



Nepal: The Politics of Constitution Drafting

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The Constitutional Assembly (CA) once again missed another deadline, January 22, 2015, to draft a fresh constitution. The opposition parties, known for their hard-line approach on the issue of federalism, want to settle the contentious issues through consensus, while the ruling coalition is in favour of two thirds majority. The biggest sticky point is number and names of the likely federal states. Although there are disagreements on a few other issues, such as the form of government, judicial system and electoral system, but these differences are relatively minor and are expected to be resolved with a little effort.

Since 2008, when the first CA was formed to promulgate the fresh constitution, deadlines have been missed repeatedly. The first CA, elected in May 2008 after being postponed twice in 2007,¹ failed to provide a fresh constitution by the final extended date, May 12, 2012. Since then, it took almost two years to conduct the elections for the second CA. Elections were held in November 2013 and the Nepali Congress (NC) emerged as the largest party in the 601 members Constituent Assembly, while the Maoists gained the third position. The rise of the Nepali Congress and the defeat of the Maoists, somehow, ignited the debate over the utility of consensus building in the restructuring of state – a long pending controversial issue.²

Consensus versus Two-Thirds Majority

As the ruling coalition enjoyed two-thirds majority in CA, it preferred two-thirds majority formula over the idea of consensus on contentious issues. Opposition is stuck to the formula of consensus. The Maoists, who, in their election manifesto, talked about the idea of two thirds majority in the case of no consensus, have now stepped forward to embrace the consensus only approach. Perhaps, the reason for the change was their smaller strength in the second CA. In fact, it appears that ambiguities over the process of constitution drafting are largely shaped by the political interests of ruling and opposition parties and have less to do with the interests of the Nepali citizens.

The interim Constitution of Nepal has left no space for such type of ambiguities. It held that: a) the bill shall be passed by consensus, the meeting must be attended by at least two third members of the CA, and b) the preamble or the article, if consensus could not be reached, shall be put to vote; “and if in such voting, the preamble or article is passed by at least two-thirds of all the members of the Constituent Assembly present, such preamble or article shall be deemed to have been passed.”³

The Maoists felt that a popular demand of ‘meaningful federalism’ from Janajatis and Madhesis could not get proper attention in the second Constituent Assembly, which was dominated by the Nepali Congress and the Communist Party of Nepal (Unified Marxist-Leninist) CPN-UML.⁴ The ruling coalition’s attempt to forge a consensus is being considered by former rebels and Madhesis as an attempt to deepen the division in the society and further sidelining of marginalized and newly emerging forces.⁵

The Politics of Federalism

The federalism debate in Nepal has been subsumed by Identity or ethnicity based federalism supported by the Madhesis, Maoists and some indigenous nationalists, and administrative federalism – supposedly backed by the ruling parties, the Nepali Congress and CPN-UML. It is learnt that Maoists are hesitant to accept anything less than ten identity based divisions as suggested by the high-level State Restructuring Committee of the first Constituent Assembly.

Although, recently, some UCPN (Maoist) leaders revealed that the party is ready to accept the seven states formula pushed by the National Congress and CPN-UML – based on identity and economic viability – if the names of the states reflect ethnicity.⁶

This is not the first time that the Maoists have ‘forged an alliance’ with the Madhesi based parties and some other indigenous groups on the issue of restructuring the state. Such types of alliances were also formed during the UCPN (Maoist) regime in 2011. However, the coalition failed to serve the purpose and broke just before the second CA election in 2013.⁷ After six months of second CA election, the same grouping re-emerged with the same intentions to make sure that identity based federalism prevails in the country. The member parties of the recent alliance are UCPN (Maoist), Madhesi Peoples’ Rights Forum-Democratic (MPRF-D), MPRF-Nepal, Tarai-Madhesh Democratic Party, Federal Socialist Party Nepal, Sadbhavana Party and Tarai-Madhesh Sadbhavana Party.⁸

Since the People’s War period, the Maoists and other political parties were struggling to build a consensus on the issue of federalism. The demand of autonomous ethnic region and autonomous territorial region were among the key components of Maoist agenda during the period of civil war, and on the basis of the same, they set up nine autonomous regions.⁹ Later in 2007, two more autonomous regions and three sub-regions were added.¹⁰ The Maoists, always strongly committed to the idea of federalism, are internally less divided on this issue. But, number and names of provinces have always been concerns for them and remain the issue of debate and discussion within the party also.

The Nepali Congress, committed to federalism in its Constitutional Assembly election manifesto, remained ambiguous about the number of federal states and the basis of their formation. The Constitutional concept paper, published by the NC in 2009, contained six and thirteen states models as well as division of states on the basis of “resources and viability, identity, and linguistic and cultural responsibilities.”¹¹ During May 2012, NC, CPN (UML) and Maoists were successful in making consensus on 11 provinces model, but, after strong protest from the Madhesh and Janjati groups, the model lost its relevance. Now, the NC, which

‘concedes’ federal restructuring unavoidable, is supporting the idea of a small number of federal provinces and, as anticipated, is not in favour of restructuring on the basis of ethnicity.

The UCPN (Maoist) Chairman, Pushpa Kamal Dahal argued that the seven states formula, recently pushed by the ruling Nepali Congress and CPN-UML, rebuffs the 12 point agreement of November 2005 as well as the comprehensive agreement of 2006. The 12 point agreement, concluded between seven political parties and CPN (Maoist), was aimed at achieving permanent peace through peaceful resolution and ‘inclusive democratic processes’. Although Federalism or restructuring of the state could not get proper attention in the 2005 agreement, but ‘state-restructuring’ was one of the key components of the comprehensive agreement of 2006. The term ‘federalism’ or ‘restructuring of the state’ was missing again in the 2007 Interim Constitution. But, a violent uprising in Terai later in 2007 compelled the Government of Nepal to amend the Interim Constitution and add the provisions related to federalism.¹² However, the demand of federalism in Nepal first appeared in the 1950s, when a regional party, the Terai Congress raised the unsuccessful demand of Terai Autonomous Region.¹³

The Madhesis, who are pushing the federal agenda for their distinct identity since the 1950s, support identity based federal restructuring of the states. During the 1950s, the Madhesis fought for their direct autonomy. In the 1980s, the “Sadbhavana Party had demanded the autonomy of Madhesi from hill administration, but was snubbed by Kathmandu.”¹⁴ During 2007, the Madhesis organized the 21 days long mass movement – known as the Madhesh uprising – for the cause of federalism. In 2008, aiming to change the Madhesis dominating region into single autonomous Madhes province, three parties – Madhesi Janadhikar Forum (MJF), Tarai Madhesh Loktantrik Party (TMLP) and Sadbhavana Party joined hands. But now, instead of one single state, they (the Madhesis) are ready to settle for two states in the Tarai plain.

Other Contentious Issues

Although the issue of ‘federalism’ is the biggest irritant in the promulgation of the new Nepalese constitution, Nepal is struggling to cope with some other disagreements such as the

form of government, judiciary system, electoral system and citizenship. Parties are divided on the 'substance' of the constitution as well as the process of dissemination of the constitution.¹⁵ NC and CPN-UML are waiting for reformed parliamentary system, while Maoists are advocating mixed form of government with power sharing arrangements between the elected Prime Minister and a directly elected president.¹⁶ Taking the lesson from recent unstable political history of Nepal, NC and the CPN (UML) are looking forward to ensure stability. Madhesi have been in support of the pure Parliamentary system, but, perhaps, this time they would like to go along with the Maoists on this issue.

Parties have different opinions regarding the structure of the judicial system; they have different views regarding the structure of courts in the federal system and appointment and transfer of judges. The top four parties of the ruling coalition have agreed to continue with the existing judicial system where the Supreme Court is the apex judicial court.¹⁷ While the main opposition party, the UCPN (Maoist) was in favour of restricting the Supreme Court's jurisdiction and providing power to the parliamentary committee to deal with the constitutional issues.¹⁸ Even some Maoist leaders did not hesitate to thrust the idea of a separate Constitutional Court. The Maoist idea – formation of special parliamentary committees to control the judiciary – was criticised and opposed by the NC and the CPN (UML), as it might end the independence of judiciary.

Delhi's Dilemma

Prime Minister Narendra Modi, during his first official visit to Kathmandu on 3-4 August, 2014, addressed the Constituent Assembly and fully supported the drafting of the constitution for a democratic and republican Nepal. During his next visit to Nepal during the 18th SAARC summit on 26-27 November 2014, he reiterated his support to constitution making and, most notably, he explicitly stressed the need for drafting the constitution by the given time, January 22, 2015 through consensus and not through the strength of majority. He said, "My appeal is that Nepal's constitution should represent every community. The constitution should not be made through numbers, but through consensus."¹⁹ Moreover, he also underlined that India does not intend to interfere in the constitution making process of Nepal. Although this was a

friendly advice from the PM, New Delhi had no intention to interfere in Nepal's constitution making process, but, some political leaders in Nepal considered it differently and criticised PM Modi.

What should be India's role at the moment when the ruling and opposition coalitions have failed to arrive at a consensus on this issue? In fact, New Delhi is in a precarious situation; knowing the nature of relationship between India and Nepal, it is impossible to think about complete detachment. Amid political uncertainties in Nepal, Baburam Bhattarai, former Prime Minister of Nepal, during his recent visit to New Delhi, urged India to continue its role in Nepal's peace, but to avoid any type of direct involvement. He clearly stated that the degree of involvement from India's side should only be restricted to "create a conducive atmosphere so that political parties come together and honour past agreements and draw a constitution agreeable to all, which caters to the demands of all sections of the people of Nepal; ensures peace, stability and development in Nepal; and contributes to the national interests of India as well."²⁰ India-Nepal relation requires delicate balancing; the task will be more difficult if the 'centre of gravity' is not known. As former Foreign Secretary, Shyam Saran rightly said, "The dilemma for India remains... there is request to provide support and also maintain a distance."²¹ However, both countries need to respect each other's concern and move forward carefully as they are on the threshold of building a mutually beneficial interdependent economic relationship.

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Endnotes:

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³ The Interim Constitution of Nepal 2063 (2007) http://www.wipo.int/wipolex/en/text.jsp?file_id=189180 (Accessed 10 January, 2015).

⁴ "Consensus Stymied in Kathmandu", *Economic & Political Weekly*, op. cit.

⁵ Prashant Jha, "Nepal's Struggle for a Constitution – A Primer", *Hindustan Times*, Delhi Edition, 14 January, 2015.

⁶ Damakant Jayshi, "In Nepal, an Elusive Quest for Consensus", *The Hindu*, Delhi Edition, February 21, 2015.

- ⁷ “Maoist, Six Other Parties to Unite Federal Model”, <http://www.ekantipur.com/the-kathmandu-post/2014/07/09/news/maoist-six-other-parties-to-unite-on-federal-model/264813.html> (Accessed 09 February, 2015).
- ⁸ UCPN (Maoist) Forms Identity-based Federalism Alliance, *My Republica*, http://www.myrepublica.com/portal/index.php?action=news_details&news_id=77823#sthash.CGd4fys6.dpuf (Accessed 09 February, 2015).
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- ¹¹ “Nepal: Identity Politics and Federalism”, Asia Report, No. 199, International Crisis Group, 13 January 2011.
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- ¹³ B. Karki, R. Edrisinha, *The Federalism Debate in Nepal, Post Peace Agreement Constitution Making in Nepal*, Volume II, Nations Development Programme (UNDP) Support to Participatory Constitution Building in Nepal (SPCBN), Kathmandu, 2014, http://www.academia.edu/10171876/State_Restructuring_and_Federalism_Discourse_in_Nepal (Accessed 11 February, 2015).
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- ¹⁶ Ibid.
- ¹⁷ “Nepal Parties Agree on Constitution Deal”, *Economic Times*, http://articles.economictimes.indiatimes.com/2014-11-02/news/55682548_1_nepal-parties-opposition-parties-cpn-uml (Accessed 10 March, 2015).
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- ¹⁹ “Modi to Nepal: Draft Constitution through Consensus, not Numbers”, *The Indian Express*, <http://indianexpress.com/article/india/india-others/modi-to-nepal-draft-constitution-through-consensus-not-numbers/> (Accessed 11 March, 2015).
- ²⁰ Ibid.
- ²¹ Ibid.