



**Policy Brief: 02 October 2015**

## **Nepal's Contested Constitution and Recommendations For Moving Forward**

### **1. Introduction**

Despite significant protests and unrest, Nepal's Constituent Assembly (CA) promulgated the country's new constitution on September 20 by a two-thirds majority. Over 40 people have died in protests against the terms of the constitution and the movement of vehicles and goods has now come to a halt in many parts of the country. Concerns about the situation have been raised by the international community: the International Crisis Group released a conflict alert on September 2 highlighting the escalating situation<sup>1</sup>, and on September 30, the New York Times Editorial Board weighed in on the situation concerned that the constitution-drafting opportunity is likely to be squandered without grievances of protesting groups being addressed.<sup>2</sup> And all signs point towards continued unrest until leaders make concerted effort to address the demands of those who were excluded.

DRCN strongly recommends that immediate steps be taken to create an environment favorable for all the protesting parties to enter a peaceful dialogue with the government, where trust can be rebuilt and consensus reached on how to move forward.

This brief provides background and analysis on the events surrounding the draft of Nepal's new constitution, and promulgation of that draft. It includes findings of DRCN's fieldwork during this period of time, and concludes with recommendations for reconciling the situation.

### **2. Background**

#### **January 2015 constitution-drafting deadline**

Democracy Resource Center Nepal (DRCN) observed mobilizations in the Mid- and Far-West around the political commitment to promulgate the new constitution on January 22, 2015.<sup>3</sup> During this period, the main hurdle to drafting the new constitution were differences between the ruling coalition of Nepali Congress (NC) and Communist Party of Nepal–Unified Marxist-Leninist (CPN-UML or UML) and the opposition parties led by the Unified

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<sup>1</sup> International Crisis Group, 2 September 2015, *Nepal: Conflict Alert*. Kathmandu/Brussels: <http://www.crisisgroup.org/en/publication-type/alerts/2015/nepal-conflict-alert.aspx>

<sup>2</sup> [http://www.nytimes.com/2015/10/01/opinion/slipping-backward-in-nepal.html?\\_r=0](http://www.nytimes.com/2015/10/01/opinion/slipping-backward-in-nepal.html?_r=0)

<sup>3</sup> Democracy Resource Center, 2015, Political Update: Political situation and mobilizations around the January 22, 2015 political commitment to promulgate the constitution. Kathmandu: March 2015. <https://DRCNnepal.files.wordpress.com/2015/02/political-update-march-2015.pdf>

Communist Party of Nepal (Maoist) (UCPN(M)) over certain key issues – such as delineation and names of federal provinces and the form of governance – as well as over how the constitution should be finalized. NC and UML wanted the constitution to be approved by a two-thirds majority through voting while the opposition demanded that the constitution be approved through ‘wide political consensus’.

Despite such major disagreements, there were few street protests in early 2015. DRCN findings from this period indicate that people in the districts visited, including political leaders, were still hopeful that differences would be resolved through the CA as both groups in favor and against identity-based federalism felt represented by the mainstream political parties in the CA and decisions did not appear imminent, with negotiations on how to resolve different positions still ongoing. However, there were strong indications that protests and identity-based activities could escalate rapidly in reaction to “a trigger in which a decision is made, or appears imminent, that could produce perceived (or actual) winners and losers”, especially in the eastern and far-western Tarai; areas with overlapping claims for identity-based federal states. A senior Madhesi leader admitted in January 2015 that “Madhesi people's disillusionment with the state would eventually translate into a strong movement, especially if the constitution is passed by majority vote in the CA.” These findings led DRCN's assessment that “a constitution passed without broader consensus is unlikely to be accepted by the opposition and will deepen polarization; it will also give more space and strength to radical voices.”

### **Post-earthquake political developments**

After the devastating April 25 and May 12 earthquakes, Nepal's three largest political parties were able to forge the consensus needed to complete a draft of the long-awaited constitution on June 30 through what has become known as the ‘fast-track process’.<sup>4</sup> The major development facilitating this consensus was the 16-point agreement of June 8<sup>5</sup> when long-standing opposition party UCPN(M) joined the coalition of the two biggest parties, NC and UML, ensuring the comfortable two-thirds majority in the CA needed to approve the constitution. The Madhesi Janaadhikar Forum–Democratic (MJF-D) - the fifth largest party in the CA, and the largest representing the Madhesi community - was originally also brought into the process but rapidly withdrew support when the terms of the deal were not met in the draft constitution. The draft constitution did not include the delineation and names of federal provinces which were to be decided later by a special commission despite a June 19 Supreme Court ruling that this was in violation of Article 138 of the Interim Constitution.

The agreement between the three major political parties led to the erosion of trust in UCPN(M) especially from marginalized groups, UCPN(M)'s usual political base including the Madhesi. It became increasingly clear that UCPN(M) no longer had the influence to carry on

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<sup>4</sup> The parties finalized the constitution through a so-called ‘fast track process’, a term used by the major four parties to indicate that they adopted the shortest possible process to promulgate the constitution. This included two-day public consultations to collect and incorporate suggestions from the public in the final draft. The Prime Minister even used the term ‘double fast track’ to say that the process of constitution-making would be duly shortened. See: <http://www.ekantipur.com/2015/06/18/top-story/new-constitution-through-double-fast-track-pm/406735.html> (accessed on July 25, 2015).

<sup>5</sup> The 16-point agreement was an attempt to resolve the differences on several key constitutional issues. The positions of the four major parties of the CA differed with regards to the delineation and names of federal provinces and the form of government. UCPN(M) agreed to take forward the process of drafting the constitution registering its difference on form of government, but agreeing to carve out eight provinces and form a commission with a six-month tenure to delineate the provinces and name them. See draft of 16-point agreement from June 8, 2015: [http://www.satp.org/satporgtp/countries/nepal/document/papers/16-point\\_Agreement.htm](http://www.satp.org/satporgtp/countries/nepal/document/papers/16-point_Agreement.htm) (accessed on July 25, 2015).

their agendas of change, decentralization and the better inclusion of marginalized groups, and was keen to make use of the opportunity the post-earthquake political landscape provided them to join the national leadership. With the support of UCPN(M), NC and UML could form a majority government, and UCPN(M) was able to gain much needed political momentum, having spent the years after the second CA elections on the defense, struggling for political relevance.

In reaction to these developments and the draft constitution, Samyukta Loktantrik Madhesi (SLMM) and other ethnic and minority parties staged large protests across the country. Their position has been that the new constitution fails to address the concerns of historically marginalized groups and to facilitate their wider representation in state structures and the government, and should provide details on federal provinces.

### **3. Contested Constitution**

#### **The draft constitution and public consultations**

The draft constitution was sent for hastily planned 'public consultations' starting 20 July amid increasing polarization between the major ruling parties and the protesting parties – most notably the Samyukta Loktantrik Madhesi Morcha (SLMM) in the Madhesh. Nationwide protests began and have continued since, eventually leading to deaths of more than forty people including at least eight security personnel.

A team of DRCN analysts observed the 'public consultations' and protests in eight districts in the eastern and central Terai between 19 and 28 July. The DRCN team found that the public consultations brought mixed and divided responses: the draft constitution was met with strong oppositions from citizens, in particular among historically marginalized groups including Madhesi, Janajatis and women; while people loyal to the major political parties generally welcomed the draft with expectations that “genuine remaining demands and shortcomings” would be addressed and incorporated in the final draft in due time. Opposition to the draft mainly came on ground of the unclear delineation and naming of federal provinces; lack of equality for women in being able to pass on citizenship by descent; and lack of comprehensive inclusion and proportional representation in the three tiers of federation – federal, provincial, and local levels. Opinions were also divided on the topic of electoral constituency delimitation of federal legislature and secularism. These issues remain contested today (see below).

DRCN found widespread concerns raised by large numbers of people in the districts visited indicating that the constitution would not be accepted by many, especially in the Madhesh. The findings, however, stood in contrast to the leading rhetoric – of the major political party leaders and mainstream media – that the overwhelming majority of Nepali citizen enthusiastically welcome the draft constitution.

#### **Protests against the delineation of federal provinces**

In late July, protests against the constitution centered on the absence of delineation and names of federal provinces in the draft constitution. Following this, the three major political parties decided on a six-province model. This however was also widely contested. In reaction to the six-province model, protests erupted in several mid-western and far-western hill districts resisting the division of existing districts and development regions in a

future federal set-up instead demanding *akhanda*, undivided, regions. Responding to these protests, the major political parties then decided on a seven-province model. This in turn caused protests across Terai districts, especially in Kailali, rejecting the seven-province plan.

According to protesting Madhesi and Tharu groups the proposed demarcation “failed to incorporate past agreements” on the need to respect the independent identity of indigenous groups, Madhesi, Dalits, Muslims and other minorities, and to ensure their inclusion in the state mechanism on the basis of proportional representation. Tharu groups have maintained that the state had selectively addressed the grievances of hill people for undivided regions while ignoring their demand for a separate Tharu state.

### **Promulgation of the constitution and ongoing protests**

Voting concluded in the CA on September 15 with more than 80% of the CA members approving the new constitution which was promulgated by the president on September 20 amid celebrations inside and outside the CA in Kathmandu and ongoing protests and imposed prohibitory orders and curfews in the Terai.<sup>6</sup> Protesters have since continued to raise opposition against the new constitution for failing to address their concerns and demands.

Upon closer reading of the new constitution, most of the changes to the draft seem to be done by the way of appeasing dissenting forces rather than an attempt to address genuine grievances which continue to be raised by protesters against the delineation of federal provinces as well as other constitutional provisions. For example:

#### *Secularism:*

In the draft constitution, secularism was included in the definition of the state, but by the time of the public consultations, pro-Hindu and pro-monarchy forces led by the Rastriya Prajatantra Party-Nepal (RPP-N) – the fourth largest party in the CA – had rallied support for a Hindu Nation and against a secular state. RPP-N even quit the CA a week before the final promulgation. They were eventually brought back to the process just in time of the voting. As a consequence of RPP-N’s protests, ‘secularism’ was retained in the new constitution but an explanatory note: “Secularism shall mean the protection of ancient religions and cultures, along with religious and cultural freedoms”.<sup>7</sup>

#### *Citizenship:*

Similar complexity has been included in the provision of citizenship rights – an issue that had already been highly controversial and fiercely contested months before the draft constitution was released. Changes to the provision of citizenship by descent as it was framed in the interim constitution were rejected by advocates and women rights activists. The interim constitution of 2007 allowed for citizenship of descent to be passed on through either the father *or* the mother. The first draft of the new constitution changed the provision of *or* to *and*, meaning both father and mother had to be Nepali citizens to pass citizenship by descent. The final draft now includes the provision of citizenship through father *or* mother,

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<sup>6</sup> There was a four-day break between the approval of the CA on 15 September and the promulgation on 20 September to allow for negotiations with the MJF-D, led by Bijay Gachhadar. MJF-D had opted out of the process around one week earlier – being the last of the Terai parties represented in the assembly – in light of the scale of dissent from Madhesi and Tharus, the traditional electoral bases of MJF-D.

<sup>7</sup> For the definition of secularism, refer to Article 4(1) of the Nepal Constitution

but with additional clauses that deny Nepali women married to foreign men the right to pass on citizenship by descent to their children. This essentially reduces women to second-class citizens and most strongly affects women and their communities in the Terai, where cross-border marriages are common. Further, the additional clauses prevent 'naturalized citizens'<sup>8</sup> from holding prominent government and constitutional positions. The citizenship provisions thus appear to reveal a patriarchal and discriminatory attitude towards both women and Madhesi.

*Fundamental rights:*

Another problematic addition has been made in the section of the constitution ensuring fundamental rights. Article 17(2) states six fundamental rights that the constitution guarantees Nepali citizens, but each of these comes with conditions that could leave space for these rights to be compromised, for example the conditions attached to 'freedom of opinion and expression'<sup>9</sup>; this provision is followed by the following restrictive explanation:

"Nothing in section (a) shall be deemed to prevent the making of an Act to impose reasonable restrictions on any act which may undermine the nationality, sovereignty, independence and indivisibility of Nepal, or federal units, or jeopardizes the harmonious relations subsisting among the people of various caste, ethnicity, religion, or communities, or incites racial discrimination, or untouchability, or disrespects labor, or any act of defamation, or contempt of court, or an incitement of offence, or is contrary to decent public behavior or morality."

#### **4. Conclusions and Recommendations**

More than a week after the formal promulgation of the new constitution, Nepal's political future remains as uncertain as ever. Assessing the reactions of the days following the promulgation, there is a strong indication of a 'divided nation'. The gap between Kathmandu and the Madhesh and other ethnic and minority groups and parties throughout the rest of Nepal – both perceived and real – is wide and arguably growing. Marginalized ethnic groups, women, and Dalits feel a sense of betrayal. The protests in the Terai have led to a 'blockade' of some sort with the protesting parties focusing on disrupting the transportation of essential supplies from border transits between Nepal and India. More worryingly, with India's unwillingness to welcome the constitution without addressing the issues in the Madhesh – and thus ensuring peace and stability across the long and porous border – there are indications of a potential 'bilateral standoff'. There are already major shortages of fuel and consumer essentials in Kathmandu. Within the last few days, anti-India sentiments have rekindled, especially in Kathmandu. If outstanding issues are not resolved, there are real dangers of further turmoil and greater polarization.

DRCN offers the following recommendations towards resolving the current crisis and moving Nepal back on a track of consensus:

- The government should immediately create a favorable environment for all the protesting parties to enter a peaceful dialogue.
- As recommended in DRCN's previous report, the government should create a formal and well thought-out roadmap whereby the spirits of previous

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<sup>8</sup> For the definition of 'naturalized citizen', refer to the Articles 11(6) and 11(7) of the Nepal Constitution  
For the eligibility of naturalized citizens to hold constitutional positions, refer to article 289(1) of the Nepal Constitution.

<sup>9</sup> Article 17(2)(a) of the Nepal Constitution

agreements with Madhesis and other marginalized groups will be incorporated through amendments to the constitution. There will have to be written and public commitments to fulfill the demands of the protesting parties, thus moving away from the past precedent of making promises and not addressing them.

- The government should also directly reach out to the protesting parties and acknowledge past weaknesses, especially in regards to the fast-track process for constitution drafting.
- The protesting parties on their part should show flexibility and reciprocate the government's willingness and offer for talks.
- Protest leaders should ensure that the protests are conducted peacefully, and the protestors do not resort to violence while voicing their demands and dissatisfaction.
- All parties should be driven by a willingness to make possible compromises keeping in mind the consequences of the ongoing impasse on ordinary people of both Madhesh and the hills.
- Focus should be to resolve all the outstanding domestic issues, so that the consequences of violence and instability will not spiral into the sensitive spheres of bilateral relations with the immediate neighbors, especially India.
- DRCN believes that a political solution is possible and that genuine demands of protesting parties can be incorporated through amendments to the constitution.