

Constitution-making in Nepal

People raise demands for justice and social transformation



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Members of Nepal's Constituent Assembly check for their names before voting at Parliament House in Kathmandu on July 19, 2008. The Constituent Assembly was set to elect its first president from the Madhesi community – a group that inhabits Nepal's lowlands called Madhes or Terai. Out of 601 Constituent Assembly members, 191 members are women.

BY YASH GHAI AND JILL COTTRELL

There are many ways to make a constitution. Even within Nepal, constitutions have been made in different ways. At first, they were "bestowed" by a Rana or a King. Even when they were not drafted by the palace, they came into effect by royal proclamation. Sometimes a constitution was drafted by an expert or a committee of experts. There was no consultation with the people, except in a limited way for the 1990 constitution, and even this had little impact on the

substance of the constitution. That process seems to have been dominated by a small expert body, with close connections to political parties and the palace. Even the Interim Constitution, which replaced the 1990 constitution after the *janaandolan* or People's Movement of 1990, was adopted without consultation, although it obliges the government to enable the people to draft their own, permanent constitution. The current process of constitution making is now the task of a popularly

elected Constituent Assembly (CA), for the first time in Nepal.

Each constitution represented only marginal social and political advances, and continued to exclude the great majority of the people from political or economic power. As a result, each of these constitutions was challenged, as groups excluded from political power expressed their grievances and demanded justice.

As constitution making becomes more participatory, constitutions increasingly

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incorporate principles of democracy and social justice. The history of constitution making in Nepal reflects these global trends, which are reinforced by developing international norms, the easy availability of information about experiences of other countries, and sometimes a significant role of the international community. Nevertheless, the national context also influences the process, and although there is now considerable knowledge of comparative experience among Nepalis, the decision makers do not seem to have been much influenced by it. Key to the process in Nepal are negotiations among party leaders. Yet not everyone is happy with this process. One member of the CA called for maximum feedback from the general population during the process of drafting the constitution, to balance the risk of decisions being made by a small group of leaders.

Dealing with post-conflict issues

In post-conflict states, constitution-making is part of a series of processes that includes agreeing on a ceasefire and interim arrangements for administration of the country, bringing insurgents and dissidents into state structures, negotiating constitutional principles and the framework for deciding on the new constitutional arrangement, and holding elections for a new, legitimate government. Nepal has closely followed this sequence, and the progress on peace building determined the pace of constitutional change.

In some ways, the task of constitution making in Nepal is both easier and more difficult than in many other post-conflict states. It is easier because the insurgency was focused on political ideology, not deep-rooted ethnic conflict which leaves a bitter legacy of division and hatred – and the protagonists came from the same class background.

It is more difficult because the very settlement of that conflict, preceded by the 2006 People's Movement or *Jana-Andolan-II* triggered new demands. The insurgency and the Maoist appeal to marginalized communities – rather than merely class struggle arguments that did not have much appeal – created or renewed awareness of oppression, and encouraged the emergence of identity politics, calling in question the old model – the dominance of essentially one group. This raised fundamental questions about the nature of the state

and its "cultural" or "national" foundations. A critical issue that needs to be resolved is the nature of Nepali nationalism or identity. The question of identity is closely connected to, and finds sustenance from, social deprivation, discrimination and the poverty of many communities. This makes social justice a major issue. If the people's movement of 1989, which led to the 1990 Constitution, was seen as concerned with political power and state structures, the present movement is seen as essentially about social justice and societal transformation.

Tackling transformation

Encapsulated in this movement are a number of inter-connected "revolutions" or transformations which need to be tackled simultaneously: most obviously, monarchy to republic; hegemonic Hindu and Nepali-language-based rule to inclusiveness; feudalism and authoritarianism to democracy; caste and social hierarchy to equality of gender, caste and ethnicity; and – as yet unresolved – feudal-capitalism to socialism or communism. Most of these are divisive, even though considerable lip service is paid to some of them, such as "inclusion." The complexity of change becomes obvious when the implications of each transition are analyzed. For example, the transition to republic is not merely a matter of form – as it might be if the monarchy were abolished in a Scandinavian country, for example. In the past, the monarch symbolized the state and nation, especially as head of the Hindu religion and as an icon of history. Some used to think it was the glue that kept the country together, but others, increasingly, think that it reflected the worst features of Nepal, such as hereditary tradition, source and support of hierarchy, exclusion, and authoritarianism. Nepalis are now looking for new symbols in a post-monarchical age. There is more to this transition than merely what kind of presidency should replace the monarchy.

The transition from feudalism and authoritarianism to democracy is not only, or primarily, an institutional issue. It is fundamentally a matter of values and the culture of democracy, the empowerment of the people, awareness of and respect for human rights, and the centrality of political parties. Inclusiveness is perhaps the most

difficult aspect as it involves identity and nationalism, electoral systems, the nature of the governmental system and its recruitment practices, perhaps the recognition of group rights, and fresh thinking about the place of language, religion and tradition. Federalism, which is very much on the agenda but also very controversial, as there are no Nepali precedents, will be extremely hard to conceptualize and harder to negotiate. And the Marxian dialectics of the change from a feudal to a market and then a socialist economy, which Maoist leaders have sometimes talked about, will compound these complexities.

Crucial steps in nation-building

Thus, the question is what kind of a process for making the constitution will facilitate these transitions? The challenge involves both state-building and restructuring, and nation-building. Nation-building is crucial because the state must reflect the kind of Nepal the people can agree on. At one level, there seems to be agreement on the principles and values of the New Nepal, or *Naya Nepal*. On closer inspection, most of these appear to hide fundamental clashes of interests, approaches and priorities. Negotiating a constitution is a way to resolve differences, and agree on values, institutions and procedures to replace previous differences and modes of conflict. Properly organized, under enlightened leadership, constitution-making can also contribute to reconciliation and healing. Equally, without goodwill and wise leadership, it can be divisive. The process must allow the airing of grievances, but not allow them to take over. And the process must be one of moving on while acknowledging the past.

There is no better time than during constitution-making to engage people in discussion about public powers and institutions, and their purposes. Without some public awareness of the mechanisms of the state and an understanding of democracy, the new constitution, however well-crafted, would probably fail to take root. Democracy is almost never the result merely of a legal instrument or charter. There can be no democracy without the commitment of the people to it and their willingness and ability to participate in public affairs, co-ordinate their interests and lobby for them, exercise and protect their rights, and take seriously their own

responsibilities as citizens. As is common in many countries, people in Nepal, especially in rural communities, have only a fragmentary understanding of the institutions and procedures of the state. Moreover, in Nepal, people have been subordinated to feudal and authoritarian systems of government and need to be persuaded that they may now freely exercise their rights.

There are three very specific reasons for participation. And three elements constitute the core of the People's Movement: a new identity as a Nepali, inclusive democracy, and social justice. None of these can be achieved without the active participation of the mass of the people, representing Nepal's myriad social and ethnic communities. Participation means a great deal more than voting to elect delegates to the CA. It also encompasses the active

commitment of the people in defining the agenda of reform and the instruments for social and economic change, through debate, argument and consultation, not only in Kathmandu but throughout the country. It means identifying, through the narratives of victims, the causes of oppression, injustice and the silencing of inconvenient voices. It means allowing opportunities for the people to learn about Nepal's constitutional history, and the experiences of other countries with similar problems, and to enhance their capacity for developing democracy.

Finding the perfect mechanism

On the surface, it seems that Nepal has found a perfect mechanism for participation. It has a constituent assembly elected by the people, through rules that, while not ensuring full proportionate representation of

marginalized communities, are infinitely better than ever before. A constituent assembly has eluded Nepalis until now, despite promises, and much is expected of it. But the people's expectations might not coincide with those of the party leaders. There has been growing public impatience with the CA for not beginning to write the constitution after several months of deliberations. Elections for the Assembly were twice postponed, but they could not be avoided forever. If public pressure could no longer be resisted, it could perhaps be deflected once the CA was in place. An assembly tightly controlled by party bosses, with members of the marginalized communities brought in by courtesy, and under the auspices of the existing parties and subject to their whips, could yet undermine participation – unless the CA members assert themselves, and civil society supports them – by making submissions and demanding accountability.

Even though a CA is in place, with the potential for a national, participatory process, the constitution could effectively be made by a small group, and the 601-member assembly could become a rubber stamp. Even participatory processes need the support, if not the sponsorship, of political parties, with either an inter-party coalition, or a dominant party. Which way will Nepal go?

Phases of constitution-making

There have been three phases of constitution-making in Nepal since April 2006. The first was the truncated 1990 Constitution, stripped of provisions regarding the monarchy, and of some democratic accountability, by a resurrected House of Representatives (which had been previously dissolved by the king and whose natural term of office had expired). The second was the Interim Constitution, which was drafted by the parties, with decisions taken at the highest level. Its dominant principles, which now reach into the proceedings of the CA, are twofold and interdependent: control by eight parties; and consensus among them. The second is under pressure – and has already jeopardized the first. If these principles collapse, the procedure will revert to a form of qualified majority voting – and open up possibilities for a participatory process. But it also could threaten the process itself. 



A woman carries a large bundle of straw on her head. Eighty-five per cent of Nepalis live in rural areas which lack roads, electricity, drinking water, hospitals and schools.