Remarks at the CoCas National Conference
23 April 2007

The Constituent Assembly and the Constitution Making Process

Different methods have been used to enact a constitution. It was not uncommon for the monarch, in his or her sovereignty, to confer or impose a constitution on the people. Gradually, the monarch was forced by a rising class outside the privileged circle of the palace, to share this power with them. The doctrine of the sovereignty of the people came to the fore with the emergence of democracy, and it became accepted that the people themselves must make the constitution. Perhaps more accurately, one can say that this sovereignty of the people was generally exercised in their name by elites (as most clearly demonstrated by the manner in which the US constitution was drafted). In these instances the people’s sovereignty was expressed not so much in the manner of the drafting of the constitution, as in its ratification, through a referendum (though even that has not happened in all countries).

The principle of the sovereignty of the people was most completely manifested in the concept of a constituent assembly. The struggle for a constituent assembly, as in colonial India, symbolised the freedom that Indians wanted, an opportunity to make a constitution without interference by the British. This was of particular interest to Mahatma Gandhi, a late convert to the constituent assembly idea, who believed that Indians, gathered in all their multiplicity in the CA, would be able to resolve their problems of co-existence. Ironically the grant of a constituent assembly by the British, itself a paradox, at first came with many strings and constraints connected to communalism, and it was only after the declaration of partition that Indians were able to gain full control of their CA.

It is not surprising that the constitution making process is often characterised by controversy over the forum which will make it. It is therefore not without interest that in Nepal in 1990 the King, while acknowledging the sovereignty of the people, sought to be the giver of the constitution—and not only ceremonially. A constitution made by the monarch would reflect his or her power; this much is evident even in the 1990 constitution which had strong democratic impulses. Nor is it surprising that the Interim Constitution, made by eight political parties, without much transparency or consultation, places parties at the centre of power, some might say in a usurpation of democracy, yet in the name of democracy.

If the forum is important for the shape of the constitution, what are the prospects for Nepal? The most widely accepted principle of janaandolan is that a new constitution, heralding a new dawn, would be made by the people through a constituent assembly. Maoists had already made a constituent assembly a central feature of their reform agenda. The constituent assembly features in most agreements between the SPA and the Maoists. And the Interim Constitution has now given a road map to the constitution with the CA as its central feature.

It is not surprising, in view of its importance, that so much attention has been given to the mandate, composition and procedures of the CA. In particular the question of representation has become extremely controversial. Many feel that they are being
excluded from the CA. The promise of the CA being the gathering of the nation has been denied. They consider that the difficult questions of negotiating a new identity, defining Nayaa Nepal, and the relationship between communities and regions require a different form of representation than has so far been the case in Parliament. They say that the IC does not sufficiently recognise that the CA is different from parliament. Many communities want direct representation, not through traditional political parties that they consider have betrayed them in the past.

The question of representation becomes the more important because the IC does not define clearly the framework for the mandate of the CA. The IC itself incorporates numerous national principles, goals and aspirations, but these are not binding on the CA as constitutional principles. Should they be? Would pre-determined constitutional principles derogate from the sovereignty represented by the CA? On the other hand, if the goals of the janaandolan are not explicitly binding on the CA, what guarantee is that yet another janaadolan will not be hijacked?

Curiously the only explicit obligation on the CA is to restructure the state using federal principles, to bring an end to discrimination based on class, caste, language, sex, culture, religion and region. Unfortunately it is highly questionable whether a federation can really end these kinds of discrimination, particularly sex and class. Perhaps the better approach, more generally, would have been to oblige the CA to incorporate certain constitutional principles, reflecting the reform agenda of the janaandolan which are already reflected in the multi-party agreements and the IC, leaving it to the CA, through a process of research and negotiations, to work out how they would be given institutional expression in the new constitution. Then all outstanding issues would be submitted to the CA, and it would not have been necessary to negotiate them now, on a piecemeal basis, with the danger that they would have been dealt with even before the CA meets.

Let me conclude by saying that while the focus on the CA is understandable, it is important to locate the CA within the broader process for constitution making (of which this, and other meetings of this kind, are components). Unfortunately, the IC says little about this broader process. And yet, how well the CA can fulfil its mandate would depend greatly on programmes, activities, debates that take place before it is elected and meets. Nepal has a wonderful opportunity now to involve the people in discussions on how the agenda of the janaadolan should be given expression in the constitution, how seemingly opposed views can be harmonised or balanced, how new identities that are emerging in the wake of the collapse of the nationalist agenda of the 1990 constitution can be woven into Nepali nationalism. The legitimacy of the new constitution and people’s willing and capacity to participate in the future democratic structures of Nepal would depend greatly on how much the people are now able to become involved in the process.

The absence of any provision for this public involvement in the IC is not really an obstacle. Indeed it might be a blessing. People can define their own space and create opportunities for education, discussion and debates on the constitution, using opportunities that democracy offers. A truly democratic process would require that people in all parts of the country organise themselves into discussion groups, exchange and challenge ideas, and ensure that their views are taken seriously by the CA. The contribution that CoCas, along with other organisations, can make to this
engagement of the people is critical to the success of the CA and ultimately to democracy and social justice in Nepal. It has a well conceived programme to disseminate information about the process, has identified key issues that the CA must resolve, and it intends to give voice to the people and take their message to the CA. I wish it all success, for this work is a most significant part of a democratic and participatory constitution making process.

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