



Inclusion, participation and representation: Nepal as a case study

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Nepal was ruled by the Ranas dynasty for 104 years before democracy was established in 1951. During the Rana regime, the post of Prime Minister was held by the Ranas on an hereditary basis. At that time, whatever the rulers said was the law of the country. The first democratic elections that were supposed to be held immediately after the fall of the Rana regime in 1951 were held in 1959 only. The first Constitution was promulgated by the Rana regime in 1948 and the second in 1951. The third Constitution was promulgated in 1959 and the fourth in 1962. The fifth Constitution was promulgated in 1990 and the sixth in 2007. None of these constitutions were framed by the people's representatives. It was only in 2015, after an earlier, failed, Constituent Assembly, that a 601-member Constituent Assembly, elected by the peoples, produced a Constitution for Nepal. Nepali experience with representation draws primarily on this latest event.

At what points in the constitution building process was representation used in Nepal? In what institutions or forums did representation occur?

In principle, establishing the Constituent Assembly to write the constitution after the successful 2006 popular movement that overthrew 240-year old monarchy in Nepal was a good idea. But the three major parties – the former Communist Party of Nepal (Unified Marxist Leninist) (CPN-UML), the Communist Party of Nepal (Maoist Centre) (CPN-MC) and the Nepali Congress – unnecessarily fast tracked the constitution writing process, ignoring the democratic process and the need for taking all stakeholders – including those that represented minorities – into their confidence. A meeting of the Constituent Assembly held on 14 September 2015 endorsed 57 articles of the Revised Bill of the Constitution within a few hours. In another few hours of discussion, the Constituent Assembly cleared 176 additional articles. On 15 September 2015, Nepali Congress leader Pradip Giri objected to this fast-track process and sought time to speak in the Parliament but the Speaker, Subas Chandra Nembang, did not allow him to speak. If we count the total hours of discussion, we reach to the conclusion that the Constituent Assembly passed 230 articles in less than twelve hours. I believe that it was not a democratic process but a case of forced acceptance and forced rejection.

It also was breach of Article 70 of the Interim Constitution of Nepal 2007 which stated that all the articles and annexures of the new constitution shall be discussed and endorsed by two-thirds of the members present in the Constituent Assembly.

The motive behind adopting the fast track process of constitution-making was a power deal among the Nepali Congress, CPN-UML and CPN-MC. They had mutually agreed on promulgating the constitution under the Nepali Congress leadership, then handing over the Premiership to UML Chair KP Oli, the post of the President to Sushil Koirala from Nepali Congress and the post of Speaker and

powerful ministries such as the Home Ministry to CPN-MC. This power deal negatively affected the clauses of the Constitution.

On 9 September 2015, the United Democratic Madhesi Front, an alliance of four key Madhes-centred political parties, questioned the Constituent Assembly and boycotted the Constituent Assembly process. Although the ruling CPN-UML claims that the 2015 Constitution was endorsed by almost 90 percent of the Constituent Assembly members, the punitive whip that the CPN-UML and the Nepali Congress imposed on their Constituent Assembly members puts the fairness of the constitution-making process into doubt.

What effect did failures of representation have on the text of the Constitution?

The preamble is a mirror of the Constitution. The second paragraph of the preamble of the Constitution of Nepal accepted the glorification of various movements in the past such as the people's movements and the armed conflict. Surprisingly, however, the Constitution does not acknowledge the Madhes movements that led to the inclusion of federalism in the Constitution, to the characteristics of the new Nepali State and to the loss of Madhesi lives. Had the Madhes movements been recognised in the Constitution, it could have increased the acceptance of the Constitution in the Madhes.

The preamble also rejects citizens' rights of self-determination. The Constitution failed to recognise Nepal as a country of multiple nationalities. Although Madhesi and Janajati parties demanded more than one language of official communication, the major parties neglected their demands.

The new Constitution denies women the right of transmitting Nepali nationality to their children. The issue of affirmative action was a central one for the marginalised communities, but since the new Constitution increased the clusters (groups) eligible for reservation (from seven in the Interim Constitution to fifteen in the new Constitution) the new Constitution will certainly fail to ensure affirmative action for the marginalised communities. Even the historically dominant Khas Arya group, whose members occupy almost 80 percent of the jobs in the government sector, has been made eligible for reservations. Reservations for all means reservation for none.

As far as representation in the Parliament is concerned, the new Constitution reduced the percentage of proportional representation from 58 percent to 40 percent. This has reduced the percentage of marginalised communities in the Parliament. The new Constitution also gives eight representatives to all the provinces in the National Assembly, the Upper House of the Parliament which gives unfair advantage to the hill provinces. This means Province-2, which has a population of more than five million, will send eight members to the Upper House whereas Karnali province, which has a population of only 1.5 million, will also send eight members to the Upper House.

In principle and in practice, how did representatives relate to those they were representing?

There were divergent views within the major three parties (CPN-UML, CPN-MC and Nepali Congress), but the parties issued whips to their Constituent Assembly members telling them to follow the party's official line. Rights activists opposed the parties' decision to issue whips to their Constituent Assembly members, saying that constitution-making was a different process and that parties should not gag their lawmakers from expressing their free opinions on constitutional issues.

Nepal's new Constitution has granted one community, the Khas-Arya, status as a constitutional community, thus creating fear in the minds of other communities and leading them to disown the

statute. However, the ruling parties have been saying that the Constitution was framed with the support of an overwhelming majority and therefore no one should question it.

The new Constitution made by the people's representatives for the first time in Nepal's history had a chance to bring the marginalised communities on par with the rest of the communities especially the ruling hill elites, but the statute failed to address issues of social justice.

The Constitution was crafted completely by a handful of leaders of the big three parties—Nepali Congress, the then CPN-UML and the then CPN-MC behind closed doors in collusion with some political elites and technocrats and was presented in the Constituent Assembly for a ritual endorsement.

As far as state restructuring is concerned, the ruling parties structured the provinces in a way that divided the Madhes in five parts, contrary to the desire of Madhesi and Janajati forces. Tharu clusters were also split as their areas were mixed with the hill provinces.

The framers of the Constitution, particularly those representing the Nepali Congress and the CPN-UML, have never fully accepted the idea of Nepal as a federal state. Some leaders of the political parties did not favour giving rights to provinces and local bodies and were against forming a Constitutional Court which they believed would ultimately serve the interests of other federal actors.

Some of the Supreme Court judges also did not want to have a separate Constitutional Court, fearing the loss of cases that would otherwise fall under their jurisdiction. It would also diminish the Supreme Court's status of being the final court of record. In a meeting between the judges of the Supreme Court and top leaders, including the Chair of the Constitutional Political Dialogue and Consensus Committee, Baburam Bhattarai, and Prime Minister KP Sharma Oli, the judges formally opposed the formation of the Constitutional Court. Only one judge, Girish Chandra Lal, was in favour of establishing a Constitutional Court. Madhesi and Janajatis believe that a Constitutional Court is necessary to decide upon disputes between provinces and the central government and between different political units.

The constitutional provisions regarding the judiciary are unitary in nature. This goes against the spirit of past movements and the federal principles espoused elsewhere in the Constitution.

As far as language issue is concerned, the marginalised communities wanted the dominant language of the province to be the language of the province, but the new Constitution states that Nepali will remain the language of communication. The marginalised communities, particularly the Madhesi forces, wanted the central government to adopt a multilingual policy allowing other languages such as English and Hindi to be the official languages of the country but the Constitution makes Nepali the sole official language. Janajatis have long fought for ensuring secularism and the Constitution requires Nepal to be secular but it also provides special protection to the Sanatan traditions. This means that the provision of secularism has been severally undermined.

How legitimate were the representatives in the eyes of those they represented? What factors affected their legitimacy?

The 16-Point Agreement between the CPN-MC, Nepali Congress and CPN-UML paved the way for the major parties that controlled two thirds majority in the Constituent Assembly to adopt the fast track process of constitution-making. In the name of this fast-track process, legal and constitutional

principles were violated, that is, leaders (Madhesi and Tharu leaders in CPN-MC, CPN-UML and Nepali Congress) were forced to abide by their party's decision. They suspended some of the rules and procedures, curtailing the right of the people to have a voice on the content and fairness of the Constitution. The protests in the Terai districts continued and security forces were heavily mobilised in those districts to quell the protests. Even the Nepal Army was mobilised by misinterpreting the Local Administration Act. Finally, on 20 September 2015, when the Constitution was declared, most of the Terai districts were suffering under curfew and prohibitory orders.

Although, the leaders of the Nepali Congress and UML parties say that the Constitution was endorsed by an overwhelming majority of 90 percent of the Constituent Assembly members, the reality is that many lawmakers, including those from the Nepali Congress, CPN-MC and Madhesi parties, had strong reservations regarding many of its provisions. A majority of them were forced to vote for the Constitution by the top political leaders.

At the time of writing, Madhes-based parties, largely representing the Madhesi and Tharu communities across the Terai region, remain opposed to the current federal structure.

Madhesis protested for more than five months, blocking the Indian border entry points for three and a half months, to pressure the government to meet their demands. Instead of addressing their demands, the government injected the sentiment of ultra-nationalism among the people, portrayed the protests of Madhesis as an Indian-sponsored movement and accused India of interfering in domestic affairs of Nepal.

The dissatisfaction among Madhesis and Tharu people towards the seven-province federal model enshrined in the Constitution thus triggered protests across the Terai region. The State used security agencies to silence the voices of the marginalised communities. It seemed as though the ruling class did not take the reactions of the Madhes regarding the six or seven province model seriously.

The boundaries of the seven-province model set by the major political parties show that the provinces were gerrymandered to ensure that only members of Khas-Arya group could be chief ministers in six out of seven provinces.

The parties are tackling the demands of Madhesis and Janajati forces for a constitutional amendment in a highly grudging manner. This will further fuel the sense of alienation and anger in Madhes.

Madhesis, Tharus and other Janajatis can never have warm feelings towards this Constitution as it was promulgated after suppressing a democratic movement in the Madhes that resulted in the death of scores of innocent Madhesis. The legitimacy of the Constitution will always be in doubt.

Did the use of a Constituent Assembly, which also doubled as a Parliament, have an impact on the effectiveness of representation in Nepal?

Whips are normally not issued in a Constituent Assembly. The theory behind 'no whip in a Constituent Assembly' is the belief that a Constituent Assembly is different from a Parliament where decisions are made on the basis of majority votes. There is also a belief that every Constituent Assembly member carries the independent voice of the citizens whom they represent. A Constituent Assembly is also supposed to protect the interests of groups who have not sent representatives to the Constituent Assembly. These norms and obligations require a Constituent Assembly to frame the Constitution by forging maximum consensus.

Amendments registered by the Constituent Assembly members of the Federal Socialist Forum-Nepal, Terai Madhes Democratic Party, Sadbhavana Party, and Unified CPN-Maoist party were rejected by the majority. Major parties that commanded a two thirds majority issued whips to their Constituent Assembly members telling them to follow their parties' line while deciding on the contents of the Constitution. This was the main reason why the Madhesi, Janajati, Dalit and female Constituent Assembly members of the major parties endorsed their parties' line.

In the first Constituent Assembly, representatives from marginalised communities had meaningful participation and threatened to ignore the parties' whip in order to vote for a progressive Constitution that could better protect their interests. Unfortunately, however, the first Constituent Assembly was dissolved as the CPN-UML and the Nepali Congress acted behind the curtain to cause it to fail. The second Constituent Assembly produced a different electoral result, in which the Nepali Congress and the UML emerged as the first and second largest parties in the Constituent Assembly. CPN-MC, Madhesi, Janajati (Indigenous nationalities) and other marginalised groups failed to maintain the electoral strength that they had in the first Constituent Assembly. As the Nepali Congress and the UML commanded almost two thirds majority in the second Constituent Assembly, they were in hurry to promulgate the Constitution on the basis of a majority. These two parties had stalled the CPN-MC and Madhesi parties' attempt to decide the contents of the Constitution in the first Constituent Assembly, because they knew that the CPN-MC and Madhesi forces could easily get their agenda passed.

In the second Constituent Assembly, the signing of the 16-point agreement hijacked the Constitution as this agreement predetermined most of the key issues. Even though feedback and suggestions were collected from the public, they were also not incorporated into Constitution, because the 16-point agreement had already determined the agenda of the Constitution. Constituent Assembly members registered amendment proposals all of which were ignored by those crafting the final constitutional documents. After the 16-point agreement, the clauses of the Constitution were passed through a fast-track process. As described above, many of the lawmakers agreed to the clauses of the Constitution without getting a chance to read the contents. Thus the Constitution was framed by the second Constituent Assembly in a ritualistic manner. Lawmakers representing Madhesi, Janajatis (Indigenous nationalities), Dalits, women and other marginalised groups and communities did not have meaningful participation.

Had the public feedback and amendment proposals been accepted, the country would not have been forced into an impasse. Major political parties lost the opportunity because of the lust for power by a few technocrat lawyers and leaders.

People in Terai began expressing their dissatisfaction when the preliminary draft of the Constitution was brought through a 'fast track' process for suggestions and feedback in mid-August 2015.

In general, what were the positive aspects of the use of representation in Nepal? What were the negative aspects? And what were the implications for the success of the constitution building project?

The positive aspect of representation in the constitution-making process in Nepal was that it took the debate on the Constitution to the grassroots levels and increased peoples' awareness of the constitution making process.

The negative aspect of Nepal's experiences was that the major parties which did not want a progressive agenda to be endorsed by the Constituent Assembly were successful in causing the

dissolution of the first Constituent Assembly which had a higher number of members and forces pursuing a progressive agenda. In the second Constituent Assembly, the Nepali Congress and the UML, also known as the status quo, emerged as the largest force. These two forces became successful in coercing the CPN-MC to agree on their agenda. After the CPN-MC joined the Nepali Congress and the UML and signed the 16-point deal to fast track the constitution-making process, the Nepali Congress and the UML got a chance to tell the stakeholders and the international community that those opposing the contents of the Constitution were minority and that they had no justification to oppose a Constitution that had been ratified by almost 90 percent of the Constituent Assembly members.

Under the Constituent Assembly rules, lawmakers were supposed to be given seven days to peruse the draft before any other proceedings could start. The then Sadbhavana Party lawmaker Laxman Lal Karna raised this issue in Constituent Assembly, after which the Assembly amended the rule to replace the seven-day period with three days, significantly limiting the time for lawmakers to give their feedback on the draft.

The fast track method was ostensibly adopted to respond to the post-earthquake period. Nevertheless, the timeframe was insufficient for public feedback and suggestions. It was clearly in breach of rule of law principles and democratic values.

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