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Update on the Constituent Assembly

Recommendations

1. All political parties should adhere to the promises of consensus and cooperation among all political parties as stipulated in all past agreements.
2. Trust-building initiatives between all parties should be started to intervene in the cycle of mistrust and rebuild real consensus.
3. All political party leaders and all Constituent Assembly members should make public commitments to wide-spread and meaningful public consultations and debates. They should also commit to making public summaries of issues raised through the public consultations and the manner in which, and the reasons why, such concerns were or were not incorporated.
4. An independent and neutral committee of constitutional experts should be set up in order to facilitate the writing of the constitution.
5. Realistic deadlines for the transfer of power to sub-national units according to their capacity should be discussed in order to manage expectations. An expert commission should be established to facilitate implementation, including working with various departments of the existing and new governments to build capacity, prepare necessary legislation and build new fiscal mechanisms.
6. For international and national groups working to facilitate an inclusive and effective process of public consultation, coordination of interventions should be prioritized to avoid duplication and maximize coverage. Oversight mechanisms to ensure neutrality, competence and professionalism should exist.
7. All effort should be made in meeting deadlines and the timetables. However this should not be done at the cost of meaningful debates and participation.



Introduction

On 25 May, 2009, a year after the first meeting of the Constituent Assembly (CA), the constitution drafting process began with the submission of the first concept paper draft to the main CA body by the CA's National Interest Preservation Committee. Since then progress has been limited with five CA committees (four thematic committees and the Constitutional Committee) out of the eleven yet to finalize their concept paper drafts. Included among these are committees preparing concept paper drafts on themes which will form the foundation of the new Nepal – the Fundamental Rights and Directive Principles; Restructuring the State and Distribution of Power; and Determination of Form of Governance of the State. The weaknesses of not knowing the proposed structure of the government is evident in the already submitted drafts and renders many of them as only tentatively completed at best.

The turn away from consensus to confrontation in the political sphere following the withdrawal of the Unified Communist Party of Nepal (Maoist) (UCPN-M) from government, and the formation of a coalition government under the leadership of Communist Party of Nepal (Unified Marxist-Leninist) (CPN-UML)'s Madhav Kumar Nepal, is reflected in the constitution writing process. Drafts of committee papers with the accompanying votes of dissent reflect polarized politics and a clear division between the UCPN-M and the other large parties, the Nepali Congress (NC) and the CPN-UML.¹ At the basic level, there are two very different visions of the model of future Nepal being pushed forward: one based on a parliamentary democracy backed by the NC and

CPN-UML and the second based on socialist/communist models backed by the UCPN-M. The issue is further complicated by the fact that not only is there a lack of agreed vision on the nature of state restructuring to take place, but that also for the most part, there are divides and conflicts within each party – the control of which takes up the time of party leaders.

Meanwhile, on 9 September, 2009, the Business Advisory Committee (BAC) of the CA put forward the sixth amendment to the constitution writing calendar. With the new schedule, the drafts of the remaining committees will need to be submitted and discussed by 15 November. Importantly, the fifth amendment to the schedule on 17 July, 2009 had already reduced the time allocated for opinions and suggestions from the public on the completed draft of the constitution from two months to one month. While the sixth amendment has left this amount of time intact, it remains to be seen whether this will remain so in the future. Currently, following the discussion at the CA and the publication of the draft of statute in the Nepal Gazette, the public opinion collection drive on it is slated from 31 December, 2009 to 29 January, 2010.

An optimistic assumption is that the remaining five papers will all be submitted to the main CA body immediately after the Tihar holidays, namely after 21 October. With each paper requiring five days for discussion, it is likely that the newly formulated deadlines will again not be met, especially given that the most contentious issues will be covered in these remaining papers.² Furthermore, resolving key issues cannot be done without political consensus at the highest political levels.

¹ For a breakdown of votes and party perspectives, see Simkhada, Dhruva. 2009. *Bhinna matko chang*. Himal Khabarpatrika, 17 August, pp. 29-32.

² The Kathmandu Post. 2009. CA likely to miss deadline again. 18 October, p. 1.



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With the deadline of 28 May, 2010 approaching soon, questions of whether the constitution will be written on time have become more prominent. Importantly, the consequences of extending the deadline and what happens immediately after the new constitution is implemented, remain to be seriously thought through in terms of a potential governance gap, transitional structures, schedules for the handing over of power and overall management of expectations.

Confrontational Politics

The move away from cooperation was evident from the election of Madhav Kumar Nepal as Prime Minister on 23 May, 2009. While Nepal was elected unopposed, Maoist lawmakers boycotted the election and walked out of parliament.³ Three days following the submission of the first concept paper draft to the full CA body, the secretariat meeting of the UCPN-M decided to obstruct the House proceedings unless the major parties agreed to start a parliamentary debate on civilian supremacy over President Ram Baran Yadav's decision to reinstate the then Army Chief Rookmangud Katawal overriding the then Maoist government's decision. This deadlock was initially broken on 6 July, when CPN-UML led government agreed to find a middle path to address the Maoist demands on the President's move within a month following consultations with other parties.⁴ With the lapse of the deadline, the UCPN-M announced the obstruction of House proceedings from 7 August, 2009.⁵ Attempts to break the deadlock have failed, including an offer in late August by the

NC and the CPN-UML to support the Maoist candidate for the chairman of the Constitutional Committee (CC) vacated by Madhav Kumar Nepal if the Maoists ended the stalemate. The offer was rejected by the Maoists on the grounds that the political deadlock over issues of civilian supremacy and election of the CC head were not related.⁶

On 31 July, the UCPN-M central committee endorsed the political document tabled by chairman Pushpa Kamal Dahal 'Prachanda' for the strategy of the formation of a national consensus government for constitution drafting and the conclusion of the peace process.⁷ Concurrently, the decision was made to launch a people's movement to facilitate the formation of the national joint government, with a national gathering organizing committee formed under the leadership of Baburam Bhattarai to push forward the united national people's movement. UCPN-M protests for "civilian supremacy" with street-based activities and obstruction of the House continue.

Politics were further complicated during this period after Vice-President Parmananda Jha took his oath of office in Hindi on 23 July, 2008. The Supreme Court nullified the oath on 23 August, 2009 stating that the Interim Constitution, 2007 requires this to be done in Nepali. With Jha's refusal to retake the oath in Nepali, the post was deemed vacant.⁸ Amidst protests and debates, in an attempt to resolve the matter, Madhesi parties unsuccessfully requested the Maoists to suspend their obstruction of the legislature

³ Madhav Kumar Nepal is new PM. www.nepalnews.com/archive/2009/may/may23/news08.php

⁴ The Kathmandu Post. 2009. House back to business, finally. 7 July, p.1.

⁵ Nagarik. 2009. Samsad avarodh bholidekhi. 6 August, p. 2.

⁶ The Himalayan Times. 2009. PM sets condition for CC head. 27 August, p.1.

⁷ The Kathmandu Post. 2009. Maoist CC okays Dahal political document. 31 July, p.4.

⁸ Jha had stated that he would not abide by the Supreme Court verdict to take the oath in Nepali as it would insult the non Nepali-speaking people of Nepal. See Luitel, Ananta Raj. 2009. New statute must ensure linguistic rights of minorities. The Himalayan Times, 6 August, p. 9.



in order to pass the seventh amendment to the Interim Constitution, 2007, enabling the Vice-President to take the oath in Hindi.⁹

In-between, debates over how long the coalition government headed by PM Madhav Kumar Nepal will last continue, as do reassurances from the political parties of a move towards consensus.¹⁰ Importantly, the UCPN-Maoists have periodically indicated that only with a government under Maoist leadership will consensus and the writing of the constitution and the moving forward of the peace process be possible.¹¹

The Constitution Writing Process

While the process has been slow, important steps forward have taken place. This includes the formation on 28 May, 2009 of a 15 member Concept Paper and Preliminary Draft Proposal Study Committee to study the drafts and note issues left out, repetitions, overlaps, etc.¹² Furthermore, the election of Nilambar

Acharya on 28 August, 2009 as chair of the main Constitutional Committee enabled the re-starting of the work of the committee. Its work had halted following the election of its former head, Madhav Kumar Nepal, as PM in May.

Leadership and attendance deficit

As early as July 2009, chairperson of the CA Subhash Nembang had stated that the constitution writing exercise would be made more effective and beneficial if the leadership were to attend the CA sessions. This has not happened. Top political leaders continue to be absent from the CA committees. In early September 2009, a Nepali daily noted that the CA membership of top leaders – including Madhav Kumar Nepal, Girija Prasad Koirala, Pushpa Kamal Dahal, Baburam Bhattarai, Upendra Yadav and Jhlanath Khanal – will be annulled according to the Interim Constitution, 2007 as they have remained absent for ten consecutive meetings of the CA without notification.¹³ While warned several times before by CA head Subhash Nembang,¹⁴ it was only after the story became public that the leaders started putting official requests for leave.¹⁵

⁹ The Kathmandu Post. 2009. Maoist leaders tread on Madhesi parties' toes. 2 September, p. 4. Reports have stated that even if the Interim Constitution, 2007 was amended, it would lack retrospective power to legitimize the Vice-President's oath taking in Hindi, thus making it mandatory that the oath be taken in Nepali. The Kathmandu Post. 2009. Will 7th amendment resolve oath row? 2 September, p. 1.

¹⁰ As of 19 September, 2009 the NC has stated that it will continue to support the present government until a new constitution is written. Nepal Samacharpatra. 2009. Sambidhan nabandasamma sarkarlai Congressko samarthan. 20 September, p. 5.

¹¹ See, for example, UCPN-M chairman Pushpa Kamal Dahal's speech in which he said that those without the people's mandate cannot write a constitution. Kantipur. 2009. Maobadi sarkarma nagae sambidhan bandaina. 27 August, p. 8; and Pun 'Ananta', Barshaman. 2009. Samayama sambidhan: pura garnuparne chha shart. Himal Khabarpatrika, 1 September, p. 27.

¹² The Kathmandu Post. 2009. CA panel to give final shape to concept papers. 28 May, p. 4. With the appointment of the head of this committee, Laxman Lal Karna (Sadbhawana Party) as Minister without portfolio, Agni Kharel (CPN-UML) has been appointed as his replacement.

¹³ Pant, Khagendra. 2009. Antarim sambidhan, 2063 anusar Madhav, Prachanda, Girija, Jhlanath, Upendra ra Baburamko sambidhansabha sadasyata kharej hune. Naya Patrika. 1 September, pp. 1, 2.

¹⁴ Ibid.

¹⁵ Pant, Khagendra. 2009. Pad jogauna netaharule dina thale nivedan. Naya Patrika. 5 September, pp. 1,3. The legality of these initiatives is questionable but no action has been taken. Interestingly, reflecting the importance of the political will of leaders, the sub-committee of the BAC has recommended the removal of the CA membership of Matrika Yadav and Jagat Yadav, former Maoist leaders who have left the UCPN-M to form their own Maoist party, according to the rules of the CA regulations. The Kathmandu Post. 2009. Matrika, Jagat to lose CA berths. 7 October, p. 1.



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The issue of poor attendance has not been limited to the leaders alone. CA members and officials note that attendance at meetings has been low, with very few coming regularly.¹⁶ In interviews with civil servants working with one committee, they stated that most CA members only came to a few meetings, and all 43 CA members of that committee were never once in attendance.¹⁷ A member of one committee stated that some members only came to place their vote of dissent.¹⁸ The attendance record on the last day of the full CA discussion on the draft related to the structure of constitutional bodies revealed that only 158 out of the 601 CA members were present. Similarly, a report noted that on the 11 August, 2009 meeting of the CA in which the paper of the Committee on Determination of Nature of Legislative Bodies was to be discussed, out of 601 CA members, no more than 70 were present.¹⁹

Reasons given for the overall low turnout included: the need to attend party meetings, especially with the formation of the new government;²⁰ that CA members were generally too busy outside of the CA and the dual responsibility of CA members in the CA and legislature, which has purportedly even led to CA members walking out of discussions on drafts to attend to legislative concerns.²¹ All this, and the practice of attending only in the final stages of the drafts, has affected the quality and nature of the

discussions as well as the opportunity to learn and build consensus.²²

Controlling voices

The non-attendance of high-level political leaders and the official silence on the role of party whip within the CA regulations has not resulted in the absence of party control within the CA proceedings. While some CA members have publicly denied the use of the party whip to control CA members, others have stated that while not overt, party control exists.²³ Martin Chautari (MC)'s interviews with CA members have indicated that debates are occurring according to party lines and CA members are voting because of party pressure.²⁴ Political scientist Krishna Khanal has pointed out: if all members of a party put in a note of dissent, that means a party whip is in use.²⁵ It has been argued that party pressure has led to the lack of consensus in the committees.²⁶

Although meetings of the unofficial caucuses of women, dalits and janajatis are taking place, their impact has yet to be felt at the constitution writing level. Janajati leaders have been particularly critical of the manner in which janajati CA members have been reluctant to raise janajati issues, and even when doing so, adhere to party lines.²⁷ In terms of women,

¹⁶ Martin Chautari (MC) interviews; 23, 29 June and 10 July, 2009.

¹⁷ MC interviews; 21 July, 2009.

¹⁸ MC interview; 29 June, 2009.

¹⁹ Simkhada, Dhruva. 2009. Bhinna matko chang. Himal Khabarpatrika. 17 August, pp. 29-32.

²⁰ MC interview; 19 June, 2009; and Rijal, Ramesh (NC), chairperson of the Committee on Determination of Nature of Legislative Bodies on the radio program, Sajha Sawal. Produced by BBC World Service Trust, Nepal. 21 June, 2009.

²¹ MC interviews; 10 and 19 July, 2009.

²² MC interview; 3 July, 2009.

²³ See, for example, Himal Kharbarpatrika. 2009. Anubhav: sambidhansabhako ek barsha. 17 August, pp. 37-38; and Magar, Santa Gaha. 2009. Jati hoina dal. Himal Kharbarpatrika. 31 July, p. 58.

²⁴ MC interviews; 29 June, 5 July and 28 August, 2009.

²⁵ Mentioned in an interaction program 'Sambidhan nirman prakriyaka rajnitik bahasharu.' Organized by Martin Chautari, Banepa. 11 August, 2009.

²⁶ Simkhada, Dhruva. 2009. Bhinna matko chang. Himal Khabarpatrika. 17 August, p. 32.

²⁷ Magar, Santa Gaha. 2009. Jati hoina dal. Himal Khabarpatrika, 31 July, pp. 58-59.



an interview with a CA member was revealing: he claimed that while CPN-UML women in his sub-committee had wanted to back the UCPN-M proposal for 50 percent women in the legislature, party pressure resulted in their backing of only 33 percent.²⁸

The potential for the raising of independent voices, as noted before in MC's Policy Brief 1 (May 2009),²⁹ has been hampered by the privileging of the main political parties by the rules and regulations of the CA. This also applies in terms of the rules for the discussions of the draft papers. Generally, time for the discussion of the draft papers in the full CA has been allocated in the following manner for each paper: five days and six hours per day, for a total of 30 hours/1800 minutes. Importantly, discussion time is allocated according to the number of the party members in the CA. Consequently, for example, the UCPN-M with 238 members gets 712 minutes in total, with a daily time allotment of 142 minutes. The NC gets 341 minutes (114 CA members) and 68 minutes per day. The CPN-UML has 109 members, and gets 326 minutes, with 65 minutes per day. The least amount of time is consequently allocated for the minor parties and independent candidates; members of six parties and two independent candidates have a total of three minutes each to speak on any one of the five days allocated for discussing the paper. Furthermore, as one dalit activist stated, the practice of signing up to talk during the allocated time periods is irrelevant as "big leaders" will be bumped up regardless of when they sign up. Thus invariably dalit and other marginalized CA members will find that no time is left over for them to speak.³⁰

²⁸ MC interview; 6 September, 2009.

²⁹ Available at www.martinchautari.org.np/pdf/policy-brief_no.1_may2009.pdf

³⁰ MC interview; 23 August, 2009.

CA Papers and Issues

The following six committees have submitted their papers to the full CA body: Committee on Preservation of National Interest; Committee on Protection of Rights of Minorities and Marginalized Communities; Committee on Determination of Cultural and Social Solidarity; Committee on Determination of Structure of Constitutional Bodies; Committee on Determination of Nature of Legislative Bodies; and Committee on Judicial System. Given space constraints and the incomplete nature of many of the drafts – especially with their dependence on the final forms of the papers from the Committee on Restructuring the State and Distribution of Power and Committee on Determination of Form of Governance of the State – only the major contours and debates are given below.

Much of the debate so far has centered around terminology and definitions which, as some CA members have pointed out, has resulted in a lack of time to seriously delve into other issues more related to peoples' concerns.³¹ This is especially evident in the earlier papers where much time was taken up by debates over "Peoples' War" or "armed conflict" and other similar terminological issues. Apparent here is not only the very different ideological orientations, but increasing inflexibility between the UCPN-M and the NC and CPN-UML. This is illustrated by the first paper on National Interest.

The Committee on Preservation of National Interest had the responsibility to define issues of national interests, sovereignty, international relations and treaties and national security. Contours of the submitted paper draft include: international relations to be built on commitment to UN Charter; pursuing

³¹ Adhikari, Rabindra. 2009. Hamile kamai nagareko chahi hoina. *Himal Khabarpatrika*. 16 July, p. 35; and MC interview; 6 July, 2009.



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a policy of managing international borders in a scientific manner; following a policy with both neighbouring countries on the basis of equality and the authority of deciding Nepal's foreign policy and signing treaties to lie with the central government.

As hinted above, much time in this committee was spent in the debate over whether to use the term "People's Liberation Army" (PLA) or "Maoist combatants." According to the UCPN-M, because Nepalis had fought a revolution for Nepalis, the term PLA should be used. Those against the motion argued that the language of the peace agreement should be retained. The divide between the UCPN-M and other parties was also evident in the debates over the issue of whether to make military training compulsory for those above the age of 18 as proposed by the former. Voting resulted in the decision to use "Maoists combatants" and make military training optional. Other issues raised included identity papers for those travelling across the border to India and erecting barbed wire on the border.³²

The Committee on Protection of Rights of Minorities and Marginalized Communities had the task of defining and protecting the rights of minorities and marginalized communities as well as finding options for integration in state structures. Recommendations included the establishment of a language commission, the need to secure the right to education and language and culture and the need for protection and anti-discriminatory clauses. It was also recommended that the official language be Nepali, with communication between the center and the provinces to be in either Nepali or the language of that province (once approved by the language commission). Within the provinces, the official

language can be chosen from one or more of the languages spoken by the majority of the people.

Starting from the title of the committee, debates centered on definitions of minorities, marginalized, endangered, extremely marginalized, indigenous, "special rights," or "special arrangements," etc. The Nepal Federation of Indigenous Nationalities (NEFIN) has submitted a paper to the committee which stated among other things that basic issues of janajatis were not included, such as right to self-determination, compensation and right over land and natural resources, and that the definitions used were not acceptable – including the separating of adivasi and janajati, and the use of "minority" and "marginalized."³³ Arguing that it had initially suggested separate committees for janajatis, women, dalits, madhesis given their different historical contexts, issues and demands, in all, NEFIN has claimed that the committee as set up had not solved but increased problems.³⁴

The Committee on Determination of Cultural and Social Solidarity was responsible for deciding the working language of government in the various offices and levels of the federation, the protection of national languages and cultures, bases of social unity and other related issues. Recommendations included right to language, culture, education, all languages spoken as mother tongues to be national languages and Nepali as the official language.

The main debates were raised by the Madhesi parties and the UCPN-M. The issue of terminology was raised again over "armed conflict" or "People's War." The Maoists stressed that they had played the main role in the cultural change, but were defeated in the vote 19 to 31, and the term "armed conflict" was

³² On the latter, arguments that such proposals would require the revision of the 1950 treaty with India, resulted in the dropping of the issues. MC interview; 23 June, 2009.

³³ The paper is available at www.nefin.org.np/news—update/news/451-2009-06-24-15-31-21

³⁴ MC interview with NEFIN member; 21 July, 2009.



retained. Another debate focused on the use of Hindi along with Nepali as an official language in the new constitution. This was proposed by the Madhesi People's Rights Forum (MPRF), Tarai Madhes Democratic Party (TMDP), Sadbhawana Party and an NC member. Meanwhile UCPN-M CA members argued that there not be any one stipulated national language, but many. More specifically, they had said that the 12 languages spoken by over one percent of the population should be recognized as official languages – with no restriction to be used in terms of office use.³⁵ Much debate also occurred around education in the mother tongue; while primary education had been included in the paper, education in the mother tongue up to the university level had also been a demand as had the issue of affirmative action to keep social unity.

The Committee on Determination of Structure of Constitutional Bodies was charged with figuring out the types of constitutional bodies needed, their establishment protocols, and work and duties. They recommended the creation of the following 11 commissions: Commission for Investigation of Abuse of Authority; Audit; Public Service; Election; Human Rights; Women; Dalit; Adivasi/Janajati; for the protection of the rights of people with disabilities, minority and marginalized communities and people of backward regions; Madhesi and Muslim. The constitutional council is to make recommendations for members for these commissions based on proportional representation and inclusion, with terms running for six years, with one additional term possible. While termed as “federal” commissions, few details of what this actually means have been provided, given that core structural features of the new state have yet to be decided. However, some differentiations

have been made. For example it is stated that for the Adivasi/Janajati and Muslim Commission regional provisions will be as determined by law. However regional offices are to be established for the Commission for Investigation of Abuse of Authority and the Human Rights Commission.

Issues raised over this draft included calling the commissions, national, as opposed to federal. Overall however, debates have arisen over the number of commissions with arguments for both more and less. For example, UCPN-M lawmaker Nanda Kumar Prasain stated that just increasing the number of commissions was insufficient given that existing commissions were themselves not working. Furthermore, he stated that there was a need for important commissions like a natural resources commission and a border commission.³⁶ Interviewed civil servants stated that there had initially been suggestions for over 100 constitutional committees, the number dropped to 19 after discussions and then finally to 11.³⁷ Civil servants noted that all sorts of proposals had come in – including a commission for love. They criticized the committee for its inability to differentiate between types of commissions to be established (constitutional, legal, and those for shorter periods of time with specific goals) and the overall failure to put forward clear definitions and rationale for the choices made.³⁸

The Committee on Determination of Nature of Legislative Bodies was responsible for deciding the form and modalities of legislative organs in the center

³⁵ The Kathmandu Post; 2009. Maoists for recognition of 12 official languages. 26 June, p. 4.

³⁶ The Rising Nepal. 2009. House continues deliberations on constitutional bodies. 20 July, p.1.

³⁷ MC interviews; 19 July, 2009. The number of proposed commissions has increased during the deliberations over the draft, with a prepared list of 53 new commissions. See Bhusal, Thira L. 2009. Panel in fix over number of statutory bodies. *República*, 6 October, p. 1.

³⁸ MC interviews; 30 July, 2009.



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and the provinces, the relations between them, and their terms of reference. The committee finalized a bi-cameral parliament, consisting of two houses: the House of Representatives and the National Assembly. The House of Representatives would have 151 members, while the National Assembly would have 51. In terms of electoral systems, a 50 percent first-past-the-post (FPTP) and 50 percent proportional representational (PR) system has been recommended. There are to be 76 election constituencies and candidates from excluded groups are to be proportionally represented, with 33 percent women to be in the House of Representatives. In the National Assembly of 51, 38 are to be directly elected while 13 are to be nominated by the House of Representatives. The legislative of the province, the Provincial Assembly, is to be uni-cameral with the number of members to be based on population, but not to exceed 35. 18 are to be directly elected, with 17 to be elected via proportional election. As noted above, the numbers stated are preliminary again due to the fact that these will be affected by the drafts from the Committee on Restructuring the State and Distribution of Power and Committee on Determination of Form of Governance of the State.

However, the UCPN-M has registered a note of dissent and put forward a uni-cameral setup³⁹ with a 245 member house with representatives based on proportional representation according to population and geography, a multi-member constituency electoral system and 50 percent representation of women. It has also stipulated a voting age of 16, compared to 18 passed by the committee. According to a UCPN-M CA member on the committee, two houses would be too expensive for a country like Nepal and one house would be the best form from which to remove discrimination against oppressed classes and gender.

³⁹ In its CA election manifesto, the UCPN-M had favored a bi-cameral structure. This uni-cameral structure is envisioned with a President as head.

Furthermore, the choice of electoral system was influenced by the Maoist view that with the current mixed system, those elected via the FPTP system were more highly regarded than those coming through via the PR system. The multi-member constituency electoral system would eliminate this hierarchy.⁴⁰

The Committee on Judicial System was responsible for forming the base of the judiciary, shape and working areas, the appointment, removal, service and other issues of judges and the chief justice etc. This committee has become the most controversial, in so far as it passed Maoist proposals. This includes that the parliament should be the final authority in interpreting the constitution on political issues; anyone who has qualifications can be appointed chief justice; and the appointment and dismissal of judges can be done from the legislature. There are to be three levels of courts – federal supreme court, state high court, and local court. The NC and CPN-UML were in the minority with their proposals which included: the chief justice to be appointed from among the supreme court judges; a judicial council to appoint the judges and a federal supreme court to interpret the constitution and the law.⁴¹

There has been much criticism leveled at this draft, foremostly focused on the issue of the independence of the judiciary.⁴² The Nepal Bar Association has been most vocal,⁴³ with commentators noting that control of the judiciary by the legislature means the political control of the judiciary.⁴⁴ A majority of CA members are reported to be against the proposed visions on

⁴⁰ MC interview; 6 September, 2009.

⁴¹ The Kathmandu Post. 2009. CA panel votes to pick judges from parliament, p. 1. Out of the 42 committee members, 23 voted for appointment of judges from parliament while 19 voted for appointment from a judicial council.

⁴² Bhattarai, Tikaram. Kantipur. 2009. Swatantra nyayapalikako pakshyama. 1 September, p. 6.

⁴³ República. 2009. Bar slams CA panel's proposal on judiciary; threatens street protest. 2 September, p. 1.

⁴⁴ MC interview; 6 October 2009.



the basis that it would invite a “totalitarian regime.”⁴⁵ However, the Maoist chair of the Committee on Judicial System Prabhu Sah has stressed that this is based on study and not only will this make justice more accessible, neutral and open to all, the institution itself will also be more inclusive especially given the clause of the re-appointment of judges in this interim period.⁴⁶

Debates and Issues yet to Come

The following committees are yet to submit papers: Committee on Fundamental Rights and Directive Principles; Committee on Restructuring the State and Distribution of Power; Committee on Determination of Form of Governance of the State; Committee on Distribution of Natural Resources, Financial Rights and Public Revenue; and the Constitutional Committee.

Given the important defining nature of these remaining papers, it is unsurprising that controversy and debates have already surfaced. For example, the UCPN-M has proposed a federal state with a three-tier system – central, provincial and local – with 13 autonomous provinces based on ethnicity and regions.⁴⁷ The CPN-UML has proposed 15 ethnic provinces, with autonomous zones within the

provinces.⁴⁸ Despite missing two deadlines set by the state restructuring committee, the Nepali Congress is yet to submit its proposal. The Madhesi parties have now proposed a Madhes province along with sub-provinces, following the wide opposition to their “one Madhes, one province” claim. However, the number of sub-provinces is not clear.⁴⁹

Furthermore, the yet to be finalized preliminary draft from the CA Committee on Fundamental Rights and Directive Principles has also come under scrutiny for being ambiguous. Issues include: the directive principles being ambiguous; a lack of clarity on fundamental rights, some fundamental rights subject to restriction, potential jeopardization of press freedom⁵⁰ and the guarantee of things that are undeliverable.⁵¹ Meanwhile on 18 September the CA Committee on Distribution of Natural Resources, Financial Rights and Public Revenue endorsed the decision that the federal state has the authority to acquire land above the ceiling on the basis of law without any compensation.⁵² This has come under severe criticism publicly, and 22 non-Maoist members of the committee have registered different proposals.⁵³

⁴⁵ The Himalayan Times. 2009. Lawmakers against judiciary revamp. 14 September, p. 1.

⁴⁶ Prabhu Sah. 2009. Naya Nepal ko nyayapranali. Gorkhapatra. 8 October, p. 6.

⁴⁷ Of the 13, three are region based – Seti-Mahakali, Bheri-Karnali and Madhes. The remaining ten are ethnicity based and are as follows: Tharuwan, Magarat, Tamuwan, Tamsaling, Newa, Kirant, Limbuwan, Kochila, Sherpa, Bhote/Lama. In its CA election manifesto the UCPN-M had proposed 11 provinces. Reflecting the internal conflicts prominent in each of the main parties, Maoists of the far-western region have expressed dissatisfaction over the UCPN-M proposal to include Kailali and Kanchanpur in the Tharuwan province. Kantipur. 2009. Sanghiya bivajanbare maobadi bhitra bibad. 4 October, p. 5.

⁴⁸ Kantipur. 2009. Emaleka 15 pradesh. 16 September, p. 1. The provinces are as follows: Limbuwan, Kirant, Birat, Mithila, Bhojpur, Sunkoshi, Tamsaling, Newa, Tamuwan, Magarat, Gandaki, Lumbini, Tharuhat, Khaptad and Karnali.

⁴⁹ Kantipur. 2009. Madhesvadi dal uparajya prati sakaratmak. 20 September, p. 2.

⁵⁰ Journalists are unhappy with the preliminary draft on freedom of expression and press – they want it under fundamental rights as un-amendable and inalienable rights. Gorkhapatra. 2009. Parambhik masyaudapraati patrakharharuko asahamati. 27 July, p. 4.

⁵¹ The Kathmandu Post. 2009. Revise draft on basic rights, experts tell CA. 9 September, p. 1.

⁵² The Kathmandu Post. 2009. CA panel okays land reform amid serious controversy. 19 September, p. 2.

⁵³ The Himalayan Times. 2009. Property ceiling clause comes under fire. 21 September, p. 3.



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CA members of the Madhesi parties state that this is a strategy to seize property from Tarai and have put forward the proposal that the right to land reforms should be delegated to the provincial government.⁵⁴ And the Committee on Restructuring the State and Distribution of Power has decided to give full autonomy to the provinces except for secession. This contradicts the decision made by the Committee on Distribution of Natural Resources, Financial Rights and Public Revenue which had stated that the central government would raise income tax, value added tax (VAT), etc.⁵⁵

On the procedural side, the Public Opinion Collection and Coordination Committee has submitted a draft action plan to the CA chairman on 17 July, 2009.⁵⁶ The plan is to give each household a copy of the draft constitution. 75 teams will be formed and each CA member will go to one district (as opposed to the two in the previous outreach program), staying there from 25 to 30 days. The questionnaires are to be distributed to each house 15 days in advance, facilitated by an all party team formed under the chief district officer (CDO). However, no mechanism has yet been put in place to check on whether each household receives the draft constitution, and an official admitted that it will be “a little difficult” to submit the questionnaires within a month. Furthermore, the draft action plan is yet to be discussed, let alone approved by the CA.

Conclusion

The fear that the UCPN-M is modeling the constitution according to those of North Korea, China, Cuba and other communist states has been widely expressed.⁵⁷ Apart from its proposals within the CA, public pronouncements by its leaders have been clear: in early September 2009, UCPN-M vice-chairman Narayankaji Shrestha reiterated that his party did not accept the parliamentary system⁵⁸ while senior vice-chairman Mohan Baidhya ‘Kiran’ stated “Parliamentary democracy is merely the platform for people to chat... We won’t accept the system and will write the constitution to establish the people’s federal republic instead.”⁵⁹ The predominant focus on this theme has served to occlude two crucial issues.

First is that for the new Nepal, all state structures and laws need to be widely questioned and debated. Old institutions have not functioned, and the questioning of why and how, can only lead to a better understanding of what changes are necessary. For example, on the above mentioned controversial proposals on the judiciary, a civil servant appointed to the committee has pointed out that the judicial council has never functioned well, and the appointments have always been political. However, as opposed to the UCPN-M proposals, he pointed out that the appointment criteria could be made stronger.⁶⁰ Madhesi support of the Maoist proposal on the judiciary should also be understood as a critique of the judiciary as it currently functions, as

⁵⁴ Kantipur. 2009. Hadbandi viruddha madhesvadi dal. 22 September, p. 2.

⁵⁵ Nagarik. 2009. Srot ra rajaswa badphad ‘swayatta pradesh viparit’. 16 September, p. 2.

⁵⁶ MC interview; 13 September, 2009. The following is based on this interview with an official with the Public Opinion Collection and Coordination Committee.

⁵⁷ See, for example, Simkhada, Dhruva. 2009. Bhinna matko chang. Himal Khabarpatrika, 17 August, p. 30.

⁵⁸ The Kathmandu Post. 2009. No to parliamentary system. 11 September, p. 4.

⁵⁹ The Himalayan Times. 2009. Parliamentary system not acceptable to UCPN-M: Kiran. 13 September, p. 2.

⁶⁰ MC interview; 11 September, 2009.



argued by Professor Krishna Khanal; previous experience, including the verdict over the Vice-President's oath-taking in Hindi, has only made them more wary of the role of the judiciary as it exists in this form.⁶¹

Similarly, a debate on the role of the President is necessary. In the interim constitution, the President is, for all intents and purposes, slotted in as a replacement for the ousted monarchy. Alongside whether the President as head of state is subject to supreme court orders or has some kind of immunity exemption (an issue raised by the Vice-President debate), there is a real need to define and limit the role of the President. This is especially so given the current ambiguous clauses on the extension of the CA tenure. As journalist Prashant Jha has pointed out, the Interim Constitution, 2007 is unclear as to whether the six month extension can only be declared in the event of a formal declaration of a state of emergency, and what exactly this means for the role of the President. Given the political quagmire that would necessitate such a move in the first place and given the existence of forces who would want the President to take extra-constitutional steps in the name of establishing political order, the need for clear definitions and rules for the President is urgent.⁶²

The second issue that has been occluded by the polarized politics and the focus of the debates on communist plans for the state, has been the important

issue of implementation planning. For example, if the current 28 May, 2010 deadline is met, it is unclear what will happen the day after the constitution comes into effect. There is a dangerous vacuum in planning for interim structures and a consequent potential for a governance gap. The high-level Commission for State Restructuring could have played this role, but it is understaffed and its role ill-defined; its chairperson has recently stated that the commission has no significance given that the CA Committee on Restructuring the State and Distribution of Power has already started functioning.⁶³ Furthermore, unrealistic expectations currently are the norm. For example, the concept paper from the Committee on Judicial System has stated that three months after the new constitution has been implemented, judges at all levels of the court will be re-appointed.

Missing in current debates both within the CA and outside are time frames and structures necessary to implement the new constitution. Given the experiences of other countries, constitutional expert Yash Ghai has suggested a phased transfer – with perhaps a ten-year plan – that will enable the transfer of power to sub-national units according to their capacity. Ghai has also suggested the establishment of an expert commission to facilitate the implementation of federal components of the constitution. This would entail working with various departments of the existing and new governments to build capacity, prepare necessary legislation and build new fiscal mechanisms.⁶⁴

To conclude, clearly the process within the CA so far has not proceeded according to the initial plans of

⁶¹ Khanal, Krishna. 2009. Phaisalale uthaeka prasna. *Nagarik*. 20 August, p. 6. Khanal argues that no-where is it written in the Interim Constitution, 2007 that the oath for President or Vice-President needs to be in Nepali. The latter understanding stems from the fact that Nepali is the official language of state business and that the text of the oath included in the Interim Constitution, 2007 as part of its fourth amendment done on 28 May 2008 is given in Nepali. Given the legitimacy given to the written form in Nepal, and the fact that Jha had actually signed in Nepali, the Supreme Court did have the option of resolving the issue, but it chose not to.

⁶² Jha, Prashant. 2009. Constitutional May day. *Nepali Times*, 18 September, p. 2.

⁶³ *Nagarik*. 2009. *Rajya punarsamrachana ayog asandarbhik*. 4 August, p. 2.

⁶⁴ Ghai, Yash and Jill Cottrell, eds. 2008. *Federalism and State Restructuring in Nepal: The Challenge for the Constituent Assembly*. Report of a conference organized by the Constitutional Advisory Support Unit, UNDP. Kathmandu: UNDP, p. 54.



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sustained deliberation, a culture of multi party consultation and cooperation and widespread, free and open discussion on and by, excluded groups. Apart from party control, the issue of the capacity of CA members has been raised by various sources,⁶⁵ with a CA member himself confessing that he was not really aware of what he was doing.⁶⁶ A secretariat official stated that most CA members were not sufficiently aware of issues related to the constitution and that the capacity building and resource establishment committee trainings had not been effective – grousing that at the very least they should be aware of the subject and working areas of their own committees.⁶⁷ Secretariat officials argued that if a separate group of experts had been formed, it would have been helpful for secretariat officials as well who were confused. Indeed, they were still unsure of what and how work was to be done in the future, which was why work has been so ad hoc.⁶⁸ While other countries have established a permanent committee of experts to assist in the constitution writing process, Nepal has chosen not to. Such a committee would facilitate writing with a full understanding of the weaknesses and strengths of the old constitution as well as the ramification of the articles and clauses of the new constitution being put forward by the CA.

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⁶⁵ MC interviews; 5 July and 19 July, 2009.

⁶⁶ MC interview; 7 July, 2009.

⁶⁷ MC interview; 10 July, 2009.

⁶⁸ MC interviews; 10 July, 2009.