

Recognizing Diversity and Social Inclusion in the Constitution

Participatory Constitution Building in Nepal
Booklet Series
NO. 9



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Recognizing Diversity and Social Inclusion in the Constitution

Introduction

The Constituent Assembly (CA) is engaged in drafting a new Constitution for Nepal. The CA is a representative body in its own right. It includes a larger number of women, indigenous peoples, marginalized caste and minority groups than have ever participated in such a process before. The CA is consulting with the public to ensure that the concerns of Nepal's diverse communities are addressed through the constitution.

Few countries are homogeneous. Diversity exists in many countries. The majority have populations who speak different languages, adopt different cultures and follow different religions. It is a fact of their national life but it is not always recognized or celebrated. In the past, many rulers believed that to unify a country and build a nation, it was necessary to promote one common culture, language and religion. It was also believed that this made government more effective and efficient. This led to policies of uniformity which either suppressed by force other cultures or devalued them by encouraging assimilation to a dominant culture. This was so in the case of Nepal, a country with several religions, ethnic groups and indigenous peoples, but where only the Nepali language and the Hindu religion were given priority.

Recognizing and celebrating the existence of 'diversity' supports a different approach to nation building. This approach to nation-building is based on the notion of "pluralism", which recognizes the uniqueness and value of each community within the context of the state. It recognizes citizens' individual and collective rights to practice their own religion and culture, to expect the state to support the preservation of their identities, as well as their inclusion in the overall social, political and economic life of the country. Pluralism is a value system which creates an enabling environment whereby diverse religions, cultures and traditions can coexist in a nation. It provides the opportunity for diversity to flourish.

However, pluralism rarely evolves by itself. It emerges through concrete policies and practices of governments to support both the autonomy of different communities as well as the terms on which the communities engage with each other and the state. It establishes relationships of co-existence between various ethnic and religious groups, and communities. Through this process, groups will neither exist in isolation nor lose their identity by interacting with other groups. Pluralism recognizes multiple identities. This process helps promote dialogues and consensus building between and among various groups.

It must also be noted, however, that within ethnic and religious communities, there may be traditional practices which discriminate against individuals and groups within that community, such as women and lower caste groups. Protecting the rights of such groups to their own cultural practices may, in fact, lead to the discrimination of their own members. Calling on these groups to reform their practices may be seen as interference. But, the collective rights of the larger ethnic and religious group to autonomy must not infringe upon the human rights of other individuals, in particular women and persons belonging to marginalized segments (e.g. castes) within the group.

Another reality to note is that in many countries, communities who practice a minority religion speak a different language or adopt traditions that set them apart from the majority community, and, therefore, are marginalized. They are less represented in government or in the economy and this can create a cycle of exclusion. At the heart of the discussion on recognizing diversity and ensuring social inclusion is the concept of equality. It recognizes that members of every caste, ethnicity, language, religion and community are equally important to the country. The concept of equality is protected by the constitution and this has particular significance. The constitution is the fundamental law of the country. The form, structure and operation of the government of a country is determined by this fundamental law.

To foster pluralism and social inclusion, some norms can be established in the constitution. For example, it can be decided that in a multi-religious country, the state is secular and /or guarantees the freedom of religion. A state or a political system, which recognizes a particular religion as the state religion may not be pluralistic: rather, it risks being discriminatory. Equal (fundamental) rights for every individual of the country, irrespective of their religion, caste, ethnic group, language or culture should be ensured. The constitution can provide for special mechanisms to bring historically discriminated people to the mainstream

of the state. Equal rights for all, recognition of diversity and people's right to participate in the political process will provide opportunities for empowerment of all the people.

Similarly, a structured policy to ensure social inclusion is necessary to ensure that all people have representation in government, and have both a right and real access to development. Federalism, (i.e., devolution of power and local autonomy) are governance strategies that can be used to address some of these issues by providing a basis for people's participation in governance and for claiming their rights.

In a federal system, government is brought closer to the people. More local communities within that state will have opportunities for representation and participation. They may have more opportunities to protect their local interests, including their language and culture. By remaining within the bounds of the broader federal system, a multi-religious, multicultural and multi-linguistic society can ensure protection and promotion of diverse religions, cultures and linguistic identities. India, Switzerland, and Belgium are among the many multi-ethnic countries that have adopted federalism which is regarded as a particularly useful strategy for protecting diversity and ensuring pluralism. However, the examples of the former Yugoslavia and the former Soviet Union show that complicated federal systems do not always successfully accommodate diversity in such complex societies.

Nepal is also rich in its linguistic diversity. More than 90 languages are officially recognized. However, traditionally, only one language, Nepali, which is spoken as first language by only about half of the population, has been the language of government and official business. As a result, linguistic minorities have remained marginalized and excluded. There are various ways in which a Constitution can address linguistic diversity. Usually, Constitutions designate one language as an official, national or state language. Special laws are enacted on the details of the use of such a language. Some countries recognize a number of languages as official, and oblige their state institutions to use and operate in these languages (also including a script). In most states, these languages are used by equally large communities. However, sometimes very small languages are also included as the official state language. In federal countries, there may be provisions for the use of regional languages as official ones in the federal units, usually in addition to the overall national language.

The designation of a language as official, state or national language in itself does not suffice to regulate the use and status of that language. That is normally done in secondary legislation. However, there are also other parts of the constitution which may be of relevance here, like the provision in Nepal's Interim Constitution, that all citizens have the right to receive basic education in their mother tongue, and that all people can use their mother tongue at the level of local government. Many countries also include the right to use one's own language at court.

Challenges to Diversity and Social Inclusion in Nepal

Nepal is very diverse. There are many caste, ethnic, language and religious groups and indigenous peoples in the country. However, not all of Nepal's communities have flourished, as they have experienced traditional exclusion.

From the time when Nepal was established as a state, the Hindu religion was considered to be an essential part of the governance system in the country. The ruling classes, from the Lichchhavi dynasty (300-700 AD), the Malla dynasty (1100 - 1768 AD) to the Shah dynasty (1559 - 2007 AD) gave special importance to the Hindu religion. Hindu religious theory and practice always influenced political decision making and statecraft.

The Muluki Ain (Civil Code) of 1854 was the first of its kind in Nepal. It was formulated on the basis of the ancient caste system practiced in Nepal. This Civil Code equipped these traditions with legally binding force. The discriminatory influence of this code in Nepal's multi-religious and multi-cultural society continued even after it was modernized in the 1950s and the Constitution of 1962 AD (2019 BS) was introduced, which laid down basic rights of non-discrimination and equality. This same Constitution, however, declared Nepal a Hindu kingdom.

The Constitution of 1990, which was in force until 2007 (BS 2064), failed to effectively end discriminatory practices that were based on Hindu norms and values. Although this constitution defined Nepal as multiethnic, multilingual, democratic, indivisible, and sovereign, the document also declared Nepal as a Hindu Constitutional Monarchical Kingdom. Consequently, during the democratization process the rights of ethnic groups and religious communities

were still not effectively protected. The state continued to discriminate against languages and cultures, other than the official Nepali language and identity. Other languages failed to get recognition and protection at the national level.

The Interim Constitution of 2007, drafted as the beginning of the peace process, after over ten years of armed conflict, declared Nepal as a Federal Democratic Republican state. This document represented a significant step forward over past constitutions in specifying diversity and social inclusion for Nepal's people. In the Fundamental Rights section, specific rights of freedom and equality, rights against untouchability and racial discrimination, rights to education and cultural, rights of women, and rights to social justice are guaranteed, along with the setting up of a Human Rights Commission to promote the protection and promotion of human rights.

The Interim Constitution also declares that “all the languages spoken as mother tongues in Nepal are the national languages of Nepal and that the Nepali language...shall be the language of official business.” Even with these protections included, it is broadly understood that the new constitution may need to be more explicit and implement more far reaching mechanisms if diversity and social inclusion are to become a reality for the people of Nepal. The constitution can only provide the basis. It cannot bring about social inclusion per se. Secondary legislation, and most importantly, effective governance on this basis are prerequisites.

How Can Diversity and Social Inclusion Be Ensured ?

Drawing on good comparative constitutional and governance practices, the following approaches could be discussed in the Constituent Assembly to find appropriate ways of protecting diversity and ensuring social Inclusion in Nepal.

- » Finding ways to go further in guaranteeing basic human rights, freedom and security for all of the people of the country, by specifying effective implementation mechanisms and procedures.
- » Design a federal structure which is suitable to the demographics of Nepal, taking into account its diversified ethnic, geographical, social, and cultural

structure, the distribution of its resources and other ground realities of the country.

- » Provide for an Upper House on the basis that it will represent ethnic, indigenous, linguistic and religious group interests as well as provincial views in central policy formulation.
- » Provide adequate autonomy and rights to constituent local regions under the federal structure.
- » Guarantee, as a priority, the rights of indigenous ethnic groups, Madhesi, Dalits and women.
- » Protect the rights of minority or small indigenous peoples ("Minorities within Minorities") inhabiting provincial units.
- » Provide for effective and participatory local self-governance.

Constitutional Options

More specifically, several options may be considered in the constitution drafting process to address the issues of diversity and social inclusion. These are not exhaustive or mutually exclusive options. They offer both opportunities and challenges for a constitutional framework aimed at supporting social inclusion.

Options	Merits	Challenges/risks
Establish a Secular State (as provided for in the Interim Constitution) and guarantee freedom of religion.	<ul style="list-style-type: none"> » Equal rights to religious freedom and faith for all people. » All religions feel equally validated. » Religious organizations and institutions are free from state interference. » Creates an atmosphere where the State and its policies are independent of priests and religious authorities. » No restriction on religious practices. 	<ul style="list-style-type: none"> » Nepal is a religious society and people may find it difficult to separate their religious beliefs from their public and professional lives. » May prevent the State from controlling harmful and discriminatory practices against women, vulnerable social groups and children that are endorsed by some religions.

<p>Provide Comprehensive Charter of Fundamental Rights and create appropriate enforcement mechanisms.</p>	<ul style="list-style-type: none"> » Guarantee basic fundamental rights to all ethnic, religious, cultural, and language groups and communities. » Protect the individual and collective rights that minorities call for. » Provide measures for positive discrimination to ensure equity for marginalized groups. 	<ul style="list-style-type: none"> » Will require state institutions such as the judiciary, police, administration, educational system to re-orient themselves and effectively implement this new framework.
<p>Context Appropriate Federalism.</p>	<ul style="list-style-type: none"> » Will provide recognition and opportunities for identity based groups; including the practice and promotion of their languages and cultural practices. » Local communities and minorities will find greater opportunities for representation and participation in politics and the economy at the local level. » Reduces marginalization and exclusion » Local people will have the right of control over local resources. » Improved prospects for economic development » The right to internal self-determination and autonomy could be exercised. 	<ul style="list-style-type: none"> » Difficulty to draw boundaries due to the very complex structure of society. » Possibility of ethnic or communal conflict. » Increased pressures for coordination and cooperation which must be managed well. » Requires equitable mechanisms to distribute resources between the different Constituent Units. » May increase tensions between states and communities. » Rising expectations and demands for more autonomy may even lead to demands for secession.

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Conclusion

It is necessary that the constitution incorporates principles and mechanisms to ensure equity, equality, good governance, decentralization, and a strong and neutral judiciary that defends individual and collective rights. However, it is important to note that these alone will not be enough. Government policies and practices that promote equity to secure equality in the long term are also important. Even more important is that the people respect each other's identities and needs and collaborate on their fulfillment. They should not only claim rights for themselves. They also need to respect the rights of others and take seriously their responsibility to learn to live as a plural society. After all, pluralism is also an attitude of the mind.

About this booklet series

This series of papers is intended to provide a basic background for Constituent Assembly members and the interested public on issues related to the constitution building process. They are not position papers, proposals or intend to preempt any constitutional outcome in any other way. They are the result of a cooperative effort of Nepali and international constitutional experts, coordinated by UNDP's Support to Participatory Constitution Building in Nepal project.

These papers are living documents, and feedback and comments are strongly encouraged. The more they will lead to informed, engaged and constructive discussion and exchanges, the more will their objective be attained. As comments are received further versions of this document or additional issues may be prepared.

In translating them into some of Nepal's major national languages, all effort has been made to achieve a high level of quality standards and the correct terminology, which will be understood by a majority of the speakers of those languages. However, future debates within the various linguistic communities on the proper and correct use of terms can be expected. CCD did not want to preempt that discussion in any way, but rather sought to maximize the reach and inclusiveness of this effort by including those languages.

This booklet is part of a series of documents to be developed by the Centre for Constitutional Dialogue (CCD) on themes relevant to the constitution building process in Nepal.

The objective of this series is to engage Constituent Assembly members as well as the interested public with key constitutional concepts and issues. Each document is available in the major languages used in Nepal – Nepali, Maithili, Bhojpuri, Tharu, Magar, Tamang, Newar and English. Each document is also available in audio format as well as online.

In the first phase it is envisaged that the publication series will include the following themes: State and Religion, Federal System, Human Rights in the Constitution, Rights of Indigenous Peoples, Minority Rights, Systems of Government, Independent Judiciary, Local Self-Governance, Diversity and Social Inclusion, and Participatory Constitution Making Process.

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