

Occasional Paper

Constitution-drafting Process

Issues of Consensus and Contention

Tilak Pathak/Bhuwan KC

© Alliance for Social Dialogue

Graphic Design
Bikram Chandra Majumdar
bmajumdar33@gmail.com

November 2014

Alliance for Social Dialogue
Social Science Baha
Post box no. 25334, Kathmandu, Nepal
Phone: 4472807, Fax: 4475215
asd@asd.org.np | www.asd.org.np

Disclaimer: This paper has been prepared based on Nepali article *Sambidhan Nirman Prakriya: Sahamati ra Asahamati ka Bishaya [Saamayik Aalekh-2]*. Though the original Nepali article includes developments until September 11, 2014, this translation has been updated to include the constitution-drafting process up to November 4, 2014.

Constitution-drafting Process

Issues of Consensus and Contention



Contents

Introduction	5
Context	8
Change in balance of power	9
Formation of committees	11
Progress of the Dialogue Committee	12
Sub-committee forging consensus	12
Reappearance of disputes in the Committee	16
Issues resolved by the Dialogue Committee	18
Drafting Committee sketching the outline	20
Disputes and agreements of Constituent Assembly I	21
Conclusion	25

Introduction

It has been seven years since the process of drafting the constitution from the Constituent Assembly started. It has already been 11 months since elections to the Constituent Assembly II following the automatic expiry of the Constituent Assembly I after its failure to draft a constitution. During the elections to the Constituent Assembly II, political parties including Nepali Congress, CPN (UML), UCPN (M), and others had expressed commitment to draft a constitution within one year. The government and the political parties have expressed their commitment to draft the constitution within a year based on the first sitting of the Constituent Assembly on January 22, 2014. Based on this, the constitution should be drafted by January 22, 2015. Though the Constituent Assembly had prepared a schedule based on that, the work has not proceeded according to the schedule.

In the meantime, there have been meetings, discussions, dialogue, consultation for constitution-drafting, yet there is sharp difference of opinion on federalism, forms of government, election system, judicial system, and other important issues. Though the Political Dialogue and Consensus Committee should have resolved all disputed issues by September 6, it failed to do so. The Committee sent the issues of consensus and disputes to the full sitting of the Constituent Assembly without resolving the issues. However, the Constituent Assembly sent back the disputed issues to the Committee for further attempts at consensus giving a timeline of September 18 to 30. After there was no consensus on those issues, the Committee chairperson Baburam Bhattarai submitted the Committee's report to the Constituent Assembly on October 8. The Constituent Assembly again extended the Committee's deadline by five day (October 11 to 16) and instructed the Committee to present questionnaires on disputed issues to the Constituent Assembly on October 17 if there is no consensus by then. However, the Committee was again unable to find a consensus. Then the meeting of senior leaders of political parties decided to provide one more opportunity to the Committee to seek consensus. On October



The government and the political parties have expressed their commitment to draft the constitution within a year based on the first sitting of the Constituent Assembly on January 22, 2014. Based on this, the constitution should be drafted by January 22, 2015.



On October 21, the Constituent Assembly has extended the Committee's deadline for the third and final time for November 1. If there is no consensus by then, it has also instructed the Committee to submit an integrated report with questionnaires.

21, the Constituent Assembly has extended the Committee's deadline for the third and final time for November 1. If there is no consensus by then, it has also instructed the Committee to submit an integrated report with questionnaires.¹

However, the Committee could not forge a consensus within the deadline. After the Committee could not come to a consensus within the deadline, it indirectly extended the deadline by giving continuity the meeting of the November 2.² In a way, the Committee has ignored the instructions of the full sitting of the Constituent Assembly.³ In the meantime, on November 17, Congress-UML registered a common seven-state proposal in the Dialogue Committee of the Constituent Assembly.⁴ But UCPN (M) and other opposition parties rejected this proposal. Rejecting the proposal, UCPN (M) chairperson Pushpa Kamal Dahal said, "The Congress-UML concept cannot be discussed in the Dialogue committee. This is a concept of only a few leaders; therefore, this can only be a reference material, and cannot proceed beyond the Dialogue Committee."⁵ The next day, after the chairperson of the Dialogue Committee and UCPN (M) leader Baburam Bhattarai postponed the meetings indefinitely, the process of constitution-drafting has come to a standstill. Congress and UML have requested Constituent Assembly chairperson Subash Nemwang to call a full sitting of the Constituent Assembly and finalise the issue from there. This step by Bhattarai has invited sharp polarisation. The constitution-drafting process is in limbo because this has created antagonism among the parties.

The political parties instead of seeking consensus on disputed issues have of late formed a high-level political mechanism

.....

- 1 Deadline extended for the Committee until November 1. [2014, October 22]. *Nagarik Daily*, p.1. [in Nepali].
- 2 Pandey, Balram. [2014, November 17]. Meetings to continue until agreement. *Nagarik Daily*, p.2. [in Nepali].
- 3 Phuyal, Rajendra. [2014, November 3]. Dereliction of Constituent Assembly Instructions. *Kantipur Daily*, p.1. [in Nepali].
- 4 Adhikari, Balkrishna. [2014, November 4]. Seven-state proposal in the Dialogue Committee. *Nagarik Daily*, p.1. [in Nepali].
- 5 Pandey, Balram. [2014, November 17]. Congress-UML proposal rejected by the opposition. *Nagarik Daily*, p.2. [in Nepali].

and brought new proposals on federalism. This article gives an overview of the background of Constituent Assembly II, political development since its election, and includes the constitution-drafting process until November 4, 2014 and summarises the issues of consensus achieved and the outlines disputed issues that remained until the last moments of the Constituent Assembly I.



The political parties
instead of seeking
consensus on disputed
issues have of late
formed a high-level
political mechanism and
brought new proposals
on federalism.

Context



Though the term of the Constituent Assembly I extended four times for a total of two years, its terms expired automatically without drafting the constitution. The Constituent Assembly I term automatically expired as its term could not be extended any more as per the Supreme Court ruling of November 25, 2011.

The Constituent Assembly I election was held on April 10, 2008 to bring an end to the ‘armed revolt’ of CPN (M), address the demands of the different communities, and with the objective that a sovereign people should be able to write their own constitution. The first sitting of the Constituent Assembly I on May 28, 2008 endorsed the goal of drafting the constitution within two years. The constitution could not be drafted within the schedule because of antagonism among UCPN (M), Nepali Congress, CPN (UML) and Tarai-Madhes-centred political parties⁶. Though the term of the Constituent Assembly I extended four times for a total of two years, its terms expired automatically without drafting the constitution. The Constituent Assembly I term automatically expired as its term could not be extended any more as per the Supreme Court ruling of November 25, 2011.

Though the then prime minister Baburam Bhattarai had announced the election date, there was no consensus among the political parties⁷. UCPN (M) chairperson Pushpa Kamal Dahal proposed in the party’s general convention hall in Hetauda an election government headed by the Chief Justice.⁸ As soon as Dahal had proposed a government led by the sitting Chief Justice, discussions in its favour and against started. After a protracted dispute and debate, a written agreement on a government led by Chief Justice Khil Raj Regmi was signed among the parties on March 13. The Regmi-led government held the Constituent Assembly II election on November 19, 2013. By the time of the election, all the parties had reverted back to their own agendas forgetting the agreements reached in the past.

6 Tarai-Madhes-centred parties here refer to the parties who base their activities in the Tarai such as Tarai-Madhes Loktantrik Party, Madhesi Janadhikar Forum-Nepal, Madhesi Janadhikar Forum-Loktantrik, Nepal Sadbhawana Party among others.

7 Prime Minister Baburam Bhattarai had called for elections as the term of the Constituent Assembly was nearing on November 22, 2012.

8 The general convention of UCPN (M) ran from February 2 to 9, 2013 in Hetauda.

Change in balance of power

The results of the Constituent Assembly II election brought about extensive change in the balance of power. UCPN (M), the largest party in the Constituent Assembly I, became restricted to third place after the election, and the second and third parties in the previous Constituent Assembly came to be respectively the largest and second largest parties; however, after the defeat in the election, UCPN (M) and Tarai-Madhes-centred parties demanded investigation into the election casting doubts on its authenticity. Not only that, it threatened not to submit the name of its proportional candidates and boycotting the Constituent Assembly, but the Election Commission outright rejected its allegation.

After a long time of attempts, UCPN (M) agreed to enter the Constituent Assembly as per the agreement among the parties on December 24. Amidst considerable opposition and dissatisfaction, the political parties finalised the list of proportional candidates. The delay in finalisation of the name of proportional candidates in the name of consensus pushed the sitting of the Constituent Assembly further back. The Interim Constitution has provision where the first sitting of the Constituent Assembly has to be within 21 days of results being declared by the Election Commission, but a dispute arose between President Ram Baran Yadav and chairperson of the Council of Minister Khil Raj Regmi on who should call the first meeting. In the end after drawn-out discussions, chairperson of the Council of Ministers Regmi called the Constituent Assembly meeting.

About three months after the Constituent Assembly II election, a majority government under Congress president Sushil Koirala was formed. After the failure to form an all-party government, Congress and UML and other parties formed a government, but a dispute arose between Congress and UML on the portfolio of Home Ministry. In addition, the demand by UML for election for the president also soured relations between Congress and UML. However, Constituent Assembly



After a long time of attempts, UCPN (M) agreed to enter the Constituent Assembly as per the agreement among the parties on December 24. Amidst considerable opposition and dissatisfaction, the political parties finalised the list of proportional candidates.

chairperson and vice-chairperson were elected unanimously based on the consensus among the main political parties.



However, Constituent Assembly chairperson and vice-chairperson were elected unanimously based on the consensus among the main political parties.

Reasons for delay in Constitution-drafting

- demands by UCPN (M), Tarai-Madhes-centred parties for investigation, casting doubts on the Constituent Assembly election
- delay by the parties in finalising the name of proportional candidates
- dispute between President Ram Baran Yadav and chairperson of Council of Ministers Khil Raj Regmi on who should call the first sitting of the Constituent Assembly II. Political parties also divided on the issue
- continuous discussion among parties in the name of consensus government overshadowed the government formation process
- demand for election of the president by UML and other parties
- dispute regarding the Home Ministry portfolio between Congress and UML after government was formed under the former's leadership
- delay in election of the chairperson and vice-chairperson of the Constituent Assembly
- dispute emerged among parties while drafting Constituent Assembly Regulations, which led to the delay in formation of committees in the Constituent Assembly
- delay in formation of political committee as previous agreements
- delay in starting discussion on main disputed issues by the Dialogue Committee
- leaders of main parties not engaging in serious discussions on main disputed issues of the constitution. Strategy of wearing out each other instead of seeking consensus.

Formation of committees

There was again dispute among the political parties on finalising the Constituent Assembly Regulations. On March 21, the 12th meeting of the Constituent Assembly endorsed the Constituent Assembly Regulations 2070 and Constituent Assembly (Operational Procedures of Legislature-Parliament) Regulations 2070. The Constituent Assembly meeting on March 28 formed five of its committees. The same meeting also took ownership of the thematic reports prepared by the Constituent Assembly I. Then it also took ownership of the agreements reached in the Constitutional Committee and Dispute Resolution Sub-committee of the Constituent Assembly I.

Right after the committees were formed, the Committee to Study and Determine Constitutional Records studied the past thematic reports and separated the issues of agreements and disputes. The Committee held its first meeting on April 6 and after 18 meetings, it completed its work. This Committee was also given the responsibility of noting the important points raised by the Constituent Assembly members and send it to the Dialogue Committee. The Committee has already submitted the issues raised by Constituent Assembly members on the reports to the Dialogue Committee.



The Constituent Assembly meeting on March 28 formed five of its committees. The same meeting also took ownership of the thematic reports prepared by the Constituent Assembly I. Then it also took ownership of the agreements reached in the Constitutional Committee and Dispute Resolution Sub-committee of the Constituent Assembly I.

Progress of the Dialogue Committee

The Committee on Constitutional-Political Dialogue and Consensus Building started its work by forming five separate sub-committees. The Dispute Resolution Sub-committee led by Laxman Lal Karna has found consensus on several issues of the constitution.



According to the consensus, the House of Representatives will have 235 members, out of which 118 will be directly elected and 117 will be proportional members.

Sub-committee forging consensus

The Sub-committee with Karna as its coordinator has also forged consensus on all issues related to the Committee for Determination of Forms of Government. The Sub-committee has also forged consensus on bicameral House of Representatives and National Assembly, which will be called the legislature-parliament. According to the consensus, the House of Representatives will have 235 members, out of which 118 will be directly elected and 117 will be proportional members. Previously, there has been a dispute on whether there should be 151 members or 245 members in the lower house. Similarly, an agreement has been reached on 61-member National Assembly, where there will be 13 members from not-represented communities, 10 from distinguished individuals, and rest from the states. The Sub-committee has also found consensus on a female being either the chairperson or vice-chairperson of the National Assembly. An agreement has been reached on where the state assemblies will have a maximum 35 members where 18 will be directly elected and 17 will be proportional members. The Dispute Resolution Committee under the Dialogue Committee has forged consensus all 20 disputed issues listed out by the Committee to Study and Determine Constitutional Records such as qualification of the members of assemblies, vacant seats, oath of office, ordinances.

After Congress came up with a new proposal of 175-member House of Representatives (75 from proportional-inclusive candidates and rest from others) and National Assembly (maximum of 75 members), the disputes resolved by the Sub-committee again came undone.⁹

The Dispute Resolution Sub-committee has also resolved disputes related to the Committee on Fundamental Rights and Directive Principles. Among these, while it has been agreed that legal rights will be discussed along with judicial system, agreement has also been reached on rights to property, social justice, and directive principles. The Sub-committee garnered consensus on the rights of every citizen within prevailing laws to hold, use, sell, and profit from property and other transactions related to property. The agreement also states that the state can impose tax on individual property as needed and, except for public good, cannot appropriate or receive or assert any rights over such property; however, this provision will not be applicable to properties earned through illegal means. Also, the Sub-committee has got agreement on providing compensation while acquiring property for scientific land improvement and the state can regulate and manage land by passing laws.

On the report by Judicial Systems Committee, the Dispute Resolution Sub-committee agreed on establishing the Constitutional Court and the Chief Justice will be the ex-officio chairperson of the Court. In addition, the Sub-committee has reached an agreement on formation of Federal Judicial Commission to consult and advise on appointing, transferring, taking disciplinary action, and dismiss judges of the Supreme Court, judges of the Constitutional Court, chief judge, and judges of the High Court.

The Sub-committee also has addressed the disputes related to the Constitutional Committee. The main



After Congress came up with a new proposal of 175-member House of Representatives [75 from proportional-inclusive candidates and rest from others] and National Assembly [maximum of 75 members], the disputes resolved by the Sub-committee again came undone.

⁹ Adhikari, Balkrishna. [2014, October 12]. Congress proposal of 6 or 7 states without dividing districts. *Nagarik Daily*, p.1/2. [in Nepali].



The main parties have agreed that, except for independence sovereignty, geographical integrity, and sovereignty of the people, all other issues in the constitution can be amended.

parties have agreed that, except for independence sovereignty, geographical integrity, and sovereignty of the people, all other issues in the constitution can be amended. The main parties agreed that issues related to norms and values of rule of law, independent judiciary, fundamental rights, human rights, press freedom, pluralism, competitive multiparty system, adult franchise, and periodic election can be amended, but these will have to be endorsed through public referendum. After RRP-Nepal opposed the inclusion of ‘republican system’ as immutable, it has been decided to conclude this along with other constitutional issues as it falls in the preamble.¹⁰

The parties have agreed that all other issues can be amended through a two-third vote of the parliament. In addition, the parties have agreed that the borders and jurisdiction of the states, two-third votes of the parliamentary can be amended with consent from the respective state, but issues concerning many states or all states will need to be amended with the agreement of the majority states and two-thirds of the parliament. The Sub-committee of the Dialogue Committee has also concluded the issues of transition mechanisms. Agreement has been reached on concluding the issues of terms of the president and vice-president while resolving the disputes in the form of government; it has also been agreed to retain the present judiciary and officials of the constitutional bodies until a new appointments are made as per the new constitution. Parliamentary vacuum has not been envisaged.¹¹

The issue of states’ designing their own coat of arms without impinging on the honour and spirit of the national anthem and the national emblem have been put aside to be resolved along with the issues of federalism. The Sub-committee has reached a consensus

10 Pandey, Balram. [2014, August 29]. Agreement on Immutable Issues. *Nagarik Daily*, p.1/8. [in Nepali].

11 Pandey, Balram. [2014, August 29]. Agreement on Immutable Issues. *Nagarik Daily*, p.1/8. [in Nepali].

on the head of the state appointing ambassadors and special representatives for particular purposes on the recommendation of the council of ministers. The Sub-committee resolved these issues in a joint meeting of the senior leaders of the main parties.

The issue of jurisdiction of constitutional bodies has been agreed on after discussion on the report of the Committee for Determining of Structure of Constitutional Bodies. The Dispute Resolution Sub-committee has also garnered agreement on the constitutional authority of the Commission for the Investigation of Abuse of Authority to investigate the corruption cases against officials of constitutional bodies, judges, and army officials while in office even after their retirement. The Sub-committee has also gathered agreement for a provision where the opinion of the attorney general is not needed in corruption cases. Agreement has also been reached on proportional and inclusive nomination of commissioners to the Commission for the Investigation of Abuse of Authority; five-member commission; the president appointing the chief commissioner and other commissioners on the recommendation of the Constitutional Council; legislature endorsing an acting chief executive; and parliamentary hearing for all officials of constitutional bodies; thus, all constitutional bodies has been made accountable to the parliament.

Discussion on the remaining issues related to the Committee for Determining of Structure of Constitutional Bodies has not moved ahead. Therefore, the issues of Audit Commission; the Election Commission; Human Rights Commission; Women Commission; Dalit Commission; Indigenous Nationalities Commission; Commission for the Protection of the Rights of People with Disabilities, Minority and Marginalised Communities and People of Backward Regions; Madhesi Commission; Muslim Commission; National Fiscal Commission; and the structure of these commissions in the future states has not been resolved. Similarly, discussion related to the Public Service Commission has not started, and there has



Agreement has also been reached on proportional and inclusive nomination of commissioners to the Commission for the Investigation of Abuse of Authority; five-member commission; the president appointing the chief commissioner and other commissioners on the recommendation of the Constitutional Council; legislature endorsing an acting chief executive; and parliamentary hearing for all officials of constitutional bodies; thus, all constitutional bodies has been made accountable to the parliament.



There are no disputes in the reports of the Committee on Division of Natural Resources, Financial Powers, and Revenue Sharing; the Committee on Determination of Bases for Cultural and Social Solidarity; and the Committee on the Protection of the Rights of the Minorities and Marginalised Communities, as consensus had been achieved on them in the Constituent Assembly I.

been no agreement on issues related to appointment of constitutional officials.

There are no disputes in the reports of the Committee on Division of Natural Resources, Financial Powers, and Revenue Sharing; the Committee on Determination of Bases for Cultural and Social Solidarity; and the Committee on the Protection of the Rights of the Minorities and Marginalised Communities, as consensus had been achieved on them in the Constituent Assembly I.

Consensus has also been achieved on the disputed issues related to National Interest Preservation Committee. Agreement has been reached on whether Nepali citizens of 18 years and above should undergo compulsory military training. Though this issue had been resolved in the National Interest Preservation Committee, it had come up again for discussion in the Constituent Assembly I. It was kept in disputes issues even though the Constitutional Committee had found consensus on it.

Though discussion has started on disputed issues related to the reports of the Committee on State Restructuring and Distribution of State Power, there has been no progress. Though there has been consensus among the political parties on federalism, but there remain deep divisions on basis of federalism, the number of states, their borders, their names among others. Also, there has not much discussion on my disputed issues from the report of the Committee for Determining the Structure of the Legislative Body; therefore, the disputes remain.

Reappearance of disputes in the Committee

The Dispute Resolution Sub-committee under the Dialogue Committee had forged consensus on many issues; however, in the full sitting of the Committee, some disputes have surfaced again in agreed issues. In the

discussions in the Committee, Congress and UML stood against the formation of Constitutional Court and UCPN (M) stood to its demands for it. Similarly, Congress and UML opposed the Federal Judicial Commission alleging of political domination and there is no agreement on that. In the end, the parties went back to square on the issues of the judicial system. After the disputes among the parties, the Committee sought the advice of the Chief Justice and Justices of the Supreme Court. The Chief Justice and Justices advised that there is no need for Constitutional Court.

On October 26, a bench of the Chief Justice and five other justices advised against Constitutional Court but only for constitutional sessions.

In addition, though the Sub-committee had forged consensus on the number of members of the parliament, treatment of land as right to property, issues of amendment to the constitution, whether to follow proportional and inclusive principles in the constitutional bodies and the constitutional council, the status of the president and the vice-president in the transition period, and preamble to the constitution, disagreements emerged on these issues in the full meeting of the Committee. Chairperson of the Dialogue Committee stated that if disputes appeared in the Committee after they are resolved in the Sub-committee, there would be delay in drafting the constitution. He said, “The parties should take ownership of the decisions by the membership in the Sub-committee. Or they should get mandate of the party before joining the Sub-committee. Leaders should not show objection on issues that have been agreed upon by their own party leaders. This will result in delays in finding consensus.”¹² Disputes issues in the Bhattarai-led Committee remain in the disputed list. The Committee submitted its report to the Constituent Assembly, differentiating the agreed and disputed issues.



After the disputes among the parties, the Committee sought the advice of the Chief Justice and Justices of the Supreme Court. The Chief Justice and Justices advised that there is no need for Constitutional Court.

12 Agreement in 4-5 days [Interview with Baburam Bhattarai]. [2014, September 2]. *Nagarik Daily*, p.2. [in Nepali].



Though the Constituent Assembly extended its deadline until November 1, the Committee was not able to forge a consensus. The main issue of contention among the parties was the number of the states and their names.



The Committee had resolved the issue of compulsory military training to Nepali citizens of 18 years and above by agreeing to the provision of 'compulsory military service when needed by the nation

Though the Constituent Assembly extended its deadline until November 1, the Committee was not able to forge a consensus. The main issue of contention among the parties was the number of the states and their names. There could not be an agreement because while Congress and UML brought seven-state model based on identity and capacity, UCPN (M) stuck to 11-state identity-based model. Also, in the form of governance, Congress and UML have put forward a common proposal of constitutional president and prime minister elected from the parliament but UCPN (M) has stuck its proposal of directly elected executive president and prime minister elected from the parliament.

Congress-UML proposal has 165-member House of Representatives and a maximum of 75-member National Assembly when this issue had already been resolved by the Dispute Resolution Sub-committee of the Dialogue Committee. But due to the new proposal from Congress and UML, the settled issue has again become disputed. In addition, Congress and UML have argued for a constitutional sessions court within the Supreme Court, but UCPN (M) has argued for Constitutional Court. Thus, the main disputes among the parties centre on federalism, forms of governance, election systems, and judicial system.

Issues resolved by the Dialogue Committee

The Committee had resolved the issue of compulsory military training to Nepali citizens of 18 years and above by agreeing to the provision of 'compulsory military service when needed by the nation'. Similarly, the Committee has reached agreements on the name of the constitution to be 'Constitution of Nepal', transitional parliament and the government will remain until another system in place, bicameral parliament, and the name of the states legislatures as 'state assembly'. Similarly, in the second

extended deadline of October 11 to 16, the Committee has reached an agreement on election of the president and vice-president by the present legislature-parliament within one month of promulgation of the constitution, and compensation for and process of land acquisition during implementation of scientific land policy will be as per the law.¹³

Due to the confusion on whether the issues agreed in the Committee are to be discussed in the Constituent Assembly or to simply be endorsed by the Constituent Assembly and forwarded to the Statute-drafting Committee, these agreed issues have not been forwarded to the Statute-drafting Committee. The Regulations have the provision for discussion of issues agreed in the Dialogue Committee in the full sitting of the Constituent Assembly. Due to the fear among the leaders of the main parties that disputes might again arise on agreed issues if introduced for discussion in the Constituent Assembly, confusion prevails whether agreed issues should be forwarded directly to the Statute-drafting Committee or the Constituent Assembly.



Due to the confusion on whether the issues agreed in the Committee are to be discussed in the Constituent Assembly or to simply be endorsed by the Constituent Assembly and forwarded to the Statute-drafting Committee, these agreed issues have not been forwarded to the Statute-drafting Committee.

13 Deadline extended for the Committee until November 1. [2014, October 22]. *Nagarik Daily*, p.1/8. [in Nepali].

Drafting Committee sketching the outline

Statute-drafting Committee also has moved its work forward. The Committee has been preparing notes on the agreed issues forwarded by the Committee to Study and Determine Constitutional Records. The Committee responsible for preparing drafts of agreed issues in the Constituent Assembly has held consultation with specialists while preparing the drafts. It has held interactions with drafters of the Interim Constitution 2063 BS and the 2047 BS constitution, experts of constitutional law, and legal professionals among others.



It has held interactions with drafters of the Interim Constitution 2063 BS and the 2047 BS constitution, experts of constitutional law, and legal professionals among others.

The Committee on Citizen Relations and Public Opinion Collection has prepared an internal timetable for works after the drafts of the constitution is ready. Work has been started on how to take the first draft of the constitution to the public. The Committee on Capacity Enhancement of Lawmakers and Resource Mobilisation has continued to update the Constituent Assembly members on the issues introduced in the Constituent Assembly.

Disputes and agreements of Constituent Assembly I

Even after extension of the Constituent Assembly, the differences among the parties was not resolved, then a Study Committee on Concept Paper and Preliminary Drafts with Constituent Assembly member from Sadbhawana Party Laxman Lal Karna as coordinator. After he became a minister, the responsibility was given to UML Constituent Assembly member Agni Kharel. The Kharel-led Committee identified 210 disputed issues in the reports of the thematic committees. There were additional 78 issues of the Committee on State Restructuring and Distribution of State Power.

Then Constituent Assembly chairperson Subash Chandra Nemwang, on October 11, 2010, formed a high-level working group with UCPN (M) chairperson Pushpa Kamal Dahal as coordinator to seek consensus on the disputed issues. The working group forged consensus on 132 disputed issues and lowered the disputed issues to 78 from 210. In the meantime, the working group got dissolved after the meeting of 27 parties on December 20, 2010 'did not extend its term'. The main reason behind the dissolution of the working group was internal rift within UCPN (M). After the dissolution of the working group, initially a mechanism of 27 parties and then, after the splitting of the Tarai-Madhes Loktantrik Party, 28 parties started to resolve the disputed issues. It could not achieve anything beyond endorsing the agreements reached by the working group. Then it was decided to send the disputed issues of the thematic committees to the Constitutional Committee. Though the provision called for the Constituent Assembly to forward the reports to the Constitutional Committee after resolving the disputes, the provision was amended and the reports of the nine thematic committees were sent to the Constitutional Committee. The report of the Committee on State Restructuring and Distribution of State Power was sent to the Constitutional Committee without any discussion.

On February 24, 2011, the meeting of the Constitutional Committee formed a dispute resolution sub-committee led by Dahal comprising of main leaders of the major parties.



The Kharel-led Committee identified 210 disputed issues in the reports of the thematic committees. There were additional 78 issues of the Committee on State Restructuring and Distribution of State Power.



On February 24, 2011, the meeting of the Constitutional Committee formed a dispute resolution sub-committee led by Dahal comprising of main leaders of the major parties. After the sub-committee started achieving consensus on many disputed issues, Maoist leader Dev Gurung proposed ‘not extending the term’ as ‘ the process of forming Dahal-led committee was incorrect’ in a meeting.

After the sub-committee started achieving consensus on many disputed issues, Maoist leader Dev Gurung proposed ‘not extending the term’ as ‘ the process of forming Dahal-led committee was incorrect’ in a meeting. Despite this, the sub-committee narrowed the disputes considerably. The sub-committee reduced the disputes to 30 issues. After second extension of the term of the Constituent Assembly on May 29, 2011, the sub-committee reduced the 78 issues regarding the Committee on State Restructuring and Distribution of State Power to 25. Thus, though it appears that there are 55 disputes issues of the constitution, they mainly relate to form of government, federalism, judicial systems among others.

Table 1: the stance of four main parties on disputed issues in the end of the Constituent Assembly I

Issue	UCPN (M)	Nepali Congress	CPN (UML)	Tarai-Madhes-centred/ based parties
Form of governance	Directly elected presidential system	Constitutional president and executive prime minister elected from the parliament	Constitutional president and executive prime minister elected from the parliament ¹⁴	President elected from the legislature (TMLP)
Election system	Multi-member direct proportional election system	Mixed member proportional election system	Mixed member proportional election system	Mixed election system (TMLP)
State restructuring	Ethnicity-based 11 states based on single identity, autonomous Madhes state with right to self-determination to the Madhesi community	7 states based on multi-identity, no autonomous Madhes state	7 states based on multi-identity, no autonomous Madhes state	Guarantee of autonomous Madhes state with right to self-determination to the Madhesi community; preferential right to land natural resources (Madhesi Janadhikar Forum-Nepal, TMLP, and Sadbhawana Party)
Judicial system	Establishment of constitutional court	Constitutional court should not be established	Constitutional court should not be established	

¹⁴ Though UML had proposed a directly elected executive prime minister, it has put forward executive prime minister elected from the parliament as a compromise. The table above is based on the latest proposals from the parties towards the end of the Constituent Assembly I.

The Committee on State Restructuring and Distribution of State Power of the Constituent Assembly had passed 14-state model based on identity and capacity with majority votes. The 14-state model was passed with majority especially after UML agreed to the UCPN (M) proposal. Later, UCPN (M) insisted on the 14-state model based on ethnic identity, and UML stressed lesser number of states. Congress, UML and other parties argued that importance should be laid on identity, capacity, and geographic convenience and the Committee-endorsed had failed to link capacity and identity. In the meantime, high-level State Restructuring Commission suggested formation 11 states based on ethnic identity, and the dissenting view suggested formation of six states.¹⁵ By April 2012, UCPN (M) had stood by 11-state model, and Congress and UML had proposed 7-state model.

On the form of governance, Nepali Congress was in favour of constitutional president and executive prime minister with majority in the legislature, and UML was in favour of directly elected executive prime minister and constitutional president elected from the parliament. UCPN (M) argued for directly elected president, and Tarai-Madhes Loktantrik Party had argued for a president elected from the parliament. The disputes remained on the issues of head of state, prime minister, and parliamentary election system. UCPN (M) had proposed multi-member direct proportional election system; Congress had proposed mixed member proportional election system (first past the post and mixed proportional member); UML had proposed compensatory mixed election system (first past the post and proportional). UCPN (M) in its commitment paper to the public in the Constituent Assembly I election had stated mixed election system but had stressed on multi-member proportional direct election system in the Constituent Assembly.

Then, in May 2012, UML, which had stood in favour of directly elected prime minister and ceremonial president elected

¹⁵ The group led by the coordinator Madan Pariyar of the High-level State Restructuring Commission had suggested 11 states, but Ramesh Dhungel-led Sarbajit Khadka and Sabitri Gurung camp had proposed a dissenting opinion of 6 states.



On the form of governance, Nepali Congress was in favour of constitutional president and executive prime minister with majority in the legislature, and UML was in favour of directly elected executive prime minister and constitutional president elected from the parliament. UCPN (M) argued for directly elected president, and Tarai-Madhes Loktantrik Party had argued for a president elected from the parliament.



In the May 2, 2012 informal agreement was reached among the parties on all disputed issues. Agreement had clarified the issues of federal structure, form of governance, formation of parliament, and establishment of courts and constitutional court.

from the parliament, had also proposed directly elected president and prime minister elected from the parliament to ‘please both parties (Congress and UCPN (M)’ though during discussions, UML had dropped this issue for then. In the May 2, 2012 informal agreement was reached among the parties on all disputed issues.¹⁶ Agreement had clarified the issues of federal structure, form of governance, formation of parliament, and establishment of courts and constitutional court. The agreement provided for 11 multi-ethnic states, mixed form of governance based on division of power between directly elected president and prime minister elected from the parliament, parliament election through mixed system, 171 members from direct election and 140 proportional members in the House of Representatives, and five elected members each from the states in the National Assembly. The agreement also stated nomination of 10 members from distinguished individuals from different fields on the recommendation of the Council of Ministers. It was also stated in the agreement that central parliamentary constituency will be divided into two to elect members of the state assemblies. The parties had also agreed on appointment of judges by the Judicial Council and establishment of Constitutional Court under the chairpersonship of the Chief Justice. However, the parties could not stand by that agreement, and the Constituent Assembly was dissolved on May 27, 2012 without drafting the constitution.

16 The agreement was reached in a meeting of UCPN (M), Nepali Congress, and CPN-UML. The Tarai-Madhes-centred parties had given their critical endorsement.

Conclusion

While the constitutional-drafting process was taken ahead by forming 10 thematic committees, Constitutional Committee and three procedural committees in the Constituent Assembly I, now the constitution-drafting process has been moving ahead by taking ownership of the reports of the thematic committees through five committees. Though environment for increasing ownership of the agreements of the committees and sub-committees of the Constituent Assembly I through discussions in the Constituent Assembly has been taking place, there has been not much progress on the important disputed issues. The Dialogue Committee could not forge consensus all disputed issues within the deadline. Instead, the parties belatedly brought into discussion the formation of high-level political mechanism and all-party convention. This has caused delays in the constitution-drafting process.

The failure of the Dialogue Committee to forge consensus on disputed issues as per the schedule of the Constituent Assembly has raised doubts on promulgating the constitution within the schedule timeframe. The Committee has failed to garner consensus on such important issues as state restructuring, form of governance, election system, and judicial system. These were the disputed issues of Constituent Assembly I. the chairperson of the Dialogue Committee Baburam Bhattarai and other leaders have been claiming that not much time is required to resolve the disputed issues. However, judging by the activities and working style of the party leaders, their assertions do not seem reliable because in a way even after garnering consensus on all disputed issues of the constitution during Constituent Assembly I by May 2, 2012, the Constituent Assembly was dissolved because the leaders could not stick to their own agreements.

Nilambar Acharya, chairperson of the Constitutional Committee of Constituent Assembly I, notes the 'July development' tendency in the constitutional-drafting process. As large development works that do not last a month are



The Dialogue

Committee could not forge consensus all disputed issues within the deadline. Instead, the parties belatedly brought into discussion the formation of high-level political mechanism and all-party convention. This has caused delays in the constitution-drafting process.



Though lately the parties have started discussions on federalism, there is a big dispute on whether to create ethnic states that cannot be resolved immediately. And after the chairperson of the Dialogue Committee Baburam Bhattarai postponed the meetings indefinitely, constitution-drafting process has come to a standstill.

undertaken to use up the budget by July and show progress, similarly, Acharya is calling the attempt to find solutions to the complex issues of the constitution within 4/5 days as July development tendency.¹⁷ While the most disputed issues should have been discussion upon from the beginning, this time around also the party leaders do not seem serious towards it. Though lately the parties have started discussions on federalism, there is a big dispute on whether to create ethnic states that cannot be resolved immediately. And after the chairperson of the Dialogue Committee Baburam Bhattarai postponed the meetings indefinitely, constitution-drafting process has come to a standstill. Although Congress and UML had requested the chairperson of Constituent Assembly Subash Nemwang to call a full sitting of the Constituent Assembly to conclude this issue, this is not likely to happen through this process. Amidst this, constitution-drafting process is in limbo because of the sharp polarisation and antagonism among the parties. This points to the difficulty of drafting the constitution on time this time around also.

17 Pathak, Tilak. (2014, October 8). Clouds of doubt on January 22. *Nagarik Daily*, p.1/2. (in Nepali).

References

- Adhikari, Balkrishna. (2014, October 12). Congress proposal of 6 or 7 states without dividing districts. *Nagarik Daily*, p.1/2. (in Nepali).
- Adhikari, Balkrishna. (2014, November 4). Seven-state proposal in the Dialogue Committee. *Nagarik Daily*, p.1. (in Nepali).
- Agreement in 4-5 days (Interview with Baburam Bhattarai). (2014, September 2). *Nagarik Daily*, p.2. (in Nepali).
- Alliance for Social Dialogue. (2011, August). *Issues of consensus and contention in the constitution-drafting process*. Kathmandu: Alliance for Social Dialogue.
- Deadline extended for the Committee until November 1. (2014, October 22). *Nagarik Daily*, p.1. (in Nepali).
- Pandey, Balram. (2014, November 17). Congress-UML proposal rejected by the opposition. *Nagarik Daily*, p.2. (in Nepali).
- Pandey, Balram. (2014, August 29). Agreement on Immutable Issues. *Nagarik Daily*, p.1/8. (in Nepali).
- Pandey, Balram. (2014, November 17). Meetings to continue until agreement. *Nagarik Daily*, p.2. (in Nepali).
- Pathak, Tilak. (2014, October 8). Clouds of doubt on January 22. *Nagarik Daily*, p.1/2. (in Nepali).
- Phuyal, Rajendra. (2014, November 3). Dereliction of Constituent Assembly Instructions. *Kantipur Daily*, p.1. (in Nepali).
- Secretariat of the Legislature-Parliament. (2014,a). *The Report of the Committee on Constitutional-Political Dialogue and Consensus Building*. Kathmandu: Secretariat of the Legislature-Parliament.
- Secretariat of the Legislature-Parliament. (2014,b). *The Report of the Committee on Constitutional-Political Dialogue and Consensus Building*. Kathmandu: Secretariat of the Legislature-Parliament.
- Secretariat of the Legislature-Parliament. (2014). *The Report of the Committee to Study and Determine Constitutional Records*. Kathmandu: Secretariat of the Legislature-Parliament.

Nepal in Transition

Documentation of the peace process and the subsequent constitution making process were carried out by different actors upon the initiation of donor agencies and organizations working on human rights and peace and conflict. Primarily these documentations were carried out as a part of project activities related to protection of human rights or promotion of peace and justice and it lacked the sustained effort of documentation even at the latter stage. As a result of it, comprehensive repositories of these processes were not readily available. On this context, Alliance for Social Dialogue (ASD) started the archiving initiative called ‘Nepal in Transition’ with the goal of making information on peace process and progress of Constituent Assembly easily available. The initiative has archived the documents related to the peace process, activities of the Constituent Assembly, work of the thematic committees of the Constituent Assembly and their reports, and analytical articles on the thematic reports.

These documents and articles inform about the issues raised in the thematic committees of the Constituent Assembly, the concept papers of the political parties on these issues, and issues of consensus and contention. The progress on constitution-drafting and peace process were updated on a weekly basis from 2010 until 2013; however, since early 2014, the updates has been archived as a political analysis on a monthly basis. The constitution-drafting activities of the Constituent Assembly and its committees have been continually updated. These informations are available both in Nepali and English and can be easily accessed from the (www.asd.org.np) website.

For details on constitution-drafting process, please see:

 In English: <http://asd.org.np/en/transition/about-this-project>

 In Nepali: <http://asd.org.np/ne/transition/about-this-project>

Alliance for Social Dialogue (ASD)

Alliance for Social Dialogue (ASD) was set up in 2007 with an aim to promote dialogue within Nepal on a variety of issues, including but not limited to the promotion of democratic values and institutions in Nepal. ASD has been engaging with Nepali stakeholders in an effort to exercise intellectual leadership in important areas such as education, human rights, women, youth and independent media.

ASD seeks to develop strategic partnerships and networks to facilitate discussion and dialogue of policy issues in contemporary Nepali society. It works towards enhancing the role of democratic civil society actors in consolidating the democratic process in an effort to foster an open society. ASD has been conducting outreach activities through consultation, workshops and site visits in an effort to encourage grass root organizations to work on innovative ideas to advance concepts, policies and generate long-term solutions to local problems and challenges.



@asdnepal



facebook.com/Alliance-for-Social-Dialogue/



Alliance for Social Dialogue
Ramchandra Marg, Battisputali, Kathmandu-9, Nepal
asd@asd.org.np, www.asd.org.np