may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is more closely connected with the population of the state conferring nationality than with that of any other state (International Court of Justice, 1953: 23).

Nationality is defined by the Inter-American Court of Human Rights as “the political and legal bond that links a person to a given state and binds him to it with ties of loyalty and fidelity, entitling him to diplomatic protection from that state.” International law, however, imposes certain limits on the broad powers enjoyed by states such that “nationality is today perceived as involving the jurisdiction of the state as well as human rights issues” (Castillo-Petruzzi et al. vs Peru, 1999).
In principle, questions of nationality fall within the domestic jurisdiction of each sovereign state. As per Article 2 of the Hague Convention (1930), any question as to whether a person possesses the nationality of a particular state is determined in accordance with the law of that state. However, the applicability of a state's internal decisions can be limited by the similar actions of other states and by international law, the details of which are discussed later in this chapter along with Nepal's obligations.

Article 1 of the Hague Convention states:

'It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.

To be considered a national by operation of law means that an individual is automatically considered to be a citizen under the terms outlined in the State's legal instruments related to nationality or that the individual has been granted nationality through a decision made by the relevant authorities. These instruments can be a constitution, a presidential decree, or a citizenship act. And the Convention Relating to the Status of Stateless Persons (1954: Article 1(1)) says that a person who is not considered a national by any state under the operation of its law shall be called a stateless person.

Most people are considered nationals by the operation of only one state's laws — usually either the laws of the state in which the person was born \((jus soli)\) or the laws of the state of which the person's parents were nationals when the individual was born \((jus sanguinis)\). Whenever an administrative procedure allows for discretion in granting citizenship, citizenship applicants cannot be considered nationals until their applications have been completed and approved and the citizenship of that state is granted in accordance with the law. Individuals who have to apply for citizenship, and those whom the law defines as eligible to apply but whose applications are rejected, are not citizens of that state by operation of that state's law (UNHCR-IPU, 2005: 10-11).

2. THE GROUNDS FOR ACQUIRING CITIZENSHIP

The many different factors that may serve as evidence for nationality attribution include place of birth, descent, residence, family ties, language and ethnicity. States employ one or more of these components of nationality to delineate the original make-up of their body of nationals and thereafter, in the course of determining who is worthy of this legal status (Van Waas, 2008: 32).

The principal grounds for acquiring citizenship (apart from in international transactions such as the transfer of territory) are birth within a certain territory,
descent from a citizen parent, marriage to a citizen of another country, and naturalisation. Two main systems are used to determine citizenship as of the time of birth:

- **Citizenship by birth** — The *jus soli* principle or ‘law of the soil’ nationality is acquired at birth by virtue of being born in the territory of the state, regardless of parental citizenship.

- **Citizenship by descent** — The *jus sanguinis* principle, also known as the ‘law of the blood’, recognises descent or parentage as the indication of a genuine link. In this case, nationality is granted by a particular state to a child at birth if one or both parents are nationals of that state, regardless of where the child was born (Encyclopaedia Britannica Online, 2013).

- **Citizenship by naturalisation** — It is also possible to acquire a (different) nationality later in life, in recognition of a more recently established genuine link with a state. The most important principle in this respect is that of *jus domicili*, or the ‘law of residence’. This principle is the most common ground for naturalisation where the nationality of the state is granted upon application to the competent authorities. *Jus domicili* recognises the bond that an individual develops with a state after a significant period of habitual or permanent residence, often determined to be five to ten years (Van Waas, 2008: 33).

- **Citizenship by marriage** — An individual can also forge a bond with a state later in life through adoption by or marriage to a national. This is usually recognised as a ground for (at least facilitated) naturalisation; for access to nationality by option, registration or declaration; or even for the automatic acquisition of nationality by operation of the law (Van Waas, 2008: 34).

- **Honorary citizenship** — Many countries grant honorary citizenship to individuals who have made a special contribution to the country, and to world renowned personalities. The citizenship granted by Canada in 2001 to South African President Nelson Mandela and the citizenship provided by Nepal in 2003 to Sir Edmund Hillary, one of the first two people to set foot atop Mount Sagarmatha (Mount Everest) are examples of this kind of citizenship.

- **Acquisition of territory** — When a country acquires any territory through war, treaty or any other reason, then people having their domicile in such a territory are given citizenship on this basis. For instance the area covered by the current Nepalese districts of Banke, Bardiya, Kailali and Kanchanpur, known as the ‘naya muluk’ or new country, were merged into Nepal in 1860. The people domiciled in this territory received Nepali citizenship on this basis.
3. INTERNATIONAL PRACTICES ON THE CONVEYANCE OF CITIZENSHIP

a. Citizenship through either parents

Until around 60 years ago, the nationality laws of the majority of states did not provide equal rights to women in nationality matters. This has radically changed in favour of women’s rights since the adoption of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). There is a growing willingness and commitment by states to act to achieve gender equality in nationality laws to allow children to acquire nationality from either parent. In recent years reform has taken place in countries as diverse as Sri Lanka (in 2003), Egypt (2004), Algeria (2005), Indonesia (2006), Iraq (partial reform in 2006), Sierra Leone (partial reform in 2006), Morocco (2007), Bangladesh (2009), Zimbabwe (2009), Kenya (2010) and Tunisia (remaining gaps addressed in 2010). In many cases, reform was achieved by simply extending to women the right to confer nationality to their children, which had been previously only been granted to men. Several South Asia nations recently amended their nationality laws to ensure the non-discriminatory conveyance of citizenship by descent to children from either the mother or the father, including Sri Lanka and Bangladesh in 2003 and 2009:

- Sri Lanka’s Citizenship Amendment Act, No. 16 of 2003 replaced the rule that a person born in or outside of Sri Lanka shall be a citizen “by descent if at the time of his birth his father is a citizen of Ceylon [Sri Lanka]” with the provision that such a person will be a “citizen of Sri Lanka if at the time of his birth either of his parents is or was a citizen of Sri Lanka”.

- In Bangladesh, Act 17 of 2009 amended Bangladesh’s Citizenship Act of 1951 by replacing the term “father” in section 5 of the act in all instances with the phrase “father or mother”.

Of the 120 countries surveyed (CLAF, 2011: 103-113), 108 of them allowed children born in the country to acquire citizenship by descent from either the mother or father under the principle of *jus sanguinis* (‘right of blood’), or granted citizenship to children born in their territory under the principle of *jus soli* (‘right of the soil’). countries that allow children born in the country to acquire citizenship by descent from either the mother or father are as follows:

- In ASIA: Australia, Bangladesh, Hong Kong SAR, China, Laos, Malaysia, India, Kazakhstan, Mongolia, New Zealand, Philippines, Singapore, Thailand, Uzbekistan, Sri Lanka, China, Indonesia, Japan, Republic of Korea (North), Tajikistan, Turkmenistan, Vietnam, Pakistan, Cambodia, and Timor-Leste.
• In Europe: Austria, Estonia, Cyprus, Iceland, Hungary, Latvia, Malta, Norway, Romania, Switzerland, Macedonia, Albania, Armenia, Belarus, Belgium, Bosnia and Herzegovina, Croatia, Georgia, Italy, Lithuania, Montenegro, Poland, Portugal, Moldova, Russia, Serbia, Spain, Slovakia, Ukraine, Azerbaijan, Bulgaria, Greece and France.


• In Americas: United States (USA), Argentina, Colombia, Chile, Ecuador, El Salvador, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru and Venezuela.

• In Middle-East: Tunisia, Iraq and Morocco. (see CLAF, 2011:103–113 for details).

Of the 120 countries surveyed, 104 provide that either parent may convey citizenship by descent to children born abroad. In granting nationality to children born out of the territory, some states require that the parent who is a national of the state maintains a primary or permanent residence in the state. Another common requirement is that the child’s birth is promptly registered with their consulate overseas (CLAF, 2011:103–113).

It should also be noted that the vast majority of nations establish that children acquire citizenship at birth, as opposed to requiring that they go through an application procedure upon reaching the age of adulthood. The former approach offers children far greater social and legal protection, as it ensures that children below the age of majority possess a clear, documented, and undisputed nationality.

By contrast, under existing law, persons in Nepal only become eligible at the age of majority (16) to apply for legal proof of nationality in the form of a citizenship certificate. This is specified under Section 8 of the Nepal Citizenship Act, 2006, (Application to be given for Acquiring Citizenship Certificate).

b. Citizenship through fathers only

Only a small minority of states, including 9 of the 120 nations surveyed in (CLAF, 2011: 103-113), restrict nationality by descent such that only male citizens enjoy the right to convey nationality to children born in the country. Nepal has been included in this category as Nepali women are not entitled under the current law to convey nationality by descent to children when the father is a non-national. Women in this situation in Nepal may only petition to have the child naturalised,
and approval may be withheld even when the requirements are met—as naturalisation remains a matter of state discretion (see Box 1).

Box 1: Definition of citizenship in Nepal

The Interim Constitution (2007) and Citizenship Act (2006) of Nepal define a citizen as “any person whose father or mother was a citizen of Nepal at the time of birth” (Section 8(2)(b) Interim Constitution (2007); Section 3(1) Citizenship Act (2006).

However, Nepali women do not have the right to convey nationality by descent to children if the father is a foreign national. In such instances, the law prescribes that the mother may petition to have the child naturalised upon submitting proof that the child was born in Nepal, has resided permanently in Nepal, and has not acquired a foreign nationality (See Sections 3(2), 5(2) Citizenship Act (2006). This significantly curtails mother’s right to convey citizenship to the children.

Naturalisation is a discretionary procedure, and there are no identified cases of Nepali women conveying nationality to their children in such instances.

Other countries with a similar or same situation include Somalia, Sudan, Swaziland, Burundi, Dominican Republic, Syria, Brunei and Iran. In the case of Iran, although Iranian law establishes that only male nationals may convey citizenship by descent, this provision is balanced by a very inclusive citizenship regime based on the principle of residence with Iranian law treating all residents of the country as presumptive citizens until it is established that they are the nationals of another state (Article 976 of the Civil Code of Iran [last amended 1985]). Iranian law also features third-generation birth right citizenship (‘double jus soli’) and thus children born in Iran qualify as Iranian citizens by virtue of their birth in the territory, so long as one of their parents was also born in Iran.

c. States that prohibit children from acquiring nationality unless both parents are citizens

Among the states surveyed (CLAF, 2011) only one categorically prevents children born in the territory of the country from acquiring citizenship by descent unless both parents are nationals of the country. This is Bhutan, which, in 1985 revised its nationality laws to strip citizenship from the Nepali ethnic population, who had settled in the country a century before. The denaturalisation of the ethnic Nepali minority in Bhutan led to the flight of about 110,000 ethnic Nepalese from Bhutan to Nepal in the early 1990s, where they remained as refugees. While less restrictive, the nationality laws of Myanmar and the Republic of the Congo also make it difficult in practice for children to acquire nationality by descent through one parent alone (see Box 2).
Box 2: The laws of Myanmar and the Republic of the Congo on children’s right to acquire nationality

In Myanmar, either the mother or the father (whichever is a national of the country) may convey citizenship to the child, but the other parent must be a descendant of Myanmarese citizens (Burma Citizenship Law, 1982).

In the Congo, children may acquire citizenship by descent from either parent, whichever is a national of the country; but the parent who is a foreign national must also have been born in the Congo. The potential harm of this policy is somewhat mitigated by the fact that children born in the country also qualify for nationality if both parents were born in the Congo, even if they are not nationals (Congolese Code of Nationality, 1961 [amended 1993]). Congolese law is actually more permissive when the child is born out of the territory than when it is born in the country. Children born abroad may acquire citizenship by descent, so long as one parent is a national of the Congo (See Articles 8, 9 Act No. 35 June 20, 1961, Congolese Nationality Code).

d. Special Protective Measures to Protect Children From Becoming Stateless

Many countries also grant citizenship to children in cases where the child’s parents are stateless. Of the countries surveyed, 38 countries (CLAF, 2011:103–113) had enacted special measures to offer children in their territory additional protection from becoming stateless. Countries which adopt this approach generally grant nationality to children born or found within their territory in three situations:

- the child’s parents are stateless, have undetermined nationality, or are unknown;
- the parents possess foreign nationalities, but the countries of the parents’ nationalities do not transmit citizenship to the child; and
- other situations where the failure to grant the nationality to the child would render the child stateless.

A majority of European states have such legal provisions. These provisions mirror the principles of the Convention on the Reduction of Statelessness, 1961 (Article 4), which calls on states to:

- grant nationality to children born in their territory if they would otherwise be stateless (Article 1); and
- grant nationality to children not born in their territory if they would otherwise be stateless, provided that the child has one parent is a national of the state at the time of the child’s birth.

These special measures are intended to address exceptional cases, and they cannot be substituted for the fundamental protection offered by an appropriate legal regime on citizenship by descent which — in line with international standards, makes access to nationality fully, equally, and independently available from the mother or father. Indeed, for every state surveyed, these special protective
measures have been adopted in addition to laws allowing either parent to convey citizenship by descent.

Nepal also has some protective measures for those children found in Nepal’s territory whose paternity or maternity is not identified. However, this means has not been proven reliable means of acquiring citizenship in Nepal as no procedures has been established for those who were not cared for by any institution or person.4

e. Citizenship by Naturalisation

With respect to all of the other 120 nations surveyed, naturalisation is utilised to permit immigrants to become a citizen of their new state of residence. Aleinikoff (2003: 5) defined naturalisation as “the granting of citizenship to immigrants. In this sense, naturalisation is applied to persons who already hold a prior nationality. The definition of naturalisation is the process of acquiring a new nationality (while potentially surrendering one’s former nationality in the case of countries that do not permit dual citizenship). Aleinikoff (2003: 22) notes that several “states require that persons attaining citizenship through naturalisation renounce prior citizenships”, while Black’s Law Dictionary (Garner, 2009) defines a ‘naturalised citizen’ as “a foreign-born person who attains citizenship by law.”

Naturalisation remains a matter of state discretion precisely because the persons to whom the procedure is applied already hold a prior nationality, and states entertaining naturalisation petitions retain a wide degree of latitude in assessing whether individual applicants have established a sufficient link with their new country. Aleinikoff and Klusmeyer (2000) note that naturalisation is one of the few means of acquisition of citizenship that rest on the choice and discretion of the state and applicant, as other modes of acquisition (such as citizenship by descent) automatically grant or deny nationality based on clearly established rules.

f. Citizenship by Marriage

Among the laws of over 80 countries examined (CLAF, 2011) with respect to the acquisition of citizenship by marriage:

- 46 countries permit foreign wives to naturalize on the basis of marriage to a male citizen of the country with no residency requirement including Nepal, Afghanistan, Cambodia, China, Vietnam, Thailand; while only 24 countries allow foreign husbands to acquire nationality by marriage to a female citizen with no residency requirement including Cambodia, China, Vietnam, Thailand;
- 21 countries including Nepal, Malaysia, Pakistan, Yemen, Jordan, Somalia do not allow foreign husbands to acquire citizenship by marriage; and
- Only one country i.e. Bhutan does not allow citizens to convey citizenship to foreign spouse by marriage.
Among nations that pose a residency requirement for the foreign spouse, most stipulate a period of 2 to 5 years (CLAF, 2011).

Among Asian countries, several states have no set residency period for foreign spouses. In China, for instance, the foreign spouse must be a habitual resident of the country—but no specific period of residence is imposed as a prerequisite for applying for nationality. South Asian nations that have a residency requirement for the foreign spouse include Sri Lanka (a residency requirement of 1 year) and Bangladesh (a 2 year residency requirement) and India (a 7 year residency requirement).

Although some nations do not have dedicated legal provisions addressing citizenship by marriage, they still facilitate access to citizenship through marriage by granting the foreign spouses of their citizens’ permanent residence in the country, which in turn serves as the basis for acquiring citizenship.

4. CITIZENSHIP IN NEPAL

The Citizenship Act, 1952 — In Nepal no substantial legal framework on citizenship existed until 1952. Nevertheless, the terms “Nepali Raiti and Bidesi Raiti” (CLAF, 2011: 36) were used in law to distinguish between a citizen and non-citizen prior to the enactment of the Citizenship Act of Nepal, 1952 (Law Commission of Nepal). This Act was the first law to regulate and deal with citizenship issues in Nepal. It granted citizenship:

- by descent if one of the parents was born in Nepal (Section 2);
- by birth to persons born in Nepal’s territory (Section 2(a));
- to foreign women married to a Nepali citizen (with no residency requirement) (Section 3);
- to women born to Nepali parents and married to a foreign national based on marital relations who were divorced or neglected or separated (Section 4(b));
- to Nepalese who had acquired foreign citizenship and came together with children after the person had lived in Nepal more than a year (Section 4(c)); and
- to a person is who had lived permanently in Nepal for five years (Section 4(d)).

Also according to the 1952 Act:

- individuals who acquired naturalised citizenship were not eligible for the posts of prime minister, minister and chief of the army for 10 years (Section 9); and
• as per the terms and condition of the treaty with the Government of Tibet (then Bhot), sons of Nepali men married to local Bhot women became Nepalese citizens while such daughters became citizens of Bhot (Section 10).

The Constitution, 1962 — A new constitution was promulgated in 1962. For the first time the Constitution of Nepal 1962 (HMGN, 1962) contained a separate chapter on citizenship. Article 8(2)(d) of the constitution set a new basis for granting citizenship to persons of Nepalese origin. At time of the commence of the constitution, it granted equal and independent rights of men and women to convey citizenship to their children (HMGN, 1962: Article 7(b)). However, it delegated power to enact citizenship laws to legislature.

Nepal Citizenship Act, 1964 — Nepal Citizenship Act, 1964 did not follow the principle of equality between men and women and set the basis for citizenship by descent to be available only through fathers (HMGN, 1964: Section 3(1)).

Nepal Citizenship Act, 1964 (1981 amendment) — The provision of giving citizenship by virtue of birth was, however, ended by the Third Amendment to Section 9(2) of the Nepal Citizenship Act 1964 (HMGN, 1964), which came into force on 16 September 1981, that set a cut-off date of registration by 12 April 1981 for the application of this criteria. The Nepal Citizenship Act 1964 made naturalised citizenship available in the following cases:

• Foreign women married to a Nepalese citizen (Section 6(1)(d)). Initially, foreign woman married to a Nepalese citizen had to live in Nepal for 12 years to apply for naturalised citizenship. The second amendment to the Act (10 September, 1976) reduced the time to five years and the third amendment (16 September, 1981) waived the residency requirement for foreign woman married to Nepalese citizens;

• Foreign nationals who had resided for 12 years in Nepal and fulfilled other required conditions (Section 6(1)(d)). From the second amendment of 10 September 1976, the residency requirement was extended to 15 years.

• Persons of Nepalese origin who had resided in Nepal for two years (Section 6(1)(d)).


The Constitution of the Kingdom of Nepal, 1990 — The Constitution of the Kingdom of Nepal, 1990 (HMGN, 1990) discontinued the provision of granting Nepalese citizenship to persons of Nepalese origin. The provision to grant citizenship by birth was not, however, completely nullified, as Article 8 of the 1990 Constitution provided that persons whose father or mother were born in Nepal were deemed Nepalese citizens as per Article 7 of the 1962 constitution.
Article 9(1) of the 1990 Constitution only enabled Nepalese fathers to convey citizenship by descent to their children. Article 9(4) of the 1990 Constitution alongside Section 6(1) of the Nepal Citizenship Act, 1964 continued the provision of naturalised citizenship to foreign woman married to a Nepali citizen with no residency requirement and citizenship by naturalisation to foreign nationals who had resided in Nepal for 15 years and fulfilled other required conditions.

The Interim Constitution of Nepal, 2007 — As per the political consensus reached on 8 November 2006 to resolve the problem of citizenship, the Interim Constitution of Nepal, 2007 (GoN, 2007), the Nepal Citizenship Act (2006) (GoN, 2006), and the Nepal Citizenship Rules, 2006 (GoN, 2006) were introduced by repealing the Constitution of the Kingdom of Nepal, 1990, the Nepal Citizenship Act 1964 and Nepal Citizenship Rules 1992. The Interim Constitution recognised men and women’s equal and independent right to pass on their citizenship to their children by stating that an individual is a citizen of Nepal by descent if their father or mother was a citizen of Nepal at the time of their birth (Interim Constitution: Article 8(2)(b)). However, mother’s rights were significantly curtailed by the stipulation at Article 8(7) that mothers could not pass on their citizenship if the father is a foreign national. Additionally, citizenship by birth was introduced for one time to those who were born in Nepal before mid-April 1990 and lived permanently in Nepal (Article 8(5)). The Interim Constitution provides for citizenship by naturalisation in the following cases:

- foreign woman married to Nepalese citizen with no residency requirement (Article 8(6));
- children born to Nepali mother and foreign father (Article 8(7)) however there has not been a single successful case through this provision; and
- foreign nationals who has resided for 15 years and fulfil other required conditions (Nepal Citizenship Act, 2006: Section 5(4)).

5. POLITICAL PARTIES’ 2008 COMMITMENTS ON CITIZENSHIP

Many of the political parties that stood in the 2008 elections for the Constituent Assembly committed on citizenship issue in their election manifestos (See table 1). Almost all parties had proposed for common agenda to eliminate discriminatory provisions on citizenship against women and ensure equal right between men and women. Some parties even committed for ensuring the right of sexual and gender minorities.
<table>
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<th>Party</th>
<th>Political Parties Commitments in 2008 Manifestos</th>
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| Unified Communist Party of Nepal (Maoist)           | • A common citizenship policy will be adopted in the federal system. Nepalese citizens shall have the right to acquire citizenship easily and without discrimination. Fake citizenship shall be investigated and cancelled. (Page 8)  
• Dual citizenship shall be offered to Non-Residents Nepalese and they shall be motivated to invest their skills and capital in Nepal. (Page 10).  
• There will be provision for all Nepalese sexual and gender minority people to acquire citizenship with their identity. (Page 20) |
| Nepali Congress                                     | • The genders’ identity and equal rights will be ensured. All gender discriminatory provisions against women will be eliminated. Children shall have right to identity and name. (Page 11) |
| Communist Party of Nepal (Unified Marxist-Leninist)  | • There will be legal provision to acquire citizenship through mother-father and their custody.(Page 31)  
• Citizenship policy: Nepali citizen shall have right to acquire citizenship easily and without discrimination. (Page 17) |
| Rastriya Prajatantra Party                          | • The party commits to eliminate discrimination between men and women. And ensure equal right of descent of both males and females including provision of granting citizenship through mothers’ names. (Chapter 3 Section H.4). |
| Communist Party of Nepal (Marxist-Leninist)         | • Nepal should adopt an illiberal and rigid citizenship policy considering its two giant neighbours and the open border with Indian. The policy to grant citizenship by descent not by birth will be adopted. The central government will only have the authority to approve naturalised citizenship. (Section 12(4) (1)). |
| Nepal Loktantrik Samajbadi Dal                       | • There will be provision of obtaining citizenship by Nepalese people residing in Nepal in an easy and simplified manner. (Chapter 1 Section G)  
• There will be provision to acquire citizenship and custody through mother-father’s name. There will be provision for sexual and gender minority people to acquire citizenship with their identity. (Chapter 2) |
6. THE PROPOSAL OF NEPAL'S FIRST CONSTITUENT ASSEMBLY (2008-2012) ON CITIZENSHIP

The Committee for Fundamental Rights and Directive Principles of the first Constituent Assembly was mandated to come up with the proposed provision on citizenship. The Committee proposed for a single citizenship with provincial identity to be granted by federal governments (Article 1) of the Committee for Fundamental Rights and Directive Principles, November 8, 2009. Dissenting opinions were also recorded on single citizenship provision which is officially recorded in the Committee report. The Committee acknowledged that a number of civil and political rights are guaranteed only to citizens and hence proposed to continue the system of granting citizenship on the same grounds such as by descent, naturalisation and honorary citizenship. This is also to notify that the table below does not include all the articles on Citizenship and the explanatory notes. Only the Articles mostly related to the women's rights and children right to citizenship are mentioned. The dissenting opinions mentioned in the table are the ones which are officially recorded and compiled in the Committee reports.
Table 2: Proposed provisions of the Committee for Fundamental Rights and Directive Principles on citizenship in the new constitution

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<td><strong>Article 1: Provision for Single Federal Citizenship</strong></td>
<td>Nepal shall have provision of single citizenship along with provincial identity to be issued by provinces in the name of federal government. Some CA members proposed for “separate Federal and Provincial citizenship.”</td>
<td>1. No Nepali citizen shall be denied the right to citizenship. 2. A single Federal citizenship with provincial identity shall be provided. It also emphasized that “Citizenship should be issued and managed as provided for in law according to the responsibilities stated in the list relating to distribution of powers.” And in addition to the provincial identity, the caste/ethnicity, community and geographical distribution may also be added at the end.</td>
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<td><strong>Provision for Single Federal Citizenship:</strong> The provision of single citizenship along with provincial identity to be granted by the federal government has been provided for in Nepal.</td>
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<td><strong>Article 2: To be Considered as Citizens of Nepal</strong></td>
<td>The following persons who have their domicile in Nepal shall be considered citizens of Nepal in accordance with this Constitution: a. A person who has acquired citizenship at the time of the commencement of this Constitution. b. A person who has acquired citizenship after the commencement of this Constitution. A person who is eligible to acquire Nepali citizenship in accordance with Article 3.</td>
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<td><strong>The following persons who have their domicile in Nepal shall be considered citizens of Nepal in accordance with this Constitution:</strong> a. A person who has acquired citizenship at the time of the commencement of this Constitution. b. A person who has acquired citizenship after the commencement of this Constitution. A person who is eligible to acquire Nepali citizenship in accordance with Article 3.</td>
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<td><strong>Article 3: Citizenship by Descent</strong></td>
<td>Citizenship by Descent: 1) The following persons who are permanently residing in Nepal shall be granted Nepal’s citizenship: a) Any person whose father and mother were citizens of Nepal at the time of his or her birth.</td>
<td>a) Replace the existing provision with “Any person whose mother or father…” (Emphasis added).</td>
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<td>1. No Nepali citizen shall be denied the right to citizenship. 2. A single Federal citizenship with provincial identity shall be provided.</td>
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<td>1)</td>
<td>Foreigners having matrimonial relationship with Nepali citizens after the commencement of this Constitution may, if they so wish, acquire naturalised Nepali citizenship if they have lived for fifteen years in Nepal legally and renounced the citizenship of foreign countries. Provided that, women of foreign nationality who had a matrimonial relationship with a Nepali citizen before the commencement of this Constitution may, if they so wish, acquire naturalised Nepali citizenship after the proceedings for renunciation of their foreign citizenship are initiated.</td>
<td>Replace the second paragraph of 1) with: “Provided that a foreign woman who is married to a Nepali citizen and wishes to take Nepali citizenship, shall receive marital naturalisation citizenship of Nepal immediately after she declares that she has renounced the citizenship of her country.”</td>
<td>It also emphasized that “Citizenship should be issued and managed as provided for in law according to the responsibilities stated in the list relating to distribution of powers.” And in addition to the provincial identity, the caste/ethnicity, community and geographical distribution may also be added at the end.</td>
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<td>2)</td>
<td>Every child who is found within the Nepali territory and the whereabouts of whose parents are not known shall be considered to be a Nepali citizen by descent until the mother or father of the child is traced.</td>
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<td>b)</td>
<td>Any person who was born in Nepal to a Nepali citizen married to a foreign citizen and is residing permanently in Nepal and has not received the citizenship of a foreign country by virtue of the citizenship of father or mother's citizenship, and his or her father and mother are both Nepali citizens at the time of receiving citizenship.</td>
<td>b) The following cases are also to be granted citizenship by descent (to be added): - If a foreign national who has marital relations with a Nepali citizen dies before receiving Nepali citizenship, his/her child and the child whose father is not identified... - “Persons born in Nepal from Nepali mother having permanent residence in Nepal whose father is unidentified or father has not accepted him/her as his child.”</td>
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<td>Article 4: Regarding Naturalised Citizenship</td>
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<td>1)</td>
<td>Foreign man married to a Nepali citizen if wishes to acquire naturalized Nepali citizen, he must have lived for 15 years in Nepal permanently. Foreign woman married to a Nepali citizen if she wishes to acquire naturalized Nepali citizen, shall receive once she has renounced the citizenship of her country.</td>
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<td>A person who is born to a Nepali woman in Nepal and has been residing in Nepal and the whereabouts of whose father is not known may acquire citizenship by descent. However, a provision is added that the citizenship will automatically be transformed into naturalized citizenship in case it is proved that father is a foreign national.</td>
<td>Note that some CA members proposed to delete the whole provision on naturalised citizenship. Some CA members opined to remove the whole Article on naturalized citizenship.</td>
<td>“A person who is born to a Nepali woman in Nepal and has been residing in Nepal and the whereabouts of whose father is not known may acquire citizenship by descent.” However, a provision is added that the citizenship will automatically be transformed into naturalized citizenship in case it is proved that father is a foreign national.</td>
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<td>2)</td>
<td>A person who was born in Nepal to a Nepali citizen married to a foreign citizen and has been living permanently in Nepal and has not received the citizenship of a foreign country by virtue of the citizenship of his or her father or mother may acquire naturalised citizenship of Nepal as per the prevailing laws.</td>
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<td>3)</td>
<td>The federal government may grant the naturalised citizenship of Nepal to a foreigner who has made a special contribution to the economic or social progress of Nepal after the commencement of this Constitution in accordance with the prevailing laws on the basis of fulfilment of, inter alia, the following terms and conditions:</td>
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<td>(a) who can speak and write Nepali or any other language existing in Nepal; (b) who is engaged in any occupation in Nepal; (c) who has renounced citizenship of another country; (d) who has resided in Nepal legally for at least fifteen years; (e) who is the citizen of a country which has a legal provision or practice of granting naturalised citizenship to Nepali citizens; (f) who has good conduct.</td>
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<td>5) The details regarding the naturalised citizenship granted as per Clause (4) must be presented before the federal legislative body.</td>
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<td>Article 5: Citizenship when a territory is merged</td>
<td>Whenever any territory is acquired by way of merger into Nepal, every person having his or her domicile within such territory shall be deemed to be a citizen of Nepal, subject to the prevailing laws.</td>
<td>*</td>
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<td>Article 6: Citizenship by descent and which identifies citizen's gender identity</td>
<td>Every citizen shall be granted a Nepali citizenship certificate on the basis of the descent of their mother or father and recognizing his/her gender identity.</td>
<td>Add name and surname of his/her choice after the word &quot;on the basis of descent of their mother or father&quot;</td>
<td>*</td>
</tr>
<tr>
<td>Article 7: Reacquisition of Citizenship</td>
<td>If any person, who has acquired citizenship of a foreign country after renouncing Nepalese citizenship, returns to Nepal and lives there for five years and renounces the citizenship of the foreign country, such person may be granted the same type of citizenship of Nepal which was granted to him or her before. Provided that this provision shall not be applicable in the case of the naturalised citizenship granted as per Clause (4) of Article 4.</td>
<td>There is a different opinion that calls for replacing the proposed provision with: &quot;An individual who has abandoned Nepali citizenship, if he/she wants to re-obtain Nepali citizenship shall be provided with the same kind of citizenship as received earlier.&quot;</td>
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<td>1)</td>
<td>A person should be a Nepali citizen by descent for being eligible to be elected or appointed as the Head and Deputy Head of State, Prime Minister, Head of Federal Legislature and Federal Judiciary, Head of Security, Head and Deputy Head of the Provinces.</td>
<td></td>
<td>A person should be a Nepali citizen by descent for being eligible to be elected or appointed as the Head and Deputy Head of State, Prime Minister, Head of Federal Legislature and Federal Judiciary, Head of Security, Head and Deputy Head of the Provinces.</td>
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<td>2)</td>
<td>In accordance to this Constitution, a person is eligible to be appointed for a constitutional post for those having obtained naturalized Nepalese citizenship or Nepalese citizenship by birth must have lived in Nepal for at least ten years, and a person having denounced the Nepalese citizenship and re-obtained Nepalese citizenship by descent must have lived in Nepal for at least five years.</td>
<td>Some CA members also opined to move this Clause to Article 4 (4) and made applicable to naturalized citizen only.</td>
<td>A person should be a Nepali citizen by descent for being eligible to be elected or appointed as the Head and Deputy Head of State, Prime Minister, Head of Federal Legislature and Federal Judiciary, Head of Security, Head and Deputy Head of the Provinces.</td>
</tr>
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</table>

* CA Plenary did not change the proposed provisions by the Committee on Fundamental Rights and Directive Principles of the CA.
It is evident from the table 2 above that the first CA plenary proposed a slight different proposal on some provisions of citizenship compared as proposed by the Committee for Fundamental Rights and Directive Principles. This different version is documented in the Advice and Directives of the CA plenary decided on 26 January 2010 at 106 meeting of the CA. This new version was agreed by the High Level Task Force (mechanism formed outside the regular CA) formed on October 11, 2010 with the task to resolve the contentious issues identified by Preliminary Draft Study Committee in 7 Thematic Committees (including the Committee for Fundamental Rights and Directive Principles). The 7 member High Level Task Force was headed by Pushpa Kamal Dahal ‘Prachand’.

7. ANALYSIS OF PROPOSED CITIZENSHIP PROVISIONS

Citizenship is one of the Nepal’s major political issues. Various sections of society have deep concerns on the proposed citizenship provisions of the Constituent Assembly. The concept paper prepared by the Committee on Fundamental Rights and Directive Principles 2009 affirmed the founding base of the proposed provisions on citizenship. These bases were given as: international conventions and treaties concerned with equal citizenship rights, the state’s responsibility for ensuring rights against statelessness, the comparative analysis of the practices of other countries, Nepal’s historical and existing constitutional and legal frameworks and Supreme Court of Nepal verdicts on citizenship issues. The concept paper emphasised on the principle of non-discriminatory and consistent citizenship policy frameworks in order to address the problem faced by the country on citizenship.

On the other hand, the concept paper also recommended that Nepal should adopt a strict citizenship policy as it stated that citizenship is a sensitive issue for Nepal due to the following critical concerns related to national interests:

- Nepal’s unique geo-political context.
- The country’s open border and the cultural connections between Nepal and India (CFRDP, 2009/2010).

The founding grounds and the call for a strict citizenship policy appear to be in opposition. The concept paper referred to the modern concept of equal citizenship rights, international practices and strategies to prevent and reduce statelessness. Despite of this, it also analysed the historical policy constraints in national legal frameworks and administrative and institutional weaknesses of the national mechanisms that led to the proposed provisions being undeniably directing and guiding a harsh citizenship policy citing the protection of national interests (CFRDP, 2009).
As a result, the proposed provisions on citizenship (Table 2, Article 3) do not ensure non-discrimination and equal rights for women and children. Dissenting opinions thus were recorded on the proposed citizenship provisions by the CA members and serious concerns were widely expressed from the equality, rights of women and statelessness perspectives (CLAF, 2068: 67-100). The main concerns were on the proposed provisions on citizenship by descent and naturalised citizenship. The proposed provisions deny the substantive equality of women and children as they require both parents to be documented Nepalese citizens for the acquisition of citizenship by descent.

Although the proposed provision (Table 2, Article 3) in reality it would curtail the independent right of both men and women to convey citizenship to their children. It would heighten the risk of statelessness among children if one of the parents is undocumented, unsupportive, in denial or unavailable to support the child’s application for citizenship.

Besides, there are some grave concerns about the proposed provision on naturalised citizenship by marriage. The Madhesi political community had serious concerns about the provision of requirement of 15 years of residence for foreign men and women married to Nepali citizens as they argue that the provision did not recognize the marriage-related culture and practices of Madhesh referring that in Madheshi community there are larger practices of cross boarder marriage (particularly in India). They stated that the provision of 15 years residential requirement for foreign women should be lifted for applying citizenship in Nepal as there is a long tradition that women live in the husband’s house with the husband’s family. On the other hand, in the case of foreign women married to Nepali men, the proposed provision is stricter than the one in the Interim Constitution, 2007. According to the Interim Constitution, a woman of foreign nationality who is married to a Nepali citizen may acquire naturalised citizenship, if she desires as provided by the existing law.

These major concerns brought citizenship issues to the forefront of the debate of national political agenda. Subsequently, the High Level Task Force (HLTF) attempted to address these concerns on 4 November 2010. Against this, as agreed by the HLTF the CA plenary proposed that “no Nepalese citizen shall be denied the right to get citizenship”. However, the High Level Task Force’s decision was not free from various forms of resistance and disagreement. Resistance was mainly focused on the continuation of the same proposed provision by the Committee for Fundamental Rights and Directive Principles on citizenship by descent, principally removing the 15 years residential requirement for foreign woman married to Nepalese citizens, but keeping the 15 years waiting criteria for foreign men married to Nepalese woman (Pandey, 2011).

Another concern of women rights activists and Women CAUCUS in CA was on the proposed provision of the HLTF on granting citizenship by descent to a child born
in Nepal to a Nepalese mother living in Nepal whose father is not identified, with automatic conversion to naturalised citizenship if it is later proved that the father is a foreign national. All these concerns have stirred up debate and discussion on citizenship issues among academics, politicians, rights activists, former and serving bureaucrats and other stakeholders. From the rights perspective, the concerns were (and are) based on implementing substantive equality between women and men and the potential risk of statelessness of children. More, it will continue to reinforce stigma against women and children for generations. Nepali society has certain understanding and definition of ‘good women’ and ‘bad women’. Mostly in Nepali society, if a child is born before marriage or from various other circumstances, such mothers are levelled as ‘bad women’. In such social context, if the term ‘not identified father’ is used in citizenship, it will no doubt carry on social stigma against the women and the children. Women’s rights activists have argued that women are demanding for ‘independent and dignified identity’ of women and demanded that they deserve equal rights as of men in providing citizenship to their children. Thus there must not be any such provision in the new constitution, which hinder to promoting women’s independent and dignified lives.

Nonetheless, the debate on citizenship and its link with patriotic nationalism and the open-border issue with India is also one of the main areas of such debate as Nepal has a history of open border relation, where official travel documents are not required when the citizens of India and Nepal cross the each other’s border (Upadhaya 2011). These concerns and issues provide a solid groundwork and underpinning to analyse the proposed provisions from the perspective of the rights of women and children and overall human rights referring.

Standalone Conveyance of Citizenship — First of all, the provision on citizenship by descent and naturalised citizenship by marriage proposed by both the Committee on Fundamental Rights and Directive Principles and the CA plenary seem to respect principles of equality. Formally, they do not discriminate against any groups and individual based on sex, class, caste, colour or anything else. However, it does raise the question: does the proposed provision of citizenship by descent (which is based on formal forms of equality rights) allow either parent to convey citizenship to their children independently? The answer is ‘no’, as women or men cannot confer citizenship to their children based on their ‘stand-alone’ identity without the support of their husband or wife. The proposed provision on citizenship by descent, hence is not only limit to concerns of women and their agenda, it ought to be the concern of Nepali men too as it would hold back the rights of men in the country that they have been exercising for more than sixty years. It is evident that the proposed provisions deny the substantive equality rights of women and men and confined descent citizenship rights to formal forms for equality. The proposed provisions (Table 2, Article 3) completely fail to ensure the substantive equality of men and women in the country as being
citizens of Nepal. Single women and children who have been abandoned or denied relationship by their husbands or fathers or in-laws will be at serious risk of being denied citizenship. Hence, this provision (Table 2, Article 3) not only curtails the rights to independent identity of women, who give birth to their children, but also does not solve the problem of women and children who have been abandoned or denied relationship by their husband or father in practice.

On the contrary, the proposed provisions requiring both parents to be Nepalese citizens (Table 2, Article 3) can be viewed as helping both parents to equally realize their duty in relation to their children’s nurturing and education and to protecting women’s right to family life, including the right to property. Many Nepali citizens believe on these grounds that the proposed provision that both parents should be Nepalese citizens is appropriate.

Indeed, some, who have supported for proposed citizenship provision on descent, argued that the proposed provision supported for mandatory provision of mentioning name of father and mother in the citizenship certificate and it would promote shared responsibilities of mother and father to rearing their children. Those who argued as stated, nonetheless completely forgot that the provision for mentioning the names of both parents on the citizenship certificate and requiring both parents to be Nepalese citizens are two separate issues.

The issue of mentioning the name of either or both parents on the citizenship certificate is only a procedural matter rather than an issue linked with citizens’ substantive rights. This is an issue that could be determined by individuals through their situations and desire. Once the right to citizenship is protected (through the right to claim citizenship on the basis of either parents’ identity), the law will not forbid the introduction of a provision for mentioning the names of both parents (Gautam et al., 2011).

Formal equality has been theoretically recognised in the proposed provision regarding citizenship by descent, but the provision fails to address the substantive equality of men and women. At the same time it reinforces on the concept of equality and would create and reinforce inequality as a result.

Risk of statelessness — There is also a concern that the proposed provisions could result in statelessness for children born from couples of cross-border marriages by constitutionally disqualifying them from citizenship by descent and possibly stateless if the foreign parent finds it impossible to naturalize or does not wish to — issues which are entirely out of a child’s control. As a consequence, in practice the vast majority of children living in Nepal who were born in Nepal from cross-border marriages may qualify for naturalised citizenship, but they cannot claim it as their right and will have to live under the mercy of the authorities where they were born and live. Denying these children the opportunity to become nationals of their country of birth and residence (Nepal) may lead to their statelessness (Pradhan, 2011).
There is also a potential risk of statelessness for children born of Nepali couples such as where one parent is undocumented or absent from the child’s life. This could happen where both parents are Nepali citizens, but one of them cannot produce written evidence of being a Nepali citizen to the authorities while applying for their child’s citizenship. Hundreds of thousands, if not millions of Nepalese are currently believed to lack the citizenship certificates to which they are entitled. Thousands of children born in Nepal do not have citizenship because they do not have documentation of their fathers as Nepalese citizens (FWLD 2013). In view of this gap in documentation, a policy which prohibits children from accessing citizenship unless both parents are present, and both are documented, clearly places children at a greater risk of statelessness. The implementation of the proposed provisions would disregard the state’s obligation to prevent children becoming potentially stateless and their dignified & respectful life. They would leave children who have only a single known parent due to rape, trafficking, unsafe migration, abandonment or other causes at potential risk of statelessness.

**Arguments for restrictive provisions** — The argument in support of the proposed restrictive citizenship provisions is that they are not really a problem because the children of cross border marriage can become naturalised citizens of Nepal, which would save the children of cross-border marriages from statelessness. This view was expressed by many political and civil society leaders at discussion programmes on citizenship held during the CA, 2008.

The concern from a human rights perspective here is that the granting of naturalised citizenship will not be a right of individuals, but will be granted at the discretion of the state. Moreover, for acquiring naturalised citizenship, the Nepalese mother and father must produce documents including evidence that the child:

- was born in Nepal;
- has resided permanently in Nepal; and
- has not acquired foreign nationality through their mother’s or father’s nationality (Table 2, Article 4 (3) ) (Panday, 2011).

This means that children born from cross-border marriages of Nepal, but living outside Nepal with their Nepalese mother or father, are not eligible to apply for naturalised citizenship and they are also vulnerable to becoming stateless. The administrative requirements to qualify for naturalised citizenship are often tedious and time consuming, and disadvantaged, poor and marginalised families find it particularly difficult to satisfy the authorities as they often lack ready access to the required documents and proofs. The introduction of these provisions could therefore lead to discrimination against such people. Another important
issues with regards to this is that the children born from cross-border marriages of Nepal is not align and naturalized citizenship provision should applied for foreign national.

**Discriminatory provisions** — Not only do the proposed provisions (both descent and naturalized) (Table 2, Article 3 and 4) overlook the equal identity of women and men as independent citizens, but, they will reinforce discrimination and inequality based on status by marriage, birth and sex (Tuladhar, 2011). For instance, the Committee on Fundamental Rights and Directive Principles proposed that a person born in Nepal whose mother is Nepali and father is not identified will only be entitled to naturalised citizenship. This provision was later changed by the CA Plenary to give citizenship by descent to a child born in Nepal to a Nepali mother and living in Nepal whose father is not identified. It also said that if it is later proved that the father is foreign national, that the citizenship will be automatically transformed into naturalised citizenship. The justification and bases behind proposing such provisions are not clearly stated by the CA plenary.

The generally accepted theoretical grounds of naturalised citizenship are based on naturalisation where the nationality of a state is granted upon application to the competent authorities mostly based on the principle of *Jus domicili*. The pertinent question here: is it theoretically sound or practically justifiable that a child of a Nepali citizen, who was born in Nepal and is residing in Nepal, can be defined as an alien or foreigner and treated as a foreigner applying for naturalised citizenship? Certainly, it is unfair on the ground of universal principles of human rights, non-discrimination and equality.

**Naturalisation of foreign husbands and wives** — Similarly, as per the recommendations of the CA plenary, and as agreed by the CA Plenary, a foreign woman married to a Nepali male citizen may apply for Nepali citizenship straightaway after her marriage, initiating the process by renouncing her citizenship of her country of origin, whereas a foreign man married to a Nepalese female citizen wishing to acquire naturalised citizenship of Nepal (based on the marital relationship) is only eligible to apply for naturalised citizenship after 15 years of domicile in Nepal. The provisions say that he must renounce the citizenship of his country of origin before applying for naturalised Nepali citizenship.

**The 15 year residency requirement** — The provisions risk discrimination and inequality against Nepali women and their children. A child born to a Nepalese father and foreign mother can get Nepalese citizenship on the basis of descent if the mother gets matrimonial naturalised citizenship, which she can apply for immediately without any residential requirement. However, in the case of Nepali mother and foreign father the father has to fulfill the 15 years residency requirement just to apply the application for the citizenship. The potential consequence of this is that the children born to a Nepalese mother and foreign
father is less likely to get descent or even naturalised citizenship in practice as in most cases, at the time of the applying citizenship of the child, the child’s father is unlikely to have been living in Nepal for 15 years to enable them to apply for naturalised citizenship and thus the child will be denied the right to Nepalese citizenship by descent as it requires both parents to be Nepalese citizen at the time of the child’s birth or acquisition.

**Eligibility for high level posts** — the above proposed provisions mean that a child born to a Nepali man married to a foreign woman who has naturalised citizenship will be eligible to be appointed to all constitutional bodies irrespective of the place of birth. However, a child born in Nepal to a Nepalese mother married to foreign men (Foreign men married to Nepali women who is very unlikely to have gained naturalised citizenship as he has to fulfil the 15 years of residential requirement) can only apply for naturalised citizenship thus making them ineligible to be a member of the constitutional bodies.

**Patriarchal provisions** — this provision not only perpetuates inequality but it discriminates against children whose father is not identified or whereabouts is unknown. It will reinforce the patriarchal structure of the state by creating a gendered citizenship provision. At the same time it will lead to control over women’s sexuality as well. Thus, in many ways the provision represent the battle with patriarchal control over women’s sexuality and right to choose spouse freely. It seems that the proposed provisions on citizenship by descent and matrimonial naturalised citizenship acting together will create a situation whereby the children of Nepalese men in most of cases will have full rights to be a citizen by descent, whereas the children of Nepalese women may not even be able to acquire citizenship. This will exclude women from equal citizenship rights in terms of being able to pass their citizenship on to their children.

**Increase in Inequality** — Thus, in practice, ultimately these provisions only allow citizenship to be conferred through blood relations from a Nepalese father to his children. A Nepalese woman (who is married to a foreigner) cannot confer citizenship to her children or husband as a mother or as a wife. So, this provision leads to a constructed identity of dependent women and subordinate to men in families and society and considers women as second-class citizens. In other words, the provision of matrimonial naturalised citizenship will increase inequality between Nepalese men and women.

**Naturalisation is a matter of state discretion** — It is important to point out that there already exists similar provisions under the existing laws with no protection provided to the children of cross-border marriages from becoming stateless. As per the Interim Constitution of Nepal, 2007 and the Nepal Citizenship Act, 2006, children born in Nepal to Nepalese women married to foreign men can apply for citizenship through naturalisation when certain required conditions set by the constitution and law are met. Nevertheless, as naturalisation is a matter
of state discretion, the government has the power to deny applications for the naturalisation of such children even when the legal requirements are met. In reality, even if this provision has prevailed since 2007, there are no known cases where a child has successfully obtained naturalised citizenship through the mother.

**Issues ‘National Interest’** — the analysis of the citizenship provisions should not, however, be isolated from issues of national interest and Nepal’s open border with India. Indeed, the concept paper of the Committee for Fundamental and Directive Principles justified *strict citizenship* provisions on the ground of sensitivity relating to the unique geopolitical context, the country’s open border and the cultural connection with India. It is commonly claimed that the proposed citizenship provisions (Table 2) are to protect the nationalism of the relatively small Nepal being small country, which lies between the two giant countries as India and China — the ‘yam between two boulders’ concept.

These thoughts are supported by some other segment of the society as well i.e. Mr Suryanath Upadhaya argued that

..... Nepal is a small country sandwiched between two giants and populous countries of the world. Moreover, with India, the border is so open that any South Asian can simply walk into our country via the southern neighbor because of similar physical attributes between the people of Nepal and these countries. Nepal has already had to bear the brunt of millions of such people who have been leaving their homeland due to many reasons be it the 1971 liberation movement of Bangladesh or forced eviction of Nepali-speaking population from Bhutan or the fleeing of Tibetans after the abdication of Dalai Lama from Tibet. In this context, it is just right that we should be strict in our citizenship requirement. The issue of citizenship is an internal affair....

(Upadhaya, 2011)

It has clearly showed that the general perception regarding migration and citizenship in Nepal is based on the hypothesis that more and more population from India will reside in Nepal and acquire Nepalese citizenship. They often point their finger to the open international border between the two countries. Some Nepali politicians are “pro-nationalist” and they assume that India might send its large population to Nepal for migration, which eventually might influence Nepal’s overall political scenario. This phobia guides the politicians to make policy, which tries to stop Indian population from coming into Nepal’s territory banning equal citizenship rights to women and their children. While making this decision, they often forget that by doing this, they are actually forbidding Nepal’s citizen from acquiring Nepal’s citizenship and do not think about how substantive citizenship rights can be granted for all Nepali citizens. However, by proposing harsh and restrictive provisions, the constitution makers have ignored the rights of people born in Nepal against statelessness (Baral, 2011).
Such arguments have restricted to find out solutions. The questions are being raised that does the resolution of the questions concerning nationalism lie in establishing a stringent constitutional provision that creates a discriminatory condition of statelessness? Are there really no other alternatives and solutions to it? Some of the established human rights activists in the country have recommended that the practical solutions are the efficiency of Nepal’s administration, seriousness in the regulation and monitoring of open border, development of diplomatic relations with neighbours on the basis of self-respect and equality, commitment to the question such as transformation of the administrative machinery entrenched in the corrupt practice of selling citizenship, liberation from the thinking that only men are citizens. They also pointed out that adopting discriminatory provisions while trying to resolve a problem related to citizenship can in no way be right or justifiable. In order to prevent misuse of liberal constitutional provisions, it would be more befitting to formulate appropriate laws and regulations and to implement them stringently. Every child is entitled to the fundamental right of name, identity and nationality, and no political mechanism or agency can prevent it from enjoying such rights. It would not be suitable or justifiable for Nepalese, who are moving forward for epochal transformation of the nation in the twenty-first century, to adopt a provision that is inconsistent with the international conventions and treaties or norms and values (Gautam et al. 2012).

8. PROPOSED PROVISIONS CONTRADICT NEPAL’S INTERNATIONAL OBLIGATIONS

The above analysis strongly indicates that the proposed provisions on citizenship for the new constitution are not in line with the country’s obligations under the following international treaties which Nepal has ratified:

- the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979;
- the International Covenant on Civil and Political Rights (ICCPR), 1976;
- the Convention on the Rights of the Child (CRC), 1990; and

Human Rights Watch (2011) has commented that “if the proposed provisions on citizenship are passed into law, Nepal may have a crisis of statelessness on its hands.”

The proposed citizenship provisions could breach the following conventions that Nepal has signed up to:
• Article 15 of the Universal Declaration of Human Rights (UDHR) states that everyone has the right to a nationality. It also indicates that no one should be arbitrarily deprived of their nationality, nor denied the right to change it.

• The ICCPR recognises that all children have the right to a nationality in its Article 24, and establishes an affirmative obligation on the part of state parties to take measures, including the passage of appropriate laws, to give full effect to this right (Article 2).

• ICERD, Article 5(d) (iii), provides that states parties undertake to prohibit and eliminate racial discrimination in all its forms, and to guarantee the right of everyone, without distinction as to race, colour or national or ethnic origin, to equality before the law, notably in the enjoyment of, inter-alia, the right to nationality. ICCPR also provides, in its Article 24 (3), that every child has the right to acquire a nationality.

• Article 18 of the Convention on the Rights of Persons with Disabilities (CRPD), 2008, says that state parties should recognize, inter alia, the right of persons with disabilities to a nationality, on an equal basis with others, including by ensuring that persons with disabilities have the right to acquire and change their nationality and are not deprived of their nationality arbitrarily or on the basis of disability. The convention also recognises that children with disabilities should have the right to acquire a nationality.

• CEDAW requires that states grant women equal rights as enjoyed by men with respect to citizenship, including conveying their nationality to children (Article 9). In 2004, the Committee on the Elimination of Discrimination Against Women (the CEDAW Committee), which monitors state compliance with CEDAW, expressed particular concern that current Nepali laws preclude Nepalese women from passing their nationality on to their children (CEDAW Committee, 2004: para. 198). As a State party to CEDAW, Nepal embraces the principle that women and men must be provided equal rights on acquiring nationality and conveying citizenship to their children (CEDAW: Article 9). According to the convention, state parties should also grant women equal rights to acquire, change or retain their nationality, and ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage will automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

Some of the most serious potential breaches are in relation to CEDAW. The CEDAW Committee, considering the report of Nepal (CEDAW/C/NPL/4-5) recommended that 1) women be granted full and equal rights on the transmission of their
citizenship to their children; 2) training programmes be run for government officials at all levels on legal provisions related to the transfer of citizenship; and 3) a widespread citizenship distribution campaign should be carried out to issue citizenship certificates to entitled persons (CEDAW Committee: Recommendations para, 25, 26 and 49).

The CEDAW Committee in 2011 also recommended that the provisions of CEDAW be taken into consideration while drafting the new constitution. As noted above, the Convention on the Rights of the Child establishes that all children have a right to acquire a legal identity as well as a nationality. CEDAW requires that women should also enjoy equal rights to men in acquiring citizenship and conveying nationality to their children.

Also, Article 7 of the Convention on the Rights of the Child provides that children should be registered immediately after birth and have the right from birth to, inter alia, acquire a nationality, and that states parties should ensure the implementation of these rights in accordance with national laws and international obligations, in particular where the child would otherwise be stateless. Article 8 of this convention provides that state parties should undertake to respect the right of children to preserve their identity, including their nationality, as recognised by law, without unlawful interference.

The above-mentioned human rights framework is complemented by the Convention on the Reduction of Statelessness, 1961 and the Convention relating to the Status of Stateless Persons, 1954 however Nepal has not ratified these two conventions. In particular, Articles 1 and 4 of the Convention on the Reduction of Statelessness provide that states parties should introduce safeguards to prevent statelessness by granting their nationality to persons who would otherwise be stateless and are either born in their territory or are born abroad to one of their nationals. This convention also requires state parties to prevent statelessness upon loss or deprivation of nationality. Under Article 32 of the Convention relating to the Status of Stateless Persons, states should, as far as possible, facilitate the assimilation and naturalisation of stateless persons.

To fully understand the extent of the regulation of the right to a nationality as a fundamental right, it is important to recall the specific norms and principles spelled out in these instruments. Nonetheless, the proposed provisions on citizenship for Nepal’s new constitution do not ensure the rights of children and women as committed to by Nepal in ratifying these conventions and treaties and would seriously breach the treaties and conventions.
9. CONCLUSIONS

The overview of 60 years of development of the Nepalese legal framework on citizenship and the discourse on citizenship during the first Constituent Assembly (2008-2012) shows significant policy level inconsistencies in relation to citizenship.

Nepal's citizenship legal frameworks and discourse has been concerned mainly with who should be considered a Nepalese citizen and not with ensuring citizens' rights. It is very important for countries to ensure the citizenship rights of their people. The proposed citizenship provisions for Nepal's new constitution are not inclusive in terms of content and spirit. The provisions proposed by the Constituent Assembly (2008-2012) are not in line with Nepal’s obligations under the human rights treaties to which it is a party. The provisions, instead of providing the independent right to men and women to grant citizenship to their children, curtails both the rights of men and women and perpetuates discrimination based on gender and inequality.

Nepal's largely patriarchal legal system determines a woman's legal status according to her relationship to a man — first her father and then her husband — thus creating a notion of conditional and dependent citizenship, and providing grounds for citizenship provisions that discriminate against women. This is widely perceived to be based on beliefs that a state such as Nepal can ensure its sovereignty on the basis of male privilege and power, with men gaining full legal status in their own rights. Under such a system, which is also marked by xenophobia, the possibility of women being ‘appropriated’ by foreign men through marriage or ‘possessed’ in other ways is often perceived as a serious threat to national security and sovereignty. The proposed discriminatory citizenship provisions and practices will not only limit women's right to equality, but also restrict enjoyment of their fundamental rights, including the rights to housing, family life, freedom of movement and the right to live with dignity. Furthermore, it also curtails men's full and independent right to convey citizenship to their children which they have been exercising without hindrance.

The proposed provisions have been apparently made in line with the traditional value system (common in South Asia) that ‘a woman should go to her husband’s home and accept his citizenship’, which clearly undermines the independent existence of women, women's right to equality and is in violation of Nepal’s obligations in the human rights treaties it has ratified. Furthermore, there is a greater risk of statelessness among children if the proposed citizenship provisions are adopted.
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CHAPTER 8

THE DEBATE ON FORMS OF GOVERNMENT IN NEPAL: PARLIAMENTARY, PRESIDENTIAL, MIXED AND DIRECTLY ELECTED PRIME MINISTERIAL

- Uddhab Pyakurel
1. CONTEXT

Nepalese have given second chance to the political parties and their larders to come up with a new constitution by the popularly elected CA. The agenda to write a constitution by the CA was a long pending issue of Nepal since 1950s. Eventually the successful Janaandolan II provided that opportunity to hold the first CA election on April 10, 2008. Unfortunately, the first CA was dissolved after four years in 2012 as it could not fulfill its task to bring a new constitution even after 4 years even with the extension of its tenure many times.

Nepal had to face political and constitutional crisis along with the dissolution of the elected CA which was simultaneously working as parliament as well. As a result, both the political tussle within and among political parties and frustration within people were increased. Thanks to the political parties which, after having several dialogues and consultations, agreed on a way out to form a caretaker government under the sitting Chief Justice of the Supreme Court to hold the election of the second CA. Eventually, that formula helped not only to hold the second CA election November 2013, but also brought back legitimate government function.

The second CA has promised to come up with the new constitution within January 2015. It has also decided to take the ownership of decisions taken by the first CA. It is said that the process has already been started. As the first CA was dissolved due to lack of consensus among the political parties over more many disputed issues, including form of government, the next section of this paper provides an overview of the preliminary draft prepared by the previous CA’s Committee for Determining the Forms of Government.

The preliminary draft includes three different provisions on forms of government. In fact, there were three alternative proposals submitted and discussed in the committee. Those were:

- The United Communist Party of Nepal-Maoist (UCPN-M) proposed executive presidential system and the “Multi-member Direct Proportional Representational Electoral System.”
- The Nepali Congress (NC) and the Communist Party of Nepal-Maoist-United Marxist and Leninist (CPN-UML) proposed constitutional
president, executive prime minister and “Mixed Proportional Representational Election System.”

and,

• The Tarai Madhes Loktantrik Party (TMLP) proposed presidential system elected from the legislature, and “Mixed Electoral System”. Other smaller parties had minor variations within these three models.

Once the voting took place, the committee was divided into three groups and none of the proposals could garner majority votes. Though there were 42 CA members in the Committee, only 38 turned up on the day of voting. According to the result, 18 members of the Committee supported the proposal put by the UCPN-M whereas 20 of them voted against it. Similarly, 16 members of the Committee voted for the proposal forwarded by the NC and UML whereas 21 of them voted against it. Finally, 3 members of the Committee voted for the proposal submitted by TMLP whereas 31 of them voted against it, and remaining members remained neutral. Once no single proposal could garner majority votes, the Committee found it impossible to decide one of them as the official proposal.

If we take the first proposal, it was mainly supported by the members from Maoist party. It is the proposal which has proposed for a presidential form of government and envisages the president both as head of state and head of government. According to the proposal, a president:

• could rule the country through and in consultation with the council of ministers under the existing laws and the constitution of the nation
• should also be the supreme chief of the army and symbol of the Nepali nationalism and national unity.
• should remain guided to create optimum welfare and prosperity of the Nepali people.
• should be accountable to Nepal, Nepali people, federal legislature, and the party he or she belongs to.
• The election for the president must be held once in five years through adult franchise.
• No single person can become president for more than two terms.
• Can be called back by the political party that the president belongs to. At least a two-third majority from the executive body of the party that the president belongs to can register the proposal in the legislative to call the president back. Provided that at least ten percent of the voters across the nation, as per the latest voters list, with their signature submit a recall against the president in the Election Commission, the president must resign. In case the president indulges in bad conducts or commits serious violation of the constitution, one-fourth of the total members of the legislature can file impeachment motion against him or her at
the legislature. If the proposal is endorsed by a two-thirds majority of the legislature, the president will be dismissed from his or her post with immediate effect.

The second proposal was mainly supported by NC and UML. It proposed a reformed parliamentary form of government. This system envisages the president as the head of the state and the prime minister as the executive chief. Their justification for this type of form of government is to make the head of the state a symbol of nationality and unity of Nepal and Nepali people. The proposal states that the president should be the head of the state, and chief of the army, and will perform his or her duties and responsibilities according to the law of the land. The Electorate Council formed out of the members from both Houses of the federal legislature and members from the provincial legislatures should have the rights to elect the president, who should remain as the symbol of the Nepali nationalism, Nepali people and national unity. Chief duty of the president will be to follow and protect the constitution and work for the optimum welfare and prosperity of Nepal and Nepali people. According to the proposal, the president while exercising his or her rights needs to take approval and consent from the council of ministers. It states that the cabinet is entitled to direct, control and run the government system on a daily basis. Except for the functions specific to the president according to the constitution, all federal executive functions of Nepal will be performed in the name of the Government of Nepal.

The TMLP’s proposal which bagged 3 votes in the committee came with the idea that the president should be both the head of the state and the government. As the head of the state and the government, the president can not only direct and check the government but also approve the bill or send it back to the House for reconsideration. Thus executive rights lie with the president. The cabinet will be formed along with the president, vice-president, and other ministers. He or she can call and end the session of both Houses of the legislature. He or she can appoint officials and members according to the laws of the land, and can call for a national referendum. According to the proposal, a two-thirds majority of the members of the Lower House of federal legislature can choose the president. The president can be relieved from his or her position if he or she resigns, dies, or if the proposal of impeachment is passed by a two-thirds majority of the Lower House, or violates the constitution.

The three proposals are not final. Parties are also changing their positions as the UCPN-M party did while accepting the mixed executive system as in France. The UML) which was in favour of directly elected prime minister and had submitted the same concept paper to the Committee, accepted the West Minster model of parliamentary system proposed by NC. Here, one can argue that there is still possibility for the political parties not only to discuss on forms of government, but also change their position for a compromise.
That is why, it seems important to understand different models of forms of government established and practiced in the world. The next sessions of the paper discusses about and recommend the possible suitable model of form of government in countries like Nepal.

2. UNDERSTANDING FORMS OF GOVERNMENT: PARLIAMENTARY, PRESIDENTIAL, MIXED AND DIRECTLY ELECTED PRIME MINISTERIAL

A modern democratic state is made up of three main organs: the executive, legislature and judiciary. These organs are given the authority to carry out their different functions independently. The separation of powers doctrine holds that these three organs of the state are independent from each other. Montesquieu et al., in “The Spirit of Laws” (revised edition 1899, cited in Pocock, 1961), developed the concept of separation of powers on the premise that if the absolute power of the state is vested in one individual or agency it will lead to a dictatorship. ‘The Spirit of the Laws’, first published in 1748, is the first consistent attempt to survey the variety of human societies, to classify and compare them, and to study the inter-functioning of institutions (Pocock, 1961). However, the separation of powers between these organs is not absolute. The executive, legislature and judiciary are designed to exercise power in such a way that each maintains checks and balances on the exercise of power by the others.

Traditionally, these three organs were provided with all of the rights and responsibilities of the state. In today’s context, various other independent bodies, such as the Attorney General, Public Service Commission, Election Commission, and Commission for Investigation of Abuse of Authority, are envisioned in the constitutional systems of various states.

In a democratic state, people are considered to be the source of state power and the sovereign power assumed to be vested in people is used indirectly by their representatives. In talking about the liberal approach, which is inherent in democracy, all forms of power are theoretically rooted in the will of the people. This approach upholds the rule of law as one of the basic foundations of democracy; it affirms the separation of powers as a vehicle for the restraint of democracy; and promotes individual’s rights and freedoms as a prerequisite for their dignity (El Mor, 1998: 46).

As far as the activities, responsibilities and rights of all three organs of the state are concerned, the constitution of a country is instrumental in making these clear (Heywood, 2007: 358). Generally speaking, the legislature makes the law, the executive implements the law and carries out administrative activities of the state, and the judiciary interprets the law and punish offenders. Although the executive is the organ of the state that implements the laws, in practice,
the executive is endowed with additional duties. For example, it is generally accepted that, except for the rights allocated to the legislature and judiciary by the constitution, all other rights are executive rights. So, the executive also has an important role in running the state and carrying out state activities, such as the daily administrative and management activities. For these reasons, the executive is often referred to as the ‘government’ of a country.

The rights exercised by the executive body are executive rights. Theoretically, the will of the state is expressed in executive rights. As the executive organ has the decisive power and role in the present modern state, it is important in the constitution-making process to define the structure and nature of the executive organ. The executive nature and structure is considered important for the following two reasons: because of the dominant role of executive in effective functioning of the state and to ensure that executive rights are used responsible.

The executive can be defined both narrowly and comprehensively. In comprehensive terms, the executive includes the cabinet of ministers, civil service, local officials, army, police and other armed forces. In narrow terms, the executive refers to only the supreme agency of the executive body, i.e., the cabinet of ministers. The activities carried out by the executive are referred as ‘executive functions’. The executive body of a modern state also carries out some ‘judicial functions’, such as forgiving or executing pardons, and ‘legislative functions’, such as preparing laws by drafting and presenting bills to the legislature. Historically, the structure of the executive used to be a subject studied in politics, particularly by comparing the governments of the United States of America and that of the United Kingdom. However, now the subject is studied in a global context due to emergence of democratic states in various parts of the world, which have adopted different forms of government (Gerring et.al., 2009: 329).

As Nepal is in the constitution-making process, it is important to understand the various options for forms of government (parliamentary, presidential and semi-presidential) practised around the world. It is equally important to discuss the most suitable model for Nepal. Some scholars think that a presidential system may be better, where as others advocate for a parliamentary system. Still others favour a semi-presidential model arguing that this model of government is more able to provide the actual checks and balances necessary for democratic politics to function. However, not a single model seems to be perfect, as each system has both strength and weaknesses.

This section of the paper discusses four different forms of government that are currently being considered in Nepal: the parliamentary system, presidential system, mixed system (both versions, i.e., prime minister-presidential and president-parliamentary), and the directly elected prime ministerial system. The objective of this research is to provide ideas for discuss on the various forms of governance systems practised around the world so that the political parties in Nepal can use this information to narrow the gaps in the debate and identify
meeting points on critical constitutional issues. It is also hoped that this article will help provide options to the newly-elected Constituent Assembly.

**Forms of government**

The governance system or ‘government’ of a country is endowed with executive rights according to the constitutional provisions of the state concerned. In some countries, the head of state has the executive rights, while in others the head of the government possess such rights. In some places, the head of state and head of government share the executive rights. In some countries, the same individual holds the responsibilities of the head of the government and head of state, while in others these two responsibilities are held by two different individuals. For countries following the democratic system, constitutional law and political experts have classified governance systems into three main groups: parliamentary, presidential and mixed or semi-presidential.

However, these are not the only options. Some democratic countries have a system of government that varies from these three classifications and with its own special features. For example, Saudi Arabia, Bahrain, Bhutan, Brunei and the United Arab Emirates have a monarchical (active or dictatorial) system; China, Cuba, North Korea and Vietnam have a one party (communist) system; and the Vatican City and Iran (to some extent) have a religious head of state.

This classification is also far from being neat. It differs from country to country and over time. The use of executive prerogatives by the head of state and head of the government may also be influenced by the history of the country, political culture, personalities of the leaders, the level of trust or mistrust between political players, and so forth. For example, after 1990, Nepal was considered a parliamentary democracy with a monarch as a figurehead or ceremonial head of state. The monarchy was said to be constitutional, with the implied meaning that the elected government headed by the prime minister was the head of the government (executive). However, because many of the organs and structures of the state were loyal to the king, the parliamentary democracy functioned under the shadow of monarchy (Hachhethu, 2011: 176).

If we compare the role played by different kings around the world as head of state, the personality factor becomes evident. For example, in Nepal, King Birendra resisted exerting his will and behaved mostly according to people’s aspiration (Pyakurel, 2004), whereas King Gyanendra took the executive power into his own hands, citing the state of emergency in the country, which he rationalised using some constitutional provisions. Similar situations have occurred in other South Asian countries, such as Pakistan, where the elected governments have been unable to exercise executive power without tacitly pleasing the powerful army. So, in some circumstances, the location of executive power does not only lie with the government alone and the letter and spirit of the constitution are not always applied in political practice. As these types of undemocratic governments are not
up for debate in Nepal, the following sections focus only on democratic types of government systems propagated and discussed by political parties of Nepal during the Constituent Assembly (2008–2013) debates.

**Parliamentary system**

The Inter-Parliamentary Union, in its study ‘Parliament and Democracy in the Twenty-First Century’, calls the parliament the central institution of democracy as it embodies the will of the people and carries all their expectations that “democracy will be truly responsive to their needs and help solve the most pressing problems that confront them in their daily lives” (Beetham, 2006: 1). As the political body elected by the parliament is expected to play many roles. The InterParliamentary Union enumerates the parliament’s key roles as follows:

As the elected body that represents society in all its diversity, parliaments have a unique responsibility for reconciling the conflicting interests and expectations of different groups and communities through the democratic means of dialogue and compromise. As the key legislative organ, parliaments have the task of adapting society’s laws to its rapidly changing needs and circumstances; as the body entrusted with the oversight of the government, they are responsible for ensuring that the government is fully accountable to the people.

(Beetham, 2006: 1-2)

In fact, the parliamentary system of government is considered one of the oldest democratic models in the world. Under this system the prime minister elected by the legislature and exercises all executive power (Khanal 2013). In the parliamentary system, the legislature is considered comparatively more important than other organs of the state. The executive is directly or indirectly dependent on the approval of legislature, which can express its rejection of the executive through a vote of ‘no confidence’. In this form of government, there is generally a separate head of state and head of the government. All the executive rights are specifically vested in the head of the government (mostly the prime minister), while the head of state (usually the president, but sometimes a monarch or governor general) is a figurehead only. However, in some places a slightly different parliamentary form of government is being practised in which both responsibilities are assigned to a single person. However, as stated by Choudhry and Stacey (2013) all parliamentary systems share the following core characteristics:

- Executive authority resides in a prime minister and his or her cabinet, which is conferred by a democratically elected legislature.
- The prime minister acts as the head of government.
- The prime minister and cabinet exercise executive authority only with the confidence of the legislature and either or both can be dismissed at any time by a majority vote of ‘no confidence’ by the legislature.
Presently, there are around 66 countries in the world that have adopted the fully-fledged parliamentary system of governance. Interestingly, most of the countries with a constitutional monarchy use this system. The studies of Tsebelis (1995, cited in Gerring et al., 2009: 332) state that the parliamentary system fosters strong political parties, more centralised and party-aligned interest groups, a more centralised decision-making process, and more centralised and hierarchical administrative structures necessary for the smooth functioning of the state. The way of political functioning in a parliamentary system is thought to lead to more institutionalised and centred politics, whereas a presidential system is thought to allow for a more personalised and free-floating style of leadership centred on individual politicians and smaller, less established organisational entities (Gerring et al., 2009: 332).

Linz (1990) points out that the vast majority of stable democracies in the world today are parliamentary regimes, in which executive power is generated by legislative majorities and depends on such majorities for survival. Linz cites the example of India and many English-speaking Caribbean countries to conclude that, even in greatly-divided societies, periodic parliamentary crises do not necessarily turn into full blown regime crises and the ouster of a prime minister and cabinet does not spell the end of democracy itself (Gerring et al., 2009: 57). Bahegot (cited in Dann, 2006: 6–7) argues along similar lines and maintains that the parliamentary system is better than the American presidential system (the most successful presidential regime in the world) because there are “enhanced opportunities in the parliamentary system to communicate and cooperate between the executive and the legislative branches”.

As mentioned earlier, the parliamentary executive system started in England and is also known as the ‘Westminster’ model, named after the Westminster Parliament House in London. In the Westminster system, constitutionally, the combined structure of the king/queen and the cabinet is the executive. The king or queen functions as the head of state and the prime minister is the head of the government. As all of the executive rights are exercised by the cabinet, the prime minister is considered the actual executive chief and head of the government. Japan and some European countries, including Norway and Spain, have the parliamentary system with a monarch as the head of state. Among the countries adopting a parliamentary system of government, some countries have a president as the head of state; India, Pakistan and Bangladesh are examples of such systems where the president is the head of state, but has a similar role to that of a constitutional monarchy.

In the parliamentary system of government, even though the prime minister is the head of the executive, most of the executive rights are used in the name of the head of state. For example, in India, the executive rights are under the name of the president. Similarly, the Constitution of the Kingdom of Nepal, 2047 BS (1990 AD) contained a provision in which the executive rights were vested in the
monarch and the cabinet of ministers, but that the king was to use such rights only when recommended by the cabinet. In some countries, both responsibilities are assigned to a single person. For example, in South Africa, the head of state (president) is the person chosen from the parliament who also works as the head of the government. However, after being elected as a head of state, s/he has to resign as a member of parliament. This system, which is practised in countries such as Botswana, the Marshall Islands, Nauru, has been followed in Nepal. According to the Interim Constitution of Nepal, 2007, if the president elect happens to be a member of parliament, s/he has to resign from parliament after being elected as president. For instance, Ram Baran Yadav was elected President of Nepal in 2008 and had to resign as member of the legislative parliament.

The general practice is that once somebody is elected head of state, s/he resigns, even from general membership of his her political party, and becomes politically neutral. As in most cases, the head of state is only as a figurehead, s/he is considered a symbol of national unity for the people. As s/he does not belong to any political party, s/he is generally more acceptable by people with different languages and ethnicities and from different geographical areas as a unifying force. As the ceremonial head of state, the president or constitutional monarch is not blamed for the decisions of the executive; it is said that such a head of state can do no wrong.

In the parliamentary system of government, the prime minister is the person with the majority in the parliament, so s/he is also the leader of the parliament. Unlike in the presidential system, this system does not have a distinct separation between the legislative and executive powers. In many situations, as the prime minister is the leader of political party that has the majority in the legislature, s/he is also the head of the executive. Thus, the relationship between the legislature and executive is one of mutual assistance. In the words of Bahegot, the “efficient secret of the parliamentary system is almost complete fusion of executive and legislative powers”, and this fusion is “institutionalized in the cabinet which serves as link connecting legislative and executive branches” (cited in Dann, 2006: 3). According to Dann the cabinet as a plural government is thus the heart of the entire system; he borrows the words of Bahegot to define the cabinet as a committee of the legislative body selected to the executive body (Bahegot cited in Dann, 2006: 3).

In fact, the prime minister is considered the leader of the cabinet of ministers in the parliamentary system. S/he selects other ministers from the members of the legislature. As the prime minister and cabinet of ministers are selected from among the legislature, they are directly accountable to the legislature for their policies, programmes and activities. All of the ministers are also responsible to the prime minister and work under a concept of shared responsibilities. No minister has the right to have a different ‘opinion’ (theoretically) from the decision made by the cabinet. In this situation, a minister has only two alternatives: either to agree with the decision of the council of ministers or resign as minister.
The prime minister retains his/her post as long as s/he has the confidence of the parliament, because the parliament can remove the prime minister from his/her post through a 'vote of no confidence'. When a prime minister is removed because of a vote of no confidence, the head of state either requests another parliament-supported member to form the government or announces another election by dissolving the parliament.

If the parliament does not let the government carry out its functions smoothly without convincing reasons, or it does not pass the policies and programmes (legislative bills) of the government, then the head of the government (the prime minister) can dissolve the parliament and go to an election for a new popular mandate. The head of the government is equipped with this disciplinary tool, which helps to maintain political discipline among the members of parliament. This provision for dissolution of the parliament enhances the probability of more stable government as the legislature must be sure it has popular support if it blocks the head of the government to the point where s/he opts for dissolution of the legislature.

As far as the opposition is concerned, general practice in England and other Commonwealth countries is to provide the role of main opposition party to the second largest party in the parliament. In contrast to this, countries such as Spain and Germany have adopted a 'European parliamentary system', which is a different than the Westminster model, with a focus on consensus, rather than the adversarial Westminster system.

Advantages

**Accountability:** In the parliamentary system, the government is directly accountable to the parliament, so activities and the workings of government are scrutinised and discussed in the parliament on a regular basis. Even when the parliament does not have meetings, the discussions are still active on a regular basis through the various parliamentary committees. This reduces the chances of a government being irresponsible and helps in controlling irregularities and corruption to some extent. Although the government can change in a parliamentary system, leading to instability in the governments’ tenure, some scholars argue that this is an asset of the parliamentary system rather than a liability.

**Effectiveness:** One quality of the parliamentary system is that the government is able to work effectively without many hurdles. As the head of the government is the leader of the party with a majority in parliament (or of a coalition), the majority of the members of parliament are basically on his/her side. In this situation, the party discipline is strict and the decision of the parliamentary party is obligatory on all members. Hence, the policies and programmes of the government are generally easily passed by the parliamentarians in the legislature and the government can carry out its desired activities without hurdles. For
these reasons there is a belief that if people want the activities of the government carried out easily, then the solution is the parliamentary system.

**Accommodative and inclusive in addressing diversity:** A country can be fragmented if there is no national unity to bind people together. For a heterogeneous society with diverse ethnicities, languages, religions, communities, geographical areas, and ideologies, there is a need for a person who can be looked on as a symbol of a national unity. As the head of state and head of the government are different people and the head of state is a figurehead, the head of the state can, most of the time, play such a role to keep the country united. According to this logic, if a single person has to act as the head of state and head of the government, the executive head may not be able to be a symbol of unity or approved by all as s/he might sometimes have to take divisive and unpopular decisions as the head of the government. Moreover, if a person from a minority group is elected as the head of state then there is the possibility of guaranteeing the participation of people from all races, communities, levels and positions in the governance. The head of state, without executive power, is a suitable practice in a heterogeneous society such as Nepal and this system can only be in practice in a parliamentary system of government.

**Decentralisation of power:** Unlike the presidential system, which centres all power in an individual as the supreme authority, the parliamentary system does not give all power to the head of the government. This reduces the possibility of a person becoming a dictator and, therefore, power is usually transferred in an obvious and regular manner. At the time of elections, people choose the government policies that they prefer (as mentioned in the party manifestos), rather than an individual. In this system, the power of governance is not centred in an individual or an agency, but shared among different agencies.

**Better system for conflict transformation:** According to this line of argument, the parliamentary system is much better than the rigid presidential system, in which the politics of a country is usually conducted on the basis of the ‘personality’ created for the president. The argument is that a parliamentary system provides a better avenue for the transformation of conflict among various social, economic and political actors organised into different interest groups and represented by their representatives in parliament. As far as the issue of stability/instability of the government is concerned, there are many options to overcome these limitations. For example, under the German model of ‘creative non-confidence’ one needs to wait at least one year after government formation to table a no confidence motion against a government. If one such a motion has failed, another proposal can only be tabled after a year.

There is, however, a gap between the promise and the actual performance of parliaments under the parliamentary system in many countries. The Inter Parliamentary Union study, mentioned above, notes the “low esteem in which parliaments are held in many countries” (Beetham, 2006: 109–110). At the same
time, it highlights various examples of how parliaments around the world are struggling to meet the challenges they face, and how they are working to become more open and responsive to the needs of the electorate in a rapidly changing world.

However, the overall record of performance is a mixed one. Many parliaments have not taken significant steps to improve their performance. In some cases, instead of progress there has been stagnation or deterioration. The following, however, are some of the identified weaknesses of the parliamentary system.

**Disadvantages**

**No clear separation of powers:** As the leader of the party with the majority is the executive head there is no clear separation of powers between the legislature and executive. The head of the government can affect all the decisions made by the parliament. Similarly, the parliament can at anytime remove the government through a ‘vote of no confidence’, so the executive is also under the unnecessary influence of the parliament and, therefore, may not be able to function effectively.

**Possibility of minority rule:** As the head of the government is elected from the parliament rather than directly by the people, the government is affected by the immediate positions taken by the political parties. When a party holds the majority in the legislature, that party runs the government and all other parties are in opposition. Sometimes, the opposition parties (combined) have more popular votes than the ruling party. Hence, the minority might end up ruling and all of the parties and people may not be proportionately represented in the government.

**Focus on government formation rather than governance:** When any single party (of coalition of parties) does not attain a clear majority in the parliament, the parliament is said to be ‘hung’. When the parliament is hung, government formation is directed by calculations in parliament. Without a majority in the parliament, it is difficult for the head of the government to run the government effectively. Preoccupied with the formation of government, the head of the government is unable to focus on governance.

**Unstable government:** In countries adopting the parliamentary system, except for England where the prime minister is strong or Japan where a single party is dominant in the party system, many people criticise the system for being unable to result in a stable government. Instability can result from the greed of the small parties, proportional election system, political culture, immature behaviour of the parties, frequent votes of no confidence, efforts directed at obtaining votes for or against somebody and so forth. Critics cite the examples of Israel, Italy, Canada, the Fourth French Republic in the mid-1990s and Weimar Germany in the early 1900s. It is said that the possibility of instability is more in the countries such as Nepal, due to political polarisation and radical political ideologies. The electoral system of the country can also have an important effect on the stability
of the government. In Nepal, the electoral system is mixed and, therefore, there is very little probability of a single party achieving a majority in the parliament.

**Possibility of personal ambition prevailing:** While there is provision in the parliamentary system for periodic elections, the head of the government can opt for mid-term elections by dissolving the parliament any time s/he wants to. Dissolving the parliament is a measure that is generally used to maintain discipline in the parliament, but it can be used to further the political ambitions of the prime minister, which means that the country may have to face a fresh election unnecessarily.

**Presidential system**

Generally speaking, a system led by the executive is called a presidential system of government. One of the most often cited definitions of a presidential system, offered by John M. Carey, lists the following features of a presidential system of governance (Carey, 2005: 92–93):

- The chief executive is popularly elected.
- The term of the chief executive and of the assembly is fixed and not subject to mutual confidence.
- The elected executive names and directs the composition of the government and has some constitutionally-granted lawmaking authority.

In the presidential system, the head of the government and head of state is the same person and s/he is elected directly by the people's votes. In some countries, including the United States of America, people do not directly elect a president, but rather vote for the party, which then elects the president; there is an electoral college rather than direct popular elections (Mainwaring, 1990). However, the party chosen through the election does not have a relationship with the national parliament. In the presidential system, the head of state is not accountable to the legislature directly and s/he is not a member of the parliament. Both institutions – the president and the legislature – are politically legitimate because both are the product of a popular vote. By and large, the executive and legislature function independently and in parallel. In normal situations, one organ does not control the other. In this system, all of the executive power of the country is with the head of state.

According to data, around 55 countries across the globe have adopted the fully-fledged presidential system of government including the United States of America, Mexico, Argentina, Brazil, Costa Rica, and Columbia. As many states in the list are from North and South America, political experts refer to America as the 'Continent of Presidentialism'. However, the system is being questioned in Latin America because of their mostly negative experiences with the system. Questions are being raised such as: "Is a presidential regime itself a contributory
factor to underlying institutional weakness and the poor performance of governments? Is it a contributory condition to the crisis of governance in Latin America?" (Valenzuela, 1998). Apart from the American continent, countries such as Indonesia, the Philippines, the Maldives, Liberia, Ghana, Rwanda, and Turkmenistan have adopted the presidential system without a prime minister. The following are some of the merits identified so far.

Advantages

**Stability:** In the presidential system, the president runs the government for the complete duration of his/her term as s/he is elected for a specific time-period. The government in the system is stable as the parliament cannot remove the government by passing a vote of no confidence (Saravanamuttu 2011: 161–162). One of the merits of presidential system worth noting is the higher degree of executive stability. As Powel states, “presidential systems are designed to produce executive stability, and they do so” (Powel 1982: 63, cited in Mainwaring, 1990). Presidents, generally, have no right to dissolve the parliament. Hence, not only the president, but both institutions (the president and the parliament), can carry out their activities for the specified time. However, a president can be removed by impeachment under some circumstances; but this is an exception rather than a rule and happens only if moral questions arise about him/her.

**Clear separation of powers:** In a presidential system, as the election for the head of the state and legislative body are fully independent from each other, and these two bodies can conduct their own business separately and independently, separation of powers thus exists. The chances of interference by one body in the activities of the other, as in the parliamentary system, are much less. In this way, the separation of powers and checks and balances are more effective in this system.

As the head of state is directly elected by the people, except for in some special circumstances, s/he is fully independent of the control of the parliament. So s/he can form the government as per his/her will. As all of the executive rights are vested in the head of state, the council of ministers plays the role of advisor. The ministers appointed are not necessarily members of parliament, so are not accountable to the parliament. The concept of separation of powers is implemented in real terms in this system as the government does not require the approval of the legislature for its policies and programmes, and it also does not have to fear the legislature’s disapproval to remain in government. However, the government has to rely on the legislature in relation to a few important issues. As there is only one authoritative body, the programmes of the government can be implemented in a relatively short amount of time in the countries that follow this system.

**Directly accountable to the people:** As the head of state is elected by the direct and popular vote, s/he is directly accountable to the people. Although the
members of the parliament, who have been elected from among the citizens, also indirectly represent the public, a president is considered to be elected through a more democratic process and is more powerful than a prime minister selected from the parliament. As s/he is elected with the support of the majority of direct votes by the people (his/her constituency is the whole country), s/he becomes the singular and most legitimate elected representative of the people.

**Good mechanism for power-sharing among the major political parties:** In a country with the presidential system of governance, the election for the head of state (who exercises the executive rights) and the members of the legislature, take place separately and the voters get separate opportunities to select these two government organs. If people choose one party candidate for the president and give the majority to another party in the legislature, then both major parties get an opportunity to be the part of government and work together with more responsibility. For example, in the United States of America, if Congress (the legislative body) has the majority of representatives from the Democratic Party and the Republican candidate becomes the President, then foreign policy by the Republicans and internal policy by the Democrats is assumed to have been approved by the citizens.

Although this system is criticised for having a higher chance of the head of state turning into an autocrat, the chance of this is more in countries with unitary power structures than countries with a federal structure. As more than one state exists in a country with a federal structure and as they happen to be more self-governed units, it is easier to keep control over the centre, even if it is oriented towards totalitarianism. This is possible because the centre alone cannot exercise power without the support of the states i.e., the federal structure itself acts as another division of powers.

**Disadvantages**

**Possibility of the authoritarianism:** While the supporters of the presidential system cite the ability to maintain a stable government as its greatest strength, others point to this feature as its greatest weakness. They argue that in the presidential system there is a greater chance of the government becoming a dictatorship. As Linz mentioned, the only example of a stable presidential democracy in the world is the United States of America (Linz, 1990: 51–52). As the head of state cannot easily be dismissed from his/her post, s/he has more of a freehand and is not under anyone's control until his/her term comes to an end. Examples around the world, including present-day Sri Lanka, show that in the countries where a tolerant and democratic political culture is yet to be established it is easy for a president to be elected with the use of money and power. There are also strong chances of the president dominating and sequentially exercising power autocratically, prevailing over opposition parties and even antagonists within his/her own party. That is why it is said that after being elected as the head
of state, there is a risk of a popular state leader becoming a ‘sovereign person’ by exercising his/her power. Presidents in presidential systems also seem to have a significant advantage over the prime ministers in parliamentary system legally when they are permitted to be re-elected (Cheibub, n.d.). President Robert Mugabe of Zimbabwe has been able to remain in office for several terms by exploiting these drawbacks of the presidential system.

To avoid this, most countries with a presidential system have constitutional provisions that limit the number of times that a president can be re-elected. This prevents the incumbent president from taking advantage of their one-man hold on power to remain in power in the future. For instance, the president of the United States of America is not allowed to remain in office for more than two terms. The presidents of many South American countries are not allowed to remain in office for more than one term consecutively, although s/he may return as president after one term out of office.

**Problems with leadership succession:** In the presidential system there seems to be difficulty in the succession of leadership from one person to the other. This is because the presidential polity is built around the ‘personality’ of the leader. The legislature is another legitimate political institution, but not very powerful because it cannot dismiss the executive and has a lesser role to play in the making and passing of the bills. Besides this, in the presidential system, party politics are more loosely organised because the politics is focused on the individual. The individual usually triumphs the party, thereby weakening the party and eroding party discipline. The presidential system does not let the leadership develop, even in the president’s own party. The president usually wants his/her vice-president to be a ‘yes man’, rather than a thoughtful and wise person with strong leadership abilities, so that s/he can remain dominant in state affairs.

**Less room for peaceful resolution of conflict:** The presidential system of governance is rigid with less room for the peaceful and democratic resolution of conflict. More than two-thirds of the third world countries that adopted the parliamentary system after World War II were successful in transforming their transition phase into democracy; whereas, most of the countries that initially adopted the presidential system, including many countries in Africa, have not been able to transform into democratic systems without going through a military insurgency or constitutional accidents. In a parliamentary system, if the members of parliament are unsatisfied with the working of the executive, they can choose a new leader from the parliament as prime minister. As this is not possible in the presidential system, the army may be encouraged to take a political stance, either by the opposition parties making alliances with it or by the president deploying the army in order to ‘contain’ the opposition. There have been many such examples in world politics. So, in the parliamentary system, the government might not be so stable, but it will not lead to a change of democratic regime. However, in the presidential system, the government is more stable because of the fixed-term of the president, but the whole democratic political regime might not be stable.
Limited role of political parties: The prime minister in a parliamentary system is usually the member of the party with the majority in the legislature. That is why the party can control him/her if s/he is leaning towards totalitarianism; whereas such control is usually not there in the presidential system. Once elected, the party cannot call back the president; the president may go beyond the party’s principles and may even be able to affect the working of the party itself by using or misusing political the power at his/her disposal.

Risk of power conflict: As Dann (2006: 1–2) states, the presidential system is based on the idea of a government of one person, the president. All executive power is vested in him/her. In this system the executive (the president) is strictly separate from the legislature. Singularity and separation characterise the presidential system. As the legislative and executive bodies work independently and are not directly accountable to each other, there is a chance of a power conflict between these two bodies. This situation exists when the party of the head of state (president) and the party with the majority in the legislature are different. When one body is not able to override the other body, there can be a deadlock between the two over important business.

No room for opposition: The other drawback of the presidential system is that it is a system in which the ‘winner takes all’ without providing any or much space for the opposition parties. Although there may be little difference in the number of votes received by the president elect and his nearest rival, once elected, the president gets to use all of the executive rights without reference to the opposition. The defeated candidate has no executive prerogatives and has to wait for a fixed period of term (generally four years) to try his luck again during the election.

Mixed or semi-presidential system

A system in which both the head of state and the head of the government exercise the country’s executive powers jointly according to constitutional provisions and political culture is called a mixed system of government. In this system, the head of state is relatively more important as s/he is directly elected, whereas the head of the government is usually drawn from the parliament (as in the parliamentary system). This is why political experts call the system a semi-presidential system or hybrid system (Khanal, 2013). Semi-presidential systems share the following core characteristics (Choudhry & Stacey, 2013):

- The president is the head of state and is elected for a fixed term by popular vote.
- The president is independent of the parliament and does not require the confidence of parliament to remain in office.
- The president holds constitutionally defined powers, which include some degree of executive authority and ensure that the president and the prime minister share executive authority.
• The prime minister is head of the government and leads the cabinet.
• The prime minister and the cabinet are subject to parliamentary confidence and hold office only as long as they retain the confidence of the parliament.
• There is no definitional requirement that the prime minister and the cabinet arise from or remain members of the legislature.

This system was developed by the French during the regime of Charles de Gaulle in the Fifth French Republic in 1958. After the Fourth French Republic (1946–1956) was unable to provide political stability, the French law makers combined the features of both the American presidential system and the British parliamentary system – embracing the middle way. France has practised many different political systems and is sometimes known as a ‘laboratory of political science’.

Germany also embraced a semi-presidential system after the end of the First World War. Germany adopted a new constitution in a city named ‘Weimar’ to direct the country towards a republican system. Hence, from 1919–1933, Germany was called the Weimar Republic and practised a mixed type of governance. However, at present, Germany has a parliamentary system of government.

Currently, besides France, 41 countries including Sri Lanka, Finland, Portugal, Peru, Romania, Russia, Mongolia, and Taiwan have adopted a mixed system of government. The mixed system is neither entirely presidential nor parliamentary and draws characteristics from both of these types (Shugart, 2005: 324). According to Duverger, the Semi-Presidential System is characterised by following features (Duverger, 1980: 166, cited in Veser, 1997: 42; also see McQuire, 2012: 430 & Shugart, 2005: 324):

• The president of the republic is elected by universal suffrage.
• The president possesses quite considerable power.
• The president has opposite him/her a prime minister and ministers who also possess executive and governmental powers and who can stay in office only if the parliament does not show its opposition.

Matthew Shugart and John Carey (cited in McQuire, 2012: 430) expanded the concept to describe various forms of semi-presidential regimes prevalent in different countries. According to them, a semi-presidential form of government may be classified as either ‘premier-presidential’ or ‘president-parliamentary’. Accountability towards the parliament exclusively and dual accountability to the parliament and president is what determines whether a system is ‘premier-presidential’ or ‘president-parliamentary’ (McQuire, 2012: 430).

Along similar lines, Choudhry and Stacey (2013) categorise semi-presidential systems according to how they structure the relationship between the legislative and the executive branches on a number of key questions, such as government formation, legislative inquiry into government activity, government dismissal,
presidential power to dissolve the legislature and hold new elections, the legislative agenda and process (budget, chairing cabinet meetings, presidential veto), executive lawyering (including legislative delegation, decree powers, state of emergency powers), appointment powers, and foreign policy (including declaration of war). In addition, the constitutional rules setting out presidential powers to call for a referendum on legislation and to submit draft legislation to the courts for constitutional review affect the relationship between the executive and the legislature. While analysing these aspects, Choudhry and Stacey distinguished between the semi-presidential systems using two criteria – whether the prime minister and government are accountable to both the president and the legislature or only the legislature, and whether both the president and the legislature or only the legislature have the authority to dismiss the prime minister or government. According to them, the government is responsible to, and dismissible by, both the legislature and the president in president-parliamentary regimes, whereas the government is responsible to, and dismissible by, the legislature alone in premier-presidential systems. In other words, in president-parliamentary regimes the president wields more political power than in premier-presidential systems. The various constitutional practices in different countries using the mixed system are discussed here under the two types.

Premier-presidential: The premier-presidential system is best described by the French model of semi-presidentialism. In premier-presidentialism, the prime minister is the head of government and subject to the vote of no confidence of the parliament. The president, on the other hand, is head of the state and, in most cases, has constitutionally provisioned powers of appointment and veto. The distinguishing feature, however, is that the prime minister and government are exclusively accountable to the parliamentary majority as the president has no constitutional power to dismiss the prime minister. According to Choudhry and Stacey (2013), a system in which the legislature has the power to dismiss the government, no matter how the government is formed, is considered a premier-presidential sub-type of semi-presidential government. Under premier-presidentialism, the president has an incentive to negotiate with the legislature over the formation of the government and the legislature is likely to have an interest in reciprocating. Both the president and the legislature have a stake in the government and the regime. McQuire (2012: 428) provides three reasons that permit the development and maintenance of a premier-presidential system of government in a new democracy:

- First, premier-presidentialism creates a flexible, but powerful, political check against the president’s strong and numerous executive and legislative powers.
- Second, this check against the president’s power requires the president to resort to democratic processes to resolve political conflict, rather than rule as an autocrat.
Third, the balance of power between the president, prime minister, and parliament is strengthened by and also encourages strong party coalitions, which are necessary to safeguard democratic preferences (McQuire, 2012: 428).

President-parliamentary: In president-parliamentarism the prime minister and the government are dually accountable to the president and the parliamentary majority as both these institutions can dismiss the prime minister (McQuire, 2012: 430–431). In other words, the form of government system in which the president and the legislature enjoy concurrent powers to dismiss the government is called president-parliamentarism. In fact, the role of the president to dismiss the government is fundamental to the definition of a president-parliamentary system. Under this system the government must endeavour to retain the confidence of both the legislature and the approval of the president. Generally speaking, both the legislature and head of state are directly elected by the people in the presidential-parliamentary system. The cabinet has to be equally accountable to the head of state as well as the legislature. However, in some countries with this system, there is no constitutional provision for the legislature to remove the cabinet with a vote of no confidence. For instance, in countries such as Russia, Georgia, and Taiwan the legislature is barred from putting forward a motion for a vote of no confidence against the cabinet.

Of late, different countries following the democratic system have adopted the semi-presidential system. Among 14 ex-communist countries that have adopted a democratic system, 12 use this system, whereas only Albania and Moldova have adopted the parliamentary system. Similarly, among the 12 new democracies that emerged after 1980, 7 (all of them African countries) have adopted this kind of mixed system of governance. The following are the advantages and disadvantages of a mixed system identified so far.

Advantages

Existence of proper checks and balances: The mixed system was developed to capitalise on the strengths of the presidential and parliamentary systems and overcome their weaknesses. This system of rule envisions proper checks and balances between the head of state (usually the directly elected president) and the head of the government (usually the prime minister who happens to be the leader chosen through the parliamentary process). The uses of executive rights are similarly defined in the constitution.

Good for democracy and stability: The mixed system lends stability because the president with some executive power is elected for a fixed duration and the parliament gets to elect and change the prime minister, as in the parliamentary system. Even the directly elected president cannot usually think of exercising executive rights alone and becoming a dictator because of the appropriate checks and balances provided in the constitution. As there is a dual executive
in this system, each country has its own way of distributing the executive power between the head of state and the head of the government. This system is most easily implemented when the person elected as the head of state and the majority of the members in the legislature happen to be from the same party.

**Possibility of a state of ‘cohabitation’**: As it is possible for a party, other than the party of the head of the state, to have the majority in the legislature, this system can be described as a state of cohabitation. In countries where the coalition culture has not developed, the situation of cohabitation might compel parties to be flexible and embrace the culture of coalition.

**Disadvantages**

**Leads to conflict over appointment and dismissal of government**: It has been argued that the ambiguity and uncertainty that flows from a dually-accountable government undermines democratic legitimacy. One of the basic elements of a democratic government, namely, the elected representatives’ authority over the government itself – is undermined by this ambiguity. The basic complaint is that a dually-accountable government leads to conflict between the legislature and the president over the appointment and dismissal of the government. An absence of clearly defined authority over the government ultimately leads to doubt over whether the cabinet serves the president or the legislature.

**Prolonged conflict between president and legislature**: It has been argued that the mixed system (specifically, president-parliamentarism) is likely to induce prolonged conflict between the president and the legislature. Under president-parliamentarism, where both the president and the legislature have the power to dismiss the prime minister and the government, neither the president nor the legislature may have an incentive to negotiate over the formation of the government.

It seems that under this system the relationship of both the prime minister and the government with both institutions (the president and the legislature) is less predictable because neither the president’s nor the legislature’s preferred candidate is assured of appointment, even though both the president and the legislature can dismiss a prime minister if they are not pleased. In contrast, the outcome of government formation under premier-presidentialism is more predictable as only the legislature may dismiss the prime minister.

**Coherent policy becomes difficult**: As president-parliamentary regimes are more prone to situations of intra-executive conflict and disequilibrium, it is more difficult for the government to establish a coherent policy programme and govern effectively than in premier-presidential regimes. The president-parliamentarism does not incentivise negotiation over government formation and fosters ‘fragile’ political deals. It is argued that president-parliamentary regimes are more politically unstable than premier-presidential regimes. This can be damaging to the stability of a democratic regime and the performance of the government.
Supportive of extra-constitutional attempts: Various studies (Sedelius, 2006; Roper, 2002; Jones & Schleiter, 2004; Protsyk, 2003; and Samuels & Shugart, 2010) analyse the strengths and weaknesses of the mixed system of governance. According these studies, out of 46 mixed systems of democratic governance, 15 collapsed. Of these, 11 were president-parliamentary regimes (73%), while only four were premier-presidential (27%). While comparing the two different forms of mixed system, the president-parliamentary system was found to be more likely to collapse (58%) than the premier-presidential system (Choudhary & Stacey, 2013) (15%). Along with this, scholars argue that these weaknesses of mixed systems often create the temptation for the extra-constitutional assumption of power by the president or an unelected authority such as the military. The evidence partially supports this concern. One study done by David Samuels and Matthew Soberg Shugart (Samuels & Stugart, 2010) that contrasts president-parliamentary and premier-presidential systems concludes that the earlier has paved the way for authoritarian regimes, while the later has never done so.

Directly elected prime ministerial system

Due to problems with unstable executives and resulting governability problems in the parliamentary system, the system of directly elected prime minister has emerged as a new idea in the political market place in last decade. In countries such as Italy, Israel and Japan, the political classes have considered the introduction of a directly elected prime minister as strengthening the executive. Even in countries such as the United Kingdom and the Netherlands there have been demands for a directly elected prime minister (O’Malley, 2006: 137). As yet, there has not been substantial discussion about this system by international political scientist and constitutional law experts. However, as discussion regarding this system is taking place in Nepal, it is relevant to make some comments. The following are some of the features of the directly elected prime minister system of government:

- The election for prime minister is held directly and the executive rights lie with the prime minister.
- The president is the head of the state and instead of being elected directly, s/he is indirectly elected by a panel of electors.
- As in the Parliamentary system, the role of the president is ceremonial or constitutional only, but some executive rights can be handed over to the head of State through appropriate constitutional provisions if considered necessary.

If this system is adopted, issues regarding the responsibilities of the prime minister and provisions related to the process of removing him/her are serious topics of discussion. If the parliament can remove the directly elected prime minister with a vote of no confidence this might not create instability and chaos.

This system of government is not currently practised in any country of the world. Israel had adopted this system, but abandoned it as it was not successful. If
the prime minister can be removed with a simple majority in the parliament, it might be no different from the parliamentary system and might not allow a stable government in any case. A provision that the prime minister can only be removed through impeachment could be made, as in the presidential system. If this system is to be adopted, there is a need for serious study regarding the ways in which the loopholes in this system can be reduced. For instance, if the political party from which the prime minister has been elected also has the majority in the legislature, it could be comparatively easier to practice this system. However, in contrast, if there is a hung parliament or when the prime minister's party does not have the majority in the house, there is the risk of power conflicts and the government may not be able work according to expectations.

Although no clear views can be found to be expressed anywhere regarding the directly elected prime ministerial system, this system can be considered one of the versions under the parliamentary system (Khanal, 2013: 271). This proposal, which was initially put forward for public discussion by Nepali Congress leader Narahari Acharya, was included in the election manifesto of the Communist Party of Nepal-United Marxist and Leninist(CPN-UML). The main features of the system proposed by CPN-UML are as follows:

- The president is the constitutional head of the state and is elected by the members of state/provincial assembly and members of union parliament.
- The prime minister is the executive head of the country and is directly elected by the people. If no candidate secures the majority in the first round of elections, there is a second round between the two candidates with the most votes in the first round.
- The prime minister is elected for four years and can contest for the post for one more term.
- The prime minister can be removed from the post if the union parliament passes an impeachment proposal against him/her.
- Ministers are generally appointed from outside the parliament. If somebody from the parliament gets appointed as a minister, his/her membership in the parliament is automatically terminated.

As mentioned earlier, very little discussion has been held and scholars do not know much about the directly elected prime minister system of government. However, it seems that some of the leaders floated this very idea as a remedy to check the limitations of Westminster system as practised in the third world countries, including Nepal, in the past. This system also provides a bridging point between the two extreme positions floated (presidentialism and parliamentarism) and was popularised by the political parties in Nepal. On the one hand, parties such as the United Communist Party of Nepal-Maoist (UCPN-M), Madhesi Janaadhikar Forum and Sanghiya Samajbadi Party (Federal Socialist Party) are advocating for a directly elected president as the chief executive, where as the Nepali Congress
(except for some of the members) along with some of the small parties are for the continuation of the parliamentary system of the government. The following are the advantages and disadvantages of the system.

Advantages

**Stable government within the parliamentary system:** The directly elected prime ministerial system may solve the problems experienced in Nepal under the parliamentary system (Westminster model), while allowing Nepal to retain many aspects of the parliamentary system of government. Under this system, the prime minister becomes directly accountable to the public. If the prime minister is elected directly, s/he is comparatively more powerful and the legislature cannot remove him or her simply by vote of no confidence. This might help in maintaining political stability.

**No possibility of prime minister becoming authoritarian:** Supporters of this system argue that, as the centre of power does not remain with a single person, the prime minister cannot turn autocratic, unlike in the presidential system. It is also argued that in this system it is possible to maintaining effective checks and balances. However, the powers of the head of state must be limited by the constitution. Whether the prime minister elected by direct popular vote should be under the figurehead head of state (president) is another intriguing question about this system of governance.

**Accommodative and inclusive mechanism for addressing diversity:** This system could address the problems faced by a heterogeneous society with diverse ethnicities, languages, religions, communities, geographical areas and ideologies by providing for the election of a president from a minority group as a symbol of a national unity. As the head of state and head of the government are different people and the head of state is a symbolic figurehead, the latter can always play a respectable role in the country, not only to address issues of social exclusion, but also to unite the country.

Disadvantages

**Weak role of political parties in checking the executive:** If the prime minister elected from a party starts to function beyond the policies and programmes of their party, the whole party system could be weaken, as in presidential system. As the directly elected prime minister may not be called back, even by his/her own party, s/he is less likely to toe the party line. As the prime minister may not be removed by the parliament with a vote of no confidence, s/he is not directly accountable to the parliament. Hence there is a chance of autocratic ambitions developing in a directly elected prime minister.
Possibility of conflict between head of the state and head of the government:
Under this system, some of the specific rights are likely to be with the constitutional head of the state, but the head of the state cannot use these rights in a discretionary manner and keep a directly elected prime minister under his/her control. Here, it is worth remembering Nepal's own experience in the recent past about the power conflict of a ceremonial president with specific constitutional rights and an executive prime minister on the case of the then Chief of the Army Staff Rukmangad Katwal. 

Many argue that a directly elected prime minister can also be problematic for Nepal because there has not been enough practice of this system and there are some theoretical and practical anomalies with this system. As already stated, this system was in practice in Israel for some years, but because of some theoretical and practical anomalies with this system, Israel abandoned it. If this system of governance is to be practised in Nepal, it needs to have clear definitions and clarifications about the theoretical perspectives that offer solution to various political conflicts arising between the ceremonial head of state and directly elected prime minister. Observing the past habit of Nepalese politicians interpreting the constitution and political processes according to their convenience (rather than according to democratic principles and norms) and the lack of capacity of Nepalese scholars of political science in terms of expert knowledge production, it is difficult to imagine that these theoretical aspects will be envisioned, their remedies sought and a roadmap prepared for instituting such a form of government.

Options for Nepal
As discussed above, the different forms of governments being practised in the world each have their own unique features, advantages and disadvantages. Each system continues to evolve to avoid the disadvantages by incorporating new provisions over time. Therefore, it is difficult to make country-specific recommendations for instituting a particular form of government. Such a recommendation calls for extensive debate, research and the communication of ideas produced among academicians, politicians and other major stakeholders in Nepal's contemporary politics. In this connection, one is also reminded of the English poet Goldsmith's words as cited in Patio (2008): "For forms of government let fools contend, whatever is best administrated is best." In other words, it is good administration that counts and not the form of government. Any form of government will do, if the people who run it are capable, efficient, hard working, sincere and honest.

Finally, no political system is all ‘good’ or all ‘bad’. The success of a political system or form of government may depend on the evolution of a proper political or democratic culture. The United Kingdom does not have a written constitution, but the democratic culture that has evolved there has kept democratic going for centuries. If the political culture conducive to democratic consolidation existed
in Nepal, most probably any form of democratic government would function well. In countries such as Nepal, it is not the failure of the system or inherent flaws in the system that is to blame for the lack of political stability and good governance. These failures are due to the deliberate attempts of stakeholders to undermine the system or serve their own interests. One can take the example of the use of Article 127 of the Constitution of the Kingdom of Nepal 1990 in order to Remove Difficulties. Every country with a constitutional monarchy has such a provision and many find that it strengthens the parliamentary system under a constitutional monarchy. In Nepal, the parliamentary system was seriously harmed by the (mis)use of this clause. In Nepal, we need to investigate whether the system was problematic or whether it is simply that the practices of our political actors are not up to expectations. Baral (2010: 97) states that historical developments of a country, its social composition, culture and diversity in cultures, political traditions, economy, nature and composition of political parties, geo-political situations, newly emerging challenges and state capabilities should all be taken into account when deciding on the form of government.

Some scholars, such as Cheibub and Limongi (2002: 151–152), argue that neither a presidential nor parliamentary democracy is likely to survive in places where there is a very low level of economic development. According to their data, per capita income below USD 1,000 per annum is thought to be not conducive to democratic politics – presidential, parliamentary, semi-presidential or whatsoever. They argue that, under poor economic conditions, one in every eight democracy dies. However, this argument can be countered and there are many examples to cite of developing countries where democracy has worked.

That is why, if the new constitution of Nepal comes up with any type of democratic form of governance, it may or may not function smoothly. As Nepal is a new democracy without a properly developed democratic culture, the following components (Khanal, 2013: 275) should be included in the constitution to avoid some of the ‘weaknesses’ of the different systems of government.

- Periodic elections of the executive body and a limit on the tenure of the executive body of a maximum of 4 to 5 years.
- Constitutional assurance of the executive being accountable to people.
- Assurance of stability of governance system. A provision guaranteeing that the country will be ruled through the laws made by the popularly elected legislative body.
- Establishment of an independent judiciary with clear cut roles and rights to ensure that the laws are followed by everyone.
- Formation of various independent constitutional commissions to make the government accountable.

The proposals discussed in the first Constituent Assembly (2008–2013) were not simply replications of either of the systems discussed above (presidential or parliamentary), but contained new provisions and variations along with
the abovementioned constitutional components. If we take the example of the presidential system advocated by the UCPN-M and its allies, the proposed system goes beyond the conventional form of a presidential system and incorporates new provisions, such as that a popularly elected president can be called back by the decision of party’s central committee and that such a proposal can be tabled in the parliament by the voters if at least 10% of voters of each province agree.

Interestingly, some of the new dimensions of the proposed forms of government, such as conditions to avoid instability of the government due to a vote of no confidence, can be found even in the proposals tabled by mainstream political parties such as Nepali Congress, which has been for the continuation of the parliamentary system throughout in its history. According to the proposal of the Nepali Congress, a no confidence motion shall not allowed in first year of government formation and can be tabled only once a year in subsequent years. Their proposal to ensure inclusiveness of the cabinet by appointing ministers based on proportional representation is unique and was agreed upon by almost all political parties in Nepal.

To conclude, Nepal is moving ahead towards a mature democracy. Its long struggle for a stable democratic set up is coming to fruition. Political parties, as the main stakeholders in democracy, have been showing their maturity by engaging themselves in debate and dialogue in order to resolve every functional and ideological problem faced by the Nepali state in its journey towards participatory democracy. The introduction of proportional representation (as part of the electoral system) along with the constitutional guarantee to ensure quotas for the historically marginalised groups, the ultimately peaceful exit of the 240-year monarchy, the safe landing of the 10-year long armed conflict, and second successful election of the Constituent Assembly after the failure of the first Constituent Assembly to promulgate a new constitution are some of the achievements of the political parties. It can be reasonably hoped that the parties will resolve their differences on all matters, including the form of governance, and announce a new constitution as per the mandate of the second Constituent Assembly elected on 9 November 2013.

REFERENCES

CHAPTER 9

DESIGNING AN INCLUSIVE ELECTORAL SYSTEM FOR NEPAL

- Kåre Vollan
1. INTRODUCTION

When the Comprehensive Peace Agreement between the CPN Maoists and the seven-party alliance of democratic parties was signed in November 2006, one of the main elements was the election of a Constituent Assembly (CA) which should draft and pass a new constitution. The armed conflict had been ideological, but rooted in a history of exclusion and discrimination of large groups of society. The political powers had rested with the Hindu elite in the hills, mainly the castes Bahuns and Chhetris. The social and political divisions are mainly along three dimensions: Firstly, there are a number of ethnic groups in Nepal, 59 being officially recognised, and they represent a large diversity of languages, way of life, religion and not least of political influence. Some of the groups are politically included and have been able to be represented in parliaments earlier, whereas others a totally left out. Secondly, the Madhesi castes and religious minorities in the Tarai speaking Indian languages have also been left out of the central politics in Nepal. They have had representation in parliament but have traditionally been left out of high government positions, public service, the army, etc., even though there have been prominent exceptions. Within the caste system both in the Hills and the Tarai, the Dalits have faced not only exclusion but also severe discrimination. Within the Madhesi castes the variation is huge in economic and political terms from the dominating high castes to what has been termed otherwise backward cases (OBCs) out of which some are close to the Dalits in socio-economic characteristics.

Before 1990 all citizens were according to the constitution given equal rights, free from discrimination, but with the 1990 constitution the multi-ethnic and multilingual nature of Nepal was recognised. The recognition of diversity did not result in much change in practice, however. Identity based politics has become more prominent after 2006 and inclusion has become an important quality of the institutions, including the parliament (Tamang, 2011).

In the balance of equality and inclusion one needs to make some difficult choices: If the ideal is that all individuals should be equal with the same possibilities free from discrimination, one may argue that promoting identity may have the opposite effect since it focuses on differences. On the other hand, to overcome structural differences of access to development, political influence, positions in government etc., one may have to secure groups special rights or affirmative
action in order to achieve the long-term goal of equality. Such measures may be temporary until the excluded groups have achieved equal possibilities in the society. Some group rights are of a more permanent nature, such as right to language, culture and way of life, but this paper will only discuss the political inclusion. In some countries where the ethnic groups have been at war, at least a temporary solution has sometimes been to have political bodies where the groups balance each other (Lebanon and Bosnia and Herzegovina for example). In Nepal the war was not between groups. On the contrary the groups are living peacefully together, but the inequality was an important basis for the war. A system of representation where the ethnic and social groups balance each other, may introduce far more division than needed. If equality is the goal, one may rather have a system whereby excluded groups are supported until equal possibilities have been realised. In order to promote a group, the group needs to be identified, but the identification should not go beyond what is needed for the affirmative action, and it should be a personal choice if a person wants to invoke group representation. For example it should not be mandatory for a person to declare that she is a Dalit in order to stand for elections, but if she wants to be counted in a Dalit quota she will have to give such identity.

This paper discusses representation in the future parliament only. The main focus is to explore how inclusion of excluded groups can be implemented in a more sustainable and simple manner than under the current system. In addition some other qualities of the electoral system, such as geographical representation and accountability are discussed.

From May 2008 to May 2012 the CA worked on a new constitution for Nepal. For a number of reasons they were not able to finish the task and the CA and the legislative parliament was dissolved. Since then, efforts have been made to restart the process and to give the country a parliament, which is absolutely needed in order to provide the country with an efficient government. Two main alternatives were discussed: Re-instating the previous CA, or at least the Legislative Parliament, for a period of time to finish the work on the constitution, or electing a new CA combined with parliament for a fixed term in office, most likely four years, with the intention to adopt a new constitution within one year. After that the CA will to a parliament only for the rest of the term. An agreement between the four main political forces made on 13 March, 2013 stated that a new CA election was to be conducted under an independent government led by the Chief Justice. The day after the agreement was made the President issued an order to remove constitutional difficulties to pave the way for the agreement’s implementation. The Order included electoral arrangements close to those used for the 2008 elections except that the number of seats elected under the system of list proportional representation (List PR) was reduced from 335 to 240 and the number of appointees\(^1\) was reduced from 26 to 11. This brought the total number of CA members down from 601 to 491. In September 2013 this change
was amended and the all the previous number were re-introduced: The CA would have 601 members, 240 elected by first-past-the-post in single-member constituencies (FPTP), 335 by List PR and 26 appointees. It was an expressed point made by the negotiators in March that the deviations from the constitution should be minimal. Therefore a number of otherwise reasonable reforms were not introduced.

If the number of List PR seats had been reduced inclusiveness would have suffered. Women won 32.8 per cent and Dalits 8.5 per cent of the total number of seats in the CA in 2008. Since there were no quotas in FPTP these numbers would have been likely to be reduced if the number of List PR seats had gone down.

In 2008 women won thirty and Dalits seven seats in the first-past-the-post race in single-member constituencies (FPTP). Twenty out of the thirty women came from the Maoist party. In 2013 only ten women got elected in FPTP, and the total share of women may be reduced to 26 to 30 per cent, dependent of the parties’ use of the flexibility possible when filling the seats won in List PR.

This paper was finalised after Election Day in 2013 but before the results were available.

2. THE ISSUES OF REPRESENTATION

This paper will not discuss the new elections of a CA according to the old 2008 rules any further since the scope for reform was limited. The discussion will instead concentrate on the system that may come out of the continued constitutional process when that is re-started and concluded. During the last CA process, the majorities or large minority factions of the CA Thematic Committees recommended a mixed electoral system for the future Nepali parliament; this was also the agreement reached by the main parties on 15 May 2012, before the CA got dissolved. The numbers proposed varied from 75 seats for each race to 171 FPTP and 140 List PR in the final May 2012 compromise. The system’s further specifications will still be discussed and specified in the new CA. The issues include the following points, which will be further discussed in the paper:

i) The most likely outcome is that a parallel system, where the two races are calculated separately, is maintained. Some civil society groups are still advocating a Mixed Member Proportional system (MMPR) similar to the one used in Germany and New Zealand where the outcome is proportional in the full membership of the parliament. This is done by using the List PR seats as compensatory seats topping up the FPTP result so that full proportionality is achieved. Unfortunately the discussion in Nepal has been rather confused and some seemed to have believed that the compensation in the representation of women and other groups
which is described later is a feature of MMPR only. This is absolutely not
the case and the choice between a parallel system and MMPR is a matter
of the distribution of seats to political parties and nothing else.

ii) The size of Nepal’s future parliament was, according to the May 2012
compromise, set at 311 with 171 elected under FPTP and 140 under
a List PR system. With a lower share from List PR the possibilities for
inclusive arrangements is reduced, but this 55 – 45 per cent ratio could
still provide an inclusive result if it is implemented in conjunction with
a more targeted quota system. When as many as 171 FPTP seats have
been suggested, it is to preserve an acceptable number of seats in
Tarai using objective methods of distribution of seats to all parts of the
country. If the federal provinces are used as the basis for the distribution
of constituencies instead of the districts, as suggested in the next point,
the number of FPTP seats may be reduced.

iii) According to the Interim Constitution, the method of distributing FPTP
seats to districts was regulated by a very complicated and, in part,
contradictory procedure. The procedure came as a result of the Madhesi
protests in 2007, in which Madhesi peoples demanded that a proportional
share of the FPTP seats be allocated to the Tarai in accordance with the
most recent census data (2001). This may seem reasonable, but combined
with a requirement of over-representing sparsely populated areas in
the hills and mountains, this became problematic. Over-representing
sparsely populated areas would obviously mean that densely populated
districts would have to be less than proportionally represented, and this
cost should be borne by Tarai as well as the cities of the hills. In 2007, the
paradox was hidden to a large degree by increasing the FPTP seats from
205 to 240, but it is possible to find reasonable formulas for the future
distribution based upon the provinces.

iv) The quotas for groups are the main subject of this paper. In 2008, and
possibly in 2013, the groups Madhesi, Dalit, janajatis and others were
identified, in addition to genders and nine districts defined as “backward
regions”, as categories given quotas. “Others” consists mainly of the elite
castes Bahuns and Chhetris but they also include hill Muslims and any
groups that do not fit in the other identified categories. The way it worked
in 2008, Madhesis also included the Tarai janajatis and the Tarai religious
minorities such as Muslims, Sikhs and Jains. A person could have multiple
identities, such as Madhesi and janajati, and Madhesi and Dalit. In the
List PR race every seat was allocated to one of the four large groups, and
there had to be an equal number of women and men within each group. In
the FPTP race, no quotas were applied which meant that the traditionally
excluded groups – women and Dalits – would be underrepresented. Despite
that, it parties were not allowed to compensate for this in List PR
by over-representing such groups. They were forced to have fifty per cent men and a proportional share of elite groups on the lists even though the total result would be in the elites’ favour. In addition to women and Dalits, excluded groups within the Madhesis and janajatis would remain excluded since they were not identified in the system. The Madhesis contains castes which are close to Dalits in terms of living conditions and exclusion, and out of the 59 recognised Janajati groups five are included in the political life whereas others both in lifestyle and in terms of political influence are very different from the top five. A “creamy layer” of advanced janajati groups and Madhesi castes would pick up the seats on behalf of the larger excluded groups. In the former CA discussions, alternative ways of designing the quotas introducing affirmative action for the excluded groups instead of proportional representation on half the seats in parliament was discussed but a conclusion was not reached.

v) In 2008 the List PR race was conducted with nationwide lists where the whole country was voting as one constituency. With a future federal system one could change this into geographical lists, provincial lists being the obvious choice. This would secure geographical representation even within the PR seats. In addition, it would provide more diversity in the representation of excluded groups since groups present in only some geographical areas are more likely to be represented from provincial lists than from national lists.

vi) A threshold in terms of percentage needed for winning seats in the List PR race (in the range of 1 to 3 per cent) was proposed by the Election Commission of Nepal (ECN) both in July 2012 and in April, 2013. The political parties refused to adopt the change for the repeat CA election but it may still be an option for the future representation.

3. THE GENERAL SYSTEM OF REPRESENTATION

The system of representation is the system of transferring votes into seats. The choices are many, with plurality vote in single member constituencies (first-past-the-post or FPTP) and list proportional representation (List PR) being the two most common around the world. FPTP is used in countries where the emphasis is on having a simple composition of the parliament, a simple procedure for establishing a government and accountability. List PR is used where the emphasis is on ensuring fair representation of parties in parliament where a certain share of the votes should translate into the same share of seats in parliament. In addition to the representative distribution among parties, List PR tends to promote inclusiveness for more than political parties, including for gender, ethnic, and caste groups. Since several candidates are distributed to parties according to
the votes, more votes may turn into more seats, as opposed to in FPTP where having the highest vote wins the seat and a surplus is of no consequence. A party would therefore try to show diversity on the lists to appeal to all groups in the constituency. In addition, it is easier to combine affirmative action and quotas with List PR than with FPTP. The choice of system is, however, not always rational and tradition plays an important role in many countries. The countries belonging to the British political culture, either by being an earlier colony or being influenced in other ways, would often apply an FPTP system, simply because it is the system they are familiar with.

Mixed systems combine the List PR and FPTP. The variant called the parallel system often represents a compromise between those in favour of FPTP and those in favour of List PR. They decide to meet in the middle, and most often the number of seats elected by FPTP and List PR are equal, but not always. The MMPR has a more complicated calculation of results. First, the FPTP seats are distributed according to the constituency results, and then the List PR seats are used to top up the national party-wise results in such a way that the total result for the parliament becomes close to proportional. MMPR is, in other words, a proportional system producing a parliament representative in terms of parties and still with half the members elected in quite small constituencies, maintaining a close contact between the voters and the elected.

The difference between the parallel system and the MMPR is illustrated by the following examples. First a parallel system:

**Table 1: An example of a mixed parallel system**

<table>
<thead>
<tr>
<th>Party</th>
<th>Number of votes</th>
<th>Per cent votes</th>
<th>Won in the single member constituencies</th>
<th>List PR</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(I)</td>
<td></td>
<td>(I)</td>
<td>(II)</td>
<td>(I + II)</td>
</tr>
<tr>
<td>Party A</td>
<td>3,500,000</td>
<td>35.0</td>
<td>48</td>
<td>35</td>
<td>83</td>
</tr>
<tr>
<td>Party B</td>
<td>2,500,000</td>
<td>25.0</td>
<td>32</td>
<td>25</td>
<td>57</td>
</tr>
<tr>
<td>Party C</td>
<td>2,000,000</td>
<td>20.0</td>
<td>12</td>
<td>20</td>
<td>32</td>
</tr>
<tr>
<td>Party D</td>
<td>1,000,000</td>
<td>10.0</td>
<td>7</td>
<td>10</td>
<td>17</td>
</tr>
<tr>
<td>Party E</td>
<td>700,000</td>
<td>7.0</td>
<td>2</td>
<td>7</td>
<td>9</td>
</tr>
<tr>
<td>Party F</td>
<td>300,000</td>
<td>3.0</td>
<td>0</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>10,000,000</strong></td>
<td><strong>100.0</strong></td>
<td><strong>101</strong></td>
<td><strong>100</strong></td>
<td><strong>201</strong></td>
</tr>
</tbody>
</table>
Then the same number of votes and seats won in FPTP using MMPR:

**Table 2: The same example as in Table 1 but using MMPR**

<table>
<thead>
<tr>
<th>List</th>
<th>Number of votes</th>
<th>Per cent votes</th>
<th>Based on nation-wide result (I)</th>
<th>Won in the single member constituencies (II)</th>
<th>List PR Compensation (I - II)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Party A</td>
<td>3,500,000</td>
<td>35.0</td>
<td>70</td>
<td>48</td>
<td>22</td>
</tr>
<tr>
<td>Party B</td>
<td>2,500,000</td>
<td>25.0</td>
<td>51</td>
<td>32</td>
<td>19</td>
</tr>
<tr>
<td>Party C</td>
<td>2,000,000</td>
<td>20.0</td>
<td>40</td>
<td>12</td>
<td>28</td>
</tr>
<tr>
<td>Party D</td>
<td>1,000,000</td>
<td>10.0</td>
<td>20</td>
<td>7</td>
<td>13</td>
</tr>
<tr>
<td>Party E</td>
<td>700,000</td>
<td>7.0</td>
<td>14</td>
<td>2</td>
<td>12</td>
</tr>
<tr>
<td>Party F</td>
<td>300,000</td>
<td>3.0</td>
<td>6</td>
<td>0</td>
<td>6</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>10,000,000</strong></td>
<td><strong>100.0</strong></td>
<td><strong>201</strong></td>
<td><strong>101</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

In the examples, the parallel system over-represents the biggest parties, but in MMPR the distribution is close to proportional.

In Nepal a parallel system was introduced for the 2008 CA election with 240 elected by FPTP and 335 elected by List PR. On 15 May 2012, just before the CA expired, an agreement between the political leaders suggested a 311 seats strong lower house with 171 elected by FPTP and 140 by List PR as the permanent electoral system for the future Nepali state. Obviously the more seats elected by List PR, the more representative the parliament will be in terms of parties, and as will be seen below, the more inclusive the parliament is likely to be in terms of gender and social, ethnic, linguistic and geographic groups.

To what extent a lower threshold in terms of a percentage needed for competing for List PR seats should be introduced, is clearly a political issue, but it has some important principal implications: A threshold would first of all reduce the number of parties in parliament and possibly therefore make decision-making and the formation of governments easier. It would also provide incentives for parties to merge in order to have the strength to pass the threshold. It would further reduce the number of choices on the ballot. In 2008 there were 55 parties running and 25 parties won List PR seats; in 2013, the number of parties on the List PR ballot had increased to 122. It is not more democratic to have more choices on the ballot. From the voters’ point of views it is more important to have clear alternatives, well-articulated with distinct platforms, and it should be easy to identify the alternatives of the ballot, than to have a plethora of parties to choose from.
4. THE SINGLE-MEMBER CONSTITUENCIES

Single-member constituencies are normally delimited using either population or registered voters. In Nepal the population has been used as the main factor. In many countries, there is a requirement that the population of each constituency should not vary more than ten or fifteen per cent from the average. However, it is also common to adhere to administrative divisions in such a way that constituencies should not cross boundaries of certain administrative units. In Nepal, the country’s seventy-five districts have historically been used as said administrative units. In a future federal Nepal, the units which constituencies should not cross may shift to the provinces. As a last point, internationally it has been accepted to over-represent sparsely populated areas. In Nepal that has been done by requiring that no district can have less than one seat.

In 2007, the Madhesi parties demanded that the Tarai should have 48 per cent of the seats corresponding to their population according to the 2001 census. They got close to their share but only by increasing the total number of seats from 205 to 240. Even if the language of the Constitution indicated that the Tarai should have their proportional share, other statements granted the hills and mountains their share as well. A division of the country in the Tarai on one side and hills and mountains on the other was unacceptable to the main stream parties, since the cities in the hills would be the only ones bearing the costs of the over-representation of some districts. In the April 2007 amendment to the Constitution, it was also required that no districts could have a reduced number of seats compared to in the 1999 election – a provision which protected the districts with lower population density, but not in any consistent manner.

With a new structure of the state where provinces are the main local unit, it will be simpler to make rules which can accommodate distribution of seats according to the population, with a correction factor for area. Provinces with a large area but a low population would then get more seats than if only the population were used.

The reasons for over-representing sparsely populated areas include:

- If the population is used as the only criterion, there may be huge areas with a big diversity in culture, topography and interests which share one seat. Accountability suffers, and there will be no concept of having a local member of parliament.

- Sparsely populated areas are often far from the centres, and their possibilities for influencing decision making are reduced.

- The interests of the remote areas are so different from those of the centres’ that they need more representation to carry their views forward.
If, or to what degree, one should over-represent, is a political question. Vollan (2012) suggests a method where by an objective formula including both population and area could be used, and where a factor can be set by law that could determine the degree of over-representation. The factor reflects the political willingness to take area into account. The formula calculates a ‘distribution number’ which combines the population with the area of each administrative unit. After that, the seats are distributed in proportion to the distribution number instead of the population only. The distribution number for province number (i) is defined as follows:

\[ D(i) = \text{number of citizens}(i) + \text{Factor} \times \text{area in square kilometres}(i). \]

The \textit{Factor} would be based upon empirical data of how the results would fit the tradition and a common sense distribution in Nepal. The Factor will, in other words, be calibrated by trial and error to negotiate a reasonable number. Once agreed, the Factor can be written into the legislation and does not need to change with new population figures or changes to province boundaries.

Examples of two such factors (10 and 20) are given in the table 3. Province number 8 is the most sparsely populated one and provinces 1, 5 and 10 are the most densely populated ones.

The table shows that with the Factor set to ten, the population per seat will vary from 105,400 to 137,148 and with the factor set to twenty the range would be from 87,833 to 142,085. Both are within acceptable ranges. Within each province one may draw constituencies which benefit the sparsely populated areas, without being bound by the district boundaries.

5. THE LIST PROPORTIONAL REPRESENTATION

Ranked Closed Lists

In 2008, the lists proposed by the political parties for the proportional race were nationwide. The parties could register a list with from 34 to 335 names and there were no requirements on a geographical representation within the list. In addition, the lists were not ranked. Internationally, two types of lists are recognised: open and closed. Open lists means that the voter may give one or more votes to individual candidates within the lists, and when a party wins seats, they are filled by the candidates which have won the highest number of such votes. The candidates need to be listed on the ballot for the voters to make their choice. With open lists the sequence on the candidate lists does not matter, except for being decisive in case of a tie. \textsuperscript{3} With closed lists, on the other hand, the parties submit a ranked list of candidates and the list is published before the election. Individual candidates do not need to appear on the ballot because the voters cannot choose
Table 3: An example of using distribution numbers combining population and area when distributing seats to provinces. The provinces are not according to any actual proposal, but the diversity is close to being realistic for Nepal.

<table>
<thead>
<tr>
<th>Province No</th>
<th>Population 2001 as per round estimates</th>
<th>Area Square kilometres</th>
<th>Distribution with Factor = 10</th>
<th>Distribution with Factor = 20</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Population + Factor x Area</td>
<td>Number of constituencies</td>
<td>Population per seat</td>
<td>Number of constituencies</td>
</tr>
<tr>
<td>1</td>
<td>6,678,000</td>
<td>49</td>
<td>136,286</td>
<td>6,960,200</td>
</tr>
<tr>
<td>2</td>
<td>926,000</td>
<td>7</td>
<td>132,286</td>
<td>1,101,360</td>
</tr>
<tr>
<td>3</td>
<td>1,177,000</td>
<td>9</td>
<td>130,778</td>
<td>1,441,800</td>
</tr>
<tr>
<td>4</td>
<td>1,664,000</td>
<td>13</td>
<td>128,000</td>
<td>1,905,520</td>
</tr>
<tr>
<td>5</td>
<td>2,860,000</td>
<td>21</td>
<td>136,190</td>
<td>3,012,940</td>
</tr>
<tr>
<td>6</td>
<td>1,503,000</td>
<td>12</td>
<td>125,250</td>
<td>1,821,960</td>
</tr>
<tr>
<td>7</td>
<td>1,737,000</td>
<td>13</td>
<td>133,615</td>
<td>1,986,560</td>
</tr>
<tr>
<td>8</td>
<td>1,054,000</td>
<td>10</td>
<td>105,400</td>
<td>1,706,860</td>
</tr>
<tr>
<td>9</td>
<td>1,189,000</td>
<td>10</td>
<td>118,900</td>
<td>1,484,880</td>
</tr>
<tr>
<td>10</td>
<td>3,703,000</td>
<td>27</td>
<td>137,148</td>
<td>4,012,500</td>
</tr>
<tr>
<td>Total</td>
<td>22,491,000</td>
<td>171</td>
<td>131,526</td>
<td>25,434,580</td>
</tr>
</tbody>
</table>

Contribution of population to the total D (sum of all D(i)s):

- 93.9 per cent
  \[
  \frac{22,491,000 \times 100}{23,962,790}
  \]
- 88.4 per cent
  \[
  \frac{22,491,000 \times 100}{25,434,580}
  \]
candidates but rather select a party. Seats won by a party are filled from the top of the ranked lists. The purpose of the open lists is to strengthen the accountability of the elected members of parliament. With closed lists the parties have more influence on who fills the seats they are allocated, but the voters still know when they cast the vote which candidates will fill the seats won by a party.

In Nepal in 2008 a third alternative was used. Even though it was called closed lists in the law, the system was not similar to any internationally recognised system. The parties could fill the seats won by the party with any name on the lists, regardless of their placement on the list, and therefore the voters did not know who would fill seats won by the party they voted for. This system meant that accountability was very weak. One of the reasons given by the parties for the arrangement was that they otherwise would have difficulties in engaging candidates in an active campaign; the candidates should only take the disappointment of not being chosen after, not before, the elections. The result was that the members of parliament elected on lists and chosen after the elections by the party leaders became less honourable in many people’s views than those personally facing the electorate in FPTP. One often heard people arguing against proportional elections because those elected were only accountable to parties, not to the voters themselves. With the highly unusual selection process, this was to a large extent true, but it was not a feature of proportional elections as such. If the ordinary closed lists system had been applied such differentiation between the two classes of representatives would have lost its merits.

Province Lists

There is a danger with nationwide lists that all elected candidates come from the big centres. This has in some countries been counterbalanced by filling the seats from local lists according to certain rules. In Germany the lists for the parliament are submitted by the parties in the Länder (the states making up the federation). In a federal Nepal it would be a natural choice to require the parties to submit province lists. This would further strengthen accountability, and all members of parliament would have a geographically limited constituency. The parliament would become more inclusive in terms of groups, since the parties will fill quotas from groups living in the province. The details are described in Vollan 2012: “In Nepal this could be implemented in such a way that each party would nominate a list of candidates for every province, each meeting criteria of inclusiveness. The lists are known to the voters before the elections. The calculation of the List PR result is done in two steps:

1. The total number of List PR seats are distributed to the parties based upon their total nationwide results;
2. The seats won by each party are distributed to the party’s province lists based upon the votes cast for that party in each province.
The minimum quotas for excluded groups are distributed to the province lists in a similar manner. Mathematically this can be done in various manners, depending on whether the number of seats per province should be fixed or not.

6. REPRESENTATION OF OTHERWISE EXCLUDED GROUPS

The 2008 CA Elections

In 2008 quotas for groups were applied to List PR side of the election, both in terms of candidates and in terms of the results. The quotas were defined for broad groups such as Madhesis, Dalits, janajatis and others - others meaning all but the three first groups, which in practise meant the elite hill caste groups Bahuns and Chhetris. In addition, there had to be fifty per cent women and fifty per cent men within each group, and four per cent had to come from backwards regions.

In the 2008 elections the following quotas were applied to the list proportional (List PR) part of the elections:

Table 4: The quotas applied to both the nomination and the selection (results) process on the List PR election in 2008. They were based on the 2001 census. Within each group, there had to be fifty per cent women and fifty per cent men.

<table>
<thead>
<tr>
<th>Group to be represented</th>
<th>Percentage of candidates and seats</th>
</tr>
</thead>
<tbody>
<tr>
<td>Madhesi</td>
<td>31.2</td>
</tr>
<tr>
<td>Dalits</td>
<td>13.0</td>
</tr>
<tr>
<td>Oppressed indigenous people (janajatis)</td>
<td>37.8</td>
</tr>
<tr>
<td>Backward region</td>
<td>4.0</td>
</tr>
<tr>
<td>Others</td>
<td>30.2</td>
</tr>
<tr>
<td><strong>Total (with overlap)</strong></td>
<td><strong>116.2</strong></td>
</tr>
</tbody>
</table>

The quotas were established on the basis of the 2001 census. The groups could overlap which is why the total comes to more than one hundred per cent. If one had calculated the groups without overlap they would come to:
Table 5: The shares of non-overlapping groups based upon the 2001 census. These were not implemented as quotas

<table>
<thead>
<tr>
<th>Group</th>
<th>Percentage of candidates and seats</th>
</tr>
</thead>
<tbody>
<tr>
<td>Madhesis</td>
<td></td>
</tr>
<tr>
<td>- Madhesi Dalits</td>
<td>4.2</td>
</tr>
<tr>
<td>- Madhesi Janajatis</td>
<td>8.9</td>
</tr>
<tr>
<td>- Madhesi Others</td>
<td>18.1</td>
</tr>
<tr>
<td>Dalits other than Madhesis</td>
<td>8.8</td>
</tr>
<tr>
<td>Janajatis, other than Madhesis</td>
<td>29.9</td>
</tr>
<tr>
<td>Others (not Dalits, Madhesis, Janajatis)</td>
<td>30.2</td>
</tr>
<tr>
<td>Total</td>
<td>100.1</td>
</tr>
</tbody>
</table>

In Nepal’s elections during the 1990s, in particular, women and Dalit suffered from under-representation. Table 6 shows a detailed breakdown.

Table 6: The results of the parliamentary elections in the 1990s by group and gender. All these elections were FPTP

<table>
<thead>
<tr>
<th>Year</th>
<th>Group</th>
<th>1991</th>
<th>1994</th>
<th>1999</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Men</td>
<td>Women</td>
<td>Total</td>
<td>Men</td>
</tr>
<tr>
<td>1991</td>
<td>107</td>
<td>3</td>
<td>110</td>
<td>123</td>
</tr>
<tr>
<td>1994</td>
<td>50</td>
<td>2</td>
<td>52</td>
<td>34</td>
</tr>
<tr>
<td>1999</td>
<td>19</td>
<td>0</td>
<td>19</td>
<td>21</td>
</tr>
</tbody>
</table>
Table 7 shows the results for the broad groups in the 2008 elections. As a result of the quotas women and Dalits got a much improved representation compared to earlier elections because of the quotas applied to List PR race, but they were still only helped half way to their fair share of the parliament.

Table 7: The results of the 2008 CA elections in terms of broad group representation for each part of the election and in total compared with the electoral quotas set for the List PR race

<table>
<thead>
<tr>
<th>Identities</th>
<th>FPTP</th>
<th>List PR</th>
<th>Total for the Elected Members only(^{12})</th>
<th>PR Quota</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number</td>
<td>Per cent</td>
<td>Number</td>
<td>Per cent</td>
</tr>
<tr>
<td>Women</td>
<td>30</td>
<td>12.5</td>
<td>161</td>
<td>48.1</td>
</tr>
<tr>
<td>Madhesi</td>
<td>74</td>
<td>30.8</td>
<td>121</td>
<td>36.1</td>
</tr>
<tr>
<td>Dalit</td>
<td>7</td>
<td>2.9</td>
<td>44</td>
<td>13.1</td>
</tr>
<tr>
<td>Janajatis</td>
<td>78</td>
<td>32.5</td>
<td>118</td>
<td>35.2</td>
</tr>
<tr>
<td>Backward region</td>
<td>12</td>
<td>5.0</td>
<td>10</td>
<td>3.0</td>
</tr>
<tr>
<td>Others(^{13})</td>
<td>99</td>
<td>41.3</td>
<td>95</td>
<td>28.4</td>
</tr>
</tbody>
</table>

A more detailed breakdown of the 2008 results for the groups is shown in Table 8.
Further analysis of the FPTP results of the 2008 elections shows that the women were mainly elected from the CPN Maoist party which returned twenty per cent women whereas the three other parties winning a substantial amount of FPTP seats had from 3.0 to 6.7 per cent women only.

### Table 8: The results of the two election races and the appointments in the 2008 CA elections by groups and gender

<table>
<thead>
<tr>
<th>Group</th>
<th>FPTP Men</th>
<th>FPTP Women</th>
<th>FPTP Total</th>
<th>List PR Men</th>
<th>List PR Women</th>
<th>List PR Total</th>
<th>Appointed Men</th>
<th>Appointed Women</th>
<th>Appointed Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hill Caste</td>
<td>82</td>
<td>17</td>
<td>99</td>
<td>49</td>
<td>45</td>
<td>94</td>
<td>7</td>
<td>1</td>
<td>8</td>
</tr>
<tr>
<td>Hill religious minorities</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Hill Dalit</td>
<td>4</td>
<td>2</td>
<td>6</td>
<td>16</td>
<td>13</td>
<td>29</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Hill Janajatis</td>
<td>55</td>
<td>6</td>
<td>61</td>
<td>44</td>
<td>46</td>
<td>90</td>
<td>5</td>
<td>4</td>
<td>9</td>
</tr>
<tr>
<td>Madhesi Caste</td>
<td>47</td>
<td>3</td>
<td>50</td>
<td>38</td>
<td>31</td>
<td>69</td>
<td>3</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Madhesi Dalits</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>5</td>
<td>4</td>
<td>9</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Madhesi Janajatis</td>
<td>16</td>
<td>1</td>
<td>17</td>
<td>16</td>
<td>12</td>
<td>28</td>
<td>4</td>
<td>1</td>
<td>5</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>210</td>
<td>30</td>
<td>240</td>
<td>174</td>
<td>161</td>
<td>335</td>
<td>20</td>
<td>6</td>
<td>26</td>
</tr>
</tbody>
</table>

### Table 9: The gender break-down of the FPTP results from 2008 per parties winning such seats

<table>
<thead>
<tr>
<th>Party</th>
<th>Total FPTP Seats</th>
<th>Women FPTP Seats</th>
<th>Per cent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Communist Party of Nepal (Maoists)</td>
<td>120</td>
<td>24</td>
<td>20.0</td>
</tr>
<tr>
<td>Nepali Congress</td>
<td>37</td>
<td>2</td>
<td>5.4</td>
</tr>
<tr>
<td>Nepal Communist Party (UML)</td>
<td>33</td>
<td>1</td>
<td>3.0</td>
</tr>
<tr>
<td>Madhesi People’s Rights Forum, Nepal (MJF)</td>
<td>30</td>
<td>2</td>
<td>6.7</td>
</tr>
<tr>
<td>Tarai Madhesi Loktantrik Party</td>
<td>9</td>
<td>1</td>
<td>11.1</td>
</tr>
<tr>
<td>Sadbhavana Party</td>
<td>4</td>
<td>0</td>
<td>0.0</td>
</tr>
<tr>
<td>Janamorcha Nepal</td>
<td>2</td>
<td>0</td>
<td>0.0</td>
</tr>
<tr>
<td>Rastrriya Janamorcha</td>
<td>1</td>
<td>0</td>
<td>0.0</td>
</tr>
<tr>
<td>Nepal Workers and Peasants Party</td>
<td>2</td>
<td>0</td>
<td>0.0</td>
</tr>
<tr>
<td>Independents</td>
<td>2</td>
<td>0</td>
<td>0.0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>240</td>
<td>30</td>
<td>12.5</td>
</tr>
</tbody>
</table>
In future elections, it is not guaranteed that the biggest party will maintain the same strong gender balance as in 2008, and there is a risk that the number of women elected by FPTP will decrease.

The quotas of the 2007 Interim Constitution worked as designed and expected. However, the broad groups identified included a huge diversity of sub-groups. For example, within the Madhesis there were Dalits, Janajatis and caste groups, and within Madhesi castes there were privileged high cases such as Brahmins and Kayasthas, but also castes that may be just as excluded from political life as Dalits. The privileged groups were filling seats on behalf of the whole group and thus constituted a “creamy layer” within the group. Regardless of how groups are defined there will be layers which have more possibilities for political participation than the rest. However, it is possible to identify groups that are clearly included politically and others that are excluded from political processes and to design a more targeted system on this basis.

The Creamy Layer

A review of the election results for Nepali parliaments in 1991, 1994, 1999 and the FPTP race of 2008—all elections where no quotas were applied—provides indications as to which groups in Nepal are excluded and which are systematically given seats, and therefore as to which groups are truly in need of special measures to promote their political participation. Vollan (2011: 343-68) presented how the one hundred groups of the 2001 census had been represented in all those elections. A group was classified as excluded if it had consistently won less than ninety per cent of their proportional share of the seat; so, for example, a group with ten per cent of the population would regarded as excluded if it has won less than nine per cent of the seats. In the few cases where there were doubts on the consistency, a judgement was made. This definition had limitations. Being represented in parliament does not mean that the group has had a fair representation at all levels of government. Some Madhesi groups have been well-represented in parliament without having had the same access to government positions. One could use definitions where participation at other levels of government is taken into account, but since the definition is used only for the purpose of designing an electoral system for parliament, using parliamentary results seems reasonable. The following table shows a summary of the included and excluded groups in accordance with this definition.

The table is based upon the 2001 census and a group (of the hundred census groups) is seen to be excluded if it is consistently winning less than ninety per cent of their share of the population in the elections. Hill Muslims did not win any FPTP seats in these elections and has a population below 0.02 per cent only and are not included in the table. In this paper they will be classified as excluded even if the statistics is not significant. Please note that some figures have been corrected compared to those published in Vollan, 2011.
Table 10: The share of excluded and included groups in all FPTP elections since 1991 compared to their share of the population

<table>
<thead>
<tr>
<th>Group</th>
<th>1991</th>
<th>1994</th>
<th>1999</th>
<th>2008 FPTP</th>
<th>Share of the population according to the census 2001</th>
</tr>
</thead>
<tbody>
<tr>
<td>Excluded groups:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Madhesi Dalits</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
<td>0.4</td>
<td>3.9</td>
</tr>
<tr>
<td>Madhesi/Tarai Janajatis</td>
<td>8.8</td>
<td>6.8</td>
<td>4.4</td>
<td>7.1</td>
<td>8.8</td>
</tr>
<tr>
<td>Madhesi castes(^1), excluded only</td>
<td>3.4</td>
<td>2.4</td>
<td>6.9</td>
<td>7.1</td>
<td>12.6</td>
</tr>
<tr>
<td>Hill Dalits</td>
<td>0.5</td>
<td>0.0</td>
<td>0.0</td>
<td>2.5</td>
<td>7.9</td>
</tr>
<tr>
<td>Hill and mountain Janajatis, excluded only</td>
<td>5.9</td>
<td>5.4</td>
<td>4.9</td>
<td>9.2</td>
<td>16.4</td>
</tr>
<tr>
<td>Hill Muslims (Churaute)</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
</tr>
<tr>
<td><strong>Total excluded groups</strong></td>
<td><strong>18.6</strong></td>
<td>14.6</td>
<td>16.2</td>
<td><strong>25.9</strong></td>
<td><strong>49.6</strong></td>
</tr>
<tr>
<td>Included groups:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Madhesi castes, included only</td>
<td>8.3</td>
<td>10.2</td>
<td>9.3</td>
<td>16.3</td>
<td>6.7</td>
</tr>
<tr>
<td>Hill caste</td>
<td>53.7</td>
<td>62.4</td>
<td>58.0</td>
<td>41.3</td>
<td>31.2</td>
</tr>
<tr>
<td>Hill and mountain Janajatis, included only</td>
<td>19.5</td>
<td>12.7</td>
<td>16.6</td>
<td>16.3</td>
<td>12.4</td>
</tr>
<tr>
<td><strong>Total included groups</strong></td>
<td><strong>81.5</strong></td>
<td><strong>85.3</strong></td>
<td><strong>83.9</strong></td>
<td><strong>74.2</strong></td>
<td><strong>50.3</strong></td>
</tr>
</tbody>
</table>

If the threshold for exclusion is lowered from ninety to sixty per cent the share of excluded groups would drop from 49.6 per cent to 29.8 per cent.

To illustrate the differences in representation within a broad group, Table 11 shows how segments within the janajati groups, comparing representation and share of the population. Some of the groups are clearly under-represented whereas others have always done well in parliamentary elections.
Table 11: The share of different groups of janajatis in FPTP election results since 1991 compared to their share of the population

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Tarai Janajatis small groups</td>
<td>0.5</td>
<td>0.0</td>
<td>0.5</td>
<td>1.7</td>
<td>2.0</td>
</tr>
<tr>
<td>Hill and mountain Janajatis, small groups</td>
<td>1.0</td>
<td>1.0</td>
<td>1.0</td>
<td>0.4</td>
<td>3.5</td>
</tr>
<tr>
<td>Excluded Alt 1</td>
<td>1.5</td>
<td>1.0</td>
<td>1.5</td>
<td>2.1</td>
<td>5.5</td>
</tr>
<tr>
<td>Magar and Tamang</td>
<td>4.9</td>
<td>4.4</td>
<td>4.0</td>
<td>8.8</td>
<td>12.9</td>
</tr>
<tr>
<td>Excluded Alt 2</td>
<td>6.4</td>
<td>5.4</td>
<td>5.5</td>
<td>10.9</td>
<td>18.4</td>
</tr>
<tr>
<td>Tharus</td>
<td>8.3</td>
<td>6.8</td>
<td>3.9</td>
<td>5.4</td>
<td>6.8</td>
</tr>
<tr>
<td>Excluded Alt 3</td>
<td>14.7</td>
<td>12.2</td>
<td>9.4</td>
<td>16.3</td>
<td>25.2</td>
</tr>
<tr>
<td>Other Tarai Janajatis</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
</tr>
<tr>
<td>Newar, Gurung, Limbu, Rai, Thakali</td>
<td>19.5</td>
<td>12.7</td>
<td>16.5</td>
<td>16.3</td>
<td>12.4</td>
</tr>
<tr>
<td><strong>Total Janajatis</strong></td>
<td><strong>34.2</strong></td>
<td><strong>24.9</strong></td>
<td><strong>25.9</strong></td>
<td><strong>32.6</strong></td>
<td><strong>37.6</strong></td>
</tr>
</tbody>
</table>

With the ninety per cent threshold, the excluded groups are (still using the 2001 census groups):

**Dalits:**

*Hill:* Kami, Damai/Dholi, Gaine, Sarki and Badi.

*Madhesi:* Chamar, Harijan, Ram, Dusadh/Paswan/Pasi, Chidimar, Musahar, Khatwe, Dom, Halkhor, Dhobi, Tatma and Bantar.

**Janajatis:**

*Hill and Mountain:* Chepang (Praja), Bramu/Baramu, Pahari, Thami, Tamang, Magar, Sunuwar, Dura, Lepcha, Jirel, Raji, Hayu, Bote, Raute, Walung, Yakkha, Darai, Chhantel, Hyalmo (Yehylo), Byangsi, Kusunda, Bhote, Gharti /Bhujel, Sherpa, Majhi, Danuwari and Kumal.

*Tarai:* Patharkata/Kuswadiya, Tharu, Munda, Kisan, Jhangad (Dhagar/Jhagar), Santhal/Satar, Dhanuk, Koche, Meche, Rajbansi, Gangai, Tajpuriya and Dhimal.

**Madhesi and religious minority castes:**

Religious minority castes:

*Hill*: Churaute – Muslim

*Madhesi*: Muslim, Punjabi/Sikh and Jain

**A Suggestion for Minimum Quotas for Excluded Groups**

The results above may be used to define a set of affirmative action categories to be used in future elections. By combining the Hill and Madhesi Dalits, all Janajatis and Madhesi castes and the religious minorities (including Churaute) a set of minimum quotas could be defined:

**Table 12: Proposal for minimum quotas for a future electoral system based upon the 2001 census**

<table>
<thead>
<tr>
<th>Group (Summary)</th>
<th>Quota</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dalits</td>
<td>11.9</td>
</tr>
<tr>
<td>Janajatis, excluded only</td>
<td>25.2</td>
</tr>
<tr>
<td>Madhesi excluded castes, Tarai Muslims, Sikhs and Jains, and hill Muslims</td>
<td>12.6</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>49.7</strong></td>
</tr>
</tbody>
</table>

This system is much simpler for the parties. Only half of the seats are regulated and it is up to the parties to decide whether they should have Bahuns, Chhetris, Gurungs, Brahmins or Yadavs on their lists.

In late 2012, the data of the 2011 census was published. A preliminary analysis of the data gives the following shares of the population for the broad groups used in 2008, not including the backwards regions:

**Table 13: A comparison between the quotas of the 2007 election law and the same groups' share of the population according to the 2011 census**

<table>
<thead>
<tr>
<th>Group</th>
<th>The law as of 2008, per cent</th>
<th>Based upon 2011 census, per cent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Madhesis</td>
<td>31.2</td>
<td>32.8</td>
</tr>
<tr>
<td>Dalits</td>
<td>13.0</td>
<td>13.4</td>
</tr>
<tr>
<td>Janajatis</td>
<td>37.8</td>
<td>35.9</td>
</tr>
<tr>
<td>Bahuns, Chhetris and Hill Muslims</td>
<td>30.2</td>
<td>31.3</td>
</tr>
<tr>
<td><strong>Total identities</strong></td>
<td><strong>112.2</strong></td>
<td><strong>113.5</strong></td>
</tr>
</tbody>
</table>
The 2011 census had 125 groups compared to the 100 of the 2001 census. When trying to assess whether the groups are excluded in electoral terms it was necessary to make some assumptions based upon more general observations. For example, some of the new groups are subgroups of larger groups such as Rais and Sherpas. The splitting into sub-groups was not conducted in a consistent manner in the census and analysing each group based upon earlier election results would not provide significant information. It has therefore been necessary to make some assessments of the new groups based upon the main caste or group’s performance. For example Kulung, Nachhiring, Yamphu and nine other sub-groups are all classified together with the Rais. It has also been necessary to make some assumptions based upon the caste’s position in society due to their small size and the lack of significance of the data. Therefore the new Madhesi caste “Dev” are classified as included based upon their status as an elite group, rather than having had representatives of their group elected. Table 14 shows the results of a preliminary analysis of the 2011 census in terms of inclusion.

Please note that the assessment of exclusion and inclusion is based upon the same elections from 1991 to 2008 and does not include the 2013 elections. The only difference is the population figures for each category.

Table 14: The excluded groups based upon the census 2011 data, compared to the same based upon the data of the 2011 census

<table>
<thead>
<tr>
<th>Group</th>
<th>Share of population in per cent according the 2001 census</th>
<th>Share of population in per cent according the 2011 census</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dalits</td>
<td>11.9</td>
<td>13.4</td>
</tr>
<tr>
<td>Janajatis, excluded only</td>
<td>25.2</td>
<td>26.2</td>
</tr>
<tr>
<td>Madhesi excluded castes, Tarai Muslims, Sikhs and Jains, and hill Muslims</td>
<td>12.6</td>
<td>12.8</td>
</tr>
<tr>
<td>Total</td>
<td>49.7</td>
<td>52.4</td>
</tr>
</tbody>
</table>

Using the 2011 census the excluded sub-groups would be:

**Dalits:**

*Hill:* Kami, Damai/Dholi, Gaine, Sarki, Badi and Lohar.

**Madhesi:** Chamar, Harijan, Ram, Dusadh/Paswan/Pasi, Chidimar, Musahar, Khatwe, Dom, Halkhor, Dhobi, Tatma, Bantar, Kalar, Natuwa, Dhandi, Dhankar/Dharikar, Kori, Sarbaria
Janajatis:

*Hill and Mountain:* Chepang (Praja), Raji, Hayu, Brahmu/Baramu, Pahari, Bote, Raute, Thami, Tamang, Walung, Magar, Sunuwar, Bhote, Dolpo, Gharti/Bhujel, Yaksha, Darai, Chhantel, Dura, Lepcha, Sherpa, Topkogola, Lhom, Lhop, Jirel, Hyalmo (Yehylmo), Byasi/Sauka, Kusunda, Majhi, Danuwar and Kumal.

*Tarai:* Patharkata/Kuswadiya, Tharu, Munda, Kisan, Jhangad (Dhagar/Jhagar), Santhal/Satar, Dhanuk, Koche, Meche, Rajbansi, Gangai, Tajpuriya, Dhimal and Khawas.

Religious minority castes:

*Hill:* Churaute - Musalman

*Madhesi:* Muslim and Punjabi/Sikh.

Madhesi and religious minority castes:


Minimum Quotas for Excluded Groups Applied to the Whole House

In 2008, quotas were applied only to the List PR side of the election. Quotas on FPTP in single-member constituencies will invariably have negative side-effects which can be avoided when quotas are applied to List PR (Butenschon & Vollan, 2011). However, when applying the quotas to the List PR side of elections, the inclusiveness will be weaker than if there were quotas for both races. With a requirement of at least fifty per cent women from List PR the guarantee will be around twenty-five per cent for the parliament as such, provided the mix of FPTP and List PR is fifty – fifty per cent. It is, however, possible to guarantee a higher total share for women by using the List PR seats as compensatory seats for group representation. One should not mix this with the MMPR system where the List PR is used to compensate parties, as explained above. The principle is, however, the same. If women are not elected in FPTP they will be compensated by winning more than fifty per cent of the seats in List PR. The size of the guarantee for the excluded groups is a political question. There was a broad agreement in the former CA’s thematic constitutional committees to guarantee women at least one-third of the total number of seats in Nepal’s future parliament. Women’s groups have demanded higher shares, varying from forty to fifty per cent. Technically it is possible to implement such minimum requirements for identified excluded groups provided they make up a limited share of the population, for example up to fifty per cent.¹⁶
Using the one-third women as a norm, women as an excluded group are guaranteed two-thirds of their proportional share (two-third of half is one-third). For the other excluded groups this translates to the suggested minimum quotas of the Tables 15 and 16, showing both two-third proportionality and eighty per cent of the full share for the groups.

Table 15: Possible minimum quotas for the whole membership of a future parliament based upon the 2001 census

<table>
<thead>
<tr>
<th>Groups</th>
<th>Share of population in per cent 2001 census</th>
<th>Suggested minimum quota for the full parliament</th>
<th>Two-third proportional</th>
<th>Eighty per cent proportional</th>
</tr>
</thead>
<tbody>
<tr>
<td>Women</td>
<td>50</td>
<td>33.3</td>
<td></td>
<td>40.0</td>
</tr>
<tr>
<td>Dalits</td>
<td>11.9</td>
<td>7.9</td>
<td></td>
<td>9.5</td>
</tr>
<tr>
<td>Janajatis, excluded only</td>
<td>25.2</td>
<td>16.8</td>
<td></td>
<td>20.2</td>
</tr>
<tr>
<td>Madhesi excluded castes, Tarai Muslims, Sikhs and Jains, and hill Muslims</td>
<td>12.6</td>
<td>10.8</td>
<td></td>
<td>10.1</td>
</tr>
</tbody>
</table>

Table 16: Possible minimum quotas for the whole membership of a future parliament. This is the same as Table 15 but using the 2011 census

<table>
<thead>
<tr>
<th>Groups</th>
<th>Share of population in per cent 2011 census</th>
<th>Suggested minimum quota for the full parliament</th>
<th>Two-third proportional</th>
<th>Eighty per cent proportional</th>
</tr>
</thead>
<tbody>
<tr>
<td>Women</td>
<td>50</td>
<td>33.3</td>
<td></td>
<td>40.0</td>
</tr>
<tr>
<td>Dalits</td>
<td>13.4</td>
<td>8.9</td>
<td></td>
<td>10.7</td>
</tr>
<tr>
<td>Janajatis, excluded only</td>
<td>26.2</td>
<td>17.5</td>
<td></td>
<td>21.0</td>
</tr>
<tr>
<td>Madhesi excluded castes, Tarai Muslims, Sikhs and Jains, and hill Muslims</td>
<td>12.8</td>
<td>8.5</td>
<td></td>
<td>10.2</td>
</tr>
</tbody>
</table>

The mechanism for ensuring the minimum quota for the full house is using the List PR race as compensation for too few seats won in FPTP. The example in Table 17 is based on a fifty-fifty split of FPTP and List PR, but it will work for other mixtures as well. The example shows a possible result of a single party winning twenty FPTP and seventeen List PR seats.
Table 17: An example of using the List PR seats to ensure that the excluded groups reach their minimum representation requirement for the full parliament

<table>
<thead>
<tr>
<th>The result for one party, winning a total of 37 seats</th>
<th>FPTP (out of 20 seats)</th>
<th>List PR Compensation, (out of 17 seats)</th>
<th>Total (out of 37 seats)</th>
<th>Out of the List PR per cent</th>
<th>Minimum quota on the full parliament Per cent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Women</td>
<td>2</td>
<td>11</td>
<td>13</td>
<td>64.7</td>
<td>33.3</td>
</tr>
<tr>
<td>Dalits</td>
<td>0</td>
<td>4</td>
<td>4</td>
<td>23.5</td>
<td>8.9</td>
</tr>
<tr>
<td>Janajatis, excluded only</td>
<td>3</td>
<td>4</td>
<td>4</td>
<td>23.5</td>
<td>17.5</td>
</tr>
<tr>
<td>Madhesi excluded castes, Tarai Muslims, Sikhs and Jains, and hill Muslims</td>
<td>1</td>
<td>3</td>
<td>4</td>
<td>17.6</td>
<td>8.5</td>
</tr>
</tbody>
</table>

The minimum quota in the example is two-third proportionality for the groups and the basis is the 2011 census.

Out of the 17 List PR seats won by the party 11 have to be women and 11 have to be from the other excluded groups. The party will have to combine women and the excluded groups by choosing, for example, female Dalits or female excluded caste representatives. If the party wants to keep some of the List PR seats for elite men, most of the excluded group representatives need to be women. The incentive is for the party to have excluded groups, including women, elected from the FPTP race to free some secure seats of List PR for party leaders.

In 2008, there were detailed rules for a fifty-fifty gender split within each group. The fear was that otherwise all the women would come from elite groups. This fear is unfounded since it is in the parties’ interest to combine women and the other excluded groups in order to free space for elite men on the lists. Not specifying the split in genders in such a detail, i.e. not dictating anything beyond a minimum requirement for women, will make it much easier for parties to construct compliant lists.

With a low List PR share, the parties will run a risk that only a few seats in List PR can be filled by men of the elite groups. Therefore, the share should not be much lower than 45 per cent.

Allowing Candidacies in More than One Race

In 2008, parties were allowed to have candidates running in two FPTP seats. The purpose was to secure the parties’ top leaders a seat in parliament, but also to try to secure seats in places where only a top name can win for the party. This arrangement had clear disadvantages. First of all, voters are voting for someone who may not fill the seat even if they win, and secondly the Election Commission would have to organise a by-election whenever a candidate wins in
two constituencies. It is legitimate for a party to try to secure their leaders’ seats. This has also been done in Nepal by appointing a small number of members of parliament. That practice will hopefully cease in the future so that the parliament will be fully elected. A balanced possibility would be to allow candidates to run in one FPTP constituency and on the list for the proportional race. If the candidate wins in the constituency he or she keeps that seat, and the candidate is struck off the proportional list. In order to avoid that a large number of candidates would demand such a double security, one may restrict the number of candidates who could avail themselves of this option to, for example, five candidates (or less) per party.

Combining the minimum quotas with ranked lists can be done by requiring not only a certain share of the candidates to be women, Dalits, etc., but also by requiring a prominent placement of the excluded candidates on the list. One way of doing that is to require “one woman to be among the first two on the list, two women to be among the first four, etc.” Similar arrangements can be implemented for Dalits, excluded castes and excluded janajati groups.

**Short Lists**

An extra feature of the 2008 elections was to allow parties registering lists with fewer names than thirty per cent of a full list – which came to one hundred candidates – not to meet other quota rules than those for genders. The rule was made to accommodate the newly established Madhesis parties which did not want to be forced to have hill people on the list. The exemptions were written into the election law of 2007, and it may be argued that the provision was unconstitutional since no exception had been made in the constitution. It should also be noted that women’s parties had no such exceptions and had to have fifty per cent men on the lists.

The results were as expected. The Madhesis won 77.6 per cent out of the 58 seats won by parties with short lists:

**Table 18: The results for the short list winning List PR seats in the 2008 election**

<table>
<thead>
<tr>
<th>Groups</th>
<th>Men</th>
<th>Women</th>
<th>Total</th>
<th>Per cent seats</th>
</tr>
</thead>
<tbody>
<tr>
<td>Madhesi Dalits</td>
<td>1</td>
<td>4</td>
<td>5</td>
<td>8.6</td>
</tr>
<tr>
<td>Madhesi Janajatis</td>
<td>3</td>
<td>3</td>
<td>6</td>
<td>10.3</td>
</tr>
<tr>
<td>Madhesi others</td>
<td>19</td>
<td>15</td>
<td>34</td>
<td>58.6</td>
</tr>
<tr>
<td>Other Dalits</td>
<td></td>
<td></td>
<td>0</td>
<td>0.0</td>
</tr>
<tr>
<td>Other Janajatis</td>
<td>4</td>
<td>2</td>
<td>6</td>
<td>10.3</td>
</tr>
<tr>
<td>Others</td>
<td>6</td>
<td>1</td>
<td>7</td>
<td>12.1</td>
</tr>
<tr>
<td>Total</td>
<td>33</td>
<td>25</td>
<td>58</td>
<td>100.0</td>
</tr>
</tbody>
</table>
If the suggestion of minimum quotas for excluded groups only is adopted the reasons for the exceptions will disappear and Madhesi parties should be required to include Dalits, excluded castes and janajatis in the same way as the main stream parties. However, with the minimum quotas suggested, all such candidates could come from the Tarai.

7. CONCLUSIONS

When designing a new system of representation for Nepal, there are a number of improvements which may be implemented still using a mixed, parallel system of representation. All of these are discussed in detail in the sections above. The improvements are summarised in Table 19.

Table 19: A summary of the possible reforms to a mixed parallel system

<table>
<thead>
<tr>
<th>Improvement quality</th>
<th>Implementation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Improved inclusiveness</td>
<td>• Affirmative action for the selected excluded groups, replacing quotas for everybody.</td>
</tr>
<tr>
<td></td>
<td>• Minimum quotas for excluded groups on the full membership using compensation.</td>
</tr>
<tr>
<td></td>
<td>• Removal of the exception for short lists.</td>
</tr>
<tr>
<td>Simplification</td>
<td>• Affirmative action for excluded groups, replacing quotas for everybody.</td>
</tr>
<tr>
<td></td>
<td>• Not specifying exact split in genders within each group just keeping a total minimum requirement for women.</td>
</tr>
<tr>
<td></td>
<td>• Not allowing candidates to run in two FPTP constituencies, but instead allowing one person to run in one FPTP constituency and on one list for the proportional race.</td>
</tr>
<tr>
<td>Improved accountability</td>
<td>• Ranked lists for the proportional race.</td>
</tr>
<tr>
<td></td>
<td>• No appointed members of the lower house of parliament.</td>
</tr>
<tr>
<td>Improved geographical representation</td>
<td>• Province lists for the proportional race.</td>
</tr>
<tr>
<td></td>
<td>• New formula for distributing FPTP seats taking both area and population into account.</td>
</tr>
</tbody>
</table>

The main suggestions are the ones on improved inclusiveness. These suggestions will be more targeted towards the groups which are actually excluded than the rules under the current electoral system. In addition, it reduces the need for identifying groups and thus introducing unnecessary divisions into groups. In the balance of equality and forced inclusion, the proposals will reduce the need for disclosing identity to a minimum, and it will be up to a personal choice if one wants to be elected on a group quota.
The proposal will otherwise also strengthen the geographical representation and the accountability of the elected members of parliament, and the system will be more sustainable over time.

REFERENCES


CHAPTER 10

THE CONSTITUTIONAL COURT DEBATE IN NEPAL: WHERE ARE WE HEADING?

- Hari Phuyal
INTRODUCTION

While drafting the new constitution, the Committee on State Restructuring and Distribution of State Power (State Restructuring Committee) of the Constituent Assembly proposed the creation of a constitutional court as a mechanism for adjudicating on constitutional issues and resolving disputes over the exercise of power between the different levels of government in the new federal system. In doing so, the Constituent Assembly departed from a relatively long and established judicial history by proposing a change in the judicial structure (which currently has the Supreme Court at the top) and changes to the appointment of judges as part of the restructuring of the state (Draft Report of the Committee on State Restructuring and Distribution of State Power (Article 11 [11] in CSRDSP, 2010).

The issues of state restructuring and inclusiveness were closely linked in debates in the Constituent Assembly and featured in the discussion on the need for a constitutional court. The judiciary as a whole and the constitutional court in particular was thought to have judges from different communities through the re-appointment or new appointment. Further, the constitutional court was seen as a way of protecting provincial powers and, thereby, ensuring the inclusiveness promised by federalism. Federalism challenged the existing judiciary by providing more jurisdiction to the provincial courts and giving jurisdiction to the constitutional court.

The judiciary and Nepal Bar Association came out strongly against this proposal, alleging that the constitutional court is an unnecessary parallel institution to the Supreme Court and could lead to jurisdictional issues, inconsistent judgements and may undermine a long standing judicial history of Nepal. The judiciary and the Supreme Court felt in many ways usurped by this proposal to create a constitutional court.

Since 1990, the Nepal judiciary, especially the Supreme Court, has played a critical role in reducing discrimination drawing on the international human rights legal framework (see Meera Dhungana vs Government of Nepal; Rajendra Dhakal vs Government of Nepal; Reena Bajracharya vs Government of Nepal; Sunil Babu Panta vs Government of Nepal). The decisions of the Supreme Court have had a visible impact on Nepali society and have contributed to a shift towards a more equal and progressive society. However, the Supreme Court has also been plunged into controversy on occasion, particularly in relation to the dissolution
of parliament (see Hari Prasad Nepal vs Girija Prasad Koirala, Rabi Raj Bhandari vs Manamohan Adhikary, Shyam Kumar Khatri vs Sher Bahadur Deuba). The Supreme Court has been widely criticised for its inconsistent judgments, not only on constitutional issues, but also in civil and criminal cases. The beneficiaries of these decisions have defended the judgments of the Supreme Court, but the others have had grievances with the Supreme Court and the judiciary.

The Communist Party of Nepal (Maoist)’s position on the judiciary in the Constituent Assembly was that all state organs, including the judiciary, should fall under the jurisdiction of the parliament, as it exercises the will of the people (Minority Opinion of the CPN [Maoist] in CDFLB, 2010). This is a radical position and one that erodes the separation of powers between the judiciary and the legislature.

Therefore, it is important to note that the idea for a constitutional court did not come from the Judicial Committee’s majority opinion, which was influenced by the CPN (Maoist), but arose from the unanimous opinion of the State Restructuring Committee. Hence, the idea of a constitutional court came from a state restructuring perspective and not from the majority opinion of the Judicial System Committee. However, the vocal opposition of the judiciary and the Nepal Bar Association overtook the discussion on a constitutional court and it was initially diminished to a constitutional bench with an unclear jurisdiction and later to a constitutional court with a limited term of five years and limited jurisdiction over centre-province-local government relations.

This write up introduces the idea of a constitutional court and reviews the discussions that took place within the Constituent Assembly and outside on this issue. It explains the judiciary’s perspective and the CPN (Maoist)’s perspective; compares constitutional courts in South Africa, Germany, Korea and Indonesia; and attempts to explain where Nepal is heading in terms of a constitutional court.

**CONCEPT OF A CONSTITUTIONAL COURT**

The idea of a constitutional court originated in Europe in Austria in 1920, influenced by a well-known civil law jurist Hans Kelsen, and was popularised by South Africa when it promulgated its post-apartheid constitution in 1996. However, the United States the Supreme Court, although not a separate constitutional court, was the first court to invalidate a law as unconstitutional in *Marbury vs Madison* (1803), firmly establishing the concept of judicial review of constitutional issues in common law jurisdiction. Constitutional review is also accepted as part of common law jurisdiction in the United Kingdom. In contrast, in France, the courts cannot change the law and constitutional review is left to the Constitutional Council (Bhattarai, 2011).
The idea of a constitutional court gathered momentum after the abuse of constitutional power by Adolf Hitler during World War II. There was a call for more checks and balances in the structure of the state. The constitutional court emerged as a way of limiting the power of the state and enforcing the principles of constitutionalism. The function of the court was to interpret the constitution and maintain the spirit of the constitution by validating or invalidating legislation through judicial review.

Over time, the jurisdiction of constitutional courts increased from just interpreting the constitution to adjudicating on conflicting laws, controlling state officials, reviewing state elections and making final judgments on disputed issues in a federal state, among other things. A constitutional court can now use its jurisdiction in relation to the legislature, judiciary, government offices, individual petitioners, and through ex-officio actions. The appointment of justices to a constitutional court can be from the executive, legislature, constitutional organs or judicial commission (Upreti, 2011).

More than 50 counties around the world and 10 countries in Asia have a constitutional court (AACC-Main, n.d.). Some countries, including India, have a constitutional bench within the Supreme Court for establishing undisputed jurisprudence in constitutional issues and to avoid the conflicting judgments (Sinha, 2013).

**COMPARATIVE STUDY OF CONSTITUTIONAL COURTS**

**South Africa**

When South Africa emerged from apartheid it had to rewrite the role of the judiciary in the changed context. It created a constitutional court consisting of a president, deputy president and nine other justices. The Constitutional Court is the final arbiter on constitutional issues. Beside the Constitutional Court, the Supreme Court of Appeal is the regular highest court in the country, followed by the various high courts and magistrate's courts. The Supreme Court of Appeal and the high courts can hear cases related to constitutional issues, but the Constitutional Court is the court of final appeal in these cases.

The president of South Africa appoints the president and deputy president of the Constitutional Court and the chief justice and deputy chief justice of the Supreme Court of Appeal; however, this power to appoint can only be exercised after consultation with the Judicial Service Commission. The Judicial Service Commission advertises for posts, interviews that short-listed and submit three more name than the required seats to the president of South Africa. After consulting with the president of the courts and the leaders of the political parties, the president of South Africa makes the appointments.
The Judicial Service Commission is composed of chief justice (chair), president of the Constitutional Court, a judge president designated by the judges from among themselves, two practising barristers and solicitors designated by their respective professions, one law teacher designated by their association and a judge president from the division of Supreme Court of Appeal to fill the post for that particular high court (a total of nine legal professionals). The remaining members of the Commission are the Minister of Justice, six members of the National Assembly (at least three from the opposition political parties), four permanent members of the National Council of the Provinces, and four other persons designated by the president of South Africa in consultation with political leaders. In the nomination of a high court judge, the premier of that province will also be the member of the Commission.

The judges of the Constitutional Court serve for a 12-year non-renewable term, but must retire at the age of 70. The judges may be removed from office on the findings of the Judicial Service Commission of incapacity, gross incompetence, or gross misconduct, among other things; removal is undertaken by a two-third majority of the National Assembly (Pylee, 2006: 205).

Germany

The Basic Law of Germany establishes the Federal Constitutional Court in Germany. Its main jurisdiction is judicial review, including declaring legislation unconstitutional. The Constitutional Court possesses a number of other powers and is regarded as among the most ‘activist’ of courts. Its judgments are final and are not subject to appeal. The Court’s jurisdiction is focused on constitutional issues and the compliance of all governmental institutions with the German Constitution. Constitutional amendments or changes passed by the Parliament are subject to its judicial review, as they have to be compatible with the most basic principles of the German Constitution. The Constitutional Court checks the actions of any branches of the State to protect the civil rights of the German people, as prescribed in the German Constitution.

There are several ways in which the Constitutional Court functions: It hears constitutional complaints to restore violated rights and undertakes abstract regulation control to test the constitutionality of federal laws and specific regulation control to refer a law in question before the constitutional court. It also handles federal disputes to test the competence of any institution. The state-federal disputes are also handled by the constitutional court which is brought by the Lander, (province) to test the jurisdictional disputes. Other jurisdictions include federal election scrutiny, impeachment procedures and the prohibition of a political party.

The German Federal Constitutional Court has 16 justices and works in the Senate system. The justices are elected by the Bundestag (the German house of representatives) through a two-thirds majority. The Bundestag has delegated
this task to a special body, the ‘Richterwahlausschuss’ (judges election board), consisting of a small number of Bundestag members. The judges are elected for a 12-year term or until they reach the age of 68.

The Constitutional Court is able to actively administer the law and ensure that political and bureaucratic decisions comply with the rights of the individual enshrined in the Basic Law. Specifically, it can vet the democratic and constitutional legitimacy of bills proposed by federal or state government, scrutinise decisions by the administration, arbitrate disputes over the implementation of law between states and the federal government, and ban non-democratic political parties (Pylee, 2006: 494).

**Korea**

The Constitutional Court of Korea, established in 1988, is an independent and specialised court to review the constitutionality of laws in Korea. The Constitutional Court is composed of nine justices. Three of the positions are appointed directly by the president of Korea. Of the remaining six positions, three are appointed from candidates nominated by the chief justice of the Supreme Court and three are appointed from candidates elected by the National Assembly. The president of Korea, with the consent of the National Assembly, appoints the head of the court.

The Constitutional Court has jurisdiction over disputes between governmental entities and gives the final decision on impeachments and on the dissolution of political parties. The decision of the Constitutional Court is binding on all state agencies. The Constitutional Court protects the Constitution from violation and safeguards basic rights, including by invalidating statutes. The Constitutional Court can also decide to impeach any judicial and administrative body and to dissolve any political party if they act against democratic order. The Constitutional Court is one of the highest constitutional organs in Korea, on par with other constitutional bodies.

Any person whose basic rights are violated by a state agency can use the constitutional complaint system to bring the issue before the Constitutional Court, and this is its core function. The Constitutional Court has jurisdiction over impeachment proceedings brought against certain high-ranking public officials. The Korean Constitution provides the Constitutional Court with exclusive jurisdiction over impeachment (Korea [South] 1955, Articles 111-113).

**Indonesia**

The Constitutional Court of the Republic of Indonesia was established through the third amendment to the Constitution of Indonesia in 2001. The Constitutional Court was established in 2003 and the jurisdiction over constitutional issues, previously vested in the Supreme Court, was handed over to the Constitutional...
Court. The Constitutional Court is composed of nine justices appointed by the president of Indonesia, of which the House of Representatives recommend three, three by the president of Indonesia and three by the Supreme Court. The Constitutional Court has the jurisdiction to constitutionally review legislation, resolve disputes about constitutional competence between state institutions, resolve disputes about electoral results, dissolve political parties and impeach the president or vice president of Indonesia.

Because of the serious involvement of the Constitutional Court in controversial issues, it is considered one of the respected institutions of the country. Some of its landmark decisions have led to the Constitutional Court being considered the guardian of Indonesian democracy. In 2011, some amendments were made to the appointment and retirement of justices of the Constitutional Court.

The jurisdiction of the Constitutional Court includes reviewing laws having a link with the Constitution, disputes over the authority of state institutions, the dissolution of political parties and disputes over election results. It also rules on attempts to impeach the President (Constitution of Indonesia 1945, Art. 24C).

CONSTITUTIONAL COURT IN NEPAL’S DRAFT CONSTITUTION

The initial idea for a constitutional court came to the Constituent Assembly through the dissenting opinion of Akbal Ahamad Shah, Abisek Pratap Shah and Surina Shah of the Madhesi Janaadhikar Forum, Nepal in the Judicial System Committee (Dissenting opinion in CJS, 2010b: 110). This dissenting opinion was written when the majority failed to accept the establishment of a constitutional court to interpret the constitution and look into cases of national concern, cases related to human rights and civilian concern, and cases of political concern (CJS, 2010a). However, the State Restructuring Committee came out with the idea of a constitutional court as a mechanism for settling disputes between the centre and the provinces, among the provinces, between the province and local governments and among the local governments.

Under the proposal by the State Restructuring Committee, the constitutional court shall have equivalent jurisdiction as the Supreme Court and will be constituted by five justices, including one chairperson on par with the chief justice of the Supreme Court, with similar benefits as the Supreme Court’s chief justice and justices. The constitutional court will prepare its procedures by itself and its judgment shall be final. However, some jurisdiction over conflicts between local governments and special areas is provided to the provincial high courts, subject to appeal to the constitutional court (CRSDSP, 2010, Article 11).

The dissenting opinion of the Judicial System Committee merely raises the possibility of an alternative to what is proposed by the majority opinion of the Committee and, thus, does not set out the scope of the constitutional court in
The constitutional court proposed by the State Restructuring Committee is well thought out, but the technicalities still have to be worked out. For example, in what circumstances can the high court may refer cases to the constitutional court and, if the constitutional court hears such cases in original jurisdiction, would there be an option to appeal or review such decision by the constitutional court itself?

Box 1
From the Judicial System Committee Report of the Constituent Assembly: Majority opinion led by the CPN (Maoist), (CJS, 2010a: 7-10)

Parliamentary Mechanisms and Procedures to Oversight the Judiciary at Central, Provincial and Local Level

The head of the state shall appoint the Chief Justice or other justices on the recommendation of the Federal Legislature Special Judicial Committee (FLSJC) on the approval of legislature’s majority. Any person having certain qualifications (no need to be a sitting justice) could be appointed as the Chief Justice or justices of the Supreme Court. The chief justice or justices may be removed by resignation through the FLSJC to head of the state, attaining the age of 65 years, by the approval of the impeachment through the legislature and in case of death. An impeached judge is subject to law, if found violating it, after the impeachment. The supreme court can issue the writs in violation of the fundamental rights, has the original jurisdiction on disputes between centre and provinces, among provinces, central constitutional bodies, national security, currency and foreign affairs. Any issues having legal and constitutional interpretation may be recommended to the supreme court by the High Court. The supreme court shall submit an annual report to the head of the state and he/she shall submit to the legislature through executive head. The legislature may provide suggestion to the supreme court over the report through the law and justice minister.

The high court shall have the chief judge and other judges as specified by the law. The head of the province, on the recommendation of the Provincial Legislature Special Judicial Committee (PLSJJC) and on the approval of the provincial legislature, appoints the chief judge and other judges. Any person having certain qualification (no need to be a sitting judge) may be appointed as the chief judge and judges of the high court. The chief judge or the judges of the high court can be removed on resignation through the PLSJC to the head of the state, attending the age of 65 years, impeachment from the provincial legislature and in case of death. Any judge who is impeached by the provincial legislature may face legal action in accordance with the law. The high court shall have the jurisdiction to issue the writs in violation of the fundamental rights, assert the original jurisdiction and take appeal and can review its own decision. The HC shall submit its annual report to the provincial legislature through the head of the state and the legislature may provide suggestion to the high court through the provincial law and justice minister.
There shall be a district or local court at the district or local level and such court supervise the courts and judicial bodies under it. Judges of the district or local court shall be appointed by the head of the local representatives on the recommendation of the district or Local Legislative Special Judicial Committee (LLSJC) and by the approval of the majority of the legislature. A person having certain qualifications in the justice sector may be appointed as a judge at the district or local level. The judges of the district or local court may be removed by resignation to the head of the legislature through the judicial special committee, attaining the age of 65 years and by impeachment through the local legislature. The judge with allegation shall be provided the opportunity for hearing, if necessary by establishing a committee by the legislature and if impeached, the law will take course for any illegal acts. The judge shall not be assigned for any other works, except for judicial inquiry and elections. The district or local courts shall have the jurisdiction as trial court, of habeas corpus, to appeal on the decision of the quasi-judicial bodies and to the decision of the local courts.

The nature and structure of the judiciary proposed by the Judicial System Committee was a bone of contention among the members of the Report Harmonization Committee, which was mandated to compile all of the reports of the various committees of the Constituent Assembly and sort out the differences. After a long deliberation, the CPN (Maoist) tacitly agreed to give up the idea of a judiciary controlled by the parliament, as proposed by the Judicial System Committee, and an understanding was reached to have a constitutional court with a jurisdiction, along with other jurisdictions, as proposed by the State Restructuring Committee. However, the details of the constitutional court, which was prepared by a Task Force, were never formally discussed.

In the meantime, opposition to the constitutional court started to pour in (mainly from the judiciary and the Nepal Bar Association) and eventually the idea of constitutional court was converted to a constitutional bench, the details of which were also not worked out. During the final stages of negotiations on the draft constitution, the High Level Political Mechanism dropped the idea of a constitutional bench and agreed to have a constitutional court, but for a limited time and with a limited jurisdiction.

**NEPAL’S CONSTITUTIONAL COURT DEBATE**

**The CPN (Maoist) proposal**

The CPN (Maoist) proposed a judiciary controlled by the Parliament through a Special Judicial Committee. The Special Judicial Committee of the Parliament would be mandated to supervise and control the judiciary through the appointment of judges and reports (CJS, 2010a). This idea is based on the socialist
model that the parliament interprets the constitution, such as in China, Cuba, Vietnam and other former socialist countries (Phuyal, 2011).

The CPN (Maoist) proposal was reduced to a minority opinion in the Committee for Determining the Form of Legislative Body (CDFLB, 2010), but the Judicial System Committee borrowed this idea. The main argument from the CPN (Maoist) was that the judiciary needed to be restructured as part of restructuring the country to give the people easy access to justice. The CPN (Maoist) argued that, as the people are sovereign and they elect the parliament to exercise their sovereign power, the judiciary must also work under the sovereign representatives (CDFLB, 2010: 27–28).

However, question was raised that a judiciary controlled by Parliament puts the universally accepted values of independence, impartiality and accountability in jeopardy. This controversial idea encountered dissenting opinion within the Judicial System Committee itself and was attacked by the Nepal Bar Association and the judiciary.

Box 2

From the Judicial System Committee Report of the Constituent Assembly: Majority opinion led by the CPN (Maoist) (CJS, 2010a: 18-24)

Appointment, Removal, Accountability of the Judges at Central, Provincial and Local Level

The draft text designs Special Judicial Committee (JSC) at the respective level of the legislatures. The JSC at the federal level acts for the appointment of the CJ [chief justice] and other justices, disciplinary proceedings, removal from the service and recommends and advises on the issues of judicial administration. It is composed of deputy speaker as chair, law and justice minister, and elected nine members of the federal legislature in a proportionate and inclusive manner as members. The JSC has the power to interpret the constitution and federal law, in the case of contradiction, and matters relating to the positions of the person of national importance and matters directly concerning to politics. It shall prepare the list of the judges, as required, on the basis of proportion and inclusiveness, and submit to the federal legislature, and on the approval of the legislature, the head of the state appoints the CJ and justices. The JSC recommends for the removal of the justices on judicial misconducts to the head of the state and he/she must be approved. However, in case of removal on the allegation of corruption, the JSC shall prosecute such judge by the special court established by it. The decision of the JSC and special court established by it shall be final. The judges shall be appointed on the basis of proportion and inclusiveness based on the population.

The Provincial Legislative Judicial Special Committee (PLJSC) has the same jurisdiction as does the federal JSC has. It is composed of deputy speaker of the PL [Provincial Legislative] as chair, Law and Justice Minister, nine members of the
PL, equally represented based on the proportion and inclusiveness, as members. It prepares the list in the same manner, as does the federal JSC and submits to the PL and the head of the state appoints the chief judge and other judges from that list. The PLJSC recommends for the removal of the judges on judicial misconducts to the head of the state and he/she must approve. In the case of removal on the allegation of corruption, the PLJSC constitutes a special court for the prosecution. The PLJSC may constitute sub committees and its decision and the decision of the special court, constituted by it shall be final.

The district or local JSC has the same jurisdiction, as does the federal and provincial JSC. It is constituted in the same manner as both of the superior JSC are. It does the same function as other two JSC do for the appointment of the judges, but instead of the head of the states at both levels, the chief of the local assembly appoints and removes the judges. The local JSC also has the committee system and its decision is final, but it does not have a provision of the special court to prosecute the removed judge on the allegation of corruption.

The CPN (Maoist) proposal was also thought to have serious implications to the basic principles of democracy, foundation of rule of law, separation of powers and the proposed system was also thought to weaken the judiciary’s ability to protect fundamental human rights. Furthermore, the judicial independence that has evolved in Nepal over the past 80 years, and which was institutionalised through the 1990 Constitution (which provided the courts with constitutional status), would also be in jeopardy. Debate had already started in the Judicial System Committee to address such issues and a middle way was sought (Republica, 2012) to balance the need for separation of powers, independence of the judiciary and the proposal put forwarded by the CPN (Maoist), (Rikkila Tamang, 2011).

Visiting experts

In the meantime, in 2009, a sitting justice of the Federal Constitution Court of Germany visited Nepal and spoke (at a programme organised by the National Judicial Academy and an event organised by the Nepal Bar Association) with the judiciary, members of the Constituent Assembly, and civil society on the concept of a constitutional court and how the German Constitutional Court works.

In 2009, and again in 2010, a sitting justice of the South African Constitutional Court, Justice Zakaria Yakub, also visited Nepal and spoke with members of the judiciary, the Constituent Assembly and the media on the issue of a constitutional court. Justice Yakub delivered a public lecture and had private meetings with the Constituent Assembly members and with the justices of the Supreme Court. He apparently came from a socialist background before being appointed as a justice of the South African Constitutional Court. He also had meetings with the CPN (Maoist) Constituent Assembly members and explained why the African National Congress in South Africa adopted the idea of constitutional court. Over
several meetings, he was able to convince some of the CPN (Maoist) Constituent Assembly members of the need for separation of powers and a constitutional court, instead of a parliament-supervised judiciary.

**Box 3**

**The Bone of Contention: Which institution should interpret the Constitution?**

There are three trends in relation to the interpretation of the constitution: firstly, interpretation by the common law system through the Supreme Court; secondly, secondly, interpretation by a constitutional court; and, thirdly, interpretation by a standing committee of the parliament. Only socialist countries have taken the approach of interpretation by parliament. Countries like South Africa have recognised the importance of constitutional-political issues and created a constitutional court within the common law system to specialise the judging and harmonise the interpretation of the constitution. Some countries in Asia, such as South Korea and Indonesia, also have constitutional courts. The Constitutional Council in France works in the same way as a Constitutional Court.

It is clear that the judging of political-constitutional issues is increasingly being specialising either in a constitutional court or permanent constitutional bench in the supreme court. Some constitutional courts reviews legislation ultra vires (i.e., before enactment) and some have jurisdiction after enactment. Some constitutional courts, such as in South Africa, have a wide jurisdiction to interpret the constitution and law in light of the protection of fundamental rights guaranteed under the constitution and international law. Some countries have a permanent constitutional bench within the supreme court to reduce the organisational and financial burden involved in a separate constitutional court and tend to specialise in interpretation.

The appointment of judges to a constitutional court varies: In some countries they are appointed under the civil law approach and can be members of the parliament, having no law degree (e.g., France); in other countries they are appointed under the common law approach and are either judges with expertise in constitutional affairs or barristers, lawyers or academicians specialising in constitutional issues. In some countries, judges are elected by the parliament (e.g., Germany) and, in others, they are appointed by the different heads of the government institutions (e.g., Indonesia). However, the job of the constitutional court is to judge and the common law approach emphasises having specialised persons, either from in or outside the judiciary to be members of the constitutional court (Phuyal, 2011).

**Opposition by the judiciary**

Until the CPN (Maoist) opposed the constitutional court, there was no opposition to the idea. However, criticisms emerged, particularly from the judiciary, that the constitutional court would split judicial power and dominate the Supreme Court, as the constitutional court can have judges from outside the serving judges
and is seen as superior to the Supreme Court. Furthermore, it was argued that the creation of the constitutional court would increase the chances of conflict between the courts, judges and other branches of the government. Critics also argued that the constitutional court is a centralised institution and does not help to maintain the independence of the judiciary. The judiciary argued that there are alternatives for specialisation such as a constitutional bench in the Supreme Court.

The judiciary also pointed out that it has played an important role in promoting human rights in Nepal, promoted the idea of independent judiciary and rule of law (see cases decided by the Supreme Court such as Rajiv Parajuli vs Government of Nepal 2006). The judiciary’s argument is that it should have been rewarded for the role it played, but adopting constitutional court does not recognise its role and may even diminish or perhaps condemn the active role it played for the equal and democratic society. According to the judiciary, the idea of constitutional court was adopted in South African when the South African Supreme Court, after apartheid, was thought to brought in line with the changing context and Germany did after the Whimer Constitution was misused by Adolf Hitler. However, the context of the Nepalese judiciary was different as it also contributed to over-through the despotic regime and protected the life and liberties of those who were involved in the political movements (Bhattarai, 2011).

These arguments led to the downsizing of the idea of a constitutional court, initially to a constitutional bench and later to a constitutional court with limited jurisdiction in relation to the powers of the federal units and for a limited period of five years. The judiciary accepts the inconsistency of arguments in the politico-constitutional jurisprudence, but suggest adopting a larger bench at the Supreme Court and other methods to harmonise the precedents such as through research and analysis (Bhattarai, 2011).

**The Report Harmonization Committee**

As the constitution writing process developed, a Report Harmonization Committee was established in 2009 to narrow the gaps on disputed issues and consolidate the preliminary drafts of the constitution prepared by the various committees. This committee discussed the drafts at length to find solutions. It consulted with constitutional experts, justices of the Supreme Court and representative of the Nepal Bar Association. Then Chief Justice, Ram Prasad Shrestha, spoke vocally against a constitutional court on his return from Pakistan (15 March 2011), and the other successive chief justices followed suit, on the basis that it would reduce the power of the Supreme Court and create more contradictions with the judicial institutions (CJ cautions against Constitutional Court, 2011). A delegation of the Nepal Bar Association argued against a constitutional court at a meeting with the Constituent Assembly’s Constitutional Committee on 10 March 2011 (The Kathmandu Post, 2012).
The Report Harmonization Committee produced a compromise document in which the CPN (Maoist) agreed to give up the idea of a Special Judicial Committee in favour of a constitutional court and the rest of the parties agreed on the idea of a constitutional court as it respects the separation of powers. The High Level Political Mechanism, formed to settle remaining disputed issues, produced by the Report Harmonization Committee, approved this idea. The unofficial discussion paper prepared by the Report Harmonization Committee divided the jurisdiction of the constitutional court and Supreme Court and proposed that the constitutional court be composed of five justices headed by the chief justice (Bhattarai, 2011). Initially, it appears that the Committee had also agreed on other aspects of the judicial system, such as the formation of a judicial service commission, instead of the judicial council provided for under the Interim Constitution, 2007, which would contain representatives of the parliament to appoint the judges. However, in the final stage, mechanisms such as a constitutional council, for the appointment of the chief justice, and judicial council for appointment of the other justices were agreed.

The idea of having parliament’s representative to the judges appointing body was a controversial proposal. The CPN (Maoist) argument for such representatives to the judicial service commission was to fulfil the aspiration people’s sovereignty through the appointment of judges. The Report Harmonization Committee seems to have discussed this idea from maintaining political diversity in the judiciary in the same vein as is done in South Africa (South African Republic, 1996, Article 178 [1]). While political representation to the judges appointing body appears to maintain the political accountability of the judiciary, but this idea is yet to be tested in developing countries like Nepal. The Maldives followed this model in its Constitution (Government of Maldives & Hussain, 2008, Article 158), but the political battle over the appointment of the judges was bitter and even criticised by international organisations (International Commission of Jurists, 2011) and the United Nations Special Rapporteur on Independence of the Judiciary (Knaul, 2013).

During the deliberations over the Constituent Assembly committees’ reports in the full Constituent Assembly, the constitutional court was hardly discussed. While discussing the Judicial System Committee’s report, no voices were raised in favour of the constitutional court, however, some opposition was registered (Legislature-Parliament Secretariat, 2013: 137). The constitutional court was also not discussed during the deliberation on the State Restructuring Committee’s Report (Legislature-Parliament Secretariat, 2013: 153–157), but the State Restructuring Commission, which was established by the Government after the State Restructuring Committee Report from the Constituent Assembly, left the provision for the constitutional court in its report and recommended providing the jurisdiction of the constitutional court to the Supreme Court. This conversion was criticised by the full Constituent Assembly while discussing the Commission’s
Report, which demanded that the constitutional court be included as part of state restructuring (Legislature-Parliament Secretariat, 2013: 171).

The Report Harmonization Committee recorded the issue of a constitutional court in the ‘dissenting’ category and listed it as an issue to be settled through political consensus (Legislature-Parliament Secretariat, 2013: 199–189). Furthermore, while preparing the 210 outstanding questions, one of the questions to settle was whether or not to establish a constitutional court or empower the Supreme Court to hear the jurisdiction of the proposed constitutional court. It was also emphasised that this issue must be settled along with the issues raised by the State Restructuring Committee (Legislature-Parliament Secretariat, 2013: 233, Question no. 151).

High Level Political Mechanism

To deal with outstanding issues, the Chairperson of the Constituent Assembly recommended the establishment of a Task Force, also called the High Level Political Mechanism, which was formed on 11/2010. This Task Force was headed by Puspa Kamal Dahal, the Chairperson of the CPN (Maoist), and contained all of the chairpersons of the major political parties. Under this mechanism, it was agreed to have an independent and accountable judiciary along with an independent mechanism to appoint the justices/judges and a body such as a constitutional council, headed by the head of the executive government to appoint the members of the constitutional bodies, including the chief justice (Legislature-Parliament Secretariat, 2013: 137).

However, this process did not settle the establishment of the constitutional court, its jurisdiction and who would be the chief of the constitutional court. The High Level Political Mechanism established a sub-committee on 3/2011 to study comparative provisions on the constitutional court, including its jurisdiction, the number of justices and their appointment, qualifications and removal. The Constituent Assembly members with legal backgrounds were the members of this sub-committee. However, the report prepared by this sub-committee was never formally discussed (Legislature-Parliament Secretariat, 2013, Question no. 151), but it is said that it recommended the establishment of the constitutional court and contained detailed provisions about its jurisdiction and functioning.

The famous May 15/2012 Understanding reached in the High Level Political Mechanism settled several issues out of 117 outstanding disputed questions to be settled for the new constitution (Legislature-Parliament Secretariat, 2013: 276 and Annex 9). The same understanding settled the disputed issues on the judiciary. It was agreed that there would be a constitutional court headed by the chief justice of the Supreme Court and having the two senior-most justices of the Supreme Court and two jurists recommended by the Council of Ministers and appointed by the president of Nepal. It also agreed that the constitutional court would have jurisdiction over disputes between the provinces and the centre,
among the provinces, and between a province and local government. It was also agreed that the constitutional court would remain for five years (Legislature-Parliament Secretariat, 2013: 276).

However, May 15/2012 Understanding failed, leading to the dissolution of the Constituent Assembly. The main issues that pre-empted the failure of negotiations were the naming and number of provinces, but the final draft of the proposed constitution (Legislature-Parliament Secretariat, 2013: Annex 6), appears from the Constituent Assembly Secretariat to miss the chapters on judiciary and state restructuring. Hence, it is unclear whether or not the understanding reached by the High Level Political Mechanism on these aspects remains valid for the new Constituent Assembly if it decides to build on the previous Constituent Assembly process or if there would be another round of negotiations on the judiciary and the constitutional court.

While examining the agreed text on the constitutional court, there are some unclear issues such as the nature of the constitutional court, whether it would be a temporary or permanent mechanism, and what happens to such disputes after five years – will they be transferred to the Supreme Court or to any political mechanism? The agreed text on the constitutional court does not address these issues, nor does it address the other functions of the constitutional court, such as its jurisdiction over judicial review. It also fails to address the outstanding issues posed by the Nepal judiciary, such as the existence of conflicting judgments, inclusiveness and judicial restructuring as part of state restructuring.

CONCLUSION

The judiciary of Nepal has a relatively short history and independence and accountability are only recent phenomena. Since the 1990’s political change, the judiciary, under the new Constitution of the Kingdom of Nepal of 1990, has laid down progressive and landmark judgments, but some of its political-constitutional judgments were controversial and inconsistent with previous judgments. Furthermore, inclusiveness and restructuring are new agendas brought into the spotlight after the 2006 peace process, which have not been fully explored in terms of how they relate to the judiciary. But, the May 2012 understanding of the senior political leaders to have a constitutional court with limited jurisdiction and period has failed to address the underline causes which ignited to have constitutional court in Nepal.

Alternative models for the judiciary were widely discussed in the Constituent Assembly process, including as part of state restructuring. In this context, the idea of a constitutional court was raised as a mechanism for interpreting the constitution, albeit in a moderate and balanced way, as opposed to interpreting constitutional issues through a parliamentary committee. The proposed constitutional court was discussed at the different levels of the negotiation.
However, the proposed text of the constitutional court fails to acknowledge the comparative constitutional court’s jurisdiction such as in South Africa, Indonesia and Korea and limits the scope of the constitutional court only in federal relations for limited period. Either the scope of the constitutional court be strengthened to play a role as a guardian of the democracy or the scope of the supreme court must be broaden in the constitution itself to address the issues raised for the need of the constitutional court.

The judiciary and Nepal Bar Association heavily criticised the idea of a constitutional court, claiming that it is an unnecessary institution on par with the Supreme Court that would lead to conflicting jurisdictions and the weakening of judicial power. Such criticisms drew the attention of the Constituent Assembly and the initial concept of a constitutional court was reduced to an institution with a limited jurisdiction and for a limited time frame. The leading legal institutions such as NBA and the judiciary must also be constructive to address the criticisms raised by the Constituent Assembly and come forward with the solutions.

The nature, scope and jurisdiction of the proposed constitutional court are not clear. If the same text is used in the new constitution, the constitutional court in Nepal will be a short-lived experiment dealing with limited issues. The proposed constitutional court in Nepal is very different to those in emerging democracies such as South Africa, Indonesia and South Korea, which have inspired Nepal’s Constituent Assembly process. It is also unsure whether or not this watered-down version of the constitutional court satisfies the issues raised during the judicial discussion in Nepal. One thing is clear, however, unlike in other countries, it will not be able to play the role of guardian of the constitution and democracy.

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CHAPTER 11

STRIKING BALANCE BETWEEN ACCOUNTABILITY AND INDEPENDENCE OF THE JUDICIARY

- MARA MALAGODI
The paper analyses the issue of judicial reform in the context of Nepal's current process of constitution-making from an academic perspective. The aim of the paper is twofold: first, to provide sufficient background in terms of theoretical and technical information to understand the contentious issues in the current Constituent Assembly's endeavours of delivering an effective judicial reform; second, as resource material to present Nepali constitution-makers with an informed academic discussion about the array of institutional options available to them in order to promote both the independence and the accountability of Nepal's judiciary.

Judicial institutions worldwide face mounting pressure on the part of their respective political systems as courts acquire an increasingly important role in upholding the rule of law in democratic polities (Andenas & Fairgrieve, 2006(a): v). More specifically, the growing emphasis on the protection of human rights bears two-fold implications for the judicial branch: first, national courts have been increasingly adjudicating on issues of constitutionally-sanctioned fundamental rights to the extent that this global transformation has been described as ‘the rights revolution’ (Epp, 1998: 2). Second, national legal systems are pressurised into complying with international legal standards and human rights instruments, which often make direct reference to the crucial role of judges in guarding fundamental rights (e.g. Articles 8 and 10 of the 1948 Universal Declaration of Fundamental Rights; Articles 2 and 14 of the 1966 International Covenant on Civil and Political Rights). As a result, the widening powers of the judicial branch in many democratic constitutional systems have led to discussions about balancing the requirements, on the one hand, of the independence of the judiciary from the other branches of government and, on the other hand, of its accountability as a public body performing such a critical regulatory function (Canivet et al. (eds.), 2006). Thus, the paper concentrates on the tension that arises from institutional reforms aiming at protecting the independence of judges and, at the same time, making them accountable, ultimately without undermining their ability to conduct their work in an independent, effective and fair manner.

The paper is divided into four sections: the first one analyses the constitutional role of the judiciary in a democratic framework; the second section examines the institutional ambits pertaining to the judiciary in which the tension between judicial independence and accountability plays out; the third section explores
the position and powers of the Nepali judiciary in a historical perspective; and the final section addresses the main controversies which arose in the work of the CA Committee on the Judicial System.

1. CONSTITUTIONAL ROLE OF THE JUDICIARY

The constitutional role of the judiciary is pivotal to the protection of constitutionalism in a democratic polity. Constitutionalism is regarded as a culturally and historically-specific dynamic process in which the interpretation and actualisation of the Constitution pose meaningful restraints on ordinary political power; in this regard, constitutionalism also revolves around a political process – one that overlaps with democracy – in seeking to balance state power and individual and collective rights (Greenberg et al., 1993: xxi). In this context, the term Constitution indicates a fundamental law with its correlative institutional arrangements comprising two basic elements – a frame of government and a bill of rights – devised to restrict arbitrary power and ensure a limited government (Sartori, 1962: 855). Thus, the constitutional powers and functions of the judiciary are analysed in view of the principles of separation of powers and rule of law, which underpin effective democratic constitutional arrangements around the world.

First, the doctrine of separation of powers prescribes that the three branches of government – legislative, executive and judicial – are separated in terms of their functions and personnel, and that a system of checks and balances amongst the three branches is in place, ultimately to prevent absolutism (Leyland, 2007: 53). Therefore, the specific function of the judicial branch is to resolve disputes about the interpretation and application of law. In particular, in jurisdictions with an entrenched Constitution (written and rigid), courts of law enjoy the power of judicial review of both administrative actions and legislation on the basis of their constitutionality; as a result, judges are empowered to act as the ultimate guardians of the Constitution. To do so, the judiciary needs a high degree of independence from the other two branches, but, at the same time, the critical importance of the judicial function requires judges to be open to public scrutiny and account.

Second, the principle of the rule of law seeks to establish ‘a system in which law is able to impose meaningful restraints on the state and individual members of the ruling elite, as captured in the rhetorically powerful if overtly simplistic notions of a government of laws, the supremacy of the law and equality of all before the law’ (Peerenboom, 2004: 2). A.V. Dicey identified three core components of the doctrine with reference to late nineteenth century England: the absolute supremacy of regular laws, equality before the law and the development of constitutional principles through jurisprudence. While the Diceyan concept of rule of law has become an embattled one and significant distinctions between
procedural and substantive accounts have been drawn, it seems clear that courts still play a crucial role in skilfully navigating the requirements of the rule of law because judges remain the ultimate qualified interpreters of the law. As a result, the importance of the judiciary’s core task of dispensing justice highlights the tension between the requirements of ensuring both its independence from unduly influences and its accountability as a public body. It is important to emphasise that ‘the rule of law is meaningless unless one knows who makes the rules and enforces them. Underlying a commitment to the rule of law is a powerful impulse towards stability at all costs’ (Greenberg et al., 1993: xviii).

2. NEGOTIATING JUDGES’ INDEPENDENCE AND ACCOUNTABILITY

The protection of the independence of the judiciary has been considered one of the pillars and fundamental tenets of constitutionalism for long time. However, in the last two decades, there has been an ‘accountability revolution’ which has also translated into wide-spread debates over the establishment of institutional mechanisms and procedures to monitor the conduct of judges and hold them open to public scrutiny in a democratic polity (Le Sueur, 2006: 50). While judicial independence remains the absolute primary requirement for the proper functioning of the judiciary in a constitutional democracy, accountability has become an additional requirement. Judicial accountability, however, remains conditional to an untarnished judicial independence. In fact, the preface of the most recent study entirely devoted to the tension between the requirements of independence and accountability of the judiciary distils a succinct and direct preliminary conclusion:

The accountability issues are complex. The conclusion to draw from this book is however simple. The only way in which the judicial system can fulfil its constitutional role is through a high degree of independence. That sets high requirements to any system of accountability. The real measure of accountability is in the degree of independence. The accountability mechanisms that are required must protect independence by keeping the executive and the political system on more than arm’s length.

(Andenas & Fairgrieve, 2006a: vi)

In fact, while reforms of the judiciary in a constitutional democracy ought to be conducted in view of respecting the principles of the rule of law and separation of powers, it is also critical to keep in mind the fact that the judiciary is the weakest of the three branches of government, having neither the executive power of the sword (power to declare war and mobilise the army), nor the legislative power of the purse (power to approve the budget). As suggested by Alexander Hamilton in his Federalist Paper N. 78, the structural weakness of the judiciary vis-à-vis executive and legislature is crucial to understand the value of preserving judicial independence. Significantly, Hamilton also stresses the importance of judicial
accountability through the Convention plan of making judicial tenure subject to the ‘standards of good behavior’ to secure ‘a steady, upright, and impartial administration of the laws’ (see Hamilton, 1788).

The paper analyses here a number of areas pertaining to judicial institutions, powers and functions in which the tension between judicial independence and accountability plays out. In a constitutional democracy, these issues ought to be carefully considered when designing institutional reforms of the judiciary.

Appointment of Judges – The issue of which institution is deputed to the selection of judges is a particularly important one, especially with regard to the question of preserving judicial independence from the other branches of government. Recent reforms have opted for independent commissions which appoint judges on the basis of merit alone; the scope of this kind of commissions is to exclude or at least minimise political and executive discretion (Adenas & Fairgrieve, 2006b: 8). For instance, the Constitutional Reform Act 2005 (CRA, 2005) in the United Kingdom created the independent Judicial Appointment Commission (JAC) to replace the Lord Chancellor in order to ensure that the selection of candidates to the bench is on the basis of merit through open competition; ultimately to avoid judicial appointments of a politicised nature. Significantly, Lady Justice Hallett – a former judicial member of the Commission – highlighted the importance of the transparent selection process of the Commissioners themselves to instil trust and legitimise the work of the JAC.¹

Working Conditions of Judges – In order to preserve judicial independence from unduly influences and to also indirectly promote judicial accountability, adequate arrangements must be made for the judges’ security of tenure, reasonably sufficient salary and pension schemes, so that judges are in a financial position properly secure to refrain from involvement in non-judicial activities (Adenas & Fairgrieve, 2006b: 9). Additionally, the involvement of the legislative and executive branches in determining the remuneration of judges ought to be minimised. The protection of judicial independence is also fostered by adequate funding towards the organisation and administration of the courts upon which executive control ought to be minimised. Public scrutiny of the financial costs of the judiciary is ensured by a number of mechanisms: a transparent and clear classification of the salary scale adopted by the relevant government department published on their website,² a detailed account report of the funding and expenditure of the courts to the relevant authorities (e.g. in the UK Article 54 CRA, 2005) then published on their website³, and an openness of the courts to the monitoring of their expenditures by qualified independent bodies.⁴

Disciplinary Sanctions and Removal of Judges from Office – Judicial independence and accountability ought to be carefully balanced when devising institutional mechanisms for monitoring the individual conduct of judges. There is consensus on the principle that the institutions dealing with complaints and disciplinary sanctions ought to be independent and that political and executive
discretion should be avoided (Adenas & Fairgrieve, 2006b: 9). For instance, in the UK judges’ individual accountability is ensured by internal proceedings and in more serious cases the matter is referred to the Lord Chief Justice and Lord Chancellor, aided by the Office for Judicial Complaints under the CRA, 2005 (Judicial Conduct Investigations Office, n.d.). Moreover, the procedures for removal from office of judicial personnel ought to be a transparent last resort remedial measure and seek to exclude executive and political discretion.

**Court Structure and Appeal System** – The institutional accountability of the judiciary is guaranteed by an independent court system with a clearly defined mechanism of appeals in place to secure that judicial errors of law and fact are rectified. As highlighted on the website of the Judiciary of England and Wales, ‘the private function [of these procedures] is to provide accountability to the individual litigants. The public function is that enabling errors to be corrected maintains and enhances the confidence of citizens in the justice system. Another aspect of the public function is that the appeal court can provide guidance for future cases and thus facilitate certainty. In these ways the right of appeal furthers the rule of law’ (n.d.).

**Powers and Jurisdiction of the Courts** – The increasingly wide powers of judiciaries across the world, especially Judicial Review (JR) of legislation and the mechanism of Public Interest Litigation (PIL), have made judges dynamic actors in their country’s political lives. In fact, the long-standing debate on judicial activism has raised questions concerning the relationship between state organs, balance and separation of powers, and ultimately democratic practice; these issues divide scholars on the merits and pitfalls of judicial intervention. On the one hand, fervent supporters of judicial activism through the mechanism of constitutional review and decisions on issues of public concern argue that the courts guarantee the implementation and protection of constitutional Fundamental Rights (Dworkin, 1977; Epp, 1998; Baxi, 2000) and they represent ‘a counter-majoritarian check on temporary legislative majority’ (Baxi, 2002: 11). On the other hand, opposers of judicial review hold that it is an essentially undemocratic and unaccountable process thwarting the supremacy of the body directly elected by the People – the legislature (Hirschl, 2004; Waldron, 2006; Bellamy, 2008). This position is also well illustrated by Cass Sunstein (1996: 7) when he argues that ‘the real forum of high principles is politics, not the judiciary – and the most fundamental principles are developed democratically, not in courtrooms’. A middle-ground position is exemplified by the work of Mark Tushnet (2007) who demonstrates that socio-economic rights are, however, at times best protected outside courtrooms. It is, however, clear that – even when courts enjoy the power of judicial review of legislation in modified Westminster models like the USA and India – Parliaments still retain the ultimate power to amend legislation and even the Constitution itself – provided they have sufficient numbers to pass the amendments.
With regard to the increasing activism of the judges, many jurisdictions across the world have developed more or less formal mechanisms to prevent the encroachment of judicial activity over the political process and the discretionary powers of the executive and the legislature. For instance, in the USA the ‘political questions doctrine’ was developed by the courts to coordinate the activities of the judicial branch with the other two branches (Tushnet, 2009: 148-152). Similarly, in the UK, even if courts do not have the power to invalidate primary legislation, the principle of ‘judicial deference’ to legislation – which in the UK combines the participation of both Government and Parliament – was developed through case-law to avoid the involvement of the judiciary in questions of a political nature; this principle has become particularly difficult to operationalise following the enactment of the Human Rights Act 1998. Significantly, the UK Parliament has the power to insert ouster clauses in legislation to restrict or exclude the judicial review jurisdiction of the courts. Moreover, MPs enjoy special protection under ‘parliamentary privilege’, a kind of legal immunity for civil and criminal liability for actions in their capacity as law-makers. Similarly in the USA, the President and other state officials enjoy immunity for conduct related to their official duties.

3. NEPALI JUDICIARY IN HISTORICAL PERSPECTIVE

The creation of an independent judiciary in Nepal took place with the process of democratisation that followed the overthrowing of the Rana regime in 1951. The promulgation of the 1951 Interim Constitution and the enactment of the Pradhan Nyayalaya Ain in the same year established – for the first time in Nepali history – a court structure with an apex court whose decisions were binding on the lower courts, thus introducing the common law-derived doctrine of binding precedent (Bhattarai, 2006: 16). The progress and independence of the Nepali judiciary suffered a serious set-back during the three decades of Panchayat autocracy (1960-1990) during which the King yielded direct control ad influence over the three branches of government.

The People’s Movement of 1990 brought the Panchayat regime to an end and opened the way for an all-embracing re-democratisation of the Nepali polity. As a result, the promulgation of the 1990 Constitution brought significant changes also in the powers and organisation of the Nepali judiciary, which was arranged in a three-tier court structure (Supreme Court, Appellate Courts and District Courts). The provisions regarding the judiciary have remained largely unchanged under the 2007 Interim Constitution currently in force. The 2007 Constitution establishes under Article 100 the exclusivity of Nepali courts in exercising the powers related to justice and directly links judicial independence to the judicial commitment to protect democratic constitutionalism. Additionally, Article 116 provides that the orders and decisions of Nepali courts are binding on everyone, another sign of the increased power of the Nepali judiciary under the post-1990
constitutional arrangements. The following paragraphs analyse the balance between judicial independence from the other two branches of government and accountability under the current Constitution.

Appointment of Judges – Article 103(1) of the Interim Constitution provides for the appointment procedure of the of the Supreme Court judges who are fifteen in total, including the Chief Justice, plus ad hoc Judges in the eventuality of backlog of the court under Article 102(5). The Chief Justice is appointed by the President on the recommendation of the Constitutional Council, which under Article 149(1) is composed of seven members: the Prime Minister, the Chief Justice, the Speaker of the Legislature-Parliament, three Ministers representing three different political parties appointed by the Prime Minister, and the leader of parliamentary opposition. Under Article 149(2) the Minister of Justice sits in the place of the Chief Justice when the Council needs to make a recommendation for the appointment of the Chief Justice. It is immediately evident that the executive dominates this process. The other Supreme Court Justices are appointed by the Chief Justice on the recommendation of the Judicial Council, which is composed of five members under Article 113(1): the Chief Justice, the Minister of Justice, the senior-most Judge of the Supreme Court, a legal expert nominated by the President on the recommendation of the Prime Minister, and a senior advocate nominated by the Chief Justice on the recommendation of the Nepal Bar Association. Similarly, the appointment of judges in the Appellate and District Courts is regulated by Article 109(1), which again prescribes the appointments to be made by the Chief Justice on the recommendation of the Judicial Council.

The composition of the Constitutional and Judicial Councils does not feature independent commissioners and is characterised by a high degree of executive and judicial involvement. As a result, the procedures for the appointment processes of both the Chief Justice and all other judges might be perceived as weakening the independence and accountability requirements of Nepal’s judicial institutions. They have also led to accusations of judicial appointments being a source of patronage at times resulting in the politicisation of the judges and low levels of socio-cultural diversity in the judiciary. Moreover, while the Constitution lists in detail the criteria for eligibility for judicial appointment under Article 103(2)-(3) and Article 109(2)-(4), the criteria upon which the selection of judges is actually made are only briefly mentioned under Articles 103(3) and 109(4)-(5), which however do not give precise guidelines regarding the procedure and do not identify merit as the primary condition. Section 4 of the Judicial Council Act 1991 regarding the procedures for making an appointment recommendation was amended in 1993 to insert Section 4(A) on the ‘Basis for the Assessment of Competence or Conduct of a Judge’. Section 4(A) still does not list the criteria for selection under Article 109(5) of the Constitution, but it only specifies a number of circumstances under which a judge lacks ‘work competence’. This silence is particularly problematic as it might cast doubts on the transparency of the selection process of Nepali judges, hence on the judiciary overall.
Working Conditions of Judges – The Interim Constitution contains a number of provisions which deal with the judges’ retirement age, tenure, salary, and pension schemes. Article 103(5) fixes Supreme Court judges’ maximum retirement age at sixty-five, while Article 109(10)(b) for all other judges at age sixty-three. Under Article 103(1) the tenure of the Chief Justice is of six years. Sub-sections (1) and (2) of Article 104 entitle Supreme Court justices to remuneration and pensions as determined by law, with the exclusion of judges who have been removed by impeachment as per sub-section (3). Significantly, the Constitution safeguards the financial security of the Supreme Court’s judges under Article 104(4) by providing that the remuneration, privileges and other conditions of service shall not be altered to their disadvantage, hence placing restrictions on possible control and interference exercised by the legislature. These provisions are in place also to secure the requirement established by the Constitution under Article 106 that Supreme Court judges ought not to engage in any non-judicial activities in order to preserve both the independence and accountability of the bench. Additionally, the Administration of Justice Act 1991 allows the Supreme Court to formulate rules pertaining to its organisation and administration (Dhungelet al. 1998: 463). The Interim Constitution makes similar provisions for Appellate and District court judges; Article 109(7) provides that the conditions of service for judges shall be as determined by law, sub-section (8) specifies that they shall not be altered to their disadvantage. Under Article 110 the Constitution prohibits judges’ involvement in non-judicial activities, while retaining the right of the Chief Justice to transfer judges from one court to another on the recommendation of the Judicial Council. This power of the Judicial Council again leaves room, to a certain extent, for possible political interference in judicial activities.

The Constitution seeks to establish the accountability of the Supreme Court and the transparency of its administration by providing under Article 117 for the submission to the President through the Prime Minister of a yearly Report on the cases registered in the Court, those reviewed and pending cases, details of new precedents set by the Court, comments on the conduct of a lower court judge, amount of fines and penalties paid, details regarding the implementation of decisions, and the budget for the apex and lower courts, including a statement of expenditures. This provision was not present in the 1990 Constitution and is a welcome innovation of the Interim Constitution. This mechanism of judicial accountability could be further improved by making the Report public, e.g. by publishing it on the Supreme Court’s website.

Disciplinary Sanctions and Removal of Judges from Office – Judicial accountability is ensured by a number of procedures established by the Interim Constitution for inquiry into the conduct of individual judges and for impeachment. Article 105(2) provides that a motion of impeachment against any Supreme Court judges – including the Chief Justice – may be introduced in the Legislature-Parliament and the impeached judge has the right to defend himself; then, if a two-thirds majority vote in favour of the motion is cast, the impeached
judge shall immediately cease to hold office. The legislature controls the entire impeachment process and this might seem problematic, especially in the context of a parliamentary system where there is a direct linkage between legislative and executive power (Sartori, 1997: 101). In this scenario, the impeachment of judges could appear more likely to be informed by political reasons, while an independent body empowered to remove judges from office might be less susceptible to this kind of preoccupations.

Article 109(10) (c) provides that the Chief Justice is empowered to remove Appellate and District Court judges from office upon the recommendation of the Judicial Council for reasons of incompetence, misbehaviour or failure to discharge his office duties in good faith, incapacity to discharge those duties due to physical or mental reasons or for deviation from the task of dispensing justice. The Constitution grants to the judge under investigation the right to defend himself. Moreover, under this provision, the Judicial Council is empowered to create a Committee of Inquiry to deal with the issue; the procedures for the inquiry are further regulated by Article 113(4)-(5) and by the relevant statutory provisions of the Judicial Council Act 1991. The fact that disciplinary measures are not dispensed by an independent body might again raise questions about the possible politicised nature of the disciplinary proceedings.

**Court Structure and Appeal System** – Article 101(1) of the Interim Constitution establishes a three-tier court system composed of one Supreme Court, sixteen Appellate Courts and seventy-five first-instance Districts Courts; all the courts of Nepal have jurisdiction in both civil and criminal matters. Article 102(1) makes the Supreme Court the country’s highest judicial institution; as a result Article 102(2) empowers the apex court to inspect, supervise and give directives to all the lower courts. Moreover, Article 111 grants to the Supreme Court the power to transfer cases, while Article 112 invests the Chief Justice with the ultimate responsibility to make the administration of justice effective. The Interim Constitution guarantees the right to appeal judicial decisions and the Administration of Justice Act 1991 provides for the details of the appeal system within the Nepali courts (Dhungel et al. 1998: 513). Thus, the right to appeal guarantees both the accountability of the individual judges for their decisions and the institutional accountability of the judicial system as whole in progressively building the certainty of the law, hence actively contributing to foster the requirements of judicial independence and accountability.

Moreover, the adoption in Nepal of a modified common-law system has made the doctrine of *stare decisis* one of the pillars of the Nepali legal system. In this regard, the law reporting system plays a pivotal role in disseminating the decisions that function as binding precedents; as commentators highlighted, ‘in practice in Nepal, judicial opinions are implemented with varying degrees of fidelity by government officials. As yet there is no rule which requires the courts to publish all their decisions, although important decisions of the Supreme Court have been
reported in the monthly Nepal Law Reports [Nepal Kanun Patrika] since 1958 and in the bi-monthly Supreme Court Bulletin [Sarvocca Adalat Bulletin] series since 1991’ (Dhungel et al., 1998: 537). At the time of writing, only the issues of the monthly Nepal Kanun Patrika of the past six years (since 2065 BS, i.e. 2008 AD) [Supreme Court of Nepal, n.d.(a)] and the issues of the bi-monthly Sarvocca Adalat Bulletin (since 2065 BS, i.e. 2008 AD) [Supreme Court of Nepal, n.d.(b)] have been made available online on the Supreme Court’s website in non-searchable PDF format. Moreover, the hard copies of both the Nepal Kanun Patrika and the Sarvocca Adalat Bulletin go out of print in about two years and they are available for purchase only at the Publications Shop in the Supreme Court’s compound. The Nepal Kanun Patrika has been recently reprinted by Saman Publications, but Nepali Law Reports continue to remain largely unavailable in both hardcopy and soft copy. As a result, the combination of the above factors – together with the sorry state of public libraries where many issues of the Law Reports are either misplaced or missing altogether – makes it difficult for judges, law practitioners, students, researchers and concerned individuals to access and research Nepali Supreme Court’s decisions, notwithstanding the fact that such decisions constitute one of the key pillars of the Nepali legal system. This factor represents an institutional weakness for the Nepali judiciary, undermines the theory of compliance and, overall, weakens the effectiveness and accountability of judicial actions.

Powers and Jurisdiction of the Courts – The promulgation of the 1990 Constitution marked an extraordinary transformation of the Nepali judiciary, especially with regard to the newly-acquired extensive powers of the Supreme Court, maintained intact under the current Interim Constitution. The Supreme Court under Article 107(3) has appellate and original jurisdiction. Article 107(1) grants to the apex court the power of judicial review of the constitutionality of legislation and to void such legislation on grounds of unconstitutionality, hence departing from the traditional Westminster principle of parliamentary sovereignty. Under Article 107(2) the Supreme Court is empowered to exercise its extraordinary jurisdiction in Public Interest Litigation (PIL) cases. PIL as developed in the India has become a new kind of constitutional litigation tout court, which abandons the adversarial system as the Court can proceed suo motu or entertain the petition of any individual acting out of public concern. Significantly, Article 32 on the Right to Constitutional Remedy directly links the protection and enforcement of fundamental rights to judicial intervention. In this regard, the Supreme Court has also been empowered to issue directive orders and prerogative writs. Under Article 107(4) the Supreme Court is not bound by its previous decisions and is permitted to review its own judgements and final orders. Additionally, Article 102(3) of the Constitution and Section 7 of the Supreme Court Act 1991 determine the power and modalities under which a contempt of court prosecution can be brought forward.
The Supreme Court has developed over the year through case-law its own version of the 'political question doctrine' starting with the Ambassador Appointment case *(Radheshyam Adhikari v. Council of Ministers, 1992)*. Questions about the discretion and accountability of the apex court in highly politicised cases arose with the string of controversial House Dissolution cases between 1994 and 2002 *(Hari Prasad Nepal v. Prime Minister, 1995; Rabi Raj Bhandari v. Prime Minister, 1998)*. Moreover, two bouts of emergency rule in 2001-2 and 2005 entailed the suspension of a number of the Constitution's fundamental rights and the remedies the Supreme Court was empowered to dispense. In this regard, the judiciary proves to be the weakest of the three branches of government and the executive is always in the structural position to have the final word, especially in a Westminster-style parliamentary system where the executive dominates the political process and the term 'elective dictatorship' is used to describe its institutional position *(Leyland 2007: 117)*. In fact, Parliament can always amend laws and even the Constitution itself, provided of course that the necessary number of votes and rigorous party discipline are present in the House(s), but that is clearly an issue of political responsibility, which has little bearing on considerations for judicial reform.

4. JUDICIAL REFORM IN THE CONSTITUENT ASSEMBLY

The Report of the CA Committee on the Judicial System submitted in September 2009 states that the key objectives of judicial reform in Nepal are ‘effective dispensation of justice and wide-spread access to justice’ through a ‘reformed, independent, transparent, accountable, democratic and inclusive judiciary’ *(SPCBN, n.d.)*. The relationship between judicial independence and accountability evinced from the Report, however, seems heavily tilted towards the criterion of accountability of Nepali judges at the expenses of their independence. The principle of independence is thwarted by the non-compliance of the proposed model with the doctrine of the separation of powers. The Report envisions the creation of a Special Judicial Committee of the Federal Legislature, which is elected by the federal legislature amongst its members under Article 29(1) (c) and empowered to judicially review legislation under Article 29(2) (a) and appoint and discipline judges under Article 29(2) (c)-(d). The adoption of these provisions would seriously undermine the independence of the judiciary, its powers, functions, and ultimately its credibility. Thus, concerns with making the judiciary accountable should not destabilise the independence and the effectiveness of the institution deputed *par excellence* to the protection of the Constitution and the fundamental rights it enshrines.
REFERENCES


Court Cases:


CHAPTER 12

ENSURING INCLUSIVE DEMOCRACY FOR NEPAL: INDIGENOUS PEOPLES’ CASE FOR ‘DIRECT REPRESENTATION’ IN POLITICAL PROCESSE

- AMANDA CATS-BARIL
INTRODUCTION

Following a ten-year civil war, Nepal’s Comprehensive Peace Accord was signed on November 21, 2006 to bring peace, stability and rule of law to the nation. As the root causes of the civil war were linked to nearly 250 years of the over-centralization of power and unequal distribution of political opportunities and other resources amongst Nepal’s 123 caste/ethnic groups (Central Bureau of Statistics, 2011), the Comprehensive Peace Accord included explicit commitments to promote widespread social inclusion and guarantee political participation for Nepal’s marginalised groups going forward (Government of Nepal, 2006).

In 2007, the principles and spirit of the Comprehensive Peace Accord were embodied in Nepal’s Interim Constitution. The Interim Constitution laid the roadmap for Nepal’s twin transitional constitution writing and state-restructuring processes, including the terms for the election and operation of a Constituent Assembly composed of 601 members. Part VII of the Interim Constitution is fully dedicated to this topic and specifies that the Constituent Assembly members will be elected by a mixed system of proportional representation (PR) and first past the post (FPTP). Following protests in the Madhes region, which lines the Southern border of Nepal, and lengthy political negotiations, Article 63 of the Interim Constitution was amended several times to finally hold that there would be 240 Constituent Assembly members chosen through the FPTP contest; 350 through the PR contest; and an additional 26 members chosen by the Council of Ministers to ensure inclusion for groups who had not been represented via the other contests. More seats were allotted to the PR contest to champion inclusion and participation in the Constituent Assembly process and to ensure that the traditionally dominant elite castes were not over-represented in the Assembly.

Elections for the Constituent Assembly were held in April 2008 in line with the Interim Constitution and were, by almost all accounts, considered to be free and fair (The Carter Center, 2009). The resulting Constituent Assembly was celebrated as the most inclusive and representative political body in Nepal’s history with 191 women, 196 Madhesi, and 192 (37%) politicians from indigenous communities elected (excluding the representatives that were added by way of the 26 extra seats). Nonetheless, many traditionally marginalised communities
in Nepal took issue with the Constituent Assembly electoral system, claiming that although numerically-speaking the body was representative, in actuality the representatives from marginalised communities had not been chosen by the communities themselves but rather by the political parties. Furthermore, the groups argued that the whip system and the power given to parties to unseat parliamentarians at any time, and without justification, severely limited these representatives’ ability to break party lines and vote in favour of their indigenous constituencies on contentious issues.

This paper will discuss the claims of indigenous peoples in relation to the 2008 Constituent Assembly elections, focusing particularly on a case filed on behalf of eighteen indigenous peoples’ organizations in the Supreme Court of Nepal in 2009. The paper will analyse and discuss this case as well as make recommendations for how future elections could be improved to ensure an inclusive democracy for Nepal’s indigenous peoples.

NEPAL’S INDIGENOUS PEOPLES

According to the 2011 census there are 123 caste and ethnic groups in Nepal speaking 125 languages (Central Bureau of Statistics, 2012). Of these groups, approximately 37% of the total population of Nepal is made up of “indigenous peoples.” In Nepal, indigenous peoples refer to themselves as adivasi janajati. In Sanskrit, adivasi means first-settlers or first peoples and janajati refers to groups who exist outside of the Hindu varna caste system. The terms adivasi janajati and indigenous peoples will be used interchangeably in this report. The concept of “indigeneity”, which has gained both domestic and international political salience over the last 20 years, was first formally adopted into the Nepalese system in 2002 with the passing of the National Foundation for the Development of Indigenous Nationalities Act (the NFDIN Act). This Act created NFDIN as a “semi-autonomous foundation” composed of indigenous peoples and government representatives. The Act defines indigenous nationalities as follows:

> Article 2(1) “Indigenous nationalities” means a tribe or community as mentioned in the schedule having its own mother language and traditional rites and customs, distinct cultural identity, distinct social structure and written or unwritten history.

The Act mandates NFDIN to reduce inequalities between indigenous peoples and other groups in Nepal and to promote and protect indigenous cultural heritage and identity. As such, NFDIN has primarily focused on the preservation of
indigenous peoples’ cultural rights and economic/development status in Nepal without forging too far into the political arena (International Labour Organization, 2006). That said, in the Act’s Schedule, the Government explicitly recognises 59 indigenous groups, which is the only formal recognition provided to indigenous peoples in the Nepalese legal system. The import of this recognition and the Act itself were augmented when Nepal ratified ILO Convention 169 on Indigenous and Tribal Peoples (ILO 169) in 2007. This ratification committed the Government of Nepal to promoting and protecting the rights of indigenous peoples, including by way of enacting special measures to “safeguard” indigenous peoples’ institutions, cultures, subsistence practices and their general participation in social and economic life in Nepal.1 The Government of Nepal similarly recognised indigenous peoples’ rights to guaranteed political participation in decision-making processes that affect them when it voted in favour of the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP) in 2007.

ILO 169 provisions on special measures and UNDRIP’s provisions on guaranteed participation in political processes are critical for Nepalese indigenous peoples who have traditionally been excluded from political processes in Nepal.2 Indigenous peoples as a “social/ethnic” group within Nepal are severely under-represented in Government institutions. Despite constituting approximately 37% of Nepal’s population, from 1959 to 1999 indigenous representation in Nepal’s Government never passed 25%; their representation in the civil service never passed 10%; and their representation in the judiciary remains, to this day, essentially non-existent. The poverty rate amongst indigenous peoples ranges from 45—71% around the country and, besides Newars and Thakalis, indigenous peoples’ literacy rate fails to reach the national average of 51% (Gurung, 2012). These indicators are evidence of the root causes of conflict in Nepal. As noted in The Asian Development Bank’s Tenth Plan for the development of Nepal (2004), “conflict is intimately related to poverty, discrimination and social exclusion.” The ILO (2006) similarly recognized social exclusion as a “root cause of insurgency and political instability in Nepal.” Despite this obvious inequality, the Government of Nepal has invested little in developing special programs and policies for indigenous peoples. As one study founded, in Nepal’s Annual Programme of Fiscal Year 2006, out of 39 projects and programmes run by the Nepali government, only 4 were related to indigenous peoples. The allocated budget for these four programs was a total of NPR 56 million, .04% of the total government budget (Lama, 2009).

As Nepal’s indigenous peoples were so severely marginalized, and receiving such little attention from the Government, it was not a difficult decision for them to join the Maoist movement against the Nepalese State when it arose. Nepal’s indigenous peoples and other marginalized groups were easy recruits...
to the insurgency—their willingness to join the Maoists only highlighted the
degree of social and political discontent that these groups felt living under the
Hindu-dominated government and the extent of their disappointment in the
democratization project initiated by the ratification of Nepal’s 1990 Constitution
(IDEA, 2008). Many of the Maoist agenda items—including the demand for a
more inclusive, democratic and secular republic—aligned with the interests of
the indigenous movement. Indigenous peoples remained central to the success
of the Maoist movement and were “disproportionately involved [in the conflict]
as both combatants and civilian casualties” (ILO, 2009).

Indigenous Peoples & the Design of 2008 CA Electoral Policy

Following the signing of the Comprehensive Peace Accord, the indigenous
movement consolidated, allying with the Maoists in the negotiations of the
future Constituent Assembly’s formation and operation. Indigenous peoples’ first
centered effort in this period was targeted at the proposed Constituent Assembly
election policy and their objective to have a PR system to ensure inclusivity in
the Assembly. As noted by indigenous rights expert, Mukta Singh Lama, the first
priority of the adivasi janajatis...[was] to help craft a constitution that they can
own and that gives them security and respect as equal citizens of Nepal” (Lama,
2009). In August of 2007, the Nepal Federation of Indigenous Nationalities
(NEFIN) and the Indigenous Peoples’ Joint Struggle Committee (IPJSC) signed
a 20-point agreement with the Government of Nepal— this agreement was the
first ever between indigenous peoples and the Government (Gurung, 2012). The
first three of the twenty points of the agreement were directly related to election
policy:

1. While nominating candidates for the first-past-the-post electoral system
arranged for the constituent assembly election in the present constitution,
candidacy will be determined so as to ensure proportional representation
of all castes and janajatis.

2. While preparing a proportional list, all political parties participating in
the election will make arrangements to ensure representation of each of
the listed indigenous janajati communities.3

3. In case a listed indigenous janajati group is unable to secure its
representation through both electoral systems, the Government of Nepal
and the eight parties will reach a mutually acceptable conclusion in order
to ensure that there is at least one representative of such a group and that
the representation is legal and constitutional (NEFIN, 2007).

It was by way of this Agreement that the Government, while falling short of
adopting a pure PR election system, agreed to implement a mixed electoral system.
In the Agreement, the Government committed to ensuring that all 59 recognised indigenous communities in Nepal would have at least one representative in the CA. As this commitment was not realised in practice, it remains a major concern for indigenous peoples. In general, the 20-Point Agreement is testament to the longstanding concerns that Indigenous peoples’ representatives had about how representative the parliamentarians chosen through the proportional representation system would be. Indigenous peoples were concerned that their guaranteed proportional representation would not, in fact, guarantee a representative from each indigenous community in Nepal. This is why Point 1 of the Agreement calls for the representation of all castes/janajati and why Point 3 seeks to establish a mechanism by which non-represented communities could obtain representation.

Following the signing of the 20-Point Agreement, the Interim Constitution was amended to include in Article 63(3)(c) a commitment to have an additional 26 members of the Constituent Assembly nominated by the Council of Ministers “from among ethnic and indigenous groups who fail to be represented as a result of elections. The electoral system finally agreed to in the Interim Constitution and the Election to the Members of the Constituent Assembly Act called for 40% of the Constituent Assembly members to be elected through a FPTP contest and for the remaining 60% of the members to be chosen through the PR contest off of closed candidacy lists prepared by the political parties in line with schedules set out by the Election to Members of the Constituent Assembly Act (2007). As such, in some ways—including the principle of proportionality and promising a mechanism to ensure representation for non-represented groups—the policy reflected the interests of indigenous peoples, although in practice their principle concerns about representativity remained unaddressed.

**CONSTITUENT ASSEMBLY ELECTIONS IN 2008**

Elections for the Constituent Assembly were held on 10 April 2008 in accordance with the Election for the Members of the Constituent Assembly Act (2007) and the Interim Constitution, and in line with the spirit of the Comprehensive Peace Accord and the 20-point agreement between NEFIN and the Government of Nepal. The country voted in 240 constituencies for the FPTP race and as a single constituency for the PR race. More details about the elections and its results can be viewed in the Table below (Carter Center, 2009):
Given the historic significance of the 2008 elections, as the first democratic expression of the peoples of Nepal after the signing of the Comprehensive Peace Accord, it was remarkable the extent to which violence was limited and the elections were conducted “freely and fairly.” As noted above, the election resulted in the most representative and demographically diverse government body ever convened in Nepal. Despite impressive numeric representation of Nepal’s marginalised, particularly indigenous peoples and Dalit communities, took issue with the election system claiming that Dalit and indigenous Constituent Assembly representatives had not been elected directly by, and were therefore not representative of, the communities themselves.

THE CASE FOR INDIGENOUS PEOPLES’ REPRESENTATION: LAHURNIP ET. AL V. PM PUSHPA KAMAL DAHAL & THE GOVERNMENT OF NEPAL (“THE CASE”)

On 12 February, 2009 the Lawyers’ Association for the Human Rights of Nepalese Peoples (LAHURNIP) filed a case in the Supreme Court of Nepal to request the issuance of a writ mandamus, certiorari, or another necessary order, on behalf
of 18 indigenous peoples’ organizations. The Case highlighted the issues that indigenous communities had with regards to the Constituent Assembly elections and alleged that the exclusion of indigenous peoples’ own chosen representatives from the Constituent Assembly process contravened constitutional norms and Nepal’s international treaty obligations. The petitioners’ request was that an interim order be issued to halt the Constituent Assembly process or to force a reformation of the Constituent Assembly procedures to create an official consultative mechanism for indigenous peoples.

Procedural History

The preliminary hearing for the Case was held on 1 March 2009 before the Single Bench of Justice Min Bahadur Rayamajhi. After LAHURNIP’s argument was delivered, the Honorable Justice ordered all Government ministers, the Prime Minister’s Office and all of the established Constituent Assembly Thematic Committees to submit written answers as to “why the interim order should not be issued.” Several of the Offices complied and submitted their responses that systematically denied the merits of the case (the exact content of the responses will be reviewed below). Nonetheless, the Supreme Court stated that a hearing on the merits would be required. That hearing did not occur until May 2013, four years after the case had been filed. In the meanwhile, the Constituent Assembly was dissolved, challenging the immediate relevance of the case and the remedies requested.

Despite the Constituent Assembly’s dissolution, the Case does hold continued relevance for Nepal especially in the wake of the appointment of a new Electoral Government and the announcement of elections for a fresh Constituent Assembly on 19 November, 2013.

The Heart of the Argument

In essence, the claim of the 18 indigenous peoples’ organizations, and of the peoples these organizations represent, was that although from a numerical perspective indigenous peoples were proportionally represented in the Constituent Assembly, their representation was not “direct” insofar as the indigenous parliamentarians had not been elected directly by their communities. It is worth clarifying that indigenous peoples are not arguing for a “direct democracy” in the technical sense of the term whereby it is taken to signify that “each citizen is himself present to and directly participates in the decision-making process” (Young, 1986). Rather, the indigenous peoples of Nepal are arguing for direct representation in a representative democracy. Pragmatically, proponents of democracy in Nepal have accepted that “no person can be present at all the decisions or in all the decision-making bodies whose actions affect her life” (Young, 1986)—and indigenous peoples are no exception in this regard. For ease of reference, in this paper, indigenous peoples’ demand for representatives
to be chosen by them directly, as opposed to by way of political party lists, will be referred to as a demand for “direct representation.”

According to the electoral system established in the Interim Constitution and elaborated upon in the Election to the Members of the Constituent Assembly Act (2007), for the 60% PR portion of the elections, political parties were to be voted upon with all of Nepal voting as a single constituency. Each political party was to file a closed list of candidates before the elections with the Election Commission and was to ensure that on this list proportional representation was guaranteed for Women, Dalit, oppressed tribes/indigenous tribes, backward regions, Madhesi and others. The problem with this system, however, is that the parties appointed the marginalised groups’ representatives, as opposed to the groups they are supposed to be representative of. This means that the “representatives” were also ultimately accountable to the parties and not to the people and this is, in itself, a violation of general democratic rights and particularly—for the purpose of this paper—of indigenous peoples’ rights under international law to elect their own freely chosen representatives on the basis of their own, traditional “electoral” systems.

Beyond the initial violation of indigenous peoples’ right to direct representation, the system—according to LAHURNIP’s case—would bear frequent denial of indigenous peoples’ rights as the exclusion of indigenous peoples’ direct representatives amounted to a violation of indigenous peoples’ right to consultation on the development of any laws that may affect them, under UNDRIP and ILO 169. According to the UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), the test for whether or not consultation with indigenous peoples is required under international law is as follows:

In assessing whether a matter is of importance to the indigenous peoples concerned, relevant factors include the perspective and priorities of the indigenous peoples concerned, the nature of the matter or proposed activity and its potential impact on the indigenous peoples concerned, taking into account, inter alia, the cumulative effects of previous encroachments or activities and historical inequities faced by the indigenous peoples concerned.

(EMRIP, 2011)

Under this test, it is obvious that indigenous peoples’ consultation on the forthcoming constitution was required. The absence of this meaningful consultation through indigenous peoples’ legitimate representatives would have an echoing impact on the constitution writing process. The lack of accountable and directly elected representatives implied that indigenous peoples’ voice would not be heard and their interests not taken adequately into account in the constitution-writing process, with a significant chance that these same interests would therefore not be included in the final Constitution. It was in accordance with this logic that LAHURNIP filed their case in 2009.
Invoked Provisions of the Interim Constitution

LAHURNIP invoked several provisions of the Interim Constitution in arguing the Case. For one, the lawyers invoked the Preamble that, in part, guaranteed “the basic rights of the Nepali people to frame a Constitution for themselves and to participate in the free and impartial election of the Constituent Assembly in a fear-free environment” (Government of Nepal, 2007). LAHURNIP argued that the PR system as established under Nepalese law did not allow Nepal’s indigenous peoples to participate freely in the Constituent Assembly elections since their participation in these elections was essentially circumscribed by party membership and allegiance.

Furthermore, LAHURNIP argued that it was within the Government’s power under the Interim Constitution to establish specialised, affirmative action policies in favour of Nepal’s traditionally marginalised groups. In this regard, LAHURNIP raised Article 13 of the Interim Constitution that guarantees the right to equality and holds that “nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or advancement of women, Dalit, [and] indigenous ethnic tribes…” This provision amounts to an acceptance of the need for a commitment to substantive equality in Nepal as opposed to formal equality. This acceptance arises from recognition of the fact that the history of discrimination and favouritism in Nepalese politics means that indigenous peoples and other marginalised groups are not on equal ground with all other peoples in Nepal such that specific policies and measures are required to “level the playing field” and guarantee equality in practice.

Finally, LAHURNIP argued that under Interim Constitution Article 21, the “Right to Social Justice”, which guarantees all oppressed groups the right to participate in state structures on the basis of principles of proportional inclusion, indigenous peoples should have been given the right to directly elect their representatives on a proportional basis instead of simply being “passively” represented by the parties’ candidates who were of indigenous descent.

International Treaty Obligations & Expert Opinions

Significantly, international law has a special status in Nepal insofar as it is enforceable in domestic courts and takes precedent over national law should a conflict arise between provisions of domestic and international law. This status is protected in Nepalese legislation (Government of Nepal, 1990, Treaty Act, Article 9) and under the Interim Constitution (Article 33(m)). Nepal is party to many treaties relevant for the Case, including: the International Covenant on Civil and Political Rights (ICCPR); the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP); and ILO Convention 169 on Indigenous and Tribal Peoples (ILO 169). Although an argument for the Case could have been made under any and all of these treaties, LAHURNIP, in line with its overall...
advocacy efforts and in hopes of setting important precedents in Nepal, chose to argue the case under the treaties dedicated to indigenous peoples specifically: UNDRIP and ILO 169.

Indigenous rights under international law are broad and span from cultural rights like the continued practice of tribal rituals; to economic rights like communities’ right to determine their own development priorities; to political rights like the ones argued for in the Case. Relevant to this case are indigenous peoples’ rights to:

- Recognition as collective entities
- Special measures to correct for historic exclusion
- Consultation prior to the implementation of any policy or law that affects them directly.\(^6\)

In particular, LAHURNIP raised two provisions on indigenous peoples’ right to free participation in political processes:

- ILO 169, Article 6(1)(a) that places an affirmative obligation on signatory governments to “establish means by which these peoples can freely participate at all levels of decision-making in elective institutions”
- UNDRIP, Article 18 that holds “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives freely chosen by themselves in accordance with their own procedures.”

LAHURNIP raised these provisions specifically, as opposed to provisions related to special measures (for example) in recognition of the fact that the issue was more nuanced than numbers suggest. So, for example, the political reservation system put in place by Nepalese law, the PR representation system, could be argued to be a “special measure” intended to ensure proportional representation for indigenous peoples but there was no way for the Government to argue, given how the election system technically operated, that indigenous peoples were “freely participating” in elections. Nor could the Government argue that the indigenous representatives had been “freely chosen” by indigenous peoples themselves in “accordance with their own procedures.”

This argument was supported by the submission in court of the Special Rapporteur on the Situation of the Human Rights and Fundamental Freedoms of Indigenous Peoples’ country report on Nepal. This report was published in 2009 following the Special Rapporteur’s visit to Nepal in 2008. In the report, the Special Rapporteur noted:

The procedures in place for indigenous participation in the constitution-making process are not fully appropriate...nor are all indigenous peoples being allowed to participate through their own representative institutions. Further, the means provided for indigenous
participation in the constitution-making process do not appear to be devised with ‘the objective of achieving agreement or consent’ on the part of indigenous peoples to the constitutional provisions that directly affect their rights.

(Special Rapporteur on the Situation of the Human Rights and Fundamental Freedoms of Indigenous Peoples, 2009)

The Special Rapporteur’s expert opinion fully supported the contentions made by LAHURNIP as to the rights that Nepalese indigenous peoples were due under international law and as to how these rights were being violated by the constitutional processes unfolding in Nepal.

Nepalese Law Contradicting Domestic and International Provisions

LAHURNIP specifically contended that Articles 5 and 6 of the Election to the Constituent Assembly Members Act and accompanying regulations provided that participation in the Constituent Assembly elections could only occur on an individual or party basis. In this way, indigenous peoples’ rights to be recognised as a collective entity were violated insofar as their own collectivised political organizations were not recognised under Nepalese law as adequate electoral platforms.

Additionally, the complaint raised the issue of the party whip provision in the Republic Strengthening and Some Nepal Laws Amendment Act (2010). This Act amended several Nepalese laws, including the Political Party Dissertation Act (2054). In Section 89(8)(c) the Political Party Dissertation Act stated that a “Parliamentary Party” could use a whip to force members to vote on party lines; the Republic Strengthening and Some Nepal Laws Amendment Act amended this provision to read “Constituent Assembly Party” instead of “Parliamentary Party” implying that that the whip would apply in the Constituent Assembly as well, and thereby limiting indigenous peoples’ party-chosen representatives from advocating for the rights of their true constituencies. While voting against the party whip would not, in itself, be cause for the expulsion of parliamentarians from the Constituent Assembly it could easily serve as grounds for a party to revoke the parliamentarian’s party membership and, according to Interim Constitution Article 67(d), if a party states that a candidate “no longer holds the membership of the party” the candidate’s seat in the Legislature-Parliament would automatically be considered vacated.

Government Response

Although all the Ministries of the Government of Nepal were requested to submit responses to the petitioners’ claims to the Supreme Court, they were only received from the Chairperson of the Constituent Assembly, Mr. Subhash Chandra Nembang; the Office of the Attorney General, Mr. Ranshah Path; and the Minister of Culture and State Restructuring, Mr. Gopal Kirati. All of the Government
responses essentially made the same claim—that since indigenous peoples were proportionally represented in the CA, with a total of 218 CA members being of indigenous descent, “full respect has been paid to the issue of participation.” As such, the Government respondents argued that the Writ Petition failed to make a colourable claim. Amongst other points, the Government responses argued that since the CA Rules & Regulations had been a product of the Constituent Assembly itself, indigenous peoples had been “consulted” in the design and promulgation of those rules.

The Government responses also categorically raised the point that, out of the 14 Thematic Committees formed in the CA, the Committee for the Protection of the Fundamental Rights of Minority and Marginalised Communities had sufficient mandate and competencies to oversee the inclusion of indigenous peoples’ interest in the final Constitution. On the basis of these arguments, the Government requested an annulment of the writ petition. The Court, however, denied this request and kept the Case open and on file for over four years.

The Verdict

After holding a brief hearing in which LAHURNIP was asked to present international best practice examples of the kind of “direct representation” which they were requesting in the CA, the Supreme Court issued a final judgment on the Case in May, 2013. This judgment has not yet been made public; there has been neither media coverage nor a public Government response to the verdict. According to the attorneys who argued the case, however, the decision reached was favourable to indigenous peoples insofar as it recognised that the previous Constituent Assembly Rules & Procedures were in violation of Nepal’s international commitments to indigenous peoples. Without providing specific measures of redress, the Court issued a Directive Order to the Government, obligating it to do “further research” on methods and mechanisms for ensuring indigenous peoples’ inclusion and participation in the Constituent Assembly is in compliance with international standards. The Directive Order includes demands to amend relevant laws, rules and procedures.

This decision is rather vague in nature and substance, however, and it is hard to say what the Government will have to do to satisfy the Court’s requirements.

CONTINUED INTERNATIONAL ADVOCACY

While waiting for the Court to revisit and issue a verdict in their case, LAHURNIP’s lawyers initiated an international advocacy campaign on behalf of Nepal’s indigenous peoples, arguing for their right to participate fully and equally in political processes. To strengthen the conclusions issued by the Special Rapporteur on the Rights of Indigenous Peoples (quoted above), LAHURNIP filed a complaint with the Committee on the Elimination of Racial Discrimination (CERD), the
body responsible for implementing the International Convention to Eliminate All Forms of Racial Discrimination (ICERD), under the Committee’s Early Warning and Urgent Action Procedure. Under this procedure, peoples, organizations, and other entities, can appeal to CERD to request that the Committee intervenes in cases where serious violations of the International Convention to Eliminate All Forms of Racial Discrimination (ICERD) are at stake. The procedure is designed for use in circumstances when the Committee is needed in order to “avoid irreparable harm” to a discriminated against person or peoples in a country whose Government is a signatory to ICERD.

LAHURNIP argued that due to the Supreme Court’s lack of action in response to its petition and the Government of Nepal’s failure to reform the CA process in response to indigenous peoples’ expressed and internationally-supported demands, Nepal’s indigenous peoples were on the cusp of being irreparably harmed by the continuation of the CA process. In March 2009, CERD adopted a communication addressed to the Government of Nepal. The communication stated, in part: “Nepal’s new constitution is currently being drafted by a Constituent Assembly in which indigenous persons may only formally participate if they were chosen by political parties and act in strict conformity with the manifestos of those parties” (Committee to Eliminate Racial Discrimination, 2009). CERD requested the Government to take urgent action to redesign the CA procedures and ensure that there was a mechanism in place to promote consultation with indigenous peoples.

The Government responded to CERD, stating its intention to address the rights of indigenous peoples by way of the CA Committee to Protect the Rights of Minority and Marginalised Communities, as it submitted in its domestic responses to LAHURNIP’s case. CERD responded to the Government’s communication with a follow-up letter, and raised its concerns that the Committee to Protect the Rights of Minorities “may not be an effective alternative to a specific thematic committee” for indigenous peoples (Committee to Eliminate Racial Discrimination, 2009). CERD’s concerns were borne out by the fact that the Committee to Protect the Rights of Minorities’ report failed to address indigenous peoples’ rights, like the right to self-determination and to self-governance. CERD’s urgent recommendation to form a dedicated thematic committee for indigenous peoples was ignored.

CERD’s communications with the Government of Nepal have proved fruitful, however. For one, the communications document the legitimacy of indigenous peoples concerns in Nepal, by showing that international experts’ concurred with Nepal’s indigenous peoples’ sense that their rights were neither protected nor promoted by the CA process as structured. Furthermore, CERD was able to articulate the heart of Nepalese indigenous peoples argument, saying: “effective indigenous representation should be guaranteed by allowing the participation of indigenous representatives who are freely chosen and identified by the peoples concerned according to their own procedures.” While CERD’s recommendations
went unheeded by the Government before the dissolution of Nepal’s former Constituent Assembly, LAHURNIP submitted the CERD communications to the Court as evidence and the Court considered them before issuing its final verdict in the Case. Hope remains that the Government of Nepal will also reference the CERD communications while designing the structure and procedures for a better-functioning and more effective future Constituent Assembly and electoral system.

**IMPLICATIONS FOR NEPAL’S FUTURE ELECTION AND CONSULTATION POLICIES**

Despite the Court’s favourable verdict in the Case, an Election Ordinance was already passed to set the guidelines for Nepal’s next Constituent Assembly elections, scheduled for 19 November, 2013. As dictated, it seems that these elections will be less inclusive than the previous ones, as the proposal has been made to reduce both the total number of Constituent Assembly members and the proportion of the members that will be elected through a PR race. These proposals violate the spirit of Nepal’s international commitments, of the decision reached in the Case that is the subject of this paper, and of Nepal’s Comprehensive Peace Agreement and Interim Constitution which both contain a vision of Nepalese politics as democratic, inclusive, and aligned with international human rights standards.

If anything is to be learned from the shortcomings and ultimate failure of Nepal’s previous Constituent Assembly, it is that without ensuring the genuine inclusion and participation of vulnerable communities, it will not be possible to successfully complete the peace-building processes mandated by the peoples of Nepal. Peace-building requires genuine dialogue and the willingness to listen and to compromise. While being the most inclusive body in Nepal’s history, demographically-speaking, the CA’s composition and procedure failed to allow for the dialogue that might have borne compromise on contentious issues such as the federal design of the future Nepal. Since it is these contentious issues which remain on the table for the future Constituent Assembly to resolve, it is imperative that the required space and time is given for equitable negotiations to unfold; negotiations in which Nepal’s vulnerable communities are well-represented by peoples of their own choosing.

In concrete terms, this necessitates the official removal of the party whip system, at least insofar as it legally applies to the Constituent Assembly and a tightening of the rules related to party expulsion; a more objective test for when it is appropriate for a party to expel a member (with the consequence that they would lose their seat as a Parliamentarian) should be promulgated. Additionally, as per the recommendations made by CERD and the Special Rapporteur on indigenous peoples, if the system of Thematic Committees is retained in the future CA, a specific committee on indigenous peoples should be created in recognition
of: a) the fact that indigenous peoples are distinct from other minorities and marginalised communities in Nepal and that, in fact, they constitute approximately 40% of Nepal’s population; and b) the fact that indigenous peoples are entitled to categorical and special rights under international treaties and declarations to which Nepal is party. These reformations would collectively allow for the realization of indigenous peoples’ right to participate freely and fully in the CA and in decision-making which affects them, their rights, and their lands and territories, as required by international law.

None of these reformations, however, will quell indigenous peoples’ concerns about representativity until there has been some effort made on behalf of the Government of Nepal to reform the country’s system of political representation to account for indigenous peoples’ international rights and for their established political organizations, such as the Nepal Federation of Indigenous Nationalities (NEFIN), a federation of Nepalese indigenous peoples’ organizations formed in 1991. As recognised by the ILO’s Committee of Experts, international indigenous law “does not impose a model of what a representative institution should involve, the important thing is that they should be the result of a process carried out by the indigenous peoples themselves…” Indigenous peoples should be consulted on the future Constituent Assembly design process in Nepal; if indigenous peoples are not consulted during the design, and if their rights and institutions are not accounted for as a result, the Constituent Assembly cannot be considered a representative institution. Consultation practices and “direct representation” electoral systems are often difficult to implement in practice because they must be tailored to the political systems, cultures and histories that predate them. There is, however, a growing body of best practice examples that serve as references for countries seeking to design complex electoral systems and consultation mechanisms.

**International Examples of “Direct Representation” for Indigenous Peoples**

In issuing its verdict in the Case, the Supreme Court of Nepal asked the right question: what are international examples of the type of direct representation that indigenous peoples in Nepal are requesting? Indigenous peoples’ right to elect freely chosen representatives according to their traditional procedures and methods of voting is a difficult right to make operational. It raises a number of democratic questions and challenges. For example: how to balance democratic interests in promoting formal and/or substantive equality? and, in a national race for a national government, is it possible to have different voting procedures for different constituencies? There is no ready-made answer to these questions but several countries have grappled with them and come up with workable solutions. These nations’ legal schemes cannot, of course, be considered directly practical in the context of Nepal but nonetheless can serve as guidelines for the Government as it seeks to design and implement a more effective system of representation for indigenous peoples in its forthcoming Constituent Assembly and governance system.
There are several different methods for ensuring group representation in elections. These are, amongst others: quotas, political reservations, districting and/or the redefinition of voting constituencies, and the pure promotion of indigenous or community-based voting traditions. For example, certain of the proposals for the future Nepalese State, in reorganizing voting constituencies (i.e. federal units) based in part on identity considerations, would in theory promote indigenous peoples’ right to choose their own representatives for national level government (assuming that the federal units are guaranteed representation at the center). Other than these traditional tools for improving group representation in elections, it is very difficult to design a national-level electoral policy that allows indigenous peoples to choose their representatives in accordance with their traditional procedures.

Rather, it might be preferable to rely on institutional design and local level elections to ensure that indigenous peoples are provided the opportunity for meaningful participation in and consultation on national level decision-making processes. This section will briefly review two examples of unique methods that have been implemented in Finland and Mexico, respectively, to ensure indigenous participation in Government and consultation on policies.

**Separate Constitutional Body to Protect Indigenous Autonomy and Traditional Decision-making**

The only indigenous peoples recognised in Finland are the Sami. The Sami population is around 9,000, amounting to .15% of the total population in the country. Sami are identified in line with the principles of ILO 169, in other words by way of self-identification via the national census. There are also linguistic and descent-based criteria that serve as an objective check on the self-identification (Minority Rights Group International). Under the new Finnish Constitution, adopted in 2000, Sami are recognised by the Government; their autonomy is guaranteed in the Sami homeland in the North; and their rights to develop their language and culture are protected (Finnish Constitution, 2003, Section 17; Section 121).

The Sami have a separate Assembly (formerly recognised as a parliament) in Finland known as the Samedikki. The body was formed under the Sami Assembly Act in 1995. The Sami Parliament Act establishes the Finnish Sami Parliament, with 21 members and four vice-members of the Sami Parliament who are chosen by the Sami through elections every four years (Government of Finland, 1995, Act on the Sámi Parliament, chap. 3, section 10). The Assembly makes all decisions about Government spending related to the Saami and decisions about cultural and linguistic preservation. The Finnish Government is also obligated to consult with the Samedikki about all manners that affect the Sami; while the decisions made by the Sami are not binding on the national parliament, the recommendations made by the Samedikki must be taken into account.
This system is not perfect. For one, the Sami Assembly remains subservient to the National Parliament, even on matters that should—from an international law perspective—be decided by the Sami Assembly. Additionally, the Sami Assembly recommendations are, as noted above, not binding on the Finnish Parliament. As such, while indigenous peoples’ right to consultation is guaranteed, their right to provide their free, prior and informed consent on matters that affect them is not secured and many Sami raise complaints on this issue. As reported to the Special Rapporteur on Indigenous Peoples by representatives of the Samedikki: “most of their proposals and comments to the State, even on matters within the Parliament’s recognized sphere of competency, remain unanswered by the Finnish Government” (Special Rapporteur, 2011). Nonetheless, the Assembly does allow the indigenous peoples of Finland to have a political space of their own which can influence decision-making processes in the national Parliament and the Special Rapporteur has recognized the establishment of the Parliament as an “important example” of how to secure the rights of indigenous peoples globally.

Nepal could look to set up a similar institution in its future system of Government. This would allow for the establishment of a formal consultation mechanism in which indigenous people participate through their own freely chosen representatives, without necessitating reform of Nepal’s national level electoral system.

Legal Protection and Promotion of Customary Voting Practices

According to the National Population Council, Mexico has approximately 13 million indigenous peoples, constituting 13% of the country’s population, and spread across the 32 states of the nation (IWGIA 2011). As the first country to ratify ILO 169 after its promulgation in 1989, Mexico implemented its commitments under the Convention by enacting extensive constitutional amendments in the 1990s. These included amendments to state constitutions, as it is the states in Mexico who are mandated to manage indigenous affairs. Oaxaca, a state in Southern Mexico with a 70% indigenous population, is renowned for having promulgated the most extensive amendments of all the Mexican states and for having the most “indigenous-friendly” policies. In March 1997, particularly, Oaxaca reformed its Local Political Constitution to make “more clear, explicit and operative” the electoral rights of Oaxaca’s indigenous communities. Chapter 4 of the Code for Political Institutions and Election Procedures in Oaxaca lays out the electoral process called Usos y Custumbres that essentially allows all municipalities in Oaxaca to choose whether they would like to hold local elections in accordance with traditional indigenous practices or the common party system. A majority of municipalities chose to hold elections in accordance with Usos y Custumbres. A similar system could be developed in Nepal in areas where indigenous peoples constitute a clear majority.

While some indigenous communities in Mexico feel that their rights have been promoted by the implementation of the usos y custumbres system, many other
communities are uncertain whether or not the practice has resulted in a more just representation of indigenous peoples’ interests. Some criticize the system for allowing further entrenchment and manipulation of elections by the PRI, the party that ruled Mexico for over 70 years. Also, since the usos y custumbres are only implemented at the local level in Mayoral elections, they do not ensure indigenous representation in the national government in Mexico.

The Preamble to Oaxaca’s Constitution recognises that implementation of the system of usos y custumbres has “encountered multiple operative difficulties. It is not easy nor fast to remove the inertia built up over the years, the centuries” (Constitucion de Oaxaca, “Exposicion de Motivos”). There are fundamental human rights concerns in relation to the implementation of usos y custumbres. One exemplary case involved a Zapotec (the largest indigenous community in Oaxaca) woman named Eufrosina Cruz, who sought to become the mayor of Santa Maria Quiegolani—a municipality that chose to orchestrate its elections according to usos y custumbres. While Ms. Cruz was allowed to participate in the Mayoral election, her challenger nullified votes in her favour as, from a traditional standpoint, women are not allowed to govern in Zapotec communities. Ms. Cruz tried to challenge the nullification at the State-level but was unsuccessful (Eisenstadt, 2011). Finally, in response to a complaint filed with the National Commission of Human Rights in Mexico, Ms. Cruz and her supporters received a favourable response, ordering the reform of Oaxacan law to ensure that the promotion of traditional voting practices was circumscribed by a broader commitment to gender equality and other fundamental human rights. In 2011, Ms. Cruz, then representing Oaxaca in the State Congress, recommended a constitutional reform that would guarantee women the right to participate and vote in municipalities using usos y custumbres. The proposal was approved by Oaxaca’s Congress on 28 April 2011.

Despite this victory, many women are still forbidden from participating, not only as a candidates, but as voters in the usos y custumbres systems. The National Human Rights Commission study Women’s Political Participation in Mexico, based on a review of 2007 elections, found that 361 municipalities rely on usos y custumbres. Out of these, in 234, all women can vote; in 59 women are barred from voting altogether; in 15 only married women can vote; in 5, only widows; and these are only examples of the figures. Other restrictions apply and social pressures also often bar women from participating in these systems even if they are legally allowed to do so (National Human Rights Commission of Mexico, 2009).

The Mexican system shows that implementing indigenous peoples’ right freely chose their representatives must be done carefully; a delicate balance should be struck between respecting traditions and ensuring that these traditions do not, in themselves, perpetuate human rights abuses and discrimination. Still, the Mexican example could serve as an important one as Nepal pursues federalization and decentralization, establishing a formal “three-tier” Government system. At
the municipal level, where indigenous peoples constitute a clear majority, there could be “opt-in” clauses allowing the municipality to democratically agree to implement traditional voting practices at that level. These local level initiatives, however, should not be considered a substitute to a national level consultative mechanism, like that of the Sammediki in Finland.

CONCLUSION

LAHURNIP et Al v. PM Pushpa Kamal Dahal & the Government of Nepal brought to the fore a number of issues with the 2008 CA Elections which affect not only indigenous peoples, but Dalits, women, Madheshi, Muslim and other vulnerable groups in Nepal. The fundamental question is whether having political parties responsible for ensuring proportional representation on their closed party lists for the FPTP system, and having a single nationwide constituency for the PR race for which people can only run on individual or party bases, provides a sufficient safeguard for the political participation of Nepal’s vulnerable communities.

Indigenous peoples have particular concerns in this regard as they are entitled under international law to free participation in political processes by way of representatives chosen by themselves and in accordance with their traditional practices. While recognizing that this right is difficult to realise in practice, the international examples provided in this report show that it is possible to implement innovative and responsive electoral, institutional, and governmental schemes that at least exhibit a Government’s will to see the right realised. This can go a long way towards fostering trust and cooperation with communities who, due to historic records, have good reason to otherwise distrust their Governments.

The Supreme Court of Nepal, in ruling in favour of LAHURNIP in the Case, took a first step towards building trust and good will between the GON and Nepal’s indigenous communities. It is now up to the executive and legislative branches of the Government to translate the verdict into action and to redesign the electoral policy and/or the procedural rules and regulations of the Constituent Assembly to ensure that Nepalese indigenous peoples are freely and genuinely represented in the forthcoming CA. This could, in turn, serve as a platform for discussions regarding the development of a permanent consultative mechanism that will ensure indigenous peoples’ meaningful inclusion in Nepal’s future democracy.

REFERENCES


International Labour Organization (1989, June 27), *Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries*.


1. INTRODUCTION

Nepali society is heterogeneous and hierarchical in terms of caste, ethnicity, language, religion and culture. However, the caste-based hierarchy, backed by Hindu "Varnashramik" sociocultural system, is most significant phenomenon of Nepali society. The fundamental structure of Nepali State is also more or less based on Hindu Varnashramik philosophical grounds. Thus, our society is fraught with hierarchy based on the caste system as well as Varna System, caste-based discrimination and untouchability, exclusion and deprivation.

"Dalits" occupy the bottom of 'the four-folded' Hindu caste structure and are the most affected community from discrimination, exclusion and deprivation in Nepal. They are treated as sub-human and untouchables and therefore boycotted by the dominant groups of the society. They are also economically exploited and politically excluded from State power, opportunities and resource distributions (Kisan, 2009: 46-47). Thus, the political, economic, educational and sociocultural status of Dalits in Nepal is the worst of any community.

Social exclusion and racial, ethnic and caste based discrimination have always been part of human history. Stratification of human beings on the basis of colour, caste, class, creed, region, religion, occupation and language is a historical phenomenon. In the course of human development; social exclusion has taken the form of segregating a group of people from the social, political, economical and cultural domains. But, the fundamental social reality that needs to be exposed here is that social exclusion does not limit itself to segregation and deprivation. Social seclusion and isolation provides for a sense of superiority and inferiority among citizens of the same society or a country. Further, social exclusion also culminates in a system of domination and subjugation. All these processes ultimately lead to oppression and exploitation (Louis, 2001:5). In this regards, in Nepal, the Dalit community is the most excluded in terms of political, economic and sociocultural aspects. The Dalit movement in Nepal against all forms of discrimination, exclusion, deprivation and exploitation and for equality and inclusion has gone on for more than six decades.

After the restoration of democracy in Nepal in the 1990s, the issues of equality, non-discrimination and inclusion emerged so widely that the government of Nepal and policy makers started to seek ways for building a better understanding of social exclusion and inclusion in Nepali context. For instance, the Constitution
of the Kingdom of Nepal 1990 included some provisions for Dalits’ inclusion in terms of non-discrimination, socioeconomic and affirmative action policy aspects. The policy makers made an attempt to recognise the need to address Dalit issues for the first time through the Government’s 9th Five Year Plan (1996-2001).

After the establishment of Loktantra (so called inclusive democracy) in April 2006 and Ganatantra (the Republic) in 2008, there were many plans, pronouncements, laws, regulations and budget speeches made by the government and various authorities of the State to implement Dalit inclusion. Article 13 of the Interim Constitution of Nepal, 2007 provides the right to equality and nondiscrimination including the right to affirmative action; Article 14 provides rights against caste-based discrimination and untouchability; and Article 21 provides rights to proportional representation in all organs, sectors and levels of the State as per the principle of social inclusion. There are several laws and regulations that have made amendment to make them compatible more or less with the Article 13, 14 and 21 of Interim Constitution. The separate 'Caste-based Discrimination and Untouchability (Offence and Punishment) Act, 2011’ passed and around a dozen of laws (acts and regulations) have been made or amended to ensure that guaranteed representation for Dalits in the Constituent Assembly/Parliament, civil services, security forces, school level teachers, University teachers and other State’s institutions. The thematic committees of first Constituent Assembly (2008) also proposed several provisions for Dalits’ inclusion and provisions for making the State more inclusive overall. While it is certain that all these State initiatives for Dalits’ inclusion are not sufficient, the question remains as to how serious and genuine those attempts are. Further question remains as to how the forthcoming constitution will include and protect the rights of Dalits.

2. DALIT: A PRODUCT OF HINDU CASTE SYSTEM

The issues and problems related to caste and the caste system are not only domestic issues of Nepal, but also similar issues of South Asia, Middle-East, the Pacific, West-Africa, America and Diaspora communities around the world, in general, and Nepal, India, Pakistan, Bangladesh, Sri Lanka, Bhutan, Japan, Nigeria and Senegal, and USA in particular. The caste system affects approximately 260 million (Caste discrimination, n.d.) people worldwide, the vast majority living in South Asia, moreover, Dalits of Nepal who occupies 13.20 percent national population (CBS, 2011) are directly affected negatively by caste system and untouchability practices, though, most of the Nepali people are affected from caste system in one and other aspects.

Caste and the caste system are interlinked phenomenon. Several scholars have tried to define 'caste' which comprises various characteristics. For instance, according to Oliver C. Cox "caste describes a theoretical arrangement of the
people of a given group in an order in which the privileges, duties, obligations, opportunities are unequally distributed between the groups which are considered to be higher and lower” (Cox, 1942: 218). This definition insists that, privileges, duties, obligations, opportunities are determined by birth both in higher and lower caste group. Louise Dumont says that "Caste is a State of mind" (Dumont, 2004:34). Dipankar Gupta expands Dumont’s ‘State of mind’ to 'State of Hindu mind' saying that "the direct outcome of this approach is the belief that the 'Hindu mind' (or the inhabitants of India) is guided solely by a caste perspective and is perpetually bound down by it" (Gupta, 1981: 2096). According to Kavoori, "in the Indian sub-continental context, the essence of caste is Varna, which divides Hindu society into four orders called Brahmana, Kshatriya, Vaishya and Sudra. Brahmana, Kshatriya and Vaishya fall under ‘twice-born’ castes while the Sudras are called ‘single’ born caste. Outside these four Varna there are the Untouchables” (Kavoori, 2002: 1157).

It should be clear that 'caste system' is a basic foundation or factory of caste along with all its characteristics. Oliver C. Cox has aptly described the caste system saying that, "the caste system is ancient, provincial, culturally oriented, hierarchical in structure, status conscious, non-conflictive, non-pathological, occupationally limited, lacking in aspiration and progressiveness, hypergamous, endogamous, and static" (Cox, 1945: 360). Another scholar describes the Caste system's "rigidness, ritual hierarchical system, ascribed status and group ranking (Pankaj, 2007: 334). Some other scholars define it as governing and ordering the patterns of relations between the dominant and the dominated, between high status and low status groups, between patrons and clients (Racine & Racine, 1998: 12). Similarly, G.S. Ghurye has delineated six major features of the caste system that "the segmental division of society, hierarchy, restrictions on feeding and social intercourse, civil and religious disabilities and privileges of different sections, lack of choice of occupation and restrictions on marriage" (Ghurye, 1932 cited in Gorringe, 2008: 135-36). He has further extended it by pointing out, that caste operates at a group level and is based on hierarchy and separation. One may belong to only one caste and that caste is ranked vis-à-vis others (Gorringe, 2008: 143). Likewise, Vivekananda Jha expresses similar ideas to Ghurye and Gorringe that "caste as a system of social stratification characterised by hierarchy, heredity, pursuit of one or a few particular occupations, inequality, endogamy, restrictions as to taking food from outsiders, and the notion of purity and pollution associated with hierarchy" (Jha, 1997: 19-30). All the scholars identified hierarchy, purity and pollution, fixed duties and privileges, hypergamy and endogamy, hereditary occupation and caste-based discrimination as well as untouchability as common features of the caste system. Hence, Supported by philosophical elements, the caste system constructs the moral, social and legal foundations of Hindu society (Caste discrimination, n.d.).

There is no doubt that Hindu phenomenal caste system and untouchability is emerged in India and later on transmitted to other countries of South Asia, like
Nepal, Bhutan, Bangladesh, Sri Lanka, Pakistan and other countries of South East Asia. Concerning Nepal it was transmitted around 200 AD with Licchhavis migrated from the North India to Nepal’s hills. The Licchhavis defeated the Kirati kings and started to expand their rule. Anshubarma, a popular Licchhavi ruler started to rule Nepal (Kathmandu valley at that time) under the philosophy, norms and values of Hindu Varna system which was made more strong and deep-rooted by the King Jayasthiti Mall (1360-1395 AD). King Prithvinarayan Shah (1721-1774 AD) expanded the system all over the country which was codified as Muluki Ain (National Civil Code) by his dynasty King Surendra Vikram Shah in 1854 AD. This code ruled over the country for more than a century till 1963 AD. However, the Hindu castes system and its manifestation of caste-based discrimination and untouchability is still prevails all over the county even today after the restoration of democracy, inclusive democracy (Loktantra) and republic.

Therefore, the Dalits of India and Nepal are truly product of Hindu caste system. Consequently, the sociocultural status of Dalits, functioning aspects of Hindu castes system, and way of caste-based discrimination against Dalits are look like same in India and Nepal. However, the magnitude of discrimination and atrocities can be seen different within and outside of country.

2.1 Use of term 'Dalit'

'Dalit' is a modern and refined identity of a group that belongs to post-Vedic 'Sudra' because in Vedic period Sudra was not originally considered as untouchable. Chandal, Nishad, Ben, Rathkar, and Pukkas of Mahabharata and Purans, Upanisads and Smrities and Harrijan of Gandhi and untouchables of Ambedkar are all considered as post-Vedic Sudras or Dalits (Jadhav, 2008: 2 & Zelliot, 2001b: 137). However, one question that has always been raised in regard to the history of Dalit affirmation is 'who coined the term "Dalit" at first, when and where?' Various arguments and contested opinions can be found in this regards.

There is no doubt that the term 'Dalit', along with its revolutionary and progressive meaning, is popularised by the 'Dalit Panther Movement of Mahar's in Maharashtra (Bombay)' in the 1970s (Rajshekar, 1983: 14 & Joshi, 1986: 142). However, it was in 1888 that the 'Anarya Dosh Pariharak Mandal' first articulated this emerging Dalit interpretation of Mahar and Chambhar culture and apparently, it was used in the 1930s as a Hindi and Marathi translation of depressed classes, untouchable, backward, oppressed and Harijan (Constable, 1997: 322-334). Also it seems that, the word 'Dalit' was used by BR Ambedkar in his Marathi speeches, but not in his writings, around the 1930s (Reddy Bharati, 2002: 2 & Massey, 1991: 65). Anyway, the Marathi word "Dalit" like the word “black” for African Americans was chosen by the group itself and is used proudly. None of the prevalent terms "untouchables", "scheduled castes", "depressed classes" nor Gandhi’s euphemism, 'Harijan' have the same connotation (Zelliot, 2001a: 27). At present, the term Dalit is widely used in India and even in the Government’s documents in Nepal.
2.2 The Nepali Dalit

The term "Dalit" was first used in Nepal, when Nepal Rastriya Dalit Jana Bikash Parishad (National Council for Dalit People’s Development in Nepal) a national organisation was established in 1967 by the Dalits and for the Dalits (Kisan, 2005: 96). After the restoration of democracy in Nepal in 1990, the term "Dalit" was widely used by Dalits’ organisations as well as by the Dalit movement and Dalit political leaderships, civil society organisations, political parties, national and international NGOs and donor agencies. The Local Self Governance Act, 1999, recognised and introduced the term Dalit for the first time in Nepali legislation and after the second People’s Movement in April 2006, the term Dalit was included in the Interim Constitution of 2007 as well. Since then, the term 'Dalit' has been unanimously accepted and used as an assumed identity for unity, struggle, aspiration, equity, dignity and justice by the Dalit community as well as the Dalit movement.

The National Dalit Commission defines 'Dalits' as "those communities who, by virtue of atrocities of caste-based discrimination and untouchability are most backward in social, economic, educational, political and religious fields and deprived of human dignity and social justice" (NDC, 2008: 6). This interpretation and understanding of the term ‘Dalits’ however, could be different but in contemporary Nepali parlance, it is used to refer only to those officially categorised within the ex-untouchable castes by the National Dalit Commission, the institution which has the authority to make and amend the castes schedule of Dalits. According to the Commission's latest schedule there are 26 caste groups identified and categorised as Dalit, 7 from the Hill region and 19 from Tarai-Madhes as below (NDC, 2011):


In terms of geographical settlement, Dalits of Nepal are mainly divided in two groups: Pahade (people from the hills) and Madhesi (people from Tarai-Madhes) and in terms of race/ethnicity, Dalits are divided into three sub-racial groups: hill Aryan, ethnic Newar and Dravidians Madhesi. Dalits have settled throughout all geographical and ecological regions, in Nepal. Dalits of Nepal express themselves in different mother tongues like Nepali, Awadhi, Bhojpuri, Maithili, Magahi, Doteli and Newari and they belong to different political ideologies, different political parties, and different religious faiths. Nonetheless, in fact, Dalits of Nepal are officially (de-jure) 'ex-untouchables' because the constitution and laws of Nepal deny such discrimination and practically (de-facto) 'present untouchables'
because the untouchability practices is prevailing all over the country and every spheres of daily life.

Many observers have commented that there is untouchability among the Dalits. In the same vein, we may say there are Dalits among the Dalits. There are various degrees of discrimination and oppression by so-called higher Dalit castes against the lower Dalit castes, and there is discrimination and oppression among castes within the Dalit category (Shah, 2001: 25). In fact, Dalits have not reproduced the hierarchy among themselves but maintain the hierarchy and discrimination that was forced upon them by the Hindu Varnashramik social order and other higher castes. This bitter fact is the main barrier for building a unified Dalit movement in contemporary Nepal.

3. SOCIAL EXCLUSION AND INCLUSION IN NEPAL: CONCEPT AND APPLICATION

3.1 Social Exclusion

The term 'Social Exclusion' is defined in various perspectives and dimensions by various social scientists, social scholars and institutions. For instance, 'social exclusion' has defined with reference to 'participation and citizenship rights', 'institutional process and power relation', 'poverty and economic activities', 'institution, agent and agency' that occurs when the institutions that allocate resources and assign values operate in ways that systematically deny some groups the resources and recognition that would allow them to participate fully in social life (Jackson, 1999: 128-129; Haan & Maxwell 1998: 2; Room, 1992: 14; Stewart & others, 2006: 4; Peace, 2001: 26; Saith, 2001: 8 & Silver, 2007: 4). Those aspects that mentioned above are widely applies in Nepal.

Many scholars are contributing to expand the knowledge on social exclusion concept. For instance, Amartye Sen has divided social exclusion into 'active and passive exclusion' as per the nature of exclusion that individuals or groups of people through social processes in which there are deliberate attempts to exclude (Sen, 2000: 14-18). Similarly, Iris Marion Young has discussed on 'external and internal' exclusion that occurs deliberately through the back-door brokering ways (Young, 2000: 53-55). In addition, Hillary Silver discusses three paradigms of social exclusion such as solidarity, specialization and monopoly that each paradigm has a different notion of social integration, links social exclusion to a different cause, and is based on a different political philosophy (Silver, 1994: 539-543). In Nepal context, solidarity and monopoly paradigm of exclusion is applying extensively by ruling castes and class to excluded marginalised and backward groups.

Though, social exclusion is a theoretical lens to understand society and act accordingly. However, the acts of social exclusion always occur through different processes, institutions, agency, hegemony, compliance, resistance and rule of
game that are explored and discussed by many scholars extensively (Stewart 2006: 4; Kabeer, n.d.: 20-24; Jackson, 1999: 136 & Pradhan, 2006: 11-12). Importantly, ‘rule of game’ is a tool of those power-holder groups of the State or a society that play the role to exclude an individual and a group of people in the name of Constitutional and legal provisions, relegations, directives and other social norms and values which is extensively applying in Nepal.

Regarding the discussion on the areas and bases of exclusion there have been discussed extensively. For instance, Hillary Silver outlines the areas of exclusion such as long-term or recurrent unemployment or poverty, illiteracy, mentally and physically disability, single parenthood, women, foreigners, refugees, immigrants, minorities and other status (Silver, 1995: 74-75). Similarly, Gore, and Figueiredo discusses that livelihood, employment, education, representation, and social services, physical infrastructure, family and sociability and housing might be a few symbolic areas of exclusion that prevails globally (Gore, and Figueiredo, 1997: 7-34). Moreover, in Nepali context, including those areas, usually exclusion occurs in State agencies and services, non-state institutions, public places and sociocultural affairs, political parties, non-governmental institutions and ritualistic performances on the status of caste-ethnicity, gender, physical incapacity, linguistic, religion and regional belongingness. More importantly, in Nepal, there are several areas of exclusion that applies by denying interring into the Hindu temples or other holy places and private houses and restricting sociocultural intercourse towards Dalits and other so-called lower castes people. However, the constitutional provisions and laws do not tend to exclude any individuals or groups of people directly.

Making indicators of social exclusion is necessary for policy makers, sociologists and politicians seek to determine how to measure social exclusion. Though, it is difficult to make easily. Hillary Silver (2007) has argued, it is challenging to measure a term and concept that is as contingently defined as 'social exclusion'. However, she has collected the ‘exclusion indicators’ such as financial situation, ownership of durable goods, the quality of housing, neighborhood perception, personal social relationships, physical health and psychological well-being, level of consumption and savings, production, political engagement, social interaction, income poverty and material deprivation, exclusion from the labour market, exclusion from public services; and exclusion from social relations (Gordon, 2000, Burchardt, Le Grand & Piachaud, 2002 & Barnes, 2005; cited in Silver, 2007). In Nepal, including all those aspects, belongingness with lower caste like Dalit, Muslim, backward region are other indicators of exclusion.

Social exclusion prevails in all country of the world ether they are underdeveloped or developed, autocratic or democratic, socialist or communist, monarchical or republican. However, the way of exclusion occurs differently as per the different status of particular country. There are contested opinions find on the definition, meaning, domains, areas, elements, characteristics and indicators of social exclusion. However, the paradigms, kinds and means of social exclusion are recognised globally in the same ways and understanding. There is no doubt, the
concept of 'social exclusion and inclusion' is expanding and enforcing to apply mainly for poor and third world’s countries through multinational donors as well as UN agencies which is main causes of criticism on it. Not need to be hesitated that the concept had travelled to Nepal by riding on bilateral and multilateral donor agencies during the period of 1998 to 2007 AD.

3.2 Social Inclusion

The term "Social Inclusion" and "Social Exclusion" are understood as two sides of a coin. C. Jackson has written about the relationship between social exclusion and social inclusion and urges that there can be simultaneous exclusion and inclusion, that is individuals and groups can be excluded in one domain and included in another (Jackson, 1999: 133-34). It shows exclusion and inclusion are interlinked phenomena that can be occurred simultaneously. In addition, O’Reilly argues "...inclusion and exclusion are the extreme poles of a continuum of relations of inclusion and exclusion" (O’ Reilly, 2005; cited in de Haan & Maxwell 1998: 4). It means exclusion and inclusion are opposite pole of each. However, Hillary Silver argues, that the tendency to treat ‘social inclusion’ as the opposite of ‘social exclusion’ may reflect a desire to sound positive, to focus on social objectives rather than dwell on the past… in sum, social inclusion is not the opposite of social exclusion (Silver, 2010: 193-195). Inclusion is a compulsory consequence of exclusion indeed.

In addition, there is a general understanding that, exclusion is 'bad' and inclusion is 'desirable' all forms of inclusion is good (Loury, 1999; Jackson, 1999: 127; Kabeer, n.d. & Sen, 2000). It means social inclusion itself is not solely a concept but is expected to reduce the negative consequences of exclusion. However, Woodward and Kohli have tried to distinguish social exclusion and inclusion by arguing that one deals with social problems, while the other deals with social membership (Woodward & Kohli, 2001; cited in Silver, 2010: 193-195). Similarly, Hunter says, social inclusion literature is consistent with the promotion of non-discrimination and inclusion...in laws, policies and programs, and the promotion of the full and effective participation in decisions (Hunter, 2008: 11). All the definitions of social inclusion tend to ensure the participation and membership in social, cultural, political, economic institutions/agencies as well as activities and processes.

Largely, western understanding of social inclusion falls broadly into the following three models. RED, or the redistributionist discourse, has an emphasis on income inequality, poverty reduction or what has been recently described as ‘progressive universalism’; MUD, or the moral underclass discourse, claims that poverty and exclusion are caused by the behaviour of individuals and their ‘subcultures’; and SID, or the social integrationist discourse, is about equal participation and equal access to opportunities, with an emphasis on labour market participation (Atkinson & Marlier, 2010). The three models of social inclusion comprise three distinct approaches to achieving a socially inclusive society that derives to three versions of the role of the state.
3.3 Social Inclusion: A Dalit Perspective

For Dalits, there is not only one straightforward meaning of social inclusion. The meaning of social inclusion for Dalits is: socio-cultural inclusion in society; physical/material inclusion/representation in State structures and non-State sectors; inclusion in socio-economic development; non-material inclusion as well.

Socio-cultural inclusions means making society free from caste-based discrimination and untouchability practices and assimilate Dalits among all groups without any discrimination and distinction. For the physical/materials inclusion/representation, Dalits should be included proportionally as per their national or local population ratio in all structures, organs, sectors, levels and agencies of the State and non-States such as ministry, departments, commissions, academies, authorities, corporations, and committees of the State and companies employment of non-States. Moreover, surplus rights and representation should be included in addition of their proportion in some areas of the State to correct the present exclusionary status caused by historical exclusion, deprivation and disadvantage.

Socio-economic inclusion means, Dalits should be included in land and shelter distribution; equal opportunity in employment of State and non-state sectors; prerogative rights to their traditional caste-based occupations, knowledge and skills; and free and compulsory education with adequate scholarship from pre-school to post-graduate level. Noon-material inclusion of Dalits means inclusion electoral and recruitment processes, decision making to implementing processes; access in benefits; and largely acceptance of the existence, respects, recognition, leadership, capacity and dignity of Dalits in every spheres of political, economic, socio-cultural and spiritual life and behaviours.

4. EXISTING CONSTITUTIONAL, LEGAL AND INSTITUTIONAL PROVISIONS

4.1 Constitutional Provisions

The Interim Constitution of Nepal, 2007 is the backbone of all existing inclusion policies and provisions. Article 13(3) introduced the term "Dalit" to Nepal’s legal schemes along with calling for affirmative action as fundamental rights for Dalits. In addition, in Article 14 the Interim Constitution addresses the issues of caste-based discrimination and untouchability, which Dalits have been experiencing for centuries, as Article 14(1) ‘rights against untouchability and racial discrimination’ includes the provision like, "no person shall be discriminated against as untouchable and subjected to racial discrimination in any form, on grounds of caste, race, community or occupation. Such discriminatory treatment shall be punishable, and the victim shall be entitled to such compensation as determined by law."
Article 21 has accepted the principle of proportionate representation of all groups in Nepal based on their caste/ethnic groups’ percentage of the total population. Thus, the Article has provided Dalits with the right to participate in state structures proportionately as per their population. This is an extremely new concept of inclusion followed by this constitution in the history of Nepalese constitutionalism. Because, previous constitutions, there had not included the even a basis essence of inclusion and affirmative action, whereas the Interim Constitution of Nepal, 2007, included the provision of equal sharing of rights, resource, representation and opportunity on the basis of population of each groups. Similarly, Article 33 (d1) provides that it is the ‘Responsibility of the State’ to enable Dalits to participate in all organs of the state structure on the basis of the principle of proportional inclusion. However, neither the laws have been made or amended nor applied in practice of the principle of proportionate representation in Nepal.

Article 63(4) of the constitution holds that political parties, when selecting candidates for the ‘Constituent Assembly/Parliament’ first (2008) and second (2013), must abide by the principle of inclusiveness and must take this principle into consideration while selecting candidates for the election of first past the post [FPTP] system as well as ensure the proportional representation of Dalits along with other oppressed communities while making the lists of the candidates for the election of proportional representation [PR] system. However, the major political parties did not take seriously this principle in both elections. Unfortunately, have to say that Nepali Congress, a largest and oldest democratic party did not give even a Dalit candidacy from a constituency in second CA election whereas a Dalit candidate had contested in first CA election 2008. Regarding the PR system, Dalit representation is in decreasing way that shows the result of second CA election.

Moreover, Article 141(c) obligates political parties to include Dalits and women in their executive committees at various levels. However, the political party act is not amended yet as per this constitutional provision. Article 154 of the Interim Constitution commits the Government of Nepal to form a National Dalit Commission along with other necessary commissions to safeguard and promote the rights and interests of Dalits and other previously marginalised communities, which opens the doors for institutional inclusion of Dalits in the State.

4.2 Legal Provisions

The Parliament passed the, "Caste-based Discrimination and Untouchability (Offence and Punishment) Act, 2011” on 24th May, 2011 to increase the sociocultural inclusion of Dalits by reducing caste-based discrimination and untouchability; however, implementation of the Act is very poor. The Act has provided rights against caste-based discrimination and untouchability to the people and punishment (jail up to 3 years and fine up to 25 thousands rupees including compensation with other fines) to the offenders. However, in light of the Interim Constitution and the Act, other Acts such as the Press and Publication
Act, 1991; the Motion Picture (Production, Exhibition and Distribution Act, 1991; the National Broadcasting Act, 1992; the Sanskrit University Act, 1987 & the Child Labour (Control and Regulate) Act, 2000 have not been amended yet which need to be amended in same standard as soon as possible.

For the political representation of Dalits, Sections 12(1)(c), 80(2)(d) and 176(2)(d) of the Local Self-governance Act, 1999 (LSGA) has opened the door to Dalit represent Dalits in the council of Village Development Committees, Municipalities and District Development Committees, which are not executive bodies indeed. Similarly, Section 3(b) and 7(3) of the Constituent Assembly Member Election Act 2007 provide guaranteed representation for Dalits in Constituent Assembly/Parliament. To increase Dalits’ representation/inclusion in public services, security forces and other governmental employments, there are around ten laws (Acts and Regulations) that have been amended to date. The Civil Service Act, 2007, which comprises ten services, has allocated altogether 45 percent of seats to be fulfilled by competition among the marginalised groups, such as Dalits, women, indigenous people, Madhesi, persons with disabilities and people of backward region, as per the affirmative action policy and inclusiveness. Section 7(7) of Civil Service Act, 2007, has further categorised six groups of beneficiaries and their percentage of seats reservation out of the 45 percent such as women (14.85%), indigenous peoples (13.15%), Madhesi (9.05%), Dalits (4.05%), and persons with disabilities (2.25%) and backward regions (1.8%) which are below half of their respective national population percentage ratios or proportionate status.

All together 55 percent of seats are allocated for open competition among general candidates of all castes/ethnic groups including Dalits, women, indigenous people, Madhesi, persons with disabilities and people of backward region groups. However, it is seems a kind of reservation for the male of advanced castes and classes. It because, they have been getting benefits by this provision ultimately

By establish Civil Service Act, 2007 as a benchmark and leading Act on inclusive and affirmative action policy in Nepal other nine laws (Acts and Regulations) have amended with the same provisions of inclusiveness. Though, persons with disabilities have been withdrawn from the list of beneficiaries in the service of security forces (Nepal Army, Nepal Police, and Armed-Police Force) whereas, the percentage for women that provided by Civil Services have further reduced and added to other groups. For instance, in the security forces women got 9% (reduced 5.85%), indigenous people 14.4% (added 1.25%), Madhesi 12.6% (added 3.33%), Dalit 6.75% (added 2.45%) and backward regions 2.25% (added 0.45%), respectively (Kisan, 2012a: 24). But there is not any argument and a point seen why and how does those percentages reduced and added at all.

The allocated quotas in public service and security forces are adverse of the essence of Article 21 of Interim Constitution, 2007. Because, Article 21 provides the rights of proportional representation in all sectors, level and structure, whether the laws are allocating even less than half of their population ratio.
As per the latest study of Nepalese laws (Acts and Regulations) on gender and social inclusion perspectives, there are 103 Acts found which need to be amended in terms of broad ‘affirmative action policy’ to be in compliance with Articles 13(3), 33(d)(1), 35(10) and 35(14) of the Interim Constitution and Section 7(7) of the Civil Service Act (Kisan, 2012a: 26-146). However, after this task, making compatible with concept and essence of Article 21 of Interim Constitution will be remained.

4.3 Institutional Provisions

Though, the concept of social inclusion and affirmative action had adopted clearly by the Interim Constitution of Nepal, 2007, before this constitutional guarantee, the initiation of establishing institutions for the protection of Dalit human rights and socioeconomic development had started from Ninth Five Year Plan (1996-2001 AD). For instance, ‘Dalit Development Committee’ had established in 1997 and 'National Dalits Commission’ in 2002; whereas, 'Badi Development Committee’ had established in 2012; 'Haliya Mukti Structure’ in 2012 and a high level mechanism on 'Promotion of Dalits’ Rights and Eradicating Caste Based Discrimination and Untouchability in 2013’ as well.

The National Dalit Commission (NDC) has set up by an executive order in March 2002 which is still operating under the executive order of government and a bill for making NDC as an autonomous and statutory body has not passed yet. The commission, after onward its' formation, has been engaging in conducting research/studies on the status of caste-based discrimination and socio-economic status of Dalits; monitoring the implementation and effectiveness of State’s policies and programs; mobilizing fact finding mission against atrocities and discrimination; making and reshuffling the schedule of castes and surname of Dalits; and providing caste identity certificate for Dalit individuals. By lacking of separate Act, rule and regulation, and autonomous power, NDC is facing various difficulties in terms of rights, resource and power mobilization.

Dalit Development Committee has set up in 1 October writ 1997 by the formation directive of Dalit Development Committee under the Development Committee Act, 1956. It was extended as District chapters to 75 Districts in 18 July 2003 as a 'Dalits Uplift District Coordination Committee' with the objectives of monitoring of governmental as well as non-governmental activities on Dalit perspective. But the electoral government formed by bureaucrats dissolved all Districts chapters in 12 June 2013.objective of its formation was empowerment, development and mainstreaming Dalits in economic, educational, socio-cultural aspects. by conducting research study of socio-economic, educational and caste-based discrimination status of Dalits. The committee, from its establishment has been working on distributing scholarships to Dalit students in higher education, advancing traditional occupation of Dalits and professional skills development.

Badi Development Committee has set up by the executive decision of Council of in 27 July 2012 under the Development Committee Act, 1956 with the objectives
of mainstreaming Badi in national development. The Committee is undertaking empowerment initiatives and enhancing rights by monitoring government policies and programs of government such as Janta Aabas, privilege card distribution and citizenship card distribution programmes towards Badi. This is also facing several legal and budgetary difficulties.

5. PROPOSALS OF THE CONSTITUENT ASSEMBLY FIRST (2008)

The first Constituent Assembly (CA) was dissolved on 27 May 2012. In the dissolved CA, there were 50 (8.31%) CA members from Dalit community, which was the highest representation of Dalits in any State structure to date. Though, lack of coordination, cooperation and adequate discourse among the Dalit CA members on the issues pertaining to Dalits; a few significant issues related to Dalits were not rose properly, however, many issues of Dalits have been incorporated during the constitution drafting processes initially by the its thematic committees which were likely to be included in the first draft of the constitutions. It is important to further discuss them in detail.

5.1 Proposals related to equality and non-discrimination

Several thematic committees of first CA proposed provisions related with equality and non-discrimination that were the major achievements of the first Constituent Assembly in relation to Dalits. For instance, CA Committee for Fundamental Rights and Directive Principles (CFRDP, 2010) had incorporated the provisions against caste-based discrimination and untouchability under its proposed Article on 'right to equality', 'right to miscommunication', 'right against exploitation', 'rights against untouchability and racial discrimination' and 'rights of Dalit community'. Similarly, CA Committee on the Protection of the Rights of Minorities and Marginalised Communities (CPRMMC, 2009) had incorporated this issue under its proposed Article of 'right to equality' and 'rights against untouchability and caste-based discrimination'. Furthermore, CA Committee on Restructuring of the State and Distribution of State Power (CRSDSP, 2010) had incorporated this issue under its proposed Article on 'rights of Dalits'. CA Committee to Decide the Basis of Cultural and Social Solidarity (CDBCSS, 2010) had also incorporated this issue under its proposed Article on 'right to language and culture' and 'rights against untouchability and caste-based discrimination' as well.

Later on, a Committee on review and compilation of thematic committees' reports formed by CA had consolidated Dalit issues under its proposed Article on 'Rights of Dalits of its reports' (CSCP, 2010: 349-350) whereas the committee was compiled of this issue in two points such as 'any forms of caste-based discrimination and untouchability on the ground of caste, descent, community and occupation at any places, which shall be considered as a serious social crime, punishable and compensable to victims' which was further incorporated by the Constitutional Committee in its tentative first draft of Constitution.
5.2 Proposals related to representation and inclusion

The CA Committees have adopted the basic concept of affirmative action (CFRDP, 2010), special provisions (CPRMMC, 2009), equal representation, special/compensatory rights (CRSDSP, 2010) and principle of inclusiveness (CDSCB, 2010) to increase the representation of Dalits and marginalised groups at all organs, sectors and level of State.

By following the Article 21 of the Interim Constitution of Nepal, 2007 the CA committee on Fundamental Rights and Directive Principles; Determination of the Form of the Legislative Body; Determination of Forms of Governance of the State; and Committee on Judicial System were adopted the principle of proportional representation and inclusion that might be the strong conceptual backbone for making laws and implementation strategies. Most importantly, the Committee on Restructuring of the State and Distribution of State Power, was adopted the principle of compensatory representation/special rights based on the need to correct for historic discrimination and exclusion of Dalits by proposing three and five percent superfluous representation in federal and provincial level of political structure for Dalits in addition of its proportionate shared. However, criticism against this proposition is started by saying that which group’s quotas will be reduced and in what rational and procedure.

The CA Committee on Judicial System was proposed to establish the separate benches in all Courts (CJS, 2010) that scheme can open easier and faster the way to increase access to justice for Dalit than the existing lengthy and general procedures. Moreover, the CA Committee to Decide on the Structure of Constitutional Bodies was proposed to extend the chapter of National Dalit Commission to federal levels. This proposition is intending to increase the access of Dalit people to NDC and vis-à-vis. Thus, those propositions might be helpful for settling the caste-based discrimination and untouchability and atrocities against Dalits. The committee on constitutional bodies (CDSCB, 2010) and Committee of State Restructuring (CRSDSP, 2010) were raised up the issue of intra Dalit inclusion among the hills Dalits, Madhesi and Dalit women that should be addressed which has been undermined by the Nepali Dalit movement to date.

5.3 Proposals related to socioeconomic uplift

Some committees’ reports were highlighted the issues of traditional occupation of Dalits and right to land extensively. The CA committee on Restructuring of the State and Distribution of State Power (CRSDSP, 2010) was proposed to provide land for landless Dalits for one time basis; to provide adequate resources, technologies and trainings to them to uplift the traditional knowledge, skill and occupation; to protect the rights of Dalits for using, protecting and developing their traditional occupation, knowledge, skill and technology own-self; and to protect the rights for reaping professional gains for those who have been engaged in traditional occupations (CFRDP, 2010).
In addition, to uplift of landless Dalits, tillers (haliya) Dalits, and shepherds (harawa, charawa) Dalits the Committee on Natural Resources, Economic Rights and Revenue Allocation (CDNRFPR, 2010) was proposed various socioeconomic provisions. Those propositions, related to land, traditional occupations and socioeconomic were good sounding for Dalits which might be good source for second CA for constitution-making process and parliament for making laws in this regards.

5.4 Proposals related to education and social security

Regarding this issue, the Committee on Restructuring of the State and Distribution of State Power was proposed a provision for free education for Dalits from primary to post graduate level. Similarly, CA Committee for Fundamental Rights and Directive Principles was clearly proposed free and compulsory primary education, free education up to secondary level as well as higher education and some incentives schemes on health and social security (CRSDSP, 2010). The issues of free education, health and social security schemes were long impending agendas of Nepali Dalits which were seem to very close to address.

6. ISSUES THAT SHOULD BE INCLUDED IN THE FORTHCOMING CONSTITUTION

6.1 Preamble and definition

The Constitution, hopefully, will be released by the second Constituent Assembly, 2013. The concern of Nepali Dalits is that their agendas should be included in the 'Preamble' instead of 'Miscellaneous' section of the Constitution. For instance, the statement ‘caste-based discrimination and untouchability free State’ (UNDP/SPCBN, 2011: 9) should be included at the preamble and definition of the State. In addition, the State should address its past misdeeds [Common understanding of Dalit organisations (sister organisation of political parties), 2009: agenda 1] towards Dalits in the preamble section of the Constitution.

6.2 Nondiscrimination and equality

The CA/Legislative-Parliament formulated a law [Caste-based Discrimination and Untouchability (Offence and Punishment) Act 2011] on 24 May 2011, to control those caste-based discrimination and untouchability practices but have not been able to eliminate or completely control yet. Because of lack of willingness of the State, biased and unaccountable public authorities, failures of political parties and minimal access of Dalits in decision making as well as implementing level, agencies and processes, the contents of this Act have not been implemented to date. The Constitution should include a separate Article on the ‘right against caste-based discrimination and untouchability’ under the chapter of Fundamental Rights and should prohibit such discriminatory acts even
in private spheres; these acts should be punishable, compensable and clearly stated as 'a serious social crime against humanity' (Common understanding, 2009: agenda 11).

6.3 Representation/social inclusion

(i) **Inclusion in principle**: 'Representation’ or ‘inclusion’ is the most important agenda which is decade’s long impending agenda of Nepali Dalits. To address this agenda, first of all, the constitution should clearly adopt the concept of social inclusion, affirmative action, proportional representation and special/compensatory rights for Dalits under the Article of 'right to equality' and 'rights of Dalit Community' to ensure Dalits’ representation in every organ, sectors and levels of State and semi/non-State agencies categorically (Kisan, 2010: 46-51). It also should be clear that the essence of Dalits’ representation is not only in ‘material [physical] aspects’ but also in ‘non-material aspects’ of representation/inclusion. This means inclusion in decision-making to implementing processes to access to benefits and inclusion in integration, recognition and acceptance of Dalits identity, capacity and leadership.

(ii) **Inclusive electoral system**: The existing mixed/parallel electoral system, which is applied in CA election first (2008) and second (2013), could not ensure the proportional representation of Dalits in any kind of public representatives-based State bodies/structures, like Constituent Assembly and parliaments of federal, provincial and local bodies. Hence, for ensuring proportional representation in all those structures the Constitution should adopt such electoral system that could resulted fully proportional representation of Dalit and other groups. ‘Mixed-Member Proportional Representation [MMPR] electoral System’ could be applicable for the time being (Kisan, 2010: 119) which comprises the norms of FPTP and PR (Proportional Representation) system including compensation of misbalance of parallel system. Furthermore, ‘Party Block-Vote System’ or ‘Block-Vote System’ is also other Dalits favorable electoral systems that can be considered in place of MMPR (UNDP/SPCBN, 2011: 10-12). Thus, the electoral system is a very important factor of social inclusion discourse which should be ensured by the Constitution.

(iii) **Proportional and compensatory inclusion**: First of all, the end goal of the State should be to create an equitable and proportionally inclusive State ascertains duration of time that should be explicitly stated. To reach this end goal, the State must act to increase the Dalits’ representation up to proportional level in every organ, structures and level of State within a certain period of time. There could be two way to fulfill this goal within a given time, either to deconstruct the all existing structure and establish new kind of proportionate inclusive structure from the beginning or to arrange by reduce and add scheme for those groups who are in over and under representation status in particular State structures and agencies to provide compensation for Dalits who are frequently under representation status in all structures of
the State for centuries. Hence, there should be a provision of the 'right of additional representation of Dalits' in the chapter of 'Fundamental Rights' of the Constitution in the light of the principle of compensation (Kisan, 2010: 48-51). The percentage of additional representation in the Constitution can be fixed as an average (10%) (Common understanding, 2009: agenda 1, 14 & 17) or let it be open for negotiation in comparative ratio with over or under representation of particular castes and Dalits in particular State organs, sectors, levels and agencies.

(iv) Institutional inclusion: Institutional representation/inclusion is an integral part of Dalit inclusion in the State. The State has already formed National Dalit Commission, Dalit Development Committee and Badi Development Committee indeed. However, they are formed without any strong constitutional and legal foundation. Hence, National Dalit Commission should be included as a constitutional body to make it strong, independent, autonomous and statutory body and other existing institutions also should be backboned by strong laws, resources and human resource viability (Common understanding, 2009: agenda 6 & 16). Moreover, the constitution, should open the door to established other institutions to uplift, develop and mainstreaming Dalits, like a ministry, department, corporation, authority, academy, and so on, with sufficient authority and funds (Kisan, 2010: 120-134). Without institutional inclusion, only other efforts on it would not be able to mainstreaming Dalits in Nepali State structures.

(v) Inclusive action plans and fast-tracking system: To fulfill the goal of 'proportional inclusiveness' of all State organs, sectors, structures and agencies there should be a realistic and periodic action plan and the concept like 'fast-tracking' system in public services or any kind of State employment sectors. South Africa is a role model who has applied experience of this concept (Kisan, 2012a: 17-22). For more information, in South Africa, after the emancipation from Apartheid on 27 April 1994, the Parliament pronounced a 'White Paper' that provisioned to review and reform existing policies and legal provisions concerning the underrepresentation of excluded groups in public services (White Paper, 1994: 33-34). Another 'white paper' reformed the traditional recruitment, selection and promotion processes and by changing 'procedures' and 'attitudes' of management level, it also aimed to increase Black's representation in public services up to 50 percent and women's representation up to 30 percent within 4 years (White Paper, 1995: Chapter 10). The paper introduced the concept of 'fast-tracking' system in recruitment and promotion. The White Paper (1998: 12-17) contributed to reduce the barriers to enter the public service of Blacks and 'public service laws amendment act, 1997' provisioned a new way of evaluation to make public service inclusive (Act no. 47, 1997: 15-16). These initiations resulted in the black man's representation in public service increasing from 15 (1995) to 61 (1999) percent within five years and 40 percent black man and 27 percent women obtained high managerial positions which all occupied
by’ white man’ before taken those initiations (SSAAR, 1998: 10). The concept applied and experience gained in South Africa, would be applicable in Nepal to increase Dalits’ representation proportionally in all sectors, levels and structures of Nepal State within the a certain given time period. The Constitution should open the door of fast-tracking system as fundamental tool of affirmative as well as social inclusion concept.

(vi) Intra-Dalits inclusion: The intra-Dalit inclusion and proportional representation among them as per the population ratio of each caste is a significant issue of Nepali Dalits (Kisan, 2010: 113-114). The Constitution should include a provision of ‘intra-Dalits representation/inclusion’ that could help for meaningful inclusion of Dalits from all ecological regions such as Mountain, hill and Tarai-Madhes, and the inclusion of Dalit women and Dalit persons with disabilities (Kisan, 2012e: 3-4). The issues of intra-Dalit inclusion among them should be addressed simultaneously at the same time of addressing issue of Dalits’ inclusion in the State and among other groups.

6.4 Education and cultural rights

The Constitution should include the provisions of free and compulsory education including an adequate amount of scholarships from pre-primary to undergraduate and free education with an adequate amount of scholarships up to post-graduate level (Common understanding, 2009: agenda 5). The Constitution also should provide the rights to get proportional seats/quota and scholarships in higher level studies in science, medical sciences, engineering, agro forestry sciences, social sciences, accountancy etc., within the country and overseas. In addition, schemes for establishing hostels, book banks, coaching and educational grant for Dalit students also should be guaranteed by the Constitution via laws (Kisan, 2010: 128-130). This is Nepal, whether without Constitutional or legal guarantee, any policies, schemes and executive initiatives would not be feasible in implementation level.

6.5 Socio-economic uplift

The Constitution should also include the provisions to provide enough land to landless Dalit families; shelter for homeless Dalit families; prerogative rights on traditional caste-based occupation, skills and indigenous knowledge; first priority rights to use and control over the natural resources; eradication of haliya, balighare and harawa-charawa tradition; and other socio-economic uplift issues (Kisan, 2010: 124-28) (Common understanding, 2009: agenda 3 & 4). Under the concept of ‘Welfare State’, the State should consider to provide basic economic welfare schemes to include the excluded in various aspects. Food and shelter are the basic needs that should be guaranteed by the Constitution as rights of Dalits. Without constitutional guarantee any types of economic initiations, basically right of land, cannot be applied by the welfare State.
6.6 Local federal units

There are two contested concepts in discussion in contemporary Nepal for ensuring rights of Dalits in federal arrangements that are formation of 'territorial federal Dalit province' and 'non-territorial structure/province.' Both are not conceptually as well as practically feasible (Kisan, 2012d: 100-116). What I think that, in place of these arrangements; restructuring, redemarcating, renaming and recreating of local administrative (federal) units like Village Development Committee/Municipality/District Development Committee on the basis of castes, ethnicity, community, language, cultural and religious identity and making Dalits' plural local bodies will be more feasible (Kisan, 2012b: 196-197). Creating local units based on single majority/plurality of population of any single caste, ethnicity, community, religion and language and providing territorial as well as cultural autonomous rights to those units would be the best scheme for Dalits. Only within such units, Dalits can play the role to eliminate caste-based discrimination and to develop physical infrastructure and human resources of Dalits for ultimate assimilation of Dalits and non-Dalits into discrimination free and developed society (Kisan, 2010: 25-31; Kisan, 2012c: 56). This scheme carries on the essence of 'bottomup civic selfgovernance', which encompasses the small scale governance, collective practical action, voluntary bottomup confluence, and collectivistic self-defence as well (Kisan, 2013:86). Thus, the concept of restructuring local federal units on the basis of identity should be adopted by the Constitution.

7. CONCLUSION

The Nepali State is still exclusionary in terms of material as well as non-material aspects on the basis of caste, ethnicity, community, gender, culture, religion and region. This is the time to correction of existing exclusionary status of Nepali State either. For compensating those past discrimination, exclusion and deprivation and for making the future State 'inclusive' in all aspects the Constitution should adopted the concept of social inclusion and affirmative as well including all its' methods, models, tools, techniques and measures. For instance, three models of inclusion (RED, MUD and SID) and three methods of affirmative action (preferential, remedial and compensatory) including fast-tracking system should be incorporated by the Constitution in one or another way for its constitutional guarantee. It is needs to keep in mind that for making inclusive State substantially, there should be inclusive constitutional provisions, policies, laws, institutions, agencies, agents, processes, electoral system, and structures in both material and non-material aspects. The approach of inclusion should be both horizontal to vertical; the methods of inclusion should be both bottom up to top down; and the way of inclusion should be from policy making to implementing to level of accessing benefits; and time frame of inclusion (making fully inclusive State) should be fixed and structured.
Concerning the Dalits which is the most, excluded among the excluded groups, needs extra/special tools, techniques and measures additionally in comparison of others. For instance, 'compensatory or special rights' is needed for Dalits in addition of 'proportional representation' or 'token reservation' to fulfil the benchmark of proportional representation substantially for certain period of time. Only for making inclusive State structure is not enough for Dalits that they are experiencing sociocultural exclusion additionally which has been manifested as caste-based discrimination and untouchability practices for centuries. For creating socioculturally inclusive society, the Constitution should adopt the concept of caste-based discrimination and untouchability Free State and such acts as severe social crime against Humanity.

To incorporate all those things that are discussed above, the Constitution should include several Articles such as 'right against untouchability', 'rights of Dalits', 'right to proportional and compensatory representation', 'rights against land and homelessness', 'formation of Dalits plural local bodies' and special provisions for other socioeconomic uplift and social safeguard. For this purpose, the Dalit community and its' leaders should work hand in hand to safeguard the achievements made till date and find solution of the unresolved issues.

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**Constitutions, Laws and other Documents (Published and Unpublished)**


CHAPTER 14

INDIGENOUS PEOPLES RIGHTS IN NEPAL’S 2008-12 CONSTITUENT ASSEMBLY

HOW NEPAL WENT TO WAR FOR A CONSTITUENT ASSEMBLY THEN PEACEFULLY CONSTRAINED THE DISCOURSE WITHIN

- KEITH LESLIE
1. HISTORICAL CONTEXT OF IP ISSUES IN NEPAL (UNTIL 1990)

Since the late 18th C., after the formation of the unitary Nepali State, ethnic cultural and linguistic identity had been repressed beneath the authority, power and privilege concentrated among the ruling Hindu high caste elite, particularly the Shah and Rana regimes, as well as among select Thakuri/Chhetri and Brahmin families who served as their courtiers.

Until the ‘People’s Movement’ (Jann Andolan) of 1989-90 overthrew the Shah dynasty that had ruled Nepal since the 1950s, there had been an ardent effort by the then titled ‘His Majesty’s Government’ to cloak the multi-cultural Nepali national identity under the guise and assimilation of state-sponsored religion (Hinduism), based on an established hierarchical caste structure, with Nepali as the only legally permitted and recognised national language.

Under His Majesty’s Government (HMG), it was officially taboo to publicly discuss ethnic differences, establish ethnic organizations or political parties, recognise indigenous identities in national plans, record ethnic or caste identities in the national census or teach in mother tongue languages.

The first legal recognition of the rights of the indigenous peoples (IP) was written into the preamble of the earlier Jann Andolan-inspired multi-party 1990 Constitution. This 1990 Constitution for the first time identified Nepal as a “multi-ethnic, multi-lingual, democratic, independent, indivisible, sovereign, Hindu and Constitutional Monarchical Kingdom”.

In this manner the 1990 Constitution finally accepted the cultural and historical reality of Nepal as a diverse nation of multiple ethnicities and languages living within one state. However, even though the 1990 Constitution reinstated a multi-party parliamentary system, it retained the constitutional authority of the king (although reduced) and the primacy of Hinduism. The nascent demands, particularly among IP intellectuals and certain communist politicians, for a secular, republican state were still relatively muted at that time.

Only after the ratification of the 1990 Constitution did the National Planning Commission mention indigenous communities for the first time in its 8th Five Year Plan (1992-97). This was later expanded in the 9th FYP (1998-2003) with a chapter on “Adivasi and Janjati in National Development”. However, neither measurable
indicators nor alternative means of tracking progress were established in the 9th FYP to monitor proposed improvements in the socio-economic or political rights of IP communities in Nepal (Hangen, 2007).

In 2002, however, the GoN passed the Nepal Federation for the Development of Indigenous Nationalities Act that established a new government body to specifically oversee and provide support on Janajati issues. The GoN also, for the first time, officially recognised 59 distinct Janajati groups, defining them as “a tribe or community as mentioned in the schedule having its own mother language and traditional rites and customs, distinct cultural identity, distinct social structure and written or unwritten history” (Gellner, 2005).

2. IMPACT OF THE MAOIST MOVEMENT ON IP RIGHTS (1996-2006)

The dramatic and hopeful events of the first People’s Movement in 1989-90 and multi-party election of 1991 were soon followed by a hung election in 1993. The following years led to a constant shuffling of cabinets with nearly annual changes in government coalitions and the rapid growth of political frustration and cynicism. Rejecting multi-party parliamentary politics as meaningless, the third largest party in the Parliament sent a 40 Point non-negotiable demand to the Congress Party-led GoN, resigned en masse from the Parliament, then initiated a Maoist insurgency with armed attacks across Nepal in February 1996.

Briefly stated, a decade of a military stand-off between the Royal Nepal Army and the CPN/M People’s Army led to over 16,000 deaths, the disappearance of thousands of people, the 2002 collapse of the parliamentary political system and then a 2005 royal take-over of the government. These events precipitated the second People’s Movement combining the Maoists with the legitimate political parties that jointly led the street protests that eventually forced the king to relinquish his authority. This event led directly to the 2006 Comprehensive Peace Accord (CPA) signed between seven political parties and the CPN/M.

During this decade, Nepal’s political identity shifted definitively from a Constitutional Hindu Monarchy under the 1990 Constitution to “the sovereignty and state authority of Nepal vested in the Nepali people” [Interim Constitution (IC), 2007] under a secular “Federal Democratic Republic State” which “legally abolished the monarchy” (IC, 2007) in the 2007 Interim Constitution.

The ten-year Maoist insurgency succeeded in two or its primary goals: ending the Shah monarchy and removing Hinduism as the state religion of the nation. The Maoists achieved these objectives due to the growing administrative weakness of the State; the greed and myopia of the major political parties; the economic malaise of the economy; the disillusionment of the Nepali people in their government; and, the rising political consciousness of the historically
marginalised due to the effective Maoist mass mobilization and indoctrination of disenfranchised and discriminated, rural communities.

The ethnic and indigenous organizations aligned with the CPN/M were an essential component of the Maoist rural insurrection. Through Maoist political grassroots efforts, IP increasingly understood how they had not only minimally benefited from State-sponsored development and modernization, in many ways they had been conscientiously marginalised, isolated and deracinated. Given this situation, abetted by their lower education achievements, human development index status⁴ and per capita income than the higher caste communities⁵, the indigenous communities were ripe for an ideological and political motivation.

The Maoist also promised a firm commitment to the restructuring of the Nepali state with an emphasis on expanding the political, cultural and linguistic rights of the indigenous (and other marginalised groups). In fact, due to the Maoist insistence, both the 2006 CPA and the 2007 Interim Constitution (IC) commit to remedies to alleviate the ‘historical marginalization’ of indigenous communities. The IC states:

“Women, Dalits, indigenous ethnic groups … shall have the right to participate in state structures on the basis of proportional inclusion.” (IC, 2007).

Although this language was significantly more progressive than the 1990 Constitution, which thoroughly neglected indigenous peoples, IP organizations were still critically disappointed. They were stunned to see that the 2006 CPA contained no explicit mention of the situation of the ‘adivasi janjati’ even though the Maoists had constantly reaffirmed that such discrimination was a basis for their People’s War.

The IP leaders expressed even more concerned that the 2007 IC did not explicitly commit to ensuring their key constitutional demands, e.g. the formation of ethnic federal states: self-determination; a proportional reservation policy based on population; and commitment to prior consultation with IP leaders on issues affecting their communities. Nor did it reference the specific international obligations the GoN had committed to when signing ILO 169.

Yet, the IP obtained their largest representation ever (218 out of 601) in Nepal’s Parliament- Constituent Assembly in the April 2008 CA election. The proportional representation election law,⁶ proposed by the CPN/M which required reservations for historically marginalised communities, ensured CA seats close to their actual population figures, in addition the CPN/M nominated a larger proportion of IP who won their First Past the Post (FPP) parliamentary seat elections.

Thus, for the first time in 240 years, since the creation of the Nepali state, with the new clauses in the Interim Constitution 2007 and the increased numbers of
IP MPs in the Constituent Assembly, IP rights and priorities were at the center of constitutional negotiations regarding the country’s political future.

3. POLITICAL DISAGREEMENTS BETWEEN THE GON AND IP COMMUNITIES

Nonetheless, even after the 2008 election of a Maoist government, indigenous peoples organizations and their ethnic activists retained their skepticism and doubts with regard to the sincere commitment of the Constituent Assembly, the GoN and mostly high-caste leadership of the major political parties, including the CPN/M, to address their political and constitutional concerns in the context of creating a ‘new’ Nepal.

In their effort to pressure the GoN and political parties to commit a priori (before drafting the new constitution) to recognise expanded IP rights, these ethnic indigenous organizations began a series of civil disobedience movements. Their demands included:

- Free, fair and open consultation and participation with IP communities
- Recognition of IP traditional community authority structures
- Establishment of ethnically defined federal units or provinces
- Self-determination as a legitimate right of the indigenous peoples, and
- Proportional representation in all organs of the State

Between late 2008 and early 2010, these ethnic groups resorted to protests, strikes, bandhs (forced closures), chakka jams (no vehicle movement) in their regions around the country. The Tharu, Limbu, Tamang and Rai were the most radicalised and effective in shutting down urban areas and major highways. To end these lengthy agitations, the GoN signed formal agreements with representatives of the Tharuwat, Limbuwan, Tamsaling and Kirat indigenous organizations.

In most cases, the GoN, often lead by different prime ministers or political parties, provided written guarantees on the following commitments in these agreements:

- Ethnic federal states with the right to autonomy within the Nepali State
- Full proportional representation in State structures
- Fulfillment of the GoN obligations under ILO 169

Yet, due to the constant changes in government, as well as a lack of serious political will by the political parties, almost no substantive action was implemented after signing these negotiated agreements. Consequently, the gap in trust between IP political and intellectual leaders and the major political parties grew wider. This became more severe after the tabling of key components of the draft constitution without specific mention of IP rights.
Consequently, on September 11th, 2009, a broad coalition of IP activists expressed their political exasperation in a “Dhulikhel Joint-Declaration” (see Annex I). This publicised Declaration included a long list of restated IP demands, including the inclusion of specific IP rights in the draft of the new constitution. The Declaration was followed by a press conference during the last week of November 2009 organised by the same coalition announcing a new series of protests across the country unless the Constituent Assembly and political leaders acknowledged recognition of core IP rights in the new constitution.

For over two years, from 2010 until May 2012 when the original CA was finally closed, the IP issues remained unresolved. Indigenous civil society leaders, as well as the more politically radical political leaders, continued to threaten mass protests. Their militant (often ex-Maoist) youths and ethnic fronts insisted that their demands be addressed publicly within the GoN and Constituent Assembly.

When the commitment to finalise the constitution was delayed past the 2011 deadline, NEFIN and associated political wings of ethnic organizations and fronts implemented a series of bandha across Nepal, including shutting down the Kathmandu Valley, to protest the delay in the promulgation of the constitution, as well as the lack of commitment or clarity on the formation of new federal provinces.

4. DECISIONS REGARDING THE DRAFTING OF THE NEW CONSTITUTION

Even moderate IP leaders expressed concerns regarding the CA administrative rules and structures. The official CA administrative rules that guided the drafting of the new constitution were finalised among the major political parties. There was no serious input or participation by indigenous or other historically marginalised leaders, either inside or outside the Constituent Assembly, in writing that rulebook.

Consequently, even though an indigenous (Limbu) CA member, Subas Nembang, was elected Speaker of the House, any substantive discussion of IP issues was relegated to the background. IP civil society leaders complained that the CA structure neither permitted the formation of an IP Caucus among MPs from different parties nor established a specific Indigenous Peoples (‘adivasi janjati’) Committee among the ten technical or thematic committees organised to draft preliminary concept papers.

Instead, indigenous issues were relegated to the Committee for the Protection of the Rights of Minorities and Marginalised Communities. Yet, IP issues and rights were not merely sub-issues related to minorities or marginalised communities.
IPs had separate rights and conventions that needed to be specifically addressed within the new constitution, not the least the rights protected by ILO 169 that had been signed already by the GoN.

Thus, even during the early preparations to draft a new constitution, IP leaders and intellectuals already felt the IP representatives in the CA had been forced by their political parties to submerge their historical grievances to maintain the traditional societal forms of status quo caste-based elitism. IP issues which were so sensitive culturally and urgent politically were, once again, neglected and diverted by the influential high caste men who controlled their political parties and GoN administrative apparatus.

Similarly, due to the political party-based structure of the new election laws, there were no legitimate representatives of the IP community form outside of the political party system. Only IP community members who belonged -- and owed their allegiance -- to their political parties, not their ethnic communities, were permitted seats in the Constituent Assembly.

5. MINORITY RIGHTS VIS-À-VIS INDIGENOUS RIGHTS

In this regard, IP leaders strenuously opposed the major political parties' decision, equally supported by the Maoists, who tend to perceive IP issues within a class or economic perspective, to conflate adivasi janjati cultural and political rights with generic minority and marginalised communities’ rights. It was strongly felt that indigenous issues would be too conveniently lost among the various minority rights claimants and never fully addressed in the new constitution unless they were the responsibility of a distinct CA committee.

Human rights academics and professionals distinguish between international definitions of ‘minority’ and ‘indigenous’.

The most accepted definition for ‘minority’ outlined by Capotorti in his 1979 seminal study on discrimination against minorities is,

... a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed toward preserving their culture, traditions, religion, or language.

(Hannum, 2000)

By this definition, the term ‘minority’ is distinguished by its ‘non-dominant’ status with ethnic, religious or linguistic characteristics including an emphasis
on preserving their culture. A slight alteration of this definition is attributed to Deschenes who added the term ‘collective’, a term that is now often used to describe group or collective rights (Hannum, 2000).

The CA Committee for the Protection of the Rights of Minorities and Marginalised Communities, in contrast, defined ‘minority’ as the following:

 Minority community means [those] which suffers from all forms of discrimination and exploitation. The term also indicates an ethnic, religious, linguistic community with less population suffering from such discrimination and exploitation.

The CA Committee identified a minority as, perforce, ‘marginalised’ and ‘excluded’. There appears an implicit, if unacknowledged, opinion in the Nepali context that a minority should be both discriminated against and exploited.

This pro forma subservient minority description may be actually valid in the historically hierarchical and disaggregated Nepali social structure, but it is qualitatively and normatively inappropriate with regard to an indigenous definition that puts its emphasis on the dignity and coherence of a traditional culture.

The ILO Convention 169 has set an internationally accepted definition of ‘indigenous’.

This definition states:

 Peoples in independent countries are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographic region to which the country belongs, at the time of conquest or colonization or the establishment of the present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions. 7

In contradistinction to the CA definition of a minority, this internationally accepted term for ‘indigenous’ more evocatively refers to the complex, historical cultural characteristics of an original tribe or ethnic community. Protecting cultural heritage with an attachment to a specific land or geography, and even concomitant political rights, are more pronounced in the indigenous definition than in that for minorities.

In the Nepal context this sense of indigenous refers to people who inhabited the land before the modern borders of the nation were established and pre-colonization. Although Nepal was not externally colonised, the IP communities were well-established and distinct cultures much earlier than the creation of Nepal in the late18th and early 19th centuries. Yet through the nation’s
modernization process, over the past two centuries their cultures and languages have been systematically marginalised and discriminated against by a dominant, authoritarian and hierarchical political society.

Additionally, it is critical to note that according to international law, ‘minorities’ do not have the right to self-determination; only ‘peoples’ have that right. This point was a major concern while drafting the UNDRIP as earlier IPs were considered indigenous people and/or indigenous persons/communities. The term ‘peoples’ was adopted intentionally to confer the right to self-determination on these communities. With Nepal’s indigenous peoples demanding their ‘right to self-determination’, if only for the cultural legitimacy that they feel it will confer, being granted rights under the auspices of the Minority Rights Declaration, as this Committee report does, perforce, actually limits their collective rights.

Possibly for this reason, due to its restricted mandate, the CA Minority Committee chose to refer only to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities” in its Interpretative Comments, but not to the Declaration on the Rights of Indigenous Peoples (UNDRIP) or the ILO Convention 169 which explicitly refer to collective indigenous peoples rights.

Thus, critical cultural and legal distinctions between the definitions of what constitutes ‘minority’ and ‘indigenous’ communities have been strategically eliminated by the political party elites during their preparations for the drafting of a new constitution. This conclusion has led many IP leaders, once again, to insist upon the creation of a CA Adivasi Janjati Committee separate from the CA Rights of Minorities and Marginalised Communities Committee.

During the 2008-12 CA, these IP leaders continued to warn the major political parties that there would be no successful conclusion to the drafting of a new constitution without greater recognition of the ‘inherent rights of indigenous peoples’. The situation, alas, has not changed even as the parties prepare for a second CA election in November 2013. No significant progress has been made between the IP leaders and the leadership of the major three political parties (the UCPN-Maoist, NC and CPN-UML).

6. RIGHTS OF MINORITIES AND MARGINALISED COMMUNITIES COMMITTEE CONCEPT PAPER

Although the CA Rights of Minorities and Marginalised Communities Committee did not specifically distinguish adivasi janjati rights from a wide range of other minorities in their concept paper, some statements, if included in a final constitution, may potentially provide greater support for indigenous rights in Nepal. Although much less than the IP activists have demanded, some of the potentially progressive aspects of the concept paper include:

358 | Chapter 14
Preamble: The State ‘will ensure proportional representation’

Def. of Nation: “Nepal is… an inclusive State with full proportionality”

Fundamental Rights: “Minorities… shall have the right to establish relationships with a foreign community which has a similar identity”

Fundamental Rights: “Minorities… shall have the right to use rights related to their communities, individually or collectively.”

Fundamental Rights: Persons of minorities…shall be fully represented in a proportional way in the State’s plans, projects & programs”

Fundamental Rights: “The State shall identify the minorities… that are backward and… make arrangements for proportional representation”

These aspects, it should be mentioned, offer hope that this proposed iteration of a Nepali constitution (which would be the third since 1990) will be more progressive for indigenous rights than any previous Nepali constitution. However, the political spectrum has also changed over time. What may have been acceptable a decade or more ago with regard to IP rights, may no longer meet the minimum demands of an increasing number of ethno-political activists who lobbied strenuously and effectively for the adoption of ILO 169 and UNDRIP. There is now a much more vocal and substantial constituency of national, regional and grassroots activists committed to ensure that the State recognise their long-suppressed cultural identities and ready even for confrontation if their demands are not met.

In this regard, given that the GoN has already ratified ILO 169 and approved UNDRIP, as well as the Maoists having made indelible and continual commitments to indigenous peoples, the lacunae in the existing concept paper may precipitate a crisis if the draft constitution does not recognise more explicitly and extensively these promises.

Some of the key outstanding IP issues that have not been definitively concluded include:

- **Representation Rights:** There is no language that commits the State to ensure IP representation through representative institutions or recognition of IP traditional social, cultural and political institutions.

- **Reservations:** There is no firm and binding commitment to ensure that IP or historically marginalised communities, e.g. Dalits, will be granted reservations.

- **Consultative Rights:** There is no commitment by the State to consult IP on legislative or administrative measures that may affect them.

- **Land Rights:** There is no mention of ownership and possession rights concerned with the traditional lands of indigenous peoples.
• **Natural Resources:** The rights of IP to natural resources pertaining to their traditional lands are not explicitly safe-guarded.

• **Agradhikar’Rights:** The question of ‘priority rights’ was not referenced in the concept paper, yet this contentious issue was raised by some IP activists who were insisting on these for *adivasi janjati* in their proposed eponymous federal states (Mishra, 2009).

In addition, there are some objectionable clauses in the existing draft, as well:

• **Language Rights:** The report notes that each new province/state will chose a “language spoken by a majority”.

  Yet this is an ambiguous expression. For example, what if a province has a plurality of an ethnic community, but not a full majority? This clause may intentionally or not ensure limit the official acceptance of minority in the future federal states.

• **Cultural Rights:** “Provided this shall not...undermine morality or jeopardise harmonious relations between communities or groups”.

  During the drafting of this clause, even OHCHR raised questions as to the legal enforcement and interpretation of this constitutional phrasing. They asked, e.g., what is meant by ‘morality’? Such legal questions may lead to the non-enforcement or slow erosion of the strength of the intention or commitment.

Additionally, most of the IP references in the Committee’s concept paper refer to negative rights in the sense that the State shall not discriminate against IPs. However, there is no language that explicitly ensures that the State will provide positive discrimination or affirmative action for the *adivasi janjatis*, as demanded by the IP communities, as they are entitled to under UNDRIP and ILO 169.

In fact, the pertinent and underlying issue of group rights is entirely neglected in the concept paper. The Committee’s premise of minority rights is centered on the traditional human rights priority of ‘persons’ – not ‘peoples’ – so it guarantees rights for the individuals belonging to minorities, but does not recognise the collective rights of historically marginalised communities and their cultures.

The avoidance of a serious discussion on collective rights, which are at the core of many of the long-standing grievances that have lead to the current political crisis and historic Constituent Assembly, has not only been greatly disappointing for indigenous communities, but also for those in the international human rights community who had hoped that Nepal would provide progressive guidance to other nations in transition politically at a time when collective rights have gained greater currency among human rights specialists, cultural rights activists and academics.
Consequently, the CA Committee made no mention of the “historical injustices” or “dispossession of their lands, territories and resources” which have prevented indigenous people from “exercising their rights to development”, language that is found in the UNDRIP.\footnote{11} Similarly, few of the most innovative IP rights established in ILO 169, and ratified by the GON, appear in the concept paper.\footnote{12}

Therefore, outside of earlier populist political rhetoric, under the rubric of the rights of minorities and marginalised communities, the core and still unresolved IP concerns and issues were discouraged, dismissed and displaced in this all-important CA concept paper.

7. FUNDAMENTAL RIGHTS AND DIRECTIVE PRINCIPLES

The Committee on Fundamental Rights and Directive Principles released its final report in late November 2009. Similar to the Minority Committee paper, there was no direct mention of indigenous peoples in the fundamental rights, although there were clauses specifically related to Dalit and women. In fact, none of the written recommendations made by the IP Caucus\footnote{13} were included in the concept paper.

In its comments on the concept paper, OHCHR noted that in situations where historical discrimination has not been alleviated by previous constitutional clauses or legislation, it may be appropriate to consider ‘adverse effect discrimination and substantive inequality’.\footnote{14} Although OHCHR specifically referred to rights against untouchability in these cases, if the next CA seriously considers this innovative principle, it may also consider the adverse affects of historical and systemic discrimination against indigenous communities.

As found in the Interim Constitution 2007, there are some more encouraging and progressive statements in the Directive Principles, following the Fundamental Rights section, but it is clearly stated that the Directive Principles shall not be raised in any court “as to whether provisions contained in this Part are implemented or not.”\footnote{15} This obviously and purposefully obscures a potential benefit of these aspirational clauses.

Immediately after the release of this concept paper, the IP Caucus accused the Committee Chair (a Brahmin woman from the Congress party) of purposefully excluding IP rights and not permitting a recorded vote on issues presented by IP MPs. In a moment of dramatic intention, members of the IP Caucus publicly burnt the Fundamental Rights concept paper in front of the CA in late November 2009.

Nor were these issues ever resolved by the CA Constitution Committee or through discussions or actual voting on the floor of the CA before it was dissolved in May 2012.
8. RELATIONSHIP WITH ILO 169

Neal’s modern transformational political events of 1990, whereby a centuries-old Hindu monarchy was forced to permit the establishment a parliamentary democracy, occurred almost simultaneously as the ILO adopted its Indigenous and Tribal Peoples Convention 169 in June 1989. The passage of the ILO Convention was followed by the UN establishing its Year of Indigenous Rights in 1993 (which later became a full decade 1994-2003).

The GoN then ratified the ILO 169 Convention in September 2007 and voted for the UNDRIP the same year. Nepal was actually the first Asian country to ratify ILO 169. A few key IP CA members were able to positively influence the leadership of the major political parties soon after the restoration of the parliament (after having been dismissed by the king during the Maoist rebellion). However, the individual UML politician most associated with the ratification of ILO 169 believes that he was denied a party ticket in the next election due his effective lobbying on behalf of the Convention (Personal Communication, n.d.).

As these issues have become more politicised within Nepal, many traditional political party leaders have questioned the wisdom of the GoN ratification in this regard. These international obligations, nonetheless, have buttressed and justified demands for the expansion and delineation of indigenous peoples cultural, ethnic, linguistic and collective constitutional rights in Nepal.

In fact, according to the Nepal Treaty Act 1990 (Art. 9), the provisions of treaties are applicable as domestic laws in Nepal; this means that they can be enforced in Nepalese courts. The Treaty Act holds that following ratification, in case the treaty provisions conflict with the provisions of domestic laws, the latter shall be held to be invalid to the extent of such conflict CCD, 2009).

Yet few of the rights established under Convention 169 as ratified by the GON were explicitly included in the concept papers prepared by the CA Committees. There appeared to be a well-organised reluctance among the leaders of the major political parties to acknowledge the legal obligations and commitments made by the GON in ratifying ILO 169.

Therefore, unless the IP MPs are able to force a more open discussion on these obligations on the floor of the CA, such questions will end up in the Nepali courts, not previously very favorable to IP rights -- but possibly open to change depending on the nation’s future politics.

9. CERD RECOMMENDATIONS AND COMMENTARY

The adoption of the 1981 Declaration on the Elimination of All Forms of Racial Discrimination, with the appointment of a Special Rapporteur by the Commission
on Human Rights and its Sub-Committees, was a historic improvement in the protection of discriminated minorities globally.

In this regard, the CERD Committee has taken note of the drafting of a new constitution in Nepal and officially written twice to the GoN referring to their General Recommendations 23 from 1997, particularly point (d):

Ensure members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.

The GoN, nonetheless, has not taken action on the content of these letters. These points remain contested as even some expatriate constitutional lawyers believe the CERD Committee does not fully understand the local conditions and sensitivities with regard to these issues (Private conversation, October, 2009). Yet IP activists (who have kept the CERD Committee informed of these events in Nepal) consistently refer to these CERD letters (and the lack of action by the GoN) as legitimate proof of the insincerity of the GoN and CA with regard to ensuring free, prior and informed consultations with the IP community during the constitution drafting process.

In addition, CERD had further communications with the GoN twice during 2009 urging that the CA create a separate Indigenous Rights Committee in the CA, as well as criticizing the proposed electoral regulations and laws. These letters have since been used as evidence in a case filed on this specific point with the Supreme Court of Nepal.

10. SPECIAL RAPPROTEUR ON THE HUMAN RIGHTS AND FUNDAMENTAL FREEDOM OF IPS

Among a series of high profile UN human rights visitors during the Constituent Assembly process, James Anaya, the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples came in December 2008 for lengthy meetings with GON officials, political leaders, IP leaders and the international community.

After these discussions, in his country report issued in 2009, Anaya noted:

... a long history of oppression and marginalization has excluded indigenous peoples from political representation and decision-making, full citizenship, economic and educational opportunities; and their distinct cultures and languages have been continuously threatened.

Anaya noted that additional mechanisms in the constitution-making process should be established that consult directly with indigenous peoples through
their chosen representatives and in accordance with their own methods of decision-making, as required by the international standards to which Nepal has committed.

IP legitimate demands for self-determination and autonomy need to be adequately incorporated into ongoing discussions about the federal structure... to be embodied in the new constitution," Anaya said. He encouraged the GON to ensure that the IP receive fair representation and resources (Anya, 2009).

11. CONCLUDING CONSIDERATIONS

This paper has reviewed the range of indigenous peoples discourses that were most palpably expressed during the initial 2008-12 Constituent Assembly process in Nepal. These debates and demands, presented both inside and out of the CA itself, sought to ensure that Nepal created a 21st C. constitutional construct by which to overcome the historical assimilative coercion of the pre-1990 State structures, policies and constitutions.

The 2008-12 CA witnessed the rise of ethnic political consciousness and participation evident in the much more diversified CA membership, achieved primarily through the requirements of the proportional representation list. Additionally, for the first time in Nepal's legislative history, there was significant influence of an autonomous IP Caucus and significantly more vocal IP representation in each of the major political parties.

However, as this epochal political process failed to produce a new constitution before the CA was dissolved, more distinct and innovative strategies will be required to integrate and ameliorate new forms of indigenous rights in the years ahead into Nepal's changing legal, political and constitutional frameworks.

It has been noted that due to the growing schism between the IP leadership and the major political parties during the effort to drafting the new Nepali constitution, important CA Committee concept papers, particularly on the Rights of Minorities and Marginalised Communities and Fundamental Rights and Directive Principles, were obscured or sidelined during such discourses.

This lack of a political consensus to legitimate IP rights may led to a crisis during the final stages of drafting a new constitution. This was one of the primary causes for the political parties to seek a closure to the process. The lack of constructive dialogue between the political party elites (primarily hill high caste men), the IP Caucus, and indigenous activists, both among ethnic intellectuals and the more militant factions of the indigenous political fronts, became more apparent as the
thematic concept papers were sent by their Committees to the floor of the CA for final approval.

Thus, no agreement was ever reached between the IP leaders and the major political parties before the final date by which the new constitution needed to be ratified (May 28th, 2010). The major political parties failed to find a common consensus among them. The CPN/M party that had advocated most actively for the rights of the indigenous failed to forge an understanding, or find a negotiated agreement, among the key constituencies within the CA, particularly with the indigenous leaders of the adivasi janjati communities. No viable conclusion was reached to address their most pressing issues and find ways to incorporate their priority concerns in a new constitution.

Nonetheless, although the interface between the political and constitutional processes regarding IP issues has been too often erratic, inconclusive and elusive, certain critical and influential precedents were achieved during the 2008-12 CA process essential to one day fulfilling the vision of an ‘ethno-culturally pluralist’ Nepal (Jackson, 2003).

Yet to reach a lasting and secure consensus between the IPs and the dominant communities of Nepal, the keystone of this national and cultural transformation must be an acceptance that the nascent collective rights of indigenous communities will be clarified, acknowledged and legitimately protected by the new Constitution.

Equally, as ethnic-activists temper their demands for unrealistic aspects of self-determination, complete provincial control over natural resources, and rigid interpretations of ethnically pure political cultural institutions, the national political parties will need to be more willing to accept innovative and reasonable references to group rights in the new constitution that specifically benefit the indigenous peoples of Nepal.

For this to be achieved, however, more frequent, sustained and honest communication will be required between the adivasi janjati leaders and the status quo ante political establishment. A national commitment to acknowledging a collective rights framework cannot come primarily from visiting UN Special rapporteurs, or only from demands of the most aggressive indigenous activists and intellectuals.

Instead, there needs to be a more syncretistic, national consensus that perceives the benefits of ensuring guarantees to historically marginalised indigenous peoples that will sustain and strengthen the unifying ambition and purpose of the State while retaining, enhancing and expanding the culturally rich and vibrant political pluralism that already exists within Nepal.
REFERENCES


Dhulikhel Joint-Declaration by IP Representatives in Nepal (11 September 2009).


Annex 1: The Dhulikhel Joint-Declaration

2066 Bhadra 26 (11 September 2009)

We, the (following) political parties of the indigenous ethnic groups, representatives of the ethnic organizations and intellectuals representing indigenous (peoples) ethnic groups, in order to ensure the rights of the indigenous ethnic groups, through a joint meet, issue this Declaration by using the national and international laws that guaranty our basic freedom and our inalienable rights, especially the UN Charter, The Covenant on Civil and Political Rights, The International Covenant on Economic, Social and Cultural Rights, the International Convention on Elimination of all Forms of Racial Discrimination, the UN Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, ILO Convention no. 169, the UN Declaration on the Rights of the Indigenous Peoples, and the individual and collective rights guaranteed by the Interim Constitution of Nepal-2007, and the National Foundation for Development of Indigenous Nationalities Act (2002).

Regarding the Constitution Making Process

The preamble, articles, clauses and schedules of the new constitution that are related to and influence indigenous ethnic groups should be passed only after establishing thematic committees in the CA and other relevant mechanism with the prior informed independent consent of the indigenous people in order to ensure their meaningful and effective representation according to the provisions of international laws ratified by Nepal, the letter of caution written to Government of Nepal by the Monitoring Committee on the Convention on Elimination of All Forms of Racial Discrimination and the recommendations made by the United Nation’s special rapporteur to oversee the issues related to human rights of the indigenous people.

Provisions regarding the identity and individual and collective rights of the indigenous people should be introduced separately.

Regarding the Rights of the Indigenous People

1. The new constitution must at least incorporate the rights of indigenous peoples, word by word, as guaranteed by the international laws.

2. All the indigenous peoples shall have the right to self-determination. By exercising this right, indigenous peoples, through traditionally and independently established organizations and judicial institutions, shall have the right to adopt the legislative, administrative and other measures and implement them according to traditionally and independently determined judicial systems, norms and values to ensure autonomy and self rule for their community in the areas they inhabit. Except for the rights relating to external security, foreign policy, and currency, they shall (under this provision) have all other rights including the right to priority to
establish self-ruled autonomous provinces within the federal set up on the basis of historical background, ethnicity and language.

3. The indigenous people shall have the right to determine their identity and have membership to the community as well as to determine the responsibilities community members towards the community according to their customs and traditions. This shall not minimise the rights of individuals/members of the concerned community to obtain and retain the citizenship of the Federal Republic Nepal and the right to exercise other rights as an equal to other citizens of the country.

4. The indigenous people shall have the right to (use) their mother tongue and they shall have rights to use their mother tongue in each organ and level of the state.

5. The individual and collective rights as well as human rights of the indigenous peoples that are guaranteed by the ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples, and other international laws shall be fully recognised, guaranteed and protected. If their individual/collective rights and human rights are violated, they shall be provided effective remedies through judicial, administrative and other measures.

6. Indigenous peoples/ethnic groups and individuals shall be independent and equal to other citizens, and they shall not be discriminated against while using and practicing their rights, especially the rights based on their origin and identity of the indigenous/nationalities. They are entitled to the right to appropriate remedy against any kind of discrimination.

7. All the rights including the right to self-determination shall be equally implemented to indigenous men and women. Indigenous ethnic women shall have special right to equality and development. The State shall adopt different measures for effective remedy if there are any cases of discriminations against and violations of the human rights of indigenous women, elderly citizens, youth, and children, the third gender and differently-able people. The indigenous ethnic women shall have the right to participate in each level of the government on the basis of proportional representation with the recognition of their identity.

8. A special provision shall be made in the new constitution for those who are on the verge of disappearance, marginalised and highly marginalised groups within the indigenous peoples,

9. The State of Nepal should guarantee indigenous people’s inherent right to self-determination in the constitution and make provision for its practice. In addition, it also ensures their rights to participate effectively in the political, economic, social and cultural spheres of the state through their representatives elected freely according to process set by them.
10. (a) Nepal shall be multi-national, multi-ethnic, multi-lingual, multi-cultural, multi-religious and a secular state. It shall be a Federal Democratic Republican state.

(b) The State shall give recognition to indigenous people’s right to determine political system independently, and to adopt policies for economic, social and cultural development, and have ownership and effective control over their traditional land, resources and the areas they inhabit. This also includes the right to prior informed independent consent in each level of the government, which affects the rights, life style, the areas of (their) inhabitation and the interests of the indigenous nationalities. The indigenous nationalities shall have the right to be rehabilitated (in a new way) in their traditional land, homelands, religious lands which were seized in the past.

(c) The State shall protect indigenous people’s right to maintain, develop and preserve their political, economic and social system, and the right to livelihood and unhindered access to, and the use and control over means of development, as well as the right to be involved in their traditional and economic activities independently.

(d) In addition to the rights mentioned in (a), (b) and (c), the indigenous peoples shall have the right to participate at all levels of the central and local level legislatures on the basis of proportional representation through their independently elected representatives from their representative institutions and the practices set by them.


(a) Recognise and respect indigenous distinct culture, history, language and way of life as an enrichment of the State’s cultural identity and to promote its preservation;

(b) Ensure members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular based on indigenous origin or identity;

(c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;

(d) Ensure members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;

(e) Ensure indigenous communities can exercise their rights to practice and revitalise their cultural traditions and customs and to preserve and to practice their languages.
Annex 3: Amendment Proposed by IP to the Preliminary Draft of Committee on Fundamental Rights and Directive Principles

<table>
<thead>
<tr>
<th>Article</th>
<th>Amendment Proposal</th>
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<tr>
<td>Rights of Indigenous Peoples</td>
<td>1. Indigenous Peoples shall have right to self-determination, ethnic self-rule and autonomy.</td>
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<td>2. Indigenous Peoples shall have right to proportionate representation in all organs of state at all level on the basis of ethnic population, and each small Indigenous Peoples group shall have right to special representation and access (in all organs of state at all level).</td>
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<td>3. Indigenous Peoples shall have right to representation through own traditional systems and institutions in any agencies whose decision affects them.</td>
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<td>4. Indigenous Peoples shall have preferential right over natural resources including their ancestral territory, water, forest and land.</td>
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<td>5. Indigenous Peoples shall have collective and community rights regarding conservation and promotion of full cultural heritage including of practices and self-management of their identity, spirituality, rituals, life style, institutions, and knowledge and craftsmanship.</td>
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<td>6. Indigenous Peoples shall have political preferential right within their self-ruled territory.</td>
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<td></td>
<td>7. Indigenous Peoples shall have right regarding access, control and self-management of traditional land, natural resource and biodiversity, and conservation, promotion and use of traditional knowledge, craftsmanship and practices, and to equitable entitlement of profit thereof.</td>
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<td>8. Indigenous Peoples shall have right to proportional access to all resources, means and facilities of the country.</td>
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<td></td>
<td>9. Indigenous Peoples shall have right to receive education free of cost in their mother tongue and script, operate educational institutions in their mother tongue; use mother tongue in official transactions as well as in offices and courts; receive information in their mother tongue; and maintain and practice their own traditional laws and judicial systems as well as judicial institutional mechanisms.</td>
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<td>10. Indigenous Peoples shall have right to conserve, promote, control and develop their material and immaterial cultural heritage, their traditional culture, knowledge, craftsmanship, art, literature, local tradition and intellectual property related to them.</td>
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<td>11. Non-resident Indigenous Peoples shall have right to right to acquire dual citizenship if they wish, as provided by law.</td>
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<td>12. Indigenous Peoples shall have right to free prior informed consent in regards to any decision making or action of any agency of state which affects them or is of their concern.</td>
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<td></td>
<td>13. The individual or collective rights of Indigenous Peoples which are provided by this constitution and laws or international conventions and declarations shall be inviolable, indivisible and inalienable, and the state shall have responsibility to guarantee, protect and promote such rights. No pretext including lack of laws shall prejudice such rights.</td>
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CHAPTER 15

SPOT LIGHT ON INCLUSION DEBATE IN NEPAL WITH SPECIAL FOCUS ON CONSTITUENT ASSEMBLY THEMATIC COMMITTEE REPORTS

- Neeru Shrestha
1. INTRODUCTION

Nepal, for the first time in its history, elected an inclusive constituent assembly in 2008. It was supposed to draft discuss and pass a Federal Democratic Republic constitution which would address and accommodate the concerns and aspirations of marginalised and excluded communities. However, this assembly was dissolved in May, 2012 without promulgating the constitution or realizing the Nepali people’s aspirations for social justice and equality. It is an obvious fact that inequality and exclusion existed in Nepali society for various reasons. Core issues in the writing of constitution were inclusion and state restructuring. The major challenge before the constituent assembly is to draft a constitution that has necessary provisions that will ensure social inclusion and mainstreaming of politically excluded communities of Nepal including by providing measures to achieve this goal effectively and progressively.

Nepal has elected the new constituent assembly and it is yet to be seen as to how it will design its new constitution so as to address the issues of social inclusion. Discussions and debates must take place on outstanding issues to reach to a consensus, as to date, political parties are still struggling and taking various positions on such key issues as the federal framework, system of governance, election model, constitutional court and number of constitutional commissions. At the end of the day what really matters is the fact that did the new constitution addressed the following questions of excluded communities:

- Does it promise a path to achieve and realise a just and equitable society for all residing in Nepal?
- Does it open opportunities for partnership in governance?
- Does it enable everyone to equally participate in all development that affects them and to share in its benefits?
- Does it provide for a federal structure with respect for community identity and recognition of autonomy?
- Does it call for meaningful representation and effective participation in all state structures?
- Does it ensure access to excluded communities in all state resources?
- Does it provide for a fair and proportionate representation in all state structures?
• Does it provide for special provisions by way of affirmative action measures for certain time to minority groups?²

There have been substantial discussions and work by 10 constituent assembly thematic committee and constitutional committee to prepare a basis for the preliminary draft of the constitution. The High Level State Restructuring Commission Report 2012 also added value to the discourse. Similarly, the Concept Paper and Preliminary Draft Study Committee also known as Gaps and Overlap Study Committee reviewed the concept papers and preliminary draft to flag any contradictions or overlapping provisions to ease and facilitate the understanding and further the dialogue for the possible consensus. All of these reports have laid an important foundation for addressing the issue of inclusion. The draft reports submitted by the Constituent Assembly (hereinafter called CA) Committee on Fundamental Rights and Directive Principles, the Committee on Restructuring of State and Distribution of State Power, Committee on the Judicial system, Committee on Determination of Structure of Constitutional Bodies, Committee on Determination of forms of legislative body and Forms of Governance and Protection of Rights of Minorities and Marginalised Communities, among others, are very important while analysing the proposed provisions from inclusion perspective. The proposed draft provisions in reports of each of the above mentioned thematic committees can be a great resource for shaping the future constitution.

2. NEPALESE PERSPECTIVE ON CONCEPT OF INCLUSION

2.1 Nepalese Context

The origin of inclusion debate could be traced with the launching of armed conflict by the then CPN Maoist in 2052 BS (1996 AD). Social inclusion was debated as one of the measures that could mitigate the conflict in Nepal. Indigenous Ethnic peoples’ movement and Madhesi peoples’ movement have expanded the inclusion debate to include issues of identity, autonomy and self-rule. After the 2nd people’s movement of 062/063(2006), Interim constitution formally acknowledged the concept of inclusion in its various articles. It even defined the proportionate representation for Marginalised groups as fundamental right. This course has been a strong foundation to pave the inclusion debate in Nepal.

Inclusion always comes with democracy. To realise democracy, participatory and inclusive democratic institutions are must (Ajit, 2008: 1). Exclusion blocks overall development. Inclusion is a prerequisite to end unequal relationship, inequality of all forms and to make a just and equitable society. With the policy and program along with required procedures, the goal is to make all decision making bodies inclusive.
After the signing of the Comprehensive Peace Agreement in 2002 (2006), the republic and state restructuring agendas were understood as established in Nepal. The cultural identity of various social groups took their form during the political struggle. The inclusion issue gathered momentum at the state and development paradigm. The formation of the Constituent Assembly formed in 2008 was the most inclusive assembly of its kind in the history of Nepal and a broad reflection of Nepali society with roughly 34% Madhesis, 33% Women, 33% Janajitis, 8% Dalits, and just under 4% from backward communities (these figures are based on the 240 first past the post members and 335 proportional representation members of the 575-member Constituent Assembly, not including the 26 nominated members).

Social inclusion has been the most important part in the debate of inclusion. It is debated as a transformative tool in restructuring of the state and to promote equitable development. In Nepal, increasing participation of excluded groups in all decision making that affects them; equitable representation of minority groups in state apparatus; empowerment of disadvantaged groups and the agenda of recognition and respect for diverse identities and autonomy through federal process have been core in the debate on social inclusion.

A few Nepali scholars observe inclusion issues as following:

**Rajendra Shrestha**, states that “Inclusive democracy is to ensure participation in law making and implementation of all the groups of class, profession and level who do not have access and share in state policies and public affairs enabling them to be equal part through proportionate representation (Bhandari, 2064 BS: 93).

**Krishna Bahadur Bhattachan** says, “Inclusive democracy is sharing of power and rights on the basis of ethnic proportionate representation through adopting special measures in government federal structure for all caste, ethnicity, gender, linguistic, religious and regional groups (Bhandari, 2064 BS: 50).

**Keshav Man Shakya, Malla K. Sundar and Arjun Limbu** defines inclusion as a legal entitlement of all groups in state that ensure maintaining identity with respect to different status, religion, culture, custom, practices, language and participation without discrimination in state system (Bhandari, 2064 BS: 50).

**Devendra Raj Pandey**, states that, “social inclusion, as a concept, can be related to anything from the quality of representation in the parliament, equal opportunity for education or jobs for different sections of the population to the recognition of identities, languages and cultures of all peoples a nation-state may claim as its members. They require special recognition and affirmative action for justice (Aditya, 2007:1).”

Similarly, **Rohit Kumar Nepal**, states that, “positive discriminatory policies have to be introduced with immediate effect and implemented in a time bound manner to be phased out gradually in the course of two generation”. He adds that there is a need to mainstream the excluded groups in to political policymaking and decision making processes and calls for quotas and reservation in education, employment and political positions of the government, legislator, executive and judiciary. He suggests, to adopt two pronged strategy, one to include the excluded groups in policymaking and decision
An equal and just society requires inclusion at the centre and at provinces. An equal society protects and promotes equal, real freedom and substantive opportunities to live in the ways people value and would choose, so that everyone can flourish. Equal society recognises peoples’ different needs, situation and goals, and remove the barriers that limit what people can do and can be (Bagihole, 2009). Given our context, inclusion is both an accepted norm and an agreed tool to uplift the situation of minority groups that enable them to fully enjoy all human rights and fundamental freedom. To favour minorities, Marginalised and excluded communities, positive action, various special measures and other interventions have to be incorporated in the new constitution and implemented effectively in the days to come to promote social inclusion.

2.2 Brief Relevant constitutional provisions, laws and policies on inclusion

Constitutional provisions:

The constitution of Kingdom of Nepal, 2047 (1990) in article 11 provided right to equality and Article 11(3) provided enabling provision for positive discrimination in favour weaker sections of society and stated that special provisions shall be made by law for the protection and advancement of the interests of women, children, the aged or those who are physically or mentally incapacitated or those who belong to a class which is economically, socially or educationally backward. But no law on affirmative action was enacted during the entire life time of this constitution.

The Interim Constitution of Nepal (IC), 2063 (2007) contains provision related to right to proportional and inclusive participation of backward communities, including women, Dalit, indigenous ethnic group, Madhesi, oppressed groups
etc. Further, it has explicitly recognised principle of proportional inclusion as fundamental right. Article 13, of the IC provides rights to equality. Article 14 guarantees right against untouchability and racial discrimination to all citizens independent of their caste, descent, community or occupation.

Article 21 provides that women, Dalit, indigenous ethnic groups (Adibasis), Madhesis communities, oppressed groups, the poor farmers and labourers who are economically, socially or educationally backward, shall have the right to participate in state structures on the basis of the principle of proportional inclusion. It also mentions that the problems faced by women, Dalits, Adivasi Janajitis (ethnic indigenous groups), Madhesis, oppressed groups, minority communities and other disadvantaged groups shall be addressed, by eliminating class, caste, language, gender, cultural, religious and regional discrimination (Article 138, Interim Constitution, 2007). It stipulates that the state shall adopt policy of reservations and positive discrimination for excluded and backward communities (Article 35 (14)).

Relevant laws

Constituent Assembly Member Election Act 2064(2008) and Civil Service Act 2049 (1993) in its 2nd amendment provided Affirmative Action in legislation for the first time. On the basis of civil service act, affirmative action policy has now been legally implemented in nine other acts including with amendment in a few by laws. Similarly, affirmative action policy has been implemented in almost 18 government services.

Civil Service Act 1993: Provides that 45% percent of the posts to be fulfilled by open competition by women, Adibasi-janjatis, Madhesis, Dalit, disabled (differently able) and people coming from backward area. A separate provision for open competition is made to fill these reserved quotas. It allows reviewing above provision in ten years. A special provision of age bar for women regarding the entry in civil service is made by giving additional 5 years as grace. The maximum age for entry into the civil service is 35 years, whereas, for women candidates it is 40. Civil servants from the listed category of women have a grace period of one year for being the potential candidate for the promotion.

Police Regulations 1991, 12th amendment provides 45% reservation of which, 20% are to be fulfilled by Women, 32% is to be filled by Adibasi janjatis 28% by Madhesis, 15% by Dalit and 5% by people coming from backward areas. A Similar arrangement for reservations is made in Armed Police Force Regulations 2003, 4th amendment in 2007. The Nepal Army issued a separate working procedure for recruiting personal in 2011 following the same reservation percentage. Following the provisions of civil service act, the government has issued directives to all public enterprises including universities and financial institutions to incorporate inclusive policy.

Bill to Amend Some Nepal Acts for Making Some Public Services Inclusive 2067 (2011): The government has proposed a bill to amend the existing provisions of inclusion in existing Acts. Affecting 19 different acts it offers to make public service inclusive, provides inclusion and to specific communities and regions. As per the proposed bill, the reservation may increase from 45% to 48 %. It qualifies Madhesi community. Candidates are restricted to apply for two or more categories of reservation seat except for women. A
The Eighth Plan (1992-1997) admitted for the first time that the government services in the past were not reaching to socially and economically Marginalised groups and made a commitment to conduct special programmes for excluded groups such as women, Dalits and Adibasi janjatis to uplift their socio economic conditions and bring them in the main stream of development.

The Ninth Plan (1997-2002) contained a separate chapter for indigenous people and ethnic groups with a long-term concept of their development and integration in the society, envisaged for the formation of an autonomous Janajiti council at the district level and arranged to allocate resources from Village Development Committee (VDC) and District Development Committee (DDC) grants for implementing the programmes as identified by them. A separate section for gender and development categorically incorporated 12 critical areas of concern and envisaged providing 20% of employment to women candidates in all public sectors.

The Tenth Plan (2002-2007) states, as one of its objectives, to empower women, indigenous and ethnic groups, Dalits and other excluded communities on the basis of equality and to work towards their inclusion through their increased access to development efforts. Numbers of specific institutions like National Foundation for Development of Indigenous Nationalities (NFDIN), Women Commission, Dalit Commission were established during this plan period.

Three Years Interim Plan (2007-2010) recognised the existing relationship between conflict, poverty and exclusion and adopted inclusive strategy focusing on the excluded groups such as Adibasi-janjatis, Dalits, Madhesis, women, people with disability and extremely poor people, and people of the remote geographical areas. It also stated that it will ensure participation of excluded groups in development investment and outcomes. The plan adopted the policy of proportional representation of excluded communities in all decision-making
processes and structures of the State and positive discrimination in the economic, education and health sectors to ensure the economic and social security of the weaker sections and communities among the excluded groups.

Three Years Plan (2010-2013) expressed its firm commitment to promote inclusion in public services by providing equal opportunities to all competent and interested people representing different classes and communities.

2.3 Supreme Court of Nepal on Inclusion Issue

Supreme Court (SC) of Nepal has been progressive in furthering the issue of inclusion. It has clearly admitted that Nepal’s interim constitution 2007 (IC), has inherited the principle of inclusion to address the issues of marginalization and exclusion that existed in our society. The inclusion issue has been developed as legal entitlement for the first time in IC under fundamental rights. Analyzing the norm and spirit of IC, the court in its ruling has further elaborated the need to apply inclusion by all state agencies as part of state responsibilities.

The SC also has been very wide in analyzing the concept of substantive equality. In its various ruling it has not only recognised the principal of substantive equality but also has developed a strong jurisprudence to favour it by applying international human rights instrument, as duty of Nepal being state party to various such conventions.

A few cases on the jurisprudence of inclusion and positive discrimination:

**Inclusion and the constitution**: The inclusion issue in Interim Constitution as interpreted by Supreme Court of Nepal has been guaranteed both as fundamental rights and state obligation. It has interpreted inclusion as like reservation to empower and mainstream the Marginalised communities. In this verdict SC describes the inclusion principle to be applied by all state institutions including the Sanskrit university as part of state obligation to ensure inclusion as per the spirit and norm of the IC. In the above case, the court stated that there was no legal provision on inclusive principle until the political change of 062-63 (2007). Due to unitary and centralised state structure, and laws being accordingly to serve, there were limited privileged males who were educated receiving certain comfort. Though, the IC has guaranteed a number of fundamental rights for all Nepali citizens, the certain groups who were prevented from education, opportunity of job including state investment, the Marginalised groups and communities could not enjoy the rights by competing with educated and privileged groups. Hence, the inclusion provision has been provided in the IC as like a reservation and is constitutionally mandated to empower and mainstream the Marginalised groups to enjoy all fundamental rights.

The Supreme Court of Nepal admitted that the proviso Article 13(3) of Interim Constitution is to provide special provisions for the protection, empowerment or advancement of women, Dalit, indigenous ethnic tribes (adivasi janajiti) Madhesi or farmers, labourers or economically, socially or culturally backward, disabled and the article 33 (d1) as state obligation to enable Madhesi, Dalit, indigenous ethnic tribes (adivasi janajiti), women, labourers, farmers, the physically impaired, disadvantaged classes and disadvantaged regions to participate in all organs of state structures on the basis of proportionate...
inclusion. It reiterated that the Sanskrit university being a state institution could not get immunity from applying the inclusive principle. The advertisement published by the same University dated 2067/5/26 (2011) to fulfill the vacancy of instructor and vice-lecturer, serial number 1-14 did not include women, Dalit, adivasi, janajiti, Madhesi, physically impaired groups as per the inclusive principle to be followed by all state institution. Thus the SC held that the advertisement is not found accordingly on the basis of constitutional provision on inclusive principle hence is void.

The court ruled that the spirit of the IC 2007, has been to make Nepal an inclusive state hence the cabinet decision dated 2068/9/5 (2012) following military policy paper (2012) to approve new entry of 3000 military from Madhesi community and within that group to include women, Dalit and Marginalised groups is not against the provision under article 13(2). The court analyzed the policy paper, section 8.5, that provided equal opportunity for all Nepali citizens to open positions of military soldier to participate in free competition from Himalayan, hill and terai regions by opening 5 centers in respective regions. Further, to make Nepali military more inclusive the policy paper has provided programs of awareness raising, campaigning to build ownership towards military institution and preparation of classes to conduct and such other measures to be adapted to that ends. Thus the court held that the cabinet decision to include Madhesi community in the military is not against the principle of inclusion provided in IC and also does not violate the principle of equality under 13(2).

Positive discrimination as compensatory discrimination:
The supreme court has described that positive discrimination is an important tool to advance the situation of backwarded and Marginalised communities and has considered it as compensatory discrimination or compensatory state action. It has recognised that back warded communities and those groups that have not been able to come in mainstream of life due to discriminated policies of past and lack of appropriate opportunities in economic, social and educational areas. Hence such groups are to be provided and made available of special benefits, concession or opportunities as compensation.

The court noted that positive discrimination is another part of equality. Formal equality is one dimension to ensure equality between the individuals whereas another dimension is substantial equality among various groups. Positive discrimination is developed as a means to create a just society that needs to be incorporated within the constitution as a formal mechanism to end inequalities in society. One dimension of equality is a strong tool to achieve substantive equality that ensures equality in result and is not limited only in providing equal opportunity. It recognised the basic principle of bringing the Marginalised communities in the mainstream through ensuring special provision in the constitution and stressed the equally important fact of its effective implementation.

In the above case, the court has interpreted proviso to Article 11 (3) of the Constitution of The Kingdom of Nepal as special provision that can be applied to advance the rights of groups listed but shall not be applied as limiting the rights. As the constitution guaranteed that special provisions shall be made through law to protect, empower and advance the situation of women..., no law could be made to prevent women to enjoy equal rights (between married and unmarried women). Hence, the provision of Nepal military (pension, gratitude and other benefits) policy 2033, rule 10 proviso that made different provision for married and unmarried daughter is against the provision of constitution and is void.
The constitutional provisions, laws enacted and plans implemented have shown a commitment towards working and making inclusion a reality in principle. However, there is still a lot to be done to achieve the goals set in the documents as to be realised by the disadvantaged communities of our society. It requires both clear and specific policies for different categories and a mechanism of monitoring and evaluation as per the target plans. Similarly, it requires adequate resources to be allocated, mechanisms to be built with periodic review to improve and develop strategies as per the context and people in need to integrate in the system to better achieve the goal.

There is also a dire need to objectively qualify groups that need Affirmative Action and other measures to empower to enjoy equal human rights and fundamental freedoms. In the absence of a clear legislation with a list of groups receiving special protection, the implementation becomes week and sometime impossible. The Supreme Court quashed one writ petition\textsuperscript{15} for the application of special protection and held that there is a need to enact comprehensive umbrella law that objectively qualifies the groups (women, children, aged, physically and mentally weak, socially, economically and educationally backwarded class) and in the absence of such legislation, the policies prepared on piece meal basis cannot fulfill the objective and spirit of the constitution.

In the current debate, there are no groups left in Nepal that have not asked special measures or affirmative action. Social and human development index definitely can be a basis while identifying such groups.

3. BRIEF OVERVIEW ON THE MEANING OF INCLUSIVE MEASURES

3.1 Affirmative Action (AA)/Special Measures (USA, India and South Africa)

*Affirmative Action (AA)/Special Measures*

“Affirmative action” is a term used frequently, but, unfortunately, not always with the same meaning. While in the minds of some the concept of “affirmative action” is also covered by the term “positive discrimination”, it is of the utmost importance to stress that the latter term makes no sense. In accordance with the present day general practice of using the term “discrimination” exclusively to designate “arbitrary”, “unjust” or “illegitimate distinctions”, the term “positive discrimination” is a contradictio in terminis: either the distinction in question is justified and legitimate, because not arbitrary, and cannot be called “discrimination”, or the distinction in question is unjustified or illegitimate, because arbitrary, and should not be labelled “positive”. On the contrary, the term “positive action”, is equivalent to the term “affirmative action”. The former term is more often used in the United Kingdom. In many other countries, such action is known as “preferential policies”, “reservations”, “compensatory or distributive justice”, “preferential treatment”, etc.\textsuperscript{16}
The jurisprudence of equality, formal vs substantive also has been the foundation to develop various measures of inclusion to achieve a just society where all can enjoy fundamental rights equally. Due to the unequal relationship existed in society for various reasons, formal equality principle has been inadequate and substantive equality jurisprudence has developed to ensure that equality in real terms could only be enjoyed while that is applied to achieve equality in effect/ result and not only in law. The substantive equality as being the basis norm to enjoy human rights has been identified and developed through various UN instruments.

Affirmative action policies regulate the allocation of scarce positions in education, employment or business contracting so as to increase the representation in those positions of persons belonging to certain population subgroups (Fryer & Loury, 2005: 147-162). AA has been defined as a civil rights policy premised on the concept of group rights that seeks equal workforce representation for minority workers. Affirmative action presupposes a hierarchy of more/less desired positions; a significant diversity of racial/ethnic group identities; due to a history of social exclusion, a substantial social disparity between these groups and a political/ economic need for group representation (Galanter, 2012: 3-20).

The main justification for affirmative action is non discrimination and equal treatment. This includes addressing the effects of past discrimination, to overcome structural arrangements that perpetuate inequality, and to assure personal fairness and equality. General welfare is another justification, which is based on the desired social outcome e.g. to reduce group disparities, to afford representation to the underrepresented and bring their voices into public deliberation, to encourage the development of the wasted talent, or simply to reduce friction and promote communal harmony. Reparations are third justification. It considers that a history of invidious treatment by a certain group has resulted in accumulated disadvantages and lingering effect on another. In present, it would not matter how fair and unbiased measures are employed for benefit distribution, as it is important to note that the victims of past injustice will not fare well in terms of current performance. Hence, fairness demands that present distributions are to be arranged to undo the offset old biases, not to perpetuate them. Affirmative action provisions are a medium through which the nation envisions itself and its future, the bonds between its citizens, and what it means to be a nation (Loury, 2012).

Positive action is about bringing individuals up to a point, for example, through training or the acquisition of qualification where they can compete equally with other individuals. Despite popular myth it does not constitute preferential treatment which for example, gives people jobs purely because they are minority ethnic group, a women or disabled. In fact the UK Equal Opportunity and Development legislation legitimises affirmative action for particular groups on the basis that they are disproportionately underrepresented in the certain positions
or at certain levels within an organisation and the duty to ensure positive equality in the public sector for people of all races, gender and with a disability requires the active promotion of equality (Bagihole, 2009: 120-125).

USA, India, South Africa and AA

United States of America

Affirmative action in the United States of America does not have constitutional or legal guarantees for reserved seats. There is a strong jurisprudence found in court cases. The goals of AA policy in USA (Loury, 2012) have been;

- open previously foreclosed opportunities to women and minorities through advertising, outreach, training etc;
- ensure non discriminatory hiring practices by those doing business with federal government through goals, timetables and compliance review;
- correct the effect of past discrimination through, for example court order hiring target, given a finding of past discrimination;
- reduce the significant inequality between the races which continues to exist in American society through legislatures
- secure "inclusion" greater dignity and respect.

Affirmative Action in Education and employment are provided in the United States. Recipients of federal funds are required to document their affirmative action practices and metrics. Educational institutions which have acted discriminatorily in the past must take affirmative action as a remedy (Civil Rights Act, 1964). The Civil Rights Act is a federal law that prohibits discrimination on the basis of race, color, national origin, sex (including pregnancy), and religion in employment, education, and access to public facilities and public accommodations, such as restaurants and hotels. There are many anti discrimination laws in the United States and the Office of Civil Rights enforces the following education anti-discrimination laws: Title VI of the Civil Rights Act of 1964 (race, color, religion, national origin) Age Discrimination Act of 1975 (people of a certain age; Title IX of the Educational Amendments of 1972 (gender); Rehabilitation Act of 1973 (people with disabilities; Title II of the Americans with Disabilities Act of 1990);The Pregnancy Discrimination Act ;The Equal Pay Act of 1963 (EPA) ;The Age Discrimination in Employment Act of 1967 among others.

Employers who contract with the government or who otherwise receive federal funds are required to document their affirmative action practices and metrics. The United States Equal Employment Opportunity Commission (EEOC) enforces federal anti-discrimination statutes, and provides oversight and coordination of all federal equal opportunity regulations, policies, and practices.

The United States has developed anti-discriminatory measures for minorities or discriminated groups, which is focused on the labor market, but also applies to
other markets. Affirmative action is also applied in other economic and social spheres such as housing, education and various government contracts – the latter includes government products and consumer goods. Further, various methods both legal and non-legal have been used to provide protection and equal participation to the discriminated groups in various markets. These measures include; a) reparation or compensation for the denial of property rights for long time in the past; b) legal provision against discrimination in the labor market in the form of Equal Employment Opportunity Act. This act prohibits any form discrimination of worker on grounds related to productivity or related to non-economic consideration and c) affirmative action to ensure fair participation of minorities (or discriminated groups) in employment – either by promoting balance (racial/religious) in employment policy, with certain general benchmark without quotas or with fixed quotas in protection of population of the minority groups (Thorat, Aryama & Negi, 2007).

India

Affirmative action is applied in India in the form of reservation. In the constitution of 1950, 15%, reservation was provided to Dalits and 7.5% was for indigenous tribal. The AA programme in India consists of 22.5 percent quotas in government educational institutions, government jobs and in all levels of elected bodies for (SC &ST). Hence, India’s AA programme is primarily caste-based, although there is some AA for women in the electoral sphere. In 1991, reservation is provided 27% to Other Backward Class (OBC) in jobs that later were extended to educational institutions.

The Constitution of India allows making special provisions for the advancement of socially and educationally backward classes of citizens:

........nothing in this article shall prevent the State from making any special provision for women and children; making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes; shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions …

(Article 15 (3)(4) & (5) Constitution of India, 1950)

Specifically, it permits taking special provisions for Scheduled Castes and the Scheduled Tribes (SC &ST). India has provided reservation to Dalit and ST from the local level to the state legislative body as well as in the federal legislative body. Furthermore, the reservation for those two groups are extended to public civil service, police and border security force, teacher, university teachers. It also
requires seats to be reserved on the basis of population of Schedule Caste and Schedule Tribes in every Panchayats (local unit of government) and Municipality, out of which one-third is reserved for women from same communities. Seats are also reserved for Schedule Caste and Schedule Tribes and Anglo-Indian in House of People, Legislative Assemblies of the States, which shall be discontinued after 60 years.

For women the 33 % reservation is extended only for elected local bodies below the level of the state legislature and for OBC this is applied in the public services. There are no quotas for Other Backward Class (OBCs) in the electoral sphere. India has provided reservation to Dalits and indigenous tribal groups in proportion to their population whereas for women and OBC it is disproportionate (Article 332(1) & 243-D).

Under Equality of opportunity in matters of public employment, article 16(4A) states that

\[\ldots\text{nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.}\]

Similarly Article 16 (4B) provides that:

Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.

Article 338 provides for a Commission for the Scheduled Castes and Scheduled Tribes to be known as the National Commission for the Scheduled Castes and Scheduled Tribes with primary duty to investigate and monitor all matters relating to the safeguards provided for the Scheduled Castes and Scheduled Tribes under this Constitution or under any other law for the time being in force or under any order of the Government and to evaluate the working of such safeguards.

India has had long experience on reservations and there have been both positive and critical assessment on it as an effective way of correcting the inequality that persists in Indian society. The major criticism has been the limited ability to serve effectively and the ability of reservation system to reach those most in need. It also has been criticised for serving creamy layer including not being able to develop effective models and approaches to serve the aim as mentioned in the constitution.
South Africa and AA

The Constitution of the Republic of South Africa allows for legislative and other measures designed to protect and advance persons, or categories of persons, disadvantaged by unfair discrimination (South African Republic, 1996). The constitution requires that national legislation must be enacted to prevent or prohibit unfair discrimination. Article 185 and 187 provide for the commission for promotion and protection of rights of cultural, religious and linguistic communities and commission for gender equality.

In 1994, the parliament of South Africa issued a white paper on Reconstruction and Development. The white paper was published in the Government Gazette, with affirmative action as a sub chapter under restructuring of public service sector for the greater representation. The major objective of this initiative was to identify the inequality created by the past and to step towards ending racial and gender inequality including all form of discrimination. This policy had to be applied at all levels of government. With the admission that the major responsibility for making public service representative falls to the state, the white paper stated that the policy was to involve all concerned organisation to create just and equitable situation for all in employment areas (UNDP/SPCBN, 2012: 18).

In the entire public service areas and level, current law on entry and promotion were reviewed and amended where special groups were under represented. Further, the white paper admitted that with the current requirement for certain positions and its formal eligibility criteria, if maintained, would result in continuation of inequality and the AA could not be effectively implemented. Hence it suggested to review all those current operating laws, bylaws and procedures. It mandated to reform older promotion system for women.

For both government and private sector institution, a wider and uniform standard of AA policy was made. And that policy was to be expanded to employment including on aspects of other areas of economic and social life. To make this program effective, the white paper also ensured required budget, immediate amendment on public service act and by laws including a provision for public service commission to ensure training and information for public service (cited in UNDP/SPCBN, 2012: 33-34). In 1995, government issued white paper on Transformation of Public Service, which implemented the strategy to increase the representation of state through AA mainly by enacting of law prohibiting on discrimination based on ethnicity, gender and physical disability; wider reformation in entrance, selection and promotion procedures to increase maximum representation in public service and to ensure required attitudinal changes in all organizations, in particular policy making and administration, with necessary commitment.

In the five years of implementation of AA policy (including with fast tracking) in public service, there has been a clear result with increased number of targeted
groups. In public service 46% is increased of black people (15% in 1995 went to 61% in 1999). In the highest legislative position which was previously dominated only by white males and almost none representation of blacks and women, blacks were able to achieve 40% and women representation is increased at 27% which was close percentage targeted by the white paper. Similarly, the representation of disable and other racial groups also have been increased (UNDP, 2012: 21-22).

There are many laws enacted to promote equality and preventing discrimination. The Promotion of Equality and Prevention of Unfair Discrimination Act 2000 prevents and prohibits unfair discrimination. It requires the State to develop action plans, develop codes of practice and guidelines, provide assistance, advice and training on issues of equality, and develop appropriate internal mechanisms to deal with complaints. Likewise, Employment Equity Act 1998 promotes employment equity, including provisions prohibiting unfair discrimination, regulating affirmative action and establishing a Commission for Employment Equity. This Act ensures qualified people from black people, women and people with disabilities equal opportunities in the work place.

3.2 Special measures/AA in UN Convention:

Convention on elimination of all forms of discrimination requires signatory state parties to implement the convention through special measures by enacting legislation, policy action and other governmental measures in order to secure full and equal enjoyment of human rights and fundamental freedoms by disadvantaged groups. The objective of special measures has been advancing substantive equality. The sole purpose to adopt special measures are required to secure adequate advancement of certain racial or ethnic groups or individuals and are not provided to maintain as separate rights and to be discontinued after the objectives are achieved.

Adequate advancement means goal directed programs to alleviate and remedy disparities in the enjoyment of human rights and fundamental freedom affecting particular groups and individuals and protecting them from discrimination. Such disparities include persistent or structural disparities and de facto inequalities resulting from the circumstances of history that continue to deny to vulnerable groups and individuals the advantages essential for the full development of the human personality. AA is always directed to a certain target group composed of individuals having characteristic in common, finding themselves in a disadvantaged position. AA programs are basically concerned with women, blacks, immigrants, poor people, disabled persons, veterans, indigenous peoples, other racial groups, specific minorities, etc.

Special measures includes legislative, executive, administrative, budgetary and regulatory instruments, at every level in the State apparatus, as well as plans, policies, programs and preferential regimes in areas such as employment,
housing, education, culture, and participation in public life for disadvantaged groups. The State parties are responsible to design framework for the consistent application of special measures in all parts of State where necessary.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) recognize a process of equalization in which social resources are redistributed to provide for the satisfaction of the basic rights of every member of society, based on the idea of equality of opportunity. Identifying the disadvantaged groups requiring positive action is important step to realise the rights in the convention.

The ILO Discrimination (Employment and Occupation) Convention of 1958 (No. 111), engages the State to undertake to pursue a national policy designed to promote equal opportunities and treatment in respect of employment and occupation with a view to eliminating any discrimination, enacting legislation to that effect and seeking the cooperation of employers and workers organizations and other appropriate bodies.

3.3 Reservation, Proportional representation and Special Rights:

Reservation (Quota)

Reservations, or quotas, is one of the most important measures of affirmative action. It is also sometimes understood as synonymous with affirmative action. However, affirmative action is a complete concept for promoting substantive equality to create a just society whereas reservations are just part of it. Reservations involve separating a certain numbers of seats for a backward community, certain groups in a particular institution.

This concept has evolved to promote access of the most backward communities/groups one or more, for a specific period of time and it is not applied to all groups. Right to equality ensures formal equality. Equality amongst equals is easy to understand and ensure. But where people are not equal and can’t enjoy the rights equally due to their unequal access to economic, social and political opportunities, the concept of formal equality becomes a farce. Hence the policy of reservation is applied to promote such groups by reserving seats at political level for their representation so that they can participate in decision making that affects them. Further, reserving seats in civil service provides their sharing and ownership in the system. Similarly, with reservation in educational scholarships, they are empowered towards making themselves competitive.

The reservation system has been applied to allocate certain numbers of seats in the super structures of the State mechanism and is called as top –to- bottom approach. Its primary beneficiaries are the creamy layers of the targeted groups. This approach has been criticised as being beneficial for creamy layer worldwide. As it is a temporary measure and a periodic provision, to uplift the unequal and
would, in principal, wither away when the inequality is eliminated, the problem lies in its limitation on the period. Furthermore, it is also not easy to identify where, to whom and which areas, the reservation is allocated. Reservation may be applied to areas where merit based open competition would effectively deny and exclude the disadvantaged groups from their access to education and employment opportunities. Reservation system is an option where proportionate representation and special rights cannot provide meaningful solution to discrimination and deprivation.

Proportional Representation

Proportional representation (PR) is a principle that ensures representation in State organs, bodies or structures for caste, ethnicity, gender, language and religious or any other group, in proportion to the group’s population. The precondition for applying this mechanism is the existence of accurate and scientific survey of population. This is not a periodic provision but may be continued forever provided the populations’ proportions remain the same. This mechanism was established in Nepal after the second people’s movement (Jana Andolan II) in Article 21 of Interim Constitution 200, which states that economically, socially and culturally backward women, Dalit, adibasi-janajitis, Madhesis, destitute classes, poor farmers and labourer shall have the right to participate in state structures on the basis of principle of proportional inclusion. PR is a mechanism that is applied to ensure both access to opportunity and resource sharing and distribution to all groups residing in the country on the basis of their population proportion. Proportional representation is a policy of just distribution of political posts to all the communities and it is not necessarily limited to excluded and disadvantaged groups alone.

The weakness of this system is that tension would always remain where the opportunity is limited and the minority within the beneficiary group is at risk of being the ‘looser’. This system does not also help small population groups. Similarly, to apply the principle of PR, the state may need to divide all its resources equally to all the groups.

Special right

Special right is a new subject that has remained center of focus in the discourse of state restructuring in Nepali society. In the draft CA committee reports, this concept has been reflected as "Comensatoriatory rights" or "Additional Rights". Special Rights is interpreted as rights that are given in addition to proportional representation and are justified as part of special measures to ensure just and equal society.
4. ANALYSIS OF FINDINGS AND RECOMMENDATION OF CA COMMITTEE

The major objective of inclusive state is to ensure that in a diverse cultural society, people from all classes and communities and from all regions participate equally in state affairs through representation, access to resources and power sharing. The Federal governance system, autonomy, proportional representation and special provisions for disadvantaged groups are understood as structural elements of inclusion. This section looks at provisions proposed in the reports of the various committees of the Constituent Assembly from social inclusion perspective including proportional representation and special provisions for disadvantaged groups (minority, Marginalised and excluded groups). Note, it does not deal with the federal system and autonomy provisions of the Constituent Assembly committee proposals.

This section analyses the Constituent Assembly reports from the perspective of inclusion, and for that purpose the following are considered indicators of an inclusive democracy:

1. **Governance in partnership**- The major characteristic of an inclusive democracy is governance in partnership which requires a federal governance system, two tires of legislature, a multiparty system and protection of minorities through the electoral system.

2. **Social inclusion**- Social inclusion is generally ensured through proportional representation with autonomy, ensuring representation and participation of various groups that are disadvantaged on the basis of caste, ethnicity, language, religion, culture and regions.

3. **Economic inclusion**- Economic inclusion is ensured by ownership and power sharing of state resources and representation in all state apparatus, and ownership of ethnic groups over natural resources.

4. **Political inclusion**- Political inclusion achieved by ensuring people from all classes, castes, ethnic and linguistic groups and regions participate in state structures. It also requires the creation of state structures with political, economic and cultural rights to be exercised by people and powerful local bodies.

5. **Cultural and Lingual inclusion**- Cultural and lingual inclusion encompasses the right to self determination by the provinces which allows them to promote and protect culture, language and their development with equal opportunities. It also includes the recognition of language and culture and their promotion and protection.

6. **Legal Pluralism**- Inclusive judiciary. Legal pluralism and an inclusive judiciary entail the recognition of customary practices by the local courts and official recognition of local languages in the provinces and at local levels.
Freedom and participation is core to individual opening door for political opportunities that ensures their access to other services of State which enable the access of all groups in society to power and decision making and, ultimately, to the benefits of development. Inclusion is must to make institutions people friendly to win the faith and to give feeling of ownership to the disadvantaged community. The inclusion process should not only be targeted to state structures but encompass all the institutions and processes that are accountable to society. For the historically disadvantaged communities to address the past injustices special mechanisms of affirmative actions, special rights and reservations have to be offered at periodic basis. The ultimate goal of inclusion is that all barriers to access to economic and state resources are eliminated and inclusive development realised. Inclusive development means ensuring equal participation in the process of development and its benefit or result.

All eleven Constituent Assembly committees proposals are committed to an inclusive state as evidenced by their reports and preliminary drafts. Broadly, the Constituent Assembly reports have recognised diversity and plurality; provided for respect and protection of culture, language and traditions; ensured proportional inclusion for all groups; proposed non-discrimination and special protection for certain groups; made provisions for participation and representation of citizens in all structures of the State; and provided for the empowerment and protection of certain vulnerable group.

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<td>Women, Dalits, Madhesis, indigenous tribes (adivasis/janajatis), minorities and Marginalised, Muslims, the gender and sexual minority community, people with disabilities, youths, backward classes, farmers, laborers and oppressed groups, who are socially backward, shall have the right to participate in state structures on the basis of proportionate inclusion.</td>
<td>Having determined to create an equitable society on the basis of proportionate, inclusive and participatory norms in order to ensure economic equality, prosperity and social justice while ending all manner of discrimination relating to class, caste, region, language, religion, gender and class, including the caste system and untouchability.</td>
<td>Nepal is a multiethnic, multilingual, multi-religious, federal, democratic republican, secular, inclusive State with full proportionality based on equality, freedom and justice and free of ethnic, linguistic and religious discriminations, and of untouchability.</td>
<td>“….ending class, racial, linguistic, gender, cultural and regional discrimination, and accepting the fact that the institutional development of democracy, sustainable peace, stability and economic and social transformation are possible only after building an inclusive state, while also seeing to the participation of women, Dalits, indigenous people/Janajitis, Madhesis, Muslims, the disabled, and people of minority and Marginalised groups and backward regions and classes in all organs of state restructing on the basis of proportionate representation and inclusiveness…”.</td>
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4.1 Political inclusion and Non political inclusion

The Constituent Assembly committee reports are generally satisfactory in terms of their provision for both political and non political inclusion. A proportional electoral system for legislature and executive at different levels (federal, provincial and local) is proposed. This system envisages the inclusion of women, Dalits and others through reservation and political preferences. The principle of proportional inclusion is applicable in the appointment of judges and also in the public services. The committees’ reports recognise the ethnic, lingual, religious and cultural diversity of Nepal and proposed that Nepal be deemed a secular, inclusive and multinational state. The proposed 9 provinces (out of 14) and 23 autonomous regions are named on identity of diverse ethnic groups.

The following proposals of CA reports ensure political and non political inclusion;

- **Proportional inclusion in the state structure and public service:**
  The proposal for Proportional inclusion in the state structure and public service as a fundamental right is one of the strong proposals in committees' reports. The communities to be represented in proportion to their populations are women, Madhesis, Tharu, Dalit, Adivasi Janajitis, Muslim, backward classes, regions, minorities. (see Annex I: Committee on Fundamental Rights and Directive Principle)

- **The Principle of proportional representation and inclusiveness:**
  Introducing a reservation and quota system for excluded and Marginalised community has been broadly accepted under the principle of proportional representation and inclusiveness in all state mechanisms, including legislative bodies, judiciary, constitutional bodies, security forces, ambassadorial and special representatives positions. Specifically, proportional representation and inclusiveness is provided to all castes, tribes, religions, color, sexes, classes, and for Dalits, Tarai people, Madhesis, Muslims, the disabled and endangered Tribe and Community. (See Annex I: Committee on Fundamental Rights and Directive Principle; Annex IV: Committee on Determining the Form of Legislative Body; Annex V: Committee on Determination of Forms of Governance of State; Annex VI Committee on Judicial system; Annex VII: Constitutional Committee and Constitutional Bodies)

- **Participation and empowerment of Marginalised and excluded communities:** The participation and empowerment of Marginalised and excluded communities is covered in the provision on proportional and inclusive participation which gives priority (special opportunities) to such groups in employment, education, health, housing etc. (See Annex III: Committee on Rights of Minorities and Marginalised Communities)

- **Provision of Constitutional Commission:** New Commissions have been proposed including a Women Commission, Muslim Commission,
Adibasi Janajiti Commission, Dalit Commission, Madhesi Commission and Commission to protect the interest of Disable, Minority and Marginalised communities and Backward class and region as Constitutional Bodies. (see Annex: VII Constitutional Committee and Committee on Constitutional Bodies)

- **Protection of Language and Culture**: Adivasi-Janajitis and marginalised communities are to receive special opportunities and benefit for the protection, promotion and development of their language and culture.

- **All mother tongues are recognised as national languages**: All mother tongues are to be recognised as national languages and Nepali in Devnagari script is proposed as the official language for use by federal government. However, the proposal opened the way for other languages to be recognised as official language at the federal and provincial level through legislation.

- **Right to religious freedom, right to protect, promote and to own customs and traditions**: The committee reports provide for the right to religious freedoms and the right to protect, promote and use own customs, traditions, rituals and practices that are not inconsistent with norms and values of universal human rights.

- **Self determination and political preferential rights**: Out of the total 14 provinces, 9 have been proposed as ethnic provinces with the right to self determination and political preferential rights for the dominant ethnic group was proposed to lead provincial government at least for initial two terms. Under special structure, 23 autonomous regions have been proposed to protect the interest of minorities and provinces can create more autonomous regions if needed. (see Annex II: Committee on Restructuring of State and Distribution of State Power). The state restructuring commission reports had different recommendation to this committee proposal. It recommended to remove this political preferential right in the province for the dominant ethnic group but retained it for autonomous area.

- **Reservation through electoral system**: Seats in the legislative bodies at the federal, provincial and local level will be reserved through the proposed proportional electoral system. Out of 151 member of House of Representative, 75 are to be elected through proportional representation system. In provincial legislature approximately 50% (17 out of 35) members to be elected through proportional representation. Similarly, there are provisions of 30% members to be represented from the communities which are not represented in local legislature through direct election. In addition, 13 members of the National Assembly to be nominated from Marginalised and excluded group. (see Annex IV)
• **Reservation for women:** Women shall have the right of proportionate representation at all levels of the State structures. Specifically, at least one-third of the elected members in the House of Representatives and Provincial Assemblies shall be women. In addition, women leadership is to be ensured in one of the high-level positions such as president or vice-president, Speaker or Deputy Speaker, Chairperson or Vice-Chairperson of national assembly, and speaker or deputy speaker of provincial legislature. (see Annex I, II, V)

• **Reservation for Dalits:** The Committee for State Restructuring has proposed for proportional representation for Dalit on the basis of population at federal, state and local level political structure and an additional 3% and 5% representation for Dalits in federal and State composition respectively. (see Annex II)

• **Additional reservation for women and Dalits:** The reports have tried to ensure diversity context of women and have proposed reservation within reservation. The proportional representation of Madhesi women, indigenous nationality women, and minority and Dalit women was proposed in all rights subjected to women. Similarly, the proportionate representation of hilly Dalit, Madhesi Dalit and Dalit women were provided for in all rights received by the Dalit community. (see Annex II)

The proportional representation should be constitutionally guaranteed for all tiers of the federal state with a periodic review of its population. The CA reports propose representation for excluded and minority groups in all state organs and structures. However, this needs to be further scrutinised in terms of the groups being listed for the positions. It is perhaps worth pointing out that the affirmative action principle or system of reservation or quota does not apply in private sector. It is high time we consider this option through special legislation (Amarya, Thorat, Negi & Aryama, 2006).

The political parties also needed a constitutional provision to reserve seats at decision making level for excluded, Marginalised and minority communities. Further, there is also a need to incorporate a provision for political parties to ensure inclusive composition both at candidacy and in the result.

The current Constitution making process has made a real attempt to increase the representation and participation of all communities at every level of state structures thereby opening up opportunities for governance in partnership. Reservation and quotas have been proposed as a tool for addressing the gap between the diverse population groups. Effective implementation of such system is really a challenge. The true implementation of such provisions will clearly contribute in overcoming the disadvantageous situation of excluded and Marginalised population.
4.2 Token Inclusion or Substantive Inclusion

Token inclusion may be understood as something put only for decorative purposes only, but without any influence on actual decision making. In contrast, substantive inclusion is inclusion that really provides an opportunity for different groups to access and share in resources. It ensures effective representation and enables all groups to make decisions that affect them and share in the outcomes or benefits of development. The Committee Reports have made a historic attempt to address the concerns of minority and disadvantaged groups through proportional representation and other measures. The various drafts have also addressed the issue of equality and non discrimination recognition, protection and promotion of their identity as well as ensure proportional representation in the State's plans, projects and programs.

With the following provisions of CA reports, it can be said that they have incorporated social, economic, cultural and lingual inclusion including legal pluralism. The provisions at large insure substantive inclusion. However, there is a need to qualify the groups even more carefully to be put under the provisions of special measures. Also it is needed to distinguish which measures of AA are to be applied to which groups. This is a work still to be done objectively so that the groups which are identified to receive AA are rationally justified on the basis of their human development index and social status.

- **Guarantee certain rights by eliminating all forms of discrimination:** The reports of committee contain provisions that ensure right to life with dignity; right to equality with special provisions for Marginalised community; social justice; right to social security right to full proportional representation according to law. (see Annex I and III)

- **Adoption of special measures:** The reports of the committees propose that the State can make special arrangement, along with a provision for compensation for victimisation and for the protection, development and empowerment of groups (women, Dalit, Adivasi Janajiti, Madheshi, Muslim etc.) that are economically, socially, politically and or educationally backward communities or classes.

- **Special arrangements:** The reports of the committee propose protection, empowerment and advancement of minorities by making special arrangement including compensation for past discrimination, on the basis of positive discrimination.(see Annex III)

- **Self determination:** The reports of the committee proposed that tribal people, indigenous nationalities, Madhesis shall have the rights to self-determination internally and locally in terms of politics, culture, religion, language, education, information, communication, health, settlement, employment, social security, financial activities, commerce, land, mobilization of means and resources and environment as prescribed by law.
• **Right to education:** State obligation is created to protect and promote such institution and also providing assistance from the State. The report of the committee propose that no person shall be deprived of the opportunity to get enrolled in or receive higher education form a public educational institution just by reason of having received education from an educational institution opened or run by a particular religious, cultural or linguistic community.

• **Right of Indigenous nationalities:** The reports of the committee propose the right to identity and dignified access to Indigenous nationalities to natural resources and means as well as self-rule and autonomy living in the state, local unit and special structure. Further, state duty is proposed as the main economic objective for the just distribution thereof to indigenous peoples including other situation is made better on the basis of the principles of economic and social justice. Protection, promotion and secure genetic resources and traditional knowledge, skills and practices relating to cultural heritage of indigenous, communities, with the arrangement of equal benefit sharing from these resources.

• **Special court:** The committee reports propose a separate court or bench in order to settle family disputes, disputed related to domestic violence, child rights, Dalits, customary practices, religious, and culture based disputes of indigenous people, muslim, janajitis (ethnicity) and other minorities. (see Annex VI)

There is no clarity as to reserving seats as part of affirmative action. A clear provision is required that reviews the reservation system on a periodic basis and analyses the status of inclusion of various population groups in Nepal. Terms such as positive discrimination, inclusive proportionate representation and special provisions are used throughout the preliminary drafts and reports without any consistency. Hence, there are rooms for confusion while they will be implemented. As affirmative action is a temporary measure, a reasonable timeframe is required to be incorporated. A clear provision on reserving seats for Dalits, indigenous peoples, women, minorities and excluded groups in educational and technical school admissions, or other supports is yet to be added.

### 4.3 Progressive Realization of Fundamental Rights

Having strong provisions without political commitment for effective implementation does not make any sense. It would instead lead to frustration and resentment of the constitution. Hence the government has to provide for periodic review of implementation status of fundamental rights and inclusion provisions in the constitution.
Committee on Fundamental Rights and Directive Principles on Right to equality

**Right to equality**

1. Right to live with dignity: Every individual shall have the right to live with dignity.
2. Right to freedom (Independence): Except as provided by the law, no person shall be deprived of his/her personal liberty.
3. Right to equality: All citizens shall be equal before the law. No person shall be denied the equal protection of the laws.

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**Rights Regarding Education**

Every citizen shall have the right of access to basic education (16).

**Rights Regarding Language and Culture**

Every person and community shall have the right to use own language.

Every person and community shall have the right to participate in the cultural life of that community (17).

**Rights Regarding Employment**

Every citizen shall have the right to employment. The terms and conditions of the employment shall be as prescribed by law (18).

**Rights Regarding Labour**

Every worker shall have the right to proper work practices (19).

**Rights Regarding Health**

Every citizen shall have the right to free basic health services and no person shall be deprived of emergency health services (20).

**Rights Regarding Food**

Every person shall have the right to food (21).

**Rights Regarding Accommodation**

Every citizen shall have the right of access to proper accommodation (22).

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5. CONCLUSION AND RECOMMENDATION

People were optimistic with the constitution making process in particular from the perspective of the most disadvantaged groups of our society. The Constituent Assembly unfortunately failed to deliver an inclusive constitution due to dispute in major areas such as state restructuring and forms of government. Nevertheless the debate has continued to remain in the national agenda and it is most likely to be one of the leading agenda of newly elected constituent assembly.

Last four years plus debates and interactions on raising the demands and aspirations to ensure the rights of Marginalised, excluded and minority groups for a just society could be an asset to carefully design and promulgate a working constitution. This will provide an opportunity to feel ownership over the process and product. There is a need to share real and open discussions following a democratic process where all opinions are respected.

As each society is unique in terms of its history thereby having different problems, we have to be truly honest also in offering solutions that are real and effective to the context. In this, all the references from international experiences shall be taken as guideline while, specific goals and mechanisms are to be prepared following the demands and aspirations that Nepali society is putting on the debate.
One opportunity is lost. We must continue to put efforts for resumption of constitution making process that is participatory and inclusive. There is no alternative to a federal inclusive democratic constitution that is able to respect and manage our diversity.

The following are key recommendations.

- Identification of minorities, excluded groups to provide constitutionally guaranteed affirmative action and special inclusive measures. There is a serious need to qualify groups receiving special treatment which can be done with the formation of a task force that objectively propose the list with justifiable human development and other social index. This would qualify the list as what inclusive measures to be adapted to which groups and how. Various commissions to be established with functional and financial independence that may advance the situation of minorities. Effective implementation of such mandates will compliment to obtain inclusive goal hence such provision of accountability of those commissions to be ensured in the constitution itself.

- As there are various inclusive measures at discussion on the table, representation of people directly proportionate to their population could be proposed as the most serving approach to our context.

- Extending reservation and affirmative action with regard to education and employment in the private sector. This needs to be constitutionally guaranteed to promote real inclusion in our society with a certain timeframe as education and employment opportunities are key to all human development that open entire possible areas to enjoy fundamental freedoms.

- Reservation policy is to be extended in private sector including in nongovernmental organization to achieve the goal of inclusion. Similarly, diversity-based incentives may be introduced as another possible inclusive measures for the private sector for promoting the employment of women, Dalits, adivasi janajtis, Madhesis, Muslims and other minorities.

- A mechanism has to be ensured that monitors the effective reinforcement of anti-discrimination laws. As the principle provisions are important to enact, equally important factor for realization of inclusion has been the effective implementation of laws that ensure inclusion at large.

- To promote, implement and monitor, equality and Inclusion, a Commission should be established that continuously and objectively analyze the need of the context and develops mechanisms and frameworks with holistic approach to achieve the target. There should be a provision to review periodically to realise whether the mechanisms developed to the context best served the communities in need. It should also be vested with power to reinvent and intervene with the changes required to serve effectively.

Now that the new CA has been elected to resume the task of constitution making, it will be very important for the new CA to capitalise on the achievements of the past CA and then build on it to complete an inclusive federal democratic republic constitution. Former CA failed to deliver a new constitution but it has succeeded in thrashing out many substantive issues of proportional representation, social inclusion, substantive equality and management of diversity in society. All these
outcomes of deliberations in CA is the property of the people of Nepal. It will be in the wisdom of CA to take advantage of these deliberations and decisions related to provisions on inclusion.

REFERENCES


## ANNEXES: FINDING AND RECOMMENDATIONS OF CA THEMATIC COMMITTEES ON INCLUSION

### Annex I: Committee on Fundamental Rights and Directive Principles

The following are relevant provisions from an inclusion perspective.

<table>
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### on anti discrimination

3.2. The State shall not discriminate against any citizen in the application of general laws on grounds of religion, colour, caste, tribe, gender, sexual orientation, biological condition, disability, health condition, marital status, pregnancy, economic condition, origin, language or region, ideological conviction or other similar grounds.

(9) Right Against Untouchability and Racial Discrimination 1. No person shall, on the ground of caste, tribe, descent (origin), community, occupation or physical condition, be subject to discrimination and untouchability in any form.

2. No person belonging to any particular caste or tribe shall, in relation to the production or making available of any goods, services or conveniences, be prevented from purchasing or acquiring such goods, services or conveniences; and no such goods, services or conveniences shall be sold or distributed only to members of a particular caste or tribe.

3. No one shall be allowed to purport to demonstrate superiority or inferiority of any person or group of persons belonging to any caste, tribe or origin; or to justify social discrimination on the basis of caste and tribe or untouchability; or to disseminate ideas based on untouchability or caste superiority or hatred justifying social discrimination; or to encourage caste discrimination in any form.

4. No person shall be subjected to any form of discrimination by engaging him or her in an act or task contrary to his or her will, whether by practicing or not practicing untouchability on the basis of caste or tribe.

5. All forms of untouchability and discriminatory acts shall be punishable in accordance with law and an individual victimised by such an act shall have the right to proper compensation.
Every woman shall have the right to proportionate participation in all agencies of the state apparatus on the basis of inclusiveness.

The Dalit community shall have the right to participation in all the organs, agencies and sectors of the state apparatus on the basis of an inclusive, proportionate system, along with compensation. The provision for compensation shall be as prescribed by law.

(Rights Regarding Social Justice: 1. Women, Dalits, Madhes, indigenous tribes (adiwasijanjatis), minorities and the Marginalised, Muslims, the gender and sexual minority, disabled people, youths, backward classes, farmers and labourers and oppressed groups, who are socially backward, shall have the right to participate in state structures on the basis of the principles of proportionate inclusion.

Directive Principles
(3:a) 5. To make the army, police and all organs of security strong, consolidated, professional, inclusive and accountable to the people on the basis of a national security policy.

on Special Measures
3.2 Provided that nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or advancement of women, Dalits, indigenous ethnic tribes (adiwasijanjatis), Madhes or farmers, labourers, oppressed regions, Muslims, backward classes, minorities, Marginalised and endangered communities or destitute people, youths, children, senior citizens, gender or sexual minorities, the disabled or those who are physically or mentally incapacitated and helpless people who are economically, socially or culturally backward.

(27) 5. The adiwasi, janjatis shall have the right to their identity, to protection, promotion and development of their language and culture, and to special privileges with priority for their empowerment and development, and to benefits thereof.

(27)6. The minority communities shall have the right to special privileges for maintaining their identity and for enjoying their social and cultural rights, and to benefits thereof.

(27)7. The Madhesi communities shall have the right to equal distribution of economic, social and cultural opportunities and benefits, and to special privileges for the protection, uplifting, empowerment and development of the destitute and backward classes in those communities, and to the benefits thereof.

(27) 8. The citizens of the oppressed regions shall have the right to special privileges for their protection, uplifting, empowerment, development, the fulfilment of basic needs, and to the benefits thereof.

Directive Principles
(3:j.2) To keep women, Dalits, Madhes, adiwasisjanjatis, backward classes, Muslims, minority and Marginalised communities, oppressed classes, sexual and gender minorities, disabled (differently able) people, backward regions, the poor, farmers, labourers, and youths participating in the state structure of the nation on the basis of the principle of inclusiveness and in public services on the basis of the principle of proportionate participation.

(3:j.6) To make a special provision for inclusive, proportionate participation of women in all the organs of the State.

Source: Committee on Fundamental Rights and Directive Principles
Annex II: Committee on Restructuring of the State and Distribution of State Power Committee

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<tr>
<th>Committee on Restructuring of the State and Distribution of State Power Committee on Representation on Special Measures</th>
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**Provisions related to special structures:** (1) As per Article (4) of the Constitution, apart from the main structure, an area with a majority of an ethnicity/community or linguistic community or with dense population within a province shall be maintained as an autonomous region.

**Provisions related to special structures:** (2) Apart from Sub-Article (1), any region can be maintained as a protected area in order to protect and promote an ethnicity/community, cultural area, or declining and Marginalised ethnic groups who are in an extreme minority.

**Provision concerning special political rights:** (1) In the case of states constructed on the basis of ethnic groups/communities within the main composition, political parties at the time of elections and during the formation of the state government should give preference to members of the ethnic group/community in a majority in the state concerned, for filling the main positions. But such rights of political preference will become ineffective automatically after two tenures.

**Provision concerning special political rights:** (2) The ethnic group/community in majority in an autonomous area constructed within the special composition, will have political preference for the top-level posts in the autonomous area. But such rights regarding political preference will become ineffective automatically after two tenures.

**Dalit Rights:** (3) Special arrangements shall be made by law on the basis of inclusion and proportionate representation for the empowerment, representation and participation of Dalits in the civil service, police and army and other areas of employment.

**Rights of endangered tribes/communities:** (1) The state shall at all levels of the federal structure implement a special protection policy and make laws for the representation of recognised endangered tribes/communities, and their participation and development.

**Rights of endangered tribes/communities:** (2) The state shall, for the representation, participation, protection and development of financially deprived, endangered and Marginalised communities, make special provisions through the law.

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<th>on Representation and Participation</th>
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**Women’s Rights:** (b) They shall have special rights in the areas of education, health, employment and social security

(c) Special provisions for the proportionate representation and participation of women in leading positions at the policy-making level shall be fixed.

**Dalit Rights**: (2) The law will regulate additional three and five percent representations in federal and state composition through provisions for the proportionate representation of Dalits in the federal, state and local level political structure on the basis of population.

(4) Proportionate representation of hill Dalits, MadhesiDalits and Dalit women will be effected in all rights received by the Dalit community.

**Rights of Madhesis:** (1) The Madhesi community shall have the right of proportionate representation along with inclusion, in accordance with existing laws and on the basis of population, at all levels and compositions and also in leading positions including in policy-making, the government, the administration, the army and police, corporations, development committees and academia.
on Non Discrimination

No discrimination shall be meted out against any person on grounds of caste, community, genetics or occupation at any place. Such treatment will be taken as a serious social crime against humanity. The victim will be entitled to reparation in accordance with the laws.

On Recognition of Identity and Autonomy

(3) 2. The federation, states, local units and special structures shall protect and preserve Nepal’s national unity, integrity and sovereignty and the country’s long-term interests, overall development, human rights, rule of law, separation of powers, check and balance, an equitable and pluralistic society based on ethnic equality, a multi-party competitive democratic system and the rights to proportionate and inclusive representation and identity.

(3) 3. The identity, self-rule and autonomy of indigenous people and indigenous nationalities living within the state, local units and special structures shall be guaranteed.

4. Structural Tiers of Federal Nepal: (1) The main structure of federal Nepal shall be of three tiers that include federal, state and local.

4. Structural Tiers of Federal Nepal: (4) There shall be autonomous areas and protected areas within the state as per Article 8 and special structures in addition to the main structure as per Sub-Article (1).

7. Formation of local levels and area demarcation: (2) The Federal Government shall assign fixed criteria to the Provincial Governments to determine the number and area of the local levels. While assigning the criteria, the Federal Government shall consider homogenous population, geographical and administrative accessibility, density of population, transportation facilities, availability of natural resources, and the cultural and community aspect of the people living in the area concerned.

12. Rights of self-determination: (1) Tribal people, indigenous nationalities and Madhesis shall have rights of self-determination internally and locally in terms of politics, culture, religion, language, education, information, communication, health, settlement, employment, social security, financial activities, commerce, land, mobilization of means and resources and environment. These will be fixed through laws
Annex III

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<tr>
<th>Committee on Rights of Minorities and Marginalised Communities</th>
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**Right to Equality:**

Persons of the minorities, Marginalised and excluded communities are free and equal in dignity and right by birth. No discrimination shall be there by the State against them in the exercise of constitutional and legal rights. The minorities, the Marginalised and the excluded communities shall have the right to live with dignity, along with their original identity. Women, Dalit, indigenous tribes, Madhesi community, oppressed group, the poor peasant and labourers, who are economically, socially or educationally backward, shall have the right to participate in the state mechanism on the basis of proportional inclusive principles."

(2) There shall be no discrimination of any kind against any citizen in the application of general laws on grounds of his/her being indigenous, Dalit, of the Tarai, Madhesi, Muslim or of any religion, color, caste, tribe, sexual and gender identity, language, political or other thought or social origin, property, birth or region or having physical or mental incapacity or state of disability or any other state.

**Right Against Discrimination And Untouchability:** (1) No person shall, on grounds of being indigenous, Dalit, of the Tarai, Madhesi, Muslim, disabled, or of a particular religion, color, sex, region, caste, tribe, descent, community or occupation, be subject to discrimination and untouchability in any form. (4) The State shall discourage discrimination among citizens or any feeling of superiority or ethnic intolerance, indignity or hatred on grounds of ethnic, linguistic, religious, cultural, economic, social, educational, political, physical, health, sex or sexual and gender identity, origin or regional or any other grounds.

On Representation and participation

Rights of Minorities, the Marginalised and Excluded Communities (11) The State shall identify the minorities and Marginalised and excluded communities or classes that are economically, socially, educationally, politically, administratively or regionally backward and make legal arrangements for their protection, development and empowerment and proportional representation at every level.

Rights of Minorities, the Marginalised and Excluded Communities

(12) The State shall make arrangements to ensure more rights regarding proportionality in connection with providing compensation to the communities suffering from caste discrimination, untouchability and religious and cultural victimization.

On special measures

**Right to equality:** (3) Provided that the State shall make special arrangements, along with a provision for compensation for victimization in the past, on the basis of positive discrimination for the protection, development and empowerment of those who are economically, socially, politically and educationally backward and those who are poor in health condition, by first identifying such communities or classes.

On Recognition of Identity and Autonomy

3) The minorities and Marginalised and excluded communities shall have the right to use, protect and promote freely, and without any discrimination, their religion, culture, language or script.

Right of Minorities, the Marginalised and Excluded Communities

(4) The minorities and Marginalised and excluded communities shall have the right to establish and operate organizations to protect and promote their original identity and to refuse to get affiliated with a community under force.

(5) The minorities and Marginalised and excluded communities shall have the right to use, protect and promote their traditional arts, knowledge, skills or expertise after registering them as intellectual property, and to put checks on their use or receive due compensation if anyone is found to have utilised them without permission.

7) The minorities and Marginalised and excluded communities shall have the right to use rights related to their communities, individually or collectively.
Annex IV

Committee on Determination of the Form of the Legislative Body

1. Constitution of the Legislature: There shall be a Legislature, to be called Parliament, which shall consist of (the Head of State) and two Houses, the House of Representatives and the National Assembly.

2. Constitution of the House of Representatives: The House of Representatives shall consist of one hundred and fifty-one members. Seventy-six of those members shall be elected by direct election, and seventy-five members shall be elected by proportional election. The House of Representatives election shall be conducted via adult-franchising and secret ballots.

3. Constitution of Provincial Assemblies: As political parties select candidates for election to the Provincial Assemblies, the law shall ensure that women, Madhesi, Tharu, Dalit, indigenous peoples, janajiti, Muslims, backward classes, regions, minorities, and other communities are equally represented on the basis of population.

4. Constitution of the National Assembly and the Tenure of Office of Members

(a) thirty-eight members to be elected by the Provinces (in equal) numbers as prescribed by law;

(b) thirteen members to be elected by the House of Representatives pursuant to law, on the basis of the system of proportional representation, by means of single transferable vote, from amongst: minorities, women, castes, languages, religions, backward groups or other communities that have not been able to participate in the House of Representatives; people of high reputation who have rendered prominent service in various fields of national life; and experts...
Annex V: Committee on Determination of Forms of Governance of the State

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<tr>
<th>Committee on Determination of Forms of Governance of the State</th>
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<tr>
<td><strong>Formation of the Council of Ministers:</strong> (1) The President shall form the Council of Ministers under his/her chairpersonship from amongst members of the legislature according to a ratio of the number of seats secured by parties represented in the legislature and on the basis of the principle of proportional inclusion. P. 12</td>
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<tr>
<td><strong>Public Administration:</strong> (1) Basic Guiding Principles of Public Administration: (f) Participation of common people in decision-making process. (i) Appointment of staffs on the basis of basic qualifications and efficiency. To provide for compensation to women, Dalits, indigenous/ caste, Madhesis and Muslims, based on the human development index. p.38-39</td>
</tr>
<tr>
<td><strong>Formation of Government Service:</strong> (1) In order to conduct the public services of the country, the Government of Nepal shall form and operate public services as follows: a) Civil Service, b) Judicial Service, c) Parliamentary Service, d) Health Service, e) Education Service, f) Nepal Army, g) Armed and Nepal Police Services, h) Corporation Service, P. 39</td>
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<td><strong>Election of lower house of Federal Legislature:</strong> (1) The members of the lower house of the Federal Legislature shall be elected on the basis of a mixed-member proportional representation system as prescribed by the law. (2) Fifty percent of the members pursuant to Sub Article (1) shall be elected through the first-past-the-post system, ensuring the candidacy of women, indigenous/caste, Dalits, Madhesis and other groups and communities, on the basis of the principle of proportional inclusion. (3) Fifty percent of the members, pursuant to Sub Article (1), shall be elected through proportional representation on the basis of a list incorporating women, Dalits, Madhesi and other class and communities, in proportion to the votes obtained by the political parties, considering the whole country as a single constituency.</td>
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<td><strong>Election of upper house of Federal Legislature:</strong> Sixty-five members of the upper house of the Federal Legislature shall be elected according to an election system as follows, as prescribed by the law. a) Forty-five members from each provincial legislature represented in equal number. b) Fifteen members elected from the electoral college comprising the chiefs of local governments and one from each province. c) Through election pursuant to Sub Article (a) and (b), proportional inclusive representation of women, Dalits, Madhesi, indigenous and other groups and communities shall be ensured. d) Five members nominated by the President on the recommendation of the Prime Minister from among experts, minorities, the Marginalised and declining communities contributing to various sectors of social life. P43-44</td>
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<td>(Draft that secured 18 votes): <strong>Formation of the Council of Ministers:</strong> (1) The President shall form the Council of Ministers in his/her chairpersonship from amongst members of the legislature on the ratio of the number of seats secured by parties representing to the legislature on the basis of principle of proportional inclusion. Provided that the President shall not be compelled to appoint a minister from a party securing less than five percent of the total number of members of the federal legislature.</td>
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<td>(Draft that secured 16 votes): <strong>Formation of the Council of Ministers:</strong> (3) The President shall, on the recommendation of the Prime Minister, appoint Deputy Prime Minister and other ministers from amongst the members of the legislature as per the principle of proportional inclusion.</td>
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<td><strong>State and Assistant Ministers:</strong> (1) The Prime Minister may appoint the state Ministers from amongst the members of the legislature as per the principle of proportional inclusion. (2) The Prime Minister may appoint the Assistant Ministers from amongst the members of the legislature as per the principle of proportional inclusion in order to assist the Minister to carry out functions under his/her portfolio. Draft that secured 3 votes</td>
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<tr>
<td><strong>7. Formation of Provincial Council of Ministers</strong></td>
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<tr>
<td><strong>Local Level Executive:</strong></td>
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<td><strong>5. Formation of executive body of local government</strong></td>
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<tr>
<td>In each executive body of local government, the members including Chairperson and Vice-Chairperson will be in the number of 5 to 11 in Metropolitan city, 5 to 9 in sub- Metropolitan city and Municipality or 5 to7 in village level.</td>
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<tr>
<td>(2) The chairperson shall nominate the members from the political parties having representation at local level legislative body according to their seats on the basis of proportional inclusive principle and shall made the work division among members.</td>
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Annex VI: Committee on the Judicial System

Committee on the Judicial System ensuring Representation and Participation

(2) Following the direct and proportional elections, in case women do not constitute at least one-third of the elected representatives, laws shall be introduced pursuant to the proportional election provision to ensure that at least one-third of the Provincial Assembly representatives are women. P 39

1) There shall be the following courts in Nepal:-(a) Federal Supreme Court, (b) Provincial High Court, and (c) District / Local Court While constituting the courts pursuant to Clauses (1) and (2), a separate court or bench under these courts may be constituted in order to settle family disputes, disputes related to domestic violence, child rights, untouchability, Dalits, customary practices, religious and cultural based disputes of indigenous people, Muslims, janajitis (ethnicity) and other minorities. Federal Legislature Special Judicial Committee, Provincial Legislature Special Committee, District/Local House of Representatives Special Judicial Committee(1) Federal Legislature Special Judicial Committee …which shall consist of, as follows:-(c) Not exceeding nine members, as elected by the Federal Legislature from amongst its members, based on the population numbers represented in the Legislature proportionally and on the basis of the principle of inclusiveness- Members

(2) Power, Rights and Duties of Federal Legislature Special Judicial Council: (b) Shall prepare a required list of candidates for Chief Justice and other Judges of the Federal Supreme Court, on the basis of the principle of inclusiveness and proportional representation, and submit to the Federal Legislature for approval.

(3) Proportional method and principle of inclusiveness to be followed in the appointment of Judges: The proportional method and principle of inclusiveness on the basis of population shall be followed in the appointment of judges. Women, indigenous and ethnic people, Madhesis, Dalits, Muslims etc., shall also be included while appointing judges following the proportional method and principle of inclusiveness.

(9) Powers, Rights and Duties of the Special Judicial Committee of District/Local House of Representatives: The powers, rights and duties of the Special Judicial Committee of the District/Local House of Representatives shall be as follows: (a) Shall prepare a required list of candidates, on the basis of the principle of inclusiveness and proportional representation, for judges of the District/Local Court and submit it to the District/Local House of Representatives for approval.
Annex VII: Constitutional committee and committee on constitutional bodies

<table>
<thead>
<tr>
<th>Constitutional Committee and Committee to Decide on Structure of Constitutional Bodies</th>
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<tr>
<td><strong>Political parties:</strong> (c) There should be a provision for inclusive participation, representing the diversity of Nepal at different levels of the Executive Committee. p.17</td>
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<tr>
<td><strong>Miscellaneous:</strong> (15) Nepali Ambassadors and Emissaries: The Head of State on the recommendation of the Council of Ministers may appoint, on the basis of the principle of proportionate inclusion, ambassadors of Nepal and other emissaries for specified purposes. p.22</td>
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<tr>
<th>Committee to Decide on Structure of Constitutional Bodies</th>
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<tr>
<td><strong>6. Women Commission:</strong> There shall be a Federal Women’s Commission in Nepal consisting of a Chairperson and two other members on the basis of proportionate representation and inclusiveness. p.30</td>
</tr>
<tr>
<td><strong>7. Dalit Commission:</strong> There shall be a Federal Dalit Commission in Nepal comprising a Chairperson and two other members on the basis of proportionate representation and inclusiveness. p.34</td>
</tr>
<tr>
<td><strong>8. Adibasi/Janjati (Indigenous/Ethnic Communities):</strong> There shall be a Federal Adibasi/Janjati (Indigenous/Ethnic Communities) Commission in Nepal consisting of a Chairperson and other members on the basis of proportionate representation and inclusiveness. p.38</td>
</tr>
<tr>
<td><strong>9. Commission for the Protection of the Rights of People with Disabilities, Minority and Marginalised Communities and People of Backward Regions:</strong> There shall be a Federal Commission for the Protection of the Interests of the Disabled, Minority and Marginalised Communities and people of backward Regions in Nepal consisting of a Chairperson and two other members on the basis of proportionate representation and inclusiveness. p.42</td>
</tr>
<tr>
<td><strong>10. Madhesi Commission:</strong> There shall be a Federal Madhesi Commission in Nepal comprising a Chairperson and two other members on the basis of proportionate representation and inclusiveness. p.47</td>
</tr>
<tr>
<td><strong>11. Muslim Commission:</strong> There shall be a Federal Muslim Commission in Nepal consisting of a Chairperson and other members on the basis of proportionate representation and inclusiveness. p.51</td>
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Source: CA Committee Reports
CHAPTER 16

MEDIA AND CONSTITUTION MAKING IN NEPAL

- RENU KSHETRY
INTRODUCTION: NEPAL’S MEDIA LANDSCAPE

Nepal’s media scene is very vibrant with a total of 3,408 newspapers, 480 radio stations and 30 television stations. This is in a country with a population of 27 million, of which 65.9% are literate (CBS, 2012). There are a staggering number of outlets for broadcasting and publishing from a wide variety of perspectives and in many regional languages as well. After the restoration of democracy in 1990, Nepal saw extraordinary growth in publications by private media houses. Prior to this, the state enjoyed a near monopoly over the dissemination of information through state-owned media such as Gorkhapatra and the Rising Nepal (broadsheet dailies), Radio Nepal and Nepal Television (UNDP, 2012).

The Rana Prime Minister Dev Shumsher founded Gorkhapatra in 1901. The few publications that came out after Gorkhapatra had to fold for various reasons, including the high prevalence of illiteracy among the population, interference by the ‘establishment’, and lack of distribution channels (Kharel, 2000). These challenges continue to this day. Of the total 3,408 registered newspapers, only 550 (103 dailies, 3 biweeklies, 431 weeklies and 13 fortnightlies) are published regularly. The situation is similar for radio and television: of the 489 radio stations registered, only 360 are on air and, of the 30 television stations registered, only 19 are in operation.

The Constitution of the Kingdom of Nepal 1990 secured freedom of expression for the people of Nepal and the right to access to information, through Article 13 on Press and Publication Right (HMGN, 1997). This article states that:

There will be no prior censorship of publication and broadcasting or printing of any news item, editorial, article, feature or other reading or audio-visual material by any means including electronic publication, broadcasting and the press should be enforced.

Similarly The right to freedom of the press is also enshrined in the Interim Constitution of Nepal 2007 in Article 15 (1), which states that:

No publication, broadcasting or printing of any news item, editorial, feature, article or other reading and audio-visual material through any means whatsoever including electronic publication, broadcasting and printing shall be censored. (GON, Cottrel, 2009)
This constitutional right is further validated in the Printing Press and Publications Act, 2048 BS (1991 AD) and National Broadcasting Act, 2049 BS (1991 AD). These Acts guarantee that the government will not confiscate registered press or cancel the registration of any newspaper because of its content (Onta, 2006). These Acts have strengthened the media and the number of newspapers and registered FM radio stations has increased over the years.

With the private media houses entering the scene after the political change of 1990, there has been much improvement in the quantity of information being disseminated, especially in the print media, due to increased competition, but quality is still an issue. Even though there has been a revolutionary growth in radio, print is still the most widely followed form of media, especially among decision makers and in the regional centres.

For this reason, and also because of their circulation and archival value, this essay focuses only on the print media, particularly broadsheet dailies and weekly magazines. There are more than 14 broadsheet dailies published in Kathmandu and 2 weekly magazines, Nepal and Himal, which changed from fortnightly to weekly in early 2013.

**ROLE OF MEDIA IN SHAPING PUBLIC OPINION IN NEPAL**

The print media is an important tool for reaching out to people through news, commentaries, editorials, interviews, opinion articles and news analysis. Newspapers and magazines are a source of knowledge and can be used as an advocacy and awareness raising tool, as well as a political tool. The role of the media in a democracy is to reflect diversity, serve as a forum for dialogue among various actors in society, hold the government and rulers accountable, and inform, educate and entertaining the public (Onta, 2006). Various research and surveys have shown that the Nepalese people have immense trust in the media and that the media shapes the public’s perception of issues. The Himal Media Public Opinion Survey 2012 (Himal Media, 2012) found that the majority of respondents have a high perception of their media. A total of 87% of 3,210 respondents said that they trust the media more than the courts, government and other public institutions (Himal Media, 2012). The Nepali media is considered a highly credible source of information and, as such, the kind of information disseminated and issues raised in the media help the public to form their own opinion on issues, which has a strong impact on society.

Unlike other countries, Nepal’s media was one of the important actors to press for democratic change during the 1990 People’s Movement (Jana Andolan I) as well as the 2006 People’s Movement (Jana Andolan II), which ousted the Royal regime. The media’s primary agenda in the later movement was to raise issues against the autocratic regime and it continued these efforts until the monarchy gave in to the pressure exerted by the media, political parties, civil society, and public in general.
After these two major historical movements (Jana Andolan I and II), the political parties and decision makers realised the importance of the media and tried their best to stay in its ‘good books’, especially of the mainstream media.

The media has always played an important role in shaping public opinion. According to Walter Lippmann, what we know about the world is largely based on what the media decides to tell us: “Elements prominent on the media agenda become prominent in the public mind (Lippmann, 1922)”. Maxwell McCombs maintains that the agenda-setting influence of the news media is not limited to this initial step of focusing public attention on a particular topic: “The media also influence the next step in the communication process, our understanding and perspective on the topics in the news (McCombs, 2004).”

According to Katherine Laccase and Larissa Forster, people rely heavily upon the news to learn about pressing issues around the globe, but the press may not give a full picture (Lacasse & Forster, 2012). Similarly, Hackett argues that the media does not simply mirror events, but instead functions as a gatekeeper and, by selecting what information is shared, exerts influence of its own (Hackett, 2007).

Even though the Nepali media is vibrant in terms of the number of media outlets, it still has a long way to go in understanding what it can actually achieve through balanced reporting and as a ‘watchdog’ when the situation demands. As Jyotika Ramaprasad mentions, the quality of the news articles and the shape of their content are determined by the journalist’s press philosophy, the publication’s ownership structure, and role expectations, as well as the journalist’s individual-level personal values and societal-level ideology (Ramaprasad, 2005).

As the majority of people in Nepal do not have direct access to the decision makers and all the processes that go into making the constitution, forming the government and other important issues, they rely heavily on the media. The general public has no option other than to take the news at face value.

Street protests have been sparked by the comments of a political leader or eminent personality, as reported in the newspapers. In December 2000, four people lost their lives in violent riots that erupted in Kathmandu after an alleged slur by an Indian actor Hritik Roshan (Nepal Protest, 2000). Roshan is alleged to have made derogatory remarks about Nepal in a television interview, which were reported by a local newspaper (India Glitz, 2005). The Nepali people take the media seriously and protest against any (perceived) wrongdoing by key political party leaders or the government, based on the media reporting.

Nepal’s media played an important role in clarifying the importance of the Constituent Assembly in the lead up to the 2008 election, as it was a totally new concept in Nepal. The media was very supportive of the Constituent Assembly election and encouraged only positive reporting before the election. In the 80-day period from 21 November 2006 to 9 February 2007, a total of 456 news articles related to Constituent Assembly election were published in all national dailies.
None of the major local vernacular dailies – Kantipur, Annapurna Post, Gorkhapatra, Rajdhani and Nepal Samacharpatra – published any negative news about the meetings of the top four parties.

The Press Council Nepal – an independent body set up by the government to monitor print media – monitored the media in the run up to the election from 9 March 2008 to 13 April 2008. The Council found that majority of the news articles and opinions were neutral and in some cases ‘positive’ (Press Council, 2012). The Council covered 43 radio stations, 46 dailies and 13 weeklies during that period.

Former Chief Election Commissioner, Bhojraj Pokharel, in an interview with 'Innovations for Successful Societies', Princeton University’s online journal, said, in reference to the media’s role that the “Constituent Assembly election was a national issue and everybody owned that issue” (Pokharel, 2012). Pokharel shared that the Election Commission faced a problem with the media favouring sides in the lead up to the 2008 election: "The political parties disguised the fact that largely they run the media. Even government media are not neutral, so we had to think of ways to make them less bias." (Pokharel, 2012).

Overall, however, it appears that the media made a conscious decision to give positive information about the Constituent Assembly and should be given credit, along with other government and civil society, for creating awareness about the importance of the Constituent Assembly election. It can be argued that people’s enthusiasm towards casting their vote in the Constituent Assembly election was increased by the media. After the election, most media houses assigning a reporter solely to cover the Constituent Assembly, which shows the importance that the media houses gave to the Constituent Assembly.

As McCombs points out, the news media can set the agenda for public attention and focus attention on a small group of issues around which public opinion is formed (McCombs, 2004). While the Nepali media has been successful in setting the agenda and forming public opinion, it could be far more effective in holding those in office to account, providing the public with clear and comprehensive information of immediate relevance to their daily lives, and being a more dynamic and imaginative force in shaping today’s Nepal.

REPORTING OF CONSTITUENT ASSEMBLY DELIBERATIONS IN THE MEDIA

The Nepali media evolved in parallel with the country’s political situation, especially with the rise, fall and rise again of democracy between the 1950s and 1990s. The parliamentary system in Nepal began in 1959 with the first general election, but lasted for only 18 months. King Mahendra took over the reins of power and brought in the party-less ‘Panchayat’ system (Upreti, 2010). The first
election to the National Panchayat took place in 1963 and the ensuing parliament was not open to journalists. In 1981 the Panchayat system was reformed with the members being directly elected and proceedings of the Panchayat became open to the media.

In a personal interview with the author, Hari Bahadur Thapa, former chairman of Journalist Society for Parliamentary Affairs (JOSPA), said that a few weekly papers and only state-owned news agencies were allowed to cover the news at that time (Thapa, 2013). However, the media had to face many hurdles to cover the news, including censorship and strict criteria to qualify for parliamentary reporting.

After the restoration of democracy in 1990, the proceedings of the new parliament were totally open to the press. Parliamentary reporting became the most important agenda of the media houses, particularly print media, and most assigned journalists to parliamentary reporting.

The new democratic government adopted an open and liberal policy towards the media, as a result of which several broadsheet daily newspapers began to publish. The increase in the number of journalists assigned to parliamentary reporting led to the formation of the Parliamentary Affairs Reporters Club in 1994 (Thapa, 2013). However, this club was active for only three years. Then, in 2001, a new group was formed called the Journalist Society for Parliamentary Affairs, which is still active and has been involved in positive interventions in government formation and putting pressure on the government and political parties to take the constitution-making process more seriously.

The Nepali media was very positive about the formation of the Constituent Assembly in 2008. Although it raised concerns about the jumbo size of the 601-member assembly-cum-legislative parliament, this number was accepted as justified for the representation of the people.

The state-owned media, Gorkhapatra, started a two-page supplement in 2007 titled ‘Naya Nepal’ (New Nepal) on constitutional issues, which was published regularly in 30 regional languages and ran for four years. In addition, two major local vernacular dailies, Kantipur and Annapurna Post, gave special coverage of the constitution-making process for quite some time. Kantipur started publishing a full page on Constitution Assembly related news every Thursday from November 2008, which continued for the next 15 months (totalling 60 issues), while Annapurna Post published a special eight-page supplementary pull out every Sunday from December 2008, which ran for four years, even after the Constituent Assembly had been dissolved. These special pages mostly contained interviews with, and opinions of, legal and constitutional experts and Constituent Assembly members on constitution making. Meanwhile, the broadsheet dailies focused more on event-based news and failed to go beyond superficial reporting.
Table 1: Media coverage on the constitution and peace from December 2010 to January 2011 (Regmi, 2011)

<table>
<thead>
<tr>
<th>Type of media coverage</th>
<th>Issue covered</th>
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<tbody>
<tr>
<td></td>
<td>Constitution</td>
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<tr>
<td></td>
<td>65.5%</td>
</tr>
<tr>
<td>Reporting</td>
<td>7.5%</td>
</tr>
<tr>
<td>Analysis</td>
<td>5%</td>
</tr>
<tr>
<td>Opinion formation</td>
<td>7%</td>
</tr>
<tr>
<td>Issue-discourse</td>
<td>5%</td>
</tr>
<tr>
<td>Exerting pressure</td>
<td>5%</td>
</tr>
<tr>
<td>Public expression</td>
<td>5%</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>5%</td>
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For example, according to the analysis presented in Table 1, two-thirds of the coverage of the constitution in the media was plain reporting, rather than analysis, which would have created a better understanding among the people of the contentious issues involved in the constitution drafting process. The media basically reported what issues were discussed and the deliberations of the Constituent Assembly members representing different political parties.

Former coordinator of ‘Sabha’ (the weekly supplement of the Annapurna Post on the Constituent Assembly), Raj Kumar Regmi (Regmi, 2013), in an interview with the author, said that Kathmandu-based journalists failed to differentiate between the role of the assembly as Constituent Assembly and legislative-parliament. If we analyse the first two-year period of the Constituent Assembly, the majority of media houses were supportive, but later started losing interest in the subject and shifted drastically from positive to critical and even cynical.

However, there were examples in the media of substantial coverage of the constitution-making process. Himal Khabarpatrika started ‘Sambidhan Yatra’, a roughly 15-page feature in each issue of the fortnightly magazine, which covered constitution-making and state restructuring. It was one of the most extensive sources of coverage on constitution making with field reports, expert interviews, public opinion, analysis and interviews with the Constituent Assembly members. Sambidhan Yatra started in November 2008 and continued for a year and a half. The initiative was funded by the United States Agency for International Development’s (USAID’s) Office for Transitional Initiative (Kshetri, 2012: 117).

Sambidhan Yatra mainly focused on the concept of federalism, including its basis and structure, state restructuring, the process of constitution making and bringing out the people’s voices on federalism (Kshetri, 2012: 109). The magazine gave
a lot of space to clarifying constitutional issues, including federalism. Political analyst, Prof Krishna Khanal’s interview was carried in four issues to educate people about federalism.

The print media was very active in disseminating, sharing and clarifying information about constitutional issues during the first two years of the Constituent Assembly. However, after the first extension of the term of the Constituent Assembly, the media was no longer as active in clarifying the issues. Himal Khabarparka gave more priority to agenda setting and to forming the meaning of any issues, than to just reporting. The coverage in Sambidhan Yatra was more comprehensive, more inclusive and represented diversity, which could be due to the fact that it was donor-sponsored, because other regular features of the magazine failed to be as inclusive (Kshetri, 2012: 94).

Nepal, a weekly magazine, gave 47.12% of its coverage to constitution making on the cover page over a three-year-period, while Himal magazine gave 39.29% coverage to constitution making on the cover page for the same period (Kshetri, 2012: 118). The media put pressure on the government to reach a consensus and resolve outstanding constitutional issues. The media also gave a lot of space to the constitutional experts and political party leaders to clarify constitutional issues. Although the Constituent Assembly could not produce a constitution within its initial two year term (by May 2010), the media was in favour of an extension of the timeframe by a year. However, the media strictly warned of the consequences if it failed to promulgate the constitution by the extended timeframe of May 2011 (first extension).

The media was very active just a few days before the expiry of each term and media coverage increased significantly. The four major national dailies ran 86 opinion articles, 35 news pieces, 7 news analysis and 2 editorials, 1 interviews and 1 vox pop on constitutional issues in the week from 22 to 28 May 2012 leading up to the expiration of the term of the Constituent Assembly. The main theme of these opinion articles and news analysis was to warn the government and the political party leaders that they should not risk the gains made by the Constituent Assembly proceedings so far by failing to promulgate a constitution.

This increase in coverage on the eve of the end of the Constituent Assembly indicates that the media gave more importance to daily events and more space to the 'event-based' news than to analysis or other types of news coverage. For instance, during an attack on the media during a bandh (strike) called by an indigenous nationalities group, according to a report prepared by Freedom Forum, Nepal, the Nepali media faced unprecedented attacks (Freedom Forum, 2013). A total of 88 press violations occurred in the country during that two weeks period from 8 to 24 May 2012. Two journalists were severely injured during demonstrations organised by different ethnic groups and associations during this period.
Following the media attacks and threats, the broadsheet dailies were full of opinion articles condemning these attacks. However, the media failed to see the bigger picture of why the media was attacked just a few days before the Constituent Assembly term expired. The majority of opinion articles said that attacks on the media should not be tolerated in any situation, even if the media or journalists are at fault.

MEDIA COVERAGE OF CONSTITUENT ASSEMBLY DELIBERATIONS

Nepali language print media is considered the most important tool for educating the urban population and has always had a significant influence on policy makers, especially political party leaders. During the four years of the Constituent Assembly tenure, the media consistently disseminated news of regular events or, rather, were excellent at maintaining a ‘record’ of events, but did not play an effective role as a ‘watchdog’.

Bhuwan KC and Tilak Pathak pointed out, in their paper on the ‘Role of Media on Constitution-drafting’ that the “Nepali media has remained supportive in the constitution-drafting process, but due to the failure to create necessary pressure with a focus on peace and constitution, a conducive environment to resolve important issues could not be created” (KC & Pathak, 2010).

The media was also too sceptical about the Constituent Assembly members elected under proportional representational quota. According to Yubaraj Sangraula (Sangraula, 2011), the media was also responsible, either consciously or unconsciously, for promoting gossip spread by what he labelled the 'new rich egotistical group' that the Constituent Assembly is full of illiterate and poor people. The media thereby lowered the morale of these Constituent Assembly members, which also affected the psyche of the general public.

The majority of the Constituent Assembly members did not have any experience on the issues that the Constituent Assembly was deliberating. The media and the experts could have helped them by providing information and analysis, but, instead, Sangraula pointed out that these Constituent Assembly members "were rather criticized for drawing the salary and state facilities they enjoyed" and the media “never praised these Constituent Assembly members for their hard work” (Sangraula, 2011).

The Nepali media played the role of a ‘publicist’ and let itself be the mouthpiece of the politicians. Philip Seib identifies three roles of mainstream media in communicating conflict: as a critical observer, publicist or battleground (surface upon which war is imagined and executed)(Seib, 2005). Initially, the media did not give priority to explaining the contentious issues, such as federalism, state restructuring, the delineation of states, or citizenship, and failed to sufficiently cover the grievances of backward communities. It did not want to tread such
a controversial path. When the media finally did report on these controversial issues, the result was disastrous because it gave the responsibility for explaining these issues to political party leaders, without having a strong message verification mechanism in place. This confused the general public even more.

Misconceptions about controversial issues such as federalism and the delineation of states abounded, and the media failed to clarify these misconceptions. Instead the media fuelled the conflict between the various ethnic and non-ethnic groups.

During the later phase of the Constituent Assembly tenure (second term extension), the media’s concentration was more on state restructuring based on ethnic identity. The interviewees were chosen based on their ability to make provocative statements, both for and against the issue. There was a competition in the media about who could pick up speeches of the political party leaders about foreign powers and international agencies ‘conspiring to split the country’. The media did not delve deeper to find out the basis for such remarks and how much truth was behind those statements. They just lifted the speeches and reported them verbatim without analysing why the allegation was made.

Analysing Himal magazine’s coverage of constitution making, it was clear that for Himal there was no other alternative to the constitution, but that states on the basis of ethnic identity were also not possible. Both Himal and Nepal magazines had this in common: both stressed that ethnic federalism is impossible (Kshetri, 2012:119). Himal was clearly of the view that even the Maoists were backtracking from their earlier stance on ethnic federalism. According to Himal, the 14-state structure proposed by the Constituent Assembly Committee on State Restructuring and Distribution of State Powers was not feasible and one Madhesh state was simply not possible (Kshetri, 2012:117). Whether the media houses admit it or not, the newspapers were not supportive of any protest programmes organised by the marginalised communities or indigenous groups. One political commentator said that the “media reporting on ethnic/caste movements has been largely negative and has contributed to undermining public support for the marginalized groups’ social justice issues” (Lawoti, 2012: 148).

The media also failed to properly disseminate information about crucial issues, such as federalism. It became evident that media was sceptical about federalism, but did not do much to explain it properly, besides simply providing space to the opinion makers. As we know, opinion makers are bound to have their views, which might not necessarily be true or balanced. This is where the media could have played a more responsible and significant role.

One day before the final term of the Constituent Assembly expired on 28 May 2012, Kantipur daily ran an opinion piece titled by Murari Sharma and Bhagirath Basnet ‘Let’s settle federalism dispute through referendum’ (Sharma & Basnet, 2012). If federalism was the main bone of contention, then the issue should have been brought forward by the media for public discussion during the four years
of the Constituent Assembly's tenure, instead of raising it a day before 'D-day'. Plenty of such missed opportunities can be seen in the raising of the issues by the media when it was too late.

In addition, if we analyse the media coverage just before each term expired, the quality of media coverage on core constitutional issues, including federalism and state restructuring, was much better, compared than during the period when there was no time pressures. The majority of the total 86 opinion articles on constitution making in the week before the Constituent Assembly's final term expired were very supportive. The opinion articles were more balanced and even the editorials suggested that the promulgation of the constitution be put as top most priority. The news analysis between 22 and 27 May 2012 was particularly hard hitting and it would have made a huge difference if the media could have maintained this level of quality coverage consistently throughout the four-year term of the Constituent Assembly.

From the above analysis we can infer that the Nepali media was supportive and serious about the constitution-making process at the beginning, but lost interest after the Constituent Assembly failed to meet the first deadline in May 2010. The interest of the media then shifted to other issues, such as government formation, and promoted dialogue between the top political party leaders outside the Constituent Assembly to resolve contentious issues. This gave the general public the wrong message, that the Constituent Assembly could not promulgate the constitution. KC and Pathak said that the “media were in favor of politics of consensus between the political parties with a strong focus on the issue of differences between political parties, regarding the government handover of power, implementation of republic system and power sharing” (KC & Pathak, 2010).

STRENGTHENING MEDIA FOR DEMOCRATIC CONSTITUTION MAKING

Free media and democracy are synonymous with one other. The media can only perform its role freely in a democratic society, and a democratic society relies on the media to ensure that democracy functions efficiently, it also functions as watchdog and can make the government accountable as democracy requires informed citizens to work. Nepal’s media history is an example of the mutual dependence of media on democracy as the media flourished after the first People’s Movement of 1990 and under the subsequent Constitution of the Kingdom of Nepal 1990. As such, it is very important to strengthen the media to ensure a democratic constitution-making process.

The Nepalese media was very close to creating an ethnic division in the country just before the dissolution of the Constituent Assembly in 2012. The ethnic communities alleged that the Nepali media was biased and reported negatively
on their activities. As political scientist Mahendra Lawati notes: “This segmental information dissemination, in which groups are fed different issues and often opposite perspectives, risks increasing the cleavages within society that could foment simmering ethnic conflicts (Lawoti, 2012).”

In terms of the constitution-making process, it is very important to have a thorough knowledge of contentious issues, such as federalism. Journalists need to know more about these issues in order to report them correctly, clarify them to the readers and analyse the viewpoints of the political parties. As Ross Howard points out in ‘Conflict Sensitive Journalism’, if journalists know more about the issues, they can report what they learn about negotiations with greater understanding; for example, “in Sri Lanka, when negotiations first began, the negotiators were concerned that the media did not understand the process and would create misperception and destroy confidence” (Howard, 2003: 9).

Raj Kumar Regmi holds the view that the media did not clarify the misconceptions and resorted to being the mouthpiece of the political parties. In an interview with the author, Regmi said:

> The media is equally responsible for the Constituent Assembly dissolution. Whether we admit it or not, one of the major reasons was issue of federalism and the media promoted it as ethnic federalism. Nowhere in the Constituent Assembly state restructuring committee report does it mention that. (Regmi, 2013)

Good journalism is a constant process of seeking solutions (Howard, 2003: 9). In Nepal the media stopped doing that and there was no means to strengthen the media for a democratic constitution-making process. The media had its limitations. Journalist Yubraj Ghimire, in his paper ‘Role of Media in Conflict and Peace in Nepal’ (Ghimire, 2006), said that the media was very critical of the monarchy, but later, after the country became a republic, did very little to make the new political actors accountable (Ghimire, 2006). He asserts that:

> If [the] media had successfully and faithfully done that, the peace process would have been very much on track. And the constitution-making process would perhaps moved at desired pace and direction. (Ghimire, n.d.)

Ghimire also pointed out that:

> …as political parties seem more worried now [more] than ever before about the legitimacy of the government, political process and the outcome of the 2006 April-May mass movement if the constitution is not written within the stipulated deadline (May 28, 2009) the concern is now dominating the opinion and editorial views in the print media, and interview based programs of television.
As it turned out, these concerns materialised and the constitution was not in fact written on time.

CONCLUSION

The Nepali media played a significant role during the Constituent Assembly election. It was very positive throughout the first two years of the constitution-making process, but slowly lost interest and there was a major shift in coverage from constitution making to government formation. The Nepali media could have played an important role in this historic process after 2008, but failed to realise the importance of their role in constitution making. The media limited itself to just reporting the events and, later in the life of the Constituent Assembly, was so critical that it gave a strong message that the dissolution of Constituent Assembly was the only option.

Most of the media rely on dissemination, rather than verification, of the messages they received. Even before the Constituent Assembly dissolution, the majority of media had some hope that there would be some last minute miracle and the Constituent Assembly would receive another term extension. This shows that how much faith our journalists had in the political party leaders, rather than the Constituent Assembly members. Dissolution of the Constituent Assembly not only altered the future of the country, but the media also lost an historic opportunity to play a responsible and mature role in an important national process.

The journalists who had in-depth knowledge about the issues being discussed failed to disseminate the information to the public in simple enough language. As senior journalist Raj Kumar Regmi admitted, of all the supplements, Sabha was the least popular among readers: “I must have failed to make it interesting or failed to give the information which could be of more interest among the readers (Regmi, 2013).”

The media could have done a lot more in terms of providing constructive feedback to the Constituent Assembly members and political parties, but it seems that the media houses and journalists were not prepared to cover the Constituent Assembly proceedings. The Constituent Assembly was a total new concept for journalists, who had previously only covered parliament proceedings, and they had no training on how to cover the issues, determine what would be of interest to the public, and project the impact that their coverage would have on the public and the nation.

Furthermore, some of the journalists who covered the Constituent Assembly/legislative-parliament beat realised that the media failed to put pressure on the government, key political party leaders and the Constituent Assembly members to promulgate the constitution on time. Lucky Chaudhary (Chaudhary, 2013),
coordinator of ‘Naya Nepal’, said that there were so many factors involved in the media’s apathy towards constitution making:

One [factor] was their attitude towards the whole process, along with heavy influences of the political parties over the media houses. The media failed to raise it as a common agenda because the journalists and the media houses were guided by their vested interests and by political interests.

The media’s role is not simply to provide space for factions of the community and sympathisers of certain political ideologies to vent their frustrations and air their views. Biased versions of any views only end up confusing the public. The media could have done a lot more by providing good news analyses backed by facts, figures and logic, without holding on any particular ‘version’ given by any particular group.

Just as the key stakeholders involved in the constitution-making process were not prepared for making a constitution, the media also lacked serious planning, guidance and strategies to guide the Constituent Assembly members and keep the constitution-making process on track. Moreover, the media was to blame for fuelling some issues, without regard for the possible serious impact on the constitution-making process.

Given all of these experiences, there is time room for improvement, for the media to rectify its past mistakes and play a constructive role in the promulgation of a new constitution by the new Constituent Assembly. It is hoped that this chapter will inspire and inform the media to play its part in this democratic process.

REFERENCES


END NOTES

CHAPTER 1

1. The UDMF was an alliance of half a dozen political parties and breakaway groups based in the southern plains area of the country (Tarai/Madhesh) that borders India.

2. Before the merger of Jana Morcha Nepal (People’s Front Nepal) with the CPN (Maoist) in 2008, the present UCPN-M or UCPN (Maoist) was known as the Communist Party of Nepal (Maoist); but after the split in the UCPNM in June 2012 the breakaway group is known as the Communist Party of Nepal-Maoist (CPN-M). Therefore in this article the term CPN (Maoist) refers to UCPN-M before the merger whereas CPN-M refers the breakaway group.

3. Bishwa Nath Upadhyaya, the Chairman of the 1990 Constitution Recommendation Commission (CRC) said that many suggestions he received were related to "such peripheral issues as community, language and religion." He described this as "unfortunate" (Upadhyaya 1990: 268).

4. This figure is calculated by the author on the basis of the reports submitted by the CA outreach groups. The author was able to access 38 reports from the 40 groups.

5. I (the current author) was also invited by several thematic committees and my experience is that it was just one way of listening by the committee members to what the experts say on the given theme rather than actually using the expertise.

6. The author was engaged in most of this sharing with CA members and political parties. The meetings were held with senior CA members, particularly those working with the top leaders, to acquire relevant feedback and to help minimize gaps.

CHAPTER 2

1. The members of the commission were Prof Dr Krishna Hachhethu, Dr Bhogendra Jha, Dr Ramesh Kumar Dhungel, Dr Sarbaraj Khadka, Mr Malla K. Sundar, Ms Stella Tamang, Mr Surendra Kumar Mahato and Ms Babithi Gurung.

2. Other members are Ram Chandara Paudel, Jhala Nath Khanal, Upendra Yadav, Narayan Man Bijukchhe, Prem Bahadur Singh, and Rukmini Chaudhary.

3. The Sub-Committee was headed by Puspa Kamal Dahal and included the five leaders of the major political parties. Other members included Ram Chandra Poudel (Nepali Congress), Jhala Nath Khanal (UML), Bijaya Gachchdar (United Madhesi Morcha), and Kalpana Rana (Small Parties). There were five invited members (Dev Gurung, Bimalendra Nidhi, Bhim Rawal, Prakash Chandra Lohani and Jitendra Dev) and five technical experts (Agni Kharel, Laxman Lal Karn, Radheshyam Adhikari, Khim Lal Devkota and Sapana Pradhan Malla).

4. Similarly, the High Level Task Force was formed under the leadership of Laxman Lal Karn and the other four members of the committee were Agni Kharel, Radheshyam Adhikari, Khim Lal Devkota and Sapana Pradhan Malla.

5. For example, Sushil Koirala, Krishna Sitaula, Khum Bahadur Khadka and some other leaders were defeated from Nepali Congress and Madhav Kumar Nepal, Khadga Prasad Oli, Pradeep Nepal, Bam Dev Gautam were defeated from CPN (UML).

6. Article 39 of the Ethiopian Constitution 1995 provides: "...every nation, nationality or people in Ethiopia shall have the unrestricted right to self-determination up to secession."

7. Article 3 of the Union of Soviet Socialist Republics Law of Secession 1990 provides that: "In case the Soviet Republic has autonomous republics, autonomous regions or autonomous territories within its borders, referendums are to be conducted separately in each of the autonomies. The people residing in the autonomies are given a right to independently decide whether to remain in the Soviet Union or in the seceding Republic as well as to decide on their state legal status. Referendum results are to be considered separately for the territory of a Soviet Republic with a compactly settled ethnic minority population, which constitutes majority on that particular territory of the Republic."

8. Originally it was two years and as per the 10th amendment of the Interim Constitution it became four years. This article was amended four times to extend the Constituent Assembly tenure (first time extended for a year, second time three months, third time also three months and last time for six months).

9. Unofficial translation by UNDP/SPCBN.

CHAPTER 3

proportional representation in terms of the parties in the Constituent Assembly and ethnicity.

CHAPTER 4

1. The rally was initially organised on the Nepal Law Campus under leadership of Gopal Parajuli and Balkrishna Swakoti. This author was also involved in organizing the event. After a brief talk, the rally was moved outside only to be met at Baghbazar by a severe crackdown from the police. The student movement began instantaneously.

2. Constitution making process in the post conflict situation engages political negotiation as a crucial aspect. The sustainability of the debate is mainly determined by the ‘political negotiation and agreement between concerned parties’.

3. 5 U.S. (1 Cranch) 137, 170 (1803).

4. This principle was articulated by American Chief Justice Marshall in Marbury v. Madison. The verdict outlined a principle that ‘the constitutionally or legally obscure or unidentifiable questions can be judged by the court in the light of political implication’. Hence, the court would not embark to suggest opinions on such issues.


7. As it will be studied later (see infra, pp. 92-94), the Supreme Court of India, in Kesavananda Bharati v. State of Kerala, held that “the power to amend does not include the power to alter the basic structure, or framework of the Constitution so as to change its identity” (Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225; AIR 1973 SC 1461). Excerpts from this judgment are available in COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS 1173-1180 (Norman Dorsey et al., eds., Thomson West 2003).


9. Except for the 1814 Norwegian Constitution and the 1990 Nepalese Constitution, Article 112 of the Norwegian Constitution of 1814 stipulates that constitutional amendments “must never, however, contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the spirit of the Constitution” (An English translation of the Constitution of Norway is available at http://www.oefre.unibe.ch/law/icl/no000000.html (last visited Mar. 22, 2007) (Emphasis added)). Article 116(1) of the 1990 Nepalese Constitution states as follows: “A bill to amend or repeal any Article of this Constitution, without prejudicing the spirit of the Preamble of this Constitution, may be introduced in either House of Parliament” (an English translation of the Constitution of Nepal is available at http://www.oefre.unibe.ch/law/icl/np000000.html (last visited Mar. 23, 2007) (Emphasis added)).

CHAPTER 5


8. The draft reads: “…nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or advancement of women, dalits, indigenous ethnic tribes (adivasis janjatis), Madhesi or workers, oppressed region, Muslims, backward class, minority, marginalized and endangered communities or destitute people, youths, children, senior citizens, gender or sexual minorities, disabled or those who are physically or mentally incapacitated and helpless people, who are economically, socially or culturally backward”.


10. As defined by the World Health Organization in the preamble of its constitution.


16. Article 51 of the Constitution.

CHAPTER 7

1. The views expressed in this article are the authors’ and do not represent the view of the organizations they are affiliated with. Mr. Luma Singh Bishowkarma is an advocate, holds LL.M. in Constitutional Law and is affiliated with UNHCR, Ms. Indu Tuladhar is an advocate. She holds her Master Degree on International Conflict Analysis from University of Kent at Canterbury. Currently, she is an Executive Director of HIMAL Innovative Development and Research Pvt. Ltd. and Ms. Binda Magar is an advocate and holds an LL.M. in International Development Law and Human Rights from University of Warwick, UK and MA in Women's Studies from Lucknow University, India. Ms. Magar is currently associated with UNDP.
2. Note that the terms 'nationality' and 'citizenship' (as well as 'national' and 'citizen') are used interchangeably in this document.


5. The High Level Task Force comprises of Hon'ble Pushpa Kamal Dahal (Chair) and other members are: Hon'ble Ram Chandra Poudel, Hon'ble Jalananth Khanal, Hon'ble Upendra Yadav, Hon'ble Narayanman Bijukchhe, Hon'ble Prem Bahadur Singh, Hon'ble Rukmini Chaudhary (Tharu). With the aim to support the work of the Taskforce, the meeting held on October 13, 2010 proposed to invite additional members including Hon'ble Dev Prasad Curung, Hon'ble Ramesh Lekhak, Mr. Bharat Mohan Adhikari, Mr. Rattenshore Lal Kayastha, Hon'ble Sunil Prajapati, Mr. Basudev Chaudhary and Mr. Hikmat Bahadur Deuba. Similarly, the meeting of November 3, 2010 decided to invite Hon'ble Agni Prasad Kharel, Hon'ble Ekraj Bhandari, Hon'ble Radheshyana Adhikari and Hon'ble Laxman Lal Karna.

CHAPTER 9

1. The Constitution Article 63 (3) (c) reads: Twenty six members to be nominated by the Council of Ministers, on the basis of understanding, from amongst the prominent persons who have rendered outstanding contributions to national life, and janajatis which could not be represented through the elections as referred to in Clauses (a) and (b). The possibility was used to a little degree to represent unrepresented janajati groups.

2. The CA committees had suggested a smaller principal house of parliament with a range of 150 to just above 200 seats.

3. In some countries, there is a threshold which a candidate may pass in order to change the pre-ranking given by the party.

4. Serbia has a similar system which is being criticised by international bodies, such as OSCE/ODIHR and the Venice Commission of Council of Europe.

5. The parties may if they want submit nation-wide lists, but most parties choose to submit local lists.

6. The same procedure may be applied regardless of whether the mixed system is a parallel system or Mixed member proportional (MMPR).

7. This process will not produce a fixed number of elected members from each province. It is, however, possible to ensure predefined number from each province.

8. The only requirement involving FPTP was that there had to be at least one-third female candidate among a party’s candidates for both races combined. The rule was not implemented in 2008 in a way promoting FPTP candidates. The rule did not apply to the results, only to the candidates.

9. The nine districts scoring lowest on the human development index.

10. One person could have more than one identity.

11. Backward regions are not listed here since this group may overlap with any group.

12. Excluding the 26 appointees.

13. Including one hill Muslim (Churaute) elected in List PR.


15. The figures are based upon the author's later analysis, and do not exactly match the quotas included in the 2007 election law.

16. The mechanism could be used for higher shares, but there might not be enough List PR seats to use since some groups are grossly over-represented in FPTP. It would also become very complicated.

17. The 2011 census figure for women is actually 51.44 per cent up from 50.05 per cent in 2001.

18. But the voters will get a second chance if such a candidate is elected and withdraws because he or she chooses to represent another constituency.

CHAPTER 10

1. The Supreme Court of Nepal was first established in 1951 with the Pradhan Nyayalaya Act which was promulgated in 1951 and was replaced by the Supreme Court Act through an Act promulgated 1956.

CHAPTER 11


CHAPTER 12

1. International Labour Organisation, Convention 169 on Indigenous and Tribal Peoples in Independent Countries (1989), Article 4: Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.”

2. It should be noted that there is a great variety of indigenous peoples in Nepal and not all groups have been marginalised to the same extent; in fact some groups enjoy representation in political processes that exceeds their portion of the population (Vollan, 2011).
3. The list referred to here is the Schedule of the NF DIN Act.

4. LAHURNIP is a NGO registered in Nepal; it is a membership-based organization dedicated to promoting and protecting the rights of Nepalese indigenous peoples. The organization has over 55 members—all indigenous lawyers—around Nepal and a central office with approximately 6 indigenous lawyers in Kathmandu. For more information, see www.lahurnip.org. The author has worked with LAHURNIP in various capacities since 2009, including serving fulltime with the Association as an Arthur C. Helton Fellow for Global Human Rights from 2011—12. The information contained herein has been gathered first-hand through interviews and institutional interactions with LAHURNIP and its members over the past five years. Copies of the write petition, CERD communications, Government submissions and other documents mentioned are available from LAHURNIP.

5. Under Article 107 of the Interim Constitution, Nepal’s Supreme Court has the power to issue specialised judicial remedies. Article 107 states that “The Supreme Court shall, for the enforcement of the fundamental rights conferred by this Constitution,…or for the settlement of any constitutional or legal question involved in any dispute of public interest or concern, have the extraordinary power to issue necessary and appropriate orders to enforce such rights or settle the dispute.” For these purposes, the Supreme Court may, with a view to imparting full justice and providing the appropriate remedy, issue appropriate orders and writs including the writs of habeas corpus, mandamus, certiorari, prohibition and quo warranto.”

6. Importantly, the Committee on the Elimination of Racial Discrimination has declared in relation to a case in Mexico that consultations with indigenous peoples are required for constitutional amendments and other constitutional processes so consultative requirements apply to processes like the ones unfolding in Nepal.

7. For more information on NEFIN and its activities in Nepal, see http://www.nefin.org.np.


9. See Chapter 3 “On Autonomy”, Article 9 of Oaxaca’s Constitution which holds “Each indigenous town or community has the social right to autonomy to have its social and political organization run in accordance with its own norms, and uses and customs…” (in Spanish: Cada pueblo o comunidad indígena tiene el derecho social a darse con autonomía la organización social y política acorde a sus normas, usos y costumbres, en los términos de la Constitución Política del Estado Libre y Soberano de Oaxaca: la Ley Orgánica Municipal, los artículos 17, 109 a 125 del Código de Instituciones Políticas y Procesos Electorales del Estado de Oaxaca, y de esta Ley.)

CHAPTER 13

1. Mahabharat (Van Parba: 221/11-12), (cited in (Kisan, 2005)).


3. The Commission has listed Kalar and Sarvanga as separate and single castes but the latest information has found that both are the same nor separate.

4. As per this Act, financial plan and statistics service, engineering service, agriculture service, judicial service, foreign/diplomatic service, administrative service, auditor service, jungle service, educational service and miscellaneous service are known as Civil Services (Section 3).


7. The Constituent Assembly first (2008) had formed 10 thematic committees to work out the consolidating issues of different themes likely to different chapters, sections and Articles of the Constitution. All committees structured led by a chairperson followed by around five dozens of CA members and a few staffs provided by the Government of Nepal. The committees were backboned by staffs of Government of Nepal. All committees made draft report under the term of reference given them by CA operation rule, 2009 with consultation of several experts from outside of CA.

8. The preamble of the constitution of Namibia, South Africa and Somalia have addressed the past racism, colonialism, apartheid and divisions against peoples.

9. The Indian Constitution (see Articles: 330, 332, 343T and 243D) has provided 15 percent seat reservation (proportional) for Scheduled Caste (Dalits) and 7.5 percent seat reservation (proportional) for Scheduled Tribe which is based on principle of proportional representation.

10. In India, there are several educational provisions for ‘scheduled caste’ such scholarships in school level, college level, higher level and PhD level in inside and outside of country. In addition, there are also hostel construction, book bank, special literacy programs, coaching classes, special exam preparation program for public services, and grant project as well (Kisan, 2010: 62-66).

CHAPTER 14

1. The terminology for the Government of Nepal while it was still ruled by its monarch.

2. Although IPs believe the separation of these terms undermines the legitimacy of their cause.

3. Termed ‘the revolution and movements’ in the Preamble of the 2007 Interim Constitution.
3. ‘HDI Thoughts’ states Hill Janjati (0.507); Terai Janjati (0.470); Brahmin/Chhetri (0.625).

5. Nepal’s Hindu high caste population includes 18% Chhetri and 12% Brahmin while the (hill and terai) IP represent at least 40% of the 27 m. population.

6. Many IP leaders were opposed to the revised election laws as they failed to permit each indigenous community to nominate their own ethnic leaders to the CA. Indigenous FPTP and PR candidates were nominated by the major political parties, not the communities themselves, in the June 7, 1989, election.

7. ILO Convention 169 Part 1 General Policy; Article 1(b).

8. UNDRIP, “Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures.”


10. OHCHR comments on the original concept paper.


13. Although the CA Rules did not permit the formation of caucuses, the IP CA members went ahead and organised their own Caucus without the support or official recognition of the CA Secretariat.

14. OHCHR comments on the original CA concept paper.


16. CERD has become one of the most influential protectors of IP rights in the UN system.

17. Shankar Limbu, IP lawyer and activist: “warned that the country will plunge into an ethnic war if the problems of the indigenous nationalities are not addressed”.

CHAPTER 15

1. The preamble of the Comprehensive Peace Accord (CPA) mentions a “democratic” and a “progressive” restructuring and article 3.5 states: “to carry out an inclusive, democratic and progressive restructuring of the state by ending current centralised and unitary form of the state in order to address the problems related to women, Dalit, indigenous people, janajatis, Madhesi, oppressed, neglected and minority communities and backward regions by ending discrimination based on class, caste, language, gender, culture, religion, and region.

2. Minority groups; Marginalised; backward and historically disadvantaged communities terms are interchangeably used in this paper.

3. Report of the Committee on the Right of the Minorities, Marginalised and Excluded Communities defines as following. Minority community means the community which suffers from all forms of discrimination and exploitation. The term also indicates ethnic, religious or linguistic community with less population suffering from such discrimination and exploitation. Marginalised community means the community which is backward from the economic, social, educational, political, religious, linguistic, and gender, health and sexual viewpoints. Excluded community means the community which has not been included into the State power because of caste, linguistic, economic, social, religious, cultural, sexual, regional discrimination and exploitation or because of physical or mental incapacity or disability. The following are the criteria; Past unequal treatment, Discrimination based on their social identity, age, religion, ethnicity, caste, gender, language, disability etc., Treatment as untouchables, Kept out from the mainstream of the nation, Excluded from economic, social, political, educational, legal, religious, artistic or scientific activities. Non use or insufficient use of public services, Suppressed (p 20).

4. The Constitution of Kingdom of Nepal 2047 was replaced by Interim Constitution of Nepal 2063.

5. Right to equality under Fundamental Rights (Article 11) provided that; all citizens shall be equal before the law. No person shall be denied the equal protection of the laws.; 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; the State shall not discriminate among citizens on grounds of religion, race, sex, caste, tribe, or ideological conviction or any of these provided that special provisions is made by law for the protection and advancement of the interests of women, children, the aged or those who are physically or mentally incapacitated or those who belong to a class which is economically, socially or educationally backward; no person shall, on the basis of caste, be discriminated against as untouchable, be denied access to any public place, or be deprived of the use of public utilities. Any contravention of this provision shall be punishable by law; no discrimination in regard to remuneration shall be made between men and women for the same work.

6. Women 33%, Adibasi janjatis - 27%, Madhesi - 22%, Dalit - 9%, Disabled (differently able) - 5%, Backward Area 4%.

7. Defined Madhesi community as those residing in Terai-Madhes including Madhesi, Adibasi janjatis, Dalit, backward class or minority Muslim communities who are economically and socially deprived.

8. Considering the 33% of the reserved seat as 100 it propose ;Adibasi janjatis 27%, those residing in Terai-Madhes, Madhesi, Adibasijanjati, Dalit, backward class or minority Muslim community 30%; Dalit19% Differently able 5%, Backward region 4% and Others 25%.


11. Article 13 (3) proviso states that "... provided that nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or advancement of women, Dalit, indigenous ethnic tribes (adivasi janajiti) Madhesi or farmers, labourers or those who belong to a class which is economically, socially or culturally backward, or children, the aged, disabled or those who are physically or mentally incapacitated.


13. Interim constitution 2007, article 13 (2) state that "There shall be no discrimination against any citizen in the application of general laws on the grounds of religion, race, gender, caste, tribe, origin, language or ideological conviction or any of these."


17. The paper is not including the debate on formal vs substantive equality in the US.

18. The commission for promotion and protection of rights of cultural, religious and linguistic communities commission primary functions are to (a) to promote respect for the rights of cultural, religious and linguistic communities; (b) to promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association; and (c) to recommend the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa. Gender equality commission primary functions are to promote respect for gender equality and the protection, development and attainment of gender equality.


CHAPTER 16


3. Article 83 (1) of Interim Constitution 2007 says that the Constituent Assembly shall also act as legislative-parliament as long as the Constituent Assembly remains in existence.

4. Interim Constitution 2007, 8th Amendment (1 year), 9th Amendment (3 months), 10th Amendment (3 months) and 11th Amendment (6 months).

5. Author’s research on four major national dailies: Kantipur, Gorkhapatra, Annapurna Post and Nagarik.
The two volume publication seeks to describe and analyse the remarkable and ambitious participatory constitution making process in Nepal and its challenges both with respect to process and substance. It also seeks to critically examine the difficult issues that have prevented agreement on the substance of the new constitution. Authors were identified so as to capture a range of views and opinions on a variety of constitutional issues that have featured in the national debate on constitutional reform. It is hoped that the collection of essays will contribute to a more informed debate that will, in turn, lead to a successful conclusion of the process.

Volume I provides an overview of the constitution making process of the first Constituent Assembly (2008-2012) and the key constitutional issues which it focused on including the protection of fundamental rights, forms of government, the role of the judiciary and social inclusion.