



‘Developing Constitutional Culture in the Context of Constitutional Implementation: a case study from Nepal’

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What changes were introduced by the Constitution that required the development of a new constitutional culture or adaptation of an existing culture?

The 2015 *Constitution of Nepal* has institutionalized Nepal as a federal, democratic, republic. While the *Interim Constitution* (2007) had declared Nepal a secular state, and the first amendment to the *Interim Constitution* (2007) on 13 April 2007 stipulated that the Nepali state would be restructured into a ‘progressive, democratic federal system’, and the first sitting of the first Constituent Assembly of Nepal declared the Republic of Nepal, 28 May 2008, it was the 2015 *Constitution* that enshrined these changes.

Given the long history of Nepal as a Hindu Kingdom and a centralized state with political, social and economic power concentrated in the capital, Kathmandu, a new constitutional culture is required for the implementation of the new constitution. This affects a whole range of key state actors and institutions. In terms of formal institutions, only the judiciary remains untouched; the executive and the legislative branches of the government have been federalised, as has the bureaucracy. Seven provinces and 753 local units with their own legislative and executive powers holding 22 exclusive powers and an additional 15 non-exclusive powers shared with the other two spheres of federal governance, have been established.

What proactive measures, if any, were taken to develop or adapt official and/or public culture to the needs of the new Constitution, during the constitution making process or in the implementation phase?

The constitution making process took place over two Constituent Assemblies (2008-2012 and 2013-2015). Core disagreements on central constitutional issues including the structure of the state and the prioritisation of power-sharing arrangements by political party elites following the 2006 Comprehensive Peace Agreement resulted in little attention being paid to transition and implementation plans, including changing the larger set of basic norms that have historically maintained Nepal as a political community. One of the consequences of this paucity of attention was the failure to develop a constitutional culture to underpin the implementation of the new constitutional arrangements.

There are a number of contradictory and overlapping issues behind this failure, a discussion of which will enable a better understanding of the challenges of developing a constitutional culture for constitutional implementation. Central to the lack of progress in implementation of the Constitution

has been the underlying beliefs and deep value disagreements that stem from the long history of a centralised country based on socially, politically and economically structured inequalities. These were not properly addressed during the constitution writing process.

For example, and as noted above, the crucial issues of secularism, federalism and the republic were dealt with before, or at the very outset of, the Constituent Assembly process. There were limited to no debate either within the constitutional making body or in the general public on these topics which have historically formed key cornerstones of past national ideology. Secularism was introduced into the first *Interim Constitution* without debate – backed by the demands of historically excluded groups, including religious minorities and the then Communist Party of Nepal (Maoist). The latter saw secularism as a means to eliminate deep-rooted feudalism based on Hinduism, and to undercut the political legitimacy of the Hindu monarch. The declaration of a Republic on the first sitting of the Constituent Assembly was a strategy to politically neutralise the then King who had taken indirect power from 2002 and direct power from 2005-2006. However, the exact nature of ‘secularism’ became a central point of contention as the constitution writing process lengthened, unsurprising given that the meaning of ‘secular’ in Nepal and its implications had previously been little debated. The meaning of *dharma nirapeksata* (‘autonomous from/ indifferent, impartial to dharma’) continues to be debated today. While religious minorities view secularism as ‘equal respect and opportunities for all religions’, arguments have been made that Hinduism has always formed the basis of harmony for the nation with concomitant suspicions of the intent behind the constitutional provisions for secularism.

Federalism also came to be inserted into the *Constitution* in the same manner – without debates or consultations within or outside the Constituent Assembly. A result of the 2007 democratic movement in the Madhes (the south-eastern plains of the country bordering India), the first amendment to the *Interim Constitution* (2007) on 13 April 2007 stated that the Nepali state would be restructured into a ‘progressive, democratic federal system’. At this time, the core constitutional issues were linked to rectifying inequality and the exclusion of the Madhesi population as ‘real Nepalis’ and thus not Nepali citizens, which have historically been defined by hill-based populations.

These pressure points emerged in the immediate aftermath of the larger People’s Movement of 2006, the Comprehensive Peace Agreement of 2006, and the 2007 Madhes Movement. However, the inability of the first Constituent Assembly to produce a constitution led to the second Constituent Assembly elections in 2013. The results reflected and enabled a clear shift in the constitutional culture away from values of inclusion and federalism. The Maoists came an unexpected third place behind the Nepali Congress and the Nepal Communist Party (Unified Marxist-Leninist) with fourth position surprisingly taken by the Ratriya Prajantra Party – Nepal, at that time a conservative and royalist political party which supported the restoration of the Hindu monarchy. These political shifts were aided by the role of media and social movements – such as the ‘Akhanda Sudur Paschim’ (Undivided Far West) movement that called for the region to remain ‘undivided’ at the same time as indigenous Tharus demanded an identity-based province of their own in the same area. These political movements provided the larger context for the debates in the first Constituent Assembly over federal demarcations along ethnic lines – debates that became increasingly sharp in 2012.

The shift described above was further enabled by the dominant political party culture of Nepal. Political parties continue to operate in a highly centralised manner with sources of political power personalised. The predominance of the older generation in top positions of power in the parties limits the potential for change, as does their male, high-caste, hill, Hindu background. Within the Constituent Assembly, the use of the party whips ensured conformity to party lines. Even more importantly, the emphasis on 'consensus' among the political party elite in the name of the 'peace process', legitimised the removal of decisions of key constitutional issues from the Constituent Assembly, to a small coterie of male political party leaders.

Many analysts have commented on the manner in which the April 2015 natural earthquake led to the 'political earthquake' of a 'fast-tracked' constitution. The decision to 'fast-track' further legitimated placing key decision-making authority in the hands of a small group of high-caste, Hindu, hill men; their decisions were legitimated by a two-week public consultation and the votes of lawmakers given minimum time to read and approve the document.

This background to the making of the constitution is key to understanding constitutional implementation. There are two key elements to consider. One is while key ideas of 'secular', 'federal', 'multi-cultural' etc are in the *Constitution*, the extent to which the norms and values underlying these concepts are shared by key branches of the state now in charge of implementing the new constitutional changes, is questionable. Secondly, many historically marginalised groups see the *Constitution* as the continued imposition of 'shared values' by the dominant cultural elite as opposed to a new shared understanding of basic rules and norms.

A. Constitutional culture and implementation

Expanding on point one of the two above, there has been clear shift in the constitutional culture at the political elite level. The current government of Nepal is led by Prime Minister K P Oli from what was known until very recently as the Communist Party of Nepal (United Marxist-Leninist).¹ The party has been able to effectively utilise nationalist rhetoric to shore up its support, particularly since the blockade in the southern border of Nepal from September 2015 to February 2016. Critical analysts have equated this nationalism with that of past conservative leaders in its implicit support of the Hindu religion and a centralised state and its treatment of the issue of inclusion of historically marginalised groups.

Over a year after local level elections and six months after federal and provincial elections, there continues to be a serious shortage of civil servants at the provincial and local levels which has greatly impacted the functioning and institutionalisation of federalism. As elsewhere, the bureaucracy is widely recognised to be conservative and resistant to change and staff have either refused deployment to provincial or local levels or returned back to Kathmandu through various means. However, the central government has come under increasing criticism for delaying the drafting of necessary federal laws that would devolve power to the provincial governments. This includes the

¹ Two major national left political forces – the Communist Party of Nepal (Unified Marxist-Leninist and the Communist Party of Nepal (Maoist Centre) – merged to become the Nepal Communist Party on 17 May 2018.

Federal Public Service Commission Act which would enable the efficient administration of a federal system of government.

The continuation of the political culture of centralised authority (in person and in Kathmandu) was made evident in the abrupt cancellation of the first inter-province council meeting by the Prime Minister. The meeting was planned to be centered on sharing of provincial level concerns by Chief Ministers with the Prime Minister. Slated for 9 September 2018, media reports stated that the cancellation stemmed from the Prime Minister's anger at a nine-point declaration made collectively by Chief Ministers two days earlier, which was perceived as the provincial level uniting against the centre. As provincial governments begin to assert their authority, conflicts between the centre and provinces appear unavoidable; in mid-November 2018 provincial governments labelled an executive order on policing in provinces as unconstitutional as provincial police administration falls under the jurisdiction of provincial governments.

B. Marginalised groups

Elaborating on the second issue listed above on the viewpoint of the historically marginalized groups, while current nationalist descriptions portray the *Constitution* as Nepal's most inclusive, democratic and progressive, the *Constitution* was passed without the explicit consent of large sections of the governed. Occluded in the current nationalist portrayals is the fact that at the time the *Constitution* was promulgated, six out of 75 districts were under curfew as a result of violent political protests centred on the constitution drafting process. These districts are all in the southern plains of the country, the Tarai, where Madhesis and indigenous Tharus predominantly reside. The amendment to the 2015 Constitution on 23 January 2016 addressed some of the demands related to the demarcation of provinces, proportionate representation, and allocation of seats in the legislature based on population, but were seen to be insufficient and additional issues remain such as recognition of all ethnic languages and naturalised citizenship. Historically marginalised groups have overall argued that the new constitution has not incorporated the rights of Indigenous Peoples, Muslims, Dalits, women and other minority groups in accordance with the interim constitution, past agreements between them and the government, and international legal instruments that Nepal has been party to such as the *Convention on the Elimination of all forms of Discrimination Against Women*, the *International Labour Organization Convention 169* and the *UN Declaration on the Rights of Indigenous Peoples*. . Important to note in terms of shifts in constitutional culture, provisions such as to right to land and natural resources, proportional representation according to population and others – which were placed in the drafts of the first Constituent Assembly – were removed in the new constitution.

What were the consequences of any failure to develop a constitutional culture to underpin implementation of the new arrangements?

The consequence of the failure to develop a constitutional culture to underpin implementation of the new arrangements has most concretely been slow progress in the setting up and functioning of government at the local and provincial levels, affecting the delivery of goods and services to citizens. While transition periods are acknowledged to be difficult, the lack of clarity on laws and delays in completing policies and procedures that would enable smoother functioning of the other levels of government has also resulted in growing distrust of the motives of the central government. Many, particularly historically marginalised groups, perceive this resistance to implementing key aspects of

the *Constitution* – particularly the devolution of power – as an attempt to ensure the failure of federalism as a political project and validate the conservative push for a return to a centralised state. Hence there is a growing lack of trust on the implementing intentions of the government.

Paradoxically, the current government has seen its legitimacy tied to the Constitution's legitimacy. This has been made most evident in the government's move this year to mark Constitution Day, 19 September, as the new national day and not Republic Day (29 May) with large extended three day celebrations and the President giving out state awards/medals on the day. Despite the government's representation of the *Constitution* as the dominant social consensus on the New Nepal, importantly, some Madhesis and Janajatis political parties and organisations refused to celebrate Constitution Day and instead marked it as a 'black day' in history.

What lessons can be learnt from these experiences for other states that are implementing new constitutional arrangements?

Nepal's experience points to the importance of inclusive processes in the writing of the constitution, the tracking of changes in constitutional culture even during constitution writing periods, and the need to attend to the development of official and public culture to the requirements of the new constitution during and after the constitution writing process.

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