

CHAPTER II

DEMOCRACY, DOMINATION AND EXCLUSIONARY CONSTITUTIONAL ENGINEERING PROCESS IN NEPAL, 1990

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INTRODUCTION

The indigenous nationalities (adibasi janajati¹), dalit ('untouchables'), and madhesi (plain people), who collectively form more than two third of the population, and women were highly excluded from governance in Nepal during its second democratic experience from 1990-2002. The men of caste hill Hindu elite (CHHE) dominated most influential realms of governance. For instance, the CHHE along with Newar, an indigenous group doing fairly well in accessing resources but facing cultural discrimination,² constituted 36.37 percent of the population in 2001 but occupied more than 80 percent of positions in the executive, Parliament, judiciary and the top civil administration in 1999 (Lawoti 2002; Neupane 2000).

Lately, especially after the King's dismissal of elected government in 2002, the political exclusion is being recognized as a problem in political circle as well.³ Attention on the issue had increased in the society earlier with the spread of the Maoist insurgency countrywide and high participation of some of the excluded groups in it. Increasingly, the majoritarian political institutions adopted by the Constitution have been identified as a major cause of the political exclusion. They failed to share power among different groups in a multicultural society. The

unitary state's failure to provide autonomy to various groups, the first past the post (FPTP) electoral method's bias toward larger political parties dominated by CHHE, and discriminatory constitutional articles have contributed in the political exclusion of various socio-culturally marginalized groups (Bhattachan 1999; Lawoti 2005; Neupane 2000). In this context, the question is why and how did a democratic Constitution, despite introducing a number of remarkable reforms like freedom of speech and association, ended up adopting exclusionary institutions? This is the question this chapter attempts to answer.

The constitutional questions have gained importance in Nepal as a new Constitution is being planned to address the Maoist insurgency and the political exclusion. An analysis of exclusionary constitutional engineering process may help prevent repetition of such processes in Nepal and other emerging multicultural democracies.

DIVERSITY, CONSTITUTIONALISM, AND DOMINATION

Nepal's cultural diversity emanates from various races, several religions, numerous national/ethnic/caste groups, around 100 languages, and regional-cultures. In terms of mobilization and self identification, they can be broadly divided into four major identity groups. The indigenous nationalities consist of more than 60 Tibeto-Burman linguistic groups from mountains, hills, and the Tarai. The dalit mostly consists of hill and Tarai dalit. Madhesi consist of Tarai Hindu caste groups, Muslims, and indigenous nationalities.⁴ The CHHE, consisting of Bahun, Chettri, Thakuri, and Sanyasi, have dominated Nepal since its conquest in 1769. Though a numeric minority, the CHHE has effectively excluded other social-cultural groups from the state apparatus. Gender inequality is also rampant across the country.

Most of the excluded groups are economically deprived as well.⁵ Some of the 'upper caste' madhesi are well off economically but they also face political exclusion and socio-cultural

discrimination. Overall class and identity often coincide in Nepal, potentially an explosive mix if not handled carefully. The focus of this article is the exclusion of identity groups from the constitutional engineering process without denying the importance of class aspect.

The 1990 Constitution in Nepal is the fifth in half a century. Dissatisfaction among successive generations over the Constitutions caused the high turnover. All of them were mostly designed to protect the interests of the rulers. I will show that the 1990 Constitution also fails to extend political and socio-cultural equality to marginalized groups. The power realm and political space was broadened but mostly accommodated more actors of the traditional elite groups in it.

This paper distinguishes between discriminatory provisions in the Constitution and discrimination that occur in practice despite ideal constitutional provisions and focuses only in the former. Some of the constitutional articles espouse equality to all Nepali citizens, but discriminatory articles have been inserted in other places that constrain the marginalized socio-cultural groups in various ways. The Constitution has contributed to four types of discrimination. First, banning ethnic parties and citizenship based on father's lineage only are some examples of explicit discrimination. Second, the lack of equal recognition of differences among cultural groups and adoption of dominant values and norms by the Constitution are examples of implicit discrimination by privileging the dominant group. Third, the Constitution does not protect substantive minority rights. Finally, the Constitution has adopted majoritarian state structures, as discussed before, that favor the dominant group (Lawoti 2005).

The 1990 democratic Constitution is favorable to the CHHE because their domination of the engineering process enabled them to influence its outcome. It ignored the aspirations and

demands of the marginalized groups. Domination of influential political and social institutions by one group has had unequalizing consequences for public policy in Nepal.

Identity movements exploded since 1990 in Nepal. They have demanded group-differentiated rights to address specific problems faced by particular groups. The demands are not for dominating other groups but are a desire to participate in the mainstream society as equal citizens. They are not communal in nature as they aim at furthering integration of excluded groups in the society. Nor are they aimed at imposing their views and values on others or isolate the groups from rest of the society. However, the method of integration they espouse is not through assimilation but in terms of equality and justice among groups.

The social justice movements do not threaten the integration of Nepal. None of the groups have demanded secession. Additionally, the large number of groups and their individual small population also reduces the potential threat. However, the threat could rise if they unite along broader cultural lines due to the continuation of discrimination in common arenas like language and culture. If groups collectively feel that their aspirations are not being met, the alliances may resort to violent activities.

CULTURALLY PLURAL SOCIETIES AND INCLUSIVE POLITIES

Exclusion occurs in plural societies when the dominant group defines the collective identity of the state according to its values and norms (Taylor 1998, 146-147). The state instead of being neutral or relatively autonomous adopts and imparts dominant values through its institutions. The alien dominant values and standards hurt minorities because they have to live with and are judged by values and standards that are not their own. Control or influence of the state by one

group becomes detrimental to other groups because state is a resource and a distributor of resources as well as a set of repressive institutions.

Recognizing that different socio-cultural groups have different values and way of life is essential for overcoming exclusion and domination in plural societies. Equality in plural societies can be achieved not by eliminating group differences but rather by ensuring equality among different groups by attending to the specific situations of particular socio-cultural groups. Absence of group-differentiated rights to marginalized groups facilitates continuation of domination by the traditional elite groups. Since they dominate the state and society, they define and interpret norms and standards and formulate public policies based on their values and priorities. Often times, to promote equality among groups, it is necessary to recognize the disadvantages the minorities face and compensate them in arenas they are disadvantaged (Kymlicka 1995; Young 2000, 1990; Parekh 1994; Mahajan 1998).

Scholars have shown that established plural democracies generally have power sharing political institutions that accommodate various groups. Federalism diffuses power by providing cultural autonomy, strong bicameralism, and constitutional protection of minorities. Consociational democracy is a more comprehensive power sharing arrangement that consists of grand coalition, mutual veto, proportionality, and segmental autonomy and federalism (Lijphart 1977, 1999).

Even though, by and large, Constitutions are idealistic and as a consequence, may not inform about the real world behavior of political actors and institutions, they become obstacles when they lack these ideal provisions. “Constitutions are ‘forms’ that structure and discipline the state’s decision-making processes. They establish how norms are created” (Sartori 1997). Constitutional provisions have provided institutional solutions for incorporating diverse social

groups within polities through the introduction of innovative accommodative structures and provisions, such as vetoes to minority groups in matters that affect them fundamentally, proportional electoral systems, and federalism.

DEMOCRATIC PROCESS FOR ESTABLISHING DEMOCRACY

Tons of scholarships have discussed and debated various aspects of democracy. The earlier classics discussed the emergence of democracy, conditions associated with it, and its advantages over other forms of governance systems. Much of later work has focused on defining and evaluation of democracies. However, no scholar, except Robert Dahl has proposed testable criteria for forming a democratic association (1989; 1998). Dahl argues that for forming democratic associations, either a state or other entities, the process must meet certain democratic requirements. They should be based on and aid in ensuring political equality among members of an association. He has proposed five criteria for making a process democratic: effective participation, voting equality, enlightened understanding, control of agenda, and inclusion of all persons for whom the rules made will become binding. If “any of the requirements are violated, the members will not be politically equal,” since those violated in a particular requirement become disadvantaged in that realm.

Dahl does not specifically discuss these criteria with regards to their applicability in culturally plural societies. Non-western and developing nature of the societies may also call for revising the criteria. Taking these issues into considerations, I will adapt Dahl's democratic criteria, discussed below, to evaluate the constitutional engineering process in Nepal.

I. Effective Participation: Throughout the process of making binding decisions, citizens ought to have an adequate opportunity and an equal opportunity for expressing their preferences as to the final outcome.

Democratic process requires equal opportunities to members for making their preferences known while deciding on matters that will be binding on them. If “some members are given greater opportunities than others for expressing their views, their policies are more likely to prevail.” Effective participation during constitutional engineering process in multicultural societies can occur at two levels. At the general public level, citizens and their associations should have opportunities to express their preferences so that the Constitution engineers hear and heed them. At the decision making level, dialogue and discussions among representatives of different groups and parties are measures of effective participation.

II. Voting Equality: When the moment arrives at which the decision about policy will finally be made, every member must have an equal and effective opportunity to vote, and all votes must be counted as equal.

Voting becomes necessary when issues cannot be settled amicably through discussion and negotiation. However, voting principle need not necessarily follow only the majoritarian principle: in plural societies such a principle may result in the tyranny of the majority(Horowitz 1994). Principles of equal consideration of all ideas and rights of minorities should be combined with majoritarian principles to arrive at just and fair decisions.

III. Enlightened Understanding: Within reasonable limits as to time, each member must have equal and effective opportunities for learning about the relevant policies and their likely consequences.

Enlightened understanding calls for thorough deliberation on all important issues and alternate policies and sufficient time and resources for making inquiries and being informed to enhance members’ ability to participate in the decision-making process. The length and scope of the consultation process, the quality of deliberation through different forums, tolerance and

openness towards differing perspectives, and access to media by all groups in terms of voice, representation, and readership are necessary for enlightened understanding.

IV. Control of the Agenda: The members must have the exclusive opportunity to decide how and, if they choose, what matters are to be placed on the agenda.

If members do not have control over the agenda on which decisions are to be made, then even if the first three criteria are met, they may not be able to discuss and decide on matters that are important to them. Whoever controls the agenda can effectively exclude certain issues by not bringing them up for deliberation and vote. This feature can be judged by inclusion of contested issues in the agenda.

V. Inclusion of Adults: All, or at any rate most, adult permanent residents should have the full rights of citizens implied by the first four criteria.

This criterion becomes very significant in culturally plural societies because even when the first four criteria are met, the process becomes democratic only to those who are included. The democratic process becomes meaningless for those who are excluded. “If you are deprived of an equal voice in the government of a state, the chances are quite high that your interests will not be given the same attention as the interests of those who do have a voice.” (Dahl, 1998, 76). Inclusive criteria in this article will relate to inclusion of socio-cultural groups in the constitutional engineering process. Inclusion is essential because in particular cases only those who experience them can better represent the issues effectively. Exclusion of minorities will deprive representation of minority input, preferences, needs and perspectives and may result into injustice and inequality towards them (Phillips 1996; Guinier 1994). The degree of formal or informal representation of different socio-cultural groups in the Constitution engineering process will determine whether this criterion has been met.

DEMANDS FOR INCLUSION AND THE 1990 CONSTITUTION

Table 3.1 lists the major demands of the marginalized groups and their treatment in the Constitution. Some of the major demands included secularity of the state, linguistic equality, ethnic and regional autonomy and federalism, proportional distribution of resources, fair access to citizenship certificates, gender equality, and an end of caste based discrimination, and reservations for deprived groups.

The debate regarding a secular state evoked intense controversy during the process. Marginalized group activists opposed the declaration of the state as Hindu the most, fearing that other socio-cultural discrimination would spring from it. However, various dominant group organizations and individuals worked for declaring Nepal a Hindu State. One of the palace nominees in the interim cabinet threatened to fast unto death if Nepal was not declared a Hindu state. Hindu organizations like Sanatan Dharma Seva Samiti and the Nepal branch of Vishwa Hindu Parishad (World Hindu Council) also actively lobbied for declaring Nepal a Hindu State (Hutt 1994; Raeper and Hoftun 1992). The King's wish to declare the nation a Hindu monarchical kingdom is understood for it would help legitimize his position. However, the political parties were also responsible for it. A cabinet member who argued for a secular state says that the supreme commander of the movement, Ganeshman Singh, and the then Prime Minister Bhattarai wanted the state to be declared as Hindu.⁶ The Constitution Recommendation Commission (CRC) inserted "Hindu" in the article defining the state. Some CRC members have defended it saying that it was necessary to clarify the position of the King as Hindu. However, the defense is not plausible because article 27(1) clearly fulfills the purpose. It states that the king is a descendent of Prithivi Narayan and "an adherent of Aryan culture and Hindu religion."

Table 3.1: Demands for Inclusion during the Constitutional Engineering Process and the 1990 Constitution

<u>Contested issues</u>	<u>Marginalized groups' claims</u>	<u>Provision in the Constitution</u>
Religion & State	The state should be secular Religious freedom for practice and conversion	Nepal declared a Hindu state Religious conversion banned
Language	Equality of all native languages	Nepali made the only official language
Education	Mother tongue instruction in schools, and the state should preserve different native languages	Nepali made the medium of instruction Mother tongue instruction up to primary school level only
Citizenship	Citizenship laws should guaranty that all citizens are able to acquire citizenship certificates easily	Citizenship through mother's lineage denied Continuation of Panchayat citizenship articles have denied citizenship to more than 3 million adults
Electoral system	Proportional electoral systems	First past the post system
Political	Right to ethnic based parties No restrictions on any sorts of associations	Ethnic parties banned Certain restrictions on associations for maintaining harmony among different groups
Cameral structure	Proportional representation of minority groups in the parliament; powerful Upper House as House of Nationalities	No proportional representation; No House of Nationalities
Regional Autonomy	Federal system of governance	Unitary system of governance
Rights	Group based as well as individual rights	Only individual rights
Cultural equality	Equality between different cultural groups	Hindu culture promoted
Minority protection	Provisions necessary for protecting minorities	No substantive provisions to protect minorities
Untouchability	Tough measures to prohibit it and special policies and programs necessary to eliminate it	Untouchability banned and laws directed to be legislated to make such acts punishable
Reservations	Reservation in education, employment, and decision making bodies necessary	Nominal reservation for women only in the Upper House

As table 3.1 shows, most of the claims of the marginalized groups were ignored by the Constitution while many dominant group favoring provisions were included. Nepal Federation of Indigenous Nationalities (NEFIN) claims that more than 25 Constitution articles discriminate against them. Women and madhesi have also decried of discrimination in the Constitution.⁷

THE POLITICS OF EXCLUSION

Exclusion through Non-representation in the Process

Socio-culturally marginalized groups were excluded in all the three stages of the constitutional engineering process that lasted for nearly six months. First, organizations of marginalized groups had no formal representation in the process. Second, very few leaders involved in the process belonged to the marginalized groups. The three stages and actors involved are summarized in table 3.2.

Table 3.2: Marginalized groups in the three stages of the Constitution engineering process

<u>Stages</u>	<u>Process, actors</u>	<u>Representation of marginalized groups</u>	<u>Time</u>
First stage: Consultation and Drafting	CRC Mandate	No mention of cultural diversity of the country, or the problems of minority groups	3 months
	CRC formation	No formal representation of marginalized groups; weak representation from political forces involved	
Second stage: Revision	Cabinet	No formal representation of marginalized groups; very weak representation from political forces	3 months
	Subcommittee	None	
Final stage: Negotiation & Promulgation	NC & ULF leadership	Very insignificant representation	
	Palace	None	

The exclusionary process began by not mentioning the cultural diversity of the country in the mandate of the CRC. The formation of the CRC further continued the exclusion. The CRC was composed of representatives of the three political forces viz., the Nepali Congress (NC), the

United Left Front (ULF), and the Palace.⁸ The CHHE heavily dominated the composition of the commission with 66.67 percent. Interestingly, all the CHHE's were Bahuns. The three nominees associated with the palace consisted of a Bahun, a Hindu Newar and a madhesi janajati.⁹ The three NC nominees were all Bahuns. The ULF nominated one janajati and two Bahuns. There was neither any woman nor dalit despite the groups' demands.

The exclusion continued when the CRC rejected the major demands of the marginalized groups. The marginalized groups held seminars and public rallies, provided written and verbal suggestions, and lobbied to the CRC and influential political leaders. They proved more competent at presenting their views at this initial stage. In fact, the number of suggestions to the CRC from marginal groups was very substantial. The chairman of the CRC, a male Bahun, showed public dismay at the large number of suggestions dealing with language, religion, and culture (Raeper et al. 1992, Hutt 1994).

The second stage consisted of submitting the draft by the CRC to the cabinet. The CHHE dominated the cabinet in similar proportion as in the CRC (63.64%), interestingly all male Bahuns again.¹⁰ With an additional 'upper caste' Hindu from Tarai and a Newar woman (ULF representative), 'upper caste' Hindus constituted 81.82 % of the cabinet. There was a Buddhist Newar from the NC. The influence of marginalized groups at this stage was further diluted by the formation of a cabinet sub-committee to recommend revisions on the CRC draft. No marginalized group members were included in the subcommittee. It proved detrimental to them. According to an interim cabinet minister, the subcommittee's recommendations were decisive since most of the cabinet members were busy running the day-to-day affairs of the country and did not get drawn into the detailed discussion into the proposed revisions by the subcommittee.

Even the minimal provisions the CRC had provided, such as the reservations for janajati and dalit in the Upper House, amongst others, were eliminated.

Exclusion of marginalized groups became complete in the final stage. Even weak and indirect representation was absent in the negotiation between the palace versus the cabinet and political parties. The King and most of the supreme leaders of political parties belonged to the dominant group. Ganeshman Singh and Bishnu Bahadur Manandhar are Newars but the former was lukewarm toward marginalized groups' issues. Table 3.3 shows the decreasing participation in the three stages. For the socio-cultural groups, the whole Constitution drafting, revising and promulgation process did not meet the criterion of inclusion for a democratic process.

Table 3.3: Marginalized groups in the three stages of the Constitutional Engineering process

<u>Stage I: Composition of the CRC</u>								
	Palace	NC	ULF	Independent	Total	%	% CHHE Domination	Pop %, 1991 ¹¹
CHHE	1	3	2	-	6	66.67	66.67	31.6
Janajati	1	0	1	-	2	22.22		22.2 (9) ¹²
Madhesi	1	0	0	-	1	11.11		30.9 ¹³
Dalit	0	0	0	-	0	0		8.7 (2.8)
Women	0	0	0	-	0	0		50.06
Total	3	3	3	-	9	100		
<u>Stage II a: Composition of the Interim Cabinet</u>								
CHHE	2	2	2	1	7	63.64	81.82 ¹⁴	31.6
Janajati	0	1	0	1	2	18.18		22.2(9)
Madhesi	0	1	0	0	1	9.09		30.9
Dalit	0	0	0	0	0	0		8.7 (2.8)
Women	0	0	1	0	1	9.09		50.06
Total	2	3	3	2	11	100		
<u>Stage II b: Composition of the cabinet subcommittee</u>								
CHHE	1	1	1	0	3	100		31.6
Janajati	0	0	0	0	0	0		22.2(9)
Madhesi	0	0	0	0	0	0		30.9
Dalit	0	0	0	0	0	0		8.7 (2.8)
Women	0	0	0	0	0	0		50.06
Total	1	1	1	0	3	100		
<u>Stage III: Supreme leaders involved in the negotiation of the Constitution</u>								
Affiliation	Leaders			Ethnicity		88.89 ¹⁵		
Palace	King Birendra			CHHE				
Nepali Congress Party	Ganeshman Singh			Newar				
	Krishna Prasad Bhattarai			CHHE				
	Girija Prasad Koirala			CHHE				
United Left Front (Communist)	Madan Bhandari (CPN-ML)			CHHE				
	Manmohan Adhikari (CPN-M)			CHHE				
	Bishnu B. Manandhar (CPN-U)			Newar				

The Lack of Effective Participation

Participation of marginalized group was limited to providing suggestions and not as equal members who could "express their preference as to the final outcome." The CRC's requests for suggestions from public and its travel to different parts of the country were positive steps for enhancing effective participation. However, the consultative process became a façade for

gaining legitimacy to the process rather than incorporating real input from the society, as demonstrated by non incorporation of large number of suggestions of the marginalized groups.

Input from the marginalized groups in the second stage was minimal. The cabinet sought no outside input. Some marginalized group cabinet members supported some of their groups' demands. However, they were few and were in the cabinet not as group representatives. It was generally assumed that the cabinet would not revise the draft drastically.¹⁶ However, it went on to make significant changes that affected the marginalized groups negatively (see table 3.4).¹⁷

An important factor for less articulation of marginalized groups' issues by marginalized group members in the CRC and the interim cabinet was due to their loyalty toward political ideology and party leadership since they were representing the political forces. Further, many of the marginalized group members in the CRC and cabinet were not involved in the socio-cultural movements and/or were not fully informed about the issues. A women's movement leader claimed that not only were women underrepresented in the whole process but that the only woman cabinet member was more concerned with general political issues. The leader in question justified her approach saying that women leader should not just raise issues of women, as it will marginalize them within party politics. Likewise, janajati activists claimed that some of the janajati members showed little empathy toward group issues. However, the marginalized groups' representatives claimed that they were able to insert some issues like schooling in native languages up to primary level, despite being in a minority. Thus, the issue perhaps was not always that the representatives were unaware of group issues but rather that a minority status within the decision making bodies affected their ability to garner majority support for marginalized groups' agendas.

Among the three janajatis in the CRC (out of nine), only the nominee associated with the palace worked for the inclusion of marginalized groups issues in the draft while another showed moderate interest. In the cabinet, there were 3 janajatis and one madhesi Hindu. Of them, only two janajatis argued strongly for secular state, an issue that was ideologically compatible since NC and ULF are avowedly secular. This demonstrates that not all marginalized group members stood for their group issues. On the other hand, some of the CHHE cabinet members, as discussed before, actively worked to declare Nepal a Hindu State.

Among the dominant members in the cabinet, only one communist fought till the very end for declaring Nepal a secular state. At later stages of debates, all others favored declaring Nepal a Hindu State or were ambivalent on the issue. This is quite revealing. It shows that the dominant group dominated political leadership will either promote their cultural values or support them indirectly by remaining silent when others push them or not oppose strongly, even if such issues clash with political ideology and democratic principles. Hence, despite their formal secular stand, the NC and ULF ended up declaring Nepal as a Hindu state.

During the process, rational self-interest of the actors also undermined marginalized issues. Marginalized group members in the cabinet and the CRC followed party directives that were formulated by CHHE leadership and infused with dominant values. It was not in their career interests to risk antagonizing the leadership. On the other hand, for the dominant leadership, continuance of more or less status quo socio-cultural policies served their interests. It facilitated the continuity of their dominance. In the same event-process, the CHHE leadership evoked loyalty toward party and political ideology over cultural issues from marginalized group members whereas they conveniently brushed aside political ideology when it came to promoting their groups' socio-cultural values.

Table 3.4: Marginalized groups' issues in different drafts and the Constitution

Constitution /Issues	CRC draft (A)	Palace draft (B)	Cabinet approved (C)	Final (D)	Remarks
State	Hindu constitutional monarchical kingdom	Hindu, constitutional monarchical kingdom	Same as B	Same as B & C	Hindu made specific in later stages
Citizenship	Father as the sole source of hereditary citizenship; birth right to citizenship omitted	Same as A	Same as A & B	Same as A, B, & C	Illiberal than 1962 Constitution; hereditary citizenship based on parents earlier; birth right at commencement in earlier
Language	Nepali the 'language of the nation' & link language; other native languages as 'national' & instruction up to primary level only	Same as A	Same as A & B	Same as A, B, & C	Instruction in native language up to primary level only
National Party	5 % vote requirement	3 % vote requirement	Same as B	Same as B & C	Lower percentage helpful to marginalized groups' parties
Lower House	175 members	205 members	Same as B	Same as B & C	One rationale for the increase was to increase participation of marginalized groups
National Anthem	Valid till the law does not change it	Cannot be changed	Same as A	Same as B	Some marginalized groups and radical communists object to the anthem
Above the preamble	-	<u>Swasti Shree ... (a royal eulogy in Sanskrit).</u>	-	Same as B	Hindu religious connotation
Reservations	Upper House: 3 for women, 3 for dalit & 9 for janajati	3 for women	3 for women	3 for women	Removal of seats for dalit and janajati

Source: CRC (1990), Uprety et al. 1997, Hacchethu 1994

Organizations and Networks: Effective participation was also hampered by infancy of organizations and network of the marginalized groups. Many organizations and ethnic parties were formed after the opening of the polity in 1990 and their outreach and strength was limited. The social justice movements were in the initial stages of building organizations, elaborating ideologies and mobilizing constituencies and engaging in self-development of members and constructing collective identities. The marginalized groups' discourses were still new and they had yet to develop common set of demands and coherent set of arguments in support for their demands. This limited the movements from being more effective during the Constitution engineering process. On the other hand, the fragmentation of marginalized groups' organizations and tendencies among leaders associated with mainstream political parties to exploit social justice organizations for narrow partisan interests also hampered effectiveness.

The emerging social justice movements faced opposition from the established and resourceful organizations of dominant group. The CHHE were well entrenched in the state and societal institutions. Padma Ratna Tuladhar, a prominent Human Rights activist, said the main reason for the dominant group's victory "was the simple fact that Brahmins were in the majority in all the relevant political institutions. Either consciously or unconsciously, they had put their own vested interests first" (Reaper et al. 1992, 176).

The Lack of Enlightened Understanding

The short duration of the constitution engineering process also contributed in undermining marginalized groups' aspirations and demands. The three-month mandate for CRC meant less research, information, consultations, and deliberations. It can be safely said that the marginalized groups' voice would have been louder and more audible, had the Constitution engineering process not been so short. The populace also was not informed of various alternatives before they were adopted. It clearly deprived the people from learning about

different alternatives and providing inputs on them. The CRC decided and the cabinet revised and negotiated the Constitution with the palace.

The movement-for-restoration-of-democracy (MRD) leaders tried to keep the processes within their control by allocating a short time span to the process. They may have felt that a longer time frame would produce challenges to their leadership and their influence on the ongoing process. The MRD leaders' claim of a potential palace conspiracy in a longer time frame is not entirely justified, for the palace also benefited from a short time frame. Longer discussions and debates would have meant more possibilities of palace privileges coming under general public scrutiny, especially at a period when the palace popularity was at its lowest ebb. The NC and the palace, on the other hand, were worried that the MRD movement would be taken over by more radical elements.

The political forces negotiating the change did not opt for a constituent assembly or propose to ratify the draft through a referendum. Such methods could have made the process more deliberative and enhanced the understanding of various issues. In Eritrea, for instance, the constitutional engineering process consisted of ratifying the new constitution by the constitutional assembly after three years of debate (Selassie 1998). The historic debates in the American Constitution Assembly were also long. The Constituent Assembly in India lasted almost for three years, and the Constitution has been widely acclaimed for its social justice contents (Mathew 1998). Despite pressure from the dominant Hindus, India did not declare the state as Hindu. It provided reservations for scheduled caste (dalit) and scheduled tribes (indigenous people) in educational institutions, civil administration, and political offices. Further, it recognized land rights of the indigenous people and established federalism that went on to provide autonomy to different linguistic and national groups. Many of these minority

sensitive articles became feasible in India because the dominant Indian National Congress party facilitated the election of minorities into the constituent assembly. The assembly had around 30 percent of minorities,¹⁸ including Dr. Ambedkar who headed drafting committee. A minority subcommittee was formed to make recommendations. The assembly adopted most of the recommendations (Chiriyankandath 1999; Galanter 1998).

The deliberate aim of narrowing the process in Nepal also became evident when the Scandinavian, Indian and other foreign experts and teams were discouraged from providing suggestions to the CRC. For a country and its leaders who always seek advice and aid from any one, the refusal of voluntary advices from foreign experts was an unusual phenomenon. It suggests that the leadership was suspicious of external suggestions that might have worked against their wish of designing the Constitution to suit their interests. In retrospect, the events of 1990s decade support this thesis. The NC has returned to power, despite not getting a majority of popular votes, partly with the aid of an electoral law that favors the larger parties.

The CHHE's hegemonic influence over even progressive institutions like the media, academia, and human rights organizations was also instrumental in undermining the marginalized groups' voice. The negligible access to mainstream media put the marginalized groups at the receiving end. Their issues and events were ignored and often distorted. They were frequently alleged with ill-founded charges imbued with racism, such as being divisive and communal. The control of the popular intellectual discourse by CHHE was influential in continuation of their hegemony. For instance, at the early stages of CRC activities, democratic politicians and intellectuals seemed in favor of a secular state. However, the reaction of the dominant group dominated media to the proposal for a secular state was very negative (Reaper et al. 1992, 156-162). The media bolstered the campaign of the conservative and fundamentalist

Hindus and spread fear among the general Hindu populace of increasing influence of non-Hindu groups such as the Christians and Muslims. The Nepali experience supports Snyder and Ballentine's argument that in ethnic matters 'free press' can become a problem when one group controls it (Snyder and Ballentine 1997).

Voting Inequality and Lack of Control on Agenda

Voting equality criterion, in terms of socio-cultural groups, became insignificant because the exclusion of marginalized groups in the process deprived them "an equal and effective opportunity to vote." In terms of political forces, only 3 political forces voted, and in terms of socio-cultural distinction, the CHHE males voted overwhelmingly.

Similarly, the marginalized groups lacked control on the agenda. The limited influence the marginalized groups had on the agenda was through public lobbying. Even then, however, it was the three political forces dominated by CHHE, the palace, the NC and the ULF, that had the final say on the agenda. Many of the marginalized groups' demands, such as federalism, were not even considered.

Exclusion from the process rendered the two criteria ineffective for the marginalized groups, showing their inadequacy. Thus, to make the criteria relevant for emerging plural democracies, inclusion of socio-cultural groups should be made explicit and various criteria should also be adapted to recognize the plurality dimension.

THE DYNAMICS OF THE TRANSITION PROCESS

Another reason for the adoption of dominant group favoring articles and institutions in the Constitution is that the dynamics of the Constitution engineering process favored the group by

default. The existing socio-cultural-political institutions were based on CHHE norms, and hence favored the CHHE interests, whereas the marginalized groups, as outsiders, were disadvantaged because of them. Marginalized groups' interests and perspectives have to be included with special efforts, which require considerable energy and resources to overcome the inertia of existing institutions. For emerging organizations with shortage of material and other resources, this is a formidable task.

The dominant values got in the Constitution through the adoption of a universalizing notion of 'same equality' for everyone. Universalizing notions benefit dominant groups because they define their values as the universal norms for society (Young 1990, Mahajan 1998).

Optimism among the citizens and faith on the political leadership during the Constitution engineering process also favored the dominant group. The general public assumed that the leadership that had made sacrifices for democracy would induce true democratic values, including socio-cultural reforms. This optimism turned out to be false. In the words of a woman activist: "We never expected them to take away the rights women already had even in the earlier Constitution," referring to citizenship rights from both parents' lineage in the earlier Constitution.

The tension that cropped up when the palace draft became public also helped the dominant group leaders. The MRD leadership successfully created an impression of threat to the nascent democracy from the palace. They called upon the people to rally behind them. This sense of urgency helped the leaders to get away with their proposals. In such an environment, one strategy used for pushing the dominant agenda was to promise future revisions in the Constitution. In the debate over secularism in the cabinet, the three members who resisted were finally persuaded by promised future reforms. However, not a single Constitution article was

amended during the democratic years despite the NC and CPN-UML controlling more than two thirds of the parliament.

UNDEMOCRATIC CULTURE OF DEMOCRATIC FORCES

The insertion of undemocratic elements in the constitution shows that the democratic forces were not truly democratic. The 1990 change broadened the elite base to include ideological opponents from the traditional social elite group but it did not include all socio-cultural groups. Dahl describes this phenomenon of public contestation among restricted elite as an initial stage in the democratization process, but which is not yet a democracy (Dahl 1971). The experience of the 1990s supports the notion that the democratic forces were not serious about ushering in real democracy through inclusion of various sections of the society. They did not introduce any constitutional amendments to end the discriminating articles, suggesting that the exclusion in the Constitution was through tacit consent of the CHHE leadership, if not by design.

During the Constitution engineering process, the MRD leaders were keen to take powers away from the king and consolidate power within political parties, which they controlled. The MRD leaders successfully fought for political rights to strengthen their positions in the polity but gave into the King on traditional cultural rights because giving such rights did not undermine their power. In fact, the King's and MRD leadership's socio-cultural interests overlapped. It would help the leaders to maintain their socio-cultural and political superiority in the society. When the King attempted to take initiative of the Constitution framing process, the MRD leaders fought back, even threatening dire consequences. They successfully maneuvered to put the army under a defense commission despite the King's wish to have it under him and the army's pressure to remain under the King (Hutt 1994, Hacchethu 1994).

Several explanations have been forwarded for the exclusionary behavior of the political leaders. Some argue that the MRD leadership was influenced by the hegemonic mono-cultural nationalism of the pre-1990 assimilative state in absence of alternative discourses. However, the explanation fails to hold once we take into account the continued ignorance and opposition to the demands put forth by marginalized groups despite the emergence of diverse alternate perspectives after 1990.

Another explanation is that the mandate of the MRD did not include extending cultural rights to minority groups. However, the mandate of the movement was extended beyond its initial demand for the legalization of political parties once the MRD leadership realized they had the power to do so. They made “four successive upward revisions” (Hacchethu 1994) but these revisions did not incorporate socio-cultural issues of marginalized groups. All the revisions were directed at the consolidation of MRD leadership's power by limiting the King’s power.¹⁹

A more plausible reason for the undemocratic tendencies of the MRD leaders is self-aggrandizement of power and mono-cultural nationalism/racism. This became evident from the power at any cost culture among the political parties and leaders in the 1990s, especially when coalitions were formed through frequent horse-trading during the 1994-1999 hung parliament, and packing of the political party positions with relatives, caste brethren, and personal loyalists.

The marginalized groups’ claims threatened CHHE leaders’ interests. Incorporating more groups in the power structure would have broadened the competition for power. Introduction of cultural rights would have opened unknown territories, increased uncertainties and unpredictability in the Nepali politics. The MRD leadership may have construed this as a threat. It served the CHHE leadership better if power politics remained within a smaller group.

CONCLUSION

This study of Nepali constitutional engineering process demonstrated that the Dahlian democratic criteria were useful in analyzing the exclusionary process. However, the study also demonstrated that the democratic criteria were not fully adequate for the analysis of democratic processes in a culturally plural society. The Nepali experience provides inputs into making the criteria more relevant. It calls for the inclusion of minorities to be made more specific.

This chapter shows that the discriminatory articles in the Constitution were inserted and inclusive elements were omitted for valid reasons, with or without conscious intentions, and the dominant group will maintain them, if not challenged, because it has served them well. Comparative survey of inclusive processes reveals that favorable policies come either with representation in the decision-making process or with social movements. In Nepal, marginalized groups were partially successful in broadening their rights through incorporation of few issues in the Constitution engineering process at the stages where they were represented and failed where they were excluded. In India, proportionate representation of minorities in the Constituent Assembly was able to incorporate exemplary inclusive provisions in the Constitution, whereas the absence of women and African-Americans in the American Constitution Assembly delayed their political participation. On the other hand, the civil rights movement in the US and the social justice movements among the oppressed groups in India have extended political rights. Given these experience, the marginalized groups have to fight for their rights in Nepal. It will probably not be handed over to them by the dominant group. Global historical trends provide hope. Freedom, associated organizing opportunities, and social movements have usually led to more freedom in the long run.

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ENDNOTES

¹ In the early 1990s the indigenous nationalities mostly identified themselves as nationalities (janajati).

² A large segment of Newar is involved in the indigenous nationalities' social justice movement.

³ The excluded groups have been publicly protesting against discrimination since 1990.

⁴ Overlaps occur between dalit and indigenous nationalities. Tarai dalit and indigenous nationalities can be included both as madhesi or indigenous nationalities. Indigenous nationalities are 36.41, dalit 14.99, madhesi 30.49 (including Tarai dalit and indigenous nationalities), and CHHE 30.89 percent.

⁵ This is not to deny the existence of poor people within CHHE but they do not face cultural discrimination and hence face lesser constraints in social mobility.

⁶ Interviews with CRC and cabinet members were taken in 1999.

⁷ See Dhungel et al. 1998 for the defense of the Constitution on these issues. They even call the “Hindu and Constitutional Monarchical Kingdom” as secular.

⁸ Extreme leftist like the Samyukta Rastriya Janandolan (those who became Maoists were part of this coalition), rightist and others, were not included in the CRC.

⁹ The chairman of the CRC, who subsequently became close to NC, claimed that the King nominated him but he nominated the two other non party members to represent the Tarai and Kathmandu.

¹⁰ Perhaps the public role of Bahuns in defining political and social norms is the reason behind identification of Bahunbad or Brahminbad (Brahminism) as cause of various social ills in Nepal (Bista 1991). Here it should be pointed out that dalit and janajatis do not show as much anger against other CHHEs: Chhetri, Thakuri, and Sanyasi.

¹¹ The ethnic/caste division is based on Neupane (2000).

¹² The bracket indicates madhesi janajati and dalit percentage that have been added to the janajati and dalit category for getting the national total for each category.

¹³ The madhesi can be divided into dalit (2.8%), janajati (9%) and other castes (15.6%) and Muslims (3.5%). The madhesi dalit and janajati proportion is based on (Whelpton 1997).

¹⁴ This is an average of the cabinet (63.64%) and cabinet subcommittee (100%) compositions.

¹⁵ This is an average of composition of supreme leadership of the 3 forces involved in the negotiations. The palace has been assigned 100 percent, and NC and ULF 83.34 % each. The NC & ULF percentages were calculated by considering Ganeshman Singh and Bishnu B. Manandhar as half marginalized groups to account for their Newar ethnicity but mixed attitude toward marginalized groups' demands. In the cabinet and the CRC, the Newars have been treated as marginalized groups since they supported marginalized groups' issues.

¹⁶ The ULF called for promulgating the draft without revisions. The palace and NC ganged up against it.

¹⁷ The changes included making the preamble not amendable, formation of the Raj Parishad Standing Committee, increase in the strength of the Lower House members, lowering of the minimum vote requirement from 5 to 3 percent for recognition as a national party, eliminating 3 and 9 reserved seats respectively for dalit and janajati. (Uprety, Shrestha, and Thapa 1997; Hachhethu 1994)

¹⁸ 37.5 percent were minorities if members of princely states are not counted. The population of India was 37.8 percent non-Hindus, scheduled caste and scheduled tribes in 1951.

¹⁹ Some attribute the tendency to concentrate power on the executive and political parties to the coup by King Mahendra in 1960 when he dismissed the elected NC government. However, power can be snatched easily from parties and cabinets as shown by the King's 2002 and 2005 actions but is more difficult to be taken away if widely distributed, something the 1990 Constitution failed to do.