

# Policy Brief

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## Constitutional Complexities and Transitional Planning

### Recommendations

1. The High Level Political Mechanism should be made more inclusive to aid in trust-building and consensus initiatives.
2. An independent and neutral committee of constitutional experts should be set up in order to facilitate the writing of the constitution.
3. An expert independent commission should be established to facilitate implementation, including working with various departments of the existing and new governments to build capacity, prepare necessary legislation and build new fiscal mechanisms.
4. Realistic deadlines for the transfer of power to sub-national units according to their capacity should be discussed in order to manage expectations.
5. All political party leaders and all Constituent Assembly members should make public commitments to wide-spread and meaningful public consultations and debates.
6. All effort should be made in meeting deadlines and the timetable. However this should not be done at the cost of meaningful debates and participation.



## Martin Chautari

### Introduction

The progress on peace building has determined the pace of constitutional change. The death of former Prime Minister (PM) and president of the Nepali Congress (NC) Girija Prasad Koirala on 20 March, 2010 comes at a time of high anxiety about the peace process and the writing of the constitution. The establishment of the High Level Political Mechanism (HLP) on 8 January, 2010 under the leadership of Koirala, had raised hopes of unlocking the political stalemate,<sup>1</sup> although even before Koirala's death, it had achieved little. The recent announcement of the decision to form a State Restructuring Commission by the three large parties of the Nepali Congress (NC), Unified Communist Party of Nepal – Maoist (UCPN-M) and the Communist Party of Nepal – United Marxist Leninist (CPN-UML)<sup>2</sup> is a step forward and will aid in pushing forward the constitution writing process.<sup>3</sup> Major party leaders continue to publicly state that the deadline of 28 May, 2010 will be met, although this looks increasingly unlikely and Constituent Assembly (CA) members have publicly stated as much.<sup>4</sup>

It is clear that the constitution writing process is inextricably linked to larger politics, especially the nature of the government. The UCPN-M<sup>5</sup> has been

demanding PM Madhav Kumar Nepal's resignation and the formation of a new government under its leadership.<sup>6</sup> Should a resignation not be forthcoming, a no-confidence motion has been threatened.<sup>7</sup> Furthermore, while the NC faces the inevitable power struggle following Koirala's demise, the CPN-UML appears to be the most internally fractured. The number of CPN-UML CA members seeking PM Nepal's resignation has been reported to have increased to 70, with Nepal seeking to boost his support by courting smaller parties.<sup>8</sup> However, the Nepal Sadbhawana Party – Anandi Devi (NSP-A) has withdrawn its support to Nepal's coalition government<sup>9</sup> and the Nepal Sadbhawana Party (NSP) has threatened likewise should the demand of "one Madhes one pradesh" not be in the Constitution.<sup>10</sup>

In the meanwhile, debates have intensified as to whether the CA can or will meet the 28 May, 2010 deadline. Options floated include an amendment to the Interim Constitution, 2007– requiring a 2/3<sup>rd</sup> majority – to extend the tenure of the CA beyond its two years or a "brief" constitution<sup>11</sup> that leaves open certain issues to be resolved at a later date. Conversations with CA members have revealed that an extension of six months seem likely,<sup>12</sup> although politically risky to voice currently.

The CA's biggest achievement so far is that it has been able to keep the process on track despite the politically unfavourable situation. All the 11 papers of the different committees have been submitted and

<sup>1</sup> The legitimacy of the HLP has been questioned from the start, with accusations of it being an unconstitutional power and conspiracy center by critics from across the political spectrum, including Prime Minister (PM) Madhav Kumar Nepal, Deputy Prime Minister (DPM) Bijay Gachchhadar, KP Oli (CPN-UML) and Baburam Bhattarai (UCPN-M). See Acharya, Santosh. 2010. Sandehama samyantra. *Nepal* 10(25): 24–27; Khanal, Gopal. 2010. Uchchastariya samyantrabata pradhanmantri asantusta. *Kantipur*, 11 January, p. 1, 2; Kantipur. 2010. Tin dalko hoina, tin netako samyantra: Oli. 13 January, p. 2.

<sup>2</sup> The Kathmandu Post. 2010. Big three at one to form commission. 1 April, p. 3.

<sup>3</sup> The nature of the authority of this commission is presently unclear.

<sup>4</sup> See for example, The Rising Nepal. 2010. 'Little chance in meeting deadline': CA member Aryal. 4 April, p. 3 and Roka, Hari. 2010. 14 Jeth pachhi ke hunchha? *Mulyankan* 179: 16–19.

<sup>5</sup> The Communist Party of Nepal (Unified) merged with the UCPN-Maoist on 3 April, 2010. The Kathmandu Post. 2010. CPN (Unified) in Maoist fold. 4 April, p. 4.

<sup>6</sup> The return of property seized during the conflict and the completion of the integration and rehabilitation of the Maoist combatants are also sticking points in the larger political process.

<sup>7</sup> The Kathmandu Post. 2010. Maoist chief ups the ante on Nepal. 5 April, p. 1.

<sup>8</sup> The Kathmandu Post. 2010. Last bid to save government. 1 April, p. 1.

<sup>9</sup> The Tarai-based political party holds two seats in the coalition. The Kathmandu Post. 2010. NSP-A pulls out of government. 6 April, p. 1.

<sup>10</sup> The Kathmandu Post. 2010. Blow to govt as NSP warns to put boot in. 6 April, p. 4.

<sup>11</sup> See for example, Adhikari, Bipin. 2010. More later. *The Kathmandu Post*, 1 January, p. 6.

<sup>12</sup> Martin Chautari (MC) interviews; 8 March and 18 March 2010.



the drafts reveal a great deal of work. However, the Concept Paper and Preliminary Draft Proposal Study Committee (CPPDPC) led by Agni Kharel which was mandated to study the drafts for repetitions, overlaps and gaps, has till date only submitted three papers to the Constitutional Committee (CC).<sup>13</sup> These drafts have been passed by voting<sup>14</sup> and they reflect political cleavages and outstanding issues that remain to be resolved and addressed. These include: full protection of fundamental rights; issues of transition; the number and names of provinces and boundaries; nature and scope of powers and resources to be allocated to the different levels; the structure of government and the form of election to central and state institutions. Importantly, the two papers that are to provide the basic foundations of the new state – i.e., Restructuring of the State and Distribution of Power and Determination of Forms of Governance of the State – were the ones to be submitted last.

### The CA paper drafts

Since the MC Policy Brief No. 2 of October 2009,<sup>15</sup> the following committees submitted their drafts: Committee on Fundamental Rights and Directive Principles; Committee on Distribution of Natural Resources, Financial Rights and Public Revenue; the Constitutional Committee; Committee on

Restructuring of the State and Distribution of Power; and Committee on Determination of Forms of Governance of the State. The papers are briefly discussed below with the intent to analyze more fully issues in the following section.

The Committee on Fundamental Rights and Directive Principles was tasked with the identification of fundamental rights, provisions for their enforcement and bases for sanctions against them, citizenship rights, directive principles and policies of the state and provisions regarding the special protection of the rights and interests of excluded groups and regions. The draft has listed 31 fundamental rights, compared to the 21 in the Interim Constitution, 2007. As with the other papers, different parties have registered votes of dissent. While there are some very progressive rights listed, some appear to be difficult to implement, such as the right to free education, health and employment. Experts have noted that even if recourse to the supreme court for the implementation of such rights is pursued, and directives issued to the government, the government is unlikely to be able to immediately implement them. This may run larger risks in the long term in terms of offering the government excuses for the non-implementation and enforcement of other basic fundamental rights.<sup>16</sup>

Issues of the measures provided for the enforcement of these rights, their definition and limitations have been raised from various sources, including the International Commission of Jurists.<sup>17</sup> These include aligning definitions with already existing international norms (including those concerning torture and preventive detention); revising the limitations put on fundamental rights and the weak enforcement of rights including access to adequate judicial remedies where fundamental rights are violated. The general need for Nepal's

<sup>13</sup> These papers are: Committee on Protection of Rights of Minorities and Marginalized Communities; Committee on Determination of Structure of Constitutional Bodies and the Committee on Distribution of Natural Resources, Financial Rights and Public Revenue. Even these papers contain issues and gaps that require the resolution by the larger Constitutional Committee.

<sup>14</sup> The Committee on Forms of Governance was unable to get a majority of votes and thus has submitted its draft with three different proposals.

<sup>15</sup> MC Policy Brief No. 2 titled "Update on the Constituent Assembly" briefly covered the following thematic papers: Committee on Preservation of National Interest; Committee on Protection of Rights of Minorities and Marginalized Communities; Committee on Determination of Cultural and Social Solidarity; Committee on Determination of Structure of Constitutional Bodies; Committee on Determination of Nature of Legislative Bodies and Committee on the Judicial System. Available at [www.martinchautari.org.np/pdf/policy-paper\\_no2\\_october\\_2009.pdf](http://www.martinchautari.org.np/pdf/policy-paper_no2_october_2009.pdf)

<sup>16</sup> MC interviews with constitutional lawyers; 12 January and 23 February, 2010.

<sup>17</sup> See the letter to the Rt. Honourable Subas Nembang, Chairperson of the CA from International Commission of Jurists, 18 November, 2009. Available at [www.icj.org/IMG/Final\\_Letter\\_to\\_Speaker\\_on\\_fundamental\\_rights\\_english3.pdf](http://www.icj.org/IMG/Final_Letter_to_Speaker_on_fundamental_rights_english3.pdf)



## **Martin Chautari**

international human rights obligations to be the basis for interpreting the fundamental rights provisions has been stressed. Furthermore, in terms of the provisions for citizenship, there appears to be an equalization of the rights of men and women in the clause that states that all foreign spouses will be able to obtain Nepali citizenship after having lived in Nepal for 15 years and given up their original citizenship. Prior to this, only wives of Nepali men – and not husbands of Nepali women – were allowed to become Nepali citizens. However, the equalization of citizenship rights between men and women married to Nepalis, has occurred through constricting the rights of Nepali men as no time line for waiting had been previously stipulated for their wives to get citizenship.

The terms of reference for the Constitutional Committee included the name of the constitution, the preamble, definition of the nation and state, national symbols, constitutional amendments, political parties and transitional provisions. As this paper was submitted before the Committee on Restructuring of the State and Distribution of Power and Committee on Determination of Forms of Governance of the State submitted their respective drafts, it contains many gaps referring to the anticipated papers. This draft was also filled with debates and decisions were made according to votes; there was voting on 98 points.

The proposed Constitution is to be titled “Constitution of Nepal, 2067 v.s.” and has a preamble that states that Nepal is to have a people’s, competitive, multi-party, democratic, proportional representative system of government, and shall adhere to the principles of civil liberties and human rights, universal adult franchise, periodic elections, press freedom, a competent, impartial and independent judiciary and the concept of rule of law. Sovereignty and state power is to be vested in the Nepali people, and Nepal is to be a multi-ethnic, multi-lingual, multi-religious and multi-cultural nation. In terms of national language, the Constitutional Committee has referred to the Committee on Social and Cultural Solidarity. The existing national flag has been retained, but there is no national emblem.

Issues that have arisen include the fact that the draft states that no amendments can be made to the new constitution should it affect democratic norms and values (which would go against the norms and values of sovereignty vested in the people). The federal system has not been included in the list of unamendable basic features of the constitution. In terms of political parties, the draft stipulates that the working committees of all political parties be inclusive, a clause protested by Madhesi parties. In terms of transitional provisions, existing state structures are to continue. For example, the president, council of ministers, the judiciary, local and constitutional bodies would remain until new office holders are appointed and new bodies are formed. The CA would continue as the interim legislature-parliament until the new legislative body comes into effect. Importantly, there is a conspicuous absence of time frames and deadline for the holding of elections, and the period of transition as whole.

The Committee on Restructuring of the State and Distribution of Power was mainly mandated to draft the structure of the states of the federal democratic republic, provide names and principles and grounds for the delineation of the federal units, demarcate distribution of power between the different levels of government and provide for modes of resolution of disputes between federal units. The proposal was passed by the majority of votes of the UCPN-M backed by some CPN-UML CA members, but it has the most votes of dissent (23). While the committee has claimed that the divisions have occurred according to identity and capacity, there was much criticism that the provinces were based on ethnic and not economic bases. Furthermore, Madhesi parties remained firm on their “one Madhes one pradesh” stance and various Janajati groups complained about size and border issues.

The Committee has proposed a three tiered system of federal, province and local levels, with special structures. Overall 14 provinces, along with capitals, have been proposed. The provinces are: Limbuwan, Kirat, Sherpa, Mithila-Bhojpura-Koch-Madhes, Sunkoshi, Newa, Tamsaling, Narayani, Tamuwan,



Magarat, Karnali, Jadan, Khaptad and Lumbini-Awadh-Tharuwan. “Special structures” have also been proposed. These are to be autonomous regions, special regions and protected areas within the province.<sup>18</sup> Due to the fact that the borders of these are to be delineated by the provinces, these remain undefined.<sup>19</sup>

Both at the federal and the province level, there are to be executive, legislative and judiciary branches while the local unit is to have an elected council – either a village council or municipality. The provincial government is to determine the exact number, border and area of local units and autonomous zones within a year of its establishment via the formation of expert commissions. For elections, political parties are to give majority ethnic/community peoples preference (for two tenures) and there is to be proportional representation of women at all level of state and in leading positions at the policy making level. In the provinces established according to identity, the ethnic group in the majority have special rights (affirmative action) in the higher political positions for at least two tenures. Inter-relations among the federal units including the special structures are to be based on principles of cooperativeness, coexistence and coordination. An inter-state council is to be set up for resolution of disputes between the federal and the provincial governments and between provinces. A constitutional court will be established to resolve issues over rights and interpretation in the constitution between all levels.

There is a general table of division of powers including powers exclusive to the center (such as defence, central bank, international treaty, formulation of criminal law), those to be shared with

<sup>18</sup> The “autonomous regions” are for those regions where a particular ethnic or lingual community dominates; the “protected areas” entail those not covered by the autonomous areas, but are economically and socially backward, or geographic areas established for special development.

<sup>19</sup> Annex 2 of the paper does provide a list of 23 autonomous regions, but Danuwar appears twice on the list. Along with Danuwar, the autonomous areas listed are: Kochila, Jhagad, Urau, Dhimal, Meche, Santhal, Lepche, Yakhkha, Chepang, Dura, Kumal, Pahari, Thami, Majhi, Baram, Thamali, Chhantyal, Sunuwar, Surel, Jirel, Helmu and Byansi.

the provinces (including economic and social planning, supply of essential goods, price control, utilization of jungles, animals, water resources spread between provinces) and those given to the provincial and local level alone.<sup>20</sup> Importantly, foreign grants, assistance and loans come under the federal authority, with the rights of the provinces to foreign assistance in grant and loan circumscribed with the consent of the federal government.

The Committee on Distribution of Natural Resources, Financial Rights and Public Revenue also has similar tabular divisions of resources. The Committee had jurisdiction over natural resources, allocation of economic resources, financial relations between different levels of governments, financial equalization among the federal and provincial government and the establishment and running of mechanisms such as the common financial fund. Its guidelines stated that it is the responsibility of the State to protect and promote natural resources and to provide the equitable distribution of benefits to the local communities. However, as in the paper above, the nature and scope of the powers to be allocated to the units are not clear. What the paper does stipulate is a common financial fund, the establishment of a national natural resources commission and importantly, an independent financial commission to recommend revenue amounts to be received by the provincial and local governments from the federal government.

The Committee on Determination of Forms of Governance of the State was mandated to determine the form and shape of governance, election methods, executives at all levels of government, the division of authority and the relations between different levels. This committee was also filled with differing opinions among the large political parties. Three different proposals were passed as none of them received the majority of votes. The UCPN-M favored a directly elected president with one house; this proposal received 18 votes. A two-thirds majority is required to remove the president for any reason, which means

<sup>20</sup> All remaining rights are given to the federal.



## Martin Chautari

he/she will be hard to remove once in power. The NC and CPN-UML proposal (which secured 16 votes) included a president without executive powers and a PM chosen from parliament. This is basically based on the Indian model and contains many components of the parliamentary system as defined in the 1990 Constitution of Nepal.<sup>21</sup> Madhesi parties have also backed a presidential system, but one elected by parliament.

There is to be a provincial chief in each province, appointed by the president in consultation with the chief minister of the province in question. A chief minister and council of ministers is to be appointed within the provinces, with the UCPN-M, NC and CPN-UML standing for a one house, parliamentary set-up. At the local level, an executive board with a chairperson and members numbering from 5 to 11, are to govern. Members are nominated on a proportional basis from political parties represented at the local level legislative body. Interrelations between the governments of the different levels are to be settled via a committee chaired by the PM/president or the deputy PM/vice president or minister nominated by the PM/president and the following other members: two federal ministers nominated by president/PM; chief ministers of concerned areas, chairperson of the local government in question and the attorney general. Necessary institutions can also be created.

In terms of elections, the UCPN-Maoist have proposed a multi-member direct proportional representation, which is the first-past-the-post system (FPTP), for the center and provincial level.<sup>22</sup> The NC and CPN-UML have voted for the mixed member proportional representation (PR), with 50% FPTP system and 50% PR. This is directly opposite to their stances prior to the Constituent Assembly elections, reflecting calculations based on their experiences. At the local level, all favor the mixed system, with 70%

FPTP, and 30% PR. Important to note is that while the FPTP is a “winner take all” method, the PR system as practiced in Nepal for the CA elections and stipulated in the draft, gives power to political party leaders to choose and fill the seats after the election. This does not build accountability and in other countries the list is fixed ahead of time. Along with the recently amended anti-defection Act, this points to the interest of political parties in the continuation of the centralized nature of the party system.

### Issues to be considered

While much work has gone into these drafts, many issues remain unaddressed. As noted above, the obvious ones are the naming and numbering of boundaries and provinces,<sup>23</sup> structure of government and the forms of election to central and state institutions. However, these issues are related to a number of other less discussed but important topics that need to be thought through. These include: the role of the second chamber of the federal structure; an independent judiciary; fiscal relations; issues of protection; modes of collaboration; the local and the transitional.

### *Orienting towards balance*

Of the neglected topics, one is the role of the second chamber in the federal system. According to the draft put forward by the Committee on Determination of Nature of Legislative Bodies,<sup>24</sup> a bi-cameral parliament of two houses was finalized: house of representatives and national assembly. The house of representatives is to be elected on FPTP and PR, while in the national assembly, it appears that 75% will be elected by the provinces, with the remainder to be elected by the house of representatives on the basis of proportional

<sup>21</sup> Internal party dissent from both the NC and CPN-UML remains.

<sup>22</sup> At the province level, 10% is to be appointed by the provincial chief upon the recommendation of the parties.

<sup>23</sup> There is also the absence of discussion on how the national capital is to be treated in the federal setup, whether as a special capital territory, as a province in and of itself, or as part of the province in which it is situated.

<sup>24</sup> For more details see MC Policy Brief “Update on the Constituent Assembly,” No. 2, October 2009, p. 9–10.



representation of excluded and prominent people. The current draft allows for equal representation of the provinces, regardless of size. This would mean that Jadan with a much less population than Mithila-Bhojpura-Koch-Madhesh, would have an equal and therefore disproportional role in the national assembly. Furthermore, while the 1990 Constitution had local government representation in the upper house, such provisions have not been made. Importantly, the role of the second chamber as a whole is unclear in the decision-making arrangements of the federal government.

Clarifying the role of the second chamber is important in so far as the current drafts produced by the CA reveal that much power is given to the federal government vis a vis the provinces. For example, the provincial chief (appointed and removed by the president at his/her pleasure) is to be the representative of the central government, with power to approve bills passed by the provincial legislature, etc. While he/she is to function on the advice or consent of the provincial council of ministers who hold executive power, there is a clause inserted that states that “this shall not be required while exercising powers on the recommendation, in accordance to the constitution and the law, of any other body or authority.” Importantly, if the inter-state council<sup>25</sup> is unable to resolve conflicts at the inter-state level, or if the federal legislature deems it necessary, the conflict is to be resolved via a discussion at the federal legislature according to federal laws. Similarly, protection clauses to prevent the mis-use of clauses enabling the dismissal of provincial governments on grounds of “national importance” need to be approved by 2/3<sup>rd</sup> majority of the federal legislature. Furthermore, the Committee on Distribution of Natural Resources, Financial Rights and Public Revenues states that disputes in the distribution of resources will be resolved according to federal laws. Given that these

clauses appear to favor federal powers, clarity on the basis of representation of the constituent units at the federal level is essential as is the degree of participation by the constituent unit governments in federal decision making.<sup>26</sup>

In the same vein, there has been much debate over the role of the judiciary. The UCPN-M backed draft passed by the Committee on Judicial System<sup>27</sup> among other things allows legislative control of the judiciary (at all levels of state), including the interpretation of law which cannot be challenged in the court. The issue of the separation of powers and the importance of the independence of the judiciary is highlighted by the proposed constitutional court. The current draft states that the appointments of the chairperson and members of the constitutional court will be according to the principles of appointment for the chief justice and other justices at the federal supreme court. It is clear that in the context of a federal Nepal, a neutral or final interpreter of the constitution between all levels (including between federal and regional legislatures) is needed for the conflicts and disputes that are bound to arise. If the federal is allowed to over-rule, this will lead to the federal dominating the regional.

The need for balance between the federal and regional also needs to be considered in the overall lack of attention given to fiscal relations in the draft. This is important given concerns over the division of provinces according to identity and not economic viability. While it is likely the currently proposed provinces will be revised, whichever way provinces are established, they will inevitably vary in wealth as well as fiscal capacity. There will be a mismatch between responsibility for raising and the responsibility for spending money. Therefore there is a need to develop extensive mechanisms of intergovernmental transfers in order to achieve fiscal

<sup>25</sup> The members and modality of this inter-state council differ from the committee prescribed by the Committee on Determination of Forms of Governance of the State, both of which appear to be structured to serve the same purpose.

<sup>26</sup> Ideally the role of the second chamber should be clarified before the election methods are selected because the latter will not only shape the character of politics and administration in the federal government but also the nature of intergovernmental relations.

<sup>27</sup> For more details see MC Policy Brief “Update on the Constituent Assembly,” No. 2, October 2009, p. 10–11.



## Martin Chautari

federalism and provide periodic evaluations over time.<sup>28</sup> Thus, the recommendation for the establishment of an independent financial commission comprised of experts (by the Committee on Distribution of Natural Resources, Financial Rights and Public Revenue) is necessary. However, it is unclear how binding that commission's recommendations will be on the federal government. There is a danger that the federal government will dominate again – which may be necessary in the transitional phase, but requires mechanisms of monitoring and adjustment over time. Financial resources should match the allocation of power and responsibilities of the provinces, the local government and other levels. According to constitutional expert Professor Ronald L. Watts, constitutions normally include stipulations of the formula and procedures for transfer of resources from the federal government to the constituent units.<sup>29</sup>

Relatedly, the general discourse on provinces appears to suggest that the issue of provinces prioritized according to identity is now unchangeable. An emphasis on identity over economic considerations, including relations to communication, connectivity, transportation, etc., may work to the overall detriment of the proposed provinces and the ethnic groups therein. Putting more emphasis on the economic feasibility and potentials of the proposed provinces would facilitate the establishment of stronger federal units, as would structuring economic zones shared by several different provinces in order to augment economic resources, possibilities and potentials.<sup>30</sup>

There is also an overall lack of clarity on the issue of protection. The draft papers have asserted

affirmative measures in terms of proportional representation and the prioritizing of majority populations in positions of power for two terms of political power etc. However, most people will not live in provinces in which they are a majority.<sup>31</sup> This stresses the importance of guaranteeing fundamental rights in accordance to international standards. It also underscores the need to clarify what measures of protection will be instituted. In India, the federal governments (i.e., equivalent to Nepal's provincial governments) have the responsibility to protect the minorities within the minorities.

An orientation towards intergovernmental collaboration is also missing in the drafts. In both the proposals for an intergovernmental committee and council, the stress has been on the resolution of disputes.<sup>32</sup> Federal systems will have inevitable overlaps and interdependence that will require extensive intergovernmental consultation, cooperation, and coordination. Policy concerns and the tools to respond to them cross jurisdictional lines. A transparent system of intergovernmental relations will facilitate continuous and open communications about issues and alternatives the various governments face. This is key in allowing the balance between autonomy and cooperation. As conflict is unavoidable, the stress should not be on avoidance of conflict but its management, including multiple safety valves and the existence of a supportive federal political culture emphasizing constitutionalism, tolerance and recognition of distinctive regional groups.<sup>33</sup>

<sup>28</sup> This is important as the manner in which powers and fiscal resources are divided in the founding period, may be unsuitable over time. Simeon, Richard. 2002. Adaptability and change in federations. *International Social Science Journal* 53(167): 146.

<sup>29</sup> Quoted in *Designing the Federal State in Nepal*. Report of a conference. 26–29 February 2008, Dhulikhel, Nepal, p. 22. Organized by UNDP – Constitutional Advisory Support Unit (CASU) and German Technical Cooperation (GTZ).

<sup>30</sup> Professor Ronald L. Watts at the interaction program “Federal Issues” held at the Center for Constitutional Dialogue, Kathmandu on 26 March, 2010.

<sup>31</sup> Subedi, Bhim Prasad. 2010. Jatiya pradesh: bahusankhyak jati pradesh bahira. *Himal* 19(19): 29–33.

<sup>32</sup> In the larger explanation of the mediating role of the inter-state council, its role as a medium of cooperation and help is stated, but appears as secondary to the conflict resolution mandate.

<sup>33</sup> Watts, Ronald L. 1998. Federalism, federal political systems and federations. *Annual Review of Political Science* 1: 131.





### *The problems of the local and transition*

Compared to the other levels of government, the local level has received relatively little attention.<sup>34</sup> The local government, while a constitutionally stipulated unit of government, appears in the drafts as a subsidiary to the provinces. This points to the importance of processes in the setting up of the federal structures. Tellingly, while the committee to resolve conflicts in the Forms of Governance draft provides a role for the local government, this is not true for the inter-state council of the Restructuring of the State paper. In the latter, only federal to province and province to province conflicts appear to need governmental arbitration even though the mandate of the Restructuring of the State Committee was the resolution of disputes at all levels. Indeed, the Committee paper refers, as do many other papers, to the local level as local bodies and not local government.

Importantly, no districts are envisioned in the three levels proposed (federal, provincial and local). If one assumes that the current proposed provinces are implemented and in the interim period the current districts are to remain functional, in some places these districts will become part of two or more provinces. If the districts do not remain, their responsibilities will have to be divided between the provincial and the local. However, given that the local governments are to be formed via the establishment of commissions by the provincial government within a year of its own formation, it may take up to five years to establish local governments. This is a result of the fact that first the federal government will have to be formed, the provincial governments will have to be elected (for which no timeline is given), then a commission will have to be formed after only which preparations for elections can take place. This means that the local population – already deprived for the past seven years of local government – will have to wait for some

additional years, unless other stipulations for local governance and/or elections can be organized.

Although the naming and general establishment of local government has been officially given to the provinces, there appears to be an unofficial agreement that there will around 1000 of these local bodies<sup>35</sup> merged from the current 3900 such entities. It is likely that the existing around 900 *ilakas* are to be transformed into the local bodies under provinces. This will pose greater problems for the access to local government (for simple birth registration, marriage certificates, etc.) for people especially in the hills and mountains. An alternative option could be to keep the old village unit as either ward or a similar unit of the local bodies and allow them to provide the services that they are currently providing. Similar considerations need to be given in terms of the judiciary. While politically the districts do not exist, the draft of the Committee on the Judicial System mentions a district or a local court. In the absence of districts, it is unclear whether about 1000 local courts will become necessary, or whether citizens will only be able to access courts at the provincial level. Local governments can perform simple conflict management tasks but can not, and should not, function as judiciary. An option would be to retain current district boundaries for the functioning of district courts, with the formation of alternative bodies at the local level for simple tasks as outlined in the Local Governance Act of 1999.<sup>36</sup> All in all, in the absence of capacity and institutional building of local governments, the risk is that the provinces will centralize power.<sup>37</sup>

<sup>34</sup> Otherwise differing party views have all agreed on the local arrangements. Criteria for the establishment of the local level of government includes: equal population; favorable geography and administration; size; transportation; natural resources and considerations of culture and community of the residents.

<sup>35</sup> MC interviews; 12, 13 and 18 February, 2010.

<sup>36</sup> In the proposal above, if current districts are retained and if they fall under two provinces, this will create more confusion. The issue highlighted here is the need for concrete planning.

<sup>37</sup> The negative ramifications of such set-ups, including the dependence of the local on support from higher-level budgets, has been well analyzed. In the case of Russia, Fedotkin notes that such dependence “emasculates the idea of the ‘autonomy’ of the system of local self-government”. Fedotkin, V. 2001. Federalism and local self-government: problems of economic interaction. *Problems of Economic Transition* 43(11): 51.



## Martin Chautari

As highlighted by the examples above, there is an overall lack of thought on transitional structures and implementation. Transitional provisions in the CA draft have focused on the continuation of existing state structures and mechanisms, with no real time lines for elections or the formation of new bodies, etc. These are in essence plans for continuity and not transition. Nothing concrete has been planned in terms of mechanisms and structures that will facilitate the implementation of the federal constitution. Government bodies of general administration, local development, home, education, health, etc. should be planning to see what effects the new structure will have for their departments and undertaking homework to respond to the new challenges. However, few initiatives have been taken by government institutions including the National Planning Commission. It was only on 18 April, 2010, that the government issued a call for a study of the changes, options and necessary preparations that the government should take in the areas of administration, security forces and natural resources.<sup>38</sup> According to a member of the high level commission for administrative restructuring, up till now, a directive had been drafted and sent to the government for approval. Because of the debates over the number and form of provinces, nothing has moved forward.<sup>39</sup>

That the challenges are vast is clear just from looking at the administrative issues alone as noted above. Again, while the Forms of Governance of the State draft has basic guiding principles of public administration – it has provided for government service commissions at the central and provincial level (with provincial covering for the local level) – nothing else is mentioned. From the existing 78,000 civil servants or so, the amount could increase up to 300,000 by the time all administrative structures are established at the different levels. Concrete planning for the provision of the necessary number of skilled administrators is lacking. However, Nigeria's example

could be copied. There a civil service staff college has been established to train both federal and provincial levels of government to build up the capacity of both.<sup>40</sup>

In terms of institutional capacity of proposed provinces, existing regional development offices are almost all situated in two southern provinces, because of the former north south divide of development regions. Jadan and Sherpa provinces do not have a single municipality, while Limbuwan has one and Tamuwan, Tamsaling, Sunkoshi, Karnali and Magarat have two each. For the provinces which have none of the necessary structures in their proposed capitals, it may be necessary for the federal government to rule in the interim period. This again brings to the fore the need to have planned and phased system of transfer with the simultaneous building of capacity for self rule.

Based on the transitional experiences of other countries, the whole process could take several years. Especially given Nepal's demographics and low literacy level, the task of setting up the various different levels of new governing structures requires careful design. This should not be left to firms, consultancies and various other organizations responding to calls for study. An independent expert commission should be established by the government to facilitate implementation of the new constitution, including working with various departments of the existing and new governments to build capacity, prepare necessary legislation and build new fiscal mechanisms.

## Conclusion

The drafts reveal a disposition towards understanding federalism in terms of decentralization. As opposed to the latter, the issue is not just about the scope of decentralized responsibilities, but the constitutional guarantee of autonomy for the constituent governments. The powers of the government of the constituent units as well as the federal government

<sup>38</sup> Gorkhapatra. 2010. Suchikrit huna aune sambandhi suchana (advertisement). 9 March, p. 4.

<sup>39</sup> MC interview; 26 February, 2010.

<sup>40</sup> Professor Ronald L. Watts at the interaction program "Federal Issues" held at the Center for Constitutional Dialogue, Kathmandu on 26 March, 2010.



stem from the constitution and so neither is subordinate. Reflecting dominant Nepali political culture, interdependence has been equated with hierarchy. Unsurprisingly then, the drafts reveal an overall lack of thought on balance and the shared-rule aspects of federalism. Shared rule and self rule combines the benefits of unity and diversity through representative institutions.<sup>41</sup>

While not in any way comprehensive, this policy brief points to a number of serious issues that remain unresolved, contradictory, incomplete and ambiguous in the various CA committee draft papers. Political party leaders do need to come to agreement on certain basic constitutional issues. A more inclusive HLPM is necessary to aid trust-building and consensus initiatives. Furthermore, given the current state of the constitutional drafts, an independent and neutral committee of constitutional experts would greatly facilitate the constitution writing process. However, a full length constitution within the 28 May, 2010 deadline appears unlikely given the complexity of issues. Political feasibility considerations aside,<sup>42</sup> even if a “brief” constitution was to be produced within the deadline, this would not change the state of preparations for the transition to the new federal nation. In essence, a new constitution would be declared but nothing would change. The problem of managing expectations is likely to arise, especially given the lack of discussion on realistic deadlines for the transfer of power to sub-national units.

Overall, the balance between elite accommodation and public involvement in the constitution writing process has clearly been in the favor of the elites. The CA timetable, amended for the tenth time on 9 March, 2010, has removed all internal deadlines such that only the 28 May, 2010 deadline appears on the schedule. This means no date has been given for the period in which the draft is to be publicly disseminated with the aim of collecting citizens’ opinions. This does not bode well in terms of political engagement with those outside the process. Prior plans for CA members to go to the districts for preliminary visits before the actual public opinion and outreach program had been suspended by the CA chairman, pending a decision on the new timetable. The amount of time left for the public opinion gathering is now up in the air. According to a member of the Committee on Public Opinion Collective and Coordination, it is highly unlikely that public opinion will be solicited, and even if undertaken, will be just a formality.<sup>43</sup> The example of Nigeria and its internal conflicts is instructive of the importance of making the process of constitution making popular and democratic. Analysts have argued that the lack of such democratic processes and the consequent nature of the provisions on such contentious issues as citizenship, fiscal federalism, regional autonomy and allocation of powers are at the heart of the conflicts plaguing the Nigerian state.<sup>44</sup> It is in the interests of the nation as a whole and the right of citizens to have a say in the designing of the new federal Nepal. This right should not be neglected for the sake of meeting deadlines.



<sup>41</sup> Watts, Ronald L. 1998. Federalism, federal political systems and federations. *Annual Review of Political Science* 1: 1–33.

<sup>42</sup> For the political considerations for producing a “brief” constitution or extending the mandate of the CA, see Jha, Prashant. 2010. Constitutional considerations. *Nepali Times*, 2–8 April, p. 2.

<sup>43</sup> MC interview; 29 March, 2010.

<sup>44</sup> Akinrinade, Sola. 2003. Constitutionalism and the resolution of conflicts in Nigeria. *The Roundtable* 368: 41–52.



## Martin Chautari

### Martin Chautari

Martin Chautari (MC) began as an informal discussion group in Kathmandu in 1991, allowing development professionals and academics to meet every two weeks to share insights and experiences. In 1995, the name 'Martin Chautari' was adopted after the late Martin Hoftun, one of the founders of the original discussion group. After being managed by the Centre for Social Research and Development for six years, in 2002 MC became registered as a separate non-government organization in Kathmandu.

Since its inception, MC's core objective has been to enhance the quality of public dialogue and the public sphere in Nepal. Started at a time in which Nepal had little, if any, culture of informed public discussion, MC is now nationally known for its discussions which are held three times a week. Chautari also conducts research focused on governance and democracy, media, education, health and livelihoods with cross-cutting themes of gender and social inclusion. A rigorous mentoring program of young researchers is in-built into MC's work.

Till date MC has published fifty seven books including an annual journal *Media Adhyayan* [Media Studies, established 2006]. MC is also the editorial home of the journal *Studies in Nepali History and Society* (SINHAS), published by Mandala Book Point since 1996. Since 2006, MC has opened its research library and media documentation centre to the public. The library's holdings total more than 15,000 books, a quarter of which focuses on the media.

All five components – the discussions, research, mentoring, publications and library – feed into each other and form an intrinsic part of MC's primary objective: strengthening the social contract between the state and citizens and expanding and making inclusive the public sphere by promoting informed dialogues and analytically rigorous research.

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