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## Indigenous People's Struggle for Political Rights and Recognition: Constitution-making and Federal Design

*Mukta S. Tamang*

### INTRODUCTION

This chapter examines indigenous people's struggle for recognition of their political rights in the new constitution and the state restructuring process in Nepal. It covers the period from the Comprehensive Peace Accord (CPA) signed in 2006 to the announcement of the new constitution by the second Constituent Assembly (hereafter CA-II) in 2015. The indigenous peoples' demand for recognition of collective political rights, particularly autonomy, and inclusion remained central in the public debate during these years. The indigenous voice received significant support from the historically excluded groups, liberal political actors as well as from the Communist Party of Nepal-Maoist (CPN-M). But eventually, met with forceful retort by the conservative segment of the powerful elites and major political parties, the proposed measures to accommodate indigenous peoples' demands were postponed or denied in the new constitution. In this chapter, I outline the key issues raised concerning indigenous rights in the constitution. Then, I offer a description of the developments particular to representation, province delineation and naming. Based on the analysis of the process, I argue that failure to accommodate

the demand for recognition stems from the repressive nature of the feudal, upper-caste sector of the political establishment in Nepal and the limits of modern constitutionalism that rests on the premise of a homogeneous national community. Despite the limits, I suggest that constitutionalism can be a productive principle and practice for enabling intercultural dialogue on how best to constitute the state of Nepal with its multiple nations.

In recent decades, the indigenous struggle for recognition has become a critical issue in the political landscape all over the world. Political theorists view the concept of recognition as an integral part of the theory of justice. The struggles for recognition are not only justified but also considered helpful to enrich contemporary democratic processes (Taylor 1994). Recognition in its basic sense refers to intellectual apprehension and awareness that another person exists. Moreover, this is an act of acknowledging or respecting another being as the bearer of equal rights and moral responsibility. As our identity is shaped by a relationship with others, the positive recognition by another person contributes to our sense of individual self-worth and self-esteem as well as bond and solidarity with other people (Jenkins 2008).

Non-recognition and misrecognition, on the other hand, results in degradation of self-confidence and erosion of self-esteem. Deprivation from recognition is also responsible for the social relation of exclusion, domination and subordination. Disregard to recognition eventually leads to degeneration of ethical life in general. Given that identity is interlinked with both self and group that one belongs to, it is imperative that recognition be conferred to the collective (Tuomela 2007; Jones 2009). Taylor (1994), one of the key recognition theorists argued that recognizing cultural identities is essential for a person to develop an authentic and positive sense of self. These deliberations are strikingly relevant for understanding the Nepali context. It is because misrecognition and the struggle for recognition of collective identity and political rights is an enduring theme in the political history of the country.

Indigenous peoples' advocacy during the constitution making and state restructuring process emphasized their collective political rights as indigenous nationalities or *Adivasi Janajatis*. This was a significant shift from the previous focus on the largely apolitical nature of demand for respect to cultural identities, religious freedom and linguistic rights. It was also an expression of discontent to the state's mere rhetorical reception of Nepal as a "multiethnic, multilingual and multi-religious" country in which the ethnic diversity existed under the control of state system dominated by hill Bahun and Chhetri communities. Exercise of cultural and linguistic diversity was limited in affairs at community and domestic sphere. Recognition of political rights was expected to enable the indigenous collectivities for practicing their political right of self-determination as sovereign peoples including cultural affairs within the framework of the existing Nepali state. In this respect, indigenous people's demands fall under the domain of political. This in essence is about redistribution of power.

How to accommodate multiple nations within one state? This vexing question unsettles the familiar identification of the state with a single unified nation in ethnolinguistic terms. The prior presence of indigenous societies before the formation of the Nepali nation-state and their structural resemblance to nation provide legitimacy to multiple nations and their demand for political recognition. Such demand for recognition requires redefining and reconstituting conventional nation-state to view it as state-nations. The two decades of indigenous movements for social justice and the Maoist war brought these issues to prominence (de Sales 2015).

The commitments were made in the Comprehensive Peace Accord (CPA) and principles inscribed in the Interim Constitution (IC), 2007 to address them through a restructuring of the state. Making a new constitution by elected representatives of the people in the Constituent Assembly (CA) was the next step for the task. The IC outlined the job of the CA, as "to carry out an inclusive, democratic and progressive restructuring of the State by eliminating its existing

form of centralized and unitary structure in order to address the problems related to women, Dalits, Indigenous Nationalities (*Adivasi Janajati*), Madhesis, oppressed and minority communities and other disadvantaged groups, by eliminating class, caste, language, gender, cultural, religious and regional discrimination.”<sup>1</sup> Recognition of the rights of indigenous peoples was one of the central themes in the task of transforming Nepal.

The election on April 10, 2008 formed the first CA (hereafter CA-I). Unfortunately, on May 28, 2012, CA-I was dissolved without completing its task. The CA-II elections took place on November 19, 2013. On September 20, 2015, the new constitution was finally promulgated in haste amidst the trauma created by a devastating earthquake. The public deliberation and debate during the process of constitution-making was momentous. Multiple social and political forces in the country including indigenous nationalities put forward their proposals (Ghai and Cottrell 2011). An idea that the making of a new form of association is possible by the act of will, reason and agreement was integral to such engagement. Constitutionalism is a principle to limit state powers through abiding rules. But it is foremost a way to define the act and the process for making the constitution. James Tully (1995: 30) aptly summarizes that a constitution should be seen as a form of activity, “an intercultural dialogue in which the culturally diverse sovereign citizens of contemporary societies negotiate agreements on their forms of association over time in accordance with the three conventions of mutual recognition, consent, and cultural continuity.” My aim in this chapter is to examine the process and locate the obstacles hindering good-faith dialogue and indigenous accommodation.

## INDIGENOUS PROPOSALS AND POLITICAL DEMANDS

Indigenous peoples have forwarded their proposals and demands through public deliberations, rallies, protests, appeals and others forms in the course of their movement to end the discrimination and

<sup>1</sup> IC 2007, Article 33(d) and CPA clause 3.5.

respect their human rights in the preceding decades. During the early phase, the central demand was for recognition of their indigenous identity. In 2002, through the Act to establish the *Adivasi Janajati Utthan Rashtriya Pratisthan* (National Foundation for Development of Indigenous Nationalities, NFDIN), the state officially recognized the fifty-nine indigenous groups in Nepal—referred officially to as *Adivasi Janajati* or Indigenous Nationalities. This was one of the major accomplishments in terms of establishing a distinct definition of *Adivasi Janajatis* as the “tribes or communities as mentioned in the schedule who have their own mother tongue and traditional customs, distinct cultural identity, distinct social structure and written or oral history of their own” (NFDIN 2003). This was also a concrete attempt to acknowledge historical exclusion and discrimination against the *Adivasi Janajatis* and the need for the preservation of their culture, language and heritage. More importantly, it was a milestone for disassociating indigenous peoples from the long-held framework of caste hierarchy in which they were unjustly presumed as impure *matwali* caste or alcohol drinkers (Höfer 2004[1979]).

The other demands of the indigenous peoples included linguistic equality, primarily their right to use the mother tongue in education and government offices. Linguistic rights were raised at the backdrop of a long policy adopted by Nepal to privilege a single Khas Nepali as official language which put the indigenous groups in a disadvantageous position. Similarly, secularism was another proposal which the indigenous movement thought was essential for religious freedom and democracy. This would also end the hegemony of one religion and discrimination against minority religious groups institutionalized by the erstwhile Hindu kingdom.

The equitable human development of all caste/ethnic groups was an overdue issue. Given the situation where the majority of people belonging to *Adivasi Janajatis* were disproportionately behind in the various indices of development (NPC and UNDP 2014), they demanded that the state should undertake special efforts to address the situation, including affirmative action, reservation, targeted

programs and others. Experience of dispossession from their land and natural resources was a critical concern of the indigenous peoples in Nepal. They wanted the state to ensure their right to territory, land and natural resources. Recognition of customary law and justice system, traditional representative organizations, and their role in management at the local level were other proposals that the indigenous peoples wanted the state to respect. As these were also in line with the international laws and standards, they wanted the Nepal government to implement the United Nation's Declaration on Rights of Indigenous Peoples (UNDRIP) and the International Labour Organization's (ILO) Convention 169 on Indigenous and Tribal Peoples that Nepal ratified in September 2007.<sup>2</sup>

Although all issues raised by the indigenous peoples, concerning their rights are ultimately linked to politics, I discuss two crucial ones taken up in the constitution-making for the present purpose. The first is proportionate inclusive representation in the state decision-making bodies and the second is granting autonomy and right to self-determination to indigenous peoples. The first mainly pertains to the election and appointment process while the second is linked with state restructuring and federalization.

Inclusion of the indigenous peoples and other historically excluded groups in all apparatus of the state and public entities was one of the major proposals for sharing of the state power and promoting inclusive democracy. The indigenous movements led by the Nepal Federation of Indigenous Nationalities (NEFIN) highlighted the exclusionary nature of the Nepali state and politics and stressed the need for the inclusion of representatives from diverse social groups. As the movement grew in its strength, the government called for negotiation with NEFIN and the Indigenous Nationalities Joint

<sup>2</sup> The Dhulikhel Joint-Declaration on Ensuring the Rights of Indigenous Ethnic Groups signed by representatives of various political parties, indigenous organizations, leaders and individuals on September 11, 2009 provides the major demands of the indigenous peoples in constitutional making. Available at [https://constitutionnet.org/sites/default/files/23\\_dpkbbs\\_indigenous\\_people\\_press\\_release\\_0.pdf](https://constitutionnet.org/sites/default/files/23_dpkbbs_indigenous_people_press_release_0.pdf); accessed May 18, 2022.

Struggle Committee. On August 7, 2007, a twenty-point agreement was reached.<sup>3</sup> This agreement to some extent brings the proposal to date on the table for incorporation in state policies. The eighth point of the agreement, related to inclusion states that:

The Government of Nepal has agreed in principle that all groups, genders, communities, castes, and ethnicities should be represented in political parties at all levels. A fully representative task force will be formed immediately to conduct a study in order to ensure inclusive participation and proportional representation of all castes, ethnicities, groups, communities, genders and regions in all bodies and levels of the state.

The adoption of a mixed electoral system for the formation of the CA in the IC 2007 was the first concrete step towards addressing the issue of inclusion. The IC laid out the principle of inclusiveness to be taken into consideration by the political parties while selecting candidates for both the first-past-the-post (FPTP) election and the proportional representation system.<sup>4</sup> The agreement also included an understanding of state restructuring and federalization which recognizes the ethnic identities. The state restructuring in federal design was thought as the best approach to address the issue of indigenous peoples' right to autonomy and self-determination as

<sup>3</sup> The unofficial English translation of the agreement between the Government of Nepal and NEFIN and the Indigenous Nationalities Joint Struggle Committee is available at [https://constitutionnet.org/sites/default/files/2007-08-07-agreement\\_between\\_government\\_and\\_janajatis.pdf](https://constitutionnet.org/sites/default/files/2007-08-07-agreement_between_government_and_janajatis.pdf); accessed May 18, 2022.

<sup>4</sup> The IC, Article 63 on the Formation of the Constituent Assembly, Clause 4 states that “[t]he principle of inclusiveness shall be taken into consideration by political parties while selecting candidates pursuant to sub-clause (a) of clause (3), and, while making the lists of the candidates pursuant to sub-clause (b), the political parties shall ensure the proportional representation of women, Dalits, oppressed communities/indigenous groups, backward regions, Madhes and other groups, in accordance with the law.”

well as cultural diversity. The need for autonomy and self-rule came to the forefront as a way for giving people the power away from the center. In 2001, the Maoist incorporated in their agenda caste/ethnic liberation along with class liberation. They also started to delineate the autonomous regions in line with the indigenous articulations. With the realization among the political actors and the opinion-makers that the root cause of the violent armed conflict was group inequality and discrimination based on caste/ethnicity, the political agenda of autonomy became part of the public discourse. This was a major step to be taken in building peace as well as *naya* or new Nepal (Sharma 2016).

The Indigenous Nationalities then is not to be taken merely as minority ethnic groups but a political community rooted in the territory with rights to self-determination. Point four of the agreement between the Government of Nepal and NEFIN and the Indigenous Nationalities Joint Struggle Committee stated that “A state restructuring commission will soon be formed to present recommendations to the Constituent Assembly regarding a federal state structure based on ethnicity, language, geographic region, economic indicators, and cultural distinctiveness while keeping national unity, integrity and sovereignty of Nepal at the forefront. The commission will include indigenous *Janajatis*, Madhesis, Dalits, women, and eminent experts from various groups, regions, and communities.”

More specific demands in the drafting of the constitution to address the indigenous peoples’ (IP) political rights came from the IP informal caucus. On July 18, 2009, an IP caucus was formed by CA members belonging to various political parties who came from an indigenous background. Out of the 217 indigenous CA members, 176 came together to work as a caucus to advocate for the indigenous issues. Despite the fact that there was no formal provision of the caucus in the CA regulation and that indigenous CA members were affiliated with different political parties, it was remarkable that they came together to work on the issues of IP rights in the constitution.



This was a pioneering initiative in deliberative democracy in Nepal. Through the process of constitution drafting, the IP CA caucus made a concerted effort to inform the CA committees as well as the CA body. It also engaged in dialogue with the wider public.

One of the important works that the IP caucus did was a detailed review of the reports prepared by all eleven committees of CA-I from the perspective of indigenous rights. On February 23, 2011, it submitted a 188-page long proposal to Subash Nembang, the chair of CA-I, detailing each article and sub-article that needed to be added, reworded, or deleted.<sup>5</sup> The proposal included a comprehensive list of the concerns of indigenous peoples and other marginalized groups such as Dalit, Madhesi, women, religious minorities and others.

The proposal submitted by the IP caucus was never formally discussed in the CA but it had a significant impact on the national dialogue on the constitution. The new constitution promulgated in 2015 by and large postponed or denied indigenous proposals but they remain in the record as an alternative proposal for restructuring the state of Nepal. What I would like to do now is look at the key recommendations in the various CA-I committee reports with respect to inclusion and federal design.

#### CA-I AND THE AFFIRMATION OF INDIGENOUS RIGHTS

The tenure of CA-I lasted from May 2008 to May 2012. This period was a productive and optimistic phase in terms of inscribing the principles in the constitution to address the demands of the IPs. The first meeting of CA-I held on May 28, 2008 declared Nepal as a republic by abolishing the 240-year old institution of monarchy which symbolized a feudal and centralized system. The systematic work done by the eleven thematic committees of CA-I, the deliberations in the CA, and the process of collecting suggestions on various issues from experts as well as ordinary citizens characterized a vibrant

<sup>5</sup> Samvidhansabha Vishayagat Samitiharuko Prarambhik Masyauda Prativedanma Adivasi Janajati Sabhasad Sabha (Caucus) ko Samshodhan, Parimarjan tatha Tippani, 2067.

moment in the democratic life of the country.<sup>6</sup> These deliberations and countrywide debates on what kind of state Nepalis wanted to build were also historic in terms of its progressive outlook. Both on the theme of inclusion and federalization, CA-I made significant advancement.

### *ON PROPORTIONAL INCLUSION AND MEANINGFUL PARTICIPATION*

Inclusion was the major concern of the indigenous peoples, minorities and excluded communities in constitutional negotiation. The term *samavesi* or inclusion holds a powerful and even emotive significance in Nepal. The concept, indeed, was central in bringing many contesting vantage points in Nepal for understanding its past, present and envisioning the future. It was a method to end the conflict, inequality and exclusion. Social inclusion in political debate, public deliberations as well as policy documents appears also as a goal that we pursue for social solidarity, intercultural harmony, mutual recognition and respect, and peace. The usefulness of inclusion is not unique to Nepal but shows a familiar line in political and scholarly debate elsewhere as well. For example, political philosopher Iris Young (2000) has theorized democratic ideal of inclusion in her book *Inclusion and Democracy*. Young poignantly states that inclusion is the principle which demands that in a democracy all those affected by a policy should be “included in the decision-making processes” and should have the opportunity “to influence the outcomes.”

Reflecting the commitment of the political parties in the CA-I elections, the agenda of inclusion was addressed by all its committees. The constitution in the making as seen in these reports considered the notions of *inclusive democracy*, *inclusive state* and *inclusive rule* in high esteem and regard. Social “inclusion” is one of the key terms that appeared in the draft reports submitted by all eleven CA-I committees (Tamang 2012). A total of more than sixty

<sup>6</sup> Details of CA-I including summaries of the eleven thematic committees are documented in Baral, Dhungana and Budhathoki (2070 v.s.).

entries are identified in these reports, of which four reports have the highest number of entries. For example, thirteen entries, the highest among them, are found in the report submitted by the Committee on Determination of the Structure of Constitutional Bodies. This is followed by the Committee on Fundamental Rights and Directive Principles (9 entries), the Committee on Determination of Forms of Governance of the State (9 entries), and the Committee on the Judicial System (9 entries).

The CA-I committee reports have dealt with the issues in great detail and offered several important principles and proposals for the new constitution.<sup>7</sup> Almost all the reports, which mentioned social inclusion in one way or other, have referred to the issue of representation and participation of diverse social groups in the state apparatus to reflect the country's diversity. Ensuring representation in the decision-making bodies was thought to be an urgent and immediate priority for power sharing in the new Nepal to be built.

The rationale for the need for inclusion was articulated in various ways in the reports. The Committee on Determination of Nature of Legislative Bodies, for example, finds it necessary to make the legislative bodies inclusive for enabling people to exercise their sovereign power. Emphasizing the significant role of the legislation, the Committee states that “among the three organs of the state—the executive, the legislature and the judiciary—the legislature alone has the crucial role of exercising the sovereignty of the people. The legislature has the important responsibility of making laws, on behalf of the state, which determines the present and future goals of the country. Thus, the legislature must represent the existing diversity of the country (e.g., class, caste, religion, language, culture, region).”

Inclusion is also regarded as part of the fundamental rights. The Committee on Fundamental Rights and Directive Principles (Part B) under the heading of (Clause 27) Rights Regarding Social Justice: wrote, “Women, Dalits, Madhesis, Indigenous Nationalities (*Adivasi*

<sup>7</sup> Translated versions of these reports were accessed in [www.can.gov.np](http://www.can.gov.np). They are also available at <https://constitutionnet.org/>.

*Janajatis*), minorities and the marginalized, Muslims, the gender and sexual minority community, disabled people, youths, backward classes, farmers and laborers and oppressed groups, who are socially backward, shall have the right to participate in state structures based on the principles of proportionate inclusion.”

From another angle, the Committee on Judicial System thought it important to respect the people’s suggestions as well as ensure an efficient judiciary. In the preface of its report, the Committee wrote:

Based on the number of recommendations received by this committee from different sectors of society during the preparation phase of this draft that, it is proved that while restructuring the country, it is necessary to establish a reformed, independent, transparent and accountable democratic judiciary based on the principles of inclusiveness and proportional representation. (p. 2)

The Committee on Determination of Form of Governance of the State provided many detailed recommendations on inclusion. The Committee recommended that “proportional inclusive representation” be incorporated in the article on obligations of the state and proposed the wording: “maintaining good governance by following the universally recognized principles of human rights, multiparty democratic system, popular sovereignty, and civilian supremacy, check and balance, rule of law, social justice, equality, proportional inclusive representation ...” (p. 38). The report states that proportional inclusion is necessary for all organs of the state as this is a crucial part of good governance and an obligation of the state.

Under the heading of Election of the Lower House of the Federal Legislature, the Formation of the Council of Ministers and Public Administration, this Committee wrote:

1) The members of the lower house of the Federal Legislature shall be elected on the basis of a mixed-member proportional representation system as prescribed by the law. 2) Fifty percent of the members pursuant to Sub Article (1) shall be elected through the first-past-the-post system, ensuring the candidacy of women, indigenous peoples, Dalits, Madhesis and other groups and communities, on the basis of the principle of proportional inclusion. 3) Fifty percent of the members, pursuant to Sub Article (1), shall be elected through proportional representation on the basis of a list incorporating women, Dalits, Madhesis, indigenous peoples and other classes and communities, in proportion to the votes obtained by the political parties, considering the whole country as a single constituency. (p. 43–44)

Formation of the Council of Ministers: 1) The President shall form the Council of Ministers under his/her chairpersonship from amongst members of the legislature according to a ratio of the number of seats secured by parties represented in the legislature and on the basis of the principle of proportional inclusion. (p. 12)

Public Administration: 1) Basic Guiding Principles of Public Administration: (f) Participation of common people in decision-making process. (i) Appointment of staffs on the basis of basic qualifications and efficiency. To provide for compensation to women, Dalits, indigenous/caste, Madhesis and Muslims, based on the human development index. (pp. 38–39).

The Constitutional Committee recommended that in the formation and operation of political parties “there should be a provision for inclusive participation, representing the diversity of Nepal at different levels of the Executive Committee” (p. 17). Similarly, this Committee also recommended that Nepali Ambassadors and Emissaries be

appointed on the basis of the principle of proportionate inclusion, for specified purposes (Article 15).

The Committee on Determination of Structure of Constitutional Bodies, which has recommended various constitutional bodies including commissions to look after the protection and promotion of the rights of IPs, proposed the principle of inclusion for the formation of these bodies. The Committee on Fundamental Rights and Directive Principles similarly recommended: “To make the army, police and all organs of security strong, consolidated, professional, inclusive and accountable to the people on the basis of a national security policy” (clause 3[a][5]).

Equally important was the recommendation by the Committee on the Judicial System. Its Article (3) stated: “The proportional method and principle of inclusiveness on the basis of population shall be followed in the appointment of judges. Women, indigenous and ethnic people, Madeshi, Dalits, Muslims, etc., shall also be included while appointing judges following the proportional method and principle of inclusiveness.”

Indigenous Nationalities in Nepal long voiced their demand for political representation proportionate to the size of the population. This concept of ensuring the representation of diverse social groups in public institutions is condensed in the principle of proportional representation or *samanupatik samavesi* in the public discourse. The link to this was their proposal for a fully proportional electoral system. In response to this call, in 2007, Nepal through the IC adopted a mixed electoral system for the CA elections. According to the electoral system outlined in the IC, 240 representatives were to be elected through the FPTP electoral system and 335 were to be elected through the proportional electoral system. An additional Twenty-six members were to be nominated later by the Council of Ministers from amongst the persons of high reputation who have rendered significant contribution in national life and “from among

the indigenous nationalities who were not able to elected from FPTP and proportional electoral system.”<sup>8</sup>

The total number of members in the CA was 601. As a result of the new electoral system, CA-I was historic in terms of achieving a remarkably inclusive composition. The composition of CA-I showed that the IPs had a representation of 35 percent, almost proportionate to their population of 37.2 percent in the country (Khanal 2018). Comparison between the size of the population and representation, CA-I roughly reflected the overall diversity of social groups including IPs, hill Bahun/Chhetri, Madhesi, Dalit and women. The IP leaders with whom I have interacted have positively evaluated the result as a part of the democratization process in Nepal. They thought that it has contributed in altering the old pattern of electing the same sets of elites over and over again in the state apex body. The demonstrated efficacy increased the trust of the people on the proportional electoral system.

There were two other concerns concerning representation raised by IPs. The first concern was on the mechanism to ensure representation/voice of indigenous population with smaller size. They include, ensuring representation of endangered IP groups in the decision-making bodies through the reservation of seats. This was thought essential as the principle of representation in proportion to population alone would not address the issue of their representation. The second concern was related to direct representation whereby IP representatives from traditional institutions outside the political parties could partake in the national institutions.<sup>9</sup> This concern was primarily based on the understanding

<sup>8</sup> Constituent Assembly Member Election Act, 2064, Chapter 2, Article 3(C).

<sup>9</sup> Twenty IP organizations, including the Lawyers Association for Human Rights of Nepalese Indigenous Peoples (LAHURNIP) and the National Indigenous Women's Federation (NIWF), filed a writ petition in the Supreme Court of Nepal demanding amendments to the electoral laws to enable the direct representation of indigenous peoples in the CA. On April 21, 2013, the Court issued a directive order to amend the Constituent Assembly Member Election Act, 2064, Constituent Assembly Member Election Regulation, 2064,

of the limits of the IP representatives belonging to political parties in terms of representing the voice and agenda of the population concerned.

#### *ON FEDERAL DESIGN AND THE NAMING OF PROVINCES*

Achieving political autonomy was one of the central themes of the indigenous peoples' movement through the 1990s. Federalization was a mechanism for ensuring autonomy. In the previously mentioned agreement signed with NEFIN and the Indigenous Nationalities Joint Struggle Committee in August 2007, the government agreed to form a state restructuring commission to recommend to the CA a design of the federal state structure that recognizes ethnic identities, languages, geographic regions, economic indicators and cultural distinctiveness. However, it took a considerable struggle to get federalism accepted by the mainstream political parties. Only after extensive mass protest and demonstration especially by the Madhesis, IPs and others, the political parties agreed to include this in the IC in its first amendment.

Why did IPs advocate for federalism and what were their proposals for constituting the provinces? Federalism has been proposed from various angles from different political forces. IPs are one of the primary claimants. For some, it was merely another label for decentralization. For others, it was a reworking of the boundaries of former administrative units with a strong center.<sup>10</sup>

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and Constituent Assembly Regulation, 2065 in accordance with the state's obligation to ratify/adopt the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on Elimination of all Forms of Racial Discrimination, ILO Convention 169, the UNDRIP and other international laws that guarantee direct representation of indigenous peoples in the constitution-making process, in accordance with their own customary practices. The Court informed the government body concerned, namely the Ministry of Law and Justice, that it should implement the decision.

<sup>10</sup> Far-right political parties and some radical left parties viewed federalism to be antithetical to national territorial integrity; hence, they opposed federalism altogether. The other political parties including Nepali Congress



Madhesi political leaders stressed regional autonomy. IPs had a particular vantage point to approach federalism. What made the IPs different from other actors who advocated federal structure was their emphasis on autonomy, linguistic rights and cultural liberty as well as issues of history (Khanal 2064 v.s.).

Autonomy was the essence of their proposal of federalism. Federalism for them was *non-centralization* as opposed to *de-centralization* programs of the unitary states. They, for example, did not want to confuse federal structure with local autonomy as clause 139(3) of the IC 2007, appeared to do. They argued that if the federal structure was limited to territorial and administrative concerns, this will not be more than a reincarnation of King Mahendra's arbitrary delineation of districts and zones. Nor would it be an important addition in the peace-building process. Federalism that they advocated was expected to have a constitutional guarantee of freedom and necessary autonomy at the sub-national level. Such autonomy would allow them to operate on their own in coordination with other member states/provinces. This was a way for dismantling the unitary and centralized state and redistribute the power at the local level.

Oponents of federalism viewed it as a threat to state territorial integrity. They suspected that IPs' demand for the right to self-determination would eventually lead to secession. Evoking the sentiments of exclusionary nationalism, they argued that identity-based federalism would increase the threat of ethnic tension and national disintegration. IP proposal had a different rendering than the opponents of federalism. IPs wanted to be able to exercise their right to self-determination within the framework of the existing state. Secession and separate state formation were never on their agenda. For them, federalism based on the principle that combines self-rule with shared-rule was a mechanism to ensure their right

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(NC) and Communist Party of Nepal-Unified Marxist Leninist (CPN-UML) who reluctantly accepted federalism because of the peoples' pressure, in essence, interpreted federalism as a different way of decentralization or reorganization of the erstwhile geographic administrative units.

to self-determination (Tamang 2009). Such an arrangement would strengthen national unity by achieving ethnic equality.

For IPs, federalism was an effective way to accommodate the country's diversity without needing to form a separate state of distinct groups. The theoretical works, as well as experiences of the federalized countries around the world, support the idea that varying types of federal model are the most appropriate, if not only, model available for countries with social and cultural diversity. As elsewhere, federalism was thought to be an appropriate way for state restructuring in Nepal to accommodate ethnic, national and linguistic diversity (Hachhethu 2067 v.s.).

Linked to history, IPs envisioned federalization as a process of decolonization. This entailed a re-interpretation of the Nepali history of "unification." The making of modern Nepal by the imperial campaign of the Gorkha King Prithvi Narayan Shah in mid-eighteenth century (Regmi 1999) is glorified in the dominant narrative as "national unification." Indigenous peoples' movement, on the contrary, depict this history as forced conquest by Gorkha empire which ended their political autonomy and introduced an internal colonization. Federalism viewed in this perspective was about regaining autonomy taken away in the process of the formation of the nation-state of Nepal. The IPs felt that the centralized and feudal state had in subsequent rule, politically excluded, culturally discriminated and economically exploited them. The process of federalization was a way to undo these historical wrongs by giving them back their autonomy and the right to self-government in new context (Tamang 2008).

Affirmation by CA-I on federalism as a way of accommodating diversity was well reflected in its unanimous decision regarding the basis for restructuring. The forty-three-member Committee on Restructuring the State and Distribution of Power in CA-I agreed unanimously on "*Identity and Capability*" as the main bases for the restructuring of the Federal Democratic Republic of Nepal. The basis of identity included five sub-bases: the ethnic/community, linguistic,

cultural, geographic, and historical continuity of the ethnic groups. The Committee chaired by Lokendra Bista, worked for thirteen months and seven days, and on January 22, 2010 presented its report. The Committee passed the proposal for carving out fourteen federal units<sup>11</sup> and proposed autonomous region, special region and protected region for twenty-three indigenous minorities (Figure 1). Further, due to lingering disagreements, on December 6, 2011 the government formed a State Restructuring Commission with seven experts to refine the proposal. The Commission produced its report on January 31, 2012 which recommended for eleven provinces<sup>12</sup> in line with the agreed bases of identity and capability (Figure 2).

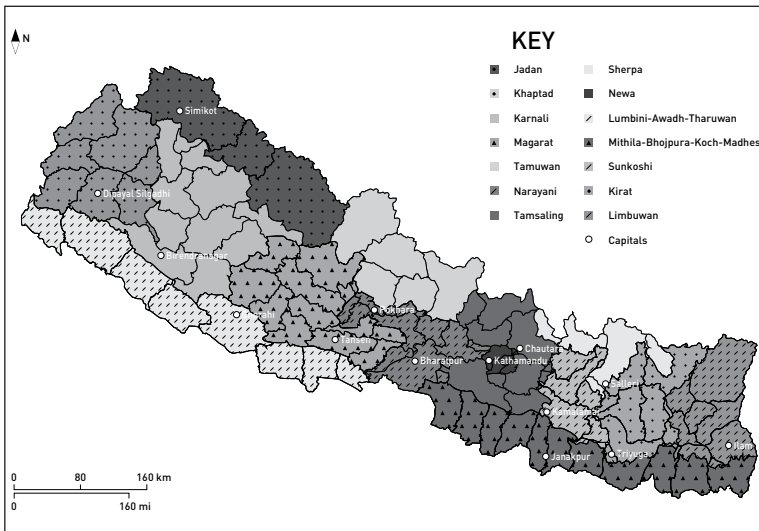
The naming of the provinces and autonomous regions in line with the indigenous linguistic heritage was another proposal. In what ways does the federalization help accommodate cultural diversity? Recognition of cultural diversity is largely a matter of expanding the symbolic domain of the state by incorporating cultural symbols, signs, names, heritage and history of its residing groups. Official recognition of festivals, ceremonies, cultural sites, food, dress and other intangible cultural heritage as part of the national culture is central to such an expansion of the symbolic sphere. After 1990, Nepal had already embarked on the process of recognizing cultural diversity by announcing national holidays for various festivals and ceremonies of the indigenous and other

<sup>11</sup> The CA-I Committee on State Restructuring Report, 2010 proposed the following fourteen federal units: 1) Khaptad, 2) Karnali, 3) Jadan, 4) Magarat, 5) Tamuwan, 6) Narayani, 7) Tamsaling, 8) Newa, 9) Lumbini-Avadh-Tharuwan, 10) Sunkoshi, 11) Sherpa, 12) Mithila-Bhojpora-Koch-Madesh, 13) Kirat, and 14) Limbuwan.

<sup>12</sup> State Restructuring Commission report 2012, proposed eleven provinces including one non-territorial province. The ten proposed identity and capability based provinces are: 1) Karnali Khaptad, 2) Magarat, 3) Tamuwan, 4) Narayani, 5) Tamsaling, 6) Newa, 7) Madesh-Avadh-Tharuwan, 8) Madesh-Mithila-Bhojpora, 9) Kirat, and 10) Limbuwan. Another was a non-territorial Dalit province. The three members representing Nepali Congress in the Commission who did not agree with the majority decision submitted a separate report. They proposed six provinces with no specific names.

cultural groups. The new anthem that replaced the old one in 2007 is an admired example of such a symbolic recognition of diversity (Hutt 2012).<sup>13</sup> Incorporation of history, culture, heroes, icons of the diverse groups in national identity along the redesigning of educational curriculum and rewriting of history are part of such a program. Indigenous Nationalities, with their cultural and historical attachment to the territory, demand federal arrangements that can address the issue of cultural recognition.

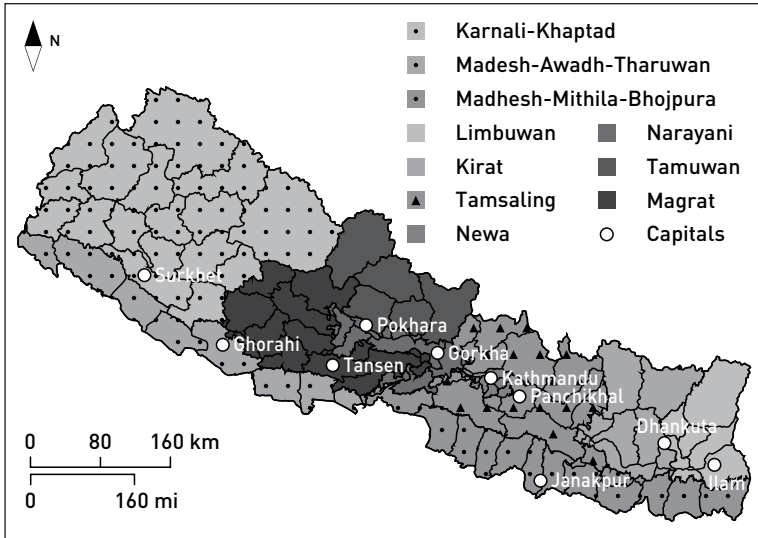
**Figure 1: Federal Map Recommended by the CA-I Committee on State Restructuring**



Source: Accord: An International Review of Peace Initiatives. Issue 26, 2017.

<sup>13</sup> The old anthem was a panegyric to the king and wished for his glory. The new one celebrates the diversity and begins with *Sayau thunga phulka hami, eutai mala Nepali; Sarvabhaum bhai phailieka, Mechi-Mahakali ... Bahul jati, bhasha, dharma, sanskriti chan vishala; Agragami rashtira hamro, jaya jaya Nepal*. The translation of above by Hutt (2012) reads: We are hundreds of flowers, [but] one Nepali garland; Sovereign and spread out, [from] Mechi [to] Mahakali; ... The multiple ethnicities, languages, religions and cultures are vast; Ours is a progressive nation, Jaya Jaya Nepal.

**Figure 2: Federal Map Recommended by the Commission on State Restructuring**



Source: Accord: *An International Review of Peace Initiatives*. Issue 26, 2017.

How do we operationalize the principle of recognition in federal design? The way forwarded by various parties and the Committee on Restructuring the State and Distribution of Power of CA-I was the adoption of the names of the provinces, autonomous regions and areas derived from the cultural and historical heritage of the Indigenous Nationalities. Demographic concentration was one basis for the delineation of the boundary (Mabuhang 2009). The CA-I proposed certain names for provinces linked to Indigenous Nationalities that have a population above 1 percent in the country and names of the Autonomous Regions and Special Area for those Indigenous Nationalities with smaller sizes. This naming proposal of the federal units, therefore, was a way toward the formal and constitutional recognition of these groups as a cultural and political community who have rights to equality in the existing state for self-rule and shared-rule. The names themselves were symbolic in

nature but they provided the IPS a sense of belonging to the country where they resided with rights and duties. This approach was also a pragmatic way to present Nepal as a multi-cultural country which recognizes the diversity of names with local allegiances and heritage.

Recent studies on toponymies has convincingly demonstrated the link between place names, geopolitics, power and resistance (Karki and Wenner 2020). As Giraut and Houssay-Holzschuch have put it, “place naming reflects how power controls territory and, in so doing, maintains that control” (2016: 2). The place naming process is embedded in power relations—that some social groups have power and authority to name while others do not. The selective way of naming “reproduce(s) the dominance of certain ideologies over others” (Rose-Redwood, Alderman and Azaryahu 2010: 462). Contestation on naming in Nepal during the process of constitution making was an act of resistance in the cultural arena for symbolic capital.

Although CA-I abruptly ended without being able to draft a new constitution, the affirmation of identity as the basis for federalism remained one of the main promises of the political parties who contested the CA-II elections. The Unified Communist Party of Nepal-Maoist (UCPN-M) and a host of Madhes based parties and political parties led by the Indigenous Nationalities remained forcefully in the front for bringing agreement on identity-based federalism. The only exceptions were the two ultra-nationalist parties who won some seats in CA-II, namely, the pro-monarchy Rashtriya Prajantanta Party led by Kamal Thapa and the communist splinter party Rashtriya Jana Morcha led by Chitra Bahadur KC. They thought that federalism was detrimental to national integration. Two major political parties, NC and the CPN-UML, while holding slightly different vantage points, nevertheless affirmed identity-based federalism. For example, the CPN-UML stood for the model of federalism that would honor all identities, transfer power to local communities and institutionalize democracy from below.

The party wrote in its election manifesto under the heading of Commitment and Roadmap of Constitution-Making:

There will be seven federal provinces based on multiple identities. Each province will have common and mixed communities with equal rights guaranteed to all. There will be a clear-cut division of authorities and mandates among the center, province and local governments. The index of authorities and mandates will be as discussed and agreed in the previous CA. The nomenclature of the provinces will be done by the concerned provincial councils. (CPN-UML 2013: 22)

The NC affirmed the recognition of identity as its political agenda in a slightly different rhetoric. In its election manifesto, the NC introduced the slogan “*pahichan bhetine, jatiya dwandwa metine*” or mechanism where “identities are recognized and conflict eliminated.” It recognized “identity and capability” as the basis for Nepal’s federalization in the new constitution. The articulation of NC on what state restructuring means for the party was illuminating. The election manifesto of NC, for example, stated that transforming itself into a democratic federal republic was state restructuring in the Nepali context by:

... replacing the monarchy with a democratic republic, centralized and unitary structure with a non-centralized federal structure, exclusion with inclusion, single identity with multi-identities, inclusive democracy and social justice, replacing policies of privileging one language, one caste, one religion and one culture with religious freedom, multilingual, multiethnic, multicultural identities, ensuring recognition of identity, access, representation progress and respect to all classes, region and communities ... (NC 2070 v.s.: 17–18)<sup>14</sup>

A sense of achievement was in the air during CA-I that the new constitution would inscribe the principles that address the issues of rights of the IPs and the historically disfranchised communities. The

<sup>14</sup> I translated this excerpt from Nepali version.

IC 2007 had declared Nepal as a secular country. This ended the privileged status of the Hindu religion as the state religion. This was an important step in furthering the principle of equality and freedom. CA-I abolished the institution of the monarchy and declared the country as a republic. Federalism was agreed through deliberation in CA-I, the apex body of the people's representatives, as a way for state restructuring. The idea of inclusion was one of the central pillars in the reconstitution towards building Nepal's future. The provinces were delineated based on identity and capability with the names associated with the historical legacy of the indigenous communities. Unfortunately, CA-I was dissolved in May 2012 without giving its members the option for voting on the draft text of the new constitution.

#### CA-II AND THE DENIAL IN NEW CONSTITUTION

This sense of achievement waned dramatically soon after the dissolution of CA-I. After its dissolution the indigenous agenda faced a systematic pushback. In CA-II elected in 2013, the number of representatives from among the IPs decreased as compared to CA-I. Despite the rhetorical acceptance of inclusion, the principle of proportional representation which was thought to have enabled the political parties to bring representatives from hitherto underrepresented communities was distorted. The political parties misappropriated the principle of proportional representation in two ways. The first is that they opted to elect the representatives from the dominant groups instead of persons from IPs and other excluded groups in proportional seats. For example, this was done by including the Brahmin/Chhetri spouse married to the IP person in proportional seats. The second is that even when the political parties elected persons of indigenous background they made sure that the persons remained loyal to the parties' decisions than the cause of the IPs. Furthermore, the process of decision-making gradually became confined to top political leaders and became increasingly exclusionary. The political parties nominated indigenous leaders



who led NEFIN to CA-II, but they had little power even to put forward their dissenting voices as CA members.<sup>15</sup> Their inclusion instead proved to be an effective way to co-opt indigenous peoples' agenda.

It was agreed that CA-II would own the decisions and build on the progress made by CA-I. But unfortunately, this did not happen. The series of political developments that affirmed the need for identity as the basis for federalization through CA-I were violated. The election manifestos of political parties turned out to be mere rhetoric. The differing and even damaging interpretation of identity-based federalism—as ethnic federalism—became prominent among the mainstream media, Marxist modernists and sections of the complicit intelligentsia (Mishra 2012; Karki and Edrisinha 2014; Shneiderman 2020).<sup>16</sup> Ultra-nationalist sentiments were mobilized against identity-based federalism. Meanwhile, a new form of ethnic politics emerged in Nepal in which dominant caste groups organized into various organizations such as Brahman Samaj, Chhetri Samaj, and Khas Chhetri Samaj. They mobilized mostly upper-caste individuals against the principle of proportional inclusion and the restructuring of the state or federalism based on identity (Adhikari and Gellner 2016; Prasai, this volume). The Constitutional-Political Dialogue and Consensus Committee of CA-II chaired by Baburam Bhattarai failed to achieve understanding among the parties on various agendas including the federal structure.

The denial of the voice of IPs and other marginalized communities first started within the parties. The presentation of a joint concept paper by NC and CPN-UML to the chair of the Constitutional-Political

<sup>15</sup> In CA-I Pasang Sherpa from NEFIN was nominated as a member by the CPN-UML. In CA-II Nagendra Kumal, then NEFIN Chair, and Pemba Bhoté, then General Secretary were nominated as members by NC and CPN-UML, respectively.

<sup>16</sup> See Thapa (2012) on the confusion created around the notion of ethnic federalism.

Dialogue and Consensus Committee came as a first surprise.<sup>17</sup> This proposal submitted on November 2, 2014, advocated names of the seven provinces which were mostly identical to the existing names of some of the fourteen zones. The names proposed resonated with the revival of the old autocratic regime of Panchayat which devised these units during the reign of King Mahendra. Although the proposal mentioned that the federal division of the provinces was based on “identity and capability,” the recognition of identity as aspired by the marginalized communities was effectively erased from the delineation of the units. Opposition political parties and researchers have interpreted this as a way of carving federal provinces for the perpetuation of old structures again dominated by members of the hill Bahun and Chhetri communities (Hachhethu 2067 v.s.).

The sixteen-point agreement between the four political parties reached on June 8, 2015 was the ultimate blow to the aspirations of IPs and other marginalized groups. The agreement was signed by Sushil Koirala, then Prime Minister and President of the NC, KP Sharma Oli, Chairman of CPN-UML, Pushpa Kamal Dahal, Chairman of UCPN-M, and Bijay Kumar Gachhadar, Chairman of Madhesi Janadhikar Forum-Loktantrik. In the first point, it stated that “the Federal Democratic Republic of Nepal will have eight provinces based on five criteria of identity and four criteria of capability.” The second point of the agreement postponed the task of naming the provinces and stated that “two-thirds majority of provincial assemblies will name the provinces.” This agreement annulled the outcomes of CA-I and provided a regressive blueprint for the new constitution.<sup>18</sup>

<sup>17</sup> Letter to Chairperson of Constitutional–Political Dialogue and Consensus Committee jointly presented by Nepali Congress/CPN-UML and others, November 2, 2014. Signatories include Sushil Koirala, KP Sharma Oli, Surya Bahadur Thapa, Biswendra Paswan, Atahar Kamal Musalman and Chandreshowr Jha.

<sup>18</sup> The sixteen-point agreement is available at [www.satp.org/satporgtp/countries/nepal/document/papers/16-point\\_agreement.htm](http://www.satp.org/satporgtp/countries/nepal/document/papers/16-point_agreement.htm); accessed January 3, 2022.

On September 20, 2015, President Ram Baran Yadav officially promulgated the Constitution of Nepal 2015. Putting his signature to five copies, he announced its entry into force in an address to the CA and the nation.<sup>19</sup> This was the moment when the country was grieving from the devastating impact of the 2015 earthquakes. The political parties took disaster as an opportunity for announcing the constitution and consolidating their power. The political parties leading CA-II claimed that the new constitution is the most progressive statute the country ever had. A closer look, however, reveals that the provisions on the key issues of the rights of the marginalized and IPs have unfortunately been rendered obscure. By the time the draft constitution reached the stage for voting in CA-II, many articles on minority rights had been omitted, and their wordings either fragmented or distorted. As a result, the essence of many provisions including proportional inclusion, autonomy, secularism and others has become unrecognizable. An analysis of the new constitution from the perspective of the rights of IPs done by a group of lawyers listed that there are eleven articles that are against the IPs, twenty-three articles that are discriminatory to IPs, forty-nine articles that would exclude the IPs and five articles that would privilege upper caste domination (Rai and Thami 2016).<sup>20</sup> CA-II ignored the long process of deliberation in CA-I and its agreements on the number and names of the provinces. CA-II arbitrarily delineated seven provinces and scratched the proposed names that were associated with indigenous heritage (Figure 3).

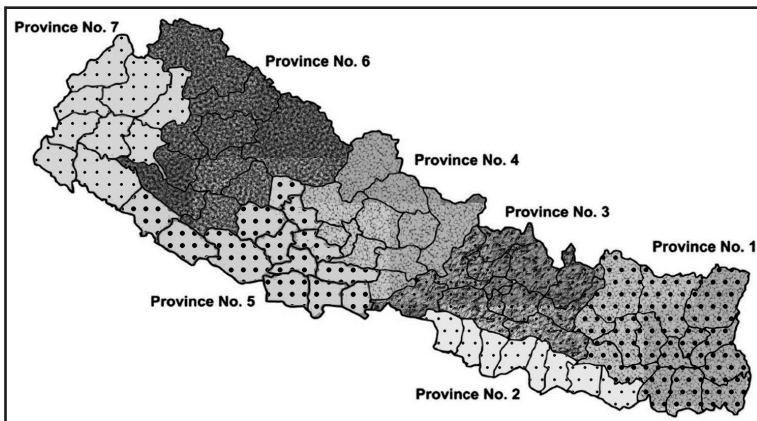
Nepal's journey towards a new constitution and state restructuring began with a promise that it would ensure the rights of the IPs and the other marginalized communities. The state promised that their identities will be recognized and respected, their political autonomy ensured, and the policies of inclusion institutionalized,

<sup>19</sup> See <http://kathmandupost.ekantipur.com/news/2015-09-20/people-celebrate-constitution-promulgation-in-photos.html>; accessed January 3, 2022.

<sup>20</sup> The analysis was carried out by a team consisting of Shankar Limbu, Bhim Rai, Dinesh Kumar Ghale, Nanda Kandangwa, Tanka Bahadur Rai and Ram Hari Shrestha (see, Rai and Thami 2016).

among others. The new constitution, nevertheless, has forgotten many of these promises and overlooked the very purpose for which the task of writing a new constitution was undertaken. While the dominant sections of the Nepali society celebrated, the IPs burned the constitution as discriminatory and demanded that it be rewritten. The mass protests against the new constitution in the Madesh and Tharu regions in southwestern Nepal became violent where the government used brutal force to suppress them. The new constitution clearly lacked consent and acceptance of the indigenous peoples and other marginalized groups.

**Figure 3: Federal Map Decided by CA-II for the New Constitution**



## CONCLUSION

The indigenous struggle for recognition and political rights remained central in the debate during the constitution-making process. Alternative proposals and political agenda advanced by the indigenous movement to recognize the rights of indigenous nationalities were of critical importance to deepening inclusive democracy. During the tenure of CA-I, significant success was made in terms of incorporating the rights of the IPs in the preliminary draft of the new constitution. Work on making state governance and society

inclusive as well as on the delineation of the provinces based on identity and capability was done systematically. This included the proposed naming of the provinces in a way to respect indigenous heritage. CA-II, however, turned out to be debilitating. Dominated by the upper caste elites who favored the status quo, it reverted the achievements made since 2006. The reversal was augmented by a section of the dominant media, political ideologues and social scientists that conflated identity-based federalization with an ethnic state where one ethnic group dominates others. The new ethnic politics on the part of hill Bahun and Chhetri organizations who opposed the identity-based federalization, inclusion and recognition of cultural diversity turned out to be the additional ruinous force to withheld the progress made during CA-I.

Despite this, the new constitution has achieved some major success such as declaring the country to be a republic, secular and federal. The issue of the political rights of the indigenous peoples is yet to be addressed. The failure to address the IPs' political rights stems from the repressive nature of the feudal, upper-caste sector of the political establishment in Nepal which is unwilling to engage in dialogue in good faith. The persistent dissent and demand for changes in the constitution by the indigenous peoples and marginalized communities indicate that dialogue needs to be continued. Democracy and federalism depend on the willingness of the political and cultural elites to take each other's demands seriously. In this context, constitutionalism as a principle and practice provides a productive framework for intercultural dialogue on how best to constitute the state of Nepal with its multiple nations.

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