

Minority Rights and Constitutional Borrowings in the Drafting of Nepal's 1990 Constitution

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This article aims to investigate the reasons for and modalities of the rejection of the minority approach in Nepal's 1990 Constitution-making experience.¹ The analysis is conducted in light of the country's post-Panchayat process of re-democratisation and vis-à-vis the high degree of socio-cultural diversity of the Nepali polity in which no group amounts to a numerical majority.² The 1990 Constitution-making process was articulated in two phases: (a) the drafting of the document by the nine-member Constitution Recommendation Commission (CRC) between 31 May and 10 September 1990, and (b) the finalisation of the draft by a three-member Cabinet Committee, leading to the promulgation of the document on 9 November 1990.³

The expression 'minority approach' is employed here to indicate the specific array of choices made by Constitution-makers in designing state institutions reflective of a country's socio-cultural diversity and giving

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- 1 The present article is based on my presentation at the MIDEA workshop on *Constitutionalism and Diversity* held in Kathmandu, 22-24 August 2007 (see http://www.uni-bielefeld.de/midea/whats%20new/previous_events.html). I am grateful to the MIDEA workshop's organisers and participants for their insightful comments on my paper and to the EBHR reviewers for their detailed and perceptive observations which significantly helped improve my paper. My doctoral research in Nepal in 2006 and 2007 was supported by a generous grant from the University of London Central Research Fund in 2006.
 - 2 The 2001 Census identified 92 languages spoken as mother tongues in Nepal, with only 48.61% of the total population naming Nepali as its mother tongue—although Nepali is constitutionally both the national and official language of the country. In terms of caste/ethnicity the Census recorded 102 groups, of which only six constitute more than 5% of the total population (Nepal Central Bureau of Statistics 2002). The two largest groups, the Chetri (15.8%) and Hill Brahmins (12.74%), together constitute the Parbatiya group, i.e. the dominant Hindu high castes of the Pahari (hilly) region of the country, to which the royal family and the majority of the country's elites belong. Ten religions are identified as practised on Nepal's territory. Hinduism has the largest following, with 81% of the total population. The Census has, however, been contested by many as a governmental attempt at downsizing the non-Parbatiya and non-Hindu population (UNDP/CASU 2008a: iii).
 - 3 See Ellingson (1991), Hutt (1993), Hachhethu (1994), and Regmi (2061 b.s.) for accounts of the drafting of the 1990 Constitution of Nepal.

expression to such diversity, i.e. a federal state structure, reserved electoral seats, group rights, consociational institutions and positive discrimination measures. I adopt Jackson Preece's definition of minority groups in nation-states as political outsiders who do not possess the characteristics constitutive of the national identity (Jackson Preece 2005: 9-10). This definition highlights the criteria of membership of a political community on the basis of belonging rather than size. Minorities are identified as the non-dominant groups 'because their religion, race, language or ethnicity differs from that of the official public identity'; conversely this definition sets aside questions of gender, sexual orientation, physical disability and non-citizenship as separate categories with their own normative basis (ibid.: 10-11).

Significantly, the 'problem of minorities' framed in the context of political membership addresses the question of what constitutes the appropriate relationship between the legitimate authority of political power and a definition of 'the people'. As Hanna Lerner elucidates, constitutions do not only establish a frame of government and a bill of rights, they are also powerful instruments to inscribe a particular version of 'We, the People'; more specifically 'the "We" issue is particularly problematic in the context of deeply divided societies, which are grappling with the very definition of their unity' (Lerner 2004: 2). Therefore, Nepal's 1990 Constitution-making experience illustrates well the dilemma of Constitution-makers as to whether to promote a sense of national unity—a cogent idea of 'We, the People'—or to embrace the country's socio-cultural diversity, not just in the 'symbolic' aspects of the Constitution like the definition of the state and the nation, but also in the manner in which the chosen interplay between the unity and diversity of the nation is translated into the various state institutions.

The MIDEA (The (Micro) Politics of Democratisation: European-South Asian Exchanges on Governance, Conflict and Civil Action) workshop held in Kathmandu in 2007 addressed many of the issues that Nepal is currently facing in devising constitutional arrangements capable of safeguarding democracy, promoting inclusion and meeting the aspirations of the different segments of Nepali society. These issues are reflected in the ongoing debates within the Constituent Assembly elected in April 2008; in fact, much emphasis is now placed on the manner in which the country's ethno-linguistic, religious, regional, cultural and gender diversity ought to

be accommodated into the new constitutional framework in order to build a more inclusive and just system. As Joanna Pfaff-Czarnecka highlighted in the workshop's opening presentation, the quest for democracy with a specific focus on social justice, social inclusion and human rights is an ongoing process that began back in 1990. Thus, a reflection on the previous 1990 constitutional experience—which ended on 15 January 2007 with the promulgation of the current Interim Constitution—and on its ideological principles is critical to understanding the current debate on constitutional change in the country. This is significant because the 1990 Constitution became an embattled document due to the discontent of Nepal's marginalised groups (Janajati, Madhesi, Dalit, women, sexual minorities, etc.) with it as a 'source of exclusion' (Lawoti 2005: 115-6), and the Maoists' core demand for the abrogation of the document and the election of a Constituent Assembly in order to end hostilities and inaugurate a mainstream political process.

The paper adopts a neo-institutionalist approach to investigate the choices made by the Constitution-drafters in 1990 with regard to the structure of the state, the electoral system, the regulation of the party system, the preference given to individual rights over group rights and the absence of positive discrimination measures. As an approach, New Institutionalism concentrates on the role of institutions as autonomous political actors in shaping political behaviour (March and Olsen 1984: 747). According to Lowndes, six features define New Institutionalism: it focuses on institutions as 'rules of the game' rather than simply organisations; it grants equal importance to formal and informal rules; it adopts a view of institutions as dynamic processes subject to change; it regards institutions as the embodiment of specific values, interests and identities; it focuses on component institutions of political life rather than whole systems of government; it emphasises the context in which institutions have developed and the way in which they are embedded (Lowndes 2002: 97).

As a result, it is argued that the institutional choices in terms of 'borrowing' made by Nepali Constitution-makers in 1990 with regard to the treatment of socio-cultural diversity need to be read in light of the end goal that the new constitutional text was devised to achieve: democracy. In this regard, the post-Cold War world situation strongly influenced the Nepali process: with the dissolution of the Soviet block, the idea of constitutional democracy was revisited and given primacy, in the first place, as the most suitable political system to enable and ignite capitalist

economic development and modernisation, hence the renewed interest in constitutional design and export of institutional structures in the early 1990s (Franklin and Baun 1995: 1). Second, liberal democracy came to be regarded as the ideal political framework within which human rights could be effectively guaranteed and for human development to unfold to its full potential. Significantly, in 1990 the United Nations Development Program (UNDP) released its first annual *Human Development Report*, expanding the notion of development beyond mere economic achievements by enlarging people's choices to comprise 'a long and healthy life, to be educated and to enjoy a decent standard of living. Additional choices include political freedom, guaranteed human rights and self-respect—what Adam Smith called the ability to mix with others without being ashamed to appear in public' (UNDP 1990: 10). In Nepal, the imperative of *bikās* (development), made persuasive by three decades of the Panchayat regime together with the powerful discourse of the development industry, made 'modernisation' an essential component of democracy in 1990 Nepal (Pigg 1992 and Leichty 2003). In fact, Nepali society expected the new Constitution to lead the country into a new democratic era. As the CRC member Daman Nath Dhungana made clear during an interview, for ordinary Nepalis democracy meant food, medical care, clean water, roads, education, and generally higher living standards.⁴

This paper focuses on the constitutional treatment of the population's diversity vis-à-vis the formulation of a Nepali national identity in 1990. My aim is to explain the institutional choices of the Constitution-makers regarding Nepal's internal diversity in relation to the influences of foreign institutional models which were adopted and adapted in framing the 1990 Constitution. In this context, it seems plausible to argue that the 1990 approach to Nepal's internal diversity is well illustrated by the formulation of the Article guaranteeing the right to equality and the Articles defining the three elements at the core of state-constructed Nepali identity: the Shah monarchy, Hinduism, and the Nepali language. My aim is to discuss the implications and modalities of the phenomenon of institutional 'borrowing' and the aspirations that the adopted institutions purported to fulfil in the context of the 1990 constitutional process. In essence, this article endeavours to go beyond an analysis of solely institutional models

4 Interview with Daman Nath Dhungana, Kathmandu, 09/04/2007.

and formulae, to unpack such concepts, and emphasise the ideological underpinnings and values informing the Constitution-making process.

Methodology

The present analysis relies on interviews conducted in Kathmandu in 2006 and 2007 with the main actors involved in the 1990 constitutional process as well as the proceedings of the CRC held in the National Archives.⁵ Tables 1 and 2 below provide a complete list of the names, political affiliation and caste/ethnic identity of the CRC and Cabinet Committee.

Table 1—Composition of the 1990 CRC⁶

NAME	TASK	AFFILIATION	CASTE
1. Bishwa Nath Upadhyaya	<u>Chairman</u>	King's nominee	Bahun
2. Ramananda Prasad Singh	Member	King's nominee	Tharu +
3. Pradyumna Lal Raj Bhandari	Member	King's nominee	Newar +
4. Daman Nath Dhungana	Member	Nepali Congress	Bahun
5. Laxman Prasad Aryal	Member	Nepali Congress	Bahun
6. Mukunda Regmi	Member	Nepali Congress	Bahun
7. Bharat Mohan Adhikari	Member	United Left Front	Bahun
8. Madhav Kumar Nepal	Member	United Left Front	Bahun
9. Nirmal Lama	Member	United Left Front	Tamang +
10. Surya Nath Upadhyaya	<u>Secretary</u>	Nominee	Bahun

Names in bold indicate the people whom I managed to interview. I should highlight that all my informants were Bahun, with the exception of one Chetri male. For this reason, during my fieldwork, I was told by a well-known ethnic activist that my data were unreliable as I had only interviewed high-caste Hindus. My choice of informants, however, was not based on their caste affiliation but rather on those who were still alive in 2007 and had been intimately involved in the 1990 Constitution-making process. Since the criticism levelled at me was based on the assumption

5 For the purposes of this article I used the debates of the CRC transcribed and published by Mukunda Regmi (Regmi 2061 b.s.) In spring 2007 I checked them page by page against the microfilm held at the National Archives in Kathmandu, and noted only minor variations.

6 The symbol + indicates the CRC members who had already passed away at the time of my doctoral fieldwork (2006-7) in Nepal. As of 2010, Mukunda Regmi and Laxman Aryal have also passed away.

that ‘real democracy’ should be inclusive, I should also point out that all of the CRC members were male. I emphasise this point because, at the time of writing, the political discourse about inclusion revolved around categories of ethnicity, language and region, far more than around the category of gender.

Table 2—Composition of the Three-Minister Cabinet Committee

NAME	TASK	AFFILIATION	CASTE
1. Yog Prasad Upadhyaya	Home Minister	Nepali Congress	Bahun
2. Nilamber Acharya	Labour Minister	United Left Front	Bahun
3. Keshar Jung Rayamajhi	Education Minister	King’s nominee	Chetri

Because I will also discuss the implications of the phenomenon of institutional borrowing in the 1990 Constitution-making process, this analysis requires broader reflection on the modalities of the political transformation that occurred in Nepal over time and the influence of external legal and political concepts. Historically, imported models have been gradually absorbed into autochthonous juridical-political structures; the interaction of different systems has generated a kind of legal pluralism in the country, a hybrid outcome with an essentially Nepali flavour. The 1990 constitutional experience of Nepal seems to be best understood within the framework of legal pluralism, which Chiba defines as

The working whole structure of law of a people, constituted not of a single system of state law, but rather a complex of various systems of law called customary, religious, local, primitive, tribal or whatever, on the one hand; and many ideational factors specifically relevant to the function of the law, such as ideas, values, beliefs, philosophies, attitudes and so forth, on the other (Chiba 1989: 172).

Thus, my analysis takes into account the process of the reception of the aforementioned elements in Nepal’s 1990 constitutional arrangements, with particular reference to the treatment of minorities. Second, I reflect on the manner in which exogenous juridical and political structures were renegotiated and adapted into a context far from their birthplace. More specifically, the very concepts of ‘Constitution’ and ‘nation-state’ are rooted in Western modernity and carry a historical specificity that

should not be overlooked when attempting to assess how such concepts travel outside their homeland.⁷ It seems appropriate to consider carefully the epistemology behind such institutions in order to fully appreciate the implications of their adoption in light of the aspirations that they carried in Nepal's 1990 Constitution-making experience.

Constitutional borrowing has been described as a phenomenon that 'embraces constitutional influences of various kinds that cross jurisdictional borders' (Friedman and Saunders 2003: 177). Here I will concentrate on the specific instance of institutional borrowing in Nepal's Constitution-making activities in the post-Cold War world situation. However, it will be critical to bear in mind that

borrowing is inevitable because there are a limited number of general constitutional ideas and mechanisms, and they have been in the air for some time [...] No one begins writing a Constitution from scratch. In addition, there exist strong interests that promote borrowing [...] On the other hand, [...] there are [often] important departures by which the drafters manifest the unique identities of their countries (Osiatynski 2003: 244-245).

Thus, this paper analyses the 1990 Constitution-drafting process together with its instances of institutional borrowing as the particular product of the Nepali context in the given historical moment of the post-Panchayat transition.

The CRC drafting process

In early 1990, most of Nepal's banned political parties united in a pro-democracy alliance⁸ and launched a *Jan Āndolan* (People's Movement) to seek the restoration of multi-party democracy in the country.⁹ Pro-democracy protests, strikes and mass demonstrations succeeded in putting pressure on the palace and, on 15 April, King Birendra dissolved the government and the National Assembly: it was the end of three decades of the Panchayat regime. On 18 April, the monarch allowed the

7 See Anderson (1983), Gellner (1983), Breuilly (1993), and Malagodi (2008).

8 On 15 January 1990, seven Communist parties united under the United Left Front (ULF) and formed a tactical alliance with the Nepali Congress against the Panchayat regime.

9 For an account of the democracy movement see Hoftun and Raeper (1992).

creation of an Interim Government under the Premiership of Krishna Prasad Bhattarai, General Secretary of the Nepali Congress. The Cabinet included other Congress members, delegates of the United Left Front (ULF), independents and royal nominees. The democratic opening engendered a passionate debate about the drafting procedures and features of a new Constitution to establish a functioning democracy in the country.

The process of drafting the new democratic Constitution of Nepal sheds light on the political dynamics within Nepal at the time. It also helps us to appreciate the nature of the 1990 document as a compromise between the dominant political forces of the country over the institutional set-up of the democratising Nepali state. In this regard, it is essential to highlight that the task of drafting the new Constitution was—once again—not carried out by an elected Constituent Assembly, but by a small Commission hand-picked by the country's political elites. This essentially unrepresentative drafting procedure for the new Constitution undermined—at least to a certain extent—the legitimacy of the new document from its very inception. In fact, some of the more radical Communist parties that had remained outside the ULF, such as the CPN (Masal) and CPN (Mashal),¹⁰ were demanding the immediate promulgation of an Interim Constitution to pave the way for elections to a Constituent Assembly. However, these groups had little political leverage. Their views were either ignored or actively opposed both by the palace and the Congress party. Congress had adopted a policy of 'national reconciliation' with the Shah monarchy and was not willing to jeopardise the achievements of the movement. The palace was concerned that a Constituent Assembly could take a republican turn.

The palace attempted to hijack the constitutional process and maintain its primacy in Nepal's political arena. On 11 May, King Birendra nominated a Constitutional Reform Recommendation Commission without consulting the Council of Ministers led by Bhattarai. The Commission was composed of seven members, of which only two were representatives of the political parties.¹¹ The public outcry forced the King to dissolve the Commission. On

10 The CPN (Masal) seceded in 1983 from the CPN (4th Convention) and the CPN (Mashal) separated in 1985 from CPN (Masal). The leader of the Mashal faction was 'Prachanda' ('the fierce one', a.k.a. Pushpa Kamal Dahal), the future supreme leader of the CPN (Maoist).

11 See Regmi (2061 b.s.: 135).

31 May 1990, King Birendra, this time on the recommendation of the Council of Ministers, formed a new nine-member Constitution Recommendation Commission, again under the Chairmanship of Chief Justice Bishwa Nath Upadhyaya. The Secretary of the CRC, Surya Nath Upadhyaya, was the tenth member of the Commission but was not granted voting powers. The Commission was given the task of drafting a new Constitution in three months, explicitly within the mandate of constitutional monarchy and parliamentary democracy.¹² Although the Royal Communiqué did not specify the political affiliations of the Commission members, it was understood that the palace, the Nepali Congress and the ULF had three delegates each in the Commission. The formation of the CRC nonetheless excluded many other political actors operating in Nepal as well as segments of society which had become active and come into public view through the democratic opening. In fact, ethno-linguistic groups, regional communities, religious minorities and women had no direct representation in the Commission.

The choice of Commission members reflected the strategies of the various political forces involved in the constitutional process. As recounted by my informants, only the three ULF representatives were well coordinated. Nirmal Lama, Bharat Mohan Adhikari and Madhav Kumar Nepal were political leaders and understood well the importance and effectiveness of collective action. Other members of the Commission were well-respected and well-known professionals in the legal field and civil service and tended to act in their professional capacities rather than with an exclusively political rationale.¹³ Chairman Upadhyaya faced the task of managing many eminent personalities with very different political backgrounds, ideologies and objectives. He therefore suggested that the Commission members worked under Committees composed of two members each. Each Committee was assigned a different topic and was requested to prepare a report to be discussed by all members of the Commission.

12 The Royal Palace Communiqué issued by the Palace Chief Secretariat on 31 May 1990 [16 Jeth 2047] formed the Constitution Recommendation Commission (CRC) under the Chairmanship of Supreme Court Chief Justice Bishwa Nath Upadhyaya. The other eight members were: Pradyumna Lal Raj Bhandari, Ram Nanda Singh, Laxman Prasad Aryal, Mukunda Regmi, Daman Nath Dhungana, Nirmal Lama, Bharat Mohan Adhikari and Madhav Kumar Nepal. Surya Nath Upadhyaya was the Secretary of the Commission, but he did not enjoy voting powers (Regmi 2061 b.s.: 134).

13 Interview with Surya Nath Upadhyaya, Kathmandu, 22/03/2007.

Table 3—Commission Subcommittees ¹⁴

No	MEMBERS	TOPIC
1	Bishwa Nath Upadhyaya Laxman Prasad Aryal	Judiciary, Attorney General, Citizenship, Political Organisation
2	Pradyumna Lal Raj Bhandari	Auditor General, Public Service Commission, Commission for the Investigation of Abuse of Authority, Election Commission
3	Ramananda Prasad Singh Bharat Mohan Adhikari	Fundamental Rights, Directive Principles and Policies of the State
4	Mukunda Regmi Madhav Kumar Nepal	State of Emergency, Transitional Period, Amendment Procedure, Miscellaneous
5	Daman Nath Dhungana Nirmal Lama	Parliament Form, Constitution, and Conduct of Business, Legislative Procedure

Secretary Surya Nath Upadhyaya set up a Secretariat to aid the Commission with legal research and the preparation of drafts. Each article was then discussed by the Commission and if agreement was not reached, a majority vote would take place. Once a decision had been taken, the discussion could not be reopened.¹⁵

Constitutional models

The Secretariat of the CRC had collected more than 150 constitutions from all over the world to ensure input and positive influences in the new document. The Commission based the formal structure of the new draft Constitution on Nepal's previous constitutional documents, especially the 1962 Panchayat Constitution. From the point of view of its contents, the CRC draft relied heavily on the 1959 Constitution of Nepal which was perceived as the institutionalisation of the achievements of the 1950-51 revolution and the beginning of the democratic era in the country. The 1959 document was drafted by a Commission nominated by King Mahendra who invited the British constitutional expert Sir Ivor Jennings to provide the Constitution-makers with guidance. Jennings was convinced that a modified Westminster model would be easy to transplant in Nepal (Dhungel *et al.* 1998: 25).

In 1990, the intention of most members of the CRC was to improve the 1959 document, particularly regarding the institutional boundaries

¹⁴ See Regmi (2004/2061: 152).

¹⁵ Interview with Daman Nath Dhungana, Kathmandu, 09/04/2007.

of and limitations to the powers of the king. The Westminster model represented, once again, the institutional framework and primary point of reference for the drafting process. The Constitution of India also greatly influenced the 1990 document. Many of the CRC members explained during their interviews that Nepal had a long exposure to the British model of government, institutions and common law system as renegotiated in the Indian context. Most of the leaders of Nepal's democracy movement had also been politically formed in the context of India's anti-colonial struggle, and the Anglo-Indian model of government was the institutional framework with which they were most comfortable and familiar. Moreover, the CRC mandate explicitly provided for the establishment of a constitutional monarchy, and the British model was considered to be the archetype and most successful instance of such a form of government.

Chairman Bishwa Nath Upadhyaya recounted an interesting incident during my interview with him.¹⁶ When King Birendra contacted him to ask him to chair the Commission, the Chief Justice told him that he could only draft a liberal Constitution following in the footsteps of the Westminster model. The king replied: "That is why I called you!" The British-style system of constitutional monarchy was the point of compromise between the three main political forces involved in the 1990 Constitution-making experience. If Nepal was to be a constitutional monarchy working under a parliamentary democracy, the Westminster model appeared to be the obvious institutional point of reference at that time. The fact that the Westminster model has been used as the institutional mould for so many constitutions around the globe is certainly more due to historical reasons, including the unmatched colonial hegemony exercised by the United Kingdom until the end of World War II rather than its suitability for export. As Sartori points out, "the United Kingdom has a difficult and *sui generis* Constitution, deriving from a tortuous sedimentation of common law, acts and conventional usage, partly legal and partly extra-legal, and despite the fact that, when one reads the British constitutional lawyers, one is often reminded of what was said in a review of Stirling's book, *The Secret of Hegel*: "never has a secret been better kept"' (Sartori 1962: 853).

Notwithstanding the limited success enjoyed by copycat Westminster-based constitutional arrangements around the globe and the short-

16 Interview with Bishwa Nath Upadhyaya, Kathmandu, 16/05/2007.

lived 1959 Constitution in Nepal, in 1990 the Nepali Constitution-makers expressed their intention to once again follow the steps of the British system of government because of the constitutional monarchical system of the UK. The peculiarity of the British constitutional arrangement is exemplified by the fact that many of the monarch's discretionary powers in the British Constitution are regulated by constitutional conventions that are the source of the Constitution's non-legal rules (Leyland 2008: 25). Harding also highlights that constitutions based on the exported Westminster model suffer from instability and uncertainty in the legal areas regulated by conventions which are essentially a form of customary law (Harding 2004: 155-6). This phenomenon has been particularly evident in post-1990 Nepal in governmental appointments, dismissal of governments and political floor-crossing. Harding presents an analysis of Westminster-style constitutional arrangements overseas in which he distinguishes the British autochthonous 'classical model' from the 'export model' devised to fit the specificities of recipient polities. These considerations raise two problematic questions: first, why did Nepali Constitution-makers opt again for British-style constitutional arrangements in 1990? Second, how did they renegotiate the imported institutional model with local realities? It seems that the Westminster model—in its normative and formal institutional dimension—was synonymous with political modernity. It was regarded as an essential prerequisite for socio-economic development, the ultimate goal of the 1990 movement.

For the first time in Nepali history, the CRC draft¹⁷ vested state sovereignty exclusively in the people of Nepal¹⁸ with the ultimate aim of establishing a constitutional monarchy. It set up a bicameral legislature and a Cabinet of Ministers responsible to Parliament under the Premiership of the leader of the party holding the majority in the lower house. The document also established an independent judiciary and the Supreme Court was granted extraordinary jurisdiction to enforce the Fundamental Rights entrenched in the Constitution. The Supreme Court was also given the power of judicial review of legislation, of settling legal questions in issues of public concern (PIL) and of issuing the necessary orders to enforce such rights.¹⁹ The

17 For the CRC draft, see Regmi (2004/2061: 1771-1846).

18 Article 3 of the Constitution of the Kingdom of Nepal, 1990.

19 Article 88 of the Constitution of the Kingdom of Nepal, 1990.

extensive powers of Nepal's Supreme Court under the 1990 Constitution represented, in reality, a significant departure from the Westminster model and an effective limitation of the doctrine of parliamentary sovereignty as it had evolved in independent India through judicial practice.²⁰

Minority demands and the Right to Equality

The efforts of the CRC members, however, were also directed towards devising an institutional framework that was suitable to their own country and maintained an essentially Nepali flavour. To achieve this, eight of the CRC members travelled around Nepal to collect suggestions from the general public. Suggestions were also sent directly to the Commission in Kathmandu in the form of letters and proposals. The success of the People's Movement had raised great expectations from different parts of Nepali society. Ethno-linguistic and religious minorities had become increasingly vocal about their demands and were active in the public sphere.

In 1990, various ethno-linguistic groups united under the umbrella organisation of the Nepal Janajati Mahasangh (Nepal Federation of Indigenous Nationalities) (Fisher 1993). These groups were pressing for a constitutionally established secular state and for full recognition of their cultural and religious rights. Interestingly, most of the suggestions received by the Commission were concerned with such issues (Hutt 1993: 35-36). As Padma Ratna Tuladhar explained, 'During the drafting of the Constitution, there were great expectations from the minorities because the Constitution was supposed to reflect the aspirations of the people, those aspirations raised by People's Movement. [...] People expected that with the democratic change, secularism was going to be a given, they were convinced that it would have been guaranteed in the Constitution'.²¹ For the janajatis, democracy ultimately meant a radical break from the top-down nationalistic rhetoric of the Panchayat system, anchored in the culture and values of the Parbatiya high-caste Hindus, and the establishment of a fairer

20 The Indian concept of judicial review evolved in constitutional practice through the tensions between Parliament and the Supreme Court over property rights and the Congress government's programme of land redistribution (See: *Golakh Nath v. State of Punjab* AIR 1967 SC 1643). Judicial review in India resulted in a *de facto* limitation of the doctrine of parliamentary sovereignty, especially with the establishment of the basic structure doctrine in the *Kesavananda Bharati* case (AIR 1973 SC 1461).

21 Interview with Padma Ratna Tuladhar, Kathmandu, 12/04/2007.

system.²² The only question was whether the Nepali political leaders were prepared to do away with the ideological narratives established by thirty years of Panchayat rule.

The CRC draft also included an extensive section on Fundamental Rights with much emphasis on the right to equality and non-discrimination on grounds of religion, race, sex, caste, tribe or ideological conviction.²³ The CRC members' awareness of the disadvantaged socio-economic position of many ethnic minorities, lower castes and women was reflected in the Article pertaining to the right to equality. In the section referring to non-discrimination on the part of the state, the following sub-clause was added:

Provided that special provisions may be made by law for the protection and advancement of women, children, the aged or those who are physically or mentally incapacitated or those who belong to a class which is economically, socially or educationally backward.²⁴

This formulation was devised to allow for future enactments of special legislation for the advancement of the underprivileged segments of Nepali society. It is very similar to Article 15(4) of the Indian Constitution introduced by the First Amendment, even if in Nepal there are no Scheduled Castes and Tribes. The aforementioned provision of the CRC draft opened the door for some form of future positive discrimination, to be defined by the legislator. The CRC members rejected the 'minority approach' and refused to include in the draft any provision for an Indian-style reservation system. Nirmal Lama, although himself a member of a Janajati group, forcefully condemned the minority approach as a path leading to communal tension (Dhungel *et al.* 1998: 39). The Indian experience of communal violence and the findings of the Mandal Commission Report, which was made public at the time of the CRC's work, greatly influenced the Nepali Constitution-making process with regard to minorities' affirmative action. Moreover, a few Indian lawyers travelled to Nepal to provide advice and assistance to the CRC work. In regard to the reservation system they are said to have

22 For discussions of ethnic identity, issues and demands in Nepal, see Gellner (ed.) (2001); Lecomte-Tilouine and Dollfus (eds.) (2003).

23 Article 11 of the Constitution of the Kingdom of Nepal, 1990.

24 Article 11 (3) of the Constitution of the Kingdom of Nepal, 1990.

urged: ‘Don’t commit the same mistakes we made!’²⁵ In her analysis of the politics of achieving Scheduled Tribe status among the Nepali population of the Indian district of Darjeeling, Sara Shneiderman clearly shows the impact of the reservation system on the area’s identity politics. Her ethnographic research reveals that the mid-1990 reorganisation of ethnic groups in Darjeeling reinforced ethnic boundaries, encouraged ethnic un-mixing and fostered mutual antagonism (Shneiderman 2007). These preoccupations were also in the minds of the 1990 Nepali Constitution-makers I interviewed.

State structure and political organisation

The formal recognition in the 1990 Constitution of the internal plurality of Nepali society was not translated into the country’s institutional framework. In 1990 there was no discussion of federalism or the inclusiveness of state structures.²⁶ In the course of the debates on the constitutional establishment, the preoccupation with strengthening national unity prevailed. Nepal’s internal diversity was perceived as a potential weakness and divisive factor in the small Himalayan kingdom.

A mixture of security concerns and a Kathmandu-centric approach to politics led to the adoption of a highly centralised unitary state structure and a British-style first-past-the-post majoritarian electoral system.²⁷ Moreover, the desire to strengthen national unity translated into a constitutional provision banning any political party and organisation formed on the basis of religion, community, caste, tribe or region.²⁸ The Constitution drafters feared that political organisations centred on ‘communal’ identities could lead to centrifugal separatist movements and sectarian violence; and at the same time, they believed that a functioning democratic establishment based on liberal values would overcome and eventually solve all of Nepal’s social imbalances and inequalities.

As highlighted by most of the CRC members I interviewed, at that time there was great anxiety about the security and independence of Nepal, especially vis-à-vis India. Due to the general political international instability in the wake of the fall of the Berlin wall, India was gravely

25 Interview with Laxman Prasad Aryal, Kathmandu, 09/04/2007.

26 Interview with Daman Nath Dhungana, Kathmandu, 09/04/2007.

27 Article 45 of the Constitution of the Kingdom of Nepal, 1990.

28 Article 112 (3) of the Constitution of the Kingdom of Nepal, 1990.

concerned about its own defences and wanted to ensure that its border security was constituted by the Himalayan range. In this vision, Nepal was of paramount strategic importance.²⁹ Thus, on 31 March 1990, the New Delhi government sent an extremely unfair new treaty proposal to King Birendra to sign in exchange for Indian support for his regime against the agitating political parties (Shah 2004: 203-204). The king refused to comply and handed over power to the parties. A small country syndrome has affected Nepal since Prithvi Narayan Shah's famous definition of the position of the Himalayan kingdom between India and China as that of 'a yam between two rocks' (Stiller 1968). The Commission draft provided that all treaties and agreements with foreign countries pertaining to peace and friendship, strategic and security matters, boundaries and natural resources had to be ratified by Parliament with a two-thirds qualified majority Hachhethu (1994: 102-103). These concerns were raised especially in relation to the many agreements concluded between Nepal and India.³⁰

Nepali identity in the 1990 Constitution

In terms of the Nepali identity promoted by the new Constitution, the CRC members wanted to include the recognition of Nepal's internal diversity in the constitutional text, but at the same time wished to reinforce the unity of the Nepali people. The three pillars of the Panchayat-era nationalism, namely Hinduism, the Nepali language and the Shah monarchy, remained virtually unchanged in the new constitutional document.

The draft made it clear that the king had to be Hindu, but the Commission could not agree whether the state should also be declared Hindu. For the first time in Nepali history, however, the state was declared 'multiethnic and multilingual', but the term 'multireligious' was omitted.³¹ Moreover, the national anthem, the national colour and the national flag all reflected Hindu symbolism (ICG 2005: 13-14). Bharat Mohan Adhikari recounted an interesting story.³² When the Commission discussed the issue of secularism vis-à-vis the persisting definition of Nepal as Hindu, the ULF members managed to secure a pro-secularism majority vote with the support of the Nepali Congress delegate Daman Nath Dhungana and the royal nominee

29 Interview with Surya Nath Upadhyaya, Kathmandu, 22/03/2007.

30 For a detailed analysis of Indo-Nepal relations from a legal perspective, see Subedi (2005).

31 Article 4 of the Constitution of the Kingdom of Nepal, 1990.

32 Interview with Bharat Mohan Adhikari, Kathmandu, 18/05/2007.

Ramananda Prasad Singh. When news of this reached the palace and certain conservative segments of Nepali society, there was an outcry and Chairman Upadhyaya exerted pressure on the Commission to reopen the decision, against the working procedure adopted by the Commission earlier on. It was then decided to leave the Constitution silent on this issue.

In the Constitution, the right to religion was again limited to ‘religion as handed down from ancient times and having due regards to traditional practices’, and the ban on conversion was also reiterated.³³ It has been argued that the objective of the restrictive formulation of the right to religion in the 1990 Constitution was ‘to discourage forceful conversion and to protect the nation from religious invaders’ (Dhungel *et al.* 1998: 181). During the CRC debate on the right to religion, the position of Laxman Aryal shed light on the purpose of Article 19.

It is not appropriate to include secularism in the Fundamental Rights, securing the right to profess any religion. We have to ponder this issue. It is important to protect the existence of our country, social peace, social unity, feelings of fraternity and nationality. Our country is small. So much for believing in secularism, since 24 Caitra 2046 24,000 people have been made Christian. Like this, conversion to another religion was made. There will be a situation where the Nepali ethnicity (*jāti*) will disappear, there will be no Hinduism and everyone will be made Christian; we call someone who comes from the outside an immigrant, but there will be a situation in which we will all be immigrants in our own country. This is what will happen to our national culture. Our ‘Nepali-ness’ will be destroyed. Therefore, no-one can convert from one religion to another (54th meeting of the 1990 Constitution Recommendation Commission, 10 Bhadra 2047, from Regmi 2061 b.s.: 1658 (my translation)).

Two points need to be made: first, the concepts of ‘Nepali-ness’ and Hinduism seem inextricably intertwined; second, it is frequently argued that Nepal’s ‘social peace’ is best protected by upholding the *status quo* of the Hindu mode of secularism which maintains the primacy of Hinduism, but guarantees the freedom to profess any of the ‘ancient religions’.

33 Article 19 of the Constitution of the Kingdom of Nepal, 1990.

Nepali was again declared both the language of the nation (*rāstra bhāsā*) and the official language, while the other mother tongues were defined as national languages (*rāstriya bhāsā*).³⁴ In the Fundamental Rights, an Article was included to guarantee cultural and educational rights, allowing the various communities of Nepal to promote their languages and cultures and to run their schools up to primary level in their own languages.³⁵ Most of my informants claimed that there was little debate about the position of the Nepali language amongst the Commission members. The position of Nepali as the lingua franca and official language of the country remained unchallenged, although it was agreed that the country's other languages deserved the space to flourish.³⁶

In the Commission, there was passionate debate regarding the position of the monarchy and the extent of its powers. The principle of 'king in parliament' was adopted, executive powers were vested in the king and in the Council of Ministers, no issue concerning any action of the monarch could be raised in any court nor discussed in Parliament, the king's name was included in the name of most constitutional bodies, and he was again declared Supreme Commander of the Army.³⁷ Although the ULF members professed a republican ideology, at that time it was not possible to do away with the monarchy and they had to compromise. However, the Communists aimed to considerably reduce the powers of the king. Madhav Nepal had in mind the framework of the Spanish Constitution which inspired him to adopt what he defined as a 'republican monarchy' system with the king as a mere figurehead.³⁸ The Nepali Congress and the palace delegates managed to impose a 'constitutional monarchy with higher status and privileges' through a majority vote (Hachhethu 1994: 103).

In the new Constitution, the monarchy was defined in Nepali as *rājtantra*. This term was directly connected to the type of democracy the 1990 Constitution establishes: *prajātantra*. The term *prajā* (people) conveys a sense of subject-hood: there can not be a *prajā* unless there is a *rājā*. The leftist political parties have usually preferred the term *ganatantra* because a *gana* can be defined as a community characterised by internal equality

34 Article 6 of the Constitution of the Kingdom of Nepal, 1990.

35 Article 18 of the Constitution of the Kingdom of Nepal, 1990.

36 Interview with Surya Nath Upadhyaya, Kathmandu, 22/03/2007.

37 Article 119 of the Constitution of the Kingdom of Nepal, 1990.

38 Interview with Madhav Kumar Nepal, Kathmandu, 10/04/2007.

on any given issue. The 1990 Constitution, while establishing Fundamental Rights for all Nepali citizens, implicitly still designated them as the king's subjects. This is reflected in the provisions relating to His Majesty. While Article 27 (2) makes the king 'the symbol of Nepalese nationality and the unity of Nepalese people', Article 27 (1) makes it clear that His Majesty must be 'a descendant of the Great Prithvi Narayan Shah and an adherent of Aryan culture and Hindu religion'. By making reference to the model of Hindu kingship, this Article aimed at providing religious and historical legitimacy to the Shah monarchy.

Ultimately, all the CRC members came to an agreement and signed the Constitution draft, but the ULF members submitted a Six Points of Dissent document in which they accepted the draft but with some reservations.³⁹

The work of the Cabinet Committee

On 10 September 1990, Chairman Bishwa Nath Upadhyaya submitted the draft prepared by the Commission to the king who handed it over to PM Bhattarai for finalisation. The Prime Minister established a three-Minister Cabinet Committee under the coordination of the moderate ULF Minister Nilamber Acharya to perform this task. The other two members of the Committee were the Congress Home Minister Yog Prasad Upadhyaya and the royal nominee Dr. Keshar Jung Rayamajhi, the Minister of Education. The three Ministers left Kathmandu and worked for eight days in Godavari to finalise the document.⁴⁰

The Committee made three significant changes to the CRC draft. First, it settled the debate about secularism vis-à-vis the Hindu state. The CRC draft formulated the provision in a manner that made being Hindu only a prerequisite for the monarch. The Cabinet Committee inserted a comma in the Article specifically defining the state as Hindu. In my interview with him, Yog Prasad Upadhyaya, the former Home Minister, looked back at the notorious 'incident of the comma' and said that he was still not sure whether the insertion of the comma was a stroke of genius or a childish gesture. He maintained that the character of the 1990 document was undeniably secular. In his view, the definition of Nepal as a Hindu state was merely

39 The main thrust of the ULF dissatisfaction with the draft related to the position of the monarchy.

40 Interview with Keshar Jung Rayamajhi, Kathmandu, 15/04/2007.

symbolic and the majority of Nepalis were in favour of retaining the Hindu kingdom. When asked how the idea of a democracy could be reconciled with the idea of a Hindu state, he said: 'The Queen is the Head of the Church of England, but who could say that the UK is not secular?'⁴¹

Second, according to the draft, every provision was amendable by Parliament with a two-thirds majority. The Ministers introduced a limitation and allowed for amendments which 'do not prejudice the spirit of the Preamble'.⁴² The introduction of the Indian-derived 'basic structure doctrine' in Nepal's Constitution was advocated both by Congress, aiming to safeguard democracy, and by the palace for its own self-preservation. Finally, the Cabinet modified the provision regarding treaty ratification and specified that treaties of an ordinary nature concerning peace and friendship and natural resources could be ratified by a simple majority.⁴³

The Committee also received a list of approximately eighteen points to be revised in the CRC draft from Reabatti Raman Khanal, the Palace Chief Secretary, mostly concerning the position of the monarchy.⁴⁴ The palace's dissatisfaction with the draft Constitution manifested itself openly on 22 October 1990 when the *Gorkhapatra*, the Government-owned daily newspaper, published an article stating that the palace had prepared a separate draft. There was a public outcry and the king came under heavy criticism. The following day, the palace issued a statement claiming that the draft had been prepared in consultation with Prime Minister Bhattarai. The Prime Minister, however, denied any knowledge of the separate royal draft and put pressure on the king to promulgate the CRC draft as revised by the Cabinet.⁴⁵ Thus, the new Constitution was promulgated by King Birendra shortly afterwards, on 9 November 1990.

41 Interview with Yog Prasad Upadhyaya, Kathmandu, 11/04/2007. The former Minister refers to the fact that by inserting a comma in Article 4(1) the Committee specifically defined the state as Hindu, and not just the Shah monarchy.

42 Article 116 of the Constitution of the Kingdom of Nepal, 1990.

43 Article 126 of the Constitution of the Kingdom of Nepal, 1990.

44 Interview with Nilamber Acharya, Kathmandu, 12/04/2007.

45 Bharat Mohan Adhikari told me that he had himself leaked the information about the separate palace draft of the Constitution to the press (interview with Bharat Mohan Adhikari, Kathmandu, 18/05/2007). This was probably—as Hachhethu (1994: 110-11) argues—upon the suggestion of the Prime Minister himself. Interestingly, it was Bharat Mohan Adhikari who gave me the aforementioned press clipping from the *Gorkhapatra* of 22 October 1990, as that particular issue of the paper is actually missing from the archives of the *Gorkhapatra* in Kathmandu.

Conclusion

The 1990 Constitution of the Kingdom of Nepal was devised to transform the Nepali polity into a functioning democracy. The document formally recognised the plural and diverse nature of the country's social fabric, but concretely put most emphasis on individual rights, in line with the liberal tradition embraced by the constitution-makers. The establishment of democracy was considered sufficient to guarantee every citizen's fundamental rights, irrespective of their ethnic, religious and regional affiliation. To a certain extent, the institution of a democratic order was also considered to be the prerequisite for modernisation and development, although the adoption of Panchayat-style nationalist narratives contradicted this very principle.

In his paper at the MIDEA workshop in 2007, Yash Ghai presented different ways in which states in multiethnic societies are organised. He categorised Nepal during the 1990 constitutional experience as a state with a political recognition of diversity but within the framework of a hegemonic model, because ethnicity was recognised, but only in unequal ways. The 1990 Constitution provided a homogenising vision of how Nepalis ought to be: Hindu, Nepali-speaking, and loyal subjects of a Hindu king who was a descendant of the father of the nation. Such narratives were firmly rooted in the cultural dominance of the Parbatiyas and their inclusion in the 1990 constitutional text helped to reinforce the hegemony of high-caste Hindu Paharis and—to a certain extent—the Newars.⁴⁶ Thirty years of Panchayat state-constructed nationalist discourse had long-standing effects on the Nepali psyche in defining the scope of what being Nepali could be. During the 1990 Constitution-making process, ethno-linguistic, religious, and regional diversity was perceived as contributing to the richness of the Nepali heritage, but—at the same time—as a disaggregating factor, a potential danger, and a structural weakness, especially regarding India. To a certain extent, such diversity was considered to be a traditional relic obstructing the modernising process envisioned by the Constitution-drafters. Surprisingly, at the same time, the Constitution-makers chose to rely on the same Panchayat-era narratives to define the essential

46 Yash Ghai, 'Accommodating Diversity in Nepal: Constitutional Perspectives', paper presented at the MIDEA workshop on *Constitutionalism and Diversity*, Kathmandu, 22-24 August 2007.

coordinates of ‘Nepaliness’ as being the unifying factors of the Nepali polity. For the palace, maintaining the Panchayat-era narratives in the new constitutional arrangements was instrumental to an enduring legitimation of the institution of the monarchy *per se*.

The political parties perceived the inclusion of such narratives in the 1990 Constitution as a merely symbolic gesture, because any constitutional document is to a certain degree expected to define who the people inhabiting the state’s territory are. Moreover, they were ready to relent and compromise on issues like the state being Hindu, the national anthem, the national colour, the national animal and so on, because they perceived them as mere formalities with little bearing on the establishment of a functioning democracy. However, a Constitution is a legal document; hence every word in it casts a long shadow within which the process of interpretation will take place once it is promulgated.⁴⁷ Symbolic provisions have important consequences for the actualisation of a Constitution. For instance, this is exemplified by the manipulation of the ‘Hindu kingdom’ clause in post-1990 Supreme Court decisions.⁴⁸

The Indian experience of increased communal violence since the 1980s contributed to the decision by the Nepali Constitution-makers to discard the minority approach. Historically, the modernising tool of legal uniformity was introduced in Nepal by Jang Bahadur Rana with the promulgation of the Muluki Ain in 1854. This Code was employed by the Rana ruler as a nation-building device: a modern nation required a certain degree of internal homogeneity.⁴⁹ The new 1963 Muluki Ain stayed in line with the old Code and rejected the idea of Indian-style personal laws.⁵⁰ The 1990 Constitution also followed in the footsteps of the country’s legal tradition by attempting to exert an even stronger central control to reinforce and consolidate state sovereignty. In this context, the 1990 Constitution-makers again adopted the Westminster model for Nepal because they considered it to be the most successful institutional form in which a monarch could

47 Michael Halton Cheadle, Personal Communication, Kathmandu, 08/06/2007.

48 See *Dr. Canda Bajracharya v. Secretariat of Parliament*, NKP, 2053/1996, Vol. 38, N. 7, p. 537, in which the Supreme Court refused to exercise its powers of judicial review of legislation to strike down inheritance legislation discriminatory to women in view of the need to preserve social stability.

49 For a detailed discussion of the Muluki Ain, see Höfer (1979).

50 Interview with Bishwa Nath Upadhyaya, Kathmandu, 16/05/2007.

coexist with democratic forces. However, as Brendan O’Leary pointed out during his presentation at the MIDEA workshop, a historically-informed analysis of constitutional arrangements around the globe reveals that the Westminster model is a catastrophe for deeply divided societies like Nepal’s, and the expectation that parliamentary systems ought to work like the British one is misguided.

This raises the question of why Nepal’s Constitution-makers again opted for a British-style constitutional arrangement in 1990. For my informants, the Westminster model was synonymous with political modernity, an essential prerequisite for socio-economic development and democratisation, which were the ultimate goals of the 1990 regime change itself. Thus, I maintain that Nepal’s 1990 Constitution-making was the product of both the processes of *aspirational* and *aversive constitutionalism* identified by Scheppele. *Aspirational constitutionalism* is defined as ‘a process of Constitution building in which constitutional decision makers understand what they are doing in terms of goals that they want to achieve and aspirations that they want to live to’ (which in 1990 Nepal translated into the adoption of nominally Westminster-style unitary institutions) (Scheppele 2003: 299). *Aversive constitutionalism*, however, is described as ‘[a process that] calls attention to the *negative models* that are prominent in Constitution builders’ minds. Constitution-builders may have only the vaguest sense of where they are going and how they should get there; more often, they have a clearer sense of what it is that they want to avoid’ (which in 1990 Nepal translated into a rejection of the Indian-style constitutional approach to socio-cultural diversity) (ibid.: 300).

To conclude, the process of institutional borrowing carried out during the 1990 Constitution-making experience sheds light on the aspirations of the drafters for a democratic and more equitable Nepal. However, the dismissal of the 1990 Constitution in early 2007 proves that the institutionalisation of democracy and the effective inclusion of disadvantaged groups require more than carbon-copying foreign models. In more general terms, we should reflect on the epistemology and historicity of institutional arrangements, especially when considering their adoption: ‘it is trite but true that the constitutional institutions and principles of any country should be understood in context in order to be useful as a model for others’ (Friedman and Saunders 2003: 180). This seems to be the main

lesson that should be taken away from the 1990 Constitution-making process for the successful foundation of a New Nepal; in fact, as Scheppele (2003: 298) sagaciously reminds us, ‘Constitution-builders guess about the future and what will most successfully guide them through it. They know about the past and the present and what they want to avoid’.

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