Constitutional Assembly Breakdown: A Study of Why Nepal's Constitution Writing Process Failed

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Constitutional Assembly Breakdown: A Study of Why Nepal’s Constitution Writing Process Failed

A Thesis
Presented to
The Faculty of the Department of Politics
Bates College

In partial fulfillment of the requirements for the Degree of Bachelor of Arts

by

Evan Cooper
Lewiston, Maine
March 30, 2015
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Abstract

This thesis explores the elements that account for why Nepal has failed to draft a new constitution since the end of the civil war in 2006. This study is grounded in two main areas of existing literature. The first is the political economy of collective decision making with a focus on the challenges faced by large groups, such as legislative bodies. The second area of literature focuses more specifically on particular challenges to constitution-drafting or constituent assemblies. Predictions from these literature sources are then applied to a newspaper analysis of eKantipur headline articles from November 2006 to January 2015 to analyze which factors are present as impediments to the constitution process in Nepal. Supplemental interviews from December 2014 are also used in order to highlight how newspaper depictions of the constitutional impasse match with the reality of the Constituent Assembly process. This study finds that while numerous political problems suggested by existing scholars appear to be present in newspaper data, the root of the problem is a lack of legitimacy grounded in the leaders of the four major political parties of Nepal. This study also uses the Nepal case to theory test Andrew Arato’s model of Post Sovereign Constitution Making. Overall, Nepal’s constitution writing failure, which is due to problems of legitimacy, supports the caveats of Arato’s theory.
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Introduction

In the fall of 2013, I spent the semester studying in Kathmandu, Nepal. While there, I conducted a study on the role of international actors in the constitution process and second Constituent Assembly election in November 2013. Despite the common rhetoric among political leaders that international actors were taking over and destroying the constitution process, my study, based on interview analysis, showed relatively little interference by the international community. The current study seeks to expand off of this research; since the common rhetoric is incorrect what does account for the failures of the constitution process?

This study explores the factors that have led to the delay and failure of the creation of a new constitution in Nepal. This study explores an answer to the question of how might we account for why Nepal has thus far failed to draft a constitution? Chapter one begins with an examination of two literatures. The first addresses the political economy of collective decision making with emphasis on the challenges faced by large groups such as legislative bodies. The second focuses more specifically on particular challenges to constitution-drafting bodies or constituent assemblies. These bodies may be a special case insofar as the level of politics is heightened and thus collective action dilemmas may either be simply exacerbated because the stakes are higher or they may manifest themselves in a qualitatively distinct form. The level of politics in constitution making is heightened as explained by Barry Weingast in his work on self-enforcing constitutions.¹

Based on an evaluation of this literature, five hypotheses were created to predict the factors that derailed the constitution process in Nepal. Hypothesis 1: Existing political institutions in Nepal are not strong enough to overcome collective action problems in the

¹ Barry Weingast. "Self-Enforcing Constitutions: With an Application to Democratic Stability In America’s First
legislative and drafting bodies. This will manifest in high transaction costs, a lack of clear committee system, or excessive negotiation time outside of the committee system. Hypothesis 2: There is a dearth of existing political institutions across a broad range of categories in Nepal, which causes significantly more time to be spent creating those institutions from the ground up. This is due to the need for some institutions to be in place such that participants are familiar for effective legislation. Hypothesis 3: Fundamental differences exist on keys substantive aspects of the constitution that participants are unwilling to compromise on. Hypothesis 4: There will be a lack of public participation in the constitution-drafting, further threatening the overall process. Hypothesis 5: There is a deficit of legitimacy, which threatens the overall political process and causes mistrust and delays.

Through media and interview analysis this study shows that heightened collective action problems played a role in the failure of the constitution process. The largest impact of collective action problems is seen in the coordination problems and opportunity costs between leaders. While a committee process reduced collective action problems to a great enough degree to draft the majority of a new constitution, leaders attempted to come to a consensus on the most contentious aspects of the constitution outside of the parameters of the Constituent Assembly. Without any institutional support, the leaders have yet to solve key issues like the number and boundaries of the new federal provinces.

In addition to answering why Nepal’s constitution process has failed, this study also aims to be a theory test of Andrew Arato’s Post-Sovereign Constitution Making model. Arato’s model is a two-part system. Part one of this model consists of a small body of stakeholders writing an interim constitution. This is followed by the election of a fully democratic body to write a final constitution. This model closely reflects the path Nepal has
taken in writing their new constitution and thus creates an opportunity to examine Arato’s theory in practice. Arato further emphasizes that legitimacy is at least the short term determinate of success. While Arato advocates that this two-stage model is structurally the best, it is also most likely to be perceived to have problems of legitimacy.2

Through media and interview analysis, this study shows that illegitimacy played a fundamental role in the failure of the constitution writing process in Nepal. In this study, illegitimacy is seen as actions taken my participants of the constitution process are in violation of democratic norms. For example, a lack of credible effort in the process, threats of violence or a return to war, and major shifts in position on key issues were seen as signs of a dearth of legitimacy. This study does not focus on a lack of legitimacy in the process overall, rather the focus is on individual illegitimate actions.

**Economic Overview of Nepal**

To understand Nepal’s political challenges the historical struggles the country has faced as well as its dire economic situation must be considered. Nepal is a country of nearly 31 million people located in South Asia, landlocked between the dominant powers of China and India.3 It is an extremely poor country with a GDP per capita of $1500 (2013 estimate), leaving it ranked 205th in world. Thus, Nepal is the second poorest country in Asia, wealthier in GDP per capita than only Afghanistan.

Nepal’s GDP is composed of 48.7% service sector, 36.8% agriculture sector and 14.5% industry sector (2013 estimates).4 The small industrial portion of Nepal’s economy is largely

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3 See Figure 1-1
4 CIA world factbook
based on garments, carpets and textiles.\textsuperscript{5} In 2008, the estimated unemployment rate in Nepal was 46%.\textsuperscript{6} Further, in 2012/3013 the remittances to GDP ratio in Nepal was 25.5\%, a huge increase since 2000/01 when the ratio was 10.7\%. This shows the increasing feeling among young Nepalis that work abroad is the only feasible option.\textsuperscript{7} Additionally this measure and the other indicators above show just how weak the Nepali economy is in the midst of political chaos.

Constitutional Lawyer Bipin Adhikari remarks on the role the faulty economy played in political indecision:

Most of the national industries have been closed. The entire productive sector of Nepal is experiencing a huge power (electricity) deficit, and despite this fact, no additional investments have been commissioned in the hydropower sector to meet the growing demand. Because of the instabilities and declining economic situation, thousands of youth have left the country for foreign employment. Labour shortages have affected the entire country and especially the agriculture sector. Foreigners are filling the vacuum. The brain-drain of young professionals has shot up at an alarming rate.\textsuperscript{8} [sic]

Nepal’s struggles with development are deeply rooted within the country and extend far beyond the political chaos that surrounds the constitution-drafting process.

**The Historical Context of Nepal’s Constitution Process**

**The 1990 Constitution**

The current path to democracy in Nepal began under the creation of a new constitution in 1990. The creation of this constitution was due to “the success of the *Jan Ándolan* (People’s Movement) in putting an end to the Panchayat monarchial autocracy and in restoring democracy

\textsuperscript{6} CIA world factbook
\textsuperscript{7} SAARC-sec.org Nepal: role of remittances in economic and financial development may 2014
to the Himalayan kingdom.”9 In the 30 years prior to 1990, Nepal existed as a monarchical autocracy, but the new constitution, drafted to appease the growing pro-democracy forces in Nepal, created a constitutional monarchy.10 The 1990 Constitution represented a compromise between the monarch and the Nepali Congress Party, the dominant political power at the time, as well as some of the more left leaning political parties. This constitution vastly reduced the political role of the king within Nepali politics.11

Additionally, the interim government, established to draft the 1990 constitution12, successfully organized elections that were held on May 12, 1991 to be held under the new constitution. Twenty parties contested the election, with just 8 winning any seats in the legislature. The Nepali Congress Party secured 110 out of the 205 seats in the parliament’s lower house, the House of Representatives. These elections under the new 1990 constitution brought a period of relative peace and stability until 1994.13

In 1994, the House of Representatives was dissolved by Prime Minister Girija Koirala for mid-term elections in November. However, political instability began when these elections produced a hung Parliament with the United Marxist Leninist party in possession of the most seats with 88 of the 205. This led to the creation of eight coalition governments over the course of five years.14

Despite this move to a more democratic system with an elected parliament, the new constitution was heavily criticized. Early objections focused on the “unelected and

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10 Ibid., 2.
11 Adhikari 2.
12 The 1990 constitution was the 5th constitution of Nepal. See figure 1-3 for a complete listing of Nepal’s constitutions.
13 Malagodi 180
14 Malagodi 181
unrepresentative nature of the body that drafted the document."\textsuperscript{15} Later criticisms emphasized the exclusionary nature of the document, which homogenized the diverse nation under the Hindu kingship. Furthermore, many citizens were dissatisfied that the monarchy was granted ‘higher privileges and status’ which prevented true rule of law.\textsuperscript{16}

Despite dissatisfaction, the period represented relative democratic successes as well. For example, “Democratic institutions grew due to freedom of speech and assembly, the legalization of political parties and other fundamental rights guaranteed to the citizens.”\textsuperscript{17} In the years immediately following the promulgation of the 1990 constitution, the many aspects of an independent judiciary, as outlined in the new constitution, were put into place, adding to the democratizing trend.

**The Start of the Civil War**

In 1996, while dissatisfaction with the government under the 1990 constitution grew and the nation fell into a period of political instability due to a hung parliament, the leaders of the Communist Party of Nepal (Maoist) submitted a 40-point list of demands to Prime Minister Sher Bahadur Deuba and threatened to start an armed insurgency against the king and the parliament if the demands were not met. The government took no steps to appease the Maoists who then went underground to carry out their plans for “The People’s War” the official name of the ten-year civil war in Nepal, which began as a small insurgency.\textsuperscript{18}

At the outset of the insurgency which started the civil war in 1996, the Maoist opposition was not taken seriously and had little support among the mass population of Nepal. However, by

\textsuperscript{15} Ibid., 96.
\textsuperscript{16} Malagodi., 96.
\textsuperscript{17} Adhikari 2
\textsuperscript{18} Adhikari 3-4
2000 the insurgency had become more serious.\textsuperscript{19} This insurgency with feeble beginnings sparked a full scale civil war that engulfed Nepal for a decade: “The insurgency progressively developed into a full-scale conflict plunging the country into a decade of violence and human rights abuses.”\textsuperscript{20}

Turmoil intensified in June 2001 when the Crown Prince of Nepal, Dipendra, killed his parents, the King Birendra Shah and Queen Aishwarya. Following the brutal killing, on June 4, 2001 King Gyanendra Shah, the former kings brother, was crowned to take his place.\textsuperscript{21} The royal massacre seemed to spark a downward spiral in political order and democratic improvements. The murder of Birendra, a strong protector of the constitutional monarchy, put moves toward democratic institution building since 1990 at serious risk. Further destabilizing the situation, the bodies of the murdered royals were quickly cremated before an investigation could take place. Additionally, the new King, Gyanendra, was one of the few survivors of the massacre and unpopular in the eyes of the public. This was, in part, due to his lack of training in statecraft and rumors in the international media that he may have played a role in the royal murders. As a result, the legitimacy of the new King was on a less stable footing than that of his brother.\textsuperscript{22}

In July 2001 Prime Minister Girija Prasad Koirala stepped down due to fears of political instability and inability to deal with growing Maoist insurgency. Koirala was replaced by Nepali Congress Party leader Sher Bahadur Deuba. The collapse of governing institutions continued in late May 2002 when King Gyanendra, at request of prime minister, dissolved parliament and declared a three-month extension of emergency rule, which had previously expired May 24,

\textsuperscript{19} Adhikari 3-4
\textsuperscript{20} Malagodi., 18.
\textsuperscript{21} Pant, 3.
\textsuperscript{22} Adhikari 4.
2002, to allow for the army to destroy the Maoist rebels. However, 56 members of parliament filed a lawsuit claiming no constitutional grounds to dissolve parliament existed during emergency rule. The Supreme Court quashed the lawsuit, thus siding with the King, on August 9, 2002.

Concerns over the ability to hold free and fair elections grew following the extension of emergency rule. The prime minister pledged that there would not be emergency rule during upcoming November 2002 elections. However, as the war intensified, Nepal’s cabinet concluded that holding elections was too risky due to the many security threats. On October 3, 2002, the King postponed elections for one year. In an effort to seize power, the King dismissed the prime minister, disbanded the cabinet, and assumed executive power the day after postponing the election. Some historians speculate that the King believed he could fight the Maoists using federal forces without the assistance of the political parties; however, history would prove that the King predicted incorrectly.

End of the War

In 2006, the peace process began when the Maoists and the parliamentary parties signed a 12-point peace agreement that ended the civil war. The peace process was formed under the 2006 Comprehensive Peace Accord signed by the Maoist leader Prachanda and the prime minister on November 21, 2006. Thus, what came to be known as the Peoples War that formally ended 10 years after it had begun.

23 Pant 3.
24 Pant 3.
25 Pant 4.
26 Pant 4.
On January 15, 2007 the Interim Constitution of Nepal took affect. It was drafted with the intent of guiding the country through the drafting process of a permanent constitution. At the urging of the Madhesi (an ethnic group residing in the Tarai region along the border of India) and due to growing violence in the Tarai region, the Interim Constitution declared Nepal a federal republic. In other words, federal design might give greater voice to those groups claiming they were silenced by the institutional design of the 1990 Constitution. However, the Interim Constitution left the formal division of the country into provinces that would make up the new federalist nation to the Constituent Assembly (CA). The Interim Constitution was a fully functioning constitution, which set up three branches of government and laid out a definition of a citizen, rights to be protected, and many other elements of the democracy. One key element of the Interim Constitution was that in defining the CA, it required the members of that assembly to create a new permanent constitution by a clear deadline in addition to functioning as the legislature of the country while that drafting was taking place.

1st Constituent Assembly

Elections were held on April 10, 2008 to populate the 601 member Constituent Assembly, which had a mandate to write a new constitution for Nepal. The newly elected leaders began their task of constitution drafting when they took the oath of office on May 26, 2008. Their first act as a newly formed legislative body was to declare Nepal a Federal Democratic Republic and abolish the monarchy. Following these acts, former king Gyanendra Shah was evicted from the royal palace on June 1, and all royal properties were nationalized.

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28 Malagodi, 294.
29 Dixit, page 145-146.
31 Adhikari 25.
On June 26 the prime minister Koirala of the interim government resigned and the CA filled his responsibilities with the newly elected President Dr. Ram Baran Yadav and Pramananda Jha as Vice President. The former speaker of the parliament was also selected as Chairperson of the CA.  

A coalition government was formed between CPN(M), or the Communist Party of Nepal (Maoist) and the Madhesi People’s Rights Forum. The new coalition elected Pushpa Kamal Dahal as the first Prime Minister. Dahal’s selection as Prime Minister was highly controversial as he was the chairperson of the CPN (Maoist) party and leader of the military wing during the insurgency and civil war. Dahal did not resign as the military leader within the party, which was the main reason that the Nepali Congress party remained in the opposition rather than joining the ruling coalition. Additionally, there was a general fear in Nepal that “the Maoist government would misuse state authority, including the internal security administration and the Nepal Army.” These feelings of mistrust are early indicators of a deep problem of legitimacy that would later play a role in preventing the promulgation of a new constitution.

The Constituent Assembly created a system of smaller committees each tasked with particular responsibilities of the drafting process. The Constitutional Committee led the drafting process under the leadership of Chairperson Madhav Kumar Nepal, who had lost his election to the CA but was later nominated to the body on January 10, 2009. The Constitutional Committee was tasked with creating a full draft constitution after each thematic committee had submitted concept papers and preliminary constitutional drafts on their respective areas.

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32 Adhikari 25.
33 Adhikari 26.
34 Adhikari 25.
35 See discussion of legitimacy in Chapter 1 and trust in Chapter 3
36 Adhikari 26-27.
Following a disagreement with President Yadav over misuse of army power, Dahal resigned as prime minister in protest on May 4, 2009. Madhav Kumar Nepal, the current head of the Constitutional Committee was then elected Prime Minister under the newly formed Coalition government led by the Nepali Congress Party and 22 other parties. Alongside this power transition, the Maoists began to obstruct the CA’s work as a parliament, and the relationship between the Maoists and the Nepal Army became increasingly tense.37 Tensions with the Maoists in the CA reached a peak on April 24, 2010, when they declared an indefinite strike until the Madhav Kumar Nepal led government resigned.38

During the tenure of Prime Ministers Dahal and Nepal, the CA, “spent the majority of its time building the committee level drafts. There were 11 thematic committees, each charged with handling a different aspect of the constitutional effort.”39 In addition to these thematic committees, the CA created the State Restructuring Commission (SRC) under the leadership of Professor Ganesh Man Gurung. This committee was tasked with developing federalization plans for Nepal as required by the Interim Constitution.

Drafts from the theme committees were submitted to the fill CA between May 25, 2009 and January 27, 2010. Contradistinctions between drafts and internal disagreements were discussed in hearing in front of the full CA. However, they were unable to resole the fundamental differences in opinion that became prominent during the full CA meetings.

The Constituent Assembly was empowered to amend “the 2007 Interim Constitution [to extend] its own term four times due to the lack of political consensus over fundamental features of the new document.”40 The Interim Constitution originally authorized the CA for a two year

37 Adhikari 27.
38 Adhikari 28.
39 Adhikari 27.
40 Malagodi, XVI preface.
term. As the first CA neared the end of this two year period they could not find a way to resolve the remaining disputes in the constitution. At midnight on May 28, 2010, the day its term was set to expire, the CA passed a constitutional amendment to extend its term for one year. The CA extended its term in the hopes that additional negotiation time would enable them to promulgate a new constitution; however, little consideration was given to the consequences of this decision.

By this time, three differing blocks had emerged within the CA. The Maoists represented extreme positions on all constitutional issues, which were often difficult to reconcile with democratic thoughts and the concept of the rule of law. The Nepali Congress projected itself as the centrist party with a strong (conservative) commitment to democracy and the rule of law. The CPN (UML), a democratic party with left antecedents, maintained its own line. Though the UML was part of the Maoist coalition, it had more in common with the NC party line. The Madhesi parties sought to bring the issues of the Tarai people to the fore. Mostly democratic, they were a regional force with little vision for the country as a whole.41

Divides in the Constituent Assembly continued to grow including the proliferation of various identity caucuses such as women, janajati, Madhesi and others. Bipin Adhikari critically claims that tensions rose as ideological stances were mixed with ethno-indigenous demands.

Further,

The CPN (Maoist) did not have an accommodative attitude on basic values of constitutional democracy. Following the CA extension, the Maoists surprised everyone by publicly unveiling a draft constitution on the streets. The other parties expressed outrage over what they saw as the non-democratic content of the draft. The Maoists were unable to present the same document in the CA.42

Following the growth in factions and increasing pressure to resign, Prime Minister Nepal stepped down on June 30, 2010. Begging on July 20, the CA spent 7 months attempting to elect a new Prime Minister, including 17 failed internal votes. Finally Jahala Nath Khanal of the UML was elected to the position, however the CA deadline was again closing in.

41 Adhikari 27.
42 Adhikari 29.
The Constituent Assembly extended its term for a second time on May 28, 2011 for a period of three months. However, Khanal and his government were unable to make progress in the divisive constitutional issues and he resigned on August 15, 2011.

On August 28, 2011 the CA voted for Dr. Baburam Bhattarai of the CPN (Maoist) party to be Prime Minister. The following day, the CA made the third extension to its tenure for three more months. Little progress was made.

The Constituent Assembly was unable to achieve its mandate and, as a result, the Supreme Court, which was established under the Interim Constitution, ruled on November 25, 2011 that if the Constituent Assembly failed to finish writing a new constitution by the end of its fourth extension, then the CA would automatically be dissolved. On November 29, 2011 the CA extended it term for the fourth and final time, for 6 months.

In the remaining few months the CA made some additional progress which, in part, included decisions for a mixed electoral system of first past the post voting and proportional representation, like the voting for the CA. They also formed consensus on establishing a federal bi-cameral legislature under the draft constitution.

The largest remaining issue that could not be solved was how to establish a federalist system. Two dominate proposals existed by the end of the first constituent assembly: and 11 state system of ethnic federalism and 6 state system created on the basis of economic viability.

Sure enough, on May 27, 2012 the CA had not completed a draft of the constitution of Nepal, and it was dissolved by Prime Minister Baburam Bhattarai. This action left the Interim Constitution in place and required the election of a new Constituent Assembly. Overall,

43 Malagodi., XVI-XVII preface.
44 Adhikari.
45 Adhikari 32.
46 Malagodi., XVI-XVII preface.
Adhikari characterizes the tenure of the first Constituent Assembly by stating, “These problems were caused by the often less than straightforward policies of the Maoists and the lackluster commitment of all the parties to the sovereign interests of the nation.”

In November 2013 a successful election was held for the second Constituent Assembly, which was tasked with picking up the constitution writing process where the previous assembly had left off.

The political timeline of Nepal since 1990 shows the ongoing struggle the country has had to form stable democratic government supported by the people of Nepal. While slow progress has been made towards representative democracy, the most recent history of the Constituent Assembly reveals deep divisions and clear impasses in creating a new constitution.

Bipin Adhikari summarizes the political struggles in post-war Nepal when he states:

Over these years, the status of the rule of law has deteriorated. Impunity is getting institutionalized. The failure to bring perpetrator of the human rights violations committed during the Maoist insurgency to justice during these years shows not only the lack of commitment to ensure the rule of law, but also declining commitment of the state towards justice. Corruption has become rampant. The increasing politicization of the security apparatus of the state is a palpable truth. There has been frequent assault on the independence of the judiciary. The decline in the capacity of the independent constitutional bodies like the Commission for the Investigation of the Abuse of Authority and the office of the Auditor General, is no more a secret. Governments formed during these years lacked any concept of strategic foresight as a tool for preserving and enhancing strategic decision-making. They lacked the capacity to act in an unpredictable situation.

The continued impasse within the Constituent Assembly has led to the obvious question of why they have been unable to complete a new constitution. History shows that most of the constitution has been completed through committee work in the Constituent Assembly yet the process continues to be held up. The remainder of this thesis aims to answers this puzzle through an analysis of existing literature on constitution-writing, media analysis and interviews with

47 Adhikari 33.
48 Adhikari 134.
Nepali constitutional experts. The following chapter presents current theories on the difficulties surrounding constitution drafting, which are used to create predictions for why the process has failed in Nepal.

**Outline of the Current Study**

Chapter one of this study examines existing scholarly literature in order to make a set of hypotheses for why Nepal has failed to write a constitution. Two literatures are examined, traditional collective action problems which all legislative bodies face as well as a literature that examines problems specific to constitution drafting bodies. Chapter two is a media analysis which analyzes newspaper magazines from *eKantipur* to test for the existence of each of the hypotheses laid out in chapter one as a factor in delaying the constitution process in Nepal. Chapter three is an interview analysis which supplements the media analysis as a further test for the hypotheses created in chapter one. This study then concludes by examining how both trust and lack of legitimacy are the basis for the failure of the constitution process.
Figure I-1: Nepal (in red) is located in South Asia, landlocked between India and China (Tibet)
Nepal’s Constitutions

1948
Promulgation of the Rana Constitution

1951
Promulgation of the Interim Constitution

1959
Promulgation of the 1959 Constitution

1962
Promulgation of the Panchayat Constitution

1990
Promulgation of the 1990 Constitution

2007
Promulgation of the Interim Constitution

Figure I-2: Nepal’s Constitutional History
2nd Constituent Assembly Party Seat Distribution

<table>
<thead>
<tr>
<th>Position</th>
<th>Party</th>
<th>Seats</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Nepali Congress</td>
<td>196</td>
</tr>
<tr>
<td>2</td>
<td>Communist Party of Nepal (Unified Marxist-Leninist)</td>
<td>175</td>
</tr>
<tr>
<td>3</td>
<td>Unified Communist Party of Nepal (Maoist)</td>
<td>80</td>
</tr>
<tr>
<td>4</td>
<td>Rastriya Prajatantra Party Nepal</td>
<td>24</td>
</tr>
<tr>
<td>5</td>
<td>Medhesh Jana Adhikar Forum, Nepal (Loktantrik)</td>
<td>14</td>
</tr>
<tr>
<td>6</td>
<td>Rastriya Prajanka Party</td>
<td>13</td>
</tr>
<tr>
<td>7</td>
<td>Tarai-Madhesh Loktantrik Party</td>
<td>11</td>
</tr>
<tr>
<td>8</td>
<td>Madhesi Jana Adhikar Forum, Nepal</td>
<td>10</td>
</tr>
<tr>
<td>9</td>
<td>Sadbhavana Party</td>
<td>6</td>
</tr>
<tr>
<td>10</td>
<td>Federal Socialist Party</td>
<td>5</td>
</tr>
<tr>
<td>12</td>
<td>Nepal Workers’ and Peasants’ Party</td>
<td>4</td>
</tr>
<tr>
<td>13</td>
<td>Rastriya Janamorcha</td>
<td>3</td>
</tr>
<tr>
<td>13</td>
<td>Communist Party of Nepal (United)</td>
<td>3</td>
</tr>
<tr>
<td>13</td>
<td>Rastriya Madhesh Samajwadi Party</td>
<td>3</td>
</tr>
<tr>
<td>13</td>
<td>Terai Madhes Sabadhavana Party</td>
<td>3</td>
</tr>
<tr>
<td>17</td>
<td>Rastriya Janamukti Party</td>
<td>2</td>
</tr>
<tr>
<td>17</td>
<td>Tharuhat Tarai Party Nepal</td>
<td>2</td>
</tr>
<tr>
<td>17</td>
<td>Nepal Pariwar Dal</td>
<td>2</td>
</tr>
<tr>
<td>17</td>
<td>Dalit Janajati Party</td>
<td>2</td>
</tr>
<tr>
<td>21</td>
<td>Akhanda Nepal Party</td>
<td>1</td>
</tr>
<tr>
<td>21</td>
<td>Madhesi Janadikar Forum (Gantantrik)</td>
<td>1</td>
</tr>
<tr>
<td>21</td>
<td>Nepali Janata Dal</td>
<td>1</td>
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<tr>
<td>21</td>
<td>Khambuwan Rashtriya Morcha, Nepal</td>
<td>1</td>
</tr>
<tr>
<td>21</td>
<td>Nera Rastriya Party</td>
<td>1</td>
</tr>
<tr>
<td>21</td>
<td>Jana Jagaran Party Nepal</td>
<td>1</td>
</tr>
<tr>
<td>21</td>
<td>Sanghiya Sadbhawahana Party</td>
<td>1</td>
</tr>
<tr>
<td>21</td>
<td>Madhesh Samata Party Nepal</td>
<td>1</td>
</tr>
<tr>
<td>21</td>
<td>Samajwadi Janata Party</td>
<td>1</td>
</tr>
<tr>
<td>21</td>
<td>Sanghiya Loktantrik Rastriya Manch (Tharuhat)</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Independents</td>
<td>2</td>
</tr>
</tbody>
</table>

Figure I-3: The number of seats held by each party in the 2nd Constituent Assembly
### 1st Constituent Assembly Party Seat Distribution

<table>
<thead>
<tr>
<th>Position</th>
<th>Previous Position</th>
<th>Party</th>
<th>Seats</th>
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</thead>
<tbody>
<tr>
<td>1</td>
<td></td>
<td>Communist Party of Nepal (Maoist)</td>
<td>229</td>
</tr>
<tr>
<td>2</td>
<td></td>
<td>Nepali Congress</td>
<td>115</td>
</tr>
<tr>
<td>3</td>
<td></td>
<td>Communist Party of Nepal (United Marxist-Leninist)</td>
<td>108</td>
</tr>
<tr>
<td>4</td>
<td></td>
<td>Madhesi People’s Rights Forum, Nepal</td>
<td>54</td>
</tr>
<tr>
<td>5</td>
<td></td>
<td>Tarai Madhes Lokaantrik Party</td>
<td>21</td>
</tr>
<tr>
<td>6</td>
<td></td>
<td>Sadhavwana Party (Mahato)</td>
<td>9</td>
</tr>
<tr>
<td>6</td>
<td></td>
<td>Communist Party of Nepal (Marxist-Leninist)</td>
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</tr>
<tr>
<td>8</td>
<td></td>
<td>Janamorcha Nepal</td>
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</tr>
<tr>
<td>8</td>
<td></td>
<td>Rastriya Prajatntra Party</td>
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</tr>
<tr>
<td>10</td>
<td></td>
<td>Communist Party of Nepal (United)</td>
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</tr>
<tr>
<td>10</td>
<td></td>
<td>Nepal Workers’ and Peasants’ Party</td>
<td>5</td>
</tr>
<tr>
<td>12</td>
<td></td>
<td>Rastriya Prajatntra Party Nepal</td>
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</tr>
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<td>12</td>
<td></td>
<td>Rastriya Janamorcha</td>
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<td>Nepal Sadhavaawana Party (Anadidevi)</td>
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<td></td>
<td>Rastriya Janshakti Party</td>
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<td>16</td>
<td></td>
<td>Communist Party of Nepal (Unified)</td>
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<td>16</td>
<td></td>
<td>Federal Democratic National Forum</td>
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<td></td>
<td>Nepali Janata Dal</td>
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<td></td>
<td>Rastriya Janamukti Party</td>
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<td>Chure Bhawar Rastriya Ekata Party Nepal</td>
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<td>20</td>
<td></td>
<td>Dalit Janajati Party</td>
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</tr>
<tr>
<td>20</td>
<td></td>
<td>Nepal Rastriya Party</td>
<td>1</td>
</tr>
<tr>
<td>20</td>
<td></td>
<td>Nepal Lokatantrik Samajbadi Dal</td>
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</tr>
<tr>
<td>20</td>
<td></td>
<td>Nepal Partwar Dal</td>
<td>1</td>
</tr>
<tr>
<td>20</td>
<td></td>
<td>Samajwadi Prajatantrik Janata Party, Nepal</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Independent</td>
<td>2</td>
</tr>
</tbody>
</table>

Figure I-4: The number of seats held by each party in the 1st Constituent Assembly
Figure I-5: Ethnic group composition of Nepal as a percentage of the total population
Chapter 1

Constitution Writing and Its Challenges: An Overview of Legal Scholarship

I. Introduction

Since the end of its civil war in 2006, Nepal has struggled to create a new permanent constitution. Due to this impasse and the need to gain a better understanding of constitution writing, it is important to ask, why has the Constituent Assembly of Nepal been unable to produce a new constitution in this time period? In her work on Kenya’s constitution, comparative legal scholar Alicia Bannon begins by noting the prevalence of new constitutions stating, “More than half of the national constitutions in existence today were written in the last thirty years.”\(^1\) This dramatic increase in constitution drafting worldwide has fostered much scholarship. However, Bannon also states that there remains a dearth of targeted case studies about constitution drafting processes and a serious lack of work on why certain drafting process succeed or fail.\(^2\) Thus, this research question focusing on Nepal provides a critical insight into the field of constitution-writing at a time in which these analyses are important to create stronger drafting institutions.

LITERATURE

Existing scholarship on constitution-drafting and constitutional development may shed light on why the first Constituent Assembly in Nepal failed and to help assess whether the second CA may succeed. Political economic theories that address the basic challenges collective action, which apply to any large assembly, may provide insight on the group dynamics at play

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2 Bannon, 1827.
within the Constituent Assembly and its drafting process. However, traditional collective action problems alone do not adequately explain constitution writing, since the collective action problems may be heightened in the context of constitution-drafting, as opposed to normal legislating. Furthermore, specific aspects of the drafting process may create unique impasses not associated with normal legislating.³

A more normative literature that addresses the various challenges to constitution drafting and recommends how constitution drafting should proceed may also provide insight, at least insofar as identified possible obstacles may be observable in the Nepal case. This literature indicates several challenges to constitution drafting that need to be overcome including 1) how best to ensure public participation 2) whether the constitution should be drafted under the assumption of a Rawlsian veil of ignorance and 3) how strong various institutions should be relative to one another, an assessment that includes institutional design, e.g., parliamentary versus presidential/separation of powers system. Normative theorists also recommend that consensus be achieved in the constitution-drafting process, and they assess the effects of deliberation on the process.

After reviewing both the collective action literature and the normative legal literature on constitution-drafting, this chapter summarizes briefly the cases of Kenya and US constitution-writing in order to gain a clearer picture of the problems associated with constitution-drafting and what particular factors might be in in the Nepal case. Finally, the chapter ends by considering Andrew Arato’s theory of “Post Sovereign Constitution-Making,” as his abstract recommendations appear to closely represent the actual process that Nepal has undergone.

Consequently, Nepal’s constitution-drafting process provides one case that may test the normative recommendations put forward by Arato.

II. The Problems of Collective Action

Large Groups and Associated Problems

Group size is an important determinate for the effectiveness of political discourse. In his book, *The Logic of Collective Action*, Mancur Olson explains that small groups are more effective than large groups. Olson explain the function of groups through the example of a business meeting. He states,

> When the number of participants is large, the typical participant will know that his own efforts will probably not make much difference to the outcome, and that he will be affected by the meeting’s decision in much the same way no matter how much or how little effort he puts into studying the issues…The decisions of the meeting are thus public goods to the participants (and perhaps others), and the contribution that each participant will make toward achieving or improving these public goods will become smaller as the meeting becomes larger. It is for these reasons among other, that organizations so often turn to the small group; committees, sub-committees, and small leadership groups are created, and once created they tend to play a crucial role.⁴

Olson emphasizes some of the rational choices that actors make when put in large group settings. Actors are incentivized not to work as hard toward the end goal in large groups, because in this setting the end goal becomes a public good that can be exploited. He elaborates on this idea when he writes, “the large, latent group cannot act in accordance with its common interests so long as the members of the group are free to further their individual interests.”⁵ Olson uses the concept of tragedy of the commons to demonstrate collective goods.

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⁵ Olson, 58.
Similarly, Donald Horowitz, in his study of constitution building in post conflict states, notes that model bias can harm constitution-making. This bias is the problem of drafters facing “limited comparative vision,” most commonly actors not using the most comparable constitutional models because they may be on the other side of the world, out of a drafter’s field of vision.\(^6\) Further, drafters may be biased by one extremely successful democracy or the constitution from the country where a particularly influential foreign advisor is from. Olson’s analysis of collective action in large groups suggests that actors have limited vision because they have little incentive to research the issues to find the best possible solution, since it is unlikely that suggestions an individual makes will make a difference in the end result.

The collective actions problems associated with large groups thus suggest similarly large constitution-writing bodies will therefore be slowed by these problems. Therefore, this begs the question, in Nepal’s constitution-writing process, are there collective action problems associated with group size?

Economist Douglas North critically elaborated on the field of collective action costs in part with his analysis of information costs. Information costs in a transaction are “costs that result from both parties attempting to determine what the valued attributes of these assets are.”\(^7\) Furthermore, North states that, “there are asymmetries of information among the players, and these and the underlying behavioral function of individuals in combination produce radical implications for economic theory and for the study of institutions.”\(^8\) Additionally, “Not only does

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\(^8\) Ibid., 30.
one party know more about some valued attribute that the other party, he or she may stand to
gain by concealing that information.”

Although North speaks of information costs and asymmetries in relation to economic
agreements, these principles apply to political negotiations as well. In negotiating different view
points, there are costs to understanding the implications of proposed legislation. Furthermore,
asymmetries exist between those who created the proposed legislation and the opposing political
groups, where motives may be hidden by the drafter. This literature suggests that heightened
information asymmetry may cause negotiation to go awry.

Overall, the literature on collective action suggests a set of testable hypotheses that can be summed up by the expectation that, in Nepal, existing political institutions are not strong enough to overcome collective action problems in the legislative and drafting bodies. Within this broader hypothesis, several questions must be asked to analyze the extent to which collective action problems play a role in the constituent assembly. One such question that will help to understand this hypothesis is what is the decision-making procedure: majority rule, supermajority, or consensus? Further, is there a committee system in place, used to have small groups make decisions? Who has agenda setting power; is there a speaker? And most simply, are there too many members in the Constituent Assembly?

In his discussion about the need to create a strong self-enforcing constitution, Barry Weingast explores the concept of rationality of fear, which he defines as, “When citizens feel threatened by potential changes in public policy, particularly when they believe their lives or livelihoods are at stake, they will take steps to defend themselves.” Additionally, “with a given level of stakes there exists a threshold probability such that if the citizens believe that the probability of adverse policy changes is at or above the threshold, they will take actions to

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9 Ibid.
defend themselves.”¹⁰ Just as Weingast emphasizes the need for a self-enforcing constitution to overcome collective action problems, it is likely that the existence of rationality of fear can heighten those same collective action problems in a different context. Weingast argues that to create a stable government, a constitution must lower the stakes of democracy to reduce the rationality of fear among a country’s citizens.¹¹ However, this argument also shows that the constitution process has much higher stakes than daily politics since the constitution will hold key decisions permanent so they do not lead to violence in disagreement in the future. Moreover, the authors cited above in the discussion on collective action problems focus their theory and research almost exclusively on regular legislative proceedings and not constitution-writing. Therefore, it is likely that the higher stakes of constitution writing that leads to increased rationality of fear among drafters exacerbates the challenges of ordinary collective action problems. This may mean that even in the presence of strong institutions that problems with constitution writing may persist.

Other authors also show the presence of this phenomenon. In his history of the writing process for the US Constitution, Clinton Rossiter discusses a particularly divisive period of time between June 21 and August 5, 1787. Rossiter describes these weeks as marked by “a struggle for power in which every contestant could speak, with no apparent feeling of hypocrisy of the ‘simple justice’ of his position, the hammering-out of the final compromise called forth emotions much deeper than those usually displayed in a game of political give-and-take”¹² Though he does not explicitly explain the activation of rationality of fear, since Weingast’s discussion of this concept came much later, Rossiter highlights increased emotions. These deeper emotions point to

¹⁰ Weingast, 2.
¹¹ Ibid.
a very similar concept as rationality of fear and explain that constitution-writing contains problems beyond those of ordinary politics.

Exacerbated collective action problems may be, in part, the cause of the deeper emotions that Rossiter discusses and thus a harder problem to solve than in ordinary political dialogue. However, the problems of constitution-writing may go beyond the traditional heightened collective action problems that Weingast discusses and thus call for an analysis of problems specific to constitution-writing. Unlike traditional collective action problems referring to legislative bodies, a constitution drafting body must deal with first-order concerns of institutional design. For example, in Nepal, the Constituent Assembly must design the institutions that create legislation rather than just debate what legislation entails. Therefore, the presence of these first-order concerns requires an analysis of constitution-writing normative literature to discover what problems are unique to the drafting process and beyond the realm of collective action which cannot explain the entirety of the delays.

III. Constitution-writing Normative Literature

Public Participation

One aspect of research on constitution-writing examines the importance of public participation to the process. Legal scholar Cheryl Saunders notes that the current constitution-writing norms call for significant public input during the writing phase of the drafting process. Further Saunders argues that public input needs to be properly organized and analyzed so that
they can be used to make a difference in the constitution and do not just serve a symbolic function.\textsuperscript{13}

In her analysis of Kenya’s recent constitution-writing process Saunders also highlights the need for public participation. Saunders notes that the writing process was to include public consultation and drafting by a small review commission, revisions to a draft by a national convention, and a final ratification by the parliament, all to maximize public participation in the process.\textsuperscript{14} Importantly, “the Act seemed consistent with many of the preconditions that scholars have argued are necessary for successful constitution-writing,” with particular emphasis on efforts to make the constitution home-grown. However, she also warns that in some cases broad participation is not needed for legitimacy and may even be destabilizing, like the increased ethnic tensions that occurred in Chad in 1996. Even in Kenya, a large participatory process had costs including financial expense, significant time, and the opportunity costs of other legislative initiatives.\textsuperscript{15} Thus, public participation, while giving the constitution process greater legitimacy, can also add significant time and resources slowing the overall drafting process.

The need for public participation in a constitution-making process leads to several important questions. Does Nepal have a legitimate venue for public input in the process? If a public participation process is present is it a contributing factor to slowing the process? Importantly, while there was a high degree of public participation in the drafting of the proposed Kenyan constitution, the overall process failed, and no constitution was ever promulgated. Thus, even with a high degree of participation, it is not enough to guarantee a successful process.\textsuperscript{16}

\textsuperscript{14} Bannon 1832
\textsuperscript{15} Bannon 1846
\textsuperscript{16} Bannon 1832-1833
This shows that there are additional important factors in the drafting process that must be examined.

**Veil of Ignorance**

Another important aspect for a constitution writing process is the need for a veil of ignorance. Alicia Bannon notes that there is a “severe risk of self-dealing when it is clear how individual parties will benefit from the new constitution, and it highlights the importance of designing processes to promote a ‘veil of ignorance.’”

Bannon claims that the veil of ignorance concern is critical because of the serious risks anytime self-interested parties sit together at the negotiating table. This veil of ignorance can be created by “uncertainty about how constitutional provisions will affect specific parties” which will in turn make a more fair final product.

Further she states, “Kenya’s experience [] stands as a dramatic and concrete example of how the absence of a veil of ignorance can undermine constitution-drafting.”

However, some scholars, like Horowitz, claim modern constitutional framers do not have the luxury of a veil of ignorance unlike the writers of the US Constitution. However, he does note that this is a major hindrance to constitutional planning that should be given attention. Further, Horowitz claims that the lack of a veil can be a particular burden in countries with a lot of ethnic diversity and tension because politicians who benefit from hostile sentiment towards other groups have no incentive to change the political environment. Thus, the most divided societies may be least likely to set up the institutions they need. Even in cases where actors are

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18 Bannon, 1851.
19 Ibid.
aiming to mitigate ethnic tensions but have other goals that are prioritized may hinder creating a system that promotes interethnic conciliation.\textsuperscript{20}

Thus, it is likely that there is no operational veil of ignorance in Nepal, and that the lack of one has significantly slowed the drafting process due to self-interest. If this is the case, evidence will show political actors vying for substantive outcomes that fit their own personal interests. This is especially likely due to the large ethnic diversity in Nepal with the potential for tension to arise surrounding various substantive decisions that need to be made in the constitution.

**Institutional Design**

Another key element highlighted by scholars for successful constitution-writing is the need for a process that produces a coherent institutional design. In her work on Kenya, Bannon states, “Kenya’s constitution-writing process, with its multiple drafting stages and myriad participants, did not lend itself to creating a set of institutions carefully designed to protect clearly articulated values.”\textsuperscript{21} Further, she states that Kenya’s two main challenges in this realm were logistical challenges due to there being over 600 drafting participants and the need to “bargain in order to accommodate interests that were fundamentally at odds and not necessarily concerned with the greater good.”\textsuperscript{22} Bannon specifically highlights the difficulties surrounding large groups, exemplifying the claims of collective active theorists. This further suggests that the size of the CA in Nepal will be a hurdle to the completion of the constitution.

In her analysis of the first stage of constitution drafting, Cheryl Saunders analyses the actions that must be taken. This first phase she describes as the agenda setting phase, in which

\textsuperscript{20} Horowitz, 1231.
\textsuperscript{21} Bannon, 1854-1855.
\textsuperscript{22} Ibid., 1855.
the constitution-writing process is set up deciding things like, “the nature of the constitution-making body, whether new elections are required and, if so, when, the electoral rules that should apply in this case, how the state is to be governed during the constitution-making period, procedure for approval and ratification of the final draft Constitution and strategies for public participation.” Saunders notes that this is a key phase of the process in which decisions made can determine the success or failure of the entire constitution process. Countries that emerge from a conflict and make these decisions during a peace process are most likely to make these important decisions by default without adequate reflection or consultation dooming the process from the start. Further, this phase of the process is critical for laying foundational levels of trust between key stakeholders. Saunders highlights the importance of proper institutions for the success of the entire constitution-writing process. Further, Saunders assertions predict in Nepal, these important institutional decisions were likely made hastily, leading to poorly planned out processes that will hinder the constitution-writing.

Similarly Horowitz points to historical bias as a hindrance to the constitution-writing process. “In some countries, the objective is to design a constitution that avoids problems that the state experienced in the past.” In such cases history can act as a serious constraint on the vision of drafters, limiting the possibilities and sometimes eliminating superior options. Horowitz notes that pre-existing institutional capacity can constrain the realm of constitutional decisions. This can play a particularly important role in creating a federal system where the process can be hindered if there are “no preexisting regional legislatures or administrations to which to devolve power.” Thus, both institutional design of the constitution process and institutions within the

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23 Saunders, 4.
24 Ibid., 5.
25 Horowitz, 1228.
26 Horowitz, 1228.
country can cause impediments to the drafting process. Horowitz’ assertions also suggest that discussions about federalism in Nepal may be particularly challenging due to the lack of federal institutions before the constitution drafting process began.

**Consensus and Deliberation**

As an extension of collective action problems associated with large groups, Olson considers “It is often assumed (though usually implicitly) in discussion of organizational or group cohesion that the crucial matter is the degree of consensus; if there are many serious disagreements, there will be no coordinated, voluntary effort, but if there is a high degree of agreement on what is wanted and how to get it there will almost certainty be effective group action.”

Olson suggests that consensus must be present and a lack of consensus is “inimical to the prospects for group action and group cohesion.” However, even with a presence of consensus there may not be the desired group result or goal: “But the results obtained under this assumption [of perfect consensus] are, for that reason, all the stronger, for if voluntary, rational action cannot enable a large latent group to organize for action to achieve its collective goals, even with perfect consensus, then a fortiori this conclusion should hold in the real world, where consensus is usually incomplete and often altogether absent.” Thus for a constitution writing process there must be consensus surrounding the end goal of producing a legitimate text in a timely fashion without the interference of individual interests.

Donald Horowitz explains risk factors that come from the constitution making process itself. One such restraint is when actors have asymmetric preferences, such as when majorities and minorities have different goals. He further claims that political parties have visibility

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27 Olson, 59.
28 Ibid.
29 Ibid., 60.
surrounding their interests and what types of institutions will benefit them most. The asymmetric preferences described by Horowitz closely align with Olson’s concept of consensus. If political parties have vastly different goals for the constitution writing process, progress will be slowed, which may be, in part, the case in Nepal.

Ian Shapiro defines political deliberation as “involving the solicitous search for right solutions in circumstances of conflict.” Shapiro argues that political deliberation can have both positive and negative outcomes. “When people believe that their reasons have been taken into account, that they have been listened to, they can sometimes accept results that otherwise they would not, even when no preferences are changed by the deliberation.” Further positive benefits can include the creation of new ideas to fix problems that might not have otherwise been though of, a two heads are better than one claim. However, deliberation may also reveal differences causing gaps to widen rather than close between parties. Shapiro further states, “the general point remains, however, that there is no particular reason to think deliberation will bring people together, even if they hope it will and want it to.” Despite these basics of deliberation, Shapiro argues that it should be pursued to “strengthen the hand of those whose basic interests are threatened.” Shapiro claims that, “As a normative matter we can say that the more one’s basic interests are threatened, the stronger is one’s claim to insist on deliberation, but beyond some threat threshold voice is not sufficient.” However Shapiro also notes that it is hard to determine where that threat threshold lies to determine in which cases deliberation is not sufficient to protect minorities. Thus is lengthy deliberation a due course of constitution-writing.

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30 Horowitz, 1231.
32 Ibid., 9992.3.
33 Ibid., 9992.4.
34 Ibid., 9992.15.
because of the many minority interests involved? Is repeated deliberation able to bring parties to a consensus?

IV. Constitution-Drafting in Practice: Insights from Two Cases

The Case of Kenya’s Constitution-Drafting Process

Alicia Bannon examines the recent failed constitution drafting process in Kenya in order to gain an understanding of what went wrong. Bannon targets her research question in this topic area, asking what went wrong in the Kenyan drafting case and what can be learned from it? Kenya underwent a popular constitution reform movement in order to replace the constitution given to the country by the outgoing colonial government. Following dissatisfaction with the repressive Moi regime, the Kenya Review Act was created to design a system to create a new constitution.

The drafting process began in late 2001, with the goal to finish before the coming elections in December 2002. The first delay to the process was President Moi’s decision to dissolve Parliament in 2002, making it impossible for a new constitution to be put in place prior to the election. Another factor that destabilized the process was corrupt vote trading practices when opposition leader Raila Odinga agreed to join the NARC political party’s coalition under Mwai Kibaki, put together under the Memorandum of Understanding, in exchange for the promise that he would be prime minister under the new constitution. However, while this new coalition led to a peaceful democratic transition on the promise of quick constitution drafting, it also led to a highly divisive and acrimonious Constitutional Conference because the contents of
the constitution had not been discussed in the memorandum.\textsuperscript{36} The Conference required three rounds of negotiations which did not conclude until March 2004 and, “led to lawsuits, the withdrawal of the Kiabki government from negotiations, parliamentary bills to alter both the Act and the existing constitution, and alternative drafts,” all of which significantly damaged the process according to Bannon.\textsuperscript{37} Bannon also highlights three critical substantive issues which plagued the process including, “(1) the structure of the executive (whether there should be a Prime Minister in addition to the President, and if so what powers the position should enjoy); (2) devolution (whether Kenya should have a federal system with significant lawmaking powers at the local level); and (3) Khadis courts (whether Kenya should codify separate civil courts for Muslims).”\textsuperscript{38} As mentioned, one of the most significantly damaging events to the process was the walk out of President Kibaki’s allies from the process, following the decision by delegates to reject consensus and vote for a constitution with a strong Prime Minister. Following the walk out, the remaining delegates completed a draft without the government or its representatives and submitted the draft to Parliament under the Kenya Review Act.\textsuperscript{39} However, Parliament made changes to the Review Act allowing the parliament to make revision to the draft before bringing it to a vote. This made further political division, causing Kibaki to support the new constitution with revisions to the executive made by Parliament and Odinga to vehemently oppose the new draft. Odinga claimed that the new draft “failed to reflect the will of the people regarding essential reforms,” and further he “stoked ethnic tensions and at times misrepresented the content of the proposed draft.”\textsuperscript{40}

\textsuperscript{36} Bannon, 1835-6.
\textsuperscript{37} Ibid., 1836.
\textsuperscript{38} Ibid., 1836-7.
\textsuperscript{39} Ibid., 1838.
\textsuperscript{40} Ibid., 1840-1.
From this history of Kenya, Bannon lays out some lessons for future constitution drafting processes. One critical point follows from Bannon’s analysis is the need to mitigate ethnic tensions in countries with large ethnic diversity. Bannon states that in multiethnic societies there is a risk, “that constitutional review could lead to violence or ethnic pandering, undermining the legitimacy of the final product” and thus “a review process must be consciously designed to mitigate ethnic tensions and to avoid possibilities for capture along ethnic lines.” Most critically, constitution-writing processes must avoid giving one ethnic group the ability to monopolize power or take away power from other ethnic groups and designers must be mindful avoiding this when creating rules for drafting committees and other institutional processes.

The Case of US Constitution-Drafting

One well-researched case of constitution-writing that can shed some light on the problems associated with the process is that of the US Constitution of 1787. Clinton Rossiter provides a particularly clear account of the writing process as told largely through the vigorous notes of James Madison. Rossiter highlights several key issues that plagued the drafting process as well as successes. When highlighting some of these key successes and failures, Rossiter states:

The convention, for all its innate dignity and regard for form, operated as a large committee rather than a small assembly, and it was able to move with a minimum of posing and pouting toward a goal only dimly perceived in the opening days. If it did rather more meandering along the road than seems to have been necessary in retrospect, that is because the situation was not quite so simple as Madison and Wilson wanted their colleagues to believe, and because an organic unity rather than a mechanistic consolidation had somehow to be worked out to the satisfaction of small states and large. The search for such unity might easily have gone astray in a gathering any more numerous, divided, and faction-minded than this committee of largely like-minded gentlemen.

41 Ibid., 1853.
42 Ibid., 1854.
43 Rossiter, 180-1.
Rossiter makes a key prediction that success of negotiations in the Convention would not have been possible had there been more people in attendance. Likely referring to the problems of collective action already highlighted, it is much harder for larger groups to function accordingly. Thus the American case begs the question, is group size one of the problems at play in Nepal’s efforts to write a constitution? Further, Rossiter points out that there were only fifty-five framers, and just twenty-nine of them were full time participants. Thus, if problems would have ensued after an increase beyond a fifty-five-member body, what does this mean for the potential problems associated with 601 member framing body? Additionally, Rossiter’s passage suggests that factions lead to an impasse in constitution-writing. Thus, in Nepal numerous factions as seen in groupings of like-minded politicians could be an additional factor in inhibiting the completion of the constitution.

Rossiter also highlights substantive disagreements as a major impasse to the constitution process. Rossiter states, “the quest for a formula of representation acceptable to both James Madison and William Paterson was, as Hamilton said bluntly on June 29, a ‘contest for power, not for liberty’ that drove a sharp wedge between otherwise like-minded men.” Here, the American framers struggled with the question of how representation would work in the proposed upper house of the legislature with some advocating for equal representation of all states and others desiring proportional representation based on population. Rossiter’s analysis of representation as a roadblock to the constitution process shows that it is not just institutional problems that slow the process. Therefore, in Nepal it is important to look at how the CA has dealt with the most divisive issues to discover whether they are a hindrance to their process.

44 Ibid., 164.
45 Ibid., 183.
V. Post Sovereign Constitution Making: Recommendations for the Ideal Process

One line of theory, first developed by Andrew Arato, focuses on democratic constitution making in which two drafting stages occur, an interim one and a final one. He refers to this model as Post Sovereign Constitution Making or the round table form. According to Arato, it is the interim constitution stage, which differentiates this process from other constitution drafting models. Also unique to this process is the use of round table discussion by the major political forces to draft the interim constitution and then the subsequent use of a democratically elected body to draft the final document.\(^\text{46}\) Arato advocates for the potential success of this model due in part to the inclusion of the government power in the first round table step. Although some debate whether the non-democratic government should play a role in defining the rules (in the interim constitution) from which the elected body will draft a final constitution, Arato argues that the government power has earned a legitimate position in the round table discussion through the use of violence. Arato further states, “The general rule must be: the more inclusion, the better leadership, the more incorporation or public aspirations openly expressed and discussed, the more freely elected assembly can be constrained.”\(^\text{47}\) Overall, this model asserts that as a new form of constitution making, it finally overcomes the danger of collapse into dictatorship, “by applying constitutionalism to the method of constitution making on foundations” that are legitimate.\(^\text{48}\)

Upon further research Arato states that while the type of drafting model plays an important role, legitimacy is more central to the development of a democratic constitution. Arato


\(^{47}\) Ibid., 437.

\(^{48}\) Ibid., 437.
states, “It is the solution of the problem of legitimacy that tells us the most about the democratic nature of constitution-making, rather than the choice of models.” Further Arato notes that, “it is a legitimacy problem (rather than choice of specific model) that represents the level on which the normative justification of each process, and at least the short-term chances of its success in a divided society, should be tested.” However he also states that, “If I still say that some types, the two multi-stage ones, are best, this means only that they are structurally in the best position to generate legitimacy. (They are curiously also the ones most likely to perceive that they have a legitimation problem; because of the non-democratic character of the first stage.)” Thus, with Nepal falling into this model, there are serious concerns with legitimacy that must be addressed. Arato mostly discusses the legitimacy problems facing Turkey, largely having to do with disagreements between the legislature and the constitutional court. Although the majority of his article specifically refers to Turkey with no outside application, the topic of legitimacy may have some important implications for other cases. For example, one reason that Arato sites as illegitimate in the Turkish case is a 10% voter threshold for party representation in the legislature. He suggests that this is too high a bar for broad representation and this concept may apply in other cases.

VI. Conclusion

As briefly described at the beginning of this section, Arato’s Post Sovereign Constitution Making theory appears to closely represent Nepal’s constitution making process with a small body creating an interim constitution followed by a second phase of permanent constitution-

50 Ibid., 474.
51 Ibid., 475.
writing by a democratically elected body. However, despite this closely followed path, Nepal continues to be plagued by a slow drafting process riddled with setbacks. Does Nepal, as a case study of constitution building, demonstrate that Arato’s assertion that the Post Sovereign Constitution Making path is the most effective is, in fact, incorrect? Or, does his model correctly assert that this structure of constitution building has the most potential for success but that Nepal has a serious problem of legitimation that has hindered the process? Preliminary historical evidence may suggest that this latter possibility could be the case due to the numerous legislative walk-outs, boycotts, and violence. However, if no legitimation problems exist within Nepal and the country’s process in fact conforms to Arato’s model, the Nepal case will provide significant evidence against Arato’s proposed ideal process.

This chapter provided an overview of existing scholarship in the fields of collective action and constitution-writing in order to form hypotheses about why the constitution-drafting process has failed to produce a permanent constitution at the present time. This literature leads to a set of predictions for the factors that explain why Nepal has struggled to produce a final constitution. Hypothesis 1: Existing political institutions are not strong enough to overcome collective action problems in the legislative and drafting bodies. Hypothesis 2: A lack of existing political institutions across a broad range of categories will be present in Nepal, causing significantly more time to be spent creating those institutions from the ground up. Hypothesis 3: Fundamental differences exist on substantive issues that take significant time to reconcile. Hypothesis 4: There will be a lack of public participation in the constitution-drafting, further threatening the overall process. Hypothesis 5: There is a deficit of legitimacy, which threatens the overall political process and causes mistrust and delays.
In the following chapter, these hypotheses, which were developed out of the existing scholarship highlighted above, will be tested using media analysis. The news data will be analyzed to test the above hypotheses in order to make conclusions about the factors that have caused the failure of the constitution drafting process in Nepal.
Chapter 2

Media Analysis: Coverage of Constitutional Delays

I. Introduction

In the previous chapter, existing scholarship on collective action problems and constitution-writing was reviewed in order to propose the kinds of issues that may possibly delay or derail a constitution drafting process. This literature was used to generate a set of hypotheses to answer the question in the current study: Why has Nepal been unable to complete a new constitution? The hypotheses for the study as outlined in the previous chapter are as follows:

Hypothesis 1: Existing political institutions in Nepal are not strong enough to overcome collective action problems in the legislative and drafting bodies. This will manifest in high transaction costs, a lack of clear committee system, or excessive negotiation time outside of the committee system.

Hypothesis 2: There is a dearth of existing political institutions across a broad range of categories in Nepal, which causes significantly more time to be spent creating those institutions from the ground up. This is due to the need for some institutions to be in place such that participants are familiar for effective legislation.

Hypothesis 3: Fundamental differences exist on keys substantive aspects of the constitution that participants are unwilling to compromise on.

Hypothesis 4: There will be a lack of public participation in the constitution-drafting, further threatening the overall process.

Hypothesis 5: There is a deficit of legitimacy, which threatens the overall political process and causes mistrust and delays.

This chapter aims to assess these hypotheses by performing a media analysis of coverage of the constitution process. In Nepal, the Constitution writing process had its origins in the Comprehensive Peace Accord, which ended the civil war in 2006. Therefore, this analysis of the delays to this process begins with the creation of the peace accord and moves forward. The
Comprehensive Peace Accord was signed between the government of Nepal and the United Communist Party of Nepal (Maoist) on November 21, 2006. This study examines the factors that delayed the constitution drafting from this date to January 22, 2015.

Methods

This chapter examines print news coverage from eKantipur from November 2006 to January 2015. This range is broken into four main time periods for analysis: November 2006 through April 2008 (the first Constituent Assembly election), May 2008 through May 2012 (the tenure of the first Constituent Assembly), June 2012 to November 2013 (the second Constituent Assembly election) and finally, December 2013 to January 22, 2015 (the tenure of the second Constituent Assembly through its failed one year constitution drafting deadline.) The articles for this content analysis were selected by pulling out every article from the daily headlines that made references to the delays to the Constituent Assembly election or problems associated with the Constitution drafting process in the title of the article. A sample of six months out of the year was chosen. The months selected for each year were January, March, May, July, September and November. This specific selection of months was chosen because most of the major Constituent Assembly deadlines and the two elections took place in May and November, with the final deadline taking place in January. In total, there were 153 news articles analyzed for the first time period, 335 news articles for the second time period, 120 news articles for the third time period and 107 articles for the fourth time period. In total 715 new articles were analyzed from November 2006 through January 2015. A content analysis was then performed to determine the accuracy of the hypotheses of this study. The major themes that were coded for were problems of legitimacy, substantive issues, collective action problems, problems associated with a lack of pre-existing institutions and public participation. Articles that did not fit these categories were
coded as other. These reasons for delay that were coded were selected based on the hypotheses presented in the previous chapter. Coding was done based on the title and brief review of the contents of each article.

*eKantipur* is the only major English language newspaper in Nepal with online archives available dating back to 2006. Thus, a limitation of this study is that there may be some biases in the analysis on print media alone. However, the additional inclusion of data from interviews with legal scholars knowledgeable about or working in the drafting process should reduce bias that may result from relying on content analysis of a single news source alone. Another limitation of this media analysis is that the headline section of the newspaper was missing from November 2008 through May 2009. For these months the National and Capitol sections were analyzed, since they were the newspaper sections that included coverage of the constitution process. Further, *eKantipur*’s archive was missing all newspaper articles form May 7, 2009 through September 6, 2009, part of the second time period. Despite this missing data, it is unlikely that it significantly affected the results for the time period since there was still 335 articles included in the data set.

**Summary of Data**

The number and percentage that each coded category represents in the sample are displayed in the figures bellow. Figure 2-1 represents the first time period (November 2006 through April 2008), Figure 2-2 represents the second time period (May 2008 through May 2012), Figure 2-3 represents the third time period (June 2012 to November 2013) and Figure 2-4 represent the fourth time period (December 2013 to January 22, 2015). The totals of column two and three are greater than the total number of articles, for example 153, and 100%, respectively for figure 2-1. This is due to the fact that some articles discussed multiple reasons for delay.
<table>
<thead>
<tr>
<th>Reasons for Delay</th>
<th>Number of Articles Mentioning Reason for Delay</th>
<th>Percent of Total Mentioning Reason for Delay</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legitimacy</td>
<td>57</td>
<td>37.3</td>
</tr>
<tr>
<td>Substantive Issues</td>
<td>40</td>
<td>26.1</td>
</tr>
<tr>
<td>Collective Action</td>
<td>36</td>
<td>23.5</td>
</tr>
<tr>
<td>Existing Institutions</td>
<td>27</td>
<td>17.6</td>
</tr>
<tr>
<td>Other</td>
<td>11</td>
<td>7.2</td>
</tr>
<tr>
<td>Public Participation</td>
<td>1</td>
<td>.7</td>
</tr>
</tbody>
</table>

Figure 2-1: News Paper Articles by Content Type for Time Period 1 (November 2006- April 2008) 153 news articles in total

<table>
<thead>
<tr>
<th>Reasons for Delay</th>
<th>Number of Articles Mentioning Reason for Delay</th>
<th>Percent of Total Mentioning Reason for Delay</th>
</tr>
</thead>
<tbody>
<tr>
<td>Collective Action</td>
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<tr>
<td>Legitimacy</td>
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<td>30.7</td>
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<tr>
<td>Substantive Issues</td>
<td>99</td>
<td>29.6</td>
</tr>
<tr>
<td>Other</td>
<td>23</td>
<td>6.9</td>
</tr>
<tr>
<td>Public Participation</td>
<td>8</td>
<td>2.4</td>
</tr>
<tr>
<td>Existing Institutions</td>
<td>6</td>
<td>1.8</td>
</tr>
</tbody>
</table>

Figure 2-2: News Paper Articles by Content Type for Time Period 2 (May 2008-May 2012) 335 news articles in total

<table>
<thead>
<tr>
<th>Reasons for Delay</th>
<th>Number of Articles Mentioning Reason for Delay</th>
<th>Percent of Total Mentioning Reason for Delay</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legitimacy</td>
<td>60</td>
<td>50</td>
</tr>
<tr>
<td>Collective Action</td>
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<td>35</td>
</tr>
<tr>
<td>Substantive Issues</td>
<td>17</td>
<td>14.2</td>
</tr>
<tr>
<td>Other</td>
<td>12</td>
<td>10</td>
</tr>
<tr>
<td>Existing Institutions</td>
<td>7</td>
<td>5.8</td>
</tr>
<tr>
<td>Public Participation</td>
<td>1</td>
<td>.8</td>
</tr>
</tbody>
</table>

Figure 2-3: News Paper Articles by Content Type for Time Period 3 (June 2012- November 2013) 120 news articles in total

<table>
<thead>
<tr>
<th>Reasons for Delay</th>
<th>Number of Articles Mentioning Reason for Delay</th>
<th>Percent of Total Mentioning Reason for Delay</th>
</tr>
</thead>
<tbody>
<tr>
<td>Collective Action</td>
<td>51</td>
<td>47.7</td>
</tr>
<tr>
<td>Substantive Issues</td>
<td>29</td>
<td>27.1</td>
</tr>
<tr>
<td>Legitimacy</td>
<td>26</td>
<td>24.3</td>
</tr>
<tr>
<td>Existing Institutions</td>
<td>6</td>
<td>5.6</td>
</tr>
<tr>
<td>Other</td>
<td>5</td>
<td>4.7</td>
</tr>
<tr>
<td>Public Participation</td>
<td>1</td>
<td>.93</td>
</tr>
</tbody>
</table>

Figure 2-4: News Paper Articles by Content Type for Time Period 4 (December 2013- January 2015) 107 news articles in total
In this chapter each of the reasons for delay seen in the figures above, will be discussed in more detail in relation to each of the hypotheses. Further, examples from each coding category are given in order explain how each category was coded, and how the issues presented in the news articles relate to delays or failures in the constitution-writing process.

**A norm of missed deadlines?**

Before elections could be held to draft a permanent constitution, an interim legislature was formed in order to run government. However, seemingly foreshadowing the future, even the interim parliament was slow to form. Maoist leader Dev Gurung commented that, “The government is not showing any attention towards implementing the agreements reached in the past. We (the Maoists) are almost sure that this tendency of missing deadlines will have adverse effects on holding the constituent assembly inside the stipulated time frame.”¹ Gurung appears to point to a norm of missing deadlines that was established early on in the constitution-drafting process. Gurung made this assertion while referencing the deadline for the interim government to be seated by December 1<sup>st</sup>. Further, along with the Peace Accord, an Interim Constitution was drafted with a deadline to be promulgated by November 26<sup>th</sup>. As expected by Gurung, the deadline for the Interim Constitution was missed, an essential prerequisite to start the process of creating a permanent constitution.² Even the signing of the Peace Accord came 5 days after it was supposed to, on November 21<sup>st</sup> instead of November 16<sup>th</sup> which “was expected to have a domino effect on the rest of the tasks specified by the November 8 accord.”³ Following from this soon to be norm of missed deadlines, Prachanda, Chairman of the Communist Party of Nepal (Maoist), stated that there was a chance that the Constituent Assembly Election slated for June of

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³ Ibid.
2007 would be missed as well.\textsuperscript{4} Part of this norm of missed deadlines that can be seen throughout the media analysis in this chapter was a domino effect on an even larger scale than Gurung suggests. As each delay came due to the problems highlighted below, more deadlines were pushed off. This norm of missing deadlines came from a series of problems within the government, which are evaluated bellow through the analysis of the media to test the validity of the hypotheses of this study.

II. Collective Action Problems

One aspect that contributed to the growth of this new norm of missed deadlines was the presence of basic collective action problems within decision-making bodies. The media analysis clearly portrays the existence of serious collective action problems across all four time periods in Nepal. In the first time period, collective action problems were found in 23.5\% of the newspaper articles. In the second time period, collective action problems were found in 38.2\% of the newspaper articles. In the third time period collective action problems were found in 35\% of the newspaper articles. In the fourth time period collective action problems were found in 46.8\% of the newspaper articles.

In time periods two and four, the first and second Constituent Assembly respectively, collective action problems were the greatest reason for delay. However, in time periods one and three, the election periods, collective action problems were the third and second greatest reasons for delay respectively. This shows that collective action problems caused more delays during sitting periods of the Constituent Assembly than the election periods prior to the assemblies. Further, there is an overall upward trend in the percentage of news articles showing collective

\textsuperscript{4} “PM, Prachanda Agree to Finalize Interim Statute within Next Few Days.” \textit{eKantipur}, December 6, 2006.
action problems. Thus, collective action problems became worse over time. This, in part, helps to explain why the Constituent Assembly was still unable to complete the constitution in the second term even though the majority of the document had already been completed in the first term.

**Collective Action at Play**

One example of the way collective action problems were shown in the media coverage of the constitution process was continued indecision over final aspects of the Interim Constitution. In mid December 2006, the leaders of the eight major political parties including the Maoists met to resolve the final aspects of the Interim Constitution. At this time, the major differences between parties were “the model of election, criteria of reservation, procedure of appointments in constitutional bodies and fundamental rights.” These issues pointed to clear substantive hold ups, which would again be seen while drafting the final constitution. However, it also signifies the presence of collective action problems due to the time it took to resolve these issues.

Significant transaction costs mostly in the form of time were expended while negotiating the answers to these substantive problems. It took time for each side to explain their opinions, followed by negotiated agreements and rebuttals from each of the parties in disagreement, which depending on the issue could be as many as eight parties. Thus, the process of negotiation on just a few remaining substantive issues had significant transaction costs of time. On January 15th, 2007, the Interim Constitution was unanimously promulgated by the sitting legislature which resulted in the Interim Parliament taking over the same day, thus ending this round political disagreement.

With in weeks of the promulgation of the Interim Constitution, there was pressure to create an amendment bill, which among other things would define the election system for the

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6 “Interim Constitution Issued; HoR, National Assembly Dissolved.” eKantipur, January 15, 2007
Constituent Assembly Election as well as resolutions to the issues pressured by the protesters in the Terai district. In mid February of 2007, the major eight parties met to resolve disagreements about the amendment. However, this meeting ended with the contentious issues still unresolved. By March, the amendment bill had been taken up by the interim legislature. On March 6, Speaker Subash Chandra Nemwang stated that the bill could not yet be passed because it required more discussion. The bill included a Constituency Delineation Commission, which would revise existing electoral constituencies. As part of this task, the commission would revise the number of electoral districts in the Terai region, which would provide the remedy that protesters in the region sought. After significant delay, the amendment was finally passed on March 9, 2007.

The delay and extended need for deliberation suggests the possibility that collective action problems were at play. While media coverage is unclear what caused the need for added deliberation it is likely that large group dynamics and information costs were to blame. Despite the presence of these collective action problems, the inclusion of the Constituency Delineation Commission also shows that the legislature made efforts to improve institutions to solve the problems that slowed election progress.

Overall, the media analysis clearly shows that collective action problems were a key contributing factor to the failure of the constitution process in Nepal. Further, newspaper evidence shows that collective action problems were more detrimental to the first and second Constituent Assemblies than to the election times periods. Additionally, collective action

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problems increased over time, showing that the institutional design of the Constituent Assembly was ineffective at facilitating consensus and diminishing disagreements.

III. Lack of Institutions

The second hypothesis states: There is a dearth of existing political institutions across a broad range of categories in Nepal, which causes significantly more time to be spent creating those institutions from the ground up. This is due to the need for some institutions to be in place such that participants are familiar for effective legislation. Thus, it is expected that there will be a large learning curve, where new institutions will be set up and members of the Constituent Assembly will require time to learn how to navigate the system. The media analysis lends supports this hypothesis in part, but is unable to confirm it as a key factor in the failure of the constitution process.

As expected, the first time period reflects the highest percentage of newspaper articles with problems due to a lack of existing institutions, at 17.6%. The remaining time periods show significantly less evidence of a lack of existing institutions as a factor in slowing the constitution process. In the second time period, problems due to a lack of developed institutions was represented in only 1.8% of news articles. In the third time period, these problems only account for 5.8% of news coverage. The fourth time period is similarly low at 5.6% of news articles.

The large percentage reflected in the first time period can be explained by the fact that it was the first Constituent Assembly election. As the first election under the guise of a new fully democratic constitution, there was little infrastructure in place and many decisions to be made. Twenty-seven articles in the data set contained references to problems that were due to a lack of
existing institutions, representing 17.6% of the data set for the first time period. Thus, the data provided support for the second hypothesis.

Despite the evidence in favor of hypothesis two in the first time period, the remaining time periods do not completely match the expectations of this hypothesis. If hypothesis two was the main contributing factor, the second time period would also be expected to have a relatively high percentage of articles with problems due to a lack of institutions. This is because the second time period is the first term of the Constituent Assembly, and thus there were many new institutions that had to be formed. However, only 1.8% of the articles in the second time period reflect delays due to a lack of institutions. Although this does not completely discount the effect of the need to build institutions from the ground up, it does suggest that hypothesis two is not the main contributing factor to the failure of the constitution process in Nepal.

**Building Institutions**

An example of how a lack of institutions slowed the constitution process particularly in the first time period is the disagreement over the electoral system to be used for the 601 member CA. Half the seats were to be decided via a first past the post system. However there was a lack of consensus as to whether the remaining seats, whether they should be decided using mixed member proportional representation or a parallel system. In mixed member proportional representation, “each parties’ seats garnered in the first-past-the-post system will be subtracted from the quotient to arrive at the final number of seats to be allocated to the party in question.”

However if a parallel system was used, then the remaining 204 votes would be divided among the parties based on the proportional representation election alone. The Election Commissioner, Nilkantha Uprety further iterated that the main reason why an election act had yet to be

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completed by February 2\textsuperscript{nd} was because the parties could not agree on the type of voting system, but he insisted that this type of decision had to be made by the parties.\textsuperscript{11}

Due to a further lack of electoral institutions, the parliament had to do further work to prepare for the upcoming Constituent Assembly Election. For example on March 26, 2007 the parliament passed both an Election Crime and Punishment law as well as an Election Code of Conduct.\textsuperscript{12} While news media does not frame this legislation as a delay to the political process, they were statutes that took time to draft and deliberate on that added significant time to the overall process. Further, these acts had to be worked on extensively because there were no prior election institutions, so everything had to be built from the ground up, something an existing democracy would not have to face when running an election. Further, the longer the election process took, the more delayed the start of the constitution drafting process was.

Even more simple questions had to be decided in order to hold this first election. There was disagreement between parties on whether to have a single ballot paper for both the proportional representation system and first-past-the-post system, or if they should be on two separate ballot papers.\textsuperscript{13}

However, decisions of even lesser importance were largely made by the bureaucratic Election Commission without direct party involvement. Although the media does not frame much of the discussion about new electoral structures as delays, they all add to the time and eventually caused multiple extensions in the election dates due to the amount of work that had to be done before the election could be held. Further, this was in part due to a lack of electoral institutions as this was the first fully democratic election to take place in Nepal.


\textsuperscript{12} SAC Approves Two Election Bills.” \textit{eKantipur}, March 26, 2007.

One major institution building task that the Election Commission undertook was the delineation of new electoral constituencies due to changes in the voting procedures. Before the election was finally held in March of 2008, the election commission went through several rounds of dividing the country into constituencies, starting for the first time in March of 2007.14

While newspaper analysis shows that the constitution-writing process has suffered due to a lack of existing institutions, the government did also facilitate the building of political institution to expedite the political process. For example, on March 23, 2007 the parliament formed six special committees including the Parliamentary Hearing Committee, Constituent Assembly Elections Management Monitoring Committee, Peace Accord Implementation Monitoring, Conflict Victims Rehabilitation and Relief mobilization Monitoring Committee, State Restructuring Committee and Committee for Social, Economic Transformation.15 Thus, while a lack of institutions were a significant delay in moving towards writing the constitution, the government also made some attempts to rectify the institutional defect.

IV. Substantive Delays

Discussion over a series of substantive decisions also seriously delayed the constitution drafting process as shown through the media analysis. This analysis provides support for the third hypothesis, which states: fundamental differences exist on keys substantive aspects of the constitution that participants are unwilling to compromise on.

For the first time period, out of the 153 article sample, 40 articles referred to problems involving substantive delays to the drafting process, which was 26.1% of the entire sample. In the second time period, substantive delays were seen in 29.6% of newspaper articles. In the third

time period, 14.2% of articles reflected substantive delays while the in fourth time period, 27.1% of the media coverage reflected these delays. The types of substantive disagreements varied broadly and were largely brought up by individual disagreeing parties, with the eight ruling parties a major contributing factor.

The relatively higher percentage of articles that contained substantive delays in the second and fourth time period accurately matches expectation because while the Constituent Assembly is in session, more specifics are discussed in political dialogues. Further, it is likely that the first time period also has higher instances of substantive delays because of the discussions surrounding the interim constitution, including Nepal’s status as a republic and the voting system explained below.

The Manifestation of Substantive Delays

One key example of a substantive delay was the Maoist demand for declaring Nepal a republic before the CA elections were held. General Secretary Madhav Kumar Nepal supported this claim in a statement on March 6th 2007.\textsuperscript{16} Pressure to declare Nepal a democratic republic began as early as January 23, 2007, about a week after the Interim Constitution was passed.\textsuperscript{17} This issue plagued the interim parliament all the way until December 28, 2007, when an agreement was reached to declare Nepal a federal democratic republic, though it still had to be endorsed by the Constituent Assembly once it took power after the election.\textsuperscript{18} The issue of declaring Nepal a federal state came up many times during this time period, with some parties, like the Maoists, arguing that it was absolutely necessary while other disagreed claiming that the interim legislature did not even have to power to declare Nepal a republic and that on the Constituent Assembly could do so. Debates on this substantive topic are one example of the

\textsuperscript{17} “No Alternative to Democratic Republic: Prachanda.” \textit{eKantipur}, January 23, 2007.
ways in which significant time was added to the deliberative process that in part, led to rescheduling of the Constituent Assembly Elections.

Another example of a major substantive issue that plagued the political process during this early time period was over voting systems. While disagreements over voting systems were also an arena for collective action problems, the strong stands that parties closely held on this issue where hard to break and were one of the substantive disagreements as well. As described above, these disagreements began soon after the Comprehensive Peace Accord was signed and continued through late 2007. Just one example of these closely held beliefs and their negative impact on political progress was on November 24, 2007 when Prime Minister Girija Koirala proclaimed that it was not possible to use a fully proportional representation system, signifying the continued disagreement on the topic.  

Overall, the media analysis shows that substantive disagreements played a role in the failure of the constitution process. However, substantive disagreements are to be expected in any legislative context. This analysis does not allow for an explanation for why substantive disagreements persisted or why members of the Constituent Assembly were unwilling to compromise on their substantive beliefs. Thus, substantive disagreements alone do not account for why Nepal’s constitution fails in comparison to other legislative processes. Although the media analysis proves that substantive disputes were a factor in slowing the constitution process, further analysis is needed to see why Nepal’s constitution-drafting process failed.

V. Public Participation

Media analysis also showed evidence in favor of Hypothesis 4: There will be a lack of public participation in the constitution-drafting further threatening the overall process. Unlike the other hypotheses which are proven based on the large number of news articles covering the topic, public participation is expected to be the opposite. A lack of news articles discussing public participation will show that it has not been a priority among legislators.

Across all four time periods, there are very few references to the inclusion of public input in the constitution writing process. The first, third and fourth time periods each have just one article discussing public input in the constitution process representing .7%, .8%, and .93% of news articles respectively. Only time period two has more than one mention of public inclusion with 8 articles, measuring 2.4% of the 335 total articles between May 2008 and May 2012. Thus, the media analysis shows that few public opinions were taken into account while drafting the constitution. While this is not expected to directly affect the length of time the constitution process would take, it does have an affect on the overall legitimacy of the document.

An Account of Public Participation

For example, in the first time period, the only news article covering public participation was from February 6th, 2007. The article showed that just four months before the CA election was originally supposed to be held, 30% of the national population had never even heard about the CA poll. Further, of those who had heard about the CA poll, only approximately 25% of them correctly understood the purpose of the election.20

Although this time period was a pre-drafting phase, the dearth of public knowledge around even the election shows a complete lack of government efforts to publicize the political process to the citizens at large, let a lone offering a chance for regular citizens to give input into

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the process. Therefore, during this first time period in the constitution drafting process, hypothesis 4 holds due to the evidence seen in the media analysis.

VI. Problems of Legitimacy

Overall, media analysis rendered strong support for hypothesis 5, which states, there is a deficit of legitimacy, which threatens the overall political process and causes mistrust and delays. The existence of legitimacy problems is critical in understanding how Nepal fits into Andrew Arato’s theory of Post Sovereign Constitution Making, as explained in the previous chapter. Arato’s model recommends a two stage drafting process for constitution writing, first an interim constitution drafted by stakeholders in an ending conflict and second democratic phase to draft a permanent constitution. However, Arato also explains that this model tends to have problems of legitimacy which can be destructive to the constitution-writing process. Thus, media analysis was performed to see how prevalent problems with legitimacy were in order to test the validity of hypotheses 5 and to see whether the Nepal case supports Arato’s model.

Overall legitimacy concerns were consistently high across all four time periods. In the first time period, 37.3% of all the news articles reflected problems of legitimacy. This coding category included more media articles than any other category. Thus, the media analysis lends strong support to hypotheses 5 during November 2006 to April 2010 time frame.

Legitimacy was also the highest percentage of articles for the third time period. 50% of the media coverage in the third time period reflected problems of legitimacy. The first and third period both represent the elections to the Constituent Assembly. Therefore the media analysis suggests that the largest fears about legitimacy are with elections. This follows expectations.

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since elections are the primary mechanism to ensure the opinions of the people are included in the constitution. Legitimacy concerns also play a large role in the second and fourth time period. 30.7% of the articles in the second time period reflect legitimacy concerns while 24.3% contain problems of legitimacy in the fourth time period. Thus, problems of legitimacy continue to play a role in the Constituent Assembly, though it is slightly smaller than during election periods.

A Lack of Legitimacy

One example of the media analysis showing problems of legitimacy is as follows. On December 6th Sher Bahadur Deuba, president of the Nepali Congress party, stated that meeting the June deadline for the Constituent Assembly election would only occur on time “if a fear free environment could be created.” Further, Deuba blamed the creation for this hostile environment on Maoists due to their ongoing extortions. This highlights the beginnings of a problem of legitimacy.

On December 26th, Deuba again iterated concerns over Maoist “unruly activities.” Deuba clarifies the need for the Maoists to enter mainstream politics so that deliberations can occur for agreements to be made. Deuba stated, “Activities like the Maoist extortions will only delay the elections to the Constituent Assembly.” Deuba was not alone in these assertions, with members of parliament from several parties accusing the Maoists of disrupting the functions of government. Some of the parliamentarians asserted that, “the frequent Maoist muscle-flexing and obstruction to the reinstatement of village secretaries and displaced police posts had shown they were still not serious regarding the upcoming elections to the constituent assembly.” Romi Gauchan Thakali urged to Maoists to stop the disruption since it would have a negative impact

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23 Ibid.
24 “CA Elections will be Delayed if Maoists Don’t Stop Unruly Activities.” eKantipur, December 30, 2006.
25 Ibid.
on the CA elections, since disrupting the installment of police stations would just harm the
distribution of citizenship certificates. These actions of the Maoists thus further contributed to
legitimacy problems since the legitimacy of the constitution drafters is directly tied to how fair
their election was. Thus, the election process could be significantly harmed if voters are not able
to prove their citizenship since the distribution of certificates was disturbed, then the overall
process lacks complete legitimacy.

Maoist violence continued on February 10th, 2007 when a group in Kavre seized voter
lists from the government team that was there to distribute citizenship cards. The Maoists seized
the list in order to force “government team members to enlist their cadres’ names who were from
other districts.” These violent tactics seriously hindered the legitimacy of the election process
since it may have led to people voting twice.

Further, in February of 2007, the Chief Election Commissioner, Bhoj Raj Pokhrel, urged
the government to take care of the security problem within the country. He further stated that the
election could not be held if security was not ensured.

Another example of separate issue with legitimacy was in the southern low land region
along the Nepal-India border known as the Terai region. This region was a significant
contributor to ongoing violence and disruption in the country during this period. In this region,
the Madhesi ethnic group frequently used violence to enact demands on the government. One
such example was a strike called by the Nepal Sadbhawana Party (Anandidevi), which
represented a portion of the Madhesi people. eKantipur reports that, “Demanding the
government for proportionate allocation of the election constituencies and the announcement of

27 Ibid.
29 “EC Urges Government to Formulate Policies, Extend Assistance for CA Elections.” eKantipur, February 11,
2014.
federal state [sic] while restructuring the state, the NSP(A) shut down major cities across the Terai belt and brought vehicular movement to a stand still. “Madhes banda affects life across Terai.” eKantipur, December 25, 2006.

Although this example is non-violent, these types of protests were increasingly common and disruptive to regular life and government function, contributing to legitimacy problems within Nepal’s political process.

Unrest in the Terai region was continued throughout this stage of the political process. Analysis shows that institutional efforts were made however to resolve this hindrance to the constitution process. A government talks committee was formed to resolve the unrest. Local Development Minister Rajendra Pandey, a member of the talks committee, stated that there was no alternative to peace talks with the Madhesi community, and that work was being done to address their demands. Minister Pandey further said in his February 5, 2007 statement that unrest in the Terai region was getting out of control. “Govt, Eight Parties Ready to Amend Interim Statute: Minister Pandey.” eKantipur, February 5, 2007.

Further questions of legitimacy arouse out of the delays from the CA elections. For example, civil society leader Daman Nath Dhungana said, “the CA elections must take place on time. Protractions in this regard will raise serious constitutional questions.” “Protraction in CA Elections May Incur Constitutional Crisis: Experts.” eKantipur, January 19, 2007.

Further human rights leader Padma Ratna Tuladhar stated, “The people’s mandate is not for an indefinite period.” These leaders among others point out the importance for holding the CA election so that the government gains legitimacy through the mandate of the people. Further, the leaders suggest that delays in the election process reduce the legitimacy of the decision the government makes.

The significant media evidence for the existence of problems of legitimacy may provide favorable evidence for Arato’s theory of Post Sovereign Constitution Making. While Arato

33 Ibid.
asserts that this model is the best option for constitution drafting, a path Nepal has followed, he also states that the model is prone to problems of legitimacy that may derail the constitution process. As seen here, numerous problems of legitimacy exist in the current constitutional history. Thus far, the Nepal case neither fully supports Arato’s theory nor does the failures of Nepal’s constitution process kill the theory of Post Sovereign Constitution Making.

VII. Other

In the first time period, 11 out of the 153 total articles, 7.2%, mentioned delays outside of the hypotheses tested in this chapter. 6.9% of the articles in the second time period reflected other reasons for delay. The third time period had 10% of articles representing other reason for delay and the fourth time period contained just 4.7% of articles reflecting other types of delays. The issues that these articles presented varied broadly. The next chapter of interview analysis

One example of a reason for delay covered in a new article coded in the other category was the reduction of arms and cantonment of army troops on both sides. This issue was taken up quickly with the assistance of the United Nations (UN) at a meeting on November 24th, just three days after the signing of the Peace Accord.34 Despite the promising speed to which this issue was first addressed, it continued to be an issue that continually presented problems to the overall political process.

VIII. Conclusion

The headline news articles in eKantipur provide some basis of support for each of the hypotheses. Each of these five hypotheses have at least some basis of support in this time period,

34 “Govt-Maoist-UN Representatives Hold Meeting.” eKantipur, November 24, 2006.
including: Hypothesis 1: Existing political institutions are not strong enough to overcome collective action problems in the legislative and drafting bodies. Hypothesis 2: A lack existing political institutions across a broad range of categories will be present in Nepal, causing significantly more time to be spent creating those institutions from the ground up. Hypothesis 3: Fundamental differences exist on substantive issues that take significant time to reconcile. Hypothesis 4: There will be a lack of public participation in the constitution-drafting further threatening the overall process. Hypothesis 5: There is a deficit of legitimacy, which threatens the overall political process and causes mistrust and delays.

While this media analysis shows that these hypotheses may continue to explain the failures of the constitution process in Nepal, further research is required. This chapter lends the strongest support to the role that collective action, and a lack of legitimacy and public participation has played in the failure of the constitution process. This media analysis lends more limited support the influence that substantive disagreements a

In the following chapter, these hypotheses will be tested again through an interview analysis in order to gain a more nuanced understanding of the role each hypothesis has played in Nepal’s constitution process.
Chapter 3

Interview Analysis: A Crisis of Power, Trust and Legitimacy

I. Introduction

In the previous chapter, a media analysis was performed to examine whether the hypotheses accurately represent the reasons for the failure of the constitution process in Nepal. This chapter aims to supplement the media analysis with an analysis of interview data. The interview analysis aims to answer the research question of this study, what are the factors accounting for the failure of the constitution process in Nepal. Further, this chapter of interview analysis aims to test the hypotheses of this study which are as follows: Hypothesis 1: Existing political institutions in Nepal are not strong enough to overcome collective action problems in the legislative and drafting bodies. This will manifest in high transaction costs, a lack of clear committee system, or excessive negotiation time outside of the committee system. Hypothesis 2: There is a dearth of existing political institutions across a broad range of categories in Nepal, which causes significantly more time to be spent creating those institutions from the ground up. This is due to the need for some institutions to be in place such that participants are familiar for effective legislation. Hypothesis 3: Fundamental differences exist on keys substantive aspects of the constitution that participants are unwilling to compromise on. Hypothesis 4: There will be a lack of public participation in the constitution-drafting, further threatening the overall process. Hypothesis 5: There is a deficit of legitimacy, which threatens the overall political process and causes mistrust and delays.

Interviews were performed in order to supplement the media analysis and get a more accurate representation of the problems involved in the constitution writing process in Nepal.
Since only one new source was available for media analysis, interview data were needed to reduce the amount of bias in this study. Further, interviews also increased accuracy by including the first hand perspective of Nepali experts rather than just using hypotheses based on constitutional experts who are unfamiliar with the specific context of Nepal. Interviews with these experts also highlight factors that were detrimental to the constitution process beyond the hypotheses that came out of existing scholarship. Thus, the interview analysis presented in this chapter provides a more in-depth and nuanced picture of why Nepal has failed to complete a new constitution following the civil war that ended in 2006.

Section II of this chapter uses interview analysis to test hypotheses 1-4. Section III reviews small contributing factors to the failure of the constitution process that were not highlighted by the hypotheses but were presented by the interview subjects. Section IV explores the key hurdle to the constitution process of parties and constituent Assembly members’ efforts to build their own power base at the expense of the desires of the people of Nepal. Section VI examines how a lack of trust has led to the failure of the constitution process. Subsequently, section VII examines hypothesis 5, the major role that a lack of legitimacy plays in the failure of the constitution process.

**Methods**

Four one-on-one semi-structured interviews were conducted based off a series of eight questions that intended to uncover what the interviewees understood as the cause of the Constituent Assembly failure. Questions were aimed to test the hypotheses laid out in this study and to uncover other causes that had not been discovered in scholarly literature. Interviews lasted between 40 and 70 minutes and were conducted between December 21, 2014 and December 26, 2014 in Kathmandu, Nepal.

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1 See Appendix I at the end of this thesis for a full list of the eight interview questions
Subjects included Bipin Adhikari, Ram Krishna Timalsena, Rajesh Gautam and a government official. Bipin Adhikari has a PhD in Constitutional Law and is the Dean of Kathmandu University Law School. Adhikari has acted as a consultant on the constitution process through his work with the Nepal Constitution Foundation and Nepal Consulting Lawyers, Inc. Ram Krishna Timalsena is the Executive Director and Principal of National Law College, Nepal. Timalsena is a constitutional law expert and holds a PhD in constitutional law and an LLM degree from Delhi University. Rajesh Gautam, PhD is an emeritus professor of history at Tribhuvan University and an expert in Nepal’s constitutional history. The government official who was interviewed holds a law degree but preferred to remain anonymous due to his position.²

All interviews were recorded digitally and transcribed except for the government official at his request. Some of the transcriptions are missing names due to challenges with translation, however this did not obscure the meaning of the interview subjects’ viewpoints. Interviews were conducted in English expect for Professor Gautam who spoke Nepali. Gautam’s daughter-in-law attended the interview to translate from Nepali to English.

It is important to note some of the limitations of this interview process. The sample of interviews is small and thus may not capture all expert viewpoints on why the constitution process has failed. It was challenging to schedule interviews due to a lack of email response prior to arrival in Nepal, and because of time constraints and scheduling conflicts while in the country. Despite these challenges, this chapter offers qualitative data that supplement the media and allows for deeper analysis of issues that are less readily apparent in the newspaper.

² Interview transcripts can be found in the appendices end of this thesis. See Appendix II for Gautam, Appendix III for Adhiakri and Appendix IV for Timalsena. There is no transcript for the interview with the government official because the interview was not recorded. Notes are also not included to further protect the identity of the interview subject.
II. Testing the Hypothesis

Lack of Existing Institutions

While it is clear that a lack of existing institutions played some role in the slowing of the constitution process, interview data suggest that it is not the reason that the process failed. When asked if this played a role in the failure of the constitution process, Professor Gautam states,

No not because of that. Yes the people don’t know about it, the people have not been consulted but this is not the main reason. The main are just those two.3

Then, after rephrasing the question, Gautam answers,

Lets say 90% of the constitution is done. But what some party leaders are saying, lets discuss federalism later, for now lets make the constitution, lets just be done with it. And still there is disagreement. They are not agreeing on this: we will discuss about it but not now. Lets just finish the constitution. But cant agree.4

Despite clarifying the question, it is clear that the meaning was lost in translation.

Gautam’s answer is off topic and appears to suggest that there was little involvement of the people in Nepal in the constitution process, a topic that he returns to later in his interview. Despite misunderstanding the question, part of his answer still lends some evidence to suggest that a lack of existing institutions and structures was not part of the problem. Professor Gautam estimates that 90% of the constitution has been completed, thus the majority of issues have already been solved regardless of whether they were new to Nepal.5 Thus, new aspects of governance were not the main issue since most of the features have already been agreed upon. Thus, a lack of existing structures that had to be built from scratch did not play a major role in the failure of the constitution.

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4 Ibid.
5 Ibid.
Adhikari’s answer is more direct and indicates a better understanding of the topic, and he still comes to a similar conclusion. He states,

You know, how can you have a federal system in place without making the constitution. This is something, federalism is meant for the people deciding. So I think that’s not the issue. I think rather it the extreme federalist position. So you see when you have a debate in your country [United States] a debate between federalist and anti-federalists, so everybody was in favor of federalism. Its not that anti-federalists wanted a unitary state, they all wanted federal system but its only that some wanted the center to be very weak while others wanted the center to be very strong, so this is what some are struggling for. So here the substantial chunk of the population, they don’t want federalism now even myself as a choice I’m not for the federal system, in the beginning I was not.6

Using a lack of federal structures as an example of an institution that was not there before and had to be built from the ground up, Adhikari’s response illuminates an important fact: it does take time to develop new institutions where none existed before. In the case of federalism this would have lengthened the constitution process, however this does not account for the failure of the constitution process. While it may have added time to the constitution process, this alone does not account for the failure.

Collective Action Problems

Interview data showed mixed results for the existence of significant collective action problems. Some of the mixed findings may have been due to difficulties in translation. Despite defining what was meant by collective action problems, immediate responses to the question showed that it was not understood in the same way by interview subjects as it is in political science literature. While some of the interview subjects explicitly rejected the existence of collective action problems playing a role, their overall descriptions of the problems in the Constituent Assembly suggested otherwise. When asked whether collective action problems played a role in the failure of the constitution, Professor Gautam answered:

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No, so that is not happening actually, only a few people are talking. What they are doing is beside CA itself a lot of people are knowledgeable about constitutions like professors, they know a lot about this stuff, they should ask them for advice but they are being totally ignored. They aren’t asking, don’t want any advice, don’t want anything to do with them.\textsuperscript{7}

Gautam states that collective action problems due to too many members in the Constituent Assembly did not play a role in the failure of the constitution process. He suggests that this is because there were only a few people in the Constituent Assembly who are actually participating in discussions about the constitution. Thus, Gautam implies that even though there are 601 members of the Constituent Assembly, most of those members just sit in the assembly and vote without any role in bogging down the process.

Gautam also states that there are only a few members of the Constituent Assembly that are knowledgeable about constitutions. However, these members’ knowledge has not been solicited and the constituent assembly leadership has ignored them. Gautam suggests that there is little discussion of legitimate legal opinions on the constitution. However Gautam also expressed that members of the Constituent Assembly were focused on consolidating power for themselves and their parties. Thus, collective action problems are at play, as members are clearly individually responsive at the expense of collective needs.

Adhikari looks at the problem of collective action in the Constituent Assembly differently from Gautam. Adhikari states,

Obviously that’s a problem. That’s a problem now that the politics has become a dominant for people who are not professional, who have not good personal career. And then people who are not professionals, who have not good personal career. And then people who have some property and ability to win. So naturally there are many people who want the numbers to swell, and so it’s a problem.\textsuperscript{8}

\textsuperscript{7} Gautam. December 22, 2014.
\textsuperscript{8} Adhiakri. December 23, 2014.
Adhiakri’s response indicates his belief that it is a problem that there are too many members of the Constituent Assembly. Despite his affirmative response, his elaboration suggests that the problem of too many legislators is due to people joining the assembly because it is a good job for those without other options or for wealthy people who want to take power. This does not necessarily mean that there being too many Constituent Assembly members has created collective action problems. Further, Adhikari makes no explicit mention of too many Constituent Assembly members playing a role in slowing the Constitution process. Additionally, Gautam states:

Yes, lots of parties is the problem.\(^9\)

Gautam suggests that there could be collective action problems surrounding the large number of parties vying for power. However he fails to elaborate on how too many parties is a problem.

Timalsena also suggests that there could be collective action problems surrounding discussion between parties. He states,

Yes because other small parties have not much role. Big four parties are responsible… actually five: Nepali Congress, UML, Nepal Congress Party Maoist, RPP, Madhesi Party.\(^{10}\)

Timalsena suggests that the five largest political parties have faced major collective action problems in resolving their disputes. However, the interviewees’ lack of elaboration on the way that collective action problems have manifested suggests that it is not the main issue, and that other factors better explain the failure of the constitution process.

Further, the overall committee process in the Constituent Assembly suggests that steps were taken to mitigate collective action problems. Professor Gautam states regarding committees in the Constituent Assembly,

Those people did their job, they have done what they are supposed to do. They have given the draft, but the leaders are not agreeing on those two issues so it’s still in process that’s why. They have done their job, what they are supposed to do they’ve done that.\textsuperscript{11}

Gautam suggests that the committee system was effective for developing a draft of most of the constitution. Gautam further states, “its the leaders who don't agree.”\textsuperscript{12} This suggests that collective action problems were mostly mitigated through the committee system to create a draft. Now that the majority of the draft has been created and the constitution is no longer being discussed in thematic committees, collective action problems may be playing a greater role in discussion between the leaders of the five main parties.

**Substantive Issues**

Substantive issues played a key role in the failure of the constitution process. The anonymous government official stated that the main reason that the first Constituent Assembly failed was because of the three main issues of the design of federal states, the judicial system, and a presidential versus parliamentary system.\textsuperscript{13} Similarly Timalsena reviews the key sticking points of the first Constituent Assembly when he states,

\begin{quote}
but it could not come with conclusion regarding form of government and the form of the federalism, number of provinces you know and their jurisdiction. And the basis of creating provinces of the states, major issue! Then only things like who will appoint judges of the Supreme Court, how many judges will be there? And also there are some issues about the number and size of parliament and the representation system directly elected or proportional, actually there will be two
\end{quote}

\textsuperscript{11} Gautam. December 22, 2014.
\textsuperscript{12} Ibid.
types of elections, first past the post and proportional representation- this is decided, but the number break down has not been decided

Timalsena highlights that the Constituent Assembly has been unable to make decisions on certain substantive topics in the constitution. The Constituent Assembly has repeatedly tried to address these contentious substantive issues and thus have lengthened the constitution drafting time. Despite the presence of key substantive delays, it is important to understand why the substantive issues continue to delay the process. The remainder of this chapter explores factors that have contributed to the overall failure of the constitution process and explains why these substantive issues have not been resolved.

**Public Participation**

Interview analysis reflects that a lack of public participation has been a contributing factor in the failure of the constitution process. Professor Gautam states,

Rather than what the people of Nepal want, the kind of constitution we want, rather what is happening, the kind of constitution they are making is what the leaders of the politicians want. Not bothered about what the general people want, they have not taken any polling or anything, nothing. Nobody has asked, nobody has bothered. Doing what they want. Even if the constitution is finalized it’s not going to be what the people want.

Gautam’s statement reflects that the Constituent Assembly has not reached out to the people of Nepal to include their input in the constitution process, a similar conclusion to the media analysis. While a lack of public participation was a contributing factor to the failure of the process, it did not play a direct role in the process as discussed later in this chapter. The lack of public participation seen here is a sign that the constituent assembly members are more concerned with their own interests. Thus, Gautam’s statement here is re-evaluated later in this chapter in section IV in the context of power grabs.

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III: Constitutional Delays

Interview data also presented some additional factors beyond the predictions highlighted in the media analysis. Professor Gautam explains how pressure placed on the Constituent Assembly from a variety of interests has played a role in the failure of the constitution process.

What is happening is the [Constituent Assembly,] the people inside are being forced from various sides. Like even we have certain views we want that in the constitution. There are some people, lets say, who want the monarchy back. So they have their agenda and they are like pushing for that and people from the diplomats from India, States, and any European country, they all have their own agenda and everybody is trying to push their own selfish motives there. Like the British people/ diplomats don’t want Nepal to be a Hindu country. Nepal is only Hindu country. They say it should be a secular country so you should have the constitution matching that kind.16

Professor Gautam explains that one contributing factor to the failure of the constitution process are the many competing interests pressed on the Constituent Assembly. Along with many internal actors in Nepal, international organizations and countries each have their own agenda in helping Nepal. Gautam suggests that diplomats from India, the US, or any European country all have their own agenda and selfish motives that are pushed on the Constituent Assembly, and have played a role in delaying the process. Gautam states that the British diplomats, for example, want Nepal to be a secular country rather than a Hindu nation as it was under the 1990 Constitution. The British say that the constitution should reflect these secular values.17 Thus, these external views have increased the scope of discussion and thus lengthened deliberation time. External influences such as Britain have heightened the political nature of the constitution and lengthened the time of the process.

16 Ibid.
17 Ibid.
Gautam underlines additional reasons for failure of the constitution process in the following statement.

There are a couple of reasons why it failed. Mainly because the Constituent Assembly, the voting for the Constituent Assembly has not just been for the Constituent Assembly, it has been for the whole, also the parliament. Combined Constituent Assembly and Parliament. So the members are more interested in the power of the seats rather than the constitution. Less bother by making the constitution than taking the citizens powers for themselves.\textsuperscript{18}

Professor Gautam highlights that the Constituent Assembly failed to finish a constitution in part because it was elected to be the parliament that writes laws as well as being the constitution drafting body.\textsuperscript{19} The dual duty of the Constituent Assembly members has a negative effect on constitution drafting for multiple reasons. In part, the responsibility of the regular statute drafting distracts the members from the task of writing the constitution. The split time on constitution writing and law making results in slow moving and ineffective governance on both fronts.

The dual responsibility of the CA members also poses a problem to constitution writing because it leads to a heightened interest in power rather than constitution writing according to Gautam.\textsuperscript{20} CA members are given larger than average amounts of power with the ability to write both current statutes and first order law in the constitution. Thus this was, in part, responsible for the parliamentarians’ focus on obtaining power rather than completing a constitution that the people of Nepal wanted. In preliminary planning stages for the constitution, experts like Professor Gautam suggested that the parliamentary duties should be separate from the constitution drafting body. However, this suggestion was not followed which has resulted in legislators making power plays rather than focusing on finishing the constitution.\textsuperscript{21}

\textsuperscript{18} Ibid.  
\textsuperscript{19} Ibid.  
\textsuperscript{20} Ibid.  
\textsuperscript{21} Ibid.
IV: Power Grabs

Overall, interview data highlights one key issue in particular: the major parties are trying to secure power for themselves at the expense of writing a constitution for the people of Nepal. Almost all of the new draft constitution has been completed, with only a few major issues left to be resolved. The major issues include the design of federalism, whether Nepal should be presidential or parliamentary and the set of the judiciary. Gautam states:

Normally what happens is when people are forming a constitution, any country, every member gives their input. But here rather than all 601 members giving input, a few core people are. Only their input is being noticed, the rest’s input are being completely ignored. So lets say a constitution is being formed, only a few people are responsible. The rest, what ever they say is not happening. What ever they say, people aren’t listening. So lets say the people who are like into constitution, the people who know about constitution, what they say is being completely ignored. And those who don’t know about constitution, what they say is happening. Those who are more powerful, what they say is happening rather than everyone’s input being included.22

Among the 601 member Constituent Assembly, most of the leaders know very little about constitutions and how to create a new effective system of governance. However, there is a minority in the assembly who have a higher level of expertise in how constitutions should be made, according to Professor Gautam. He states that those who actually know about constitutional mechanics are being ignored and getting overruled. Instead of listening to the most educated members of the Constituent Assembly, Gautam says the members are trying to press the agenda of their own parties. Members continue to debate personal things and religious matters rather than practical solutions to the constitution. Other efforts to gain power are based on the various caste groups in Nepal, such as people from the Himalayan, Terai and valley regions. Some of these leaders from the various ethnic groups are trying to put themselves first.

22 Ibid.
rather than the whole country. Everyone has their own agenda that they want in the constitution.

For example, Gautam states that there are even people who want the monarchy reinstated, so they have tried to push their views into the constitution.\textsuperscript{23}

Professor Gautam examines the way that the Maoist party used rhetorical strategies to build their own power base.

What happened is while they were fighting, while the whole violence thing was going. They were the ones who went to the different castes of Nepal. They went to the Terai people and Madheshi people and said you guys should have your own kingdom, you guys should also count. SO what you feel should be kept into account, you are being ignored now. They were the ones who were aggravating the people and polluting the minds. They were the ones who went to each and every caste group like the Magars and the Limbus and said you should do that. And what happened it… they don’t want that, they don’t want the country to be divided into smaller parts but they were the ones who said that, so they can’t go back on the promise now, they want to but they can’t…. So now they are saying despite the fact they don’t want this they are saying you should do this and to go back on their word they can’t.\textsuperscript{24}

During the war, the Unified Communist Party of Nepal (Maoist) had discussions with many of the castes throughout the country. They went to groups like the Madhesi in Terai to advocate that they should have more of a say and should get their own kingdom. Gautam describes that the Maoists “were the ones who were aggravating the people and polluting the minds.”\textsuperscript{25} Further Guatam states that the Maoists told ethnic groups that the government was ignoring them and that their desires should be taken into account. The Maoists encouraged groups to press for their own autonomy, which has resulted in the deep divide over federalism. Various ethnic groups want to divide the country into continuously smaller regions because of the initial influence of the Maoists, who used this rhetoric to build their insurgent base against the King’s army during the People’s War. Gautam suggests that the Maoists don’t actually want

\textsuperscript{23} Ibid.
\textsuperscript{24} Ibid.
\textsuperscript{25} Ibid.
to divide the country into many parts but they are unable to reverse this movement. This rhetorical technique employed by the Maoists shows the deep entrenchment of building personal power without considering the nation as a whole or future consequences. This has been one major factor in the failure of the constitution process and it is clear that the origins of the problem predate the Constituent Assembly at least back to the civil war.

Actually, Nepal like small country, it was not necessary to go to federalism but now all political parties if you talk to MPs [members of parliament] personally they don’t favor federalism but on party level they want it.  

Further, Professor Ram Krishna Timalsena states that individually, most of the Constituent Assembly members do not personally want a federal system. Choosing federalism for Nepal was not necessary, but on the party level it was strongly desired. This is largely due to pressure placed on the Constituent Assembly by ethnic and caste groups like the Madhesi. Many constitutional experts, including Adhikari, were against federalism but were ignored by the ruling parties. As stated previously, Adhikari was not in favor of federalism:

Even myself as a choice, I’m not for the federal system, in the beginning I was not. But I am an expert right, so it’s not what I want. If you have a political solution then I will try to make it a democratic and sounds principles, a solution based on constitutional legal sound principles so that it becomes workable.

While Adhikari thought that federalism was not the best system for Nepal, once it was chosen he tried to help design a federal system that would be the most effective and democratic. Originally, the parties ignored strong warnings about federalism because it was politically advantageous to advocate for greater autonomy for the ethnic groups that the political parties represent. While avoiding sound theoretical advice, many political parties used federalism as a tool to gain political support in the voting booth. Parties like the Maoists and Madhesi promised autonomy for ethnic groups in order to gain votes and power in the Constituent Assembly. It was

clear from constitutional experts like Adhikari that federalism was not the best system for Nepal, however it was employed as a rhetorical tool by parties to gain power at the expense of the success of Nepal in the creation of the most effective new constitution.

The members of the Constituent Assembly’s focus on obtaining power was also explicitly addressed by Adhikari, who states:

Maoists in particular, what they want is not democracy, they want some power base for them. Even if they speak a lot about democracy, empowerment and many things, I think their idea is quite different.\textsuperscript{28}

It becomes evident from Adhikari’s assertion that the Constituent Assembly is not focused on designing a functioning constitution with a stable democracy. Rather, the members of the assembly are focused on building their own power base and getting their own interests into the constitution. Similarly, Gautam notes,

Rather than what the people of Nepal want, the kind of constitution we want, rather what is happening, the kind of constitution they are making is what the leaders of the politicians want. Not bothered about what the general people want, they have not taken any polling or anything, nothing. Nobody has asked, nobody has bothered. Doing what they want. Even if the constitution is finalized it’s not going to be what the people want.\textsuperscript{29}

Professor Gautam’s statement highlights the fact that most decisions are being made by a small group of the political leaders in the Constituent Assembly. These leaders are trying to create a constitution that matches their own desires and builds their own power rather than reflecting the kind of government that the majority of Nepal wants. Gautam shows that the leaders have no interest in finding out what the majority of Nepal wants for a constitution, they are only interested in building their own power base.

\textbf{Rejection of Compromise}

\textsuperscript{28} Ibid.
\textsuperscript{29} Gautam. December 22, 2014.
A key aspect of the parties’ attempts to consolidate power for themselves is the inability to accept advice and compromise. Bipin Adhikari, a constitutional lawyer and consultant to the Constituent Assembly, has tried to resolve disputes largely around the contentious topic of federalism. Adhikari has tried to help resolve the disagreement between creating federal states based on identity and ethnicity versus population and economic resources. Currently the leading plan for federal states includes seven provinces largely based on population. However, Adhikari proposes,

Even within the seven provinces there is a possibility with some modification of the demarcation issue because whatever has been done is based on the current district map and if you just compromise a little and get ready for certain deviations from that map, probably within the seven provinces you can establish identity based areas, this is possible. Similarly, the second thing you can do within the provinces, there are pockets of indigenous people and it could be established as a sub-provincial region… then when this third level administration they send their representatives, they come to the provincial parliament. It could be done and it could be done very conveniently…the third thing is if you can give regional autonomy to many groups, not just seven dominant communities this will create room for identity based communities.\(^\text{30}\)

In this plan, Adhikari has created a federal system that would satisfy the desires of both sides of the debate on federalism since the federal provinces could still be based on economic and population distribution, while also allowing a degree of autonomy to mitigate ethnic tensions in the constitutional debate. Despite Adhikari meeting with members of the Constituent Assembly and giving interviews on television and radio to suggest these pragmatic compromises, leaders were unwilling to consider his proposal. Further, Adhikari is not alone in the suggestion that power should be devolved to the local level to allow for autonomy for regional groups.

The thing is now, like because I have my point of view I am not losing anything and I am not gaining anything. For the opposition, they are in a very critical mess, they say they are ready to go for the identity regional structures at the third level,

\(^{30}\) Adhikari. December 26, 2014.
that mans that they have lost much of their claim. So they don’t want to talk about it.  

Adhikari explains that if parties representing ethnic groups choose his proposal for smaller ethnic autonomous regions, they will have lost a lot of their claim and thus do not want to discuss the proposal. Political parties are even unwilling to consider compromises that would give each party almost entirely what they are looking for. Thus, it appears that the parties are not actually interested in obtaining their stated goals but are actually more interested in winning the political stalemate to gain power.

V: A Fundamental Lack of Trust

Putnam’s Theory on Trust

Interview data importantly highlights a fundamental lack of trust, a topic that was not examined in the media analysis. Political theorist Robert Putnam discusses trust as an important aspect of social norms in a strong civic society. Putnam discusses trust building in terms of two types of reciprocity within a community, balanced and generalized. Balanced reciprocity occurs through “simultaneous exchange of items of equivalent value, as when office-mates exchange holiday gifts or legislators log-roll.” However, generalized reciprocity “refers to a continuing relationship of exchange that is at any given time unrequited or imbalanced, but that involves mutual expectations that a benefit granted now should be repaid in the future.” Putnam explains that stronger norms of generalized reciprocity create trust in society and leads to increased civic collaboration. “An effective norm of generalized reciprocity is likely to be associated with dense networks of social exchange. In communities where people can be confident that trusting will be

31 Ibid.

requited, not exploited, exchange is more likely to ensue…Conversely, where no prior example of successful civic collaboration exists, it is more difficult to overcome barriers of suspicion and shirking.”

In all societies…dilemmas of collective action hamper attempts to cooperate for mutual benefit, whether in politics or in economics. Third-party enforcement is an inadequate solution to this problem. Voluntary cooperation (like rotating credit associations) depends on social capital. Norms of generalized reciprocity and networks of civic engagement encourage social trust and cooperation because they reduce incentives to defect, reduce uncertainty, and provide models for future cooperation. Trust itself is an emergent property of the social system, as much as a personal attribute. Individuals are able to be trusting (and not merely gullible) because of the social norms and networks within which their actions are embedded.

Trust is a key aspect of society developed through community relations. While it can develop through any social relationships, it is key to proper function in government. Without this trust building, legislators may struggle to work towards the common good.

**Trust in Nepal**

Evidence from the interview data suggests that a deficit of trust may be a factor in the failure of the constitution process in Nepal thus far. The fragmentation of political parties is one such sign that there is a dearth of trust. For example, during the election campaigns for the second Constituent Assembly, all of the parties stated in their manifesto that if consensus could not be achieved on a draft constitution and it could not be completed, that they would put the document to a vote regardless. Gautam explains this when he states,

And the second election, the re-election that was done, every party each had one point election manifesto, what they were saying is even if they could not make constitution, by the end, if it is not made each will put what they want down and it will go for voting. They said that. If they couldn’t make it they would put it for a vote in the assembly itself. It will be made, that is what they said. While they

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33 Putnam 174
34 Putnam 177
were campaigning everybody has that. They said we will form the constitution anyhow if by then we haven’t even if it’s not possible then even with the two-thirds of the body they will pass constitution, said mainly by the Maoists.

The Interim Constitution mandates that provisions of the new constitution be passed by a two-thirds margin in the Constituent Assembly. Part 7: Constituent Assembly, Section 70.5 states, “The Bill relating to the Constitution introduced for passage pursuant to clause (3), if voted in favour [sic] by at least two-thirds majority of the total number of existing members in the Constituent Assembly, shall be deemed to have been passed.”\(^\text{35}\) Despite the legal requirement of a two-thirds vote, significant pressure exists to pass all constitutional provisions by consensus. Thus, it was a significant step forward when many parties agreed to pass a constitution by two-thirds majority if total consensus was unattainable. The Unified Communist Party of Nepal (Maoist) was the primary champion of a return to the two-thirds threshold during the campaign for the second Constituent Assembly. Gautam further explains the rationale of the Maoists:

What Maoists felt is we are going to win this election, we will win by a majority so even until the end if it’s still not made then two-thirds of the majority whatever they say will happen. They thought we will be the two-thirds so even if the Nepali Congress says no, two-thirds is us so it will pass. But that didn’t happen in the second Constituent Assembly, so Maoists lost… so what happened when Maoists thought they are going to win so they thought whatever they want would happen. That was what they were banking upon but they lost the election and Congress has more majority now, accordingly they said two-thirds of what they said would happen. No the people saying that cannot happen is the Maoists. They went back on their words, reversed back totally.\(^\text{36}\)

According to Gautam, the Maoists, who held the most seats in the first Constituent Assembly, expected to regain their majority position in the second assembly. Thus, if they held the majority of seats, the Maoists were willing to complete the constitution by two-thirds rather than consensus since they would be able to push their own preferences through.

\(^{35}\) Interim Constitution of Nepal.  
However, the Unified Communist Party of Nepal (Maoist) lost the election to the second Constituent Assembly. In the first Constituent Assembly the Maoists held 229 seats, but in the second assembly that number dropped to just 80 seats.\(^\text{37}\) As explained by Gautam, following the election, the Maoists made a full reversal and championed against a two-thirds vote, once again advocating for consensus on all aspects of the constitution.

When the Maoists thought they were going to win they were willing to pass the constitution by a two-thirds vote, but after they lost the majority by a huge margin, they went back on their word since it was no longer advantageous for their platform.\(^\text{38}\) This complete reversal in campaign promises is one example of an act that results in significant lack of trust in the political process. The Maoists and other parties rescind aspects of their campaign promises for political convenience. Further, this practice shows that the Maoists are not making decisions based on principles. Instead, it is clear that these tactics are to increase power through any means necessary.

Further, this shift in campaign promises is not confined to the Maoists. Gautam explains a similar large shift from pre-election platform to post election platform in the Rastriya Prajatantra Party Nepal:

What happened was like there is a party, the National Democratic Party [Rastriya Prajatantra Party Nepal] what they said while campaigning is… Nepal will remain a Hindu kingdom, they won the vote. And now what they are saying is like not only we want Nepal to be Hindu kingdom but we also want to re-establish monarchy. This is not within the constitution. This is not the problem of the constitution, but they are bringing this inside now. What happened was like when monarchy abolished in Nepal, it was not done legally according to the National Democratic Party. They said it should have been done after taking in advice and consideration from the people. But it was done by a certain group of people who voted there in the parliament. They did it without consulting the people without everybody. They did it amongst themselves. And prime minister system, presidential system was introduced. So what they say is this was done illegally.

\(^{37}\) See figures 1-5 and 1-8

So they say if they can abolish monarchy illegally, then we can bring it back illegally too.\textsuperscript{39}

Gautam notes that once the party won a significant amount of seats in the second Constituent Assembly, they added that not only did they want a Hindu nation but also they wanted to reinstate the monarchy. Gautam explains the party’s rationale: since the Monarchy was not abolished through proper legal channels, it should and can be put back in place through the same means.

This example has led to the failure of the constitution process for multiple reasons. First, the abolishment of the Monarchy had already been a settled substantive issue; however, its re-introduction into the political discussion delayed the process through deliberative time. Further, this significant shift from electoral promises to practiced politics is a key example of the lack of trust in the political system of Nepal. The flawed logic of re-instating the monarchy through illegal means also highlights the general disregard for following the legal system in favor of advocating for personal and partisan power. Political parties are unable to predict one another’s moves, and the people are unable to trust that the CA members they elect will maintain their principles. As such, negotiations and agreements are exceedingly difficult in this environment.

As described in Chapter 1, collective action problems are a factor in any deliberating body. In practice in the Constituent Assembly, the switching of political party manifestos creates extremely high information costs, as described by Douglas North.\textsuperscript{40} When parties switch their stance on major issues, it takes time for other members of the Constituent Assembly to learn of this change to decide how they will approach the changed political landscape. It may result in the need for new negotiations between members of the assembly and more discussion time. With

\textsuperscript{39} Gautam. December 22, 2014.

each switch in party platform, additional time is needed and completion of the constitution is further delayed.

VI. A Dearth of Legitimacy

It is also clear that there is a significant dearth of legitimacy in the current Constituent Assembly process. Interview data shows that this is most prevalent in predictions for what will happen even if the constitution is passed or put to a vote. As previously stated, the majority of the constitution has been completed. Prior to the January 22, 2015 deadline, Gautam discussed the events that would likely take place if the constitution was finished, and passed by the two-thirds voting requirement.

Most probably the constitution will not be made, but let’s say it is made, it is finalized. Then what will happen is the Madhesi people, the people of Terai, they will be the first one to come out and protest. Then the religious groups, they will say since what we have said didn’t happen we don’t want this constitution either. The caste system people will say okay Nepal has not been divided so we don’t want this constitution. Then they will all protest and it will again fail.41

Gautam suggests that even if the constitution were to be passed through the Constituent Assembly by the January deadline, the protests would cause the constitution to fail regardless. Professor Gautam’s prediction that protests will break out suggests that there is a serious lack of legitimacy in the Constituent Assembly. Gautam’s predictions included passing a constitution by a two-thirds vote, the legal threshold under the Interim Constitution. Thus, if the people of Nepal would not accept a legally passed document created by the democratically elected legislature, it is clear that there are deeply rooted systematic problems with legitimacy.

This lack of legitimacy can be further seen in the political parties’ practice of blaming one another. Gautam states,

So suppose the constitution is not made then what is happening is each and every party will blame each other. The Congress and MLA and the Maoists saying they have interfered a lot so because of them we could not make it. And the Terai will say even though Congress and MLA in power, you couldn’t make the constitution, they did not make. The Maoists will say they didn’t have the majority and still you couldn’t do it. They will have a huge campaign and each say because of them. They will continue blaming each other and still there won’t be a constitution again. 42

Gautam suggests that if the Constitution were not completed, the main political parties would each say that the others have interfered with the process and prevented the constitution from being finished. Nepali Congress would largely blame the interference on the Maoists, while the Madheshi and Maoist parties would blame the failure on the ruling coalition, pointing out that even while in power they could not push through a constitution. However, the blame tactics will still leave the country without a finished constitution. This passing of blame highlights the inability of the parties to work together towards a legitimate constitution that reflects the desires of the Nepali people.

Interview data also reveals that aspects of the resulting constitution will not be sustainable. Both Professor Gautam and Timalsena suggest that federalism will not be able to last in Nepal even if it is passed as part of the constitution. Timalsena states,

In my opinion it wasn’t the right choice also. Federalism is very costly, employ more people. It is very difficult to build up structure, spend a lot of money to build secretariat, cabinet. Federalism will fail in Nepal federalism cannot be sustained. My personal opinion because of the cost it won’t be sustainable. 43

Timalsena is among many constitutional experts who have opposed the creation of a federal system in Nepal on theoretical grounds. Timalsena predicts that even when Nepal passes a constitution that creates a federal system, it will eventually fail. Federalism is more expensive and thus will not be sustainable in Nepal due to its small population and struggling economy.

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42 Ibid
Timalsena points out that a federal system incurs higher costs because there are more people employed and more structures to be built and maintained, like the secretariat and cabinet.

Gautam made a nearly identical prediction, stating,

> Even if Nepal goes into federalism, because of the economic situation of the people, it will not last. That is very hard to occur. A lot of people they are saying that. The people who are knowledgeable about these things, they are saying even if federalism does exist, it won’t be taken into place because the economic situation is not good enough for that.\(^{44}\)

Thus, Gautam is in agreement with Timalsena on the point that federalism will not be a sustainable system of governance for Nepal. This raises questions of legitimacy about the entire constitutional process. If the very basis of the new constitution, a federal system, is not something that will work for the people of Nepal, the process appears flawed and undemocratic. It is clear that the political parties have ulterior motivations for the constitution process rather than instilling democratic principles in the new document.

There are also legitimacy concerns within the Constituent Assembly itself. Gautam explains that,

> Very few leaders of Nepal actually have the ability to take everything into account and say something. We don’t have good leaders like that. There is no unification. No one is agreeing on anything. Everyone is aggressive for their own wants right now.\(^{45}\)

In addition to problems with the parties trying to take power for themselves, Gautam notes that the leaders are unable to work effectively. He notes that the party leaders in the Constituent Assembly do not attempt to work together or work towards compromise. Thus, the Constituent Assembly is not functioning as a democratic assembly should.

Leaders must make compromises to create a legitimate constitution for the people of

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\(^{45}\) Ibid.
Nepal, but as suggested by Gautam, the Nepali leaders are only working for their own benefit. Gautam adds that,

Most people just sitting back and listening and clapping. So there is no point in speaking out. Even when they speak out they don’t listen.\(^\text{46}\)

This further suggests that aspects of the Constituent Assembly process are illegitimate. Professor Gautam indicates that most of the Constituent Assembly members are not participating in the discussion and legislation process. It is clear from Gautam’s explanation, that many of the assembly members are figureheads, just collecting a salary but not participating in the process, while decisions are being made undemocratically among the biggest political parties’ leadership. If the constitution is not made in a democratic way, by the leaders who were elected to the Constituent Assembly, the legitimacy of the finished document will likely be called into question.

Despite legitimacy concerns, Gautam predicts that whatever form the new constitution takes, it will eventually be accepted by the people of Nepal.

What is happening is like the people of Nepal, what we feel is because there is no constitution that is why we are facing these difficulties. So whatever happens let a constitution happen so we can just move on with it. It’s been like 12-13 years since the past local election. The people will accept slowly but they will accept. The people think once the constitution is finalized it will take place then the democracy will occur and the local elections will happen and we will get what we are supposed to get. Right now because of no constitution there is no proper law, nothing going on. So how to punish them, how to do anything. Suppose I want a grant, but where do I go? Because there is no constitution to guide us, we are without rules of the parents, so no one is there to ground us.\(^\text{47}\)

While Gautam predicts that acceptance of the constitution is inevitable, it is because people want and need services from the government, not because the people feel that the resulting constitution is democratically legitimate, nor is it a reflection of satisfaction with the new

\(^{46}\) Ibid.
\(^{47}\) Ibid.
constitution. The most recent local elections were more than 12 years ago. This lack of democratic governance on the local level has extremely limited governmental services and development efforts. In order for local elections to occur, the constitution must be finished. Thus, many locals are willing to accept any constitution in order to return to proper governance. Regardless of the legitimacy of the constitution, the general public will feel forced to accept it in the hopes that having a constitution will lead to more services. It is clear that the democratically illegitimate power struggle between the parties that has prevented the creation of a new constitution has hurt the people of Nepal who have been unable to obtain government services.

VII. Conclusion

This chapter examines what factors account for the failure of the Constituent Assembly in Nepal to complete a new constitution using an interview analysis. The chapter begins by testing the hypotheses of this study, which were derived from scholarly literature on constitution drafting. The hypotheses are as follows, Hypothesis 1: Existing political institutions in Nepal are not strong enough to overcome collective action problems in the legislative and drafting bodies. This will manifest in high transaction costs, a lack of clear committee system, or excessive negotiation time outside of the committee system. Hypothesis 2: There is a dearth of existing political institutions across a broad range of categories in Nepal, which causes significantly more time to be spent creating those institutions from the ground up. This is due to the need for some institutions to be in place such that participants are familiar for effective legislation. Hypothesis 3: Fundamental differences exist on keys substantive aspects of the constitution that participants are unwilling to compromise on. Hypothesis 4: There will be a lack of public participation in the
constitution-drafting, further threatening the overall process. Hypothesis 5: There is a deficit of legitimacy, which threatens the overall political process and causes mistrust and delays.

The interview analysis in this chapter shows that while the first four hypotheses are all present to varying degrees, they are not the key explanatory factor for the failure of Nepal’s constitution process. Rather, the interviews explained other present reasons beyond what was found in the traditional literature on constitution drafting.

This chapter finds that one of the key contributing factors to the failure of the constitution process in Nepal are efforts, particularly by party leaders, to take power for themselves at the expense of the people. With a focus on personal power at the expense of all else, little progress has been made, and leaders have been unwilling to compromise.

The focus on power grabbing is also due in part to the deficit of trust demonstrated through interview analysis.
Conclusion

This study explores the factors that have led to the delay and failure of the creation of a new constitution in Nepal. This study explores an answer to the question of how might we account for why Nepal has thus far failed to draft a constitution? Chapter one began with an examination of two literatures. The first addresses the political economy of collective decision making with emphasis on the challenges faced by large groups such as legislative bodies. The second focuses more specifically on particular challenges to constitution-drafting bodies or constituent assemblies. These bodies may be a special case insofar as the level of politics is heightened and thus collective action dilemmas may either be simply exacerbated because the stakes are higher or they may manifest themselves in a qualitatively distinct form. The level of politics in constitution making is heightened as explained by Barry Weingast in his work on self-enforcing constitutions.¹

Based on an evaluation of this literature, five hypotheses were created to predict the factors that derailed the constitution process in Nepal. These hypothesis were then evaluated using a media and literature analysis to asses the degree to which they played role in delaying the constitution process in Nepal.

Hypothesis 1: Existing political institutions in Nepal are not strong enough to overcome collective action problems in the legislative and drafting bodies. This will manifest in high transaction costs, a lack of clear committee system, or excessive negotiation time outside of the committee system. This initial hypothesis that collective action problems would be a key reason for the delay and failure of the process was shown to play some role through this study. The media analysis indicated that collective action problems played an increasing role throughout the

¹ Barry Weingast. "Self-Enforcing Constitutions: With an Application to Democratic Stability In America’s First
constitution drafting process. While the interview data also suggested that collective action problems may have played some role in the delay to the process, the data shows that they were not the most critical problem that the constitution process faced. The largest impact of collective action problems was seen in the coordination problems and opportunity costs between leaders. While a committee process in the Constituent Assembly reduced collective action problems to a degree, leaders attempted to come to a consensus on the most contentious aspects of the constitution outside of the parameters of the Constituent Assembly. Without any institutional support, the leaders have yet to solve key issues like the number and boundaries of the new federal provinces. Overall, this indicates that institutional design of the Constituent Assembly needed to be stronger in order to facilitate compromise. Further this study highlights that other institutional changes need to be made to the Constituent Assembly to complete the constitution process. One key change is the need to separate the constitution drafting body from the parliament. The Constituent Assembly’s current role as both a constitution drafting body and a national parliament presents too great a challenge.

Hypothesis 2: There is a dearth of existing political institutions across a broad range of categories in Nepal, which causes significantly more time to be spent creating those institutions from the ground up. This is due to the need for some institutions to be in place such that participants are familiar for effective legislation. While the literature suggested that this would play a role in Nepal’s constitutional crisis, both the media and interview analysis preformed in this study suggested that hypothesis 2 was not a major factor.

Hypothesis 3: Fundamental differences exist on key substantive aspects of the constitution that participants are unwilling to compromise on. The media and interview analysis both suggested that this hypothesis was key in the constitutional delays in Nepal. However, the
interview analysis also suggested that hypothesis 3 was too superficial to be a total explanatory factor for why the constitution process in Nepal failed. This was apparent in the discussion of a dearth of trust and legitimacy explained in the interview analysis, which may also explain why agreements could not be reached on these key substantive issues. Thus, while hypothesis 3 is confirmed by this study, it is not the root causal factor in Nepal’s constitutional crisis.

Hypothesis 4: There will be a lack of public participation in the constitution-drafting, further threatening the overall process. Both the interview and media analysis suggest that there is a lack of public participation in the constitution drafting process in Nepal. However, neither aspect of this study confirmed that hypothesis 4 has played a key role in Nepal. Further, the lack of elaboration found on this topic in the media analysis suggests that the lack of public participation was not a key factor.

Hypothesis 5: There is a deficit of legitimacy, which threatens the overall political process and causes mistrust and delays. This study suggests, through the interview and media analysis, that the deficit of legitimacy in Nepal was the main factor in the failure of the constitution process in Nepal.

In addition to answering why Nepal’s constitution process has failed, this study also aims to be a theory test of Andrew Arato’s Post-Sovereign Constitution Making model. Arato’s model is a two-part system. Part one consists of a small body of stakeholders writing an interim constitution. This is followed by the election of a fully democratic body to write a final constitution. While Arato advocates that this two-stage model is structurally the best, it is also most likely to be perceived to have problems of legitimacy.²

This study has shown that in the case of Nepal, whether it is perceived or real, these problems of legitimacy have had very tangible affects. These problems of legitimacy have been fostered by events such as continual threats about a return to war, parties repeatedly walking out of the Constituent Assembly undemocratically, and in the days before the January 22, 2015 deadline a brawl in the assembly chambers. Regardless of Arato’s claim of whether the problems of legitimacy are perceived or real, the effects of that legitimacy has tangible affects on the constitution process in the case of Nepal.

Further, problems of legitimation found in Nepal’s constitution process are in tandem with a significant deficit in trust. The lack of trust has been reinforced by power plays and flipflopping party platforms throughout the constitution drafting process. These actions by Constituent Assembly members suggests that there is underlying mistrust because they are unwilling to commit or give up power suggesting a fear that they will lose out if they compromise even the slightest.

This problem is significantly harder to overcome than a structural reorganization. As previously explained, Putnam’s research on civic traditions in Italy indicates that strong norms of trust are built through the practice of generalized reciprocity within civic society. 3 Thus, trust must be built up overtime. Although further research is required, history suggests that the ten-year civil war may have played a role in both the deficit in trust and legitimacy in Nepal’s civil society and political sphere.

The results of this analysis suggest two possible solutions for the constitutional crisis in Nepal. First, the Constituent Assembly needs to be restructured to reduce collective action problems. This can be done in part by adding additional institutional structures to encourage

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party leaders to negotiate within a committee system. Further, in order to reduce problems of trust and legitimacy the political stakes of the constitution must be lowered. Weingast’s explanation of the rationality of fear shows that when the stakes of politics are too high, such that the risks of adverse policy changes are above a certain threshold, revolt will occur.\(^4\) This indicates the need either to reduce the number of issues that are being written into the constitution or to lower the bar for amendment, so dissenting parties feel like changes can still be made in the future. Further, the Constituent Assembly needs to think of the new constitution as more of a framework for how to govern and make decisions rather than a substantive document that includes the decision itself. If Constituent Assembly members can be convinced to only draft a framework for decision-making, the stakes will be lowered, and contentious substantive issues can be debated separately in a legislative parliament. After two failed Constituent Assemblies, Nepal should make institutional changes to reduce the fears of the political parties in order to complete a new constitution.

\(^4\) Weingast, 2.
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Appendix I: Interview Questions

1. How has violence and extortion by the Maoists affected the legitimacy of the Constitution Process?

2. How have the multiple walkouts in each stage of the drafting process affected the legitimacy of the overall constitution?

3. How have collective action problems played a role in the Constituent Assembly over time?

4. Are there institutions present in the Constituent Assembly to facilitate compromise? If so, how have they evolved since 2006?

5. How did the drafting institutions change between the first and second Constituent Assemblies?

6. What have been the major substantive problems that have led to impasse in the Constituent Assembly?

7. How has a lack of federal structures and the need to create new institutions affected the constitution drafting process?

8. How has ethnic tension played a role in the drafting process?
Appendix II: Interview with Rajesh Gautam

Evan Cooper(EC): the focus of what I am looking at is why the CA has failed

Professor Rajesh Gautam(RG): there are a couple of reasons why it failed. mainly because the CA the voting for CA has not just been for the CA, it has been for the whole/ also parliament. combined CA and parliament

so the members are more interested in the power of the seats rather than the constitution. less bothered by making the constitution than taking the citizens’ powers for themselves

among the people who are voted there around 601 most of them do not know anything about the constitution do not know how to form them. there are very few people who actually know how to do them and they are mostly getting overruled. what they say is not happening

rather than forming constitution, they are trying to press the agenda of the parties they belong to like in Nepal what is different, politicians come from different parties rather than two parties like in the states so there are many parties and each member wants to put the views of the party foremost, it’s creating some kinds of clashes, constitution is not getting written in time. the people are mostly bothered about the personal stuff, and religion rather than the constitution itself

various caste system in Nepal, people from Himalayan and Tarai and valley regions. people trying to put themselves first rather than the whole country

there is proposal of new constitution is mainly by Maoist party, they want the communist feeling more, so they are getting more aggressive towards that end

different members what they are doing rather than forming constitution, each party want their member to be prime minister. There is a power play going on

there are mainly four parties in the lead, Maoists, Nepali congress, United Front and the Madhesi party (of the people of the Tarai region) those are the four parties that are more aggressive, more dominant there

what is happening is the constitution (CA), the people inside are be forced from various sides, like even we have certain views we want that in the constitution. there are some people lets say who want the monarchy back so they have their agenda and they are like pushing for that and people from the diplomats from India, states, or any European country, they all have their own agenda and everybody is trying to push their own selfish motives there
like the British people diplomats don’t want Nepal to be a Hindu country, Nepal is only Hindu country, they say is should be a secular country so you should have the constitution matching that kind. and the European community what they are saying is like we have different caste system in Nepal… limbu magar (Buddhist people), Brahmin different people there, so what they are saying is that there should be equal people representing them, that is their agenda. this is why constitution can not be made, various people pushing their own agendas

almost all the issues have been settled except for the two main issues, one Nepal should be a country governed by a prime minister as the main leader or the president. and the second one is federalism

caste system is one, nation dependent on the caste (magar, limbu)- for federalism, that is the problem there

because of these two reasons the constitution could not be made, exactly because of these two reasons the constitution could not be finished.

what they said is you should elect the people for making the constitution, not the parliament, separate. so then the people will be more focused on making the constitution rather than making the power plays or anything else. so that is according to people like dad(professor), but that didn't happen

and the second election, the re-election that was done, every party each had one point- election manifesto, what they were saying is even if they could not make constitution, by the end if it is not made each will put what they want down and it will go for voting. they said that. if they couldn’t make it they would put it for a vote in the assembly itself. it will be made that is what they said

while they were campaigning everybody had that. they said we will form the constitution anyhow if by then we haven’t even if it’s not possible then even with the ⅔ of the body they will pass constitutional- said mainly by the Maoists

what Maoists felt is we are going to win this election, we will win by majority so even till the end if it’s still not made then ⅔ of the majority whatever they say will happen. they thought we will be the ⅔ so even if the Nepali congress says no ⅔ is us so it will pass, but that didn’t happen- in the second ca, so Maoists lost

so what happened was that they lost, so now they are creating a new drama out there. so what happened in the first CA is happening again. same problem is going on till date
so what happened when Maoists thought they are going to win so they thought whatever they want would happen. that was what they were banking upon but they lost the election and congress has more majority now. accordingly they said ⅔ of what they said would happen. now the people saying that cannot happen IS the Maoists. they went back on their words, reversed back totally

now the one who is totally against it is Maoists but they thought they would win so whatever they want would happen, now they didn't win so they are scared and now totally against this new ⅔ thingy. it was them who proposed but they are against it now.

what happened was like there is a party the national democratic party, what they said while campaigning is they will propose leader of that party is (name I can’t translate 17:07) what they said a couple of days back first while campaigning propose Nepal will remain a Hindu kingdom, they won the vote. and now what they are saying is like not only we want Nepal to be Hindu kingdom but we also want to re-establish monarchy. this is not within the constitution. this is not the problem of the constitution but they are bringing this inside now

what happened was like when monarchy abolished in Nepal, it was not done legally according to the national democratic party. they said it should have been done after taking in advice and consideration from the people. but it was done by a certain group of people who voted there in the parliament. they did it without consulting the people without everybody. they did it amongst themselves. and prime minister system, presidential system was introduced. so what they say is this was done illegally. so they say is they can abolish monarchy illegally then we can bring it back illegally too, so that’s what they are saying now

it was till then that peoples advice would have been taken into account. they did say that they but they didn’t listen to anyone and did what they wanted then

what about the fact that the CA re-affirmed after the election that the monarchy should be abolished

the election, the people who were elected were the people of the party itself so very few people wanted to talk about this. they brought out the topic but they were the least majority . they were in a very minor group.. three or four people maybe. they wanted to talk and as the people. everyone said no we don’t need to bother.

what happened is like constitution from the congress side is ready. from the national democratic party is ready, but in each party… mla is united front, united marxist and leninist, they both have constitution ready but even within themselves, some members belong to madhesi group from
Terai and they are demanding is they should have a new nation, they want madhesi to be called a different nation itself

each caste system, what they are doing is if madhesi can ask for a new country so can they.

EC: so totally new country not just a federal state

RG: it’s not clear, some say federalism, some say a new country itself

so people, not even the parliament people, they have not studied what will what might happen nobody is thinking, if they get demands so can we. every caste is dividing new country. Terai people will get country people from Himalayan region will get different countries, and let’s say the limbus, each will want different ones. they have not decided what will happen they just decide without thinking

there are different parties, in each party various people constitute the members, so now rather than just the parliament or party itself, even within the party there is disturbance

what is happening is same thing that happened in first CA, people who actually know about the constitution are less. they are in the minor number and the people who don't know anything about it are in the majority number, and what is happening is rather than the people who have been nominated for making the constitution, rather than that the people who are nominated just by the parties, in a small group they are trying to make the constitution

even in the CA the party members are doing “what we say has to happen” if that doesn't happen. that party thing it has not occurred anywhere else in the world and it wont happen anywhere else, that what's happening now

the prime minister is from Nepali congress, what the pm has said is once the constitution is finalized, then I will resign. he said he is nominated just to make the constitution, once it is done I will resign, that is what he said. what is happening with the UML they are saying okay let’s finalize the constitution then the prime minister will resign then our member will be the prime minister. just to make him prime minister they will make the constitution

even from within Nepali congress party certain group there lead by (don’t know name) he is saying if you don't make Nepal a Hindu kingdom then we will put the constitution on fire, we won't follow it. but party cannot do anything about it

what the problem of why the first CA failed, the same problem is now
normally what happens is when people are forming a constitution any country, every member gives their input, but here rather than all 601 members giving input, a few core people are. only their input is being noticed. the rest’s input are being completely ignored. so let’s say a constitution is being formed only a few people are responsible. the rest whatever they say is not happening. whatever they say people aren’t listening. so lets say the people who are like into constitution, the people who know about constitution, what they say is being completely ignored. and those who don’t know about constitution, what they say is happening, those who are more powerful what they say is happening rather than everyone’s input being included

EC: collective action problems, problems due to sheer number of people and groups interacting, takes longer

RG: no

so that is not happening actually, only a few people are talking

what they are doing is beside CA itself a lot of people are knowledgeable about constitutions like professors, they know a lot about this stuff they should ask them for advice but they are being totally ignored. they aren't asking, don't want any advice, don’t want anything to do with them.

EC: just want their own agenda

RG: exactly

EC: do you think there could be collective action because of the parties?

RG: yes, lots of parties is the problem

most people just sitting back and listening and clapping. so there is no point in speaking out even when they speak out they don't listen

rather than what the people of Nepal want, the kind of constitution we want, rather what is happening the kind of constitution they are making is what the leaders of the politicians want, not bothered about what the general people want, they have not taken any polling or anything nothing. nobody has asked nobody has bothered. doing what they want. even if the constitution is finalized its not going to be what the people want

what is happening is what people want that is not happening. general people say what kind of constitution we want is not going to happen so are we sure we want this constitution that we are making. this is from the people’s point. and what the leaders want is not happening also, and they
say are we sure we want this, the people don’t want it the leaders don’t want it. the Indian government the thing they want is not happening so they are interfering. the British ambassador has said the people of Nepal should have right to change religion, Andy Spark, that should also be mentioned in constitution, even they are interfering- to be written into constitution that’s interference

even in the last CA, on the last day when it was supposed to be finalized, there was a mass protest outside. so that happened and it was rejected. then this year in the month of Marg, the constitution is supposed to be finalized 8th of Marg (January 22, 2015). it is supposed to be that day but rather than finalizing constitutions the parties are planning, they are preparing for the mass protest again. anything is needed for protest they are focusing on rather than constitution itself

most probably the constitution will not be formed. some will be demanding Hindu nation some will be demanding based on caste

EC: how has violence by Maoists and in Terai groups affected the legitimacy of constitution, now and throughout the process?

RG: while the revolution was going on while fighting they were a very powerful force in the country. but now they are not as powerful they have been broken into many groups

what is happening, despite various groups of Maoists 4 or 5, they are saying we are the ones who wanted the CA to occur so we should have some role. they lost the election so they don’t have much role but they are saying we should have it because we are the ones who demanded it

there is a group of Maoists which is led by Moin Boudai, he is the leader of certain group of Maoists., what happened when there was election going on for 2nd ca we are not going to take part. but now he is saying even though he didn’t take part, what I said should count, my views should be included but he didn’t even run

what happened is while they were fighting, while the whole violence thing was going, they were the ones who went to the different castes of Nepal, they went to the Terai people and Madhesi people and said you guys should have your own kingdom, you guys say should also count, so what you feel should be kept into account, you are being ignored now. they were the ones who were aggravating the people and polluting the minds. they were the ones who went to each and every caste group like the magrs and the limbus and said you should do that. and what happened it…. they don’t want that, they don’t want the country to be divided into smaller parts but they were the ones who said that so they can’t go back on the promise now, they want to but they
can’t… so now they are saying despite the fact they don't want this they are saying you should do this and to go back on their word they cant

what should happen is like while making the constitution, the people of the assembly what they should keep into account in the geography of Nepal, the economy, the social condition of Nepal, the religious, everything that makes Nepal what it is, that should be taken into account rather than just the views of the parties, so they are not doing what is beneficial for the people, they are doing what is beneficial to them

most probably the constitution will not be made. but let’s say it is made it is finalized then what will happen is the Madhesi people the people of Terai they will be the first one to come out and protest. then the religious groups, they will say since what we have said didn’t happen we don’t want this constitution either, the caste system people will say okay Nepal has not been divided so we don’t want this constitution. then they will all protest and it will again fail

EC: so even if it’s passed it will fail

RG: yeah

so suppose the constitution is not made then what is happening is each and every party will blame each other. the Congress and MLA and the Maoists saying they have interfered a lot so because of them we could not make it. and the Terai will say even though congress and mla in power you couldn't make the constitution, they did not make. the Maoists will say they didn't have the majority and still you couldn't do it. they will have a huge campaign and each say because of them. they will continue blaming each other and still there won't be a constitution again

normally what happens is when a constitution is being made the people of the country are the ones who decide. what is happening right now is for example prime minister Modi from India he came to Nepal and said not in the house outside, what he said is you should make a constitution after every member agrees but that is not going to happen, there are so many protests so there is no way everybody is going to be unified. he is saying according to the whole agreement only you should make one that is according to Modi

and the British, when he was interfering. every people who are not Nepalese are also interfering so that is also creating a huge problem for the constitution to be finalized

every country has some travel people, even Nepal has groups like that (nomads) so these travel people are being influence by the Europeans and British and everyone else. there are various NGOs working in Nepal for them. these people should be taught well etc for the religious
purpose. everyone has their own agenda obviously is groups are helping someone they each have their own agenda, even what we say should be taken into account. there is going to be a lot of interference.

very few leaders of Nepal actually have the ability to take everything into account and say something. we don't have good leaders like that. there is no unification. no one is agreeing on anything. everyone is aggressive for their own wants right now

EC: are the rules in the CA different between the first and second?

RG: no such rules

EC: structures in place to facilitate process?

RG: very small communities (I think the professor used the wrong word, not translated by daughter)

those people did their job, they have done what they are supposed to do. they have given the draft. but the leaders are not agreeing on those two issues so its still in process that’s why. they have done their job what they are supposed to do they’ve done that

mainly regarding diplomacy the groups who are supposed to go for the diplomatic acts they've done their job. the groups for developmental acts they've done their job education system. everything they've done

EC: did those groups have members of all the parties in them? because they are part of the CA, multiparty groups

RG: yes yes yes, it’s the leaders who don't agree. now they are just debating only those two main issues. the rest are done. they are like you want to do that for development, okay that’s fine with us. that’s not the problem. It’s just those two

EC: are there subcommittees to deal with that?

RG: no, nothing

what they are doing is the leaders themselves are trying to bring the decision and that is not happening, they want tot decide themselves rather than forming a committee
EC: maybe because there is such a big change in the political system, not a lot of federal structures in place already. creating fed for first time, no history of federal states, did that make it take longer because starting from scratch?

RG: no not because of that

yes the people don't know about it, the people have not been consulted but this is not the main reason. the main are just those two. they haven't thought much about it actually

EC: is it possible that some parts of the constitution took a long time to create because they had to create totally new systems that weren't there before?

RG: :most, let’s say 90% of the constitution is done, but what some party leaders are saying let’s discuss federalism later, for now let’s make the constitution let’s just be done with it, and still there is disagreement, they are not agreeing on this…we will discuss about it but not now let’s just finish the constitution but can't agree

EC: some of the parties have sued as a technique walked out/ left assembly until demands met, has that affected trust on constitution and process?

RG: what is happening is like the people of Nepal, what we feel is because there is no constitution that is why we are facing these difficulties. so what ever happens let a constitution happen so we can just move on with it. It’s been like 12/13 years since the past local election.

the people will accept slowly but they will accept. the people think once the constitution is finalized, it will take place then the democracy will occur and the local elections will happen and we will get what we are supposed to get, right now because of no constitution there is no proper law nothing going on. so how to punish them, how to do anything. suppose I want a grant, but where do I go? because there is no constitution to guide us, we are without rules of the parents, so no one is there to ground us

EC: so you think that if there is a constitution people will just accept it to get to the next round of elections to get things done?

RG: Yes. even if Nepal goes into federalism because of the economic situation of the people it will not last, that is very hard to occur. a lot of people they are saying that. the people who are knowledgeable about these things. they are saying even if federalism does exist it won’t be taken into place because the economic condition is not good enough for that.
what is happening is like the people of Madhesi, Terai, the whole Terai area should be ours, Nepal is made up of Himalaya mountains, valleys and Terai. even if want to divide into federal states, you should divide it in half from so every part has mountains, hills and Terai, but the people of Terai don’t want that

even before Nepal was divided into 5 developmental states, and every one had some of each, but Madhesi say they don’t want Himalayas- so that is also creating a problem

EC: outside of federalism, has ethnic tension played a role in any other way?

RG: religious democracy, they want to practice whatever they want to practice- the ethnic groups, not a huge problem though. not a huge problem other than federalism really

EC: how has the Maoists party that was not part of the last election Mohan Bodia, did that affect the legitimacy of the constitution?

RG: despite the fact that we did not take part in the last election, what we say should be taken into account- it’s not that big a problem but it is a problem

EC: how is that being dealt with?

RG: the rest of the parties are like you didn’t take part so its your fault, not our headache
Appendix III: Interview with Bipin Adhikari

EC: how ongoing violence throughout the process may have affected legitimacy

Bipin Adhikari (BA): it will definitely affect the legitimacy because after all it’s a political document so you cannot get rid of that. It’s clear there is a ⅔ proposal, it’s clear that if you go numerically it will be passed through the CA process. It’s only the political issue of some splinter groups of cpn maoist and madhesi, how you address them. and apparently they too are trying to work out some compromise. and it is impossible for the majority to go through the minority agenda, it snot going to happen. but the challenge is to address the opposition agenda through the current proposal. for example 7 province federalization has been proposed, that’s fine. the challenge is to answer how the issue of identity could be resolved under this frame work. It’s not for us to tell how many provinces will be good for the country since that is something that will be a political issue. there is a ⅔ majority and they agree that 7 provinces is fine. now to make it acceptable politically to the splinter groups and the opposition forces you have to show how you can resolve the identity issues within this framework. and unfortunately within this area the ruling parties have nothing

I was also interviewed a number of times on the radio and tv and my answer was it’s not for me to comment on the ruling party coalition proposal because the proposal as it appears legally is not a problem because they talk about certain reforms and you cannot say they are not good reforms, they are fine. the issue is you have an opposition with certain identity issues that need to be redressed on the naming of the provinces, okay, the second is on the giving of protection to the minorities and indigenous people, on that they have to come out with a very clear proposal like my comment let me summarize what I told the media:

1) even within the 7 provinces there is a possibility with some modification of the demarcation issue because whatever has been done is based on the current district map and if you just compromise a little and get ready for certain deviations from that map, probably within the 7 provinces you can establish the identity based areas, this is possible

2) similarly the second thing you can do within the provinces, there are pockets of indigenous people and it could be established as a sub-provincial region. for example lets say in eastern Nepal you have there is the Kosi province for example. kosi province and sagar mata even with in the kosi province you can very comfortably find out what are the integrated areas and what not. and you can make an autonomous region within the province and give them plenty of power. (me: like a second level of federalism?) no not second level, it will be the third level, but then when this third level administrations they send their representatives, they come to the provincial parliament. it could be done and it could be done very conveniently. that way the current proposal is the recognition of 7 ethnic groups in that framework you can recognize almost 22/23 groups. so in terms of the minority majority index or in terms of indigenous non-indigenous you’ll find that it
gives more opportunity to the indigenous people. That way you can give some locations, regional autonomy to the dalit population also and for example you will generally find Magars generally belong to western Nepal but then they have pockets of concentrated area in eastern Nepal also, so you can take it out as an autonomous region. it will not work in the case of municipalities because they are very diverse, mixed groups there but if you go to the villages it is always possible to find out which villages have what population... if you restructure it can be done

3) the third thing is if you can give regional autonomy to many groups, not just 7 dominant communities. this will create room for identity based communities also and dalits also. for the rest I think it’s not an issue at all. if you segregate the indigenous people together, making sure they are at least in majority or in comfortable population size, then the non-indigenous people will also be clear. it is always possible to take out 3, 4, 5 structures. not just indigenous people then the rest will have their place. as far as naming is concerned you can give any name on the third layer to the dominant group now. on the provincial naming I don’t see any scope of the ethnic naming because the non-ethnic people will not allow it the concept is to make democracy work and if you create a structure/ write things into the constitution that are not acceptable to the democracy then even if you come out with a very significant constitution it will not help (me: and that ethnic naming continues to be an issue now?) yes. this is there and there are so many reasons. for some people it has become part of their personality and they don’t want to get rid of it. my proposal is you get down from the second level and to the third level and get what ever name you want and it’s possible that many ethnic groups won’t even prefer ethnic naming. It’s the condition of some major groups
	naming has to be according to the current proposal a secular name. non-ethnic name. what is a kosi is a famous river of Nepal which flows down from eastern Nepal to Indian ocean. now kosi is a Nepali name. or ethnically it’s a Kus name but if you take it positively it’s possible to find a ethnic name for this. this is a limbu territory, give it a limbu name sagarmaha is a Nepali name which means the top of the world. okay fine you don’t accept sagar mata because it is Nepali or bahun chetri. it is possible to get sherpa name for sagar mata which is (cant translate 11:16) you can get even Keirath name, all rivers you know have their ethnic names. so if you take it from that language or like in limbu if you don’t accept kosi the big literary figure is (name I cant translate 11:41) who developed the limbu script, it could be taken as that province and that will be acceptable to the rest because it’s not ethnic as such but it’s ethnic for the ethnic people because that particular person comes from their community and for me these two things could be mutually agreed. and don’t leave it to the province because even if you leave it the province and democracy works you know it is impossible to establish any name just by majority because any majority belongs to the ethnic bon chetri people. so you know its not good to avoid the problem rather tis good to resolve it right now. resolving is bon chetris have to give away their claim for
the existing names and then the indigenous people will have to accept the ethnic names but not the name of the particular ethnic group find something else but choose yourself.

for example: Nepal is a newer name, it has not harmed anybody because it is now already accepted and when Kathmandu valley was run over by the gurkhas they did not impose their name on the valley, they rather submerged their name in the valley’s name. so it is not called Nepal traditionally and this name went to the whole country. gurkha give up their name, it should have been kingdom of gurkha if you go by the logic of victorious people. so the way you have New England. they didn’t do that. this could be acceptable and even if the people, for me if you ask me, by way of constitutional law, on the basis of that, what has been proposed is fine, there is nothing to disagree this is a political disagreement, but the political side is more important. if the indigenous people are to be accommodated they could be on the third layer, and you could put in the constitution that the constitutional arrangement will be reviewed after 5 yrs, after 5yrs we will have another election and these groups will have another chance to ventilate themselves and maybe there is a change in the composition. and if there is a change in the composition they can do whatever they want but if ⅔ is a rule on always have to compromise.

ultimately what is more important and the third important thing is electoral system. electoral system is more important because what I find is now that people are talking in terms of identity and some talking in terms of historical territory, that irritates many. because if you go by that provision, which territory belongs to a particular group is also in the context of time and space. now historically the kus people, they came from western Nepal, 3000 yrs before they migrated from persian region from Caucasus mountains… word manufactured in process into Kus. Kus comes from caucus, but it’s the same word. here 3500 yrs before probably none of the people claiming these territories as ethnic were indigenous in fact because all related, research shows one group in Ngar we thought were east Asian migrated over the centuries, they are African groups who migrated many thousand yrs before. you cannot sort out historically however you can sort out on the basis of existing people. who is residing where and how to ensure autonomy to them. and as long as you have democratic relations intact the government should not hesitate to offer autonomy. there are some people speaking too arrogantly but that’s something the international law that for occupation, liberation is a must but not for a country which has been liberated since many years so that is the perception.

and if you focus on the electoral system a couple things are very important. constituencies for the election on the basis of, it will ensure identity. similarly you can also, not very democratic but you can also have rotational constituencies. so that each community especially in broader terms like bon chetri give rotation constituencies, it’s not very good, but if it can satisfy people go now rotational constituencies could be given to women, dalits, or to even parties, bon chetri, indigenous people but it all depends which territories. like in the high Himalayan range the
population is very much diluted and you have to give constituencies to the ethnic groups in that territory. in the mid hills where the population is quite mixed you can give it to very concentrated constituencies, you can give it to mixed groups or for the women to make 50% for the women. and even within the 50% give reflection to the proportional representation of the different caste groups. this is the 2nd proposition that I have been talking about

the third is that the system of local government. doesn’t extend to the villages. Let the villages be autonomous territories and big territories. when you have electoral system that gives you representation, ensure quality representation, ethnic representation the state will always be inclusive probably even after the first election it will be different. and then these whole issues could really be discussed you don’t have to wait. so I think a combination of on the form of government I think its fine. I don’t know if I talked with you about this before but in 2009 when the first CA started working and there was no progress on the debate I came out with a model constitution for Nepal and I tried to address the current agenda at that time and give that draft to the CA at that time. now what? my proposition was, it is good to have a parliamentary system at the national level although to make sure politics is not too much at the regional/provincial level, let it go according to the presidential system. it is not necessary to make both layers of government parliamentary because you know this is a country where you have overwhelming politics and then politics in order to destroy the democratic system. now the Maoists for example they talk about democracy only as long as it’s good to them. for example now you have ⅔ majority in the house, there is a proposal that they don’t want it now, even though it was their idea. as a democrat they should have said …. and then what I proposed is if you give a parliamentary system too much politics it will impair the development process. and even though parliamentary system is important at the national level because of the diversity, the scope that it gives to the diversity- and the selection of ministers, multiple leadership all those things. now once you go down to the provincial level for the election there should not be more politics so I saw the model of Japan. they are a unitary state, not federal but they have a parliamentary system at the national level and a presidential system at the local level and I found it interesting. and American features, let’s forget Japan because people don't understand it, people understand you know the US system, you just apply the US system for the provinces with one exception that there is a unicameral assembly because we don’t need senate and house of reps at the local level because small province and within the province you know original autonomy for special structure so this is how it could be accommodated.

EC: If there are these proposals they the mps have seen, that might be more effective proposals, why is it that they haven’t been able to decide on anything?
BA: the thing is now, like because I have my point of view, I am not losing anything and I am not gaining anything. for the opposition they are in a very critical mess. they say they are ready to go for the identity regional structures at the third level, that means that they have lost much of their claim. so they don’t want to talk about it. similarly, Maoists in particular what they want is not democracy, they want some power base for them. even if they speak a lot about democracy, empowerment and many things (my thoughts: TRUST ISSUE- they say one thing but they don’t actually mean it) I think their idea is quite different. now CA was created because they wanted the constitution to be drafted through the process and now the ruling coalition wants to go through the process and they say now. and that means you are not for democracy. like we study about the confrontation between Bush and Gore, at least the court was there. now this is a political issue and the court does not have any jurisdiction so how do you sort out? you have to wait until next election and for that election to happen you have to have the constitution

EC: and then how do you think collective action problems might have played a role due to too many legislators or too many parties? 29:43

BA: obviously that’s a problem. that’s a problem now that the politics has become a dominant for people who are not professionals, who have not good personal career. and then people who have some property and ability to win. so naturally there are many people who want the numbers to swell, and so its a problem, but I think to get the constitution you have to maintain the standard set by the 1990 constitution. you should not further deviate from that standard. so for the national assembly at least 205 for the national parliament and that was the system. now the current proposal has come down for 151, 150 or something. i think that number is not a very good thing to increase it.

so it’s a problem with Madhesi groups also. they want the whole strip along the Indian border to be a Madhesi land. so India wants a Hindu land in Nepal. so they want to use that and then they are on that line and it will not be acceptable to the hill people. its very difficult in fact now even for the Madhesi… Madhesi as a province but this is 52% of Nepal in population. you cannot have 7 province structure of the country where 52% is one and the rest is divided. but they are arguing for it. this is a problem and now the proposal at least it cuts out three party based districts from eastern Nepal to the hills, it joins it with the hills so that means that there is some effort to make population as indicator so you have more or less similar population throughout. and that’s a good idea. now for Madhesi I think there is now issue its all political. and divested interest.

EC: but it’s been a problem in terms of trying to finish the constitution?

BA: yeah.

EC: lack of federal structures?
BA: no I don’t think so. you know how can you have a federal system in place without making the constitution. this is something federalism is meant for the people deciding. so I think that’s not the issue, I think rather it’s the extreme federalist position. so you see when you have a debate in your country (referring to US) a debate between federalists and anti-federalists so everybody was in favor of federalism. its not that anti-federalists wanted a unitary state they all wanted federal system but it’s only that some wanted the center to be very weak while others wanted the center to be very strong, so this is what some are struggling for. so here the substantial chunk of the population, they don’t want federalism now even myself as a choice I’m not for the federal system, in the beginning I was not. but I am an expert right, so it’s not what I want. if you have a political solution then I will try to make it a democratic and sound principles, a solution based on constitutional, legal sound principles so that it becomes workable, and democratic values are promoted and constitutional, you know the concept of constitutionalism is enforced. so this is the idea. so okay go for federal system no problem but when you say that there will be a federal system but the prime minister of a province will be only be from a particular ethnic group, then it’s a problem because it’s not a society of red Indians or Australians.

EC: is that something that was proposed?

BA: it was proposed

EC: now it’s dead?

BA: yeah now it’s already out of the context

EC: was that something that happened during the first CA?

BA: yeah

that was not acceptable. that’s why the first assembly failed.

EC: in terms of the second CA what do you think have been the main issues that are continuing to plague the process?

BA: it is the same issue. because the Maoist became very unpopular and Madhesi became unpopular also that you know the people around they become very, that the whole current was against them. okay? and they got booted(36:45) that why they came around with the ⅔ majority so, constitution is only technical issue now. the constitution has been amended, there is no
internal process, once the constitution is drafted you can put in the assembly. and it will be passed by $\frac{2}{3}$ majority

EC: but the Maoists don't want that?

BA: yeah Maoists don’t want but then the thing is

EC: but you think it would pass?

BA: they, I don’t know, its a very difficult thing. we want but they compromise. and compromise should be on you know. now you can see the mood of the people. what ever you negotiate on the table the solution cannot be something that will be denied by the people. the majority must be counted. so its all about, and then if you get a solution that is acceptable to the majority that’s fine but then for that to happen the Maoists should be able to propose something that you know is far below their expectation but still holds good to the majority. and this is what I’m proposing

EC: so in terms of…. I’m also wondering about the structures within the constituent assembly, are there committees and things to facilitate the process?

BA: yes there are. there are 5 committees now, but you know I think they cannot you know, unless you know if you want democracy to read through then the prices is enough the constitution is there. now that the idea is also to accommodate and that something that is a leadership concern. and if the leadership is to convince the people its possible. so these committees apparently have less role now.

EC: so they’ve done their job but now they’re not the problem anymore?

BA: yeah they have not been able to do the job because this job involves political leadership and you know whatever you decide it has you know the thing is there must be leadership within the country that can sell it through.

EC: so there is a lack of leadership them?

BA: yeah, it’s not the expertise it’s the leadership

EC: and then how have techniques like walking out of the legislature in order to exact demands on the rest of the body, how do you think that has affected the process?
BA: this is obviously you know what happened, let me tell you the difference, your question is I mean most of the process, the related jobs were done already by the first assembly. they were received by the second assembly and now the process has started from that time so it was not all over again it was only building on what was already done, so now its the leadership you know. okay?

EC: yeah, so I guess just to sum up you think that the lack of leadership is the main issue that hasn’t been solved?

BA: yes

EC: so are there any other major issues that have kept it from the process being finished?

BA: yes lack of leadership and its you know lack of leadership but you know it’s also the you know the minority and indigenous voice, the way it is being interpreted. okay. so, so, the leadership should be able to quell the people. especially the ruling coalition should be able to convince that within this framework you can get everything that you possibly want in an ethnic setup. its all that democracy will prevail, numbers will be counted and certain minority rights will be protected, rights of the indigenous people will be protected and the society, the political system will be very inclusive and the system of proportional inclusion will be followed everywhere and they have to give electoral system that really makes sure that its not the war again. that the liberal democracy should be qualified in the way that acknowledges the modest indigenous you know expectations

EC: those were all the questions I had unless there is anything more that you think I should know?

BA: no I think I give you three solutions which could be

but then I tried for example, I invited a group of almost 25 ethnic leaders some from the house some outside the house and had three hour discussion with them, on my proposal. nobody wants. because what they want is you know a complete you know…

recording stops and refuses to play at 43:00 however there is only 45:07 total
Appendix IV: Interview with Ram Krishna Timalsena

began by explaining my work

EC: ongoing violence following the war from the Maoists and also in the Terai region might have slowed the process and affected the ultimate legitimacy. What do you think about that argument?

Ram Krishna Timalsena (RT): actually that not only the reason, no violence or political instability something about political parties causing delay in the constitution making

EC: indecision in the parties did you say?

RT: yeah indecision and they are thinking in their political parties own interest, not the national interest

and also that there are many contradictory types of ideologies in the political parties and their priorities are not the same. some of the priorities never meet together. like the supreme Maoists, you know? Maoist whole goal and goal of Nepali Congress is different. but how to make compromise between the two? how to make agreement?

EC: and have they been trying to compromise?

RT: they try to lead their own points and they don’t compromise. if they compromised, it is long back since 6 years, well talking about the compromise, there is no compromise in major issues

EC: What would you say the major issues are?

RT: as you know the forms of the government. whether they do presidential or parliamentary. the second thing organization of the election system, what type of judiciary they require, these are major issues, how the judiciary will be designed

EC: and then I’m also wondering about the techniques that some of the political parties have used to walk out of the constituent assembly, how that might have affected the process?

RT: yes of course, seriously

EC: and the also with the Maoist party that decided not to take part in the 2013 election, how do you think that might have affected the process and the ultimate legitimacy of the final document?
RT: oh I don’t think that they have raised this issue but there are not records of this deadlock. deadlock is between the parties who took part in the election

EC: but do you think that that group abstaining from the election might have affected people’s trust or belief in whatever document results out of the constituent assembly?

RT: that’s not sure but they have said this, they claim that, “without us how could you make the constitution” but it is not always so, not necessarily because they have spoken outside of the constituent assembly and there is no problem with the constituent assembly

EC: so they have spoken with that party outside?

RT: yeah yeah yeah

EC: and then also a common idea within political science literature is collective action problems which are basically issues of deadlock surrounding decisions that have to be made by groups. especially large groups. so I was wondering if you think…

RT: I don’t think Nepal generally even the political parties decide not by the big group all the issues they are decided by a few leaders. they decide and they say. even if they (the other mps) are interested in making the constitution, they don't have say, the political leaders they decide all course and the CA has become ineffective

EC: do you think that maybe the process might have been slowed down because there are so many political parties?

RT: Yes because other small parties have no much role. big four parties are responsible

EC: what parties?

RT: actually five: Nepali congress, UML, Nepal congress party Maoist, RPP, Madhesi party

EC: do you know much about the structures within the congress to facilitate discussion. such as a majority leader who has agenda setting power, does that exist?

RT: Nepali congress is true parliamentary form of democracy. there are other flexibilities, Nepali congress talks only about having a parliamentary system, independent judiciary, human rights so on and so forth, they are very flexible
UML is talking about directly appointed prime minister. but these days they are talking about parliamentary system. As far as the Maoists are concerned they want presidential type of system

EC: in terms of the process in which decisions are made in the CA, can you tell me a little bit about that?

RT: actually in the CA the process is they have many things that were deliberated during the first CA, so many things are similar things were approved by the first constituent assembly. and secondly what ever were different, very minor issues they were sorted out through the CA political dialogue committee, but it could not come with conclusion regarding form of government and the form of the federalism, number of provinces you know and their jurisdiction. and the basis of creating provinces of the states, major issue! then only things like who will appoint judges of the supreme court, how many judges will be there. and also there are some issues about the number and size of parliament and the representation system directly elected or proportional, actually there will be two types of elections, first past the post and proportional representation- this is decided, but the number break down has not been decided

EC: did the way that decisions were made, has it changed at all between the first CA and the second CA?

RT: the process is similar the only thing is that in the first CA there were many committees, but in second there are few committees.

EC: is that because many decisions have already been made?

RT: yes yes yes

EC: so then in the first CA there were committees based on substantive issues…?

RT: yes

EC: and they came to agreements and brought them to the whole body to be voted on?

RT: yes

EC: was that system effective?

RT: good to distribute the job among the committees and then come to the full house, that’s good but sometimes there are overlapping areas between the two committees and that will be resolved by the full house and they have another committee to resolve those issues
EC: in your opinion what was the biggest issue that prevented the first CA from completing the task of the constitution?

RT: there are two types of issues: internal and external

internal issues are that the political parties have their own priorities, their own issues, their election manifestos and ideology

and maybe international influence

I can't blame any country but there are many interests, basically the interest coming from India, China, America, and European interests

EC: did they all have conflicting interests?

RT: they have their own agendas

EC: so I’m also wondering a little bit about what you see as the current problems in the 2nd CA and whether it will prevent January completion?

RT: I don't think there will be constitution by Jan. if they will be able to agree on draft constitution, it will be within 6 months

it can be but you cannot eliminate all process
2) you have less than one month time, even if they agree on the contentious issues, they need to deliberate it and adopt it, it is very limited time

EC: and then also one of the things I’ve come across in the literature is that when making new constitution, a lack of existing structures like lack of federal structure may have led CA to take longer time

RT: we have not idea about federalism, even if we talk about federal country but have not conducted in depth research about the federalism, they talk on a superficial level

EC: how is that being solved?

RT: once they sort out these things there will be many errors they will amend later. without amendment it will not be perfect. actually Nepal, like small country, it was not necessary to go to
federalism but now all political parties if you talk to mps personally they don't favor federalism but on party level they want it

in my opinion it wasn't the right choice also. federalism is very costly (expensive), employ more people

it is very difficult to build up structures, spend a lot of money to build secretariat, cabinet

federalism will fail in Nepal, federalism cannot be sustained- my personal opinion because of the cost it won’t be sustainable- if you make local government very strong that is enough. local government and central government, don’t need state government. give all the power to the local government

but nobody is very worried about local governance and without local governance you cannot have development, give as much power as you can give to the locals

EC: you think that’s what will end up happening?

RT: yeah

EC: also how do you think ethnic tensions within Nepal have played a role in the constitutional drafting process?

RT: yes this is major issue, actually now Nepali people are being more demanding, without considering the effect, actually the problem of ethnic minority was not like that as it was presented. Nepal for many centuries they live together with harmony but these days the harmonies are dividing

EC: do you think it is individual Nepalis that have created this or is it the fault of the parties?

RT: it is the political parties and international forces

EC: have ethnic tension played a role in discussions?

RT: so far to my mind European interests are about secularism. in Nepal majority are Hindu and they are now expanding a lot establishing churches (Europe) and it should not be like that. of course there should be religious freedom but we should not intervene. this is one of the areas, because of that there is fragmentation and many people are poor in Nepal, they can be easily bought. if offered $100… because they don’t have bread and butter, they exchange for religion
EC: is that happening a lot?

RT: yes a lot, if you just go to the statistics from last 10 years to now and the number of churches everywhere you will find churches. one of the Japanese girls I met last year in China I talked to her and said what do you do in Nepal? she use to speak Nepali, “my job is to convert Hindu to Christian” and I talked to her where you stay and she said M…. we are going to establish church, 12,000 churches… you should not be like that. Hinduism is very liberal, even I am Hindu, I do not worship, I don’t believe in any god…. ranting about that, hard to understand, Buddhists very liberal

EC: how do you think that conversion practice is affecting the political process?

RT: the minorities. they have failed to address minority issues, ethnic issues. the state should take into account those issues very seriously but it is not very big problem if you solve politically everything. deal with it after the constitution is finished

EC: and are they still focusing on this issue or have they let it pass?

RT: they are using this tool to drag it out not create consensus or something

EC: and which parties, is it the Maoist parties, are advocating the most for the rights of the minorities?

RT: I don't think that, they just want their own interests. they are using the minorities to further their own interests, they use. it is a political tool. they don’t believe in production, they believe in distribution only. without production how can you distribute? without your pocket size if it is small, how can you give bread and butter to the people. how can you create employment. you must go in a planned way, they don’t have plan. only they are using this poverty as a tool to support them.

EC: can you explain a little bit more in which ways they are using poverty and minority rights as a tool?

RT: they will provide so and so things free of cost, but they can’t

EC: using it to collect votes?

RT: yeah and the poor electoral people, they believe them. they don’t know. everyone is now selling poverty. if country economically prosperous it will develop some sort of economic agenda to empower the people. no there is no economy only politics.
now to democratize Nepal institutionally structurally you have to empower the people economically.

EC: in summary what would you say have been the biggest problems in preventing the CA from being able to finish the constitution?

RT: it’s the factional interest, of the political parties particularly of the leaders. and the leaders they don’t practice democratically. even they don’t hear the voices of the mps of the CA members. they decide themselves, unilaterally.

EC: can you elaborate?

RT: the problem of visionary leaders, they don’t think up how to move the Nepal in the coming days. practically, how to make Nepali people rich, educated, and employed major issues is you know education, employment and empowerment. it is about economics.

EC: so they are not thinking about economics?

RT: yeah

EC: yeah so that pretty much covers everything I had unless you can think of anything else about the process?

RT: yes the process is concerned there is no much difficulty about the process. the CA rules provides the process, how to make it, how to collect opinion, how to introduce into the full house, there is no problem about the process.

EC: so then the major issue is just with the political leaders?

RT: yes yes and their interests is to go to the power not to make the constitution.

EC: thank you so much, this was very helpful

RT: good luck, have a nice time

EC: can I use what you’ve said?

RT: yes yes yes that’s fine no problem.