Annual Review of Constitution-Building Processes: 2015

3. Forces and mechanisms in plurinational constitution-building in South Asia

Sumit Bisarya

International IDEA resources on constitution-building processes

© 2016 International Institute for Democracy and Electoral Assistance

This is an extract from *Annual Review of Constitution-Building Processes: 2015* (Stockholm: International IDEA, 2016)

Download the full publication from our website:

‹http://www.idea.int/publications/catalogue/annual-review-constitution-building-processes-2015›

International IDEA
Strömsborg
SE-103 34, STOCKHOLM
SWEDEN
Tel: +46 8 698 37 00, fax: +46 8 20 24 22
Email: info@idea.int, website: www.idea.int

3. Forces and mechanisms in plurinational constitution-building in South Asia

Sumit Bisarya

In 2015, constitution-building in South Asia was dominated by the promulgation of the Constitution of Nepal, after two constituent assemblies and seven long years, and the launch of a new constitution-building process in Sri Lanka. Notable constitution-building events certainly took place in neighbouring countries, such as the 21st amendment to the Constitution of Pakistan—which enabled the establishment of military courts to legally try civilians accused of terror-related offences without due process constitutional guarantees (Siddiqi 2015)—and the Indian Supreme Court striking down a constitutional amendment seeking to significantly reform the judicial appointments system (Khosla 2015). However, this chapter focuses on the processes in Nepal and Sri Lanka, not only because they were of paramount importance in their respective nations, but also because they both deal with a similar issue—the task of finding constitutional arrangements to accommodate conflicting groups that perceive themselves as different nations living in the same state.

Nepal and Sri Lanka are relatively small countries in terms of geography, with populations ranging between 20 and 30 million people. While both are characterized by strong ethnic group identities, the nature of the cleavages in each country—that is, geographically concentrated populations with politically salient differences—differs considerably. In Nepal the 2011 national census identified 126 castes or ethnic groups, and 123 languages were reported as inhabitants' mother tongues. From a constitutional design perspective, Nepal is very much a country of minorities. The largest caste or ethnic group, the Chhetri, represents only 16 per cent of the population, and the most widely spoken language, Nepali, is reported as the mother tongue for only 44.6 per cent of the population (National Planning Commission of Nepal 2011). In contrast, Sri Lanka's diverse society is complex in its cross-cutting and numerous identities, yet there is a strong majority of Sinhalese (74.9 per cent of the population), and Tamils are the largest minority group, at 11.1 per cent (Sri Lankan Department of Census and Statistics 2012).

While the demographics and constitutional processes in these countries are starkly different, the processes are similar in the sense that demands for constitutional designs that provide for territorial autonomy are couched not in the language of minority cultural groups ceding concessions from a majority, but rather as a challenge to the 'perception of the state as a unitary national site within which only one process of nation-building can take place' (Tierney 2008: 441–42). Central to the difficulties of reaching a constitutional settlement in both cases has been the response by those in power to demands for territorial devolution.

In both Nepal and Sri Lanka, dominant groups have preferred a constitution-building process that views the inclusion of minority groups as a gracious concession or accommodation, despite the fact that such an approach cannot meet minority groups' expectations for devolution. Rather, the success of the constitutional settlements depends on a constitution-building process that is envisaged as a joint endeavour in which different nations approach a state-building project as equal partners. Furthermore, given that constitution-building negotiations in both countries take place between elected representatives, the difficulties in arriving at an agreement that adequately recognizes the plurinational identity of the state, and the demands accompanying such recognition, are rooted in the different incentives and constraints placed on these negotiators as they seek to respond to the demands of their constituents.

In recent years, extensive effort and time have been invested in the development of the historical, legal and sociological aspects of plurinational constitution-building in both Nepal and Sri Lanka (see e.g. Lawoti 2015; Welikala 2015e). While much of this work is important in its innovative redefinition of the debate around plurinationalism and governance, and its reconceptualization of constitution-building outside the context of the liberal Western homogenous nation state, it often approaches the argument from a normative perspective—as if, once both sides can be convinced of the true nature and essence of plurinational state-building, a federal deal will somehow arise.[1]

This chapter focuses on federal politics in the two countries' constitution-building processes during 2015, based on the understanding that moving towards federalism is predicated on 'a political will designed to force a particular kind of constitutional bargain based upon elite negotiations and compromises' (Burgess 2012: 12) and an examination of the democratic forces that shape—or hinder—such a bargain. It briefly describes the political forces and mechanisms involved in constitution-making, and discusses how they have affected the chances of finding a stable solution to questions of
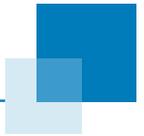
plurinational constitution-building in Nepal and Sri Lanka. It concludes by discussing the difficulties of consensual constitution-building in plurinational societies.

Forces and mechanisms in constitution-making

Much of the literature on federal theory focuses on sociologically rooted concepts of autonomy, community, identity and recognition. However, an examination of the processes taking place in Nepal and Sri Lanka offer a stark reminder that the creation of a federal constitution requires that the political will and circumstances are conducive to efforts to 'negotiate, bargain and compromise about the process of state and nation-building' (Burgess 2012).

The politics of these two constitution-making processes have tightly constrained the parameters of how the new constitutions respond to demands from the territorially concentrated populations in each country. The following section recounts the two cases through the lens of the upstream and downstream constraints on the constitution-making body. Elster (1995) uses the terms 'upstream constraints' and 'downstream constraints' to illustrate that no constitution-making body is ever completely sovereign and free in its capacity to make decisions.

In order for such a body to be established, it first needs to be convened, and its members need to be selected. The ways in which these processes are conducted—and, in particular, by whom—help define the universe of possible outcomes that the constitution-making body is likely to produce, and are referred to as upstream constraints. Further, if individual members (or groups of members) of the constitution-making body have a specific mandate, this may constrain the possible actions of the body as a whole. Downstream constraints refer to the mode of ratification, and the fact that the constitution-making body must pursue options that will be acceptable to those with the power of ratification.

These forces and mechanisms are complicated by the plurinational nature of the state-restructuring debates in both Nepal and Sri Lanka. Any analysis of their constitution-building processes must be undertaken through this dual lens of existential group identity claims and parallel nation-building processes, which are then channelled through political mechanisms. These mechanisms constrain the possible outcomes of the constitution-building process in specific ways, sometimes exerting pressure in opposite directions.

The promulgation of Nepal's Constitution

Background

On 20 September 2015, Nepal's second Constituent Assembly (CA-II) passed the country's seventh constitution.[2] As this was the conclusion of a lengthy peace process that began in 2006 after a decade of conflict (International IDEA 2015), one might expect some degree of national celebration. Instead, the promulgation was met with protests, blockades and violence, taking the country to the brink of economic collapse.

There were a number of issues on the reform agenda of the constitution-building process, the most contentious of which was the dispersal of power away from the traditional elites. Nepal has been governed by the so-called Caste Hill Hindu Elite (CHHE)—consisting of the hill Bahun, Chhetri, Thakuri and Sanyasi groups—for its entire history, despite the fact that, at the time of the recent conflict, these groups comprised only 31 per cent of the country's population (Lawoti 2015). The majority of the population is represented by a complex mix of overlapping nationalities and identities—including Dalit, indigenous, Madhesi and Muslim groups—which have been historically disempowered and marginalized by the promotion of a dominant 'national Nepali' identity that denied the presence and importance of differing identities and nationalities within the Nepali state.

From an early stage in the constitution-building process, demands to share power and recognize diversity centred on federalizing Nepal. The requirement that the country become a 'progressive, democratic federation [emphasis added]' was inserted into the 2007 Interim Constitution at the insistence of the Madhesi parties (Lawoti 2015). The transition from a unitary to a federal state involved a number of other contentious issues, including the powers allocated to each level of government and the number and boundaries of the proposed substates.

Following a massive and devastating earthquake on 25 April 2015, which claimed over 8,000 lives and made hundreds of thousands homeless, the parties in the government coalition—dominated by the two largest political parties, the Nepal Congress (NC) and the Communist Party of Nepal–Unified Marxist Leninist (CPN–UML), and also including the smaller Madhesi Janadhikar Forum–Democracy (MJF–D)—pursued a fast-track process to finalize the Constitution. This greatly limited any opportunities for consultation, negotiation or general public participation. The process was based on a 16-point agreement between the parties, which included an eight-state federation but deferred the decision regarding federal boundaries to a

post-promulgation process (Shakya 2015). When the Supreme Court ruled that the Constitution had to define the federal map, the parties released a map of six states, which was later increased to seven following significant protests in the western part of the country. As the delineation made it unlikely that any state could be controlled by a Madhesi majority—a key demand of most Madhesi parties and movements—protests continued to intensify throughout the second half of the year.

Forces and mechanisms

To a significant extent, the upstream constraints exerted on CA-II in passing the new Constitution in 2015 were rooted in the experience of the first Constituent Assembly (CA-I, 2008–12). For example, there were two separate convening processes: the convening of the constitution-building process as a whole, and the convening of CA-II.

The convener of the constitution-building process as a whole was, arguably, the Comprehensive Peace Agreement (CPA) signed on 21 November 2006—which ended the decade-long violent Maoist-led insurgency—rather than any specific individual, group or institution.[3] As such, it is important to understand the constitution-building and peace processes as belonging to the same overall political settlement. A broad range of groups signed up as parties to the CPA: on one side, there was the seven-party alliance in government (including the NC and CPN-UML), while on the other was the Maoist leadership, which incorporated the Madhesi and Dalit groups' demands for inclusion. The constitution-building process was therefore constrained by the peace process in the sense that it needed to reflect a consensus on the restructuring of the state along more inclusive lines or risk a return to conflict. Given that CA-II was established due to the failure of CA-I to produce a constitution, there was significant pressure on CA-II to deliver a draft without significant further delay.

With regards to upstream constraints, due to the selection of CA-II, the composition of its membership was determined by the 2013 elections, which saw a significant swing back to the larger political parties—with 601 seats in Parliament, the NC won a 196-seat plurality, while the CPN–UML followed closely behind with 175 seats. This meant that two parties dominated by a CHHE leadership could form a coalition government (albeit in an uneasy coalition), and that they would only require a few smaller parties to join them to form a constitution-making majority of 401. With regards to downstream constraints, CA-II had the power to adopt the Constitution by a two-thirds majority without recourse to a referendum. However, regular strikes, protests and popular agitation outside the assembly from Madhesi, Maoist and other

groups served as a reminder that any constitution would need to respond to their long-articulated demands.

Thus, while the events that gave rise to the constitution-making process as a whole, as well as the regular street protests, clearly predicated peace and acceptance of the constitution as part of a consensus-driven process and an inclusive new political order, the convening and selection of CA-II constrained it in the opposite direction, pushing the NC and CPN–UML to drive the process, and to do so without significant delay. Substantively, these constraints affected a number of issues—from women's rights to the system of government—but perhaps the most contentious was the number and boundaries of substates. The difference in negotiating positions can be roughly summarized as follows.

On the one hand, disadvantaged ethnic groups, particularly Madhesi groups, argued for a larger number of states, which would be defined along ethnic lines and would include one state in the Terai plain region, which spans the southern part of the country (and where Madhesis would form a majority). On the other hand, the CHHE groups sought to limit the number of states, use economic or geographic factors for their delineation, and divide the Terai vertically rather than horizontally. The combined upstream constraints caused by the selection of CA-II (which resulted in a CHHE majority), and the need to produce a constitution without delay, provided upstream constraints tending towards the latter position. At the same time, the need to produce a constitution that would meet the expectations of the mobilized masses outside CA-II, as well as the international community, produced informal downstream constraints in the opposite direction.

Denouement

Regardless of the demand for CA-II to produce a constitution quickly, contention over the number and boundaries of states—as well as the electoral system, the system of government and the question of whether to include a specialized constitutional court—continued unresolved into 2015. However, the immense physical destruction caused by the April 2015 earthquake also had a significant effect in terms of tipping the balance between the competing constraints discussed above.

Generally speaking, a national crisis is likely to lead to more cooperative bargaining (Negretto 2013), but in the case of Nepal the earthquake had the opposite effect, for two reasons. First, it meant that donors—already fatigued with delays in the political transition process—had to reallocate funds to humanitarian aid. This loosened the external donor-driven constraint for

consensus over the constitutional order in favour of a resolution to the long-delayed constitution-making process, thus driving the government to complete the constitution to earn support from donors reluctant to trust them with significant funds for disaster relief. Second, the government's immediate reaction to the earthquake was heavily criticized as being woefully ineffectual and inadequate (ICG 2016a). Thus, under fire from all sides, the government sought to deliver on the constitution in order to regain public support, and to avoid taking further blame for delays that it saw as being caused by intransigence among the Madhesi parties, despite the democratic mandate given to the government in the 2013 elections.

In June, the four largest parties—the NC, the CPN–UML, the Unified Communist Party of Nepal–Maoist (UCPN–M) and the MJF–D— announced a 16-point agreement that would pave the way for the final constitutional text.[4] Included in this pact was an agreement on a federal set-up of eight states, the boundaries of which would be decided *after* the promulgation of the Constitution, by a two-thirds majority of Parliament and following recommendations from a federal commission. Following a Supreme Court ruling that any new constitution must define the state boundaries, the parties to the 16-point agreement released a map of six states (with no explanation of why this was reduced from eight) that divided the Terai region across all six states in such a way that the Madhesi population would not have a majority in any state.

Almost immediately, protests erupted in the Terai, resulting in the deaths of both protestors and policemen, a national economic crisis caused by a blockade of imports from bordering India, and the boycotting of CA-II by all Madhesi parties—including the MJF–D, which was party to the 16-point agreement (ICG 2016a). Rather than seek to mollify the protestors, the four-party government coalition added fuel to the fire by creating a seventh state in the far west of the country to respond to the demands of people living in the hill regions, while continuing to ignore the demands of those in the Terai. This sparked violent confrontations between the police and Tharu groups residing in the western plains around Tikapur, which resulted in the deaths of seven police officers and the infant child of one officer, and caused the deployment of the army for the first time since the end of the Maoist uprising (ICG 2016a).

The NC and the CPN–UML refused to modify their positions and pushed ahead with the passage of the Constitution on 20 September. They could point to the fact that a democratically elected constituent assembly had voted for their draft by an overwhelming majority of 89 per cent. Despite this, Madhesi groups and the broader population in the Terai continued to voice

their dissent through protests and the import blockade. This dissonance between the political landscape and the societal expression of group identity has led to an impasse, but given the instability inherent in Nepali politics, and the current unlikely coalition between the CPN–UML and the UCPN–M, further developments are certainly likely. The only question is in which direction these developments will take Nepal.

The constitution-building process in Sri Lanka

Background

In late 2014, Sri Lankan President Mahinda Rajapaksa announced that early presidential elections would be held in January 2015, and that he would run for a third term, a situation made possible by the 2010 repeal of term limits in the controversial 18th amendment to the country's 1978 Constitution.[5] If the call for early elections was meant to destabilize the opposition and pave the way for a straightforward extension of Rajapaksa's rule, it did not turn out as planned.

In November 2014 the United National Party (UNP) announced it would support Maithripala Sirisena as the opposition's candidate to challenge Rajapaksa. Sirisena was formerly the general secretary of Rajapaksa's Sri Lanka Freedom Party (SLFP) and the health minister in Rajapaksa's government, and his defection to the opposition was followed by several other high-profile SLFP members. Sirisena won the January 2015 elections after a campaign in which he promised to reform the Constitution, including the abolition of the executive presidency—an institution of the 1978 Constitution that had not been present in Sri Lanka's previous parliamentary constitutional history (Welikala 2015a). On taking office, Sirisena appointed Ranil Wickremesinghe, then-leader of the UNP, as prime minister of a minority government.

The fragile Sirisena–Wickremesinghe coalition passed a constitutional amendment in April 2015 that stripped away some of the hyper-presidential excesses grafted onto the Constitution by the 18th amendment under Rajapaksa. The April 2015 amendment reinstated term limits and removed the president's discretionary power to dissolve Parliament. Sirisena managed to cobble together enough SLFP votes to reach a two-thirds majority—which, given the historical enmity between Sri Lanka's two major opposing parties, was no small achievement. However, in order to progress with further constitutional reforms, it was felt the government needed to turn to the electorate for a fresh mandate; parliamentary elections were held in August 2015 (Welikala 2015b).
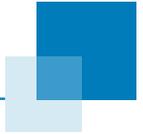
The unitary state

Tamil nationalist aspirations for increased autonomy extend back to at least the 19th century, if not earlier, but they were significantly amplified as a consistent political demand with the passage of the Sinhala Only Act of 1956, which proclaimed Sinhalese as the country's only official language.[6] Since that time, a Sinhala nationalist political majority has, with only sporadic attempts at finding a political solution, consistently ignored claims for increased autonomy from the Tamil minority, including in constitution-building processes in 1972 and 1978. In 1972, the Constitution proclaimed Sri Lanka to be a 'unitary state', thus explicitly denying any claims to plurinationalism and divided spheres of sovereignty. This clause was reproduced in the 1978 Constitution and was also included in a list of entrenched articles whose amendment would require a referendum (Edrisinha 2015).

As Tamil demands continued to fall on deaf ears, they became substantively stronger—shifting from greater power sharing at the centre to devolution, federalism and finally secession—and more militant, until the civil war that ended in 2009 with the defeat of the Liberation Tigers of Tamil Eelam by government forces. Since that time, the subject of a political solution to deal with the continuing disenchantment of much of the Tamil population with their current constitutional lot has not been broached.

The current constitution-making process: forces and mechanisms

In the elections of August 2015, Sirisena's electoral campaign platform made it clear that Sri Lanka was electing a Parliament to oversee further constitutional reforms, and that these would continue the move away from an executive presidency started by the 19th amendment and engage in the long-standing 'national problem' (i.e. the question of territorial devolution of power). Given this, political parties included in their campaign platforms their positions on constitutional reform. Under the heading 'Ensuring Freedom for All', the UNP-led coalition, the United National Front for Good Governance (UNFGG), pledged to pursue a new constitution including measures for 'maximum devolution within a unitary state' (Welikala 2015c). The reaffirmation of the unitary state sent a clear signal to reassure Sinhala–Buddhist nationalists that their vision of Sri Lanka as a Sinhala nation state would not be changed. At the same time, the Tamil National Alliance (TNA), which won more seats in the elections than any other Tamil party, pledged to pursue 'a federal power-sharing arrangement based on the recognition of the Tamil people's right to self-determination', at least partly in order to subdue criticism from smaller, but more vocally nationalist, Tamil parties (ICG 2016b: 2).

Elected on the basis of these campaign promises, the new 'constitutional assembly' is therefore subject to clashing upstream constraints in terms of conflicting mandates that are made all the more difficult to reconcile given the potential spoiler role of the extreme wings on both sides. Yet the fact that the Constitution must be passed by referendum acts as a looming downstream constraint on the actions of all negotiating parties.

The UNFGG won a plurality in the elections, gaining 106 of a total of 225 seats. The United People's Freedom Alliance (UPFA), a coalition led by Sirisena and the SLFP, followed with 95 seats. Soon after the elections the SLFP and UNP signed a coalition agreement to form a national government for a period of two years, with Wickremesinghe continuing as prime minister. As part of the agreement, they agreed to work together on issues of constitutional reform—while conspicuously avoiding any specifics on the 'unitary versus federal' issue—and stated that Parliament would negotiate and draft the new text by transforming itself into a constitutional assembly (Welikala 2015d). With the two largest parties joining forces in government, the TNA—the third-largest party in Parliament—was recognized as the official parliamentary opposition. This has allowed for important and regular channels of dialogue, for example between the TNA leader, R. Sampanthan, and Prime Minister Wickremesinghe, and through the TNA's automatic ex officio inclusion in the Steering Committee of the Constitutional Assembly.

While the Constitutional Assembly is now considering issues ranging across the entire breadth of the constitutional agenda, including the executive presidency, the electoral system, the Bill of Rights and judicial review, this chapter focuses on the general issue of the devolution of power. Negotiating a path for consensus among all parties on this issue within the upstream and downstream constraints described briefly above will require parties to find the smallest of overlaps between multiple Venn diagram circles.

On the Tamil side, Sampanthan and the TNA must walk a precarious political tightrope: the devolution deal must offer enough to the Tamil population to be seen as a success, but he cannot afford to be too vocal in his demands, which Sinhala nationalists could use to validate their position that any dialogue regarding devolution is a recipe for instability. Indeed, the TNA has continued to assuage government concerns by emphasizing the party's rejection of talk of separatism, stressing instead a common goal of a 'united and undivided' Sri Lanka (ICG 2016b: 22).

On the government side, the first struggle is within the SLFP. First, former President Rajapaksa seeks to maximize the temptation for defections from Sirisena by labelling cross-aisle collaboration with the party's historic rivals—
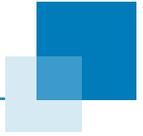
the UNP—and open negotiations with Tamil leaders as signs of weakness, in contrast to his own strong form of leadership. Second, the UNP–SLFP coalition must find sufficient space for consensus with the TNA, while not conceding so much ground that Sinhala nationalist rhetoric will drown the proposal at referendum. Even deleting the term 'unitary state' from article 6 of the Constitution, regardless of any substantive changes in the constitutional allocation of public power, may be sufficient for Rajapaksa and his allies to mobilize enough voters to ensure the referendum fails.

Another constraining circle in this Venn diagram of constitutional preferences is provided by Muslims in the Eastern province, who make up some 40 per cent of the population. Their support of the constitutional solution will be critical, and must assuage their concerns that any devolution of power to Tamils in the Northern and Eastern provinces could harm the status of Muslims or dilute their political influence. This factor is particularly relevant when negotiating any potential merger of the Northern and Eastern provinces, which has been a long-standing demand of Tamil nationalists, who see the whole region as the Tamil homeland (ICG 2016b: 2) and recognize the increased political power that such a merger would provide. Such a merger would greatly dilute the political voice of the Muslim population and would therefore be likely to swing a significant number of Muslim votes against the proposed constitution.

Finally, the potential downstream constraint of the provincial councils must also be considered. Under the current Constitution, provincial councils must be consulted on any legislation that affects their powers. While the Constitutional Assembly will be able to overrule any objections by passing the bill with a two-thirds supermajority, the political cost of overruling provincial councils and seeing their grievances aired in public will certainly affect votes at the eventual referendum. As Welikala notes, the role of the provincial councils is further complicated by the political landscape: some councils are under the control of SLFP majorities (which may not be in tune with President Sirisena's leadership), while others, most problematically the Northern Provincial Council, fall 'under the sway' of a Tamil nationalist leader who may use this opportunity to pick a fight with the TNA by rejecting its proposed constitutional settlement (Welikala 2015d).

Threading the political needle to find a deal among these competing interests and constraints should, however, be made easier by the broad scope of possible issues on the reform agenda. Accompanying a package of devolutionary reform with the abolition—or at least a very significant disempowerment—of the executive presidency, along with increased representation at the centre through the establishment of a second chamber and reformed electoral laws,

may be enough to allow Tamil leaders to convince their constituents that this deal is too good to turn down, and unlikely to be made available again in the near future. However, whether such a proposal will be possible from the government side will—as discussed above—require a great deal of intricate political manoeuvring in order to bring on board the SLFP and negate the influence of Sinhala nationalist propaganda during the referendum process.

Cognizant of the fragility of the SLFP–UNP coalition, as well as SLFP party discipline under Sirisena and the TNA's position in seeking compromise, and understanding that the alignment of the current political constellation with three party leaders keen on finding a consensus deal is unlikely to recur in the near future, the government has set an ambitious timeline for the constitution-building process. This timeline will, no doubt, be subject to delays, but the hope is that it will concentrate energies on finding a deal before one or more of the components of the political alliance falls apart.

Conclusion

Events in Nepal and Sri Lanka reiterate the complicated politics of constitution-building in plurinational contexts. Designing a process through which societal interests can be channelled into political negotiation becomes increasingly difficult when segments of society do not feel that their voice can be accurately represented by the mere weight of population, but rather see themselves as equal partners in the constitution-building process. Further, traditional protections of individual rights as a means to guard against the tyranny of the majority are not sufficient in the plurinational context, when issues of recognition and the very identity of the state are at stake. As a result of this incongruity between the composition of a constitution-making body based on a representation of the population at large (as a collection of individuals) and the self-identification of segments of that population as 'a people', the constitution that *can* be created by the constitution-making body is often not the constitution that *should* be made, in terms of providing a stable, long-term constitutional settlement.
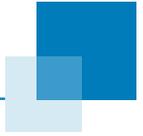
Notes

1   Unless specified otherwise, in this chapter 'federal' refers to a general concept of shared rule and self-rule that can take many different institutional forms, including special autonomy, federalism, devolution or decentralization.

2   Constitution of Nepal 2015 (official English translation by the Ministry of Law, Justice and Parliamentary Affairs of Nepal), <http://www.constitutionnet.org/files/nepal_constituton_2015_final_english_version_23_sep_2015.pdf>.

3   The full text of the 2006 CPA is available on the United Nations' Peacemaker website, <http://peacemaker.un.org/nepal-comprehensiveagreement2006>.

4   For an unofficial translation of the 16-point agreement, see <http://www.satp.org/satporgtp/countries/nepal/document/papers/16-point_Agreement.htm>.

5   Constitution of the Democratic Socialist Republic of Sri Lanka (as amended up to 15 May 2015), <https://www.parliament.lk/files/pdf/constitution.pdf>.

6   Official Language Act (No. 33 of 1956), <http://www.commonlii.org/lk/legis/num_act/ola33o1956180/>.

References

Burgess, M., *In Search of the Federal Spirit* (Oxford: Oxford University Press, 2012)

Edrisinha, R., 'Debating federalism in Sri Lanka and Nepal', in M. Tushnet and M. Khosla (eds), *Unstable Constitutionalism: Laws and Politics in South Asia* (Cambridge: Cambridge University Press, 2015)

Elster, J., 'Forces and mechanisms in the constitution-making process', *Duke Law Journal*, 45 (1995), pp. 364–96

International Crisis Group (ICG), *Nepal's Divisive New Constitution: An Existential Crisis*, Asia Report no. 276 (Brussels: ICG, 2016a)

—, *Sri Lanka: Jumpstarting the Reform Process*, Asia Report no. 278 (Brussels: ICG, 2016b)

International IDEA, *Nepal's Constitution-Building Process, 2006–2015: Progress, Challenges and the Contributions of the International Community* (Stockholm: International IDEA, 2015)

Khosla, M., 'Pick and choose: judicial appointments in India', ConstitutionNet, 30 October 2015, <http://www.constitutionnet.org/news/pick-and-choose-judicial-appointments-india>, accessed 16 August 2016

Lawoti, M., 'Competing nationhood and constitutional instability: representation, regime and resistance in Nepal', in M. Tushnet and M. Khosla (eds), *Unstable Constitutionalism: Laws and Politics in South Asia* (Cambridge: Cambridge University Press, 2015)

National Planning Commission of Nepal, *Nepal Population and Housing Census: National Report* (Kathmandu: National Planning Commission of Nepal, 2011)

Negretto, G., *Making Constitutions: Presidents, Parties and Institutional Choice in Latin America* (Cambridge: Cambridge University Press, 2013)

Shakya, P., 'Nepal's constitutional deal: significant milestone but short of a breakthrough', ConstitutionNet, 12 June 2015, <http://www.constitutionnet.org/news/nepals-constitutional-deal-significant-milestone-short-breakthrough>, accessed 16 August 2016

Siddiqi, S., 'On massacres of children and constitutions', ConstitutionNet, 15 January 2015, <http://www.constitutionnet.org/news/pakistan-massacres-children-and-constitutions>, accessed 16 August 2016

Sri Lankan Department of Census and Statistics, *Census of Population and Housing: Final Report* (Colombo: Sri Lankan Department of Census and Statistics, 2012)

Tierney, S., 'Giving with one hand: Scottish devolution within a unitary state', in S. Choudhry (ed.), *Constitutional Design in Divided Societies* (New York: Oxford University Press, 2008)

Welikala, A., 'From presidential to parliamentary state – a mid-term look at Sri Lanka's constitutional reform process', ConstitutionNet, 31 March 2015a, <http://www.constitutionnet.org/news/presidential-parliamentary-state-midterm-look-sri-lankas-constitutional-reform-process>, accessed 16 August 2016

—, 'Sri Lanka: the nineteenth amendment to the constitution, from start to finish', ConstitutionNet, 26 May 2015b, <http://www.constitutionnet.org/news/sri-lanka-nineteenth-amendment-constitution-start-finish>, accessed 10 July 2016

—, 'Sri Lanka after the elections: challenges and opportunities for further reform', ConstitutionNet, 31 August 2015c, <http://www.constitutionnet.org/news/sri-lanka-after-elections-challenges-and-opportunities-further-reform>, accessed 16 August 2016

—'Constitutional and governance reforms in Sri Lanka: the road to the promised land', ConstitutionNet, 30 November 2015d, <http://www.constitutionnet.org/news/constitutional-and-governance-reforms-sri-lanka-road-promised-land>, accessed 20 July 2016

—, 'Constitutional Form and Reform in Postwar Sri Lanka: Towards a Plurinational Understanding', in M. Tushnet and M. Khosla (eds), *Unstable Constitutionalism: Law and Politics in South Asia* (Cambridge: Cambridge University Press, 2015e)

About the author

Sumit Bisarya is the Senior Programme Manager with the Constitution-Building Processes Programme at International IDEA.

About International IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization that supports sustainable democracy worldwide. International IDEA's mission is to support sustainable democratic change by providing comparative knowledge, assisting in democratic reform, and influencing policies and politics.

What does International IDEA do?

In the fields of elections, constitution-building, political parties, gender in democracy and women's political empowerment, democracy self-assessments, and democracy and development, the institute undertakes work in three activity areas:

1. providing comparative knowledge derived from practical experience on democracy-building processes from diverse contexts around the world;

2. assisting political actors in reforming democratic institutions and processes, and engaging in political processes when invited to do so; and

3. influencing democracy-building policies through the provision of comparative knowledge resources and assistance to political actors.

Where does International IDEA work?

International IDEA works worldwide. Based in Stockholm, it has offices in Africa, the Asia-Pacific, and Latin America and the Caribbean. International IDEA is a Permanent Observer to the United Nations.

<http://www.idea.int>