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# The Rejection of Constitutional Incrementalism in Nepal's Federalisation

Mara Malagodi\*

## Abstract

The relationship between federalism and identity was the single most contentious issue in the drafting of Nepal's 2015 Constitution, and remains an embattled feature of the country's post-conflict constitutional settlement. This article explains why 'constitutional incrementalism' – the innovative constitution-making strategy for deeply divided societies theorised by Hanna Lerner – was ultimately (and wisely) rejected in Nepal's federalisation process. Historically a unitary state since its creation in the late eighteenth century, Nepal committed itself to federal restructuring in 2007, but profound disagreements endured over the set of institutional choices concerning the features of Nepal's federal arrangements throughout the country's latest constitution-making process (2008-15). Constitutional incrementalism with its emphasis on deferral, ambiguity and contradiction was thought of in some quarters as a pragmatic and instrumental way out of Nepal's political impasse. In the end, the 2015 Constitution expressly named the Provinces (even if by just using numbers) and demarcated their boundaries already at the time of its promulgation. Any changes to this framework can only take place now by way of constitutional amendment. This article explains why the incrementalist approach was rejected in Nepal's federalisation process, and reflects on the conditions under which constitutional incrementalism may succeed in societies that present profound disagreements over the collective identity of the polity.

## 1. Introduction

The present article aims to explain the reasons why the 'incrementalist' approach to constitution making was rejected in Nepal's contentious process of federalisation during the post-conflict drafting of the current 2015 Constitution (2008-15), and to distil key comparative lessons from this case study. An incremental strategy would have favoured gradualism with respect to foundational issues – that is, deferring the making of key decisions, and employing linguistic ambiguity and contradictory provisions in constitutional texts.<sup>1</sup> Constitution makers in deeply divided societies sometimes opt for open-ended design choices that allow greater constitutional leeway to future generations without being bound by past decisions. Particularly in post-

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<sup>1</sup> Hanna Lerner, *Making Constitutions in Deeply Divided Societies* (Cambridge University Press, 2013) 39-40.

conflict societies it is difficult to reach agreements on the most contentious issues and speak constitutionally in one voice. As such, constitutional incrementalism may offer a pragmatic and instrumental way out of political impasse. Ultimately this was not the case in Nepal's process of federalisation.

To clarify, the term 'federalisation' designates the set of institutional choices concerning the features of Nepal's federal arrangements made *at the time of* constitution making. The ongoing post-2017 administrative process of federal restructuring understood as the setting up of the institutions of government at provincial level *after* the promulgation of the Constitution, instead, is outside the scope of this article. As for the expression 'constitutional incrementalism', this was coined by Hanna Lerner to describe a particular type of constitution-making strategy deployed in deeply divided societies. Lerner's seminal contribution was first articulated in a 2010 article,<sup>2</sup> then in book form through a more in-depth comparison of the constitution-making experiences of India (1947-50), Ireland (1922), and Israel (1948-50).<sup>3</sup> Lerner argues that the incrementalist strategy allows societies with profound disagreements over the identity of the polity and the nature of the state to succeed in crafting a constitution (or function under an informal one) in the short term, and to promote political stability and democracy in the long term. The present article aims to apply Lerner's framework to Nepal's experience of federalisation during the country's post-conflict constitution-making process, and test the viability of constitutional incrementalism in this context.

The key argument advanced in this article is that constitutional incrementalism was not a strategy that suited Nepal's political context and historical circumstances with regard to federalisation during the drafting of the new constitution. As such, its rejection was a positive outcome that ultimately prevented further conflict and fostered political stability in the country. Conversely, the partial deployment of incrementalist strategies in the drafting of the declaratory parts of the new constitution represents a step back from the inclusionary strides in the previous Interim Constitution and contributed to exacerbating existing political tensions and disaffection on the part of historically marginalised groups.

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<sup>2</sup> Hanna Lerner, 'Constitution-writing in deeply divided societies' (2010) 16:1 *Nations and Nationalism*, 68-88

<sup>3</sup> Lerner, (n 1).

Disagreements over the identity of the polity have been at the heart of Nepal's post-conflict constitutional experience. The drafting of the country's new, permanent constitution through the work of two Constituent Assemblies ('CAs', held 2008-12 and 2013-15) has been central to the peace process (2006-15) after the ten-year-long civil war between the Maoist insurgents and the government (1996-2006). In 1996, the Communist Party of Nepal (Maoist) launched a 'People's War' to capture the Nepali state with a view of initiating a radical program of state restructuring. The demand for a new, inclusive constitution drafted by representatives directly elected by the people was pivotal to the Maoists' political project and became the precondition for peace.<sup>4</sup> The Maoist insurgency also brought the question of federalisation on the basis of identity at the forefront of the country's constitutional debates.

Federal debates in Nepal date back to the early 1950s, but remained marginal until the beginning of the peace process. In fact, Nepal has been a unitary state since its creation in the late 18<sup>th</sup> century. In 1996, however, the Maoists advanced the demand for territorial autonomy on the basis of ethnicity as part of their state-restructuring scheme, linking radical constitutional change to identity politics for the first time in the country's history. The People's War was not an ethnic conflict per se because the main driver of the insurgency was the politics of class; but the war also featured conspicuous demands for recognition of the many historically marginalised groups in the country.<sup>5</sup> Nepal's staggering socio-cultural diversity is illustrated by the 2011 Census data.<sup>6</sup> However, no single ethno-linguistic group constitutes a majority, and most groups are intermingled and territorially dispersed.

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<sup>4</sup> Michael Hutt (ed), *Himalayan People's War: Nepal's Maoist Rebellion* (Hurst & Company 2004) 285-87.

<sup>5</sup> Sara Shneiderman, Luke Wagner, Jacob Rinck, Amy Johnson, and Austin Lord, 'Nepal's Ongoing Political Transformation: A review of post-2006 literature on conflict, the state, identities, and environments' (2016) 50:6 *Modern Asian Studies*, 2041-2114.

<sup>6</sup> Hinduism is the religion of 81% of the population. Nepali remains the lingua franca of the majority of the population, but only 44.6% named it as their mother tongue, alongside 122 other mother tongues. Of the country's 125 caste and ethnic groups, only the largest six account for more than 5% of the total population. The two biggest groups are the Chetri (i.e. Kshatriyas of local Khas origins) who make up 16.6% of the population and the Bahun (i.e. Pahari or hill Brahmins) who make up another 12.2%. Together, these two high-caste Hindu groups constitute the Parbatiya group (28.8%) to which Nepal's royal family and most of the elites belong. In terms of historically marginalized groups, dalits (i.e. 'former untouchables') form about 14% of Nepal's population. The 63 groups classified under the umbrella term Adivasi Janajati (i.e. 'indigenous people'), who can be described as ethno-linguistic groups that do not use Nepali as their mother tongue, account for 36% of the total population. Madhesi groups (i.e. non-Pahari 'Terai plain dwellers', often erroneously described as 'of Indian origins') constitute slightly less than 20% of the population.

Nepal has witnessed a steady politicisation of identity since 1990 – with a sharp increase during the civil war.<sup>7</sup> Throughout the peace process the demand for identity-based federalisation became a key component of the Maoist agenda – alongside those of Madhesi and Janajati groups that operated both outside and within the mainstream political parties. As such, political actors advocating for identity-based federalism believed this kind of territorial restructuring would break the dominant groups’ hold on power. Conversely, the leadership of the mainstream political parties initially resisted demands for federalism *tout court*. Then, by 2007, when federalisation became politically inevitable, its detractors ostensibly opposed only identity-based federalism, not federalism *per se*.

The ‘federal question’ proved to be the single most contentious issue in the drafting of Nepal’s new constitution. Disagreements over federalisation were so severe that they risked derailing the entire post-conflict constitution-making process. Thus, constitutional incrementalism was seen in some quarters as a viable strategy to overcome the impasse. India’s successful experience with the linguistic reorganisation of the States, which entailed changing the names and boundaries of the federal units *after* the promulgation of the constitution, was hailed as a good example for Nepal to follow. Eventually, the inability to find an agreement on the modalities of federalisation led to the collapse of the first Constituent Assembly in 2012 after a botched attempt at postponing it. Federalism remained the main stumbling block also for the second Constituent Assembly. It was only after the devastating earthquakes in the spring of 2015 that the leaders of the main political parties agreed to ‘fast-track’ the drafting of the constitution. They again attempted to sideline the question of federalisation by keeping the constitution silent on the names and demarcation of the federal units and making provisions for the Provincial Assemblies to determine them at a later stage. However, it again proved impossible to transfer the most controversial decisions about federalism from the constitutional to the political arena. In the end,

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See: Government of Nepal Central Bureau of Statistics, ‘2011 Census’, <<http://cbs.gov.np/image/data/Population/National%20Report/National%20Report.pdf>>; Government of Nepal Central Bureau of Statistics, ‘Population Monograph of Nepal: Volume II’ (December 2014), <<http://cbs.gov.np/image/data/Population/Population%20Monograph%20of%20Nepal%202014/Population%20Monograph%20V02.pdf>>.

<sup>7</sup> Alpa Shah and Feyzi Ismail, ‘Class Struggle, the Maoists, and the Indigenous Question in Nepal and India’ (2015) 50:35 *Economic and Political Weekly*.

the 2015 Constitution expressly named the Provinces (even if by just using numbers) and demarcated their boundaries already at the time of its promulgation.

The analysis of the Nepali case study contributes to debates in the field of comparative constitutional law by drawing a set of Nepal-specific conclusions and by distilling more generalisable comparative lessons about constitutional incrementalism. Nepal's process of federalisation is analysed in light of the recent debates on incrementalism<sup>8</sup> with two aims in mind: first, to explain specifically why the incrementalist approach was rejected in matters of federalisation during Nepal's most recent constitution-making process; second, to reflect more broadly on the conditions under which constitutional incrementalism may succeed in societies that present profound disagreements over the collective identity of the polity.

## **2. Political Actors, Territorial Demands, and Federalisation in Nepal**

The modality in which federal demands have emerged and have been articulated in Nepal explain *both* the inextricable link between federalisation and identity politics in the country, *and* the widespread resistance to federalism from a vast array of political actors. Nepal's political context is crucial to understand the rejection constitutional incrementalism in matters of federalisation. Thus, this section provides a mapping of Nepal's political forces in historical perspective and classifies them into two categories: 'adamant' pro-identity federalists and 'reluctant' pro-capability federalists. Then, it offers an overview of Nepal's federalisation process to signpost the crucial developments in Nepal's embattled constitutional saga.

### *2.1. 'Adamant' v 'Reluctant' Federalists: Identity and Capability-Based Federalism*

Nepal was never colonised. Moreover, the Shah Hindu monarchy with its dynastic continuity (1769-2008) remained Nepal's key political institution for over two

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<sup>8</sup> Rosalind Dixon and Tom Ginsburg, 'Deciding not to decide: Deferral in constitutional design' 9:3 *International Journal of Constitutional Law*, 636-672; Rohan Edrisinha, 'Challenges of Post Peace Agreement Constitution Making: Some Lessons from Nepal' (2017) 9:3 *Journal of Human Rights Practice*, 436-446; Asanga Welikala, 'The Idea of Constitutional Incrementalism' (2017) *CPA Working Papers on Constitutional Reform*, N. 14.

centuries. As such, the ideological narratives fostering the legitimacy of political authority in the country gave rise to an autochthonous form of constitutionalism. Hinduism, the Shah monarchy, and the Nepali language became the main ideological coordinates upon which a state-framed creation of the Nepali nation took place. Conversely, these narratives have also determined specific patterns of marginalisation and exclusion of the many caste, ethno-linguistic, regional, and religious groups in the country.<sup>9</sup> The roots of this process can be found as early as in the late 18<sup>th</sup> century; however, it became full-fledged only in the 1960s during the Panchayat monarchical autocracy (1960-1990).<sup>10</sup> 'Unity in diversity' in the Nepali context came to mean a hierarchical ordering of society constructed around the values and ideological coordinates of the dominant upper caste *pahari* Hindus (*Parbatiya*, now *Khas-Arya*), and underpinned by a highly centralised Hindu monarchical form of state.<sup>11</sup>

Nepal has always been a unitary state, whose administrative structure up until the elections of 2017 reflected the Panchayat arrangements introduced in 1961. The organisation of the Nepali state featured no recognition of sociocultural diversity in territorial form. The local Panchayat administration was territorially organised along two levels: second-tier local government bodies (with 75 Districts, *jilla*, 3,995 Village Development Committees, *gaum*, and 36 Municipalities, *nagar*); and first-tier local government bodies, (with 5 Development Regions, *kshetra* and 14 Zones, *anchal*). Significantly, the functions of the first-tier bodies remained unclear.<sup>12</sup>

The re-democratisation of 1990 opened the political space to the voices of Nepal's many groups marginalised on the basis of class and identity (gender, caste, religion, ethnicity, language, region, sexual orientation, etc). While a popular movement had succeeded in putting an end to the Panchayat regime and restoring multiparty democracy under a constitutional monarchy, forms of constitutional nationalism and

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<sup>9</sup> Mara Malagodi, *Constitutional Nationalism and Legal Exclusion: Equality, Identity Politics, and Democracy in Nepal* (Oxford University Press 2013).

<sup>10</sup> Pratyoush Onta, 'Ambivalence Denied: the Making of Rastriya Itihas in Panchayat Era Textbooks' (1996) 23:1 *Contributions to Nepalese Studies*, 213-254.

<sup>11</sup> András Höfer, *The Caste Hierarchy and the State in Nepal: A Study of the Muluki Ain of 1854* (Universitätsverlag Wagner 1979).

<sup>12</sup> Susanne Hesselbarth, 'Alignment Strategies in The Field of Decentralisation and Local Governance, Country Study of Practices And Experiences: Nepal' Development Partners Working Group on Local Governance and Decentralization International Development Partner Harmonisation for Enhanced Aid Effectiveness, <[http://www.delog.org/cms/upload/pdf/wg/CountryStudy\\_Nepal\\_Oct2007.pdf](http://www.delog.org/cms/upload/pdf/wg/CountryStudy_Nepal_Oct2007.pdf)> (October 2007).



legal exclusion persisted.<sup>13</sup> Growing demands for social inclusion, however, mostly consisted of moderate, systemic demands for institutional reform. Thus, in 1996, the government commissioned a report on decentralisation and local self-governance, and created a task force to improve the situation of marginalised groups.

The government committed to decentralisation and devolution by enacting the Local Self-Governance Act in 1999.<sup>14</sup> Significantly, the Act prescribed the mandatory allocation of 20% of seats at the Village level to women,<sup>15</sup> and provisions for the nomination of women and marginalised groups in the executive committees at Village<sup>16</sup> and District level.<sup>17</sup> However, the innovations introduced by the 1999 Act remained mostly ineffective as no local elections were held for twenty years (1997-2017). A modicum of recognition along identity lines was also introduced by the National Foundation for the Development of Indigenous Nationalities (NFDIN) Act in 2002, which was intended to increase the participation of Janajati in state institutions. However, the NFDIN Act only recognised 59 groups as ‘indigenous nationalities’,<sup>18</sup> while the 2001 Census had identified over 100 caste/ethnic groups. These groups had previously united in 1990 under NEFIN (Nepal Federation of Indigenous Nationalities), and put forward civic demands for recognition and inclusion through affirmative action, with a very limited territorial dimension.

Nepali governments have been historically most preoccupied with politics in the Terai – the long lowland area running along the open border with India, whose population is to a great degree composed of Madhesi. One of the most contentious issues in the Terai throughout the 1990s has been the question of citizenship, with estimates that in 1994 about 3.5 million people did not have citizenship certificates. According to an ICG report, this was caused by the legal requirements of descent and knowledge of Nepali for naturalization, discriminatory linguistic policies by the state, under-representation in state institutions, and economic discrimination.<sup>19</sup> The 1990 Constitution featured clearly discriminatory and exclusionary citizenship clauses denying citizenship through matrilineal descent and requiring written proficiency in

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<sup>13</sup> Malagodi, (n 9).

<sup>14</sup> Hesselbarth, (n 12).

<sup>15</sup> Local Self-Governance Act 1999, s 7.

<sup>16</sup> *ibid* s 8.

<sup>17</sup> *ibid* s 172(2)(e).

<sup>18</sup> National Foundation for the Development of Indigenous Nationalities (NFDIN) Act 2002, sch.

<sup>19</sup> International Crisis Group, ‘Nepal’s Troubled Tarai Region’ (9 July 2007) Asia Report No 136, 4-5.

the Nepali language to acquire citizenship. These provisions were included to protect ‘Nepali-ness’ given the heavy Indian influence in the Terai due to the open border.<sup>20</sup> The demand for equal citizenship has been at the core of the agenda of Madhesi rights activists since the 1950s. The movement found renewed strength in the 1980s and organised itself as an identity-based regional political party in the early 1990s. Thus, Madhesi demands for identity-based federalism ought to be understood in connection with their long-standing campaign for equal citizenship.

The Maoists capitalised on these groups’ discontent, which stemmed from their economic, social and political marginalisation, and successfully tied the demand for federalisation with identity. Madhesi, Janajati and Dalit groups operating inside and outside traditional parties embraced demands for identity-based federalism. They demanded federal restructuring along ethnic lines to secure their inclusion and participation in state structures, and break the long-established Pahari upper-caste Hindu hegemony over the country. ‘Adamant’ federalists emphasised the importance of identity and history as the basis for federalisation:

They demand that state boundaries be demarcated so that marginalised groups together gain a slight demographic, and possibly electoral, advantage over upper-caste Brahmin and Chhetri groups. In many present administrative units, the latter are dominant. Districts could also be divided between the new states. Speakers of some languages other than Nepali would be able to use their mother tongues officially in their states, giving Nepal’s linguistic diversity the chance to develop in the mainstream. For marginalised groups, federalism is also about recognition and dignity. All these measures would help modify the monolithic Hindu, hill upper-caste Nepali identity codified by the monarchy in the mid-20th century.<sup>21</sup>

The promulgation of the Interim Constitution in January 2007 represents a watershed for federal demands in Nepal. The new document, while heavily based on the 1990 Constitution, remained silent on the issue of the monarchy, devoid of most of the ethno-cultural references that characterised the previous document, and proclaimed Nepal a secular state.<sup>22</sup> It provided the basis for the functioning of the Constituent

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<sup>20</sup> Malagodi, (n 9) 164-68.

<sup>21</sup> International Crisis Group, ‘Nepal’s Constitution (I): Evolution not Revolution’ (27 August 2012) Asia Report No 233, 3.

<sup>22</sup> Mara Malagodi, ‘Constitutional Change and the Quest for Legal Inclusion in Nepal’ in Colin Harvey and Alexander Schwartz (eds), *Rights in Divided Societies* (Hart Publishing 2012), 169-93.

Assembly, but left a number of issues open for later political negotiation, such as federal restructuring. Significantly the 2006 Comprehensive Peace Agreement was entirely silent on federalism. The commitment to federalisation resulted from the *Madhesi Andolan*, a mass protest movement against discrimination of Madhesi groups, which led to prolonged strikes and violence in January 2007. To appease the protestors, the Interim Government eventually accepted their demand for federalisation and amended the Interim Constitution accordingly.<sup>23</sup> The amended Interim Constitution, however, fell short of a federal design and Nepal remained *de facto* a unitary state.

It was only at this point, in response to the violent protests in the Terai, that the Nepali Congress, UML, and other smaller conservative and left wing parties recognised federalisation as inevitable. They also accepted federalism to appease their Janajati, Madhesi and Dalit members and supporters, and avoid exacerbating political conflict. The debate had now shifted onto the basis of federalisation and the ‘reluctant’ federalists steadfastly opposed identity-based federal restructuring. They advocated instead for a weak form of capability-based federalism along the existing lines of devolution, with no reference to identity, to make each federal unit financially viable. Their opposition to identity-based federalism stemmed from nativist conceptions of the Nepali state and nationalism, a fear of losing their power base, and an apprehension that a polarisation of Nepal’s highly diverse society along institutionalised ethnic lines may lead to Nepal’s disintegration and further conflict. While the spectre of secession was mostly a rhetorical threat used by the Nepali Congress and the UML—as well as the parties advocating a unitary state (e.g. RPP)—many expressed genuine concerns that identity-based federalisation could lead to further marginalisation and violence.

## *2.2. Nepal’s Constitution-Making Process and the Federal Question*

The first Constituent Assembly held its first meeting on 28 May 2008, and declared Nepal a ‘Federal Democratic Republic’. The ‘adamant’ federalists had political

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<sup>23</sup> International Crisis Group, ‘Nepal: Identity Politics and Federalism’ (13 January 2011) Asia Report No 199, 8.

momentum and a slight numerical advantage.<sup>24</sup> Substantive debates on the nature of federal restructuring took place first in the Committee on State Restructuring and Distribution of State Power. The majority in the Committee voted for a model featuring 14 Provinces based on the criteria of ‘identity’ as well as ‘capability’, which was to ensure the viability of the Provinces; however, the names and boundaries of the Provinces were mostly along ethnic lines.<sup>25</sup> The identity markers highlighted by the Committee were: ethnic/communal, linguistic, cultural, geographical/continuity of regional identities, and continuity with historical identities.<sup>26</sup> Preferential political rights (*agradhikar*) were in the form of temporary reservations of a share of political offices for the majority group in each Province. No other special entitlements were given to such majority ethnic groups. This model raised preoccupations about the position of smaller groups and was opposed by the ‘reluctant’ federalists. Significantly, four UML members voted for the proposal in the Committee against the party line, allowing it to pass. A number of Committee members, however, did not support the proposal. A Nepali Congress leader put forward an alternative 6 Province model defined solely on the basis of capability and not identity, where the federal units were strikingly similar to the existing Development Regions.

After thirteen month of deliberations, the Committee’s report was completed and submitted for plenary discussion on 27 January 2010. The discussion in the Constituent Assembly was brief, but caused so much controversy that federalisation was set aside and added to a growing list of contentious issues’.<sup>27</sup> The question of federal restructuring was then moved out of the Assembly with the creation of a nine-member High Level State Restructuring Commission in November 2011. Significantly, the Commission members were not CA members, but political appointees deemed to have some specialised knowledge in matters of federalism. The elusive search for political consensus brought the deliberations on a key political issue outside of the Assembly. However, the Commission too proved incapable of resolving

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<sup>24</sup> The Maoists controlled almost 35% of the seats and the Madhesi parties were respectively the fourth and fifth biggest parties.

<sup>25</sup> The fourteen provinces identified by the CA1 Committee on State Restructuring and Distribution of State Authority were: 1) Limbuwan, 2) Mithila-Bhojpora-Koch-Madhes, 3) Kirant, 4) Sunkoshi, 5) Sherpa, 6) Tamsaling, 7) Newa, 8) Narayani, 9) Tamuwan, 10) Magarat, 11) Lumbini-Awadh-Tharuwan, 12) Karnali, 13) Jadan, and 14) Khaptad.

<sup>26</sup> Constituent Assembly of Nepal, *Report of the Committee for Restructuring the State and Distribution of State Power* (2010).

<sup>27</sup> International Crisis Group, (n. 21).

the deadlock. The majority report put forward an 11 Province model with names reflecting the mixed adoption of ethnic and geographical denominators (except in the case of Dalits, whose Province was to be non-territorial). The minority report by three Commission members (NC and UML appointees) proposed a 6 Province model along the existing administrative structure, with the names to be decided by parliament after promulgation. By February 2012 the Commission submitted two separate reports to the Prime Minister.<sup>28</sup>

Eventually, with the 28 May 2012 deadline looming, the top party leaders attempted a series of last minute agreements. On 15 May, the Nepali Congress, UML, and Maoist leaders agreed on an 11 Province model with provisions for naming the federal units at the first meeting of their respective Provincial Assemblies. Janajati and Madhesi groups, however, successfully pressured the Maoists to uphold their commitment to identity-based federalism. Thus, the Maoists backtracked from the deal on the eve of the Assembly's deadline leading to its dissolution.

The 2013 elections made the 'reluctant' federalists into the dominant force in the second Constituent Assembly. Nonetheless, little progress was made on negotiations over the most contentious issues until the decision to 'fast-track' constitutional drafting after the 2015 earthquakes. On 8 June 2015, the main four parties (Nepali Congress, UML, Maoists, and Madhesi Forum-L) reached a political settlement known as the 16 Point Agreement, which was to form the basis of the new constitution.<sup>29</sup> Significantly, the negotiations included only four of the thirty-one parties represented in the Assembly and made little effort to include representation from the marginalised groups. The Agreement crucially sought to postpone the naming and demarcation of the federal units until the promulgation of the new constitution and the elections of the central and provincial legislatures. The postponement immediately sparked protests. As a result, petitions were filed in the Supreme Court to have the Agreement declared violative of the currently in force 2007 Interim Constitution. In an unprecedented move, on 19 June, a single bench of

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<sup>28</sup> Alliance for Social Dialogue, 'Two Separate Reports by the State Restructuring Commission (January 29-February 4)' *Alliance for Social Dialogue* (5 February 2012) <<http://asd.org.np/political-updates/two-separate-reports-by-the-state-restructuring-commission-january-29-february-4/>>.

<sup>29</sup> 16 Point Agreement: <[http://www.satp.org/satporgtp/countries/nepal/document/papers/16-point\\_Agreement.htm](http://www.satp.org/satporgtp/countries/nepal/document/papers/16-point_Agreement.htm)>.

the Supreme Court issued an Interim Order against the implementation of the Agreement's postponement of federalisation.<sup>30</sup>

As protests grew increasingly violent and the security forces' response heavy handed, on 8 August 2015, the political leaders relented and inked a 6 Province deal on the basis of the existing administrative boundaries, splitting the Terai across a number of Provinces, and excluding identity as the basis for federalisation.<sup>31</sup> Protests intensified and on 21 August the Nepali Congress, UML, and Maoists agreed on a new 7 Province model (essentially carving Province 7 out of Province 6 and maintaining the controversial longitudinal division of the country), while the Madhesi Forum-L did not support the scheme.<sup>32</sup> On 23 August, the draft constitution was tabled for approval by the Assembly as the CA members representing the marginalised groups walked out in protest.<sup>33</sup> Violent demonstrations and communal violence erupted across the Terai, leading to the death of security forces and protestors in Kailali, the imposition of a curfew, and the deployment of the Nepal Army.<sup>34</sup> Nonetheless, the new Constitution was promulgated on 20 September 2015 with an astounding majority in the Assembly. While federalism was eventually accepted, the framework adopted – entirely devoid of identity considerations in both naming and delimitations – reflected the political balance between the 'adamant' and 'reluctant' federalists.

### 3. Constitutional Incrementalism in Nepal

Constitutional incrementalism – an innovative approach to constitution making – aims to offer an alternative way of tackling disagreements over the nature of the polity in deeply divided societies. Lerner describes this evolutionary strategy as based on silences, contradictions, and deferrals in the drafting of the constitutional text in order to avoid forcing unequivocal choices between competing norms and identities at this high stake moment. Lerner also emphasises that this approach to constitution making

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<sup>30</sup> Adv.Dipendra Jha, 'English Version of the SC order' (*Twitter.com*, 19 June 2015) <<https://twitter.com/dipjha/status/612139709553229824>>.

<sup>31</sup> The Nepali Times Blog, 'Federalism deal signed' *The Nepali Times* (Kathmandu, 8 August 2015) <[www.nepalitimes.com/blogs/thebrief/2015/08/08/federalism-deal-signed/](http://www.nepalitimes.com/blogs/thebrief/2015/08/08/federalism-deal-signed/)>.

<sup>32</sup> Karma99, 'Timeline of proposed federal structures' (*Karma99*, April 2015) <<http://www.karma99.com/2015/04/proposed-federal-structures-of-nepal.html>>.

<sup>33</sup> Prakash Acharya, 'CA on cusp of promulgating constitution' *The Himalayan Times* (Kathmandu, 24 August 2015) <<http://thehimalayantimes.com/kathmandu/ca-on-cusp-of-promulgating-constitution/>>.

<sup>34</sup> Human Rights Watch, 'Like We Are Not Nepali: Protest and Police Crackdown in the Terai Region of Nepal' *Human Rights Watch* (16 October 2015).

applies only to controversial foundational issues. These encompass the constitutional choices regarding the declaratory parts and symbolic aspects of the constitution; they do not include institutional decisions about the frame of government at the time of constitution making.<sup>35</sup> The advantages of adopting an incrementalist strategy in constitutional definitions of the polity's collective identity are twofold: in the short term, to avoid overt conflict and secure the adoption of the constitution; in the long term, to promote political stability and democracy.

Lerner further explains that an incrementalist strategy avails itself of a toolkit based on four principles that diverge from the common wisdom associated with constitution-making moments.<sup>36</sup> This section investigates the extent to which Nepal's federalisation process during the drafting of the 2015 Constitution adhered to the key tenets of constitutional incrementalism: (a) non-majoritarianism, (b) a non-revolutionary approach to constitution making, (c) the representation of 'We the divided people' and (d) the transfer of decisions from the constitutional to the political sphere. It is argued that to some extent incrementalist strategies were deployed during Nepal's post-conflict constitution-making process to address some foundational issues, but when it came to federalisation it proved impossible to fudge and defer.

### *3.1. Non-Majoritarianism*

The choice of a non-majoritarian decision-making process in constitution making is pivotal to the incrementalist strategy because it secures the co-option of minorities and their buy-in into the new constitutional framework.<sup>37</sup> Decision-making by consensus at the time of constitution drafting aims at enlarging to the greatest possible extent the base of stakeholders upon which the new constitution relies. As such, constitutional incrementalism deems a consensual approach to constitution making more effective than majoritarianism in fostering the legitimacy and stability of the emerging constitutional settlement. The crucial question, however, is to determine whose consensus ought to be gained to secure the viability and endurance of the new constitution. This can only be determined by an astute analysis of the competing

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<sup>35</sup> Lerner, (n. 1) 39-40.

<sup>36</sup> Lerner, (n. 1) 41.

<sup>37</sup> Lerner, (n. 1) 41.

political interests along ideological and identitarian fault lines, and their translation into group affiliations in each specific case study.

In Nepal, a commitment to decision-making ‘by consensus’ (*sahamati*) was built into the 2007 Interim Constitution in all the clauses related to decision-making in the Constituent Assembly – both in its ordinary legislative capacity and constitution-making facet. For instance, the 5<sup>th</sup> Amendment added a subsection to Article 33 on the Responsibilities of the State ‘to develop a culture of resolving major political problems of the country with understanding, consensus, and cooperation amongst the major political parties’. Two issues arise: first, this section was non-justiciable; thus, consensus decision-making remained, legally speaking, aspirational. The Interim Constitution, instead, provided for voting procedures for all the Constituent Assembly’s decisions; most of them required a simple majority of members present in the House, with a quorum of one fourth of the total CA members. Only constitutional amendments (Article 148) and the passing of the new Constitution required a qualified majority of two-thirds of the total CA members (Article 70). Similarly, the Constituent Assembly Rules, which were enacted in November 2008, provided that all of the Constituent Assembly’s Committees could pass any proposal at Committee stage by a simple majority vote. While legally two-thirds of the CA members could declare the new Constitution, politically it proved unmanageable to do so without the support of all the main political leaders, that is, ‘by consensus’.

Second, the requirement of a consensus decision-making process in constitution-drafting matters focused on the leaders of the parliamentary parties (*samsadīya dalkā netā*) under Article 70(3). In a way, the Interim Constitution treated Nepal’s major political parties as monolithic and ideologically homogeneous entities. Conversely, the party leadership was expected to iron out any internal differences and enforce discipline through the use of party whips. But, in both Constituent Assemblies, identity-based political cleavages manifested themselves also at intra-party level in the three main ideology-based political parties: the Nepali Congress, UML and the Maoists. In fact, even if the CA Rules were silent on the issues of Caucuses, CA Speaker Subhash Chandra Nembang allowed for the spontaneous creation of cross-party Caucuses along identity lines in the first Constituent Assembly. The formation of the Women, Janajati, Dalit, and Madhesi Caucuses demonstrated that other bonds



of solidarity and political cooperation existed in the Assembly beyond party affiliation. In fact, on numerous occasions, CA members voted according to their conscience, ignoring party lines. For instance, the vote against party lines of the UML Janajati members in the first Constituent Assembly's Thematic Committee on State Restructuring allowed for the 14 Province model to pass at that stage.

The party leaders responded by unleashing their whips on defiant party members. However, the use of whips in the first Constituent Assembly, not just on ordinary legislative matters, but also on votes on constitutional issues when rebellious members were subjected to a three-line-whip, effectively curbed many cross-party initiatives aimed at securing inclusion. This was especially significant for the defiant CA members elected under proportional representation, as expulsion from their respective parties would have resulted in the loss of their seat altogether.<sup>38</sup> Significantly, quotas for marginalised groups were only adopted for CA seats allocated under proportional representation (335), not first-past-the-post (240), making the most representative seats for marginalised groups the most vulnerable to the use of whips.

The leadership of the three main political parties, including the Maoists, dominated by upper caste Pahari Hindu males as it was, succeeded in silencing voices of dissent by their women, Janajati, Madhesi, and Dalit members. The suppression of demands for inclusion within the Constituent Assembly severely curtailed 'systemic' ways through which the discontent of marginalised groups could be channelled and accommodated. A 2012 report by the International Crisis Group took stock of the failure of the first Assembly and concluded:

The peace process has relied extensively on a tired idea of consensus between the parties. Until the constitution was completed, the main parties were to agree on all major decisions to ensure broad buy-in. This sometimes prevented the worst-case scenario, but it also devalued democratic participation.<sup>39</sup>

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<sup>38</sup> Krishna Khanal, Frits Sollewijn Gelpke, and Uddhab Prasad Pyakurel, *Dalit Representation in National Politics of Nepal* (Nepal National Dalit Social Welfare Organisation 2012) <[www.idsn.org/fileadmin/user\\_folder/pdf/New\\_files/Nepal/2013/Dalit\\_Representation\\_in\\_National\\_Politics\\_of\\_Nepal\\_-\\_2012.pdf](http://www.idsn.org/fileadmin/user_folder/pdf/New_files/Nepal/2013/Dalit_Representation_in_National_Politics_of_Nepal_-_2012.pdf)>.

<sup>39</sup> International Crisis Group, (n. 21) i,

As a result, the Constituent Assembly was hollowed out as the primary site of democratic deliberation and the constitution-making task was substantially shifted to the leaders of the main political parties.

In the second Constituent Assembly, the coalition government of the Nepali Congress and UML sought to prohibit the formation of cross-party Caucuses and continued the use of whips in votes on constitutional matters, even if the new CA Rules were silent on both issues.<sup>40</sup> A 2014 Policy Brief by Martin Chautari concludes that while unwritten, the ‘ban’ on Caucuses in the second Constituent Assembly was clear:

Lessons learnt by the political elite from the first Constituent Assembly thus appear to be the importance of limiting inclusion, securing the privilege of the main political parties, enabling absenteeism, controlling democracy, and protecting political hierarchy in what should be the site of equal democratic deliberations for a new constitution.<sup>41</sup>

As a result, little progress on drafting was made, and by October 2014 the ruling coalition hinted at the possibility of passing the new constitution ‘by process’, that is, by a qualified two-third majority vote in the Constituent Assembly.

In response, the Maoist-led alliance of twenty-two parties threatened to reject the new constitution if it was not forged ‘by consensus’, and to take to the streets and launch a programme of protests. However, the requirement for a two-thirds majority vote to pass the new constitution made the two dominant parties short of a handful of votes and a degree of compromise was eventually forced upon them. The ‘reluctant’ federalists (temporarily) accepted identity as one of the basis to delimit the federal units and for affirmative action. However, as intra and inter-party squabbles continued, the new constitution could not be passed within the original deadline of January 2015.

In the wake of the spring 2015 earthquakes, Nepal’s political elites sought to ‘fast track’ the drafting of the constitution by sidestepping key procedural requirements within the Assembly. A number of Constituent Assembly Rules were suspended,

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<sup>40</sup> Kamal Dev Bhattarai, ‘CA caucus debate rages; parties divided’ *The Kathmandu Post* (Kathmandu, 8 March 2014) <[www.ekantipur.com/2014/03/08/top-story/ca-caucus-debate-rages-parties-divided/386395.html](http://www.ekantipur.com/2014/03/08/top-story/ca-caucus-debate-rages-parties-divided/386395.html)>.

<sup>41</sup> Martin Chautari, ‘Attendance and Process in Constituent Assembly II’ Briefing Paper No 11, Martin Chautari (September 2014).

leading, for instance, to a much shorter timeframe for CA members to revise the draft tabled by the Drafting Committee and for public consultations.<sup>42</sup> As the leaders of the main four parties (Nepali Congress, UML, Maoists, and Madhesi Forum-L) reached the 16 Point Agreement, they entirely excluded from the decision-making process smaller parties, but also women, Madhesi, Dalit, Janajati, and religious minorities – both within their own parties and outside – ignoring their demands for recognition. Eventually, the consensus reached amongst the leadership of the biggest three political parties allowed for the constitution to be passed by the second Constituent Assembly with an 89% majority, and 532 out of the 598 CA members present voting in favour of the document.

The new constitution and its embattled federal scheme certainly embody the consensus of the main political parties' leaders and reflect the successful co-option of the Maoists by the political mainstream. However, the new constitutional arrangements did not garner the consensus of many marginalised groups who had first demanded identity-based federalisation as the main constitutional route to inclusion. Thus, the 2015 Constitution remains a contentious and unstable settlement with regard to federalism. It is premature to say whether the ongoing process of federal restructuring will resolve this impasse, or whether further constitutional amendments will be required to secure the buy-in of the detractors of this mode of federalisation.

### *3.2. Non-Revolutionary Approach to Constitution-Making*

Constitutional incrementalism rejects the revolutionary understanding of constitution making in favour of an open-ended approach that allows for future adaptations and gradual resolution of potentially explosive foundational questions. In Nepal, the making of the 2015 Constitution by a directly elected Constituent Assembly was *prima facie* at odds with the tenets of incrementalism both in terms of process and scope. First, in terms of process, King Tribhuvan had initially promised a Constituent Assembly in 1951 – a promise that remained unfulfilled until 2008. An elected body had never drafted any of Nepal's previous six constitutions. Thus, the allure of a Constituent Assembly process, and the expectations that it engendered, grew

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<sup>42</sup> Nepali Times, 3 July 2015, 'Fast-track Drafting' <http://archive.nepalitimes.com/blogs/thebrief/2015/07/03/fast-track-drafting>.

exponentially in that context. The modality of constitution-making through a Constituent Assembly raised *per se* enormous expectations. Andrew Arato explains that Constituent Assemblies are the archetype of revolutionary constituent power. They are conceived as sovereign institutions with unlimited powers; as such they are imagined to embody the unified will of the people and promise a total rupture from the old regime through a foundational moment.<sup>43</sup> Certainly for the Maoists and for many of Nepal's historically marginalised groups, the constitution-making process through a directly elected Constituent Assembly represented both the achievement of a very long political struggle and the opportunity to reshape their country radically.

Second, the work of the first Constituent Assembly began under the banner of 'building a New Nepal' and the mantra of social inclusion. The Constituent Assembly was expected to bring radical change and re-define the meaning of 'Nepali-ness' by forging a new civic sense of national belonging in which all groups and individuals could feel included. As such, it was conceived as a radical break from the past and a critical juncture in Nepal's constitutional politics. The process of federalisation with an emphasis on identity was a central part of this radical programme of state restructuring. In this light, the new constitution was expected to settle the foundational questions that had started to emerge during the 2006 democracy movement, the 2007 *Madhes Andolan*, and Janajati agitation organised by NEFIN. Crucially, constitutional demands for secularism, federalism, republicanism, and affirmative action measures in state employment and political representation were reflected into the Interim Constitution and were simply expected to endure in the permanent constitution. The first Constituent Assembly effectively operated on that assumption, even if the main opposition parties – Nepali Congress and UML – consistently (and in the end successfully) resisted that trajectory to the point that the constitution could not be finalised. The dissolution of the first Constituent Assembly, the success of the centrist parties, and the debacle of the pro-federalist forces in the elections of the second Constituent Assembly changed the direction of Nepal's constitution making, especially with regard to the constitutional re-definition of the nation and the role of identity in the state restructuring agenda.

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<sup>43</sup> Andrew Arato, *Post Sovereign Constitution Making* (Oxford University Press, 2016), 91, 108.

The work of the second Constituent Assembly began on a sombre note, in the shadow of the first Assembly's failure and with the 'reluctant' federalists at the helm of the government. This meant a much more modest scope that translated into a steady rollback of the inclusion agenda, especially in the form of identity-based federalism. There was a pervasive sense that after 2012 the 'constitutional moment' had been somehow lost.<sup>44</sup> Tellingly, the first International Crisis Group's report after the demise of the first Constituent Assembly was titled 'Nepal's Constitution: Evolution Not Revolution'. Thus, the changed political composition of the body reshaped its constitution-making priorities. Like in the first Assembly, federalism was slotted by the Constitutional Records Study and Determination Committee as one of the 'disputed' issues and, in early 2014, kicked to the Constitutional Political Dialogue and Consensus Committee headed by Maoist leader Baburam Bhattarai.

Virtually no progress was made on the most contentious issues for over a year and the 'adamant' federalists began to fear that the 'reluctant' federalists were engaged in a form of counter-revolution by stealth through delaying tactics. The proponents of identity-based federalism had already made concessions to the other camp during the first Constituent Assembly: they had agreed to remove preferential rights and include other basis for federalisation alongside identity, for example 'capability'. However, the apparent capitulation of the Maoists in supporting the post-earthquake agreement that sought to postpone federalism was the last straw for many marginalised groups: 'Mutual mistrust was so high in June 2015 that Madhesi, Tharu and Janajati groups read the postponement of the state boundaries as a ploy by traditionally dominant hill-origin Brahmin and Chhetri leaders to slide federalism off the table'.<sup>45</sup>

On 30 June 2015, the Constitution Drafting Committee released the first draft of the Constitution. The document ignored the Supreme Court decision forbidding the postponement of federalisation and ordering the Constituent Assembly to delineate the federal boundaries. In fact, Article 60 of the draft made provisions for the Federal Parliament to decide with a two-thirds majority vote the names and boundaries of the federal units on the basis of the report by an *ad hoc* Commission. Controversially the draft also presented an 8 Province model, which did not reflect any of the proposals

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<sup>44</sup> Bruce Ackerman, *We the People: Foundations* (Harvard University Press 1991).

<sup>45</sup> International Crisis Group, 'Nepal's Divisive New Constitution: An Existential Crisis' (4 April 2016) Asia Report No 276, 7.

previously discussed. Moreover, the draft backtracked on proportional representation, reintroduced gender-based discrimination in matters of citizenship, and created the controversial category *Khas-Arya* as a group entitled to affirmative action measures. Tensions ran high across the country, but particularly in the Terai.

Negotiations continued and changes made to the draft. When in August 2015 the map of the proposed 6 Province model was released to the public, violent protests by Madhesi and Tharu groups erupted. The protests were met with a heavy-handed response by security forces, which further exacerbated a tense situation.<sup>46</sup> The protests continued for months alongside an unofficial blockade of the border with India. The attempts to put pressure on the Nepal Government to review the constitutional arrangements backfired, leading to intransigence in Kathmandu. Ultimately the only way to change the territorial demarcation of the federal units under the 2015 Constitution will be to amend the document. Given the complex procedural requirements and the lack of appetite for reform from the main parties it seems unlikely in the immediate future, leaving little room for systemic, evolutionary ways of revisiting federalisation under the 2015 constitutional settlement.

### *3.3. Representation of Ideological Disagreement*

The accommodation of conflicting views about the nature of the polity is at the heart of constitutional incrementalism. Thus, the incrementalist approach to constitution making expressly recognises a country's deep identitarian cleavages in the foundational aspects of its constitution. Competing ideas about the state are represented in the guise of 'We the divided people' by including vague and even contradictory constitutional provisions that define the collective identity of the polity.<sup>47</sup> This is perhaps where Nepal's 2015 Constitution comes closer to displaying an incrementalist approach in the drafting of the constitution's declaratory parts.

With regard to federalisation, the designation of the Provinces with numbers from 1 to 7 under the 2015 Constitution can be construed as an example of incrementalism only to a limited extent. While the 2015 Constitution rejected the politics of defining and

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<sup>46</sup> Human Rights Watch (n. 34).

<sup>47</sup> Lerner, (n. 1) 43-44.

entrenching provincial identities by using historical ethno-cultural markers and instead simply assigned a number to each of them, it made no provisions for any future renaming of the Provinces under Article 56 and Schedule 4. Cultural identity was taken out of the constitutional equation in matters of federalisation, but not deferred. The issue now appears settled and closed off to any intervention short of a constitutional amendment. In fact, during the life of the first Assembly innumerable discussions over the names of the federal units had taken place to no avail. The ‘politics of naming’ became inextricably intertwined with discussions over the basis to delimit the boundaries of the Provinces, that is, to what extent identity and history could be criteria for federalisation from a territorial perspective.

The role of identity in federalisation also raised the issue of the relationships amongst the different groups within each federal unit. The difficulty of this debate was exacerbated by the proposals to include preferential rights for the majority ethno-linguistic groups in each Province. The proposal was already dropped during the first Constituent Assembly, but the moral panic and backlash it engendered are a clear indication of the widespread opposition to identity-based federalism in the country. As such, the foundational question of naming the Provinces acquired central stage in Nepal’s federal debates, eclipsing more substantive questions about federalising the frame of government.

The main objection to identity-based federalism stemmed from the fear that Nepal would become ‘balkanised’. It was repeatedly argued that the explicit recognition of identity as the basis for federalisation would ultimately threaten national unity and lead to the fragmentation of the state. In this regard, it is important to underscore that the drafting of the 2015 Constitution took place in the wake of the earthquakes and in the midst of the unofficial Indian blockade. In this vulnerable context nationalist sentiments ran high and the plea for national unity found fertile ground among the majority of the country’s political forces. Eventually, Nepali politicians from across the spectrum closed ranks, found their way to a set of agreements, and produced a constitution within a few months. A sign of this defensiveness is clearly evident in the total absence of official records of the constitution-making process in the second CA. Committee reports were not made publicly available (they still are not) and the debates of the CA were not recorded. However, the lack of transparency

in the constitution-making process significantly weakened the legitimacy of the new Constitution, especially given how embattled it remains. The protests in the Terai eventually made federalisation inevitable, but identity as a basis for state restructuring was obliterated by the perceived threats to Nepal's territorial integrity.

The newfound emphasis on national unity, however, translated also into the manner in which the 2015 Constitution approached broader foundational issues. The constellation of provisions that define the identity of the Nepali polity in the constitution's declaratory parts represents the clearest example of constitutional incrementalism in this case study. The ideological tensions in the re-definition of Nepal's national identity are encapsulated in a set of contradictory positions that simultaneously backtrack from the more neutral Interim Constitution and incorporate aspects of 'constitutional nationalism' that were prevalent under the 1990 Constitution.

Nepal is defined as a 'multi-religious' nation (Article 3), but secularism is limited to 'the protection of religion since *sanātana*', that is, a particularly conservative version of Hinduism (Article 4), and national emblems are steeped in Hindu symbolism with the cow as the national animal and saffron as the national colour (Article 9). On more substantive matters, which nonetheless pertain to the legal entitlements that stem from belonging to the Nepali nation or not, the 2015 Constitution guarantees freedom of religion, but continues to include a ban on conversion (Article 26). Women's rights are expressly included in the Constitution (Article 38) and no discrimination on the basis of gender is permitted (Article 18), but the section on Citizenship directly discriminates against Nepali women married to foreign citizens or those who have had children with foreign men (Article 11). Affirmative action measures for historically marginalised groups are found throughout the 2015 Constitution, but the new controversial *Khas-Arya* category was included in the list of beneficiaries (Articles 18, 42, 84, 176, 259, 267) nominally as a way of addressing the issue of the 'creamy layer' and uplift poor upper caste Pahari Hindus, but substantively to appease the dominant groups.

It is in light of this re-creation of a 'hierarchy of belonging' to the Nepali nation by the new Constitution that the dissatisfaction with federalisation by a number of marginalised groups ought to be understood. While 'historical identities' were



obliterated in the process of federalisation ostensibly to prevent ‘balkanisation’, they found a place in the definition of the nation. But the national identity promoted by the new constitution reflected long-standing ethno-cultural majoritarian nationalist narratives forged during the Panchayat era and constitutionalised ever since – with the notable exception of the 2007 Interim Constitution, which was more inclusive on foundational issues. Unlike the case studies selected in Lerner’s book, which are all constitution-making experiences in newly created states, Nepal’s 2015 Constitution was the seventh in the country’s history and backtracked from a previous, more inclusionary constitutional settlement. Nationalist narratives in the new constitution, however, have been tempered by far-reaching references to multiculturalism in the declaratory parts of the document and an extensive section on fundamental rights – although many of them subject to ordinary legislative intervention.<sup>48</sup>

The question that remains is whether the foundational vagueness, contradictions, and inconsistencies in the 2015 Constitution will prove a useful tool to defuse tensions and create a common denominator. Only time will tell: the way in which Nepali politicians will choose to implement the constitution, and Nepali judges interpret it, will determine its stability.

### *3.4. Transferring Problems from the Constitutional to the Political Arena*

Constitutional incrementalism deals with intractable foundational issues by deferring them in time and space. In other words, the most problematic constitution-making choices are postponed, removed from the constitutional arena, and put in the hands of politicians to solve them at a later stage through ordinary legislation.<sup>49</sup> In Nepal there were two failed attempts at deploying this strategy – at the eleventh hour of the first Constituent Assembly in May 2012 and with the signing of the 16 Point Agreement in June 2015. The obvious source of inspiration for postponing the controversial naming and demarcation of the federal units in Nepal came from the successful linguistic reorganisation of the Indian States in 1956 – six years after the post-independence Constitution came into force.<sup>50</sup> But there was a crucial difference: British India

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<sup>48</sup> Dixon and Ginsburg, (n. 8).

<sup>49</sup> Lerner, (n. 1) 44-46.

<sup>50</sup> Lerner, (n. 1) 147.

already featured a federal structure during colonial times and federalism per se was not a controversial issue within the Constituent Assembly.<sup>51</sup> Moreover, delaying the reorganisation of States on the basis of linguistic identity in India did not equate to postponing federalism. In Nepal, instead, had the new constitution deferred the demarcation of federal units, Nepal would have continued to function as a unitary state until the Provinces were created. In India's Constituent Assembly the relationship between linguistic identity and federal units was purely foundational, in Nepal instead it mixed foundational questions with frame of government issues. As a result, in Nepal a purely incrementalist strategy of temporal deferral to the political arena was rejected in matters of federalisation.

Nepal, instead, adopted a seemingly incrementalist strategy with regard to the constitution-making process throughout the work of the two Constituent Assemblies by transferring key decisions from the constitutional to the political arena. The most contentious constitution-making decisions (federal restructuring, presidential versus parliamentary government, and the judiciary) were soon removed from the Constituent Assembly and put in the hands of the main political parties' leadership *outside* the CA. But these decisions were not deferred; they were made contemporaneously to the life of the constitution-making body. Immediately after the first Constituent Assembly's Committees submitted their reports and they were unsuccessfully debated in the plenary, the task of resolving controversial issues was removed from the CA. The process was removed from the open public debate of the body directly representative of the Nepali people, which had been created specifically to write Nepal's new constitution. It was, instead, entrusted to the leaders' old guard who operated outside the CA, therefore without the procedural guidelines and safeguards established to carry out the constitution-making task in a transparent, deliberative, and inclusive manner.

These mostly upper-caste Pahari Hindu men negotiated crucial decisions about Nepal's new constitutional settlement through the High Level Political Committee (HLPC) set up by then Prime Minister G.P. Koirala in January 2010. Even if the parties' leaders were CA members they did not operate as constitution-makers in the HLPC on the basis of the CA's 'rules of engagement'. The distinction between the

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<sup>51</sup> Benjamin Schoenfeld, 'Federalism in India' (1959) 20:1 *The Indian Journal of Political Science*, 52-62.

constitutional and political arenas in this context is to be understood on the basis of the fact that the Interim Constitution mandated that the CA was the only body empowered to draft the constitution. The net result was that no inclusive and transparent deliberations within the Constituent Assembly were allowed to accommodate different points of view on both foundational and structural issues. Ultimately, the modus operandi of backdoor secret negotiations and opaque deals outside of the Assembly undermined the legitimacy of the constitution-making process itself and its inclusionary credentials because the Constituent Assembly was the only body in which marginalised groups were directly represented. At the same time, the political leaders failed to forge a compromise solution, notwithstanding further extensions of the first Assembly's term, and the body was eventually dissolved.

Since 2013, the change at the helm of the government and in the balance of the political forces within the second Constituent Assembly further enhanced the strategy of transferring key decisions from the CA to the political leadership outside the CA. The earthquakes, the protests in the Terai, and the Indian blockade gave renewed urgency to constitution drafting, and this strategy sacrificed inclusion and legitimacy for speed and contingent political gains. Given how controversial certain aspects of the 2015 Constitution have been – first and foremost the modalities of federalisation – the lack of inclusion and transparency in the constitution-making process curtailed the buy-in of stakeholders from marginalised groups, and ultimately became detrimental to the legitimacy of the constitutional settlement that was eventually achieved. This outcome is clearly the exact opposite of what constitutional incrementalism purports to achieve in the long term, even if in the short term a constitution was produced.

#### **4. Conclusions**

The article has analysed the process of federalisation during the drafting of Nepal's 2015 Constitution and it has engaged with two questions. First, it sought to explain why the incrementalist approach was rejected in the course of Nepal's most recent constitution-making endeavour. It is argued that the rejection of constitutional incrementalism in Nepal's process of federalisation can be explained primarily by the

nature of federal demands and the balance of power between ‘adamant’ and ‘reluctant’ federalists. On the one hand, Nepal’s ‘adamant’ federalists demanded an identity-based form of federalism designed to redress their historical marginalisation and to break the dominant groups’ hold on state power. On the other hand, ‘reluctant’ federalists had accepted a form of federalisation based on ‘capability’, strikingly similar to the existing territorial administrative organisation, and devoid of identity.

Since the proposal for an incrementalist approach to federalisation ultimately came from the ‘reluctant’ federalists, the ‘adamant’ federalists interpreted it as an attempt to avoid federalisation altogether – a form of counter-revolution by stealth. This sentiment became particularly acute in the context of the second Constituent Assembly, where ‘reluctant’ federalists controlled almost two-thirds of the seats and had cogent justifications – post-earthquake reconstruction and the Indian blockade – to fast-track constitution drafting. Under those conditions, delaying federalisation became equated with relinquishing federalism *tout court*. Moreover, Nepal’s post-conflict constitution-making process was initially expected to be a constitutional moment that would produce the country’s ‘definitive’ constitution – the seventh in its troubled history. The open-endedness of constitutional incrementalism was ill suited for federalisation under these political circumstances and its rejection avoided an exacerbation of political violence.

Second, the article sought to reflect on the conditions under which constitutional incrementalism may succeed or fail. In Nepal, the demands for federalisation straddled constitutional questions of frame of government (the creation of federal units *ex novo* and their territorial delimitation) and foundational aspects (the naming of federal units). Thus, when questions of constitutional design address both structural *and* foundational aspects of constitution making, it is difficult to deploy the incrementalist toolkit because it is impossible to fudge, avoid, be ambiguous, or silent on matters pertaining to the structure of the state. Moreover, in Nepal, the transfer of constitutional decisions to the political sphere took place when the Constituent Assembly was still in place – not afterwards. This led to a progressive de-legitimation of the constitution-making process as a whole. Thus, in terms of comparative lessons, the sequencing of constitution-making decisions is paramount. For an incrementalist strategy to succeed in both its short term goals of producing a constitution and

avoiding further conflict and in its medium to long term goals of fostering political stability and democracy, the appropriate timing for shifting thorny constitutional issues to the political sphere is when the constitution-making process is concluded – not during. This point is especially important in the context of a Constituent Assembly, which as the highest form of constituent power conjures a powerful image of the sovereign people and engenders dramatic expectations of radical change. This sequencing secures the legitimacy of the constitution-making process, and of the new constitution.

Finally, non-majoritarianism and consensus decision making in deeply divided societies ought to be construed around the broader principle of social, political, and economic inclusion, not solely around the inclusion of the existing political parties. This is crucial when identitarian cleavages are also intra-party, and the party leadership is dominated by hegemonic groups. For constitutional incrementalism to succeed all stakeholders ought to have a seat at the table, and postponement, vagueness, and silence must not equate to political defeat for minorities and historically marginalised groups. In this respect, ‘adamant’ federalists in Nepal understood well the potential risk of adopting an incrementalist strategy that Lerner has termed ‘over-rigidity’.<sup>52</sup> Had federalisation been postponed in Nepal, material constitutional arrangements surrounding the territorial organisation of state power would have likely emerged, acquired a degree of path-dependency, and become paradoxically harder to change. Ultimately many historically marginalised groups feared that the deferral of federalisation would have translated into a ‘Waiting for Godot’ scenario for inclusion through federalisation, while ethno-cultural forms of majoritarian nationalism in the declaratory parts of the new constitution further entrenched the hegemony of dominant groups.

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<sup>52</sup> Lerner, (n. 1) 210-211.