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Participatory Constitution-making in Nepal (2008–2015)

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After seven years of political deadlocks, debates, close international watch and growing public disenchantment, Nepal's Constituent Assembly (CA) finally adopted a new constitution of the new federal republic on September 20, 2015. Its promulgation took place under the shadow of Indian economic blockade on the Nepal-India border that saw essential goods such as fuel, food, medicine, etc. entering into Nepal come to a halt for months. The failure of the main political parties to enshrine the demands and the aspirations of the Madhes-based parties in the constitution was understood to be the principal reason for the Indian blockade. It appears that a political stability in Nepal rests on taking India and China in confidence. But more importantly, the success and failure of the new constitution lies with the principal political actors and their vision of values, spirit and letters of the newly adopted constitution.

Nepal's experiment with the written constitution dates back to 1948, when the last Rana ruler, Padma Shamsheer, promulgated the first ever constitution. Known as *Nepal Sarkarko Vaidhanik Kanun* (Official Act of the Government of Nepal), it was primarily aimed at safeguarding the interests of the Rana family against the demands for democratic rights. Since then the country has experimented with

various constitutions, both of democratic and authoritarian nature. Following the overthrow of the century-old Rana regime (1846–1951), there were moves to frame a constitution through an elected constituent assembly in the 1950s. However, such an assembly never materialized. That idea of the constituent assembly was once again revived in the immediate aftermath of the *Jana Andolan II*.

Nepal's *Jana Andolan II* or the People's Movement of April 2006, was instrumental in bringing the decade-long Maoist insurgency (1996–2006) to an end. It brought the Maoists into the peace process, ended Nepal's absolute monarchy, and began the political transition. A major landmark development of the subsequent peace process was the election of the CA in April 2008 that was tasked with making a new constitution. The present constitution (seventh in seven decades) is thus integral to the Comprehensive Peace Accord (CPA) signed in 2006 between the Government of Nepal (GoN) and the then Communist Party of Nepal-Maoist (CPN-M).

Although the CPA and the Interim Constitution (IC) 2007 envisaged CA elections as an “inherent fundamental right of the Nepali people” (Peace Committee 2007), there was no provision in it that would make constitution writing process a participatory one. After the adoption of the CA Rules in November 2008 an explicit provision was made for public participation. The CA rules made the public participation mandatory by allocating time for public consultations on the draft and stipulating that relevant suggestions from the people be accommodated in the constitution (Samvidhansabha Sachivalaya 2065 v.s.). The second CA or CA-II (2014–2015), though much more conservative in terms of its public participation, also provided provisions for public consultation and made the first draft of the constitution available for public hearing and suggestions (Samvidhansabha Sachivalaya 2070 v.s.).

Such participatory aspect has been given due importance in recent decades, considering that both substance and process are equally crucial for constitution-making and its consolidation. Several case studies reveal that “well-conducted processes can,

indeed, contribute to building stable, peaceful states, whereas poorly conducted processes must certainly undercut such efforts” (Solomon 2010: xi). In 1994, South Africa adopted a process with a slogan “you have made your mark, now have your say” that is considered a model for participatory constitution-making. It is said that the South African process had reached out to about 65 percent of the adult citizens and helped to “create a sense of ownership and engender the respect for the new constitution” (Ebrahim 1998: 249).

Scholars have argued that adopting the homogenizing values rooted in the legal equality of the twentieth century constitutionalism cannot fulfill the desire of multi-cultural and multi-ethnic society for the self-rule. This has been demonstrated in a range of across Africa (Rwanda and Burundi), Europe (Belgium) and Asia, including Nepal. The first political requirement for a multi-ethnic society is to create a constitutional framework, wherein different cultural, ethnic, linguistic and social groups can, at minimum, share power to ensure adequate and equitable representation in the new state structure (Ghai 2000). In the context of Nepal such process is interpreted as “restructuring the state” (Khanal 2065 v.s.). As a result, questions of the recognition of indigenous people and their collective rights, multilingualism, inclusion, proportional representation, equitable power-sharing, affirmative rights, and federalization of the state, which were considered “peripheral” or “secondary” issues in the 1990 constitution-making process became matters of primary concern in 2008.¹

Likewise, the presence of international agencies and their concerns about the constitution-making process was yet another dimension that Nepal experienced during the political transition phase between 2008 and 2015. The presence of the United Nations Mission in Nepal (UNMIN) from 2007 was a part of the peace process, as both the

¹ Bishwonath Upadhyay, the Chairman of the 1990 Constitution Recommendation Commission, said that many suggestions he received were related to “such peripheral issues as community, language and religion” which he described as “unfortunate” (NPD 1990: 293).

parties, the GoN and the CPN-M, had agreed to United Nations assistance in monitoring the management of arms and armies, and observing the conduct of CA elections (MoPR 2068 v.s.a; 2068 v.s.b; Peace Committee 2007). While respecting the constitution-making as a sovereign affair, the international community was keenly observing and extending its support to see that the new constitution is successfully made and meets the minimum international standard and values of democracy, human rights, rule of law, justice and equality (Khanal 2068 v.s.).

This article is divided broadly in two parts: the first part looks at the dynamics and the works done by CA-I. The second part examines CA-II. In the concluding section, I revisit some of the issues and comment on the three aspects of the constitution writing exercise—mainly on participation, process, and on the contents of the constitution thus promulgated.

THE CONSTITUTION-MAKING PROCESS (2008–2012)

After the success of the *Jana Andolan II*, drafting a new constitution became one of the key tasks for the political parties. A series of peace talks between the Seven Party Alliance (SPA)—which then headed the government, and the CPN-M covered important issues related to the new constitution such as: respect for civil and political rights, including right to property and religion, multi-party competitive politics, democratic system of governance, rule of law, independent judiciary, and press freedom. These issues particularly became important because the Maoists had labeled them “bourgeoisie tools” during the insurgency, and had advocated replacing them with new models. Political agreements on these subjects became part of the formal arrangement in the signing of the CPA and framing of the Interim Constitution (IC) 2007.

Nepal’s constitution-making process was broadly based on the bottom-up approach since there were neither “constitutional principles” as was the case in South Africa (Haysom 2002), nor guiding “objective resolution” as in India (Austin 1999). However,

looking at the agreements reached among the major political parties, especially the CPA, the IC 2007, the 2008 election manifestos of the political parties, as well as key decisions made following the first meeting of the CA, it could be said that almost all political parties, including CPN-M, had agreed to certain broad principles to be followed while framing the new constitution through the CA. Although CA was a sovereign body in itself and not bound by these understandings, they served as a reference points and formed the basis for the deliberations of CA's thematic committees, and for the preparation of the preliminary draft reports.

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

- Institutionalize a federal democratic republic thereby ending the two and a half century-old monarchy
- Restructure the state in a progressive manner so as to ensure secularism, inclusion and end discrimination on the grounds of class, caste, ethnicity, region, gender, religion, language, etc.
- Introduce federalism and transform existing “unitary structure” to a federal one
- Adopt a political system that follows the values of universally accepted democratic governance, i.e., multi-party competitive politics, an elected and accountable government, separation of powers and institutional checks and balances, rule of law, an independent judiciary, a free press and holding of periodic elections based on adult franchise
- Ensure universally accepted human rights, civil and political, economic and social rights, including social justice, equality and affirmative measures to hitherto marginalized and deprived communities and classes
- Ensure equitable access, proportional representation and participation of the diverse and hitherto excluded groups in the state organs

A popularly elected CA was the commonly agreed formal constitution-making structure that also functioned as “legislature-parliament” (L-P) for the given period. After a series of negotiations between and among key political actors it was agreed that the assembly would have 601 members, of which 240 would be elected directly from single-member constituencies on the basis of first-past-the-post (FPTP) system, and 335 members from the party lists based on proportional representation (PR) system. The PR seats assured inclusive quotas for various social groups, including women. The remaining twenty-six seats were to be filled through nominations by the government based on political parties’ recommendations.

Table 1: Population Groups and Party Representation in CA-I (2008–2012)

Social Group	Proportion of Popln.	Representation in CA	Political Party*	Share of Seats
Hill Chhetri, Brahman, Thakuri, Sanyasi	30.9%	33.2%	UCPN-M	238 (39.6%)**
Hill Dalit	7.1%	5.6%	NC	114 (18.9%)
Hill <i>Janajati</i>	28.5%	26.9%	CPN-UML	109 (18.1%)
Madhesi <i>Janajati</i>	8.7%	8.1%	MJFN	53 (8.8%)
Madhesi caste groups	14.8%	20.8%	TMLP	21 (3.4%)
Madhesi Dalit	4.7%	2.3%	SP	9 (1.5%)
Muslim	4.3%	2.8%	Minor parties including independent members	57 (9.5%)
Women	50.04%	32.7%	Total	601

* Originally twenty-five political parties were represented in the CA, but later on due to internal splits the number of parties went up to more than thirty. The data here includes only those parties represented at the time of the election results, including by-elections.

** Includes seven seats received by Jana Morcha Nepal, which integrated with CPN-M soon after the 2008 elections to form UCPN-M.

Source: Author’s tabulation based on *Nirvachan Ayog (2065 v.s.) and CBS (2002)*.

The 2008 CA elections produced a hung L-P that was however inclusive in terms of caste/ethnic/gender representation and political orientation. The former insurgents, the CPN-M (later Unified CPN-M or UCPN-M) emerged as the largest party with almost 40 percent of the seats in the assembly and 30 percent of the popular votes. The traditionally dominant Nepali Congress (NC) and Communist Party of Nepal-Unified Marxist Leninist (CPN-UML or UML) came distant second and third. The Madhes-based parties—Madhesi Janadhikar Forum, Nepal (MJFN), Tarai-Madhes Loktantrik Party (TMLP), and Sadbhawana Party (SP)—together emerged as the fourth political force determining the fate of the ruling equations in the post-election power configurations. The composition of the CA (see Table 1) reflects the underlying challenge of forging a consensus on key contents of the constitution as well as a balanced power sharing among major political parties both for ensuring conducive political environment of constitution writing, and smooth political transition.

THE ROADMAP

The newly elected CA could only begin constitution-making after it had accomplished some fundamental political functions such as adopting a resolution which formally transformed the country into a republic by abolishing the monarchy, and electing a president and a vice-president of the new republic, as well as a prime minister. It had to perform other preliminary procedural works as well. Besides, the CA also had to adopt its procedural rules and form necessary committees. It took almost six months to accomplish these which then set a time frame for the constitution-making. On the following day (November 16, 2008) it adopted an eighty-two-week calendar of works stipulating the activities and steps to be followed. This timeline was set from November 16, 2008 to May 28, 2010, with the latter date constituting the original deadline for promulgating a new constitution. Between November 2008 and May 2010, the CA calendar allocated specific days and weeks for each activity from forming thematic committees to the eventual promulgation of the

constitution. As outlined in IC 2007, the roadmap of constitution-making looked as follow:

- Formation of CA thematic committees
- Seeking submissions and suggestions from experts and common citizens
- Thematic committees prepare concept notes and preliminary drafts
- Discussions on preliminary drafts in CA plenary
- Preparation of the first draft of the constitution by Constitutional Committee incorporating points raised by CA members in plenary and its suggestions
- Initial debates on the draft constitution in plenary and its adoption
- Public hearings and consultations on the draft constitution across the country and seeking suggestions on it
- Preparing the Constitution Bill by Constitutional Committee and incorporating relevant suggestions
- Clause-wise discussions in CA and the passage of each clause of the bill, including preamble and decision on amendment proposals received
- The signing of the final constitution by all members of CA after its passage through the assembly, and authentication of the document by CA chairperson
- Promulgation of the constitution by the president in a formal ceremony organized by the CA (GoN 2008)

The CA rules and procedures (2065 v.s.) provided for the formation of committees for constitution-writing, including ten thematic committees, one Constitutional Committee (CC), and three procedural committees. The CC was mandated to integrate and finalize overall draft of the constitution after the submission of preliminary drafts by thematic committees. The CC was also responsible for writing preamble, preliminary sections covering

the definition of the state and nation, none of which were assigned to other thematic committees. Thematic committees were mostly assigned to develop concept notes and prepare preliminary drafts in their respective areas. The terms of references (ToRs) of the thematic committees included inviting the public to make suggestions and submissions in response to advertisements in the media, and holding consultations with experts and concerned government officials and seeking their opinions. The committees had the authority to study reference material, seek expert opinions, and obtain suggestions from the general public, to study the manifestos of the political parties and concept notes and proposals related to the constitution. The primary function of the thematic committees was to prepare concept notes and come up with a preliminary draft of the new constitution covering their respective areas.

PUBLIC PARTICIPATION IN CONSTITUTION-MAKING

Public participation in constitution-making in Nepal under CA-I was sought in three crucial stages—in pre-election civic education, during draft report preparation phase (through CA outreach and civil society/NGO mobilization), and at the final draft stage (to prepare an integrated draft). In 2007–2008, soon after the decision to hold CA elections were made, a massive civil society drive, mostly funded by the donors, began to engage people in the process. This included pre-election civic education and mobilizing popular opinion on the contents of the constitution—a sort of sensitizing the popular wishes particularly those of the marginalized groups such as women, Dalit, etc. (see, e.g., NCARD 2065 v.s.; International IDEA 2008, 2009; UNDP 2007, 2008a). Such activities focused on the contents of the new constitution, and on inclusive public participation in the constitution-drafting process. Issues relating to constitution-making became a key component of many donors’/NGOs’ community level programs. However, it is to be noted here that the NGOs could only make suggestions. The writing of the constitution fell entirely within the ambit of the CA.

In the pre-election civic education phase, people were “sensitized” about the importance of the CA and the inclusive constitution-making process. Even during the drafting of the IC 2007, general public and other “concerned” groups had submitted their suggestions on its content. These suggestions were not much different from those voiced later in the context of the CA submissions (see Khanal 2008). In the run up to the CA elections (2007–2008), various civil society groups organized interactions, workshops and discussion programs throughout the country informing local people about the CA elections and the key subjects of the new constitution, and advocating for an inclusive representation in the assembly. By the time CA elections were held in April 2008, public debate had already begun on issues related to state restructuring, inclusion, electoral system, and the form of government, which eventually became the most contentious issues in producing the new constitution. At the same time, the electronic and print media provided platforms for debates and discussions between and among political actors, experts and the general stakeholders.

CA OUTREACH

If we look at the calendar and the steps set by CA-I, we can say that Nepal chose an open and bottom-up approach to constitution-making. Thematic committees began their work in December 2008, and they sought suggestions from political parties, civil society groups, and other interest groups including general public. Interested groups/individuals could submit their views/opinions/suggestions either directly to a thematic committee, or to the CA’s Civic Relations Committee, or local government agencies. They could do so by email, fax, phone (a toll-free number was available) or by letter. Likewise, the CA also requested all concerned parties to make available the conclusions of seminars, workshops and publications related to constitution-making. Each committee prepared detailed questionnaires in their respective themes to collect opinions on specific areas of the constitution. They also ran media campaigns to seek submissions directly from citizens.

Two procedural committees—Public Opinion Collection and Co-ordination Committee (POCCC), and Civic Relations Committee (CRC)—were assigned specific responsibilities to support and facilitate these processes. The POCCC was responsible for the collection of public opinion on the draft constitution, conducting public hearings, and organizing interactions, workshops, and seminars on the draft constitution. Besides, it was also assigned to keep the records of submitted suggestions, prepare a report of the suggestions, and submit it to the CA (Samvidhansabha Sachivalaya 2065 v.s.: 37–38). The CRC was responsible for establishing a mechanism for citizens’ access to the CA, for disseminating information on the constitution-making process, and for monitoring and evaluating the conduct of government agencies, I/NGOs, civil society, and the media with regard to the constitution-making process (Samvidhansabha Sachivalaya 2065 v.s.: 38–39).

As per the calendar of operations, the CA’s works needed to be completed within two years (by May 28, 2010). However, the calendar was changed more than a dozen times and the CA term was repeatedly extended, making it a four-year term ending in May 28, 2012. The calendar had originally set public participation in two stages. In the first stage, nine weeks were allocated for collecting opinions and suggestions from experts, civil society, and the general public. In the second stage, twelve weeks were slated for public consultations on the draft constitution.

The CA, however, planned for its members to first go to the people to collect suggestions in the CA Outreach program. For this purpose, each thematic committee prepared a set of written questionnaires. The eleven sets of questionnaires contained a total of 291 questions that ranged from sixty-four questions from the Committee on Determining the Form of Governance of the State to twelve questions from the Committee on Determining the Constitutional Bodies. The public opinion collection drive that began on February 27, 2009 ended some three weeks later on March 22. CA members were divided into forty teams to collect suggestions

from all seventy-five districts and 240 electoral constituencies. The teams were supported by the CA Secretariat and the local field staff of district agencies. The largest team (No. 15) was made up of thirty-seven CA members to cover Kathmandu, Lalitpur and Bhaktapur districts. The smallest team (six members) covered Humla district. Most teams made their field visits as scheduled (Vyavasthapika-Samsad Sachivalaya 2070 v.s.: 293–295).

Altogether 559 CA members, excluding the prime minister, ministers and some top leaders, were involved in the outreach campaign. They altogether conducted 1,906 programs in which an estimated half a million people participated. Almost an equal number of submissions were received (Vyavasthapika-Samsad Sachivalaya 2070 v.s.: 296–299). The overall participation and response of local people was impressive. Except for some isolated cases, the CA teams were well received by people across the country.

The verbal expression or the written submission of local people in the presence of CA members can be seen as “wish lists.” CA members and the secretariat staff took notes of suggestions. Participating local people were asked to make their suggestions by filling in questionnaires that they could either complete on the spot or return to the team in person later, or submit them through local government agencies. The ratio of the returned questionnaires was quite high. According to the CA Secretariat, a total of 549,763 written submissions were received including 95,566 submissions through the CRC (Nagarik Sambandha Samiti 2068 v.s.). Such a huge number of submissions were made possible by the separate thematic questionnaires.

The teams’ reports on the public opinion reveal that most of the concerns were related to day-to-day governance and service delivery such as inflation, unemployment, lack of health care facilities, corruption, degrading law and order situation, poor condition of roads, lack of irrigation facilities, violence against women, etc. It was quite natural for the people to raise such concerns because problems relating to governance are acute in Nepal. Likewise, general strikes

(Nepal *bandh*), extortion by political parties and other agitating groups, and prolonged power cuts were other pressing concerns that came out of the initiatives. People from across the country suggested capital punishment for rape and for the trafficking of women and girls. The outreach campaign also provided an opportunity for elected leaders to have direct interaction with citizens.

However, the outreach program had severe deficiencies. The language used in the questionnaires was very formal, “legalistic” and “Sanskritized” and thus difficult for the ordinary people to comprehend. Moreover, the time allotted for the outreach (field visit) was inadequate. The team members lacked orientation and training to conduct the opinion collection (MC 2066 v.s.: 6–8). They admitted that they would have done better if they had some orientation before they set out. There was also some skepticism as to whether the very many suggestions that have been provided would be incorporated in the draft. Also, in some areas, NGOs organized parallel programs, ignoring the CA outreach, a result of poor planning and arbitrary implementation.

CIVIL SOCIETY OUTREACH

Soon after the success of *Jana Andolan II*, and the signing of CPA in 2006, many civil society organizations and NGOs were engaged in mobilizing public opinion on the contents of the new constitution. After the 2008 CA elections, such activities gathered further momentum, but without proper coordination and planning, resource mobilization, and strategies.

With the consent of the GoN a donor consortium was formed in 2008 under the auspices of the United Nations Development Programme (UNDP) to support, coordinate and facilitate participatory constitution-making. The Department for International Development (DFID) of the UK, the Danish International Development Agency (DANIDA), the Norwegian Embassy and the United States Agency for International Development (USAID) were involved in this initiative. The Support to Participatory Constitution Building in Nepal (SPCBN) project was launched

to channel international assistance for the constitution-making process (UNDP 2008b). In addition to providing infrastructure and logistical support to the CA Secretariat, this project aimed to support public participation in the constitution-making process. A debating platform, Centre for Constitutional Dialogue (CCD) was created under SPCBN auspices, which helped linking international experts and comparative knowledge on constitution-making with Nepali stakeholders.

Parallel to the CA outreach program, a large number of NGOs initiated public education activities on the contents of the constitution. A series of thematic papers, awareness booklets, and technical guides were produced in Nepali as well as other major languages spoken in Nepal in order to facilitate people's understanding of key parts of the constitution and the constitution-making process (see, CCD 2009, 2010, 2067 v.s.a; SPCBN 2066 v.s.). Information was also made available through SPCBN's website. SPCBN aimed to reach out to all districts, electoral constituencies, municipalities and VDCs across the country. Its "democratic dialogue" program facilitated various communities, including those considered marginalized such as women, Dalits, indigenous peoples, and Madhesis, to have their say in the new constitution. Submissions collected from various constituencies were handed over to the CA chairperson (CCD 2067 v.s.b).

Many NGOs were engaged in this process individually or in consortia. Some made submissions on women's rights stressing the need for a woman-friendly constitution (Pro-Public 2065 v.s.), while others focused on child rights recommending such rights should be enshrined in the constitution (CZoP 2067 v.s.). Other public submissions focused on issues related to Dalits, Madhesis, indigenous nationalities, women, youth and disadvantaged regions, such as the Karnali zone (see, e.g., Dalit NGO Federation 2065 v.s.; Madhesi NGO Federation 2067 v.s.; CCD 2068 v.s.; SPCBN 2068 v.s.; LANCAU 2010). Some focused on the rights of people with disabilities (Khanal and Kushiyait 2010). Most NGOs worked

through networks to cover wider cross-sections of the population and geographic regions. Some even submitted model drafts of the constitution (e.g., NCARD 2067v.s.; Bagchand 2010; Adhikari 2066 v.s.; NLS and IDEA 2012).

To sum up, despite poor planning, both CA outreach and NGOs' initiatives had an extensive, transparent and accessible campaign to gather suggestions from the general public. Local people enthusiastically participated in these exercises. The CA outreach was the only initiative of the state to facilitate participatory constitution-making. The civil society outreach availed extensive channels for the general public to provide their feedback on the upcoming constitution though the entire process was totally dependent on donor funding and NGO activities. And it also increased expectations that their input would be taken into consideration while writing the fundamental law of the land.

THE DIVERSE AGENDA AND DIFFERING PROPOSITIONS

When CA thematic committees began deliberating on their respective themes, a host of wish list of the people, political parties' proposals and positions, demands and submissions of a wide variety of organized stakeholders about the contents of the constitution had already poured in. There were commonalities as well as diametrically opposite proposals. It would be relevant here to discuss them briefly, for it would help us to understand the challenge of synchronizing and reflecting those demands in the constitution.

Almost all the parties represented in the CA were for universally accepted democratic rights of the citizens including such civil liberties as freedom of expression, press and assembly, and freedom to practice any religion of one's choice. Similarly, they had promised for the right to form and join organizations including political parties and trade unions, choose any profession of one's like, right to free movement within the country and reside in a place of one's choice, right to education, and so on. The parties had also promised to respect the universally accepted human rights. They had also expressed their commitment to enshrine such social and economic rights as access

to healthcare, free education up to the school level, employment or allowance for the unemployed, land reforms ensuring land for the landless, tenant's right, housing for the homeless, etc. Commitments of special rights were made for the people with disability, old age, children, women, Dalit, minority and marginalized community and people of the backward region. Affirmative actions, including 33 percent reserved seats for women in the state institutions and for other historically disadvantaged social groups were promised.

There were many commonalities on the political structures of the state and processes. Except for a few, most parties had promised for a republican, secular and federal state; bicameral legislature at the federal level and unicameral one in the provinces; independent judiciary; rule of law; etc. However, there were also a number of conflicting standpoints on various issues, e.g., republic versus monarchy, Hindu versus secular state, federal versus unitary state, bicameral versus unicameral legislature, supreme court versus constitutional court, election of judges instead of appointment through due process, and so on. For instance, Rashtriya Prajatantra Party, Nepal (RPPN), a pro-royalist party with four seats in CA-I stood for the revival of the monarchy and the Hindu state instead of establishing a secular republic. The key points of differences between various political parties were:

- The Maoists proposed a thirteen-province federal model based on ethnicity, language with indigenous native ethnic name and special prerogative for the (largest) ethnic community of a province to head the government in that province.
- NC and UML did not specify the number of provinces but preferred as less as possible based on geographic contiguity, ethno-linguistic and cultural commonality, natural resource distribution, and economic, political and administrative feasibility. They rejected ethnic names for the provinces.
- Madhes based parties in general stated that the provinces be carved out along the three major topographical regions—

mountain, hill and Tarai. Their focus was on making the entire southern plain (Tarai/Madhes) a single province.

- Rashtriya Jana Morcha, with four representatives in the CA, vehemently opposed the idea of federalism itself, and argued that federalization would eventually disintegrate the nation.
- RPPN did not oppose federalism as such but demanded holding referendum to decide whether the country should be federalized or not.
- With regard to form of the government, the Maoists proposed a presidential system but with a prime minister as well. They proposed bicameral legislature at the federal level and unicameral one in the provinces, but they often changed their position from bicameral to unicameral. For the election of the legislature, they proposed multi-member constituencies with FPTP votes and the seats in the constituency to be divided as per ethnic population. On judiciary, they stood for a constitutional court.
- NC and UML proposed parliamentary form of government with president as ceremonial head of the state. The two parties proposed bicameral parliament at the federal level and unicameral one in the provinces. They had proposed a mixed electoral system, consisting FPTP and PR. On the issue of judiciary, they saw no need for the constitutional court, and proposed Supreme Court as the final judicial authority.
- Madhesi parties, except MJFN, in general supported the parliamentary form of government. MJFN proposed the presidential system. They also wanted bicameral parliament at the federal level and unicameral one in the provinces. But they stressed that the electoral constituencies should be drawn on the basis of population. Moreover, their emphasis was on the issues relating to the specific interests of the Madhesi community such as citizenship, language, inclusion, reservation, proportional representation, etc.

- The rest of the parties aligned either with the Maoists or with the NC-UML, though some of them had specific proposals on certain issues. Minor ethnic parties favored a sort of presidium reflecting ethnic diversity for the executive, with the provision of heading the institution such as the president on a rotation basis. They also advocated for the legal recognition of customary practices as well as for the establishment of customary courts.
- Though most parties advocated secularism and republicanism, RPPN favored the revival of the constitutional monarchy and the Hindu state.
- On some of the rights relating to property, land reform, etc., the parties had ideological differences. The Maoists and a few other smaller communist parties proposed ceiling on property (land), and nationalization of land above the ceiling without due compensation. The Maoists proposed compulsory military training. NC and UML rejected such an idea and also taking the land without due compensation.

THE SOCIAL DYNAMICS

As mentioned earlier, various social groups had begun airing their demands regarding the contents of the new constitution even before the CA elections were held. The *Janajatis* in the hills and Madhesis in the southern plains were the most vociferous groups asserting their stances on the upcoming CA elections as well as on the contents of the new constitution. So much so that the holding of the CA elections looked impossible without addressing the agitating groups' concerns. The GoN held series of talks with various agitating groups—Madhesis, *Janajatis*, Dalits, etc.—and signed more than a dozen agreements/understandings with them. One of the points of the agreements reached with the Madhesis was to “take into consideration the aspirations of indigenous ethnic groups ... including people of Madhes for autonomous provinces” while deciding the federal set up. Subsequently, the IC 2007 was amended (clause 138[1]a) which recognized this fact. After the CA elections, these agitating groups obviously wanted those earlier commitments

to be reflected in the new constitution. However, a number of points of these agreements and understandings were mutually exclusive, i.e., it was not possible for the GoN to honor all the points of all the agreements.

Besides, various caucuses were formed in the CA to develop a common position across the party platforms related to the interests of respective groups, such as women CA members' caucus, indigenous people's (IP) CA members' caucus, etc. These groups too forwarded their positions in the context of constitution-making. They submitted their counter proposals vis-à-vis the preliminary drafts of the thematic committees (see, e.g., Women's Caucus 2011; SPCBN 2068 v.s.; Adivasi Janajati Sabhasad Caucus 2067 v.s.; Madhesi NGO Federation 2067 v.s.). Among the caucuses, IP caucus was the most assertive, and it challenged the parties' proposals, especially the federal design, representation and inclusion provisions, the rights of indigenous people, and so on.

The societal dynamics appeared more complex, challenging, and difficult to reconcile. On the one hand, it exerted tremendous pressure on the political parties, and on the other, it tended to polarize the society along ethno-regional line. When the parties' position and differences surfaced in the committees' preliminary drafts along ethnic lines, it also had impact on the public opinion as well. Demonstrations and agitations all over the country became the daily routine—some in favor and others in opposition to the draft proposals of the CA committees. As a result, even public life became highly polarized, divided along ethnic and regional line. The diversity seemed taking a divisive turn.

All these differing propositions had to be processed, filtered and reconciled in order to develop a sound and workable framework for the constitution writing. At this juncture reconciling role of the senior party leaders, expert consultations in the thematic committees were expected. But no such thing took place when the committees began preparing their reports. As a result, the committees' decisions and reports took partisan trajectory.

THE PREPARATION OF PRELIMINARY DRAFTS BY THEMATIC COMMITTEES

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

The committees also invited experts to advise them on issues of concern. Around 500 experts were reportedly consulted. The Committee on Fundamental Rights alone had consulted 372 experts (Vyavasthapika-Samsad Sachivalaya 2070 v.s.: 98). But the arbitrary way with which experts were consulted can hardly be called "expert consultation" (Khanal 2067 v.s.). The committee members themselves prepared concept notes and preliminary drafts, with the CA secretariat staff assisting them. The concept notes were based on commonly understood concepts, international practices, Nepal's own experiences and the positions taken by the political parties. They also considered the demands of various interest groups and the submissions received by the CA.

Differing views of the political parties, and other stakeholders began to surface after preliminary draft reports were made public via news media and other means. But the absence of informed debate and critical appraisal of the preliminary drafts was acutely felt. In order to bridge this gap, some donor funded projects initiated debates on the draft reports at the local level. SPCBN initiated a series of dialogues on the issues pertaining to the reports at regional, district and local levels participated by local party leaders, civil society and NGO activists. The major contents of the preliminary drafts of the committees were summarized and briefed to them through such

dialogues and workshops. Their comments and suggestions were later compiled and shared with key CA members and political parties (CCD 2011; SPCBN 2068 v.s.). Many NGOs were also engaged in this process (e.g., RDF 2068 v.s.; NLS 2069 v.s.; Madhesi NGO Federation 2067 v.s.). This phase of informal public consultation provided an opportunity to the people and other stakeholders to verify whether or not the preliminary drafts had incorporated their suggestions.

NEGOTIATING THE CONTENTIOUS ISSUES

When the draft reports of the thematic committees were out, it soon became clear that there were wide differences of opinion, contradictory positions, dissenting opinions, and gaps and overlaps within the preliminary drafts. This necessitated a careful scrutiny. The CA chair in May 2009 set up a fifteen-member committee, often referred as Gaps and Overlaps Study Committee (GOSC), as provided for in Article 89 of the CA rules, to study the preliminary drafts and synthesize them as far as practicable. Subsequently, all the draft reports were referred to this committee.

This committee identified and scrutinized the overlaps and tried to minimize the gaps and differences. It submitted its report to the CA chair in parts so that the CA could decide and resolve the differences. The committee listed 210 points in one group, and seventy-eight federalism related contentious points in another group. The committee submitted its report in September 2010 and stated that these differences ought to be resolved by the CA itself based on the understandings at the political level (Avadharanapatra ra Prarambhik Masyauda Adhyayan Samiti 2067 v.s.). Accordingly, the leaders of political parties represented in the CA informally held series of meetings and formed a seven-member task force to resolve the differences identified by the study committee, excluding the differences on State Restructuring Committee's report. On the state restructuring issue, a commission was yet to be formed as per the provision of IC 2007 (Clause 138.2). By December 2010 the task force had narrowed down the differences to seventy-eight points (Vyavasthapika-Samsad Sachivalaya 2070 v.s.). However,

the differences relating to such outstanding constitutional issues as the form of government, election, representation, the judiciary remained unresolved.

In February 2011, the Constitutional Committee, while deliberating on the contentious issues, felt the need for a formal mechanism to resolve disputes, and to come up with an integrated draft of the constitution. The IC 2007 had provided for a modality of inter-party consultations in CA in order to reach a consensus before voting on the Constitution Bill in the CA plenary (Clause 70.3). The legitimacy of the task force was also questioned by some of the parties. The Constitutional Committee eventually formed a five-member Dispute Resolution Sub-committee (DRS) for resolving the remaining disputes. The DRS consisted of leaders of major political parties represented in the CA. The sub-committee was assisted by a five-member task force and was able to resolve most of the seventy-eight contentious points, but there still remained fourteen points or issues on which real consensus could not emerge. The most contentious issues concerned federalism, form of government, electoral system, and the judiciary.

In the meanwhile (November 2011), the political parties agreed to form the ever elusive State Restructuring Commission (SRC). Members of the SRC were chosen from outside the CA but on the basis of party quota. The parties' stance was reflected in the Commission's work as well as on its recommendations. The Commission could not submit a unanimous report—the report also included the recommendations of the minority members in the annex. The key contentions were on the number, name and boundary of the proposed provinces. The majority members recommended ten provinces, which was largely an improvised version of the State Restructuring Committee's report, and the minority members proposed six provinces (Rajya Punarsamrachana Uchchastariya Sujhav Ayog 2068 v.s.). The Commission's report did not help to resolve the differences on the federal design, rather it further polarized the political and public positions.

Amidst such confusion and chaos, there were some positive developments reported particularly around mid-April 2012. It gave a hope that the CA would eventually be able to deliver the constitution as scheduled. Issues relating to the integration of Maoist combatants into the Nepal Army were more or less settled, as the number of combatants seeking integration fell down dramatically and the rank harmonization was also agreed upon. Power sharing among political parties had been one of the most pressing issues, but it also appeared to have been eased following the five-point power-sharing deal reached on May 3, 2012 between the UCPN-M, NC, UML and the United Democratic Madhesi Front (UDMF), which together held more than 90 percent CA seats. The deal made it clear that the NC, the main opposition party, would join the government headed by Baburam Bhattarai in order to give it a shape of consensus government. The contentious issues for constitution-making would then be resolved and the draft prepared. After this, Prime Minister Bhattarai would step down to facilitate the formation of the NC-led national government, which would promulgate the new constitution and continue in office until new elections that would be held within a year (Phuyal 2070 v.s.).

THE EFFORTS TO PREPARE AN INTEGRATED DRAFT

Whatever solutions, understanding or consensus had been reached at the Task Force and DRS level with regard to the contentious issues had to be first endorsed by the Constitutional Committee (CC). Only after the integration of the various reports, the drafting of the final report could begin. In researching this account, I found it difficult to understand what the CC actually did at this stage. The picture is blurry. According to informal sources, experts had been commissioned to prepare an integrated draft. As the extended term of the CA was drawing to a close, leaders were hard-pressed to resolve the remaining contentious issues so that they could agree on an integrated draft and the CA could formally accomplish its job with the parliament giving the finishing touches to whatever work was left. Accordingly, on May 15, 2012, the sub-committee reached an informal deal that the new constitution would have:

- a mixed system of government with a directly elected president and a prime minister elected by the parliament with the two sharing executive powers;
- Eleven-province federal structure; delineation to be done later by a federal commission;
- a bicameral legislature in which the seats of the lower house would be elected according to the FPTP and PR system; and
- a constitutional court headed by the chief justice would look after disputes relating to federalism.

As mentioned earlier, boundary delineation of the federal units remained one of the thorniest issues throughout the process. The leaders agreed on an eleven-province model with multi-ethnic identity, where citizens belonging to different caste and ethnic groups would have equal rights. They also agreed that a federal commission would be formed to deal with matters pertaining to the delineation of provincial boundaries, the merger or creation of new provinces; and that the parliament would finally decide the matter according to the recommendations of the federal commission. It was also agreed that the names of the provinces would be decided by the provincial legislatures (Vyavasthapika-Samsad Sachivalaya 2070 v.s.: 431). The Madhesi Front had expressed strong reservations particularly on the federalism related issues, though some of its constituents had stated that it would not hinder the constitution-making process in view of the approaching May 27, 2012 deadline. But the understanding did not last long. Even before the agreement was referred to the CC, the Madhesi parties started agitations in the Tarai districts challenging the deal. The UCPN-M backtracked from the agreement, which stalled the constitution-making process and eventually led to the demise of CA-I, creating a state of constitutional and political stalemate.

THE CONSTITUTION-MAKING PROCESS (2014–2015)

The historic CA, now called CA-I in popular parlance, failed to deliver a constitution it promised to the people, and ended without

providing a way out of the constitutional crisis. The IC 2007 did not envisage the end of the CA without writing the constitution, and thus had no provision for the elections to another CA. Moreover, the parties were not in agreement with the incumbent government to head such elections. So a new political deal was required to end the stalemate and create a conducive environment for the elections. After a series of talks and negotiations, the key political players, namely NC, UML, UCPN-M and the Madhesi Front reached an agreement that a non-party government should be formed to head the election period and the President should issue an order under the “removing difficulties” clause to legitimize the government and elections to this end. Accordingly, on March 13, 2013 President Ram Baran Yadav taking an excuse of the provision Article 158 of the IC 2007 issued an order to this effect (Nepal Sarkar 2069 v.s.). A government headed by the sitting Chief Justice Khil Raj Regmi was formed. Other members of the cabinet were drawn from among the ex-bureaucrats.

Elections to CA-II were held on November 19, 2013. The electoral seats and procedures were no different from CA-I. The Maoist breakaway group, the CPN-Maoist headed by Mohan Baidya “Kiran” and few other minor parties boycotted the elections. Except for some sporadic violences, the elections in general were peaceful.

CHANGED POLITICAL EQUILIBRIUM

The results produced a new political configuration in the new assembly. The NC emerged as the largest party followed closely by UML. UCPN-M, the largest party of CA-I, was relegated to the third position. The Madhes based parties’ electoral strength also declined substantively. The pro-royalist RPPN who fought with the “Hindu state” agenda emerged as the fourth largest party (see Table 2). Both the Maoists and the Madhesi parties witnessed a sharp decline in their electoral strength. They raised doubts on the fairness of the elections, and threatened to boycott the assembly, which delayed the final declaration of the result for some weeks. The issue was resolved

when the parties agreed to investigate the electoral process by a committee consisting of their delegates.²

Table 2: Comparison of Social Groups and Political Party Representation in the First and CA-II³

Social Group	CA-I	CA-II	Proportion of Popln.	Political Parties [*]	Seats in CA-I	Seats in CA-II
Hill Castes (Khas-Arya)	33.2%	41.1%	30.9	UCPN-M	238 (39.6%)	84 (14.0%)
Hill Dalits	5.6%	4.5%	7.1	NC	114 (18.9%)	207 (34.4%)
Hill Janajatis	26.9%	23.5%	28.5	UML	109 (18.1%)	183 (30.5%)
Madhesi Castes	20.8%	16.3%	14.8	RPPN	4 (0.7%)	25 (4.2%)
Madhesi Dalits	2.3%	2.0%	4.7	Madhes-based parties	87 (14.5%)	50 (8.3%)
Tarai Janajatis	8.1%	9.2%	8.7	Other ethnic parties	6 (1.0%)	14 (2.3%)
Muslim	2.8%	3.2%	4.3	Minor parties including independents	43 (7.2%)	36 (6.0%)
Women	32.7%	29.3%	50.0%			
Total	601	599^{**}			601	599

* Originally twenty-five and thirty parties were elected in CA-I and CA-II respectively. There had been split and merger of the parties. The party count includes only those represented at the time of the election results.

** Two seats remained to be nominated.

Source: Author's tabulation based on *Nirvachan Ayog (2065 v.s., 2070 v.s.a and 2070 v.s.b) and CBS (2002)*.

In terms of representation, CA-II was not radically different than the first. The representation of Khas Aryas went up by 8 percent

² The committee was formed, which however did not do any investigation.

³ Including by-elections.

but that of women, Dalits and *Janajatis* saw some decline, viz., 3.5, 1.4 and 2.3 percent respectively. However, representation of Tarai *Janajatis*, especially that of Tharus, went up a bit.

The first meeting of CA-II was held on January 22, 2014 and it had three major agendas: 1) election of the prime minister, 2) adoption of new Rules of the Assembly, and 3) expediting of the constitution writing process. NC President Sushil Koirala was elected the prime minister as a part of NC-UML deal, which also included some minor parties. UCPN-M and Madhesi parties sat on the opposition bench. The ruling front had comfortable majority, with support of nearly two-third members of the CA. Controversy however arose on the issue of way forward. The fundamental question was whether or not the works of previous assembly were binding to the new CA. The NC, UML and RPPN championed the argument that the new CA being a sovereign body duly elected by the people was not obliged to own the works of the previous assembly. UCPN-M, Madhesi and other ethnic parties insisted on owning the works of the previous assembly, and proceeding with the remaining tasks, as they saw no point in reinventing the wheel. Ultimately, the parties agreed to own the works of the previous assembly, and complete the unfinished tasks.

Before CA-II resumed its business of constitution-making it had to elect chair and vice-chair of the new assembly, and adopt new CA Rules. Subash Nembang, who had been the chair of CA-I was once again elected unanimously as the chairperson and Onsari Gharti of UCPN-M was elected as the vice-chairperson. CA Rules Drafting Committee was also formed. On March 21, CA adopted new Rules, which resolved the controversy regarding the ownership of the works of the previous assembly. The new CA Rules defined the “Document” as to include all the reports and documents prepared, and decisions adopted by the previous CA, its committees and commissions, task forces, political committee/subcommittees to this effect (Samvidhansabha Sachivalaya 2070 v.s.: clause 2 dha). For this purpose, a separate Constitution Documents Study and

Determination Committee was created. Altogether, there were following five committees in CA-II:

- Constitutional-Political Dialogue and Consensus Committee (CPDCC)
- Constitution Documents Study and Determination Committee (CSDSC)
- Constitution Drafting Committee (CDC)
- Civic Relations and Constitution Suggestions Committee (CRCSC)
- Capacity Building and Resource Management Committee (CBRMC)

The last two committees also existed in the previous CA. Among the remaining three, the CPDCC was reformulation of the previous Constitutional Committee and was responsible for hammering out consensus on the contentious issues. A separate committee for the drafting purpose (CDC) was also formed. Indeed, the rearrangement of the committees was based on the experiences of the previous assembly. As the number of committees was reduced to half, the number of members in each committee grew in order to accommodate all the parties representing the assembly in proportion to their strength. The first three committees had seventy-three members each and the latter two had ninety-three members each.

REVISED PROCESSES

During the election campaigns for CA-II, major political parties promised to complete the constitution-making within a year even though the CA constitutionally had a four-year limit. The counting of the deadline started from the first meeting of the assembly, which took place on January 22, 2014. CA-II thus was supposed to complete the entire constitution writing process by January 22, 2015. It adopted a calendar of activities on April 4, 2014, which outlined the time-bound activities of the Committees and the CA plenary.

The main activities, as outlined in the calendar, could be grouped into the following phases.

- CDSDC to determine the agreed and not agreed works of CA-I based on the documents of the previous assembly by the end of May 2014.
- CPDCC to hold dialogs, interactions with political parties and other concerned groups in order to harmonize the differences, and reach a consensus on the disputed issues by mid-September 2014.
- CDC to simultaneously prepare a draft on the agreed contents as well as to give final shape to the first draft of the constitution by October 17, 2014.
- CRCSC to prepare an action plan for public consultation on the draft. Comprehensive public hearing, seminars, interaction on the first draft to be held. CA members to visit district/constituencies and receive public submissions. To be completed by November 16, 2014.
- Preparation of Constitution Bill taking into account of public hearing and submissions on the first draft. CA to debate on the Bill; members to submit amendment proposals. Clause-wise discussion and passing each of the articles including preamble and annexes. To be completed by January 14, 2015.
- Members to sign in the copy of the passed constitution, and the CA chair to authenticate it. The president to sign the copy of the constitution and proclaim the adoption of the new constitution before the people. To be completed by January 22, 2015.

On March 28, 2014 the CA secretariat handed over all the related reports, decisions and documents (related to the constitution-making) of CA-I to CA-II, which with the consent of the assembly was subsequently sent to the CDSDC for its perusal. The CDSDC analyzed the agreed and not agreed points of the previous assembly and submitted its reports on June 29. Its job was simple, i.e., to

document the works already done; to prepare the list of agreed and not-agreed issues. Simultaneously, the CA plenary began deliberations on the reports of the CSDC. The agreed issues after deliberation in the plenary were sent to the CDC for drafting purpose and the not-agreed issues to CPDCC, which was to try once again to find consensus. Though CPDCC had also submitted series of reports on parts between September 11 and December 10, 2014 no consensus was reached on the most contentious issues.

As in CA-I, the process remained gridlocked despite a stage show of committees and plenary debates. There was no progress on such disputed issues as federal structure, form of government, electoral system and the judiciary. Behind the CA corridors, there were some attempts especially among the parties of ruling coalition to hammer out disputed issues into some workable options. The NC, UML, RPP and a few fringe parties including independent members representing 404 members—enough to meet the two-third requirement—put forth a proposal in November 2014. It proposed seven provinces (two in the Tarai and five in the hills), keeping two and three of the disputed five Tarai/Madhes districts in the east and the far west in hill-based provinces as the federal set up. Parliamentary form of government with a bicameral parliament at federal level and a unicameral one in the provinces was suggested. It proposed FPTP method for the elections to the lower house and PR method for the upper house. To decide on the disputes relating powers of the federal units, a constitutional bench in the Supreme Court was suggested (NC *et al.* 2071 v.s.). The agreement (proposal) was submitted to the CPDCC, which showed its reluctance to entertain the document, as the UCPN-M and the Madhesi Front objected. And, one-year deadline to adopt the constitution could not be met.

EXPEDITING THE PROCESS

On April 25, 2015 a massive earthquake hit the country, affecting central and eastern hill districts including Kathmandu Valley and killing over 9,000 people. The earthquake proved instrumental in bringing the parties together. Realizing the need of national unity

at the time of such calamity, major political parties tried to reach a workable agreement on the contentious constitutional issues and expedite the constitution writing process. On June 8, four political parties—NC, UML, UCPN-M and Madhesi Janadhikar Forum-Democratic (MJF-D)—signed a sixteen-point deal which, despite controversies, expedited the constitution writing process. The deal had tried to address, though on their respective ways of understanding, all outstanding contentious issues of the new constitution except the carving of provinces for the federalization.

On the issue of federalization, they agreed to have eight provinces, demarcation of which was to be done later, by a commission of experts. The names of the provinces were to be decided by the parliament of the concerned provinces following the promulgation of the constitution. As per the deal, federal parliament was to have two houses, the lower to be elected by a mixed electoral system consisting of FPTP and PR, whereas the provincial parliament was to be a unicameral one. Likewise, parliamentary form of government, and a constitutional court headed by the chief justice of the Supreme Court to decide the disputes related to the powers of the constituent units of the federation as well as disputes related to parliamentary and provincial elections was agreed upon.

The deal also consisted of power-sharing provisions: The new president, vice-president, prime minister, speaker and deputy-speaker were to be elected by the transformed L-P after the promulgation of the new constitution (Kantipur 2072 v.s.a). As per the informal understanding, incumbent Prime Minister Sushil Koirala was to step down after the promulgation of the constitution and a UML leader was to succeed. An NC-backed candidate was to be elected head of the state whereas the UCPN-M was to get the position of speaker of the transformed L-P.

The pact generated controversy and split within the opposition camp. The UCPN-M until then was leading the opposition of thirty-party alliance. After the pact, the alliance collapsed, and MJF-D was ousted from the Madhesi Front. Madhes-based parties and a hill

ethnic-centric Federal Socialist Party disagreed with the sixteen-point agreement, particularly on the provision related to boundary delineation of the federal units.⁴ The agreement of the parties was also challenged in the Supreme Court, which issued an order that the sixteen-point deal was against the Article 138(3) of the IC 2007, which had entrusted the CA to make final settlement on matters relating to state restructuring and the form of federal system. Because of this verdict, the boundary of the federal units could not be left to the transformed L-P to decide (Khatiwada 2015).

PREPARING THE FIRST DRAFT

The drafting of the constitution began against the above backdrop. But, because the deal done by the parties fell outside the ambit of CA process, certain procedures had to be followed. The CPDCC resumed its business and prepared a report based on the sixteen-point agreement, and submitted it to the CA chair on June 11 which—after the preliminary discussion in CA plenary—was sent to CDC for drafting. The report had retained the provision of delineating boundaries of the provinces at a later date by the transformed L-P. It however stated that there would be eight provinces based on the principles of identity and viability. The government would form a commission to delineate the boundary of the provinces, which would complete its work within six months and submit its report. The parliament would then decide the matter based on the recommendations of the commission within the next three months (Samvidhansabha Sachivalaya 2072 v.s).

On June 30, the CDC submitted integrated first draft of the constitution which had, including preamble, thirty-seven parts, 297 articles and seven annexes. In order to expedite the process, clause 93(3) of CA Rules was suspended, and the deliberation time on the draft was shortened. CA adopted the draft constitution by more

⁴ Madhesi Janadhikar Forum, Nepal led by Upendra Yadav and Federal Socialist Party led by Ashok Rai later merged to form a new party called Federal Socialist Forum, Nepal (FSFN).

than two-third majority despite several suggestions and dissenting opinions by its members. The draft constitution was made open to public for their opinions and suggestions for nearly two weeks (July 9–24). The CA members went to their electoral constituencies (July 20–21) seeking their feedback/suggestions from the people (more below). However, one of the major political forces, united front of the Madhes based political parties—Madhesi Front—boycotted the CA process, and even threatened to disrupt it through agitation. But the major parties went ahead as per the sixteen-point agreement and adopted the first draft of the constitution.

PUBLIC CONSULTATIONS ON THE DRAFT

When the draft constitution was approved, the CA also adopted an action plan for public consultation on the draft prepared by Civic Relations and Constitution Suggestion Committee (CRCSC). The committee called it Public Opinion Collection National Campaign. In addition to 5,000 copies printed in the Nepal Gazette, CRCSC printed 230,000 copies of the draft constitution as well as 100,000 copies of the summary of the draft highlighting the main features, and distributed all over the country. The state-owned daily *Gorkhapatra* also printed the draft constitution in large numbers (250,000 copies). Radio, TV channels were also mobilized with news brief, talk shows highlighting the features of the constitution (Nagarik Sambandha tatha Sujhav Samiti 2072 v.s.). Except for the chairperson, all CA members including the prime minister and ministers were allotted to visit the districts and constituencies as planned by the CRCSC. Around 500 CA members participated in this process.

Despite the protest by the Madhesi Morcha, the public consultation went ahead and people from all walks of life participated in the program. NGOs and other civil society groups were also engaged in debating the draft constitution, and collecting suggestions from the general public. More than 200,000 people gave their opinions, suggestions and comments on the draft. In the constituency-based consultations alone, about 185,000 people, including women who made about 30 percent of the participants, participated and

expressed their opinion. Around 153,000 suggestions were received. Besides, more than 35,000 people including those living outside the country gave their suggestions (Nagarik Sambandha tatha Sujhav Samiti 2072 v.s.). The CRCSC report has only listed the types of suggestions on various parts of the draft (see Table 3). However, as per the CA members who attended the constituency-based consultation programs most suggestions were: 1) declaring Nepal a Hindu state; 2) delineation of the boundary of the provinces before the promulgation of the constitution; 3) simpler provision for citizenship—either by the name of mother or father; 4) keeping the number of provinces to the minimum; etc.

Table 3: Submissions Made on the First Draft of the Constitution

Sources of Submission Received	Number of Suggestions
Constituency-based consultation	153,193
Websites	20,722
Email	8,800
Toll free telephone	1,144
Fax	2,471
Post and in person submission	616
Total	186,946

Source: *Nagarik Sambandha tatha Sujhav Samiti (2072 v.s.)*.

THE CONSTITUTION BILL

Once the public consultation was over, and when the CRC submitted its report, CA formed a Special Committee consisting of the head of four major parties, including MJF-D, to sort out the contentious issues. Taking into account the public opinion, the Committee proposed six-province model, and a clarification note on what “secularism” meant. On August 8, it submitted its report, and on the same day PDCC submitted its report to CA based on Special Committee’s work (Samvaidhanik-Rajnitik Samvad tatha Sahamati Samiti 2072 v.s.). When the provinces’ sketch was out, Surkhet and Karnali area, including the southern plain or the Tarai, witnessed massive protests

against it. The Surkhet/Karnali people demanded that the existing Mid-West Development Region be a separate province. Following which, the Special Committee came up with a seven-province model, which MJF-D of the coalition opposed. Nevertheless, the CRC went on with the revised Constitution Bill; it submitted the Bill to the CA on August 23 (Samvidhan Masyauda Samiti 2072 v.s.). The CA began deliberations on the Bill from August 27. The first four days (27–30 August) were for the preliminary discussion on the Bill, and six days (August 31–September 5) were allotted for the members to submit their amendment proposals, if any.

A total of fifty-six amendment proposals were submitted by political parties as well as by individual members, covering most of the provisions of the Bill. Three major parties—NC, UML and UCPN-M—also jointly proposed a seventy-five-point amendment proposal. Along the same time, due to the pro-Tharuhat (separate Tharu province) movement, the situation in the Far West Tarai worsened. A violent clash with the Tharus in Tikapur, Kailali led to the killings of eight police personnel, including a senior officer. Subsequent actions taken by the security forces created a tensed environment there. The MJF-D demanded review of the boundary delineation—either create an eight-province model accommodating Tharu concerns or revert to the earlier agreed six-province model. But since the three bigger parties could not accommodate its proposal, MJF-D boycotted the process. Thus, at the final stage of constitution adoption all the Madhes-based parties had been out of the process rendering the constitution-making process to a significant void.

The three parties seemed determined to conclude the process at any cost. However, they claimed that they kept the dialogue open to all dissenting groups, including the Madhesi Front and MJF-D. Subsequently, the CA began clause-wise deliberations on the Constitution Bill, including the amendment proposals. Five days (September 8–12) were allotted for such discussions. The meetings were attended by more than 90 percent CA members. Most amendment proposals, except some of the key proposals jointly put

by NC, UML and UCPN-M, were rejected. The CA plenary formally passed the Constitution Bill clause by clause (September 13–16). Most of the decisions were taken by voice vote since the parties' position and polarization was open.

When the Constitution Bill was being discussed, clause-wise passage was taking place with majority members' thundering consents, the entire southern plain (Kailali to Morang) was engulfed in violent protests. The violence unleashed in Tikapur in the Kailali district had reached the eastern end, and the area in-between was burning for months. By the time the constitution was passed, forty-four people including, ten security personnel lost their lives. President Ram Baran Yadav repeatedly drew attention of the political leaders, and urged them to build an amicable environment and consensus for the final settlement of the constitution. However, dialogues and negotiations failed to produce an agreement, and the three major parties were in no mood to wait any further.

GEOPOLITICAL CONSTRAINS

The constitution-making is a sovereign national exercise, but not absolutely free from the immediate international context. And, Nepal is no exception. As mentioned earlier, international community was closely watching the constitution-making process of Nepal with great interest. However, its interests were generally confined to the adherence of internationally accepted democratic principles, rule of law, justice and human rights provisions. Additionally, it had also given priority to the inclusion of the concerns of hitherto marginalized community. Secularism and religious freedom had also been its priority. Apart from India and China, the European Union, USA, UK, Switzerland, Denmark and Norway were the leading members of the international community which played key roles in the peace process, and also provided international development assistance.

Compared to other countries, the roles played by India and China were more visible when Nepal was making a final decision on the constitution, and the designing of the federal map had significant

geopolitical limits (Ghimire 2013; Khanal 2014). Though India never made its priority explicit regarding the contents of the constitution, it was not difficult to gauge her preference when it came to the form of government and the federal design. When the Bharatiya Janata Party-led government under Prime Minister Narendra Modi came to power, the Hindu agenda also gained more traction. Prime Minister Modi, during the SAARC summit in Kathmandu, openly advised the Nepali side to not go by the majority voting, and stressed on the consensus for constitution-making (Sharma 2071 v.s.). When the CA passed the constitution on September 16, 2015, Modi sent his Foreign Secretary S. Jayashankar as his special envoy to Kathmandu and tried to persuade the Nepali leaders to delay the promulgation for some time so that Madhesi parties could also be brought on board (Nagarik 2072 v.s.). When Nepal promulgated the constitution on September 20, India not only reacted sharply but also imposed blockade in the Nepal-India border for months on the pretext of Madhesi parties picketing on the border check-post. This was a fatal blow to a landlocked country, and it created an acute shortage of basic supplies, including fuel and medicine for more than three months. Relations between the two countries ebbed, only to be normalized almost a year later when the new government led by the UCPN-M leader Prachanda was formed in July 2016.

China's concern was basically on the nature of the provincial design. It seemed more nervous with the nature of federalism debate in Nepal, especially with the agenda of "right to self-determination" and the federal proposals. How this concern was expressed and communicated to Nepali leaders during the tenure of CA-I is not very clear. But after the demise of CA-I, the Chinese concern had been expressed in unequivocal terms. The Chinese delegation, a month after the collapse of CA-I, led by Ai Ping, the Vice Minister for Asian Affairs in the International Relations Department of Communist Party of China, reportedly expressed concern over Nepal's adoption of federalism, and suggested to aim decentralization instead (Annapurna Post 2069 v.s.; Rajdhani 2069 v.s.). Going by the

reports, he even warned the international agencies (Western and Indian) to not provoke issues of ethnicity in Nepal.

This concern was further elaborated in the writings of the leading journalists. Sudheer Sharma, editor of *Kantipur*, wrote:

China, through political, diplomatic, academic (think-tank) channels had repeatedly given advice to the high level Nepali leaders including Prachanda that single identity based federalism is not in the interest of Nepal which ultimately would also be against the interest of China. What Ai Peng told in June after the end of CA was only the reiteration of it. (Sharma 2069 v.s.: 7)

The Chinese think-tank representatives were even more explicit. Chinese concerns continued to be expressed also through semi-official channels. Professor Hu Shisheng of China Institute of Contemporary International Relations (CICIR) gave interviews to Nepali journalists stating that Hindu state and monarchy would not return in Nepal and suggested not to adopt ethnic federalism but “a mixed model” (Acharya 2071 v.s.; Shiseng 2071 v.s.). In fact, over the years, it was observed that China’s diplomacy towards Nepal in the post-republican era, i.e., after 2006 political change, had become more “assertive” and “aggressive” as it was keeping keen interest and cautiously watching Nepal’s political transition and the constitution-making process (Pokharel 2070 v.s; Poudel 2070 v.s.).

ADOPTION OF THE CONSTITUTION

On September 16, 2015 the Constitution Bill as a whole was finally put for voting before the CA. The bill was passed by an overwhelming (85 percent) majority—more than the legally required two-third votes. There were 597 members in 601-member assembly at the time of voting. Out of 597, 507 voted for, twenty-five voted against, eight abstained, and fifty-seven boycotted the process (Kantipur 2072 v.s.b). But, later when the constitution was put up for the signature

of the members, even those who voted against signed. In all, 537 CA members (90 percent) signed the copy of the constitution.

President Ram Baran Yadav signed the copy of the constitution on September 20, 2015 and proclaimed its promulgation in an official ceremony organized by the CA. From that day the new Constitution came into effect, and the CA got itself transformed into the Legislature-Parliament until a new elected parliament would succeed it.

After the promulgation of the constitution, the government appealed its citizens to celebrate the achievement with fanfare for two days and even declared September 20-21 as public holiday. Except in the Tarai/Madhes, the constitution was received well. Sections of Madhesis and Tharus protested and organized programs to mark it as a “black day.” It became evident that particularly the Madhesis and Tharus, and also some section of the *Janajatis* had strong reservation on the document and refused to accept it (Shah 2072 v.s.; Tharu 2072 v.s.; Yadav 2072 v.s.). Three major political parties—NC, UML and the UCPN-M—organized a joint rally in Kathmandu on September 21 to celebrate the new constitution. The leaders once again tried to assure dissenting parties/groups that they would accommodate the grievances, including the provincial boundary delineation through subsequent amendments.

The international community too received the constitution well. Already when the CA passed the constitution and the day for the promulgation was fixed, a host of countries like China, Japan, USA, UK, Germany, Russia, Australia, etc. had shared their pleasure and wished for the successful implementation of the constitution (Adhikari 2072 v.s.). The Kathmandu-based representatives of embassies and diplomatic missions including ambassadors attended the public function in which President Yadav promulgated the constitution. The statement issued by the Ministry of Foreign Affairs of India stated that it had “noticed” the promulgation of the constitution but raised concern over the violent events taking place in the areas

bordering India. It urged to peacefully resolve all the disputed issues and to make the constitution acceptable to all (Kantipur 2072 v.s.c).

“The Constitution of Nepal” (GoN 2015) is a comprehensive document with a preamble, 308 articles and nine annexes, and is divided into thirty-five parts. The title of the constitution (Article 307) is a neutral one. The preamble acknowledges the commitment to end all kinds of discrimination; pledges to make an equitable society with proportionately inclusive and participatory principles. It also expresses to achieve the aspirations of people for durable peace, good governance, development and prosperity through federal democratic republican system of government. The constitution does not specify anything as basic structures but republicanism, federalism, secularism and inclusion seem to be the major pillars. It also seems to be the most flexible constitution. Any provision of the constitution can be amended without adversely affecting the sovereignty, territorial integrity, independence of Nepal and sovereignty inherent in the Nepali people. However, the amendment to change the boundaries or the subjects under the provincial jurisdiction requires the consent of the affected provinces (Article 274).

In many cases, the promise of the constitution especially for the hitherto marginalized groups, such as the Dalits, is very high. In order to realize these provisions, the state needs host of specific legislations. It is stated that these will be done within three years of the commencement of the constitution. However, due to hasty and messy process in adopting the constitution, many provisions appear clumsy, ambiguous, redundant and repetitive. Many of these shortcomings can be improved through practices, provided the key actors remain flexible to accommodate the changing contexts and needs.

CONCLUSIONS

Nepal embarked on writing a new constitution through representatives elected for the same purpose in 2008, and after spending nearly

seven years—there was a brief interregnum in-between—it came up with a document in 2015 that is largely democratic. But, it also has the legitimacy shortfall, for a significant chunk of the population did not own it when it was proclaimed.

Nepal's constitution-making process was complex and delicate for several reasons. First, it was a part of the peace process and thus depended on the progress made on that front. Issues related to the integration of the former Maoist combatants into the Nepal Army caused both delay and difficulties during CA-I. Second, the country moved to an entirely new set up—from a monarchy to a republic, and it also decided to switch from a centralized unitary system to a federal setup. Third, the CA elections produced a hung assembly of members with diverse political orientations—region specific, ethnicity based, etc.—making the equation of power uncertain and fluid. Fourth, Nepal's geopolitical location, sandwiched between two powerful neighbors India and China, and with explicit divergent interests, added further complexity to the process. Fifth, there was also a massive public mobilization by various social groups and civil society organizations who were interested in seeing their interests (some were mutually exclusive) reflected in the yet to be written document.

Frequent changes in the government, due to the lack of agreement on power sharing in the post-election period, seriously affected the progress of the CA-I process. As in South Africa, the need of the hour was a clear constitutional provision for a national unity government, but the IC 2007 did not have such a provision. All it provided for was the formation of governments on the basis of “consensus,” but how that could be achieved was not stipulated. So, when the parties could not reach a consensus after the CA elections, the constitution was amended to allow for majority government to be formed should there be no consensus government. This amendment set the scene for a game of making and breaking of governments. It also set in motion splits in political parties, intra-party conflicts, and shifting alliances.

There were procedural problems too. In the first place, there was no drafting committee to assimilate the preliminary reports. Thematic committees were given the responsibility of drafting parts of the constitution assigned to them in their terms of references (ToRs). The eleven separate draft reports created a huge challenge for compiling and producing an integrated draft. Many former CA members who were involved in sorting out the differences admitted that it was a mistake to let the thematic committees prepare the preliminary drafts. Although impressive in terms of social inclusion, most of the thematic committees were led by relatively “junior” members of the political parties. The process went well until they developed the concept notes, but when they entered the phase of preparing the preliminary drafts of the constitution, the members switched to toeing their party or ethnic line, and the thematic committee chairs failed to moderate the process. The absence of a clear provision and procedures for resolving disputes was another lacuna, as almost half of the CA-I’s term was spent trying to resolve the differences. As expected, CA-II started its work from where the previous assembly left. The same issues, disputes and positions once again prevailed, and after some preliminary works, it also encountered similar deadlocks.

The April 2015 earthquake proved a blessing in disguise. The major actors realized the gravity of the situation and struck a deal. The sixteen-point agreement of May 2015, despite controversies, ultimately rolled the process towards a concluding end. The promulgation of a new constitution became possible in less than four months of the signing of the agreement. The impetus behind the deal was once again an understanding of power sharing deal among the major actors, which however couldn’t actually be realized later.

Despite several limitations and complexities, one of the distinct values added to Nepal’s latest constitution-making exercise is the participation of public in the process. The need for participatory constitution-making was recognized and provisions were made to facilitate that in the CA rules and regulations. The CA rules required

each thematic committee to seek suggestions from the general public. Apart from making public consultations mandatory, once CA-approved the draft constitution, the CA was also required to incorporate relevant suggestions thus garnered in the Constitution Bill. As in the South African model, the CA-I schedule even called for attempts to be made to inform those who made suggestions individually about their submissions along with the response of the respective committees, which however was deleted by the CA-II schedule.

CA-II appeared more conservative to the participatory process. It was confined to the CA chambers and senior leaders meetings. Majority arrogance syndrome was clearly visible in the three major parties' behavior, especially in the UML, which made the negotiations more difficult. The final negotiation was done by a handful of leaders (three each from NC, UML and UCPN-M) and the method of passing the Constitution Bill was done in a summary basis in the excuse of "fast-track," which undermined the value of participatory process that was so arduously adopted engaging the wider section of the people to begin with. Before its adoption, a two-week long public consultation on the draft constitution was organized.

Going just by the sheer numbers, there had been an "impressive" participation both at the CA and at the citizenry level during the final stage of the constitution writing. However, both the Madhesi and the Tharus launched massive protest programs against the Constitution Bill. Likewise, Madhes-based parties, with less than 10 percent CA members, boycotted the process in the last but very crucial phase of the constitution-making and its adoption. Numerically speaking the three major parties—NC, UML and UCPN-M—had more Madhesi CA members than the Madhes-based parties had. But this alone cannot fulfill the void created by their boycott. The formal enacting of the constitution in such a condition of "deep internal disagreement" was a "high-stake game" that could derail the process and undermine political stability. The efforts to keep them in the process have not yet been successful due to intransigence of both

sides, particularly the arrogance of the major parties. The issue was basically the geographic alignment of the boundary of province number five, which could have been adjusted without costing much to either side. It was not a matter of technical-political majority versus minority but the question of taking a major community, i.e., the Madhesis into confidence.

The boycott of the CA process at such a crucial juncture by the Madhes-based parties including Sanghiya Samajvadi Forum undermined the value of the participatory constitution-making process that Nepal had so pertinently undertaken after the signing of the CPA. Promulgating the constitution with numerical strength is not enough, as a portion of Madhesis, Tharus and *Janajatis* still do not own the constitution. There are therefore challenges ahead with regard to its implementation, as it has to accommodate the concerns of women, Madhesis, Tharus or *Janajatis*.⁵ In order to give a proper grounding to the constitution and the constitutional process there requires restraint from both sides as well continued negotiations resulting into minimum understanding and consensus so that the constitutional system is not rendered defunct and democracy derailed. With the holding of elections at the local, provincial and federal levels in 2017 the political system as conceived by the constitution is fully in place and it has finally received a wider acceptance by the public at large including the Madhesis.

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⁵ The first amendment of the constitution was done within four months of the promulgation, which was a unilateral offer especially in the initiative of the outgoing NC government to accommodate the concerns of Madhesis regarding the representation and inclusion.

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