

How Nepal can learn from the experiences of others



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Nepal's President Dr. Ram Baran Yadav, third from left, administers oath of office to Constituent Assembly Chairman Subash Nembang, far left, in Kathmandu. Mr. Nembang, who comes from one of Nepal's indigenous groups, was unanimously elected to the post on July 24, 2008.

BY GEORGE ANDERSON

This special edition of *Federations*, published in both English and Nepali, is a contribution to the extraordinary process of political change that Nepal is passing through.

I was first in Nepal in February 2007 and returned for another visit in September 2008. The change between visits was amazing. During my first visit, the King was in his palace, the cease-fire was very shaky, the timing of elections was very uncertain, and the lack of consensus on

such major issues as the monarchy, religion and federalism was palpable. I returned to a country that had become a republic, with an elected president. Elections had successfully produced a widely representative constituent assembly. A coalition government was presided over by the head of the former insurgency, with a commitment to completing the peace process. The country was declared to be secular, multi-national and multi-linguistic. And there was a broad consensus – and

constitutional commitment – on Nepal becoming a federation.

These accomplishments are encouraging, though Nepal still faces huge challenges and complex issues. This magazine looks at several of them.

The article by Yash Ghai and Jill Cottrell discusses constitution-making and encourages Nepal's leaders to learn from experience elsewhere and to have a broadly participatory process. They emphasize that the underlying question is to resolve the nature of Nepali

George Anderson is the president and chief executive officer of the Forum of Federations.

nationalism and identity and this necessarily involves the larger public.

Khrishna Khanal looks at the choice of a parliamentary or a presidential system, of electoral system—whether the current regime of mixing first-past-the post and proportional representation or something different, and of federalism itself. He rightly observes that these choices will depend greatly on how the coalition government maintains unity and manages day-to-day government.

Drafting an inclusive language policy

Sujit Choudhry looks at language policy and draws on experiences in South Asia, both to show the importance of language policy and the risks associated with exclusionary policies. Of course, with over ninety languages, Nepal must balance demands for inclusion with the need for practical arrangements in relation to languages of work and of service to the public.

My own article demonstrates the importance of fiscal arrangements in shaping federations. In Nepal's case, the federal government will necessarily dominate the collection of public revenues for the foreseeable future, so decisions will be needed as to how the federal government should provide financial support to the constituent units: through shared taxes, transfer payments or conditional program payments. As well, Nepal will need a staged approach to restructuring public finances and to balance the national and regional interests regarding the management of the country's potentially huge wealth in hydro-electric resources.

Mukta Tamang illuminates the sensitive debate in Nepal on self-determination. He points out that while a Leninist approach might allow for a right to secession, this is not consistent with international law and is extremely rare in constitutional practice. However, he thinks the real substance of the debate in Nepal is not about secession, but about demands for inclusion, equality, human rights, and the rule of law – in other words, about accommodation in a united Nepal that respects diversity.

Bipin Adhikari reviews the current judicial structure and alternatives to adapt to a federal set up. He also makes the critical point that a key objective is a



Elderly Nepalese talk at the Darbar Square in Kathmandu. Nepal's population is estimated to be 27 million. According to the population profile published by Nepal's Central Bureau of Statistics, 54 per cent of the population is literate.

people friendly judiciary with good access at the constituent unit level.

Meeting the needs for devolution

Katy Le Roy draws lessons from Nepal's history of devolution initiatives, including the challenges associated with limited capacity in the country to manage a highly devolved arrangement. She sets out a series of key questions that must be answered in determining the allocation of powers and makes the important point that in some areas the constituent units may share power with the federal government – or even be subject to some measure of federal oversight.

Finally, Nicole Töpferwien addresses the hot issue, to which I return below, of drawing the federal map.

Nepal appears to risk agenda overload in coping with so many complex and interrelated issues, especially because the country has limited experience and there is no consensus on some key questions. How to proceed? The Constituent Assembly (CA) has taken a positive step in identifying 10 well defined areas for its committees. So the next phase of the road map is reasonably well charted.

Three suggestions

That said, I have three suggestions.

First, it is important that the CA not be preoccupied with dealing with the

ghosts of the old regime. The country has changed and it is important to focus on what is actually happening now and what makes sense for the future. You have an elected constituent assembly and government unlike any before. Neither is perfect, but have the legitimacy of election by universal suffrage and they include Nepalis from all castes, classes, and ethnicities. Thus today's Nepal has already taken a giant step towards the recognition, accommodation and even the celebration of diversity. You may not need a new constitution full of provisions trying to correct the sins of the past.

Secondly, take time. A new constitution should last a very long time and it need not be written in a year. Time can help in understanding the strengths and weaknesses of your interim regime and help develop consensus on key points. It will be needed to implement a new regime, particularly a strongly federal system.

Finally, think about the sequence of issues. There may be some questions where it is easier to develop consensus first; such consensus may help resolve other, tougher, issues later.

Determining the territorial boundaries of constituent units in a federal Nepal is potentially very divisive. Too often, this dominates the debate about federalism. Nepal is unusual in being a unitary system



opting for federalism, but without having clear internal boundaries – no historic constituent units, and no clear linguistic or ethnic boundaries. This makes the delimitation of constituent units difficult and causes passions to run high. Too many see the object of the exercise to be making their group into a constituent unit majority.

Passions might be lowered by considering some basic realities. As Nicole Töpperwien points out, the demographic realities in Nepal mean that there will be no ethnically homogenous constituent units and few with a clear ethnic majority.

“In a federal Nepal, the vast majority of Nepalis will live in a province (constituent unit) where their ethnic, linguistic or caste group will not be in the majority—and where no group will be in the majority. This means the vast majority of Nepalis have a stake in designing a federal Nepal that accommodates the diversity of citizens wherever they live.”

Settling how this would be done—what minority, land and language rights might be protected for citizens wherever they live—should make it easier to draw maps, when the time for that comes, because the stakes will be less.

This relates to how many constituent units and their sizes? There appears to be a notion that there may be ten or so. That could work well. But some advocate the whole of the *terai* being one constituent unit. About half of the country’s population would be in one constituent unit, which risks creating an unbalanced and poorly functioning federation.

There are some other important realities. Nepal’s revenue collection will be highly centralized. Thus the federal government may, through the power of the purse or through whatever constitutional powers it is given, have a major role in determining many public policies. The country does not have the capacity to move quickly to a highly decentralized federal system.

For these reasons, there must be careful attention to the central institutions: the legislature and executive; the courts; the civil service and army. Many federations have special provisions to accommodate their diversity in their central institutions. The role and the nature of the upper house can be important in this.

It would be healthy to work towards some consensus on such questions early in your debate. Dealing with them *before* addressing boundaries has the advantage of everyone coming to the table having to think how they would like to be treated if they were—as they quite probably will be—not part of a majority in a constituent unit. This could lead to defining protections and rights and to establishing the role of the federal government in a way that accommodates all Nepalis, wherever they live in the federation. 



The city of Bhaktapur, in the Kathmandu Valley, could be included in a future constituent unit that includes Kathmandu-or not.