

Major Research Paper

Title: "The Incidence of the Composition of the CA on the Public Legitimacy of the Constitution-Making Process: the Inappropriateness of the South African Model to the case of Nepal"

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Summer 2013

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Introduction

Societies emerging from conflict often undergo a process of constitution building, in order to mark a fundamental break with the past and reorganize the relations between the state, individuals, and different social groups. Some of the objectives of constitution building are reconciliation among conflicting factions in a society, the promotion of national unity and a new national identity, empowering the people and providing them with inalienable rights, and increasing the legitimacy of the state. The *substance* or content of new constitutions is obviously important, since the articles and principles stipulated will provide the legal framework and standard against which all ordinary legislation will be evaluated. Some of the most common principles stipulated in constitutions include democracy, popular sovereignty, human rights, equality and non-discrimination, protection of minorities, and separation of powers between the different state organs.¹

In addition to substance, however, the design and implementation of the *process* of constitution-making in post-conflict situations has been considered increasingly important in recent years. This is so because if constitutions are not drafted in a way that harmonizes with the principles and values they espouse, and in accordance with the fundamental social changes they promise to deliver, they will not enjoy credibility in the eyes of the public. The process must also be designed in a way that insures its *effectiveness*, which means that it should be well-planned by the main constitutional actors, with clear procedures and rules of the game that can be implemented, so that negotiations and deliberations are fruitful and disagreements and conflicts can be overcome constructively.²

There are many values and principles which guide the process of constitution-making, such as transparency, accessibility, and public participation. One of the main values characterizing a process that

¹ Bockenforde, Markus, Hedling, Nora, and Wahyun, Winluck, (2011), "A Practical Guide to Constitution Building", *International IDEA: Institute for Democracy and Electoral Assistance*, at pp. 4-6

² *Ibid*, at pp. 6-8.

enjoys public legitimacy is the degree of *inclusivity* that it allows for different segments of society, especially the groups that have legitimate historical grievances and have been previously excluded from power structures. This is so because if these groups are not included in the process of drafting the constitution, they could easily perceive the final document as being imposed on them from the outside, and this would mean that no fundamental break with past power relations has occurred. One of the ways in which inclusivity transpires in the constitution-making process is in the composition of the *Constituent Assembly (CA)*, which is the body usually responsible for carrying out the processes associated with drafting the new constitution.³

An ongoing case of constitution building which clearly exemplifies the importance of inclusivity and which reveals the incidence of the composition of the CA on the public legitimacy of the process is that of Nepal, which has received considerable attention from the media and the international community. An important issue of contention in Nepal was the system of representation to the CA; the main political parties wanted to adopt a first-past-the-post (majoritarian) system, while most ethnic minority groups, women's groups and civil society representatives called for a proportional representation system. South Africa was often used by these social groups as an example of a constitution-making success story worth emulating, and it was stressed that the South African CA was inclusive because it used a system of proportional representation, where every vote counts and where smaller constituencies and minority groups are properly represented. When the Nepali CA stumbled upon a constitutional impasse in 2011, experts and academics once again turned to the South African model for guidance to overcome the stalemate between political parties.⁴

³ Ghai, Yash, Brandt, Michele, Cottrell, Jill, and Regan, Anthony (2011), "Constitution making and reform: Options for the process", *Interpeace*, pp. 7-11.

⁴ Dr. Bipin Adhikari, *Nepal's constitutional impasse: an insider's perspective*, (5 June 2012), link provided on Nepali CA website.

The case of South Africa is undoubtedly worth learning from and emulating, since it can be considered in many ways as one of the few successful constitution-making processes of the last few decades. The process was effective, in the sense that no important deadlines were missed, and although the Constitutional Court did not ratify the first draft submitted by the CA (because it was considered to breach some of the pre-established constitutional principles), the second draft was ratified and the constitution was adopted in a timely fashion. More importantly, the South African Constitution can be said to enjoy public legitimacy because it was accepted by all social groups and there were no more protests and violence related to this issue.

Although Nepal's CA did end up using, to a great extent, a system of proportional representation like in South Africa, this alone did not generate inclusivity. In fact, the general consensus amongst observers of the international community is that the process has been a failure so far, or at least has arrived at an impasse. The CA was dissolved due to fundamental disagreements between the main political parties and due to social protests, and a new CA election is scheduled for November 2013, although the election date has already been postponed twice. The process so far has not enjoyed legitimacy in the eyes of the public, nor has it been effective in respecting its deadlines and producing results, to the point where most Nepali do not favour an extension of the CA's mandate (according to recent polls).⁵

This paper will argue that the problem in Nepal was not so much the system of representation to the CA, but the domination of the process by political parties. The difference in the CA's performance in the cases of Nepal and South Africa can be attributed to some fundamental differences between the political parties, political culture and political communities in these two countries. It is argued that in the case of South Africa, the fact that political parties were the main medium of representation to the CA was favourable for the public legitimacy and effectiveness of the process, because the main political

⁵ Ibid.

parties were seen as democratic and representative, as well as functional and effective. Moreover, South Africa had an established culture of political participation – in the form of sustained popular involvement in the liberation struggle, as well as an established political community – in the sense that different social groups had agreed on principles which allowed them to co-exist.

By way of contrast, the dominance of political parties within the Nepali CA was detrimental to the public legitimacy and effectiveness of the process, because political parties in Nepal were seen as non-democratic and elitist, as well as dysfunctional and ineffective. Moreover, there wasn't a culture of political participation established – and popular involvement in liberation had not been led mainly by political parties, and there also wasn't an established political community – to the extent that different social groups had not agreed on principles for living together.

Because of these fundamental differences in the political contexts in South Africa and Nepal, this paper argues that the South African model is not the most appropriate one for emulation for the Nepali process. Rather, it is asserted that the models of other countries such as Libya, Egypt and especially Kenya are more applicable. It will be shown how in all these countries different mechanisms were used for broadening the membership of the CA beyond political party affiliation, and making sure that the constitution-making process is not dominated by political parties. The last section will apply various lessons learned from all these past experiences to the Nepali case, and will provide some insights for moving forward with the process, namely the possibilities of broadening the CA membership, establishing an independent commission, and involving civil society more fully in the process (such as for public participation programmes). First, however, will be examined the role of CAs in constitution-making more generally, and how they are thought to enable inclusivity.

The Role of CAs in Constitution-Making and How they Enable Inclusivity

CAs which are directly-elected by citizens are a relatively recent occurrence, since historically, constitution-making was an elite-driven and even secretive process. Most constitution-making endeavours were performed by indirectly-elected CAs, which are also known as *Constitutional Conventions*, where members are elected by either state organs or members of legislatures. For example, the members sitting in the Constitutional Convention in the United States (1787) were elected by state legislatures, and the process in Germany (1948) created a body called the “Parliamentary Council” composed of delegates elected by the legislatures of the Länder. Similarly, India (1947-1949) and Pakistan (1947-1956) also used indirectly-elected assemblies. In many cases, the meetings of these bodies and their deliberations were kept confidential and “secret”, and the rationale for this was that consensus-building was a delicate matter which could easily be hindered by the presence of outside observers.⁶

Aside from indirectly-elected CAs, there have historically been several other types of bodies created to conduct constitution-making processes. *Constitutional Conferences* were often used in colonial and post-colonial situations, and were usually comprised of delegations of the existent national governments, the constituent units and representatives of the major political parties. This type of arrangement was often used prior to “independence” where the constitution-making process was instigated or led by the imperial government, such as in Canada (1864-66), the West Indies (1947-57) as well as several former-colonies in Africa and Asia. These conferences were typically controlled by the aforementioned elites, and highly secretive. Another type of arrangement for constitution-making is a *Constitutional Commission*, usually comprised of experts or public figures charged with studying constitutional issues, examining public opinion and proposing ways out of an existent constitutional

⁶ Fafard, Patrick and Reid, Darrell, (1991), “Constituent Assemblies: A Comparative Survey”, Research Paper No 30, Institute of Intergovernmental Affairs, pp. 5-6.

impasse. They are sometimes used alongside CAs to support their work on different issues, and many countries have had positive experiences with them, such as the Fijis in the 1970s.⁷

Directly-elected CAs were traditionally rare because political elites did not want to lose their monopoly over the constitution-making process, but they have definitely become the norm in present times. This type of CA is the product of general direct elections where citizens elect representatives, generally members of political parties, to act as delegates in the CA. This form of arrangement started in France with the *Assemblée Nationale* (1790-1791) following the French Revolution, but was foregone until recent times in favour of the aforementioned indirectly-elected constitution-making bodies. The first examples of CAs created through direct democratic elections are perhaps Spain (1977) and Nicaragua (1984). In the 1990s, they have slowly become the norm, with South Africa, Cambodia, and East Timor as only a few examples.

Democratic CAs are supposed to be transparent and their deliberations are meant to be accessible to the public. In South Africa, for example, all CA deliberations were transcribed and available on a website. It makes no doubt that modern CAs are more inclusive and representative than indirectly-elected or appointed bodies, since the citizenry can exercise a more direct control over the constitution-making process and can hold delegates directly accountable. Moreover, direct elections are in themselves a fundamental expression of democracy, and they set an important precedent for the way power will be shared in society in the future.⁸

There are various choices and possible arrangements for setting up the functioning of a CA. This body can have unlimited powers to draft a constitution and promulgate it into law, or it can have limited powers, and be constrained by constitutional principles (such as in South Africa), a review process and a need for certification (such as by a Constitutional Court or some other state organ), or a limited range of

⁷ Ibid.

⁸ Ibid, pp. 7-8.

topics that it is allowed to cover. A CA can function alongside a regular legislature, or it can itself become a parliament within a specified timeframe. It is documented that when a CA functions alongside a parliament, there can be tensions and a lack of cooperation between the two⁹ (such as was the case in Nigeria and especially Kenya, as will be shown in a later section).

A last observation in regards to CA membership: although general direct elections are a historical step forward from indirect elections, it has been the experience of many countries that small elites still end-up hijacking the process. This is especially true if political parties are not internally democratic and are more concerned with maintaining political/economic privileges than with fundamental social change, as has been the case in Nepal and will be shown throughout this paper. It will also be explained that there seems to be a new historical movement that is taking place, which calls for CA membership away from political parties and towards new modes of representation, such as independents and civil society.

Before examining these issues, however, it is necessary to briefly examine what other factors determine the inclusivity of a constitution-making process, aside from the composition of the CA.

An inclusive constitution-making process which enjoys public legitimacy and is effective

It is not possible to examine in this section the diversity of factors that are considered important for an inclusive and effective constitution-making process, but it is worth mentioning a few of the most prominent ones. *Public education programmes* are definitely considered essential for a process to be inclusive, and their aim is to raise awareness amongst citizens about the constitution-making process that is taking place, and to familiarize them with the country's constitutional history and the important elements and social changes that are at stake. The challenge with this endeavour is often times in reaching distant parts of the country, or in reaching members of peripheries, which might not have

⁹ Ghai, Yash (2008) "The Role of Constituent Assemblies in Constitution Making", *International IDEA: Institute for Democracy and Electoral Assistance*, pp.6-10.

access to the internet or television. For this reason, it is highly recommended to use all possible sources of communication, such as newspaper and radio, and to conduct public outreach programmes all over the country, so that no region or community may be excluded from the process.¹⁰

Another important element which is closely linked to the first is conducting a *public participation programme*. Once citizens have been made aware of the constitution-making processes and of the social issues at stake, it is time for them to provide their input (ideally through individual submissions) as to what they believe should be changed about the current constitution, or what should be included in the new constitution. This process would ideally be started before a constitutional draft is prepared, but it could also be initiated after. In the latter case, citizens would be given access to the constitutional draft (which was prepared by political parties, the CA, or some independent commission) and would be encouraged to provide submissions about whether the draft includes all the issues that they consider important. The challenge for conducting such a programme is, once again, effective public outreach in distant or underprivileged parts of the community or country. Moreover, this process can be quite costly and time-consuming. Additionally, an effective mechanism for processing citizens' submissions by the members of the CA needs to be carefully planned and established.¹¹

Lastly, many countries have found that creating an *Independent Commission* helps the process by enhancing its effectiveness. Such a commission would have the advantage of political independence and therefore not get bogged down in political conflicts and partisanship or narrow-minded concerns, and would be able to act more effectively based on objective analysis and evidence. This commission is typically meant to share the workload with the CA and to take a given number of issues "off its hands", such as public participation programmes, writing the constitutional draft, reviewing and analyzing citizens' submissions, researching issues on human rights, etc. It is reported that many countries have

¹⁰ Bockenforde, Markus, Hedling, Nora, and Wahiun, Winluck, (2011), "A Practical Guide to Constitution Building", *International IDEA: Institute for Democracy and Electoral Assistance*, at pp. 10-12

¹¹ *Ibid*, pp. 20-30.

had favourable experiences with such commissions, since they have succeeded in advancing a process which might have come to a stalemate if left only to political parties.¹²

Now that the role of CAs and how they relate to inclusivity has been examined, and some other elements that make up a constitution-making process which enjoys public legitimacy and is effective have been studied, it is time to analyze the case of South Africa, and how different political factors along with its CA membership affected the public legitimacy of its' process and its effectiveness.

Part I - The incidence of the composition of the CA on the public legitimacy and effectiveness of the Constitution-making process in South Africa

This first part will show that the processes and negotiations leading up to the formation of South Africa's CA naturally drove it to favour political party affiliation over other modes of representation, and that this choice must be appreciated in the context of the contentious issues between the main political parties and their competence for leading the process. It will be argued that in the case of South Africa, the fact that political parties dominated the process was not problematic for the public legitimacy that its activities enjoyed, since political parties were seen as representative and democratic, and South Africa enjoyed a strong culture of political participation in the form of involvement in the liberation movement, along with an agreed-upon political community – through agreement on principles.

Section I – The processes leading up to the creation of South Africa's CA

The establishment of South Africa's CA has been the result of a long string of negotiations between the main political parties, manifesting itself in a two-stage process often interrupted by violent events, negotiation deadlocks and creations of numerous new organs and initiatives for renewing discussions.

¹² United Nations Development Programme (UNDP) (2007), "Constitution Making in Nepal, *Report of a Conference Organized by the Constitution Advisory Support Unit*, UNDP, 72 p.

The most contentious issues arose between political actors and not with civil society or specific groups, and the constitutional principles which were meant to “bind” the CA were used as a safeguard for inclusivity of broader society and the protection of minority interests.

Section 1.1 – The processes and negotiations preceding the formation of the CA in South Africa

Over forty years of conflict between the apartheid state and the various social dissenters, most prominent amongst which the *African National Congress* (ANC) and its allies, culminated in the governing *National Party's* (NP) declaration of a state of emergency and introduction of military personnel in the black townships in 1990 and 1991. For the first time, however, the international community gave a comprehensive and impactful response in the form of the “*Harare Declaration*” in October 1991, which called for the release of all political prisoners, the unbanning of political organizations, the removal of militaries from the townships, the cessation of political executions, an end to the state of emergency, and a repeal of legislation intended to suppress political activity. This declaration, along with the longstanding social pressure that had been exercised on the state by political protesters, can be seen as important factors which caused the NP to be more amenable to negotiating terms for ending the violence and finding a settlement.¹³

Thus began South Africa’s constitution making process, which is said to have started in 1990 and ended in 1996, with the coming into effect of the constitution. The early stages of the negotiations relied heavily on the Harare Declaration. Two months after that event, CODESA I was established to further the state reforms, which was a working group including most South African political parties. The ANC was calling for a democratic constitution-making process involving a CA, while the NP was hesitant and stressed the importance of legal continuity. The second plenary session of CODESA failed in May 1992,

¹³ Seo, Sang-Hyun, (2008) “A Study of Democratic Transition in South Africa: Democracy Through Compromise and Institutional Choice”, University of South Africa.

due to the Boipatong massacre and the ANC's withdrawal from the talks after claiming the complicity of the NP in the events.¹⁴

The ANC continued its initiatives by other means, and along with the Communist party and labour movement supporters, organized campaigns of mass action and mobilized the people in demand of a democratic and elected CA. This march was ended in violence, with the Bisho massacre in September 1992, where fire was open on protesters. This finally gave way to the "Record of Understanding" (Sept. 26, 1992), through which for the first time the NP agreed to a democratic constitution-making process. In return, the ANC conceded to an interim constitution which would entrench a government of "National Unity" for 5 years and thus insure the continuity of apartheid-era NP officials.¹⁵

In March 1993, the *Negotiating Planning Conference* convened (which was meant to replace CODESA) and it established the *Multi-Party Negotiating Process* (MPNP). The ANC agreed to give regions significant powers, in order to appease the Inkatha party and other parties desiring more regional autonomy. The "Technical Committee" within the MPNP played a central role in laying forth the subsequent steps in the constitution-making process. It established a proposal for a CA, which will be examined in more depth in the next section. It forwarded a bill for the establishment of a Transitional Executive Council (TEC), in which the current government (NP) would have to share decision-making power with the ANC and other parties. It also proposed a bill laying out a date for the general elections (for 27 April 1994), and the first draft of the interim constitution got published. After examining these proposals and heavy negotiations, the parties agreed amongst themselves, and definite dates were set for the TEC, the interim constitution, and elections.¹⁶

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

There were numerous contentious points between the NP and the ANC, mostly between 1990 and 1993, such as property rights, decisions on a unitary or federal state, minority rights, and the form of interim government that should be established. By 1993, however, the two parties were able to converge on most fundamental points, at least to the extent of the structures and timelines for constitution-making. The most vocal dissension in 1993 came from the Freedom Alliance (dominated by the Inkatha group and right-wing extremists), which mainly called for a more decentralized and federal or confederacy-like state structure. They also opposed the role and powers of the CA, since they desired that the final constitutional document be already negotiated before elections. In the absence of concessions on these points, they refused to partake in elections and advanced the threat of violence and civil war. To avoid further bloodshed, the ANC and the NP both worked extensively to formulate concessions and get the dissenters to agree. Things finally quieted down prior to election, and the Freedom Alliance came aboard, with peaceful and for the first time non-racial general elections taking place on 27 April 1994.

Section 1.2 – The final decisions and settlements on the election and composition of the CA in South Africa

Having a democratically elected Constituent Assembly (CA) was one of the most important contentious points and requests of the ANC. The former felt that majority rule was the only way to obtain justice, freedom and respect for human rights for the majority of South Africans which had been denied and oppressed for so long. As was previously explained, both the NP and the Freedom Alliance were reluctant to accept this. Their main concern was that through an election and through the sheer weight of superior numbers, the ANC would be able to impose its will and have the final say in the constitution-

making process and crush minority interests. It was a set of pre-agreed upon binding constitutional principles which enabled them to quench these fears and accept the option of a CA.¹⁷

The CA was democratically elected but had to abide by the 36 Constitutional principles listed in Chapter Four of the “interim” Constitution. These principles included the protection of minority rights and guarantees of regional autonomy on a variety of political, economic and social issues. Additional provisions concerning the establishment of the CA were elaborated in Chapter five, and were based on the recommendations of the Technical Committee. It was decided that the CA would comprise of 490 members from seven political parties, of which 400 would sit in the National Assembly and 90 in the Senate. The joint sitting of these two bodies would make up the CA.¹⁸

There seems to have been no real debate about the composition of the CA being anything other than members of political parties. This was so because it was the political parties, and especially the most important ones like the ANC and the NP, which had negotiated the peace process and the transition to democracy every step of the way. Additionally, it was agreed that although the CA would be composed only of political parties, civil society and individual citizens would be included throughout the process of constitution-making. The interim constitution was based on some principles which were meant to guide the process, which will now be examined.

The first principle was inclusivity, which meant that the new Constitution had to be the combined product of the ideas of all major role-players, of which 3 categories were identified. First were the political parties which were actually represented within the CA. Second were the political parties outside the CA along with organized civil society. Finally were the individual citizens. As will be seen in a later

¹⁷ Klug, Heiz. (2011), “South Africa’s Experience in Constitution Making”, *Legal Studies Research Paper Series Paper No 1157*, 47 p.

¹⁸ Ibid.

section, this principle led to comprehensive participation programmes for these other role-players, through committees, seminars, and public participation campaigns of various sorts.¹⁹

The second principle of the interim constitution was accessibility, which implied proactive steps in making sure that the constitution-drafting process was accessible to all South Africans. This materialized in an elaborate media campaign, amongst other initiatives. The third principle was transparency, and this materialized in the fact that all CA meetings were open to the public, and all speeches and transcripts, as much as possible, were made available on the internet.²⁰

It therefore appears that in the case of South Africa, it was considered from the get-go that political parties were the main actors able to get the job done as elected members in the CA. At the same time, special care was given to highlight the importance of involving all players in society, and a firm commitment in taking deliberate steps to encourage and allow that involvement were taken. One of the main reasons why this strategy worked in South Africa is because political parties were seen as trustworthy and enjoyed public legitimacy, as will be examined in the next section.

Section 2 – The incidence of the public perception and reputation of South African political parties

This section will examine the impact of the way in which political parties in South Africa are perceived on the public legitimacy and effectiveness of the constitution-making process. It will be argued that political parties were seen as the natural choice for representing South Africans within the CA, because they were known as being democratic and representative, as well as functional and effective in the pursuit of their goals.

Section 2.1 – Political parties in South Africa were seen as democratic and representative

¹⁹ Ibid.

²⁰ Ibid.

South African political parties, and especially the ones leading the liberation struggle, have acquired a reputation through time of being internally democratic and representative. This is truest of all in the case of the ANC. The decision-making process within the party was democratic and characterized by extensive deliberation, as opposed to top-down or imposed by party leaders upon regular members. Nelson Mandela argues that the internal democracy of the party was based, to some extent, on traditional African values of consensus-reaching between chiefs and members of the community or tribe. The fundamental idea in traditional decision-making was that every member of the community needed to express their view and decisions would be taken unanimously, so that a majority would not be able to crush a minority. Although this trend is obviously harder to apply in a mass party, due to the natural difficulty in reaching unanimity amongst many members, the values behind this practice and the habit of allowing every party member to express their view and to be taken seriously in party meetings, regardless of rank, have been espoused by the ANC.²¹

Another reason why the ANC was seen as egalitarian and non-elitist is because ordinary people who were not affiliated to the top leaders and who were not part of a particular socioeconomic or ethnic group were still able to climb up the party hierarchy and hold positions of power. One study in the 1990s established that unemployed people or people with lesser education were almost equally likely to hold positions on branch executives as those with jobs or higher education. There were also no ethnic barriers to ANC leadership; its leaders were from diverse ethnicities and clans (Nelson Mandela being a “Xhosa” and Oliver Tambo, another prominent ANC leader of the same period, was a “Zulu”, for example). Although there weren’t non-black leaders in the ANC, it was still the party which was most inclusive of other races, as will be shown shortly. Women were not very present in the party leadership in the 1990s, but this trend has changed after the first democratic elections (1994), and a recent study established that 32% of women currently hold higher office in the party, compared to 42% of men. The

²¹ Mandela, Nelson, “Long Walk to Freedom”, at pp. 39-41

National List Committee still insures that every third spot on its list of candidates is occupied by a woman.²²

Another factor which helped the ANC become truly representative and known as a “mass party” was its sustained outreach activities towards peasant and rural communities. Following its creation in 1910, the ANC grew primarily as an urban movement, comprised mostly of city “bourgeois” and educated individuals allied with urban workers. As its activities and ambitions grew in importance, the party started reaching out to rural and peasant communities in the late 1940s. It is reported that only in 1952 did the ANC succeeded in expanding its activities in rural areas with some consistency and establishing permanent party bureaus. It was the issues of land allocation and land segregation (which were of great concern to most peasants) that served to truly bridge the interests between the rural and urban ANC members, and the collaboration between these two geographical constituencies of the party grew over time. This was an important accomplishment for increasing the party’s representativeness since many other parties, such as the Pan-African Congress (PAC), remained solely urban-based for a long time²³

Finally, the ANC was much more inclusive of races other than black South Africans in its programme, as it accepted Indians and whites in its party, campaigns and activities. The party brought forth a vision of South African nationhood as being multiracial, as is expressed by their famous statement; “South Africa belongs to all who live in it, black and white, and (...) no government can justly claim authority, unless it is based on the will of the people”. This position can be contrasted with the motto of the PAC, whose message was “Africa for the Africans” and who was actually formed as a split from the ANC in response to the perception that the latter was being too inclusive. It turned out that the broad appeal of the ANC

²² Seo, Sang-Hyun, (2008) “A Study of Democratic Transition in South Africa: Democracy Through Compromise and Institutional Choice”, University of South Africa.

²³ Ibrahim, N. (2010) “Soul of a Nation: South Africa’s Constitution-Making Process”, 330 p.

won more public sympathy, and while the PAC was eventually dissolved as a party, the ANC was (and still is, to a great extent) seen as the most representative party in South Africa.²⁴

As far as other South African political parties were concerned, the *Communist Party*, a close historical ally of the ANC, was traditionally elite-driven and less representative of broader society. It was originally consisted of an alliance between Marxist intellectuals and urban workers (especially miners in Johannesburg). However, it is documented that once it returned from exile right before 1990, it undertook a drastic transformation of its internal structure and its membership regulations and recruitment strategies. Many members of the former leadership stepped down, and the party committed itself to becoming a “mass party”, such as the ANC. It reoriented its message from socialism to “democratic socialism” and undertook vigorous recruitment strategies in both urban and rural settings, and between 1990-1992 its membership grew from around 4,000 to 45,000 members. It is therefore reasonable to affirm that the Communist Party did become democratic and inclusive, at least by the time the CA elections were to be conducted.²⁵

Another important South African party that is worth briefly examining is the *Inkatha Freedom Party* (IFP). This party was formed in 1975, initially with the sole purpose of preserving the Zulu ethnic group as a cultural identity and furthering its interests. It can be argued that it always remained consistent with this aim, since in the negotiations preceding the CA formation in South Africa it was constantly pushing for more rights and more regional autonomy and even independence for the Zulu of the KwaZulu Natal region. Those that shared this goal and indulged or approved of its methods in pursuing this aim, such as instigating Zulu groups to violence, could surely consider the party as being representative of the cultural interests of the Zulu. In terms of being democratic, however, the record is more mixed, since there have been allegations of coercion in the KwaZulu region of individuals to

²⁴ Ibid.

²⁵ Ibid.

become party members. Since there was overlap between the party and the regional government, it is said that people were forced to join in order to have access to land, housing, pensions, jobs and other resources.²⁶

The last South African party which will be examined here and which was also seen, it is argued, as highly representative, if not internally democratic, is the National Party (NP). It must be stated at the outset that this contention is only construed to apply to the Afrikaner cultural group and obviously not to South African society more generally. The fact is that Afrikaners had a strong group identification to the NP and commonly referred to it as “our” party, and this was partially a result of its glorified past and of being seen as having elevated Afrikaners from the status of British subjects to a state of cultural and political independence. The party was also involved with various intellectual movements which affirm the groups’ uniqueness and distinct place in history. As one author states in respect to Afrikaners; “There is a close connection between the realization of having one’s own language, the recognition of being involved in a unique history, and the claim to being a people with a divine calling”. The NP leadership helped construe this identify, and Afrikaners saw the NP as representative of their interests as a group, because of this strong cultural identification.²⁷

In terms of how internally democratic the NP was, it can be stated that the party was at least semi-authoritarian by modern standards – since decisions were often taken by the party leader with little consultation except within the Cabinet. However, Afrikaners were not concerned with this lack of internal democracy and deliberation, since as is explained by Robert Shrine, they tended to have a historical veneration for their party leaders. Their first leaders, such as President Malan and Strijdan, were involved in the Boer Wars against the British in their youth, and they took over the party essentially as saviours of the nation (winning the NP’s first elections in government). Loyalty to the party

²⁶ Ibrahim, N. (2010) “Soul of a Nation: South Africa’s Constitution-Making Process”, 330 p.

²⁷ Boule, Laurence (1994), “Malan to De Klerk: Leadership in the Apartheid State”, Hurst, 312 pp.

and sticking behind the leader were prominent values in Afrikaner society. When splits did occur from the party, they were usually movements towards the far-right, by party members who considered that the leaders were not sufficiently protecting the interests of the group. Nonetheless, in the run-up to the CA elections, the majority of Afrikaners still felt represented by the NP, and this showed itself in the polls.²⁸

In conclusion, because political parties in South Africa, and especially the main liberation movement parties such as the ANC and the CP, were seen as democratic and representative, they seemed as a legitimate choice for being representatives of the majority of South Africans inside the CA. More generally, most citizens felt that whatever their interests were, political parties could channel those interests on their behalf, since even if parties were not fully democratic, as the NP and the IFP, they were still seen as being representative.

Section 2.2 – Political parties in South Africa were seen as functional and effective

One of the most common forms of criticism brought against political parties (or politicians) in any context is the act of delivering false promises, or failing to do what they have pledged to do to their electorate. Functional and effective in the context of political parties can therefore be understood as their ability to reach their goals or fulfill their promises, for the benefit of the communities or individuals they represent. On the run-up to the first democratic elections in South Africa, when the CA was to be formed, South African political parties - especially the main liberation parties in the struggle against Apartheid (the ANC and the Communist Party), were seen as being functional and effective. They had delivered on their promises.

²⁸ Boule, Laurence (1994), ``Malan to De Klerk: Leadership in the Apartheid State``, Hurst, 312 pp.

One of the main promises that these parties made to the people of South Africa was that if the masses continued to support the struggle against the apartheid regime, especially through participation in the ANC-led activities, strikes, and boycotts - this political and popular resistance will eventually produce enough pressure on the South African government as to force it to abandon its racist policies. The emergence of the first democratic elections to the CA can be seen, in a way, as the ultimate actualization and fulfillment of that promise, at least up to that point.

The liberation movement political parties were also seen as functional and effective because of the ability they had demonstrated throughout their history to handle major obstacles and recover from setbacks. The ANC and the Communist Party especially had faced numerous moments of turmoil during which their leadership was questioned or the possibility of victory against the Apartheid regime seemed like an unlikely outcome. There were such setbacks as the banning of both parties in 1960, the Rivonia trials and the imprisonment of important members of the ANC and Communist Party leadership, and mass action campaigns that resulted in disaster and the death of many demonstrators, such as the massacres in Sharpeville (1960), Soweto (1976), and Port Elizabeth (1985). Some formerly prominent South African parties did not resist the test of time and the pressures of the apartheid government, such as the PAC - which after some failed attempts stopped organizing mass-action campaigns, and the Black Consciousness Movement (BCM) – which was prominent in the 1970s but disappeared by the late 1980s due to government pressures. It can be said, therefore, that the ANC and the Communist Party were “survivors”, and the resilience they have demonstrated throughout time gave them tremendous credibility and legitimacy in the eyes of the public.²⁹

A final reason why the liberation movement political parties were seen as truly effective and capable of delivering on their promises was the international credibility they gained over time through effective

²⁹ Ibrahim, N. (2010) “Soul of a Nation: South Africa’s Constitution-Making Process”, 330 p.

lobbying of international organizations. South African political parties, headed by the ANC, had gained the attention and sympathy of many governments and organizations around the world, which led to the effective introduction of the anti-apartheid struggle on the agenda of the UN General Assembly as early as the 1950s. It took time before the cause gained support or acceptance from the major western powers, since many had important economic ties with the South African regime.

The UN Security Council considered the situation in South Africa for the first time in March and April 1960, at the request of 29 Asian-African States. It finally adopted a resolution recognising that the situation in South Africa “if continued might endanger international peace and security”. A Special Committee was established at the UN for the struggle against Apartheid, in which the ANC and the PAC received observer status in 1974. The international pressures of the UN and individual governments, culminating in the Harare declaration, were decisive factors in the National Party's acceptance to open negotiations with the liberation movement parties. It can be stated that this international recognition of the ANC's and its allies struggle, and the ties and assistance it helped them cultivate and achieve, were seen by the masses in South Africa as examples of political success and confirmation of their ability to produce results.³⁰

In terms of the other political parties in South Africa, it could be argued that the IFP was also functional and effective in representing the interests of its Kwa-Zulu region. It did conduct and lead mass action campaigns for improving the rights and status of Zulus' as a cultural group throughout the 1970s and 1980s, and Buthelezi (which was party leader in the run-up to the CA elections) was one of the main actors having demanded the release of Nelson Mandela as a prerequisite to opening negotiations with the NP. Moreover, according to pre-election polls, the white community viewed the IFP as the most trustworthy amongst African parties, with a capitalist ideology and more amenable to negotiations,

³⁰ Ibid.

while they viewed the ANC and its allies with suspicion and considered them to have a socialist or even communist-based dogma. Finally, the agitation created by the IFP before the elections did succeed in guaranteeing more regional autonomy and local powers for the Zulu group, which won them popularity in the Kwa-Zulu region and this came across in the polls. On the other hand, the violence that was instigated by the IFP at various stages and the obstinacy of its leaders in refusing the proposals and agreements which were accepted by both the ANC and the NP caused many South Africans and international observers to view them as saboteurs of the process. Moreover, their narrow-minded focus on Zulu ethnic interests as opposed to South African interests undoubtedly runs counter to the goals of nation-building and national unity.³¹

The NP was also historically considered as functional and effective by the Afrikaner group. Malan, who was the first political leader to win elections for the NP in 1948, had the Afrikaans language successfully recognized as an official language. The following twenty years of the NP were dedicated to “consolidating the ethnic movement” and “giving whites and Afrikaners in particular a protected position in society”. This was achieved through affirmative action programs, protective policies and subsidies, which elevated the socioeconomic status of entrepreneurs, business owners and farmers. The laws of the apartheid era were all seen, for the most part, as expressions of this protective policy for the Afrikaner privileges and culture.

Another successful accomplishment of the NP was maintaining party unity behind the party leader and preventing, for the most part, splits from the party. Since the NP was constituted federally, provincial loyalties and local rivals always threatened to disintegrate and separate from the center. The NP Federal Council, which brought together provincial leaders with the main party leader, is said to have played a

³¹ Ibid.

crucial role in maintaining party unity, through effective deliberation and especially group pressure (and loyalty for the leader, was explained in the last section).

It can thus be stated, for all these reasons, that the NP was seen as traditionally functional and effective in the eyes of most Afrikaners, since it had served their interests faithfully for close to half a decade. At the same time, there have been instances where Afrikaner public opinion had lost confidence in the effectiveness of the NP, namely when the violence between the government and social dissenters (political parties and others) increased between 1984 and 1986 and at various points in 1993.³²

It can therefore be asserted, to conclude this section, that the main political parties in South Africa which were involved in the negotiations preceding the formation of the CA were generally seen as functional and effective by their respective supporters, which taken together constituted the vast majority of South Africans. This was so because they had demonstrated throughout their history that they were able to deliver on their promises, as well as to recover from setbacks and preserve party unity. As this section has now finished analyzing political parties specifically, the next section will assess the incidence of the political culture and the political community in South Africa on the public legitimacy and effectiveness of the constitution-making process.

Section 3 – The importance of the culture of political participation and the political community existent in South Africa

This section will examine how a culture of political participation, such as the one which emerged over the years in South Africa, cultivated in the eyes of the public a sense of trust in political parties. It will also be examined how the creation of a vibrant and experienced political community before the occurrence of democratic elections also might have served in providing legitimacy to existing political parties.

³² Boule, Laurence (1994), ``Malan to De Klerk: Leadership in the Apartheid State``, Hurst, 312 pp.

Section 3.1 – The emergence of a culture of political participation in South Africa – through popular involvement in the liberation struggle

It is important to note from the outset that South Africa obviously did not enjoy a culture of political participation in the general meaning of the notion, since the vast majority of South Africans were completely excluded from political processes and enjoyed little or no civil and political rights in the apartheid state. The country did however enjoy a culture of political participation in the form of political protest and popular engagement in the political activities of the liberation struggle.

Political participation in South Africa started in a more pronounced way with the increased activity of the ANC, one of its oldest political parties, in the late 1940s and early 1950s. Although the party had been created in 1910, it was initially very reluctant to engage in overt public protest, and limited its dissent to written articles and deliberation in intellectual circles. It is only with the creation of its Youth League in the 1940s that it decided to take on a more proactive approach to social change, and this manifested itself in general strikes, mass action campaigns, boycotts and demonstrations.

These forms of public involvement became much more frequent and intense in the 1950s, with such mass-events as the Defiance Campaign in 1953, and they also involved more and more participants. As a result of these campaigns, a relationship of trust was formed between the ANC and its allies and the masses of South Africans. The ANC leadership demonstrated political maturity on several occasions by calling for strikes and campaigns at strategic times and also calling off campaigns when the violence or repression would become too intense, or when it was sensed that the situation could become explosive. South Africans became accustomed to these forms of active political protest and participation, under the leadership of the main parties.³³

³³ Seo, Sang-Hyun, (2008) ``A Study of Democratic Transition in South Africa: Democracy Through Compromise and Institutional Choice``, University of South Africa.

When the ANC and the Communist Party were banned in 1960, and due to the violence with which the liberation movement was crushed by the apartheid government in these years, active political protest by South Africans also came to a halt. It is only in the 1970s that political activism was ignited again, with the appearance of new political actors on the scene, such as the BCM and the IFP. One member of the BCM executive recalls that there were intensive efforts undertaken to involve South Africans in the liberation struggle once more, especially in rural areas that had been previously ignored. As he mentions: "Our community was highly mobilized at this particular time. In order for liberation movements to succeed in their conscientization bid, they deem it necessary to engage communities in various projects that would heighten the revolutionary spirits of the people".³⁴

The 1980s witnessed a new wave of public participation in political protests, which was this time led by civil society. The United Democratic Front (UDF), which was created in 1983, was a loose organization of NGOs, such as church associations, street committees, trade unions and professional associations. They were said to be highly ANC-oriented in their policies and they received a lot of foreign funding, especially from Scandinavian countries. What is even more impressive is that the culture of political protest which had been instigated by the liberation struggle parties for all these years finally began to take root and manifest itself in all areas of society. As one author mentions: "By the early 1980s not only was it possible to hear all manner of anti-apartheid protest from the stage, the pulpit and increasingly, the street, but a whole alternative left subculture flourished vigorously and unabashedly. Long before the advent of De Klerk, the ANC line on the academic and cultural boycott was observed as virtual law by most universities and the generality of producers, directors, actors and musicians, while in the campus

³⁴ Buttler, Jeffrey (1987), "Democratic Liberalism in South Africa : Its History and Prospect", Wesleyan, 438 pp.

bookshops it was possible to buy the works of Che Guevara, Regis Debray and other theorists of guerilla warfare (...).”³⁵

When the ANC was unbanned and came back from exile in the late 1980s, in addition to involving the public in renewed mass action campaigns, it even implicated the ordinary citizenry in domains that are typically considered as technical and as the exclusive prerogative of specialized departments, such as policy research and formulation. The party started devoting resources to policy analysis to sustain its day to day activities and campaigns. The Legal and Constitutional Department (LCD) and the Department of Economic Policy (DEP) were created during this period. These specialized departments of the ANC initiated workshops with local communities to get them involved in the policy process. According to testimonials of participants at the time, it was an empowering process for ordinary citizens who previously believed themselves as having no technical understanding of economic or political issues. It also gave ordinary citizens a sense of control over the policy formulation of the ANC, which made them more committed to the organization and its leadership.³⁶

As a result of this sustained political participation and the culture of political protest which was formed, South Africans came to trust political parties to be inclusive and to involve them in political processes and decision-making. The fact that parties had the experience to involve citizens and the latter had the experience of being engaged and proactive made this expectation more likely to be realized. Once the South African CA was established, the public participation programme which was conducted is considered to have been one of the most elaborate and ambitious in the world.

Civic education on the constitution-making process was disseminated through all mediums of communication (television, radio, internet, the mail, and organized workshops in all communities) and lasted for 17 months, and members from the different constitutional committees travelled to all regions

³⁵ Buttler, Jeffrey (1987), “Democratic Liberalism in South Africa : Its History and Prospect”, Wesleyan, 438 pp.

³⁶ Ibid.

of the country to make sure every community was informed about the process and was given a chance to participate. Only after this lengthy process was a constitutional draft produced, which was then presented to the South African public for feedback. Close to two million individual submissions were received and processed, and it is considered that political parties within the CA have taken the input of the citizenry seriously into account when elaborating the final constitutional text. It can thus be concluded that South Africa did enjoy a strong culture of political protest and participation, under the leadership of the liberation parties, and this undoubtedly helped in creating such a participatory public consultation process once the CA was formed.³⁷

Section 3.2 – The incidence of having a political community before establishing a democracy

Yash Ghai, who is a known constitutional expert, explains that historically the existence of a political community has generally preceded the formation of a democracy. In other words, nation building has come before the choice of the system of government that should operate society, since the nation consists of people that have agreed, on some level, to live together and share common values and a common identity. This reality becomes problematic in the modern context since constitution-building often implies simultaneously building a political community and a democracy. This is most apparent in formerly colonial states, where national frontiers have been artificially designed by colonial powers and people of different tribes and creeds have been forcefully brought together to form a nation. In such a context, elections often make matters worse because politicians tend to appeal exclusively to the

³⁷ Klug, Heiz. (2011), "South Africa's Experience in Constitution Making", *Legal Studies Research Paper Series Paper No 1157*, 47 p.

interests of their tribe or kin, which makes the idea of nationalism hard to materialize and embrace in many post-colonial states.³⁸

As a former colony, South Africa's political community can be said to have been forcefully established, and there are numerous tribes and ethnicities that have not consciously or wilfully decided to constitute a nation and share common interests. The ANC has succeeded to some extent to rally black South Africans together and create a sense of common interest and identity, in the fight against the oppressive apartheid-era regime. Nelson Mandela describes this fact in his autobiography, and mentions that while he (and most ANC leaders) grew up with the idea of only furthering the interests of their immediate clan or kin, the increased political consciousness and mobilization that spread throughout South Africa through the liberation struggle caused these narrow and more limited perspectives to evaporate in favour of a broader, nationalistic point of view.

Even with a sense of common interests throughout black South Africa, the overall political community, if existent, was still deeply fragmented. There was first the tension between the white minority who wanted to maintain former privileges, and the black majority who wanted to gain control over their country and enjoy equal rights and privileges. There were also tensions within the black communities, such as with the IFP and its Zulu group, who did not share the ANC's enthusiasm for a united South Africa and were strongly pushing for local autonomy or a federative system of governance.

The way these tensions were solved in South Africa has allowed for the formation of a political community to be agreed upon, to some extent, prior to the establishment of democracy. The political community in South Africa has agreed to live together through negotiation, and the way in which all social groups agreed to partake in democratic elections was through the establishment of a set of

³⁸ Ghai, Yash (2008) "The Role of Constituent Assemblies in Constitution Making", *International IDEA: Institute for Democracy and Electoral Assistance*, 35 p.

binding constitutional principles. These principles protected the interests of minorities and insured that the political outcome of the elections would favour them to an acceptable extent, regardless of what political parties would have the most control over the state after elections.

A brief examination of these principles is appropriate. There were 34 constitutional principles, specified in Schedule 4 of the Interim Constitution, with which the final Constitution would have to conform. They covered the broad areas of (1) the form of the national government, (2) the power relationships between the national and sub-national governments, (3) minority rights, (4) human rights concerns, (5) the creation of public organizations, and (6) amendment procedures. Principle 12 provides for the right to self-determination of specific communities in the formation of organs of civil society.³⁹

According to principle 21, for example, local governments would have “an equitable share of revenue collected nationally”. Principle 34 further asserts that no principle is meant to constrain “a constitutional provision for a notion of the right of self-determination by any community sharing a common cultural and language heritage”. Indigenous laws and traditional forms of leadership were also to be explicitly recognized and protected by the Constitution. Finally, amendment of the Constitution would require a super-majority, and amendments affecting the provinces would require acceptance by a special majority of provinces.⁴⁰

Some criticisms have been brought against the use of constitutional principles, such as the fact that they are an elite-driven process which is essentially anti-majoritarian and non-democratic. Such assertions might be true to an extent, but in the South African case they were a necessary compromise which allowed for the formation of a democracy. Prior to holding general elections, there needed to be a fundamental agreement between the different social groups that had been in conflict to live together

³⁹ Klug, Heiz. (2011), “South Africa’s Experience in Constitution Making”, *Legal Studies Research Paper Series Paper No 1157*, 47 p.

⁴⁰ Ibid.

and constitute a society or nation. Although these principles obviously did not create a sense of common values and identity amongst these different groups, they did allow each faction to foresee a constitutionally protected place for itself in the new social order. These constitutional principles that were used in South Africa have served as a nation-building tool and have successfully replaced, it could be argued, the natural processes of formation of a political community.

Part II – The incidence of the composition of the CA on the public legitimacy of the constitution-making process in Nepal

The second part of this paper will show how the “Jaanandolan” popular movement got started in Nepal, and how it unfolded to the point of initiating a constitution-making process and finally elections for a CA in 2008. It will be argued that the choice of political parties for composing Nepal’s CA and dominating its process was detrimental to its effectiveness and public legitimacy, because parties in this country are seen as nondemocratic, elitist and ineffective, and Nepal also lacks a culture of political participation and an established political community.

Section I – The processes leading up to the creation of Nepal’s Constituent Assembly

This section will show that Nepal’s constitution-making process is the result of a desire from formerly excluded minorities and social groups to have more power and respect for their rights in Nepali society. It will be shown how the battles unfolded between parties and social groups to insure representativeness and inclusivity within the CA.

Section 1.1 – The processes and negotiations preceding the formation of the CA in Nepal

One of the main causes of the internal conflict and civil war which have occurred in Nepal and have led to the current constitution-making process is the lack of inclusivity within the Nepalese state for the rights of minorities. The source of the problem can at least be partially attributed to the 1990

Constitution, which is considered racist and sexist because it only promotes one language (Khas Nepali), one religion (Hindu), one community (Hill Upper-Caste Hindus) and their specific culture, and it also discriminates against women in matters of property inheritance, divorce, citizenship and penal laws.⁴¹

These legal exclusions are said to have materialized in political, economic and social forms of exclusion, since the Hill Upper-Caste Hindus have centralized state power and social privileges, while the vast majority of Nepalese are alienated from political processes and 42% of the country lives below the poverty line. Illiteracy and unemployment are also prevalent in most communities. Another element which is said to have magnified the centralization of power was the ongoing role played by the King, whose position maintained the old privileges of the monarchy and disempowered the forces of liberal democracy (such as the role of political parties).⁴²

The “People’s war” or “Jaanandolan” are the expressions associated with the Maoist insurgency, which began in 1996 with the goal of taking down the existing political order and drafting a new constitution for Nepal. The indigenous nationalities, the dalits, and women’s groups have had especially high participation rates in this movement, which gained momentum and quickly spread all over the country, culminating in civil war. It is in July 2001 that an initial ceasefire was announced between the state and the Maoists, and three subsequent rounds of peace talks were held. The Maoists put forth 3 central demands: (1) a round-table conference, (2) an interim government and (3) a constituent assembly. These demands were rejected by the government and the other political parties, who were still strongly connected to the existing monarchy and power structures. The Maoists withdrew from the peace talks in November 2001 and the civil strife and violence resumed for several years. In February 2005, the King dissolved the government and arrested several ministers, which is something he wasn’t allowed to do according to the 1990 Constitution. This motivated the other main political parties, united as the Seven

⁴¹ Bhattarai, Hari P., (2008), “Inclusive and Participatory Constitution Making”, *Democratic Constitution Making*, 145 p.

⁴² Ibid.

Party Alliance (SPA), to reach an agreement with the Maoists, known as the 12-point plan, which called for the stepping down of the king, an interim government and legislature, and a constituent assembly to draft a new constitution for Nepal, amongst other points.⁴³

What followed became known as the April 2006 movement (or “Jaanandolan II”), which was a national general strike launched by the Maoists and the SPA, in which millions of people partook and marched onto the streets for 19 days. The king was finally forced to step down on April 25th. What followed was a comprehensive peace agreement (CPA) between the SPA and the Maoists, and an interim constitution was promulgated in January 2007, followed by an interim legislature several months later. An election for a CA was finally held in 2008.⁴⁴

Section 1.2 – The final decisions leading up to the election and composition of the CA in Nepal

The issues related to the formation of the CA were debated amongst political parties (mainly the SPA and the Maoists) as well as within the interim legislature (the House of Representatives) thoroughly between 2006 and 2008. The major issues under debate were the representation system and the election system of the CA that should be opted for. Politicians took part in several meetings and activities discussing these points, such as the “National Symposium on Constituent Assembly and Inclusive Democracy for Conflict Transformation”, held in June 2006, where members of civil society, academics and personalities from the international community joined political figures in discussions. The different options for the formation of the CA were discussed, and past case studies of other countries were examined. It is interesting to note that some members brought forth the idea of composing part of

⁴³ Ibid.

⁴⁴ Ibid.

the CA with representatives of specific ethnic and community groups and civil society members, but this notion was not given serious consideration in discussions.⁴⁵

The major issue of contention became the choice between the traditional majoritarian first-past-the-post election system which had been operating in Nepal and a proportional representation system, such as the one present in South Africa which was described in a previous section. There were many elements within the political leadership of the main parties which favoured the old system of representation, because it insured their continued grasp on power. This gave way to continued protests and occasional violence from regional minorities throughout 2007 in Nepal, especially the Madhesi in the Tarai region, which lobbied strongly for a proportional representation system. Several other women, Dalit and minority groups also protested and felt that the main political parties were not living up to their commitments to inclusivity and representation in political processes. In the late summer of 2007, the government signed several agreements with minority groups, promising to grant them proper representation in the CA.⁴⁶

The interim constitution had been agreed upon by political parties and passed in the House of Representatives in January 2007, but its provisions regarding the CA and other issues were still unsatisfactory to many social groups. It laid out a *mixed* system of representation, comprised of the old majoritarian first-past-the-post system and a proportional system. Specifically, it would comprise 205 members from each system and 19 members from different areas of national life nominated by a council of ministers. Many social groups felt that the old political elite would still hold too much power under such a mixture, and the minorities would not be given an effective voice. This led to several protests culminating in the general strike of the Madhesi in February 2008, which lasted for 16 days, and caused the government to sign a specific agreement with them as well. In the end, the political

⁴⁵ Ghai, Yash and Cottrell, Jill, (2008), "Creating the New Constitution: a Guide for Nepali Citizens", *International IDEA: Institute for Democracy and Electoral Assistance*, 291 p.

⁴⁶ Ibid.

leadership agreed to broader proportional representation, and the final layout of the CA after the 2008 elections was 240 members elected on a FPTP system, 335 based on a proportional system, and 26 appointed members, with 33% of the CA being composed of women.⁴⁷

The overall consensus is that the CA in Nepal is much more representative in its composition of women and ethnic and regional minorities than any other previous democratically elected body in this country. However, the dominant role within the CA is still played by political parties, which has been a source of problems and complications, as will be further described in the upcoming sections.

Section II - The incidence of the public perception and reputation of Nepali political parties

This section will show how Nepali political parties have never been seen as democratic and inclusive, and many groups have expressed their distrust in them throughout the constitution-making process. It will also be shown how these parties have had a poor historical record of performance and effectiveness, which is manifest today in the present constitutional impasse.

Section 2.1 – Nepali political parties were seen as non-democratic and elitist

Political parties in Nepal have always been controlled by a small elite which have enjoyed power and privileges by their connection to the monarchy and through their economic resources. They tend to be pahadi Bahuns and Chhetris and Newars, which are all Upper-Hill Hindu groups. They have tended to dominate not just political parties but the entire state structure since the 1990s. For example, in 1999 these groups held more than 81.7% of leadership positions in state governance areas such as public administration, the legislature and the judiciary.⁴⁸

⁴⁷ Ibid.

⁴⁸ Bhattarai, Hari P., (2008), "Inclusive and Participatory Constitution Making", *Democratic Constitution Making*, 145 p.

The composition of political parties also gives testament to their elitism and lack of inclusivity. In the last 3 elections to the House of Representatives before the CA election, the elite groups aforementioned held roughly 80% of seats, whereas the entire spectrum of other ethnicities and communities were comprised in the remaining 20%. Additionally, although women comprise more than 50% of the total Nepali population, representation in parliament has been less than 9%. The presence of women and minorities in the party's central committees is even lower, with only less than 8% of members being from other ethnic groups and only 9% being women. This trend of exclusion has been maintained at least in part by the Nepali laws regarding party registration, which prohibit party formation for explicitly ethnic motives. This has prevented ethnic minorities to group themselves effectively, to an extent.

Aside from their lack of inclusivity and representativeness of the broader Nepali population, the decision-making processes within the main political parties tend to be elite based and non-democratic, usually controlled by one or two leaders. There is no broad participation in parties' decision-making and agenda setting. Moreover, they are highly centralized, which means that party bureaus at the grassroots level and at the periphery have little or no influence on the political outcomes being manifested or decided upon at the center. It is stated that many party stations outside the center are completely nonoperational except for election times.⁴⁹

This situation has had several consequences for the public perception of political parties in Nepal. Ethnic communities outside the center, even if they were to overcome the language and ethnic barriers to party membership, would still be unable to participate meaningfully in party processes due to their geographical distance from the center. Even if they were able to get closer to the center and participate, the authoritarian and top-down nature of decision-making within the main parties would render their voice insignificant. These public perceptions have been a major reason for the public unrest and the

⁴⁹ Chautari, Martin (2013), "The Debilitating Mechanics of Nepal's CA (2008-2012)", Briefing Paper No 8, March 2013, 12 p.

discontent of several ethnic groups in the run-up of the CA elections, because they did not trust the main parties to ever become inclusive.⁵⁰

It is interesting to note that many observers now confirm that the fears of ethnic groups regarding the main parties' lack of internal democracy were well-founded and have been verified, at least in the way the CA sessions have unfolded up to now. It is documented that the top leaders of the main parties (the Nepali Congress and the Maoists, amongst others) have demonstrated chronic absenteeism and have only been present to 5-8% of CA meetings. What is even more alarming is that many important decisions were taken by the top party leaders informally *outside* the CA, and would later have to be ratified within, which rendered much of the time spent debating within the CA as useless. One CA member has rightly cried out to the press: "If these 4 (leaders) are to make all the decisions, what need is there for us?"⁵¹ This situation demonstrates that there subsists a fundamental lack of respect for democratic values within the main political parties, and the fears of ordinary Nepalese in this regard were well-founded.

Section 2.2 – Nepali political parties were seen as dysfunctional and ineffective

The main and oldest political parties operating in Nepali society have played a subservient role to the monarchy for most of their existence, which has greatly diminished their effectiveness in influencing political outcomes historically. The Nepali Congress was created in 1947 and the Maoist party in 1949, but both were established in exile and could not have direct influence in Nepali politics. They were progressively allowed into the state structure, while given very limited powers by many subsequent kings, until they were banned again in 1960 by the authoritarian Panchayat regime and forced back into operating in exile. It is only in 1990 that political parties in Nepal became legal and official once again,

⁵⁰ Ibid.

⁵¹ Chautari, Martin (2013), "The Debilitating Mechanics of Nepal's CA (2008-2012)", Briefing Paper No 8, March 2013, 12 p.

after the NC and the United West Front launched a mass movement to this effect. Nepal became, on paper, a multiparty democracy in 1990. Thus Nepali citizens have had little or no contact with Nepali political parties before that year.⁵²

The hopes were high in Nepali society in 1990 that political parties could be an effective medium of public representation, and many citizens turned up to vote. These ideals were soon shattered in the years to come, and a main reason was the poor performance of Nepali political parties. They were seen as being self-centered and power-grabbing, which caused them to be dysfunctional in many ways, and internal party conflicts, factions and splits prolonged political instability for many years. Specifically, seven of the eleven governments between 1991 and 2002 have collapsed because of internal conflicts inside the ruling party. Party factionalism in particular has been a major issue, since Nepal had no specific laws restricting “crossing the floor”, such as a mandatory re-election in the new party.

These factors have justifiably created an impression of ineffectiveness of political parties in achieving political outcomes for the greater good of the nation, or even for specific constituencies. This poor performance of parties has also caused many citizens to become disillusioned even in the run-up and during the April 2006 Movement, because of continuous conflict and the break-down of negotiations between the SPA and the Maoists. It was apparently civil society groups, not political parties, which convinced many Nepali social groups to continue demonstrations.

It is documented that lack of political competence has continued to hinder and slow down the constitution-making process after the Movement, and it continues to be a major issue. For example, since the Interim Constitution has been passed, it has been amended six times, due to criticism from social groups. Elections to the CA have been postponed twice, due to disagreement between the main

⁵² Bhattarai, Hari P., (2008), “Inclusive and Participatory Constitution Making”, *Democratic Constitution Making*, 145 p.

parties. Some articles in the interim constitution which have subsisted have proven to be very problematic later on.⁵³

For example, the CA was meant to function for 2 years, but it could dissolve itself earlier by resolution. No explanation was made for the reasons for an earlier dissolution, and certain experts and academics feared that some political figures within the CA would be tempted to push for dissolution and drag on the process indefinitely, due to the privileges and advantages that CA membership bestows or if the direction of change is not suitable to some important leaders. Dissolution ended up being happening in 2012, due to apparent disagreement on certain issues (one of which being federalism) and new elections to the CA have been postponed twice, and are currently planned to be held in November 2013.

Many Nepali citizens had little faith in political parties even during the April Movement, because of their poor record of competence, as was described in this section. What is more deplorable is that many citizens which had renewed hope for a new type of politics have been further disappointed, due to incessant clashes, conflicts and an inability of political parties to meet the majority of deadlines since the constitution-making process has been ignited.

Section III – The incidence of the absence of a culture of political participation and a political community in Nepal

This section will explain the effects of not having a culture of political participation in Nepali history on the present constitution making process, as well the incidence of not having an agreed-upon and established political community prior to the formation of a democracy in this country.

⁵³ United Nations Development Programme (UNDP) (2007), “Constitution Making in Nepal, *Report of a Conference Organized by the Constitution Advisory Support Unit*, UNDP, 72 p.

Section 3.1 – Nepali society has been historically characterized by a lack of political participation

Throughout Nepal's history, the vast majority of its citizens have never developed a habit of political participation in any form. One of the main reasons for this is the control of political outcomes by an elite ethnic and socioeconomic minority, which has already been noted in a previous section. Other obstacles have also been illiteracy, language barriers and citizenship barriers. Illiteracy amongst several parts of the population living in the peripheries from the center has been an obvious impediment to public involvement, since becoming a party member or voting requires the ability to read or write most of the time.

Language barriers have been even more common, since Nepali has been declared the only official language of the state by the 1990 constitution, and it is the language that has been used for all forms of political participation. This excluded a great many Nepalese speaking one or more of the other 92 living languages existent in the country. A final obstacle has been acquiring citizenship, which was restricted by the 1990 Constitution to persons being able to fulfill certain family or residential requirements, and this excluded many women and ethnic groups living in Nepal, particularly the Madhesi group.⁵⁴

It can be said that the public participation in the Maoist insurgency has been the exception rather than the norm in Nepal, since the Nepalese have not been easily involved in political marches or protests under the leadership of a particular party. The Jaanandolan has been successful particularly because it deplored the lack of political participation and inclusiveness in Nepal, and many citizens were envisioning the possibility of change under a new state structure. It is important to note however that the public participation during the Jaanandolan is attributable just as much if not more to civil society groups as to the Maoist party. It is documented that civil society members conducted outreach activities

⁵⁴ Bhattarai, Hari P., (2008), "Inclusive and Participatory Constitution Making", *Democratic Constitution Making*, 145 p.

in distant parts of the country (where Maoists were completely absent) and they convinced the Nepalese to keep on demonstrating when the latter were disillusioned by the constant disagreements and conflicts between the main political parties.

In terms of constitution-making, the Nepalese people have never had the experience of being involved in the drafting of a constitution. Nepal has had 5 constitutions before the present one, four of which were imposed on society by the monarchy and the last one in 1990 was negotiated amongst members of the elite. It provided for some limited public participation, but the majority of ethnic groups were excluded from the process.

One of the consequences of the absence of an established culture of political participation and protest in Nepal was that ordinary citizens and even civil society groups did not know how to remain involved and hold political leaders accountable once the constitution-making process was ignited. It is documented that while civil society was very present during the Jaanandolan phase, it has been particularly absent from the process ever since. Moreover, ordinary citizens or groups having grievances or requests for the process did not know any other way of making their voice heard by political parties other than violence and social disruption, as was seen by the Madhesi insurgency in late 2007 and 2008.

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This lack of historical public participation and protest manifested itself in a lack of competence and an inability of the main political parties to meaningfully involve citizens in a public participation programme for drafting the constitution. Many analysts and academics agree that the participation programme initiated by the current CA was poorly planned and implemented, and was overall disappointing. The public was not properly prepared beforehand. Parties requested submissions by citizens through e-mail,

⁵⁵ United Nations Development Programme (UNDP) (2007), "Constitution Making in Nepal, *Report of a Conference Organized by the Constitution Advisory Support Unit*, UNDP, 72 p.

telephone or mail, and when extremely few of those actually came through, a 300-item questionnaire was sent out to the people, but it was not tested beforehand and it was very complex and confusing, such that even highly educated people had a hard time answering. They were also expected to hand-in the questionnaire at the end of the face-to-face meeting, making the process very rushed and hasty. There were also no established mechanisms for analyzing or reviewing submissions, and many CA members simply ignored them. It can thus be said that up to now, the opportunity for public participation in Nepal's constitution-making process has once again been missed.⁵⁶

Section 3.2 – The incidence in Nepal of creating a democracy without the prior agreement on forming a political community

As was explained in an earlier section in the first part of this paper, in reference to a notion brought forth by constitutional expert Yash Ghai, the creation of a political community has historically preceded the establishment of a democracy. In modern instances of constitution-making, however, both tasks often have to be realized simultaneously, which creates an inevitable conflict and tension in the process. This is particularly true in the case of Nepal, since many of the different ethnicities living in the country do not view themselves as Nepalese, but rather as members of their own particular group. With 102 ethnicities and 92 languages, most of which have been excluded from Nepal's centralized decision-making structures, there isn't any real notion of Nepali nationalism. As one author asserts; "This multicultural society has no common myths, traditions or historical experiences that it can share".

The very idea of nationalism in Nepal is hard to accept for many ethnic and minority groups, since historically "nationalism" has been equated with "forced assimilation". Since the birth of modern Nepal in the 18th century, Hinduism has received state patronage and there have been continuous attempts to absorb all social and cultural groups into the Hindu beliefs, religion, language and culture. Nation

⁵⁶ Ibid., at pp. 48-51.

building in Nepal has been more about “imposing uniformity rather than embracing diversity”. In the 1960s and 1970s, the Panchayat government considered that Nepalese development required a homogenous society, and in the name of “equality”, it tried to suppress cultural differences. Any claim to a different cultural identity was considered as treason or rebellion against the state. It is astounding to observe that even with the advent of multiparty democracy and the 1990 constitution, the same assimilationist mentality survived, and the Hindu language and culture was still promoted to the exclusion of other languages and cultures, as was already previously described in an earlier section.⁵⁷

This historical reality makes nation-building in today’s Nepal extremely difficult. This can be seen in the fact that the most contentious issues in the ongoing constitution making process are linked to “identity politics”, such as inclusion of ethnic groups that want to be recognized for their specific differences (linguistic, cultural, developmental) from the mainstream society. These groups want representation within the political class, but mainly for special interests for their particular communities. There is very little thought in the present context for Nepali interests as a whole. Moreover, several groups are pushing for various forms of regional autonomy or even independence, sometimes through violence, such as the Madhesi insurgency.

It is entirely possible that a sense of Nepali unity and nationalism can develop through time, but this would only happen if trust arises in the state’s institutions and if minority rights and interests are truly respected and represented. Whether this is going to happen or not after the drafting of the new constitution remains to be seen, but it is interesting to note that contrary to the case of South Africa, Nepalese political parties have not bound themselves with constitutional principles which would protect the rights and concerns of minorities and specific local or factional interests, regardless of the outcome of the CA elections and constitution-drafting process. For example, many of the issues that have caused

⁵⁷ Ibid, at p. 54.

the Nepali CA to arrive at a constitutional impasse, such as the form of government and the power relationship between the central government and local governments, as well as the right to self-determination of various ethnic groups, were addressed in South Africa within the constitutional principles, and for this reason they did not become serious points of contention that prevented deliberations to proceed within the CA.⁵⁸

Because of the nature of Nepali political parties, and their informal and non-democratic decision-making processes, there is still a great risk that the final outcome of the CA's constitution-drafting endeavours may not be favourable and acceptable to all social groups and communities. Since there will be a new round of elections to the CA in November 2014, there is still possibility for significant changes to be made, to make the process more inclusive and effective.

Part III – Drawing lessons from the past and from other countries, and making Nepal's constitution-making process more inclusive and effective for the future

The final part of this paper will examine the cases of Libya, Egypt and especially Kenya and their choice of a CA composition with as strong role for civil society or independent members other than politicians, as examples of solutions that were sought to problems of inclusivity, public legitimacy and constitutional impasses within the CAs. The very last section will draw some broad lessons for Nepal based on the various past experiences analyzed in this paper, and current options for making the constitutional endeavour more inclusive and efficient and for overcoming the current impasse will be explored.

Section I – Other forms of CA representation than the medium of political parties: the cases of Libya, Egypt and Kenya

⁵⁸ Bhattarai, Hari P., (2008), "Inclusive and Participatory Constitution Making", *Democratic Constitution Making*, 145 p.

In the cases of Libya, Egypt and Kenya, politicians and political parties did not constitute the main mode of membership to the CA, and civil society and independent candidates played an important role in the constitution-making process. The first case to be analyzed is that of Libya.

The Libyan CA and constitution-making process

Following the collapse of the regime of Col. Muammar Al-Qaddafi in late 2011, the National Transitional Council (NTC) was entrusted with leading the constitution-making process in Libya. It first released the Constitutional Declaration which laid out the processes and timelines to be applied, and it specified that the new constitution was to be adopted through an appointed Constitutional Commission, a National Public Conference (NPC, acting as an interim legislature) and a national referendum. The NPC serves in many ways as a preliminary body to a CA (which will later be directly elected), but the constitution-drafting process would be performed by the Commission.⁵⁹

In terms of their composition, the NPC was to consist of 200 members “from amongst all the sons of the Libyan people”, which would be elected as both independents and party members from all constituencies and regions of the country, and it is reported that 634 women candidates participated in the NPC elections in July 2012. The NPC, who was still working on the new Election Law, announced in April 2013 that the CA will be comprised of 60 members directly elected from the country’s three historical provinces in the east, west and south, and will come from both party lists and independents.⁶⁰

Some contentious issues that have been prevalent in the NPC’s deliberations is whether the members of the CA and the Commission should be elected or appointed, since there is a need for selecting qualified individuals for the constitution-making process. Although CA membership was decided to derive from directly elected individuals to guarantee inclusiveness, the Commission was initially meant to be

⁵⁹ Gluck, Jason (2011) “Extending Libya’s Transitional Period”, 12 pp.

⁶⁰ UNDP Quarterly in Libya : “Preparing for Democratic Transition” (July 2012)

appointed, since it will deal with the more technical and legalistic aspects of constitution-drafting. This became a contentious issue within the NPC for over a year, and it also caused continuous unrest and violence throughout the countries, since certain ethnic minorities fear being excluded from the process. Another contentious issue was whether the CA and the Commission, if elected, should be composed of independents or political party members. Many communities and ethnic minorities feared being excluded from the constitution-making process if membership on its bodies requires political party affiliation, and this issue also created social unrest and tensions throughout the past year.

The Election Law, which has finally been passed in July 2013, states that elections to the Constitution-drafting Committee will take the form of a first-past-the-post system of independent candidates, without party lists. Twenty seats will be allocated to each of the western, eastern and southern regions, while women will have six seats (2 per region), and the Tebu, Amazigh, and Tuareg, which are ethnic and cultural minorities, will also have 2 seats each. As for the CA composition, it will also be composed of members from all three regions of Libya, but it will be formed through both independent candidates and party lists.⁶¹

It therefore appears that in the case of Libya, the prominent role given to directly-elected independent candidates as opposed to political party candidates in both the CA and the Committee has served as a means to guarantee more inclusivity of different minorities and cultural groups, and to generate public legitimacy for the constitution-making process.

The Egyptian CA and Constitution-making process

Following the organized protests against the Mubarak regime in Egypt in early 2011, the Egyptian president resigned and a new parliament was elected in late 2011, bringing a majority-coalition to the Muslim Brotherhood and its President Mohammed Morsi. The next steps were to form a CA for the

⁶¹ Ibid.

drafting of the new Constitution. Since constitution-making processes in Egypt had historically been secretive and elite-driven, it was argued that the CA should be elected from amongst parliamentarians and independents. According to a March 2011 Constitutional Decree, MPs were the ones to elect CA members, but they could not elect themselves.⁶²

The first CA elections produced a composition of 50 political party members and 50 independents, but it was heavily criticized for holding too many Islamist members (66 of the total 100 were Islamists, and 38 out of the 50 Parliamentarians were from the Muslim Brotherhood). There were only 6 women and only 5 members of the Christian minority. The case was referred to the Cairo Administrative Court, which ruled the CA as unconstitutional and unrepresentative for holding too few women, youth and minority groups. In June 2012, an agreement was reached and the CA was recomposed, this time comprising 39 MPs, 6 judges, 9 law experts, 1 member of the armed forces, the police and the ministry of justice, 21 public figures, 5 members of Al-Azhar University, and 4 members of the Coptic Orthodox Church.

Even after these changes, non-Islamists accused Islamists of hijacking the process and securing a strong proportion of members in the new CA as well. These developments lead several CA delegates to join forces in boycotting the Assembly, and calling for an alternative process of constitution-building based on popular consensus. It also lead to the withdrawal of many independents from the CA (especially church organizations and other civil society members), to the point where the CA could not always reach the necessary quorum of 85% to continue holding its meetings. As of this date, the CA proceedings continue, with several judicial complaints as to its composition still pending.⁶³

It thus appears that in the Egyptian case, one powerful political party and cultural group was seen as dominating the CA and the overall constitution-making process, and the election of more CA members

⁶² Mustafa, Tamir (2012) ``Drafting Egypt's Constitution: Can a New Legal Framework Revive and Old Transition?``, Issue No 3, Volume 1, Midan Masr.

⁶³ Ibid.

which are not affiliated to any political party (or independents) was seen as the solution to the problem of lack of inclusivity. This led dissatisfied CA members to an orientation towards civil society and social/cultural minorities, as new candidates for this decision-making body.

The Case of Kenya and its CA Composition

The constitution-making process which was undertaken in Kenya is highly illustrative of the prominent role that members of society other than politicians can play in the process, and it can be a positive source of inspiration for Nepal, specifically because it was not dominated or even initiated by political parties and politicians, since the public did not trust the latter to be inclusive and responsive to its input. It was rather initiated and led by civil society, academics and community groups.⁶⁴

A few words on how this process got started are appropriate. The Kenyan government in the years 2000-2001 was centralizing power and becoming more authoritarian by restricting freedoms of association and expression through new legislation, and it had also been seen as authoritarian and repressive for the previous 35 years since independence. In fact, in 2000, some constitutional amendments were seen as having transformed Kenya into a one-party state.⁶⁵

It was civil society – initially religious communities and professional organizations – which started pressuring the government for a review of the constitution in 2002. They were joined by trade unions and NGOs, and when the government resisted the process and refused to make any concessions, extensive marches and protests were organized, some of which culminated in violence. Civil society

⁶⁴ ``Lessons Learned from Constitution-Making: Processes with Broad-Based Public Participation`` (2011), *Democracy Reporting International*, Briefing Paper No 20.

⁶⁵ *Ibid.*

decided not wait for government to respond; it took full control of the process by creating the People's Commission of Kenya, whose mandate was to consult the people and create a draft Constitution.⁶⁶

The government realized that this process was gaining momentum and was moving forward with or without its consent or participation, and it finally accepted to get involved by passing an act in parliament which laid out detailed provisions for the constitution-making process to follow. Three major National Conferences were held, bringing together civil society, parliament and political parties.

The CA was composed of 220 members of parliament, and 126 members chosen by civil society, as well as 13 members representing different aspects of society. Because civil society had undertaken an extensive public participation programme, travelling across every single district of the country and obtaining individualized submissions from Kenyans on the political, social and economic issues that affect them and the kinds of changes they would like to see reflected in the new Constitution, it had very strong legitimacy in the eyes of the public and this provided it with a stronger bargaining position in the discussions inside the CA, compared to politicians and political parties. The draft constitution which ended up being adopted was very strongly based on civil society's public participation programme.⁶⁷

The problem which occurred in Kenya was that Parliament had to ratify the constitution even after it was approved by the CA, and the former was still strongly connected to the current president and regime. Not enough votes were secured in parliament to ratify the constitution, and the president refused to recognize or implement it. Yash Ghai, who was a prominent academic member involved in the Kenyan constitution-making process, argued that the outcome was not a failure because for the first time Kenyans had been given a voice and had expressed the kind of system of governance that they wanted, and they had been able to openly criticize the government. In view of this, it was inevitable that

⁶⁶ Ghai, Yash (2009) ``Decreeing and Establishing a Constitutional Order: challenges facing Kenya``, IDEA, 14 pp.

⁶⁷ Ibid.

in the future, a constitution similar to the one which was drafted would come to be implemented and would replace the old power structures in Kenyan society.⁶⁸

These predictions made by Yash Ghai ended up materializing after 2007, when there was extreme violence in the country following the presidential elections (which had confirmed the same regime to power). The government was forced to initiate a new constitution-making process, which would this time be led by political parties but would be based on the feedback and ideas collected during the public participation programme and the proposed Constitution of 2003-2004. The new Constitution was put to a national referendum in August 2010 and was approved by 67% of respondents. This new document limits the powers of the executive, especially in relation to the legislature and the judiciary, and reinstates more freedom of expression and association.⁶⁹

It thus appears that the Kenyan constitution-making process was a long one which did not succeed in producing the desired changes upon its first attempt, but the seeds that were planted by the work of civil society and the extensive participation of Kenyans ended up bearing fruit and forcing the regime to enact constitutional changes acceptable to perhaps the vast majority of Kenyans.

Drawing Lessons for Nepal, and the Current Options for Moving Forward

It has been argued that the dominance of political parties in Nepal has been detrimental to the constitution-making process, and it can be seen from the previous case studies that this situation is of common concern to many societies embarking on the path of constitutional change. In view of this, it could be stated that the appropriateness of South African political parties as leaders of the constitution-making process is an exceptional case rather than the norm, and in Nepal as well as many other

⁶⁸ Ibid.

⁶⁹ ``Lessons Learned from Constitution-Making: Processes with Broad-Based Public Participation`` (2011), *Democracy Reporting International*, Briefing Paper No 20.

countries, the process should include a broader membership than political affiliation in order to insure inclusivity and representativeness.

As this paper is being written, the Nepali constitution-making process has reached an impasse. A new CA election was supposed to be held on 22 November 2012, following the dissolution of the CA on 27th May 2012. This election has been postponed twice and is now set to be held on 17 November 2013. The political parties blame one another for the impasse, and they also share the “blame game” with the election commission and the government. In mid-2011, an opinion poll indicated that 45% of respondents in Nepal opposed the extensions of the CA’s mandate, with only 10% stating they would vote for the Nepali Congress and another 6% for the Maoists. The vast majority seems undecided, or perhaps disillusioned with all the involved political parties.⁷⁰

One way to move the process forward in the run-up of the new CA elections is to broaden its membership, by perhaps directly electing more independents (as in Libya), or having the interim legislature elect independents (as in Egypt), or to have civil society appoint members to the CA (as in Kenya). This could reinstate public confidence in the process, which is badly needed following the poor record of performance of political parties. The probable issue with this option is that political will would be lacking to increase the size of the CA (which it will be argued will only complicate and prolong deliberations), and the other option of reducing the size of the CA will mean that current political parties will have to lose seats, which would also be a potentially sensitive issue. Several groups have pressured political parties for more direct methods of election to the CA (such as having independents) since the election process was ignited in 2006-2007, and the main political actors have turned a deaf ear to this proposition.

⁷⁰ Dr. Bipin Adhikari, *Nepal's constitutional impasse: an insider's perspective*, (5 June 2012), link provided on Nepali CA website.

Another option for breaking the current impasse, which has been suggested by many in Nepal and within the international community, is establishing an independent commission for the drafting of the Constitution. This commission could comprise law experts and prominent members of civil society, and could conduct studies on constitutional issues and different forms of government and state structure, identifying what would work best for Nepal and perhaps putting the proposed draft to a national referendum. It could also possibly conduct civic education and a public participation programme, since the ones previously initiated by political parties were considered ineffective and overall disappointing. At the very least, the commission could share the workload with the political members of the CA, in order to better coordinate and implement the constitution-making process. This option could be feasible if civil society and the general public keep pressuring political parties to this effect.

Whatever arrangement is found to continue the process of constitutional change, a more prominent role should be given to civil society. As was mentioned in earlier sections, civil society was deeply involved in mobilizing Nepali communities in political protest throughout the Jaanandolan movement. They enjoy a good reputation amongst various social factions and they are not subject to the same disillusionment and complaints which are directed towards political parties. Civil society would surely be able to increase public participation in the constitution-making process, which is an essential task for insuring that the new constitution is acceptable to all social groups in Nepal. Involvement in the process would allow groups to have their concerns and voices properly heard, and they would be more likely to endorse the outcome, even if it did not meet all their previous expectations.

Conclusion and Summary of arguments

This paper has argued that the South African model of CA composition and the prominent role played by political parties in the constitution-making process is not an appropriate example for Nepal, although South Africa has been considered a major success story worth emulating by countries undergoing

constitutional change. The main differences between these two countries are the public perception and the actual abilities of their political parties, as well as their political culture and community. Because political parties in South Africa were seen as democratic, representative and effective, and they enjoyed a culture of political participation through prolonged involvement in the liberation movement and an agreed-upon political community, the fact that CA membership in South Africa was done through political party affiliation actually benefited and facilitated the constitution-making process.

On the other hand, because Nepali political parties were seen as nondemocratic and elitist, and because Nepal did not enjoy a culture of political involvement and its political community was deeply fragile and fragmented, the medium of political parties for CA composition and for the process as a whole has proven to be detrimental to its efficiency and public legitimacy.

It has been finally argued that a more appropriate model of CA composition which would have been worth emulating in Nepal are the Libyan, Egyptian or Kenyan models, which provided for a much stronger presence of civil society and independents within the CA. This could still be a viable option for Nepal, since new CA elections are scheduled for November 17th 2014, but if this option is not politically feasible, some other options for making the process more inclusive and effective are the establishment of an independent commission and the active involvement of civil society in the process, for conducting public participation as well as other programmes.

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