

NEPAL'S CONSTITUTION (I): EVOLUTION NOT REVOLUTION

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NEPAL'S CONSTITUTION (I): EVOLUTION NOT REVOLUTION

EXECUTIVE SUMMARY AND RECOMMENDATIONS

Nepal's peace process was to end with a new constitution. Yet, after four years of delays and disputes, the country's main political parties were unable to agree on federalism, a core demand of large constituencies. On 27 May 2012, the term of the Constituent Assembly, which also served as parliament, ended without the new constitution being completed. The parties must now decide what to do next: hold an election for a new assembly or revive the last one. This will be hard. Obduracy on federalism, bickering over a unity government, a changing political landscape and communal polarisation make for complex negotiations, amid a dangerous legislative vacuum. The parties must assess what went wrong and significantly revise the composition and design of negotiations, or risk positions hardening across the political spectrum. Talks and decision-making need to be transparent and inclusive, and leaders more accountable. The public needs much better information. None of this will necessarily mend the deep social rifts, but it would reduce space for extremists and provocateurs.

Until there is a new constitution, Nepal is guided by the 2007 Interim Constitution and the 2006 Comprehensive Peace Agreement (CPA), which provides for the state to be restructured to address entrenched inequalities, often rooted in discrimination based on identity. But federalism is not only about devolution or quotas. For groups that feel their culture, history or language have been sidelined by a unitary state-sponsored Nepali identity, it is also about dignity and recognition. A standoff has emerged between upper class and dominant hill-origin upper-caste populations on the one hand, and ethnic communities often described as historically marginalised on the other.

These divisions map clearly on to party politics. The traditional parties are the Nepali Congress and the Communist Party of Nepal (Unified Marxist-Leninist), commonly known as UML, which emerged as the second and third largest parties in the 2008 elections to the Constituent Assembly. These parties, currently in the opposition, are sceptical about acknowledging identity in a federal model. They have been encouraged by an upper-class, upper-caste backlash against the new pro-federal and pro-identity politics order. The two main forces in the ruling coalition, the Maoist party and the Madhesi Morcha, a front of par-

ties representing Madhesi populations of the southern Tarai belt, were the largest and fourth largest in the assembly, respectively. They coalesced with a cross-party caucus of assembly members from *janajati* groups (the numerous ethnic groups outside the Hindu caste system who claim distinct languages, cultures and sometimes historical homelands) into a powerful pro-federalism alliance, with connections to social movements. They say the agenda should be set by the majority, namely themselves.

Public discussions have focused on whether "ethnic states" should be established. Sceptics of federalism sometimes define these as mono-ethnic entities where populations other than the majority ethnicity would be unwelcome. Yet discussions in the assembly made it clear that no group would enjoy a majority in any state. Nepal's extraordinary ethnic diversity simply does not allow this. Demands for preferential political rights to be granted to the dominant ethnic groups in each state were ceded two years ago. Madhesi, *janajati* and Maoist actors do, however, care about how many states there will be, naming rights, and boundaries that give them a slight demographic and possibly electoral edge. Madhesi parties also focus on inclusion in state institutions.

The assembly ended because leaders of all parties, new and old alike, made secretive, top-down decisions. They were dismissive of their own members and never explained the issues at stake to the public, relying instead on fear-mongering and extreme rhetoric. Throughout the peace process, decisions on the main points, whether the constitution or the former Maoist army, have been hostage to bargains on government formation, enmeshing power sharing with substantive issues.

The peace process has relied extensively on a tired idea of consensus between the parties. Until the constitution was completed, the main parties were to agree on all major decisions to ensure broad buy-in. This sometimes prevented the worst case scenario, but it also devalued democratic participation. Instead of discussions in the assembly on real issues, senior leaders cobbled together inadequate or unrealistic deals purportedly to save the peace process, but often about their personal futures or getting a share of

government. Deep disagreements between the parties were papered over. Donor activity has sometimes unwittingly supported this tendency.

As no single party won an absolute majority in the 2008 elections, the contingencies of unstable coalition politics allowed the parties to throw government formation into the fray with constitutional issues. The deep polarisation over federalism meant that on 27 May 2012, any constitution could have elicited violent protests. The situation has calmed, but triggers remain. There is no agreement on the way forward and no minimum common understanding of federalism.

When the assembly ended, Nepal also lost its legislature. The absence of an elected parliament, coupled with the high trust deficit between the government and opposition parties, bodes ill for stability. For all the parties, deciding on how to resume constitution writing is inextricably linked to government coalitions and electoral calculations. Indeed, the discussion between the parties since the assembly ended has been dominated by questions of whether, when and how the government will change. A broader constitutional crisis looms if the opposition leans on the largely ceremonial president to challenge the government. The political context is shifting; parties are trying out new agendas and alliances and new actors are emerging. Divisions are rife within the parties – the Maoists have already split – and contradictions run deep in the alliances.

Denying moderate identity-based claims makes the polarisation worse and risks stoking communal tensions, as does dismissing the fears of groups that feel they will lose out. Explaining the debate will clarify it, but resolve little. Parties need to present a roadmap with broad buy-in before either going to elections or bringing back the assembly. For this, they can build on the work already done. Between themselves, they need guarantees on power sharing. Elections now could help clarify the context, but they will in effect be a referendum on federalism and risks of violence are real. For once, issues matter in Nepali politics. Mainstream parties are best positioned to reflect the country's ethnic complexity, especially as the balance of political and social power is such that no single party will capture the votes of an entire group.

RECOMMENDATIONS

To address and reduce the social polarisation and democratic deficit, redesign decision-making processes and enforce transparency

To the Three Largest Parties, namely, the Maoist party, the Nepali Congress and the Communist Party of Nepal (UML), as well as the Madhesi Morcha:

1. Make an early decision in consultation with smaller parties on whether to hold elections to a new assembly and when or whether to revive the lapsed Constituent Assembly.
2. Recommit to the Comprehensive Peace Agreement and acknowledge the changed political landscape by including in discussions emerging, ignored or resurgent groups, such as Tharu, Dalit, Muslim and women's bodies, as well as upper-caste groups and pro-Hindu monarchists.
3. Acknowledge that the legislative vacuum cannot persist without dangerous consequences and separate government formation and functioning from constitution writing by:
 - a) agreeing on a full budget for the current fiscal year beyond the current partial budget;
 - b) endorsing an unchangeable timetable for polls or decisions on a constitution;
 - c) deciding on sequencing of government formation, elections and compromises on federalism that involve all parties ceding some ground, perhaps by designing an all-party government with a rotating cabinet or prime ministership; and
 - d) committing to a code of conduct for protests and government responses to them.
4. Reduce the risk of violence if new elections are held by:
 - a) signing a code of conduct committing to abjuring hate speech and to participating in direct discussion rather than through innuendo in the media;
 - b) implementing, before campaigning starts, a public information and consultation program on federalism staffed by former assembly members, academics and lawyers associated with the drafting process;
 - c) maintaining contact with each other, their representatives on the ground and local actors and avoiding scheduling public party events that may clash with those of others;

5. Ensure better functioning of a revived or new assembly by planning for more plenary discussions; enforcing rules of procedures, timetables and strict penalties for absentees, including expulsion; electing sub-committee chairs; and disallowing party whips.
6. Improve negotiations and decision-making by:
 - a) agreeing at an early date on the role of the report of the State Restructuring Commission, and the status of all previous agreements between governments and various protesting groups;
 - b) making negotiations public, even televised if necessary;
 - c) taking into consideration the new census data;
 - d) accepting technical and academic support where it might be helpful; and
 - e) avoiding the trap of leaving decisions up to “expert panels” or commissions that will certainly be politicised and possibly even less in touch with the general public.
7. Initiate consultations for policy discussions on inclusion, including classification of groups, criteria for quotas and the relationship between federalism and inclusion.
8. Address discontent and factionalism within their ranks.

To the Nepali Congress and UML:

9. Contribute to the speedy resolution of the present crisis by:
 - a) clarifying their bottom lines on federalism and inclusion;
 - b) communicating more democratically with party organisation in the districts; and
 - c) protesting if need be, but allowing some ordinances necessary for governance to go through.

To the Main Maoist party:

10. Minimise conflict with the new party by agreeing to negotiate division of countrywide assets; keeping open channels of communication with cadres in the field.

To the New Maoist party:

11. Clarify party positions on the current impasse and a program sooner rather than later.
12. Agree to negotiate division of countrywide assets with the original party.

To the Monarchist or Pro-Hindu Right:

13. Refrain from using a divisive fundamentalist religious agenda.

To the Government of Nepal:

14. Maintain trust and help create a conducive environment for decisions by:
 - a) maintaining constant, open and flexible communication with the opposition;
 - b) ensuring responses to protests are even-handed and proportionate; and
 - c) focusing on governance, but remaining sensitive to concerns about accountability in the absence of a legislature.

To the President of Nepal:

15. Ensure that the office is responsive to the widest range of interests and resist pressure to transcend his ceremonial role to take strong positions against either the government or the opposition.

To the Judiciary:

16. Refrain from involvement in the political process and exercise judicial restraint.

To the Nepal Army:

17. Resist the urge to support any actor or pronounce on the legitimacy of governments.

To India and China:

18. Resist pressure from interest groups and instead promote dialogue between all parties.
19. Give Nepali actors space to negotiate their own decisions on constitutional issues.

To UK, U.S. and European Union (EU) Donors and the UN:

20. Work more transparently within the framework of the CPA and the Peace and Development Strategy by:
 - a) not withholding the analysis of linkages between ethnicity, access to social services and poverty rates that informs programming;
 - b) addressing concerns that donors have preferred outcomes incongruent with the CPA;

- c) taking Nepali partners into confidence but suspending support if pressured to work against CPA commitments and international charters; and
- d) refusing support to negotiations or confidence-building measures that are not transparent or are driven primarily by a few leaders in the big parties.

Kathmandu/Brussels, 27 August 2012

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I. INTRODUCTION

The end of the Constituent Assembly on 27 May 2012 focused attention on two critical issues. One was the destructive potential of the main parties' wilfulness and high-handedness. The other was the complexity of the challenge Nepal has set itself with regard to federalism and inclusion. In theory, most say they want a fair and equitable society. In practice, the political, social and personal recalibrations that must take place for that to happen are deeply discomfiting to many.¹

Federalism is seen as a way to simultaneously devolve power and acknowledge the histories and cultures of Nepal's many ethnic groups. These groups say that the dominant narrative in Nepal makes the historical experience of upper-caste hill elites the norm and ignores the structural causes of inequality between social groups. In this debate, "inclusion" means greater and more effective representation in state institutions of *janajati*, Madhesi, Dalit and other groups who have been significantly under-represented or actively excluded.² The Maoists, Madhesi parties

and newly influential ethnic actors in the mainstream parties and outside them are the strongest proponents of what is sometimes called "identity-based federalism", or federalism which, with other policy measures, will address these concerns.

The Nepali Congress and UML, Nepal's traditional democratic parties, are sceptical at best about placing identity at the centre of debates on federalism and inclusion. They argue that doing so will be dangerously divisive to Nepali society and that it will weaken the state. These parties and other opponents of federalism tend to argue that poverty, not identity should determine who counts as excluded. They would prefer to see federalism as a primarily administrative arrangement related to devolution of power. Political preferences and attitudes to federalism are not determined solely by people's membership in demographic groups. Yet, there is a clearly emerging dynamic in which the Congress and UML are seen to represent elite and upper-caste interests, and the other parties a more progressive agenda. These labels are overly simplistic, but their easy adoption is an expression of how deep differences in Nepali society can go.

It is not yet clear how constitution writing will be restarted. The decision on how to go back to constitutional negotiations is inextricably linked to decisions on a change of government. When the term of the Constituent Assembly ended on 27 May, Nepal also lost its parliament, as the same body performed both functions. The Maoist-Madhesi coalition continues as caretaker and the Congress and UML lead the opposition. The November 2012 election date Prime Minister Bhattarai announced has to be formally cancelled, as there is no agreement between the parties yet and the election commission needs more time to make

¹ For previous Crisis Group reporting on the peace process, constitution writing, federalism debates and the Maoist party, see Crisis Group Asia Reports N°128, *Nepal's Constitutional Process*, 26 February 2007; N°132, *Nepal's Maoists: Purists or Pragmatists*, 18 May 2007; N°156, *Nepal's New Political Landscape*, 3 July 2008; N°199, *Nepal: Identity Politics and Federalism*, 13 January 2011; N°211, *Nepal: From Two Armies to One*, 18 August 2011; and Crisis Group Asia Briefings N°120, *Nepal's Fitful Peace Process*, 7 April 2011 and N°131, *Nepal's Peace Process: The Endgame Nears*, 13 December 2011. Full Nepali translations of all papers from 2007 onwards are available at www.crisisgroup.org/nepali. The Comprehensive Peace Agreement is available at www.un.org.np/node/10498 and the Interim Constitution of Nepal, 2063 (2007) is available at: <http://ccd.org.np/new/index.php?action=resources>.

² For the purposes of this report, "*janajati*" refers to the umbrella term for a large number of ethnic groups, most from the hills, who are outside the Hindu caste system and claim distinct languages, cultures and, often, historical homelands. Since the 1990s, this ethnic or "nationalities" definition has included a claim of indigenity. "Madhesi" refers to the umbrella term for a population of caste Hindus residing in the Tarai region, who speak plains languages and often have extensive economic, social and family ties across the border in northern India. "Tharu"

refers to the indigenous populations of the Tarai plains. Other terms include "Dalits", or Hindus considered "untouchable" by upper-caste groups of "Muslims", who can be of both plain and hill origin, though they predominantly live in the Tarai. "Upper caste" refers to members of the two highest castes hill- or *pahadi*-origin Hindus, Brahmins and Chhetris. Similar upper-caste groups are also part of Madhesi Hindu populations, but unlike the hill upper-caste groups, they are not closely associated with the dominant culture of Nepal. For more on identity politics, see Crisis Group Report, *Nepal: Identity Politics and Federalism*, op. cit.

preparations and comply with regulations. The next chance for elections is between March and May 2013. Some leaders say the assembly should be revived through a consensus decision by the parties. They argue that agreement is possible on the constitution before any elections are held and that the new statute can be issued by the revived assembly. The next elections would then be for a new parliament.

The tussle is not only between actors and pro- or anti-federalism alliances, however. There is also a deep divide between the ruling coalition and opposition parties. The ruling Maoist party and the Samyukta Loktantrik Madhesi Morcha (SLMM or Madhesi Morcha), a front of some Madhesi parties, are allies in both government and for federalism. Yet, some of their potential *janajati* allies are in the Congress and UML. The splinter Maoist party and another front of some Madhesi parties, the Brihat Madhesi Morcha (BMM or Broader Madhesi Morcha) are both for federalism and present themselves as truer to the issue than the ruling Maoists and Madhesi Morcha. However, their priority is also unseating the present government, which puts them on the same side of that fight as the Congress and UML. There are similar contradictions even within parties.

This paper surveys the options available to resume the constitution-writing process. It first examines the trajectory of the federalism and inclusion debates in terms of substance and procedure, and explains the contentious issues as well as areas where the behaviour of the parties and design flaws in the process were obstacles. This report then assesses the constraints and opportunities of the election option as well as revival of the assembly. It outlines the challenges the parties face regardless of which they choose, and identifies possible game-changers.

A companion report published simultaneously, *Nepal's Constitution (II): The Expanding Political Matrix*, examines the changing landscape as established parties split, new political forces emerge, and various actors attempt alliances for or against federalism. Many are struggling to find agendas or distinguish themselves from competitors. These efforts are influencing the debate on federalism. But the parties, their factions and individual leaders are concerned as much with electoral calculations as with ideology. The positions they will finally take will be driven by more than only ideas. Personality clashes and factional divides further complicate the motivations at work. Together, these two reports describe the interplay of issues, political behaviours and the constantly shifting balance between actors that will determine whether and when Nepal will get a constitution and what it will look like.

The policy recommendations in this report are in many cases straightforward repetitions of basic guidelines for negotiations and the rules of the Constituent Assembly. Implementing them does not force any actor to accept par-

ticular options, only to negotiate more clearly and inclusively. This is a relatively low-cost measure, except for those whose primary aim is to spoil. The immediate priorities for the parties are evident: to negotiate a convincing roadmap that will also be acceptable to various interest groups and the public; and to be a credible, sensitive and viable alternative to those who purvey dangerously simplistic and irreversibly polarising alternatives.

Research for this report was carried out primarily in Kathmandu between May and August 2012. Interviews were conducted with a wide range of political actors at all levels, including senior leaders, activists and organisers, as well as journalists and some members of the international community.

II. STEPPING OFF THE EDGE

As has so often been the case, Nepal's politicians left the tough issues until last. After years of delay, the Constituent Assembly only started discussing federalism during its final months. Prior to that, constitutional negotiations were linked to the future of Maoist combatants, who remained under their party's command until April 2012.³ Once the issue of the combatants had been resolved, discussion of federalism became inevitable. After four years of functioning and four extensions of the assembly's term, pressure from interest groups and the general public was building on the parties to complete the constitution. All actors, those for and against federalism, in parties, factions and other groups, saw their final chance to influence the future context. This could have meant increased flexibility; instead positions hardened. Earlier concessions were withdrawn and new alliances were formed.

The assembly finally ended because each side felt further concessions would render the new constitution meaningless and that the other side was more invested in the assembly and so would compromise at the last minute. "We thought the Maoists would save the assembly at any cost", said a senior UML negotiator, a sentiment echoed by some in the Nepali Congress, too.⁴

A. FRUSTRATED IN FEDERALISM

1. The sticking points

Most Maoists and Madhesi and *janajati* groups put forward core considerations.⁵ They demand that state bound-

aries be demarcated so that marginalised groups together gain a slight demographic, and possibly electoral, advantage over upper-caste Brahmin and Chhetri groups. In many present administrative units, the latter are dominant. Districts could also be divided between the new states. Speakers of some languages other than Nepali would be able to use their mother tongues officially in their states, giving Nepal's linguistic diversity the chance to develop in the mainstream. For marginalised groups, federalism is also about recognition and dignity. All these measures would help modify the monolithic Hindu, hill upper-caste Nepali identity codified by the monarchy in the mid-20th century.⁶

The assembly was the most representative body in Nepal's history, thanks to quotas for population groups and proportional representation for parties.⁷ For identity-based movements, such as Madhesi, and to a smaller extent,

the main party and "the new Maoist party" for the breakaway party.

⁶ After removing the ruling multiparty government and replacing it with direct royal rule in 1960, King Mahendra enforced a narrow definition of Nepali national identity where the language, history, customs and dress of hill-origin upper-castes were declared as those of all Nepalis. Members of ethnic and other minority groups who assimilated wholly had significantly more opportunities. This school of nationalism was notably anti-Indian and fuels some of the anti-Indianism in contemporary Nepali politics too.

⁷ Voters cast two ballots in the 2008 elections. One was for a representative for their constituency and the other for a party of their choice. 240 members were elected from the same number of constituencies through First Past the Post (FPTP) contests, where the candidate receiving the most votes in a single-member constituency won. Almost 4,000 candidates contested the FPTP races. 335 members were elected from a nationwide constituency through party list-based Proportional Representation (PR). Each party list needed to have at least 34 candidates and there were about 6,000 candidates for PR seats. This list and the parties' final selection for the assembly after the results were in had to meet quotas for demographic groups based on the Election Act of 2007 and provisions in the Interim Constitution. However, there were two caveats: the Election Act granted the parties 10 per cent flexibility in filling these quotas, so they could select a few less or a few more candidates for each category. The Election Act also waived all quotas except those for women for PR lists that had 100 or less candidates. The lists were not ranked and nominees could be chosen from anywhere on the list. This meant that voters could not be sure which of the many candidates on their party's list would be sent to the Constituent Assembly. Nils A. Butenschon and Kåre Vollan, "Electoral Quotas and the Challenges of Democratic Transition in Conflict-Ridden Societies", The Norwegian Resource Bank for Democracy and Human Rights, September 2011. See also Crisis Group Asia Report N°149, *Nepal's Election and Beyond*, 2 April 2008, Section III.A.

³ The constitutional negotiations began after a 10 April decision handed command of Maoist combatants, weapons and cantonments to the Nepal Army. Phanindra Dahal, "Army takes charge of PLA fighters, weapons", *The Kathmandu Post*, 11 April 2012; "Why the cantonments imploded", *Republica*, 11 April 2012. See Crisis Group Asia Report N°234, *Nepal's Constitution (II): The Expanding Political Matrix*, 27 August 2012 for more.

⁴ Crisis Group interview, Kathmandu, May 2012.

⁵ For the purposes of this report, "Madhesi" refers to the umbrella term for a population of caste Hindus residing in the Tarai who speak plains languages and often have extensive economic, social and familial ties across the border in northern India. "*Janajati*" refers to the umbrella term for a large number of ethnic groups, most from the hills, who are outside the caste Hindu system and claim distinct languages, cultures and often, historical homelands. Since the 1990s, this ethnic or "nationalities" definition has included a claim of indigenesness. For more on identity politics, see Crisis Group Report, *Nepal: Identity Politics and Federalism*, op. cit. The Maoist party split in June 2012. This paper refers to the pre-split party as "the Maoists". For the post-assembly context, it uses "the Maoists" to refer to

Dalits⁸ and Muslims, increased political participation, power and representation in state institutions are an important way to achieve recognition. Ethnic groups have stepped down from their initial maximalist demands. They had initially lobbied for political preferential or prime rights, including through reserving the position of state chief minister for members of the dominant groups for a fixed period.⁹ This demand was barely mentioned after early 2010, when attention shifted to state names.

Madhesi groups had argued for a single Madhes state stretching across the Tarai in southern Nepal, saying a large state would be stronger in relation to the centre.¹⁰ Now, they agree to two states and show flexibility on some contested parts of the region claimed by hill-origin groups. Tharu groups,¹¹ after which the second Tarai state would be named, are considered the Tarai's indigenous population and are stronger in the west.

Sceptics in the Congress, UML and some other parties argue that the federal structure these groups want will not be economically viable and will threaten national integrity. Hill states with no outlet to the southern border would be overly reliant on the Madhesi states. To access government services, citizens would have to travel to new state capitals, possibly inconveniently located, rather than district headquarters they are used to. Allowing the use of other languages would put Nepali speakers at a disadvantage. The Congress argues that the current districts should be used to build the new states, which ought to resemble the current development regions, organised along a north-south axis. Each development region includes river basins and slabs of the high Himalayas, middle hills and southern plains.¹²

The Congress and UML argue that acknowledging ethnic identity will set Nepal on the path of rupture. For example, ethnic references in state names would provoke those groups not mentioned. All of Nepal's scores of ethnicities could demand their own states.¹³ The Congress is particularly hostile to the idea of strong Madhesi-dominated states, claiming these could threaten national unity and even secede. It argues that hill- or *pahadi*-origin groups, whose presence is relatively important in some pockets of the Tarai, could face discrimination. There is a deep-seated perception that Madhesi leaders are more sympathetic to Indian interests than Nepali. Madhesi populations are bound by close cultural, familial and economic ties to groups across the border in India, which is another source of anxiety to many hill-origin leaders. Still others argue that "ethnic federalism" will not lead to "empowerment".¹⁴

Some concerns have merit. For example, Nepal has often been crippled by shutdowns of the highway dividing the north and the south, due to protests, so the anxiety about access has some reasonable grounds.¹⁵ Other concerns appear to be from force of habit. Federalism could indeed yield benefits, such as new roads across the hills to new state capitals or decentralisation through new sub-regional administrative centres. The Nepali language is increasingly widespread and unlikely to disappear, given the opportunities it provides for speakers and its overwhelming dominance in government, administration, education and commerce. In very few parts of Nepal and almost none of the proposed states would any single group be in the majority; rather, there would be "largest minorities". Despite all this, the arguments of the traditional parties give pro-federalists ammunition to say that the Congress and UML are against all change. "The Maoists made many compromises, at least the Congress and UML could have reciprocated. Instead, they obstructed", said a Madhesi leader from Dhanusha.¹⁶

⁸ "Dalits", among the most underprivileged and discriminated against groups in Nepal, are Hindus formerly considered "untouchable" by upper-caste groups.

⁹ For more on the preferential rights debate and how it slipped out of the mainstream, see Crisis Group Report, *Nepal: Identity Politics and Federalism*, op. cit., Section IV.E.

¹⁰ For long, the Madhes movement's slogan was "One Madhes, One State". "Madhes" is in this case used synonymously with "Tarai", as a way for Madhesi activists to lay claim to the entire plains.

¹¹ "Tharu" refers to the indigenous populations of the Tarai plains.

¹² In April 2012, the Congress proposed a map for state restructuring with seven states based on "identity and capability". The model included two Tarai-only states and four of the five hill-mountain states had access to the southern border. Thus, the Tarai was divided between six states. The model also kept all 75 districts intact and most states were named after rivers, as most of the present administrative zones are. Maoist and Madhesi leaders immediately criticised this proposal. Kamal Dev Bhattarai, "Cong comes up with 7-state model", *The Kathmandu Post*, 28 April 2012.

¹³ According to the 2001 census there were 103 ethnicities in Nepal. "Rastriya Janaganana, 2058 (Jaat/Jaatiko Janasankhya)", Central Bureau of Statistics, 2008.

¹⁴ For example, two former foreign secretaries argued that in a federal structure, increased political space for minorities would not be sufficient for empowerment, which had to be consolidated with economically viable states. "Put it to a vote", *Republica*, 16 June 2012. Proponents of this argument also generally oppose quotas for most groups and say that economic growth is the best way to reduce inequalities. See "Chaar pradesh nai upayukta", *Kantipur*, 20 January 2012.

¹⁵ For example, a thirteen-day strike in 2009 by Tharu agitators along the east-west highway led to major price rises in Kathmandu and other hill centres. "Strike in the Tarai sends vegetable prices soaring", *ekantipur.com*, 28 April 2009. Madhesi mobilisation has also often shut down the highway. Smaller parts are often blocked, including by loyal groups demanding compensation for deaths on the road.

¹⁶ Crisis Group telephone interview, Madhesi leader, Dhanusha, May 2012.

Negotiations in the assembly and later among senior party leaders moderated maximalist positions and led all groups and parties to acknowledge Nepal's complex ethnic mosaic. States would be formed on the basis of "identity" and "capability", namely their ability to be viable economically, though it was not clarified how this would be judged.¹⁷ Towards the end of the assembly, *janajati* leaders agreed that the ethnic elements in state names could be toned down by addition of geographic or cultural references.¹⁸ Madhesi actors were open, albeit cautiously, to negotiations on competing claims over parts of the Tarai. Tharu groups would negotiate the disputed parts in their area.¹⁹ In the lead-up to 27 May, Madhesi, Tharus and *janajatis* also agreed not to interfere with each other's demands or negotiations.

2. Bogeymen

Despite these many compromises and the clear agreement that all Nepalis would have the same rights to live, work, travel and own property anywhere, parties and activists on all sides continued to talk about "ethnic federalism", feeding the public phantom fears, misrepresentation and hate speech.²⁰ Congress and UML sympathisers raised the

spectre of "new minorities" (that is, hill upper castes) being deprived of rights in mono-ethnic states. Sceptics of federalism play on genuine fears, but they invoke frightening images of communities being expelled from their homes.²¹ Ethnic leaders and activists could have taken the lead in clarifying the debates about federalism and inclusion to address these concerns. They did not do so, possibly to leverage their position. This failure has been damaging, particularly when taken with the inflammatory, extremely provocative language used by some in their ranks. The perception that any mention of identity-related issues is dangerously polarising has only been reinforced.²²

The truth barely matters when communal tensions are rife and insinuation and rumour prevail over calm dialogue. There are many ways of being marginalised in Nepal, including through poverty. Claiming a demographic advantage will not necessarily unite all ethnic groups either, as hierarchies make for complex relations between them. Individual identities are themselves multidimensional and social boundaries between groups are often more blurred than fixed definitions assume. All this needs to be factored in while making policy decisions and can be used to moderate the debate. Yet these arguments tend to be raised largely to dismiss demands for greater inclusion of historically marginalised groups or for more respectful recognition of their identities and history, rather than to start a dialogue.

As the discussion has spilled over from the assembly into society at large, local communities and groups have framed their demands in a variety of ways, including through appeals to different kinds of identity, including region and caste. The unexpected alliance of Madhesi, Maoists and *janajatis* has also taken the edge off the "ethnicity" claim, given how diverse it is. This coalition does, however, shift the focus squarely onto the historically dominant groups, putting the onus on them to compromise.

Identity claims have historically been ignored. For example, during the drafting of the 1990 constitution, suggestions were solicited from the public. The drafting commission's

¹⁷ In April 2012, the parties agreed to specify five vectors of "identity": geography, ethnicity, population, language and culture. "Pahichanka panch adharma sajha antarvastu khojne sahamati", *Annapurna Post*, 20 April 2012.

¹⁸ For example, the hill state in the far east that pro-federalists had conceived as the "Limbuwan" state, based on a historical polity, would be named Limbuwan-Koshi, after the Koshi River.

¹⁹ In the far west, there is a strong, largely upper-caste hill movement claiming some parts of the Tarai. Many hill-origin families in this area live, do business and own property in both the hills and plains. Some senior national leaders hail from the hills but their voters reside in the plains. Claims for other parts of the Tarai, such as its eastern districts of Jhapa, Morang and Sunsari are more driven by national leaders, who fear their constituencies will be split. They are able to play on the fears of hill-origin people who live in the Tarai, including *janajatis*, to be displaced as some *pahadi* families were following the Madhes movement. (Many of these families are reportedly returning, as tensions have been low for some time now. "Madhesma melmilap", *Kantipur*, 14 April 2012.) A recent UN report suggests that both Madhesi and hill populations are migrating to urban areas in the Tarai, then to areas along the highway and to Kathmandu, if they can afford it. "Migration patterns in the Central Tarai: Has an equilibrium been disrupted?", Field Bulletin, UN Resident and Humanitarian Coordinator's Office, July 2012. There is also a drive to keep Chitwan district, in the middle of the Tarai, intact. This reportedly has the support of Maoist Chairman Pushpa Kamal Dahal "Prachanda" himself, as he is from Chitwan. A fourth passage to the Indian border between the hills and plains has been suggested through Nawalparasi district in the western Tarai.

²⁰ Academic Krishna Hachhethu argues that while the proposals of the assembly's Committee on State Restructuring and the

Distribution of State Power and of the State Restructuring Commission appear to emphasise ethnicity, they are "non-ethnic". This argument implies that it is the present state that privileges a dominant, mono-ethnic culture, and not the states proposed in "identity-based federalism" which recognises Nepal's diversity. Krishna Hachhethu, "Prastavit sanghiyata: Rupma jatiya, saarma gairjatiya", *Nepal Samacharpatra*, 9 June 2012.

²¹ There have been alarming warnings that identity-based federalism will lead to ethnic cleansing of Chhetris and Brahmins. Akhanda Bhandari, "Mero rajya kaha parcha?", *Kantipur*, 12 February 2012; "Jatiya rajnitiko raap", *Naya Patrika*, 5 June 2011.

²² In January 2012, ethnic leaders warned of "bloodshed" if the new constitution did not address indigenous demands. "Adivasiko pakshyama samvidhan nabaney raktapat", *Annapurna Post*, 22 January 2012.

chairman, Justice Bishwanath Upadhyaya, “expressed dismay over the fact that the vast majority of suggestions ... concerned linguistic, religious, ethnic, and regional issues”, all of which were, according to him, “peripheral” issues. Many pro-federalism activists feel the same is happening again.²³

3. Missing all the signs

Federalism and inclusion are distinct issues, but closely connected. State restructuring was proposed specifically to make the Nepali state more representative and inclusive. The debate has developed narrowly and procedural and substantive problems have persisted.

Early discussions: bringing up federalism

The first phase of this discussion predates the Constituent Assembly. In response to the 2007 Madhes Andolan or movement, which demanded recognition of Madhesi marginalisation and increased inclusion of Madhesis in state institutions, the Interim Constitution was amended to include federalism. The same year, in response to an agitation by the influential network of *janajati* NGOs, the Nepal Federation of Indigenous Nationalities (NEFIN), and other *janajati* groups, the interim government signed a deal which guaranteed at least one representative in the assembly from each officially recognised *janajati* community, greater inclusion of *janajati* in state institutions and committed to establishing a state restructuring commission.²⁴

These agreements only occurred after the government had been pushed against the wall for trying to ignore earlier commitments in the CPA. The deals were made in haste and with little consultation, under strain and with considerable hostility. It is no surprise that many mainstream

actors have continually tried to back away from them, including the Congress and UML, which were leading members of the interim government. This cycle of promises made and broken, aggressive protests and sullen capitulation with even more promises continues uninterrupted.

The Constituent Assembly's limited input

The second phase is the work done by the Constituent Assembly's committee on state restructuring and distribution of state power that completed its report in January 2010. The majority in the committee voted for a fourteen-state model based on “identity and capability” of states to be viable, with names and boundaries along ethnic lines. Preferential political rights through temporary reservations of select political offices for majority groups in each state were also proposed.²⁵ UML *janajati* representatives voted against their official party line, which allowed the proposal to pass with a simple majority in the committee. A Congress leader presented a dissenting minority opinion that suggested a six-state, north-south federal model similar to today's development regions, and this became the reference point for the party. In both proposals, states would have limited power compared to the centre.

A plenary discussion of the proposals was attempted, but this led to shouting and disruption of assembly proceedings by members who felt they were being ignored. The report was kicked to the constitutional committee, which simply added the federalism proposals to a growing list of “contentious issues”. Although assembly regulations allowed for a vote on issues when the committees could not agree, senior leaders were asked to reach consensus on them, which they often did informally and away from the assembly. An unwillingness to allow parliamentarians to debate and resolve the difficult questions that they had been elected to address – and their fatalistic acceptance at being sidelined – have plagued the entire peace process.

²³ Michael Hutt, “Drafting the Nepal Constitution, 1990”, *Asian Survey*, vol. 31, no. 11 (1991), pp. 1020-1039. In a striking echo of the current debate, Hutt writes: “Rather than attempting to accommodate these grievances, the commission and the interim government simply perceived them as a threat to national unity, and virtually dismissed them out of hand. Thus, Justice Upadhyaya said it was ‘unfortunate’ that most suggestions had been about ‘peripheral’ issues, and he called upon all political parties to educate the people on basic constitutional subjects”.

²⁴ The Fourth Amendment of the Interim Constitution in May 2008 came about after two waves of protests in the Tarai. The first was a 21-day long movement in which at least 24 people died. The second was a year later in January-February 2008 where six protesters were killed. The state restructuring commission, as envisioned in the deal with NEFIN, would “present recommendations to the Constituent Assembly regarding a federal state structure based on ethnicity, language, geographic region, economic indicators and cultural distinctiveness while keeping national unity, integrity and sovereignty of Nepal at the forefront”. “Agreement between the Government and Janajatis”, 7 August 2007.

²⁵ The fourteen-state model was a longstanding Maoist proposal. States were named after ethnic groups that claimed close historical ties to the territory. Some, like the proposed Limbuwan state in the east and Newa state in Kathmandu Valley, were recognisable as historically informed. Others were less so, such as the Gurung-majority Tamuwan in the western hills. Boundaries were such that formerly minority groups would have a demographic edge over hill upper-caste groups in many states. This count included all ethnic groups in the proposed states, not only titular or dominant groups. Madhesi parties agreed to two Madhes states, instead of one. Preferential rights meant that the position of governor would be reserved for candidates from the titular ethnic group for two terms, or the first ten years of the new dispensation. “Report on Concept Paper and Preliminary Draft, 2066”, Assembly Committee on State Restructuring and Devolution of State Power, January 2010. For more on the assembly's various thematic committee reports, see Crisis Group Report, *Nepal: Identity Politics and Federalism*, op. cit., Section IV.

Plenary discussions could have indicated the limits of compromise or even outlined practical, creative and broadly acceptable compromises.

The UML clearly had not thought federalism a serious matter and had taken its *janajati* members for granted. It sent ethnic nominees to the state restructuring committee, assuming that this was “their issue” rather than a national one, and that they would be the docile, undemanding minority. This was not the case, and it is still not. In fact, UML ethnic leaders are now upset with their party’s leadership. “My party was ultimately the biggest opponent of *janajati* demands”, said one.²⁶

*The State Restructuring Commission:
yet another failed step*

In November 2011, the parties sceptical of federalism, the Congress and UML, urged the formation of the constitutionally mandated State Restructuring Commission. They were earlier against it as a way of opposing federalism in general. At this point, some in these two parties thought the commission could comprise technocrats or experts who, they were convinced, would counter proponents of identity-based federalism. The parties ended up dividing the positions on the commission among themselves. Some nominees were indeed experts or academics, but they also had party sympathies and did not all adopt a unique position on the role of identity in federalism; some argued it was workable, others that it would harm national integrity.²⁷ The commission proposed ten states, with similar characteristics to those suggested by the parliamentary committee, limited preferential rights and a “non-territorial” state for the highly marginalised Dalit communities.²⁸

This bickering over commissions, committees and the agreements has repeatedly taken up the parties’ time and attention. Yet, the status of their work is usually unclear. For example, the State Restructuring Commission’s report was called “reference material” when it was tabled in the assembly in March 2012.²⁹ In any case, these bodies have also become sideshows or distractions, as decision-making has been concentrated in the hands of a few leaders who are usually asked to find consensus. “Senior leaders never bothered with the [assembly’s] thematic committee’s report, they were too fixated on power politics”, said a constitutional expert.³⁰

The first report on federalism had the imprimatur of the assembly, even if it had not been discussed. The second was written by a constitutionally mandated body. But both were completely ignored in the final weeks of the assembly, when the leaders tried to adopt an entirely new deal. Such relentless disregard for rules and commitments will continue if no new safeguards are put into place.

Institutional representation: a stumbling block

In January and February 2012, bureaucrats and the government tussled over an inclusion bill that increased reservations for marginalised communities in government services from 45 to 48 per cent.³¹ The cabinet bills committee reportedly held the bill up for weeks. One sticking point was that Brahmins, Chhetris and some smaller associated castes, which total just over 30 per cent of the population, were classified as “others”. They objected to the perceived insult in being treated dismissively; and to the fact that other groups had specific quotas to their names while positions left over after those quotas were not spe-

²⁶ Crisis Group phone interview, Kathmandu, May 2012.

²⁷ The CPA also envisions such a commission. Ethnic activists were promised that it would be formed “soon”, in the monsoon of 2007, but it was ignored in favour of the assembly’s state restructuring committee. For more on the commission and *janajati* and Madhesi concerns about overrides of assembly suggestions, see Crisis Group Briefing, *Nepal’s Peace Process: The Endgame Nears*, op. cit., Section IV. In the commission too, Maoist and Madhesi nominees were on one side, and the UML’s *janajati* nominee joined them at the end to push through an identity-based model.

²⁸ The Congress continued to propose its north-south states that would maintain the demographic balance of the current districts, where hill upper castes are often the largest group. Political preferential rights were included in the commission’s report but not pertaining to the states’ chief ministers positions. They were, instead, for autonomous and special areas within states that were going to be granted to very small local ethnic groups. “How majority, minority reports differ”, *The Kathmandu Post*, 2 February 2012; “SRC submits report”, *Republica*, 1 February 2012.

²⁹ “SRC report only for reference: Lawmakers”, *Republica*, 24 March 2012. The Interim Constitution says that the commission’s report is supposed to guide the work of the assembly.

³⁰ Purna Man Shakya, “Review of the Four Year Period of CA and the Preview of the Declared ‘CA Election’”, Dr Harka Gurung Lecture Series, Kathmandu, 1 June 2012.

³¹ Quotas were first introduced in August 2007 following the deal with NEFIN, when the civil service was directed to allot 45 per cent of all vacancies for historically marginalised groups. Many laws, such as those governing recruitment into the civil service, and admissions and promotions in universities were amended to reflect this. There was, however, no overarching law about quotas, an omission the 2012 bill was supposed to address. The bill also specified sub-quotas for members of marginalised communities within the quota for women, and reiterated quotas for marginalised groups in the security forces. This bill was seen as a push by the Madhesi front in government to once again highlight the need to include Madhesi in the army, in particular. “Bill on inclusion has Madhesi bias”, *The Himalayan Times*, 15 February 2012. For more on this fraught subject, see Crisis Group Briefing, *Nepal’s Peace Process: The Endgame Nears*, op. cit., Section V.

cifically earmarked for upper castes.³² Where quotas have been implemented, such as higher education and public service, there are bitter debates about recruitment, promotions and admissions patterns, including complaints from marginalised groups.³³

This episode demonstrates the power of state institutions. Nepal's bureaucracy, like its judiciary, is not entirely representative of the populations it serves, is often seen as close to the traditional parties, and wields enormous influence.³⁴ Institutional loyalties remain with the old order, not the new. This dynamic of contestation and resistance from state institutions is likely to continue.³⁵ A member of the Madhesi Morcha, the front of five Madhesi parties in government, described it thus: "As long as the formal peace process is on, the judiciary poses the greatest potential obstacles [by ruling conservatively on peace process issues such as the term of the Constituent Assembly].

³² "Rastriya Janaganana, 2058 (Jaat/Jaatiko Janasankhya)", op. cit. "Inclusion bill mired in stiff opposition by secretaries", *Republica*, 6 January 2012; "Brahmin, Chhetri listed as 'others'", *The Kathmandu Post*, 6 January 2012. Crisis Group's attempts to understand how government servants had the authority to stop a bill failed, when bureaucrats said that cabinet rules of procedure were classified. Crisis Group telephone interview, Kathmandu, January 2012. In a democratic dispensation, it is difficult to imagine both that civil servants can stop law-making and that regulations governing the functioning of cabinet or the legislature are not transparent.

³³ The complaints about quotas are legion and similar in most contexts. Most often heard in Nepal from upper-caste speakers is that there are poor upper-caste people too, just as there are rich *janajatis* and even Dalits. Marginalised groups complain that their best candidates are forced into reserved quotas, rather than being allowed to compete in the open category. They argue that the quotas should only be for candidates who cannot meet the standards for open competition. The inference is that slotting all candidates from minority groups into quotas, rather than allowing some to compete, in effect "reserves" the open category – currently 55 per cent – for upper-caste candidates.

³⁴ In 2009, 83.93 per cent of Nepal's bureaucracy was from upper-caste hill-based Hindu communities – mainly Brahmins and Chhetris. The combined population share of these groups was just under 31 per cent of the total population in the 2001 census. In comparison, Madhesis comprised only 8.93 per cent of the bureaucracy (while they are about 40 per cent of the population) and Dalits were not represented in any numerically significant way, although they make up almost 13 per cent of the population. Mahendra Lawoti, "Ethnic Politics and the Building of an Inclusive State" in *Nepal in Transition: From People's War to Fragile Peace* (New York, 2012), p. 143. All population figures are from "Rastriya Janaganana, 2058 (Jaat/Jaatiko Janasankhya)", op. cit. and "Dalits and Labour in Nepal: Discrimination and Forced Labour", International Labour Organization, 2005.

³⁵ Crisis Group interview, Kathmandu, January 2012.

Once the new constitution is in place, it will be the bureaucracy hindering implementation".³⁶

One of the greatest policy challenges will be to devise inclusion strategies that are targeted and sensitive to the broad range of experience within groups, rather than just crudely proportionate. Increasing the numbers of members of marginalised groups in various institutions is important, but numbers alone do not guarantee appropriate representation or benefit to the community. There will also have to be sunset clauses on some quotas, as not all may need to be permanent. Assembly members, including from pro-inclusion parties, have barely discussed the relationship between affirmative action or quotas and federalism.³⁷

4. The final weeks of the assembly

Discussions on federalism between the top leaders began in earnest only in March and intensified in April 2012. In mid-April, the Maoist party formally handed control of its former fighters, their weapons and cantonments to the Nepal Army. This addressed a longstanding Congress demand. The Maoists and Congress had also renewed discussions about a change of government to allow the Congress to return to power.

There were whispers about leaving federalism for later, with only an in-principle commitment in the new constitution. But Madhesi, *janajati* and Tharu groups opposed this, arguing there could be "no constitution without federalism and no federalism without identity".³⁸ They also rejected the idea of constitution-by-commission or anything less than the Constituent Assembly.³⁹ The dissident faction of the Maoist party would also have split from the party immediately if any of these suggestions had been pushed through. (The split occurred soon after the assembly ended.) Mid-level leaders from all pro-federalism parties had also cautioned their leaders that they would respond negatively to such decisions.

³⁶ Crisis Group interview, member of the Madhesi Morcha, Kathmandu, January 2012.

³⁷ A Congress assembly member said, "though there need to be constitutional principles for this, we will discuss them once we have a new constitution and are writing laws". Crisis Group interviews, Congress and Madhesi Morcha assembly members, Kathmandu, January-February 2012.

³⁸ Crisis Group interview, Madhesi negotiator, journalist, Kathmandu, December 2011.

³⁹ Top political leaders had discussed finalising a draft constitution without decisive clauses on federalism as early as March. The possibility of state restructuring decisions being postponed beyond the term of the assembly was also enough to bring Madhesi and Tharu leaders – often hostile towards each other in the past – together. "Morcha calls for statute with federalism, identity", *The Kathmandu Post*, 1 April 2012.

These discussions occurred in the context of a November 2011 Supreme Court ruling that another extension of the assembly would be illegal, directing the assembly to finish drafting the constitution by the end of its term, on 27 May. If it could not, the parties were to use the referendum provision as needed to resolve difficult questions, conduct new elections to a new Constituent Assembly, or take other unspecified necessary measures. Each option would require some sort of constitutional amendment or voting, but this never happened. Some actors see this and the court's numerous rulings on peace process issues as judicial overreach. They argue that most of these issues are political and therefore out of the court's jurisdiction.⁴⁰

Public pressure was mounting. Some newspapers positioned themselves against extending the assembly, even as it appeared increasingly clear in May that there would be no constitution. They argued that this would "force" the politicians to reach consensus on federalism, but this urging instead encouraged parties to take uncompromising positions.⁴¹

In late April, the Maoists, Congress, UML and Madhesi Morcha reached an informal agreement. This did not address the demands of any single group entirely, but was put together from earlier proposals and would have been palatable to most. The number of states would be reduced, as per the Congress's demand, to just six to eight states, and there would be no more than two in the Tarai. State names would refer to more than one ethnicity and hill states would have direct access to the border with India.⁴²

In early May, the parties signed a formal agreement. The Congress and UML would join the government and the parties would resolve all constitutional issues. Prime Minister Bhattarai would step down and a Congress nominee would lead an all-party government that would promul-

gate the new constitution before 27 May and hold the next general election.⁴³

It seemed a realistic goal for the parties to prepare a near-complete draft by 27 May. This would either allow some sort of constitution to be passed, or would be enough progress to convince the Supreme Court to allow the assembly to be extended by another few weeks or even months.

On 15 May, the parties came up with an agreement that bore no resemblance to any proposal floated before. The federal set-up would have eleven states whose names and boundaries would be decided later by a commission. The Tarai would be divided between five states. Parts of the far-western plains districts claimed by the Tharu community would be allotted to a hill state. The deal did not address government formation or the prime minister's resignation, which are perennial concerns of the opposition.⁴⁴

The agreement might have been acceptable to Maoist and Madhesi Morcha leaders, but by this time, the issue was out of their control in the assembly and had spread to the streets. Crossing party lines, 320 Maoist, Madhesi and *janajati* assembly members immediately signed a motion objecting to the deal. "The deal was an attempt by top leaders to sabotage federalism", a UML *janajati* leader said.⁴⁵ This strong rejection of the agreement crystallised the broad "pro-federalism" alliance between the Maoists, Madhesi and *janajatis*.⁴⁶ For some months, various activists for identity issues and movements, such as the Limbuwan groups,⁴⁷ NEFIN, and Tharu groups had been discussing in-

⁴⁰ Crisis Group interviews, constitutional lawyers, March and May 2012. The judiciary is known to be unhappy about some provisions proposed for inclusion in the new constitution including that for a constitutional court. For example, see Sundar Khanal, "Judges, top leaders meet to iron out differences", *Republica*, 28 March 2012. For more on tensions between the judiciary and politicians, particularly Maoists, see Crisis Group Briefing, *Nepal's Peace Process: The Endgame Nears*, op. cit., p. 14. In December 2011, the Supreme Court also disallowed the recruiting of 3,000 Madhesi into the Nepal Army, a key issue for the Madhesi parties in government. The Supreme Court eventually reversed its decision in April 2012. "SC quashes writ on Madhesi hiring", *The Kathmandu Post*, 13 April 2012.

⁴¹ Many of these same newspapers now push for a revival of the assembly, rather than elections to a new one.

⁴² Crisis Group interview, senior negotiator, Kathmandu, June 2012.

⁴³ This agreement, reached on 3 May, built on an informal deal in 2011 to assuage the Congress's fears about not having a turn in government before the next election. See Crisis Group Briefing, *Nepal's Peace Process: The Endgame Nears*, op. cit., Section VI.B; Kamal Dev Bhattarai, "Parties agree on unity govt under Bhattarai", *The Kathmandu Post*, 3 May 2012; and Crisis Group interviews, Kathmandu, April-June 2012. On the March developments, see "Turning Point", *The Kathmandu Post*, 28 March 2012. On the handover of the former combatants, see Section II. The unity government including the Congress lasted only seventeen days. Having agreed to extend the assembly, the Congress changed its mind and withdrew after the bill to do so was tabled. "NC quits govt after 17 days", *ekantipur.com*, 24 May 2012.

⁴⁴ Phanindra Dahal and Kamal Dev Bhattarai, "Finally, deal on 11 states, mixed governance model", *The Kathmandu Post*, 16 May 2012.

⁴⁵ Crisis Group interview, UML *janajati* leader, Kathmandu, June 2012.

⁴⁶ "Finally, deal on 11 states, mixed governance model", op. cit. "Dahal seeks revision to deal on 11 states", *The Kathmandu Post*, 20 May 2012; "PM says will review 11-state deal", *The Kathmandu Post*, 19 May 2012.

⁴⁷ Limbuwan groups, active in the eastern hills of Nepal, demand a state named after the historic "Limbuwan" homeland of the Limbu ethnic group. These groups also pushed assertively for preferential rights and the right to self-determination when

formal alliances. They supported the loose Madhesi-Maoist-*janajati* alliance at the national level.

The 15 May agreement had not been discussed in the assembly and was viewed as lacking both moral legitimacy and constitutional sanction. Once again, negotiations were handled privately by senior leaders. They did not even represent all the positions within their own parties and ignored members who might have been more representative or who had worked seriously on these issues in the assembly. They also did not take seriously the bottom lines of various groups.

This agreement came in the context of a growing backlash against federalism by upper-caste and upper-class groups. Madhesi, *janajati*, Tharu and other identity-based groups, already restive and suspicious, reacted both to this new assertiveness of upper-caste groups perceived to be against federalism and to agreement between the parties which they said was an attempt to “postpone federalism” and “dismiss the question of identity”.⁴⁸ Sporadic instances of communally-tinged violence across the country threatened to spill over.

When the 15 May agreement fell apart, it was clear that the assembly desperately needed more time. On 22 May, the parties tabled a bill for one last three-month extension. Two days later, the Supreme Court ruled on a writ challenging this and upheld its November 2011 position that the constituent body could no longer be extended. It further charged the prime minister and deputy prime minister with contempt and ordered them to appear personally to explain themselves.⁴⁹

As had happened repeatedly earlier, government formation and the parties' immediate access to power was a constant factor in both substantive discussions and in negotiations

the movement was at its most radical in 2009 and 2010. Authority in the Limbuwan movement is fragmented between many smaller groups, but the movement demonstrated a wide-ranging set of tactics to push for its demands. These included forming a militant youth group, installing signboards welcoming visitors to “Limbuwan”, and collecting “taxes” on commercial goods passing through territory the movement claimed. For more, see Crisis Group Report, *Nepal: Identity Politics and Federalism*, op. cit., Section III.C.1.

⁴⁸ Crisis Group interview, UML *janajati* leader, Kathmandu, June 2012. “Morcha, Janajatis slam states ‘sans identity’”, *The Kathmandu Post*, 16 May 2012; “Broader Madhesi Front all set to protest 11-state model”, *The Kathmandu Post*, 18 May 2012. Some ethnic leaders also argued that all eleven states proposed in the 15 May agreement would have been dominated by upper-caste groups.

⁴⁹ This is extremely unusual in Nepal, where laxity is often the order of the day. If found guilty, a contempt charge carries a jail sentence of up to one year and/or a fine of up to Rs.10,000 (approximately \$110). The case now appears to be dormant.

about extending the assembly. Even as the parties were trying to discuss federalism, some leaders in the Congress and the dissident Maoist faction led by Vice Chairman Mohan Baidya were also gathering support to depose Prime Minister Baburam Bhattarai. Much of the UML's establishment joined them, along with a small Madhesi front in opposition, called the Brihat Madhesi Morcha or Broader Madhesi Morcha. This influenced calculations on all sides.⁵⁰

5. The mood outside Kathmandu

Mobilisation had been increasing outside the assembly and Kathmandu in the weeks leading up to the failed mid-May 2012 deal. As federalism looked inevitable, upper-caste groups and the urban elite, who feared reduced influence and opportunities in the restructured state, saw their last chance to contain the changes or gain concessions. Chhetri groups mobilised particularly in the central-western hills, and other upper-caste groups organised popular protests in the far west in April and May.⁵¹ Tharu groups responded to the latter with an agitation of their own, prompting clashes between the two sides. The 15 May deal confirmed the worst fears of pro-federalism forces and NEFIN enforced a tight three-day national shutdown in response. Both sides occasionally resorted to violence and security forces sometimes used force to disperse crowds. Various Madhesi groups shut down parts of the Tarai for weeks and Limbuwan groups also shut down parts of the east.

The various movements also had the tacit or explicit support of party factions or leaders, regardless of their parties' official positions on federalism. Many national and mid-level leaders are thinking about a future in state politics and are therefore becoming increasingly concerned with local or regional issues.

When clashes or other violence occurred, it was because competing protesters had crossed paths, one side felt threatened by the other, inflammatory speech or rumours had spread, or the police response had been seen as unfair.⁵² NEFIN and other critics point to biased media coverage of many pro-federalism protests in comparison to cover-

⁵⁰ Crisis Group interviews, senior Congress negotiators, Maoist members, opposition Madhesi leaders, Kathmandu, June 2012. For more on the rivalries and factionalism in the Congress, see Section II.B.3 and Crisis Group Briefings, *Nepal's Peace Process: The Endgame Nears*, op. cit., p. 11 and *Nepal's Fitful Peace Process*, op. cit., p. 12.

⁵¹ For more on the far-west movement and Tharu politics, see Crisis Group Report, *Nepal's Constitution (II)*, op. cit., Sections IV.B and C.

⁵² For example, Tharu groups and some human rights defenders alleged that the police response was biased in the mid and far west. “THRD call for urgent action to stop communal violence in Western Tarai”, Tarai Human Rights Defenders Alliance, 9 May 2012.

age of the “success” of the upper-caste movement in the far west, for example. Neither of these factors justifies the violence of responses, as in the NEFIN shutdown, for example, but credible allegations of state and media bias only sharpen radical impulses.⁵³

Most of the protests ended, as they often have in recent years, with a deal between the agitating groups and the government. For example, deals with the far-west movement, NEFIN and finally Tharu groups were reached.⁵⁴ The agreements were signed for the sole purpose of stopping protests, without any coherent policy or logic behind them. They contained many contradictory commitments and it is clear there was no intention of actually implementing them.⁵⁵

The inclusion question also arose. In early and mid-May, Hindu upper-caste communities claiming indigenous status enforced nationwide shutdowns. The “indigenous” designation is important because it gives groups access to special quotas and reservations.⁵⁶ The protesters also asked that the state not be restructured along ethnic lines. Caste Hindus do not claim homelands and are dispersed across Nepal. Dalits did not participate in this movement, but were also included in the deal the government signed with upper-caste groups.⁵⁷ *Janajati* activists were sharply criti-

cal. They argued that 59 listed “indigenous nationalities” had met criteria set out in the National Foundation for Development of Indigenous Nationalities Act of 2002, while Brahmin and Chhetri groups did not fit these standards.⁵⁸

Violence, shutdowns and provocative language from all sides have fuelled perceptions that identity claims are inherently divisive. The shutdowns and clashes also highlighted the potential losses to business interests, which have barely been consulted or reassured that state restructuring will not reduce profits. It was thus easy for non-political and political upper-caste groups and upper-class interests, such as those represented by the business community, media and civil society, to come together and advocate that these debates be put aside for the sake of “social harmony” and that everyone adopt a single Nepali identity.⁵⁹ The widespread and explicit assertion by upper-caste and class groups was a new phenomenon that helped bolster the traditional parties’ positions against identity-based federalism in the lead-up to 27 May.

⁵³ For an excellent summary of some of these arguments, see “Tactical mistakes”, *The Kathmandu Post*, 22 May 2012.

⁵⁴ The NEFIN strike led to the government agreeing on 22 May, once again, to political preferential rights. “Nefin-govt deal displeases NC, UML”, *The Kathmandu Post*, 24 May 2012.

⁵⁵ Commentator and researcher Deepak Thapa notes that all governments are tempted to sign contradictory agreements with agitating groups to paper over genuine concerns. Instead, he calls for a “mammoth roundtable” to sort out competing claims. “Piece-meal approach”, *The Kathmandu Post*, 24 May 2012. For some examples of agreements signed between the government and ethnic and regional activists, see Crisis Group Report, *Nepal: Identity Politics and Federalism*, op. cit., p. 8.

⁵⁶ For more on quotas, see Section II.A.2 above. The protests included Chhetri, Brahmin and Thakuri organisations. Here, “Thakuri” refers to a high-caste hill-origin Hindu community that has long had close ties with the Shah dynasty. This alliance contained groups previously unlikely to cooperate. Chhetri groups, for example, have been critical of Brahmin organisations. Crisis Group interview, Chhetri Samaj Nepal leader, Kathmandu, January 2012. “Bahun-Chhetris to intensify protests; Nefin slams plan”, *The Kathmandu Post*, 11 May 2012.

⁵⁷ Dalits remain Nepal’s most underprivileged and discriminated against group, including through practices of untouchability. They would gain the least from state restructuring, having no territory or demographic advantage; but the community has not mobilised aggressively. Dalits, and to a lesser extent Tharus, have an uncomfortable relationship even with other marginalised or identity-based groups. Many *janajati* communities, for example, have adopted the caste Hindu attitudes and behaviour dis-

criminating against Dalits. See also Crisis Group Report, *Nepal's Constitution (II)*, op. cit., Section V.A.

⁵⁸ “Bahun-Chhetri Samaj banda off”, *The Kathmandu Post*, 18 May 2012. In literal terms, the “indigenous” category is misleading. Nepal was settled in waves of migration and few communities can claim true “indigenoussness”. Until the 1990s, activists used “*janajati*” or “nationalities” to describe groups originally outside the Hindu caste structure; whose religious traditions often have elements of animism and shamanism; who claim historical, cultural and religious closeness to particular territories in Nepal; and whose mother tongues are Tibeto-Burman languages. In this sense, “ethnic” implies groups outside the dominant cultural norms. The *adivasi* or “indigenous” tag was adopted in the mid-1990s, in response to international recognition of the category, when *janajati* activists realised that their groups had many of the markers that were used to define indigenoussness. Indigenoussness in this case is a political, rather than literal, claim.

⁵⁹ Crisis Group interview, business analyst, Kathmandu, May 2012. “Communal harmony” was the theme of a 23 May rally in an upscale Kathmandu neighbourhood in response to the NEFIN strike. Speakers reiterated that ethnic claims damaged Nepal’s national identity. The rally was not just dismissive of the marginalised groups’ concerns; it also seemed to suggest that the monarchy should return. A popular royalist entertainer chanted slogans to rally the crowd: “*Hamro Nepal, hamro desh, pranbhanda pyaro chha*” or “Our country, our Nepal, is dearer to us than our lives”. Most Nepalis recognise this as a slogan of the absolute monarchy, similar to “*Hamro raja, hamro desh, pranbhanda pyaro chha*” or “Our king, our country are dearer to us than our lives”. The gathering was organised by the Federation of Nepalese Chambers of Commerce and Industry and the Federation of Nepalese Journalists, among others. Academic Mahendra Lawoti argued that the rally further alienated ethnic and identity-based movements. “Identity, mobilisation and the state”, *The Kathmandu Post*, 25 May 2012.

B. WHAT HAPPENED ON 27 MAY

The end of the assembly was a perfect storm. Everyone saw this as their last chance to gain something. Parties were aware of the rigidity of each other's positions, yet believed the other side would blink first. Concessions were matched by a shifting of goalposts. Power struggles over government and threats of splits in parties ran through every discussion. Democratic practice was ignored. Some traditional actors, even if they were sympathetic to federalism, were reluctant to see the "Maoist agenda" succeed. The parties involved were speculating on their political future, without realising how the very absence of the assembly and constitution would change the equation.

Several options were available to the assembly, including those suggested by the Supreme Court in its November 2011 ruling. The government could have imposed a state of emergency, which would not have guaranteed a constitution or extension but could have helped buy time. A near-complete constitution could have been issued and some argument made for a final "technical rollover" to polish details. Promulgating even a partial constitution would have allowed the assembly to continue as parliament, or another body could have resolved outstanding questions. The parties had not discussed the court's election option seriously, but the Madhesi Morcha began mentioning it in the final days. The assembly's chairperson – equivalent to the speaker in parliament – could have convened a session in the absence of an agreement and kept it alive for some days to force leaders to reach a deal. The assembly could have been extended if all parties had agreed to challenge the court together.⁶⁰

Meanwhile, cross-party political alliances were emerging strongly and challenging their own parties' leaders. The Maoists had been linked to the Madhesis since they jointly formed the government in August 2011. The Madhesis and *janajatis* had agreed in the months before that they would not interfere with each other's negotiations. Influential actors in all three forces agreed again shortly before 27 May that an in-principle commitment to federalism, with the details left to a commission or the parliament that would remain, could not be trusted. Traditional elites in the political parties, bureaucracy and judiciary would find new ways to obstruct federalism at a later stage. The history of multiple deals made on federalism and inclusion and which have not been honoured also worked against this option.

The parties had underestimated the extent to which their internal divisions, often based on federalism, would limit their room for manoeuvre. Mid-level leaders from the

Madhesi parties, which have often split, put intense pressure on their leaders not to compromise. The Maoist party's Baidya faction would have immediately walked out if the party had shown more flexibility on federalism. UML *janajati* members also said on 27 May that they would immediately leave if party leaders made them give up their demands. Party splits and defections on 27 May could have had uncontrollably negative consequences for the leadership of all parties, for law and order and for the continuation of the constitution-writing process.⁶¹

1. Talks

On 27 May 2012, leaders of the four major political forces – the Maoists, Congress, UML and Madhesi Morcha – met around 9.30am at the prime minister's residence in Baluwatar, ostensibly to negotiate a deal on federalism. The establishment factions of the Maoists and Madhesi Morcha were clear they could not back the proposed eleven state model of 15 May. They stuck to their demand of ten or fourteen states with ethnic names, and no more than two states in the Tarai, hoping the Congress and UML would be forced to agree when faced with a broader consensus.

Any compromise beyond this meant Maoist party leader Prachanda would face a serious challenge from *janajatis* within his ranks, who were also being wooed by party senior Vice Chairman Mohan Baidya "Kiran". The Madhesi Morcha was under intense pressure from younger leaders and Madhesi civil society and intelligentsia not to back down. These parties also feared ceding grassroots space to a rival front of Madhesi parties, Broader Morcha, led by Upendra Yadav and that still demanded a single Madhes state.⁶² "If we had compromised any more, our whole agenda would have been lost. The constitution-writing process would have become hollow, so what was the use of saving the process at the cost of substance?", a senior Madhesi Morcha leader said. The UML's role was at this time severely constrained by the threat of its 41 *ja-*

⁶¹ The following section is based on conversations Crisis Group had from 30 May to mid-June 2012 with 21 central-level party leaders in Kathmandu from the Maoist party, the Congress, the UML, the Madhesi Janadhikar Forum (Loktantrik), Madhesi Janadhikar Forum (Ganatantrik), Madhesi Janadhikar Forum (Nepal), and Sadbhavana Party (also a Madhes-based party). All were directly involved with the negotiations and in some cases with the drafting of the constitution. More than two interviewees corroborate most elements of this account.

⁶² Yadav has been sidelined in Kathmandu politics for more than three years. However, he headed the original Madhesi Janadhikar Forum (MJF) party, which became synonymous with the Madhesi agenda. He continues to maintain a significant grassroots network and has a reputation for integrity amid of sea of tainted leaders. He is also close to the Baidya faction of the Maoist party. For more, see Section III and Crisis Group Report, *Nepal's Expanding Political Matrix*, op. cit., Section III.C.

⁶⁰ Consensus among the parties is recognised in the Interim Constitution as a valid tool to resolve a deadlock.

najati assembly members, who had played a prominent role in the cross-party *janajati* caucus, leaving en masse.

Yet, the Congress and UML were equally convinced that the primary compulsion of the Maoists and Madhesis was saving the assembly, the constitution and federalism. They could thus bargain hard. The Congress, UML and dissident Maoists were also gathering support for a no-confidence motion against the government. But even they were uncertain. Some younger UML leaders in particular felt it was ill advised to focus on power sharing at such a sensitive moment.

When the talks broke for lunch that day, little of substance had been discussed, but many things had become clear. Parties feared ceding too much or gaining too little on federalism. Individuals were concerned that their social groups would lose disproportionately in state restructuring. Insofar as any actor was thinking beyond immediate self-interest, some were aware that there was a risk of sustained violence breaking out along group lines following the adoption of a constitution. Party structures and leadership were threatened, notably but not exclusively in the Maoist party and the UML. All actors were looking at their political futures.

When the parties reconvened at the prime minister's residence at about 3pm, the extreme reluctance to reach a deal became clear, particularly on the part of Congress. The parties received representations from minority caucuses, including the women's and Dalit groups. The *janajati* caucus, which had been unexpectedly influential since the 15 May deal, agreed to a significant concession on state names. These could be "mixed", including an ethnic group and a geographic feature or a historical reference.⁶³ "The top leaders were positive about our suggestions and we were satisfied – we did not want the process to stall because of us. But they showed their true colours later", a Congress leader in the *janajati* caucus said.⁶⁴ Sections of the Congress objected even to this diluted nomenclature and changed the discussion back to the number of states arguing for eleven states or some combination of ten states with referenda on parts of the Tarai. The *janajati* caucus was amenable to the eleven-state model, too, but the Madhesis could not accept it, as it divided the Tarai into five states.

The Congress and UML chafe at being held responsible for the end of the assembly and it is indeed difficult to lay the blame solely at their door. However, it is clear from

numerous first-hand reports of the discussion at this stage, including from Congress negotiators, that there was a high degree of actual or feigned ignorance on their part about the proposals on the table and about what "ethnic" federalism has come to mean over time. A senior Congress negotiator says his party's argument became as simple as, "if you [Maoists, Madhesis and others] don't accept eleven states, we won't accept ten". Another claimed he never read the proposals. Even at this late stage the Congress was unwilling to accept that identity had become a determining political factor. It was the same for the UML. A top leader is reported to have said that the UML would reject any deal that had "even a whiff of identity".⁶⁵ Forced into federalism, the two parties wanted to change as little as possible.

Neither the Congress nor the UML would have agreed to a vote in the assembly on provisions for federalism in the constitution, although regulations allowed for this. The "pro-federalism" lobby could not push for a vote either. Despite the 320 signatures from 599 members of the assembly against the 15 May deal, the Maoists, Madhesi Morcha and *janajatis* were unsure that they could gain the two-thirds majority needed to reach an agreement. In any case, the chairperson did not turn up at the assembly at any time in the afternoon of 27 May, preferring instead to sit with the leaders. Without him, there was no one to convene a session, let alone administer a vote.

By 4pm, it was clear that there would be no deal that could provide a fig-leaf for any subsequent decision – to extend the assembly, bring out a partial constitution, or make plans for a change of government. The question became what to do instead.

2. Breakdown

Talks moved to the government headquarters in Singha Durbar, where for the next eight hours five to ten leaders from each of the major parties roved between the chairperson's chambers, the prime minister's office and the cabinet office. There was some suggestion that the leaders move to the assembly building a kilometre away, but this was abandoned, ostensibly for security concerns. As a result, most assembly members spent the day ignorant of how the discussions were proceeding and unsure when and for what they would be called upon to vote.

In Singha Durbar, the parties discussed a few options together and with the assembly chair. The partial constitution idea was renewed. After it was issued, the assembly would, according to the Interim Constitution, be "trans-

⁶³ See Section II.A.1. In addition to the Limbuwan-Koshi state in the east, the Kathmandu area would not be called the Newa state, but the Newa-Bagmati state, after the Bagmati river.

⁶⁴ Crisis Group telephone interview, Congress leader, Kathmandu, June 2012.

⁶⁵ Crisis Group interview, journalist, Kathmandu, June 2012.

formed” into a “Legislature-Parliament”⁶⁶ which could resolve outstanding issues.

The objections were legion. Madhesi and *janajati* leaders, including those in the Maoist party, doubted that parliament would have the will or legitimacy to complete the constitution. They argued that the assembly had been specially elected to draft the statute, but it failed. There was no guarantee that a parliament, which had less legitimacy for this purpose, would succeed. The Maoists were certain that the first day the so-called “transformed parliament” sat, the coalition government that they led would be faced with a no-confidence motion. Given the factionalism in the parties and threats of splits, the Maoists and Madhesi Morcha were concerned about finding themselves in opposition. This would tilt the balance of power away from actors in favour of enshrining federalism in the new constitution. In any case, whoever led the government in the transformed parliament would not be able to push through their solution for federalism without the required two-thirds majority.

The shape of the draft was another obstacle. The assembly secretariat, assisted by three senior lawyers, had been working for some days to give complete form to the sections that had already been decided. Assembly members, leaders and bureaucrats give conflicting reports of how far the process had progressed. The chairperson is said to have shown a draft riddled with ellipses. Others claim large parts were in good enough shape to be formalised quickly.⁶⁷ However, a senior member of the assembly’s dispute resolution sub-committee said that given “the shape the draft was in, those of us who worked a lot on these issues would have been absolutely humiliated if it came out”.⁶⁸ A pro-federalism member involved in the writing process argued that it did not matter what shape the document was in, as the Congress was threatening to withdraw support from numerous provisions it had previously agreed to, such as the semi-presidential form of government.⁶⁹

Procedurally, too, there were obstacles. The draft was technically still with the constitutional committee’s dispute resolution body; neither the committee nor the dispute resolution body had sat for some days but due process required that the committee pass the draft on to the next step. Some of the parties were insisting that their members would have to follow the instructions of party whips, if there was a vote on federalism or on the constitution. Assembly members across the political spectrum have frequently said that this would be unacceptable, arguing that they should be allowed a conscience vote on constitutional matters. For example, UML *janajati* members wanted to be able to vote for identity-based federalism even if their party took a different line.⁷⁰ Given the time constraints, it would have been almost impossible even to reproduce and distribute the draft and assembly members would have had to vote on the partial constitution without having read it.

Even if these matters had been solvable, however, the more critical issue of ensuring continuity of the federalism negotiations in the “transformed legislature-parliament” was not. Earlier in the afternoon, an adviser close to the discussions had drafted a short resolution for the parties to discuss, if the parliament that replaced the assembly was to deal with federalism. The federal states would be based on “identity and capacity” and the principles, norms and standards proposed by the two earlier state restructuring bodies would be respected. Madhesi parties added that there would be ten states and that members would be allowed to vote freely, without interference from party whips or fear of expulsion. The Congress and UML deleted the no-whip provision and added a clause saying that proposals made by the parties would also stand. Even if the *janajatis* and Madhesi had trusted parliament to deal with federalism, there could not have been agreement on the terms of reference for such a task.

Other options could have been adapted from provisions in the Interim Constitution to keep parliament alive.⁷¹ About six hours before the assembly ended, leaders began to consider how to extend its term despite the Supreme Court’s judgment, or to save its role as parliament, even if a partial constitution could not be issued. Some pointed to the bill tabled a week earlier to amend the clause for extension. Although the Supreme Court had stayed the bill, they suggested it could be amended to replace the assembly with a

⁶⁶ The body elected in 2008 was meant primarily to function as a Constituent Assembly. Its secondary, shadow role was as parliament, or “legislature-parliament” as it was called.

⁶⁷ Crisis Group interviews, negotiators, constitutional lawyers, Kathmandu, June 2012.

⁶⁸ Crisis Group interview, Kathmandu, June 2012.

⁶⁹ Crisis Group interview, Maoist negotiator, Kathmandu, June 2012. Provisions in the new constitution for judicial appointments and a constitutional court had been hard fought between the parties and the Congress threatened to withdraw from some of these agreements. According to a member of the drafting process, there were numerous gaps in the provisions on the form of government and the electoral system, too. Another member said that at this stage Prachanda began to hanker again for mention of the “people’s war” in the preamble. Crisis Group has looked at a late version of the draft – it is unclear how many exist and

in what state they are – and it is perhaps for the best that the text did not see the light of day.

⁷⁰ Crisis Group interview, UML negotiator, Kathmandu, June 2012.

⁷¹ Two articles were seen to provide a way out. Article 64, on the term of the assembly, amendment of which the Supreme Court had effectively stayed days earlier, and Article 82 on dissolution of the assembly and continuation of the body as parliament.

parliament. But many were sceptical. Prime Minister Bhattarai from the Maoists and Deputy Prime Minister Krishna Sitaula from the Congress had already been charged with contempt over this very issue. This made the prime minister, at least, extremely wary. Alternatively, another clause of the Interim Constitution dealing with dissolution of the assembly could have been amended to allow parliament to continue and elections to be held.⁷² A leader from the Maoists' Baidya faction argued that this would amount to "constitutional fraud".

The Maoists also asked that the Congress and others commit in writing that, in exchange for an extension or continuation of parliament, they would not immediately lodge a no-confidence motion against the government. The main priority of the Congress did appear to be unseating the government to take charge itself. This demand, rather than urgency about finishing the constitution, has also dominated its response to the post-assembly context.

3. Emergency

By 8pm, discussion had turned to declaring a state of emergency, which the Maoist leadership at this time supported. While this would not automatically extend the assembly's term, it would keep the house alive and buy the parties some time. But it would only work if all the parties bought into the decision immediately or provided cast-iron guarantees that they would ratify it when it came to a vote.⁷³

The Congress was divided. Leaders associated with the party's president, Sushil Koirala, said that though they were possibly sympathetic, they would protest imposition of an emergency. A Congress negotiator claimed that he had spoken to President Ram Baran Yadav, who had said he would not sign the order.⁷⁴ Rival leader Sher Bahadur Deuba, on the other hand, was an enthusiastic supporter. Deuba favoured the continuation of the Bhattarai-led government and a state of emergency, believing that since a change was inevitable, such flexibility would allow him to

appear as a more broadly acceptable candidate for prime minister when the time came.

The Maoists insisted that all major parties needed to "own" the emergency. Reportedly, so did the Indian establishment. Both believed the measure, unpopular with the public in any case, would not be used to agree on a constitution, but instead to change the government. "You can't reach a consensus for the constitution, only for a no-confidence motion", Prime Minister Bhattarai reportedly said late on 27 May. This would open the door for a government controlled by the Congress, UML and the Baidya faction, if the latter were to split from the Maoists. This contradictory coalition would not likely be a constructive force for the constitution or much else. For different reasons, these actors are also aggrieved by India's apparent approval of the current government. They could possibly operate on a nationalist and therefore anti-Indian platform.⁷⁵ It would also be in bad faith to write a constitution under a state of emergency, although this does not seem to have influenced the parties' thinking.

There was little, if any, communication from the leaders. All afternoon, assembly members had been concerned that Chairperson Subas Nembang was not even on the premises or reachable on the telephone. Instead, he trailed the top leaders. An interlocutor said Nembang refused the prime minister's repeated requests that he return to the assembly hall.⁷⁶ Many now argue that he was not true to his responsibilities to the assembly but swayed by his loyalties to the more hardline anti-federalism faction of his party, the UML. Had he convened the assembly (the body only functioned as parliament for legislative purposes, not for constitution writing) session, no matter how late, perhaps the leaders would have been forced into a better decision. It would also have been possible to keep the session alive for some days and make constitutional amendments to extend the assembly's term further or vote on parts of the draft constitution.

There are arguments against this, mainly that the assembly had no "business", since there was no draft to comment on. Yet the spirit of democratic practice ought to have dictated that the chairperson respect the interests of assembly members who had been left out of all decision-making, and bring the discussion back to them.

⁷² Article 83 of the Interim Constitution deals with the Constituent Assembly functioning as parliament after it has promulgated the constitution. Articles 64 and 82 deal with dissolution of the assembly. Interim Constitution of Nepal, op. cit.

⁷³ The Interim Constitution says the government or cabinet can impose a state of emergency on the condition that it is tabled for approval by a two-thirds majority in parliament within a month.

⁷⁴ The position of president is ceremonial; he is only to act on the recommendation of the cabinet. However, he holds some powers that used to lay with the king, including the ability to "remove obstacles" or be the "last resort" to a crisis. The current president, who was elected by the Constituent Assembly in 2008, is a Congress member who has not always appeared free of partisan motivations. See Crisis Group Asia Report N°173, *Nepal's Future: In Whose Hands?*, 13 August 2009, p. 6.

⁷⁵ Crisis Group interviews, Congress and Madhesi negotiators, Kathmandu June 2012. For more on allegations of Indian support to the present government and Baidya's objection to an investment protection treaty Prime Minister Bhattarai signed with India, see Crisis Group Briefing, *Nepal's Peace Process: The Endgame Nears*, op. cit., pp. 8-10.

⁷⁶ Crisis Group interview, Maoist assembly member, Kathmandu, May 2012.

The major parties were under severe pressure by now. Prime Minister Bhattarai and Prachanda continued to be uneasy about a possible no-confidence motion in the background, though they were unclear whether this was being planned by the Baidya faction to depose the government or to mobilise for a pro-federalism vote. It was not certain that either the UML or the Maoists would split in the face of a deal on federalism that they deemed disappointing, but the leaders of both parties took the threat seriously. The Congress was livid as its negotiators were left alone for long stretches over the course of the day while the prime minister and Prachanda were apparently conducting other meetings. Some 150 assembly members, fed up of being ignored, tried to march on the government headquarters. They were pushed back by a tight security cordon and the gates of the seat of government, Singha Durbar, were locked.

4. Election

The last pieces fell apart in the chairperson's chambers at about 9pm. Prime Minister Bhattarai and Prachanda went to the prime minister's office, where the final decision on the assembly's future seems to have been made. The prime minister said that, according to the verdict of the Supreme Court, elections to a new assembly were the only alternative. There was some tension with the chief secretary, who was reluctant to formulate the government's proposal for elections. He argued, with some justification, that constitutional amendments were needed to conduct polls. However, it was unlikely these could be passed in the two hours that remained, even if the Congress and UML agreed to an election.

Shortly before 10pm, Prime Minister Bhattarai called a cabinet meeting. The Congress, having heard that the proposal to organise elections was moving forward, rushed over to agree to a state of emergency. The prime minister was already speaking with his cabinet, however. Prachanda reportedly said, "there is nothing to discuss now". Congress leaders, frustrated by a day of waiting and reacting while everyone else apparently had things to do, were exercised by the prime minister's "indecent behaviour".⁷⁷ By 10.30pm, the cabinet had decided that elections would be held on 22 November 2012. The deputy prime minister from the UML, Ishwor Pokharel, objected, but to no avail.⁷⁸

Over the next hour or so, the election announcement was drafted and the prime minister went to inform President Ram Baran Yadav. At about 11.45pm, the president received a protest drafted from the Congress, UML, Upenendra Yadav's MJF (Nepal) and a faction of a party in the ruling Madhesi Morcha. Almost simultaneously, Prime Minister Bhattarai announced that elections to a new assembly would be held. There was no formal announcement to assembly members, no ceremonial thanking or ending of the assembly.

⁷⁷ Crisis Group interview, Congress negotiator, Kathmandu, June 2012.

⁷⁸ After the Madhesi Morcha and Maoists backtracked from the 15 May agreement on federalism, the Congress cabinet members resigned. Technically, Prime Minister Bhattarai never accepted their letters of resignation. The UML members, who had also joined the government after the 15 May deal, resigned on 28 May.

III. NEXT MOVES

There are two broad possibilities: new elections or agreeing on the constitution and reviving the assembly to pass it. Neither option is ideal or easy. Both require political consensus and navigating constitutional gray areas. The parties need to reach a decision quickly so this limbo can end, as the Interim Constitution envisages neither a situation with no legislature nor another election for a Constituent Assembly. The assembly was meant to provide Nepal with a new constitution that would establish a new electoral system.⁷⁹ The elections cannot take place as announced in November 2012 since the parties did not agree on the way forward and, as a result, the election commission was unable to begin preparations on time. Elections can now only be held in spring 2013 at the earliest.⁸⁰ The absence of an elected parliament will be increasingly problematic, worsening the mistrust between the parties and making governance extremely difficult.⁸¹

Some suggest that the parties could reach in-principle agreements on constitutional issues and then hold an election to a body that, at its first sitting, would ratify those agreements and promulgate the new constitution. But the absolute unpredictability of election results and the parties' history of backtracking on deals inspire no confidence that such a faux-deal would be honoured.⁸²

⁷⁹ This section is based on conversations Crisis Group had between late May and mid-June 2012 with close to 25 central-level party leaders in Kathmandu; telephone interviews with almost twenty district-level leaders and activists from Sunsari, Dhanusha, Banke, Bardiya, Kailali, Dadeldhura; interviews in Kathmandu with four constitutional lawyers and advisers to the constitution-writing process. Crisis Group also visited eight districts in the mid- and far-west in April – Banke, Bardiya, Dadeldhura, Doti, Kailali, Kanchanpur, Pyuthan, Surkhet – and six in the east in June – Dhankuta, Jhapa, Morang, Saptari, Siraha, Sunsari.

⁸⁰ It is received wisdom that, because of weather conditions, festival seasons and farming schedules, elections can only be held in October-November or April-May. On 30 July, the election commission announced that polls could not take place in November, as the constitution and other relevant laws had not been amended to legally allow for elections. The parties had also not reached any agreement on this matter.

⁸¹ Until there is a parliament, the government will have to rule through ordinances that have to be approved by the president, which could mean conflicts between the latter and the prime minister.

⁸² For example, although the parties had agreed to declare Nepal a secular republic immediately after the 2008 elections, there were bitter negotiations between the Maoists and Congress, which used this as a bargaining chip while negotiating who would be elected president.

Some opposition members and civil society actors have taken to lobbying for elections to local bodies, last held in 1997. This is a distraction at best and mischievous at worst. Until there is a constitution, any election – whether for local government or parliament – will be a proxy for voting on all disputed issues. Heightened tensions, polarisation and heavy mobilisation will increase the risk of violence. Although representative local bodies are desperately needed, they should not be attained through such an election, as local government is the last issue on the minds of parties.

The parties have no absolute positions for or against either elections to a new assembly or reviving the old one. Their stance at any time reflects their relations with other actors, confidence or lack thereof in their agenda and analysis of their strength relative to other parties. In the weeks after the end of assembly, calls for reviving it were strong. After that, for a period, a consensus in favour of elections was close at hand, but that proved elusive. Three months after the assembly lapsed, there is still no clarity on how constitution writing will resume.

The ruling Maoist-Madhese coalition prefers elections but is open to reviving the assembly. The Congress flip-flops between the two options and for now prefers to revive the assembly. The UML wants the prime minister to resign, the constitution to be decided and issued, and elections to a new parliament. These decisions are linked to a change of government – the Congress desperately wants to get back in power and will make that a precondition for both reviving the assembly and conducting elections. In return, the Maoist-Madhese alliance will want constitutional issues settled.

There will have to be a package deal encompassing all these variables. The trust deficit is so high between the ruling Maoist-Madhese alliance and the main Congress-UML opposition that any agreement will need to include firm principles and guarantees. Some of these will be evident in the sequencing they agree upon; others will have to be negotiated. For example, should the newly elected body, whether a Constituent Assembly or parliament, accept the relatively uncontroversial clauses drafted by the last assembly in the interests of time? If the election does not lead to a clear winning party or alliance, should there be an all-party government until the constitution is written? In all cases, some options might be unacceptable to a party simply because an opponent favours it.

The impact of the change in the overall political picture cannot be gauged yet. The Maoist-Madhese *Morchajana* alliance could either consolidate or fragment. The new Maoist party is a significant factor, as is the Broader Madhese Front. The Congress will try and rally around an alliance it will call pro-democratic. Newly powerful actors, such as the *janajati* caucus and associated groups, other identity-based outfits and the monarchical right wing can-

not be fobbed off with meaningless deals.⁸³ The debate on federalism and inclusion has now moved out of the parties' control into the social sphere. These changes complicate the possibility of an agreement.

At the heart of all this lies the elusive consensus. So far, it has been a way to ensure that everyone gained something in return for a concession or to extract the most benefit from the balance of power.⁸⁴ International actors have also encouraged consensus, even as its actual meaning was increasingly detached from the ideal behind it.⁸⁵ Something more substantial is needed now, not another series of vaguely worded and half-meant agreements. The parties need to recommit to the CPA and negotiate iron-clad guarantees on the way forward.

A. REVIVING THE ASSEMBLY

The absence of an elected legislature is deeply damaging. If it persists, tensions between the parties will inevitably worsen. Reviving the assembly would address this. However, reinstating the body for the same actors to continue the same discussions, again short-circuit provisions for broader consultation and fall back into power plays to make and break governments is meaningless and possibly very difficult. The balance of power has changed between the

parties, as the formation of new alliances suggests. Groups outside the assembly will want to be heard, but not all parties seem to have accepted this. Reviving the assembly also means parties could again get sidetracked, attempting hostile removal of governments.

The full emergence of some of the political alliances that were unofficially in play in the final weeks of the assembly could be a critical factor. The ruling Maoists and Madhesi have announced their Federal Democratic Republican Alliance. This will push for either elections to a new Constituent Assembly or reinstatement of the last one after the parties have agreed on contentious constitutional issues. This is not a significant shift for any of the members, but it brings the constitution back to the centre of the decision and conveys the impression that these actors set the agenda.

The Nepali Congress, again in the throes of distracting and damaging factional conflicts, realises that this alliance pushes it into a corner. Even the basic peace process agenda of a new constitution appears to be slipping from the grasp of the Congress. This will affect its electoral chances, even among constituencies sceptical of identity-based federalism. The public at large, tired of the parties using the peace process as an excuse for all their shortcomings, sees the new constitution as a marker of a new phase for the country. The position the Congress finally takes could be strongly in favour of completing the constitution as soon as possible, issuing it and holding elections to a new parliament. That way, it can gather support from those disgruntled about specific decisions on federalism.

The sticking points will be sequencing and the role of the revived assembly. The Maoists and now the Madhesi want an agreement on the substance of the new constitution first and the assembly only revived to pass it. The Congress says the prime minister's resignation should be the precondition for any further step and is unclear about whether constitutional negotiations should take place in a revived assembly or before that with the assembly only reconvened for a short time to pass the constitution. The best hope for revival is if actors who want it most badly can convince their party members to agree. Those largely in favour of reinstating the assembly are Maoist Chairman Prachanda, senior Congress leader and former Prime Minister Sher Bahadur Deuba, the *janajati* members of the UML and some Madhesi actors. Most parties give the impression that reviving the assembly can be business as usual. This is neither possible nor desirable. Consultations will need to be more broad-based, detailed and transparent, in order to reduce the risk of violent responses. Ideally, they would take local-level actors into confidence and involve more voting by assembly members. (See Section III.C for how to improve negotiations.) Such measures will prolong negotiations. However, the parties are in a rush to finish the constitution. That makes it unrealistic to expect renewed negotiations

⁸³ See Crisis Group Report, *Nepal's Expanding Political Matrix*, op. cit., Sections III.C for more on the second Madhesi group and Sections III.D and IV.C for more on the resurgent right wing.

⁸⁴ See, for example, Crisis Group Asia Briefings, *Nepal's Peace Process: The Endgame Nears*, op. cit., Section VI.A; and *Nepal's Fitful Peace Process*, op. cit., Section V. When the Maoists were out of government from early 2009 to early 2011, they had no incentive to dismantle their army even if they had no intention of resuming war. The party demilitarised in a slow, calibrated process and each step was accompanied by other political changes. Under the hostile UML government of Madhav Kumar Nepal (May 2009-February 2011), it discharged the disqualified combatants. Under the Jhala Nath Khanal-led UML government (May-August 2011) in which the Maoists were a junior partner, they agreed to divide the former fighters into those who would retire and those who wanted to join the Nepal Army. The party would hand over the cantonments, weapons and combatants when it would lead the government. The Congress similarly used the combatants issue to block progress on constitution writing. When the future of the fighters was settled in November 2011, work could begin in earnest on the constitution, but only because an informal deal had also been concluded, in which the Maoists would make way for a Congress-led national government after the constitution was issued. The UML's primary contribution has been the making and breaking of governments.

⁸⁵ A senior Congress leader said: "We are all responsible for what happened. We all kept talking about consensus and the international community kept pushing consensus too, as if that mattered more than substance". Crisis Group interview, senior Congress leader, Kathmandu, June 2012.

and a revived assembly that will function differently than before. Negotiating the constitution will remain a profoundly challenging task.

B. THE ELECTION OPTION

Elections would be a powerful measure of the actual extent and nature of change in Nepal's political context. Such clarity could help re-cast the debate on federalism. Many supporters of the election believe polls will tip the balance of power. Technically, the new constitution requires a two-thirds majority to be passed in the assembly. In reality, it needs the broadest possible consensus to be accepted as legitimate. Even if a coalition could garner the majority and pass a constitution, this will occur in a polarised environment after an election that will possibly have been violent. Getting the numbers does not guarantee a lasting, broadly acceptable political settlement, though it will be the basis for decisions.

The parties also disagree on the primary function of the body that will be elected. The Nepali Congress says elections should be to a parliament that can have a secondary function as a Constituent Assembly. The Maoists want the previous arrangement to continue – the elected body's primary identity should be that of a Constituent Assembly which can turn into parliament after it has issued a constitution.

Most importantly, the outcome of an election is extremely unpredictable. Nearly all observers and many politicians completely misread the mood before the 2008 Constituent Assembly elections. The present context is more fluid and has more actors. Like in 2008, there is a clearly identifiable political axis around which the election will revolve, namely federalism.

Supporters of a pro-federal and pro-identity constitution argue that a loose coalition of Maoists, *janajatis* and Madhesi form a significant force. However, these actors face challenges. Single-issue electoral alliances are an untested strategy, for one. For another, local dynamics and alliances will be a critical and complicating factor in deciding how to divide up seats. Old, localised contradictions and tensions between individuals in the pro-federal groups could resurface, such as between Madhesi and *janajati* contenders, Maoists and Madhesi, Maoists and *janajati* candidates or Madhesi and Tharus. For each of the three forces in a notional winning pro-federal coalition – Madhesi, Maoist and *janajati* – there is a similar opposing force. The Maoist party has split and another Madhesi front has emerged. *Janajati* groups could also not all choose the same side.⁸⁶

This could either still mean a victory for pro-federalism forces; or it could severely fragment constituencies and loyalties.

Nepalis do not always vote along identity lines and if they do, it is not always for the same reasons. Brahmins and Chhetris will not all vote for only the Congress and UML, for example. By the same token, even if *janajatis* vote more than before for *janajati* candidates, they might not always choose the most radical line on federalism. "I believe Congress will perform well in elections here in the eastern hills but will need to field a *janajati* candidate", said a Congress leader in Dhankuta.⁸⁷

Upper-caste groups for the first time face the possibility of being in the political minority. They could mobilise in ways that capitalise on contradictions in the pro-federal camp or by raising the level of fear. New regional or identity-based parties could shift the balance away from national actors. The far-right, particularly the monarchist Rastriya Prajatantra Party (Nepal), or RPP(N), favours elections, believing it can capitalise on some of the insecurity and frustration of the general public. All these dynamics will vary from place to place.

Elections are best held by an all-party government, to reduce, if not eliminate, the risk of serious violence, as well as mutual recrimination and allegations of government-perpetrated fraud. Yet even with this in place, contestation at the constituency level is bound to be sharp, and not only because of federalism. "We were scared during the last election, but we are not now. We have got our boys together again and we have got pistols and other things too", a Congress organiser from Kavrepalanchok district said.⁸⁸

The effective postponement of the elections from November 2012 to, at the earliest conceivable, March or April 2013, prolongs a painful legislative vacuum. Yet, the delay could be useful. Many parties are not prepared for elections. "Nobody, not the Congress, not the UML [was] ready for elections in November", a Limbu leader from Sunsari said.⁸⁹ The delay also allows a cooling-off period, rather than segueing directly from the present polarisation and disappointment into an election campaign. If the parties decide on elections to a new assembly, former parliamentarians, parties and interest groups should use the delay to initiate local- and regional-level dialogue to explain the discussions so far about federalism and inclusion.

⁸⁶ For more on these dynamics, see Crisis Group Report, *Nepal's Expanding Political Matrix*, op. cit. Sections II, III.C and IV.A.

⁸⁷ Crisis Group interview, Congress leader, Dhankuta, June 2012.

⁸⁸ Crisis Group interview, Kathmandu, June 2012. Other mid-level Congress leaders and activists have also spoken frankly about this "preparation".

⁸⁹ Crisis Group telephone interview, Sunsari, May 2012.

All sides need to modify their tone and language to reduce the risk of violence. Equally, they must listen and answer questions honestly. The abstractions presented by Kathmandu's elite politicians and commentators have given rise to spectres. Explaining the nuts and bolts and demystifying party positions does not automatically mean that elections, constitution writing or implementing federalism will be peaceful. But it will allow the Nepali public, whose good faith and good-will have been severely tested, to have its voice heard if there are elections. The parties also need to moderate expectations – things will indeed change, but merely having a constitution will not solve all problems. Crisis Group has heard significant arguments for and against elections to a new assembly from actors, activists and analysts across the political spectrum.⁹⁰

1. Elections are democratic and (relatively) legal

The most common argument in favour of elections is that polls are the best test of the consolidation of identity politics and of whether the political balance of power has changed. Maoists, most Madhesis and new *janajati* actors not in established parties are the strongest advocates of this position. They argue further that if the representatives in the last assembly could not agree on the constitution in four years, there is no guarantee that they can do so if given another few months. Now, they say, although misinformation remains, people are better informed about federalism than they were in 2008. A central-level Maoist leader said: “At that time [in 2008], people were voting for peace, or for or against the Maoists. By now many people know that the core of the peace process is federalism. That is about all Nepalis, not only Maoists. People should get the chance to vote for that”.⁹¹

Some activists also say that voters need a chance to bring their regional concerns to the fore and to jettison discredited politicians. For instance, the fear of a close election could force parties to present clear agendas and select better candidates. Every part of the country has different problems and responses to the federalism debate and the Kathmandu-centred discussions of national leaders and media tends to flatten these, presenting them as only for or against federalism, and for or against ethnic or upper-caste identity.

For example, in the eastern hills, where Limbuwan groups are active, there is a distinct history of identity movements and radical rhetoric about self-determination has alternated with accommodation and outreach to all groups. In the far west, Tharu and upper-caste groups are open to negotiation and there are tangible issues to discuss. In the Pokhara area, a sharp polarisation between upper-caste

groups and *janajati* groups became visible in May, although no specific disagreement was apparent. An election would allow these issues to play out, while a revived assembly would continue to treat them as appendages of a “national problem”.⁹²

Some pro-federalism constitutional experts and analysts argue that elections are the least problematic option, although, like reviving the assembly, polls will also require the law to be bent. Even if only one election to a Constituent Assembly was envisioned, at least there are constitutional provisions that can be amended to conduct a second election. Some of these experts add that the last assembly allowed too many overrides of democratic procedure. A fresh start in a new assembly would allow the process to be strengthened. Even the electoral design could be improved. For example, parties could be asked to rank their lists for proportional representation, so voters would know which candidate on the list would take the first seat the party won, which the second and third and so on.

Members of the Congress and UML argue, when they favour elections, that the political landscape will not change completely. New alliances, such as that envisioned between the Maoists, Madhesis and *janajatis* might not last. *Janajati* groups may not maintain momentum. “Old faces and old forces will not just vanish, we are still relevant”, a district-level Congress organiser said.⁹³ They argue, as do a few observers, that if elections bring old actors back to the assembly, this will help preserve some of the work of the last body.

Finally, the far-right monarchist parties favour elections, believing they can capitalise on some of the insecurity and frustration of the general public.⁹⁴

2. Elections will be violent and will not change things

The strongest arguments against elections come from the Congress and UML. Members of these parties argue that there is no guarantee elections will throw up definitive results.⁹⁵ A new assembly could thus find it even more difficult to reach a deal on the constitution. It would be a waste of time and financial resources to again be saddled

⁹⁰ See Section III.B.3 for more.

⁹¹ Crisis Group interview, Kathmandu, July 2012.

⁹² Crisis Group interview, analyst, Kathmandu, July 2012.

⁹³ Crisis group interview, Kathmandu, June 2012.

⁹⁴ The most prominent of these parties is the Rastriya Prajatantra Party (Nepal), or RPP(N), which has said since 2006 that the abolition of the monarchy was both wrong and illegal. For more on the royalist right, see Crisis Group Report, *Nepal's Constitution (II)*, op. cit., Section III.D.

⁹⁵ There are real concerns that the Congress itself will fare very badly, but leaders do not of course present this to outsiders as an argument against elections.

with a weak and constantly shifting balance of power and the compromises of coalition politics. More importantly, a senior Congress leader said: "If the next election is for a Constituent Assembly, this will cement damaging, undemocratic political positions and radical ethnic parties. They may gain electoral support, but such politics does not serve the country's best interests".⁹⁶

An extension of these arguments, although not one that politicians or analysts raise directly, is the heightened risk of violence. The weeks before the last assembly ended demonstrated how deep polarisations run in Nepali society. The election will in effect be a referendum on federalism and the place of identity in the federal model. Groups jostling for a say in the new constitution will see their definitive moment to influence decisions. Elite groups who feel they may lose out will be struggling to maintain supremacy. Communal violence would be much less controllable than the calibrated inter-party violence that elections often involve. Radical armed groups could emerge, if fringe groups on any side feel that the election will only serve to soften their agenda, not further it. (For more on the risks of violence, see Section III.E.)

An argument against elections initially advanced by members of the Congress, UML and some in Kathmandu's civil society was that the government's decision to call elections without bringing the other parties on board first and making the necessary constitutional amendments was unconstitutional. Instead, the government should have ensured the constitution was amended to conduct the polls legally. Sections of these groups also often say that four more years of another 601-member body is too expensive.⁹⁷

Those who present the above arguments say that the last assembly had resolved most of the contentious constitutional issues. The best way forward, they say, is to complete the constitution as soon as possible, either through an all-party government, a revived assembly for discussions or a constitutional commission. This would allow a quicker end to the exhausting peace and constitution-writing processes and a much-needed return to regular parliamentary politics so parties could focus on governance instead.

The more extreme end of the argument against new elections holds that the average Nepali has no idea what federalism means and that Nepal has been shown it was not

ready for a Constituent Assembly. At best, some on the far-right hold, a commission could draft a constitution. Alternatively, the idea could be shelved until Nepal's politics stabilises.⁹⁸

3. Election challenges

The Interim Constitution contains election-related articles that need to be amended. This can be done through ordinance with or without the consent of the opposition, through a difficult political agreement to revive the legislature for a few days, or if the president uses his authority to "remove obstacles", as the Interim Constitution calls it.

The articles needing amendment deal with the date of the election, the cut-off date for eligibility to vote, and constituency delineation.⁹⁹ The Constituency Delimitation Commission bases its delineation of constituencies on the census, and many argue that the 2001 census figures are not an adequate or fair basis to draw constituencies.¹⁰⁰ A census was conducted in 2011 but will only publish its final report at the end of October 2012. Redrawing constituencies will be challenging and contentious.

Voter registration is also a tricky issue. Based on population projections, the election commission had expected to register about 14.5 million voters ahead of the next election. So far, 10.5 million have been registered. About a million eligible voters, who are not yet registered either lack citizenship or, the commission assumes, are not interested in voting. The remaining are believed to be living overseas.¹⁰¹ The details of more than 60,000 voters are inaccurate and need to be fixed.¹⁰²

⁹⁶ Crisis Group interview, Kathmandu, June 2012.

⁹⁷ The Interim Constitution originally gave the assembly two years. Every one of the four extensions since the original end of the assembly's term in May 2010 took place through a constitutional amendment. The Interim Constitution thus now mandates a four-year term for the assembly. This will have to be amended either before the next election or in the first sitting of the newly elected Constituent Assembly to reduce the term back to two years or even less, as the parties see fit.

⁹⁸ Crisis Group interviews, anti-federalism analyst, Kathmandu, June 2012.

⁹⁹ Articles 33.A, 63.3 and 63.7. The Interim Constitution of Nepal, op. cit. Crisis Group interview, election commissioner, Kathmandu, June 2012.

¹⁰⁰ Crisis Group telephone interview, senior official, Central Bureau of Statistics, Kathmandu, June 2012.

¹⁰¹ Citizenship certificates are a political hot potato in the Tarai. There are allegations of Indian citizens obtaining them by fraud or through the favour of political leaders who want a pliable constituency. But Madhesi activists allege bias and barriers including language to accessing the government services, such as land and other records needed to prove citizenship. However, the problem is not confined to the Tarai. The election commission found that as many as 40 per cent of residents in some hill districts do not have citizenship papers. The Carter Center estimates a total of 2.1 million people may lack citizenship documents and that between 1-4 million eligible voters are unregistered. "The Carter Center's Fourth Interim Statement on the Election Commission of Nepal's 'Voter Register with Photograph' Program", The Carter Center, July 2012. The number of Nepalis working and living overseas is estimated at over 3 million; this also complicates the election commission's efforts to

C. MAKING NEGOTIATIONS BETTER

Political games will not stop. Despite that, discussions can clearly be better designed, whether in a parliamentary framework or not. An assembly set-up would make safeguards easier, although rules are effective only as long as actors commit not to disregard them. Any new discussions inside or outside the assembly have to be more inclusive and transparent. That means politicians must be willing to expose themselves to scrutiny and give up some power in exchange for uncertain rewards. Leaders must pay attention in their own parties to the positions of mid-level leaders and minorities, both of whom might be more in touch with the mood in the districts. But it is impossible to impose internal democracy on parties or to make them adopt more coherent policy mechanisms or more transparent organisational management. The parties will have to want to function differently, even if only for a short time.

1. Protecting Constituent Assembly functions

The assembly had created so-called thematic committees to prepare papers and drafts on a variety of constitutional subjects.¹⁰³ These were reasonably well-informed and creative, although there were also some significant loopholes. When thematic committees could not agree on an issue or there was a significant dissenting opinion, both alternatives were left in the draft.¹⁰⁴ The constitutional committee should have been the first stop after the thematic committees to resolve contentious issues.¹⁰⁵ If this was too difficult, specific issues could have been put to a vote following plenary discussions. The new constitution was also meant to be passed article by article, rather than as a whole. However, voting did not occur at any stage. Instead, a high-level task force and then the constitutional committee's "dispute resolution sub-committee" decided on everything.¹⁰⁶

register voters and issue voter IDs. Crisis Group interview, senior election commission member, Kathmandu, 4 June 2012.

¹⁰² Crisis Group interview, election commission official, Kathmandu, June 2012.

¹⁰³ Some of these drafts were passed unanimously by the committees, others were passed with a "minority opinion" attached.

¹⁰⁴ For example the committee on the judicial system's concept paper included dissenting opinions from its members on more than five issues. "A Report Preliminary Draft with the Concept Paper", Assembly Committee on the Judicial System, September 2009.

¹⁰⁵ In theory, the constitutional committee would resolve outstanding issues or decide to put them to a vote. In practice, top leaders of the Maoist party, Congress, UML and later, Madhesi parties negotiated these issues, often tacitly as part of wider negotiations on the Maoist fighters and change of government.

¹⁰⁶ After the high-level taskforce was formed in October 2010, the assembly was bypassed entirely in these discussions. Smaller parties protested. As early as February 2011, the constitutional

Some in Kathmandu now say that the last assembly failed because Nepal is not ready for a constituent assembly. But this argument overlooks how much of the constitution was actually negotiated. The inability to agree on federalism does not mean the idea of a constituent assembly has failed; rather, it is an indication of the distance between the parties on major constitutional matters. The multiplicity of issues they were negotiating, constitutional and others, allowed for federalism to be continuously pushed back.

It also became the norm to override democratic practices. At various points, the assembly's timetable had to be amended as it scurried to meet deadlines. From the start, the planned public consultations began getting shorter and shorter until they disappeared earlier this year. "Even with a three-month extension until 27 August [2012], the parties would not have consulted with the public", claimed a UML *janajati* leader.¹⁰⁷ Processes were also amended. By May 2012, it was decided to pass the entire constitution in one go, rather than voting on each article.

Workarounds can be found for any provisions; rules will only work if the parties stop considering them idealised suggestions. Yet some measures could be enforceable and helpful for a new or revived assembly, such as:

- ❑ Rules of attendance and serious penalties should be enforced so as to force senior leaders to participate.¹⁰⁸
- ❑ Some rules of procedure, such as on plenary discussion and voting to resolve contentious issues, as well as timetables, including for public consultation, should not be amendable.

committee's chair, Nilambar Acharya, criticised top Congress, UML and Maoist leaders for keeping other parties out of constitutional decision-making processes. "Challenges in drafting the new constitution discussed", nepalnews.com, 5 February 2011. The dispute resolution sub-committee belonged to a web of sub-committees and task forces that followed. It was formed later in February 2011 and mostly comprised the same top Maoist, Congress, UML and Madhesi leaders (some of whom had lost their constituencies in the 2008 elections) who had dominated these negotiations. In theory, the sub-committee was under the constitutional committee, but in reality it operated entirely independently.

¹⁰⁷ Crisis Group interview, UML *janajati* leader, Kathmandu, June 2012.

¹⁰⁸ Senior leaders were notorious for skipping parliamentary sessions. From May 2008 to April 2010, the average attendance of assembly meetings was 63 per cent, or slightly less than two thirds of the members. Senior leaders had particularly dismal attendance records. For example, Maoist Chairman Prachanda had an attendance rate of 6.93 per cent during this period, and Congress prime ministerial hopeful Sher Bahadur Deuba, 1.98 per cent. "Attendance and Participation in the Constituent Assembly", Policy Paper no.4, Martin Chautari, September 2010.

- ❑ Members of assembly committees should not be nominated members of the assembly, but have to be either directly elected or selected by the parties from the ranked lists of candidates for seats won through the proportional representation vote.
- ❑ Committee heads should be voted in by committee members or rotate according to pre-defined criteria instead of being appointed on the basis of “consensus”.
- ❑ Formal provisions for participation of legal and academic advisers should be enforced. The presence of these experts must be official and their contributions minuted.
- ❑ The use of “consensus” during assembly meetings and while resolving contentious issues will be unavoidable, but should be used in combination with voting and only on issues and proposals that have been presented previously in the assembly.

If new elections are held, other questions perhaps need to be considered, such as how to separate power sharing in government from negotiations. The proportional representation provision is already contested by the Congress. Abolishing it is not the answer, but it clearly needs to be redesigned to allow for more meaningful representation.¹⁰⁹

2. Improving broader negotiations

Future negotiations clearly need to be more transparent, inclusive and responsive. Parties need to make three kinds of efforts.

Broad-based consultations should take place. Parties must speak clearly and openly to the public about the issues on the table and the debates around them. The constitution has been delayed by years and there is perhaps not enough time for the large village-level consultations that were once envisioned. Yet, open meetings in districts, with local and national leaders, can take place even as politicians are muddling around in Kathmandu trying to find a way out of the present morass. It would be particularly useful to have mid-level politicians who were deputed to the various thematic committees to conduct these information sessions. Most made a good effort in the assembly. They are reasonably well informed, used to speaking with each other, and appear slightly less tainted than top leaders.

Consultations should also take place at the local level. The federalism negotiations could be expanded outside only a putative Constituent Assembly and take place at various levels. “Some parties are calling for *sarvadaliya* [all-party] roundtables or talks, but actually, the way forward will have to be *sarvapakshiya* [multi-sided], so groups not in the assembly have a voice”, a UML *janajati* leader said.¹¹⁰ Some negotiations, such as on specific contested territories in the far west or the eastern Tarai, can take place in those very areas; local ideas can contribute to regional solutions. On complex questions such as outlets from the hills to India through Tarai districts, academic or expert opinion, even if it is often politicised, should help inform political decisions. There will need to be more discussions about the relations between the proposed states and between the states and Kathmandu with regard to trade and taxation; local entrepreneurs and larger business interests could be consulted so they too feel less threatened.

Inclusion needs to gain clarity in the debate. Policy discussions urgently need to be initiated on inclusion measures and classification of groups before these questions resurface through popular protests. The Brahmin-Chhetri push to be classified as indigenous was about inclusion as much as it was about federalism. The indigenous category needs to be clarified and the viability of provisions like the International Labour Organization’s Convention 169 which relates to the right to self-determination deserves discussion. The pro-federalism parties have not yet reached out in any meaningful way to the Dalit or the women’s caucuses. For both, among the most disadvantaged in Nepal today, the extent to which federalism can generate inclusion matters more than abstract debates about federalism.¹¹¹

D. OUTSTANDING ISSUES

Although federalism is the stickiest issue, other factors influenced the end of the assembly and will affect future decisions.

First, parties were divided on the form of government. The Maoists pushed for a directly elected president, arguing that this would lend stability in comparison to endless coalition politics. The calculation is also that this system would best serve party Chairman Prachanda’s personal ambitions. The Congress countered that it would lead to authoritarianism. A “mixed” or “semi-presidential” system was decided on, with a directly elected president and

¹⁰⁹ Ranked lists would be a step in the right direction. The quality of participation of members who entered the assembly through the quota system, particularly women, Dalits and some *janajatis*, has been criticised by many quarters, including the groups these members are supposed to represent. This is in large part because the parties chose candidates who would toe the party line, rather than be useful participants with public legitimacy. See also Crisis Group report, *Nepal’s Expanding Political Matrix*, op. cit., Section V.A.

¹¹⁰ Crisis Group interview, UML *janajati* leader, Kathmandu, June 2012. There are others who echo this demand. Crisis Group interviews, Congress member, Madhesi negotiator, Kathmandu, June 2012.

¹¹¹ For more on Dalit dynamics and women’s participation, see Crisis Group Report, *Nepal’s Expanding Political Matrix*, op. cit., Sections V.A and V.B.

a prime minister elected by parliament. This decision was thought the best compromise, although it was likely to give rise to two power centres and potentially crippling power struggles. In the final gasps of discussions on federalism, the Congress said it would withdraw from the agreement on the semi-presidential system, suggesting a trade-off with federalism discussions.

Secondly, the judiciary had also been much exercised over provisions related to it in the new constitution. The Maoists proposed political appointments at every level, and a constitutional court. Critics said this would open the courts to even greater politicisation than now and said nominations and promotions of judges should continue to be based on seniority only, setting aside ability and track record. After consultations with the judiciary, the compromise was a constitutional court with a term limit.¹¹² Yet, some argue that this episode damaged relations between the judiciary and the parties, particularly the Maoists, and influenced the Supreme Court decision against further extension of the assembly.

E. GAME CHANGERS

The parties' lack of organisation, fragmented decision-making and leadership crises will determine how the coming months play out.¹¹³ But other factors could change the game significantly.

Violence: There has been no significant violence since the assembly ended, but any episode of communally tinged violence followed by perceptions of a biased police response or violent provocations could put an unpleasant end to the parties' dithering.

Although there is widespread anger at what is seen as the irresponsibility of the political elite, confusion about what happened and uncertainty about what comes next mean there are no clear targets for immediate protests. However, clashes could occur between opposition and ruling coalitions; between pro- and anti-federalism groups; locally between members of identity-based organisations; as well as between the two Maoist parties or the two Madhesi fronts. Provocative but anonymous acts of violence targeting ordinary people have the potential to ignite tensions and could be depicted as having ethnic undertones. "Ethnic tensions will definitely rise again when it comes time to decide on [state restructuring] issues", a commentator in Sunsari said.¹¹⁴

Groups could attempt to assert their presence and push their causes at the local level. In recent years, an increase in public programs, declaration of "ethnic constitutions", symbolic announcements of new states, and biased local media have sparked violence, as have rumours of atrocities by protesting groups. Symbolic acts and inflammatory rhetoric play a critical role.¹¹⁵ So far, urban areas and areas with mixed populations along Nepal's main highway are more volatile. But the new pro- and anti-federalism alliances could increase the risk of violence and tensions could spill over to new areas.¹¹⁶

Many of these scenarios depend on whether the response of the state security forces is perceived as balanced and proportionate or not. Political agitation also becomes more extreme, violent and frequent when movements have a martyr. The response of successive governments since 2007 has been to sign agreements promising to meet agitators' demands. The impracticality of this approach was demonstrated in May 2012, when the government signed many pacts, some mutually contradictory, with a range of protesters.

Without a legislature and only a short-term budget, the balance that parties had reached at the district level will change. For the last two years, there has been little violence between the parties at the local level, in large part because of agreements to share the development budget and tenders. Now, parties from the ruling coalition may feel emboldened to break these deals. Most parties also have "incentive-driven" cadres on the rolls, whose careers are

¹¹² According to the agreement the parties reached on 15 May 2012 in consultation with members of the judiciary, the Supreme Court and the Constitutional Court were to have equal status and both would be headed by the chief justice. The Constitutional Court would have jurisdiction over disputes between the states, between the states and the centre, and between states and local governments, while the Supreme Court would deal with all other constitutional issues. In addition to the chief justice and the next two most senior justices of the Supreme Court, the Constitutional Court would also include two constitutional experts nominated by cabinet. This, it was argued, would give the Constitutional Court a "political character" and differentiate it from the Supreme Court. Justices to the Supreme Court are nominated by the Judicial Council. Crisis Group telephone interview, constitutional lawyer, Kathmandu, August 2012. See also "Draft of agreement among parties", *The Kathmandu Post*, 16 May 2012.

¹¹³ For more on the parties, see Crisis Group Report, *Nepal's Expanding Political Matrix*, op. cit.

¹¹⁴ Crisis Group interview, Sunsari, June 2012.

¹¹⁵ The United Limbuwan Front, an alliance of Limbuwan activist groups and parties, has already announced a Limbuwan state and released the "Interim Limbuwan Constitution" on 26 May 2012. Crisis Group telephone interview, Limbuwan leader, Sunsari, June 2012. In the far west too, signs have gone up welcoming visitors to the Unified or Undivided Far-West state.

¹¹⁶ The city of Pokhara for example, is not often considered a hotbed of ethnic or communal tension. Yet, in May 2012, Chhetri activists and ethnic activists clashed there.

in petty crime or enforcement or who depend on tenders for government work.¹¹⁷ These individuals may have to seek alternatives. If an election seems to be on the horizon, all parties will be fundraising and muscling in on each other's turf even before campaigning begins.

The president: The president's position is ambiguous. Constitutionally, President Ram Baran Yadav is a ceremonial figure, but he remains a potential power centre. For example, in early August he refused to endorse ordinances forwarded by the government to update and amend election laws. He argued that there first needed to be consensus among the parties on the way forward. Shortly after the assembly ended, he stated that the prime minister was a "caretaker" only. This was controversial, as the president himself is also caretaker, by virtue of having been elected by the last assembly. President Yadav sparked controversy in 2008 and 2009, when he was accused of supporting positions taken by his party, the Nepali Congress.¹¹⁸ In recent years, he has rehabilitated his image to a large extent, notably after his role in the army chief's reinstatement in 2009.¹¹⁹

President Yadav is under significant pressure from the opposition Congress and UML to help facilitate a change of government. The president holds the power to "remove obstacles" and he is also seen by some as the "last resort".¹²⁰ If no political consensus is reached, he will almost inevitably act. The opposition parties will be tempted to prolong the stalemate to keep this option open.

The Supreme Court: The judiciary's actions in connection with the assembly are seen by many as overreaching or activist. Faced with the uncertain post-assembly scenario, the court has tried to backpedal, asserting that a solution

to the present crisis lies with the politicians and ruling in favour of the government's proposal to pass the budget through ordinance. Yet, if the government oversteps a notional line between the prerogatives of a regular government and a caretaker one, the court's loyalties will also be severely tested.

Governance: The absence of a legislative body will pose serious challenges to the government, as the difficulty to pass the partial budget in July 2012 illustrated. Other governance issues could arise and it is difficult to envision the parties setting aside their differences in the interests of governance. As with the partial budget, the government will have to issue ordinances, which the president will have to approve, and this could cause tensions between the president and prime minister.

The royalist right and former king: The former king, Gyanendra Shah, has occasionally pronounced grimly on the state of Nepal's politics and governance since he was deposed in 2006. However, he has usually ruled out a return or a political role. Until the assembly ended, that is. In early July 2012, he said that if the people so wished, he would return – not as a political figure, but in his original role as the king of Nepal. Greater visibility bolsters efforts of the few conservatives who support the monarchy publicly. Some in the royalist group do not believe the king can or even should return. But they raise the monarchy issue tactically to garner support for restoration of the 1990 constitution with the monarchy removed or made purely ceremonial. The chances of this happening are also slim, but such talk adds to the confusion and polarisation.

The Nepal Army: There will be little domestic and no international support if the army moves in support of any actor, whether the president, the opposition or the former king. The army also does not seem to want to intervene. Yet, the Nepal Army is still a relatively autonomous player. After the assembly ended, it felt the need to state that it would follow the orders of any "legitimate government". This pronouncement harks back to the army's dangerously dismissive attitude toward civilian governments earlier in the peace process – it is not the place of the security forces to judge the legitimacy of a government.¹²¹

In 2011, the Nepal Army became cooperative, to a certain extent, on the issue of integrating some former Maoist combatants.¹²² Although it has also been careful not to infringe

¹¹⁷ See Crisis Group Asia Report N°194, *Nepal's Political Rites of Passage*, 29 September 2010, Section III.B.1.

¹¹⁸ For example, see Crisis Group Report, *Nepal's Future: In Whose Hands?*, op. cit., Section II.C and Crisis Group Briefing, *Nepal's Peace Process: The Endgame Nears*, op. cit., Section VIII.

¹¹⁹ President Yadav came under a cloud for reversing then-Prime Minister Prachanda's dismissal of the former chief of army staff, Rookmangad Katawal, in early 2009. See Crisis Group Report, *Nepal's Future: In Whose Hands?*, op. cit., p. 6.

¹²⁰ The power to "remove obstacles" is generally understood to mean that the president's sanction could allow the parties to override procedural and some constitutional obstacles. Article 158, The Interim Constitution of Nepal, op. cit. Some politicians call him the "last resort", arguing that in a situation where all actors are discredited or the parties simply cannot agree, there is at least some constitutional cover for the president to act. However, since the president's role is ceremonial, he should in theory act only on the recommendation of cabinet. The article granting the president this power is a relic of the constitutional monarchy. The power to "remove obstacles" is constitutionally granted, but there are no limits placed on it. Under the king, this meant that the palace could do as it wished, at the end of the day. Article 127, The Constitution of Nepal, 1990.

¹²¹ See, for example, "Euta janel kahilyai ritayard hundaina", *Nagarik*, 23 January 2010.

¹²² For background on security sector issues and particularly the question of Maoist fighters and the end of the Maoist army, see Crisis Group Reports, *Nepal: From Two Armies to One*, and *Nepal's Expanding Political Matrix*, both op. cit.

on parliamentary debates,¹²³ it has been implicated in politics in one way or another. Some argue that the deal on the fighters was a quid pro quo between the Maoists and the army.¹²⁴ The army, for long steadfastly against any integration, agreed to take in more combatants than expected in a new directorate. The government in turn signed off on a restructuring plan and particular high-level promotions.¹²⁵ The broader restructuring plan would, by some accounts, inflate the officer ranks more than strictly necessary.¹²⁶ This proposal was rejected by a parliamentary committee, which argued that changes should not be made before a new national security council was in place and could evaluate the new context.¹²⁷ The assumption was that the constitution would be issued and that Nepal would soon be on the road to creating new states.

However, far fewer than the expected 6,500 former Maoist fighters ended up opting for integration into the army. This means the government and the army will have to come up with an alternative to the directorate that was to have been 18,500-strong and headed by a lieutenant general. But regardless of the Maoist fighters, the army now insists on the directorate, which is an important part of its restructuring plan.¹²⁸ Relations between the Maoists and

some top officers may have thawed, but they have not become allies and old resentments could resurface.

General Gaurav Shumsher Rana became acting chief of the Nepal Army in August 2012. He replaces the outgoing head, General Chhatra Man Singh Gurung who retires in September.¹²⁹ The appointment ended speculation that the succession could be disputed or used by parties to counter each other. There is a general perception that General Rana and the Maoists are hostile to each other and that he represents a section of the army sceptical of the changes underway in Nepal. To allay these concerns, General Rana should reject all calls to intervene on behalf of political actors and refrain from speaking on constitutional questions. Similarly, politicians must realise that solutions engineered with the support of the army will be unacceptable and worsen the polarisation.

The Nepal Army appears willing to play a positive role in quickly resolving the future of the Maoist fighters who have opted for integration into the army.¹³⁰ Such steps will elevate the army's image. When the parties start working again on the broader peace process, General Rana will be faced with a process the army has deep reservations about, namely its democratisation to become more accountable to civilian oversight, accept changes in its recruitment procedures to better represent Nepal's diverse population, and its downsizing.¹³¹

¹²³ In 2009, the then-chief of army staff, General Rookmangad Katawal, made an unsolicited presentation about the Nepal Army's views on constitutional issues to the assembly's committee on preservation of national interests. "Senalai rajnitik vivadma natana", *Kantipur*, 14 February 2009. For more on General Katawal and the Nepal Army's resistance to the peace process, see Crisis Group Report, *Nepal's Future: In Whose Hands?*, op. cit., Sections IV.A and IV.B. When the polarisation between the Maoists and other parties was at its worst in 2009 and 2010, the current chief of army staff, Chhatra Man Singh Gurung, was open in his support for non-Maoist parties. Since 2011, however, the Maoists and the army have become reasonably close. Of peace process issues, the inclusion agenda remains sharply contested by the army, which objects to recruiting more Madhesi youth, for example. "NA already inclusive enough: Army chief", *The Kathmandu Post*, 5 July 2011; "Army unhappy about decision", *The Kathmandu Post*, 22 December 2011.

¹²⁴ Crisis Group interview, retired senior Nepal Army officer, Kathmandu, June 2012. See also Dhruva Kumar, "Sena punar-samrachana ra rajyavyavastha", *Kantipur*, 4 May 2012.

¹²⁵ "CoAS tells House panel of need to re-do 'obsolete' Army structure", *The Kathmandu Post*, 30 April 2012. These reportedly included a relative of the chief of army staff, Chhatra Man Singh Gurung. The promotion could have changed the succession race. "Army restructuring", *Republica*, 10 May 2012.

¹²⁶ Crisis Group interview, retired senior army officer, June 2012. Dhruva Kumar, "Sena punar-samrachana ra rajyavyavastha", op. cit., Section IV.B.

¹²⁷ The decision was made by the state affairs committee on 8 May 2012. "SAC shelves Army restructuring plan", *The Kathmandu Post*, 9 May 2012.

¹²⁸ Crisis Group interview, retired senior army officer, Kathmandu, June 2012.

¹²⁹ General Gurung handed over control of the Nepal Army to General Rana before he took his customary leave one month before retirement. "Gen Gurung hands over responsibility to Rana", *The Kathmandu Post*, 10 August 2012.

¹³⁰ Crisis Group interview, Kathmandu, August 2012.

¹³¹ For more on the succession and General Rana's challenges ahead see Sarojraj Adhikari, "Jimmevariko suruvat ra samapti", *Kantipur*, 11 August 2012 and Prashant Jha, "Reform agenda", *The Kathmandu Post*, 8 August 2012.

IV. THE INTERNATIONAL COMMUNITY

The most significant international actors in Nepal are its neighbours, India and China. The influence of other international actors on Nepal's peace process has waned significantly in recent years, as Nepali politicians have negotiated between themselves and appealed to neighbours for help. India remains a critical actor that can often help swing decisions one way or another. China remains interested, but its influence on day-to-day politics is a recent phenomenon. The UN's four-year-long political mission ended in January 2011, but its department of political affairs maintains a small presence in Nepal.

A. INDIA AND CHINA

Although India's role was not visible directly around the end of the assembly, a section of the Indian establishment supported the holding of fresh elections to determine a new balance of power, arguing that the end of the assembly would not be disastrous. Indian frustration with the ineptitude of the Congress and UML in negotiations, their inability to manage their parties and their poor performance as opposition contributed to this position. So did the sympathy of some Indian actors for federalism.

Since the assembly ended, New Delhi has appeared largely agnostic on whether elections should be held or if the assembly should be revived. However, India has begun pushing for an all-party government, although it has been supportive of Prime Minister Bhattarai for almost a year.¹³² This position gives some impetus to the Congress and UML's demands that the government resign. Without a parliament, dislodging the government is a difficult proposition. But Prime Minister Bhattarai can hold out for only so long in the face of broad-based pressure.

Some senior Maoist leaders are also reportedly concerned that India has become less enthusiastic than it was about identity-based federalism. This pullback could be due to concerns about the impact and possible spillover across the border into India of violence between groups over federalism.¹³³

The suggestions of Indian preference for an all-party government come in the context of politicians and government officials noting an unprecedented degree of Chinese involvement in Nepalese politics.¹³⁴ This has taken a number of forms. An immediate irritant for many, including New Delhi, was the recent appointment by Prime Minis-

ter Bhattarai of a chief secretary of government who is perceived to have a pro-China tilt.¹³⁵

There are increasing reports from senior leaders, government officials and some in the diplomatic community of an emerging Chinese position on federalism.¹³⁶ It is thought that China believes that federalism along identity lines and the creation of a large number of relatively strong and autonomous federal states along Nepal's northern border will weaken the Nepali state's ability to control what in Nepal is called "anti-China activity", the official language used to describe pro-Tibet activism.¹³⁷

India's position on the options open to the parties is challenged by more than Chinese involvement. The Congress and UML could intensify protests. The leverage that the new Maoist party will have is yet unclear, though it could be a visible and vocal challenger. A resurgent right wing or aggressive identity-based movements that ride the wave of discontent against the main parties could mean additional protests or some violence by non-party actors. Anti-government and nationalist sympathy could increase anti-Indian public displays, particularly by the new Maoists and monarchists. This has variable impact on New Delhi's decisions or behaviour with regard to Nepal, but it could give courage and coherence to the traditional parties' anti-government actions. An irritable army under pressure from politicians or a president who argues that he is being pushed to act could also win more influence.

Yet, India's response cannot simply be to support those forces that look the most coherent or clear; these will almost by definition be pushing narrow solutions such as presidential intervention. Nor can it be driven solely by fears of Chinese influence. India's most constructive role now is to encourage all the parties, and especially those in

¹³² Crisis Group telephone interview, analyst, Kathmandu, August 2012.

¹³³ Crisis Group interviews, Kathmandu, August 2012.

¹³⁴ Crisis Group interviews, Kathmandu, August 2012.

¹³⁵ On 29 July 2012, the prime minister appointed Lila Mani Poudel as chief secretary. Poudel is a former consul general to the Tibet Autonomous Region and is thought to have high-level connections in Beijing. Crisis Group telephone interview, foreign ministry official, Kathmandu, August 2012; Anil Giri, "Cabinet picks Poudel as acting chief secy", *The Kathmandu Post*, 30 July 2012. India's unhappiness with Prachanda's apparent cosyng up to Beijing when he was prime minister in 2008 and early 2009 was one factor that forced his resignation. See Crisis Group Report, *Nepal's Future: In Whose Hands?*, op. cit., Section V.A.

¹³⁶ Crisis Group interviews, Kathmandu, August 2012. When the vice minister of the Communist Party of China's International Department, Ai Ping, visited Nepal in June 2012, he cited China's difficult experience with developing states equally to prioritise "infrastructurally feasible" states. Quoted in "Focus on economy, not ethnicity", *The Himalayan Times* online edition, 30 June 2012.

¹³⁷ Crisis Group interviews, Kathmandu, August 2012. See also Deepak Gajurel, "Chinlai baipas garnasakne thaun chaina", *Drishhti*, 7 August 2012.

the mainstream, to first make up with each other and then reach out to the constituencies they habitually ignore.

China could be entering uncharted territory if it is expanding its sphere of influence in Nepal. It would be useful for any actor attempting this to study India's experience: while New Delhi has undeniable and sometimes definitive influence, Nepali actors are also adept at taking what is useful from foreign patrons and then doing as they wish. There is no linear relationship between influence over Nepali actors and specific outcomes.

India and China are unlikely to allow their positions in Nepal to significantly affect bilateral relations. They are both wary of an increase in engagement by European countries, the U.S., or the UN's political office. Some political analysts in Kathmandu speculate that the Nepal-India-China dynamic could develop in new ways, if all three decide that limiting other actors' involvement is a useful strategy.¹³⁸

B. OTHER INTERNATIONAL PLAYERS

European bilateral actors, the development side of the UN, and other non-Asian donors are increasingly feeling the pressure of the changing political context. Members of the traditional establishment sharply criticise donor projects aimed at inclusion and federalism or targeting communities which are now making their voices heard.¹³⁹ Donors are accused of having stoked ethnic sentiment or having promoted ethnic federalism against the wishes and best interests of Nepalis.¹⁴⁰ These allegations discredit *janajati* groups, presenting them as proponents of a donor-driven agenda. The more extreme end of the right-wing, royalist and Hindu loyalist spectrum also holds European

donors responsible for the increase in proselytisation and the establishment of a new secular state.¹⁴¹

There is dubious merit in these claims. Whether through language rights movements, cultural organisations or more overt political activity since the 1990 pro-democracy movement, identity-based activism has a considerably longer history in Nepal than donor support for it.¹⁴² There is also no evidence that donors "ask the Maoists to push secularism" or "fund churches" as some allege¹⁴³ though it is quite possible that donor oversight of projects they fund leaves something to be desired.

Donors now seem to be backing away from inclusion issues. Although no donor has publicly done so yet, some are keeping a consciously low profile or postponing publication of studies on the correlation between ethnicity and living standards. An assessment that releasing such information will contribute to tensions could be a factor in such decisions, as could security of staff.¹⁴⁴ Chhetri and Hindu activists, in particular, sometimes make threats of physical harm against European donors and the UN.¹⁴⁵ Yet lying low and concealing information only reinforces the perception that donors are not transparent because their intentions are mala fide.¹⁴⁶

The UN development system is also under pressure to scale back its work on support to federalism, social inclusion and justice issues. The UN's Development Assis-

¹³⁸ Crisis Group interviews, Kathmandu, August 2012.

¹³⁹ The long-running support of the UK aid agency, the Department for International Development (DFID), for NEFIN has been particularly controversial. When NEFIN organised a *bandh*, or shutdown, in May 2011, the agency pulled its funding, saying that it could not support such political activity. Senior Congress politicians refer to "our foreign friends" responsible for the loss of the assembly and imply that European donors who supported programs on inclusion or the activities of caucuses in the Constituent Assembly were irresponsible. *Janajati* interaction program; Crisis Group interviews, Congress leader, academic, Kathmandu, June 2012.

¹⁴⁰ Crisis Group interviews, Congress leader, Kathmandu, June 2012; royalist analyst, Kathmandu, June 2012. Also see, Santosh Ghimire, "Adivasi janajati ra datri nikayako sahayog", *Naya Patrika*, 30 January 2012; Shekhar Koirala, "Jatiya adharma sanghiyata ghatak", *Kantipur*, 19 January 2012.

¹⁴¹ For example, see Jeevan R. Sharma, "The India factor", *Republica*, 28 July 2012; Amish Raj Mulmi, "Nepali Hindutva", *himalmag.com*, July 2011.

¹⁴² For some background, see Crisis Group Report, *Nepal: Identity Politics and Federalism*, op. cit., Sections II.A-C.

¹⁴³ Crisis Group has heard this claim in Kathmandu and in districts during interviews with Congress members in particular, but also members of other parties including the UML and RPP(N). Crisis Group interviews, Kathmandu, October 2011-July 2012; Dadeldhura, May 2012.

¹⁴⁴ Some activists and journalists allege that the release of a World Bank and DFID report which examines in detail the correlation between identity and exclusion or marginalisation has been deliberately withheld due to pressure to do so from powerful members of upper-caste groups. Crisis Group interviews, Kathmandu, June, August 2012. "Identity groups fail to recognize equal rights of others: Report", *Republica*, 22 August 2012; "Elites find it difficult to let go uni-culturalism: Report", *Republica*, 21 August 2012; "Pressure from 'hill elites' halts Dfid exclusion report", *Republica*, 20 August 2012. Employees of donor organisations speaking to Crisis Group in their personal capacity said they believed DFID did not want to inflame communal sentiment. Crisis Group interviews, Kathmandu, May and June 2012.

¹⁴⁵ Crisis Group interviews, Shiv Sena Nepal leader, Kathmandu, November 2011 and Chhetri activist, Jhapa, June 2012.

¹⁴⁶ Crisis Group interview, ethnic activist, Kathmandu, June 2012. See also Prashant Jha, "The battle ahead", *The Kathmandu Post*, 13 June 2012.

tance Framework determines the organisation's budgetary allocations and priorities and sets the agenda for the UN and many bilateral aid agencies. The next planning period runs from 2013 to 2017 and the UN consulted extensively on the plan document with the National Planning Commission (NPC). In early August 2012, the NPC reportedly wrote to the UN Resident and Humanitarian Coordinator asking that references to structural discrimination, religious minorities, statelessness, weak rule of law and impunity be removed or toned down.¹⁴⁷ The NPC also returned a heavily edited version of the document to the UN, which purged the text of references to discrimination against ethnic minorities, the Hindu caste system and the political domination of some ethnic groups. It also suggested that rather than "vulnerable groups", the plan focus on "poor and disadvantaged groups".¹⁴⁸ The UN says the document has not yet taken final form.¹⁴⁹

Activists who work on identity issues and some development workers are angry about what they see as a shift in donor priorities. They argue that by supporting social inclusion projects and affirmative action in their own recruitment policies, donors have only responded to the disparities identified by their research, often based extensively on the Nepali government's statistics.¹⁵⁰ The political settlement proposed in the Comprehensive Peace Agreement (CPA) and Interim Constitution recognised that identity-based discrimination is a significant challenge for the country. To argue that there is no structural discrimination is to roll back a major peace process commitment.

Some donors have also supported the constitution-writing process. Some of this has been public, such as the UN's support to "participatory constitution building" and International IDEA's for the *janajati* caucus.¹⁵¹ Other initiatives have supported or facilitated informal negotiations between mid-level leaders on constitutional and other issues.¹⁵² All programs have been criticised for not being neutral or having actively promoted agendas detrimental

to Nepal. Like the suggestion that *janajati* politics is a foreign invention, these accusations are debatable and often depend on which side of the federalism debate one takes.

Yet, international players' engagement with constitution writing can be criticised. Two kinds of activity require closer attention. One is the common donor habit of scooping up select assembly members and taking them to various parts of the world, for example on "study tours" to see how other countries deal with federalism. Some in Nepal see this as distraction that diverted assembly members' attention from the difficult tasks at hand.

The other is donor support to negotiations that took place away from the assembly. Donors who supported a few such initiatives say that they provided a neutral and confidential area for discussions. Away from the public eye, negotiators trusted by party leaders could speak freely to each other and seek expert advice if they needed it. This, it is argued, kept the channels of communication open between the parties.¹⁵³ While there is some merit in this reasoning, these negotiations added one more layer of secrecy to an already un-transparent process of deal-making on constitutional issues and took it a step further away from the assembly. At this stage of the peace process, donor-funded confidential talks also seem unnecessary. There are enough Nepali public and semi-private spaces for leaders and negotiators of all levels to speak to each other. Finally, given how undemocratic Nepal's political parties can be, the impact of such discussions on final decisions is debatable. At the very least, independent evaluations of the impact of such efforts should be conducted.

Whether through a revived assembly or a new one, the debate and negotiations on constitutional issues are going to become more fraught. Many more actors will compete for a seat at the table, and their tactics could be questionable. Patience for closed-door, top-down decisions is waning. Donors will have to balance security concerns with continuing their work. They will also have to be more responsive to critiques rather than just ignoring them. They must also make sure that any further support to constitution writing or negotiations is transparent and open to public scrutiny.

Since the start of the peace process, donors have carried on as if it were business as usual and the CPA was an apolitical wish list. If reminder were ever needed that all development is indeed political, Nepal's donors, the international community and the country's own bureaucrats have received it now.

¹⁴⁷ The NPC is officially headed by the prime minister. It appears as if Prime Minister Bhattarai was, however, unaware of the commission's actions with regard to the UN planning document. Crisis Group interviews, Kathmandu, August 2012.

¹⁴⁸ Crisis Group interviews, Kathmandu, August 2012. Prashant Jha, "Walk the talk", *The Kathmandu Post*, 22 August 2012. "NPC undermines minorities' plight", *The Himalayan Times*, 15 August 2012.

¹⁴⁹ Crisis Group email interview, August 2012.

¹⁵⁰ For example, see "Unequal Citizens: Gender, Caste and Ethnic Exclusion in Nepal – Summary", DFID/World Bank, 2006.

¹⁵¹ International IDEA has supported the various caucuses in the assembly, including the *janajati* group, but this has been less controversial.

¹⁵² Crisis Group interviews, former Maoist and Congress assembly members, two participants in one such series of negotiations. Kathmandu, May-June 2012.

¹⁵³ Crisis Group interviews, three NTTP dialogue participants, Kathmandu, January, March, June, 2012.

V. CONCLUSION

The 2008 election to the Constituent Assembly, with the unexpected Maoist win and Madhesi consolidation, was the first defining moment of Nepal's transition. May 2012 was the second. Whether the Constituent Assembly is revived or the country elects a new one, the context of the peace process has fundamentally changed. Identity may become simply one of many ways of doing politics in Nepal. But until there is a new constitution and there are signs that it is being implemented, it will remain the most significant issue. The parties have to pull off a delicate balancing act. Denying the concerns of historically marginalised groups will radicalise the debate and harden the polarisation. Addressing these concerns could mean, in the short term, considerable losses to some traditionally elite constituencies. These are genuine fears, and need to be softened. In the long term, identity-based groups will also need to broaden their political repertoire and acknowledge the diversity in their own ranks if they want to build strong political institutions and networks. The risks that all this will feed multiple conflicts are clear.

Discussions on inclusion and federalism have sharpened the divisions between many groups. Yet not all the fallout has been negative. There is an unprecedented degree of public discussion about socio-political issues in Nepal. Fears have increased, but so has knowledge. Nepalis are asking their politicians more questions and there is room to make public debate informative and constructive. More practically, many members of the Constituent Assembly did a significant amount of work on the wide array of constitutional issues and worked across party lines through many knotty questions. This knowledge should be shared with the public and could help when the constitution writing process resumes.

There are many hands reaching for the gates and many voices clamouring to be heard. It is perhaps too much to expect selfless sacrifice from leaders or parties. But for the sake of their own survival, they must at least sit down with the new players and talk. The parties must also demonstrate genuine, practical commitment to the democratic values they claim to hold dear. Some political actors may have to accept short-term losses in exchange for remaining viable in the long-term. If they do not, fringe and radical players, old and new alike, are waiting to take their place. Nepal is undergoing a democratic transition and its political parties must use this to enhance the practice of participatory democracy at all levels. The constitution is at the heart of this process. Difficult as it might be, the project cannot be abandoned.

Brussels/Kathmandu, 27 August 2012

APPENDIX A

MAP OF NEPAL



Map No. 4304 UNITED NATIONS
 January 2007 (Colour)

Department of Peacekeeping Operations
 Cartographic Section

APPENDIX B

GLOSSARY

Assembly

Constituent Assembly – unicameral body tasked with drafting a new constitution, also served as a legislature-parliament, term ended on 27 May 2012.

Brahmin

Members of the group traditionally considered the highest caste hill-origin Hindus, broadly called upper caste.

Brihat Madhesi Morcha

Broader Madhesi Morcha – smaller of the two fronts of Madhesi parties, currently in the opposition, has reasonable grassroots-level support and influence in the Madhesi population.

Chhetri

Members of the group traditionally considered the second highest caste hill-origin Hindus, broadly called upper caste.

Congress

Nepali Congress – second largest party in the assembly that ended on 27 May, a major traditional player in Nepal's democracy, strongly against ethnicity-based federalism.

CPA

Comprehensive Peace Agreement – November 2006 agreement officially ending the decade-long war, signed between the government of Nepal and the Maoists, then called the Communist Party of Nepal-Maoist.

Dalit

Members of the group of Hindus considered at the bottom of the caste ladder. Untouchability has been outlawed but Dalits still face many kinds of discrimination.

DFID

Department for International Development – UK government's department responsible for promoting development and the reduction of poverty. Recently renamed UK Aid.

FPTP

First Past the Post – an electoral system in which the candidate with the most votes in a constituency, not necessarily a majority, wins.

International IDEA

International Institute for Democracy and Electoral Assistance – intergovernmental organisation supporting sustainable democracy worldwide.

Janajati

An umbrella term for a large number of ethnic groups, most from the hills, outside the caste Hindu system, claim distinct languages, cultures and often, historical homelands.

Janajati caucus

Cross-party caucus of indigenous assembly members formed to pressure the national parties to pass a federal model acknowledging identity.

Madhesi

An umbrella term for a population of caste Hindus residing in the Tarai who speak plains languages and often have extensive economic, social and familial ties across the border in northern India.

Madhesi Morcha

Samyukta Loktantrik Madhesi Morcha – alliance of five Madhesi parties, Madhesi Janadhikar Forum (Loktantrik), Madhesi Janadhikar Forum (Ganatantrik), Tarai Madhes Loktantrik Party, Tarai Madhes Loktantrik Party (Nepal) and Sadbhavana Party. Its primary agenda is federalism and more equitable representation of Madhes in state institutions. Does not include MJF (Nepal) and Sanghiya Sadbhavana Party, two other significant Madhesi parties.

Maoists

Unified Communist Party of Nepal-Maoist, or “the establishment party” – largest party in the now defunct assembly, came above ground at the end of the war in 2006. The party split in June 2012. The parent party retains

this name, the new party is called the Communist Party of Nepal-Maoist.

MJF (Nepal)

Madhesi Janadhikar Forum (Nepal) – party under the leadership of original MJF chairman, Upendra Yadav.

Muslim

Followers of the religion of Islam who can be of both plains and hill origin but predominantly live in the Tarai.

NA

Nepal Army, until 2006 the Royal Nepal Army.

NEFIN

Nepal Federation of Indigenous Nationalities – an umbrella organisation of indigenous nationalities, formed in 1991, has a presence in over 60 of Nepal's 75 districts and over 2,500 of almost 4,000 Village Development Committees.

New Maoist party

Communist Party of Nepal-Maoist or CPN-M – formed by Mohan Baidya “Kiran” in June 2012 after vertical split from the Unified Communist Party of Nepal-Maoist.

PLA

People's Liberation Army – the army of the Maoist party, which fought the state for ten years.

PR

Proportional Representation – an electoral system where the seats a party wins are proportional to the number of votes it receives.

RPP(N)

Rastriya Prajatantra Party (Nepal) – only party in the assembly that demanded restoration of the monarchy, also demanded referendum on secularism and federalism, led by monarchist Kamal Thapa, split from the Rastriya Prajatantra Party in 2008.

State Restructuring Commission

Commission formed in November 2011, tasked with recommending an appropriate state restructuring model, presented two reports in January 2012 – a majority report with ten states and a minority report with six states.

State restructuring committee

Committee on State Restructuring and Distribution of State Power – one of the assembly's ten thematic committees, submitted its report in January 2010 with a fourteen-state state restructuring model.

Thakuri

Members of a high caste hill-origin Hindu community, had close ties with the Shah dynasty.

Tharu

Members of the indigenous populations of the Tarai plains.

UML

Communist Party of Nepal (Unified Marxist-Leninist) – third largest party in the last assembly.

Upper caste

Term used in the federalism debate to refer to members of the highest caste hill-origin Hindus, usually Brahmins or Chhetris.

APPENDIX C

ABOUT THE INTERNATIONAL CRISIS GROUP

The International Crisis Group (Crisis Group) is an independent, non-profit, non-governmental organisation, with some 130 staff members on five continents, working through field-based analysis and high-level advocacy to prevent and resolve deadly conflict.

Crisis Group's approach is grounded in field research. Teams of political analysts are located within or close by countries at risk of outbreak, escalation or recurrence of violent conflict. Based on information and assessments from the field, it produces analytical reports containing practical recommendations targeted at key international decision-takers. Crisis Group also publishes *CrisisWatch*, a twelve-page monthly bulletin, providing a succinct regular update on the state of play in all the most significant situations of conflict or potential conflict around the world.

Crisis Group's reports and briefing papers are distributed widely by email and made available simultaneously on the website, www.crisisgroup.org. Crisis Group works closely with governments and those who influence them, including the media, to highlight its crisis analyses and to generate support for its policy prescriptions.

The Crisis Group Board – which includes prominent figures from the fields of politics, diplomacy, business and the media – is directly involved in helping to bring the reports and recommendations to the attention of senior policy-makers around the world. Crisis Group is chaired by former U.S. Undersecretary of State and Ambassador Thomas Pickering. Its President and Chief Executive since July 2009 has been Louise Arbour, former UN High Commissioner for Human Rights and Chief Prosecutor for the International Criminal Tribunals for the former Yugoslavia and for Rwanda.

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