Creating the New Constitution: A Guide for Nepali Citizens

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Preface

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization that supports sustainable democratic change worldwide, including support to the constitution-making process. Since 2006, and on the basis of requests by national parties including political parties and more recently the Constituent Assembly, International IDEA has been providing support to the constitution-making process in Nepal. This support has focused mainly on the provisioning of resource materials and the convening of dialogues among national political actors on topics of key importance to the constitutional process.

International IDEA will continue supporting the constitution-making process by opening avenues through which a broad cross-section of Nepali society can come together to discuss a host of constitutional issues. International IDEA will provide access to international expertise through its own comparative publications and through its networks of international experts.

Following *Jana Andolan* II, much debate has arisen on the Nepali constitution. Hence, *Creating the New Constitution: A Guide for Nepali Citizens* comes on the heels of much rich discussion and research into contemporary issues that Nepali constitutional experts have had to grapple with.

The publications provides a brief history of past constitutions in Nepal. It includes a more detailed examination of the substance of the 1990 Constitution, analyzing its strengths and weaknesses, as a means to provide a better understanding of the current issues and debates. It also identifies proposals and controversies surrounding political reform and provides cross-reference to the experiences of other countries relevant to the current process in Nepal.

The publication does not offer particular solutions; rather it provides an analysis of different options that emerge when making a new constitution. It aims to encourage full participation in the process of constitution making by introducing readers to constitutionalism, the roles of constitutions, and to key constitutional concepts, relating the latter to the current issues of political reform.

Vidar Helgesen
Secretary General
August 2008

Acknowledgements

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Contents

Acronyms and Abbreviations

APF	Armed Police Force
BVNC	Back to the Village National Campaign
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Convention for the Elimination of All Forms of Racial Discrimination
CPN	Communist Party of Nepal
CPN (Maoist)	Communist Party of Nepal, Maoist
CPN (UML)	Communist Party of Nepal, United Marxist Leninist
CRC	Convention on the Rights of the Child
EC	Election Commission
FPTP	First Past the Post
HOR	House of Representatives
IC	Interim Constitution
ICCPR	International Covenant on Civic and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
IGP	Inspector General of Police
ILO	International Labour Organization
LS	List System
MMP	Mixed Member Proportional
NA	National Assembly
NC	Nepali Congress
NDC	National Defence Council
PIL	Public Interest Litigation
PR	Proportional Representation
RPP	Rastriya Prajatantra Party
SPA	Seven-Party Alliance
STV	Single Transferable Vote
TADO	Terrorist and Disruptive Activities Ordinance
UN	United Nations
UDHR	Universal Declaration of Human Rights
UNESCO	United Nations Educational, Scientific, and Cultural Organization
UNMIN	United Nations Mission in Nepal

CHAPTER 1

CHAPTER 1

Form and Purposes of a Constitution

Deciding the Nature of the New Nepali Constitution

It may be useful to think of a constitution as an agreement among a group of people who have decided to live together and form a political community. Today, the people of Nepal, having decided to remain together, have to create a new constitution that will lay down the rules of governance. When creating the new constitution, the people will have to work out the answers to questions such as the following:

- Who will be the leaders of the community? Will they be chosen by the people? Will the offspring of previous leaders become the next leaders? Will the leaders be leaders for life or for only some defined and shorter period?
- What are the purposes of having leaders? What powers should the people give to the leaders to carry out those purposes? Should the people give up all their power to the leaders or should they keep some for themselves, for example, powers that concern the individual or the family? Will there be different kinds of leaders, with different functions?
- If only limited powers are given to the leaders, how will the community ensure that the leaders stay within those powers?
- If people are not happy with the leaders, can the leaders be removed? If so, how?
- If a person or a group breaks the agreement that the people have made, what should be done to them?
- Who will settle disputes among the people or between the people and the government? The leaders? Some independent body?

- What arrangements, if any, will the community make to look after the weak and the disabled? Are the weak and the disabled the responsibility of the family or of the whole community?
- How will the expenses incurred by the leaders for running the affairs of the community be met? Through a contribution from the people? From all the people? From some of the people?
- Who decides how the resources of the community are to be distributed or used?
- Can the constitution be amended, and if so, who should make the amendments? The leaders? The people?

How and Why Constitutions Were Developed around the World

An issue that may not be discussed during the drafting of constitutions, but one which underlies all the discussions and negotiations relevant to the making of constitutions, is the issue of the values that a society has. Does the society in question value women as much as it values men? Does the society have a shared religious belief? Is social harmony more important than efficiency? While a constitution may not say anything about these values, a careful reader of any written constitution can see what many of the values of the society are, and most modern constitutions say something explicit about these values.

In most instances, societies do not come together as a result of agreement. Most of today's states were created when larger and stronger states invaded smaller and weaker territories and forcibly included the smaller entities in the bigger states. Many present states came into existence as colonies, often bringing within common borders communities or even states that were previously separate. The people had no say in these processes. To consolidate the rule of the invaders, constitutions were imposed on the people. Until recently, constitutions were 'granted' by kings or military commanders or a small section of the elites. Constitutions created under such circumstances cannot be called social contracts.

Today, however, most constitutions are made through processes in which the people participate directly. They are the result of negotiations among political parties, members of key sectors of society, members of linguistic or ethnic communities, and other stakeholders. Often, these negotiations and participatory processes are conducted through a constituent assembly. It is argued that it is only through this broad participation that competing interests can be balanced and a basis for national unity and prosperity established. Furthermore, it has been argued that a fair process of constitution making increases people's respect for the constitution and their willingness to abide by its terms.

Earlier constitutions tended to assume the existence of a common nation and made no provision for ethnic, religious, or linguistic differences. In many countries, this approach to creating constitutions often resulted in the dominance of the majority community over the others, and these countries are now facing problems because there is no feeling of togetherness among its communities. Such countries, when making a new constitution, will feel especially strongly the need for a participatory process. Today's constitutions do not assume the existence of a common political nation, but instead expressly acknowledge the existence of communities with different languages, religions, and histories. Today's constitutions try to deal with these differences in a constructive way so that communities feel positively about belonging to a common nation.

In many parts of the world, especially but not only in the former colonies, new thinking was shaped by the experiences of Western countries. The characteristics and organizing principles of the Western countries were reflected in the independence constitutions of many countries in Asia and Africa. This was especially true in Asia; for example, the independence constitution of India reflected as much British ideas of governing a state as it reflected Indian social, economic, and political realities. On looking back, some commentators have said that it was neither inevitable nor wise that the developing societies should have followed Western developments.

Nepal and the Constitutions It Has Had

Nepal is not an exception to the general pattern described earlier of how communities come together to form a nation. It consists of many communities, each of which did indeed at one time have a body of laws and practices of their own that dealt with issues of governance. Those local laws were not written; their rules were to be found in customary laws and practices, in the values of the communities, in their concepts of leaders and leadership, and in their rules about leadership or councils, property, and family. To some extent, these bodies of law could be described as traditional community constitutions. But as kings unified Nepal, they brought under their rule disparate communities (each with its own norms of governance).

For a very long time, there was no such thing as one written 'Nepali constitution.' The rules for government were based on the way the kings (or the Ranas during the Rana period) ruled the country. Perhaps because Nepal was never colonized and was somewhat isolated, it got something that we would recognize as a constitution only in 1948. That constitution was proclaimed by the Rana prime minister. The people were not involved in its preparation, although the proclamation of the constitution was the result of internal and external pressure, perhaps stimulated by constitutional developments in India. Ironically, the first constitution came at about the same time that the long period of Rana rule was about to collapse, and the constitution failed in its aims of propping up an increasingly discredited regime. With the restoration of the authority of the monarchy, King Tribhuvan promulgated a new constitution in 1951 (now on

the advice of the Council of Ministers). Intended as an interim constitution until a constituent assembly was to be formed, the Interim Constitution was not replaced until 1959; and when the Interim Constitution was finally replaced, it was done so not by a constituent assembly but by King Mahendra. But this new constitution did not last long either, as the king took over the administration of the state while he commissioned the preparation of yet another constitution that gave all powers of the state to the king. King Mahendra proclaimed this newest version of the constitution in 1962. The 1962 Constitution remained in force until 1990, when a new constitution, proclaimed by King Birendra, brought to an end the *Panchayat* system of rule.

The 1990 Constitution was based on the recommendations of a Constitution Commission (which for the first time consulted the people) and was intended to acknowledge the sovereignty of the people (the people had achieved sovereignty through *Jana Andolan* I). The 1990 Constitution did introduce multiparty democracy, but it still gave considerable powers to the king—powers that were later abused by King Gyanendra to reassert direct monarchical rule in 2005. The achievements of *Jana Andolan* II, however, forced King Gyanendra to give up his powers and emphatically acknowledge the people as the source of all sovereignty. The Nepali people have now agreed that the people's sovereignty will be manifested in the Constituent Assembly that was elected in 2008, which will create a new constitution that will incorporate the reform proposals of *Jana Andolan* II.

We can see from this brief account of Nepal's political and constitutional history (of which a detailed analysis is given in the chapter 'History of Constitutions and Constitution Making in Nepal') that both the contents of and the methods of making the constitutions were determined by social forces and that the progress made in the content from one constitution to the next represented a gradual transition from autocratic to democratic rule. Of these constitutions, the 1990 Constitution was the only one that could be considered a modern democratic constitution: the 1990 Constitution was created through a relatively participatory process; the 1990 Constitution signalled a clear movement to democratic rule by providing for an elected government accountable to the people through the legislature; it included a bill of rights; it sought a separation of powers; and it created a judiciary that was supposed to ensure the supremacy of the constitution.

The 1990 Constitution was different from the traditional community constitutions in many ways. New types of education, new attitudes towards identity and religion, new concepts of the status of the individual and the role of the community, new ideas of self-determination and of democracy—especially among the members of the marginalized communities that had had their cohesion undermined by the formation of the Nepali state— and the effects of urbanization all gave rise to a new consciousness. This new consciousness in the people created different expectations and led to new demands

by the people. In the face of these changes, traditional authorities started losing their hold over the people, particularly the educated people, and the traditional authorities were less able to provide discipline and control over their communities than they used to be able to in earlier times. Furthermore, the enormous growth in the power of state institutions required new forms of control and accountability. These realities, combined with the interests and the vision of a newly emerging group of political leaders, led to new ways of thinking about the state and the political community, and the best way to govern the nation.

The Major Issues That Are Addressed by Modern Democratic Constitutions

Here we discuss the nature of modern democratic constitutions, which echo in important ways key elements of the reform agenda of the Nepali people. To maintain the special legal status of a constitution as the compact among the people on how to govern the country, a constitution is often termed the 'supreme law.' This means that all other laws and public policies must be consistent with the constitution, and if they are not, they cannot be enforced. Usually, there are special legal procedures to ensure that the provisions of the constitution are respected and enforced. Thus the constitution, among its other functions, serves to protect the rights of the people. The status of the constitution is also preserved by the special procedures outlined for its amendment. The legislature cannot use the ordinary procedures of law making to change the contents of the constitution. Normally, a constitution can only be changed by special majorities in the legislature or by the participation of other institutions in addition to the legislature, such as regional authorities or, through a referendum, by the people themselves.

Sovereignty

Historically, countries belonged to their king ('sovereign'), the authority of the state flowed from the sovereign monarch, and constitutions were granted, amended, and replaced by the sovereign monarch. The monarchs themselves were above the law. Gradually, the idea developed that the country belonged to the people. At first, some sections or layers of society, such as the aristocracy or propertied and educated men, were given this recognition, and later, it was given to all the people. Now, it is generally assumed that the authority of the state comes from the people.

The 1990 Constitution was the first constitution in Nepal to refer to the people's sovereignty (all earlier constitutions proclaimed, or assumed, only the sovereignty of the king). But the 1990 Constitution was still ambiguous in its treatment of sovereignty. It recognized both state authority and people's sovereignty, thereby leaving itself subject to interpretation, even confusion and manipulation. For example, in the beginning of the preamble to the 1990 Constitution, it was stated by the king that 'We are convinced that in independent and sovereign Nepal, the source of sovereign authority is inherent

in the people,' but at the same time, the constitution was enacted by the king 'by virtue of the state authority.' Similarly, King Gyanendra too acknowledged the people as the source of sovereignty in his proclamation of April 2006, when he reinstated Parliament, although it was he who was actually reinstating Parliament.

A constitution must reflect the sovereignty of the people and regulate the exercise of power and authority that flows from it. The regulation (and limitation) of state authority, as delegated by the people through the constitution, is essential for safeguarding the liberties of citizens and for ensuring the proper and fair administration of the country (it is this idea that is captured in the notion 'constitutionalism').

State sovereignty has two aspects, internal and external:

In its internal aspect, sovereignty means

- the state has actual and legal control over its territory;
- the state is free to organize its institutions and to determine its internal affairs.

In its external aspect, sovereignty means

- the state is independent, and other states cannot interfere in its internal affairs;
- the state has fixed and secure boundaries;
- the state is a member of the international community, which is organized on the principle of state sovereignty, and it has the right to participate in international organizations and affairs.

Because of the growing recognition of the people as the source of sovereignty, constitutions have increasingly tried to provide a role for the direct participation of the people in the affairs of the state and to ensure the proper accountability of the people's representatives in the executive and the legislature.

In recent decades, there has been an interesting development in the concept of sovereignty, which is reflected in some constitutions of states that are made up of many communities. At one time, sovereignty was often understood as requiring one centre of power. But now, the idea of undivided sovereignty is out of favour with communities or states that want to promote forms of self-government. The older federations, like the United States of America, have always accepted divided sovereignty, but now, even in predominantly unitary states, extensive powers are devolved to and are exercised autonomously by regions. Some recent constitutions, such as the Constitution of Ethiopia, say that they are based on the sovereignty not of the 'people' but of distinct communities within the country, thus according a high constitutional status to ethnic or religious communities.

Separation of the State and Its Institutions from Communities

The state is made up of people—in their communities and their groups. But the state is not the same thing as its people. The existence of the state has its own justification, principally, to provide for the welfare of the people, and it has its own institutions. This separation between the state and its people produces the distinction between the public and private spheres. The purpose of this distinction is to preserve the independence of both state institutions and non-state organizations from each other.

Control of and Accountability of State Power

Modern states that are democratic involve rule by the will of the people. Since not all people can participate directly in state affairs, the state is organized on the principle of representative democracy; that is, people elect their representatives to state institutions, particularly the legislature and the executive. Therefore, free and fair elections play an important role in a democracy.

Although a democratic state is based on the will of the people, which for many purposes means the will of the majority, it is also committed to at least three other values:

- the protection of minorities, whose views would be disregarded in a system that is based entirely on majority rule, and who could be oppressed;
- the limitation of the powers of state authorities, to prevent them from oppressing the people or encroaching upon the independence of non-state groups and organizations. Power is limited in a number of ways, including restricting what the state can do, separating state powers (such as the legislative, executive, and judicial) and giving them to different institutions, and enabling each state institution to operate as a check on others, such as the legislature on the executive and the judiciary on both (which is often referred to as checks and balances);
- the accountability of state institutions, in order to ensure efficiency and legality of government and to prevent arbitrary, unlawful, or dishonest conduct (this is particularly important because state institutions, unlike community organizations, are not governed directly by community values or control).

Limiting and controlling power has become difficult because the people expect much from the state. The modern state is viewed as a 'developmental' state: people expect the state to promote economic and social development. But a state cannot promote development without exercising substantial powers over the community, natural resources, and public finances. And the state cannot promote development without the presence of a large civil service and development and regulatory agencies. Balancing these substantially increased functions and powers with the goal of limiting and controlling state power is a great challenge.

Individualism, Equality, and Human Rights

The modern state is committed to the equality of all persons. This is such an important goal that it can be described as an essential principle. The principle is implemented in several ways, including

- the granting of citizenship, which defines the special relationship that individuals have with the state, and which means that the state cannot discriminate against any citizen, but must treat everyone as an equal.
- guarantees of individual rights, particularly protection against discrimination, but also rights of association, public participation, religion, and so on.
- The principle of the equality of all persons has certain important consequences that may be of particular concern when constitutions are being made.
- The obligation of the state to protect the equality of all persons may affect the independence of communities within the state; for example, can a community insist that women may not inherit or own property because this was a traditional rule of the community, or that people with disabilities cannot hold certain positions in community institutions?
- Can the state recognize communities and groups as legal entities that have rights and obligations, and give them the power to regulate their internal affairs in accordance with their own decisions or customary practices? What is the status or role of group rights in a state committed to the equality of all individuals?
- Does the commitment to equality restrict the power of the state to take special measures (often called 'affirmative action') to help groups that have been historically disadvantaged, such as women or indigenous or marginalized communities?

The state has to protect the fundamental rights of all persons. These rights include the people's rights to personal liberty and security (extending to protection from torture or detention without trial), access to and protection of the legal system, the right to live in any part of the state and to leave and enter it at will, the right to form political parties and other associations, the right to express themselves freely, and the right to practise their beliefs.

Social Justice, Basic Needs, and the Environment

In recent years, there has been increasing recognition that the state also has obligations to ensure that people can live in dignity and security, that state policies do not prevent people from pursuing their lawful activities and taking care of themselves and their families, and that all people have access to education, shelter, and health services.

The state is also increasingly obliged, under national and international law, which is often reflected in constitutions, to protect the environment and to consider the responsibilities of the state and its people to future generations; such provisions are included in constitutions to prevent the state and the people from destroying the environment.

Membership of International and Regional Communities

The state is a member of the international community of states, and as such, has rights as well as obligations. These obligations are increasing because there is now growing awareness about the interdependence of states and peoples. More and more international and regional organizations have been established or strengthened to impose national responsibilities and to promote international co-operation to meet the challenges of our time, including the protection of human rights and the environment. Since these developments seriously affect national policies and institutions, foreign affairs are no longer just a matter of the ruler's dealing with her or his neighbours, and the rules for conducting foreign affairs are integrated into the national constitutional system. This development is reflected in constitutions in a number of ways: special provisions on foreign policy, regulation of the exercise of treaty-making powers and the application of treaties and regional laws, provisions on membership of regional or international organizations and the authority of the state to participate in peace keeping forces abroad are all included in constitutions.

Addressing the Challenges That Modern Constitutions Face

Although so many constitutions seem to have failed the world over, people still have great faith in constitutions to provide for democracy and stability. In 1990 in Nepal, there was great hope in the new constitution. In 1997, there was tremendous enthusiasm in Thailand for the promulgation of the new constitution, which was seen as the solution for countering authoritarian and military rule and corruption. But is it wise to put so much trust in constitutions? When constitutions do not fulfil the aims they embody, is it the constitutions or the people that fail?

A country needs a constitution that can make a meaningful contribution to effective and fair government. However, one can point to some difficulties that constitutions have faced or can face:

Personalization of Power

State power in the modern constitution is impersonal, which means that

- well-defined powers are vested in the holders of offices, not in individuals;
- powers are given for specific purposes to promote the public good and other national goals, and can only be exercised for those purposes;

- the manner and the procedure by which power is to be exercised are set out in the constitution or the law;
- the exercise of power can be challenged in courts or in other lawful ways by people who consider that power has not been exercised in accordance with the above principles.

But leaders have not always followed the procedures for the exercise of power or the purposes for which power is given. Nor have they always respected the division or separation of powers, and thus it has sometimes been very difficult to control their action or to make them accountable. Ministers and other officials often follow suit and exercise their powers in similarly irresponsible and irregular way. Furthermore, large parts of a constitution may remain inoperative because of the dominance by individuals at the head of government and by the leaders' failure to empower other intermediary institutions. We have seen how even good constitutions can become weak, as in Nepal recently, in Thailand under Thaksin, and in India under Indira Gandhi.

Corruption

Politicians can be tempted to use their control over or access to the state to make money for themselves:

- When given bribes, some leaders may use their power for the benefit of only a person or a company.
- Some leaders may set up companies in the names of their wives or relatives to which profitable state contracts are awarded, and payments are made to these companies even if they have not performed their job or performed it in a shoddy way.
- Some leaders may appoint their friends and relatives to posts in the government or its agencies, even when the appointees are not competent or qualified for the jobs.

Thus corruption may become a way of life in government and other public institutions. A small number of people became very rich while others get poorer and are unable to meet the basic necessities of life. Corruption also results in the abuse or waste of national resources. A culture of corruption discourages honest and enterprising persons and companies from making investments in the running of the state. In corrupt governments, prime ministers, ministers, and officials may also do all they can to ensure that the institutions and mechanisms of control and accountability do not work, and indeed they may even try to involve figures of authority, such as judges, in their own corrupt schemes. Few practices have so fundamentally undermined the spirit and letter of constitutions all over the world as has corruption.

Although corruption is not just a problem restricted to developing countries, its impact on developing countries tends to be greater because these countries are poorer—and because their powers to investigate and control wrongdoings are weaker. Corruption survives to some extent in all 'developed' economies as well, but many countries, both more and less developed, have had success in dealing with corruption. Corruption can be checked. A constitution cannot stop corruption, but it can help create the conditions in which corruption can be controlled, and to some extent, prevented and discouraged.

Ethnic Diversity

It has been argued that the modern constitution, based on the values of individualism and the equality of all citizens, best reflects the goals of a state whose population is not divided by ethnicity, religion, or language. It is argued that the constitution assumes the existence of a well-established, common political accord for communities among whom there are common values and who share a common culture, and among whom there are relatively few points of conflict. But in many instances, the modern constitution has actually complicated and made difficult the task of governing a state inhabited by peoples of diverse ethnic origins, speaking different languages, or affiliated to different religions.

In today's world, politics and the economy have become ethnicized. The members of an ethnic community may tend to support their ethnic leaders regardless of their morality, effectiveness, and conduct, for they may think that leaders from their ethnic community will bring development to their area, and that leaders who are of a different ethnicity will not. Thus people's ethnic consciousness tends to reduce their concern for human rights or public morality. Even more alarmingly, ethnic differences have led to major conflicts, which have challenged the stability of the government and the legitimacy, or even the survival, of the constitution.

It is sometimes argued that ethnicity is not a serious problem in Nepal, as it is, for example, in Sri Lanka or India. But from the perspectives of Dalits, *Janajatis*, and *Madhesis*, the history of Nepal is one of their steady subordination—militarily, politically, and socially—to the dominant upper castes who draw their ideology from Hinduism and who are deeply embedded in the ruling class and closely associated with the monarchy. In any case, with the increasing focus on poverty and social justice, attention will turn to the structures of exploitation that have proved inimical to the marginalized groups, who are now increasingly conscious of the structures of the state and society that have led to their own marginalization. These groups are seeking a re-organization of the state that will recognize and respect their cultural, linguistic, and religious differences from the dominant communities, as well as their unequal social bases. If the experience of other countries is any guide, identity politics is likely to play a critical role in discussions

on constitutional reform and in the design of institutions that will fashion the new constitution in Nepal. The new constitution will have to confront issues of ethnic diversity and social oppression.

In recent years, there has been much scholarly discussion on how to structure the state. One suggestion is that instead of balancing the interests of only individuals, the constitution should also balance the interests of ethnic or religious groups. It is argued that the task of the constitution is not merely to govern a 'national' or common political community, but to create a common political community. It is not easy to determine how to create a common political community in which the people's primary loyalty is to that larger community—the state—and secondarily to ethnic, religious, or linguistic communities. Some scholars and policy makers think that this is best done through a liberal constitution in which all individuals are treated equally, but in which special opportunities are created for those who have been historically disadvantaged. Others say that the constitution has to recognize political and legal rights within communities and establish state institutions in which all communities share power (through devices like coalitional cabinets, federalism, and proportional representation in the legislature, judiciary, public services, armed forces, and regimes of personal laws).

One of the biggest challenges to the making of and attribution of roles to constitutions today, as is the case in Nepal now, is to create a common political community out of diverse groups. The future of Nepal will depend fundamentally on how that matter is resolved.

Weak Civil Society

Apart from the formal institutions and mechanisms that the constitution establishes to safeguard and enforce the constitution, an important body that ensures that the government observes the directives of the constitution is civil society. Civil society in this context means non-state organizations other than the family, and includes religious bodies, professional associations, economic institutions, the media, and NGOs. An active civil society, committed to the rule of law and to making the government accountable for its actions, can mobilize and control institutions of the state and galvanize the public to pressure the government. Civil society is generally stronger and more vocal in South Asia than it is in many developing countries, but it still faces many problems:

- Society has been divided into a number of ethnic, religious, or caste groups, which have been unable to act together.
- The government, with its infinitely greater resources, has dominated civil society.
- A substantial number of people live in rural and remote areas; and the people

who live in such areas are primarily occupied by local concerns. Many of them are not familiar with national politics, nor do they have opportunities to participate in political processes.

- Most people do not know much about the constitution—how it may impact their own rights, or how they can use the constitution to challenge bad laws or acts of the government.

The Way Forward

Various conclusions or interpretations can be made about modern constitution from the issues that have been discussed. It can be argued that in certain respects, the modern constitution is absolutely essential for governance: the constitution acknowledges the sovereignty and unity of the state, protects human rights, and limits state power. But for various reasons, these provisions have not always been honoured and made effective. If this analysis is correct, then the task for constitution makers is to design devices and instruments that could ensure the implementation of these provisions. Most constitutions contain relatively few devices to ensure the implementation of their provisions and rely principally on the political process to secure respect for the constitution. Since the political process has not helped in developing the people's respect for an undermined constitution in many countries, alternative methods should be provided. These methods could include measures that strengthen constitutional mechanisms as well as measures that increase public awareness of the constitution and facilitate the role of civil society in the affairs of the state.

It could also be argued that in some respects the modern constitution is indeed deficient; for example, it does not acknowledge or acknowledge sufficiently the existence of ethnic diversity and ethnic consciousness, and so it fails to respond to the tensions that arise from the conflict between national unity and ethnic autonomy. The vision that modern constitutions have of a united political community, the nation, is misleading or premature. The constitution may also be deficient in not providing for social and economic justice and in tackling issues such as poverty. If this analysis is correct, then the solution would be to modify the constitution.

Yet another interpretation may be that the modern constitution is so alien to the people that it cannot serve their needs. Those who subscribe to this interpretation argue that notions of power, political community, democracy, and human rights, and the mechanisms for ensuring them are not understood or supported by the ordinary people, and therefore, remain paper provisions and do not enter the domain of reality. Resolving such issues would require a radical review of the constitution, and perhaps, fundamentally different types of constitutional arrangements.

Reflecting the People's Choices in the New Nepali Constitution

The decision to negotiate and adopt a new Nepali constitution provides the people of Nepal with an opportunity to

- reflect on the social and constitutional history of Nepal
- consider the strengths and weaknesses of the modern democratic constitution, and
- decide
    - what kind of society they want to establish
    - which values they want to live by
    - how they want their various communities to co-exist
    - how these communities relate to the wider political community that is Nepal
    - what kinds of safeguards must be included in the new constitution to prevent the misuse of the constitution
    - what kinds of provisions must be included in the new constitution to ensure that the constitution is implemented properly.

CHAPTER 2

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2

History of Constitutions and Constitution Making in Nepal

Governance According to Traditional Laws

Although modern Nepal came into existence with the unification of Nepal by King Prithvi Narayan Shah in the latter half of the 18th century, the country did not have what we could call a constitutional document before 1948. Some of the rules for governing the country were based on the norms, values, and teachings of Hinduism mentioned in the *Dharmasastras*, and some were based on the norms and values prevalent in the local communities. The governing principles of *dharma* (righteous conduct) referred to the privileges, duties, and obligations of man, his standard of conduct towards god, to society, and to himself, and served as the moral standard against which all religious, political, or social actions were to be tested. The king was to be a strong ruler, recognizing the supremacy of *dharma* as a form of higher law; the rules governing the *Raj dharma* (righteous conduct for the king) were to guide the king in his executive, legislative, and judicial functions; and the subjects in turn had obligations to uphold the king's authority.

The Hindu system envisaged no conflict if the king and the subjects were able to uphold their respective *dharmas*. There were no standard methods to govern the relationship between subjects and the state, nor was there a constitutional method to resolve the conflict of interest between subjects and the state; and the legal, political system and the various social and communal traditions that the king was bound by lacked theories of rights that could form the basis of constitutionalism. The so-called *varna* (caste) system adopted by the Hindu and Newar kingdoms discriminated against a large segment of the population, especially Dalits.

In 1846, following factionalism and internal power struggle in the palace, Jung Bahadur Rana, a military leader, emerged victorious and founded the Rana lineage of hereditary

prime ministers, limiting the king to a titular role. His usurping of power gave rise to a tightly centralized autocracy. Jung Bahadur Rana also helped to promulgate the National Civil Code of 1854, which codified the existing customary laws, introduced the necessary rules for governance, and placed all the ruling class, as well as commoners, under the umbrella of an explicitly codified law. The code was mostly concerned with the relationships among the castes. The code also tried to adopt Hindu laws being practised in the other states in the subcontinent, making the local legal system more inflexible. Although initiated in good faith, the code also disturbed the traditional coherent relationship that *dharma* had with local traditions. The patriarchal social system, the lack of any universality of laws, the inequality among social groups, and the diffused nature of religion and law—all of these factors contributed to the evolution of a unique social and political system that often had problems in restraining and regulating the exercise of power at the highest level.

The Hindu mode of governance allowed the kings to practically assume all power and imposed almost no restriction on the kings: the fear of god wasn't going to rein in the kings all the time. The system throughout the period emphasized the government of law instead of will, but *dharma* was more like a religious manifesto than a legal concept. Even this limited concept of constitutionalism that Nepal had was undermined when the kings were sidelined and state power was taken over by the Ranas. Another important characteristic of the rule of the kings and Ranas was the highly centralized and militarized nature of the Nepali state.

The Succession of Constitutions

Nepal has had six constitutions: the Constitutions of 1948, 1951, 1959, 1962, and 1990, and the Interim Constitution of 2007. The table at the end of this chapter compares some of the major features of these constitutions.

There had been stirrings of dissent earlier in Nepal, but the political scenario really started to change only in the 1940s, with the independence that India achieved and the constitution that India produced influencing events in Nepal. The people in Nepal started demanding that they be allowed to participate in the political system, and they also demanded civil rights and liberties. In response, the Rana prime minister Padma Shamsher promulgated the Government of Nepal Act 1948, the first ever constitutional law of Nepal. This document, written in a modern constitutional language, was drafted by a committee whose members had differing views on what the document should say. Included in the committee were experts from India. However, in the eyes of the prime minister, the basic purpose of the document was not to transform the traditional regime into a modern constitutional government, but to neutralize the demands from the people for a constitutional government and to give a constitutional veneer to Ranarchy.

But Padma Shamsher was forced out of his office by a less liberal successor, and the constitution was discarded even before it came into operation. The period of absolutism that followed precipitated the 1951 revolution, which restored the powers of the monarch, who on 18 February 1951, made the following proclamation:

> Hereafter, our people shall be administered in accordance with a democratic constitution to be framed by the Constituent Assembly elected by the people. Until such a constitution is framed, a council of ministers, composed of popular representatives having the people's confidence, shall be constituted to aid and advise our administration.

An interim coalition-government was then formed, in which the Ranas and the Nepali Congress, the political party that had led the revolution, were equally represented. And the prospects for the Nepali people's participating in the making of the constitution and the governance of the country looked promising. An interim constitution was drafted, again with the assistance of Indian experts.

The Interim Constitution lasted eight years. The entire character of the constitution changed due to the repeated amendments and efforts made to deal with the instability caused by the frequent changes of government (10 governments were formed in those eight years). In the process, the constitution, which had been promulgated with the intention of transferring state powers to the people, ended up transferring the powers back to the king. King Mahendra, who succeeded King Tribhuvan (who had promised to elect a constituent assembly), aspired to exercise active leadership in accordance with Hindu traditions and refused to hold elections for a constituent assembly.

However, because of mounting public pressure, King Mahendra had to eventually set up a constitution-drafting commission. The commission drafted what became the Constitution of the Kingdom of Nepal 1959, on 12 February 1959, with input from a British constitutional expert, Ivor Jennings. The country then held parliamentary elections, in which the Nepali Congress won more than two-thirds of the seats. Unfortunately, however, the elected Nepali Congress government led by B.P. Koirala did not last for more than eighteen months, as King Mahendra, invoking his emergency powers, dissolved the elected Parliament and suspended most of the constitutional rights. The king declared that the parliamentary system, as under the 1959 Constitution, was unsuitable for Nepal on account of the lack of education and political consciousness on the part of Nepalis, and he imposed on the country a system that purportedly had its roots 'in the soil of the country.' The king formed a Council of Ministers under his own chairmanship and ruled until 1962. In accordance with the king's directions, a small committee made up of only Nepalis drafted the 1962 *Panchayat* Constitution, in one month.

The *Panchayat* system continued for almost thirty years. In between, a referendum was held on 24 May 1979, in response to an outbreak of student agitation, and the referendum gave the people an option to vote for either the *Panchayat* system, with suitable reforms, or the multiparty system—as the opposition demanded. But the referendum was manipulated in various ways, and those supporting the multiparty system lost. The *Panchayat* system, however, allowed for some changes, such as the introduction of direct elections and the concept of ministerial responsibility to the legislature. But the system could not function properly because of the conflict of interests between the democratic institutions and the forces surrounding the king. Furthermore, amendments to the constitution strengthened the position of the king.

As a new wave of democratic change swept Eastern Europe at the end of the 1980s, in Nepal, the two biggest political parties rallied the people onto the streets in *Jana Andolan* I. This movement eventually led to change and to the promulgation of the 1990 Constitution. But the manipulation of the constitution by the king, some flaws in the constitution, and the ineptitude of successive governments, along with the Maoist insurgency, which began in 1996, and the royal takeovers led to the rejection of the constitution; and the 1990 Constitution was replaced by the Interim Constitution, which was passed in January 2007. The Interim Constitution paved the way for a constituent assembly and yet another new constitution.

In light of the current discussions about the making of a new constitution, it would be informative to look back at the earlier constitutions and see how they differed from each other and whether there has been any development in their contents.

Processes Used in Making the Constitutions

It was only when the 1990 Constitution was in the process of being drafted that any attempt was made to consult with the Nepali people in the making of a constitution. But the consultations were neither extensive nor systematic, and it is not clear whether the consultations had any impact on the constitution that was created. The constitution that was passed was largely the work of the Nepali Congress and the CPN (UML). The 2007 Interim Constitution, on the other hand, is the result of an understanding among eight party leaders. Until now, the Nepali constitutions have all been drafted by a small group of experts or members of the elite or members of political parties.

Promulgators of the Constitutions

The 1948 Constitution was brought into law by the Rana prime minister, a de facto ruler. The Interim Constitution of 1951 was promulgated by King Tribhuvan, on the advice of the Council of Ministers. The 1959 Constitution was promulgated by King Mahendra, exercising his sovereign power over the country that he inherited. The 1962

Constitution was also the handiwork of the king. Surprisingly, even the 1990 Constitution, which declared that sovereignty was vested in the people, was promulgated, as a result of a sleight of hand, by a king. None of the constitutions was brought into existence through the will of the people or Parliament.

System of Government

The basic structure of the system of government in Nepal has been based on a parliamentary system, as in the UK and India, in which the prime ministers and ministers have to be members of the legislature. Although the fundamental requirement of a parliamentary system is that the government in order to stay in office must have and retain the support of the legislature (or its main, elected house), only the 1959 and 1990 Constitutions had such requirements in a real sense. In the 1948 Constitution, the Rana prime minister could not be removed; in 1951, there was no elected legislature; and under the *Panchayat* regime, the National *Panchayat* could pass a vote of no confidence, but the king did not have to uphold the outcome of the vote.

The Role of the King

Initially, the adversaries of the political parties were the Ranas, and the king supported the political parties in their struggle for the overthrow of the Ranas. But after the monarchy was restored, and after the king first reneged on his promise to hold constituent-assembly elections to draft a new democratic constitution, there has been a constant tussle between the parties and the kings. The *Panchayat* Constitution was the triumph of the monarchy and, thus, represented a definite step backward in constitutional progress. Other steps backward involved the abrogation of the constitutions, or in the case of the 1951 document, the abandonment of its central promise to form a constituent assembly.

The Constitutions of 1951, 1959, and 1990 showed progress towards the instituting of constitutional monarchy, where the authority of the monarch was based on the constitution. In a constitutional monarchy, although the monarch may have certain powers that he can exercise at his discretion, these powers are limited and are specifically concerned not with policy, but with maintaining a constitutional system. Under the 1959 Constitution, although it seemed that most of the powers of the king were to be exercised on the recommendation of the government, the king had the final say on whether, under the constitution, he did have discretionary powers on any matter. There was also a chapter called 'Powers of the King,' and it was unclear whether these powers were also to be exercised on the recommendation of the government. Unfortunately, the drafters of the 1990 Constitution did not learn from the problems created by the imprecision of the 1959 Constitution and included provisions in the 1990 Constitution that could be interpreted in many ways. One of the results of including such ambiguous

articles in the 1990 Constitution was that the king was able to dismiss the elected government of Sher Bahadur Deuba in 2002 by interpreting according to his needs the meanings of the articles, and the king subsequently formed the government of his choice.

The Role of the Judiciary

A system of independent courts is essential for the success of any constitution and for the enforcement of rights enshrined in the constitution. The 1948 Constitution could establish a High Court, and, interestingly, a Judicial Committee of the Legislature (with two outsiders) to act as a final court of appeal. This system for the judiciary seems to have been modelled on the House of Lords in its judicial capacity (the British final appeal court). The Rana Prime Minister could appoint the judges, but he would have been able to dismiss them only if the Judicial Committee (which he had appointed) recommended the dismissals. The 1951 Constitution merely mentioned the High Court. The High Court Act of 1952 created the first independent judiciary in Nepal, but following a few controversial court decisions against executive actions, the High Court's power of judicial review was removed by a law in 1954. The 1959 Constitution set up the Supreme Court but gave no details of the court's jurisdiction. A commission appointed by the king could recommend the removal of a judge, but the king did not have to accept the recommendation. The 1962 Constitution provided for recommendation for the removal of judges by a commission or the National *Panchayat*, and for the first time, provided the Supreme Court with the jurisdiction to enforce human rights and other rights (modelled on the Constitution of India). The 1990 Constitution did finally set up a full judicial system by establishing the district courts, the appellate courts and the Supreme Court and by providing security of tenure to Supreme Court judges (less so for judges in the lower courts).

Democracy and Elections

Only under the 1959 and 1990 Constitutions were there freely elected legislatures in Nepal. A primary feature of some of the constitutions was indirect elections. Half the members of the Rastra Sabha under the 1948 Constitution could be elected by the presiding officers of local *Panchayats*. Under the 1962 Constitution, the National *Panchayat* was indirectly elected by people whose own election had been indirect, and the right to stand for elections was limited to the members of certain classes and professional organizations. Even under the 2007 Interim Constitution, all 73 of the Maoist members and 48 other members were party appointees, and the term of office of the rest of the members, who were elected in 1999, had actually ended by 2004. Another common feature in the systems Nepal has had so far has been the appointing of House members by the king, or as in 1948, by the prime minister.

The 1948 Act did not make room for political parties. Parties did contest elections under the 1959 Constitution, but parties were banned in 1960, although they were briefly permitted to operate during the referendum campaign on that constitution. Under the *Panchayat* Constitution, provisions for the representation in the National *Panchayat* of various interest groups were made through a constituency of university graduates and various class organizations that were devised as a substitute for political parties and to direct the political process. A unique body called the Back to the Village National Campaign (BVNC) was introduced in 1975 to further restrict the election process. Only those candidates who were approved by the BVNC—that is, essentially by the king—could contest elections at any levels of the *Panchayat*, and this body could remove a member of the National *Panchayat* on the grounds of bad conduct or unacceptable political activities, thereby negating the concept of political participation and democracy.

The principal objective of the 1990 Constitution, on the other hand, was multiparty democracy, and it did recognize parties explicitly and, indeed, regulated them.

Human Rights

All the constitutions have had some provisions for human rights: The 1948 Constitution had only token provisions; in the 1951 Interim Constitution, all the rights were included under a chapter on directive principles, which, as in the Constitution of India, could not be made the basis of any legal claim before the courts and so were hard to enforce; and the constitutions that came later mostly drew on the provisions of human rights as they were outlined in the Constitution of India. The 1959 Constitution, however, undermined all the human rights enshrined in it, as one of its clauses said that the provisions for human rights would not affect the validity of any law that was supposed to be for the 'public good,' and public good was defined in a broad way. Also, the human rights provisions did not apply to the army at all, and could not be applied to the police, as well. We can trace the rather broad limitations placed on certain human rights in the 1990 Constitution and the 2007 Interim Constitution to this provision, which was put in place to safeguard the 'public good' in the 1959 Constitution.

Directive principles, which, as mentioned earlier, cannot be used as the basis for legal claims, have been included in several Nepali constitutions. There was no chapter on directive principles in the 1959 Constitution. Although there was a chapter on directive principles in the 1962 Constitution, it was short and vague. In 1990, the chapter was long and detailed, and much of its contents were drawn from the Constitution of India. The 2007 document also has a long chapter, with some additions reflecting the spirit of *Jana Andolan* II. But these additions tend to be vague.

Hinduism

Interestingly, successive constitutions have been increasingly 'Hindu' in some ways. Apart from a preambular mention of Lord Pashupatinath, the 1948 Constitution was silent on Hinduism, and it had a freedom-of-worship provision. The 1951 Constitution said nothing about religion, except for mentioning that discrimination on the basis of religion should be prohibited. The 1959 Constitution did not mention Hinduism either, except to say that the king would have to be Hindu. The 1959 Constitution included, for the first time, a provision that allowed the people the freedom to worship according to the tenets and norms of their ancestral religions. The 1959 Constitution, however, didn't allow proselytizing. The 1962 Constitution had a declaration that Nepal was a Hindu state and that the cow was the national animal. The 1990 Constitution retained these provisions. Though the 2007 Constitution has declared Nepal a secular state, it has retained most of the other provisions.

Inclusiveness

The 1951 Interim Constitution said that the members of the Advisory Assembly would have to be chosen in such a way as to represent various regions, classes and interests. The 1959 Constitution added a provision that the king had to be an adherent of 'Aryan culture.' In a country where many are of 'non-Aryan' stock, this provision made people feel excluded. This provision remained intact in the 1962 Constitution but disappeared from the 1990 Constitution, which also recognized all mother tongues as national languages and Nepal as a multiethnic and multilingual country. The 2007 Constitution went further, promising the restructuring of the state and the ending of the problems related to race, religion, region, caste, and gender. But Nepali has remained the only official language.

Accountability of the Government

Governments were not really accountable to the legislature or to the people until the 1990 Constitution. Also, there was no effective judicial system to enforce rights and duties. Other organs of accountability in most systems around the world include the auditor general who scrutinizes the accounts of the government to ensure that money is spent as approved and in accordance with the law. The auditor general has been established in all the Nepali constitutions. Except for the 1951 Constitution, all the constitutions have guaranteed some degree of security of tenure for auditor generals (an important safeguard for people whose responsibilities include holding governments to account). Other constitutional bodies now include the Election Commission (first mentioned in the 1951 Constitution), the Public Service Commission (mentioned in all constitutions), the Commission for the Investigation of Abuse of Authority (since 1990) and the Human Rights Commission (first mentioned in the 2007 Interim Constitution).

The Need for Reflecting on Past Constitutions

There is some degree of continuity in the constitutions that Nepal has had. Many of the basic ideas and the language in which they were expressed were taken from the British system of government, either directly or through the Indian Constitution. Directive principles were drawn from the Constitution of India (which took the idea and some of the language from the Irish Constitution). The 1962 Constitution owed something to the *Panchayat* System of the 1948 Indian Constitution, and interestingly, had some features similar to the 'guided democracy' constitution already in force in Indonesia. Many of the institutions mentioned in the constitutions before 1962 can still be seen in the 1990 and 2007 Constitutions. However, progress towards a truly democratic and inclusive constitutional system has not been smooth. Constitutional changes have reflected shifts in power, and several of the constitutions have been short lived. At times, some of the constitutions have been less democratic than the ones they replaced (for example, the 1962 *Panchayat* Constitution was distinctly retrogressive).

The instituting of major changes in the constitutions has been preceded by the creation of interim constitutions and interim governments—as is the case now. The people have been repeatedly deprived of the chance to understand their constitutions and to be involved in their making. None of the Nepali constitutions was drafted with the full involvement of the people—even that of 1990. Will things be different this time?

Features of Different Constitutions of Nepal

Features	1948	1951	1959	1962	1990	2007 (Interim Constitution)
Systems of government	The hereditary Rana prime minister was the head of government (executive power was vested in the PM); the Council of Ministers was made up of members of the legislature and the ministers were chosen by and could be dismissed by the PM; the cabinet could also dismiss ministers.	The PM was appointed by the king; ministers were appointed on the advice of the PM; all the ministers became members of the Advisory Assembly.	Parliamentary system; the PM had to be a member of the House of Representatives; ministers had to be or had to become members of either House; the House of Representatives could pass a vote of no confidence.	The PM and ministers had to be members of the National *Panchayat*; the cabinet was chaired by the PM or the king; the king could dissolve the cabinet; the National *Panchayat* could pass a vote of no confidence, but the king could disapprove it; the Raj Sabha (the PM, ministers and various other senior office holders or people appointed by the king) was to advise the king; the king appointed a commissioner for each zone.	The PM was the leader of the largest party/combination of parties in the House; the House could pass a vote of no confidence; the king could remove the PM; the Raj Parishad was to advise the king.	The PM was appointed by consensus; ministers need not be members of the House; a provision for passing a vote of no confidence was later added through an amendment.

Features	1948	1951	1959	1962	1990	2007 (Interim Constitution)
Role of the king	None; it was only mentioned that citizens were to be loyal to the king.	The king had executive and legislative powers; he could approve a bill presented by the cabinet (which would have to go to the Advisory Assembly, if it was in existence and was in session); the king could dismiss the government.	The king had formal executive powers; the king could appoint a PM on his discretion but the PM-designate would have to be a person who commanded a majority in the House; the king could suspend the cabinet Government if he could not find a suitable PM-designate; most of the king's functions were carried out on the advice of the cabinet, but the king himself had the final say on whether to heed the advice given or not; there were formal provisions in place that provided for the cabinet to consult with the king about forthcoming recommendations, assignment of portfolios, etc; the king could reject a recommendation to dissolve Parliament; the king could dismiss civil servants, grant honours and exercise powers of mercy.	Sovereignty was vested in the king; there was no compulsion for the king to act on advice given; the king had the power of mercy, could confer titles, dismiss civil servants and appoint ambassadors.	Sovereignty was vested in the people; the king had to generally act on advice given to him.	No functions/roles for the king have been outlined (some of the king's previous functions are to be performed by the PM or the Council of Ministers; bills are to be signed by the speaker of the House).
Parliament	PM and two chambers; the Rastra Sabha had 60-70 members (60 per cent of the members were elected—six by functional constituencies and the rest by the presiding officers of certain local *Panchayats*; 40 per cent of the total number of members were appointed by the PM); in the Bharadari Sabha, all the 20-30 members were appointed by the PM, to represent various national interests; 25 per cent of the members retired each year.	The Advisory Assembly was selected by the king to represent various regions, classes and interests; the cabinet consisted of-ex officio members.	The HoR comprised 109 directly elected members; half of all the members in the Senate were elected by the HoR and the other half were nominated by the king.	The National *Panchayat* was indirectly elected— by zonal assemblies, specified organizations and university graduates; 15 per cent of the members to the National *Panchayat* were chosen by the king.	HoR comprised 205 directly elected members; the National Council had 35 members elected by the HoR, three from each Development Region elected by local government members, and 10 were nominated by the king.	The HoR comprises 198 members who had been directly elected in earlier elections, 48 additional members appointed by parties and 83 Maoists.

Features	1948	1951	1959	1962	1990	2007 (Interim Constitution)
Human rights	There was a list of basic rights and freedoms—these rights and freedoms could be removed if they conflicted with the purported aims of the state to uphold public order and morality.	None as such— provisions similar to the Indian Constitution were included in the directive principles.	There was a fairly short chapter on human rights— though adequate for the time.	A short chapter on human rights.	Longer chapter on human rights.	The chapter on human rights is similar to that in the 1990 Constitution, with some provisions for economic, social and cultural rights added.
Directive principles	Not named as such: there was a section providing that the state would introduce education.	There was a DP chapter (non-justiciable); about half of these principles were similar to HR provisions in other constitutions.	None.	Very short and non-specific.	Long and detailed.	Longer.
Courts	Village *Panchayats* were to deal with small cases; the judges in the High Court were appointed by the PM; the members of the Judicial Committee of the legislature, with two qualified outsiders, were all appointed by the PM—the Judicial Committee was also the Supreme Court of Appeal; judges could be dismissed by the PM on the recommendation of the Judicial Committee	High court was mentioned – a law was required; no other courts were mentioned.	Only the Supreme Court was mentioned; the Supreme Court's jurisdiction was not indicated; judges could be removed by the king only if a commission appointed by the king (government) recommended their removal (the king did not have to accept recommendations).	Supreme Court judges were appointed by the king (after consultation); judges could be removed by the king after recommendation by the Commission or by the National *Panchayat*; writ jurisdiction for fundamental rights and other rights.	Supreme Court—with writ jurisdiction; Appellate Courts, District Courts. Security of tenure for Supreme Court judges.	Similar to the 1990 Constitution.
Local government	Gram *Panchayat* for each village/group; Nagar *Panchayat* for each town; Zilla *Panchayats* elected by presiding officers of lower *Panchayats*.	The setting up of a system of *Panchayats* was a directive principle.	Not mentioned.	Village Assemblies elected Village *Panchayats*; District Assemblies were elected by Village and Town *Panchayats*; Zonal Assemblies (comprising all members of District *Panchayats*)		Interim local bodies at the district, municipality and village level to be constituted; country to be federal (amendment to IC).

Features	1948	1951	1959	1962	1990	2007 (Interim Constitution)
Religion	Lord Pashupatinath was mentioned in the preamble; freedom of worship.	No mention.	King had to be a Hindu; Right to practise one's traditional religion provided for; no conversion to other religions was allowed.	As in the 1959 Constitution, with the additional mention that Nepal was to be a Hindu state; the cow was deemed the national animal.	As in the 1959 Constitution, with the additional mention that Nepal was to be a Hindu state; the cow was deemed the national animal.	Secular state; the cow remains the national animal; people have the right to practise their traditional religions; no conversion to other religions is allowed.
Inclusiveness	No mention of equality or non-discrimination, nor caste, etc.	Members of the Assembly were to represent different regions, classes and interests.	The king had to be an 'adherent of Aryan culture'; No discrimination on the basis of religion, race, caste, sex, tribe was permitted; no person would be allowed to create enmity between classes.	Similar to the 1959 Constitution.	Similar to the 1959 Constitution on issues regarding equality and discrimination, but also additional mention was made about all mother tongues, national languages; people were deemed equal 'irrespective of religion, race, caste or tribe' ; Nepal was deemed a 'multi-ethnic, multilingual' country.	State to be restructured to do away with problems related to class, caste, region and gender; mother tongues may be used in local offices.
Other points	Auditor general; Public Service Commission; PM could make rules to remove difficulties in introducing the constitution; PM could make emergency regulations that could last for six months.	Auditor general; Public Service Commission—both were appointed by the government; the Election Commission was appointed by the king on the advice of the government.	Auditor general; Public Service Commission—both were appointed by the king (government); the king (government) could issue orders to remove difficulties in bringing the constitution into force (not after two years).	Auditor general; Public Service Commission—both were appointed by the king; attorney general; Election Commission; the king had Emergency powers; the king could issue orders for removing difficulties about bringing the constitution into force—but not after the first sitting of the National *Panchayat*.	Auditor general; Public Service Commission, Election Commission—all appointed by the king on the advice of the Constitutional Council; the Commission for the The Commission for the Investigation of Abuse of Authority was similarly created; attorney general; provisions on political parties were included; power to remove difficulties orders could be made by by the king (must mean on advice of the cabinet) to be laid before Parliament; no time limit for this; the National Defence Council (two ministers and the king) was to provide recommendations for using the army.	Human Rights Commission was added; Council of Ministers may remove difficulties—the motions must be approved by the legislature; no time limit for removal of difficulties; the National Defence Council (all ministers) to make recommendations on the use of the army.

CHAPTER 3

CHAPTER 3

The 1990 Constitution and Its Collapse

Introduction

As the last chapter shows, over the last sixty years, Nepal has been governed under five different constitutions. Each constitution represented the dominance of a particular class (but not necessarily of a particular ethnic or regional group). Each constitution was adopted to promote (and occasionally to resist) social and political change. The purpose of this chapter is to establish the context of the present process of adopting a new constitution. Since the new constitution is being created because the 1990 Constitution needs to be replaced, it is necessary to examine the record (strengths and deficiencies) of the 1990 Constitution. It is also necessary to examine the changing social circumstances (and struggles) that affected the relevance or acceptability of the 1990 Constitution. Just as the 1990 Constitution was the result of the people's struggle for a democratic and just social order, the present process of making a constitution is the result of the people's struggle for an inclusive, just and peaceful social order. Both the process of making a new constitution and its contents must reflect the ethos and agenda of *Jana Andolan* II and open up opportunities for all the people to participate in the designing of new institutions of the state.

The 1990 Constitution was made through greater consultations with the people than were the previous constitutions. However, it has been argued that those consultations did not turn out to be meaningful. Although meetings with the people were held through the agency of government officials, few members of the Dalit, ethnic and marginalized communities, women, and rural people participated in the consultation process. The commission charged with drafting the constitution disregarded most of the recommendations related to the rights and demands of these groups. And the cabinet and subsequently the then king made changes in the draft prepared by the commission, moving the constitution even further away from the aspirations of the

people. The stage is now set for a more participatory method of constitution-making through a constituent assembly, representing, at least in theory, the sovereignty of the people. However, it remains to be seen whether in practice it will be the sovereign people who decide on the new constitution.

This chapter discusses the underlying principles of the 1990 Constitution, how they were incorporated and how far they were implemented. It also examines the shortcomings of the constitution and its failure to provide a clear and binding programme of social, political, and economic reform. It tries to ascribe responsibility for the failure to achieve these and other objectives prescribed by the constitution. It also suggests that there are some lessons that can be learned from the collapse of the 1990 Constitution, as Nepal prepares to adopt a new constitution to fulfil the agenda of *Jana Andolan* II.

The Underlying Principles of the 1990 Constitution

As stated in the preamble to the 1990 Constitution, there were four interconnected principles that informed the drafting of the 1990 Constitution: multiparty democracy based on adult franchise, parliamentary system of government, constitutional monarchy, and national unity. The constitutional provisions for achieving these objectives are briefly discussed and assessed below.

Multiparty Democracy

Democracy

Since the 1990 Constitution was created in reaction to and after the demise of the partyless *Panchayat* system, multiparty democracy became a principal objective of the 1990 Constitution. Multiparty democracy emphasizes both democracy and the specific method of its practice through the organization and functioning of political parties. Democracy is a system in which the sovereignty (i.e., the power and authority) of the state is vested in the people. Democracy is based on values that recognize the dignity, liberty and rights of all persons and operates through fair and generally accepted procedures. Political parties compete, mainly through free and fair elections, for the right to exercise state power on behalf of the people. That power has to be exercised in accordance with the constitution, which is the supreme manifestation of the will of the people. In this section, we discuss firstly the provisions for the recognition of the importance and establishment of democracy and then the provisions for the role of political parties.

The 1990 Constitution was historically important because it recognized, for the first time in Nepal, the sovereignty of the people. Previously, sovereignty was deemed to be with the king, who was addressed as the 'sovereign.' The 1962 Constitution, which immediately preceded the 1990 Constitution, had its main principle outlined thus: 'The sovereignty of Nepal is vested in His Majesty and all powers—executive, legislative,

and judicial—emanate from him' (Art. 20(2)). It is interesting (and ironic) that in 1990, although King Birendra claimed and exercised the power to enact the constitution, he stated that 'We are convinced that in the independent and sovereign Nepal, the source of sovereign authority is inherent in the people' (preamble) and that henceforth, the constitution could be amended ultimately by the people themselves through their duly elected representatives in Parliament (Art.116).

The 1990 Constitution included a number of human rights, which are the foundations of democracy. Foremost among them was the equality of all citizens before the law. Article 11, stating this equality, prohibited discrimination against any citizen on the grounds of religion, race, sex, caste, tribe, or ideology. The constitution guaranteed the freedom of expression, press and publication, and the right to form associations and to assemble. These rights, so critical to democracy, allow like-minded people to work together, express their views, and lobby and influence others. The constitution also included guarantees of a fair trial to opponents of the government in power, to prevent their harassment (Art. 14). Article 16 guaranteed the right to demand and receive information on any matter of public importance, information being essential to accountability for and over the exercise of power. Personal and collective rights of religion and culture were also protected (Arts. 18 and 19), although not as fully as they should have been.

The constitution also required periodic elections to the House of Representatives, and indirectly, for the formation of a government. Citizens of age 18 or older were entitled to vote (Art. 45(6)), and citizens of 25 years or older were able to stand as candidates for elections (Art. 47). The elected representatives could then choose the prime minister for the new government. Elections also gave the people the opportunity to remove parliamentarians and governments who/that failed to do their job well or honestly.

Checks and Balances

In order to prevent concentration of power in one authority, state powers were divided among the king, Parliament, the Council of Ministers, and the judiciary. There were some attempts to introduce a system of checks and balances so that the government could be accountable to the legislature, and an independent Supreme Court had the authority and obligation to enforce the constitution and thus to hold state authorities within the limits of their powers (although as is shown later, the Supreme Court, at least in the early years, seemed to be less than impartial and paid undue deference to the king). A number of other independent authorities (the auditor general, the Public Service Commission, the Election Commission and the Commission for the Investigation of Abuse of Authority) were established to reinforce the principle of accountability and to insulate the officials who were performing public tasks (such as the managing of electoral process) from political influence. The procedure for making appointments to these bodies, through a Constitutional Council consisting of the prime minister, chief

justice, presiding officers of the two legislative houses, and the leader of the opposition (Art. 117), was designed to reduce the influence of the government. Nor could the appointees be dismissed by the government because, just as in the case with judges, they could only be removed after appropriate procedures in Parliament. And their salaries could not be reduced.

The system of government was parliamentary, which meant that the party or coalition of parties with the majority of seats in the House of Representatives formed the government. The government was responsible to the House, so that it had to secure approval in the House for making new laws and for raising and spending money; the government had to be accountable to the House. The government could be removed through a vote of no confidence by a majority of the members of the House.

Parliament consisted of two houses. The members of the House of Representatives were elected directly by the people in single-member constituencies. The members of the National Assembly were of three kinds. Ten were appointed by the king from amongst distinguished persons, 35 were elected by members of the House, and 15 were to be elected by chairpersons and deputy chairpersons of local authorities (Art. 46).

Unitary State

The presence of only a small number of representatives from regions and zones meant that the state was unitary and centralized (meaning that most powers of the state were vested in the government at the national level). In a country as diversified as Nepal and with such limited means of communications, a unitary and centralized system limits the possibilities of people's participation in public affairs (which is an index of the democratic nature of the state). In recognition of this weakness, the constitution required the government to 'bring about conditions for the enjoyment of the fruits of democracy by providing opportunities for the maximum participation of people in the governance of the country by means of decentralization of administration' (Art. 25(4)).

The constitution also established other principles of policy, which state authorities had to implement to strengthen democracy, particularly participation. Some of these policies were concerned with social justice and improvement of the economic, educational, and health standards of the people, particularly of the marginalized communities.

The Role of Political Parties

It is clear from the preceding account that the principal components of democracy were included in the 1990 Constitution. As the principal objective of the 1990 Constitution was multiparty democracy, marking the end of partyless *Panchayat* rule, the status and roles of political parties were emphasized (see chapter on political parties in this book). Beside the general freedom to form associations, the specific right to form political

parties and carry on political activities was guaranteed (Art. 112(1)). A one-party system was prohibited (Art. 112(2)). In a parliamentary system of government, parties play an important role in the formation and dismissal of governments, and the stability of a government depends on the emergence of clear and disciplined majorities in the legislature; accordingly, the government is formed by the majority party or a coalition of parties with the support of the legislature, and a government can be dismissed by a vote of no confidence, which is often orchestrated by the opposition party or parties. To strengthen party discipline, legislators were forced to give up their seats if the party (or the parties) that sponsored their candidacy notified that they had been expelled from the party (Art. 49(f)). A party had to establish a minimum degree of public support before it could be registered (Art. 113(2)(d)). It had to establish internal democracy within the party (Art. 113(2)), and a party could not discriminate against any person with regard to membership on the grounds of religion, caste, tribe, language, or sex (Art. 113(3)). In the 'first past the post' system, it is more difficult for party leaders to control the nomination of candidates than it would be for leaders in a proportional representation system, but elections, in general, place parties (through their ability to nominate candidates and their election campaigns) in a stronger position than social groups and other such entities.

The functioning and credibility of the government depends on the nature of the organization of political parties. As we have seen, the 1990 Constitution helped parties to maintain control over their members by allowing parties to expel their members and thus drive him or her out of Parliament—and to prevent an opposition member from crossing the floor to join the government. Equally, the rule helped the ruling party to maintain its majority. Therefore, the organization and ethos of parties had a major impact on the working of the political system and its degree of transparency.

An equally important function of political parties is to facilitate the engagement of the people in public affairs. Parties offer policy alternatives from which people can choose, and parties are the principal vehicles for people's participation in public and political life of the country. Opposition parties provide a check on the policies and activities of the government. But parties can perform these diverse roles only if they are internally democratic, well organized, and disciplined.

In Nepal, however, the political parties were seen as playing a crucial role in maintaining the principal character of the state as united, harmonious, and hegemonic. The freedom of association could be restricted if it 'undermined the sovereignty and integrity' of Nepal or 'disturbed the harmonious relations subsisting among the various castes and communities' (Art. 12(2)(3)). A party could not be registered if its name, objective, symbol, or flag indicated that it belonged to any particular religion, was communal, or of a 'nature tending to disintegrate the economy' (Art. 113(3)). The decision of the Election Commission on this matter was final (Sec. 17(2) of the House of Representatives

Members Election Act, 1991). The parties did little, it is said, to bring the marginalized communities (Dalits, women, *Janajatis*, and *Madhesis*) into the mainstream of politics or into institutions of the state. Membership of political and state offices remained the preserve of the traditionally privileged communities.

The nature of Nepali democracy, therefore, depended greatly on the nature and organization of political parties and their behaviour when in the government or opposition. But the behaviour of parties did not help the cause of Nepali democracy. Parties were obsessed with power, and they rarely thought about how they could use power constructively. This obsession with power led to intrigues and splits among parties. The rule for dissolving the House of Representatives was improperly used to settle scores among parties (which, as is argued later on in this chapter, led to the palace's intervening in parliamentary affairs). No government lasted the full term of five years. Parties were condemned for not implementing any of the constitution's participatory, democratic norms. They remained the bastions of privileged castes and communities and their tenures were marked by personalized styles of leadership. There was the growth of 'partyism,' whereby political and government leaders identified themselves more with political parties than with the national state, state institutions, and the lives of ordinary citizens. This led to a culture of clientelism, political patronage, and impunity, which affected other aspects of society and diminished the effectiveness of policies and initiatives. Parties paid undue deference to the palace, failed to uphold the rule of law, and all this led to, as one commentator put it, 'the total collapse of law into politics.'

Constitutional Monarchy

Limiting the Power of the Monarch

The central feature of the 1990 Constitution was the balancing of the power of the king with that of the government. The preamble identified 'constitutional monarchy' as a principal objective of the new political order. A constitutional monarch was the head of state but had limited powers, many of them symbolic. Most powers of the state were vested in an elected legislature and executive. In a symbolic way, the constitutional monarch personified and expressed the unity of the country (as was also stated in the constitution, Art. 27(2)). The king was obliged to abide by the constitution (Art. 27(3)), although it was also stated that the conduct of the king could not be questioned in court (Art. 31). His property and income could not be taxed (Art. 30). He had the sole authority to determine questions of succession to the throne (Art. 28). These provisions strengthened the institution of monarchy.

Let us now analyse the state powers the king had and the king's relationship to the government and the legislature. The general principle was that the powers of the king regarding the government were to be exercised 'by and with the consent of the Council of Ministers', unless the constitution stated that a power could be exercised by the

king at his 'own discretion' (i.e., he himself would decide how to exercise it) or on the recommendation of any other institution or official (Art. 35). This is a standard provision in parliamentary systems with a monarch or president (as in India). Under this formula, the effective power of the government rested with the Council of Ministers. But the prime minister had to keep the king informed of the business and decisions of the government and on matters relating to peace, security, politics, economics, and foreign affairs (Art. 43), which presumably gave the king the opportunity to offer his advice to the government.

Discretionary Powers of the King

The powers of the king that were to be exercised at his own discretion were very few:

- appointing the prime minister, although within rules that were intended to ensure that the prime minister had the majority support in the House of Representatives, and which seriously restricted the king's discretion (Art. 36(1));
- asking Parliament to reconsider a bill before giving his assent (Art. 71(4));
- possibly assigning a judge to a non-judicial task (Art. 92).

Examples of the powers the king exercised on the recommendation of other bodies included

- dismissing the prime minister following a vote of no confidence by the House of Representatives (Art. 36(5)(b));
- appointing judges on the recommendation of the Judicial Council, except for the chief justice, in which case he had to follow the recommendation of the Constitutional Council (Art. 87(1));
- appointing members of independent bodies on the recommendations of the Constitution Council;
- appointing an auditor general on the recommendation of the prime minister (Art. 109);
- deploying and managing the army on the advice of the Defence Council (Art. 118(2).

Powers Dependent on Decisions of Ministers

The king was supposed to perform all other acts or make his decisions (such as convening, summoning, proroguing, or dissolving the House of Representatives (Art. 53); declaring an emergency (Art. 115); passing or repealing of ordinances (Art. 72); addressing Parliament (Art. 54), appointing ambassadors (Art. 120); and taking remedial action to remove difficulties in bringing the constitution into force (Art. 127)) on the recommendations (meaning instructions) of the Council of Ministers.

Ambiguity Resulting in the Misuse of Power

Unfortunately, the significance of the formulation of Article 35(2) appears not to have been generally understood, and the many references to the king's powers, which he was to exercise on the instructions ('advice and consent') of the government, gave the impression that too much power had been given to the king. This problem was compounded by the fact that it was not possible to question in court whether advice had been given to the king or what the advice was (Art. 35(6)). This too is a standard provision (intended to ensure the confidentiality of the business of the Council of Ministers and to keep the judiciary out of political disputes). But the result could be that certain acts of the king that were in violations of the constitution could not be challenged. For example, the power to dissolve the House of Representatives could only be exercised by the king on the recommendation of the prime minister (Art. 53(4)); but if the king were to dissolve the House without the prime minister's recommendation, it would not be possible to challenge the king's decision in court. Moreover, the conduct of the king could not be discussed in Parliament (Art. 56), another sort of impunity. Therefore, the 1990 Constitution did not fully accomplish the project of bringing the monarchy within the confines of the constitution.

The king also assumed for himself powers that were clearly reserved for the government. Soon after the constitution was enacted, King Birendra appointed an ambassador of his own liking to France, without seeking the recommendation of the prime minister. The Supreme Court justified the appointment by invoking Article 120, which gave the king the power to appoint ambassadors without anyone's being able to inquire into whether he had been advised by the Council of Ministers. This decision encouraged the king to exercise more and more powers later. For example, after the 1991 elections, he nominated ten members of the National Assembly without the advice of the Council of Ministers (as required by Art. 46(a)). Prime Minister Girija Prasad Koirala did not protest this usurpation of the Council of Ministers' authority.

Bias of the Supreme Court and Prime Ministers towards the Monarchy

More importantly, the king used the powers to dissolve the legislature in an unprincipled manner. The practice of dissolution started when, with the recommendation of Prime Minister Girija Prasad Koirala, King Birendra dissolved the House. When parliamentarians from the ruling party challenged the constitutionality of the dissolution, the Supreme Court justified the dissolution on the grounds that the king had to follow the recommendation of the prime minister. On another occasion, the king granted dissolution on the recommendation of Prime Minister Manmohan Adhikari. When challenged, the Supreme Court declared the dissolution unconstitutional, on the grounds that a minority government could not recommend the dissolution. However, when on a later occasion, Sher Bahadur Deuba, heading a minority government, was unable to get the approval of the House to extend the emergency and recommended

dissolution, King Gyanendra granted it. The House acted as an impediment to the wishes of both the king and the Deuba government to extend the emergency. King Birendra also refused to accept the recommendation of Prime Minister Surya Bahadur Thapa to dissolve the House. Instead, without the recommendation of the government, the king asked the opinion of the Supreme Court, which gave him the discretion to decide, and the king refused to grant dissolution. Thus, the constitutional principles were not consistently followed.

Contentious Articles 127 and 71

After the October 2002 takeover, King Gyanendra formed a Council of Ministers of his own choice, ignoring Articles 36 and 42. In doing so, he relied on Article 127, which stated that the king could issue orders if necessary to 'remove difficulties' in bringing the constitution into effect. Prime Minister Sher Bahadur Deuba also used Article 127 when he recommended the postponement of elections in October 2004, which the king promptly accepted. From 2002 until *Jana Andolan* II in April 2006, the country was governed by ordinance, under the authority of Article 127. The National Assembly was unconstitutionally marginalized, and it was not able to meet after the dissolution of the House of Representatives.

There is little doubt that the king used Article 127 improperly. Firstly, this article, which was probably taken from the Indian Constitution, was to have been used to facilitate the transition to the new constitution; the article was not meant to be used as a standing authority for future emergencies. Secondly, when applying Article 127, the king had to act on the recommendation of the Council of Ministers (in accordance with Article 35(2)), although the Supreme Court interpreted Article 127 as not being covered by Article 35(2). Thirdly, the purpose of Article 127 was to ensure the fulfilment of the constitution, not its subversion. Under the 1959 Constitution a similar removal-of-difficulties provision was limited to two years, and required the approval of both houses of Parliament.

King Birendra is also considered to have violated Article 71 concerning assent given to legislative bills passed by Parliament. Except for bills dealing with financial matters, the king could have, within one month, referred a bill back to Parliament for reconsideration. If in a joint session of the House of Representatives and the National Assembly, the bill had been passed again, with or without amendments, the king would have had to give his consent within a month. Since Article 71 did not refer to the personal discretion of the king, presumably he would have had to act on the recommendation of the Council of Ministers. But no government was able to enforce Article 71. Almost none of the bills were assented to by the king within the one-month period from the date that the bills were tendered to him. King Birendra never assented to the Citizenship Bill 2001. He asked, without the recommendation of the Council of Ministers, for the opinion

of the Supreme Court on the validity of the bill, and the Supreme Court advised him that the bill was unconstitutional. In these ways, the kings undermined the authority of Parliament.

The King, the Government, and the Army

Even more problematic was the relationship between the king, the government, and the army. The army has been traditionally regarded as the king's army, fully loyal and personally accountable to him (see the chapter on national security). The 1990 Constitution changed the organization of the army and aimed to bring the army under the control of the government. It established a National Defence Council consisting of the prime minister (as chair), the minister of defence, and the commander in chief (Art. 118). The commander in chief was appointed by the king on the recommendation of the prime minister (Art. 119(2)). The king was the supreme commander of the army, presumably a formal role, as he was to 'perform the operation and management' of the army on the recommendation of the National Defence Council (Art. 118(2)). The organization and operation of the army were to be determined by law (and, therefore, by the government and Parliament).

However, it was widely perceived that these provisions failed to transfer the loyalty of the army from the king to the people (Parliament). No prime minister was able to mobilize, control, and operate the army. Girija Prasad Koirala once resigned as prime minister because the Royal Nepal Army did not cooperate with him. The army seemed to be sympathetic to the king's attempts to undermine democracy. It did not directly take over state power, but did support the king's takeover of powers. The episode of the emergency is revealing. When Sher Bahadur Deuba's government, constitutionally appointed, imposed an emergency, Parliament refused to approve the extension of the emergency beyond three months. Why the army withheld cooperation with one prime minister but allowed another to continue the emergency with the army's support (despite parliamentary opposition), well beyond the limits of the constitution, is explained by the interventions of the king.

Why the Provisions Failed

In summary, the constitution did aim to make the king a constitutional monarch, but, for a variety of reasons, it did not succeed. One, there seems to have been an inadequate understanding of the status and role of a constitutional monarch. Two, the provisions of the constitution concerning the king were drafted in a style that could mislead those not brought up in a constitutional monarchy system (particularly the way in which formal and real powers are divided, as is evident from the way in which Article 35 operated). Three, the political parties and prime ministers seemed to have been overly deferential to the king and exaggerated his constitutional role. Four, the political competition between political parties and the use of powers of dissolution or votes of no confidence by the

party leaders for purely personal and political reasons gave the king opportunities to intervene in politics. Finally, the aura that the monarchy had—given the monarchy's centrality in Nepali politics throughout Nepal's history—had the effect of diluting the restrictions on the king's constitutional powers.

National Unity

The unity of Nepal was an important theme of the 1990 Constitution. The preamble referred to the principles outlined above as promoting 'among the people of Nepal the spirit of fraternity and the bond of unity on the basis of liberty and equality.' Article 2 said that the 'people of Nepal being united by a bond of common aspirations and faith in the independence and integrity of the Nation, irrespective of religion, race, caste, or tribe, collectively constitute this Nation.'

But the notion of unity was deeply driven by the commitment to a specific sense of Nepali identity based on one religion, one language, and one culture (even to the extent of dress)—this even though the constitution described Nepal as being multi-religious and multilingual (Art. 4(1)). The state itself was unitary and highly centralized, with all state powers (executive, legislative, and judicial) given ultimately by the constitution to institutions in Kathmandu. The character of the state was exclusionary, as it was oriented towards the majority religion and the majority language, and thus, also towards the majority culture. The unitary nature of Nepal and the centralization of power accentuated the consequences of dominance by established elites, drawn from limited classes, castes, region, and one gender. It denied others the possibilities of the exercise of the power to determine policies at the local level or to use the local language for official purposes.

In many countries, second chambers are used for the representation of minorities or regions. A different form of representation from that in the other house is considered valuable if the second chamber is to act as some kind of check on the Lower House or if it is to create a more representative and participatory legislature and recognize social and cultural diversity. Under the 1990 Constitution, the National Assembly largely reproduced party membership (and even the king's appointees were drawn from well-off communities). Such arrangements neither served the purpose of scrutinizing the Lower House nor the representation of or concern for minorities.

Religion, Language, and Culture

The 1990 Constitution declared Nepal a Hindu state (Art. 1). The king had to be an 'adherent of Aryan Culture and Hindu Religion' (Art. 27)—at the same time, the king was declared to be the 'symbol of the Nepali nation and the unity of the Nepali people.' Apart from this, the implications of Nepal's being a Hindu state were not spelled out. But the dominance of Hindu beliefs and rituals was pervasive. Provisions

about the monarchy tended to emphasize and reinforce the Hindu and 'Aryan' aspects of Nepal. When too many Hindu values and rituals are associated with the monarchy, the very symbol of the nation can be seen as divisive and marginalizing of non-Hindu communities.

Although the 1990 Constitution guaranteed the adherents of all religions the freedom to 'profess and practice' their own religion (Art. 19), the freedom seemed to be qualified, since it only related to belief or practice as 'coming down to him hereditarily having regard to traditional practices.' This provision could restrict reform of religious practices. It reinforced another restriction, that 'no person had the right to convert a person to another religion,' although, presumably, this did not prohibit a person from changing his or her religion.

Although other languages were not ignored, the 1990 Constitution made Nepali the official language (written in the Devanagari script) (Art. 3). This meant that all official business had to be conducted in Nepali. The article also declared, 'All languages spoken as mother tongues in various parts of Nepal are the languages of this nation,' although the implications of a language's being a national language were not stated and the state seemed to have no responsibility for promoting the use or development of these languages. Article 18, which dealt with culture and education, gave every community within Nepal the right to 'conserve and promote its language, script, and culture.' They were free to 'establish schools for providing primary level education to the children in their mother tongue.' But the way these rights were formulated suggest that they were to be exercised in the private domain, without assistance from the state.

The 1990 Constitution could also be read, additionally, as preventing the constitutional recognition of political rights associated with other cultures. As we have seen, the constitution prohibited the creation of a political party 'on the basis of religion, community, caste, tribe, or regionality' (Art. 112(3)). An elaboration of this rule was the prohibition of any party which 'prejudicially restricted' membership on the basis of religion, caste, tribe, language, or sex. A party was also prohibited if its 'name, objective, symbol, or flag indicated it as belonging to any particular religion or being communal or of a nature tending to disintegrate the country' (Art. 113(3)). Such was the concern with communal harmony that even the right to move freely in the country and to reside in any part of Nepal could be denied if it 'disturbed harmonious relations subsisting among various castes and communities' (Art. 12(2)(4)).

It is possible that these restrictions (along with the restrictions on freedom of speech, assembly, and association) inhibited legitimate political activity, obscured elements of Nepal's diversity that needed to be recognized, and forced minorities to operate through political parties over which they had little influence. It could also have led to

the centralization of power in parties, in a mirror image of the centralization of power in the state (as mentioned below).

In contemporary times, national unity also depends on fairness and justice, a sense on the part of all sections of society that the state treats them with respect, that they have reasonable opportunities to participate in the affairs of the state, and that they are fairly represented in its institutions. As will be evident below, the constitution's failure in this regard lay at the root of the 1990 Constitution's collapse.

The Collapse of the 1990 Constitution

Despite the commitment in the 1990 Constitution to multiparty, parliamentary democracy, there were problems with some of its provisions and with the lack of their proper implementation. The fact that some people proclaimed the 1990 Constitution as the 'best in the world,' while others rejected it shows that it was divisive from the very beginning (even among its drafters). The openings that the constitution allowed, indeed required, for the harmonization of these views (e.g., affirmative action, better representation, and decentralization) were not taken up by the elite.

Driven by concern for personal and party gain, political parties failed to establish a genuinely participatory democracy; state affairs remained the preserve of a caste-based elite. Ministers and officials were corrupt and indulged in favouritism—and frequently disregarded the rule of law. Intra-party intrigues led to splits and unstable governments. Governments took relatively few policy initiatives, frequently invoking royal intervention to justify their inaction, and they thus gave ample opportunities to the palace to meddle in politics. They acquiesced in the unconstitutional initiatives of the king, and thus to some extent, legitimized them, opening opportunities for the king to take over power (in October 2002 and February 2005). Even the Supreme Court (without a single judge from marginalized communities) seriously misread both the letter and the spirit of the constitution, and failed to develop its democratic and participatory potential. In 1998, the Supreme Court invalidated the use of the Maithili and Newari languages in local administration. The Supreme Court banned regional parties although it is doubtful if they would have disturbed inter-ethnic relations. The court upheld various unconstitutional acts of the king, thereby weakening democracy and accountability.

The greatest failure of the 1990 Constitution lay in its inability to address the diversity of the Nepali people. The state declared Nepal as a Hindu state and gave primacy to Hindu religion. Harka Gurung, a prominent intellectual, wrote that the primacy given to Hinduism 'sanctifies the caste system... State advocacy of a particular religion militates against equality in practicing one's faith… The state alignment to Hindu ideology continues to perpetuate the social exclusion of millions of people with its economic

and political ramifications.' Gurung believed that the Hindu identity in the constitution attenuated the citizens' sense of belonging to the state.

Although Article 11(3) prohibited discrimination on the grounds of, among others, religion, the article on religious freedom itself sanctioned discrimination, as it restricted that freedom to the exercise of a person's own traditional religion—'the freedom to profess and practice his own religion as coming down to him hereditarily having regard to traditional practices' (Art. 19(1)). In response to this, the Muluki Ain was amended in 1993 to include an explanation, which said that the dignity of traditional practices at religious places should not be deemed discriminatory. Harka Gurung commented on its implication, saying: 'maintaining the dignity of traditional practices means perpetuation of the past or inequality towards certain sections of the population.' In fact, the Supreme Court held that this explanation was unconstitutional. Article 18(2) provided for the teaching of non-Nepali languages only up to primary school. Gurung concluded that these provisions 'constrained the formulation of progressive policies on social inclusion in political and social development.'

A number of commentators have said that the representation of and other circumstances of the marginalized groups worsened under the 1990 Constitution. There is evidence that after the introduction of democracy in 1990, the disparity increased in favour of the high-caste communities. Some groups even felt more severely politically excluded than they had felt during the autocratic *Panchayat* regime. Dalits were almost completely excluded from Parliament, the cabinet, and other organs of the state and constitutional bodies. The presence of Muslim and *Madhesi* communities in these bodies declined too.

The national crisis inherent in these developments was triggered by the assumption of power by King Gyanendra in 2002 and 2005 and the autocratic manner in which he ruled the country. But the opportunity for the king to act in this unconstitutional way had been brought about by the gradual loss of legitimacy of the political parties. The crisis was further aggravated by the Maoist insurgency in the mid-1990s. The insurgency itself gained support from various communities because the political parties had lost their legitimacy and because the parties failed to deal with the social problems of exclusion, discrimination, and oppression. It is unnecessary to recount the events well known to all Nepalis that led to the fall of the king. The coming together of the seven political parties with the Maoists and their agreeing to respond to the wishes of the people—to establish a new social, political, and economic order (discussed in the first chapter)—were critical. The parties and the Maoists agreed to hold a round-table conference, create an interim constitution and government, and elect a constituent assembly to implement a reform agenda that promised Nepal an inclusive and participatory democracy, respect for human rights, the rule of law, and social justice. These developments prompted the people to come out in their thousands in *Jana Andolan* II to protest against royal rule and

demand the restoration of democracy. Many sacrificed their lives or suffered serious injuries in the struggle for reform.

Jana Andolan II succeeded in bringing the king to his knees. The king conceded that sovereignty belonged to the people. He was forced to recall the House of Representatives, which promptly passed a resolution that claimed sovereignty for itself and repealed all provisions relating to the monarchy. Meanwhile, the seven-party alliance and the Maoists negotiated various agreements for transitional arrangements, which culminated in a comprehensive peace accord, including the disposal of weapons and the creation of an interim constitution that provided for the adoption of a new constitution by an inclusive constituent assembly.

So who is to be blamed for the collapse of the 1990 Constitution? Perhaps the constitution itself, which might have contained a basic flaw within itself? Or the kings who refused to accept the limits on their power, and who—if they had performed their proper roles—might have facilitated the transition to democracy? Or the political parties, in not respecting fundamental principles of democracy, participation, inclusiveness, and social justice that the constitution required of them? Or the Supreme Court for its bias towards the monarchy or for its major misunderstanding of the principles of constitutional monarchy? Or the Maoists in turning to insurgency and violence rather than mobilizing the people, the marginalized, and the disadvantaged, through democratic and constitutional practices? Or civil society, which allowed the parties to capture it and which failed to play an autonomous role in upholding values of democracy and social justice?

Lessons from the Experience that Nepal Had with the 1990 Constitution

What lessons can we draw for the current round of constitution making?

Participatory Process of Constitution Making

The first lesson has to do with the process of making the constitution. All people, but particularly the marginalized communities, must be allowed to, and must, participate fully in the process, articulate their grievances, and lobby for their demands. A good process can be a great public education in democracy and responsibility—without which a constitution cannot easily take root. The promise that the constituent assembly will be the manifestation of the sovereignty of the people, and not merely the dominance of political parties, must be realized. The reason for having a participatory process and an inclusive constituent assembly is not just that this would produce legitimacy for the constitution. Equally important is that the constitution will have to define Nepali values and identity in a more inclusive way than the 1990 Constitution did, and this cannot be done except through negotiations among all key communities and groups.

A participatory process also offers an opportunity to engage the people in a dialogue on democracy and to prepare the people for the understanding of and participation in public affairs, without which democracy cannot develop or flourish.

True Social Equality

The second lesson is that formal equality, which a provision of the constitution specifies, is not sufficient. There must be real equality, of opportunity and access. That requires pro-active policies and affirmative action on the part of the state, the redistribution of resources and the empowerment of the disadvantaged. This is particularly the case when the real problem is not legal or political but social. The marginalized communities constitute a majority and have enjoyed the right (and power) to vote. Yet they have remained marginalized. The grant of universal right to vote did not help them because they were weighed down by centuries of social oppression and exclusion. What they needed in order to enjoy the status formally conferred on them was constructive, practical steps in terms of representation, affirmative action, specific opportunities and respect, so that they could exercise rights granted to them under the constitution.

Protection and Implementation of Basic Rights

Third, the constitution must impose clear obligations on the state to secure all of the people's rights, particularly the rights to education, health, shelter, and human security. Many components of the directive principles need to be converted into rights. But the enforcement of rights should not be left to private initiatives. There should be a clear timetable for their implementation by the state, and where relevant, by the corporate sector. Special institutions, such as a constitution implementation commission, should be established to ensure adherence to the timetable.

Reform of Political Parties

Fourth, it is not enough to impose obligations on the state. A grandiose bill of rights may remain a mirage, unless the institutions of the state, particularly the legislature and the executive, are also rights-friendly. Political parties must become real instruments of democracy and accountability. Therefore, institutions must be so structured that they allow the participation of and respond to the needs and demands of the disadvantaged. The reform agenda of the 1990 Constitution was not fulfilled mainly because these institutions became the bastions of the privileged and the established elite. A major reform of the organization and functioning of political parties is imperative if the goals of the *Andolan* are to be achieved.

Clarity of Language in the Constitution

Fifth, a point about the style of drafting the constitution needs to be mentioned here. A major problem with the 1990 Constitution was that powers were given to one authority,

but they were to be exercised at the instructions of another (this, as we have seen, was a particular problem with the monarchy). But the word 'instruction' was not used; instead the words used were 'on the advice and consent' or 'recommendations,' both of which in ordinary language fall short of 'instruct' and do not suggest that advice or recommendations are binding. The language used was very confusing, particularly to those who had little experience with the 'Westminster' style constitutions. So not only did the 1990 Constitution give the impression of giving a lot of powers to the king, but the king and other institutions, whether deliberately or inadvertently, assumed that many of these powers indeed belonged to the king. Consider Article 120:

(1) His Majesty shall appoint the Royal Nepali Ambassadors.

(2) His Majesty may designate Royal representatives to represent him on special occasions. He may also appoint special envoys for specified purposes.

The first sub-clause can certainly be read together with Article 35(2) as requiring the king to act on the instruction of the Council of Ministers. But what about the first sentence of the second sub-clause? One might think that in the appointment of a person to represent the king, the king should have some say, but not if the representation is for the purposes of the state. And what about the second sentence? The representatives mentioned seem more like envoys for a special state assignment who should be appointed at the instruction of the government. But one cannot be sure. There are other examples of similar ambiguities.

It is best if the constitution prescribes in clear and simple language who has what powers and how they are to be exercised. Relying on the conventions or practices of other systems not familiar to Nepalis is not sensible, especially in areas as sensitive as the exercise of fundamental state powers.

CHAPTER 4

CHAPTER 4

4

The Making of the New Constitution: The Interim Constitution's Road Map

The Interim Constitution

When a country emerges from a state of conflict and state institutions have either collapsed, been discredited, or are unacceptable to one or more groups, an interim constitution is usually adopted to provide for the governance of the country until a new government under a new constitution is established, and to set out the road map (goals, institutions and procedures) for the making of the new constitution. Sometimes an interim constitution is short (especially when the previous constitution has been modified) and sometimes long and comprehensive (when the previous constitution is completely rejected). Sometimes interim arrangements take the form of a political agreement among the key actors.

In Nepal, the seven parliamentary parties that had negotiated a political alliance with the Maoists in 2005 were in favour of using the 1990 Constitution, with its unsuitable provisions modified or deleted, as an interim constitution, on the restoration of the House of Representatives (in a proclamation in May 2006, the seven parties attempted to do precisely this). Thus the modified older constitution became the Interim Constitution (although doubts had been raised by some about the legality of this procedure) for the period leading up to the inclusion of the Maoists in the legislature (and ultimately the government). The Maoists were not enamoured of the 1990 Constitution and had insisted on its replacement by a specially tailored constitution.

On 15 January 2007, that Interim Constitution was adopted by the former House of Representatives and ratified by the (new) Interim Legislature-Parliament. The Interim Constitution is a lengthy document and covers most topics that one would ordinarily find in a permanent constitution. But this chapter concerns itself with the process for a new constitution, the central feature of which is the Constituent Assembly.

The Constitution-making Process

In the last three years or so, there has been extensive discussion on how an inclusive and effective constitutional system of government could be established in Nepal. These discussions became all the more important as the institutions of the state came under severe attack from the Maoist insurgency, the House of Representatives was abolished, and the authoritarian rule of the monarchy replaced the parliamentary system of government. Negotiations between an alliance of seven parliamentary parties and the Maoists on 22 November 2005 led to an agreement that on the cessation of hostilities, a constituent assembly would be elected to frame a new constitution. One of the main demands of the 2006 *Jana Andolan* was that the new constitution should be made by a broadly representative constituent assembly, and thus in this agreement made between the chief political actors, considerable emphasis was placed on the sovereignty of the people and their participation in the constitution-making process. This defining characteristic of the process that would be adopted was emphasized in the second understanding among the parties, and the parties and their civic organizations promised that they would actively work 'to establish full democracy with the sovereignty and the state power of the country completely in people through the election of a constituent assembly on the basis of the determined process.'

The Interim Constitution gives effect to this agreement, guaranteeing a constituent assembly 'to formulate a new constitution by the people themselves' (Art. 63). Thus considerable public attention has focused on the composition and role of the Constituent Assembly, but it is doubtful if the provisions meet the test of an inclusive assembly or if the process will be particularly participatory.

Constituent Assembly: Membership and Representation

Originally, the Constituent Assembly was to have 425 members, consisting of three categories of members (Art. 63(3)): 205 members were to be elected in single-member constituencies in the 'first past the post' system; that is, the winner would be the person who won the largest number of votes, even if the winner could not garner an overall majority ('the first category'); 204 members were to be chosen on the basis of party lists, by a system under which voters would vote for a party ('the second category'); a party would be given seats in proportion to its share of the votes, and the party would draw its members from its list; the third category would consist of 16 persons prominent in national life, to be nominated by the Council of Ministers.

These provisions have been changed three times, as the result of agreements with various groups. The provisions now call for 240 single-member-constituency seats (designed to increase the number of seats in the Tarai) and 335 proportional-representation seats (the second category). The Interim Constitution provides that when parties are nominating

candidates for constituency seats, they must take inclusiveness into consideration. And when composing party lists, the parties have to ensure 'proportional representation of women, Dalits, oppressed tribes and indigenous tribes, backward regions, and *Madhesis* and other groups,' as provided in the law. The provision is more specific in the case of women: at least one-third of the total number of candidates from the two categories must be women. And there are now to be 26 members nominated by the Council of Ministers. These nominees will be selected from among distinguished persons and from ethnic and indigenous groups who fail to be represented as a result of the elections.

The terms 'proportional' or 'proportionality' as used in the directives regarding the Constituent Assembly connote two meanings: one meaning refers to proportionality between the parties, the other to proportionality among categories of communities and between the two genders. Achieving proportionality in the first sense does not necessarily mean that the second type of proportionality will also be achieved, but the Interim Constitution aims to achieve both types of proportionality at least among the second category of seats. The Constituent Assembly Election Law goes into more detail about this issue: The law requires that each party must have a certain percentage of candidates from specified groups in its list (*Janajatis*, *Madhesis*, Dalits, representatives of backward regions, and others [meaning hill Brahmins and Chhetris]). Within each group, half of the candidates must be women. After the elections, when the number of second-category seats that each party is entitled to has been determined, the parties will make their final selections from their lists, again respecting the same proportions outlined for inclusive representation. The parties are then entitled to deviate from the proportions to a limited extent.

There are various problems with these provisions that cannot be explored in this paper, but it must be said here that many groups fear that their hopes of being represented will not be completely fulfilled. In the first category of seats, there is no guarantee that even if the parties do respect the directive to take inclusiveness into consideration when nominating candidates, this will produce proportionality of members from the marginalized communities. In fact, there is widespread speculation that parties could place candidates from marginalized communities in those constituencies where the parties have the least prospects of success.

There is to be a two-vote system: voters will cast a separate vote for their constituency member and another for a party list. Voters will have the opportunity to calculate the impact of their votes, and to vote, if they so wish, for a geographical candidate on the basis of that individual's merit or party affiliation, and to vote for a list on the basis of the make-up of the party lists. But this system will only work if voters understand the system—if they have been educated about it. And it will only work if voters actually care enough about inclusiveness for the issue to affect their voting choices—if the issue of inclusiveness is more important than, say, their traditional choice of party.

Furthermore, even if members of marginalized communities were to be represented in significant numbers, the extent to which they would be able to present and lobby for the interests of their communities would be affected by the fact that virtually all their representation would be through the parties. Consequently, they would be subject to the party whip, which could inhibit their ability or willingness to lobby for their interests. This possibility of representatives from marginalized communities being subject to the parties' wishes, which has worried many sections of the marginalized communities, has been reinforced by the rule that a member may be removed if the party of which the member was a member at the time of the election gives notice that the member has left the party or no longer holds membership (presumably meaning that the party can effectively expel such a member) (Art. 67)).

There is also the fear that the 26 nominated persons will be distributed among the eight political parties for patronage purposes rather than to secure expertise and relevant experience. So they too could be subject to party discipline, a factor that could reduce the value of such membership (although the Interim Constitution prescribes, as one criterion for the registration of a party that its own constitution should provide for an effective system of discipline for its members (Art. 142(3 (d)).

In the Interim Constitution, the provisions regarding the Constituent Assembly election are biased in favour of political parties, rather than ethnic, community, or professional groups. This bias is particularly evident in certain provisions; for example, Article 142(5) says that while parties that are represented in the interim legislature are entitled to registration without showing significant support, other parties have to present signatures of at least 10,000 supporters. The second category of members will be elected on the basis of one national constituency, rather than on the basis of regional or zonal constituencies. This provision allows the central committees of the parties to increase their control over candidacies in the second category. Moreover, only political parties will be eligible for party-proportionality seats. There is a danger that such exclusive membership through the mechanism of existing parliamentary parties will exclude scholars, professionals, social workers, and special groups, like the disabled and linguistic minorities, all of whose participation is essential to ensure a balanced and professional constitution.

And attempts to set up new parties more closely related to the marginalized groups that discriminate in granting membership on ethnic or gender grounds or with objectives that 'would disturb the religious or communal harmony or divide the country' (Art. 142(4)) may run afoul of the rules in the Interim Constitution regarding rules about party formation. In fact, some sectional parties, especially pro-*Madhesi* parties, were registered, but they won exemption from the rule in the law which was mentioned in the Interim Constitution to ensure that only a certain percentage of members in an ethnic party could be members of the ethnic group the party was created to represent.

It has now been agreed that the Constituent Assembly will consist of 601 members. Such an assembly is undoubtedly very large and may not prove conducive for holding detailed discussions or for building consensus. To ensure proper participation in this large assembly, careful thought needs to be given to the procedures that must be followed in the Constituent Assembly: the procedures should not unduly prolong the proceedings, and yet they must offer proper opportunities for debate.

Free and Fair Elections to the Constituent Assembly

Whatever the system of voting adopted, there is general acceptance that the actual elections must be free and fair. The very first responsibility of the state is to ensure the conducting of a free and impartial election for the Constituent Assembly. This principle is stated in the agreements between the SPA and the Maoists and now constitutes the mandate of the United Nations Mission in Nepal (UNMIN). An independent electoral commission is to 'conduct, supervise, direct, and control the elections' to the Constituent Assembly (Art. 129). As a pre-condition to embarking on a free and fair electoral process, it has also been widely accepted that the weapons held by the Maoists (and a similar number of weapons belonging to the army) must be stored away, and all intimidation of citizens will have to be stopped. It is the responsibility of the Electoral Commission and UNMIN to ensure that these and other necessary conditions are met before elections are held.

But although the prime minister and other party leaders made several public statements of their commitment to the Constituent Assembly, and to the original June 2007 deadline for the Constituent Assembly election, progress on finalizing the details of the electoral laws was slow. As the parties had not consulted other groups, it became necessary, as shown above, to have consultations with the *Madhesis*, *Janajatis*, and Dalits. Thus the June deadline could not be met, and the Interim Constitution was amended to extend the deadline to mid-November 2007. But even though a new scheme for representation was successfully negotiated, elections could not be held in November either because the Maoists threatened to boycott the elections unless certain demands were met. By the time the demands were settled, it was too late to hold the elections in November, and the constitution was amended yet again, this time specifying that elections would be held by the middle of April 2008.

Procedures for Dealing with Election Disputes

A special court known as the Constituent Assembly Court is to be established to resolve complaints regarding elections to the Constituent Assembly (Art. 118). Petitions regarding electoral disputes can only be submitted in this court. Only this court, and not even the Supreme Court, can interpret the law on electoral issues (Art. 102(4)).

Fundamental Binding Constitutional Principles that Underlie the Mandate of the Constituent Assembly

As discussed in chapter 5, there are considerable advantages in adopting fundamental constitutional principles in order to bind or guide the constitution-making process, in terms of the contents of the new constitution. That chapter shows the kinds of fundamental principles that emerged from the 2006 *Jana Andolan*, the Comprehensive Peace Agreement, and the Interim Constitution. The Interim Constitution does not clearly specify that the Constituent Assembly is bound by any fundamental principles, except decentralization of state power in the form of federalism. But the Interim Constitution does contain many fundamental principles of state policy and directive principles, and it could be argued that these principles are intended to be the guidelines for the Constituent Assembly.

The most important of these principles pertains to the restructuring of the state, which appears in several places in the Interim Constitution (the issue is discussed in detail in the chapter on restructuring and federalism). For example, the chapter on the form of state and local self-governance calls for the 'inclusive, democratic, and progressive restructuring of the state' to bring about 'an end to the discrimination based on class, caste, language, sex, culture, religion, and region by eliminating the centralized and unitary form of the state' (Art. 138).

We find that Articles 33 and 34 contain many broad principles (set out in more detail in chapter 5), just as the preamble of the Interim Constitution does. Many of these articles are concerned with democracy, inclusiveness, participation, human rights, and self-governance. None of these articles is binding, in the sense that persons could not go to court claiming that these principles had been breached. Instead, these principles are meant to be guidelines for the state. These goals are indeed the inspiration for and the aspirations of the *Jana Andolan*, and since the Constituent Assembly is the child of the *Jana Andolan*, it is not unreasonable to argue that these goals have the status of fundamental constitutional principles and that they bind the Constituent Assembly.

However, despite the emphasis on, and the frequent reiteration of these goals, the Interim Constitution does not provide for any method for adopting these principles in the new constitution, to verify or certify that the new constitution has successfully and effectively incorporated them.

High Level Commission on Restructuring

A High Level Commission is to be set up by the government to make recommendations on the restructuring of the state (Art. 138). The term 'restructuring' is used in Nepal to mean changes that will need to be made in the structure and institutions of government, measures that will need to be taken to advance historically disadvantaged communities,

methods of governance that will need to be adopted to ensure a greater degree of public participation, and so on. In the Interim Constitution, however, it seems that the term 'restructuring' is used in a narrower sense, referring only to the elimination of the 'centralized and unitary form of the state,' and the term is used to respond to the demand for a federal or devolved system. But this concept of restructuring ('inclusive, democratic, and progressive') actually refers to a broad and ambitious agenda: to bring to an end discrimination based on 'class, caste, language, sex, culture, religion, and region' (not all of which might be compatible). There is considerable controversy on whether the basis of federalism should be ethnicity ('cultural') or geography ('developmental'), and Article 138 does not resolve this controversy, as it refers to both 'caste, language, and religion' and 'region.' A detailed discussion of federalism and restructuring is contained in chapter 14.

Federalism or devolution is a complicated and controversial issue and will require careful thought. The High Level Commission (yet to be appointed 19 months after the enactment of the Interim Constitution, as this book goes to press), can provide a useful source of ideas, analyses, and options for the Constituent Assembly if the commission is independent and is run by experts. It is unclear whether the commission's recommendations are to be made directly to the Constituent Assembly or if the recommendations are to be vetted by the government, although Article 138(3) does state that the final decision on the restructuring would be made by the Constituent Assembly.

Time Lines

The general principle is that the Constituent Assembly shall function for two years from the time of its first meeting (Art. 64) (the first meeting must be held within 21 days after the election results are announced (Art. 69). However, the Constituent Assembly may dissolve itself earlier by a resolution (Art. 64). No explanation is provided as to the reasons for which an earlier dissolution may be made. The only justifiable reason would be if the constitution were to be adopted before the two-year tenure of the Constituent Assembly comes to an end. But that possibility is already provided for in Article 82, which says that save for a temporary extension to enable elections to the legislature under the new constitution to be held, the Constituent Assembly would automatically be dissolved on the adoption of the new constitution. There may indeed be a case for the dissolution of the Constituent Assembly if it fails to meet the deadline (or the extended deadline under Article 64, as was stipulated in the Iraqi Interim Constitution). But might there be any justification for a premature dissolution of the Constituent Assembly by its members (given that the members will be elected to enact the new constitution)? Could this power of dissolution be used to disrupt—indeed permanently sabotage—the Constituent Assembly if the nature of constitutional changes to be made were not to suit the political party with the majority of members? And what majority

would be required to pass the resolution? (Normally resolutions can be passed by a simple majority of members present and voting, unless expressly provided otherwise (Art. 68), as would be the case for the adoption of the new constitution.)

It is also possible to extend the life of the Constituent Assembly for another six months, by a resolution of the Constituent Assembly, if the constitution is not ready due to 'an emergency situation in the country' (Art. 64). As defined in Article 143, 'war, external invasion, armed rebellion, or extreme economic disarray' could lead the government to formally declare an emergency. Article 64 could, therefore, be read as requiring the Constituent Assembly to finish its task within the two years, but for any exceptional situation, and even in that situation, it has to complete the work within the period of extension (which presumably cannot be extended further—in Iraq, the word 'one off' was used to specify that no further extension would be possible, and in the case of failure, the Constituent Assembly would automatically be dissolved). The extension would require a resolution passed by a simple majority of members present and voting.

Presumably, to justify the extension, it would be necessary for the Constituent Assembly to establish that the delay was caused by the proclamation of an emergency. But what if the proclamation takes place a week before the end of the stipulated two-year tenure of the Constituent Assembly? And there has been no provision made for a scenario in which an emergency has not been declared but the Constituent Assembly's task still has not been finished. Should such a situation result in the automatic dissolution of the Constituent Assembly?

On the question of the duration of the Constituent Assembly or the length of time allowed for the conclusion of the process, there are generally two opposing views. One says that constitution making is so critical to the future of the country that it should not be rushed; that people must be given ample opportunities to participate in the process; and that there must be enough time provided for educating the people and to consult with them. Others argue that if too much time is allowed, the members of the Constituent Assembly, not wanting to let go of the prestige and financial benefits of membership, will drag out the process as long as possible. If the process is unduly stretched for this or other reasons (e.g., if the ruling clique opposes reform), the opportunity for change may be lost. Constitution reform is a highly political process, with great but also narrow interests at stake, and there are always people who are willing to sabotage the process. A drawn-out process gives such people ample opportunities to do so. On the other hand, given the kinds of purposes served by the process (for example, the people and the representatives will have to educate themselves on the purpose and structure of the state and on questions of public policy), the presumption must be against a rushed process. What constitutes a happy medium between too long and too short a process depends on the context, and on whether the people are knowledgeable

enough to engage in the process. But because the elections have been delayed, people have had some opportunities to learn about the process, through the efforts of local and international organizations (including International IDEA and UNDP), and the prolonged interim period has given the people the time to discuss the substantive issues, like federalism and the rights of marginalized groups. A number of books and pamphlets regarding these central issues have been published, and there have also been some negotiations between the government and representatives of marginalized groups (including *Madhesis*) that have clarified the kinds of issues that must be negotiated in the Constituent Assembly. Since this process of education and consultation has, to an extent, been carried out, it should be possible for the Constituent Assembly to make relatively speedy progress.

The Rules and Procedures of the Constituent Assembly

The Constituent Assembly will perform a dual role—as a constitution-making body and as a legislature. To some extent, the two tasks are different and may require different procedures. Parliamentary procedures are quite technical, and those members of the assembly not familiar with them may find themselves at a disadvantage. The rules for the Constituent Assembly's constitution-making function should be made simpler and more facilitative of exchanges and should not have too many points of order. If the Constituent Assembly utilizes the provision in the Interim Constitution for it to set up a legislative affairs committee, it would be easier to have two different sets of procedural rules (Art. 83(1)). In any case, the Constituent Assembly in its role as a legislature will be bound by the normal rules of financial procedures (Art. 83(4)).

In general, it is left up to the Constituent Assembly to determine the rules of its procedures, subject to the provisions of the Interim Constitution (Art. 78). The most important of these rules concerns the system of voting (which is discussed separately in this paper). The first meeting is to be convened by the prime minister within 21 days of the elections; subsequent meetings will be convened by the presiding officer, or on the request, for good reason, of one-fourth of the members (Art. 69). The Constituent Assembly will elect its chairperson and vice-chairperson from among its members, subject to the proviso that both should not come from the same party (Art. 71). For most purposes, the quorum will be one-fourth of the total membership, but when decisions regarding the new constitution are to be made, then at least two-thirds of the entire membership will need to be present to constitute a quorum (Art. 70(2)). Decisions other than those about the new constitution are to be made by a simple majority of members present and voting (Art. 75).

According to Article 74, a vote cast by a non-member cannot be invalidated. This rule may need to be reconsidered, at least for occasions when issues such as the inclusion of provisions in the new constitution are being determined, for a vote by a non-member may prove to be decisive.

Privileges of the Constituent Assembly

In order to ensure complete freedom of speech in the Constituent Assembly, no member of the Constituent Assembly can be 'arrested, detained or prosecuted in any court for anything said or for any vote cast in the Constituent Assembly' (Art. 77). Persons who publish any documents or reports regarding the votes taken or proceedings made under the authority of the Constituent Assembly are immune from any legal proceedings. Members cannot be arrested during the period of constitution drafting, except on a criminal charge.

The Constituent Assembly has been given considerable authority to protect its proceedings from external control as well as to discipline outsiders who criticize it. The Constituent Assembly and its committees have been given the 'exclusive power to decide whether or not any proceeding is regular' (Art. 77(6)). Courts are excluded from making any enquiry into these matters.

The Interim Constitution prohibits anyone from making any comments 'about good faith concerning any proceeding of the Constituent Assembly' as well as any 'publication of any kind' about 'anything said by any member which intentionally misinterprets or distorts the meaning of the expression' (Art. 77(3)).

The violation of any of these privileges constitutes contempt of the Constituent Assembly. The Constituent Assembly is the sole judge of whether a violation has been committed. If the Constituent Assembly decides that a person has committed contempt, the chairperson, in consultation with the Assembly, may issue a reprimand or impose a fine or order the imprisonment of the person. Presumably, there is no appeal from this decision to the courts or other authority.

But while it is true that the issues that the Constituent Assembly will consider and decide on are so fundamental to the future of Nepal that there should be the least restrictions on free speech and debate in the Constituent Assembly, some of the privileges that the Constituent Assembly has been endowed with seem excessive: the Constituent Assembly should not be protected from judicial review if its members commit legal irregularities; the chair should not be able to punish those who are critical of the Constituent Assembly ('judge in their own cause'); and the Constituent Assembly should be accountable.

System to Be Used for Voting on the New Constitution

The Constituent Assembly will vote separately on the preamble and on each article of the bill for the constitution (Art. 70). At the first voting, the proposed provision will be passed only by unanimity (that is, only if no member votes against the provision; so presumably, an abstention from voting is not counted as a negative vote). If unanimity cannot be achieved, the political leaders of the parliamentary (legislative) parties 'shall

carry out mutual consultation to develop consensus' (Art. 70 (3)). A maximum period of 15 days is allowed for consultation. Within seven days after the consultation is concluded, a vote may be taken again. If there is still no unanimity, a further vote may be taken during which, if a two-thirds majority votes in favour of the provision, the provision is passed.

But the rules regarding unanimity may cause problems too. For one, while it is good to have a rule that encourages consensus, unanimity is almost impossible to achieve; also, if the rules state that in the absence of unanimity, a two-thirds majority suffices, the majority may have little incentive to compromise.

It is also undesirable that only party leaders should be involved in consensus-building exercises—perhaps the drafting committee assumed that only parties will be able to contest elections.

Public Consultation and Participation

As stated in the preamble, a primary goal of the Interim Constitution is to guarantee 'the rights of the Nepali people to frame a constitution for themselves.' The preamble also guarantees persons qualified to vote the right to participate in a 'free and impartial election of the Constituent Assembly in a fear-free environment.'

The Interim Constitution does not give the people the right to participate in the processes that lead up to the formation of the Constituent Assembly and during the Constituent Assembly's tenure. The original version of the Interim Constitution had provided for an awareness-raising committee to inform the public about the process and to collect their views and recommendations to assist in the drafting of the constitution. The present version of the Constituent Assembly does not contain any such provision, although it does provide for a commission to make recommendations on the restructuring of the state (Art. 138, discussed above).

Since the Constituent Assembly is free to establish rules for its procedure, it would be possible for the Constituent Assembly to provide for a greater degree of participation (for example, by setting up a committee of its members to consult with the people, or by inviting views and recommendations from the public). But might the Constituent Assembly also be able to require that the new constitution be put up for approval in a referendum to the public? Article 157 authorizes the Constituent Assembly, through a vote of two-thirds of members present, to refer to a referendum matters of 'national importance' on which it is necessary to make a decision ('except as otherwise provided elsewhere in the constitution'). The purpose and scope of this article is not immediately clear, but some clues regarding its function may be gleaned by noting where the article has been placed in the Interim Constitution and by parsing the definition of what constitutes conditions under which the article can be used: the article is located in the chapter titled 'Miscellaneous,' just before the article dealing with the 'power to remove

difficulties'; and the referendum is to deal with a matter not 'otherwise provided elsewhere in the constitution.' This treatment accorded the article suggests that a referendum may be used for deciding the outcome of something unexpected, something sufficiently critical that it must be decided by the people, regardless of the cost or complexity of a referendum. As the procedures for the adoption of provisions of the new constitution are set out at some length in Part 7 of the Interim Constitution, it is unlikely that the referendum can be used to resolve an issue relating to the new constitution.

How and When the New Constitution Will Come into Force

There are no express provisions in the Interim Constitution about when the new constitution would come into force. Perhaps it is assumed that it would come into force on the day specified in the new constitution. That day could be the date of its adoption by the Constituent Assembly, but it would be possible for the Constituent Assembly to postpone the time of its coming into force. Could the Constituent Assembly specify that the constitution would become effective only if it were to be approved in a referendum? The answer, as indicated in the preceding paragraph, is a likely 'no.' It is relevant to note here that Article 64 envisages that the maximum duration of the Constituent Assembly will be two years (with the possibility of an extension for another six months). Presumably, if the Constituent Assembly were to continue after its two-year tenure, it would then be necessary to move to new constitutional arrangements. But Article 82 envisages the possibility of the Constituent Assembly's continuing until elections for the first legislature under the new constitution are held. It is unclear for how long the new elections can be postponed. It is also unclear whether the coming into force of the entirety of the new constitution can be postponed, or merely the parts dealing with the legislature. It would be important for the Constituent Assembly to specify these matters clearly in the transitional provisions of the new constitution.

Amending the Interim Constitution

There is only one method for amending the contents of the Interim Constitution. An amendment can be passed if it is voted for by at least two-thirds of all the existing members. Since members of parties are subject to party discipline, and because all important decisions are being taken by party leaders, the leaders of the three main parties have been able to change the Interim Constitution at will. As of now, there is no real entrenchment of the provisions of the Interim Constitution; indeed, we have seen how easily they have been changed on five occasions. This flaw in the procedures for amendment has somewhat devalued the Interim Constitution and its image as a supreme, constitutional document.

Normally, an important function of an interim constitution is to entrench decisions in the road map, and in this way to give to the people a sense of security and predictability

about the process. While there is an advantage to having a flexible interim constitution, that flexibility is only desirable for provisions that pertain to the interim arrangements, rather than for the roadmap to the new constitution. A culture of changing the Interim Constitution at will may allow more groups who are unhappy about the original provisions, or the changed provisions, to advance their own claims for amendment. It is unlikely that this 'flexibility' is good for the overall process.

Nor is the procedure whereby these changes are negotiated good for the process. These negotiations take place between the seven parties on the one hand and the 'agitating' community on the other. These sorts of bilateral negotiations are inconsistent with the notion of a constituent assembly, where all interest groups get together to examine all claims and to settle differences. Neither the eight parties nor the interim government has any electoral mandate or legitimacy to negotiate these claims. This mode of negotiations also gives the impression that it is within the authority and grace of the seven parties (for the most part representing the old elite) to make concessions to the marginalized communities—thus reinforcing forms of relations that are to be eliminated.

Conclusion

A Constituent Assembly of over six hundred members is perhaps not ideally suited to frame a constitution. There will be complex problems of logistics, funding, accommodation, and most of all, with devising appropriate forums and venues for meaningful negotiations (in committees that may have as many as 80 members).

It is clear that the constitution-making process will be dominated by political parties. And among the political parties, the most influential members will probably be drawn from the same circle that dominated the constitution-making process in 1990. Such a setup may not be fully compatible with Nepal's new credo of inclusiveness. After all, it is from the widely held perception of lack of inclusiveness that many of the challenges to the Interim Constitution have come. Even if excluded groups are now admitted to the Constituent Assembly, they will have to be included as members of, mostly, established parties, and thus their influence will be marginal.

It is also essential that adequate preparations be made to assist the Constituent Assembly. An independent commission could still make a big difference. If an independent commission is not set up, then civil society organizations, such as universities and think tanks and NGOs, must make up the deficit. They must undertake research on the complex issues that the Constituent Assembly will face, and they must mobilize the people to participate in the process.

Finally, there is a lack of space for the people, in general, and civil society, in particular, contrary to the earlier commitments made by the seven parties now in government.

The Interim Constitution has no provisions for the involvement of the people, other than in their capacities as voters. The participation of the people would depend on their own efforts or on the efforts of the private sector and civil society. Since full and active participation is essential for the transition to a new Nepal, civil society must now take the matter in its own hands.

CHAPTER 5

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5

Fundamental Constitutional Principles

This chapter considers a number of issues related to the recognition and incorporation of fundamental values in the new constitution of Nepal. It first examines whether the Constituent Assembly should be bound by a set of constitutional principles, and then it examines how these principles should be incorporated in the constitution.

Formulation and Status of Constitutional Principles

Rarely does a country embark upon the making of a new constitution without very good reason. Even when the reasons are valid, a group or region may sometimes resist such a process out of fear that the outcome will be unfavourable to it. If this is the case, agreeing on the goals of the process, perhaps even limiting the scope of the changes that will be made, may help to overcome such resistance. A prior agreement on goals has other advantages too. Identifying priorities early helps to give direction to the process of making a new constitution and assists in balancing different aims and interests. For example, agreeing that national unity and identity may require both effective state institutions and forms of self-government for different regions and communities, and thus the processes for creating a balance between individual and community rights, would certainly be an issue best tackled early. Increasingly, goals are defined by reference both to local traditions and culture and international norms (such as democracy, national unity, human rights, social justice, and gender equity).

People's understanding of the process of constitution making can be enhanced if a few clear principles are agreed upon in advance; otherwise there is a danger that, with attention focused on details, people may become confused and thus may not be able to participate in the process. Goals can also orient the direction and modalities of the process. In Nepal, the objectives of the 1990 Constitution—multiparty democracy

and constitutional monarchy (seen as the mandate from *Jana Andolan* I)—were clearly spelled out and became, effectively, the terms of reference for the Constitution Recommendations Commission. The laying out of these objectives, to some extent, precluded a detailed consideration of goals of social justice or the elimination of social and political exclusionary practices. But that does not mean that the objectives pertaining to social justice should be left out in Nepal's new constitution. In fact, if a progressive agenda is adopted during the making of the new constitution, it will encourage wide participation and help to give voice to the people.

However, it is important that the process leave room for ideas and recommendations that may emerge from consultations with the people—particularly with representatives of the rural people, the marginalized groups, the women, or minority groups, who may have little influence on the initial choice of goals.

It has sometimes been argued that to bind the Constituent Assembly in this way is inconsistent with the sovereignty of the people that the Constituent Assembly represents. It is of course possible to leave the Constituent Assembly to decide its goals, as among its first tasks. This happened in both the Indian and Pakistani constituent assemblies, but only after the restrictions that were placed to protect the rights of minorities in the original British proposals on the constituent assembly had been removed with the partition of India. But in a nation where a diversity of interests vies for representation, a constituent assembly could quickly get bogged down in controversy over the goals of the new constitution, and the process could get delayed or may even completely stall.

One compromise would be to restrict the fundamental principles to those matters on which there is a near-universal consensus. Important issues for which there is demand from substantial sections of the people can be placed on the agenda of the CA as matters that must be addressed by the assembly. This approach was adopted in Kenya. Although one might think that it would not be necessary to set out formal goals if there is universal agreement about them, the truth is that some groups may find that these accepted principles do not suit them after all; or some groups may be so concerned with other objectives of interest to them that they may lose interest in the carrying of the fundamental principles into the new constitution.

Who Decides the Goals?

There is no uniform method for deciding goals. Sometimes the vision of a dominant leader is a sufficient mandate, while in some cases, elaborate negotiations among a host of 'stake holders' are necessary. In some African countries, delegates at national conferences that bring together political groups, former 'dissidents,' and religious and civil society groups have been the principal actors driving the processes for setting out the goals of reforms. Sometimes the fundamental principles have been set by the

political parties, as was the case in Fiji and South Africa. In Eastern European countries, goals have been decided through round table conferences of political parties. In India and Pakistan, after independence, the goals were decided by their respective constituent assemblies. In countries like Namibia and East Timor, where the international community has played a key role, the goals have been set by the UN Security Council. In other countries like Cambodia and Afghanistan, the goals have been set by a consortium of concerned states. The terms on which the European Union was willing to recognize states that emerged out of the former Yugoslavia—upholding democracy and the rule of law, and the protection of minorities—served effectively as the framework for drafting their constitutions.

In Nepal, important sections of the people and civil society seem to think that fundamental principles must bind the Constituent Assembly. In their submissions to the committee for drafting the Interim Constitution, many groups wanted to express these principles in detail. In order to consolidate the objectives of *Jana Andolan* II, the political parties in the seven-party alliance and the Maoists discussed certain fundamental principles in a series of agreements that concluded with the Peace Agreement and the formation of the Interim Constitution.

We can identify certain principles agreed in the *Jana Andolan*, the Comprehensive Peace Agreement, and the Interim Constitution. These are

(1) The new constitution must

(a) be based on the wishes of the people of Nepal, and

(b) respect the goals agreed upon in the 8- and 12-point agreements, the Comprehensive Peace Agreement and the Interim Constitution, including

(i) sovereignty of the people;

(ii) the constitution as Supreme Law;

(iii) inclusive democracy;

(iv) national independence, sovereignty, geographical integrity of the country, and national unity;

(v) accountability and integrity of state institutions;

(vi) non-discrimination on the basis of class, caste, ethnicity, gender, region, or religion;

(vii) independence of the judiciary;

(viii) rule of law;

(ix) basic needs and human rights;

(x) recognition of diversity of languages and cultures;

(xi) federalism and decentralization (the specific commitment to federalism being introduced by an amendment to the Interim Constitution);

(xii) righting past wrongs.

Compliance with Constitutional Principles

How can it be ascertained that the goals have been adequately incorporated in the constitution? There is no standard way to ensure compliance with the obligation to incorporate fundamental principles. In South Africa, the prior goals (acting as the parameters of the constitution) were so critical to the process that a provision was made for the Constitutional Court to verify that the draft constitution conformed to the goals before the constitution came into force. In fact, the court referred the draft back to the constituent assembly on two issues, and it was only after these issues had been rectified that the court certified the draft and had it approved by President Mandela.

In many countries, a referendum is necessary on the final product. This can be seen as a validation of sorts, even though the principal reason for agreeing in advance on fundamental principles is to avoid the consequences of majoritarianism.

The South African method of using the Constitutional Court to certify the draft is unusual, and such a process was possible only because the parties had agreed to a detailed list of constitutional principles. Such a procedure might not make sense in Nepal, where there appears to be broad agreement on fundamental principles. Also, leaving the final word to the courts would detract from the status of the Constituent Assembly as a sort of paramount political body (especially if the Constituent Assembly's rules of procedure provide sufficient safeguards against the majority's imposing their will). Finally, only some of the principles could possibly be decided in the courts, for most of the deliberation needed would essentially be a matter of political, rather than legal, judgment.

When there is no formal procedure for determining compliance, it is useful to remind the members of the Constituent Assembly, in particular the chairs of its committees, of their obligation to respect the fundamental principles. In order to ensure that the fundamental principles have been incorporated, the Constituent Assembly may instead set up its own committee to review the draft before its adoption. Such a committee might be formed from the chairs of the various thematic committees in the Constituent Assembly. These chairs should be assigned the responsibility of harmonizing the chapters prepared by all the committees. To reconcile differences between the thematic committees, the members should refer to the principles.

Methods of Incorporating Values

Preamble

The preamble is still one of the oldest and most common ways of incorporating values. The preamble is the introductory part of the constitution that normally sets out some or all of the following:

- the history of the constitution (especially if the constitution is written just after the struggle for independence or democracy);
- the values and aspirations of the people;
- the reasons for the constitution's being enacted;
- the nature of the state, either as democratic or referring to the ethnicity of the dominant community or to the plurality of communities;
- the authority under which the constitution is made: nowadays, the authority is normally the people with a reference, perhaps, to the guidance or blessings of the Creator.

The real significance of the preamble is political rather than legal (in some legal systems, though, the preamble can be used as an aid for interpreting the constitution and is even binding), and it is written to speak to ordinary persons, not lawyers. The preamble, often written in a 'flowery' or ringing tone, gives grandeur to the constitution, and it can have great symbolic significance; an example of the usual language employed can be gleaned from a reading of the preamble to the US Constitution, which says:

> We the People of the United States, in order to form a more perfect Union, establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

Nepali Preambles

All the Nepali constitutions except the 1962 Constitution have had preambles. An interesting way to understand the reasons the constitutions were created and the dynamics of the politics of the time is to analyze these preambles. They provide an insight into the source of authority of the constitution makers and the objectives of the constitutions. The 1948 Constitution was 'ordained and proclaimed' by Maharaja Padma Shumsher Jung Bahadur Rana, under authority given to the Ranas by the 'sacred Panja-patras by Shree Panch Maharajadhiraja of Nepal' in 1903. The preamble to the 'Interim' Constitution of 1951 was ordained and promulgated by His Majesty the King of Nepal 'on the advice of the Council of Ministers,' thus acknowledging a significant shift of authority. By the time of the 1959 Constitution, there seems to have been a

certain regression—the constitution was enacted and promulgated by King Mahendra Bir Bikram Shah Dev 'in the exercise of the sovereign powers of the Kingdom of Nepal and prerogatives vesting in Us in accordance with the traditions and customs of our country and which devolved on Us from our August and Respected forefathers.' The preamble to the 1990 Constitution shows an interesting contradiction. The constitution was enacted and promulgated by King Birendra Bir Bikram Dev 'by virtue of the State authority, as exercised by Us,' but the king also acknowledged that 'in the independent and sovereign Nepal, the source of sovereign authority is inherent in the people' and declared his 'desire to conduct the government of the country in consonance with the popular will.' Will the preamble of the new constitution reflect the complete transformation of sovereignty from the kings and Ranas to the people?

Fundamental Principles and Objectives of the State

Some constitutions contain a statement on the fundamental principles, objectives, and obligations of the state. These appear in addition to the preamble when the preamble is kept short in order to maximize its impact and also because the principles can be more programmatic and specific than the preamble. This practice of including additional statements is more common in civil law countries, but is also being used in common law countries now because of the perceived limited legal significance of the preamble. Most constitutions now try to define the character of the state and may declare their philosophical or other basis:

- The French Constitution, for example, says: France shall be an indivisible, secular, democratic, and social republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race, or religion. It shall respect all beliefs (Art. 1).
- The Portuguese Constitution defines the Portuguese state as being 'based upon the dignity of the human person and the will of the people and is committed to building a free and just society united in its common purposes' (Art.1). Another section defines Portugal as a 'democratic state that is based upon the rule of law, the sovereignty of the people, the pluralism of democratic expression, and democratic political organization, and respect and effective guarantees for fundamental rights and freedoms and the separation and inter-dependence of powers, and that has as its aims the achievement of economic, social, and cultural democracy, and the deepening of participatory democracy' (Art. 2).
- The declaration of the character of the state is sometimes part of a wider set of principles of the state, as in Portugal. Other principles in the Portuguese Constitution include as basic obligations of the state the promotion of 'the welfare and quality of life of the people, and actual equality between the Portuguese in their enjoyment of economic, social, and cultural and environmental rights,

through the transformation and modernization of the economic and social structures' (Art. 9(d)). These principles are generally intended to guide the state, public institutions, and citizens but are seldom legally enforceable.

Directive Principles of State Policy

Directive principles of state policy are similar in many ways to state principles and obligations (and sometimes they are combined, as in Papua New Guinea). India popularized the use of directive principles in the Commonwealth; today, directive principles are also found in the Constitutions of Uganda, Namibia, Ghana, Nigeria, Bangladesh, Papua New Guinea, and Sri Lanka. The most detailed and specific statement of directive principles is to be found in the Indian Constitution. The principles include obligations on the state to

- promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice—social, economic, and political—shall inform all the institutions of the national life;
- minimize inequalities in income;
- eliminate inequalities in status, facilities, and opportunities, not only among individuals but also among groups of people residing in different areas or engaged in different vocations;
- secure that
    - the citizens, men and women equally, have the right to an adequate means to livelihood;
    - the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
    - the operation of the economic system does not result in the concentration of wealth and the means of production to the common detriment;
    - there is equal pay for both men and women;
    - the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter vocations unsuited to their age or strength;
    - children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment;
    - make effective provision for securing the right to work, to education, and to public assistance in case of unemployment, old age, sickness, and disablement and in other cases of undeserved want.

Most constitutions that have directive principles of policy state that they are not justiciable, which means that the courts would not enforce the principles directly. The Indian Constitution says, for example, that the directive principles are 'not enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country' and that the state is under a duty 'to apply these principles in making laws.' The Ghanaian Constitution goes further when it says that directive principles 'shall guide all citizens, Parliament, the President, the Judiciary, the Council of State, the cabinet, political parties, and other bodies and persons in applying or interpreting this Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a just and free society.' The Ghanaian president has to report to Parliament, at least once a year, the steps taken for the realization of the directives, particularly those regarding basic human rights, a healthy economy, the right to work, the right to good health care, and the right to education. Similar provisions exist in Uganda.

Consequently, courts, among other institutions, have to take directive principles into account when interpreting the constitution. Increasingly, courts are using the directive principles in different ways, as justifying qualifications on rights: the right to equality, for example, has been marshalled to justify affirmative action when a directive principle requires the state to redress historic or contemporary injustices inflicted on a section of the community. The right to life has been interpreted, with the help of directive principles, to include the right to basic needs and a clean environment. To promote social justice, courts have used directive principles as the basis for giving directions to governments, legislatures, and administrators. They have also used directive principles to restrict the scope of fundamental rights when the exercise of the rights threatens a protection accorded by the directive principles. For example, the directive principle on living wages and decent conditions of work has been used by some courts to uphold the reasonableness of the restrictions imposed by minimum-wages legislation.

Directive Principles in Nepal

Directive principles first appeared in Nepali constitutions in 1951 (in the Interim Constitution). That constitution did not have a separate chapter on human or fundamental rights and such rights as were given appeared as directive principles. The scheme of directive principles was greatly influenced by the Indian Constitution, which had just been enacted. So the directive principles were not 'justiciable' and had no bearing on the validity of past or future laws although they were to be treated by the government as 'fundamental in the governance of the country' and had to 'apply the said principles in adapting the existing Nepali laws as early as possible, as well as in framing laws hereafter.' Directive principles included

- promotion of 'the welfare of the people by securing and protecting as effectively

as it may, social order, in which justice—social, economic, and political—shall inform all the institutions of the national life;'

- right of all citizens, 'men and women equally,' to an adequate means of livelihood;
- equitable distribution of resources 'as best to subserve the common good';
- protection of children and youth against 'exploitation';
- assistance to the elderly, the sick, and the disabled, and 'other cases of undeserved want;'
- securing to all workers a 'living wage, conditions of work, ensuring a decent standard of life, and full enjoyment of leisure and social and cultural opportunities';
- promotion, 'with special care,' of the educational and economic interests of the weaker sections of the people and protection against 'social injustice and all forms of exploitation';
- promotion of village *Panchayats*;
- a uniform civil code throughout Nepal.

Directive principles disappeared in the 1959 Constitution, but the 1959 Constitution did include an enforceable set of fundamental rights. The 1962 (*Panchayat*) Constitution reintroduced directive principles, but they were more limited in scope than they were in the 1951 Constitution. The 1962 Constitution defined the aim of the *Panchayat* system as the promotion 'of the welfare of the people by setting up a society which is democratic, just, dynamic, and free from exploitation by bringing about harmony in the interests of different classes and professions from a comprehensive national outlook.' This might be read as an aim concerned more with 'stability' and 'harmony' than with social justice.

Directive principles occupy a prominent place in the 1990 Constitution. They are broader than in the past, covering matters like the environment and land reform, and placing considerable emphasis on economic and technological development, while retaining the focus on public welfare, social justice, and a special concern for the more marginalized and vulnerable members of society.

The substantive provisions of the 1990 Constitution deal with the parliamentary, multiparty system with a constitutional monarchy. The demands of the marginalized communities for specific provisions for their participation and development were disregarded in the structures of the state (particularly in the legislature and the government). But their concerns were reflected in the directive principles which, they were told, would be implemented by future governments. The directive principles that were

intended to deal with major politically contentious issues concerned the decentralization of the state and the promotion of the interests of the economically and socially backward groups. The directive principles on these issues were therefore critical to the growth of a balanced and harmonious society, on which the constitution places so much importance. But fifteen years on from the adoption of the directives on decentralization and participation, and social justice and the advancement of disadvantaged groups, little progress has been made. That failure contributed significantly to the rise of discontent with the state and laid the foundations for the Maoist insurgency.

The weak and ambiguous nature of directive principles raises the question of whether they would serve a useful purpose if included in the new constitution and whether, if they are included, they should be made more binding.

Preambles and state and directive principles identify national aspirations, goals, and priorities, but they achieve little by themselves. At best, they are instructions or even only guidelines to those in authority (often inserted in constitutions more for their cosmetic value than as serious commitments). Little progress will be made unless the institutions that exercise state authority are designed to respond to the imperatives of state principles. Take the example of the Nepali Constitution's directive principles: they are not binding by themselves; they depend on positive initiatives by agencies of the state, particularly the government, the legislature, and the courts; the beneficiaries of the principles are not able to enforce them except through political action, but the directives can only be invoked with any degree of success if the plaintiffs or petitioners have political clout, connections to representatives in state institutions, and access to centres of authority.

Dominated largely by high-caste groups, state institutions have largely ignored directive principles aimed at the sharing of power and the advancement of marginalized groups. The lesson is that unless the marginalized groups are brought centrally into powerful state institutions and power is shared with local organizations, governed by local communities, there will be little prospect of the reform, in whose name the Constituent Assembly is being convened.

Questions

1. Should there be a formal agreement on fundamental principles that the new constitution must reflect?
2. If so, where should those principles be enshrined?
3. How should the Constituent Assembly be reminded that it has the obligation to make a new constitution that reflects those principles?

4. What mechanism should be used to ensure that those principles have indeed been reflected in the new constitution?
5. What common experiences of Nepalis should be reflected in the preamble?
6. What principles should be set out in the preamble?
7. Should the directive principles be made binding?

CHAPTER 6

CHAPTER 6

Human Rights as the Framework for Freedom, Diversity, and Social Justice

For a long time, human rights have been an integral part of constitutions. It is inconceivable that a constitution today would not contain a bill of rights. Additionally, human rights have influenced conceptions of constitutionalism and fairness, a fact that is reflected in the design of state structures and procedures. However, ideas about the purposes and scope of human rights have changed since the US and French constitutions of the late 18th century. At first, human rights were seen as protective mechanisms for citizens against arbitrary exercise of state power and as giving citizens certain freedoms, principally that of expression and association. Now, more and more aspects of people's lives—relationships between individuals and communities, between them and the state, and among states—are governed by the regime of human rights.

Human rights are closely connected with the history of constitutions and the development of democracy and constitutionalism in Nepal, too. By criticizing the army and insurgents alike for abusing human rights during the civil conflict in Nepal, the human rights defenders were able to create a groundswell of opposition to the culture of oppression in Nepal. In fact, *Jana Andolan* II was triggered when the Nepali people's human rights were grossly violated. Respect for human rights features high in the aspirations of the people; this is reflected in the 8-and 12-point agreements between the Seven-Party Alliance and the Maoists. Human rights are an important component of the peace process and are highlighted in the Comprehensive Peace Agreement. It is widely accepted that there can be no lasting peace or justice without respect for and promotion of human rights. The Interim Constitution gives a constitutional status to the Nepal Human Rights Commission and has a more extensive chapter on human rights than any previous constitution.

There are several reasons that human rights, which are critical in defining the relationship of individuals and communities to the state, are given so much importance

in constitutional and political systems:

- Human rights are inherent in the human being and are not surrendered to the government when people form a political community. Indeed one of the reasons for forming a political community is to strengthen protection of human rights.[1]
- Human rights are necessary if human beings are to live in dignity, fulfil their potential, and satisfy their physical, cultural, and spiritual needs.
- Implicit in the above points is the protection of individuals and communities against the state; as the power and reach of the state increases, there is a corresponding emphasis on people's rights and freedoms.
- Human rights empower citizens and residents by giving them a central role in decision making in the organs of the state; these rights also allow citizens to form the associations they want, and prevent their vital interests from being violated by the state.
- Provisions for human rights protect citizens against the excesses of 'majoritarianism,' provide justification for special treatment of minorities and other disadvantaged communities, and help promote their identity and culture.
- Many rights, such as the right to vote, the freedom of expression and of the media and access to information, are necessary for the establishment and protection of democracy, and for holding the public authorities accountable to the public.
- Rights provide guidance to organs of state regarding the exercise of state power.
- Respect for human rights limits internal and external conflicts and strengthens national unity.

Different Kinds of Rights

Historically, rights emerged with the rise of strong states and markets (due to the realization that the state and the market placed individuals at risk of exploitation and oppression, and that certain guarantees were essential for the market economy). In recent years, the concept of rights has been broadened to include a variety of entitlements that are considered necessary for protecting individuals and to allow them to fulfil their needs, including material ones.

The first rights to be protected were individual rights, and the protection was restricted to political and civil rights—rights of life and liberty; civil rights, such as the right to

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[1]This idea is expressed in the Ugandan Constitution (1995) as follows:
Fundamental rights and freedoms of the individual are inherent and are not granted by the State (Art. 20(1))

associate and assemble; freedom of expression; and political rights, such as the right to vote and stand for elections, and the right to participate in public affairs.

Economic, social, and cultural rights were recognized next. These rights were given prominence in socialist theories, which attached great importance to social justice and providing fair living conditions for all. They include the right to education, employment, shelter, health, and food.

Solidarity rights were recognized next: right to a clean, healthy, and sustainable environment, peace, and development. These rights are important for the community as well as for the individual.

These categories represent different dimensions of rights. Civil and political rights are directed at ensuring a secure space for individuals to pursue their values and interests and are aimed at limiting state intervention in their lives. Economic, social, and cultural rights, on the other hand, impose obligations on the state to take specific action to facilitate the enjoyment of social and economic rights. The state is not necessarily required to provide free education or medical services, and so on, but the state is obligated to pursue policies that enable individuals, families, and groups to earn a living; the state is also responsible for maintaining an honest administration, for distributing resources equitably, and for formulating appropriate policies. The third category of rights also requires an active role for the state, in part as a regulator. It requires the state and other authorities to pursue sensible policies that do not exhaust or destroy natural resources or waste money on weapons; and the state must create conditions for peaceful and consensual living and establish opportunities for individuals and groups to pursue economic and social interests in fair, conducive, and equal conditions.

To some extent, these categories represent different economic and philosophical ideologies. Some commentators have even argued that these categories are in conflict or should not be given the same degree of priority. Nevertheless, today it is recognized that all categories of rights are equally necessary for people to live in dignity and peace, and that these rights are interdependent. For example, rights to education and literacy (which are classified as social rights) are necessary for the freedom of expression (which is classified as a civil right), because to express themselves, people have to be able to read and communicate. Similarly, a clean environment is necessary for everyone's health and the right to life, more generally (bringing together all categories of rights).

The notion of who the beneficiaries of rights are has also changed. At first, only citizens were given rights, as in France, and even the concept of citizenship was limited (as in the early years of the USA). Today, all persons are entitled to human rights, although in most countries, political rights connected with elections or employment in state institutions are still restricted to citizens. The concept of who the beneficiaries are has also changed from the early period, when rights were considered appropriate only for individuals.

The individualistic orientation of rights was criticized for promoting selfishness and leading to the disregard of the values and interests of the community or the state, and this view has resulted in some countries' imposing wide restrictions on the enjoyment of rights, on the grounds of 'public interest' (as in earlier Nepali constitutions).

Another solution is to find ways to balance rights with the responsibilities of individuals and groups. Examples of duties and responsibilities can be found in a number of constitutions, including in India, Papua New Guinea, Uganda, and Portugal. Typically, these responsibilities include duties to

- defend the constitution
- protect the security and independence of the state
- obey the law
- pay taxes
- respect the rights and culture of others
- take responsibility for the welfare of family and children.[2]

Placing undue emphasis on individual rights, particularly political rights, can lead to 'majoritarianism,' under which the culture and values of the majority community dominate society and in which the members of the majority community participate at much higher levels in the governance of the country than do others. To offset majoritarianism, many countries are now increasingly recognizing collective and group rights, particularly of ethnic, religious, and linguistic minorities, and indigenous communities. Cultural rights, as well as forms of self-government for minority communities through autonomy, are now given increased attention. Special provisions are made in international treaties and national laws for the promotion of the rights of vulnerable sectors of society, such as women and children.

Other forms of collectivities to which rights are generally extended are commercial and social organizations, such as companies or trade unions. Associational rights are particularly important to trade unions, while property rights are critical for commercial organizations. For trade unions, the freedom of expression is important because that freedom allows them to organize protests and so on and lobby for their interests; and the freedom of expression is important for companies because that freedom allows

[2] The notion of duties is strong in Vedic thought and was included in the very first document granting rights in Nepal. The 1948 Constitution decreed that within his capacity, 'it shall be the duty of every citizen to promote public welfare, to contribute to public funds, to be in readiness to labour physicially and intellectually for the safety and well being of the Realm and bear true allegiance to His Majesty the Maharajadhiraja Shree 5 and His Highness the Maharaja Shree 3 and be faithful to the State and its Constitution' (Art. 5).

them to advertise their products and the services they offer (although some countries give a lesser degree of protection to 'commercial' speech than, for example, to political or intellectual speech).

At first, only the state had obligations under the regime of human rights. Individuals or collectivities could violate the rights of others (through discrimination, for example) without incurring legal penalties. In some instances, special laws were passed to outlaw racial, ethnic, or gender discrimination (and of course, the criminal law protected several rights of individuals). But with the growing power of companies and with the increasing recognition that much discrimination and oppression takes place in society and within the family, there is a move towards extending obligations that arise from the rights of others to corporate and social groups. The South African Constitution provides an example:

> Article 8 (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

Nor are corporations automatically beneficiaries of human rights, as the following clause of Article 8 indicates

> (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

These developments have increased the scope and the complexity of rights, but there are also tensions between different categories of rights. Rights also provide a framework for balancing competing interests; equality, for example, can be seen as requiring non-discrimination, but others see effective equality as being (at least in some circumstances) the justification for special provisions for the disadvantaged or the vulnerable. The notion of rights as universal and individual oriented is increasingly challenged as being 'majoritarian,' insensitive to minority cultures. The call is for 'differentiated,' rather than 'uniform,' rights, with considerable shift in emphasis from the individual to the 'community.' In multi-ethnic societies, human rights have become intertwined with questions of identity. Rights groups have challenged the notion of the 'nation-state' theory, by drawing attention to diversity and cultural rights. The prominence that this shift gives to culture raises issues not only about relations between communities, and between them and the state, but also about the internal organization of each community. It may be that culture is not an unqualified good (ask women in Asia and Africa, and ask Dalits), and constitution makers may have to decide between rights as traditionally understood (as individual rights) and cultural values. How this dilemma is to be solved remains a great challenge in our times.

Fresh ways of thinking about rights have also come with the search for social justice—with the increasing recognition of the importance of economic and social rights as

ensuring the basic needs of the people. This factor has led to a more flexible approach to the notion of equality and non-discrimination. And the interest in democracy-as-participation has expanded our notion of political rights.

The Internationalization of Rights

Today, human rights are no longer a matter of concern or interest to the state only. There are international and regional systems of rights, consisting of treaties and declarations on rights and institutions to supervise the implementation of rights. The most important document is the Universal Declaration of Human Rights adopted by the General Assembly of the UN in 1948, which has provided the basis on which many treaties and declarations have been made. The principal treaties are the Covenant on Civil and Political Rights and the Covenant on Economic, Social, and Cultural Rights, which between them cover most rights. There are specialist treaties for protection against racial discrimination and torture, and for the protection of the rights of women, children, refugees, and indigenous peoples. There are Declarations on the Rights of Minorities and of Indigenous People, which while not legally binding, carry considerable moral authority.

Regional human rights systems exist in Europe, Latin America, and Africa—but there is none in Asia. Perhaps Asia is too large and too diverse a continent, with enormous cultural and religious diversity, and several authoritarian regimes, and maybe sub-regions provide a more workable category in Asia; but despite occasional proposals for an ASEAN human rights scheme, little concrete progress has been made. Regional or national schemes, with their own courts that make binding decisions, are stronger than the international schemes, in institutional terms.

Each of the international treaties is supervised by an international committee of experts, set up under the treaty, to which member states are required to submit periodic reports. Some countries (including Nepal) have accepted additional protocols under which individuals can complain to the committee, although in most cases, these committees, while able to interpret state obligations, are unable to enforce their decisions. Some states, however, are prepared to follow the decisions made by committees.

There are other components of the international system. It is now widely accepted that the international community, especially under the authority of the UN Security Council, can intervene in the internal affairs of a country if there are massive violations of human rights, to restore order or to protect victims (as in Serbia, East Timor, Kosovo, and Sudan). The United Nations' Council of Human Rights has the responsibility of examining individual country records on the observance of human rights, which it discharges partly through special representatives and rapporteurs, and the Council is now about to begin peer reviews of countries' records.

The international community has set up special judicial tribunals for trials in respect

of the crimes against humanity (for example, in Rwanda, Cambodia, and the former Yugoslavia). The international community now has a permanent International Criminal Court with broad jurisdiction, at the Hague. National courts can also exercise jurisdiction over any person who is charged with crimes against humanity, wherever the crimes may have been committed (this is known as 'universal jurisdiction' and was exercised in the case of former Chilean president Pinochet).

There are other ways in which the internationalization of rights occurs; for example, the decisions and general comments of the treaty bodies are frequently cited in national courts, and the judgements made by international and regional human rights courts are also a source of interpretation in national courts. Furthermore, national courts borrow from other national courts (Nepali and Indian courts survey a wide array of US and British cases)—and in this way, there is a rich and productive trade in precedents.

Key international instruments make it clear that the international community has a duty of mutual obligation to assist states in the fulfilment of their human rights responsibilities, for example, through technical, financial, and other forms of assistance. Human rights are seen as manifestations of global responsibility and solidarity. The international community has promoted the establishment of human rights commissions at the national levels, based on principles designed to ensure independence, competence, and commitment ('the Paris Principles'). In 2005, the summit of heads of governments of member states of the UN made a commitment on behalf of the UN to protect groups and communities against wide-scale violations of their human rights. The engagement of the international community is very evident (and appreciated) in Nepal, where the first forms of international involvement, based on international norms, in the conflict and insurgency were driven by humanitarian concerns. One of the largest field offices of the Office of the High Commissioner of Human Rights, a principal UN agency, is in Nepal, and it has played an important role in promoting and monitoring human rights.

Human rights, therefore, are no longer a matter just for a state, but are deeply woven into a state's international obligations. The framers of Nepal's new constitution need to keep this fact in mind.

Development of a Rights Regime in Nepal

Although the Muluki Ain (1853) is viewed as an instrument of exclusion, because it enshrined the hierarchical system of Nepali society, with its inequalities, it did have some elements of a reforming nature. It granted freedom of religion, in the sense that a person could practice his or her religion. Conversion of Hindus to any other religion, however, was prohibited. It prohibited forced labour except for public purposes. It placed restrictions on the practice of 'sati,' although it did not abolish it entirely. And it restricted the severity of physical punishments previously permitted, and forbade torture to exact confessions.

The modern movement for human rights began with the contacts the Nepali elite and middle class made with Indian freedom fighters in the 1940s and the return of Gorkha soldiers from abroad, where they came across democratic states that placed great emphasis on rights and freedoms. Under domestic and international pressure, the Rana regime under Prime Minister Padma Shamsher introduced a constitution (the first such document in Nepal; see chapter 2), the Government of Nepal Act 1948, which purported to grant (in one article) basic democratic freedoms: 'the freedom of the person, freedom of speech, liberty of the press, freedom of assembly and discussion, freedom of worship, complete equality in the eyes of the law, cheap and speedy justice, universal and free elementary education, universal and equal suffrage for all adults, security of private property as defined by the laws of the state as at present existing, and laws and rules to be made thereafter' (Art. 4). Some specific legislation was subsequently passed to implement these rights. Nevertheless, the Act suffered from several serious shortcomings: the rights were subject to past and future legislation (which effectively rendered them useless); the implementing legislation imposed various restrictions on the exercise of the rights and freedoms; the final judicial authority to determine violations of rights was not formal courts, but a body set up by the government (Art. 52); and there were insufficient democratic reforms to sustain these liberal rights.

But the conservative forces were against even this limited form of rights, and they resisted reforms, overthrew Padma Shamsher, and scrapped the constitution. This turn of events, however, mobilized the forces for democracy and rights, and led to the overthrow of the Rana regime and the restoration of the monarchy. King Tribhuvan then proclaimed the 1951 Constitution, which had a detailed section on rights and freedoms (Part II). These rights and freedoms included equality before the law, prohibition of state discrimination on the grounds of religion, race, caste, sex, or place of birth, and equal opportunity for employment in state services. The constitution aimed to guarantee various rights and freedoms (personal liberty, speech, and expression; peaceful assembly; forming associations and unions; free movement and residence within Nepal; acquiring and disposing of property; and the right to practice any profession). The constitution prohibited employment of children who were under 14 years of age in 'any factory or mine or … other hazardous employment' (Art. 21). Various provisions ensured due process of rights in respect of criminal trials. The constitution also guaranteed a number of social policies to promote egalitarianism; to create humane conditions of work; to provide for maternity relief; to provide welfare for the old, the disabled, and other weaker sections of society; and to provide social justice. The formulation of these rights and policies was greatly influenced by the newly established Indian Constitution.

As with the 1948 Constitution, there was considerable reluctance about rights in the 1951 Constitution. No distinction was made, as in India, between rights and social policies, all appearing under the rubric of Directive Principles of State Policy. As such, none of them was legally enforceable, and laws inconsistent with the rights could not

be challenged (although the government was to treat them 'as being fundamental in the governance of the country,' (Art. 3(2)). Even without this exemption, the rights were made subject to the 'existing law' (and therefore without any superior force)—and law making was firmly under the control of the king. However, there was a provision for a stronger judicial machinery in the form of the Pradhan Nyayalaya, and a subsequent executive order attempted to give it independence of the executive and increased jurisdiction. But because of a few bold decisions made by the Pradhan Nyayalaya, the king cut back its jurisdiction and immunized various laws against judicial review, by constitutional and legislative means. In fact, the king assumed full executive, legislative, and judicial powers, becoming the supreme power, with no accountability, and he lay down the 'foundation of Royal absolutism.'[3]

Yet once again, this assertion of royal 'prerogative' provoked such strong public protests, that the old law that bestowed constitutional jurisdiction on the Pradhan Nyayalaya and gave finality to its decisions was restored. HB Tripathi says that after this re-establishment of the old law, the Pradhan Nyayalaya, presided over by the late chief justice Hari Prasad Pradhan, firmly established its role as the protector of human rights, promoter of the rule of law, and the guardian of the constitution, in a number of landmark decisions (p. 33). But the very success of the Pradhan Nyayalaya incurred royal displeasure, and the legislative basis of the Pradhan Nyayalaya was removed by an executive order, and legislation was enacted for the creation of a Supreme Court, to which were appointed all the judges of the Pradhan Nyayalaya, except for the chief justice! This was an attempt to clip the wings of the judiciary.

But the pressure for reform continued, compelling King Mahendra to promulgate the 1959 Constitution. The 1959 Constitution had no directive principles, but the rights it gave were enforceable in courts. It provided for the right to life and liberty, equality before the law, rights to property, freedom of expression and speech, the right to assembly without arms, the right to form associations or unions, and the freedom to move and reside in any part of Nepal. It allowed freedom of religion, but in a restricted way (the definition of religion was confined to traditional practices, and there was prohibition of converting a person to another religion)—and the constitution restricted kingship to a Hindu and 'adherent of Aryan culture' (Art. 1(3)). The constitution also granted, for the first time in Nepal, the right to constitutional remedies, through a petition to the Supreme Court, for the redress of violations of a right (Art. 9). Moreover, any person could seek a ruling from the Supreme Court to determine the validity of a law for consistency with the constitution (Art. 54)—the constitution having been declared supreme law (Art. 1). The independence of the Supreme Court and of its judges was established by fettering

[3] H B Tripathi, *Fundamental Rights and Judicial Review Nepal* (2007), p. 31.

the king's power to dismiss the judges, and by protecting other provisions that assured Supreme Court judges security of office and terms of appointment.

But these positive developments were negated by the very wide restrictions that could be placed on rights by immunizing considerable existing legislation and providing for limitations on rights for the 'public good,' a term that was very broadly defined.[4] Nor could courts examine the validity of the limitation if the law recited that it was made for the 'public good.' This effectively meant that the extent to which a right was available depended entirely on the will of the king. The king made extensive use of this restriction and much repressive legislation was enacted.

The *Panchayat* Constitution of 1962 marked a fundamental departure from the political progress made in the earlier constitutions.[5] However, it retained the supremacy of the constitution and the right to seek redress through the courts. It introduced the idea of fundamental duties, of which 'devotion to the nation and loyalty to the state' were emphasized (Art. 9). The rights given included life, liberty, and due process of law, the equal protection of the law, the usual rights, and the usual freedoms (of speech, etc. and property, in a formulation that was becoming traditional), and the restricted version of the freedom of religion. The wide grounds for limitation of rights under the previous constitution were retained (with the addition of 'the interests of minors or women'). During the *Panchayat* regime, it became customary to insert the formula (in the preamble) for exemption from the rights, and thus exclusion of judicial review, in all legislation, and in this way, most rights were negated.

Directive principles (unenforceable) were introduced and formulated in the context of the *Panchayat* system, subject to the overriding goal of the 'welfare of the of the people' through a 'society which is democratic, just, dynamic, and free from exploitation by bringing about harmony in the interests of different classes and professions from a comprehensive national outlook' (Art. 19).

The 1990 Constitution, which was created after the first *Jana Andolan*, was made with the aim, inter alia, to 'guarantee basic human rights to every citizen of Nepal' and to 'transform the concept of the Rule of Law into a living reality' (preamble). As was to be expected, the 1990 Constitution retained the supremacy of the constitution and the

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[4] Public good was defined: maintenance of law and order, maintenance of national security, good relations between Nepal and other countries, good relations between different classes or sections of the people, as between the people of different areas, or generally good manners, health, comfort or convenience or decency or morality and economic welfare of citizens, or to prevent internal disturbance or any attempt to subvert this Constitution or any law or any other like attempt or for the prevention of contempt of court or house of Parliament (art. 8(2)).

[5] Anirud Gupta writes, 'The Constitution of 1962 seeks to vest in the king every set of political power that could be obtainable in a despotic order,' in his book *Politics in Nepal* (1993), p. 261.

right to constitutional remedies. It distinguished directive principles from fundamental rights. Fundamental rights covered the right to equality, freedom of speech, and so on (although now with the specification of grounds for derogation from each right, covering the same sorts of exemptions as in preceding constitutions). It had a separate article for freedom of press and publication (Art. 13). It had detailed provisions for the protection of personal liberty (not significantly different from previous constitutions). It introduced four new rights—the rights to information and communal culture, in respect of language, script and education, privacy, and the abolition of capital punishment.

The directive principles and policies of state (the distinction between the two is not too clear) covered a large number of goals. Apart from goals set out in previous constitutions, the constitution placed a clearer emphasis on social and economic rights and economic processes and institutions. It provided specifically for the provision of legal aid for indigent persons, to 'establish justice for all' (Art. 26(14))—which was in keeping with the emphasis on the rule of law and the independence of the judiciary and of legal processes.

Although the rights in the 1990 Constitution were not much different from those in its two immediate predecessors, the grounds for limitation were more carefully defined. The machinery for enforcement and the general ambiance for the rule of law were much stronger, with strong democratic institutions and an independent judiciary. The constitution established a new body, an independent commission, to receive complaints about and to investigate the abuse of authority and an improper or corrupt act by a person holding a public office. There were other independent bodies to ensure the fair exercise and accountability of power. The prospects for the promotion of democracy and rights were more promising than had been in any previous constitutions. The status and authority of the Supreme Court was established, with a number of interesting judgments (referred to in chapter 17). But democracy as it functioned under the constitution did not fulfil its other aims, particularly of social justice or the devolution of power.

The Interim Constitution was drafted both to provide for a transitional government and to reflect the goals of *Jana Andolan* II. More so than the 1990 Constitution (where the primary emphasis was on democracy), the Interim Constitution is oriented towards social and ethnic inclusion, the constructive recognition of diversity, and the fundamental goal of social justice—by the restructuring of the state and society. This orientation is reflected in, among others, the scheme of fundamental rights and directive principles. The innovative features as regards rights are (a) stronger and more expansive prohibition of untouchability and racial discrimination; (b) rights of security and social justice for the marginalized communities; (c) rights of vulnerable groups (women and children); (d) rights of labour; and (e) the prohibition of torture.

However, it is in the directive principles and policies that the agenda of the *Jana Andolan* is more evident. The Interim Constitution requires 'an inclusive, democratic, and progressive restructuring of the state' (Art. 3(d)). This will be done in substantial measure by the introduction of federalism and the principle of proportionality. Another pervasive theme is the advancement of the economic and social status of not only the better-known marginalized communities, but also labour, farmers, the disabled, and Kamaiyas. Reservations and other forms of special assistance may be established to achieve these objectives. The state also has more general obligations, particularly to fulfil citizens' rights to education, health, housing, employment, and food sovereignty. Since these appear as policies rather than rights, their beneficiaries have no recourse to legal redress in case of default. However, Article 21 does give marginalized communities the right to participate in state structures on the basis of proportionality; Article 17 gives the right to receive primary education in the mother tongue as well as to receive free education up to the secondary level; and Article 13 authorizes special measures for the marginalized.

Nepal's International Human Rights Commitments

Nepal has signed a number of human rights treaties. Except for the International Convention on the Elimination of All Forms of Racial Discrimination (which Nepal signed in 1971), all the treaties were signed after the restoration of democracy under the 1990 Constitution. Apart from the two major covenants and protocols, Nepal is bound by the Convention Against Torture, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Right of the Child (and the protocol on the sale of children for prostitution or pornography), and the recently signed the ILO Convention concerning Indigenous and Tribal Peoples. But this still leaves out a number of important treaties. Nepal has a patchy record of reporting to the treaty bodies. Although its record is certainly better than that of many countries, it has come under considerable criticism from the Office of the High Commissioner for Human Rights for serious and widespread violations of human rights.

Conclusion

Nepalis have had to struggle hard to obtain human rights and freedoms because the state has conceded rights only when under national and international pressure. But there has been a gradual broadening and deepening of rights, as is obvious when the 1948 and the 2007 Constitutions are compared. Rights have steadily become more enforceable, the status of the Supreme Court as the guardian of rights is now established, and the Human Rights Commission provides additional means for the promotion of rights.

On the negative side, social and economic rights are, for the most part, not given a high priority and are not enforceable. Successive constitutions have restricted rights to

citizens, although now more rights are given to 'all persons.' Most economic, social, and cultural rights are still in the domain of directive principles, and are thus not enforceable. It is still too easy to impose legal limitations on rights in the ways shown above. The emphasis is still on individual rights (and particularly citizen rights when some long-term inhabitants find it difficult to acquire citizenship). A review of the constitutions shows that the drafters have been reluctant to express in concrete terms the diversity of Nepal (although the Interim Constitution does take some strides in this direction).

The Constituent Assembly will face considerable challenges in devising a bill of rights that responds to the sense of dignity and aspirations of Nepal's various communities—and this issue will be examined in the next four chapters.

CHAPTER 7

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7

Diversity, Rights, and Unity

The Nation-state and Its Critics

The post-Second World War development of the regime of human rights was based on the assumption of a nation-state. A 'nation-state' is understood to refer to the convergence of the territory of a state with a nation, whose members are united by ties of history and culture and commitment to a common future. The principal basis of rights and obligations in a nation-state is citizenship. All citizens are equal before the law and enjoy the same rights. The sovereignty of the people is expressed through the state, which provides a common regime of laws, the machinery for justice, democratic rights of franchise and candidacy in elections, and the protection of other rights of individuals. The state ensures law and order through its monopoly of the use of force. A citizen's linguistic, religious, and cultural affiliations and membership of a community are irrelevant to his or her relationship to the state. In so far as there are differences of culture (which in a nation-state are assumed not to be serious), these differences are expressed in the private sphere or civil society. As chapter 3 has shown, this approach dominated the 1990 Constitution.

This model of the nation-state has come under considerable attack in recent decades, in Nepal as elsewhere, challenging the very concept of the nation-state. No country today has cultural, religious, linguistic, or even historical homogeneity. A nation-state based approach, in effect, privileges the culture or language of the majority and marginalizes that of other communities, even where the state professes neutrality. The attack is sometimes conducted in terms of identity, which has become a fashionable term. Minorities in so-called 'nation-states' do not get proper recognition of their culture or history or other basis of identity, and this lack of recognition is demeaning to them. While this attack has its basis in the psychological harm a community suffers,

the marginalization of minorities takes other forms as well: exclusion from or under-representation in the institutions of the state, limited opportunities in the economy, social discrimination, lack of access to the legal system, and the denial of justice in many sectors of life.

A considerable part of the attack is expressed in the terms of human rights. Minorities and other disadvantaged communities emphasize the rights of participation (as, for example, in Article 25 of the International Covenant on Civil and Political Rights), which are not possible unless they have separate representation in state institutions or access to the basic necessities of life (as guaranteed in the International Covenant on Economic, Social, and Cultural Rights) or special measures to overcome their historic or cultural discrimination and injustices. They claim that their right to culture is threatened by educational systems in which their children have to learn in a foreign language, and that the conducting of state business in another language further marginalizes their own language; at the same time, their economic, political, and social prospects are jeopardized (due to their insufficient familiarity with the official language). All these, they claim, are violations of the fundamental right of equality.

Disadvantaged communities sometimes invoke the right of self-determination to advance their claims. This is a complex idea, and its meaning in international law has changed somewhat in the last half-century. There is a detailed discussion of the topic in chapter 9.

The challenge to individual, citizen-oriented rights was cast in terms of group or collective rights: rights to autonomy, language, special measures ('affirmative action' or 'reservations'), regimes of personal laws, separate electoral laws, representation in the government, and proportionality in public services. In these instances, citizenship right of equality would have to be sacrificed to the claims of particular communities. While there is an increasing recognition of collective rights, the matter remains deeply contested and controversial, not only at the philosophical level, but also at the material level, for it concerns the distribution of resources and benefits. Some say that if there are too many group rights, the national interest suffers and the national unity is threatened. Others say that unless group rights to benefit minorities are provided, they will protest and try to secede. Yet others say that individual and collective rights have to be fairly balanced so that both national and group identities are recognized, for it is only in this way that national unity can be preserved or enhanced.

Nepal is facing this problem, as the marginalized communities are demanding greater representation in state institutions as well as the recognition of their languages and cultures. This chapter explains the diversity of the Nepali people, ways in which some communities have been marginalized, and what can be done for their advancement.

Diversity of Nepal

Ethnic, cultural, and linguistic diversity is the most characteristic feature of Nepal as a nation; its communities differ in their social and racial origins. Broadly speaking, its people can be classified into three major groups in terms of their ethnic origin, namely the Aryan Nepalis, Tibeto-Mongol Nepalis, and indigenous tribal Nepalis. The first group—comprising Hill and Tarai Brahmins, Chhetris, Thakuris, and Dalits—has inhabited the more fertile lower hills, river valleys, and Tarai plains. The second major group, comprising communities of Tibeto-Mongol origin, occupies the higher hills from the west to east. The third group comprises several indigenous communities such as Tharus, Dhimals, Chepangs, Botes, Santhals, and Rautes. The Hill castes are about 40 per cent of the population, the non-tribal Tarai groups are about 30 per cent and the tribal groups 25 per cent. Academics tend to divide the population into five broad cultural groups: i) the caste-origin Hindu groups; ii) the Newars; iii) the *Janajatis* or nationalities; iv) Muslims; and v) others.

The monopolization of power by certain caste groups has been a persistent feature of the last two hundred years. The autocratic and absolute Shah monarchy, followed by the Rana oligarchy, played a crucial role in the feudal structuring of the state. Both these regimes used 'caste-based' structure as an instrument of order and social regulation. Although the caste system was eliminated in principle in 1964, it still formed the basis of societal relations, politics, and statecraft. None of the constitutions promulgated after the 1951 revolution addressed the problem of caste-based exclusion.

Social Structure

Brahmins and high ranking Thakuris, Rajputs, and Chhetris among the Aryan Nepali group dominate the nation socially, politically, and economically. The Dalit community, although Aryan, is socially ostracized, politically excluded, and economically deprived. The indigenous communities (of which there are about 61 nationalities) are excluded politically. The second and the third groups, known as the indigenous nationalities and minorities, are politically excluded. Altogether, there are about one hundred caste and ethnic groups.

According to the 2001 census, 92 languages are spoken as mother tongues. Since language and culture are inseparably connected and influence each other, a system of governance and development should reflect all cultures and languages. However, the recognition of Nepali as the only official language has led to the exclusion of other languages. In this way, a large segment of the population has been unable to take advantage of services and opportunities provided by the state.

While the majority of people are Hindus or Buddhists, or practise a combination of both faiths, the Nepali population includes other religious groups as well. According

to the 2001 census, Hindus make up 86.5 per cent of the total population, Buddhists, 7.78 per cent, and Muslims, 3.35 per cent. A small section of the population is tribal and animist. These figures have been challenged, as several nationalities not classified as Buddhists, Muslims, or Christians have been randomly and inaccurately classified as Hindus. For example, *Janajatis* (indigenous communities) such as Magars (7.14 per cent of the total population), Tharus (6.75 per cent), Limbus (1.58 per cent), and Rais (3.94 per cent), who have their own religious rituals, are classified as Hindus. These communities, together with Buddhists and tribal groups, constitute a significant part of the population not governed by Hindu faith. The Hill Brahmin, Chhetri, and Thakuri, the major Hindu groups, approximately constitute 30 per cent of the total population. The Tarai population is also largely Hindu, though there are some Muslim groups.

Nature and Extent of Exclusion

The exclusion of indigenous, Dalit, and tribal groups is a deeply rooted problem. Constitutions and laws have institutionalized their exclusion. The following groups are affected by the exclusion:

- The people of Karnali zone: Karnali zone is the most remote and inaccessible part of Nepal. Set in rugged and high mountains, the amount of arable land in this zone is extremely limited. Its upper hills are covered by snow most parts of the year, and productivity in these hills is very limited. The entire zone suffers from illiteracy, ignorance, poverty, and serious health problems. All governments have ignored the welfare of the people in this part of the country. The problem of this zone is therefore that of geographical exclusion.

- Dalits: Approximately 13 per cent to 20 per cent of the population comprises the Dalit community, which has been socially maltreated for generations. The exclusion of Dalits is a socio-economic, political, and psychological problem.

- Indigenous communities: Indigenous communities constitute approximately 40 per cent of the total population. Many are now displaced from their native habitation. Their cultural and linguistic identities are under threat.

- Tribal groups: There are over thirty small tribal groups who are extremely backward, socially and economically. They are the most disadvantaged population in terms of socio-economic development. A larger part of their population is landless, jobless, and disenfranchised. Their presence in politics is almost non-existent.

The following two tables (drawn from an unpublished paper by Krishna Hachhethu) show graphically the disparities on a number of indices on welfare and participation between the dominant groups and the marginalized groups. But these figures alone cannot capture the humiliation, helplessness, alienation, and suffering experienced by the marginalized communities.

Table 1 (A) Human Development by Caste and Ethnicity: 1996

		Dominant Groups			Marginalized Groups			
		Brahmin	Chhetri	Newar	Madhesi	Janajati	Dalit	Nepal
1	Life Expectancy	60.8	56.03	62.2	58.4	53.0	50.3	55.0
2	Adult Literacy Rate (%)	58.00	42.00	54.80	27.50	35.20	23.80	36.27
3	Mean Years of Schooling	4.4647	2.786	4.370	1.700	2.021	1.228	2.254
4	Per Capita Income Nrs.	9921	7744	11953	6911	6607	4940	7673
5	Per Capita PPP Income US$	1533	1197	1848	1068	1021	764	1186
6	Life-expectancy Index	0.957	0.522	0.620	0.557	0.467	0.422	0.500
7	Educational-attainment Index	0.490	0.342	0.462	0.221	0.280	0.186	0.295
8	Income Index	0.237	0.181	0.289	0.160	0.152	0.110	0.179
9	Human-development Index	0.441	0.348	0.457	0.313	0.299	0.239	0.325
10	Ratio to HDI Nepal = 100	135.87	107.31	140.73	96.28	92.21	73.62	100.00

Source: NESAC. 1998. Nepal: Human Development Report 1998. Kathmandu: Nepal South Asia Centre.

Table 1 (B) Integrated National Index of Governance: 1999

		Dominant Groups		Marginalized Groups				
		Brahmin/Chhetri	Newar	Madhesi	Janajati	Dalit	Other	Total
1	Court	77	13.6	7.6	1.7	0	0	235
2	Constitutional Bodies	56	24	12	2.8	0	0	25
3	Cabinet	62.5	9.4	15.6	12.5	0	0	32
4	Parliament	60	7.6	17.4	13.6	1.5	0	265
5	Public administration	77.6	17.6	3.7	1.2	0	0	245
6	Party Leadership	58.8	10.9	15.8	15.2	0	0	165
7	Leadership: Local Elected bodies	55.5	15.7	16.2	12	0	0	191
8	Leadership: Commerce and Industry	16.7	47.6	35.7	0	0	0	42
9	Leadership: Educational Arena	77.3	11.3	7.2	2.1	1	1	97
10	Leadership: Cultural Arena	69.1	17.9	0	4.9	0	0	123
11	Science/Technology	58.1	29	9.7	3.2	0	0	62
12	Civil-society Leadership	75.9	14.8	7.4	1.9	0	0	54
	Total	66.5	15.2	11.2	7.1	0.3	1	
	Population (%)	31.6	5.6	30.9	22.2	8.7	1	
	Difference from Population (%)	+ 34. 9	+9.6	- 19.7	- 15.1	- 8.4	-1	

Source: Neupane, Govinda. 2000. *Nepalko Jatiya Prasna* (Question of Caste/Ethnicity in Nepal). Kathmandu: Centre for Development Studies.

These patterns of exclusions had the following implications:

- The state was monopolized by political elites belonging to the dominant groups. Other cultural and linguistic groups were prevented from participating in the political process and the system of governance.

- Civil and political rights had no meaning for the general public. The exercise of such rights by women, indigenous groups, Dalits, and tribal groups was effectively barred by the dominant presence of upper-caste political elites in politics, the bureaucracy, and the military.
- Economic and social rights were not considered to be 'basic or fundamental rights.' The state thus failed to 'take responsibility for ensuring a dignified life for the people.'

Demands of Different Communities

All the marginalized groups have been seeking proper representation in the Constituent Assembly so that they can negotiate for constitutional provisions to protect their legitimate interests (the *Janajatis*, for example, want every *Janajati* community to have at least one representative, while *Madhesis* are placing more importance on proportionality). As seen in chapter 4, the original provisions in the Interim Constitution were inadequate, and perhaps the amendments are not necessarily fully satisfactory. *Janajatis* and *Madhesis* have entered into agreements with the government as to how this and other demands would be met (some prior to the creation of the Constituent Assembly). What provisions do the marginalized communities hope to achieve in the Constituent Assembly?

Dalits

For Dalits, the following are among the main issues which should be addressed in the new constitution.

Reservations

Reservation is a form of affirmative action in which members of a community are assured a minimum number of seats in the legislature (e.g., by restricting the candidates in a number of constituencies to that community) or a quota of places in the public service and educational institutions. India has for a long time provided reservations for Dalits and Adivasis to allow the disadvantaged communities to catch up with others, and although intended to be temporary, reservations continue 60 years after independence.

Dalits want reservations in the private sector too. The private sector follows discriminatory hiring practices, which causes inefficiency in the market. As the private sector receives support from the government, there is a thin line between private and public spheres. These factors, coupled with the notion of fairness, justify requiring social responsibility on the part of the corporate sector towards marginalized groups and the promotion of diversity.

Reservations can be controversial, because although one community considers that they are an appropriate measure to compensate it for past disadvantage or injustice, others

consider them as giving an unfair advantage to one community, often at the expense of merit, and leading to inefficiency in the bureaucracy and economy. Some people say that reservations do not remove disadvantage, but perpetuate discrimination instead. Some say that reservations in their very nature violate equal opportunity of others. But the fact is that reservations are a remedy against discrimination that is based on historical denial of equal opportunity. The aim of providing reservations is to create true equality, not discrimination, to give opportunities to the disadvantaged to realize their potential. Reservations also help in the psychological and spiritual integration among diversified groups, increase the sense of belonging, and help prevent favouritism. Furthermore, the Indian experience shows that reservations can be an effective way to bring the disadvantaged into the mainstream, to give them self-confidence, and to give them opportunities to have their views listened to.

Elimination of Untouchability and Caste-based Discrimination

Dalits want all forms of untouchability (whether in the state or non-state sectors) to be abolished and penalized. Untouchability is demeaning for both the victim and the perpetrator. Its perpetuation is against the notion of rights (and its fundamental principle of equality), democracy, the rule of law, the principle of equality, and human rights.

Socio-economic Rights

As the most socially and economically disadvantaged community, Dalits have a particular interest in social justice. They favour the adoption of economic and social rights as justiciable and enforceable rights (economic, social, and cultural rights are the subjects of chapter 10). The new constitution should acknowledge the context of the Dalits' socio-economic reality.

Janajatis

The principal demands of *Janajatis* are the following:

Federalism and Autonomy

Janajatis want a federal state based on 'ethnicity, language, geographic region, economic indicators, and cultural distinctiveness' and the right of self-determination. Sometimes they have asked for the second chamber of the legislature to be declared the House of Nationalities (the issue of federalism is discussed in chapter 16).

Recognition

Janajatis want local languages to be given constitutional recognition along with Nepali. Everyone must be able to seek and receive information in their respective mother tongues on matters of public importance. They have also asked for the right to form

indigenous peoples' parties (prohibited in the 1990 and Interim Constitutions). The state must ensure that the traditional knowledge, skills, practices, and technology of *Janajatis* are harnessed and preserved. They want the state to respect their cultures and their practices.

Representation and Participation

Janajatis would want all genders, classes, regions, and communities to be represented according to their population in state institutions and in political party institutions, at all levels. They also want that there be a mechanism for consultation with the marginalized communities when decisions that concern their interests are being made.

International Norms

The state should ratify and implement treaties and declarations on indigenous peoples' rights, particularly the ILO Convention 169 (now ratified by Nepal in 2007) and the General Assembly Declaration on the Rights of Indigenous Peoples (2007).

Secular State

They want the state to be secular since Nepal is a multi-religious country; they say that a theocratic state is not only contrary to modern democratic ideas and values, but also that a theocratic state hinders communal and religious harmony.

Welfare of Kamaiyas

The state must find a permanent solution to the problems faced by freed Kamaiyas (bonded labourers).

Land

Kamaiyas are of the opinion that much of their land was improperly alienated to new upper-caste settlers, rendering Kamaiyas either landless or marginal land holders or displaced from their ancestral homelands. They want their rights to such land recognized.

Madhesis

The following are the key demands of the *Madhesis*:

Federalism and Autonomy

The major demand of *Madhesis* is federalism with substantial powers ('autonomy'), preferably, with the whole of Madhes (or the Tarai) as one of the states in the federation, though some flexibility has been shown recently on this point. They want a better distribution of revenue, a significant part of which is generated in the Tarai, to the

Tarai and other underdeveloped areas. However, they have made it clear that they are committed to the sovereignty and integrity of Nepal, and that the detailed decisions should be made by the Constituent Assembly.

Citizenship

The inhabitants of the Tarai have found it difficult to acquire Nepali citizenship, although they have lived for centuries in that area (due to the stringent criteria based on descent, the absence of birth certificates, and lack of titles to land, which cannot be acquired without citizenship!). Consequently, they were deprived of many rights. In November 2006, the law was changed to make it easier for people to acquire citizenship—and many people took advantage of it. But some did not receive the information on time, and a further round for granting citizenship seems necessary.

Proportionality

Madhesis, like other marginalized groups, are underrepresented in all state institutions, particularly the armed forces. They demand proportional representation in the legislature, the executive, the judiciary, and in the public services, at the national level. They also want most senior posts in administration in the Tarai to be 'localized,' that is, given to *Madhesis*.

Language

Madhesis resent the fact that all business of the state has to be conducted in Nepali, which disadvantages them in terms of access to state appointments and marginalizes their culture. They advocate a three-language policy comprising (a) native language, (b) Nepali language, and (c) English language, in government, business, education, and international correspondence. Some advocate recognition of Hindi, which is an important language in Madesh.

Minority and Cultural Rights

Madhesis want national recognition for the customs, languages, and cultures adhered to by the *Madhesi* people, including those of Muslims. They want full guarantee of human rights through the elimination of all kinds of discrimination based on race, language, gender, religion, culture, national and social origin, and political and other ideology. They want affirmative action for Tarai Dalits, claiming that the Tarai Dalits are the most deprived of all Dalits.

Accommodating Diversity

These demands made by marginalized groups are not merely demands for the recognition of cultural or linguistic diversity. They constitute a claim for political inclusion, and in a fundamental way, these demands are about social justice. They imply a major restructuring of the state and the re-allocation of political power and economic resources, with a

greater recognition of group rights. A distinguished Nepali scholar, Mahendra Lawoti, has shown that these demands were also made to the commission that drafted the 1990 Constitution, only to be rejected.[1] In his other writings, Lawoti has pointed to constitutional devices that might accommodate these claims. Various chapters in this book indicate how these claims might be met: through federalism, electoral systems, democratization of political parties, economic and social rights, the executive system, gender rights, empowerment of communities through civil and political rights, and fairer citizenship rules.

To a considerable extent, the claims of the marginalized communities have been acknowledged in the Interim Constitution, if not always accommodated in a concrete form. There is now a move towards a form of proportional electoral system and gender representation; the state has been declared secular; the principles of affirmative action and reservations have been accepted (and partially implemented in recent amendments to the public service legislation); there is greater flexibility as regards language policy; eligibility for citizenship has been eased; some economic and social rights are now enforceable; there is a strong anti-discrimination and anti-untouchability ethos; and most importantly, there is the obligation to restructure the state through federalism (although the subject remains controversial).

Whither Nepal?

Will these changes (particularly the adoption of a federal structure), as some argue, lead to the break up of Nepal? Will the changes disturb what some regard as the 'harmonious relations' between different communities? The dynamics of ethnicity are hard to predict, but some comparative insights might provide some guidance.

The roots of discontent in Nepal lie in the economic, social, and political exclusion of communities and their members. There is a close correlation between a person's being poor and being a member of an ethnic minority group. Although a powerful case for a more inclusive state system is based on the threat to the culture of minority communities, and therefore, to their identity, self-respect, and social orientation, many ethnic protests and insurgencies are less about the preservation of culture, religion or tradition than about the marginalized communities' lack of access to the state and the economy. In this way, ethnicity itself becomes a social and political force, a means to mobilize and organize members of the community, as its leaders advance claims for full participation in the affairs of the state.

Today, around the world, it has become exceedingly hard to resist such claims. Such claims now find support in both moral and legal theories, on bases of justice and

[1] 'Democracy, Domination and Constitutional Engineering,' which appears in his edited book, Contentious Politics and *Democratization in Nepal* (2007), p. 55-63.

self-determination. The international community urges political leaders to agree on measures of self-government or power sharing, putting both the government and the insurgents under considerable pressure, as a way to resolve internal conflicts. Because internal conflicts are, for the most part, fuelled by a deep sense of grievance felt by certain communities, and sustained by the easy access to supply of arms in international and regional markets, it is difficult today to suppress ethnic sentiments, demands and mobilization—paradoxically, the more the attempts to suppress such movements, the stronger they become, with increasing capacity for disruption.

Perhaps the most fundamental challenge to constitution making is that in situations like that of Nepal, the making of a new constitution is more than just the rebuilding of the state. The building or rebuilding of the state assumes a prior agreement made by all parties to come together, to form a political community. But when people disagree on the fundamental values of the state or when people do not have a sense of belonging to a common political community, the task of the constitution is two-fold. The first is the building of consensus, developing a framework for co-existence and co-operation among communities, based on social justice and the negotiation of national values and national identity. In short, constitution making is about nation building, an undertaking in which the process is as important as the substance of the constitution. The second, state building ('restructuring of the state'), follows from the way the first task is resolved.

Consequently, in a number of states, new norms, emphasising the virtues of diversity, and a re-conceptualization of the political community and of the division and sharing of sovereignty, have found their way into constitutions. Clear alternatives to the single nation-state, based on the political and legal recognition of ethnic or 'national' communities, have emerged. These developments have drawn attention to different models or approaches through which ethnic claims and conflicts are resolved, some of which are now part of the discourse in Nepal as it enters the phase of negotiations on a new constitution. In some multi-ethnic states, the only way to reconstitute the state may be to recognize different ethnic communities as the basis of political rights, forming complex systems of power sharing—and giving up on the vision of an overarching national identity. In Nepal, ethnic consciousness is not yet at a stage where it will not permit fair and reasonable solutions. There is, over most of the country, as several opinion surveys have shown, a remarkable commitment to the notion of a united Nepal. For most people, a Nepali identity is stronger than ethnic or regional affiliations. But it may not always remain so if their legitimate concerns are not dealt with, in appropriate forums and through fair procedures.

CHAPTER 8

CHAPTER 8

Women and the Constitution

Introduction

Discrimination on the basis of sex, ethnicity, caste, and religion has always existed in Nepal. This has resulted in the isolation and exclusion of those who have been discriminated against. Nepali women face many problems as elsewhere, but some forms of discrimination that Nepali women face are particular to Nepal (see the box). This chapter examines how a new Nepali constitution might help to protect the rights of women and ensure their full participation in the workings of the nation.

As responsible citizens, women are surely not concerned only about the rights of women. They may also have a special interest in the rights of children, the disabled or the disadvantaged. They may have their own perspectives on other issues too, as on peace (in Nepal and in the world), the environment or fairness in society. All these are relevant matters that need to be addressed by any constitution, but, since they are dealt with in other chapters of this book, this chapter will focus solely on women's rights and issues.

Discrimination against Women Particular to Nepal

- Unlike most countries, the female life expectancy is lower than that of men. The female literacy rate (average 35 per cent) is also lower than men's (63 per cent).
- Some laws still discriminate against women: for example, a foreign man who marries a Nepali woman cannot become a Nepali citizen even if he gives up his other citizenship—this is unfair to both the partners involved in the marriage, but can often place a great burden on the wife, who cannot bring her husband

to live here as a citizen; army regulations prohibit employment of married women in the combatant force.

- Few women have been involved in public life: for example, only 5.8 per cent of the members of the House of Representatives elected in 1999 were women; not one woman was on the committee that drafted the 1990 Constitution.
- Violence against women seems to be increasing, and women who speak out on the subject in public are very vulnerable; women have been particularly badly affected by the civil conflict in Nepal.
- There is a serious problem of trafficking in women and girls.
- Many cultural practices in Nepal discriminate against, demean and stigmatize women, especially widows; in some societies, women are confined in cowsheds during their menstruation periods or when they have just given birth to a child; child marriages still occur (more commonly for girls). Some communities deprive women of food for 24 hours after they have given birth.

The 1990 Constitution was intended to secure social, political, and economic justice and to establish a system of justice with a view to making the concept of the rule of law a reality. The constitution guaranteed rights against discrimination on the basis of religion, race, caste, tribe, ideological conviction, or sex.

The restoration of multiparty democracy in Nepal paved the way for civil society movements. In this new democratic environment, women were able to organize themselves and learn about their rights and became more active in claiming their rights. So why is inequality between men and women still an issue in the country? Does the unequal treatment of women stem from merely social and cultural factors, or does the prevalence of such treatment in Nepal mean that Nepalis have an inadequate understanding of equality?

Problems in the 1990 Constitution and Their Remedies

Discriminatory Language

The language used in the 1990 Constitution was sexist and excluded women: it used words like *bhatritwa* (brotherhood) for positive attributes like camaraderie, but did not use the Nepali equivalent for 'sisterhood.'

Hindu Nation

In light of the attitude towards women prescribed by certain Hindu texts, Article 4 in the 1990 Constitution, which described Nepal as a Hindu country, had serious implications: the article justified the discrimination against women based on religion and culture

that had been practiced in the past, even by the Supreme Court. A constitution that promotes secularism would go a long way towards ensuring that discriminatory acts against women that are supported by certain religious traditions will not be tolerated.

Right to Property

Women's right to property, even today, is not completely secure in comparison to that of men. The right to property (Art. 17) was the only human right in the 1990 Constitution that did not affect existing laws, which meant that there was no change in property laws (and oddly, the Interim Constitution too has not proposed changes to property laws). Historically, women needed to remain unmarried and to attain the age of 35 years to be even entitled to a share of parental property. The Eleventh Amendment to the Country Code did eliminate some of the discriminatory property law provisions, but even after the laws had been eliminated, women once they got married had to return the remaining portion of the parental property to their parental relatives.

This provision regarding property rights was removed by the Act to Amend Some Nepal Acts for Maintaining Gender Equality, 2006, after *Jana Andolan* II. However, discrimination against married women, especially against married daughters, persists even today. The gains of the 2006 Act and women's property rights could be more clearly secured in the new constitution.

Violence Against and Exploitation of Women

Violence against women (both in public as well as private spheres) was not clearly defined and prohibited in the 1990 Constitution. Trafficking in human beings, slavery, serfdom, or forced labour (not only involving women) was prohibited by the 1990 Constitution (Art. 20(1)) and had to be punishable by law. The Interim Constitution treats physical, mental, or other form of violence against women in a similar way (Art. 20(3)). Both constitutions also prohibit employment of children in factories or mines or in any other hazardous work. But though the Supreme Court views voluntary sex work like any other profession, under the right to profession, in practice, the law still treats sex workers as criminals. For the first time in Nepali constitutional history, the Interim Constitution has recognized social security as a right for women and others in need of security (though a law to address the issue still needs to be legislated); such provisions can be critical for helping women who are victims of violence.

Privacy

The right to privacy is one of the fundamental rights that have been provided for since the 1990 Constitution (Art. 22), but this right can be limited by law. The Supreme Court made use of this right, for example, in Annapurna Rana's case, when it overturned a district court order that had ruled that a girl's vagina and uterus could be examined

to establish whether she was married. However, until now, no law has been enacted to honour and protect the right to privacy, and to make it really effective (though a taskforce has been formed to submit drafts of laws on the right to privacy). But this right can also have negative consequences: women who have been violated may invoke the right out of fear of the legal proceedings.

Citizenship

Powerful interests and deeply entrenched cultural norms have for many years discouraged the strong political measures that are needed to revise discriminatory laws pertaining to the issue of a person's nationality. The ideology of patriarchy was reflected in the 1990 Constitution, which said that only a person whose father (but not mother) was a citizen of Nepal when that person was born could become a citizen of Nepal (Art. 9(1)).

But on 26 November 2006, the recalled Parliament adopted the Nepal Citizenship Act 2063, which repealed Article 9; thus any woman, whether married or not, can now pass on her citizenship to her child (this right is also important for a single parent and for the child too because until now a child found in Nepal whose father's nationality was not known was deemed a Nepali, but if the father was known to be a foreigner, the child would not be a Nepali, even if the mother of the child was a Nepali).

Still, even today, though women of foreign nationality who marry Nepali citizens can acquire Nepali citizenship after starting a process to renounce their former citizenship, a foreign man who marries a Nepali cannot acquire Nepali citizenship by virtue of the marriage. Thus a woman may be forced to choose between her marriage and her place of residence; broken marriages, single parenthood, and custody battles are often the results of these laws. And even though the Citizenship Act 2063 is in effect, children of such marriages may become Nepali only if they settle in Nepal and have not acquired the citizenship of the country their father was born in; and even then, they are only entitled to naturalized citizenship. These children may be at risk of becoming stateless, and may, if they are non-citizens, be denied the right to basic human rights, such as the rights to identity, freedom of movement, residence, education, property, employment, and basic health care in their mother's country (because both the 1990 and Interim Constitutions give many rights to citizens only).

A number of countries have now adopted more flexible rules about the nationality of women who marry foreigners, by allowing them to retain their own nationality; but in Nepal, people cannot retain dual nationalities. Citizenship in India is conferred not only on the basis of the parents' nationality, but also on the basis of a person's place of birth. Many developing countries have now adopted a non-discriminatory approach to citizenship. In Europe, discrimination is prohibited between nationals on the basis of whether they have nationality by birth or nationality through naturalization. The

drafters of the new Nepali constitution could include similar provisions in the new constitution.

Participation in Public Life

Although the 1990 Constitution included some special measures to ensure women's participation in political processes, the participation of women in Parliament, political parties, government, the judiciary, and all other constitutional bodies, the Planning Commission and other state institutions was not guaranteed. For the election of the members to the House of Representatives, each political party was required to allocate at least five per cent of their party tickets to women candidates (Art. 144); but this measure could not ensure that women were actually elected in this proportion.

Despite declaring that women should have one-third of the seats in the Constituent Assembly, the Interim Constitution seems to suffer from the same defect regarding proportional representation of women. However, the Election of the Members of the Constituent Assembly Act did guarantee that nearly 50 per cent of members elected under the proportional representation elections would be women.

How could women's participation in the future Parliament be guaranteed? Some countries have earmarked some of the ordinary constituencies as women-only constituencies, though all voters vote. Some countries have introduced special, extra constituencies for women. Proportional representation electoral systems almost always encourage parties to have more women candidates. The new Nepali constitution could also require this. And even once there are a significant number of women legislators, it would still be necessary to think about improving the circumstances in which they work, to help them discharge their duties more effectively.

Participation in public life is a right, according to CEDAW and other human rights treaties. But such provisions do not benefit just women; these provisions cut both ways: a country that excludes half its population from meaningful participation in decision making is actually depriving itself of resources. Women have a contribution to make; sometimes it will be a different sort of contribution from that of men. Special measures for ensuring women's participation in public as well as in private spheres could be secured in the new constitution.

Directive Principles and Their Implementation

The 1990 Constitution provided that the state would have to pursue a policy of making the female population participate in the task of national development, by making special provisions for their education, health, and employment (Art 26(7)); and that the state would have to ensure good health, education, security, protection, and welfare of all the helpless women (Art. 26(9)). However, efforts towards gender balance were piecemeal

and process-oriented, rather than goal-oriented. These 'directive principles' were not recognized as being legally enforceable.

Though the Interim Constitution has included more rights for women, as we have seen, it still includes a long list of mostly ineffective principles and policies, including ineffective policies relating to women from the 1990 Constitution. Although some courts in India and Nepal have used these principles to benefit women when interpreting legal rights, none of these principles can be used in a straightforward manner to found a claim to a legal right enforceable in the courts.

The Way Forward

Ineffective Approaches to Legislating Laws Pertaining to Women Must Be Cast Aside

Besides changing discriminatory provisions in the old constitution, the basic philosophical and psychological approaches that are employed in designing laws about women need to be cast aside, and new models for legislating women's issues should be framed. Applying the framework of the old 'protectionist model' in the extreme, which categorizes women as weak, subordinate, and in need of protection, may actually do more harm than good. For example, in 2001, the Supreme Court accepted a ruling that said that women who did not have prior approval from a guardian or the government could not seek employment abroad. The court justified its acceptance of the ruling on the grounds that the court was preventing women from being trafficked. On the other hand, legislating from an approach at other end of the spectrum—for example, by using an extreme version of the 'gender-blind approach'—will also not work. The gender-blind approach does not take into consideration the continuing impact of past discrimination; and it tends to reinforce dominant standards based on male experience and interests. Another problem with the gender-blind approach is that other equally serious dimensions of discrimination that stem from a woman's marital status, a woman's being pregnant, or a woman's sexual orientation (lesbian women receive savage treatment from society and even from their families) are left unaddressed.

Nowadays, it is widely recognized that a better approach than the two mentioned earlier needs to be used to ensure true equality for women; for example, quite a number of constitutions, as exemplified by the South African Constitution, which includes 'reproductive health care' as part of the right to health, now recognize women's reproductive role. The Interim Constitution of Nepal does so too.

It would help too if Nepali lawmakers took cues for legislation from declarations on human rights treaties. Nepal is party to 20 Human Rights instruments, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979, which differentiates between non-discrimination and true equality.

Article 1 of the convention defines discrimination comprehensively as 'any distinction, exclusion, or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field.' This article recognizes even indirect discrimination, where the *effect* is discrimination against women, even if there was no *intention* to discriminate. A substantive definition of equality (as used in CEDAW) takes into account and focuses on diversity, difference, disadvantage, and discrimination. Such a definition could be referred to, to eliminate, through corrective and positive measures, the existing discrimination faced by disadvantaged groups at the individual, institutional, and systemic levels. And while it is true that few national constitutions explicitly mention problems faced by people who face multiple forms of discrimination, (e.g., a poor, Dalit woman, or a Dalit woman who has a disability), there is no reason why the new constitution could not flag this as an issue.

The Role of the Constitution and Courts in Strengthening the Rule of Law

The constitution outlines the fundamental laws of the land, but if these laws are violated, it is the courts that are brought in to arbitrate. Thus the courts have a great responsibility in ensuring that the laws of the land are upheld. If fundamental rights are violated, the Supreme Court has the power to issue orders to enforce such rights or to settle disputes. For example, public interest litigation (PIL), under which some of the technical rules are relaxed (see Art. 88 of the 1990 Constitution), has become a very effective tool protecting the rights of socially excluded groups. The judiciary's sensitivity towards gender justice and human rights is also crucial to make PIL an effective tool of social reform. To its credit, the Supreme Court has ordered the government to make laws for the protection of women's rights, such as the law to eliminate gender discrimination, the law to criminalize marital rape, and the law against sexual harassment. The Supreme Court has also declared parts of the Country Code invalid because they discriminated against women, and were therefore, against the spirit of the constitution. The Supreme Court has also recognized human rights law as binding national law (e.g., in the Lily Thapa case).

The constitution can thus be used to improve the laws about women. And in line with these judicial decisions and the strong concluding comments given by the international committee responsible for monitoring the observance of CEDAW, (and after years of social and political struggle by women's groups), the Country Code was amended in 2002, and the Gender Equality Act was passed in 2006. However, the record of compliance with court orders in Nepal is mixed; sometimes, even the government has ignored the

orders (although the constitution says that the orders are binding). While it is true that constitutions often leave potentially thorny issues aside (sometimes intentionally so) for future legislatures and courts to decide, a major effort should be made to ensure that the new constitution of Nepal clearly and concisely represents the intentions of Nepali citizens, particularly those intentions relating to the provision of human rights.

Special Measures

Compensatory discrimination, often known as positive discrimination, is aimed at correcting historical or social discrimination. CEDAW and some constitutions make it clear that this is not really a form of 'permitted discrimination,' but is, instead, important for achieving real equality. The 1990 Constitution did permit special measures for women (and other vulnerable groups): 'special provisions may be made by law for the protection and advancement of the interests of women' (Art. 11(3)). But the government did not make any laws based on these provisions, and the efforts of some public institutions, such as Tribhuvan University, to reserve seats for women and other people from the disadvantaged communities were declared invalid by the Supreme Court, for want of such a law. Even after court directions to enact such a law, nothing was done to put the constitutional provision into effect.

Special measures can mean reservations—the allotting of or the facilitating of access to valued positions or resources; the most important allotments are reservation of seats in legislatures, reservation of posts in government services, and reservation of places in academic institutions (especially in technical and professional colleges). Special measures should also include the granting of scholarships, grants, loans, land allotments, health care, and legal aid to a beneficiary group. And finally, there should be special protective measures in place to protect the vulnerable classes from being exploited and victimized.

Reservation is a popular tool for correcting historical and social deprivation. It creates equitable opportunities for deprived communities to mitigate the effects of deprivation and to bring about equality. It ensures representation of communities that otherwise would remain unrepresented or underrepresented. It creates a sense of inclusion by developing a sense of belongingness. It cultivates talents by providing opportunities and incentives to the unprivileged and deprived communities. Yes, it does have negative impacts too: those who cannot avail of the benefits of reservation may be frustrated by what they consider 'unfair favouritism' (on-going controversies in India, sometimes violent, are a good example of the hue and cry reservations can invite); it can minimize competition, and poorly implemented preference policies artificially protect beneficiaries and blunt the development of their skills and resources; preferences may aggravate the dependency of benefiting groups and undermine their sense of dignity, pride, and self-

sufficiency. However, this does not mean that 'protective discrimination' should never be adopted. The only caveat is that it must be just, fair, and reasonable, not benefiting, for example, already wealthy women just because they are women.

Protecting the Laws That Protect Women

Even though there have been some recent improvements in the laws that affect women, an ordinary law can be changed and discriminatory practices can be reintroduced; if women want full equality and participation, provisions for protecting the laws will have to be written into the new constitution. And while the Interim Constitution also reflects the improvements made in securing the rights of women and children, these gains need to be strengthened in the new constitution to be prepared by the Constituent Assembly.

In this regard, the provisions for women's rights that were made in the Ugandan Constitution of 1995 could be used as a reference (see the box).

Directive Principle No. VI:

The State shall ensure gender balance and fair representation of marginalized groups on all constitutional and other bodies.

Article 33:

(1) Women shall be accorded full and equal dignity of the person with men.

(2) The state shall provide the facilities and opportunities necessary to enhance the welfare of women to enable them to realize their full potential and advancement.

(3) The state shall protect women and their rights, taking into account their unique status and natural maternal functions in society.

(4) Women shall have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities.

(5) Without prejudice to article 32 of this constitution, women shall have the right to affirmative action for the purpose of redressing the imbalances created by history, tradition or custom.

(6) Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status are prohibited by this constitution.

But the gender balance provision in the Ugandan Constitution is still rather vague and not legally binding. Various draft constitutions in Kenya (none yet adopted) have included more precise provisions, calling for women's taking up one-third of the available positions in government, or even guaranteeing such participation. And the Rwandan Constitution provides:

> 9. The state commits itself to conform to the following fundamental principles and to promote and enforce the respect thereof:
>
> i) Building a state governed by the rule of law, a pluralistic democratic government, equality of all Rwandans and between women and men reflected by ensuring that women are granted at least thirty per cent of posts in decision making organs;
>
> ii) Political organizations participate in the education of citizens on politics based on democracy and elections and operate in such a manner as to ensure that women and men have equal access to elective offices.

Universally recognized principles must be taken into consideration while drafting the new constitution. The new constitution could include statements such as the following, or statements to the same effect: 'everyone has the right to nationality;' 'statelessness should be avoided wherever possible;' and 'there should be no discrimination based on sex.'

Since the Supreme Court has sometimes referred to international law in the past, the new constitution could clearly state the position of Nepali law *vis-à-vis* international treaties (especially human rights treaties). It is vital that Nepal's law reform takes account of comparative jurisprudence practices emerging at the international level. It is also important to recognize that social values and customs are not static and that there is no harm in changing them with the changing times.

Strong, independent, and neutral institutions are also essential to ensure effective enforcement of people's rights. For example, although some people have suggested that it is wise not to have too many of such commissions, South Africa has a Gender Commission. Carrying out the principle of proportional representation in public bodies would mean that such a commission and the Human Rights Commission, as well as the Dalit Commission, would also need to have a proportional representation of women.

Questions

Here are some questions that are worth considering by the public and members of the Constituent Assembly:

1. Apart from the general statement that women and men are equal, what special problems faced by women in Nepal do you think are so important that somehow a good constitution ought to make some mention of them?
2. Should the foreign husband of a Nepali woman have the same right to become a citizen as a foreign woman who marries a Nepali man?
3. Should the constitution say that a child has a right to a nationality?
4. Women make up just over half the adult population; if the constitution insists on 'proportional representation' of women, should the figure earmarked for women's representation mean 33 per cent or 51 per cent?
5. Should Nepal have special seats for women in the House of Representatives under the future constitution?
6. If so, should they be voted for by women only or by both men and women?
7. Should there be special provisions in other areas of life to ensure that women achieve equality, even if some people could think that these provisions positively favour women?
8. If so, should the constitution make such provisions a duty to be fulfilled through law when necessary?
9. How long should such special provisions last? Ten years, twenty years, or should there be different time limits depending on the type of problem?
10. Should political parties be required by the constitution to involve women, and if so, should the constitution say how?
11. Should discrimination against women be a crime for which offenders can be punished or should it be something for which compensation must be paid, or both?
12. How can the constitution ensure that punishment is carried out for a punishable act? Or must there be a separate law to enforce punishment?
13. Should there be a separate Gender Commission to represent the rights and interests of women?

CHAPTER 9

CHAPTER 9

Liberty, Freedom, and Participation

Introduction

The earliest forms of human rights were concerned with the liberty of the people, to prevent oppression of the people by the state. Later, as it became clear that people needed to protect their liberty, freedoms that enabled people to express and organize themselves (such as the freedoms of speech and writing and of association) were emphasized. Later still, as ideas of democracy developed, the rights of participation in public affairs came to the fore, the most important of which was the right to vote and to stand for elections to the state legislature and the right to participate in other institutions (such as the executive and public services). Rights of liberty, freedom, and participation have constantly redefined the relationship between the state and citizens (including the structure of the state). In more recent times, the right to ultimate freedom, the right to self-determination, has been enunciated, and is regarded as the most fundamental and democratic of human rights. Unlike other rights, which are vested in the individual, self-determination is a collective right, and it affects the relations of communities with the state and between communities themselves. Thus today, human rights reflect the changing concepts of the role and structure of political and state organizations—and the expanding notion of the autonomy of the individual and communities.

To some limited extent, this pattern in the elaboration of civil and political rights is seen in the various constitutions of Nepal. For the most part, the freedom of expression and the press is well appreciated and recognized in Nepal. So is the right of assembly and association (apart from the restrictions on the right to form political parties). The right to vote is also acknowledged as a fundamental right (although it was denied to many because of restrictions on the entitlement to citizenship, for the most part redressed now). The freedom of religion is provided (although as shown in a previous chapter, the provisions fall somewhat short of internationally accepted norms). The freedom of

movement has been included in most Nepali constitutions (although not necessarily as an unqualified right) and so have due process rights. This chapter will, therefore, not address civil and political rights, which are well-recognized in Nepal. Instead, the focus is on issues that have coloured political debates in Nepal since the *Jana Andolan*: the right of self-determination, rights of minorities, and the rights of indigenous peoples. (Women's rights are dealt with in chapter 8.) These group rights are of particular significance in the constitution-making process.

Self-determination

Historically, the issue of self-determination has arisen during the collapse of empires, when the rulers had to determine the future of parts of their territories inhabited by people belonging to a different cultural background. Wars toward the end of the 19th century and the First World War entailed the dismemberment of empires within Europe, and vanquished empire-states were forced in peace agreements to give independence to parts of their empire on the basis of cultural (in practice linguistic) homogeneity. This kind of self-determination was often referred to as national self-determination, popularized by the US President Woodrow Wilson. At that time, this was seen to be more of a political than a legal principle, and, even back then, limits on its universal application were apparent.

When empires in Asia and Africa were dismembered, a different principle was employed. The colony became independent, but was circumscribed by its colonial borders, regardless of how culturally diverse its inhabitants were or whether some communities had more in common with the neighbouring state. India was an exception to this rule—and indeed the human tragedy that followed the nation's partition strengthened the resolve of the international community to maintain erstwhile colonial borders. The UN Charter required the progressive independence of colonies (but did not refer to self-determination as the foundation for this independence). The consequence was that most colonies became independent as multi-ethnic states, some under the dominance of a majority, and this led to protest movements by minorities, many demanding independence in the name of self-determination.

Self-determination in UN Instruments

Once most colonies achieved independence, the international community relied less and less on self-determination as the basis for independence. The term 'self-determination' began to be used in the sense that the UN Charter had assigned it. Friendly relations among nations were to be 'based on respect for the principle of equal rights and self-determination of peoples' (Art. 1(2)). The term was used in a similar way when describing the nature of co-operation among states (Art. 55). The word 'peoples' was used to mean a 'state,' not cultural communities (the articles were intended to require states to adopt democratic and participatory political systems, and if a state complied,

the UN could not interfere in the country's internal affairs). It was this meaning that was intended by the two principal human rights covenants (on Civil and Political Rights and Economic, Social, and Cultural Rights), which in 1966 prescribed self-determination as the overriding principle of human rights. However, the language used to describe the concept of self-determination was not without ambiguity. The full text of Article I in both covenants is as follows:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The State Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

There is nothing (at least in parts 1 and 2) in this article that gives a part of a state the right to independence or secession. This is obvious from the fact that the Covenant on Civil and Political Rights has a provision (Art. 27) dealing with the rights of minorities, which falls well short of a right to secede, being confined to the exercise of cultural rights within the community.

Outside the case of colonies, self-determination is used to refer to the internal organization of the state, the underlying principle being that of democracy. The people of each state are free to decide how they would wish to be governed, without external interference. This aspect is now often referred to as an internal aspect of self-determination. The UN Human Rights Committee, which supervises the implementation of the Covenant, has stated that the right of self-determination is not restricted to the colonial situation, but it has not defined what a 'people' is nor suggested that it encompasses the right to secede. The Canadian Supreme Court has pronounced more clearly on the matter in an advisory opinion on whether Quebec has a right to secede from Canada under international law. The Court's general conclusion was that international law does not specifically grant components of sovereign states the legal right to secede unilaterally from their 'parent state.' Although international law does not specifically prohibit secession, the Court's view is that international law places great importance on the

territorial integrity of the state (and unless the constitution of a state expressly allows secession, as some do, international law does not support secession).

A careful study of conventions and resolutions of the UN or of regional organizations where the right has been mentioned shows that the right is to be exercised within the confines of the territory of the state. This is most clearly expressed in the UN resolution on its 50th anniversary, which states that a people's right to self-determination does not authorize or encourage 'any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction.' However, this statement also makes clear that a state is entitled to the integrity of its territory only if it respects the people's right to determine political, economic, social, and cultural issues. In other words, the principle of self-determination requires that a state have a democratic and inclusive character.

The Canadian court's conclusion on this point was that self-determination is normally to be achieved within the framework of the state. It said: 'There is no necessary incompatibility between the maintenance of the territorial integrity of existing states… and the right of a "people" to achieve a full measure of self-determination. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity.'

The UN Human Rights Committee has emphasized that 'self-determination' is a fundamental right on which depend other rights; its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights' (in General Comment 12 (1984)). The Committee has encouraged states to explain in their reports to it what measures they have taken to implement this right. In particular, it urged them to 'describe the constitutional and political processes which in practice allow the exercise of this right.' It also stated that the obligation to ensure self-determination belonged to all states, not merely to those states directly involved in a self-determination issue.

Article 25 of ICCPR—Participation Rights

The Committee has linked self-determination to other rights under the Covenant, most importantly, Articles 25 and 27, of which the first is a general right available to all citizens, while the second aims at the protection of minorities. The Committee's

interpretations of Articles 1, 25, and 27 have given great prominence and shape to the right of participation.

Article 25 is the right to participate in public affairs. It reads:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:
>
> (a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
>
> (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
>
> (c) to have access, on general terms of equality, to public service in his country.

The Human Rights Committee has explained the significance of Article 25 rights in General Comment 25 (1996). It says that Article 25 'lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant.' No distinctions are permitted between citizens in the enjoyment of these rights on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The conduct of public affairs is a broad concept that relates to the exercise of state power, in particular the exercise of legislative, executive, and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at the international, national, regional, and local levels. The allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs should be established by the constitution and other laws. Participation in public affairs includes lobbying, and for this and other reasons, the freedom of expression and of the media must be secured. Equal access to public service must be ensured, if necessary, through affirmative action.

The comment sets out at length the institutional and procedural aspects of free and fair elections. Representation from constituencies should reflect proportionality of the population, which prohibits unequal sizes of constituencies (*Istvan Matyus v. Slovakia, Communication No. 923/2000*). It sketches a broad framework, dependent on the exercise of many rights and freedoms, for the right to participate in public affairs.

The Human Rights Committee has emphasized rights of full participation of all communities in the constitution-making process. The general comment says that 'Citizens also participate directly in the conduct of public affairs when they choose or change their constitution.' In a complaint from an indigenous community in Canada (the Mi'kmaq), in which the community said that they had been excluded in a series

of constitutional conferences, the Human Rights Committee held that constitution making is indeed 'a conduct of public affairs.' But the Committee also held that the method chosen by the government for the representation of indigenous peoples of 'approximately 600 aboriginal groups' by 'four national associations,' and later by 'a panel' of up to 10 aboriginal leaders, was sufficient to satisfy the requirement of 'participation.'[1] The Committee affirmed its basic position about the right to participation in a case from New Caledonia when a number of residents complained that they were left out of the roll of voters in a referendum to determine the constitutional future of that French overseas possession, although they qualified for voting for elections to the legislature. The Committee held that the residents had been excluded because they were not sufficiently closely connected to New Caledonia (most residents were of French origin, some were recent arrivals) to justify their participation in decisions about the future status of New Caledonia (*Gillot v France* [CCPR/C/75/D/932/2000]). Thus as in the Mi'kmaq case, the Committee deferred to the arrangements decided by the national regulations, but perhaps not unreasonably.

Article 27 of ICCPR—Minority Rights

The Human Rights Committee has also read a great deal of self-determination issues into Article 27 (although it has argued that the two rights are different, one belonging to a group and the other to individuals). The text of Article 27 is as follows:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the others members of their group, to enjoy their own culture, to profess and practise their own religion, to use their own language.

This is the only direct provision dealing with minorities. Although the state's obligations were intended to be limited, being restricted to non-intervention, in a series of decisions (particularly concerning indigenous peoples), the Committee has read it as imposing positive obligations for the benefit of minorities. The Committee outlined its understanding of self-determination in General Comment 23 (1994), as follows: It said that positive measures of protection are required not only against the acts of the state itself, but also against the acts of other persons within the state. The enjoyment of Article 27 rights does not prejudice the sovereignty and territorial integrity of the state. However, one or other aspects of these rights may consist in a way of life that is closely associated with territory and the use of its resources (and which in some cases

[1] In *Marshall v Canada* (CCPR/C/43/D/205/1986), the Human Rights Committee said: 'It is for the legal and constitutional system of the state party to provide for the modalities of such participation,' and 'Article 25(a) of the covenant cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in public affairs. That, in fact, would be an extrapolation of the right to direct participation by the citizens, far beyond the scope of Article 25(a).'

may justify forms of self-government or autonomy). As these individual rights can only be exercised in the context of the community, the identity of the minority must be protected. Affirmative action may be justified in favour of the minority. Steps must be taken to protect its culture, which manifests itself in many forms, including a particular way of life associated with the use of land resources. Minority members must be encouraged to participate in decisions that affect them. The protection of these rights is directed to ensure the survival and continued development of the cultural, religious, and social identity of minorities concerned, thus enriching the fabric of society as a whole.

In its readings of both the rights to self-determination and protection of minorities, the UN has taken the view that in some special cases, when a minority group is denied full rights of participation, it may be entitled to a measure of autonomy. When the international community has become involved in internal disputes in a country, it has often promoted or advised autonomy for minorities (Sudan, Sri Lanka, Kosovo, Bougainville/Papua New Guinea, Cyprus, Aceh/Indonesia, and Bosnia-Herzegovina). Some national constitutions have provided for autonomy (China, Ethiopia). The Canadian Supreme Court has said that even if there is no express constitutional provision, if a minority wants to secede from the federal government, the government must enter into negotiations with it to resolve the problem, even if negotiating could lead to secession.

The UN General Assembly Declaration on the Rights of Indigenous Peoples (discussed below) has proclaimed the indigenous peoples' right to self determination, but the declaration has also made it clear that the right does not entitle any group to secede from the state. The following articles are relevant:

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 46

1. Nothing in this declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

The declaration gives several examples of self-determination within this restricted sense. Indigenous peoples may maintain their cultural distinctiveness and their system of laws, provide education in their own languages, are entitled to have their own representative institutions, have to be given the right to participate or be consulted on decisions that affect them, and must be involved in the administration of services like education and health to their communities. They have the right to manage their lands, and with that right can come self-government over many internal affairs (as the declaration recognizes the spiritual and identity-related aspects of land among indigenous peoples).

Aspects of self-determination also appear in the UNGA Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities (1992), although in weaker forms. States are required to protect and promote the existence and identity of minorities. The minority groups have the right to participate effectively in decisions at the national, and where appropriate, regional, level concerning the minority to which they belong or the regions in which they live. They are guaranteed equal rights with other citizens and protected against discrimination on the grounds of their identity. States should consider appropriate measures so that persons belonging to minority groups may participate fully in the economic progress and development in their country.

Minority Rights

Apart from developments described above, there are two important international instruments for the protection of minorities. The first of these is the Convention on Genocide. Genocide is defined as 'any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.'

Genocide is a crime punishable under international law; and states have to give effect to the Convention in domestic law, so that it would also be a crime under national law. The International Court of Criminal Justice has authority to punish acts of genocide. Any state can call upon the UN to take measures to prevent or suppress acts of genocide. Thus the condemnation of, and the obligations to take steps against, genocide are truly international.

The Genocide Convention, which is directed at the most extreme forms of group protection, was supplemented in 1965 by the Convention for the Elimination of All Forms of Racial Discrimination (CERD). Its preamble says that 'any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous.' The existence of racial barriers is 'repugnant to the ideals of any human society.' 'Racial discrimination' is defined broadly to mean 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.' The CERD would, therefore, be relevant to the protection of *Janajatis*, Dalits and *Madhesis*.

The CERD obliges state parties to end all forms of racial discrimination, whether committed by its own agencies or 'by any person, group or organization.' However, special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination. But these measures should not lead to the maintenance of separate rights for different racial groups, and they shall not be continued after the objectives for which they were taken have been achieved. Ending of racial discrimination requires the ban on dissemination of ideas of racial superiority or incitement to racial hatred.

The CERD emphasizes the importance of political rights—the right to participate in elections, to vote, and to stand for election—on the basis of universal and equal suffrage; it also emphasizes the right to take part in the government as well as in the conduct of public affairs at any level and to have equal access to public service.

Despite these developments, rights of minorities are not considered to be adequately protected. The UN has for long tried to reach international agreement on a new and more comprehensive treaty for rights of minorities. In Europe, a number of legal instruments have been adopted for the protection of minorities, particularly language rights. But elsewhere, the progress has been slow (although in individual countries, there is now greater recognition of minority rights). The first tentative step was taken by the General Assembly in 1992 when it adopted the Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities.

Indigenous Peoples' Rights

Greater progress has been made in respect of indigenous peoples. A variety of different communities are covered by the term 'indigenous people,' but four features characterize them: they are the original inhabitants of a country and have enjoyed a historical

continuity; they have distinct cultural forms (including laws and customs that govern the community); they are non-dominant in the state; and the communities are based on self-identification. They have a special, almost spiritual, relationship to land, which is also critical for the preservation of their culture. In almost all these respects, they are different from other communities in the state, and they wish to preserve these differences.

The first step in the protection of indigenous and tribal peoples was the ILO 107 Convention (1959). However, the indigenous people did not participate in the Convention, and the Convention did not reflect their priorities—the Convention was paternalistic, oriented towards individualism, and aimed at the assimilation of indigenous people into the wider community, through market principles.

Consequently, a new convention (169) was adopted in 1989. While ruling out secession, the new convention does recognize the aspirations of indigenous peoples to 'exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live.' The spiritual elements of land are recognized, traditional values and practices are to be preserved, and the minorities have the right to participate in, or be consulted on, decisions that affect them. Nepal ratified the Convention last year, but so far has done little to implement it.

Some indigenous communities found even this Convention inadequate. Consequently, a highly participatory process (in which any community or state could participate) to prepare a new legal instrument was established under the UN Human Rights Commission. After many years of negotiations, the Declaration on the Rights of Indigenous Peoples was approved by the UN General Assembly in 2007 (Nepal voted for it). Apart from the issue of self-determination (which has been discussed above), the declaration places particular emphasis on the minorities' rights to traditional land and other resources, control over which must be vested in them. They must also be paid compensation for the lands that were taken away from them in the past. They must be given the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. States must consult and cooperate in good faith with the indigenous peoples through their own representative institutions in order to obtain their free and informed consent before approving any project affecting their lands or territories and other resources, particularly mineral, water, or other resources. Somewhat controversially, indigenous peoples are given the right to determine the responsibilities of individuals in their communities.

Conclusion

This chapter has focused on those rights (many of which have a collective dimension) that are of special significance to the constitution-making process. The traditional civil

and political rights of individuals are, for the most part, understood in Nepal and are non-controversial. Of the rights discussed here, self-determination has aroused keen emotions in Nepal.

As a principle of international law, self-determination does not guarantee secession, except in the case of a colony or occupied territory, or (more questionably) when the rights of a minority have been grossly violated. There is no accepted definition of what constitutes a 'people' for the purposes of this right. But international law and practice have supported constitutional rules that recognize the rights and identity of minorities and, most importantly, have supported autonomy as a manifestation of the self-determination rights of minorities. Thus self-determination has become a more significant aspect of constitutional law than of international law. The Human Rights Committee sees self-determination as a framework for constitution making, requiring the representation and participation of all sections of society, and prescribing the basic entitlements of communities. The corpus of human rights establishes the benchmarks for many substantive provisions of the constitution.

But this specific, law-oriented meaning of self-determination has not deprived self-determination of its powerful political appeal (rooted in shared culture or history of either glory or repression) as a basis for independence. It is in this sense that insurgent groups dissatisfied with their treatment by a state dominated by another community have employed this principle. However, whether they achieve independence by using this principle or not depends more on international politics than legal rules, especially as a state is free to recognize or not the independence proclaimed by a secessionist community (as has happened recently in the case of Kosovo)—although attempts have occasionally been made to prescribe conditions under which a secessionist state would be recognized.

CHAPTER 10

CHAPTER 10

Human Rights and Social Justice

The Reality of Nepal

Social justice is a demand of ordinary people and has a special significance for disadvantaged groups. In Nepal, there are many communities for whom the fundamental issues of constitutional reform pertain to issues of basic livelihood, health, and quality of life, rather than to systems of government and electoral systems, although these ought also to have an impact on questions of social justice. The following figures from the UNDP Human Development Index show how dismal the situation is in Nepal: adult literacy rate: 48.6%; life expectancy: 61.3; under 5 mortality rate: 74 per 1000 live births (UK 6, USA 7[1]); children underweight for their age: 48%; births attended by skilled personnel: 11%; Nepal's overall place in the human development index: 142.[2]

Many people may question whether these issues have any place in a constitution, but as we will see later, some constitutions have included such rights.

Economic, Social, and Cultural Rights as Human Rights

Respect for human rights requires that each and every individual's dignity be respected simply because they are human. Some people question whether economic, social, and cultural rights are really 'rights,' but in fact, international law has recognized these rights for a long time. The first global human rights institution, the International Labour Organization (ILO), of which Nepal is a member, has protected workers' rights since

[1] These figures for Nepal have enormously improved in recent years. The UK and USA figures are shown to indicate what a country might ultimately strive for, not as a derogatory comparison.

[2] Taken from the UNDP Human Development Report 2007/2008.

1919; its constitution recognizes that 'universal and lasting peace can be established only if it is based upon social justice.'

As a member of the United Nations, Nepal must respect the UN's principles. The Universal Declaration of Human Rights recognizes the individual's rights and duties, and 'the inherent dignity and … the equal and inalienable rights of all members of the human family.'[3] The declaration covers economic, social, and cultural rights, and civil and political rights, in an integrated manner. The economic and social rights include

- the right to work, to just and fair conditions of employment, and to protection against unemployment;
- the right to a standard of living adequate for health and well-being, including food, clothing, housing, medical care and social services;
- security in the event of loss of livelihood, whether because of unemployment, sickness, disability, widowhood, old age or any other reason;
- special care and assistance for mothers and children;
- the right to education, which shall be free and compulsory in its 'elementary and fundamental' stages.

The notion of 'cultural right' is more complex. The Universal Declaration contains these elements: the right to take part in cultural life; the right to enjoy the benefits of scientific progress and its application; the right to benefit from the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which the beneficiary is the author; and the freedom indispensable for scientific research and creative activity. There is a close connection with other rights, such as the right to education, which could be used as a tool for creative participation in society. Culture is the accumulated material heritage of humankind, and the state's respect for the people's culture is essential for people to achieve full human dignity. But 'culture' has a wider meaning too: it refers to the way of life of communities, which is often particularly important for preserving the identity of minority groups.[4] Culture in this sense is given protection in international treaties such as the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Rights of the Child—both of which Nepal is a party to, and thus obliged to respect.

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[3] Preamble of UDHR

[4] See for example Article 27 of the International Covenant on Civil and Political Right (ICCPR) and Article 30 of the Convention on the Rights of the Child (CRC). The rights of the minorities have been further expanded: see the 'Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities' adopted by General Assembly resolution 47/135 of 18 December 1992. In addition, cultural rights are also referred to in numerous international instruments—see the Declaration of the Principles of International Cultural Co-operation, proclaimed by the General Conference of UNESCO on 4 November 1966.

The economic and social rights, and culture in the narrower sense, are protected in the International Covenant on Economic, Social and Cultural Rights (ICESCR)—again Nepal is a party.

Are Economic, Social, and Cultural Rights Different from Civil and Political Rights? The Narrow View

The intense ideological cleavages of the 1960s between 'West' and 'East' (or between capitalism and communism) led to the adoption of two separate covenants. The ICESCR did not have any international body to monitor how states implemented it until 1985, whereas the ICCPR had one (the Human Rights Committee) at the very outset. The Committee on ICESCR, even now, has no power to handle individual complaints of the violation of rights, while the new Human Rights Council (dealing with civil and political rights) does. These differences reflect and strengthen the idea that economic, social, and cultural rights are somehow less binding and less enforceable than civil and political rights. Some people describe civil and political rights as 'first generation' rights, economic, social and cultural rights as 'second generation' rights, and rights such as right to self-determination and right to development as 'third generation' rights, with each later 'generation' being less enforceable and less 'real' as rights. For these people, while civil and political rights are rights, economic, social, and cultural rights are 'aspirations'; civil and political rights have enforcement mechanisms and remedies, but economic, social, and cultural rights do not; ICCPR's civil and political rights 'only' require states to desist from violating rights; economic, social, and cultural rights would require states to take positive steps and spend resources. Economic, social, and cultural rights are often described as 'non-justiciable'—meaning that they are not suitable for decision by courts. Reflecting this type of approach, and the Indian Constitution's, the 1990 Constitution of Nepal placed these 'rights' in the directive principles part: they were guidelines for the government, but they could not be used in court.

These sorts of arguments will be made against the introduction of enforceable economic, social, and cultural rights in the new constitution for Nepal—though, as we shall see, some progress has been made in the Interim Constitution.

The notion that economic, social, and cultural rights can be considered 'rights' is sometimes mocked. The following are some of the objections that are voiced: how can the state, especially a poor one, provide food and housing for all? And with the triumph of capitalism in the world, generally, economic, social, and cultural rights are subject to other objections: ensuring these rights requires considerable state intervention, when capitalism calls for the 'rolling back' of the state; these rights remove incentives from citizens to be self-reliant; they promote inefficiency, and unlike civil and political rights, are not 'market friendly.'

Many people do not accept the ideological basis of these criticisms—essentially the same as those that were raised way back in the 1960s. But, as we shall see, there are responses that do not assume a particular ideological perspective.

A Broader View

Many criticisms of economic, social, and cultural rights as 'rights' flow from an inadequate understanding of the way those rights are framed, have been developed, and have been used. In truth, failure to recognize and enforce economic, social, and cultural rights undermines the overall protection of human rights of all sorts. And it is not possible to draw a clear line between different types of rights. Economic, social, and cultural rights derive from the inherent dignity of human beings. Freedom from fear and want can only be achieved if the conditions are created for everyone to enjoy economic, social, and cultural rights, as well as civil and political rights. The right to self-determination and the right to equality cannot be fulfilled without enabling people to freely pursue their economic, social, and cultural development.

These rights are framed in cautious terms in international treaties: Social security is to provide for lack of livelihood in circumstances *beyond a person's control*; the state is not required to achieve full protection of rights immediately, but *progressively*, though to the full extent of its available resources.

The idea that civil and political rights are 'cheaper' and require less of the state is also misleading. Fulfilling the highly political right to vote is expensive, as is respecting the right to a fair trial. On the other hand, many of the social and cultural rights can be guaranteed without much in the way of material resources.

The Committee on Economic, Social and Cultural Rights (which studies reports from states on their performance under the Covenant, and also develops general guidelines), meetings of jurists, and UN special rapporteurs on these rights have explained and elaborated them. The committee provides guidelines for adequate implementation of economic, social, and cultural rights at the domestic level, focusing particularly on the enactment of strong and effective laws and the establishment of implementation mechanisms. 'Progressive realization' must be read in the light of the overall objective, which is to establish clear obligations for state parties to move as expeditiously as possible towards the realization of these rights (a lack of resources must not be used as an excuse for doing nothing.) The principle requires *effective use of resources available*. States are obligated, regardless of their level of economic development, to *ensure respect for minimum subsistence rights for all*. The term 'available resources' refers to both the resources within a state and those available from the international community. Furthermore, the Committee has made clear that it considers many of the provisions in the Covenant to be capable of immediate implementation, for example, the principle of equality (the

state must not discriminate unfairly between its citizens in matters of economic, social, and cultural rights).

The obligations of the state are often summarized as involving: (i) the duty to respect the rights, (ii) the duty to protect them, and (iii) the duty to fulfil them. The duty to 'respect' the rights means the state must refrain from interfering with the rights; for example, the state must not evict people arbitrarily in violation of the right to housing. The duty to 'protect' the rights means the state must prevent others from violating the rights; for example, it must prevent arbitrary evictions by others. The duty to 'fulfil' the rights means that the state must ensure that it or others can provide what is necessary for the right to be achieved. Many of these duties would not involve the expenditure of major resources—certainly no more than would civil and political rights.

Rights-based Approach

Going to court is not the only way to protect rights. Nor does the fact that some economic, social, and cultural rights are perhaps not suitable for enforcement through the courts affect their validity as rights, though it does affect the way they are applied. Full realization of rights requires political action and the incorporation into state policies of a 'rights-based approach'—it requires that rights be a fundamental guiding principle of government policies.

The rights-based approach provides a justification for, indeed may require, affirmative action for socio-economically marginalized sections of the society.

Justiciability

The Committee on Economic, Social and Cultural Rights has rejected the argument that no such rights are suitable for enforcement through the courts. And in recent years, the courts of a number of countries have shown that indeed they can enforce such rights in some circumstances. In South Africa, their relatively new constitution actually creates rights in a way that makes them justiciable. In India, the courts themselves have been able to turn some of the directive principles (designed not to be justiciable) into rights that have legal backing. The courts in Nepal and other countries have, to some extent, followed the Indian courts.

In a case about residents in a squatter area, the South African Constitutional Court decided that the right to access to adequate housing (which is in the constitution), meant that the government had a duty—in which it had failed—to take steps to provide housing to the most severely affected residents of a squatter area. In response to this case, it is said that most municipalities now have a 'Grootboom allocation' (named after the case) in their budgets for those in most dire need. In another case, the court held that planning laws would have to be interpreted in a way that made them consistent

with the right to housing. The court has also held that the right to health means that government must provide anti-retroviral treatment to HIV-positive pregnant women to prevent transmission of the virus to their children.

The Supreme Court of India said that after having failed for 44 years to make the directive principle on education effective, the government had a duty to provide basic education (up to age 14) free for all. It made equal pay for equal work (a directive principle) a legal right on the basis of the general right to equality. It has ordered government to provide food for the most vulnerable groups in times of serious shortage, and has also held that the right to life includes right to livelihood, right to housing, right to health, and right to the environment.

There are more examples from other parts of the world too. For example, the Latvian Constitutional Court relied on the ICESCR to hold that the state was in breach of a duty when it failed to ensure that social insurance premiums were paid by employers, and the court held that affected employees could claim compensation from the state. And the African Court/Commission of Human Rights held that the Government of Zaire was in breach of the African Charter by failing to provide safe drinking water and other basic services, and by closing universities and schools.

All these cases give an indication of the possibilities for enforcement of economic, social, and cultural rights through the courts. It is true that those courts cannot substitute their own judgment for political decisions to be made by the state, and they cannot make the same detailed policy decision as a government can (they do not have the information or the skills or even the mandate of the people), but they are not powerless. Accepting responsibility for enforcing such rights is easier if the law or the constitution—as in South Africa—makes it clear that they are indeed legal rights.

Economic, Social, and Cultural Rights in the Nepali Constitutional Framework

The various constitutions that Nepal had between 1948 and 1962 had a variety of provisions. Some guaranteed equality; some promised free primary education or affirmative action for underprivileged groups. But none protected a wide range of rights, and none gave effective remedies. The 1990 Constitution in its preamble promised social justice, but this promise was not transformed into economic, social, and cultural entitlements for a large number of indigent and marginalized people of this country. Apart from the right to equality in enjoyment of rights, which is common to all fundamental rights, there was no fundamental guarantee for economic and social rights. Although Article 18 recognized some cultural and educational rights, and although the constitution recognized Nepal as a 'multiethnic and multilingual' country, this recognition of Nepal's diversity was contradicted by the phrase 'Hindu Kingdom'

and by the constitution's giving recognition only to the 'Nepali' language, spoken by the majority of people belonging to 'Aryan' community (i.e. Brahmin, Chhetri), as an official language.

Part IV of the 1990 Constitution incorporated the economic, social, and cultural issues within the directive principles, rather than creating enforceable rights; no remedy was available to implement these provisions as the constitution clearly states 'the principles and policies shall not be enforceable in any court.' The 1990 Constitution echoed the ICESCR when it said the principles must 'be implemented in stages through laws within the limits of the resources and the means available in the country.' But the courts in Nepal did not go as far as the Indian courts did in deciding whether the state had fulfilled its responsibilities. In a case about starvation in 1998 that was filed on the basis of right to equality, including special provisions under the constitution, the Supreme Court said, 'the government had already arranged sufficient food in the districts and also has expressed its commitment to fulfil its obligation' and rejected the case—thus refusing to investigate what the government said it was doing or would do.

The Interim Constitution of 2007, however, seems more progressive, as it starts with the fundamental guarantee of 'right to dignified life.' Some economic, social, and cultural rights are guaranteed within the 'fundamental rights': right to the environment, basic health services, education, (including free education up to the secondary level), language and culture, employment and social security, food and property. It respects the mother tongues of all communities spoken in Nepal, including the right to use them in official business at the local level. It provides room for 'affirmative action' with the provision of right to social justice for economically, socially, and educationally backward or marginalized women, Dalits, indigenous and ethnic groups, *Madhesis*, poor farmers, and workers; free legal aid to the poor; rights of women, including reproductive health; right against physical and mental violence against women; equal rights of son and daughter to ancestral property; it also includes the rights of children, including rights to subsistence, basic health, and social security; protection against exploitation as well as special measures for children who are parentless, mentally retarded, as well as victims of conflict; and rights for displaced, vulnerable, and street children. There is prohibition of child labour, where this may be dangerous, and of recruiting children into the army or police.

Similarly, the Interim Constitution incorporates state responsibilities and directive principles and policies addressing political, economic, and social transformation through social reconstruction. The provisions regarding relief measures to victims of conflict, including rehabilitation and elimination of discriminatory laws, are all positive developments.

Is More Needed?

Many economic, social, and cultural rights are still not fully guaranteed in the Interim Constitution, as they require 'laws' that are yet to be adopted (for example, the rights to health services, education, and social security)—which is not so of civil and political rights. In the absence of such laws, implementation remains uncertain. If rights are taken seriously, the constitution as the fundamental law of the country should, as far as possible, provide, without requiring any other laws, a remedy to the 'needy.'

Some economic, social, and cultural rights remain in the directive principles (such as the 'policy of establishing the rights of all citizens to … housing,' or the special provision for women for 'their education, health and employment'), and these are still described as being non-enforceable in the courts. Though this part of the constitution talks of 'state responsibility' this provision about non-enforceability weakens rights protection.

Questions

1. In Nepal, which of the rights that could be identified as economic, social, or cultural are most important?
2. Which such rights are most under threat?
3. Would it be sufficient to insist simply that everyone must have equal access to rights?
4. Should the new constitution of Nepal, as that of 1990, include certain social, economic, and cultural matters as directive principles that do not give rise to rights directly enforceable in court?
5. Do you believe that the role of enforcing economic and social rights is suitable for the courts?
6. Are there things that the constitution could do to ensure that the courts are better equipped for such a task?
7. The more rights are included in the constitution, the longer it becomes. How would you balance these factors? Would you give high priority to having a short constitution or to one that includes a wide range of rights?

CHAPTER 11

CHAPTER 11

Elections and the Electoral System

In a democracy, elections allow the people to freely choose their representatives. Elections may serve a number of principal functions:

- They provide for the representation of the people in the legislature.
- They allow the people to choose a government with a mandate to rule.
- They provide people with opportunities to make policy choices.
- They help make government accountable to the people.
- They promote and facilitate a competitive party system.

The constitution and the law must determine who the voters are, who can stand for elections, how the votes are counted, and who administers the elections. The detailed procedures for the administration of elections are outlined in election statutes, rules, and regulations. One very important aspect of elections is the electoral system.

What Do We Understand by an Electoral System?

The electoral system is the mechanism by which the votes cast in a general election are converted into seats won by parties and candidates. The choosing of an electoral system by a democracy is one of its most important institutional decisions, for different systems can translate the same strength of votes into different overall results. In the 2004 South African elections, for example, held under the proportional representation list system, the African National Congress won 69.75 per cent of the seats with 69.69 per cent of the popular votes: this was a highly proportional result. In Mongolia in 2000, the Mongolian People's Revolutionary Party won 72 seats in the 76-member Parliament with around 52 per cent of the popular votes (the electoral system in Mongolia was based on the plurality/majority system, like that in Nepal). In the 1999 elections in Nepal, the Nepali

Congress won 113 seats (54.15 per cent) with only 36.14 per cent of the popular votes. In both Mongolia and Nepal, the results were highly disproportional.

The electoral system should meet the specific demands and needs of the people and the nation. Following the success of *Jana Andolan* II, Nepal has elected a Constituent Assembly in order to frame a new constitution best suited to the aspirations of its people. Therefore, the electoral system chosen was important for the elections to the Constituent Assembly and will be so for the future constitution, as well.

The electoral system affects the behaviour of voters and the parties. It also determines the type of relationship between the electors and their elected representatives. The choice of electoral system is, therefore, related to the type of politics and party system we expect. We can evaluate an electoral system by asking questions such as the following:

- Does it convert votes into seats in a way that reflects the popular choice?
- Does it respect the principle of one person, one vote, and one value?
- Does it ensure the proportional representation of minorities?
- How far does it provide for or is likely to lead to the proportional representation of women?
- Does it lead to a clear and close relationship between the elected officials and their constituency?
- Particularly in the parliamentary system, does it lead to a stable and firm government, as, for example, by producing two major parties, with one among them gaining a clear majority? Or does it lead to a fragmented Parliament with a proliferation of small political parties, thereby requiring the formation of a coalition government?
- Does it lead to ethnic harmony or to ethnic conflict?

These were some of the major complaints against the previous electoral system in Nepal:

- It favoured the representation of high-caste hill Hindus: Brahmins and Chhetris.
- Dalits remained unrepresented. Even major political parties did not put forward Dalit candidates.
- Women were very under-represented.
- *Janajatis* and *Madhesis* could not get their due and fair representation.
- Minority parties did not receive due representation in proportion to their

popular vote and were compelled to remain outside the political mainstream.

- In multi-cornered contests among the political parties, candidates who had garnered as little as 20 per cent of the total number of votes were elected.
- Elections had become very expensive.
- Electoral malpractices undermined the legitimacy of election results.

Types of Electoral Systems

Electoral systems may be broadly classified as plurality/majority systems, proportional systems, and mixed systems. Each of them has a number of variations to suit the practical needs of the country concerned.

Some countries may desire a strong government, even if this result is achieved by a less than fair representation, while others may value an accurate reflection of popular opinion in the legislature, even if that leads to a proliferation of political parties or to ethnically based parties and to a weak or unstable executive. Some countries value electoral systems where the make up of the legislature reflects the ethnic make-up of its society, while others aim for systems that ensure a measure of ethnic integration.

Plurality/Majoritarian Systems

In a plurality system, the person or group that garners the highest number of votes is elected, even if they do not receive the votes of more than half the electors. The most common plurality system (often called the 'first past the post' (FPTP) system) is based on single-member constituencies. This system is practised in the United Kingdom, the United States of America, India, Bangladesh, and Pakistan, among others. Nepal has also practised this system until now. In a majoritarian system, a party must acquire over half the votes (50 per cent plus 1) to get elected. This majority may be achieved by a second round of elections between the two top candidates (as sometimes happens in the presidential elections in France, a number of Francophone African states, and Uganda).

These are some of the implications of the plurality or majoritarian systems:

- There are usually a small number of political parties in the legislature.
- The government may be elected on a minority national vote (as in the 1999 election in Nepal).
- In a plurality system, it is possible that an elected member may not enjoy the support of the majority of voters in the constituency.
- Minorities tend to be under-represented; minorities do not have their own parties, but join mainstream parties.

- Many votes are wasted, in the sense that they have no impact on the outcome of the election. This is true of all the votes cast in a constituency against the person who won, as well as of all the votes cast that were in excess of what was needed to win the election in that constituency.
- Since each member has a small constituency, a close relationship between the member and the constituents is possible.
- The government tends to be more stable.
- The government tends to be made up of a single party.

Why do plurality and majoritarian systems usually produce very disproportionate results? One reason for the disproportion may be attributed to unevenly sized constituencies: a group concentrated in a constituency with many voters will be able to elect fewer of the representatives it wants than another group of the same size which constitutes a majority in sparsely populated constituencies. Another reason is the way that support for particular parties or policies is geographically distributed. Suppose, for example, a particular party had about 500,000 voting supporters; if the supporters were spread over five constituencies where they constituted overwhelming majorities, they could elect only five members. If they were found in 10 constituencies in each of which they were the largest single group, they could elect 10 members. If they were spread over many constituencies and never constituted the largest group, they might never be able to elect a single member. Both these situations apply in Nepal: Dalits and some ethnic groups are very scattered, while others are more compact; and hill constituencies have far fewer voters than constituencies in Kathmandu or in the plains.

Proportional Representation Systems

In a proportional representation (PR) system, each of the contesting parties wins seats in proportion to the number of votes it has obtained. If a party wins 40 per cent of the votes, it will get 40 per cent of the seats, and the geographical distribution of voters has no impact on the number of seats won. There are many types of PR systems. About 70 countries in the world practise some form of a PR system. The most common PR systems are the list system (LS) and the single transferable vote system (STV). In the list system, each contesting party makes a list of its candidates. If it receives 40 per cent of votes, it will be entitled to 40 per cent of the seats, and enough candidates will be taken from its list to fill those seats. In the single transferable vote system, each constituency has a number of members of the legislature, and voters number the candidates they prefer, beginning with their first choice, up to a maximum of as many seats as the constituency has representatives. In countries where there are many illiterate voters, this system is difficult to practise. These are some implications of PR systems:

- They are more representative than the plurality/majority system.
- They are good for minorities since even a small minority (say no more than 10 per cent of the population) will secure 10 percent of the seats if all its members vote for its party; this is, however, true only if the minorities have their 'own parties' or if they tend to vote for specific parties, rather than splitting their votes among various parties.
- They are also good for women and other 'non-traditional' candidates because they offer an incentive to parties to widen their range of candidates to appeal to all the electorate (see the following box).

Inclusion and Proportional Representation: The South African Experience

The population of South Africa is approximately 73 per cent black, 15 per cent white, 9 per cent coloured (mixed race) and 3 per cent Indian. Under the apartheid system there were separate legislative houses for whites, coloureds and Indians, and none for blacks. Because of its history with apartheid, the new South Africa rejected any system that categorized people by race. It adopted proportional representation as its electoral system: the whole country was one constituency, on a party list basis.

In 1994, the first post-apartheid legislature was elected under this system. It comprised 52 per cent blacks, 32 per cent whites, 8 per cent Indians and 7 per cent coloureds. In 1999 there were 58 per cent blacks, 26 per cent whites, 10 per cent coloureds and 5 per cent Indians in the legislature. In 2004, the figures were: 65 per cent blacks, 22 per cent whites, and figures for Indians and coloureds were about the same as in 1999. In 2004, there were 33 per cent women members. The black members were drawn from virtually all the main language groups.

None of this was achieved by using any sort of quota system.

- They encourage proliferation of parties, since even small parties are likely to get some seats.
- They may encourage ethnically based parties, if these are allowed, and thus may tend to perpetuate ethnic/religious distinctions.
- Elected members do not have strong links to their constituencies since several members represent one constituency: in some exceptional cases, the entire country is treated as one constituency (e.g., Israel and South Africa).
- Party leaders usually have greater control over the choice of candidates in list systems than in single-member constituencies since they decide who is on the list

and in what order their names appear on the list, whereas in small constituencies the choice is often made by a local committee.

- Due to the proliferation of parties, governments tend to be coalitions of parties and consequently may be weak and unstable.

Mixed Systems

Some systems try to combine the advantages of both the plurality system (in terms of clear results and stable government and stronger links of members with their constituencies) and the proportional system (ensuring representation of minorities; fair representation, in terms of a better ratio of votes to seats).

In the mixed member proportional system (MMP), which was pioneered in Germany, some of the seats are allocated to single-member constituencies and the rest are based on party lists. Voters cast their votes for a candidate in single-member constituencies as in the plurality system, but they also vote for a party. The number of seats allocated on the basis of the lists takes account of the number of seats each party received in the single-member constituencies. Even if a party fails to win any seat in single-member constituencies, it is compensated for by the seats from the party list, in proportion to the votes it receives at the national or regional levels. In recent years, the system has been copied in several countries, including New Zealand, Italy, and Mexico. A somewhat similar mixed system was agreed upon for the election of the Constituent Assembly in Nepal. But unlike in Germany, the system chosen is the parallel system, under which, although the second group of members is allocated on the basis of proportional representation, no account is taken of the number of seats each party would obtain in the geographical constituencies; it is, therefore, likely to be less proportional than the mixed member proportional system. The parallel system is used in a number of countries.

Elections in Nepal

Elections were introduced in Nepal in the late 1940s, when the Rana regime promulgated the Nepal Government Act 1948, the first constitution of the country. This provided for elected village and town *Panchayats*. However, the Nepali people exercised universal adult franchise only after the end of the Rana regime in 1951; the first ever parliamentary elections were held in 1959.

The Parliament under the 1990 Constitution consisted of two houses—the House of Representatives (HOR), with 205 members, and the National Assembly (NA), with 60 members. Members of the HOR were elected directly by the people, based on the plurality system, from 205 single-member constituencies. Thirty-five members, including three women, of the NA were all elected by the members of the HOR, based on the single transferable vote system. Fifteen members, three from each of the five

development regions, were elected by the elected members of local bodies (e.g., VDCs, municipalities, and DDCs), on the basis of the plurality model. The remaining members were nominated, not elected. Local elections for VDCs and municipalities were also based on the FPTP/plurality model with universal franchise. But the elections for DDCs were indirect, and the members of VDCs and municipalities within the district had voting rights.

Nepali citizens aged eighteen or above are entitled to vote. The Election Commission (EC), which is an independent constitutional body, is responsible for the elections. It registers voters and publishes the lists of names and election schedules, administers the elections, enforces the code of conduct, counts the votes, and declares the results. Any complaints related to the elections are entertained by special courts.

Disproportionality and Exclusion

There were three parliamentary elections and two local elections between 1991 and 1999. However, the system lacked fair representation of the people, in terms of the country's caste/ethnic and social composition. In particular, Dalits, women, and other minorities were at a great disadvantage. Other than one representative in the 1991 elections, no Dalit has been elected to the House of Representatives. Women's representation remained below 6 per cent.

The election results for the House of Representatives, as shown in table 1, illustrate the disparity of representation in the national legislature. The hill high-caste groups had a clear domination over other groups, with members from these groups controlling almost 60 per cent of the seats (Brahmins and Chhetris make up about 30 per cent of the population in Nepal).

Table 1 Representation in the HOR by Caste/Ethnicity and Gender (Total Members: 205)

Caste/Ethnicity	Percentage of the Population	Number of seats held (%)		
		1991 Election	1994 Election	1999 Election
Hill High-Caste	7023220 (30.9)	114 (55.6)	129 (62.9)	122 (59.5)
Hill Dalit	1615577 (7.1)	1 (0.5)	-	-
Hill Ethnic	4988298 (22)	34 (16.6)	24 (11.7)	28 (13.7)
Newar	1245232 (5.5)	14 (6.8)	12 (5.8)	14 (6.8)
Inner-Tarai Ethnic	251117 (1.1)	1 (0.5)	-	-
Madhesi Caste	3381852 (14.9)	18 (8.8)	22 (10.7)	29 (14.2)
Madhesi Dalit	1031292 (4.5)	-	-	-
Madhesi Ethnic	1800452 (8.)	18 (8.8)	14 (6.8)	10 (4.9)
Muslim	971056 (4.3)	5 (2.4)	4 (1.95)	2 (1.)
Women	11377556 (50.04)	7 (3.4)	7 (3.4)	12 (5.8)
Men	11359378 (49.96)	198 (96.6)	198 (96.6)	193 (94.2)

Source: CBS 2002 and Election Commission, 1991, 1994, and 1999.

Similarly, political parties' representation in the HOR also did not accurately reflect the voters' choices; for example, in 1991 and 1999, the Nepali Congress won the majority of the seats, with less than 38 per cent of the popular votes. In 1994, the CPN (UML) emerged as the largest party in the house, with even fewer votes. In the 1999 elections, the CPN (ML) could not win a single seat even though it got more than 6 per cent of the popular votes, while another party with a little more than one percent of the votes was able to get five seats. These figures are shown in table 2.

Table 2 Parties' Popular Vote and Seats in the HOR

	1991		1994		1999	
Political party	Popular vote in %	Seats won (%)	Popular vote in %	Seats won (%)	Popular vote in %	Seats won (%)
NC	37.75	110 (53.65)	33.38	83 (40.49)	36.14	111 (54.15)
CPN (UML)	27.98	69 (33.65)	30.85	88 (42.93)	30.74	68 (34.63)
RPP	-	-	17.93	20 (9.76)	10.14	11 (5.37)
RPP (C)	6.56	3 (1.46)	-	-	3.33	0
RPP (T)	5.38	1 (0.48)	-	-	-	-
SJMN	4.83	9 (4.39)	1.32	0	0.84	1 (0.49)
NSP	4,10	6 (2.92)	3.49	3 (1.46)	3.13	5 (2.44)
NWPP	1.25	2 (0.97)	0.98	4 (1.95)	0.55	1 (0.49)
RJM	-	-	-	-	1.37	5 (2.44)
CPN (D)	2.43	2 (0.97)	-	-	-	-
CPN (ML)	-	-	-	-	6.38	0
RJMP	0.47	0	1.05	0	1.07	0

Source: Election Commission (compiled from Election Results 1991, 1994, 1999).

Demands for Proportional Representation

Nepal's experiments over the years with the plurality model of elections have exposed the model's inherent inability to provide for fair representation of the Nepali nation, especially in the context of the country's multicultural and multiethnic composition. For a long time, proportional representation in Nepal was confined to academic debate. In recent years, however, support for proportional representation has been gaining strength in political circles, particularly among the smaller political parties and the ethnic communities. Even the mainstream political parties have now shown support for proportional representation.

The plurality election method is simple and it is believed that it provides stability to the government. In Nepal, however, it could not provide even this stability. In the 1991 and 1999 parliamentary elections, the Nepali Congress secured a comfortable majority in the House, but on both occasions, it failed to complete its tenure. After the 1999 election, the prime ministership changed three times in less than a year. Thus Nepal

has not seen the supposed benefits of the system, and furthermore, it has proved to be highly exclusive.

Electoral System for the Constituent Assembly

The seven-party alliance (SPA) and the Maoists decided that the election to the Constituent Assembly was to be based on the mixed (parallel) system, involving two elections. Each voter had two votes—one for a constituency member and one for a party. After the government conducted negotiations with *Madhesi* and *Janajati* groups, the Interim Constitution was amended to make the system more proportional. This involved some changes in geographical constituencies, with an emphasis on having seats in the Tarai reflecting the proportion of the population that lives there. Secondly, the Election Law for the Constituent Assembly had detailed requirements for the lists of candidates and for the allocation of PR seats to candidates that were intended to ensure that *Janajati* groups, Dalits, *Madhesis*, people from backward regions, and women were represented in proportion to their presence in the population.

Devising an Electoral System for the Future—with a Focus on Inclusivity

It is not necessary that the election system used for the election of the Constituent Assembly be used for the elections of future legislatures. Nor is it essential for the same system to be adopted at all levels—at the national level and at the lower-level units, if Nepal becomes a federation, and at the level of local government. The adoption of some form of proportional representation system seems likely. On the national level, it would be possible to either retain the plurality system now in place or to adopt a wholly proportional representation system; a mixed system, similar to that used for the Constituent Assembly could also be adopted. Any of these systems might include adaptations designed to ensure greater inclusivity.

A Modified Plurality System

A plurality system could be retained if some of the defects of the system were to be removed. If constituency sizes were much more comparable, the make-up of the legislature would be more reflective of the voters' preferences. Although such a system can never be truly proportional, greater inclusiveness could be achieved by having, for example, certain seats reserved for certain groups. Seats for women have been created in some countries (Bangladesh and Rwanda are examples), and a similar model could be adopted in Nepal, whereby certain seats could be reserved for members of ethnic communities. Some states have also modified the plurality system to ensure the representation of minorities by reserving seats for them that are either voted on by the members of the minority (as in Hungary, Romania, and colonial Kenya) or by everyone (as in India, for scheduled caste and tribes). In Fiji, ethnic seats were originally designed to protect the indigenous people when they were a minority, and have been retained,

although indigenous Fijians are no longer a minority; and all major groups have ethnic seats, amounting to 46 out of the 71 members. Similarly, in Nepal, it would be possible to reserve seats for Dalits, for example. Any such device, however, would be complex, perhaps leading to the overlapping of constituencies, with people having more than one vote—or choosing whether to register as voters in a general or an ethnic constituency. Otherwise, it would be necessary to rely on provisions in the law and the constitution designed to require or encourage parties to have a wider range of candidates

Proportional Representation

Before a country decides to adopt any PR system, it should be made clear to the people why the country is opting for the PR system: whether the problem of representation is related more to the representation of smaller political parties or to ensure the representation of the social, ethnic, and cultural groups in proportion to their population size. If the system does not address socio-cultural proportionality, but only the representation of smaller parties, then it may have little relevance for Nepal. However, as seen from the example of South Africa, proportional representation (especially the list system) tends to be more inclusive. But the effectiveness of the system varies according to the situation; in Sri Lanka, for example, women remain reluctant to enter politics, partly because of electoral violence, and thus the system has not had the usual effect on the gender balance

In Nepal, ethnic parties' electoral appeal has been weak, and ethnic groups have needed to rely on major parties for representation. Indeed, parties that are restricted to members of certain communities are unconstitutional (see the next chapter). The focus of the debate here is how the proportional representation of the diverse socio-cultural groups can be ensured through elections, while maintaining the party proportionality. The range of possibilities discussed here exclude various systems used elsewhere, including multi-member constituencies in which voters express ranked preferences by writing in numbers—excluded because of the high proportion of illiterate voters in Nepal. For a similar reason, it is assumed that all list systems would involve closed lists—meaning that voters would be able to know the names on the party lists and the order in which the names appear on those lists, but they would not be able to alter the lists.

List PR System

As mentioned earlier, a list system does encourage parties to include a wider range of candidates. To what extent the adoption of such system has this effect depends on many factors within the society. Parties can be encouraged to include a wider range of candidates by providing parties with incentives (for example, the use of public funding) for doing so (see again the chapter on political parties), rather than, or as well as, adopting a new electoral system. A decision would have to be made as to whether

the whole country should be one national constituency or should be divided into several multi-member constituencies, for each of which each party would produce a list of candidates. Most of the countries using the list PR system follow the regional/provincial list systems.

It is technically possible to allocate a fixed quota for each of the ethnic or other groups, in proportion to their population. When this is done in a system with one national constituency, it tends to undermine the national political parties and encourages the fragmentation of politics along ethnic and sectarian lines. Allocating such quotas, however, is less of a problem in a list system based on large multi-member constituencies, because there would be fewer groups to provide for than in a state with one national constituency. There are, however, risks in fixing a quota for disadvantaged groups: it might be impossible to draw up a system that would satisfy everyone; it might require voters to identify themselves along ethnic lines, thus underlining ethnic differences; and the working out of the details could be very complex. The Constituent Assembly will have the experience of the elections to that body itself, which involved the use of very complex quotas, to study, before deciding on a system for the new constitution.

Usually, to win a seat in a given constituency, contesting parties must obtain a certain percentage of valid votes (known as the threshold). There are wide variations of thresholds, ranging from the most liberal in the Netherlands (0.67 per cent) to the most conservative in Seychelles (10 per cent). A low threshold allows more parties to get a seat in proportion to their popular vote, but it tends to produce more small parties in Parliament (and if their lists are headed by men, such small parties may tilt the gender balance further in favour of men).

In list systems with one national constituency, independent candidates generally have no chance to contest for elections and only political parties can do so; in multi-member constituencies, a provision for independent candidates can be made. However, it must be said here that independent candidates fared very poorly in the most recent election in Nepal (though two candidates have been elected to the Constituent Assembly).

Different Electoral Systems: Pros and Cons

System	Advantages	Disadvantages	Ethnic Proportionality	Representation of Women
System under 1990 Constitution (first past the post)	Familiar system; easy for voters to understand; voters can vote for one person (probably a party person) Voters can identify their members May produce small number of parties and clear majorities needed; stable government	May produce a legislature that does not reflect people's wishes May produce a government that most people voted against Individual members may have minority support	Low	Few women

System	Advantages	Disadvantages	Ethnic Proportionality	Representation of Women
Plurality system with quotas	Easy for voters to understand; can be more proportional, in terms of gender and ethnicity, etc. Voters can identify their members May produce a small number of parties; and clear majorities needed for a stable government	Has the same disadvantages that the existing system has Could be complex if special seats lead to overlapping constituencies and voters having more than one vote Quotas may strengthen and perpetuate ethnic divisions	Could be high	Could be high
List PR with national constituency	Parties get seats in proportion to the votes they get Incentive to parties to broaden appeal, so is likely to be more inclusive Simple for voters—voters need to vote only for a party	Gives a lot of power to the party secretariats Voters have no sense of a connection with individual members No independent members Tends to produce many small parties and unstable governments	Higher than in a plurality system—how high depends on whether voters' behaviour will be affected by ethnicity of the candidates included on the lists, and whether parties will respond by choosing a wide range of candidates	Higher than in a plurality system—how high depends on whether voters' behaviour will be affected by the gender of candidates on the lists, and whether parties will respond by choosing women candidates
List PR with regional, multi-member constituencies	Proportional in party terms Incentive to parties to broaden appeal Easier to field independent candidates There may be some connection between members and their constituencies Simple for voters	Gives a lot of power to the party secretariats Tends to produce many small parties and unstable governments	May be easier for regional parties identified with particular groups to get representation	Similar to national constituency system
List PR with regional, multi-member constituencies and quotas for minority groups and women	Same advantages as the system mentioned above, with greater ethnic/group proportionality	Same disadvantages as the system mentioned above Complex—hard for voters to understand, especially for illiterate voters Quotas may strengthen and perpetuate ethnic divisions	Quotas could produce very proportional results	Quotas could produce very proportional results
Mixed Member (MMP)	Parties get seats in proportion to the votes they get Could have quotas Connection between constituency members and constituencies	Voting system may be hard to understand, especially for illiterate voters With quota, would be very complex	For half of the seats, there would be an incentive for the parties to broaden range of candidates Quota system could be used— but would be very complex	For half of seats, there would be an incentive for the parties to broaden range of candidates to include more women

What Should the New Constitution Say?

On the Electoral Systems

It is not necessary, indeed it is not even common, for constitutions to specify the electoral system, although there are exceptions. The Constitution of Fiji, for example, goes into great detail about the nation's electoral system because it was a major issue in their constitution review. The Constitution of South Africa says that the legislature must be elected under a system that 'results, in general, in proportional representation.' It would be possible for the new Nepali constitution to provide that the system must be (i) proportional in terms of party and (ii) inclusive in terms of ethnicity, and so on. It could go further and be more detailed. The disadvantage of having greater detail is that if the implementation of the provisions leads to a serious problem in the make-up of the legislature, it would need a constitutional amendment to change the provisions—and such a change might not have the support of the party or parties who may have benefited from the problem. The advantage of having greater detail is that a more detailed constitution would be more effective in achieving inclusiveness.

On Other Matters

It is normal for a constitution to provide for an independent election commission to be in charge of elections. As with other commissions, a decision has to be made about whether the constitution should provide full details about the composition of the commission. The constitution could also provide some criteria for fair elections; if so, these should not be too detailed. Both voters and candidates might need to meet certain qualifications. A right to vote could be included in the human rights chapter, as in the South African Constitution:

19 (2) Every citizen has the right to free, fair, and regular elections for any legislative body established in terms of the Constitution.

(3) Every adult citizen has the right –

1. to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and

2. to stand for public office and, if elected, to hold office.

This provision led to some interesting cases before the Constitutional Court in South Africa—such as whether prisoners had the right to vote. The court first decided that the government could not exclude all prisoners from the right to vote, though it left it to a new law to decide the exact rules. But when the government passed a new law excluding from the right to vote all those imprisoned without the option of paying a fine, the issue went back to the Constitutional Court, which then struck out the new law because it was deemed too broad an exclusion.

A few countries (including Australia, Thailand, and Fiji) make it a duty to vote, as well as a right (though not necessarily in their constitutions).

Questions

1. Is it important to have members of the legislature who represent particular geographical constituencies? Does this take precedence over the issue presented in the next question?
2. Is it important that membership of the legislature be roughly proportional to the preference for parties expressed by voters?
3. Is it important to have a legislature that reflects in detail the ethnic, caste, gender, and other demographic characteristics that make up the nation as a whole?
4. Would you consider stability of governments to be more important than proportionality and inclusiveness?
5. Would it be acceptable or desirable for candidates and/or voters to be required to identify themselves by ethnic group?
6. Would voters be able to cope with a system that required them to vote twice—once for a candidate and once for a party? (Experience in elections to the Constituent Assembly should provide some answers to this question.)
7. Who should have the right to vote?
8. Who should have the right to stand for elections?
9. Are the requirements for fair elections so important in Nepal that they should be specifically mentioned in the constitution, or would it be sufficient for the constitution to say that elections must be free and fair?
10. Should there be a legal duty to vote?

CHAPTER 12

CHAPTER 12

Political Parties

Following the successful popular uprising of April 2006, political parties have come back to power in Nepal. The Communist Party of Nepal or CPN (Maoist), against the backdrop of a decade-long armed insurgency and in contrast to its original ideological goal of establishing a one-party people's democracy, has accepted a role in a new type of Nepali politics. In making a new, inclusive Nepali democracy through the abolition of monarchical rule and transformation of armed conflict into peaceful competitive politics, political parties have a pivotal role.

What have been the main problems with political parties in Nepal?

They are highly centralized and, consequently, the party units at the grassroots level have remained non-functional except during election times.

The party leadership is elitist and oligarchic, and there is no broad participation in the party's decision-making process.

The parties' central leadership features mostly dominant groups—hill Brahmins and Chhetris.

Factions and splits have been a dominant characteristic; these have been, by and large, a product of a clash of interests and egos and hunger for power among party leaders. Seven of the 11 governments between May 1991 and October 2002 collapsed due to the internal conflicts within the ruling party.

Party functionaries have been motivated to promote their self-interest, widening the gap between parties' promises and their performances.

Party funding has not been transparent.

Role of Political Parties

Political parties play a fundamental role in the development and operation of the constitution and the political system:

- They mobilize opinion, as they did, for example, in the struggle against colonialism, or in the case of Nepal, against the hegemonic power wielded by the palace and the Ranas. Nepali parties played a role as a catalyst in all the big democracy movements/revolutions—the 1950-51 armed revolution against the Rana oligarchy, the 1990 mass movement against the authoritarian party-less *Panchayat* regime, and the April 2006 popular uprising against monarchical rule.
- They bring together opinions and resources, enabling people with similar views or interests, whether they are economic, social, religious, and so on, to organize their activities and lobby on behalf of the people.
- They are the principal means through which the ordinary people participate in political and constitutional processes and exercise many of their civil and political rights.
- They mediate in several ways between civil society and state institutions (in rather different ways from other intermediary agencies between the state and society, such as NGOs, the media, etc.)
- They secure the representation of the people in state institutions, particularly the legislature; they offer the people political, social, and economic choices, particularly through the electoral process; and they bring public opinion to bear on government policies—this is a role they play when in opposition as well as when they are in government. They usually have a special position as the only organizations able to put forward candidates to represent the people in government.
- The competitive party system offers citizens a choice of policies on social reform, economic development, and political ideology.
- They bring cohesion and discipline to the government and to the opposition, for they help to organize and coordinate ministries and parliamentarians, and enable the opposition to scrutinize and challenge the government.
- They play a key role in national integration, bringing together people from different parts of the country or from different linguistic or religious affiliations, in common organization and with common purposes, and they help develop the national outlook and values.

Parties, of course, serve these purposes as part of or as a result of their efforts to capture state power through elections.

The health of the political process depends fundamentally on the state and the health of political parties. Democracy has a chance to flourish if parties are properly and democratically organized, offer the people clear choices of policy and goals, uphold constitutional values, pursue their objectives with dedication and professionalism, and seek honestly to reflect public interest and public opinion.

It is clear from the experience of many countries that parties that are not motivated to perform in the ways listed in the preceding paragraph can subvert the fundamental principles of the constitution and become an instrument of manipulation and control. For example, if parties are themselves not run democratically, the larger constitutional system will reflect this lack of democracy, and the political system will become corrupt and criminal, under the dominance of mafias, thugs, and private armies. If parties see their primary role to be that of aggregating and articulating narrow sectional interests, like ethnicity or tribalism, they will divide society rather than integrate it. If they see their main objectives as gaining access to power rather than the safeguarding of moral values or national interests, they will engage in intimidation and violence and thus make fundamental compromises with democratic practices. In these circumstances, individual politicians also become self-serving and lose their personal integrity or sense of commitment to their constituents, and they may frequently change parties to suit their personal conveniences and ambitions. When such things happen, politics and politicians become discredited, and people lose confidence in democracy, which they come to associate with parties and politicians. Many people may also become alienated from and withdraw from politics. In these conditions, a *coup d'état* becomes likely and is often welcomed.

An Overview of the History of Nepali Political Parties

Nepali political parties came into being with the birth of the democratic movement, which originated in the 1930s and 1940s in opposition to the oligarchic Rana regime (1846–1951). The history of the origin of Nepali political parties is markedly different from the history of political parties in the West, where parties evolved within Parliament as a consequence of the extension of popular suffrage; the history of Nepali political parties is also different from that of political parties in other Third World countries where parties first appeared as part of the nationalist movement against colonial rule.

The Praja Parishad, formed in 1935, was the pioneer political party in Nepal, but it could not survive Rana repression. The Nepali Congress party (NC) and the Communist Party of Nepal (CPN) were founded in exile in India, in 1947 and 1949, respectively. The mission of the NC, at the time of its inception, was to overthrow the Rana regime, a goal later directed against the partyless *Panchayat* regime. It was only in 1956 that the NC proclaimed its ideology of democratic socialism. Unlike the NC, the CPN adhered to Marxist ideology, that is, class struggle, armed revolution, and dictatorship of the

proletariat. The NC was instrumental in launching a successful armed movement against the Rana regime in 1950-51.

In 1951 when democracy was ushered in, a promise was made that elections to a constituent assembly would be held, but this promise was never fulfilled. When parliamentary elections were finally held in 1959, the NC won a two-thirds majority and formed a government under the leadership of B. P. Koirala. The Gorkha Parishad, created by the former Rana rulers and their cohorts, became the major opposition party in Parliament. But before and after the 1959 election, the CPN was the dominant actor in oppositional politics outside Parliament; despite its participation in the political process, it took the oppositional role, politically as well as ideologically, against the parliamentary system (1951-60).

The evolution of the party system was, however, cut short when King Mahendra, through a royal coup in December 1960, banned all political parties. During the authoritarian *Panchayat* regime (1960-90), political parties were forced to recast themselves in their original format, as movement organizations working in exile or underground. Eventually the NC and the United Left Front (of seven splinter left groups) jointly launched a mass movement in 1990, which restored the multiparty system. A new constitution was promulgated in November 1990.

Between 1991 and 1999, three parliamentary elections and two local elections were conducted. The number of parties registered in the Election Commission increased from 44 in 1991 to 65 in 1994 and to 100 in 1999, but fewer than half of the officially registered parties actually contested the elections, and fewer still succeeded in gaining seats in Parliament. The last three general elections and the two local elections produced a two-party dominant system, which is conventionally seen as being ideal for political stability and for the institutionalization of democracy. The NC and the Communist Party of Nepal United Marxist (CPN-UML) appeared as political alternatives to each other, and about six small parties succeeded in gaining a few parliamentary seats in one or all of the last three general elections.

With the reinstatement of multiparty democracy in 1990, political parties also transformed themselves from illegal organizations to legitimate contenders for power, and their functions and responsibilities, as related to governance, also increased. How well did parties perform in this new situation?

The situation of parties after 1990 was conditioned by three major interconnected, paradoxical situations. One, the 1990 Constitution guaranteed the stability of the constitutional monarchy and parliamentary system, but the escalation of the Maoists' armed insurgency all over the country, on the one hand, and King Gyanendra's ambition and acts of taking power back, on the other, posed a real threat to the survival

of democracy and the constitution. Secondly, political parties enjoyed continuous electoral support, but they largely failed to acquire support for their performance, and consequently, the popularity of parties and their leaders declined considerably. This second paradox was itself a product of a third: political parties were formed for the pursuit of their own ideological goals, but once they were in a position to translate their ideology into public policy and governance, rather than working for the good of the nation, the party leadership appeared to be largely self-centred and power-seeking. Internal party conflicts, factions, and splits prolonged political instability, led to a decline in political ideology, eroded democratic norms and values, and made the institutionalization of parties and the party system problematic.

Party Ideology

Each political party in Nepal has a distinct ideological identity that is largely shaped by its own history and philosophy. The NC, because of its long struggle for parliamentary democracy since its formation in 1947, is a democratic and centrist party. The Rashtriya Prajatantra Party (RPP), being a party of former Panchas, is relatively conservative and rightist; the National Sadbhawana Party is a conformist but regional based party that champions the cause of *Madhesis*, the people of the Tarai region; the CPN (UML) is a moderate left party that has given up its earlier faith in a one-party system, despite retaining some communist rhetoric; the People's Front and the Nepal Workers' and Peasants' Party are relatively radical communist parties, despite their participation in the parliamentary process; and the CPN (Maoist) is seen as an ultra-left party, which launched an armed insurgency against parliamentary democracy. The CPN (Maoist) has, however, abandoned its one-party doctrine and is participating in 'competitive multiparty politics.' Some new parties, especially *Madhesi* parties, emerged to fight the Constituent Assembly elections.

How Political Parties are Organized in Nepal

Nepali political parties have complex structures comprising four types of organizational units, briefly described here:

1. The core governing body, a central committee, exists at the apex of the structure. Below it, committees down to the ward level at the bottom are entrusted with diverse functions, like recruiting, training, and mobilizing party workers, and so on.

2. The party in public office is a forum consisting of the party's representatives in state bodies. Separate formal structures exist for elected representatives at central and local levels. At the centre is the parliamentary party. The party in public office is expected to carry out two major functions: translate the party's

principles and goals into state policies and programmes and develop a common action plan and strategy *vis-à-vis* other parties to influence decisions made by the government and Parliament.

3. Specific departments/committees have been set up by the major political parties at both the central and district levels since 1990. Their responsibilities can broadly be categorized into three spheres: a) management of the party's internal affairs; b) overseeing business relating to the elected wing of the party, and c) public-policy formulation.

4. Ancillary and affiliate organizations have been formed by all political parties. Some of these organizations were formed in the pre-democratic period and others were formed following the restoration of democracy in 1990. As the sphere of parties' influence expanded to new avenues and platforms, party affiliates mushroomed in all segments of society, including caste, ethnic, and professional groups, such as teachers, doctors, civil servants, etc. Most of these ancillary and affiliate organizations have their own structural networks at the district level.

Constitutional and Legal Provisions Regarding Parties

Parties were recognized in the 1990 Constitution for the first time:

1. Persons committed to common political objectives and programmes were entitled to form and operate political organizations or parties.

2. Political parties were free to secure support and cooperation from the general public for their objectives and programmes.

3. Any law or decision restricting participation in elections or in the political system to one party or one ideology was unconstitutional.

4. Registration of parties with the Election Commission was required for the purpose of elections.

5. To qualify for registration, a party would have to have a democratic party constitution and rules, and would have to have secured at least three per cent of the total votes cast in the previous election to the House of Representatives.

6. Parties could not be formed on the basis of religion, community, caste, tribe, and region.

7. The Election Commission was not to register any party that restricted membership on the basis of religion, caste, tribe, language, or sex.

8. A party could not be registered if its name, objectives, insignia, or flag was religious or communal or tended to fragment the country.

The Interim Constitution retains these restrictions. The Regulation of Political Parties Act 2001 reflects the provisions of the 1990 Constitution, and among other things, prohibits parties from undertaking the following activities:

1) interfering with the sovereignty and integrity of the country;
2) threatening harmony in relations among caste, ethnic, and other communities;
3) encouraging violence;
4) owning arms or ammunitions;
5) undermining public morale;
6) receiving grants from foreign nationals, agencies, and government;
7) violating codes of conduct, etc.

Some of these rather vague statements may create the risk of imposing excessive restrictions on parties. There is also the question of who is to decide, for example, whether a party is 'undermining public morale.'

The Electoral Commission has also developed elaborate codes of conduct for candidates and parties.

A Reformed Party System

So what would be needed for the Nepali party system to operate well and to perform the roles that we outlined earlier, and how would a new constitution be relevant in these matters?

Parties in the New Nepal Must Be Inclusive

The Interim Constitution 2007 has already provided that parties must show that they have a provision for the inclusion of members from 'neglected and oppressed groups including women and Dalits' in their executive committees at all levels. Besides, selection of candidates for the Constituent Assembly must ensure due representation from the ethnic groups, Dalits, other oppressed groups, and women (see the chapter on the electoral systems). But there are weaknesses in the provisions: the provisions are not very clear; they may be hard to implement in practice; and, in the case of the provision about executive committees, the provision does not say that parties cannot be registered unless they actually have such members, but that they must only 'provide for' such membership.

In fact, some parties were already trying to be more inclusive in their structure, prior to the promulgation of the Interim Constitution. The NC's constitution was amended in 1995 to require at least 10 per cent representation from excluded groups, including women

and Dalits, in the party committees at all levels. Similarly, the RPP 's constitution required priority to be given to minority and underprivileged groups in nominating committee members. But the impact of these changes on actual representation in Parliament in the 1999 election was limited: the House elected then had no Dalit members, for example. However, parties' awareness of minority interests has been increasing gradually and is reflected also in the amplification of their policy platforms related to caste, ethnicity, language, religion, and other issues of exclusion in each succeeding election to the House of Representatives. The changed political landscape since April 2006 will also presumably have an impact on those platforms in the future.

What more can a new constitution do? We have seen the restrictions placed on sectarian parties. Arguably, this has had a tendency to reinforce existing power distribution: parties tend to be dominated by Brahmins/Chhetris and thus favour their interests, but parties formed to fight explicitly for the interests of Dalits, Muslims, *Janajatis*, or *Madhesis* cannot be registered (though one formed for the rights of women could, so long as it did not restrict membership to women). Many constitutions have rather similar provisions, but by no means all. In fact, although the old rules still exist in the Interim Constitution, a number of parties representing sectional interests were allowed to participate in the Constituent Assembly elections and some won seats—especially the *Madhesi* parties. It seems that the Election Commission was taking a more 'inclusive' view of Nepali politics.

Parties Must Be Democratic

How can parties claim to represent the people in a democratic polity unless they are themselves democratic? Again the 1990 Constitution did require this, and the Regulation of Political Parties Act 2001 makes it mandatory to have periodic elections within the party, and it requires that at least half of the party office bearers should be elected. Parties have been becoming more democratic—against the old practices of nominating posts in the party in the pre-1990 period, almost all political parties have actually conducted internal elections. The NC and RPP have introduced a rule that a person cannot hold the position of party president or chairman for more than two terms.

Parties Must Respect Human Rights

However, the constitution should not be too restrictive. Freedom of thought is a key ingredient of democracy. True, illegal acts can and should be punished, whether committed by political parties, their members, or by others, but advance censorship of political ideas held by parties is generally no more acceptable than advance censorship of ideas expressed by the press or individuals. It is important to ensure that provisions on political parties are compatible with the human rights provisions.

Parties Should Be Effective

In the end, it is the voters who must decide how effective parties are, but some specific issues can be addressed in the constitution. Very small parties are unlikely to be effective. Certain electoral systems tend to produce larger numbers of parties (see the chapter on the electoral systems), and if this is the situation that Nepal should face, electoral rules can try to reduce the number of small parties, by saying, for example, that in a list system no party that obtains less than a certain percentage of the total vote (maybe 1 per cent, 3 per cent, or 5 per cent) cannot get any seat. The 1990 Constitution had a provision designed to ensure that parties that had very little support in the past could not be registered. But the provision was interpreted to allow the registration of new parties; such interpretations are important, because otherwise, new ideas and new groups may be permanently shut out of the system. The Interim Constitution requires that new parties (those not present in the current Legislature-Parliament) must produce the signatures of at least 10,000 voters before they can be registered to contest the Constituent Assembly elections. This is a discriminatory provision. As a general principle, however, there may be some virtue in requiring a party to show some degree of support before it is registered.

Parties Need Resources

In many countries, parties' needs for resources, especially to contest elections, have led to massive corruption. Now a number of countries provide for some financial resources for parties to contest elections or for other purposes; the Nepal government budget for 2003-4 had provisions for financial grants to be awarded to political parties at the annual rate of NRs 20 per vote received by them in the last general election. Such a system has other possibilities: it can be used to provide incentives—parties get more money if they have more women members or members from other historically disadvantaged groups. Some constitutions have rather general provisions requiring or permitting public funding; Brazil's Constitution, for example, says 'Political parties are entitled to funds from the party fund.' The South African Constitution says, 'The rules and orders of the National Assembly must provide for …financial and administrative assistance to each party represented in the Assembly in proportion to its representation, to enable the party and its leader to perform their functions in the Assembly effectively,' and more generally, 'To enhance multiparty democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis.' The 2004 draft of a new constitution for Kenya specified a percentage of the national budget to be allocated to the fund for parties (this may be too detailed), imposed restrictions on how the money could be used, and specified that the distribution of the fund should be related to the support shown for

the party at the last election and the 'number of women candidates and marginalized groups elected through the party.'

Parties Must Be Financially Well-run and Accountable

Parties must be transparent, so that their sources of income and the ways in which their money is spent are known. In the UK, recently, a police investigation was conducted to investigate the granting of public honours by parties in return for donations and loans to parties. In Nepal, the Election Code of Conduct contains three general provisions: prohibition of vote buying, ceiling on election expenditures for each candidate, and submission of statement of election expenditures. The Party Regulation Act 2001 provides that a party should submit its annual budget of income and expenditure to the Election Commission, that its accounts should conform to the law and be audited by recognized auditors, and that the names of persons or organizations donating more than NRs. 25,000 to the party should be recorded. A constitution would probably not include detailed provisions about amounts and procedures, but it could provide general principles on transparency and accounting, etc. Some constitutions require that parties are open about who their members are; Poland, for example, says that parties that keep their structure or membership secret are prohibited.

Parties Must Be Disciplined

Disciplining a party can be a difficult issue. One of the biggest problems undermining democracy in Nepal has been party factionalism. The provisions in many countries requiring members who 'cross the floor' from the party they were elected to, to stand for re-election are designed partly to prevent this from happening. But if a party splits into more than one party, such a rule does not usually apply. Some people wonder whether such a rule is fair: Is it compatible with the members' freedom of association? Should it apply if a member crosses the floor to the party in government and also in the opposite direction? Should it apply if the member is dismissed from the party? There are issues on which, in many countries, individual members are allowed to vote and speak according to their consciences. And it is rather incompatible with democratic ideals, which include tolerance of dissent, that political parties should tolerate none. The right balance is not easy to achieve.

Parties Must Not Use Violence

The use of violence is almost certainly a criminal offence. But violence by or on behalf of political causes is a particular problem in many countries. Some constitutions, like that of Brazil, address this problem by saying: 'Political parties are forbidden to use paramilitary organizations'; some constitutions, like that of Poland, say that any party that approves of 'the application of violence for the purpose of obtaining power or to influence state policy' will be prohibited.

Parties Must Be Accountable to Their Members

A truly democratic internal structure should ensure that parties are accountable to their members, and the law and constitution may be able to do little more.

The System of Regulation of Parties Must Be Fair

Some constitutions require that a party must be registered before it can behave like a political party at all. Others require that parties must be registered before they contest elections. Other systems do not require registration of parties at all, though this is rare now. Some systems give the Election Commission the power to register parties; others create a separate office of registrar of political parties. Either way, it is obviously important that the body that registers parties must be independent of government pressure. In many countries, opposition parties have been denied the right to participate in elections by having their registration refused or delayed.

Party Campaigns Must Be Fair

Some constitutions have provisions about fair access to public media and limits on election expenses by parties and candidates.

Parties Should Serve the National Interest

Some constitutions have provisions about foreign funding or linkages. In Angola, parties are under a 'prohibition to receive contributions of monetary or economic value from foreign governments or governmental institutions.' In Brazil, parties have to abide by a 'prohibition from receiving financial assistance from a foreign entity or government or from subordination to the same,' and the Algerian Constitution says that 'Any obedience, in any form, of the political parties to foreign interests or parties is forbidden.' The last prohibition must be difficult to monitor. Forbidding any foreign funding may make it difficult for parties to receive assistance from any of the several foreign bodies formed to provide training, etc., for parties; however, a local NGO can sometimes receive such funding and organize training programmes.

In light of the mass uprising of April 2006 and the challenges of making a new constitution, there are some other changes that parties might consider. Most of these changes are issues that a constitution could not deal with expressly, though the constitution could help to create an environment that encourages such changes:

- Parties should reorient themselves towards making policies and toward seeking office to implement those policies, rather than being mainly concerned with capturing power.
- Decentralization of party structures would help in making local party functionaries active outside election times and contribute to the party's capacity to work as

linkage institutions between the state and society. A certain degree of autonomy and independence would enhance the potential of the local units of the party to structure public opinion in the process of formulating and promulgating party policy.

- Decision making in the party should be broad based so that the party rank and file will be more committed to carry out the party's policies, programmes, and plans.
- Parties should have their own policy committees, with good documentation and research cells. Such committees will enhance the party's ability to understand the emerging complex problems of society and in formulating realistic policy and making prompt responses to changing issues and visions.
- Drawing on lessons from the past, it can be argued that professional organizations should not be politicized along party lines. A reduction in politicization and excessive party-run clientelism would have various positive effects, including the development of professionalism in non-political sectors and the growth of a meaningful civil society.

Some Questions

1. Apart from the provision of internal elections, what would be the key issues of internal democracy within the party?
2. How could parties become inclusive in terms of ensuring representation in state apparatus and in the content of their policies?
3. Should we have a provision for reservations (quotas) for the poor, women, and marginalized groups in party management structures and in the selection of party candidates for elections?
4. Would provisions of state funding help reduce parties' reliance on big business houses and reduce corruption? What other measures could be taken to make party funding accountable and transparent?
5. Should there be limits on campaign expenditure?
6. Should there be limits on parties' receiving contributions from certain sources, and if so, what sources?
7. Should members who leave a political party on the ticket of which they were elected lose their seats? If so, should the same apply to an independent member who joins a party?

8. If you believe that the answers to any of these questions is 'Yes,' would you wish each point to be included in the constitution or would some of them be best left to ordinary law and codes of practice?

9. Given the pluralistic nature of Nepali society and the emergence of ethnic movements, is it (i) practicable and (ii) desirable to retain the previous constitutional provision of prohibiting parties from being formed on the basis of caste, ethnicity, region, or religion?

CHAPTER 13

CHAPTER 13

Systems of Government

The most important factor that guides the designing of a constitution is the system of government chosen by a country, that is, the systems of law and administration under which a country is governed. The system of government determines the composition and powers of the institutions of the state and the manner in which these powers are allocated. The system chosen also determines the relationships among the organs of the state and between the organs of state and the people.

Designing a System of Government

Identifying the Tasks of the State

When deciding how the powers of the state are to be allocated and exercised, it is useful to identity the most important of these powers:

- One of the state's most significant powers is to make laws. In older societies, the making of laws was not very important because tradition was strong and change slow, and the role of the law was limited to maintaining stability. In the modern state, on the other hand, where economic development and social change are emphasized, the role of the law is to establish the framework for policies and institutions to promote change and development.
- Another key function of the state is the management of the economy: the modern economy, whether centrally planned or determined by the market, is infinitely more complex than the economies of earlier periods. Many factors determine the nature of a modern state's economy—the production of goods, the capital and labour necessary to generate production, the relations between employers and employees, the management of resources and marketing, the provisions and guarantees for a sound currency, the banking and insurance services, the nation's

infrastructure, the legal system, the level of the people's education and training, the state's economic relations with other economies and international economic institutions, etc. In a market economy, many of these activities are performed by individuals and companies, but the state has to provide the constitutional, legal, and institutional framework for the market to function and to ensure the proper co-ordination of the various components of the economy.

- A primary responsibility of the state is to guarantee law and order, the security of its residents, and to defend the country against external attacks. The state has to ensure the recruitment, training, and disciplining of the police and armed forces to assist in these tasks. The state has to create and enforce laws that protect people's lives, families, and property. It must safeguard national resources, not only for the present generation, but also for future generations.
- The modern state is responsible for putting in place mechanisms and procedures to resolve disputes that occur in society. In a modern state, there will be many disputes over a variety of matters among members of families, between manufacturers and consumers, among trading partners, between employers and employees, between citizens and public authorities, between landlords and tenants, and so on. A mechanism for satisfactorily resolving these disputes is essential to the security, stability, and economic and social development of society.
- The state also has the responsibility of ensuring national unity and social cohesion and fostering a sense of public responsibility and commitment to the public good. Many states fulfil this responsibility by ensuring fair distribution of resources across the country and across social classes, by creating symbols of national unity, by providing civic education in schools and other institutions, and by providing an honest government that is responsive to the needs of all its citizens and communities. In a multiethnic, multilingual, and multi-religious society like Nepal, the state should also ensure that all communities are treated fairly and that all communities benefit equally from the state's laws and policies.

Allocating the Tasks: Division of Responsibilities between Different Levels of Government

One of the most important decisions to be taken when determining the design of the state is whether the system of government is to be unitary or federal (or some other form of devolution). Both unitary and federal systems can include different systems of government (such as presidential or parliamentary systems), but the powers of the authorities, and to some extent, the structure that the bodies of governance will have depend on this decision.

The Division of Responsibility between the State and Civil Society

Constitutions generally restrict themselves to allocating tasks among organs of the

state. When allocating these tasks, it is can be useful for us to imagine the state as a political community, rather than as an all-powerful political entity ruling over society. If we do so, it will make it easier for us to address the question of whether all these tasks should be given to the state or whether they can and should be divided between the state and non-state institutions. In a market economy, many tasks—the providing of health and education, the production and exchange of goods, for example—are performed by non-state actors. By undertaking many tasks vital to the running of the state, civil society supplements the efforts of the state: civil society institutions inculcate values of moral and civic responsibility, create opportunities for people to get involved in policy making and to participate in public affairs, play a formal or informal consultative role in the making and implementation of laws and policies, and settle disputes. And most importantly, civil society provides a check and balance to the power of the state and makes sure that public authorities are accountable to the people. We can, therefore, think of the relationship between the state and civil society as being partly complementary and partly 'competitive.' But the competition is conducted between actors who have the same goal—to foster the values of the political community.

Many constitutions assume, but do not expressly provide for, the relationship between the state and civil society, although specific laws promulgated by many states are increasingly recognizing the roles of civil society institutions. It is important to consider whether the new Nepali constitution should have provisions for the role of civil society and if so, what they should be.

Allocating Powers among State Organs

In modern democracies, powers are usually vested in different organs of the state, unlike in political communities of the past, where they were concentrated in a single body such as the monarch, the chief, or the council of elders. Modern parliamentary democracies usually divide the tasks of governing mentioned earlier into three broad categories—legislative, executive, and judiciary (or the making of laws, the execution of laws, and the interpretation and application of laws), and vest them in three separate institutions—Parliament, the executive, and the courts, respectively (the fact that all three functions are described in terms of laws shows how important law is to and in the modern state). Although these broad categories do not fully capture the diverse tasks that a modern state has to perform, by classifying the powers of the governing bodies within these categories, we will be better able to design fair and effective institutions.

Let us first examine why the modern state divides powers in these ways and why they are assigned to different organs of state.

Modern states divide powers and allocate them to different institutions for the following reasons:

- to reduce the burden on a particular institution;
- because different powers need different expertise: for example, the skills required to make laws are different from those necessary to interpret the law;
- because the separation of institutions ensures that each institution is qualified for its functions: thus policy making, which is pre-eminently a political task, is best carried out by representatives of the people (hence an elected assembly); the implementation of laws and policies requires technical and administrative expertise, for which qualified ministers and public servants are necessary; and the interpretation of law and its impartial administration requires people educated in the practice of law;
- because the separation of powers and institutions limits the power of any one institution and reduces the possibility of the dominance of one institution over other institutions and the people;
- because the separation of institutions facilitates checks and balances, so that each institution can keep a check on the other (e.g., in the United States of America, the president nominates senior officials and judges, but their appointment requires the consent of the Senate);
- to ensure that certain key state-functions that are necessary for a democratic and accountable government are discharged fairly and without political bias; in many modern states, these functions are the responsibilities of experts and independent bodies, which are separate from other main organs of the state. Nowadays, bodies such as independent electoral commissions, public service commissions, auditor general, attorney general, etc are usually assigned some of the tasks that used to be performed by courts of law (these bodies are discussed in chapter 19).

However, it is important that the concern with the separation, limitation, and accountability of powers should not undermine the effectiveness of state organs. The model of separation and limitation is based on the concept that the state should perform a strictly small number of tasks and leave most decision making to private actors, especially in a private and decentralized economy. Such a model is, however, difficult to work with, even in the West, and state organs need to have sufficient powers allocated to them for them to be effective. They need to have these powers for the following reasons:

- to promote economic, social, and cultural development;
- to equalize or redistribute economic wealth and opportunities so that every citizen has access to basic needs;

- to manage and coordinate the framework of the economy, an urgent task in a globalizing economy when the frontiers of all national economies are being dismantled;
- to protect the environment without jeopardizing industrial development;
- to manage and resolve ethnic and other conflicts;
- to provide relief during natural and man-made disasters.

It can be extremely challenging to create a mechanism for separating and limiting the powers of the state organs without at the same time undermining the effectiveness of these organs. Fortunately, if state organs exercise power responsibly, transparently, and in accordance with legal and administrative procedures, these organs will not be able to abuse the wide powers given to them—the greater the power an organ has, the greater the need for safeguards and accountability.

Criteria for Assessing Systems of Government and Institutions

There are no simple or clear criteria for assessing the efficacy of systems or institutions; when making such assessments, it is necessary to be familiar with the values the state wants to uphold and the goals it wants to attain. One can divide these values and goals into three clusters. The first cluster has to do with democracy and rights. The kind of issues to look for in this cluster are the extent and mode of representation, whether all groups and regions are represented fairly, how democratic and participatory is the decision making process, and how responsive are state institutions to the needs and aspirations of the people. The second cluster forms around the concept of accountability, transparency, and integrity—mechanisms for disclosure of government information, rules about good conduct of officials, safeguards against abuse of power, complaints mechanisms, and so on. The third cluster revolves around stability, efficiency, and effectiveness. Does the government enjoy a reasonable period of office? Is it able to develop and implement clear and firm policies? Does it perform its functions with a degree of professionalism?

Some commentators say that these values and goals conflict and that no one system can deliver them all, or in equal measure. So one must establish priorities or agree on trade-offs before proceeding to design the system of government. The designers of the system of government may, for example, see a conflict between the goal of having an executive that is more accountable to the legislature and having an executive that is more efficient and stable: they may consider the executive in the parliamentary system, which does not have a fixed period of office for the executive, to be more accountable to the legislature, and they may consider the executive in the presidential system, where the executive has a fixed period of office, to provide more stability at the executive

level. Others may consider this analysis too simplistic and say that the stability of the executive depends not so much on the formal powers vested in the executive as on the executive's ability to forge a consensus on various issues pertaining to governance and would counter with the claim that executives in parliamentary systems are better able to mobilize consent than are executives in presidential systems. But such debates are beneficial in helping designers of the system of government think through their proposed designs. Furthermore, such lists of criteria will at least provide designers of the system of government with a means to compare systems and help them decide which system would be suitable for the country.

Choice between Systems of Government

There are three or four systems of government (parliamentary, presidential, mixed, and monarchical). But there are differences even within each principal type, producing a great variety of systems. Each of these systems has worked well in different contexts. So it is hard to say which system works the best. Much depends on the overall context in the country, which is determined by a society's traditions and history, how a society has been governed over a long period of time (and therefore, people's and officials' familiarity with them), the influence of colonization or a similar experience, and so on. The context is also influenced by a country's socio-economic situation, ethnic diversity, demography, and even geography. A powerful influence in recent decades has been the global context, in which the paradigm of the modern state is replacing traditional modes of governance. Modern states have their own logic, dynamics (e.g., the concentration of power and force, the consequent need for safeguards, the hardening of state borders, the marketization of the economy, and new modes of decision-making and participation across communities and vast geographical distances, etc), and ways of working, and these mechanisms are also influenced by the states' being members of international and regional organizations, which pressure states to conform to global norms.

Although the last point suggests a growing similarity of systems and institutions, it is unwise to overlook the national context. For example, similar systems of government in different countries will operate differently due to differences in the context. Thus, the parliamentary system in the United Kingdom works differently from that in India or in the small island states of the South Pacific. Another variable is the electoral system—some systems tend to produce a predominantly two-party system (as in the United Kingdom, which has single-member constituencies) and others facilitate the proliferation of parties, as in many European countries with proportional representation systems. Whether a country has two parties or a multiplicity of parties will determine how the parliamentary system works (this explains the different experiences of the United Kingdom and European nations). Similarly, the presidential system in the United States of America works quite differently from presidential systems in Latin America; the president in the United States of America has to cope with essentially two parties in

the legislature, but the presidents of Latin American countries, which have proportional representation systems (at least for the legislatures), have to work with several small and fluid parties. The United States of America, therefore, has a relatively stable government, unlike Latin American nations. There are other variables to be considered too, such as the homogeneity or diversity of the population, the size of the country, and so on. It is thus hard to predict how a system that has been developed in one country will work in another country. What this suggests is that it is necessary for designers of systems of government to constantly keep in mind local traditions and contexts, without giving up the willingness to learn from the experience of other states.

CHAPTER 14

CHAPTER 14

Federalism, Devolution, and Local Government

Introduction

Many people see federalism as a way to empower communities and regions marginalized by the centralization of power in Nepal and to help promote the religious, linguistic, and ethnic diversity of the Nepali people. The drafters of the 1990 Constitution understood the problems arising from centralization and thus inserted a directive principle requiring the state to 'bring about conditions for the enjoyment of fruits of democracy by providing opportunities for the maximum participation of the people in the governance of the country by the means of decentralization of administration' (Art. 25(4)). But little effective action was undertaken to decentralize power, even to the limited extent as was recommended by the constitution; and what little effort was made to do so was undermined by the Maoist insurgency.

Restructuring the state has thus become the major objective of the Constituent Assembly. The Interim Constitution gives great importance to restructuring the state in order to strengthen democracy, increase inclusiveness, and foster social justice. The preamble to the Interim Constitution envisages that restructuring the state will resolve 'the existing problems of the country based on class, caste, region, and gender.' Article 34(2) of the Interim Constitution calls for self-governance based on ethnicity, language, culture or religion. The Interim Constitution also encourages the state to promote the co-existence of various communities and to help 'in the equal promotion of their languages, literature, scripts, and arts and culture' (Art. 35(3)). Perhaps the most explicit provision regarding decentralization is Article 138, which commits the Constituent Assembly to eliminating the 'centralized and unitary form of the state' as a means to end discrimination based on 'class, caste, language, sex, culture, religion, and region.' An amendment made on 9 March 2007, following riots in the Tarai, in support of regional government, specifies that the restructuring will be along the lines of federalism. A

High Level Commission is to be set up to make recommendations on the restructuring, leaving the final decision to the Constituent Assembly.

The Origin of Federations

In order to locate the debate on federalism in the Nepali context, it is useful to identify two variables: First, we need to examine how federations are formed. A federation can be formed by independent, sovereign entities coming together, a process that may be called 'federation by aggregation' (the USA, Switzerland, and Australia), or by the restructuring of a single unitary and centralized state, which may be called 'federation by disaggregation' (Nigeria, Spain, India, South Africa).

In previously centralized systems that have disaggregated to become federations, the powers of the units are clearly defined and the residual powers are taken up by the centre. Countries that have seen processes of aggregation and disaggregation (such as Malaysia, India, and Canada) have detailed lists of federal powers exclusively exercised by the centre, state powers exclusively exercised by the states and concurrent powers exercised by both the centre and the states.

Second, we need to examine why federations are formed. One type of federation, called 'territorial federation,' is created for the following reasons: (a) managing space and distance in countries with large territories; (b) creating greater capacity for self-defence and national integrity; (c) promoting economic development by creating a larger unit for market and trade; and (d) enhancing democracy by fostering greater participation and responsiveness. A second type of federation, called 'ethnic federation,' is determined by a state's cultural diversity (particularly differences of language and religion). Ethnic federalism is usually chosen to confer forms of self-government on distinct cultural communities that are dominant in different parts of the country. This type of a federal system provides protection for the culture, language or religion of minorities and responds better to the special circumstances and needs of these communities.

It is easier to form federations by aggregation because the entities that become federal units were previously independent states, which already possessed established constitutional and political systems; thus only some new forms of power and a small number of new institutions at the centre have to be created. Furthermore, this kind of federation is generally based on the consent of entities that recognize the advantages of coming together. Establishing a federation by disaggregation, on the other hand, is often not as easy because groups with a vested interest in maintaining centralized state power may resist federalization, while the supporters of federalism may be prepared to wage war in order to achieve their aims. Such a federation is also technically more difficult to establish for two reasons: one, many decisions have to be taken while designing the system (each of which can be controversial); and two, several governments have to be

created, often from scratch, in the new federal units, regions which may have previously not had the capacities to make decisions or implement policies.

Likewise, the dynamics of 'territorial' and 'ethnic federations' are different. In territorial federations, often the result of aggregation, the boundaries of federal units are predetermined (these boundaries are not demarcated according to any particular logic, and are usually the products of history); in ethnic federations, on the other hand, creating new boundaries or respecting existing boundaries are of the essence, as one of the purposes of federating is the need to recognize cultural diversity. An ethnic federation is prone to periodic adjustments of boundaries (possibly following bitter controversies) and to the creation of new federal units, as fresh claims of ethnic or cultural distinctiveness are advanced. Some major issues in the operation of ethnic federations concern relations between ethnic communities, calling for frequent negotiations (and possibly, different methods of conflict resolution than the methods used to resolve conflicts in territorial federations).

This discussion leads us to questions such as the following: (a) are some kinds of purposes more easily achieved through federalism than others? (b) does federalism give rise to new problems—what might they be, and can they be managed? (c) are some federations more manageable than others? (d) in which federations are human rights better protected? (e) are some forms of federation more conducive to national unity than others?

The Interim Constitution of Nepal has opted for federalism to promote inclusiveness and social justice. Article 138 of the Interim Constitution calls for the elimination of the centralized and unitary state in order to end discrimination based on class, caste, language, sex, culture, religion, and region. But will defining the central reasons for federating as has been done place too much of a burden on federalism? And will other complementary remedies and policies also have to be put in place to achieve the outlined objectives? How can it be ensured that the federalism that will be instituted in Nepal is truly 'inclusive, democratic, and progressive,' as demanded by Article 138? And how can it be ensured that the structures of power that operate at the national level (and which are deemed to be the cause of Nepal's problems) will not be reproduced at the level of federal units (led by the same parties and social interests)?

Designing the Federal Units

The people of Nepal will soon have to make a fundamental choice regarding the primary function of the federation. Should the federation be territorially based, with boundaries drawn on the basis of the units' geographical features, capacity for governance, availability and access to resources, and potential for development? An important feature of territorial federations—that all persons and communities in a sub-national unit of such federations shall be treated equally—bolsters the argument for opting

for this system. Or should the Nepali federation be based on ethnicity, where persons of the same ethnicity or caste or language constitute the sub-national unit and enjoy benefits that others do not, such as the use of their language and control of resources? The main reason for opting for ethnic federation is that such a system helps to protect and promote the economic and social well-being of minority groups and helps them maintain their distinct identities. The debate in Nepal has revolved around this polarity. The extreme caste and ethnic diversity of Nepal throws into sharp relief the differences of the two approaches, for the ethnic approach could lead to a large number of small units, while the territorial approach would lead to a small number of large units, with somewhat contradictory consequences for administration, 'efficiency,' and identity. And although the amendment of the Interim Constitution on 9 March 2007 may seem to favour the communal rather than the geographical/developmental approach (removing discrimination based on 'class, caste, language, sex, culture, religion, and region'), the amendment is certainly not unambiguous.

Criteria for the Establishment of Sub-national Units

Before we consider the issues that Nepal will face when designing its federal system, it would be useful to briefly consider the arguments for and against ethnic federalism. The main argument for ethnic federalism is that where ethnic consciousness is strong, unitary states or federations based primarily on geographical or administrative grounds may fail to satisfy a community's need to protect its identity, its desire for a measure of self-government and the recognition it seeks for the value or importance of its culture. An ethnic federation gives cultural communities the means to develop their language, protect their religion, take affirmative action in favour of disadvantaged members, promote regional parties, and build the political standing they will need to negotiate with the centre (and other federal units) for ensuring equitable distribution of resources. On these grounds, the ethnic community can be integrated in the national political system, and national unity is strengthened. The international community usually advances ethnic federalism or autonomy as a solution for countries that are threatened with the possibility of ethnic conflict and to pre-empt units from seceding from the larger state.

The opponents of ethnic federalism argue that ethnic federalism would not work so well for Nepal. Ethnic federalism weakens the sense that people have of belonging to a single nation because, often, people's primary (and sometimes exclusive) loyalty turns out to be loyalty to the ethnic community to which they belong. Their dependence on central institutions is thereby reduced and the ability of ethnic units to secede is thus enhanced. It may be argued that, at the least, a great deal of time and energy of the national authorities is taken up in constantly negotiating ethnic claims. National unity may also be threatened because minorities within a state or province dominated by one ethnic group may be vulnerable to discrimination, even oppression. In such cases, central authorities may be forced to intervene in the affairs of the state or province, producing

further tensions. In ethnic federations, measures directed at maintaining national unity (through effective and legitimate dispute-resolving mechanisms, consultation and co-operation, and power-sharing mechanisms, where relevant) become critical. The all-important ability of the centre to ensure equitable distribution of resources and the fair development of all regions may also be reduced if resources are unevenly located in the different states.

Discussions in Nepal

Determining the criteria for federating is a useful starting point for discussions on the nature of the federation that needs to be adopted in Nepal, for the design of the federation will depend fundamentally on which approach is adopted. Dr. Pitamber Sharma, a prominent Nepali intellectual, has collated data on the size and distribution of ethnic, linguistic, and caste groups, by Districts and Village Development Committees, as well as data on the distribution of resources, all of which could prove invaluable in informing any discussion related to federalism. Sharma has also analyzed the proposals of others intellectuals such as Dr. Govinda Neupane, Dr. Mahendra Lawoti, and Dr. Harka Gurung, and has usefully summarized their views.

Among those who favour an ethnic federation, Govinda Neupane proposes 11 units, based, as Sharma says, on 'the historical-cultural background, language, and the areas of historical occupation of particular population groups… reminiscent of the situation existing at the beginning of the 18th century,' while ignoring geographical or economic feasibility.

Sharma states that 'most of the major ethnic groups such as the Limbus, Rais, Tamangs, Gurungs, and Magars in the hills and Tharus in the Tarai have demanded the creation of states based on their 'historic areas of occupation.' The *Madhesi* groups have tended to equate ethnicity with language groups and have demanded the creation of states based on language groups. While some *Madhesi* groups (including the Nepal Sadbhavana Party) see the need to create one single *Madhesi* state along the southern border, others are for two or three separate states, including one for the Tharus in the west. Some of the *Janajati* groups, such as the Tamangs, have demanded that the areas of Tamang occupation be given a state status in their historic territory. Most of the *Janajati* groups have articulated their demands for ethnic states in a general way and are in the process of formulating more concrete proposals. The federation of the *Janajatis*, Nepal Janajati Mahasangh, for example, has called for autonomous ethnic states, but has not specified the number and extent of such ethnic states.

The Maoists have proposed 11 autonomous regions. According to Sharma, 'These groupings represent areas of ethnic occupation and historical neglect, geographical marginalization and remoteness.' The principal criteria are derived from Stalin, namely 'common territory, common language, common economic life, and common psychology.'

Sharma says that 'Other than ethnicity, the Maoists have not explained adequately the basis for the formation of these autonomous regions.'

The CPN (UML) supports autonomy based on ethnicity, language, culture, and region (as aspects of the right of indigenous nationalities and ethnic groups to self-determination). Sharma comments that the criteria 'seem to be comprehensive and confusing, and the CPN (UML) has yet to come up with concrete proposals for designating federal regions or states and explain the meaning and context of self-determination and the extent of autonomy and how it is to be exercised.' The Nepali Congress has long been opposed to federalism, although it was among the parties that favoured the insertion of federalism as a goal in the Interim Constitution.

Mahendra Lawoti proposes that ethnic affiliations, where feasible, should be the basis for federating. Citing the case of Limbus, he writes that 'since many of the marginalized socio-cultural groups are concentrated in different regions, different groups might be able to form majority governments in those regions.' He believes that even if a marginalized group is not a majority, it would still have considerable influence at the regional level. Lawoti's strong advocacy of ethnic federalism is based on his belief that only through ethnic federalism can the marginalized groups escape their oppression by the ruling communities.

The late Dr. Harka Gurung, a proponent of federalism based on the logic of geography, viability, and the imperative of development, had proposed making the district as the federal unit, with a reduction of their numbers from the present 75 to 25. Gurung believed that district autonomy would be possible only if the districts had adequate resources, if the district governments were given more authority to collect taxes and if the district governments could collect revenue generated by the local resource base.

Sharma himself uses criteria composed of economic geography, and to a lesser extent, of ethnicity. First he demonstrates why the ethnic, caste, linguistic, and historic homeland criteria are neither realistic nor viable: there are only 14 districts in which a single group is the majority (nine of them dominated by Chhetris); groups, particularly the caste groups, which are dominant in one or more districts, are also the most dispersed, the result of the mobility of the people. He concludes, 'As a result there is considerable ethnic/caste diversity even in areas that have a dominant ethnic/caste population… Even among *Janajatis* there are dominant/majority and minority *Janajatis* in the same geographical area…Dalits do not have a territorial enclave.'

There will likely be serious difficulties in getting everyone to agree on the fundamental basis of Nepali federalism. It is clear that if each or most of the ethnic, caste or language groups were to have their own region or even district, Nepal would end up with a very large number of very small units. The dilemma is obvious: if ethnicity or identity were to be the main determining criteria, the regions would not be able to take on many

functions and responsibilities, given their lack of resources and capacities; if on the other hand, the size of the units were to be increased by reducing the number of regions or districts, ethnic self-rule would be diminished and many groups would feel quite distanced from the centres of power. Organizing the state on the basis of three or so tiers of administration may resolve the dilemma to some extent, as the region would be the focus of policy and legislative initiatives, and region-wide development projects, while districts would deal with matters of greater local significance, including culture. Of course, the more the tiers, the more complex, and perhaps more expensive, the federal system will become. A model that could be studied to understand the ramifications of federalizing would be the Indian federation, which has adopted the approach of organizing states on the basis of language and has invested in local self-government (*Panchayats*) to provide for more responsive administration.

The debate about the basis for, size, and number of units would be more fruitful if the powers and structures at each level were specified. How many tiers of government should there be? How are powers to be divided between them? How will regional/district governments be financed? How will relations between different levels be managed? Will there be one public-service institution or many, one judiciary or many? Does the country have enough resources for and the capacity to manage a complex federal system? How will disputes between different levels of government be resolved? What impact will federal relations have on inter-community relations? Besides these fundamental issues, there are many other issues that will have to be taken into account when designing the details of the federal system. Examining their implications may help to resolve differences among the different proponents of federalism.

Understanding the implications of federalism may also help Nepalis decide on the kind of federation they should pursue and prompt them to reflect on the kinds of issues and problems that could best be dealt with through federalism; if the public feel that federalism is not a viable option, that revelation may allow the public to focus their attention on other kinds of constitutional devices that may be better suited to dealing with at least some of the problems that, currently, are expected to be resolved through federalism.

Structuring Federalism: Issues and Choices That Nepal Faces

This section discusses a number of issues that need to be considered while designing the federal arrangement in Nepal. Because the purposes of federalizing are different, the criteria for defining sub-national units, the balance between self-rule and shared rule, the salience of culture, the politics of internal mobility, the allocation of resources, and the modes of dispute settlement are also often different in the two primary types of federal systems—the ethnic or the geographic. And although the emphasis would vary according to the primary objectives of the federal system chosen and according to

the national context, there are certain features that need to be incorporated into every federal design.

Division of Powers Between the Centre and the Units

A key element of a federal system is the combination of 'shared-rule' (that is, the powers and structures of authority at the centre in which all the different sub-national communities participate at the national level) and 'self-rule' (that is, the autonomous powers that each sub-national unit can exercise). For federal relationships to be viable it is important that the powers of shared-rule and self-rule be balanced and that there be effective institutions and mechanisms for consultation and co-operation among the units and between them and the centre.

Levels of Government

As is obvious from the preceding section, there has been relatively little discussion in Nepal of the number of levels of government that would be needed. Pitamber Sharma's four-level proposal (centre, region, district, and village/township) shows that flexibility can be achieved by creating a multi-level structure to deal with issues of policy, resources and capacity, and by making provisions for units to deal with the national government at the regional level, and issues related to identity and participation at the district level. Frequently, the adoption of a federation turns previously dominant groups into minorities in some federal units. One way to deal with the concerns of the minority groups is to grant these groups a limited autonomy in areas where they might constitute a significant proportion of the population. In 2000, this solution was widely canvassed in Sri Lanka to protect Sinhala and Muslims in the north-east and Tamils in the south. In Switzerland, there are three levels of government (national, cantonal, and communal), which are constitutionally protected. Many federations, such as Bosnia-Herzegovina, and recently, India, have moved to three tiers, in which local councils and municipalities are constitutionally protected.

Number of Units

The number of units can be a critical factor that will determine whether a federation will survive or not. A federation that is composed of a small number of units may be burdened with too many responsibilities. If there are only two units (as in East and West Pakistan, Czechoslovakia, and the non-territorial federation of Cyprus), each dominated by different cultural communities, the larger community would want as much power as possible to be handed to the national government, which it would expect to control, and the minority would want as much power as possible to be delegated to the sub-national level. A federation would likely be unbalanced if there were a big discrepancy in size and resources among sub-national units. In a federation with a larger number of units, who the disputants are may change with which issue is being contended. But different

kinds of balances can be struck, and provisions could be made for other units to act as mediators to resolve disputes. On the other hand, with a large number of units, co-ordination may be difficult; and if a relatively small country has a large number of units, the units would have limited capacity for governance and would be unable to resist the influence of the national government.

Boundaries, Merger of Units, and Creation of New Units

In ethnic federations, the number of units is usually increased by the fragmentation of existing units (as in India, Nigeria, and Spain). In some cases, there may be disputes about the boundaries of neighbouring units, and sometimes there may be pressure to merge some units (as happened in the Indian exercise of the integration of princely states). All of these developments could possibly take place in Nepal as the process of federalization unfolds. It is, therefore, important that the constitution provide procedures for the splitting or merging of units and the adjustment of boundaries. The provisions should make it neither too easy nor too difficult to change the sizes of and the number of the units. If the procedure is too easy, many demands for new units could be made, and if it too difficult, the failure to make necessary adjustments when required could lead to conflict. The procedures for making the change should ensure that before the changes are made, people living in the areas that will be affected by change are consulted; in most cases, the people's approval should be necessary. Adequate time should also be allotted for conducting proper debates on the desirability of change. In some constitutions, such as in Spain, some criteria are specified before the process for change can begin.

One or More Constitutions?

It is essential that a single national constitution prescribe the parameters of the federation, including the division of powers, relations between governments at different levels, methods for resolving disputes, and methods for interpreting and amending the constitution. It is customary for the national constitution to specify the nature of government at the national level (i.e., of the federal government). The structures of government at the sub-national levels are generally dealt with in the constitution of the sub-national unit. Sub-national constitutions have to be consistent with the national constitution, but otherwise are free to establish the institutions of the unit and its system of government within a broad range. There can be considerable differences between constitutions of sub-national units (e.g., some are unicameral and others bicameral, some may have their own bills of rights, while others may rely on the national constitution; and in Malaysia, some are monarchical but others are 'republican'). The scope and importance of state constitutions, therefore, varies, depending on how centralized power and institutions are. In some countries, sub-national constitutions may only be drafted on the approval of the central executive or legislature.

In a few countries, the national constitution also deals with the structures of government in the sub-national units (India, Nigeria, and Pakistan). This is, perhaps, administratively more convenient and is employed in federations that are centrally oriented; some units, for example, may not have the capacity to make their own constitutions (it is interesting that when sub-national units are allowed to create their own constitutions, there is remarkable similarity between their constitutions); but it leaves less scope for accommodating traditional structures when they vary across the country (as may be the case in Nepal).

The Second Chamber

Federal legislatures are generally bicameral. One chamber is based on the principle of the representation of the people, so that membership is based on the population in each of the units. The other chamber usually represents the units at the national level, protects their interests, and enables them to participate in the governance of the whole country (as an aspect of shared rule). The basis of the memberships is sometimes equal representation of the units, and sometimes it is the size of the population (provided that every unit has at least one member).

In some countries, the second chamber represents not sub-national units, but ethnic communities (as in Ethiopia), providing a different kind of balance between the national government and communities. In Nepal, there have been suggestions for the creation of such a legislative chamber (in contrast to the National Assembly under the 1990 Constitution, which was based essentially on party representation).

The powers and responsibilities of the second chamber also vary. Some, as in Germany and South Africa, are used as a framework for negotiations between the national and sub-national governments (in which case, there is representation of sub-national governments, rather than of people directly). In Ethiopia, the second house, the House of Federation, has the explicit responsibility of protecting the rights and interests of sub-national units and ethnic communities, ensuring adequate budgetary allocations and interpreting the constitution.

The work of the second chamber can be supplemented by other institutions and procedures for inter-governmental relations (such as premiers' conferences). In short, there is considerable room for creativity regarding the designing of the second chamber, including allowing the provision for meshing the interests of the national and other governments, as part of the strategy of 'bonding,' and to give the chamber the power to represent non-state communities and groups.

Institutional Arrangements: The Role of Independent Institutions

This section considers a special aspect of how institutions at the national and sub-national levels could be organized. Normally, each level of government has its own

institutions (legislature, executive, etc), but in some cases, it might be more appropriate, as well as cheaper, for the different levels to share institutions. The most obvious, and less controversial, are the Electoral Commission, the Audit Commission, the Human Rights Commission, the Anti-Corruption Commission, and the Ombudsman type of body. These bodies are meant to be independent, not subject to any politician or official; they have to maintain national standards uniformly throughout the country; and some of them need to be present in all zones or districts. These bodies are best described not as institutions of the central government, but as national institutions. Their national character would become even more evident, and increase their legitimacy as such, if the appointment of their members could be made through a process in which the sub-national units had some participation, for example, through a national appointments board consisting of persons appointed by both levels of government.

Other institutions that could be shared are the judiciary and bodies that provide legal services. Judges are, after all, supposed to be independent, sworn to obey and enforce the constitution and the laws. Also, having a common judiciary would eliminate complex legal issues that arise from having multiple jurisdictions, such as giving recognition to decisions of separate judiciaries, enforcing the laws of different jurisdictions, matters related to extradition, taking evidence in another jurisdiction, etc. Again, it would be necessary to ensure that a truly independent process is established for the appointment, and where appropriate, dismissal of judges. It is of course not uncommon for each unit in a federation to have its own judiciary, but it is doubtful if Nepal can afford the resources for a multiplicity of judiciaries. The world's largest federation, India, is able to operate with only one judiciary. The same type of approach could be adopted in Nepal for the provision of legal advice and the conduct of prosecutions. An added benefit of adopting the Indian system would be the enhancement of these independent institutions, as they could be de-linked from any particular government.

The subject of a shared public service raises different kinds of issues (including that of loyalty), but certainly some sharing of services would be sensible and should be feasible. The new sub-national units will need considerable support as they begin to establish their governments, so a pool of senior or retired public servants could assist them with this task. More broadly, a national commission could be established to provide expert advice on finance and taxation, law drafting, and the setting up of management systems, and so on. This point is discussed later in this chapter.

Division of Powers: Contents and Methodology

One of the most important decisions to be taken is that regarding the division of powers among governments at different levels. Certain powers are almost always reserved for the national government: powers over foreign affairs, defence, citizenship, currency, and international trade; in practice, there are many more (as in India and Malaysia). In principle, the central government should have those powers that are essential for

preserving the independence of the state, and matters pertaining to national security, interactions at the international level with other states and international organizations, the maintenance of integrated domestic economy, regulation of large natural resources, and national infrastructure. Typical powers for the sub-national units include powers over primary and secondary education, local markets, co-operatives, health clinics, agriculture, irrigation, land taxes, culture (including libraries), sanitation, and local roads. In principle, sub-national units should have powers that are of particular regional interest: local transportation, education, primary health, marketing of agricultural products, local languages, co-operatives, micro-credit, and local taxes.

But in fact, there is no standard formula for dividing powers, and in the newer federations, the central government is given many powers that have a direct impact on the daily lives of the people in the sub-national units (areas from which the central government in older federations were carefully excluded). The division is also determined by the capacities of governments at different levels. Under international norms and agreements, countries have assumed responsibilities in many areas of life; these bind the national government and have to be discharged by the central authorities. There is also increasing co-operation between the national and sub-national units, which makes the older type of division unrealistic.

The final point to be considered is also concerned with the method of division of responsibilities. At one time, it was common to have two lists of powers: one which belonged to the centre, the other to the sub-national units (and the un-prescribed powers, the residue, falling to the centre). Each level of government had to stay within its own prescribed area. Today, this kind of separation of functions is giving way to a more collaborative form, in which the centre and the units work together or in which both have the responsibility for several areas ('concurrent powers'), such as over agriculture, education, irrigation, transport, energy, airports, housing, and the environment. This approach generally leads to three lists—for the centre, for the units, and one of concurrent powers shared by both the centre and the units. In such collaborative setups, it is necessary to have a rule as to whether the law of the centre or the unit would prevail in case of conflict. The traditional answer is that the centre should prevail in the case of a federation by disaggregation (as would be the case in Nepal). However, consideration should be given to the rule of the paramountcy of the unit, since, when the federation is established, all laws would be of the central legislature, leaving very limited scope to units. A modification of this proposal would be to divide the concurrent list into two parts, one where unit laws would prevail, and the other where the national law would prevail.

In deciding both on the substance and the methodology of the division of powers, it would do well to remember that a scheme for the most appropriate division would emerge after trial and error, and powers may need to be phased over time, which suggests that the system should be flexible. A concurrent list provides flexibility. Three

other devices are useful: one is a general provision for the transfer by the government of its powers to another unit; the second is the South African rule that the national law would prevail over unit laws if a national law is necessary on that matter; third, the power to make laws and the power to implement those laws can be given to different governments.

Resource Allocation

A critical function of a federal constitution is to allocate resources among the different levels of government, as no government can act without adequate resources even if many powers are given to it. We can think of resources as including public service, money, taxing power, and natural resources. Resources should be matched to responsibilities. Equally, the responsibility for raising resources should be given to the government that has to spend or use them, to induce a sense of responsibility. This rule is subject to the economies of raising resources, for sometimes a government may be better at raising resources, but may not need the resources for itself. This issue arises most clearly in the area of taxation. The most productive type of taxes (corporate tax, customs duties) are most efficiently raised and collected by the centre, yet a part of that revenue may be best spent in the sub-national units. To resolve such issues, and to uphold the general principle of equalization of resources and development, a complex scheme of taxation and revenue distribution would be required.

The Cultural Question

The chief justification for ethnic federalism is that this kind of federation ensures the protection of minority cultures. A national minority that is dominant in a sub-national unit would be able to promote its culture, which would normally be marginalized in a unitary state. It is thus common to give responsibility for cultural matters (including for customary laws or practices) to sub-national units. Such arrangements also open up possibilities regarding language policy and use. The unit could prescribe a local language, perhaps of the majority or dominant people, as an official language, and require that public servants learn that language so that the people can deal with official business in that language. Even if the minority language is not made an official language, the government is likely to take measures to develop the language. Such an approach is also possible in a unitary state, but it is less likely (as Nepal's experience itself demonstrates).

It is unusual to have different official religions in a country, even in federations. But an exception is Switzerland, where each canton can decide on its religion. However, this may not apply in Nepal, as the Interim Constitution commits Nepal to being a secular state, with full equality of all religions.

The Rights of Minorities

A paradox of federalisms established for the protection of a national minority is that such federalisms can put other groups in the autonomous area (some previously dominant) at risk. In order to prevent endless ethnic conflicts at local levels and to protect these 'new' minorities, special provisions must be devised, in addition to a strong bill of individual and citizen rights. Where a minority is concentrated in a cluster of villages or in small towns, they should be given local autonomy. District or regional governments should be required to include representatives from minority communities, and the central government might be given the responsibility of protecting minority rights throughout the country.

Dispute Settlement and Inter-governmental Relations

It is inevitable that disputes will arise to a greater extent in a federation than they would in a unitary system—between different governments, between individuals and corporations about matters like the allocation of resources and exercise of powers. Many of these disputes concern interpretations of the law—as to who has what powers, or whether a law or act exceeds the authority of the government, or about conflicts of laws (which system or rule of law applies in particular situation). A federal system is essentially legalistic, even when the system emphasises the principles of co-operation and consultation. These disputes have to be ultimately resolved by the courts. And this means that all governments and non-government groups require good legal expertise and advice.

But there are also disputes about policy, and ironically, these disputes can be more acute in a federation oriented towards co-operation than when the divisions of responsibilities are clearly separate. These disputes can be settled through negotiations, and perhaps only in this way. Therefore, systems which emphasize co-operation also need a host of committees and commissions for settling claims to rivers and so on, the equalization of development, the allocation of money, co-ordination of planning, etc. The people must be prepared to accept that decision making will become complex and more time consuming.

In ethnically based federations, there are very specific (and difficult to resolve) disputes about inter-community relations, boundaries, definitions of identity, and issues regarding membership of a community or a region, which can lead to violence, and which can only be resolved through negotiations and fairly constant intervention or mediation by the centre. In designing an ethnic federation, one should not disregard the dynamics of ethnicity, which under a new framework may achieve new impetus. It must be remembered that while ethnicity can influence federalism, federalism can also influence ethnicity.

Entrenchment in the Constitution

One crucial factor that distinguishes federalism from other methods of decentralization is its protection in the constitution. Many see this as a virtue, for it means that the centre cannot take away the powers of the sub-national unit or disband its institutions. And it also means that legal disputes between the federal entities are finally resolved by an independent supreme or constitutional court. Others, however, see this constitutional protection as the problem with federalism—that the federation can be conflict prone and rigid. Even when there is very wide acceptance of the need for change, convoluted amendment procedures may make it impossible to implement changes. When flexibility is needed for a fundamental transformation of political power and institutions, federalism locks the parties and the system into a rigid framework.

Flexibility can, however, be achieved with guarantees of protection. This chapter has suggested that one way to do this is to have a long list of concurrent powers, over some of which the units have the final say, and others over which the national government has the final say. Another solution is to use the second chamber as a negotiating forum for national legislation, which would be enforced by the units. A third method may be to confine the constitution to the principles and parameters of federalism and leave the details to a law that itself will enjoy some degree of protection from amendment (but not as highly protected as the constitution). And yet another method might be to require a review of the working of the federal arrangements after, say, seven years.

Implementing Federal Arrangements

The experience with the 1990 Constitution, despite its having a requirement for decentralization, shows that decentralization does not come about unless there is the political will. The history of the demise of the federal provisions in several independence constitutions in Africa and Asia reinforces this lesson. This chapter has demonstrated the political and administrative difficulties of instituting federalism of the disaggregation type, when a unitary state has to be transformed into a federation. It has also shown the complexity of the federal system and the many legal and technical details that have to be got right if federalism is to work. Decisions on these details must be informed by a great deal of knowledge—of geography, demography, taxation, sources of revenue, administrative capacity, transportation facilities, and other forms of infrastructure, historical affiliations, political attitudes, and so on. It is also obvious that a full-blown federation cannot come into existence overnight; of necessity, the process has to be gradual and phased, and a great deal of new legislation and administrative re-arrangements will have to be made to lay the foundations for creating a federal state.

The implication of the analysis outlined above is that a body must be given the responsibility to begin the research and accumulate the knowledge that must inform the deliberations of the Constituent Assembly when it begins its review of this topic (which

now it is required to do after the constitutional amendment of 9 March 2007). The Interim Constitution will require a High Level Commission to facilitate the decisions of the Constituent Assembly (although it does not specify its precise tasks).

It is also clear that sustained efforts must be made to implement the federal provisions of the new constitution. An independent, expert commission (perhaps drawing on the personnel, experience and documentation of the High Level Commission set up for the Constituent Assembly) should be established to work with the various departments of the government and of the new governments of the sub-national units, to enhance capacities for governance, prepare the necessary legislation, build new fiscal mechanisms, and assist in the gradual transfer of functions and resources to the sub-national units. The transfer of power must be gradual, as each unit demonstrates the willingness and the capacity to take on more functions (while taking care to ensure that this system of gradual transfer does not become an excuse for doing nothing).

Supplementing Federalism

One can say with some confidence that federalism alone will not by itself solve the problems of gender, class, inequitable social structure, and exclusion. To solve the problems of disadvantage, discrimination, and exploitation, at least two things are necessary. The first is the very careful design of the federation—it must be remembered that not all federations are alike; each has its own approach and orientation. If social justice, inclusion, and diversity are the objectives in Nepal, this must be reflected in the details of the division of powers, the allocation of resources, and the democratization of institutions at all levels. Secondly, other methods of promoting social justice must be pursued along with federalism, such as the creation of national policies of fair representation and proportionality, affirmative action, provisions to promote linguistic and cultural diversity, and plans to ensure regional development and equalization—the aim would be to restructure the entire state. The state should promote the economic development of depressed areas and encourage the opening up of opportunities in the economy and professions for the marginalized communities. More attention will need to be given to group or community and minority rights. The state should respect and promote the languages and cultures of the marginalized communities (see the 'Diversity, Rights, and Unity' and 'Women and the Constitution' chapters).

Conclusion

Most people in Nepal accept the need for decentralization because outside of a few centres, the centralized state has limited economic growth. The national government has a poor understanding of the situation and problems of the hinterland and is largely unable to make any positive contribution to their development. People have few opportunities to participate in the affairs of the state, which is a major obstacle to the development of democracy. There also seems to be few effective mechanisms for the

equalization of resources, benefits, and development across the country.

As federalism is seen to be the way out of these predicaments, it is important that the Constituent Assembly be able to make informed decisions to bring about change. More research focused on the legal and other technical issues identified in this paper needs to be conducted. There is also a need for a more focused debate on the merits and demerits of federations and the ways in which federalism can be designed to achieve the objectives of inclusiveness and social justice. And it would be desirable while this exercise is undertaken, to consider supplements to federalism and alternatives to ethnic federalism.

But it must also be borne in mind that federalism requires a minimum degree of trust—the more trust there is between the centre and the units and among the people, the more robust the federation will be. The way choices are made, how early accommodations are made to create a good momentum in negotiations and the ability to see problems from the different perspectives of the centre and each of the units are important factors in trust building.

Questions:

1. Are some kinds of purposes, for example, managing space and distance in countries with large territories, more easily achieved through federalism than through other systems?
2. Will federalism give rise to new problems? What might they be, and can they be managed?
3. Will federalism be able to achieve the following goals?
   (a) creating greater capacity for self-defence and national integrity;
   (b) promoting economic development by creating a larger unit for market and trade; and
   (c) enhancement of democracy through greater participation and responsiveness.
4. Are some forms of federation more manageable than others?
5. Are some forms of federation more conducive to national unity than others?
6. How can human rights best be protected in a federal system?
7. What powers should be centralized and what powers should be non-centralized, and to what degree or extent?
8. What mechanisms would best deal with these issues?
   (a) Financial equalization between the regions
   (b) Conflict resolution
   (c) Management of natural resources

CHAPTER 15

CHAPTER 15

The National Executive

The Importance of the Executive

The most important element in the operation of the state and the governance of the country is the executive. Among other powers and responsibilities, the executive decides on the key policies of the state, formulates laws for the approval of the legislature, determines the rates of taxation and other revenue-raising measures and the expenditure of public money, allocates state resources, handles foreign policy and relations, exercises powers of prosecution, and appoints people to key offices in the public service. While the legislature can exercise some control over the executive, and while the judiciary may be able to restrict the executive to its lawful powers, it is clear that only the executive has the powers to initiate major changes in the policies and to govern the country. Consequently, the nature and structure of the executive is important for at least two reasons: (a) the effective running of the country depends on it; and (b) it is necessary to regulate and make accountable the exercise of executive powers.

The Question of the Monarchy

Under an amendment to the Interim Constitution, Nepal is already committed to being a republic—that is, to having no monarchy. This decision was implemented by the first meeting of the Constituent Assembly. But this decision leaves many issues still to be decided about the structure of the executive. What the Constituent Assembly did at its first meeting was a temporary measure, leaving the final decision on this important matter to full deliberation at a later stage. The abolition of the monarchy opens up possibility for various options for the system of the executive. Nepal has experienced several executive systems (as shown in the preceding chapters). We turn to a brief discussion of some contemporary options.

Systems of the Executive

Most modern systems of government in the world can be classified into parliamentary, presidential, and mixed systems.

Sometimes reference is also made to power-sharing as another form of the executive. Power-sharing arrangements can be organized in any of the three systems mentioned. But since there are often special rules about the composition of and decision-making rules in power-sharing executives, which are different from these three varieties, it is better to treat power-sharing as a distinct type of executive.

The Parliamentary System

In a parliamentary system, the head of state is usually separate from the head of government. The head of state in a parliamentary system is either a monarch, as in Britain, or a president, as in India, the latter normally elected by the legislature or an electoral college of national and regional legislatures. The head of government is the prime minister. The prime minister and the cabinet have to be appointed from among the members of Parliament.

In most parliamentary systems, the president appoints the prime minister, but must choose as the prime minister that member of Parliament who has the support of the majority of parliamentarians, which usually means the leader of the majority party or the leader of a coalition of parties, which together have the support of the majority. Sometimes, the prime minister is appointed by or on the advice of the speaker of the legislature (as in Sweden), following the same principle of majority support; and occasionally, the prime minister is directly elected by the legislature (as in Papua New Guinea or the Solomon Islands). The prime minister appoints the members of the cabinet.

The president may also, in some circumstances, have the power to remove a government, but otherwise, his or her role is mainly ceremonial. The real power of government is vested in the cabinet, acting under the prime minister. The cabinet operates on the principle of collective responsibility, which means that decisions on policy must be made by the entire cabinet and defended by all ministers.

The government is at all times responsible to Parliament and must explain and defend its policy to its members. Parliament can at any time remove the government by passing a vote of no confidence. In many parliamentary systems, the prime minister can also ask for and secure the dissolution of Parliament, subject to certain restrictions; the conflict between the prime minister and Parliament is then resolved in the resulting general election.

There is a set of variants of the parliamentary system under which the head of government is the president, who is also the head of state. As well as being a member of Parliament, the president is elected president directly by the people. There are, maybe, three countries with such systems: Kiribati, in the Pacific, Kenya, and South Africa; and all are somewhat different. The Kenyan system is very weak in terms of checks and balances: the president is too powerful. In South Africa, the president leaves Parliament once elected as president. They are all parliamentary systems, in that the president can be removed by a vote of no confidence. Interestingly, Nepal's system under the Interim Constitution was rather similar: the prime minister was the head of state until mid-2008.

The Presidential System

In the presidential system, the executive power is vested in the president. There is total separation between the executive, that is, the president and the legislature. The president is elected directly by the people, as is the legislature. Neither the president nor any member of his or her cabinet can be a member of the legislature, and the life of the president and of the legislature are fixed. The president cannot be removed by the legislature through a vote of no confidence (but may be removed for serious misconduct by a formal process known as impeachment), and the president cannot dissolve the legislature. The president appoints his ministers and senior administrators, although their appointment requires the approval of the legislature. Normally, all executive functions are vested in the president, and the role of the cabinet is merely to advise the president. The president and the majority of the legislature do not necessarily have to be from the same political party, and the president has far less control over the legislature than is usually the case in a parliamentary system. But since all laws, including the adoption of the budget, have to be passed by the legislature, the president has to work with the legislature to ensure that his or her policies and plans can be carried out.

Parliamentary and Presidential Systems Compared

We can summarize the major differences between parliamentary and presidential systems, as follows:

- In the parliamentary system, there is no sharp separation between the composition of the executive and the legislature, as there is in the presidential system.
- There are more checks and balances in a presidential system, but there is continuing accountability of government to the legislature in the parliamentary system, as the prime minister and ministers sitting in Parliament have to constantly defend their policies and as they are subject to a vote of no confidence.
- Ministers have to be members of Parliament in most parliamentary systems

(but not in France), but in a presidential system, members of the legislature cannot become ministers unless they resign from Parliament; apart from this, the president also has a greater choice of ministers.

- There will usually be a fixed term for both the executive and the legislature in a presidential system, producing a kind of stability. But unless there is an acute fragmentation of parties, the parliamentary system works more smoothly because the government has a majority in the legislature.
- In the parliamentary system, the head of state is separate from the head of government; in the presidential system, the head of state is the president.
- The head of government is directly elected in the presidential system, but the head of government is appointed or elected by a small electoral college in the parliamentary system.
- The head of government in the parliamentary system shares responsibility with the rest of the cabinet, but the head of government is the sole authority in the presidential system.
- The principal form of control and accountability in the parliamentary system is political, although the courts could declare laws and policies that violate the constitution, which is the supreme law of the land, unconstitutional and void. In the presidential system, there may be more use of the law to deal with political issues.
- The parliamentary system is in some ways more suited for accommodating diverse interests and groups; for example, the position of head of state can be used to recognize minorities (perhaps by rotating the headship among groups that can never hope to control the government) and by the distribution of ministries among different groups. On the other hand, in the presidential system, where the president is not restricted in his choice of ministers, he can distribute portfolios among political and ethnic groups.

Mixed Systems

Some countries have tried to combine the strong and stable system of government that is often associated with the presidential system with the more democratic and accountable system of the parliamentary system. The best known example of this comes from France, which has been copied in its original form, as in Sri Lanka and many African Francophone states, or in a modified form, as in Portugal and Finland.

The French system was established in 1958 to stabilize its political system, which had been previously parliamentary, because France had experienced frequent changes of government. The powers of the executive are divided between the president, who is not

responsible or accountable to the legislature and cannot be removed by it, and the prime minister and his or her cabinet, who are responsible to the legislature. The president can dissolve the legislature, but only after consultation with the prime minister and the presiding officers of the National Assembly and the Senate, and that also only once a year. Parliament controls its own time table, but the president can convene extraordinary meetings. Most powers of government belong to the prime minister and the Council of Ministers, but the president has important (and somewhat vague) powers to defend the integrity of the republic and to safeguard the constitution. The president is elected directly by universal suffrage. The president appoints the prime minister, but effectively, the prime minister has to command majority support in the Lower House, the National Assembly. The normal rules of the parliamentary system apply in relation to the cabinet and the legislature, including the powers of the National Assembly to dismiss the government by a vote of no confidence. When the president and the prime minister come from the same party, the system works largely as a presidential system, and when they come from different parties, they may frequently quarrel and the system may not work well. Whether a mixed system operates more like a presidential or parliamentary system depends on the relative political strength of the president or prime minister, but the bias is towards the parliamentary system, for despite the intention to create a strong executive, the powers of the president are regarded as appropriate for times of acute national crisis, while the normal working of government depends on continued support from the legislature. Nevertheless, presidents may try to expand their powers and may succeed when their party has a majority in the legislature. Thus the mixed system does not preclude tensions between the president and the prime minister and can lead to politics of intrigue and disunity in government, as is amply illustrated by the experience of the mixed system in Sri Lanka.

Systems of Power Sharing

In both the presidential and parliamentary systems, all the powers of the executive go to the side that wins the elections ('winner takes all' systems). The losing party has, at best, the role of the official opposition, its task being to criticize government policies and activities. Both systems are adversarial, that is to say, the winning and losing parties are locked into a conflict. Sometimes these systems are criticized for creating or reinforcing political divisions and excluding one group completely from access to power. It is said that such systems may be acceptable in states that are homogeneous, for it is likely that election victories will periodically swing from one party to another, so that the loser has merely to await its turn. However, in a state where people are divided by ethnicity or religion, the minority communities may be perpetually in opposition and will, therefore, become dissatisfied and reject the system. In such situations, ways must be found to include all groups in the legislature and the executive so that no group is left out. Various electoral systems have been proposed to ensure fair representation of

minorities (see chapter 11). The typical way to ensure the inclusion of all groups in the executive is through power sharing in the cabinet.

Power sharing is often practised to manage future relations between the 'warring' parties when a civil conflict has ended (as is anticipated in the Interim Constitution in Nepal, at least until after the general elections following the adoption of the new constitution by the Constituent Assembly). The first government after the end of apartheid in South Africa, as established in its interim constitution, brought into the cabinet all parties that had at least 20 per cent of the membership in the legislature. The Constitution of Bosnia-Herzegovina, a country with different major ethnic communities, is based on power sharing in all state institutions, including the judiciary. The current scheme for the restoration of democracy and normality in Burundi is based on power sharing, as is the Good Friday agreement for peace in Northern Ireland. The 1997 Fiji Constitution provides for power sharing by all parties that have 10 per cent or more of the parliamentary seats.

For obvious reasons, power sharing is easier in a parliamentary system than in a presidential system, for in the latter power is vested in one person, ministers being advisory. There is much greater scope for negotiations and alliances among political parties in a parliamentary system. However, power-sharing governments are not easy to operate, and may lead to the loss of accountability of the executive, as all leading parties are part of the executive. Nepal's own experience under the Interim Constitution shows the difficulties of running a Parliament that operates on the principle of power sharing, a principle that is mandated by the constitution, rather than by a Parliament, where willing partners form a coalition. South Africa decided not to continue with power sharing when it adopted the final constitution, and serious difficulties have arisen in the operating of governments in Bosnia-Herzegovina, Northern Ireland and Fiji, all of which use the power-sharing format. It is, therefore, being suggested that while power sharing is useful, even necessary sometimes, to consolidate peace after the end of conflict, power sharing should be a transitional rather than a permanent feature of the constitution.

The examples of power sharing mentioned above are required by the constitution. This form of power sharing has to be distinguished from the situation when no party has a majority and has to team up with one or more parties to secure enough votes to form a government. This type of coalition government is quite common in parliamentary systems in which elections are held by proportional representation. However, India is an example of even a 'first past the post' electoral system necessitating national coalition governments due to the rise of regional parties (in 2007 the Indian government had some 30 parties).

The above examples should also be distinguished from a federal system, where power

sharing takes the form of distribution of powers, some to the national government and some to the regional government. In general, federal systems do not raise specific issues for the structure of the executive (and are compatible with both presidential and parliamentary systems), but they do raise issues about the national executive's powers and about the structure of the executives at the regional level (as discussed in the chapter on federalism). But in some ethnically based federations there is power sharing in the sense used in this section, at one or both levels of government.

Principles for the Executive in Nepal

It is possible, by examining the logic or dynamics of different executive systems, to assess their usefulness and effectiveness for specified objectives. Thus one could say that Nepal is engaged in a three-pronged transition: from a mixed monarchical-multi-party democratic system to full democracy based on the sovereignty of the people, from insurgency and conflict to peaceful and stable politics, and from a rather exclusive to an all inclusive system of representation and participation that recognizes the diversities of its people. Each of these transitions has implications for the system of the executive. Full democracy requires the accountability of the executive to elected bodies; peaceful and stable politics necessitates power sharing (at least for a period), and inclusion depends on both wide participation and a dispersal of power. For most of these objectives, a parliamentary system, with its collective nature, responsibility, and accountability of the cabinet, seems better fitted than a presidential system, with its concentration of power and authority in one person.

However, the seemingly neat and clear logic of institutions is affected by a number of political and cultural factors. Mention has been made, in this and other chapters, of the importance of political parties, the principal vehicles through which a system of government works. This is evident from Nepal's experience since the first stirrings of democracy in the 1950s, and particularly in the operation of the 1990 Constitution. The nature and role of parties, in turn, depend on the electoral system; the 'first past the post' system produces a very different result and consequences from a proportional representation system. The people's and the leaders' experience with and understanding of the system are also critical—this consideration might lead to the strategy of removing deficiencies of the existing system, rather than that of introducing a really new system. There are other factors too, among which we must include the willingness or capacity of the people to take advantage of the opportunities for influence and participation opened up by a new constitution.

The purpose of this chapter is to highlight these considerations, not to elaborate them or to advocate a particular approach. This chapter thus concludes by examining some of the potential pitfalls of adopting a parliamentary system in Nepal, as shown by Nepal's experience with the 1990 Constitution, and by making some suggestions as

to how they might be mitigated. Major problems in the 1990 Constitution included the exclusion of the marginalized communities, the frequent fragmentation of political parties, the instability of the executive, the failure of Parliament to exact accountability of the executive, particularly in matters of security and civil-military relations, and the failure of the executive to fully implement the constitution. The possible remedies for these deficiencies are addressed in other chapters.

How to Reduce Instability of the Executive

Here we refer to the instability of the executive, which means that short-lived governments are unable to take a long view of reforms and policies, are unable to take effective steps to implement the constitution and laws, and are bogged down in intrigue and the politics of survival. With the changing position and popularity of political parties and the greater mobilization of marginalized communities, there may be greater instability of the executive.

Instability arises, among others, from the following factors: quarrels among the leaders of a party leading to splits, the changing of party loyalty among parliamentarians, and the absence of restrictions placed on the number of times a vote of no confidence in the executive can be proposed.

The Constituent Assembly may wish to consider the following provisions to reduce instability:

- Constructive vote of no confidence: This method of removing a government, which was first introduced in the German Constitution in 1949, requires that a motion for the removal of the government should also nominate a person who would become prime minister if the motion were to be successful. One result of this rule is that the office of the executive is never left vacant; as soon as a government is removed, a new prime minister is appointed. Another is that it is hard to win support for the motion to remove the prime minister, for while many parties and their leaders may want to remove the prime minister, it is less easy for them to agree on a successor (most party leaders probably want the job!). A limited number of countries have adopted this rule, including Papua New Guinea, where the rule has introduced an element of stability in an otherwise volatile political situation. It has also been adopted in the Thai Constitution of 2007. The other side of the coin is that a government which ought to be removed because it no longer has the support of Parliament, or because it is ineffective, may survive for long periods (as indeed has been the case in Germany).
- Restrictions on motions of no confidence: Would it be a good idea to specify periods of 'no motions of no confidence,' in order to give a newly elected executive time to establish itself? If so, there could be a rule that no motion

can be moved in the first year of a new government. Restrictions can also be placed on the introduction of additional motions for a period of one year after an unsuccessful motion. And some countries have a rule that no motion can be moved in the last year of the life of a government. The Interim Constitution does say that no more than one motion may be moved within six months, but this, though probably desirable, is only a limited restriction.

- Special majorities for removal of government: Another way to introduce stability could be to require that the motion of no confidence can be passed only by a two-thirds vote of all parliamentarians, which would in practice be hard to obtain (this is, in fact, what the Interim Constitution of Nepal provides). But this may not necessarily be a good idea, as it would mean that a government which does not have enough support to secure the passing of its legislative bills or the budget can stay in office even though it cannot effectively perform the tasks of government.

- Restrictions on 'crossing the floor': The 1990 Constitution restricted crossing of the floor, as it enabled the party on whose ticket a member was elected to notify the speaker if he or she left the party, leading to the member losing his or her seat (Art. 49(1) (f)). The Interim Legislature (Art. 48 (c)) has a similar rule and the rule has been modified for members of the Constituent Assembly (expressly referring to involuntary as well as voluntary leaving of the party, Art. 67(d)). If this is seen as too drastic a limitation on parliamentarians' freedom of association, it could be modified to say that no member may cross the floor to accept a ministerial office.

- Restrictions on splitting of parties: Splitting of parties has been a characteristic of Nepali politics. The 1990 Constitution itself made no provision on this, but the House of Representative Members Election Act (2047; 1991) enabled the registration of a splinter group if 40 per cent of the members of the central committee petitioned for registration (Art. 19). And, under the Anti-defection Act of 1997 members could retain their parliamentary seats in such circumstances. Perhaps this rule could be reviewed.

- Dissolution of Parliament by a vote of no confidence: Members of Parliament may be inclined to vote for a motion of no confidence if their own status as members is not affected. However, if Parliament itself is dissolved through a vote of no confidence, they are unlikely to support the motion of no confidence. In some countries, a prime minister who has lost the vote of confidence can ask for the dissolution of Parliament, or in some countries, dissolution takes place automatically on the vote. The virtue of this rule is that in case of a conflict, the matter would be resolved by the people themselves in an election. However, the rule on dissolution is not necessarily always a good thing, for it would greatly

reduce the willingness of parliamentarians to exercise proper scrutiny of the executive and to impose appropriate sanctions, the most effective of which is the executive's removal.

The above discussion shows that while too frequent a use of the vote of no confidence is undesirable, the ability to remove the executive that has lost the support of Parliament is an essential aspect of parliamentary government, and this provision is often cited by supporters of the parliamentary system to show the system's superiority to the presidential system. But the lesson is that the provision must be used responsibly and legitimately.

Questions

1. What are the advantages and disadvantages of the parliamentary and presidential systems of government? Which system would be better for Nepal?
2. If the Constituent Assembly decides to maintain the parliamentary system, what improvements to the system under the 1990 Constitution would you propose?
3. What restrictions should there be on parliamentarians' crossing the floor (i.e. leaving their party to join another)?
4. Should a member of Parliament be removed from Parliament if the party that nominated the member expels her or him from party membership?
5. How can the participation of the people in the affairs of the state, and particularly the work of the executive, be promoted?
6. What are the different ways in which the executive can be held accountable? How can the accountability of the executive be increased?
7. Whether one looks at the membership of the legislature, the executive, the judiciary or the public service, one finds few women, *Janajatis*, *Madheshis* and, least of all, Dalits. The constitution did not prohibit the participation of these groups. Their exclusion was due to the practices of political parties that dominated the political process. What provisions would you recommend for promoting greater inclusion in the executive?

CHAPTER 16

CHAPTER 16

The National Legislature

Introduction

The name given to the national legislature varies from country to country. 'Parliament,' is used in the United Kingdom, India, Canada, Australia, and most countries that have parliamentary systems. The United States of America calls its entire legislative body 'Congress.' Some countries call either the entire legislative body or one of the Houses 'National Assembly.' The Indian Parliament comprises the House of the People and the Council of States; the US Congress comprises the House of Representatives and the Senate. In this paper, we will use 'legislature' to refer to the national legislature, and 'members' to refer to 'members of Parliament.'

Under the 1990 Constitution, the national legislature comprised the House of Representatives and the National Assembly, as well as the king (who was considered a part of Parliament because of his role in signing laws). The House was made up of 205 members from geographical constituencies, and the members were elected to the House in general elections that all Nepali citizens over the age of 18 had a right to vote in.

Some members of the National Assembly were chosen by the king, some were elected by the House, and some were elected by members of the local authorities. The National Assembly was intended to bring into Parliament a variety of opinions and experience, and to represent the interests of local areas and authorities.

The word 'legislature' implies that the function of this body is to make laws, but in a representative democracy, the legislature has functions other than those implied by its name. In a parliamentary system—like the Nepali Parliament under the 1990 Constitution—the relationship of the legislature with the government is rather different from that in a presidential system (see the chapter on systems of government), but in all

democratic systems, the legislature has essentially the same four main functions:

- to represent the people
- to make laws
- to authorize and supervise the raising and expenditure of public revenue
- to oversee and hold the executive accountable

Parliamentary and presidential systems may differ in the ways that powers are allocated and exercised, and mixed systems may include features of both these systems. Perhaps it will be easier to see these differences if we compare in broad terms the legislatures in typical parliamentary and presidential systems:

Power to	In a Parliamentary System	In a Presidential System
Pass laws	Laws are passed by the legislature—must usually also be signed by the head of state (monarch or president).	Laws are passed by the legislature—must usually also be signed by the head of state (president), who is also head of government.
Approve the budget	In theory, the legislature has the power to approve or reject the budget.	In theory, the legislature has the power to approve or reject the budget.
Appoint the head of government	The head of government (prime minister) must have support of the legislature (or of the Lower House).	The legislature has no role in appointing the head of government.
Dismiss the head of government	The legislature may remove the head of government by votes in the Lower House—such removal usually requires a simple majority.	The legislature may not remove the head of government through this process.
Question the prime minister and ministers	There is usually a formal procedure for this.	There may be a formal requirement that the president (and ministers) attend and respond to questions.
Debate national issues	Important function.	Important function.
Set up committees of inquiry into the conduct of the executive and other issues	Important function.	Important function.
Dismiss the head of state by vote of no confidence	If the head of state is the president, the legislature may have the power to remove the president, or play a part in the removal, by a form of trial (impeachment).	The legislature usually has the power to remove the head of state by a form of trial (impeachment).
Approve the appointment of ministers	The legislature may have no role—except that the prime minister would have to retain support of the legislature.	The legislature often has the power to approve or reject the president's nominees.
Approve treaties entered into by the state	Practice varies.	Practice varies.
Approve other appointees (like judges, ambassadors, etc.)	Rarely has any role.	Often has a role.
Dismiss judges	Traditionally, the legislature could remove the highest judges through impeachment.	Sometimes the legislature could remove the highest judges through impeachment.

Issues Under the 1990 Constitution

Representation

One central problem with the legislature under the 1990 Constitution of Nepal was that it wasn't inclusive enough: the make-up of the legislature did not mirror the social make-up of the country. When making the new Nepali constitution, it will be necessary to think creatively about how a more inclusive democracy, as mandated by *Jana Andolan* II, can be created. To read about possible solutions in detail, please refer to the chapters on political parties and electoral systems.

Making and Changing Laws

Most laws are drafted by government departments and introduced into the legislature by ministers. Under the 1990 Constitution, all laws had to be passed by both chambers, and there was a procedure for resolving disagreements between the two chambers. A law so passed would then go to the king for his signature of approval (he could refer it back to the legislature only once for reconsideration, if he had sufficient reason to do so).

However, there was a provision, modelled on the Constitution of India, under which, the king could pass a law, known as an ordinance, when Parliament was not sitting. The king could pass such ordinances without his first being requested to do so by the members of the government; such ordinances were effective for only a limited time, and the ordinances could continue to stay in effect only if they were then approved by Parliament. This procedure has been used in controversial circumstances by the executive in Nepal; and in India too, this procedure has been much abused, especially at the state level. Many people think that this practice undermines the power of the legislature to pass laws, and that if a new law is really urgently required, the legislature should be recalled, instead.

The legislature often gives executive departments the power to make rules and regulations for implementing the objectives of the parent law. There is concern about this method of making laws, which is conducted almost in secret, by people (in reality by civil servants) who have not been elected for the task of law making. Even if consultations are carried out, they are usually conducted only with experts involved in the subject matter of the detailed regulations, not with the public at large. Thus public participation is undermined, as is the role of the elected members. A constitution could have provisions that would place some limit on the law-making power of the executive and that would also set up a mechanism under which such 'delegated legislation' would have to be scrutinized by the elected legislature.

Problems with Public Finance

In principle, no public expenditure can be incurred, and no taxes imposed, without

legislative approval. Although in principle expenditure must be approved in advance, under the 1990 Constitution, once the budget had been presented, the government could present a Vote on Account Bill to get approval of expenditure for up to one-third of the estimated annual expenditure, without a thorough discussion being held on the matter (the provision is unclear). The 1990 Constitution included a provision for a 'Contingency Fund' for emergencies, under which the government could incur expenditure without approval, though then, the amount incurred had to be repaid as soon as possible. The constitution was not clear about how the approval for this expenditure was to be obtained. Finally, there was the possibility of a Vote of Credit Bill, for which parliamentary approval could be sought for certain expenses without the government's having to explain in detail to the House how the money would be spent. The circumstances under which such a bill could be tabled was specified in the constitution as 'local or national emergency due to either natural cause, a threat of external aggression or internal disturbances, or other reasons.' This is a very wide provision (especially 'or other causes'), more so than in other constitutions, which gives greater discretion to the executive than is common.

In some countries, the auditor general is appointed by the legislature and reports to the legislature, but under the 1990 Constitution of Nepal, the auditor general was appointed by the king on the recommendation of the Constitutional Council, and reported to the king, who laid the report before Parliament. Now, under the Interim Constitution, the president has the functions once exercised by the king.

Holding the Government Accountable

The government can be held accountable for its actions in various ways, including through the questioning of ministers in the House and in committees. In the Nepali Parliament, there were nine committees in the House of Representatives looking at different substantive areas of government activity. Committees can be a very effective aspect of the work of the legislature, partly because members in such committees are often knowledgeable about the subject matter that has been delegated to them. Although such committees do not work in secret, their work is performed away from the eyes of the public, enabling them to concentrate better on the matter at hand.

One House or Two? The Need for a Second Chamber

Out of the past five constitutions in Nepal, three (1948, 1958 and 1990) provided for legislatures with two Houses. The 1990 Constitution provided a second chamber, of which 10 per cent of the members were nominated, 25 per cent were elected by the representatives of local governments, and 65 per cent (including at least three women) were to be elected by the first chamber of the legislature.

It is sometimes argued that two chambers in the legislature are not necessary in a unitary

(non-federal) state, but many unitary countries do have two chambers. In the federal system of government, the universal practice is to have two separate chambers: an important function of the second chamber is to provide representation for the regions at the centre and to safeguard regional interests. The second chamber can be used to secure regional/territorial representation even if there is no devolution, and this was one of the functions of the National Assembly under the 1990 Constitution.

The second chambers in Germany and South Africa play a key role in making laws and policies at the centre, especially in relation to matters that affect the regions. In Germany, each regional government has a certain number of votes in the second chamber, determined by the region's population, and the regional governments may choose as many member as they have votes; in South Africa, each province has ten members: four who are members of the provincial legislature and six non-members of the provincial legislature nominated by the parties at the province level. The US Senate has an equal number of members from each state, while the House of Representatives has representatives from each state, determined by the population of the state. The Senate also has a higher minimum age-requirement for its senators than the House of Representatives has for its representatives.

In the United Kingdom, as in some other countries, there is a second chamber, which came about as a result of history—different classes of society had different Houses. Some constitutions in African countries and countries in the South Pacific use second chambers as a legislative or consultative forum for chiefs. A variation of this approach is the nominated second chamber, where persons who are not politicians—retired public servants or those citizens who are eminent in their professions or in social and religious groups, and who bring important perspectives to bear on legislative and policy decisions—are included in the chamber. This type of a chamber is in place in Canada, and in the British House of Lords too, nominated life peers (nobles) are replacing hereditary peers (but eventually all or some of the members will be elected, which may make the House of Lords more like the House of Commons).

In Burkina Faso, the Upper House is composed of representatives of social and economic groups, and in Malawi, the Upper House includes distinguished citizens and representatives of various districts and religious denominations. Such forms of representation may be criticized for being undemocratic, but in countries where there is much widespread disillusionment with the ethics, commitment, and competence of professional politicians, there may be justification for considering these supplementary forms of participation.

Tenures and Functions of Chambers

In some countries, while the first, popularly elected chamber has a limited life, the second chamber is never dissolved (though certain sections of its members may have

to retire at different times). Thus the second chamber can enjoy a continuity of tenure that the Lower House may lack.

The powers of these second chambers vary. In most countries, the elected chamber is given more powers, and the legislative power of the second chamber is limited to a power to delay motions in the House, the passage of bills, and so on. Furthermore, the different make-up of the second chamber can give rise to thorough debates on issues on which that chamber's members have special interest or expertise.

In some countries without second chambers, advisory councils may be established, either to advise the head of state (as in Portugal), or to provide a forum through which minorities can, or must, be consulted by the legislature on specified kinds of laws and policies (as in Finland and under the new constitutions of many East European states).

Second Chambers in Nepal

Nepal's experience with the second chamber has not been very satisfactory: the second chamber under the 1958 Constitution blocked several reform measures passed by the first chamber; and the second chamber under the 1990 Constitution was not effective in representing the interests of local governments because the members of the chamber were influenced by party politics. Despite the second chamber's shortcomings, it does not mean that Nepal should not have a second House.

As the new system in Nepal is expected to be federal, there will also be legislatures at the regional or provincial levels.

Life of the Legislature

In parliamentary systems, it is normal for the life of the legislature (or the lower/elected house, if there is more than one) to be fixed at five years (more rarely at four or even three years), but there are usually provisions in the law that make it possible for the House to be dissolved, and for a general election to be called before the mandated date. Often, the prime minister effectively has the power to determine the date of elections; giving this power to the prime minister means that he or she can choose a favourable moment that would increase his or her chances of winning the election. Of course, if such a call for an election seems too blatantly manipulative, the electorate may rebel and vote instead for the previous opposition. In some systems, the House itself decides on its dissolution; but if the prime minister has a majority and his or her party is well-disciplined, this amounts to the same thing as the prime minister's calling for the dissolution. It is possible to restrict the possibility for an early dissolution—restricting it to a situation where a deadlock in the House makes it impossible to form a government, or to pass a budget, for example. It would be perfectly possible for the constitution to provide a fixed life for the legislature, though this is rare. In a few constitutions, the date

for the first annual sitting of the legislature is fixed. All Parliaments in Nepal under the 1990 Constitution were dissolved prematurely, though the Supreme Court held that in some cases the power to dissolve Parliament had been misused. An early dissolution of the House can give rise to many problems, including the added cost of elections and the fact that the government's work will be interrupted.

Presidential systems normally have a fixed life for their legislatures. The dates for US congressional elections are absolutely fixed; if there is disagreement between the president and the Congress, they must try to work out their differences.

Role of the Opposition

In a parliamentary system, the party or parties in government control most of the legislature's time and largely determine the business to be undertaken. The word 'opposition' is used to describe the members who are not in the parties in government. In a presidential system, as in the United States of America, the opposition to the president might comprise the majority of the members, as is the case at present (mid-2008). The constitutional role of the opposition is to constantly question, probe, and call the government to account. Its function is almost as important as that of the government. Criticism from the opposition is partly intended to influence government policy, through force of argument or the pressure of public opinion, and is partly directed by the opposition towards the public, with a view to wooing the electorate during the next election.

In the United Kingdom, the leader of the opposition and some of his or her principal colleagues in both Houses form a group called 'the Shadow Cabinet.' Each member of this group 'shadows' the work of a minister or department, in order to be able to make informed criticism of the government's policies and administration and to outline alternative policies. The opposition is expected to behave as though it may be called to form the government at any time, and thus it should not make false promises or impede and obstruct the work of Parliament.

The 1990 Constitution of Nepal, for the first time, mentioned the leader of the opposition, but otherwise, as in most constitutions, said nothing about the role of the opposition. The leader of the opposition was one of the five members of the powerful Constitutional Council headed by the prime minister that selected the chief justice, the auditor general, and all members of the Election Commission, the Commission for the Investigation of Abuse of Authority, and the Public Service Commission.

The record of the performance of the leaders of the opposition in Nepal was not entirely satisfactory, but with experience, they were beginning to improve their performance. Under the Interim Constitution, however, there was originally no provision for a formal opposition, and no leader of the opposition; this is because the Interim Constitution

is intended to be a temporary set-up while the nation focuses on creating the new constitution. However, the Interim Constitution was amended to provide for the opposition. In drafting the new constitution, it will be important to consider whether the previous provisions, or even more detailed provisions, should be introduced. Some constitutions do say rather more about the role of the opposition and the role of its leader: these constitutions may require that the ruling party get involved with, or at least consult with, the leader of the opposition, on certain issues that need to be decided on a cross-party basis, like issues related to national security or election procedures or appointments of certain government officials, especially to posts that should be non-political.

Making the Legislature More Effective

As the revenue that passes through the government and the bureaucracy that serves the government grows, the trend worldwide is for the executive to dominate the legislature. The executive's dominating of the legislature can, however, create situations in which elected legislative bodies are less and less able to take their own legislative and policy initiatives, or in which the legislative bodies are unable to scrutinize and control the executive. In many countries, most politicians do not see themselves as professional politicians committed to their party manifesto or to the good of the constituency or country, but regard their stint in the legislature as a stepping stone to ministerial or other high office, especially in parliamentary systems. Consequently, they do not take enough interest in the work of the legislature.

In many parts of the world, a number of proposals have been made to strengthen the role and capacity of the legislature. They include the following:

- Training and further education for members, particularly instructions in reading and understanding accounts and other financial statements; providing proper grounding in the constitutional and parliamentary procedures;
- Adopting a rule that demands minimum educational qualifications of the members; this, of course, may mean that the legislature is less truly representative of the people, and it is true that many effective members in many countries have not had the highest of formal educational qualifications. But members must be able to at least understand the business of the legislature;
- Instituting a retirement age for members: public servants in many countries have a compulsory retirement age (unless there are concerns about 'age discrimination'). Should members be treated any differently? Some people might argue that if the voters want a person who is old, the public should be allowed to have him or her as their representative, but it may be difficult for the voters to know whether a candidate is really still up to the job or is being sustained by drugs or is skilled at

putting on a front of being active, in order to conceal their declining powers, as seems to be the case in several African and Asian countries. Also, the reality may be that the electorate vote for a party and not for individuals.

- Anti-defection provisions, under which members who defect from their party to another lose their seats in the assembly. There is some controversy over such provisions, discussed briefly in the chapter on the executive.

- A provision whereby members who are absent from the assembly or committees for more than the prescribed minimum number of days lose their seats in the assembly. There was such a rule in the 1990 Constitution—members could lose their seats if they were absent without permission (of the speaker) for 30 consecutive sittings of the chamber; if Parliament sat for only three or four days a week, and broke for periods of some weeks quite often, 30 sittings might be spread over several months. Under the Interim Constitution, members could lose their seats if they missed 10 consecutive meetings. But if they give notice of absence they don't lose their seats. Some constitutions are more demanding than this: according to the Kenyan Constitution, members who are absent for eight consecutive assembly sittings can lose their seats, and the proposed drafts of the new Kenyan Constitution have included stricter provisions still.

- Increasing the quorum. Many legislatures can sit, and even vote, even if quite a small number of members are present at the time of voting. Under the 1990 Constitution in Nepal, the quorum for the House of Representatives was 25 per cent of the members of the House. This is perhaps a little low, although it is unrealistic to require more than half of the members to be present. Very low quorums were fixed in various systems, under the assumption that members were only part-time employees. If the legislature is to become more effective, the members should perhaps take their jobs as seriously as (if not more than) people would in any other profession.

- Restricting the size of the cabinet: in some countries, nearly half of the members are appointed to the cabinet or to other executive positions to eliminate or minimize the dangers of a vote of no confidence. Indeed in Nepal, with a chamber of 205 members under the 1990 Constitution, ministers, ministers of state and assistant ministers could constitute quite a large proportion of the House. The constitutions of some countries do specify the size for the Council of Ministers; in Vanuatu, the cabinet must not exceed 25 per cent of the Parliament, while Samoa fixes the number of ministers at no fewer than eight and no more than 12. These are tiny countries with small legislatures, and a larger country would have a lower percentage limit, or an appropriate number.

- Strengthening the research capacity of the legislature and individual members, by appointing researchers, including legislative drafters, for the legislature and facilitating the appointment of researchers for political parties.

- Providing a reasonable salary and pension for members. However, many countries also provide that the members themselves may not fix their pay; an example is the Constitution of Fiji, under which the salaries of members and other public officers are fixed by an independent commission. Over-generous salaries fixed by the members themselves may lead to public disillusionment and anger with politicians.

- Creating an independent administrative service and support bodies, such as a secretariat, was provided for in the 1990 Constitution of Nepal. However, this requires that the government must provide the necessary staff. In some countries, Parliament has its own separate staff, so that the government cannot starve the legislature of resources.

- Specifying a minimum number of sitting days. The 1990 Constitution said that not more than six months would have to elapse between the end of one (annual) session and the beginning of the next. This provision said nothing about how many days the legislature would have to sit for. The Constitution of Papua New Guinea says the legislature must 'meet not less frequently than three times in each period of 12 months, and, in principle, for not less than nine weeks in each such period,' which should ensure that the legislature sits for over half the weeks of the year, and without having excessively long periods of recess (though the phrase 'in principle' weakens the provision). Such a requirement is relevant not just to ensure that the members work reasonably hard, but to make it unnecessary to provide for the executive to pass major laws when the legislature is not sitting, and also to reduce the risk of the government's adjourning the legislature to prevent a vote of no confidence (something which does actually happen in Papua New Guinea). The second risk can be reduced by permitting a certain number of legislators to require the calling of the House even when it is in recess.

- Strengthening the committee system, with one committee for each major sector of the executive, with research and other administrative staff; giving the committee the power to summon ministers, civil servants, stakeholders, and experts to supply information; encouraging the committee to use outside experts, if need be—for example, by recruiting advisers for major inquiries, etc.; making committees alternative sites of expertise where policies can be debated and formulated and whose proceedings can be open to the public; encouraging public hearings in the capital city and other parts of the country.

- Strengthening the capacity of the auditor general so that his or her office can assist parliamentarians in scrutinizing government expenditures and budget proposals.
- Creating better library and internet facilities for members of the legislature.

Should the legislature also have the power to reject or approve appointments to certain positions? Under the US Constitution, Supreme Court judges, ambassadors, members of the cabinet, and certain officers must be appointed with the approval of the Senate. One reason for this is to involve the states of the federation; another is to provide a check on the exercise of patronage by the president. In a parliamentary system, where the political balance in the House necessarily favours the prime minister, but where the prime minister could be removed by a simple majority, a process such as the one in use in the United States of America is not as necessary, and is less effective as a check on the executive. And if appointments are made by an independent body—as is becoming increasingly common in the appointment of judges (see chapter on the judiciary)—it may not be wise to politicize the matter by involving the legislature. It might be wise to re-think the provision introduced into the Interim Constitution that requires legislative approval for the appointment of ambassadors, members of independent commissions, and certain judges.

The Public and the Legislature

Public participation in government should go beyond the people's periodically voting for their representatives. Legislative sittings are normally open to the public, but this does not mean that the public feel encouraged to attend these sittings. Effective public participation is not achieved simply by making such opportunities available, but by instituting processes that encourage, aid, and promote the fullest possible participation by the public. This is especially so if those who exist on the margins and periphery of society are to be brought into the mainstream political process, through a system of governance that is inclusive, responsive, and transparent. What is needed is a comprehensive education, information, and outreach strategy that is aimed at providing the public with the knowledge and the means to access what may otherwise appear to them to be remote and incomprehensible institutions.

Some legislatures actively encourage the public to participate in the law-making process and to attend the sittings of the legislature, committee meetings, and public hearings, and have a programme of public information about the legislature's work—civic education campaigns, public hearings, community events, open weeks, and publications, advertising, and media coverage are examples. A constitution would normally not specify such outreach programmes in great detail, but it could require the legislature to be more open to the public in general terms, or even require that a legislature have a committee with the special responsibility of promoting public participation.

Political parties may facilitate public participation too. The wider party structure may provide a valuable network, linking individual constituents and communities with their elected representatives. Party structures can be used to ensure that local views and grievances filter up through the system, and the structures can be designed to provide channels for the distribution of information on the ground. Unfortunately, all too many parties are happy for the people to vote for them at election time, but do not provide much of a link between people and the legislature the rest of the time. More democratic and accountable party structures could remedy this situation.

For centuries, citizens have petitioned legislatures in the hope that they would pass laws on, or investigate, matters the citizens were concerned about. This old idea has been given a new lease of life in some countries. In Scotland, for example, a largely autonomous part of the UK, there are rules to ensure that petitions from the public are given adequate consideration.

In some countries (and in the state of California), it is possible for a certain number of voters to propose a change in the law and require a vote of the electors on the topic of their choice (perhaps during the same time that a regular election takes place). If the proposed idea is accepted by a prescribed majority of the voters, the legislature is bound to pass the law. In other countries, it is possible for a change in the law proposed by government to go to the people for a vote. But such provisions, while they sound very democratic, can be controversial; for example, conducting such voting is expensive. There is also the risk that the people will be swayed by some particular event into passing an unwise law. The public could probably have neither the interest nor the resources to give full consideration to proposed changes in the law. There is also a risk that laws that are unfair to minorities will be passed (though human rights provisions should make this less likely).

Questions

1. Should the legislature retain the power to pass a vote of no confidence in the government?
2. Should the legislature be given a role in the appointment of judges, senior public servants, ambassadors, etc?
3. Should the constitution restrict the powers of the government to dissolve or prorogue (adjourn) the legislature? If so, should there be any circumstances in which it can be dissolved prematurely, or should its term be fixed? How long should that term be?
4. Should there be an upper age-limit or a maximum tenure for the members of the legislature to be fixed in the constitution? Should there be a minimum age for members?

5. What constitutional provisions would be needed to enhance the honesty and integrity of the members of the legislature? Would these include the possibility of the electors of a constituency (if geographical constituencies are retained) being able to recall their member? Or automatic loss of seat for a member who misses a certain number of sitting days?
6. Should members be able to fix their own salaries?
7. Should Nepal have two houses of the legislature even if the country does not have a federal system? If so, what would you see as the role of the second house?
8. What measures would you like to see in the constitution to enhance the effectiveness of the legislature? A larger quorum? A requirement to sit for a minimum number of days in a year? Provisions on the role of committees?
9. Do you believe that members of the public should be more actively involved in law making and other activities of the legislature? If so, do you have suggestions about how this can be achieved?

CHAPTER 17

CHAPTER 17

The Judiciary

The Role of the Judiciary

The judiciary is the bedrock of any democratic constitution. The principal role of the courts is to decide disputes by application of the constitution or the law. These disputes can be between individuals, companies, and associations, between these and the state, and occasionally disputes between different state bodies. In applying the constitution or the law, the courts have to interpret them, for frequently the parties to a dispute will advance interpretations. By interpreting the constitution or the law, the courts also develop the constitution or the law. Another task of a court, in deciding a dispute, is to make findings of facts from the evidence presented to it by the parties. Courts are not the only bodies that settle disputes (all kinds of bodies settle disputes in a society—elders, professional organizations, communities, mediators and arbitrators, head of clans, etc.) What is distinctive about a court is that it has to follow prescribed features that give the parties to a dispute opportunities to present their case, including the evidence, require observance of various formalities, give parties the right to be represented by advocates, and to decide the case by applying the law. An even more important distinction is that the decisions of the courts are binding on all parties, and the state is obliged to assist in the enforcement of the decisions.

Our interest here is in the role of the courts in relation to the constitution. A constitution is the supreme law of the land. One of the principal functions of the courts is to uphold the supremacy of the law by declaring void laws or administrative acts which are inconsistent with it. In most states today, a fundamental role of the courts is to protect the constitutional rights of citizens and other persons.

The legislature and the executive will be influenced by electoral politics, and there may be attempts to apply and interpret the constitution according to party interests. It has

been repeatedly said that it is crucial to have an independent and competent judiciary to protect rule of law and supremacy of the constitution. The judiciary, particularly of the Supreme Court, is the final arbiter of any constitutional and legal dispute between state and citizens and among the institutions of the state.

The Concept of an Independent Judiciary

Two UN General Assembly Resolutions (40/32 of 29 November 1985 and 40/146 of 13 December 1985) laid down some 'Basic Principles of the Independence of the Judiciary' that provide some international standards and guidance for Member States. The principles emphasize the following:

1. The independence of the judiciary should be guaranteed by the state and enshrined in the constitution or the laws of the country and should be respected by all. (Protection in the law is much weaker than in the constitution, since laws can be changed relatively easily).

2. The judiciary must decide cases impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats, or interferences (improper interference would include interference from the state, or from political parties, businesses, etc).

3. The judiciary must have the power to decide all issues of 'a judicial nature,' and the courts themselves must alone decide whether an issue is within their legal competence.

4. There must not be any inappropriate or unwarranted interference with the judicial process, and judicial decisions should not be subject to revision by any other body.

5. Everyone must have the right to be tried by the ordinary courts or tribunals using established legal procedures.

6. A Member State must provide adequate resources to enable the judiciary to properly perform its functions.

7. Individuals appointed as judges must have integrity and ability, with appropriate training or qualifications in law. There should be no improper motive (which would include political motives) in their appointment, and no discrimination on the grounds of race, sex, etc.

8. The terms of office, salaries, etc. of the judges should be protected by law, and judges must have security of tenure unless they are unfit to discharge their duties because of their incapacity or behaviour.

The judiciary has always been fairly independent in Nepal. Even during the one-party

Panchayat system, which was directly headed by different kings from 1962 to 1990, the Supreme Court claimed fairly independent status within the constitutional constraints under that system. The 1990 Constitution, which was promulgated after the demise of the *Panchayat* system had fuller provisions about the independence of the judiciary than did the earlier constitutions, and measured against the standards set by the UN Basic Principles, those provisions of the 1990 Constitution were reasonably good. The provisions in the Interim Constitution on the independence of the judiciary are, however, rather weak.

Provisions Regarding the Judiciary in the 1990 and Interim Constitutions

Provisions for the Appointment and Removal of Judges in the 1990 Constitution

In the 1990 Constitution, the provisions for the appointment of the judges and the procedures for their removal were stringent: Article 87(1) of the 1990 Constitution said, 'His Majesty shall appoint the Chief Justice of Nepal on the recommendation of the Constitutional Council, and other judges of the Supreme Court on the recommendation of the Judicial Council.' Under Article 117, the Constitutional Council consisted of the prime minister as chair, the minister of justice, a judge of the Supreme Court, the speaker of the House of Representatives, the chairman of the National Assembly, and the leader of the opposition in the House of Representatives. The Constitutional Council was designed not to exclude politicians, but to enable political compromise. According to the 1990 Constitution, the Judicial Council was to consist of the chief justice, the minister of justice, the two senior-most judges of the Supreme Court, and one distinguished jurist to be nominated by the king on the recommendation of the Council of Ministers. In this council, the two persons with government support (the minister and the jurist) would be outweighed by the three judges, who would supposedly have been uninfluenced by party loyalties. For the removal of the judges of the Supreme Court, Article 87(7) provided that judges of the Supreme Court could only be removed for incompetence, misbehaviour, or failure to discharge the duties of his/her office in good faith, by a resolution of the House of Representatives, or by a two-thirds majority vote of all its members that required the king's approval. This power was never used.

A judge of the Appellate and District courts could be removed by a recommendation of the Judicial Council on the approval of the king; the grounds were the same as for removing Supreme Court judges (Art. 91).

Provisions for the Appointment and Removal of Judges in the Interim Constitution

Under the Interim Constitution, the chief justice is still appointed on the recommendation

of the Constitutional Council, but that body is effectively dominated by the executive. And the Judicial Council is significantly less independent of the executive than it was under the 1990 Constitution. On the face of it, the provisions for the removal of judges in the Interim Constitution are similar to the provisions in the 1990 Constitution, but if the legislature is dominated by political consensus, there is a risk that Supreme Court judges could be removed by political consensus too. Lower court judges are still removed by the Judicial Council, which may be executive-dominated. And there is, worryingly, a new ground for removal of lower court judges: on the grounds of 'deviation of justice'; this language may open the way for the executive to remove judges who make decisions that the executive does not like. The Interim Constitution also includes a vague qualification about a candidate's moral character, which it says needs to be considered during a candidate's appointment, but such vaguely worded criteria can prove problematic—who is qualified to determine a candidate's character, and what characteristics would disqualify a candidate on the grounds of poor moral character?

Remuneration

Article 87(11) of the 1990 Constitution guaranteed that 'the remuneration, privileges, and other conditions of service of the chief justice and other judges of the Supreme Court shall not be altered to their disadvantage'; a similar provision was made for judges of the Appellate and District Courts. These provisions are retained in the Interim Constitution.

Lack of Immunity

One of the basic principles of the UN General Assembly Regulations is absent from both the 1990 Constitution and the Interim Constitution—the provision that judges should have immunity from civil or criminal action for what they do or say as judges. Without this guarantee of immunity, judges face the risk of being sued or even criminally prosecuted for the remarks they make or for the actions they take in the course of their work. The fear of reprisals in such situations may also prevent judges from speaking and acting freely against the powerful.

The Annual Report

An inroad into judicial independence seems to have been made by the Interim Constitution requirement for an annual report by the judiciary to be made to the prime minister, which would include not only statistics and information about important precedents, but also critical comments made by higher court judges about judges in the lower courts. Though the judiciary, like any other government agency, ought to report annually, there are some implications, or at least overtones, about this measure that is of concern: reporting to the prime minister, who is the head of government, seems to

suggest some accountability to government. However, since the Interim Constitution was amended in 2008, the judiciary's report is to go to to the president.

Use of Judges for Non-judicial Work

The use of judges for non-judicial work in some countries, and in Nepal too, has given rise to concerns about how judges may be used to chair highly controversial inquiries. In the 1990 Constitution, there was a provision (retained in the Interim Constitution) that judges could do only judicial work, but this provision was intended only to complete the separation of the lower judiciary from the civil service, not to ensure that judges would not be involved in politically sensitive inquiries. Judges are permitted to be involved in teaching and research. And the Interim Constitution retains the more worrying provision, also from the 1990 Constitution, that lower court judges may be used for election work; apparently such assignments have become common. Such work arguably brings judges rather too close to politically sensitive activity.

The Use of Temporary Judges

A provision common to both the 1990 Constitution and the Interim Constitution that allows for the hiring of temporary judges is open to criticism. Such practice is not uncommon in many countries, but these judges may be tempted to decide cases in the government's favour in the hope that they will be re-appointed as judges after their tenure is over. The chances of such instances occurring increase, of course, if the appointing body is government dominated.

Retirement

According to the Interim Constitution, Supreme Court judges cannot be appointed to any government post after retirement (except to the Human Rights Commission), nor can they practice in any court; this is a new provision in the Interim Constitution. On the whole, the provision is desirable because of the risk of junior judges being overawed if addressed in the courts by their recently retired eminent seniors.

But the provision, which calls for judges to retire at the age of 65, can be viewed as being quite restrictive too. It is not necessarily desirable that recently retired judges work for the private sector either. For these reasons, some countries have a higher retirement-age for judges.

New Powers for the Chief Justice

In the Interim Constitution, there are two new provisions giving powers to the chief justice that are potentially worrying—especially in view of the possibility that the chief justice may be less than independent (see above): first, the chief justice is now

allowed to transfer a case from one court to another at the same level if he believes that 'dispensation of justice' may be adversely affected unless the case is transferred; and second, the chief justice may issue instructions to the Supreme Court and other courts to make the administration of justice effective. These provisions may seem like harmless measures to promote efficiency, but they do indicate a highly centralized judiciary; and such provisions could perhaps be used to influence the outcome of decisions taken by the courts. Like the 1990 Constitution, the Interim Constitution gives the Supreme Court the responsibility of supervising the lower courts, but this particular provision seems to give a high degree of individual power to the chief justice.

Some Issues about the Judiciary

Response to Crisis

To be sure, the Supreme Court decided a number of cases against the government during Nepal's trying times and protected some of the rights of citizens, including those of children, but there were many occasions when the judiciary could have done more to strengthen the rule of law. The tumultuous period that Nepal recently witnessed saw the judiciary sometimes failing to do its job and in fact sometimes working in ways that were detrimental to the culture of democracy.

For more than three years when Nepali democracy deteriorated, the judiciary remained a silent spectator to the whims and fancies of the king, including when the king promulgated dozens of ordinances. The judiciary's failure to deal with the issues—by failing even to schedule hearings of the difficult cases about the situation, damaged its reputation as an independent organ.

Corruption

In recent years, the judiciary has come under considerable criticism for the corruption within the court system. Corruption always leads to the denial of justice, and when corruption leads to judges' deciding cases as senior ministers want them to, it breaks down the separation of powers and negates the fundamental role of the judiciary, which is to protect citizens against the excesses of the executive.

Predominance of Brahmins and Chhetris

The judiciary, particularly of the senior courts, is dominated by Brahmins and Chhetris. Dalits and members of other marginalized communities wonder if such a judiciary can truly dispense justice in a multi-caste and multi-ethnic society, They question whether such judges can understand the difficulties that their communities face in accessing justice, and suspect that the judges will be biased against their communities, which already suffer from prejudice and stereotyping by the elite communities.

Maoist 'Courts'

The justice system, just like other organs of the state, was adversely affected by the 11 years of armed conflict. In some parts of the country, people stopped taking their cases to court and almost all disputes were settled by the Maoists under their so-called 'people's courts,' which did not follow the fundamental principles of justice, rule of law, and principles of natural justice. The Maoists used torture and intimidation, and even killed people, if required, to extract confessions, and they meted out barbarous punishment.

Although the Maoist courts were unconstitutional and sometimes used dubious methods, many people in rural areas, mostly the poor and downtrodden, seemed happy with these courts because they delivered quick decisions at minimum or no cost. This suggests that our system for delivering justice needs to be thoroughly examined in order to make it more competent, affordable, accessible, proactive and able to provide speedy justice even to the people living in remote and rural areas. Non-judicial bodies and tribunals could be set up to complement the existing court system, provided that the rules for arbitration in these bodies are clear and based on the free agreement of the parties concerned. This is the basis for arbitration in state-sanctioned courts too. Non-judicial bodies and tribunals can help in deciding private disputes, especially commercial disputes, thus relieving the official courts of some of their work. Furthermore, in many countries people are allowed to invoke their traditional, or sometimes, religious law, provided that these laws do not conflict with the constitution. The application of such laws is often possible only in areas of personal relations, like marriage and issues about children and family property.

Reorganization of the Judiciary

What to Do with Corrupt Judges

One important issue is what to do with sitting judges who are corrupt or incompetent. To dismiss them, except when their dismissal is in accordance with the constitution, is to weaken judicial independence. South Africa, when faced with a judiciary tainted by support for the previous racist regime, decided against an outright dismissal of these judges and instead created a higher court, the Constitutional Court, with judges of unimpeachable credentials, to set the tone for a new era. In the absence of a constitutional court in Nepal, one solution would be to replace Supreme and Appellate Courts judges as they retire with lawyers of outstanding record and integrity, who would set the standards for the entire judiciary. Another solution would be to devise a scheme that would encourage judges who are not up to their responsibilities into early retirement.

Oversight of the Judiciary

The question of how to judge the judges themselves is a crucial and difficult question

that a constitutional democracy must address. To maintain constitutional order and to protect the rights of citizens, the judiciary must be kept independent from any kind of interference. The problem is that judges who are corrupt or who are not working to the best of their abilities cannot be replaced easily, for example, by voting them out of office, since judges are not directly elected by the people (although this is done in some US states, it is very rare).

In cases of very serious misbehaviour by Supreme Court judges, there is a constitutionally sanctioned procedure that can be used by the legislature to remove the judges. This is desirable and should be continued. But, though this procedure has never been used, it may be unwise to leave removal to a political body alone. In some countries such removal cannot take place without a recommendation from a tribunal comprising senior judges with perhaps a senior non-lawyer. And there may be an argument for instituting some complaints procedure against judges, and also for some process under which senior judges can be given some formal advice or warning, rather than having, as at present, only the possibility of removal.

To maintain the independence of the judiciary in the courts below the Supreme Court, any disciplinary or other such action taken against judges working in these courts, such as the suspension or removal of judges, should be undertaken by the Judicial Council. However, the Judicial Council should be properly equipped with law and institutional capacity so that impartial and speedy investigation and action can be taken against dishonest judges. In Nepal, there is a custom of limiting the punishment to forcing them to resign or to merely removing them from office, even in cases of proved corruption; no further legal action, similar to that taken against any other civil servant, is taken against such judges.

Constitutional Court

In recent decades, many countries have set up constitutional courts (Germany, Poland, Hungary, Russia, Spain, Portugal, South Korea and Italy) with the authority to interpret and enforce the constitution. Apart from South Africa, these are civil law countries where the courts did not traditionally have the authority to interpret the constitution or review legislation for compatibility with the constitution. Nepal could set up a constitutional court too, but given that Nepal has a common law system, where the Supreme Court has constitutional jurisdiction, do we need a constitutional court? The advantage of a constitutional court is that it has specialist judges, experts in constitutional law, possibly including law professors, while the Supreme Court is a 'generalist' court, most of whose judges may lack in-depth knowledge of constitutional law. If there is a need to strengthen the capacity of the courts to deal with constitutional cases, it might be best to take a different approach. A separate constitutional bench could be established in the

Supreme Court, consisting of a minimum of seven judges, some of whom might be drawn from a pool of outstanding legal scholars.

Speedier Justice

At present, the Supreme Court is burdened with too many cases. The Supreme Court is the final court of appeal, but it also is the first court for certain types of cases. It would be possible to make the Supreme Court a true appeal court, with very limited power to hear cases in the capacity of a court of first resort. Possibly, the Supreme Court should have jurisdiction in cases of disputes between federal units when the country becomes a federation. The constitution could also make the Appellate Courts more powerful than they are now, in terms of jurisdiction, competence, resources, and strength, as they can provide more speedy justice to the people at the regional level than the Supreme Court can. The Appellate Courts could become the principal court for the enforcement of the fundamental rights and for the other types of cases that at present can go to the Supreme Court at first instance. The Supreme Court could then have appellate jurisdiction in all the cases decided by the Appellate Court. The name of the Appellate Court might have to be changed.

Appointment Process and the Role of the Judicial Service Commission and the Judicial Council

Under the Interim Constitution, as we have seen, the appointment of the chief justice of the Supreme Court is mainly made by politicians. The provision under the 1990 Constitution, on the other hand, was much less susceptible to political influence. It would be possible to provide for this appointment to be by an independent non-political body, giving priority to a candidate's ability and integrity over experience or seniority. (This principle is in line with Article 13 of the UN Basic Principles.) The new situation in Nepal is similar to the situation in India, where the government appoints the chief justice, and where, in order to avoid controversy, a practice has emerged of appointing the most senior member of the Supreme Court as the chief justice. This practice now also seems to be emerging in Nepal and could become a controversial issue here. The nomination-by-seniority method would perhaps avert controversial appointments, but the practice could also lead to the nomination of a series of short-term chief justices who are unable to put their stamp on the court.

The principal functions of the Judicial Service Commission are to recommend to the government on appointments, transfers or promotions of gazetted officers of the judicial service, or on disciplinary action to be taken against them. The government must act on the recommendation of the Judicial Service Commission. The provisions of the 1990 Constitution, under Article 94, with regard to the Judicial Service Commission are fairly adequate and need not be changed, except for making provisions to create an

inclusive judicial service with adequate representation of women and under-privileged classes of society.

Article 93 of the 1990 Constitution authorized the Judicial Council to make recommendations and give advice on appointments, transfers, disciplinary action, and dismissal of the judges and other matters relating to judicial administration. The Judicial Council has been criticized for making the judiciary largely a closed-club of bureaucrats, as almost all judges in the courts are appointed and promoted from the judicial service, rather than looking more widely. The Judicial Council has also hesitated to take disciplinary action against their fellow judges for incompetence or corruption, even against judges whose faults were widely reported in the press. This has tarnished the image of the judiciary in the eyes of the public.

It has been suggested that the problem lies with the composition of the Judicial Council, where judges have a dominant role. The composition of the Judicial Council could be changed to give other stakeholders predominant positions so that the appointment and monitoring of the judiciary could become more effective. The composition of the Judicial Council could be changed to include the following: the chief justice, the minister of justice, two judges of the Supreme Court (to be nominated by the full-court itself), two distinguished lawyers or legal academicians or jurists, and three members of the legislature to be nominated by the legislature itself, including one member from the opposition bench (this is based on the South African Constitution Article 178(1)(h)). There is, however, room for argument about who should select the lawyers or academic members: the Nepal Bar Association is very political, and the appointments made by the association could also be influenced by politics. One solution would be to nominate members without any political affiliation, but even if such a system were adopted, the question would remain as to whether members nominated under this category would have the appropriate qualifications in law or the relevant experience. There are valid arguments for examining the suggestions of proponents on both sides of the debate.

The Pool of Appointees

A career in the judiciary is not considered a very attractive career choice by many Nepalis. The judges and officials working in the judicial services are underpaid in relation to the services they are supposed to deliver; the nature of the work involved calls for judges to maintain a certain level of aloofness from society; and they cannot practise law after retirement. Furthermore, experienced and able practising lawyers or legal academicians hesitate to join the courts unless the terms of work offered for joining the courts are more attractive than those offered for practicing at the bar or in academia. Jobs outside the courts are more attractive, not only in terms of remuneration, but also because they give practitioners more access to research, and opportunities for publishing studies and

participating in national and international seminars. A judge needs not only independence and job security but also adequate remuneration, reasonable working conditions, access to research facilities, appropriate working conditions, adequate budgetary resources, pension, and a long service-tenure if he is to dispense justice fairly.

Prosecutions

Rules about the judicial and legal system have to be seen as part of an overall, inter-connected system. The structure and powers of prosecution have a great deal to do with whether the power of prosecution will be used for political purposes, for victimization or to create a culture of impunity. The independence of prosecution is as critical to justice as the independence of the judiciary is—as is being increasingly recognized. The role of the attorney general is no less important; unfortunately in most countries, the attorney general has to perform a dual role that could prevent him from being impartial—on the one hand, he is a legal adviser to the government, often sitting in the cabinet and controlling prosecutions; on the other, he is the custodian of legality. Being both a politician, with all the demands such a role entails, and a lawyer, with professional responsibilities and certain standards of conduct, does not allow the attorney general to do justice to his work—as has now been officially recognized in the United Kingdom, the country that gave birth to this curious hybrid. The status and role of the ministry of justice also plays an important part in fostering the overarching notion called the rule of law, as do the roles played by the police and other security forces, the politicians and the people. But as has already been mentioned before, the burden of maintaining the rule of law falls critically on the judiciary.

Conclusion

It is thus within this broad picture, and the larger context of reform, of restructuring, inclusiveness, and social justice that the Interim Constitution promises, that the judicial and legal system should be designed. We should be forward looking, not afraid to be innovative, but at the same time, we must examine the systems of the past and their record. The judicial and legal system cannot be understood without taking into account the waves of changes that will lead to the creation of a new Nepal. The legal and judicial systems too should reflect the values of democracy, inclusion, participation, social justice, and transparency. We should also reflect on what the role of the ordinary people in the administration of justice should be: will the people be subjects and spectators, or participants? How can the personnel of the law reflect the diversity of the people of Nepal? How far should the legal system respond to the cultural and religious diversity of Nepalis? How can we promote the access of rural and other communities to justice and its institutions? Can we move away from the adversarial processes of the legal system to a culture of mediation? What is the role of community institutions and procedures in the settlement of disputes? How can the constitution ensure the true equality of all before the law? And how should our universities and other tertiary institutions orient

their research and teaching to respond to the many challenges that the new constitution will pose for the government and the people?

Questions

1. Should the new constitution provide for an appointment mechanism for the chief justice that is entirely free of government or political elements?
2. Should the new constitution have non-lawyers on bodies that are responsible for the appointment and discipline of the judiciary?
3. Should it still be possible to make temporary judicial appointments?
4. Should the constitution give judges immunity from legal action for what they do as judges? If so, should such immunity be granted even if the judges are proved to have been acting on the basis of wrong motives?
5. Should the judiciary have financial resources that it controls and for which it does not have to depend on the government?
6. Should the judiciary have to report annually, and if so, what information should it report and to whom should they report?
7. Should the retirement age of judges be raised, and if so, to what age?
8. Should a retired judge be allowed to be appointed to independent commissions other than the Human Rights Commission?
9. Should the power to decide important human rights and other cases at first instance go to the Appellate Court rather than to the Supreme Court, or even to the District Court?
10. Should judges continue to be involved in election work?
11. When a federal system is set up, should each state/unit have its own, complete legal system, or should the national legal system be applicable in the unit?
12. How can the new constitution guarantee adequate resources to the judiciary?

CHAPTER 18

CHAPTER 18

National Security and Democracy

Introduction

A fundamental demand of people around the world is that their governments provide them with security. People hold their governments responsible for maintaining a society that follows the rule of law, a society in which citizens can enjoy their fundamental rights and where the government will protect its citizens from criminal acts—whether those acts are committed by other citizens or by agents of the state. The government is also expected to protect the state against acts of aggression committed against it—whether those acts are committed by other states or by insurgents within the country.

Since security is such a fundamental concern of the masses, the people in power may sometimes exploit tumultuous situations in the country—when the rule of law barely holds and when the very existence of the state seems to be under threat. They may take measures ostensibly designed to remedy the situation, but which may actually be astute political manoeuvres designed to seize absolute control of the state machinery. Such was the case in Nepal when King Gyanendra, encouraged by the leaders in the army, declared an emergency on 26 November 2001. That act by the king heralded the beginning of the demise of Nepali democracy (a democracy which had been reinstated in the country in 1990 with the ending of the autocratic *Panchayat* system). A few years later, the king would succeed in utterly dismantling Nepali democracy and assuming absolute power. The irony was that the emergency, which was supposed to have been declared for the greater good of the people and the country, instead marked the onset of Nepal's darkest political days. Parties were gradually relieved of their powers to rule the country, and the king continued on his path of political ascent until he ended up an absolute monarch. The people, far from enjoying a new era of liberty, saw their fundamental rights stripped away; and the democratic state, the safeguarding of which

the emergency was supposed to guarantee, instead got transformed into a totalitarian state.

This chapter is concerned primarily with the possible provisions that the future constitution in Nepal could include—provisions that would help regulate relations between the security sector and the representatives of the people, and which would prevent events of the sort that Nepal has recently seen, from happening again. The first part of this chapter examines the effects of the emergency on the Nepali people and the Nepali state. It then traces the series of events (mainly the violations of constitutional provisions) that paved the way for the king to declare the emergency. And the third part addresses constitutional possibilities for ensuring effective regulation and accountability of the security sector.

Emergency, Democracy, and the Contest for Sovereignty

According to Article 115(1) of the 1990 Constitution of Nepal, the king could declare a state of emergency in response to a situation of 'grave emergency' arising as a result of 'war, external aggression, armed rebellion or extreme economic disarray.' Conveniently for the king, the time around November 2001, when the emergency was declared, was a time of heightened civil conflict in Nepal. The king was able to claim this as a time of 'grave emergency' and a situation that was getting progressively worse—the Maoists had stepped up the offensive and were now not just limiting themselves to attacking the police, but were also taking on the army. The king thus declared an emergency and took on new powers. During the emergency, all the democratic attributes of the constitution, including civil liberties, remained suspended under emergency law.

Although a state of emergency is a special situation in which the government has greater powers than the constitution usually allows, the 1990 Constitution had been actually reasonably cautious about prescribing the number of rights that could be suspended. But the Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO), promulgated in 2002, had several clauses directly contravening the constitutional order. Section 20 of TADO conferred immunity on the security forces, even in cases of extreme violation of human rights, for 'any act or work performed or attempted to be performed ... in good faith under the Act.' Emboldened by this *carte blanche*, the security forces arrested hundreds of people, detained them in unmarked places, such as military barracks, and kept them incommunicado, thus protecting the state from being held responsible for such actions. Although the right to *habeas corpus*, the remedy for wrongful detention, could not be suspended, no application for it was, in reality, ever entertained.

The emergency allowed the security forces to suppress human rights and prepared the ground for the emergence of an authoritarian state. The period saw a rapid increase in the military's size from around 47,000 soldiers to the present official figure of around

98,000, strengthening the force's capacity to take control of the public sphere. Under the guise of the emergency, the state was also able to raise the defence/security budget and to promote the security agenda at the cost of social agendas, and that in turn led to an economic downturn, which contributed to increasing poverty and destitution in the country. The Unified Military Command structure, comprising all elements of national power—political, economic, informational and diplomatic—was also created during this time. With the protection afforded by the Unified Military Command, the security forces were able to torture the citizens, perform arrests—even without warrants—and threaten and intimidate the common people; large numbers of people 'disappeared' as a result of the activities of the security forces; a heightened culture of impunity took hold, and the people became victims of both non-state and state terrorism, as political violence continued unimpeded.

While it is true that emergencies have been declared in countries like Sri Lanka and India (10 times in as many years in the case of the former), in those countries, constitutional democracy has continued to thrive, and the armed forces in those countries have always refrained from meddling in politics. Before the king declared the emergency in Nepal, in contrast, the leaders of the Nepali security apparatuses were reportedly goading the monarchy to usurp power. The inspector general of the police (IGP), Pradeep Shumsher Rana, for example, once openly advised the king to take over state power, right in the presence of the prime minister, at a meeting in the palace. The infirmity of the government was such that the prime minister could not dismiss the IGP outright. Earlier, when the army had disobeyed an executive order given by the prime minister, the chief of the army staff was not dismissed; instead, the prime minister resigned. What this proves is that the army had by then already sidelined the prime minister and had taken over the running of state affairs. Later, high ranking military officers pressured the next prime minister to extend the emergency period by asserting, 'The army cannot return to barracks once mobilized in counter-insurgency action, without completing the task. Therefore, the tenure of emergency should be endorsed and extended at any cost.'

Article 115(2) of the 1990 Constitution provided that any proclamation of a state of emergency had to be laid before the House of Representatives for approval within three months of the proclamation. For the emergency to continue, the decision for its continuation would have to be approved every six months thereafter, by at least two-thirds of the House. The political parties refused to extend the emergency period by another term, in opposition to the wishes of the ruling party, and the prime minister decided he was left with no alternative but to dissolve Parliament in order to extend the period of emergency rule. All of these events indicate that none of the vital organs of the state under the 1990 Constitution was loyal to the imperative of strengthening civilian rule under that constitution.

Through the use of the emergency order and by mobilizing the armed forces, King Gyanendra was able to suspend the entire democratic order in Nepal. Emergency power was supposed to have been used in protecting the democratic state, and by managing the disruption caused by violence, to return the nation to normalcy. But the continuing state of violence and disorder were exploited by the king to serve his own interests, not the interests of the political system presided over by him.

The Main Factors that Allowed the King to Usurp Power

Article 35 Violated and the Implications

Under the 1990 Constitution, the decision-making authority of the king was explicitly defined thus:

> Except as otherwise expressly provided as to be exercised exclusively by His Majesty or at His discretion or on the recommendation of any institution or official, *the powers of His Majesty under this constitution shall be exercised upon the recommendation and advice, and with the consent of the Council of Ministers*. (Art. 35(2), emphasis added).

This article was perhaps derived from the Indian Constitution, which prevents the president, the head of state, from having any role whatsoever in vitally important decision-making processes. In fact, there have been several instances in India when strong-willed prime ministers did not even confide in the president before making their decisions public. The declaration of the emergency in India on 26 June 1975 is a case in point. In Nepal, on the other hand, the emergency declared by the king was not only brought about by a direct violation of Article 35, but according to the Nepali Congress president Girija P. Koirala (the then prime minister), the emergency was imposed not by the government, but by the army. Neither Koirala, as the president of the ruling party, nor his party's government resisted the move. Rather, the declaration of emergency was actually endorsed by an overwhelming majority of votes in Parliament.

Flaws in Article 118

Article 118 in the 1990 Constitution was designed to provide for civilian control over the military through a National Defence Council (NDC). But that Council did not function for a decade after 1990 and was activated only as a response to the challenges posed by the Maoist insurgency. Furthermore, the NDC, comprising three persons—with the prime minister as the chair, the defence minister and the chief of army staff—did not have a civilian majority because the defence portfolio was usually held by the prime minister.

Article 118(2) of the 1990 Constitution empowered the king to 'operate and use the Royal Nepal Army on the recommendation of the National Defence Council.' However, the requirement for acting on the recommendation of the prime minister was wrongly

interpreted as not being compulsory. Thus on the question of mobilization of the RNA, the discretionary power of the king prevailed over the power of the *de facto* head of government. This practice undermined the executive power of the elected prime minister and the Council of Ministers.

The fact that the activation of the NDC was felt to be necessary only in mobilizing the RNA in the counter-insurgency campaigns also suggests that national security was not a serious concern of the government. And when the crunch came, the NDC became useless as a policy making body for the prime minister. Implicit resistance to the NDC's recommendations by the army and explicit use of discretionary powers by the king, in relation to military mobilization, destroyed the relevance of the NDC as a policy organ.

Article 119 and Article 120 Abused

Article 119(1) in the 1990 Constitution in effect handed over the army to the king, and Article 119(2), which was supposed to put a check on the king's powers over the army, was summarily dismissed by the king. Article 119(1) read, 'His Majesty is the Supreme Commander of the Royal Nepal Army.' The follow-up provision, Article 119(2), read: 'His Majesty shall appoint the Commander-in-Chief of the Royal Nepal Army on the recommendation of the prime minister.' Moreover, the army was governed by the Military Act of 1959, issued by King Mahendra. The chief of the army staff, in accordance with the 'Act on Rights, Duties, Functions and Terms of the Service of the Commander-in-Chief 1969,' was responsible to the king rather than to the government, and the situation did not fundamentally change after 1990.

To make matters worse for the elected government, the army was also deeply imbued with the tradition of looking at the monarchy as the symbol of national unity and stability. Its motto was '*Rajbhakti*, *Hamro Shakti*' (loyalty to the monarchy is the source of our power). All sensitive defence matters—weapons procurement, the promotion of officers from the rank of Lt.-Colonel up, the appointing of military attachés in embassies abroad, the establishment of new barracks and the expansion of the armed forces—were settled in the palace. The palace's appointing of numerous retired military generals as ambassadors, by invoking Article 120 of the 1990 Constitution, worked to sway the loyalty of the high-ranking army officers towards the monarchy. But although Article 120 empowered the king to appoint ambassadors, the king was only supposed to exercise the power to appoint ambassadors on the advice of the cabinet; in violation of the constitutional provision, however, this requirement was ignored. The action of the king was challenged before the Supreme Court, which agreed that the king's power was to be exercised only on the recommendation of the Council of Ministers. Unfortunately, the court also held that, because of another provision in the constitution, it could not look into what passed between the Council of Ministers and the king.

Lack of Defence Policies

The government did not publish any white paper on defence, nor did it constitute a defence review committee to define a national defence policy. National security, therefore, remained incompletely defined. In fact, during the democratic period after 1990, the Defence Ministry was never used in shaping national security policy. Nor was the NDC ever used in formulating either national defence and security policies or in identifying potential threats to national security.

Lack of Legislative Oversight over the Army

The 1990 Constitution required Parliament to have committees on finance, public accounts, human rights, and foreign relations, among others. These committees were to be watchdogs over the executive and to make recommendations to improve the functioning of government. The State Affairs Committee was, in particular, responsible for defence and home affairs. But there were no significant instances of the parliamentary committees exercising their oversight authority in relation to defence and security. They failed to play any effective role in guiding or controlling the executive; their roles were limited to reviewing and discussing issues and bills sent to them by the full House. The committees avoided dealing with crucial issues such as the Tanakpur Barrage case and the ratification of the Mahakali Treaty, which was signed with India in 1996. The politicians in the government and the national legislature shied away from sensitive issues related to the security forces and military affairs because they felt that internal security was the responsibility of the Home Minister and that the Defence Ministry and Defence Minister would look after the army. The legislators neither tried to learn, nor did they ever seek outside expertise, when reviewing bills related to the budgeting for security and defence. And after the declaration of the national emergency in 2001, the politicians passed security related bills without giving them much thought. They also unquestioningly endorsed the transfer of resources to the security sector that had been earmarked for the social sectors.

Some of the shortcomings described above spring directly from the dynamics of a weak state: when the government does not play an active role in designing state policies, when oversight agencies do not work to keep excesses of power in check and when the political leadership acts irresponsibly, the government loses its ability to maintain constitutional control. In such a situation, the executive may view the actions of committees as needlessly interfering of the executive's decision-making authority. According to Subhas Nembang, the speaker of the reinstated House, and formerly a chairperson of the Public Accounts Committee, an investigation of top security officers by the Public Accounts Committee on possible financial irregularities was stopped by the direct intervention of the prime minister (who doubled as the defence minister).

And in July 2001, the prime minister advised the Public Accounts Committee 'not to torture security personnel by calling them for interrogation and seeking explanation before the committee.' The prime minister also asked the committee to refrain from unnecessarily harassing the chiefs of the armed forces, the police and intelligence services. Furthermore, the parliamentary committees were accused of overstepping their limits by interfering in the sphere of government authority by none other than Prime Minister Girija Prasad Koirala himself. Thus although the government was a creature of Parliament in the parliamentary system, the roles and functions of Parliament were always being undermined by the government itself (see the chapter on the legislature).

Recent Developments

The King's Control over the Army Relinquished

After its reconvening following *Jana Andolan* II, the House of Representatives stripped the king of his power base—the armed forces. In a declaration made on 18 May 2006, the House declared, among other things, that the army would no longer be called the *Royal* Nepal Army, that the cabinet would appoint the commander in chief for the Nepali army, that the title of the Supreme Commander of the Army (which used to be accorded to the king) was to be scrapped, that any issue of mobilization of the army would have to be presented to and ratified by a special committee formed by the House and that the army would have to be an inclusive and national institution.

Changes in the IC Regarding the NDC, etc

The Interim Constitution provides that the NDC must be constituted under the chairmanship of the prime minister and include only ministers. The Council of Ministers, in accordance with the recommendation of the NDC, can control, use and mobilize the armed forces. Certain provisions in the Interim Constitution have also called for the process of democratizing the armed forces and making the forces more inclusive, by requiring that a plan of action would have to be prepared by the Council of Ministers in consultation with the relevant committee of the Legislature-Parliament.

Army Top Brass being Made to Answer to the Legislature

With the change in the political equation, a sub-committee of the Public Accounts Committee of Parliament is reportedly questioning some senior military officers on 'irregularities' amounting to Rs. 2.3 billion, as recorded in the auditor general's report.

Changes to the Provision for Declaring an Emergency

The circumstances under which an emergency may be declared have not been changed by the Interim Constitution, but any declaration of an emergency must henceforth be

laid before the Legislature-Parliament within one month of its declaration and, after approval, would be effective for only three months. The Council of Ministers now has the power to declare a state of emergency.

Suggestions for the Future

The redefining of national security policies and matters pertaining to civil-military relations awaits the decisions on the new constitution to be drafted by the members of the Constituent Assembly. Now that there is no king, a fundamentally new situation has arisen in the country, and the possibilities have opened up for the security apparatus to be placed truly under democratic control, in the interests of the governed. The chapter thus examines ways in which security can be improved in the country, an issue that the past governments in Nepal should have held at a premium, but sadly did not. It will look at international standards for security forces regulation and examine the ways in which countries have tried to introduce greater civilian control and accountability *vis-à-vis* security. By no means are all these measures usually found in constitutions around the world. There are arguments in favour of not including too much detail regarding security in the constitution: if the detailed arrangements were to prove unsatisfactory, it would be difficult to change the provisions.

Human Security

If there is a chapter in the new constitution on directive principles of policy, matters such as the provision of adequate resources for the police or community policing might be mentioned there. But some modern constitutions have refrained from including directive principles that cannot be legally enforced. A 'right to life' provision, for example, might be interpreted to cover security, but this type of obligation on the state has traditionally been thought of as requiring the state not to kill, rather than requiring the state to positively protect its citizens. There have, however, been a few recent cases in several countries where, on the grounds provided by the human rights provisions, actions for compensation have been brought against the government or against the police for their failure in taking positive steps to avert risks to people's inalienable right to life. The Indian courts, for example, have been able to use the right-to-life argument as the basis on which to direct the police to carry out certain investigations, and there have been similar cases in other countries, such as Bangladesh.

International Standards

There are a number of sets of standards and guidelines drawn up at the international level for the management of the security forces and the behaviour of personnel, and most constitutions have some provisions about the security forces, their role and control over them. This is not simply a question of the government's controlling the security forces and vice versa, but is, at its heart, a question of building a relationship that is characterized by a reasonable degree of trust on both sides. The UNDP *Human*

Development Report, 2002, for example, argues very forcefully for strong civilian control over the security forces. It suggests that in the absence of civilian control, the security forces tend to be secretive and could create a situation whereby it would be difficult to hold them accountable for their actions. Furthermore, when the security forces are not accountable to the public, the budgets allocated for defence can be greatly in excess of what the public deems is acceptable. Such a context, where military spending carries on unchecked, breeds corruption—the procurement of military supplies is a major area of corruption in many countries. The UNDP report suggests the following principles for democratic governance in the security sector: 'the sector should be subject to the same principles of public sector management as other parts of government, with small adjustments for confidentiality appropriate to national security'; the report also calls for 'a well articulated hierarchy of authority between civil authorities and defence forces.' Civil authorities must have the means and capacity to monitor the security forces.

How can all these ideas be translated into general provisions in the new constitution of Nepal? One constitution that could be referred to is the South African Constitution, which has included general principles that apply to all their security forces. From these and other provisions in the South African Constitution, the following principles can be derived:

- The security forces should be politically neutral.
- The security forces should be under civilian control.
- The only military force should be the official one.
- The security forces should respect the rule of law, democracy and human rights.
- The security forces should be transparent and accountable.
- The security forces should be regulated by the legislature.
- The security forces should not obey illegal orders.
- The security forces should defend the national sovereignty and help in emergencies.
- The security forces should be disciplined and patriotic.

The Army

In most nations, it is customary for the head of state to be the commander in chief of the armed forces. This practice survives from the days when the monarch actually led his army into battle. Today, the title is often merely formal, especially when held by ceremonial heads of state. Even in countries like the USA, where the president in

the role of the commander in chief wields considerable power, his powers are limited by making him dependent on the Congress for funds for the security forces and by the fact that only the Congress is vested with the authority to raise an army. Such a balance is important for maintaining civilian control of the military while at the same time preventing the abuse of that civilian control. In Nepal, however, as we have seen, after 1990, the king actually exercised real power even though the constitution had not intended to give him this power.

Constitutions vary in what they say about control over the military. Some define roles for oversight bodies that have a majority of civilian members, maybe including non-politicians; in Ghana, for example, such a body has the responsibility of advising the president on appointments to the armed forces (and their advice must be taken), except during the appointing of service heads, who are appointed by the president in consultation with the Council of State, which has a wide membership. The same body also advises the president 'on matters of policy relating to defence and strategy including the role of the Armed Forces, military budgeting and finance, administration and the promotion of officers above the rank of Lieutenant-Colonel' and draws up regulations regarding the organization of the security forces. And the South African Constitution says, in rather general terms, 'multiparty parliamentary committees must have oversight of all security services.'

The Police

The total strength of the police (82,000) in Nepal gives a ratio of one police officer to about 305 people, which is favourable in comparison with UN guidelines (which recommends a ratio of 1:400), but of these, 20,000 are in the paramilitary units and 12,000 operate only in the Kathmandu valley; so the number of police available for regular crime control in some parts of the country is inadequate. Though the police force has been developed on the community-based model, in order to create a sense of trust between the police and the community, the public's perception of the police is extremely negative as a consequence of the criminalization of this force by the power elites. The police have, moreover, been used as a brute force to suppress political dissent, civil disobedience movements and political opposition to the regime, rather than to bring criminals to justice. Likewise, the Armed Police Force (APF), raised in 2001 to deal with the Maoist insurgency, is seen only as riot-control police used to contain demonstrations against the regime in power.

International standards of various types emphasize that the police must maintain high standards of integrity, respect for privacy, respect for human rights and human dignity, transparency and accountability and that they must use force proportional to the circumstances, and use firearms only in extreme situations. But for any police force

to perform at such levels, its personnel should also be reasonably remunerated and provided with adequate resources and training.

Another important area that needs to be given high priority is recruitment. The recruitment procedures in Nepal, which are currently plagued by a culture of favouritism and political clientelism, only serve to create a corrupt police force. Prudent recruitment also means recruiting personnel to suit the needs of the police force. For example, since people will have more faith in a police force that they think understands them, it would be wise to recruit more women to deal with law and order situations involving women—women are more likely to report violence against them if they can report to women officers.

It is also very important that the police avoid the opposite risks of having too great a freedom from outside control and of being excessively subservient to the government of the day. The police should be expected to serve every government with equal commitment, provided that the government is observing the law and the tenets of the constitution. In order to insulate the police service from political control, many nations have instituted independent police service commissions. Such police service commissions seek to insulate the police service from political control while at the same time evaluating the qualifications of the personnel for appointment and promotion.

The relations between the public and the police can be strengthened in various ways: by setting up consultative bodies that include the public, by making codes of police conduct accessible to the public and by instituting a civilian body that is responsible for the oversight of the police. Following recent reforms, the police in Northern Ireland, for example, take a new oath of office with an express understanding to observe human rights—the police are given human rights training, and the new Policing Board monitors the human rights performance of the police.

As far as constitutional provisions regarding the police go, it would perhaps not be appropriate to include very detailed provisions; broad principles that apply to the police force could, however, be included. Some constitutions have general statements about the role of the police. For example, the South African Constitution says:

> 205(3) The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

More particular provisions that could be included in the constitution relate to police-public liaison bodies such as the bodies that field complaints against the police (such as the South African Police Complaints Commission, which is not a constitutional body though it is contemplated by the constitution). Undercover policing operations should,

however, be explicitly referred to as being subject to legislation, and obliged to comply with human rights standards. Civilian oversight over the government's power to order the police to undertake operations that intrude into people's lives, such as phone tapping and other such activities should be included in the provisions.

Intelligence Services

Although most societies are subject to increasing levels of surveillance—partly because of the increasingly sophisticated methods now employed by criminals, and partly because of actual or perceived security threats—people should still be entitled to assume that their private lives will be subject to scrutiny only if they have been reasonably suspected of having broken the law or are imminently likely to break the law.

As far as possible, domestic intelligence gathering should be governed by the principles of human rights: as little violation of privacy as possible must be involved. When such interferences do occur—such as with the privacy of the home or with personal communications—there should be a monitoring system in place. It has also been suggested that intelligence gathering should be separate from law enforcement and from politics, and many countries have committees of Parliament that supervise the intelligence services, including the discussions of their budget (confidentially).

There are various models that Nepal can draw on for creating a civilian body to maintain oversight of intelligence gathering units. Canada has a number of bodies with different mandates, including the Security Intelligence Review Committee (SIRC), which consists of three to five senior members of society who are appointed on the recommendation of the prime minister, after consultation with the leaders of the largest parties in Parliament (and who are not serving members of Parliament). In the UK, the Intelligence and Security Committee, composed of members of both Houses of Parliament, is selected to monitor the work of the intelligence and security agencies by the prime minister, after consultation with the leader of the opposition. This is a statutory committee and does not have the same powers as a select committee of Parliament. The UK also has a civilian Intelligence Services Commissioner to monitor the exercise of certain powers. In Australia, a parliamentary committee reviews the administration of and the expenditure incurred by the intelligence services. The members of the committee (not ministers) are appointed on the recommendation of the prime minister, after consultation with the leader of the opposition. The members of the committee are subject to security clearance, and the committee may not be required to disclose information that would be prejudicial to national interests. These various provisions are not found in constitutions.

Many constitutions make no particular reference to intelligence services, but there are exceptions. The South African Constitution, for example, says that any separate

intelligence service must have a head appointed by the president (the head of government as well as head of state), and that either the president or a member of the cabinet must 'assume political responsibility for the control and direction' of that service. In addition, an inspector appointed by the president and approved by the legislature is responsible for monitoring the activities of the service.

States of Emergency

The provisions for declaring states of emergency should be narrowly drawn. It should be very clear when a state of emergency can be declared, and by whom. The requirement for approval of the declaration by the national legislature is a common precaution in many constitutions (and it should not be possible for the government to evade this requirement by dissolving Parliament, as has been done in the past in Nepal). And while it is important that a state of emergency should not be allowed to continue for long without renewed approval of the legislature, the need for taking such approval should not arise so often that it hinders the employing of measures necessary to deal with the emergency. The human rights that may be suspended during an emergency should be as few as possible, and mechanisms must exist to prevent the government from abusing such powers of rights suspension. Some countries have set up special tribunals to ensure that the rights of any person detained during a period of emergency are not violated, and other provisions in their constitutions provide for the monitoring of emergency powers and their use.

Courts and the Security forces

As a general rule, the security forces should be subject to the law just like any other citizen, and ideally, to the same courts. It is common to have separate courts for enforcing military discipline, but modern practice has moved away from restricting military cases only to military courts. It is now common, and international standards require it to be so, that human rights abuses by forces be subject to trial under ordinary law and in ordinary courts. The 1990 Constitution of Nepal limited the power of the Supreme Court to control military courts, but the Interim Constitution does not contain the same exclusion. In addition, although the Interim Constitution says that the National Human Rights Commission may not take any action over matters under the Army Act, it seems to suggest that this provision does not apply to human rights abuses. Both these points are positive.

Other Aspects of Security

There are many other aspects of security that need to be broadly defined. Issues pertaining to border security, customs officers and prisons could be included in the

constitution. Even issues regarding private security firms and availability of weapons could probably be outlined. Some constitutions have provisions about the prison service. Explicit reference to the other issues is rare. It would be possible for the constitution to contain some general principles about how border guards and other disciplined forces should be subject to some of the same obligations as other forces.

Security Forces and Federalism

In a federal Nepal, the constitution will have to indicate which level of government is to have power to pass laws on matters of security. In some countries, there is only one national police force, in others the states/regions can also have their own police force.

Post-conflict Issues

The Comprehensive Peace Agreement and the Interim Constitution both contain provisions for dealing with issues arising from the history of the conflict in Nepal. In particular, there are provisions about the integration of the Maoist forces into the regular forces of the nation and about the demobilization of the Maoist militia, where appropriate. There is also a requirement for setting up a Truth and Reconciliation Commission.

Discussions about the new constitution should provide everyone, the policy makers and the public, with an opportunity to reflect on the roles that the security forces should play in the future. It may also be necessary to have more provisions to specifically outline the methods in which the former combatants are to be dealt with. Many other constitutions in post-conflict countries have adopted such provisions to deal with post-conflict issues.

Questions

1. Should the constitution include general statements about the role of the security forces?
2. Should the constitution require that a committee of the legislature oversee the work of the security forces, and what should the powers and functions of such a committee be?
3. Should civil society have a role in overseeing the police force?
4. How can civilian oversight of the intelligence services be secured?
5. In what circumstances should it be possible to declare a state of emergency and suspend some human rights and give extra powers to the executive?
6. Assuming that a declaration of an emergency needs to be approved by the

legislature, how soon must that approval be given, how long should it last and by what majority in the House should the resolution approving the declaration be passed?

7. How should the new constitution deal with questions related to the civil conflict, including the integration of the Maoist forces and the rehabilitation of former fighters, etc?
8. In a federal Nepal, should there be separate police forces for each new state/region or just one national police force?

CHAPTER 19

CHAPTER 19

Maintaining the Role of the Constitution

Introduction

It is one thing to make a constitution. It is quite another to breathe life into a constitution—to have it become a living, vibrant document that is used for effective governance, for controlling the exercise of state power, and for promoting the values and aspirations expressed in the constitution, to have it become a powerful tool that is used by the people to improve their lives. The fortunes of a constitution are shaped by many factors: personalities and elites, political parties and other organizations, social structures, economic changes, traditions of constitutionalism—and by the rules and institutions in the constitution itself.

This chapter discusses factors that influence the fortunes of a constitution and how its objectives can be achieved, including the role of independent institutions, or constitutional interpretation, of protective mechanisms, and of constitutional amendments.

Assessing the Success of a Constitution

A country adopts a new constitution because it aims to achieve particular objectives. These objectives can vary from one period to another, and from one country to another. The objective of the 1962 Constitution of Nepal was to reverse the country's progress towards parliamentary democracy by introducing the *Panchayat* system under the dominance of the king. The objective of the 1990 Constitution was to establish a multiparty, parliamentary democracy with a constitutional monarchy. The 2007 Interim Constitution intended to provide for an interim government and to provide for the road map that would be referred to when making the new constitution, which would have an extensive agenda of reform reflecting the goals of the *Jana Andolan* of 2006. The current Interim Constitution is the most ambitious of all Nepali constitutions so far. It aims to create an inclusive state in which all diversities would be respected, to make the

society more egalitarian, and to bring about social justice. The Interim Constitution aims to achieve these ends by fundamentally restructuring the state. Although, a temporary and, as was the intention, a short-lived constitution such as the Interim Constitution cannot hope to achieve much of its agenda, it can at least establish a reform agenda for the new constitution.

It is not easy to assess the success of a constitution. A constitution's success could be ascertained by its durability—by seeing how long the constitution lasts; but a constitution can last for a long time without achieving the objectives expected of it. In a nation that has recently emerged from a state of conflict, one way to measure a constitution's success would be to see if the constitution helped sustain the new period of peace; but then again, the peaceful state may have been achieved at the expense of justice or by curtailing the people's participation in governance. For a constitution that was created to improve the democratic machinery in a country, the constitution's success may be judged by the regularity with which free and fair elections were held in the country and by determining if changes of government occurred peacefully. For a constitution that was created with the aim to promote social justice and egalitarianism, its success could be measured by determining how inclusive the government became. And yet another way to measure a constitution's success might be to see if the people came to hold a favourable opinion about the constitution and became loyal to it. Most constitutions, however, have multiple objectives, of which only a few may be realized (and the few objectives achieved might not even have been the most important ones). Thus gauging a constitution's success can be an inexact undertaking.

How, for example, should a constitution that has a real impact, but not of the kind that was hoped for, be judged? Since a constitution has its own dynamics, through institutions and procedures it sets up, and since society has its own dynamics, through the interplay between traditions and development, the situation that transpires after a constitution is adopted can change considerably. Such new contexts may render the original aims of the constitution irrelevant, or at least less pressing (for example, a constitution intended for bringing about social justice may later be judged by how it accommodates issues related to globalization, which places a low priority on social justice). Some scholars say that it is impossible to predict the consequences that the adopting of a particular constitution may have. Moreover, since most modern constitutions incorporate ambitious agendas related to democratization, ethnic harmony, economic development, modernization, and so on, a theory of causality may not provide a rigorous enough framework to gauge a constitution's success. In nations where the constitution is seen as a social-engineering device, ordinary people have huge (and often unrealistic) expectations of what a constitution will do for them, and thus assessing a constitution's success in such contexts becomes an even more difficult endeavour. This is certainly the case in Nepal today, where the reform agenda that will determine the contents of the new constitution has been created on the basis of inter-party negotiations and the goals of *Jana Andolan* II.

Designing and Implementing a Constitution

One of the most important questions for Nepal is whether the Constituent Assembly can design a constitution that will realize the reform agenda. Recent scholarship on constitutions aims at turning constitution-making into a science—perhaps over optimistically. But if constitution-making is a science, what are its principles and tools? There are at least two dimensions to constitution-making: the making of the constitution and the implementation of the constitution. Earlier chapters have already examined the constitution-making process, and they have analyzed the importance of public participation in more detail.

It is often claimed that the particular benefits of having a participatory process is that the constitution will be deemed legitimate and that the people will have enough knowledge of the constitution to be able to use it when they participate in public affairs and to protect their rights. This dimension is, therefore, supposed to be closely connected to the utility and success of the constitution.

As regards the implementation of a constitution, it is possible to identify three elements—'implementing, promoting, and safeguarding.' To *implement* a constitution means to give full expression to its provisions: making new laws and policies to give effect to them, setting up new institutions (and giving them powers and resources adequate for their responsibilities), and repealing laws inconsistent with the new laws and policies.

To *promote* the constitution means enforcing these laws, respecting the rights and freedoms of the people, developing constitutional norms, sustaining institutions and the rule of law, holding regular elections, providing access to justice, resolving disputes in accordance with the constitution, and facilitating the participation of the people in public and state affairs.

Safeguarding the constitution means protecting the constitution against hasty amendments that detract from the values of democracy, constitutionalism, and the rule of law. The constitution needs to be safeguarded against amendments and procedures that distort constitutional norms or against those procedures that are conducted without regard to the law; the constitution must also be safeguarded against procedures that unnecessarily call upon the use of emergency powers. And in extreme cases, safeguarding the constitution means protecting the constitution from being scrapped through the use of illegal measures such as a military coup.

There are various constitutional devices that have been employed or prescribed for implementing, promoting, and safeguarding constitutions (discussed below). But now it is necessary to turn to a second topic: the different approaches prescribed within a constitution, which are used for achieving its objectives and the status of different provisions.

Components of a Constitution

The provisions of a constitution can broadly be divided into those that are directly binding (having the force of law), and those that are not directly enforceable (those provisions that are framed as principles, directives or policies). The non-enforceable provisions may impose moral or even legal obligations on the state, but the state cannot be compelled by the process of law to carry out their suggestions. Rather, the sanctions for non-compliance are political. The bill of rights is an example of a directly binding provision, and directive principles or state policies are examples of non-enforceable provisions.

The preamble, which often recites the context and purposes of a new constitution, was sometimes regarded in the past as not being legally binding, but some jurisdictions now treat it as binding, or at least as an aid for interpreting the constitution. Some analysts of the 1990 Constitution regard its preamble as binding, by referring to Article 116(1), which can be read as prohibiting constitutional amendments 'designed to frustrate the spirit of this constitution.'

Some provisions could be viewed as guidelines; the government may respond to their directives at its discretion. There are also provisions that are intended to be binding but which depend on further legislation or administrative action before they become binding. For example, a right or conduct may sometimes be framed with the attendant words 'in accordance with the law,' which means that a law would need to be enacted, before the precise, enforceable obligation arises. Other examples are rights, obligations or conducts granted or imposed by the constitution that can only be implemented as part of a scheme of further rules and institutions, such as the freedom of information.

Another way to distinguish constitutional provisions is by examining their nature: some provisions create rights and obligations or prescribe rules of conduct, and others relate to the structure and status of institutions. The former can more easily be mobilized or enforced by the public than the latter.

The language in which a provision is cast depends to a considerable extent on the provision's status. If a provision is directly binding, the language used to describe it must be as precise as possible, to give sufficient guidance to citizens and to those whose task it is to interpret and observe the constitution, particularly the judiciary. Directive principles, on the other hand, can be formulated in broad terms and can be aspirational in their tone.

The above-mentioned permutations of constitutional provisions give the Constituent Assembly considerable flexibility in deciding which rights, obligations, institutions, and procedures must come into force at once, and which can be postponed or made subject to 'available resources.' Thus the Indian Constitution, for instance, following the Irish Republic's example, made a distinction between binding human rights and non-

enforceable directives of policy (in which were included social and economic rights). South Africa, which considered social justice to be imperative for racial harmony, made economic and social rights enforceable in its constitution. The Nepali Interim Constitution of 2007 makes considerable use of these different possibilities.[1]

While there is something to be said for directives that guide or bind the government, but are not enforceable, practice shows that many of these directives are seldom implemented (as was the case with several provisions of the 1990 Constitution of Nepal, and as has been the experience in India). Politically powerful groups may give in to domestic or international pressure to include provisions they dislike only because they know that the directives are not enforceable, and they may disregard the provisions later.[2] And even when a provision is binding, there may or may not be express remedies and procedures for its enforcement (remedies are, however, generally provided for human rights).[3]

In order to clearly register its intentions, the Constituent Assembly will have to pay careful attention to the approaches and styles used in drafting the new constitution (something which perhaps was not done in the Interim Constitution). As a general principle, all constitutional provisions should be binding. Where it is necessary to draw up flexible provisions, the constitution should provide a schedule that sets out who has the primary responsibility for implementing the provisions, and the time table within which those provisions should be implemented (the Indian government did not provide for free primary education, a directive principle of policy, even more than 40 years after its constitution had come into force, although it was obliged to do so as speedily as possible). If the state has refused to implement a provision after, say, five years, the constitution could authorize the courts to do whatever is reasonable within their capacity to give effect to the provision (the Constitution of Papua New Guinea contains a provision to this effect). It is also good practice to indicate what remedies are available should particular provisions be violated.

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[1] The preamble refers to the commitment to competitive multiparty democracy, human rights, inclusion of marginalized communities and restructuring of the state. Part I defines the nation and state of Nepal—in ways which are aspirational rather then representing present reality. Part III (on fundamental rights) makes legally enforceable social and economic rights (such as the right to employment and social security). Part IV ('Responsibilities, Directive Principles, and Policies of the State') is the most aspirational section of the Interim Constitution (and most aspirational of all previous constitutions). For example, it defines as the responsibility of the state 'to enable *Madhesi*, Dalits, indigenous ethnic groups, women, labourers, farmers, the physically impaired, disadvantaged classes, and disadvantaged regions to participate in all organs of the state structure on the basis of proportional inclusion'). Another state policy is to 'raise the standard of living of the general public by fulfilling basic needs such as education, health, transportation, housing, and employment of the people of all regions, by equitably distributing investment of economic resources for balanced development of the country.' These principles and policies are not legally enforceable: 'No question shall be raised in any court as to whether provisions contained in this Part are implemented or not' (Art. 36(1)). However, the next section of the article says, 'The State shall mobilize or cause the mobilization of the required resources and necessary means for the implementation of the principles and policies contained in this Part'.

[2] An interesting recent example is the amendment of the Interim Constitution which provided for the office of the leader of the opposition 'provided for by law' (Art. 57A). No law was ever passed!

[3] Article 107 of the Interim Constitution has broad provisions for remedies through the Supreme Court, even when the constitution has made no specifice provision.

These suggestions outlined above are obviously more than merely drafting points. As contemporary constitutions become increasingly both aspirational and prescriptive, the issues of feasibility, flexibility, and enforceability become critical—and are fundamentally a political issue. Since the nature and roles of constitutions have changed in important ways in the last few decades, it is necessary to consider how these changes affect the implementation and enforceability of constitutions.

Nature and Role of Contemporary Constitutions

The older constitutions were instruments of rule designed by one community, class or region. These constitutions did not by themselves establish the ruler's dominance, which was often done by the use of force. Rather, the function of the constitution was to recognize the dominance of one group and provide the legal basis for its rule. The ruling group may have acquired some legitimacy from the constitution, but the constitution was not the basis of the group's dominance, which lay in the group's dominance in social and economic spheres. In these circumstances, the constitution was effective as an instrument of governance.

Contemporary constitutions, on the other hand, do not reflect any settled form of social or economic domination. Many recent constitutions have resulted from a stalemate when no competing group was able to win an outright victory; this imbalance of powers was often reflected in the constitution. Some constitutions are truces; the fundamental problems were not solved; instead, a framework for competing parties to work together in was established by the constitution. Most constitutions created in such contexts remain fluid, subject to changes in political configuration, and inherently tense. Some constitutions have been made under considerable external pressure (bilateral, regional or global), indeed, are sometimes imposed (as in Bosnia-Herzegovina). Such constitutions may not fully reflect the wishes of the influential leaders of local communities. The absence of a clear ruling group committed to the constitution makes its implementation or enforcement problematic.

The problem of implementing and enforcing a constitution is aggravated by the ambitious scope of contemporary constitutions. The older constitutions dealt mainly with the system of government, establishing principal state institutions, distributing functions and powers among them, and providing some basic rules for relationships among them. They did not explicitly aim to change society. The limited scope of those constitutions meant that their provisions were largely implemented. Today's constitutions seek to solve many social and political problems: of accountability, corruption, the environment, poverty, equitable distribution of property and other resources, recognition of new and multiple forms of identity, the democratization of the party, and political organizations and processes. In multi-ethnic societies, constitutions also need to deal with relations among ethnic, linguistic, and religious communities and between them and the state (compare this situation to the earlier simpler situations in which the constitutions' main,

almost exclusive, concern was with moderating the relationship between the state and the citizen). In this respect, the new types of constitutions are not merely about designing and building the state, but also about the more complicated task of nation building. An equally difficult task that new constitutions assume is that of fundamentally reforming social relationships and institutions—something that research shows is extraordinarily hard to achieve through law (as, for example, was the case in India, where the constitution was intended to reform society and bring about greater social justice).

The agendas that inform the nature of the newer constitutions are extremely hard to implement, and key aspects of the agendas may run counter to the interests of the wealthy and the elite, who, not yet sufficient in number and divided along ethnic lines, may not able to resist the people-driven provisions in constitution-making processes; the elite are, however, frequently able to resist the implementation of such provisions. Today's democratic models of constitution making may render the product an imposition of the ruled on the rulers (but without the ability among the ruled to effectuate it)—so much of the struggle is to constrain and control rulers rather than to give them the capacity to rule. The accommodation of numerous identity interests also means that the community can become fragmented and social coalitions for joint action on implementation may be hard to sustain.

The Interim Constitution of Nepal bears a strong resemblance to the new constitutions that have been described above. Nepal's Interim Constitution is committed to fundamental social reform (especially as regards the inclusion of women, *Janajatis*, and Dalits). It is inspired by a new vision and identity for Nepal. It is committing Nepal to political and economic values and goals (especially those of equality and social justice) that are fundamentally at odds with the country's traditional structures and relationships. And since the relationship between the Maoists and other political groups remains unsettled, as do the ideological differences between them, it is likely that when the Constituent Assembly starts working on the new constitution, the process might be marked by divisiveness. The Constituent Assembly faces the fundamental challenge of ensuring that the new constitution can be implemented, enforced, and safeguarded.

Threats to the Constitution

A constitution needs to be safeguarded against these chief threats: neutralization of the values of the constitution, imperfect or incomplete implementation of the constitution, the occasional or systematic disregard of some of its provisions, selective implementation of its provisions, and the abuse of powers given under the constitution (for example, the denying of separation of powers or the independence of institutions, including the judiciary)

Threats to the constitution are inherent in circumstances that require the strengthening of the powers and capacity of the state. People have high expectations of the state as an agent for social and economic development and as a solver of society's problems.

But this sense of dependence is also accompanied by a deep suspicion of those who manage the affairs of the state—the politicians and civil servants—who are widely regarded as self-serving and corrupt. Thus there could be attempts to restrict the purposes and modes for the exercise of state power and to impose high standards for the conduct and accountability of those who wield state power. At the same time, the state is the terrain of internal struggle and conflict, while externally, there are economic and political forces against which the constitution can provide limited resistance.

A major threat to the integrity of the constitution is corruption. Powerful interests within or external to the country that are not sympathetic to the objectives of the constitution or that wish to buy illegitimate influence may use corrupt means to sabotage the constitution. Corruption leads to the subversion of both the values and institutions of the constitution—one of the surest ways to weaken them, for example, is through the financial or political corruption of the judiciary.

Another major obstacle to achieving progressive social reforms and changes through the use of the constitution is the force and resilience of social traditions, ideologies, and institutions. Among other consequences, the force of tradition can make the disadvantaged fearful of using constitutional remedies because they might not want to provoke political, economic or social retribution from the powerful.

The wide-ranging ambitions expressed in modern constitutions (particularly as they affect class or ethnic interests and identity, such as affirmative action and social and economic rights) may make the constitution controversial and divisive, and may prevent it from becoming an unquestioned point of loyalty and focus.

The viability and success of a constitution is premised on the ideology of constitutionalism, a belief in the value of restrictions on power—expressed as substantive and institutional limitations—and the practice of the rule of law, with the emphasis on rules and the modes of their enforcement. These ideologies reflect and spring from political and cultural traditions. Paradoxically, countries that try to use the constitution for social transformation often lack these traditions. This situation may be aggravated if those who will benefit from the provisions of the constitution being respected and enforced lack the knowledge of the role and content of the constitution. These factors can only allow those who are dissatisfied with the constitution for one or another reason to seek solutions outside the constitutional framework. The military or political insurgents, for example, often use this approach, and Nepal has also had to deal with the monarchy and the Maoists using this approach. Sometimes the constitution can be delegitimized by its adherents, as political parties in Nepal are alleged to have done to the 1990 Constitution, thus opening challenges to the constitution from its detractors. And finally, delegitimization, it is said, can come from the very ambitiousness of a constitution, when it raises hopes that cannot be satisfied, thus exposing the constitution's ineffectiveness.

How to Safeguard the Constitution?

Compared to the attention that is now being paid to the process of making the constitution, relatively little thought has been given to how to implement and safeguard it. The issues of implementing and safeguarding a constitution were not of much concern in the older constitutions. In the older constitutions, it was assumed that the real protection of the people and their rights lay in the political processes stipulated by the constitution—the executive would be scrutinized by the legislature, and in the common-law world, the constitutional jurisdiction of the courts could be used as a check. But in the recent, more ambitious constitutions, which are difficult to safeguard and enforce, most of the attention has been focused on ways to make the constitution effective.

Two dimensions are noticeable in modern approaches to ensuring enforcement and protection of a constitution. One is to insert mechanisms into the constitution itself ('internal'); the second is to secure support from outside the constitution, in civil society and other sites of influence and power ('external'). We'll take a brief look at each of these dimensions before elaborating on them further with the help of comparative experiences.

Contemporary constitutions, characterized by extreme distrust of politicians and bureaucrats, normally provide some institutional rules to encourage the spirit of the constitution. And in a paradoxical way, the constitution is devoted in substantial measure to neutralizing politicians, regulating their conduct, and removing certain critical and sensitive powers and functions from them. The powers of state institutions are prescribed with great precision; the purposes for which powers may be exercised are specified; and rules are established to remove conflicts of interests, through codes of conduct and other mechanisms. Collective rights supplement individual rights; and it is likely that there would be greater resort to using enforcement mechanisms in respect of collective rights. A number of politically neutral, independent institutions are set up to exercise sensitive functions, insulating them from political influences and manipulation (see below). Certain responsibilities (for which the government may not have much appetite) are given to independent commissions: human rights, in general, and those of vulnerable communities, in particular; protection of the environment; prevention and control of corruption. There is a greater concern with enforceability: remedies are formulated, non-judicial bodies such as ombudsmen with enforcement powers supplement the judiciary, and easier access to them and to the courts is provided.

As for the external dimension, some constitutions are made with international participation, and there are explicit or implicit understandings that the international community would guarantee the constitution's integrity. Elections, regarded as central to the democratic operation of the constitution, are monitored and occasionally supervised by external actors. The international community takes a dim view of constitutional

coups and is prepared to impose sanctions or mediate a way back to legality. As has already been noted, the international agencies encourage participatory ways of making constitutions, to make people aware of democratic values and procedures, and to facilitate the people's participation in public affairs and in the enforcement of the constitutional remedies. Some constitutions recognize the role of civil society, to supplement others' efforts at public education, advocacy and enforcement, and social reform, without which many provisions of the constitution may remain dormant. And rules about the practices used by political parties are adopted to lay the foundations of democracy in the wider society.

Internal Devices for Implementing and Safeguarding the Constitution

Supremacy of the Constitution

Constitutions usually proclaim their own supremacy, that is, the rule that the constitution is superior to all other laws, and laws are invalid if they conflict with the constitution. The typical way to express this principle is as was done in the Interim Constitution (Art. 1):

(1) This Constitution is the fundamental law of Nepal. All laws inconsistent with this Constitution shall, to the extent of such inconsistency, be void.

(2) It is the duty of every person to uphold this Constitution.

Sometimes the formulation is broader, to indicate that all institutions of the state, as well as all persons, are bound by the principles of the constitution. For example, the Ghanaian Constitution, in respect of the bill of rights, states:

> The fundamental human rights and freedoms enshrined in this chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all other organs of government and its agencies and, where applicable to them, by all natural and legal persons in Ghana, and shall be enforceable by the Courts (Sec. 12(1)).

Protecting the Constitution against a Coup

A constitution cannot do much to protect itself against its overthrow: several Nigerian constitutions, for example, made illegal the overthrow of the government or the constitution, but this provision could not prevent the constitutions from being overthrown. The constitutions of today try to deal with the role of security forces (which pose the greatest threat of a coup), and seek to subordinate the armed forces and police to civilian authorities (but even this measure may not prove effective if the armed forces are determined to overthrow the government).

Some protection against an overthrow of the constitution lie in (a) popular support

for the constitution and its legitimacy, which may be strengthened by the constitution's effectiveness and from the people's being knowledgeable about the constitution; and (b) external support for the constitution in the form of sanctions, as discussed above.

Protecting the Constitution against Hasty or Retrogressive Amendments

Sometimes a constitution made with wide participation or after elaborate negotiations between key actors can be changed fundamentally, often speedily (as with the independence constitution of Kenya, which was transformed within a year from a parliamentary to a strong presidential system and from a quasi-federal to a highly unitary state). Today, constitution makers pay particular attention to the process for amending the constitution (especially where the legislature is unicameral), partly because some recent constitutions have been compacts between ethnic communities, rather than merely the product of a specified, general majority (as in Bosnia-Herzegovina—this is somewhat analogous to the normal rules on amendment in a federation where all states are involved, as the federation is regarded as a compact).

The following are some aspects of the provisions for making amendments that the Constituent Assembly in Nepal may wish to consider:

- Should some principles or provisions be made unalterable? Some constitutions do this (for example, in Germany and Switzerland), and in India, the Supreme Court has established the doctrine that the basic features of the constitution cannot be amended (republicanism, secularism, federalism, and human rights).
- Should all provisions be amended through the same process? The amendment process should reflect the fact that not all provisions are of the same importance. Many constitutions provide for different methods for amending different provisions (such as in Canada).
- Should there be a specified period between the introduction of the bill for the amendment and its passage at the final reading, to allow time for discussion and reflection? Some constitutions provide that the introduction and final vote should be held at separate sessions of the legislature, spread over a fixed period. Others are more stringent and say that the legislature should be dissolved after the introduction of amendment proposals, and the final vote be taken by the new legislature.
- Should there be a period of time after the adoption of the constitution during which no amendment can be introduced? (East Timor has a 10-year moratorium). During this period, people can build knowledge of the constitution, and the government and others can begin the serious attempt of implementing it.
- Or should the constitution require periodical reviews to consider the need for

amendment? There was such a provision in the 1990 Fiji Constitution that was imposed after the military coup, which led to a thorough review of and a more democratic constitution seven years later. The Portuguese Constitution envisages reviews every five years.

- Should bodies other than the legislature have a role in amending the constitution? This approach would be consistent with the view that constitution making is a participatory process.
- Specifically, should a commission be set up to collect public views (as is often done before a constitution is made)?
- What should be the voting requirement for amendments?
- Should there be a referendum? If so, what kind of a referendum? It has been argued that the referendum (which has a majoritarian bias) is unsuitable for multi-ethnic states.

Limiting Emergency Powers

Emergency powers can often be abused: the declaration of emergency can be a disguised form of coup (see the chapter on security). In emergencies, the executive gets extensive powers of law-making and is able to suspend or place restrictions on human rights, which would otherwise not be permitted. Today, under the pretext of fighting 'terrorism,' much ordinary legislation (not requiring a declaration of emergency) has been passed in numerous countries, which derogates seriously from basic human rights.

It is not possible to dispense with emergency powers altogether, for there can be occasions (whether as a result of natural calamities or insurgencies) when special powers become necessary. But it is important to clearly state in the constitution the rules governing the declaration of emergencies and the use of special powers. The abuse of powers can be minimized in the following ways: by prescribing the only reasons for which an emergency can be declared; by requiring parliamentary approval within a short period of the declaration of the emergency, and for renewals (perhaps with escalating majorities), power in parliament to end the emergency; by prohibiting derogations from specified rights; and by providing courts or other independent institutions access to review the use of powers and appropriate remedies.

Judicial Review and Enforceability

In common law countries (including Nepal), final decisions on the interpretation of the constitution are made by the judiciary. In civil law countries, interpretation was left to the legislature. However, now most civil law countries have a constitutional court or council that reviews legislation for compatibility with the constitution (China being the big exception). Judicial review is considered essential for maintaining the integrity of the

constitution and as an essential aspect of the separation of powers. Judicial review also helps to expound and develop the constitution (and removes the necessity of frequent amendments, as the US experience shows). The enforceability of the constitution facilitates the growth of constitutionalism and the rule of law. The authoritative status of the courts enables judges to resolve critical political and social disputes and helps to maintain peace and order in society. Through the way judgments are written, courts can play an important role in educating people about the importance of human rights and constitutionalism and the balancing of different values. For this to happen, it is essential that the courts enjoy legitimacy and the respect of the people, which comes from judges being free, independent, and competent. These matters have been dealt with in greater detail in the chapter on the judiciary.

Non-judicial Redress

As access to courts can be difficult for many individuals and communities because they lack knowledge or resources, and since judicial reviews take a long time, many constitutions provide a role for special bodies to receive complaints from the public about maladministration or violations of rights. Some bodies have the power to investigate and report, some can bring prosecutions, while others may by themselves be able to give a remedy, for example in the form of compensation (as the Human Rights Commission can in Nepal). One of the oldest bodies of this kind is the auditor general, who examines the accounts of the government and other state agencies and assists the legislature in its scrutiny of the government. The best known of these bodies is perhaps the ombudsman, known in some countries by a different name (in Nepal the Commission for the Investigation of Abuse of Authority fulfils that role, and in Uganda, the Government Inspectorate). In many countries, the Human Rights Commission also performs this role. In several countries, there is a special body to receive and deal with complaints against the police (whose conduct is notoriously hard to regulate, monitor or control). Of growing importance are bodies to fight corruption, whose functions include setting standards for the conduct of state officials, and investigating and making recommendations for prosecution or recovery of corrupt gains (the Commission for the Investigation of Abuse of Authority, institutionalized in the 1990 Constitution and carried forward in the Interim Constitution, is mainly an anti-corruption body).

Nepal has considerable experience with this type of body (as well as with ad hoc commissions and enquiries). Their record is, however, uneven (in considerable part because of the lack of the commitment of the government—a problem not restricted to Nepal). These bodies work well if they are independent and have enough technical and financial resources. For them to be independent, it is important to ensure that appointments to these bodies are made impartially, that nominees are chosen on the basis of their qualifications, that members cannot be dismissed arbitrarily, and that no political or other pressure is imposed on the members in the discharge of their

functions. It is best that these bodies receive their funds directly from the legislature, not through government departments.

Neutralizing Sensitive Responsibilities and Tasks

Many constitutions now try to insulate from political influence the exercise of certain kinds of state power that have a major impact on the fair operation of the political and administrative system, such as prosecutorial functions and the enforcement of law, the recruitment of civil servants, appointment of independent bodies or offices concerned with the scrutiny of the government, currency policies, and the conducting of elections. Insulation is achieved by giving these powers to independent institutions and commissions. The 1990 Constitution introduced some of these institutions and commissions in Nepal (which have now been incorporated in the Interim Constitution)—Constitutional Council, Judicial Council, Public Service Commission, the Election Commission, and the Election Constituency Delimitation Commission. These institutions and the functions they perform are now well accepted in Nepal. However, their prosecutorial functions were not made independent in the Interim Constitution.

Establishing Conditions for Rule of Law

The rule of law is a complex concept, but, put simply, it means that the affairs of the state and its relations with the people are conducted strictly in accordance with the law, especially the constitution. The law itself must be fair and respect fundamental human rights. It is up to the courts, not the executive, to determine the validity and the meaning of the law. All state authority must be founded on the law. The law must bind all, including the government, and all citizens must receive equal treatment before the law. No one is above the law. The law must be administered impartially, without fear or favour. An important function of the rule of law is to limit the powers of the state and to protect citizens and communities against the arbitrary acts of the state or other forces.

Particularly important to the rule of law is a strong, effective and independent legal system. It requires a strong and competent legal profession. In order to enable people to seek the help of courts to enforce their rights, legal aid should be provided to the needy. An effective legal system requires that the attorney general, who is head of the system and the chief legal adviser to the government, be independent. It also requires an independent system of prosecutions. Unfortunately, this is not the case in Nepal, as prosecutions are under the attorney general, who has no security of tenure.

A major deficiency in Nepal is its weak legal system and the inability or unwillingness of the government to enforce the law to protect the rights of the people. Powerfully placed individuals, including politicians, are allowed to conduct illegal activities with impunity. Corruption within the different branches of the legal system further weakens

the protection of the law. State and private authorities will have to make major efforts to strengthen the rule of law, for without the rule of law, the constitution means little.

Constitution Implementation Commission

The experience of the 1990 Constitution (and of numerous other countries) is that governments implement only those provisions that they like, and that civil society is too weak or unqualified to do much about it. The failure to implement the constitution fully can also arise from the lack of expertise or resources. To make up for the lack of political will or the scarcity of resources, an independent commission, with considerable resources, could be established for a period of 10 years or so to ensure full implementation of the constitution. This chapter has already indicated how much new legislation (and the repealing of old laws) and the establishing of new institutions are needed to give effect to the ambitions of contemporary constitutions. The commission would have the responsibility, in conjunction with the government and civil society, to review the old and prepare the new legislation, ensure the transfer of powers to regions (in the case of federalism or decentralization), and facilitate the establishment of new institutions. The commission would also promote knowledge of the constitution and facilitate the participation of communities and NGOs in public affairs. The commission could report periodically to the nation through the legislature on progress and bring to the legislature's attention obstacles preventing full and effective implementation of the constitution.

Protecting the Constitution from the Outside

People as Guardians

This chapter has already given an indication of how external forces can assist in enhancing the legitimacy of the constitution and fostering respect for it. Here we consider one major source of support—the people themselves. Ultimately, the people have to be the guardians of the constitution. A major problem in many countries that are trying to introduce or strengthen democracy is that they focus almost exclusively on restructuring state institutions, including adopting separation of powers, re-distributing powers, and incorporating bills of rights. Little effort is made to educate the people on the values and practices of democracy or to disseminate information about the role and contents of the constitution. A democracy can develop only if people understand the values of their rights and learn how to use them to pursue their interests, within the framework of the law. When electing their representatives, the people must learn to make informed decisions based on policies and the record of candidates—the power of the vote is often greatly underestimated. They must understand how to hold public authorities accountable, and they must not be afraid to do so. They must take responsibility for the promotion of democracy and rights. They must seize opportunities to become involved in the conduct of public affairs. They can also act as agents of accountability in the

following ways:

- by providing alternative budgets or analyses of draft state budgets;
- by publishing annual assessments of the record of government and corporations on human rights, social justice, environment and natural resource policies, and so on;
- by providing alternative reports to regional and international human rights supervising bodies on the national record;
- by undertaking constitutional litigation to prevent the state or private interests from breaching the constitution or law.

Since individuals work together with others, the role that civil society and non-governmental organizations can play is sometimes recognized and protected in the constitution, such as in the Philippines, where the constitution says:

> The State shall respect the role of independent people's organizations to enable the people to pursue and protect within the democratic framework their legitimate and collective interests and aspirations through peaceful and lawful means.
>
> People's associations are bona fide associations of citizens with demonstrated capacity to promote the public interest and with identifiable leadership, membership and structure (Artical XIII (Sec. 15)).

Conclusion

Implementing a constitution is not merely about this or that provision, or even the totality of the constitution, important as these are. It is about the inculcation of a culture of respect for and discipline by the law, acceptance of rulings by the courts and other bodies authorized to interpret the law, giving effect to judicial decisions, acceptance of the limits on the government, respecting and promoting human and collective rights, the participation and empowering of the people, and bringing about new understandings of authority. It is also about the reform of society. Much oppression takes place in society, such as the oppression of Dalits and the subordination of women, and constitutions and state agencies can only do so much about these issues.

Both the Indian and Nepali experiences show the limits of the abolition through law of untouchability and the removal of prejudices and practices against Dalits. The ambitious agenda of social reform in the Interim Constitution (and presumably in the new constitution) will require leaders with the vision to see that the New Nepal requires major social and economic transformation and the courage to bring this about.

About the Contributors

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About International IDEA

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The International Institute for Democracy and Electoral Assistance—International IDEA—is an intergovernmental organization that supports sustainable democracy worldwide. Its objective is to strengthen democratic institutions and processes.

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International IDEA acts as a catalyst for democracy building by providing knowledge resources and policy proposals or by supporting democratic reforms in response to specific national requests. It works together with policy makers, governments, UN agencies, and regional organizations engaged in the field of democracy building.

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After *Jana Andolan* II, there have been many debates on the forms of a new Nepali constitution. So *Creating the New Constitution: A Guide for Nepali Citizens* comes on the heels of a lot of rich discussion on and research into contemporary issues that Nepali constitutional experts have had to grapple with. But still the book offers further insights into the issues.

The book presents a brief history of past constitutions in Nepal from the perspective of constitution making. It includes a somewhat more detailed examination of the substance of the 1990 Constitution, analyzing its strengths and weaknesses, in the expectation that this will help readers better understand the current issues and debates. It identifies some proposals and controversies surrounding political reform. It also provides references to the experiences of other countries that are worth considering.

The Constituent Assembly members, who have been entrusted with the task of writing a new constitution, should find the book very useful. So should civil society members, constitutional lawyers, media people, who have been debating over the visions that the new constitution will both encapsulate and fulfil.

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