

Nepal

Constitutional reform: peace, power and representation

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After the 10-year “people’s war” and another six years of tough transition, Nepal’s peace and constitution-making processes are at a difficult crossroads. The dissolution of the first Constituent Assembly (CA) in 2012, with no new constitution agreed, reflected the scale of the challenge of post-war political transition in Nepal. As Nepal re-launched its constitutional process in November 2013, a second CA needs to learn the lessons of its precursor’s failure and engage political leaders, embrace civil society dialogue and overcome political differences in order to reach consensus on key issues such as federalism.

Peace process and constitutional review

The Communist Party of Nepal (Maoist) (CPN-M) took up arms against the state in 1996, challenging a political system it accused of being feudal and failing to serve the needs of the people. Before it declared war, the CPN-M had submitted a 40-point list of demands. Among them were that a new constitution be drafted by “people’s elected representatives” to abolish the special privileges of the king and the royal family, and that the army, the police and the bureaucracy be brought under democratic control.

The list also included a call for the removal of discriminatory legislature, including relating to the 1950 Nepal–India treaty, which contained measures related to supporting the “public and its well-being” and “people’s lives”. The Maoists further called for a secular state (rejecting its existing Hindu identity), the end of discrimination against women and of all class exploitation and prejudice – including the Hindu system of “untouchability” – and the formation of autonomous governments in areas where ethnic communities were in the majority.

The Maoists’ social reform agenda and armed insurrection techniques initially attracted support from many poorer people in the outlying hills and mountainous areas. The government soon realised that the Maoist uprising was much more than a law and order problem. The

mysterious assassination of King Birendra and his family in 2001 helped to fuel fighting between the state and the Maoist insurgency. The existing constitution and parliamentary institutions came under increasing stress, and neither national nor local elections could be held. The parliamentary parties generally sided with the state, despite their differences with the king. The war cost the lives of approximately 15,000 people, with many more displaced, and led to serious human rights violations and abuses.

In 2005 the Maoists were able to strike a deal with the major political parties to jointly challenge the monarchy. The new king Gyanendra, crowned in 2001, had alienated mainstream political parties by using the war as a pretext for his oppressive handling of them. The deal followed a three-month unilateral ceasefire declared by the Maoists as a way to reach out to political parties, and included a 12-point Understanding which required the dismantling of the “autocratic” and “illegitimate” rule of the monarchy and called for elections to establish a CA to draft a new constitution.

The parties and the Maoists agreed to pursue democracy as a way to restore peace. It was to be based on a forward-looking restructuring of the state that would respond to grievances related to class, caste and gender, as well as to other political, economic, social and cultural challenges.



Nepalese political leaders from 22 parties join hands during a protest demanding the resignation of Prime Minister Baburam Bhattarai in Kathmandu on 8 June 2012. © Prakash Mathema/AFP/Gettyimages

The parties were prepared to dismantle the monarchy and abandon the parliamentary constitution of 1990 if the Maoists agreed to give up arms and join the democratic political mainstream. The Maoists wanted to show that the protracted “people’s war” had been a success, while the parties wanted an end to violence and resumption of a democratic process.

The Comprehensive Peace Accord (CPA), signed by the government and the Maoist leader Prachanda on 21 November 2006, formally ended the armed conflict, enabling the Maoists to take part in government and placing their weapons under UN supervision. It required Maoist fighters to be put in temporary cantonments and the scrapping of the Maoists’ parallel administration. The king was stripped of political powers and his properties were nationalised under public trusts. The CPA also formed a national peace and rehabilitation commission, a truth commission, and a high-level commission for state restructuring.

In 2007 the Interim Constitution was promulgated and, after some delay, the CA was elected in April 2008. The Interim Constitution was drafted by a commission on which the Maoists and other political parties were represented, led by a former Supreme Court judge. Royalists, though, were excluded and the monarchy was subsequently abolished. The CA, which also served as Nepal’s parliament, was given a two-year term under the Interim Constitution.

After several extensions to the CA’s term, the Supreme Court eventually refused to prolong it beyond May 2012

on the grounds that its parties and the representatives needed a fresh mandate from the people. So, following four years of deliberation, the CA was dissolved on 28 April 2012 without adopting a new constitution or establishing a mechanism to move on from the prevailing impasse.

Constituent Assembly I: why it failed

Along with the existing major political parties, the CA election brought in the Maoist and new Madhesi parties. A number of parties supported constitutional and parliamentary democracy, including the Nepali Congress (NC), the oldest Nepali party, and the CPN (Unified Marxist-Leninist – UML). The Madhesi parties, drawn from different existing parties and political groups, were also broadly democratic. The CPN-M, the largest party in the CA, remained avowedly Maoist.

Politics

The Interim Constitution required the establishment of Nepal as a republic, the progressive restructuring of the state, and an end to discrimination. But these ambitions were increasingly superseded by politicking among three broad, primarily ethnically organised groups: Bahun-Chhetris (high caste hill communities), Janajatis (smaller ethnic groups) and Madhesis (the people of the plains along the Indian border). The first group came to be identified as establishment, and the other two as opposition. Many parties had predominantly internal and often contradictory agendas, and disagreed on the contents of the constitution.

There were many reasons behind the failure to draft a constitution. Four different coalitions and alliances led

the country during the CA's four years. All the major parties, including the Maoists, prioritised their own supremacy. There was lack of trust between Maoists and non-Maoists about the change agenda, underpinned by radical differences of vision. The major parties disagreed fundamentally on the system of government: a parliamentary system, a presidential system or a mixed system. All parties wanted a representative parliament, but differed on the electoral system and allocation of seats – first-past-the-post or closed-list proportional representation.

The Maoists accused mainstream parliamentary parties of remaining essentially feudal and of being unprepared for the radical change required to address grievances that they said underpinned the war. Non-Maoists saw the Maoists as inherently undemocratic. The Maoist model envisioned a government that included all parties with more than five per cent of seats, led by a directly elected president but leaving little space for opposition. The Maoists' concept of property rights and popular sovereignty did not tally with modern principles of human rights and the rule of law, while they also believed in parliamentary sovereignty over the constitution and that the judiciary should be governed by parliamentary majority. An additional challenge to progress was the growth of intense internal disagreements between Prime Minister Baburam Bhattarai, who led the country during the last leg of the CA, and senior colleagues and other influential members of his party.

Throughout the CA period, efforts to form a national consensus government to support constitution-making and lead the peace process, including the reintegration of Maoist combatants, failed. Neither did underlying threat of a Maoist split help the cause of transition. Meanwhile, deteriorating law and order caused by strikes and closures over political issues continued even after the start of the CA. Underground armed outfits started to proliferate in the southern plains, many of them based outside Nepal's borders.

Federalism

The extent and precise nature of federalism that the new constitution would provide was a key issue. The United People's Front, a leftist party on the margins, opposed moves towards the division of Nepal along federal lines. The National Democratic Party came out openly in favour of the restoration of the monarchy within a parliamentary framework. The Maoist and Madhesi parties, the two major new groups who had relatively common objectives on federalism, ethnic autonomy and devolution of power, allied against other parties, particularly the NC and CPN (UML) – the largest mainstream parliamentary parties.

Indigenous people pressed for identity-based restructuring through federalisation along ethnic lines. This implied allocating territory for major indigenous groups like the Magar, Gurung, Tamang, Kirant and Limbu. The Maoists in particular were committed to ethnic federalism because they believed these communities had suffered the most in the state formation process. The Bahun-Chhetris (also commonly known as the Khas community) vehemently refused ethnic division, even though they accepted federalisation, and there was intense debate about who was indigenous in Nepal and who was not. The indigenous people, Madhesis, Dalits and women of all parties formed their own advocacy caucuses, formal and informal, demanding increased representation and affirmative action.

In such a climate of ethnic tension, all political parties, even the major ones, struggled to maintain a national outlook and a stance supportive of democracy. This encouraged intra-party squabbles and delays in calling and setting the agenda for CA meetings. The first president of the new Nepalese republic, Dr Ram Baran Yadav, elected in 2008, put intense pressure on the prime minister and political parties to agree a constitution, but ethnic polarisation undermined the chances of reaching the required two-thirds majority in the assembly. Snowballing differences between political parties meant that reconciliation efforts by some of the major parties, such as the Maoists, Nepali Congress, CPN (UML), and Madhesi parties, also failed.

Power and inclusiveness

Although the CA was an inclusive body, ensuring diversity and ethnic representation, political leaders were unable to get the best out of it and craft a workable constitution. The CA process, as set out in the CA rules, was under-used. The thematic committee system was not efficient. There was not enough discussion on constitutional forms, norms, standards and procedures, and little effort to go beyond partisan approaches.

Senior party leaders were hardly involved during committee-level discussions. Senior party members were barely even aware of many choices made at committee level by CA backbenchers. The thematic committees could have managed the widening gulf between different parties if senior leaders had participated, but senior leaders prioritised political exigencies, especially making and unmaking governments, over delivering a new constitution.

Civil society was also divided along political and ethnic lines. Civil groups were not able to speak independently and thus help political parties to forge a consensus on contentious issues. The dominant Bahun-Chhetri communities did not reach out to deprived and marginalised groups. New socio-political forces,

notably Janajati (indigenous) groups, Madhesis and Dalits, were increasingly radicalised because their reasonable demands for inclusion, affirmative action and support were overlooked.

The CA could have been successful had the Maoists been more sympathetic to constitutionalism and the rule of law. The Maoist dialogue on federalism over-emphasised autonomy and self-determination at the expense of balancing self-rule against shared rule. The Maoists' commitment to ethnic autonomy was difficult to reconcile with the requirements of a modern federal state. However, none of the parties, revolutionary or conservative, had done enough homework on what type of reform they wanted. The people's war was not, in the end, a war with clear parameters for constitutional democracy.

These dynamics played out in a regional context of the evolving relationship between India and China, Nepal's immediate neighbours. Each considers Nepal to be in its security "backyard" – close to New Delhi in India, and bordering with Tibet in China – and strategically significant.

Constituent Assembly II: looking forward

Elections for a second Constituent Assembly (CA II) held in November 2013 were contested by 122 parties – up from 56 that contest the previous elections – and saw the CPN-M, the largest party in the first assembly, relegated to third place.

In March 2013 President Yadav had appointed Supreme Court Chief Justice Khil Raj Regmi as chair (effectively prime minister) of a new interim government tasked with holding the elections. The Chief Justice was selected because the major political parties were unable to agree a leader for this critical phase. But this raised concerns over the blurring of lines between the judiciary and the executive. And while the president has the power to issue orders to facilitate implementation of the constitution, there was at the time no accountable government or parliament to endorse his decision, and such a development is not provided for in the Interim Constitution.

The Chief Justice traditionally leads the judiciary and presides over the Supreme Court, taking on administrative responsibilities for it. He is chair of the Judicial Council, which recommends the appointment of judges, and is the principal point of contact between the executive and the judiciary. But for the Chief Justice to lead the government is unprecedented and there has been pressure on Regmi to resign – for example a splinter group of CPN-M made it a condition of taking part in the elections.

It is not clear that the newly elected CA will learn the lessons of the past and successfully deliver a new constitution for Nepal. There has been little real change in the leadership of political parties. Some new parties have emerged on the fringes, but these are essentially ambitious splinter groups rather than parties deeply committed to long-held values.

The focus on elections has meant that not enough has been done in the interim to resolve contentious constitutional issues like ethnic federalisation, for example through increased dialogue between the political parties and intensified civil society involvement. Opportunities to discuss the number of provinces, identity issues and the establishment of self-governance structures for smaller ethnic groups were missed.

It is entirely possible that the same challenges that sunk the first CA will reappear unchanged. The new CA and civil society will have to work hard and harmoniously to ensure that there is national reconciliation and that essential reforms are not subjugated by politics.

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