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Godot Has Arrived! – Federal Restructuring in Nepal

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Overview

This chapter analyses the process and modalities that led to the federalisation of Nepal's unitary state. It explores the historical circumstances in which demands for federalism emerged and the federal settlement enshrined in Nepal's new Constitution promulgated on 20 September 2015. The question of federalism gained prominence in Nepal's public discourse during the 'People's War', the ten-year-long armed insurgency (1996-2006) launched by the Communist Party of Nepal (Maoist) to overthrow the government. In fact, the drafting of Nepal's seventh constitution was part of the peace process that began in 2006. The new dispensation was expected to reflect the political commitment to 'building a New Nepal' – an inclusive and democratic polity – through a radical programme of state restructuring. The Maoists, together with various ethno-cultural and regional groups, argued that the 1990 Constitution, which was to re-democratize the country after thirty years of Panchayat monarchical autocracy (1960-1990), inadequately addressed – if not reinforced – patterns of exclusion of many groups on the basis of class and/or identity and they saw territorial autonomy for ethno-linguistic and regional groups as the key solution to the country's rampant discrimination.

In April 2008, the first Constituent Assembly (CA1) was elected. It featured a relative Maoist majority, but was politically fragmented. The CA1 was unable to finalise and promulgate the new document due to profound disagreements over key matters, with federal restructuring proving to be the most contentious issue. The CA1 process led to the polarisation between 'pro-ethnic federalism' political forces – the Maoists and various Madhesi parties – and 'anti-ethnic federalism' forces – the Nepali Congress, the various National Democratic Parties (RPP), and to a certain extent the Communist Party of Nepal (United Marxist-Leninist) (UML). After four extensions, the CA1 was eventually dissolved in May 2012 and a second Constituent Assembly (CA2) was elected in November 2013. The elections brought a relative majority to centrist parties – the Nepali Congress and UML. Following the disastrous earthquakes that hit Nepal in April and May 2015, the drafting of the new constitution was 'fast-tracked' leading to its promulgation in September. The new document, however, was met with growing protests in the Terai plains near the Indian border and an unofficial trade blockade by neighbouring 'India'. At the time of writing, the new dispensation has already been amended once, and negotiations over a second amendment have been ongoing for over a year with regard to the controversial demarcation of the federal units. It is important to note that at the time of writing in February 2018 the creation of the federal units of government has just started to take place after the elections in 2017.

Background

The period between 1990 and 2006 was Nepal's second experiment with democracy. In 1990, an alliance of banned and underground political parties succeeded in putting an end to the autocratic monarchical Panchayat regime. Pro-democracy leaders sought to institutionalise a constitutional monarchy and parliamentary democracy through the promulgation of the 1990 Constitution;¹ however, for many Nepalis this was an unsatisfying settlement. Moreover, political instability marred the country's parliamentary politics from 1994,² and the beginning of the People's War in 1996 led to an escalation of political violence and a progressive militarisation of the state. The royal massacre of 2001,

¹ Michael Hutt, 'Drafting the Nepal Constitution, 1990' (1991) 31 (11) *Asian Survey* 1020.

² Martin Hoftun, William Raeper, and John Whelpton, *People, Politics and Ideology: Democracy and Social Change in Nepal* (Mandala Book Point 1999).

combined with the growing military successes of the Maoists, who by 2002 controlled roughly half of Nepal's territory, led to a further erosion of democratic politics.³ Two bouts of emergency rule were proclaimed in 2002-3 and 2005, paving the way for another spell of autocratic monarchical rule under newly crowned King Gyanendra, until an alliance between the mainstream political parties and the Maoists succeeded in restoring democratic politics in April 2006.

The main grievances with regard to the 1990 Constitution were the semi-constitutional position of the Shah monarchy, a strong executive dominance, the overly centralised nature of state institutions, and the ethnocentric institutionalisation of the nation at the constitutional level. The triumvirate of Nepali nationalism – the Shah monarchy, Hinduism, and the Nepali language – was, in fact, given centrality in the constitutional text to enshrine *Parbatiya* dominance also on a symbolic level.⁴ In substantive terms, this hegemony was reflected in the under-representation of Janajati, Madhesi, Dalit, religious minorities, lower castes, and women in all the branches of the Nepali state leading to clear exclusionary patterns on the basis of identity. Furthermore, the 1990 Constitution banned the formation of political parties on a communal basis,⁵ and retained the thirty-year-old ban on proselytism.⁶

The extent of social exclusion in Nepal is even more significant when related to the degree of socio-cultural diversity of the country's population. The 2011 Census illustrates the varied composition of Nepal's population with 125 caste and ethnic groups, of which only the largest six are above 5 per cent of the total population and they are not territorially concentrated.⁷ The two biggest groups are the Chetri, i.e. Kshatriyas of local Khas origins (16.6 per cent) and Bahun, i.e. Hill Brahmins, (12.2 per cent); together they constitute the Parbatiya group, to which Nepal's royal family and elites belong. In terms of historically marginalised groups, dalits (i.e. 'former untouchables') form about 14 per cent of Nepal's population. The 63 groups classified under the umbrella term Adivasi Janajati (i.e. 'indigenous people'), who can be described as ethno-linguistic groups that do not use Nepali as their mother tongue, account for 36 per cent of the total population. Madhesi groups (i.e. non-Pahari 'Terai plain dwellers', often erroneously described as 'of Indian origins') constitute slightly less than 20 per cent of the population. While Nepali remains the *lingua franca* of the majority, only 44.6 per cent named it as their mother tongue, alongside ninety-one other mother tongues.⁸ After the re-democratisation of 1990, the Nepali state became even more Kathmandu-centric with Parbatiya males even more over-represented in state bodies (parliament, government, judiciary, civil service, police, army, universities, etc.), especially

³ Genevieve Lakier, 'After the Massacre: Secrecy, Disbelief, and the Public Sphere in Nepal' in Raminder Kaur & William Mazzarella (eds), *Censorship in South Asia: Cultural Regulation From Sedition to Seduction* (Indiana University Press 2009); Deepak Thapa and Bandita Sijapati (eds), *A Kingdom under Siege: Nepal's Maoist insurgency 1996 to 2003* (The Printhouse 2004).

⁴ Mara Malagodi, *Constitutional Nationalism and Legal Exclusion: Equality, Identity Politics, and Democracy in Nepal* (OUP India 2013), chs 3 and 4.

⁵ Constitution of the Kingdom of Nepal, 1990, art 112(3).

⁶ Constitution of the Kingdom of Nepal, 1990, art 19(1).

⁷ Government of Nepal, Central Bureau of Statistics, '2011 Census Major Highlights' <<http://cbs.gov.np/image/data/Population/Major%20Highlights/Major-Finding.pdf>> accessed 6 December 2015.

⁸ Nepal Central Bureau of Statistics, *Statistical Pocket Book – Nepal 2002* (Central Bureau of Statistics 2002).

in the higher echelons.⁹ These patterns reveal a clear link between poverty, marginalisation, and identity.¹⁰

The reason for the discrimination faced by many of Nepal's ethno-linguistic, regional, and religious groups dates back to the country's creation as a modern state entity in the late 18th century. The military conquests initiated by King Prithvi Narayan Shah of Gorkha, a small kingdom lying west of the Kathmandu Valley, led to the annexation of many small principalities and kingdoms under Gorkhali sovereignty.¹¹ Hinduism and its association to the Shah monarchy were used as an important legitimising tool.¹² This discrimination continued under the later regime of the Rana family (1846-1951), which assumed the powers of the monarch without displacing him, especially in the design of the 1854 *Muluki Ain* (Country Code), which slotted all the various ethno-linguistic, religious, and caste groups of Nepal within a single 'national' caste hierarchy reinforcing Parbatiya hegemony.¹³ Regrettably, Nepal's first experiment with democracy lasted for less than a decade (1951-1960) as in 1960 King Mahendra Shah, abruptly brought it to an end with the support of the Army. The royal coup inaugurated three decades of monarchical autocracy under the legitimising umbrella of ethno-nationalist propaganda, centred on the Shah monarchy, Hinduism, and the Nepali language, thus further reinforcing patterns of exclusion within the country's population.¹⁴

Nepal's current administrative structure dates back to the Panchayat arrangements introduced in 1961, so it continues the regime's lack of recognition of sociocultural diversity in a territorial form. The Panchayat administration was territorially organised along two levels: second-tier local government bodies (with 75 Districts, *jilla*, 3,995 Village Development Committees, *gaum*, and 36 Municipalities, *nagar*); and first-tier local government bodies, (with 5 Development Regions, *kshetra* and 14 Zones, *anchal*). Significantly, the functions of the first-tier bodies remained unclear.¹⁵ The Panchayat administrative structure corresponded also to the four tiers of the state's representative institutions. They were organised into a pyramidal structure where only the lowest level was directly elected, while the members of the other assemblies were indirectly elected by and amongst the representatives of the level immediately below.¹⁶

⁹ Dhruva Kumar, 'Social Structure and Voting Behaviour' in Lok Raj Baral (ed), *Elections and Governance in Nepal* (Sage 2005), 210-11.

¹⁰ Krishna B Bhattachan, 'Possible Ethnic Revolution or Insurgency in a Predatory Unitary Hindu State, Nepal' in Dhruva Kumar (ed), *Domestic Conflict and Crisis of Governability in Nepal* (Centre for Nepal and Asian Studies, Tribhuvan University 2000).

¹¹ Kumar Pradhan, *The Gorkha Conquests: The Process and Consequences of the Unification of Nepal, with Particular Reference to Eastern Nepal* (Oxford University Press 1991).

¹² Richard Burghart, *The Conditions of Listening: Essays on Religion, History and Politics in South Asia* (Oxford University Press 1996).

¹³ András Höfer, *The Caste Hierarchy and the State in Nepal: A Study of the Muluki Ain of 1854* (Universitätsverlag Wagner 1979).

¹⁴ Richard Burghart, 'The Political Culture of Panchayat Democracy' in Michael Hutt (ed), *Nepal in the Nineties: Versions of the Past, Visions of the Future* (Oxford University Press 1994).

¹⁵ Susanne Hesselbarth, 'Alignment Strategies in The Field of Decentralisation and Local Governance, Country Study of Practices And Experiences: NEPAL' (Development Partners Working Group on Local Governance and Decentralization International Development Partner Harmonisation for Enhanced Aid Effectiveness, October 2007) <http://www.delog.org/cms/upload/pdf/wg/CountryStudy_Nepal_Oct2007.pdf>.

¹⁶ Leo E Rose and Margaret Wepley Fisher, *The Politics of Nepal. Persistence and Change in an Asian Monarchy* (Cornell University Press 1970) 53.

Following the re-democratisation of 1990, the growing demands for social inclusion were channelled through moderate demands for institutional reform. In 1996, the government commissioned a report on decentralisation and local self-governance, and created a task force to improve the situation of marginalised groups. As a result, the government committed to decentralisation and devolution through the enactment of the Local Self-Governance Act in 1999.¹⁷ Significantly, the Act also prescribed the mandatory allocation of 20 per cent of seats at the Village level to women,¹⁸ and provisions for the nomination of women and disadvantaged groups in the executive committees at Village¹⁹ and District level.²⁰ However, the innovations introduced by the 1999 Act have remained to a great extent ineffective, as no local elections have been held for twenty years between 1997 and 2017. A modicum of recognition along identity lines was introduced by the National Foundation for the Development of Indigenous Nationalities (NFDIN) Act in 2002, which was intended to increase the participation of Janajati (i.e. ethno-linguistic groups similar to ‘tribes’ in the Indian Constitution) in state institutions. However, the NFDIN Act only recognized 59 groups as ‘indigenous nationalities’,²¹ while the 2001 Census identified over 100 caste/ethnic groups, which had previously organized in 1990 under the umbrella organization of the Janajati Mahasangh.

Nepali governments have been historically preoccupied with politics in the Terai, the long lowland area running along the open border with India, whose population is mostly Madhesi, i.e. ‘plain dwellers’ as opposed to Pahari ‘hill dwellers’. They sought to keep a tight leash on the region. One of the most contentious issues in the Terai throughout the 1990s has been that of citizenship, with estimates that in 1994 about 3.5 million people did not have citizenship certificates. According to an ICG report, this was caused by the legal requirements of descent and knowledge of Nepali for naturalization, discriminatory linguistic policies by the state, under-representation in state institutions, and economic discrimination.²² The 1990 Constitution featured clearly discriminatory and exclusionary citizenship clauses: Article 9(5) denied citizenship through matrilineal descent, a provision included to ‘protect’ Nepali-ness given the heavy Indian influence in the Terai due to the open border, while Article 9(4)(a) made the ability to read and write in the Nepali language mandatory for the acquisition of citizenship.²³ The demand for equal citizenship has been at the core of the agenda of Madhesi rights activists since the 1950s. The movement found renewed strength in the 1980s and organized itself as an identity-based regional political party in the early 1990s. Identity politics had entered Nepal, and was there to stay.

Political Opposition to the Regime

Many grievances along identity and class lines marred Nepal’s post-1990 political scene, and all of them presented an institutional dimension. In particular, it has been argued that the 1990 Constitution played

¹⁷ Hesselbarth, ‘Alignment strategies’ (n 15).

¹⁸ Local Self-Governance Act 1999, s 7.

¹⁹ *ibid* s 8.

²⁰ *ibid* s 172(2)(e).

²¹ National Foundation for the Development of Indigenous Nationalities (NFDIN) Act 2002, sch.

²² International Crisis Group, ‘Nepal’s Troubled Tarai Region’ (Asia Report No 136, International Crisis Group 9 July 2007), 4-5 <<https://www.crisisgroup.org/asia/south-asia/nepal/nepal-s-troubled-tarai-region>>.

²³ Malagodi, *Constitutional Nationalism and Legal Exclusion* (n 4) 164-68.

‘a significant role in the continued exclusion of the marginalized socio-cultural groups’²⁴ and their political opposition to it. In 1996, the Maoists – who had united the small far-left parties excluded from the 1990 constitution-making process – submitted a list of forty demands to the central government.²⁵ These included: the end of Nepal’s ‘feudal’ monarchical political system; redistributory reforms of the economy; the declaration of Nepal as a secular state; equal rights for women, ethno-linguistic minorities, and Dalits (formerly known as “untouchables”); and, the ‘promulgation of a new Constitution drafted by the People’s elected representatives’. With regard to territorial restructuring, they demanded that ‘in areas having a majority of one ethnic group, that group should have autonomy over that area’. The Maoists’ grievances focused on a multidimensional understanding of marginalisation, encompassing both questions of class and identity.²⁶ Their notion of identity politics went beyond ethnicity to include other dimensions such as gender, caste, religion, and region in light of the country’s profound sociocultural diversity. In short, Nepal’s People’s War was not an ethnic conflict per se, but it certainly featured an ethnic dimension. The Maoists and their ideas steadily gained ground, either by persuasion or coercion. Significantly, by 2002 they controlled by military means roughly half of Nepal’s territory, especially in the countryside, while the presence of the state was limited to the strongholds of the District Headquarters. The CPN (Maoist) had become a formidable political force that the Nepali establishment had to reckon with.

Identity politics and demands for recognition, however, were not new in Nepal and their articulation in the public sphere dates back to at least 1951, although the democratic opening of 1990 marked an increase in political mobilization along identity lines. Many groups in addition to the Maoists have been historically well organised, including the Madhesi parties and the Nepal Federation of Indigenous Nationalities (NEFIN) formed in 1990. It was only in 1993 that NEFIN assumed the connotation of *adivasi* interpreted in Nepal as ‘indigenous’ (as opposed to ‘tribe’ in India). The claim to indigeneity, historically debatable in itself,²⁷ seems an instrumental political move to sustain claims for self-determination on a territorial basis, especially through international legal instruments such as the Indigenous and Tribal Peoples Convention (ILO 169) ratified in September 2007. But as Gellner illustrates, in Nepal there is a high degree of intermixture with people from many groups living together and in only 15 of 75 districts does a single group make up more than 50 per cent of the population.²⁸ The Terai itself, with roughly half of the country’s population, has great socio-cultural diversity, featuring Madhesi Janajati groups, Madhesi caste groups, Pahari migrants, and Indian migrants.²⁹

There have also been demands for recognition from Dalits and various religious minorities’ organisations, which are not territorially based. Overall, the majority of identity-based demands in Nepal have been of a civil nature, i.e. to compete for resources within the system.³⁰ There have been cultural demands for ethnic, linguistic, and religious equality, economic demands for a fair share of state resources and political demands for proportional representation and regional autonomy. However, the demands with a territorial element have not been so far of a secessionist nature and secessionist threats

²⁴ Mahendra Lawoti, *Towards a Democratic Nepal. Inclusive Political Institutions for a Multicultural Society* (Sage Publications 2005) 115-16.

²⁵ Michael Hutt (ed), *Himalayan People’s War: Nepal’s Maoist Rebellion* (Hurst & Company 2004) 285-87.

²⁶ Thapa with Sijapati (n 3) 51-82.

²⁷ Rajendra Pradhan, ‘A Native by Any Other Name...’ (1994) 7 (1) Himal 41.

²⁸ David N Gellner, ‘Caste, Ethnicity and Inequality in Nepal’ (2007) 42 (20) *Economic and Political Weekly* 1823, 1827.

²⁹ Pitamber Sharma, *Unraveling the Mosaic. Spatial Aspects of Ethnicity in Nepal* (Himal Books 2008) 82.

³⁰ Harka Gurung, ‘State and Society in Nepal’ in David N. Gellner, Joanna Pfaff-Czarnecka, and John Whelpton (eds), *Nationalism and Ethnicity in a Himalayan Kingdom: the Politics of Culture in Contemporary Nepal* (Harwood Academics 1997) 530.

were only issued when all the demands for recognition and autonomy were thwarted at the centre. However, the growing polarisation between Pahari and Madhesi, together with the increasingly violent expression of political discontent and heavy-handed responses by the state, could easily escalate the political conflict and rapidly lead to a much more intractable situation.³¹

Mainstream Political Parties and Political Elites

During the 1990 constitutional experience, the main political forces were the Shah King (first Birendra, then Gyanendra) together with their royal clique and the highest echelons of the Army, the mainstream parliamentary parties (Nepali Congress, UML, RPP, Anandi Devi, etc.), and the Maoists. The constitutional ban on the formation of communal parties³² made parliamentary politics almost the exclusive purview of ideology-based parties, with the notable exception of Anandi Devi, a Terai regional party advocating for Madhesi rights. Identity-based demands and concerns remained largely ignored by all the other mainstream political parties, which featured a staggering dominance of Bahun and Chetri males in the composition of their respective Central Committees.³³ Identity politics was mainly conducted outside of parliament through the burgeoning Janajati organisations formed after 1990.

The Maoists were able to capitalise on this vacuum and successfully combined the politics of redistribution with the politics of identity in their political campaign. Moreover, they were successful in associating the Shah Hindu monarchy with traditional societal structures such as caste, and with Nepal's ethno-nationalist discourse, which had historically oppressed many groups marginalised on the basis of identity. The Maoist demand for secularism weakened the legitimacy of the monarchy while offering a common rallying point for identity-based grievances. Moreover, the controversial accession to the throne of King Gyanendra in 2001 after the harrowing events of the royal massacre further destabilised the monarchy, leading to its eventual demise in 2008.³⁴

The beginning of the peace process in April 2006 brought identity politics to the forefront of Nepal's political debates. The political achievements of the Maoists, combined with the rise of more radical Madhesi parties, significantly eroded the electoral base of both the Nepali Congress and the UML in the Terai, and forced the mainstream political parties to rethink their strategy concerning identity politics. As a result, all the biggest ideological parties created so-called 'ethnic wings' to widen their support base, and counter the Maoists, the Madhesi parties, and the growing number of identity-based political organisations. However, the reins of the main political parties – including the Maoists – remained firmly in the hands of the old leadership, mostly formed by Pahari upper caste Hindu males. The pressure brought by the *Madhesi Andolan* upon the Nepali political establishment led to a widespread commitment to federal restructuring – with the notable exceptions of the RPP and some

³¹ International Crisis Group, 'Watch List – July-December 2015' (EU Watchlist No 5, International Crisis Group 1 December 2015) < https://d2071andvip0wj.cloudfront.net/watch-list-december-2015-compressed_0.pdf > accessed 16 February 2018.

³² Constitution of the Kingdom of Nepal 1990, art 112(3).

³³ Kumar (n 9) 210-11.

³⁴ On 1 June 2001 King Birendra, Queen Aiswarya and seven other members of the Royal Family were shot dead inside Kathmandu's Royal Palace of Narayanhiti allegedly by Crown Prince Dipendra who then attempted to commit suicide and died two days later. The country was ridden by shock, uncertainty and fear as the vast majority of Nepal's population did not accept the official explanation for the killings (See Manjushree Thapa, *Forget Kathmandu: An Elegy for Democracy* (Viking Books 2005), 7-47). Moreover, the succession to the throne of Gyanendra, late Birendra's second brother, was looked at with suspicion. Rumours spread about the involvement in the royal massacre of the new King and his son Paras. The accusation was made explicit by the Maoist ideologue Baburam Bhattarai's letter published on 6 June 2001 in the daily *Kantipur*. Gyanendra was accused of being India's pawn, while late Birendra was described as a 'patriotic King'.

smaller Communist parties – but that commitment ultimately proved to be tenuous, especially towards ethnic federalism.

The Period of Constitutional Engagement

Context and Background of the CA1

The decision that there should be a new constitution, which would meet the long standing Maoist demand for a constitution drafted by the People's elected representatives, was taken in the last phase of Nepal's civil war. On 25 November 2005, the Twelve Point Agreement was reached in India between the Maoists and the mainstream political parties.³⁵ It included the commitment to elect a Constituent Assembly. The promise of a Constituent Assembly made by King Tribhuvan in 1951 was finally going to be met, even if half a century later. The success of the pro-democracy movement against King Gyanendra's authoritarian rule in April 2006 led to the restoration of the House of Representatives (Parliament's Lower House), which had been dissolved in 2002, in order to have a legislature while the CA elections were being organised. Nepal's return to parliamentary politics inaugurated a phase of exhilarating optimism for the advancement of democracy and social inclusion, and the beginning of what appeared to be a genuine 'constitutional moment'.³⁶

In 2006, Nepal emerged from a ten-year-long armed insurgency in which over 17,000 lives were lost and over 3,000 Nepalis were "disappeared".³⁷ The peace process essentially entailed two steps: the integration of the Maoist combatants into the Nepal Army, which was eventually completed by April 2012, and the drafting of a new Constitution – Nepal's seventh – by a directly elected inclusive body. Radical constitutional change was widely viewed as the primary vehicle for state restructuring to address the peace process' mantra of 'building a new Nepal'; a new constitution written by elected representatives would 'deepen democracy' by securing the inclusion of marginalised groups in state institutions and breaking the hegemony of upper caste Pahari (from the hills) Hindu elites (*Parbatiya*).

With regard to constitutional change, the Maoists were adamant to repeal the 1990 Constitution and successfully advocated for the drafting of an interim document to pave the way to the elections of the Constituent Assembly. A small commission of unelected delegates, selected by the various political forces, prepared the Interim Constitution. Shortly after its formation, the commission had to be expanded to accommodate women and Janajati delegates. On 15 January 2007, after months of negotiations, the 1990 Constitution was finally abrogated and the Interim Constitution promulgated. The most contentious issues included the position of the monarchy, the powers of the Interim Parliament and Government, the CA election process, the choice of the body to promulgate the Interim Constitution, and the issue of citizenship in the Terai.³⁸ The new document, while heavily based on the 1990 Constitution, remained silent on the issue of the monarchy devoid of most of the ethno-cultural references that characterised the previous document; it proclaimed Nepal to be a secular state, retained a parliamentary form of government with a unicameral Interim Legislature, and set out the institutional

³⁵ UN Peacemaker, '12-Point Understanding between the Seven Political Parties and Nepal Communist Party (Maoists)' (*UN Peacemaker*, 22 November 2005) <<https://peacemaker.un.org/nepal-12pointunderstanding2005>>.

³⁶ Bruce Ackerman, *We the People: Foundations* vol 1 (Harvard University Press 1991).

³⁷ International Committee of the Red Cross, 'Nepal: women from opposing sides of the conflict' (*ICRC*, 6 March 2012) <<https://www.icrc.org/eng/resources/documents/news-footage/2012/nepal-tvnews-2012-03-06.htm>>.

³⁸ Kiran Chapagain, 'ICDC misses yet another deadline' *Kathmandu Post* (Kathmandu, 10 August 2006 OR 25 Shrawan 2063 BS) 1.

roadmap for the elections of the Constituent Assembly. However, it left a number of issues open for later political negotiation, such as federal restructuring.³⁹

Following the promulgation of the Interim Constitution, an agreed number of Maoist delegates joined the Interim Parliament in January 2007 and then the Cabinet in April 2007, opening the way to the final preparations for the CA1 elections. Given the lack of agreement on a replacement, the Interim Constitution remained in force until September 2015. The issue of federalism arose relatively late in this process. In January 2007, the *Madhesi Andolan*, a mass protest movement against governmental discrimination of the Madhesi population in the Terai, led to prolonged strikes and violence. To appease the protestors, the Interim Government eventually accepted their demand for the federalization of the country and amended the Interim Constitution accordingly. However, one legal expert aptly described the agreements between the Government and the agitating ethnic-regional activists, together with the amendments to the Interim Constitution that ensued, as ‘painkillers, not treatments’.⁴⁰ Thus, federalism officially entered Nepal’s institutional politics by way of a string of amendments to the Interim Constitution that expressly committed Nepal to federalization, but they fell short of a federal design and Nepal remained de facto a unitary state. Moreover, no local elections were held for two decades, making local government at village, municipal, and district levels entirely dysfunctional.

In April 2008, the elections for the CA1 were peacefully held.⁴¹ The 601-member unicameral Assembly operated both as the country’s legislature and constitution-drafting body. To the surprise of many, the Maoist emerged as the largest party, with 35 per cent of the seats in a body of over thirty parties. On 28 May 2008, at the CA1’s first meeting, Nepal was proclaimed a federal republic and the commitment to federalization resulted in further amendments to the Interim Constitution. However, the CA1 remained deeply divided and even with four extensions to its term, it was unable to agree on a new constitution, especially with regard to the modalities of federal restructuring. Hence, the CA1 was eventually dissolved in May 2012 leaving Nepal with neither a legislature nor a constitution-drafting body in place for over a year. In November 2013, the CA2 elections signalled the electorate’s change of mood – and possibly a new trajectory for the country’s commitment to federal restructuring. The Madhesi uprising had succeeded in firmly putting the question of federal restructuring on the constitutional agenda through a series of amendments of the Interim Constitution, although they bore little substantive influence over the work and output of the CA1.

Actors and Decision-Making in the CA1 Process

The election of the CA1, after some postponement, was eventually held on 8 April 2008. The process was conducted in a reasonably free and fair manner, with a turnout of above 60 per cent of eligible voters.⁴² The CA1 featured 601 seats of which 240 (42 per cent) allocated by first-past-the-post in single-member territorial constituencies (essentially those of the general election of 1999) and 335 seats (58 per cent) allocated by proportional representation in which the entire country functioned as a single constituency and the electorate voted for political parties, not individual candidates. The PR mechanism gave parties a free hand in the selection of candidates, subject only to the legal quotas relating to identity,

³⁹ Mara Malagodi, ‘Constitutional Change and the Quest for Legal Inclusion in Nepal’ in Colin Harvey and Alexander Schwartz (eds), *Rights in Divided Societies* (Hart Publishing 2012) 169-93.

⁴⁰ International Crisis Group, ‘Nepal: Identity Politics and Federalism’ (Asia Report No 199, International Crisis Group 13 January 2011) 8, <<https://www.crisisgroup.org/asia/south-asia/nepal/nepal-identity-politics-and-federalism>>.

⁴¹ The Carter Center, ‘Observing the 2008 Nepal Constituent Assembly Elections’ (The Carter Centre April 2008) <http://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/FinalReportNepal2008.pdf>.

⁴² *ibid.*

13 per cent dalits, 37.8 per cent marginalised groups, 4 per cent backward regions, 31.2 per cent Madhesi, and 30.2 per cent Other Groups.⁴³ The remaining 26 seats were reserved for appointments made by the Cabinet after the election.

Twenty-five of the fifty-seven parties contesting the election found representation in the CA1, alongside two independent candidates. The results surprised many because the Maoists came on top with a relative majority of 35 per cent of seats, capturing many constituencies that had long been held by Congress and UML, especially in the Terai. The Maoists won almost double the seats of each mainstream party: the Nepali Congress obtained 19 per cent, while the UML 18 per cent. The fourth biggest party, the Madhesi People's Rights Forum (MJAF) captured 9 per cent, the fifth, the Terai Madhes Loktantrik Party 3.49 per cent. Only five other parties controlled more than one per cent of the seats; sixteen parties fell below that threshold.⁴⁴ The uneven distribution of seats, the fragmentation of Nepal's political spectrum, and the polarization of diametrically opposed and competing visions of the Nepali polity within the CA1 set the stage for many rounds of political manoeuvring.

The life of the CA1 was marred by political instability from its inception. The relative majority of the Maoists resulted in them obtaining key posts, including that of the Prime Minister. Maoist supremo Pushpa Kamal Dahal (aka 'Prachanda') took the reins of the Nepali Cabinet in August 2008, supported by the Madhesi parties, the UML, and a number of smaller parties, while the Nepali Congress remained firmly in opposition. However, Dahal was forced to resign in May 2009 after a row with the President over the sacking of the Chief of Army Staff, when he was succeeded by the UML leader Madhav Kumar Nepal, who was in office a little over a year. Another UML leader, Jhala Nath Khanal took the helm of the government in February 2011, after seventeen unsuccessful rounds of votes within the CA1. His tenure was particularly short-lived, and in August 2011 he was replaced by Maoist ideologue Baburam Bhattarai, who remained in office until the CA1's dissolution in May 2012. Throughout the life of the CA1, Nepali party leaders mostly concentrated their energies on political power play for governmental posts and on the Army integration process, which was only concluded in April 2012. They did not give the constitution-making process their personal time or priority, which meant that the CA1 could not resolve key issues. Leaders turned to these only at the last minute, but by then they were unable to reach an agreement before the Assembly's dissolution.

Significantly, in 2008 the electorate had rejected a number of old party leaders, even though the electoral law allowed them to run in up to two first-past-the-post constituencies. However, former Prime Ministers Sushil Koirala and Madhav Kumar Nepal – to mention just two examples – still managed to secure seats in the CA1 as part of the twenty-six Cabinet appointed posts. The appointment of leaders who had been rejected by the electorate was indicative of the attitude of the main political parties towards democratic decision-making and the CA itself. As illustrated in a Martin Chautari report, the party leaders were always confident that they would have the last word on any question of constitution-making in the name of taking decisions by 'consensus' (*sabamati*). As a result, decisions on key constitutional matters became the exclusive purview of the political leaders outside of the CA1 itself. This entirely delegitimised the drafting process in the CA, and the leaders remained unable to

⁴³ The sum of these percentages is more than 100 per cent. 'Explanation – As a number of candidates represent more than one group, the sum total of the percentage of the candidates of all groups appears to be more than one hundred' Election to Members of the CA Act 2007, Sch 1. 33 per cent of the total seats were also allocated to women.

⁴⁴ Also see Kåre Volla, 'System of Representation for the Constituent Assembly Elections in Nepal: An assessment and suggestions for future elections' (Paris-Oslo International Workshop on Democracy, Paris, 18-20 October 2010) <www.uio.no/english/research/interfaculty-research-areas/democracy/news-and-events/events/conferences/2010/papers/Volla-SystemOfRepresentationNepal-2008.pdf>.

reach a consensus even outside of the CA.⁴⁵

The commitment to ‘consensus’ decisions was built into the Interim Constitution in all the clauses related to decision-making in the CA. For example, the 5th Amendment added a subsection to Article 33 on the Responsibilities of the state ‘to develop a culture of resolving major political problems of the country with understanding, consensus, and cooperation amongst the major political parties’. However, this section was non-justiciable so that decision-making through consensus under the Interim Constitution remained, legally speaking, purely aspirational. The Constitution provided for voting procedures for all the decisions to be taken by the CA, and most of them required a simple majority of members present in the House, with a quorum of one fourth of the total CA members. Only constitutional amendments (Article 148) and the passing of the new Constitution (Article 70) required a two-thirds qualified majority. Legally, two-thirds of the CA members could, under the Interim Constitution, declare a new Constitution. Politically, however, it proved impossible to do so without the support of all the main political leaders, i.e. ‘by consensus’, which would secure the legitimacy of the new document. At the same time, this requirement made resolving several issues virtually impossible.

The Institutional Setup of the CA1

The CA1 held its first meeting on 28 May 2008, and in a historic proclamation declared Nepal a ‘Federal Democratic Republic’, putting an end to the 265-year-old Shah monarchy. Having done so, its first task was to create its Rules of Procedure and in its second meeting a 44-member CA Rules Committee was established. By November, both the Rules and an 82-week Timetable for the CA were approved. Then in December, the constitution-drafting work was organised into committees: the Constitutional Committee, ten Thematic Committees, and four Procedural Committees. For proposals to pass within a Committee a simple majority vote was required. All the Thematic Committees concluded their work and submitted their reports and concept papers for discussion by the full Assembly between May 2009 and January 2010.⁴⁶

Even if the CA1 Rules were silent on the issues of Caucuses and Party Whips, these institutions played a fundamental role in the work and demise of the CA1. CA Speaker Subhash Chandra Nemwang allowed for the spontaneous creation of cross-party Caucuses along identity and gender lines.⁴⁷ The formation of the Women, Janajati, Dalit, and Madhesi Caucuses demonstrated that other bonds of solidarity and political cooperation existed in the CA1 beyond party affiliation. In fact, on numerous occasions, CA members voted according to their conscience, ignoring party lines. The party leadership responded by unleashing their Whips on the defiant party members. However, the use of Party Whips in the CA1 not just on ordinary legislative matters, but also on votes on constitutional issues when rebellious members were subjected to a three-line-whip, effectively curbed many cross-party initiatives. This was especially significant for the rebellious CA members elected under proportional representation, as expulsion from their parties would result in the loss of their seat.⁴⁸ Thus, the main

⁴⁵ Martin Chautari, ‘The Debilitating Dynamics of Nepal’s Constituent Assembly (2008-2012)’ (Briefing Paper No 8, Martin Chautari March 2013) <www.martinchautari.org.np/files/BriefingPaper8_EngVer.pdf>.

⁴⁶ See Alliance for Social Dialogue, ‘Chronology of Constituent Assembly – I’ (*ASD.org.np*) <<http://asd.org.np/nepal-in-transition/constitution/constitutionmaking/constitution-category/meeting-chronology-of-ca-i/>>.

⁴⁷ Kamal Dev Bhattarai, ‘CA caucus debate rages; parties divided’ *The Kathmandu Post* (Kathmandu, 8 March 2014) <www.ekantipur.com/2014/03/08/top-story/ca-caucus-debate-rages-parties-divided/386395.html>.

⁴⁸ Krishna Khanal, Frits Sollewijn Gelpke, and Uddhab Prasad Pyakurel, *Dalit Representation in National Politics of Nepal* (Nepal National Dalit Social Welfare Organisation 2012)

three political parties, including the Maoists, which were all dominated by upper caste Pahari Hindu males, succeeded in silencing voices of dissent and demands for inclusion within their own parties, and in the Assembly. Essentially, this situation severely limited the availability of ‘systemic’ ways through which the demands of the marginalized groups could be accommodated within the institutional process.

The Committees’ reports had all been discussed in plenary sessions by May 2010, but no agreement could be reached among the main political parties on the most contentious issues: federal restructuring, presidential versus parliamentary government, and the judiciary. As a result, the new constitution could not be finalised. The CA1 then bought time by amending the Interim Constitution to extend its own term. At this point, the task of resolving these issues was removed from the open public debates of the body directly representative of the Nepali people and put into the hands of the old guard of leaders of the main parties. These men negotiated crucial decisions about Nepal’s new constitutional settlement, mostly through the High Level Political Committee (HLPC), which had been set up by G.P. Koirala in January 2010. As a result, no inclusive and transparent deliberations within the CA1 were allowed to iron out the differences between the various political forces. Ultimately, the modus operandi of backdoor secret negotiations and opaque deals devised by the High Level Political Committee outside of the Assembly undermined the legitimacy of the constitution-making process itself. At the same time, the political leaders failed to forge a compromise solution, notwithstanding three further extensions of the CA1’s term in May 2011, August 2011, and November 2011. ‘Postponing’ or rather ‘delaying’ the entire constitution-making process was the strategy adopted by the main political parties, since no agreement could be found on key issues. Negotiations dragged on to the point that commentators started to use expressions such as ‘Nepal at a permanent crossroad’, ‘the unending transition’, and ‘counterrevolution by stealth’. It is argued that this was a conscious negotiating strategy especially by the parties at the opposition within the CA1.

Federal Debates: Political Actors and Federalism

The question of federal restructuring has polarised Nepal’s political spectrum since the beginning of the peace process. On the one hand, the Nepali Congress, UML, and other smaller conservative and left wing parties advocated for a weak form of federalism that essentially entailed territorial restructuring along the past lines of devolution, with no reference to ethnicity. Their resistance to ethnic federalism stems from traditionalist conceptions of the Nepali state and nationalism, a fear losing their power bases, and an apprehension that a polarisation of Nepal’s highly diverse society along institutionalised ethnic lines may lead to a Balkanisation of the country – and further conflict. While the spectre of secession was mostly a rhetorical threat used by the Nepali Congress and the UML—as well as the parties advocating a unitary state (e.g. RPP)—many expressed genuine concerns that ‘ethnic’ federal restructuring could lead to further marginalisation and violence. On the other hand, the Maoists, alongside Madhesi and Janajati parties, demanded federal restructuring along ethnic lines to secure the inclusion of marginalised groups, and break the long-established Pahari upper-caste Hindu hegemony over the country. With time, it seems that the Nepali Congress and the UML accepted a degree of federal restructuring to appease their Janajati, Madhesi, and Dalit members and supporters, and to avoid exacerbating political conflict, but they remained opposed to an ethnically-based approach. For their part, the Madhesi parties progressively moved away from their original demand for a unified Madhes in the Terai, because this one province would have had 51 per cent of the total population, which would be destabilizing. But they remained supporters of federal restructuring on the basis of identity.

The debates on the nature of federal restructuring took place first in the Thematic Committee

www.idsn.org/fileadmin/user_folder/pdf/New_files/Nepal/2013/Dalit_Representation_in_National_Politics_of_Nepal_-_2012.pdf.

called the Committee on State Restructuring and Distribution of State Power. After thirteen months of deliberations, this 43-member committee completed its report and submitted it for plenary discussion on 27 January 2010. The majority in the Committee voted for a model featuring fourteen provinces based on the criteria of ‘identity’ as well as ‘capability’, which was to ensure the viability of the provinces; however, the names and boundaries of the provinces were mostly along ethnic lines.⁴⁹ The identity markers highlighted by the Committee were: ethnic/communal, linguistic, cultural, geographical/continuity of regional identities, and continuity with historical identities.⁵⁰

Preferential political rights (*agrādhikar*) were included in the Committee’s report in the form of temporary reservations of a share of political offices for the majority group in each province. No other special entitlements were given to such majority ethnic groups, essentially because no province would have a clear ethnic majority, and all would still host many smaller ethno-linguistic groups. As a result, this model raised preoccupations about the position of smaller groups. Significantly, four UML members voted for the proposal in the Committee against the party line, allowing it to pass at the Committee stage. A number of Committee members did not support the proposal, leading to a Nepali Congress leader to put forward an alternative six-unit model defined solely on the basis of capability and not identity, where the federal units were strikingly similar to the existing Development Regions.

As reported by the ICG, ‘a plenary discussion of the proposals was attempted, but this led to shouting and disruption of Assembly proceedings by members who felt they were being ignored. The report was kicked to the Constitutional Committee, which simply added the federalism proposals to a growing list of contentious issues’.⁵¹ The question of federal restructuring was then moved out of the CA1 with the creation of a nine-member High Level State Restructuring Commission in November 2011. Significantly, the Commission members were not CA members, but political appointees deemed to have some specialised knowledge in matters of federalism. The elusive search for political consensus brought the deliberations on a key political issue outside of the CA1, the only body representative of the Nepali people. However, the Commission as well proved incapable of resolving the deadlock and by February 2012 it submitted two separate reports to the Prime Minister.⁵² The majority report put forward by six members⁵³ proposed eleven provinces (i.e. federal units) down from fourteen: namely, 1) Limbuwan, 2) Kirant, 3) Tamsaling, 4) Newa, 5) Narayani, 6) Tamuwan, 7) Magarat, 8) Dalits, 9) Karnali-Khaptad, 10) Madhes-Mithila-Bhojpur, and 11) Madhesi-Awadh-Tharuwan. These names reflected the mixed adoption of ethnic and geographical denominators (except in the extraordinary case of the dalits, which was to be a non-territorially based province).⁵⁴ The minority report put forward by

⁴⁹ The fourteen provinces identified by the CA1 Committee on State Restructuring and Distribution of State Authority were: 1) Limbuwan, 2) Mithila-Bhojpur-Koch-Madhes, 3) Kirant, 4) Sunkoshi, 5) Sherpa, 6) Tamsaling, 7) Newa, 8) Narayani, 9) Tamuwan, 10) Magarat, 11) Lumbini-Awadh-Tharuwan, 12) Karnali, 13) Jadan, and 14) Khaptad.

⁵⁰ CA1, Report of the Committee for Restructuring the State and Distribution of State Power 2010. See: <http://constitutionnet.org/sites/default/files/concept_paper_restructuring_state_gtz_eng.pdf>

⁵¹ International Crisis Group, ‘Nepal’s Constitution: Evolution, Not Revolution’ (Asia Report No 233, International Crisis Group 27 August 2012) 6, <<https://www.crisisgroup.org/asia/south-asia/nepal/nepal-s-constitution-i-evolution-not-revolution>>.

⁵² Alliance for Social Dialogue, ‘Two Separate Reports by the State Restructuring Commission (January 29-February 4)’ (*Alliance for Social Dialogue*, 5 February 2012) <<http://asd.org.np/political-updates/two-separate-reports-by-the-state-restructuring-commission-january-29-february-4/>>.

⁵³ The SRC Coordinator Madan Pariyar, and members Stella Tamang, Malla K. Sundar, Bhogendra Jha, Krishna Hachhethu, and Surendra Mahato supported the majority report.

⁵⁴ Report of the Committee for Restructuring the State and Distribution of State Power 2012

three Commission members (NC and UML appointees)⁵⁵ proposed six federal units along the existing administrative structure, with the names to be decided by parliament. The outcome of this process rather than moving forward the debate on federalism, revealed how polarised and intractable it had become.

With the 28 May 2012 deadline looming, the top party leaders, who had kept their distance from the CA, attempted a series of last minute agreements. On 15 May the leaders of the Nepali Congress, UML, and CPN (Maoist) agreed on an eleven-unit federal model with provisions for naming the territorial units through the first meeting of the respective provincial assemblies. The question of naming the provinces became deeply controversial and divisive because of its highly symbolic value. Thus, Janajati and Madhesi groups pressured the Maoist leadership to uphold its commitment to ethnic federalism in the new constitution, so the Maoists backtracked from the deal on the eve of the impending deadline. As the ICG reported, ‘there were whispers about leaving federalism for later, with only an in-principle commitment in the new constitution. But Madhesi, Janajati, and Tharu groups opposed this, arguing there could be “no constitution without federalism and no federalism without identity”. They also rejected the idea of constitution-by-commission or anything less than the full Constituent Assembly’.⁵⁶ With no agreement on the most contentious issue, the CA1 was eventually dissolved on 27 May 2012, four years after its first meeting, leaving Nepal without a new constitutional settlement in place.

Dissolution of the CA1

The failure and eventual demise of the CA1 resulted from a number of factors. First, the behaviour of top political leaders marginalised the Assembly as the forum of deliberations relating to key constitutional issues. By undercutting the only truly representative body entrusted with the task of constitution drafting, the entire constitutional process was delegitimised. Second, inter and intra-party squabbles over offices and seats took precedence over meaningful and long-awaited institutional reforms. In this respect, Kanak Mani Dixit pointedly observed: ‘the fact that both the CA and Legislature-Parliament had the same members proved fatal, because government-formation always took precedence, adding both rancour and unprincipled compromise’.⁵⁷ Third, both the Executive and the Supreme Court became progressively involved in matters relating to the proceedings of the CA1, leading to an unhealthy tension between the various branches of the Nepali state.

Public frustrations with the CA1 also resulted from the Assembly’s inability to complete its task notwithstanding the total of four extensions of its term taking it from the originally established two years to four years. After the second such extension, the Supreme Court became involved into the growing controversy and eventually it adjudicated on the constitutional validity of such extensions in four instances – May, August and November of 2011, and May 2012. In the landmark judgment of November 2011, the court stated that if the CA1 failed to promulgate the new Constitution by the extended deadline of May 2012, it would automatically expire. As a result, on 22 May 2012, when the Bhattarai Government tabled a Bill supported by the four main political parties for yet another amendment to the Interim Constitution to secure a further three-month extension of the CA1, the Supreme Court responded by issuing a stay order, effectively disallowing any further CA1 extension. In an unforeseen turn of events, Prime Minister Bhattarai dissolved the Assembly on 27 May and called for new elections.

⁵⁵ SRC members Ramesh Dhungel, Sabitri Gurung, and Sarbaraj Khadka supported the minority report.

⁵⁶ International Crisis Group (n 51) 8.

⁵⁷ Kanak Mani Dixit, ‘The Life and Death of the Constituent Assembly of Nepal’ (2012) 47 (31) *Economic & Political Weekly* 35, 36.

Outcome of the Process

The dissolution of the CA1 in May 2012 left Nepal with neither a legislature nor a constitution-drafting body in place for over year. At the same time, a Cabinet, composed by Ministers appointed by the political parties and headed by the Supreme Court Chief Justice (only on temporary leave from his judicial post and an adjudicator on two of the cases that led to the dissolution of the Assembly) and unburdened by any form of parliamentary accountability, was placed at the country's executive helm. Unsurprisingly, this interim period undermined the constitutionality of the political process by implicating the Supreme Court in executive politics and it further eroded public trust in state institutions and political actors, both perceived as caught up in partisan politics and incapable of delivering institutional reform. Officially, such constitutional manipulation was justified as an exceptional measure for exceptional circumstances. However, the manifest democratic deficit was coupled with the progressive deterioration of governance, and Nepal's 'constitutional moment' seemed irremediably lost.

The elections to the CA2 took place on 19 November 2013, after having being postponed twice. First of all, the turnout was exceptionally high, approximately 77 per cent, demonstrating that the vast majority of those entitled to vote actively participated in the exercise. Second, according to both national and international electoral observers, the polls were conducted in a free, fair, and efficient manner. Third, pre-election intimidation and violence were minimal and decreased as the poll date approached.⁵⁸ A number of political parties and candidates alleged electoral fraud, but these allegations have not been substantiated.

The CA2's composition mirrors the one of its predecessor: a 601 seat unicameral legislature functioning both as the country's parliament and its constitution-drafting body. As before, it featured 240 members elected in first-past-the-post seats, 335 elected by PR, and 26 named by the Cabinet. The 2013 elections brought the main centrist parliamentary parties – the Nepali Congress and UML – back to the political forefront in that they emerged as the biggest two parties in the Assembly, while the Maoists were relegated to the third position. Of the 575 seats allocated through the elections, the Congress won 196 seats (34 per cent), the UML 175 seats (30 per cent), and the Maoists only 80 seats (14 per cent). A further 28 parties secured representation in the CA2, but they all won less than five per cent of the total seats.⁵⁹ Commentators have interpreted the electoral setback of the Maoists as both the result of a successful campaign of the mainstream parties against the proposals for ethnic federalism and the electorate's frustration with the CA1's biggest party in not delivering a new Constitution in four years.

In March 2014, the CA2 finally succeeded in re-adopting the many agreements on the new Constitution previously reached by the CA1. However, the thorny issues that caused the CA1 to be dissolved without a new constitution after four years proved divisive. The questions of federal restructuring and the form of government continued to polarize Nepal's political spectrum. On the one hand, the Nepali Congress, UML, and other smaller conservative and leftwing parties advocated for a non-ethnic form of territorial restructuring and a weak form of federalism, while retaining a parliamentary form of government. On the other hand, the Maoists, alongside Madhesi and Janajati parties, promoted a federal restructuring along ethnic lines to secure the inclusion of the many marginalized groups, and a presidential system in which the President is elected by popular vote. The majority in the CA2 of the Nepali Congress and UML made the former institutional roadmap the one that was eventually adopted. However, the requirement for a two-thirds majority of CA members to pass the new constitution made the two dominant parties short of a handful of votes and seemed that

⁵⁸ The Carter Center, 'Carter Center Congratulates Nepal on Well-Conducted Election Process' (*The Carter Center*, 20 November 2013) <www.cartercenter.org/news/pr/nepal-112113.html>.

⁵⁹ 2013 electoral results

it could force a degree of compromise. Negotiations were protracted and until the earthquakes hit Nepal in the spring of 2015 little progress had been made with regard to drafting.

The CA2 did not succeed in promulgating the new constitution within its original deadline of January 2015. Nepal's 'constitutional moment' seemed irremediably lost and radical state restructuring became a very distant prospect. In this respect, the coalition government attempted to prohibit the formation of cross-party Caucuses in the CA2, while the use of Party Whips continued. Thus, as late as October 2014, the ruling coalition of the Nepali Congress and UML hinted at the possibility of passing the new constitution 'by process', i.e. by a qualified two-third majority vote in the Assembly in accordance with the procedures of the Interim Constitution. In response, a Maoist-led alliance of twenty-two parties threatened to reject the document if not forged 'by consensus', and to take to the streets and launch a programme of protests.⁶⁰

In the wake of the 2015 earthquakes, Nepal's political elites vowed to 'fast track' the drafting of the new document and finally complete the peace process. On 8 June, the main four parties (Nepali Congress, UML, Maoists, and Madhesi Forum-L) reached a political settlement known as the 16 Point Agreement, which was to form the basis of the new constitution.⁶¹ Significantly, the negotiations included only four of the thirty-one parties represented in the Assembly and made little effort to include representation from the marginalized groups. The Agreement featured a parliamentary form of government with a mixed electoral system and a separate Constitutional Court, but crucially sought to postpone the naming and demarcation of the federal units until the promulgation of the new constitution and the elections of the central and provincial legislatures.

The postponement of the long-awaited process of federal restructuring immediately sparked protests across the country. As a result, petitions were filed in the Supreme Court to have the Agreement declared violative of the currently in force 2007 Interim Constitution. In an unprecedented move, on 19 June, a single bench of the Supreme Court issued an Interim Order against the implementation of the Agreement's postponement of federal restructuring.⁶² The apex Court arrived at its decision on the basis of Article 138(3) of the Interim Constitution, which mandates that 'the final decision relating to the structure of the state and federal system shall be made by the Constituent Assembly'. Politicians accused the Court of overreaching and the Assembly's Constitution Drafting Committee (CDC) pressed on with the preparation of the draft on the basis of the 16 Point Agreement defying the Supreme Court's order.

Protests grew increasingly violent and the security forces' response heavy handed, especially in the Terai, where the demands for federalism and equal citizenship have been historically the strongest. In the meantime, the Assembly opted for a fast-track procedure to pass the new constitution, allowing for a very brief period of public consultation over the draft.⁶³ Amidst mounting tensions, on 8 August, the

⁶⁰ See: <http://www.myrepublica.com/archive/112809/Illusive-consensus-%0D%0A>.

⁶¹ 16-point Agreement Nepali Congress – Communist Party of Nepal-Unified Marxist Leninist – Unified Communist Party of Nepal-Maoist – Madhesi Janadhikar Forum-Loktantrik) <http://www.satp.org/satporgtp/countries/nepal/document/papers/16-point_Agreement.htm> accessed 11 January 2016.

⁶² Adv.Dipendra Jha, 'English Version of the SC order' (*Twitter.com*, 19 June 2015) <<https://twitter.com/dipjha/status/612139709553229824>> accessed 11 January 2016.

⁶³ Nikhil Narayan and Sanhita Ambast, 'Nepal's "Fast-Tracked" Constitutional Process Trades Rights for Speed' (*The Wire*, 1 August 2015) <<http://thewire.in/2015/08/01/nepals-fast-tracked-constitutional-process-trades-rights-for-speed-7673/>> accessed 11 January 2016.

political leaders relented and inked a six-province deal of federalism.⁶⁴ Tharu political leader Rukmini Chaudhary pointedly commented on the deal: ‘Accepting the six-state federal model is suicidal for the indigenous [...] we demanded two states in the Terai: Madesh and Tharuhat. There is an incomplete Madhesh, and no Tharuhat. We said we don’t want a North-South federal model that puts the mountains and plains in the same state, but that’s exactly what they have given us. Indigenous groups have been cheated. Rai and Limbu homelands have been lumped together as in one state. Magar and Gurung homelands are also lumped together, as have Tamang and Newar homelands. There is Pahadi Brahmin-Chhetri dominance in each state’.⁶⁵

As protests intensified, on 21 August the Nepali Congress, UML, and Maoists agreed on a new seven-province federal deal (essentially carving Province 7 out of Province 6 and maintaining the controversial longitudinal division of the country), while the Madhesi Forum-L did not support the scheme.⁶⁶ On 23 August, the draft constitution (with the seven-province model) was tabled in the CA2 for approval by the House as the MPs representing the marginalized groups walked out in protest.⁶⁷ Violent demonstrations and communal violence erupted across the Terai, leading to the death of security forces and protestors in Kailali, the imposition of a curfew, and the deployment of the Nepal Army.⁶⁸ While a constitution was eventually framed, as expected it did not bring about radical institutional restructuring. In the end, while federalism was accepted, the framework adopted reflected the political balance between the federalist and anti-federalist forces. As such, the 2015 document provides for three tiers of government: Federal at the centre (Parts VII-X, Articles 74-125), Provincial through seven Provinces identified by numbers in Schedule 4 (Parts XIII-XVI, Articles 162-213), and Local through Villages and Municipalities at the lower level and Districts at the higher level (Parts XVII-XIX, Articles 214-230). Part XX (Articles 231-237) of the constitution defines the relationship between the three tiers of government and Schedules 4 to 9 provide for the apportionment of executive powers and legislative competence amongst the three tiers of government. Nepal’s Local government structure has remained unchanged since its creation in 1961 and the 2015 constitution simply recognises the existing framework. It remains to be seen whether the results of the 2017 local elections will breathe life into the process of decentralisation that the Local Self-Governance Act was expected to bring about when enacted in 1999, but which has remained dead letter until today.

The constitution, however, remained silent on the name of the Provinces and adopted a hybrid solution to the various proposals for federal demarcation that were on the negotiating table. The Provinces were created by lumping together clusters of the existing 75 districts. Significantly, the demand for the creation of a single Madhesi Province in the Terai was refused and the controversial longitudinal division of the country adopted. Madhesi and Janajati activists contended that this

⁶⁴ The Nepali Times Blog, ‘Federalism deal signed’ *The Nepali Times* (Kathmandu, 8 August 2015) <www.nepalitimes.com/blogs/thebrief/2015/08/08/federalism-deal-signed/> accessed 13 January 2016.

⁶⁵ Erisha Suwal, ‘“Accepting six-state federal model is suicidal for the indigenous”’ (*The Record*, 9 August 2015) <<https://www.recordnepal.com/perspective/accepting-six-state-federal-model-is-suicidal-for-the-indigenous/>> accessed 13 January 2016.

⁶⁶ Karma99, ‘Timeline of proposed federal structures’ (*Karma99*, April 2015) <<http://www.karma99.com/2015/04/proposed-federal-structures-of-nepal.html>> accessed 13 January 2016.

⁶⁷ Prakash Acharya, ‘CA on cusp of promulgating constitution’ *The Himalayan Times* (Kathmandu, 24 August 2015) <<http://thehimalayantimes.com/kathmandu/ca-on-cusp-of-promulgating-constitution/>> accessed 13 January 2016.

⁶⁸ Human Rights Watch, ‘“Like We Are Not Nepali”: Protest and Police Crackdown in the Terai Region of Nepal’ (*Human Rights Watch*, 16 October 2015) <<https://www.hrw.org/report/2015/10/16/we-are-not-nepali/protest-and-police-crackdown-terai-region-nepal>> accessed 13/01/2016.

demarcation entrenched *Pahari Babun-Chetri* demographic dominance in each Province.⁶⁹ As a result, they continue to lobby for a constitutional amendment to redefine the boundaries of the Provinces. Moreover, the long-standing controversial demand for preferential rights (*agrādhikar*) was dropped. The constitution drastically moved away from the federal model based on ethnicity and language initially proposed. The new constitution was promulgated on 20 September 2015, but amendment Bills were already being tabled in Parliament in December of 2015 and in January of 2016, but these failed to quell protests in the Terai, which continued amidst an unofficial Indian-enforced trade blockade and the increasingly vocal form of ethnonationalism embraced by the UML-led Nepali government. A new phase of political conflict has begun in Nepal and given the electoral success of the nationalist leftwing alliance (UML and Maoists) in the 2017 elections at federal, provincial and local level, it seems that this political cleavage can only deepen in the near future.

Lessons Learned

The failure of Nepal's CA1 in relation to the question of federal restructuring inspires a number of reflections concerning the link between territorial restructuring, identity politics, and the range of institutional responses to demands for social inclusion.

First, the institutional choice of territorial reorganization along identity lines seems unsuitable in circumstances where groups are not territorially concentrated and, instead, dispersed down to the village level as in Nepal. Federal restructuring along identity lines also seems inappropriate where groups are not sizeable enough to be granted their own territorial unit. The 2011 Census identified over a hundred ethno-linguistic and caste groups inhabiting a relatively small country, with most of them constituting less than 5 per cent of the total population. The combination of these two factors simply makes it impossible to design a federal structure that recognizes every single group and accords it a territorial dimension. Thus, the introduction of a federal regime prioritizing identity may entail the lack of recognition of a substantive number of groups, which could in turn lead to discontent and conflict due to feelings of further marginalization and newly institutionalized patterns of exclusion for certain groups. At the same time, groups' demands for recognition ought to be addressed through institutional reforms; otherwise their outright denial may eventually lead to secessionist attempts as the growing unrest and human violations in the Terai seem to indicate.

Second, in Nepal, debates on federalism and legal entitlements on the basis of identity have hinged on the concept of preferential rights (*agrādhikar*) as the priority entitlement of the majority ethno-linguistic group to political leadership positions in their respective future federal units. In Nepal, the debate has moved from ethnicity to indigeneity as Janajati leaders embraced the principles underpinning the UN Decade for Indigenous People, leading to the ratification of the ILO 169 Convention in 2007. The emphasis on indigeneity has been strongly connected to the demand for federal structures that embed preferential group rights. As illustrated above, the preferential treatment of 'bigger' groups in the federal units bearing their name raised the problematic question of the position of 'smaller' marginalised groups that did not succeed in obtaining their own territorial unit. Thus, it is important to delink territorial from non-territorial forms of recognition, as one does not necessitate the other as argued by Shneiderman and Tillin.⁷⁰ Notably, the 2015 Constitution entirely moved away even from the symbolism of ethnic federalism and sidestepped the controversial process of naming the seven federal units it created by referring to the Provinces with numbers from 1 to 7.

⁶⁹ Suwal (n 65).

⁷⁰ Sara Shneiderman and Louise Tillin, 'Restructuring States, Restructuring Ethnicity: Looking across Disciplinary Boundaries at Federal Futures in India and Nepal' (2015) 49 (1) *Modern Asian Studies* 1.

Third, the Nepali state has historically been the almost exclusive political preserve of Parbatiya groups with a significant under-representation of marginalized groups in the legislature, cabinet, civil service, judiciary, higher army ranks, and educational sector – accompanied by lower levels of educational and economic performance.⁷¹ As a result, the demands for social inclusion in Nepal have made the relationship between federal restructuring and the constitutional right to equality a particularly intimate and embattled one. The 1990 constitution favoured a negative view of equality based on the principle of non-discrimination. In fact, the document presented a formulation of the right to equality in which cultural, linguistic, ethnic and religious affiliation did not provide any basis to claim a positive legal right. Such features, instead, were treated as possible causes for negative discrimination. While the 1990 right to equality allowed for future special legislation for the advancement of the unprivileged segments of Nepali society, such future positive discrimination was not based ethno-linguistic or religious criteria. The conflict in 2015 and 2016 over the federal map is, in essence, a conflict between the numerous, but marginalized, Madhesis and Tharu groups of the Terai and the traditional Parbatiya Hindu elites, who are still trying to maintain their supremacy.

In a situation like that of Nepal, Kymlicka's polyethnic or representation rights may be more appropriate in providing protection to a group's culture through legislation or giving political voice in central institutions.⁷² In fact, after 2006, steps were taken to redress the question of group marginalisation in Nepal through the use of quotas. In relation to parliamentary representation, a mixed electoral system was adopted in the 2008 CA1 elections, with part of the Assembly's proportional seats allocated on the basis of identity. Moreover, the Interim Constitution took significant steps towards the recognition of group rights based on socio-cultural criteria such as ethno-linguistic, caste and regional identity. This served as the constitutional basis for ordinary legislation introducing quotas. Amendments were made between 2007 and 2009 to a number of Acts regulating public sector employment (civil service, police, army, government-owned corporations) and educational institutions to introduce reservations for categories of Nepalis on the basis of their identity. These measures are similar to the Indian approach to positive discrimination with its focus on state institutions. Significantly, the 2015 Constitution introduced the new controversial category of 'Khas-Arya' (namely, high-caste Pahari Hindus) to the list of protected categories entitled to benefit from affirmative action measures.⁷³ Historically dominant groups have now bought into the politics of recognition and its institutionalisation. In this respect, it would be important to consider the benefits for Nepal of moving away from purely majoritarian decision-making at the centre and designing institutions informed by the principles of power-sharing.

Fourth, participation in constitution making and the openness of the debate over constitutional change seem to be of paramount importance to sustain an acceptable and durable institutional compromise.⁷⁴ In Nepal, however, the CA1 ended up being marginalised by the top political leaders, who focused on other concerns, such as immediate power-sharing, while disempowering the entire constitution-drafting process. This was in the end also the outcome of the CA2, but in this case the top leaders did reach a conclusion, however strongly it may be contested by the Madhesi and Tharu. The

⁷¹ World Bank Nepal, *Unequal Citizens: Gender, Caste and Ethnic Exclusion in Nepal* (The World Bank and Department for International Development 2006).

⁷² Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Right* (Oxford University Press 1996) 30-31.

⁷³ Krishna Adhikari and David Gellner, 'New Identity Politics and the 2012 Collapse of Nepal's Constituent Assembly: When the dominant becomes 'other'' (2016) 50 (6) *Modern Asian Studies* 2009-2040.

⁷⁴ UNDP and Constitution Advisory Support Unit, 'Constitution Making in Nepal: Report of a Conference organized by the Constitution Advisory Support Unit, UNDP' (United Nations Development Programme 2007).

First Amendment to the new Constitution was passed on 23 January 2016, but it has not resolved the discontent in the Terai and no agreement had been found by February 2018 on a second amendment and the redrawing of the federal units. Given the extensive mandate that ultra-nationalist political forces received in the 2017 elections, it seems unlikely that Nepal's federal demarcation will be revised any time soon. The question, however, remains whether the coalition supporting the new document will prove able to sustain it. Clearly a broader consensus would bring more stability to the constitutional settlement, but achieving such a consensus seems an ever more distant possibility in Nepal's increasingly polarized public discourse.

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