

# Nepal's Divisive New Constitution: An Existential Crisis

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## *Executive Summary*

On 20 September 2015, Nepal's new constitution passed amid deadly protests by Madhesi and Tharu groups across the southern Tarai plains that continued for months, leaving 57 dead. Protesting groups said the statute backtracked on addressing structural discrimination. The protests had deep support in ethnic Madhesi Tarai communities, reflecting a profound, increasing sense of alienation from the state. A 135-day blockade of vital supplies by Madhesi civic and political groups, partially supported by India, has ended, but as no political solution is on the table, the protests are almost certain to resume. To stop violent polarisation and a breakdown of social relations, national parties and protesting groups must urgently agree on how to manage contentious issues, with timelines, guarantees, and a role for civic participation. A sustainable, equitable social contract is necessary for lasting peace and reconciliation.

After the devastating earthquakes in spring 2015, the largest parties in the Constituent Assembly decided, amid controversy, to fast-track a new constitution so as to fulfil a longstanding peace process commitment and enable them to focus on reconstruction. Some administrative and structural reforms mandated by the 2006 Comprehensive Peace Agreement (CPA), 2007 Interim Constitution and other political agreements are enshrined in the new constitution. But Madhesi, Tharu, janajati, Dalit, religious minorities and women's groups – all considered historically marginalised – believe the new statute and the process by which it was rushed through diluted commitments to meaningful federalism, redress for historical, structural discrimination based on ethnic and religious identity and gender, and democratic consultation.

There is disagreement over boundaries of new states, electoral representation and affirmative action, constituency delineation and citizenship-related clauses. Supporters of the new constitution feel much has already been achieved and say an excessive focus on identity-based grievances threatens Nepal's unity, integrity, even sovereignty. The objections of those who demonstrated against it have their roots in long-running social disagreements on what it means to be Nepali and whether a homogenous conception of Nepalihood has led to structural discrimination against groups that do not conform to the behaviour and values of hill-origin, Nepali-speaking, upper caste Hindu communities.

The blockade was an extreme form of protest with complex consequences, including grievous harm to the weakest and poorest sections of Nepali society and alienating communities the protestors should have been making common cause with. Yet, judging it a failure as a tactic should not substitute for a careful assessment of what is in effect a social movement in the Tarai.

All political parties and most protesters agree that the way forward is to amend the new constitution, not scrap it. In January 2016, the major parties passed two amendments related to more inclusive representation in state organs and delineation of constituencies. Madhesi parties and protestors say these do not adequately address their grievances. Like the constitution, they were adopted unilaterally by the largest parties, losing the legitimacy they would have had as the outcome of a political negotiation.

Positions are not irreconcilable, but the prerequisites for any solution – respect, trust, political will, a degree of selflessness – are in short supply. The deficit is fuelled

by ideological struggles to maintain a status quo that challengers say cements discrimination and supporters say protects the country, and by the behaviour of political parties, their lack of internal democracy, factionalism and opportunism.

There is clear risk of escalating violence in the Tarai. The depth of social discontent, lack of fruitful negotiations and disillusion with Madhesi parties is creating room for radical positions. Mainstream national parties are also in the Tarai, and some are inclined to launch counter protests, which likewise lead to clashes. The security forces are seen as discriminating against Madhesis and using excessive force. Employing them repeatedly to quell local protests fuels anger and radicalisation, could encourage armed Madhesi groups, of which the region has a history, and might also allow a fringe Madhesi secessionist movement to gain traction. While unlikely to be successful or widespread, it would increase the volatility of a complex region.

If implementation begins before these issues are addressed, the mainstream parties risk wholesale rejection of the constitution by a large section of the population. Discussions are ongoing in government about conducting local elections; these too carry grave risks of violence, boycotts, intimidation and, in some areas, rejection of the state and its political system.

The vision of Nepal as a functioning, tolerant, forward-looking, multi-ethnic society presented in the agreements that were reached after the armed conflict between the Maoist movement and the state ended is in crisis. Those documents are the basis of today's polity and cannot be replaced unilaterally. Forcing acceptance of a flawed constitution could end the political transition and trigger unmanageable new conflict.

## *Recommendations*

### *To manage tensions*

#### **To the Government of Nepal and the ruling coalition:**

1. Restore trust with Madhesi and Tharu populations by forming an independent mechanism to investigate the protest-related deaths and avoid a heavy-handed security response during protests.
2. Refrain from ultimatums and provocative comments.
3. Address the economic and humanitarian consequences of the earthquakes and blockade.

#### **To the Madhesi political parties:**

4. Rebuild trust with all social groups which live in the plains.
5. Refrain from arbitrary protest strategies, provocative speech and violence.

#### **To all Nepali political parties:**

6. Agree urgently on terms of reference for a mechanism on state boundaries.
7. Postpone local elections if there is no roadmap to address constitutional disagreements.
8. Monitor conflict risks and potential mitigation measures in contested plains and hills areas regularly.

### *To promote reconciliation and reduce the risk of violence if implementation of the constitution begins*

#### **To Madhesi and other civil society:**

9. Lead the way in social dialogue efforts in the Tarai between all social groups.
10. Create a group of respected, credible national and local figures to explain constitutional issues and coordinate messaging when tensions rise.

#### **To the Government of India:**

11. Maintain an open approach to all sides.

#### **To development partners, including India and China:**

12. Assess performance of the security forces and the National Human Rights Commission and calibrate support and training accordingly.
13. Refuse support for local elections if a roadmap agreed with agitating groups is not in place.
14. Ensure conflict sensitivity in reconstruction and development projects.

**Kathmandu/New Delhi/Brussels, 4 April 2016**

# Nepal's Divisive New Constitution: An Existential Crisis

## I. Introduction

Nepal's new constitution, its first written by an elected body, was adopted on 20 September 2015.<sup>1</sup> It took seven years and two Constituent Assemblies, the second of which passed it with close to a 90 per cent majority. However, key constituencies felt their interests were not adequately represented in that final vote. The circumstances of passage, less than five months after the earthquakes that devastated the central hills and killed more than 9,000, were deeply fraught.

At passage, anti-constitution protests had already shut down the southern Tarai plains for almost six weeks, with 46 deaths, including one on that day: seven police killed by protesters in one incident and 39 civilians shot by police, including young and elderly people. Twelve more civilians have died subsequently.

The parties representing the protesting Madhesi and smaller indigenous Tharu communities of the plains, who together are close to a third of Nepal's population, had only about 10 per cent of the assembly seats. Most of these parties boycotted the last stages of drafting, when the large parties seemed determined to use their majority to press ahead despite the strong disagreement.<sup>2</sup> From the start, the protests

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<sup>1</sup> For detail on the first Constituent Assembly, how party dynamics hindered work and led to failure and the evolution of debate on issues such as federalism and inclusion, see Crisis Group Asia Report N°233, *Nepal's Constitution (I): Evolution Not Revolution*, 27 August 2012. For detail and assessment of the changed political landscape, new political issues and behaviour after the assembly ended in June 2013 and before elections to the second Constituent Assembly in November 2014, see Asia Report N°234, *Nepal's Constitution (II): The Expanding Political Matrix*, 27 August 2012. For analysis of the Madhes movement and new Madhesi politics after the peace process' start, see Asia Report N°136, *Nepal's Troubled Tarai Region*, 9 July 2007. For analysis of broader identity politics and federalism issues, Asia Report N°199, *Nepal: Identity Politics and Federalism*, 13 January 2011. For reporting on parties' role in the peace process, see Asia Reports N°s 106, *Nepal's New Alliance: The Mainstream Parties and the Maoists*, 28 November 2005 and 126, *Nepal's Peace Agreement: Making it Work*, 15 December 2006. For extensive background on parties and the state, see Asia Report N°194, *Nepal's Political Rites of Passage*, 29 September 2010. For party peace process engagement and factional and ideological disputes' effect on negotiations, see Asia Briefings N°s 131, *Nepal's Peace Process: The Endgame Nears*, 13 December 2011; 120, *Nepal's Fitful Peace Process*, 7 April 2011; Asia Reports N°s 128, *Nepal's Constitutional Process*, 26 February 2007; 132, *Nepal's Maoists: Purists or Pragmatists*, 18 May 2007; and 104, *Nepal's Maoists: Their Aims, Structure and Strategy*, 27 October 2005. For the relationship between parties and international actors and the army's role, see Asia Reports N°s 173, *Nepal's Future: In Whose Hands?*, 13 August 2009 and 211, *Nepal: From Two Armies to One*, 18 August 2011.

<sup>2</sup> In this report, "Madhesi" refers to the umbrella term for a population of caste-based Hindus and Muslims residing in the Tarai region, who speak plains languages such as Maithali and Bhojपुरi, and have extensive economic, social and family ties across the border in northern India. "Tharu" refers to the indigenous populations of the Tarai plains, some communities of which are concentrated in large numbers in the far-western plains and the districts of Kanchanpur and Kailali. "Janajati" refers to the umbrella term for a large number of ethnic groups, most but not all from the hills, who are outside the Hindu caste system and claim distinct languages, cultures and, often, historical homelands. Since the 1990s, this ethnic or "nationalities" definition has included a claim of

have had enormous support and participation from Madhesi communities in particular, though others are also sympathetic to grievances about the flawed process and substance.

Resentments coalesced around four major issues: delineation of constituencies, which Madhesi parties felt did not accurately reflect population densities; reduction in proportional representation in the electoral system and dilution of commitments to affirmative action to increase representation in state organs; delineation of boundaries of the few new states that are to replace the current administrative division of 75 districts in the new federal set-up; and citizenship clauses that restrict women's ability to pass full citizenship to their children. Religious minorities and liberals are concerned about secularism provisions they say cement the primacy of a conservative, exclusivist strain of Hinduism.

The trigger for intensification of the protests was announcement of the federal states' boundaries. Only one of the six proposed states was plains-dominated, and Madhesi and Tharu groups said the process had been gerrymandered to reduce their influence on future state- or province-level politics.<sup>3</sup>

Drafting and approval of the document, dominated by the largest political parties – Nepali Congress (NC), Communist Party of Nepal-Unified Marxist Leninist (UML) and Unified Communist Party of Nepal-Maoist (UCPN-M), and the smaller Madhesi Janadhikar Forum-Democratic (MJF-D)<sup>4</sup> – was fast-tracked following the massive initial earthquake in April 2015. As much as its content, this process alienated many. A handful of senior leaders, mostly from the NC, UML and UCPN-M, agreed on the

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indigenously. "Dalits", are Hindus considered "untouchable" by upper-caste groups. "Upper caste" refers to members of the two highest castes, hill- or "Pahade"-origin Hindus, Brahmins and Chhetris, as well as smaller upper-caste groups collectively called Dusnami. Similar upper-caste groups are also part of Madhesi Hindu populations, but unlike the hill upper-caste groups, who are heavily over-represented in the bureaucracy, judiciary, military and democratic political leadership, they are not closely associated with Nepal's dominant culture. "Muslims" can be of both plains- and hill-origin, though they predominantly live in the Tarai. See also, Crisis Group Report, *Nepal: Identity Politics and Federalism*, op. cit. The definition and enumeration of ethnic and religious groups can reflect dominant ideologies and tactical political choices. Broadly speaking, there is some consensus on these ethnic groups figures: hill-origin Chhetri, c. 17 per cent; hill-origin Brahmin, c. 12 per cent; Hill Dalit, c. 8 per cent; hill-origin Janajati groups such as Magar, Tamang, Newar, Sherpa, c. 27 per cent; plains-origin Tharu, c. 7 per cent; plains-origin Madhesi upper- and middle-caste groups, c. 15 per cent; Madhesi Dalit groups, c. 4 per cent; mainly Madhesi Muslim groups, c. 4 per cent. Pitambar Sharma, *Some Aspects of Nepal's Social Demography: Census 2011 Update* (Kathmandu, 2014); Om Gurung, Mukta S. Tamang (eds.), *Poverty and Social Inclusion in Nepal: Further Analysis of Recent Surveys and Census* (Tribhuvan University, 2014).

<sup>3</sup> Nepal is organised into 75 districts (*jilla*). Districts, administered by District Development Committees (DDC), are further sub-divided into Village Development Committees (VDC's, GaBiSa in common usage), the smallest administrative unit. Groups of districts form fourteen Administrative Zones (Anchal), which in turn form five or Development Regions (Bikas Chhetra), Far-West, Mid-West, West, Central and Eastern. Under the new federal system, territory will be reorganised into a small number of larger states. People commonly identify strongly with their home districts and VDCs or municipalities. Loyalty to development zones is more limited, though the Far-West garners great loyalty from its hill-origin citizens.

<sup>4</sup> The largest party in the 601-member Constituent Assembly-turned-parliament is the Nepali Congress (196 seats), followed by the UML (175), UCPN-M (80), the monarchist Rastriya Prajatantra Party Nepal (23), MJF-D (fourteen), the centre-right former monarchist Rastriya Prajatantra Party (thirteen), Tarai-Madhesh Loktantrik Party (eleven) and MJF-Nepal (ten). The remaining 79 are held by 24 smaller parties, mostly but not exclusively identity-based Madhesi, Tharu, Janajati, Dalit or pro-federal parties and fringe left parties. [election.gov.np](http://election.gov.np).

most contentious matters, ignoring even their own members' dissents and cautions from Nepali and international actors that the statute needed the broadest possible buy-in to achieve legitimacy.

The new constitution is the cornerstone of the political transition that began at the end of the armed conflict (1996-2006) between the Communist Party of Nepal-Maoist (CPN-M, as the UCPN-M was then called) and the state. In April 2006, a popular movement against King Gyanendra's absolute rule supported by traditional parties and the Maoists pushed him to abdicate. Parliament, which had been elected in 1999 and suspended by the king's coup, was restored. A ceasefire between Maoists and government followed, and a Hindu constitutional monarchy became a secular state. By November 2006, the traditional democratic parties in parliament, NC, UML and smaller monarchist and other left parties, and the CPN-M had signed a Comprehensive Peace Agreement (CPA).

The CPA promised root-and-branch reform of the state in a direction it called progressive, making it more inclusive and offering redress for what it described as oppression, neglect and discrimination based on caste, class, region and gender, including against Dalit, janajati, and Madhesi groups.<sup>5</sup> These groups have come to be called "historically marginalised".<sup>6</sup> The commitments were enshrined in the 2007 Interim Constitution and described as restructuring of the state.<sup>7</sup>

At the peace process' start, many saw this as a primarily Maoist agenda. Few identity-based social movements, now major vectors of politics, had gained traction. Identity-based politics was off limits during a decade and a half of constitutional monarchy. Society was not used to extensive discussion of the scale and complexity of identity-based grievances or strong expressions of disaffection. But in the 1990s, janajati groups in particular had laid foundations for the discussion the Maoists now led. There was also a long history of debate and activism among Madhesi groups about their political identity. The new democratic space allowed these groups to rapidly gain organisational strength and intellectual clarity. They challenge the strong, state-supported definition of Nepali identity created in the image of the Nepali-speaking, hill-origin, Hindu upper-caste male. This demographic, sometimes called

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<sup>5</sup> An unofficial translation of the full text of the CPA is available at [www.un.org.np/node/10498](http://www.un.org.np/node/10498). Clause 3.5 addresses discrimination and inclusion. The "socio-political transformation" and related issues such as land reform are addressed in other clauses, including 3.6, 3.7, 3.10 and 3.12.

<sup>6</sup> This description is meant to capture the lesser access these groups have had to opportunity and power; their limited representation in many state institutions; and the explicit and tacit costs they bear in terms of social acceptance and full, dignified participation in mainstream life if they do not conform to mainstream Nepali identity. The label does not capture the various kinds of discrimination even within and between historically marginalised groups, or the relative underrepresentation of Chhetri groups in state institutions compared with hill-origin Brahmins or regional variations in poverty across all groups.

<sup>7</sup> Preamble, Articles 1, 138. "Progressive Restructuring of the State: (1) Inclusive, democratic and progressive restructuring of the state shall be made to bring about an end of the discrimination based on class, caste, language, sex, culture, religion and region by eliminating the centralized and unitary form of the state. (2) A High Level Commission shall be constituted to recommend for the restructuring of the State in accordance with clause (1) above. The composition, function, duty, power and terms of service of such Commission shall be as determined by the Government of Nepal. (3) Final decision of restructuring of the State shall be as determined by the Constituent Assembly. Interim Constitution, 2007. An unofficial translation is available at [www.constitutionnet.org/vl/item/interim-constitution-nepal-2007](http://www.constitutionnet.org/vl/item/interim-constitution-nepal-2007).

Pahade, hill or Kathmandu elite, “Brahmin-Chhetri” or, recently, “Khas-Arya”, has traditionally dominated governance, politics, policy and social mores.

The most politically influential, socially rooted and simultaneously most controversial and divisive of the new movements is the Madhes Movement. The first such (2007) successfully changed the interim constitution to a federal one. The second (2008) resulted in proportional representation and identity-based quotas in the electoral system. Tharu and janajati agitation led to agreements between the governments of the day and protest groups in broad support of this agenda.<sup>8</sup>

An ill-defined slogan of “federalism” took centre stage. The first Constituent Assembly (CA) was crippled by debate on its meaning. Mainstream parties were described as pro- or anti-federal, shorthand for whether they agreed with the analysis driving the demands for federalism and inclusion. The term became the repository of virtually all political and social anxieties related to the transition.<sup>9</sup>

The two elected CAs differed sharply in some respects, notably over the balance of power between blocs with opposing ideas regarding federalism. Yet, there were strong similarities in motivation and behaviour. Decisions were driven by deal-making between senior leaders, personal calculations, little reasoned debate, and the ignoring or crushing of dissent within parties. This contributed to social polarisation and gave negotiations a winner-takes-all character.

Crisis Group reported regularly on Nepal between 2003 and 2012, examining the evolution of the conflict, its domestic dynamics, the mechanics of resolving an armed conflict and the debates over the country's transformation, as well as the influence of international actors. This report summarises the evolution of the federalism and inclusion debate since the collapse of the first CA in 2012 and assesses ways to mitigate the risks from unaddressed social discontent, in the absence of a viable constitutional settlement. It is based on research in 2015-2016, including interviews with mid-level and senior members of political parties, civil society activists and analysts in Kathmandu and some plains districts; travel to six districts; and telephone conversations with interlocutors in plains districts, including protest organisers, students, journalists and local politicians.

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<sup>8</sup> Between 2007 and the CA dissolution in 2012, the government signed 43 agreements with mostly identity-oriented protesting groups, often with contradictory commitments. Crisis Group Report, *Nepal's Constitution I*, op. cit. pp. 6-11. Deepak Thapa, “Deal with it”, *The Kathmandu Post*, 15 September 2015.

<sup>9</sup> By the first CA's end, hill-origin upper-caste groups had successfully lobbied to be added to the list of indigenous groups. For more, see Crisis Group Report, *Nepal's Constitution I*, op. cit.

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## II. An Avoidable Disaster

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### A. *How the Second Constituent Assembly Made, Broke and Remade a Deadlock*

A deadly earthquake on 25 April 2015 and major aftershock on 12 May devastated the central hills. Close to 9,000 people died, and some 600,000 homes collapsed, leaving millions without shelter. The need for long-term support and a massive reconstruction effort soon became clear.<sup>10</sup>

After the initial shock wore off, the government was criticised for what victims, humanitarian actors and other observers felt was a slow, unplanned, inadequate response. Efficient interventions and efforts were seen to have come initially from the security forces, then donor agencies and numerous spontaneous citizens groups, with the government at times seeming to contribute little more than bureaucratic obstruction.<sup>11</sup> Political parties scrambled for relevance. The government, an NC-led coalition with the UML and MJF-D as major partners, sought to exert authority to reclaim its role and legitimacy, but did so often in heavy-handed and self-defeating ways.<sup>12</sup> On 8 June, in an atmosphere of political panic, it and the opposition UCPN-M signed a sixteen-point deal to fast-track the constitution, saying it would enable a more effective earthquake response.<sup>13</sup>

#### 1. Constituent Assembly 2: The first eighteen months

Beyond clearing the decks for reconstruction, the agreement was also meant to end years of inconclusive constitutional politicking. All parties had entered the new assembly in December 2013 at least somewhat chastened by their failure to draft the constitution in the first CA (2008-2012). They set a deadline of 22 January 2015. The reasons why they missed it echoed those behind the first failure. The NC and UML disagreed with the UCPN-M on:

- federalism, specifically the boundaries of states as they related to five districts in the Tarai (Kailali and Kanchanpur in the far west, Jhapa, Morang and Sunsari in the east), and whether some districts in the hills should be split;
- electoral arrangements, such as the percentage of members who should enter parliament via proportional representation and the principles for delineating constituencies to account for sharp regional population density variances;

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<sup>10</sup> "Aid and Recovery in Post-Earthquake Nepal: Synthesis report", The Asia Foundation, October 2015.

<sup>11</sup> Yogesh Raj, "Remembering to forget", *The Kathmandu Post*, 9 June 2015 gives an excellent account of government failure to use its information to manage rescue and relief. See also, Shradha Ghale, "Misguided priorities", *The Kathmandu Post*, 24 June 2015, "Nepal's Political Faultlines", Crisis Group In Pursuit of Peace blog, 26 May 2015.

<sup>11</sup> "Bureaucracy as usual", *Nepali Times*, 12 June 2015. Crisis Group interviews, analysts, journalists, NC members, September 2015.

<sup>12</sup> It used the prime minister's relief fund and taxes and controls on emergency relief materials.

<sup>13</sup> Crisis Group interviews, NC, UCPN-M, MJF-D and UML senior- and mid-level members, September-November 2015. "4 forces agree to fast-track statute writing", *The Kathmandu Post*, 2 June 2015. "Aath pradeshma sahamati", *Kantipur*, 9 June. Also, Kamal Dev Bhattarai, "Way paved for constitution as four parties reach 16-pt deal", *The Kathmandu Post*, 9 June 2015.

- whether the form of government should be parliamentary or a mixed system, to reduce instability caused by coalition politics; and
- whether there should be a constitutional court, proportional inclusion in judicial appointments and appointment of federal court judges by the judicial council of the state.

The NC and UML had 371 of the assembly's 601 seats and often reminded the main opposition UCPN-M that they needed only smaller parties' support to pass the constitution with the mandated minimum two-thirds majority. The pro-federalism and inclusion bloc was wary of pushing too hard lest the NC and UML withdraw even already agreed concessions.<sup>14</sup>

There was less circumspection on the streets of Kathmandu. The Maoist and Madhesi parties organised shutdowns and announced a protest program lasting through March 2015. Some of their members obstructed CA proceedings.<sup>15</sup> Other interests, including janajati, Dalit and religious groups and religious-right wing parties, agitated around the assembly. The parties' failure to agree quickly on a draft was not disastrous, given that the CA had another three years. But it highlighted the toxic mix of personal interests and ambitions, intra-party politics and ideological differences at play in the negotiations and set in place the architecture of a deadlock.<sup>16</sup>

## 2. Sixteen-point trigger

The June agreement gave some senior leaders of the four main parties the chance to resolve knotty constitutional issues in smaller forums. Solutions of a sort were found to most, including:<sup>17</sup>

- agreement on eight states or provinces in the future federal set-up, whose boundaries would be decided by "a mechanism";
- agreement on a bicameral federal legislature with unicameral provincial legislatures. In the federal lower house, 165 members would come from constituencies delineated on the basis of geography and population (down from the present 240). In addition, 110 members would be elected through proportional representation (down from the present 335); and
- a parliamentary system of governance and constitutional president, although the agreement also noted that the UCPN-M disagreed with some elements.

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<sup>14</sup> Crisis Group interviews, UCPN-M leaders, Madhesi party leaders, Kathmandu, August-October 2015. Such concessions had included accepting the relationship between historical identity and territory as a factor in determining state boundaries; and that there would be some form of quotas or affirmative action, a concept first introduced in the 1999 Local Self Government Act for women, then much more broadly mandated for groups described as historically marginalised in the 2007 Interim Constitution. For many in the NC and UML, explicitly identity-based politics and quotas are anathema.

<sup>15</sup> "Political situation and mobilizations around January 22, 2015 political commitment to promulgate the constitution", Democracy Resource Centre, February, March 2015.

<sup>16</sup> "Taraawko antarya" *Kantipur*; 3 February 2015. Crisis Group interviews, Kathmandu, February, March, 2015. Prashant Jha, "Nepal constitution: Breakthrough or abdication of responsibility?", *Hindustan Times* (online), 9 June 2015.

<sup>17</sup> An unofficial translation of the agreement is at [www.satp.org/satporgtp/countries/nepal/document/papers/16-point\\_Agreement.htm](http://www.satp.org/satporgtp/countries/nepal/document/papers/16-point_Agreement.htm).

The agreement further stated that after the new constitution was issued, a new president, vice president, prime minister, speaker and deputy speaker would be elected by the legislature-parliament (into which the CA would be transformed). This would all be in keeping with the 2007 Interim Constitution, which would also govern the election of new prime ministers, formation of cabinet, impeachment and votes of confidence and non-confidence until the new House of Representatives was elected.<sup>18</sup> The NC and UML agreed unofficially that Prime Minister Sushil Koirala would step down to make way for a UML-led government headed by current Prime Minister KP Sharma Oli.<sup>19</sup>

The sixteen-point agreement was flawed in process and substance. The only Madhesi party to sign was the MJF-D, whose leader is not considered a major advocate of the Madhesi cause.<sup>20</sup> National leaders' repeated assertions that the constitution would be "super fast-tracked" were meant to reassure, but those who had not been asked to join the discussions felt steamrollered. Madhesi parties only had 60 seats, 10 per cent, in the assembly. "I supported the sixteen-point deal, but I feel we made a mistake", a prominent NC activist said. "We should not have decided constitutional matters without taking Madhesis into confidence. We could have passed almost any document if we had not alienated them".<sup>21</sup>

The other problems were substantive. The number of states – eight, later modified to six, then increased to seven – had little to do with discussions in the previous CA, which had ended with a State Commission suggesting ten states and a "non-territorial state" for Dalit groups. The deal also left the boundaries of the states to be determined later.<sup>22</sup> Mutual mistrust was so high in June 2015 that Madhesi, Tharu and janajati groups read the postponement of the state boundaries as a ploy by traditionally dominant hill-origin Brahmin and Chhetri leaders to slide federalism off the table.

Proportional representation (PR) in the electoral system and affirmative action are seen as major gains achieved by Madhesi and janajati movements starting in 2007-2008. The ratio of PR seats to first-past-the-post (FPTP) seats in the current parliament is roughly 60-40. The sixteen-point agreement flips this to 40-60. PR allows smaller parties, including ethnic and regional ones, more representation. Further, PR lists in Nepal must include quotas for different social groups, which also helps diversify representation.<sup>23</sup> Similarly, specific measures in the 2007 Interim Constitution to ensure greater inclusion and diversity in state organs through quotas

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<sup>18</sup> According to the transitional arrangements, this should be in late 2017.

<sup>19</sup> The origin of this deal lies in a three-month fight between the NC and UML over which would form the government after the 2013 elections.

<sup>20</sup> Patronage is central to political practice in Nepal, and coalition politics is an inevitable effect of a highly-fragmented party landscape. MJF-D leader Bijay Kumar Gachhadar is described as adept at both. He is a Tharu from the eastern Tarai, but his support for inclusion and federalism is seen as opportunistic. Puranjan Acharya, "Gachhadar, Kejriwal, and Nepal", *Nagarik*, 8 January 2014.

<sup>21</sup> Crisis Group interview, NC leader and former cabinet member, November 2015.

<sup>22</sup> The sixteen-point agreement stated that Nepal would have eight provinces "based on five criteria of identity and four of capability"; that the names of the provinces would be determined by a two-thirds majority in the state/provincial assemblies; and that a two-thirds majority in parliament would approve their boundaries, based on the recommendation of a federal commission with a six-month term. [www.satp.org/satporgtp/countries/nepal/document/papers/16-point\\_Agreement.htm](http://www.satp.org/satporgtp/countries/nepal/document/papers/16-point_Agreement.htm).

<sup>23</sup> Constituent Assembly election ordinance, 2013, Election Commission of Nepal, ([www.election.gov.np/election/np/election-laws-47.html](http://www.election.gov.np/election/np/election-laws-47.html)).

for ethnic and caste groups and women were toned down to a vague commitment to “inclusion”.<sup>24</sup>

Postponing a decision on the boundaries of states, reducing the number of constituencies in the plains and the reduced ratio of PR to FPTP seats, taken together, jeopardised the federalism and inclusion project by diluting its constituent elements.<sup>25</sup> A Madhesi analyst said the intent of the deal seemed to be “to break the backbone of the state-restructuring agenda”.<sup>26</sup>

### B. *Misreading the Signs*

Protests started building soon after the sixteen-point agreement began to bear fruit, broadening in scope as various elements of the draft constitution came to light. They took the form of small rallies in Kathmandu and petitions, particularly about unequal citizenship provisions for men and women that were designed to restrict the ability of single Nepali mothers or Nepali women married to non-Nepalis to pass citizenship to children who in effect could otherwise be stateless.<sup>27</sup> Protests outside Kathmandu had a sharper edge. Public meetings had provocative speeches, and national leaders were burned in effigy. An editorial in a leading English-language daily as early as 29 June warned that:

The new draft marks a major step backwards in ensuring that Nepal becomes a more just society. [T]here are many other substantive problems with the constitution that can only serve to further marginalise the marginalised. There is a systematic attempt to remove all provisions on inclusion that were established after 2006. ... The constitution envisages placing many restrictions on the provinces and even if federalism is adopted, these states will be severely crippled from the start. The gist of the constitution is clear: it is meant to further consolidate the old power structure.<sup>28</sup>

The first spike in protests in the Tarai came in July, during public consultations on the draft constitution. The fast-track process had shrunk the timeframe for collecting public opinion and redrafting based on analysis of this opinion from over two months to under ten days.<sup>29</sup> It also reduced the time for CA members to read and debate the draft.

In hill urban centres and some district headquarters, including Kathmandu, consultation was relatively uneventful, well attended, and appreciated to a degree. In the Tarai, though, the home ministry's assessment of the environment as hostile meant

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<sup>24</sup> See Article 21 on the Right to Social Justice in the Interim Constitution and Article 42 on the Right to Social Justice in the 2015 document. Unofficial English translation available at [www.constitutionnet.org/files/nepal\\_constituton\\_2015\\_24\\_sep\\_2015.pdf](http://www.constitutionnet.org/files/nepal_constituton_2015_24_sep_2015.pdf).

<sup>25</sup> This fear was also often expressed in the first assembly, when Madhesi and Janajati groups and the Maoist party were sometimes encouraged to think about postponing difficult decisions in the name of stability or social harmony. Crisis Group Report, *Nepal's Constitution I*, op. cit.

<sup>26</sup> Crisis Group interview, Kathmandu, 8 October 2015.

<sup>27</sup> See, for example, “Nepal: Extend Time for Public Consultation on New Constitution, Repeal Regressive Aspects of Draft”, statement by Amnesty International, 22 July 2015.

<sup>28</sup> “Two steps back”, editorial, *The Kathmandu Post*, 29 June 2015. Some of these provisions were modified to an extent in the final draft.

<sup>29</sup> Crisis Group interviews, members of the Constitution Drafting Committee, September 2015. The CA Rules and Procedures are at [www.constitutionnet.org/files/nepal-constituent\\_assembly\\_rules\\_2014.pdf](http://www.constitutionnet.org/files/nepal-constituent_assembly_rules_2014.pdf). “Fast-track drafting”, *Nepali Times*, 3 July 2015. “CA takes statute fast-track”, *The Kathmandu Post*, 3 July 2015.

that the venues were heavily guarded by the Nepal Police and paramilitary Armed Police Force (APF), thus discouraging to Madhesi and Tharu, who often have a fraught relationship with the security forces. Entry was reported to be restricted in places, and when this was contested, close to 130 were wounded in clashes with the police and APF in five Tarai districts.<sup>30</sup>

In the meantime, in response to a petition challenging the constitutionality of the sixteen-point agreement, the Supreme Court ruled that the CA was required to delineate state boundaries as part of the new constitution.<sup>31</sup> On 5 August, the four parties issued a map with proposed state boundaries without formal consultation with Madhesi, Tharu, janajati or Dalit groups and despite cautions from Madhesi and Tharu leaders that it would spark major unrest.<sup>32</sup>

### 1. Debated states

The map laid out six states, with no explanation for why the four parties had abandoned their earlier prescription of eight. Madhesi, Tharu and janajati groups said the proposed divisions violated principles that had either been agreed in earlier deals or were still up for discussion. The Tarai was divided across all six states, forming a small part of all but one state, which contained no hill territory. This state, State two, would contain eight of the current twenty plains districts.

Madhesi groups want to change the alignment of current administrative divisions, called development regions. Each of the five north-south divisions includes river basins and slabs of the high Himalayas, middle hills and southern plains. Some in the NC and UML believe that it would be fairer and help foster national unity for the new federal states to closely resemble the development regions.

Madhesi groups counter that in such divisions, hill-origin upper caste groups will nearly always be the largest minority. They and janajati groups want future administrative divisions to have a different demographic balance, to create room for more diverse electoral outcomes.<sup>33</sup> Madhesi groups want the plains to contain fewer but

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<sup>30</sup> "Human rights violations during consultation on the draft constitution in the Terai", THRD Alliance, 27 July 2015. THRD Alliance echoed some media reports in enumerating clashes in Dhanusha, Saptari, Rautahat, Kapilvastu, Rupandehi.

<sup>31</sup> The ruling in the case filed by Rita Sah, a Madhesi civil society activist, and Vijay Kant Karna, a Madhesi former ambassador, said that framing the new constitution by bypassing existing constitutional provisions could "make the new constitution controversial, pose a threat to peace and order and create the fear of another conflict". "Apex court stays implementation of 16-point pact", *The Himalayan Times*, 20 June 2015. It further said the agreement violated articles of the 2007 Interim Constitution, including 138 (1a): "Provinces shall be autonomous and vested with full authority. The boundaries, number, names and structures, as well as full details of the lists of autonomous provinces and the centre and allocation of means, resources and powers shall be determined by the Constituent Assembly".

<sup>32</sup> Crisis Group interviews, senior Madhesi party leader, NC, UCPN-M and Madhesi party Constitution Drafting Committee members, Kathmandu, September-November 2015.

<sup>33</sup> One analysis of the demographic balance in the new states, based on figures for district-level social groups in the 2011 census, concludes that in all but State two, the plains-only state, the largest population group would be hill-origin upper castes, which would range from 28 to 62 per cent of the total population. The largest group in State two would be non-Dalit Madhesi caste groups (52 per cent), followed by Madhesi Dalit groups (16 per cent). In State seven, home to the Tharu movement of Kailali and Kanchanpur, Tharus (17 per cent) would be the second largest group after hill-origin upper caste groups (60 per cent). The analysis, by a prominent advocate, Dipendra Jha, who litigates Madhes-related constitutional matters, can be found at [www.madhesiyouth.com/analysis/constitutional-amendment](http://www.madhesiyouth.com/analysis/constitutional-amendment).

larger states and say that little or no hill territory should be joined to these predominantly plains states. They argue that having, say, two large units, with the demographics tilted slightly in their favour could enable a greater Madhesi voice in decision-making and governance.

### Nepal's current administrative divisions



This map shows Nepal's Development Regions and 75 district headquarters. See Appendix A for a map and names of districts. The district and state boundaries in all Nepal maps used by Crisis Group are indicative only, not a precise representation of official boundaries.

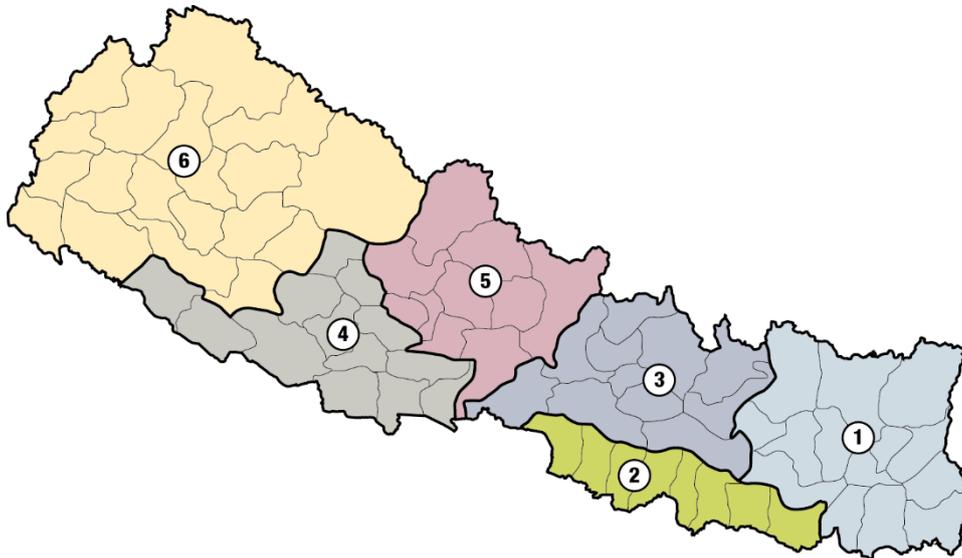
Tharu groups in the far-western Tarai identify Kanchanpur and Kailali districts as a homeland. Tharus have complicated relationships with hill-origin upper caste groups, whom they have traditionally served as farmhands or household servants, and want a degree of autonomy for areas they dominate in the plains. They also agreed with Madhesi political groups and activists that these areas should not be part of Madhesi states, so as to acknowledge distinctive Tharu history, identity and aspirations. Similarly, some larger janajati groups have strong cultural, historical and spiritual ties to specific areas and want their homelands kept intact, rather than divided between two or more states, as will happen with Magar and Gurung or Tamu groups' traditional areas of dominance in the proposed States four and five.<sup>34</sup>

In the six-state map, Kanchanpur, Kailali and contested eastern districts of Jhapa, Morang and Sunsari claimed by both Madhesi and hill-origin politicians were all assigned to hill states. Senior hill-origin leaders of the NC, UML and UCPN-M are understood to have major political, real estate, and commercial interests in both enclaves.<sup>35</sup>

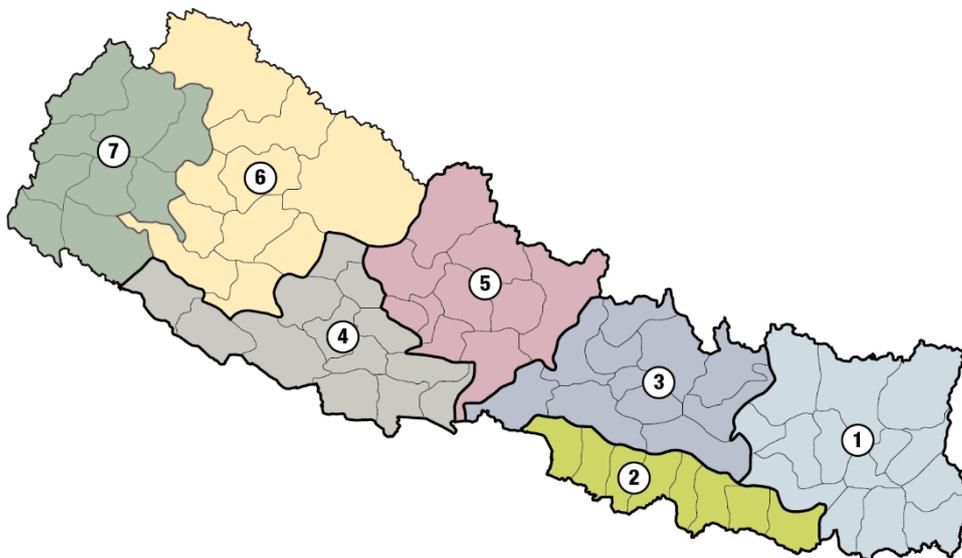
<sup>34</sup> Crisis Group Report, *Nepal: Identity Politics and Federalism*, op. cit.

<sup>35</sup> See, for example, [www.nepalitimes.com/blogs/thebrief/2015/08/06/twist-in-the-tale](http://www.nepalitimes.com/blogs/thebrief/2015/08/06/twist-in-the-tale).

**Nepal with the proposed six-state structure, June 2015**



**Nepal's seven states, as per the new constitution**



The NC and UML argued, accurately, that there are few areas where any group has an absolute majority and that giving some groups special rights could encourage newly-empowered groups to discriminate against traditionally dominant ones. They further said focusing on identities other than “Nepali” threatened to harden social divisions and weaken unity. They feared that if “identity” – understood to be closely linked to not only cultural practices and history but also specific territories within Nepal – was factored into the creation of states, this would create ethnic ghettos and could even threaten the breakup of the country.

Madhesi and janajati groups, and some social scientists, countered that while there is poverty in all groups, inequality is compounded by identity-based discrimination. One way to change the traditional domination of hill-origin high caste groups was to change boundaries to allow other groups to be the largest minority in areas. Nepal’s ethnic mosaic would stop any newly empowered or assertive groups from dominating or suppressing others. Federalism and quotas to improve representation

in policy and decision-making could address structural discrimination and inequality and engender a greater sense of equality between social groups that would strengthen national unity.

The August publication of the six-state map sparked anger and a sense that Madhesi, Tharu and some janajati concerns had been explicitly rejected. Protests were already underway against various proposed aspects of the statute, including citizenship clauses discriminatory to women and changes to secularism provisions. These escalated, most strongly in the far-western Tharu heartland, and spread by mid-August to the central and eastern Tarai.

## 2. Tikapur

In August, the impoverished far west of the Tarai became a flashpoint. Tharu groups were angry that Kanchanpur and Kailali districts, which they have long lobbied should have special status as autonomous Tharu areas, would be included in predominantly hill-based State six. They took to the streets of Tikapur, the district capital of Kailali, and elsewhere.

Tikapur is largely populated by hill-origin people but surrounded by traditional Tharu villages. Tharu protesters clashed with Akhanda Sudur Paschim (the Undivided Far-West), a group with strong roots in Kailali and Kanchanpur and the districts to their immediate north that was agitating for Kailali and Kanchanpur districts to be joined to hill districts. The six-state map kept the Far-West Development Region intact and joined to much of the present-day Mid-Western Region to form State six. The Akhanda movement enjoys the blessings of powerful national leaders from this region in all major parties. Since it gained prominence in 2011, its supporters have often clashed with Tharu groups.

A third group was also protesting in the region against merging large parts of the Mid-Western Development Region with the Far-Western Region to form State six. Traders and others in the mid-western hill districts of Jumla and Surkhet, significant commercial hubs, feared that the proposed new arrangement would dilute their competitive advantage in favour of businesses from far-western hill districts. In Surkhet on 10 August, two protestors were killed by police fire, triggering talk in Kathmandu about a compromise. On 21 August, the four major parties announced that State six was to be split to create a seventh state that would include much of the hill territories of the mid-western region.

This sparked violence in Tikapur, where Tharu protestors were enraged that while the concerns of hill districts had been addressed relatively quickly, their own older protests were ignored. Two days later, as protests intensified, some Tharu demonstrators in Tikapur attacked a contingent of Nepal Police and Armed Police Force (APF), killing seven and an infant child of an APF member. This led to the first army deployment since the end of the Maoist conflict. In the next days, despite a curfew and virtual national media blackout, there were multiple credible reports of systematic attacks by local hill-origin communities on Tharu homes and businesses in and around Tikapur. Also credible were numerous anecdotal and some media accounts of flight from surrounded Tharu villages in fear of violence. Over 4,000 were thought to have fled to India.<sup>36</sup>

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<sup>36</sup> Crisis Group interviews, Tharu activists, defence lawyers, Madhesi activists, NC politician, Kathmandu, August-September 2015, home ministry official, November 2015. Crisis Group telephone interviews, Tharu activists, October-December 2015. "Tharu men flee villages in wake of deadly

While a National Human Rights Commission (NHRC) delegation visited six days after the killings, its findings are not yet public. A parliamentary inquiry commissioned in September concluded that the deadly attack on the police contingent had been premeditated.<sup>37</sup>

### 3. Tarai shutdown

Protests against the draft constitution in other parts of the Tarai first spiked during the 20-21 July public consultation. Confrontations occurred when people were denied entry to meetings organised by CA members, which in some cases were open only to party cadres.<sup>38</sup> The clashes were under-reported in Kathmandu. By mid-August, Madhesi protests had spread across much of the Tarai, with curfews and prohibition orders in places that were flashpoints for political mobilisation or had a history of effective or violent protest. On 23 August, the parties submitted the revised draft of the constitution to the assembly, with no attempt to negotiate with protestors or the Madhesi parties in parliament.

Protests escalated, and agitators and security forces engaged in confrontations that frequently resulted in excessive use of force by the latter.<sup>39</sup> By the end of August, close to 40 people had been killed in clashes with police and APF. The mainly Madhesi Tarai Human Rights Defenders Alliance (THRD Alliance) said a number of those who died had been shot in the back or the chest, and in a few cases, some distance away from the protest sites.<sup>40</sup>

The border town of Birgunj, where over 60 per cent of Nepal's imports enter, became the nexus of protests. There and elsewhere, they were started by local actors, rather than Madhesi political parties or, as some in Kathmandu alleged, India. Nor were they dominated by gangs of thuggish young city men typically used by parties. A seasoned field analyst of Madhesi politics judged that in the early months people were more likely to join a rally if it was not explicitly associated with a Madhesi political party.<sup>41</sup> Women, college students and elderly people joined the agitation, and in some areas, parties and mobilisation networks both competed and cooperated to organise support. Over the next few months, this contributed to the radicalisation of younger protestors.

Initially it appeared as if Madhesi Muslims and Dalits were reluctant to participate in the mainstream Madhesi protests, whose leadership at all levels tends to be dominated by men of a few influential castes. That changed after the constitution

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Tikapur clash", *The Kathmandu Post*, 2 September 2015. Crisis Group interviews, Kathmandu, August, September 2015.

<sup>37</sup> "Political motives behind Tikapur Carnage", *The Himalayan Times*, 28 September 2015; "Report: Protesters were paid to commit violence", *The Kathmandu Post*, 29 September 2015.

<sup>38</sup> "Policy Brief: Nepal's Contested Constitution and Recommendations on Moving Forward", Democracy Resource Centre, 2 October 2015. "Human rights violations during the two day consultation on the draft constitution", THRD Alliance, 27 July 2015. More than 100 protestors were reportedly injured due to excessive use of force by the police and the APF in Dhanusha, Rautahat, Saptari, Kapilvastu, and Rupandehi districts.

<sup>39</sup> For detail on violence in five Tarai districts, see "Like we are not Nepali", Human Rights Watch, October 2015.

<sup>40</sup> THRD Alliance updates are available at its Facebook page.

<sup>41</sup> Crisis Group interview, researcher and analyst who conducted extensive fieldwork in the central and eastern Tarai, Kathmandu, October 2015.

was promulgated.<sup>42</sup> A Madhesi Dalit journalist wrote that in some areas, Dalits and non-Dalits were protesting – and eating – together, breaking what for many is the ultimate caste taboo.<sup>43</sup>

#### 4. How to understand the protests

An early reading of the protests in Kathmandu was that they were stirred up by disgruntled and discredited Madhesi parties, or engineered by India to weaken Nepali sovereignty.<sup>44</sup> The Tharu protests were thought to be instigated by powerful community leaders, rather than to reflect genuine social grievance. Madhesi protestors, however, were driven not just by concerns about constitutional clauses, but also by what they saw as the dismissive, insulting or apathetic response of the major parties, government and Kathmandu-centric media.

Yet, the confrontation over the constitution alone cannot explain the rapid spread of agitation across the Tarai, why it continued for six months despite enormous hardship, or why it could flare up again. Contrary to some attempts to portray the protests as against Pahade (hill-origin) people, it was clear from numerous accounts and trips to protest areas that Madhesi sentiment was better described as anti-state. Exclusion may be quantifiable, but the sense of being discriminated against and treated as a lesser citizen is harder to capture. One way of doing so is by considering the relationship between the protesting populations, dominant society and the state, particularly the security forces.

Madhesis and Tharus have a fraught relationship with the security forces. The cavalier treatment and harassment of local populations by largely hill-origin police in the Tarai is well documented.<sup>45</sup> There is a legacy of recent violent suppression and abuse of Tharu men and women by the security forces for their participation, sometimes voluntary, other times forced, in the Maoist insurgency, and the prejudices of the mainstream Nepali imagination play into how representatives of the state treat them. The targeting of Tharus in the mid- and far-western plains on the grounds of their ethnicity is documented by human rights groups and academics.<sup>46</sup> Though Tharus are just 7 per cent of the population, over a third of the 900 Nepalis who were disappeared by the state between 1996 and 2006 were Tharu men. Tharu women faced a high degree of sexual violence, particularly from the security forces.

In Madhesi communities, too, such targeting is increasingly documented and, in the analysis of Madhesi and other sympathetic commentators, relates to deeply in-

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<sup>42</sup> Crisis Group interviews, social scientists and researchers, Kathmandu, October-December 2015, January 2016.

<sup>43</sup> Bhola Paswan, "The Battle for Mahendra Highway", *The Record*, 23 November 2015.

<sup>44</sup> Prateek Pradhan, "Wrong advice", *Republica*, 16 September 2015.

<sup>45</sup> It is hard to get reliable data on Nepal Police composition. By some accounts, less than 2 per cent are Madhesi. See, for example, [www.madhesiyouth.com/political/representation-of-madhesis-in-nepal-police-apf-nepal-army](http://www.madhesiyouth.com/political/representation-of-madhesis-in-nepal-police-apf-nepal-army); also, UN Field Bulletin (2013) <http://un.org.np/sites/default/files/2013-03-01-field-bulletin-52.pdf>.

<sup>46</sup> For example, a 2008 Office of the High Commissioner for Human Rights (OHCHR) report that investigated forced disappearances in Bardiya district at the height of the war (2001-2003) revealed that Tharus were "85 per cent ... of persons disappeared by State authorities", though 52 per cent of the district population. "Conflict-related Disappearances in Bardiya District", p. 6. See also, Arjun Guneratne, "Tharu-State Relations in Nepal and India", *Himalaya*, Association for Nepal and Himalayan Studies, vol. 29, no. 1, 2010. This is not restricted to Tharus. Reporting from the early years of the war noted that members of the Janajati Magar community, the dominant ethnic group in the heartland of the Maoist movement, were also targeted in police actions.

grained social ideas about race, hierarchy and the place of Madhesis in Nepal. The communities have extensive and constantly-renewed kinship ties and significant cultural and linguistic affinities with communities across the open border with India, particularly in the Indian state of Bihar. A common view among hill-origin people is that Madhesis are more Indian than Nepali, with at best divided loyalties. Janajatis, including Tharus, and Dalits (hill-origin and Madhesi), are “pure” Nepali, but lack the attributes – Nepali speaking, Hindu, upper caste – that would make them the embodiment of natural Nepaliness.

In the same conception of Nepali nationalism that places Madhesis in a grey area, there is an existential fear of India, given its size, the accession to it of the Kingdom of Sikkim in 1975 and Delhi's often divisive influence on Nepal's domestic politics.<sup>47</sup> The nationalism and cultural belonging of Madhesis, therefore, are both suspect. In more extreme – but not rare – versions of this narrative, Madhesis are India's fifth column. This colours the experience of Madhesis in their interactions with state institutions, such as when the police or armed police use racially-charged language.

Nepal has a history of political violence against the state and of governments using security forces to crush political dissent by members of all social groups. Most older national leaders, the majority of them hill-origin, upper-caste men, have spent time in prison or were tortured for their role in the sometimes violent underground pro-democracy or leftist movements of the 1970s.<sup>48</sup> Their activities did not cast all hill-origin, upper-caste men as undesirable political elements. Yet, similar dissent or protest by janajati, Tharu or Madhesi men is taken by security forces as license to target entire communities or localities.

Protesters regard the power elites' exclusionary approach to negotiations in the CA, the resistance to constitutional amendments and the traditionally unequal relationship of their communities with the state as symptoms of a single underlying discriminatory force. The agitation is thus best read as a huge outpouring of resentment against a history of discrimination and an articulation of the desire to be treated with dignity as full Nepalis, regardless of appearance, linguistic, ethnic or other identity, and without any pressure to prove worthiness as a citizen or explain deviation from the norm.<sup>49</sup>

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<sup>47</sup> The kingdom of Sikkim was in effect a protectorate of India from 1950 onwards. It was autonomous internally, but its foreign affairs, defence and communications were handled by New Delhi. India also bore ultimate responsibility for law and order and administration. See “Press Note of the Ministry of External Affairs, 20 March 1950”, in SK Sharma and Usha Sharma (eds.), *Documents on North East India*, vol. 10, (Mittal Publications, 2005), for details of the agreement. Sikkim was strategically important to India, but there were disagreements in Sikkim over the relationship. Supporters of the Chogyal, as the monarch was called, wanted greater international autonomy, while the Sikkim State Congress party, dominated by hill Nepali-origin communities, favoured closer ties with India. An anti-monarchy agitation turned violent in 1973, and the then chief minister asked India to intervene to maintain law and order. An Indian-brokered deal resulted, two years later, in a referendum in favour of integration with India.

<sup>48</sup> Crisis Group interviews, Madhesi activist, Kathmandu, October, November 2015; telephone interviews, protest participants, Birgunj, Janakpur, Tikapur, Gaur, Bhardah, September–November 2015.

<sup>49</sup> Crisis Group telephone and in-person interviews, protestors in Birgunj, Janakpur, Biratnagar, October–November 2015, January 2016.

### C. *Festive Lights and Black Flags*

#### 1. Burning down the house

By early September, Madhesi and Tharu parties, including ruling-coalition member MJF-D, which had until then supported the constitution and the proposed federal divisions into first six, and then seven states, had boycotted the CA. The Madhesi parties wanted all deaths investigated, the army withdrawn, discussion of the significance of past agreements and a pause in the CA process to reassure communities that felt the constitution was being rammed through without consultation. A Madhesi leader said, “we want our people to be safe. How can we negotiate when [they] are being beaten and shot? Discussion should be about basic principles. What is the status of past agreements? How can we trust that any agreement we sign will be honoured?”<sup>50</sup>

Madhesi and Tharu activists pointed out that amendments would require a two-thirds majority, which was no guarantee they would receive concessions, and that the major parties had ignored many commitments in previous agreements and the 2014 cross-party deal to “own” the decisions of the first CA.<sup>51</sup> In the words of another Madhesi party leader, “some colleagues thought we could negotiate amendments later. At the local level this would not have been acceptable. Our house was burning; we had to stop it from exploding”.<sup>52</sup>

Lawmakers from parties, including the UCPN-M and NC, described the UML, in particular, and some senior NC leaders as unbending in insistence that the process stick to the accelerated timetable and scornful of Madhesi demands. The Tikapur incident reinforced a sense in the major parties that the government could gain sympathy as the besieged party, and nationalist sentiment and fears of ethnic tensions would dampen criticism of a hastily-passed constitution.<sup>53</sup> The parties maintained that, in a democracy, it was not possible to bring everyone on board, and the constitution was open to amendment in the future.

The international community has long had a voice in Nepal, given decades of development partnerships and support for the peace process. Its reaction to the protests was largely muted. Western donors have felt hobbled in recent years by criticism that they promoted culturally inappropriate liberal values and muddied the waters in the first CA. They have also been under pressure to channel development funds through the government and to show results via spending, so are loath to give further offence.<sup>54</sup>

There is fatigue with the seemingly endless post-conflict transition, feckless politicians and the global proliferation of far more deadly conflicts. Most donor countries and the UN welcomed the sixteen-point agreement, despite clear signs there was no buy-in from Madhesi and other marginalised groups. In the weeks before 20 Sep-

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<sup>50</sup> Crisis Group interview, Madhesi politicians and negotiators, Kathmandu, September 2015.

<sup>51</sup> “Major parties have pledge to take ownership of CA-I”, *The Kathmandu Post*, 10 February 2014.

<sup>52</sup> Crisis Group interview, senior Madhesi leader, Kathmandu, October 2015.

<sup>53</sup> Crisis Group interviews, UCPN-M and NC members, Madhesi, Janajati and Tharu Constituent Assembly members, one UML member, Kathmandu, August-October 2015. See also “As Tarai burns, parties could at least put CA process on hold”, special editorial, *The Kathmandu Post*, 11 September 2015.

<sup>54</sup> Crisis Group interviews, journalist, European diplomats, Asian diplomat, party leaders, Kathmandu, August-October, November 2015.

tember, diplomatic efforts to prioritise broader consultation and the need for legitimacy over speed were overly cautious and poorly coordinated.<sup>55</sup>

India, the U.S. and UN publicly and privately urged the government to bring dissenters on board. After weeks of discreet urging and wheedling and a blunt conversation between Prime Minister Narendra Modi and Prime Minister Koirala, India, a week before the constitution was passed, designated its foreign secretary as special envoy to Kathmandu to press the three major parties to negotiate. This elicited an angry public response from the prime minister's press adviser, who accused New Delhi of meddling in internal affairs.<sup>56</sup>

## 2. Undemocratic democracy

An NC leader said, "in the CA, the process looked democratic, but it was not".<sup>57</sup> Important procedures were shortened to irrelevance, as with the public consultation phase, or abandoned. Members complained they were not given enough time to read the draft, which ran close to 150 pages. The rules of procedure included point-by-point discussion of the draft in plenary. This was first reduced, in the fast-track, to give ordinary members three minutes, and senior leaders, five minutes each. At the end, it was eliminated entirely, so there was barely any plenary discussion before the draft was voted on.<sup>58</sup>

Prominent Madhesi politicians in major parties, such as Bimalendra Nidhi in the NC and Prabhu Sah in the UCPN-M, opposed the sixteen-point agreement. Other non-Madhesi senior figures were also sceptical, lobbying and even pleading with their party leadership to negotiate.<sup>59</sup> They were overridden, as were dissenting opinions of party veterans, women members and party members from Madhesi, janajati and Tharu groups. Whips forced votes along party lines. Some UCPN-M, NC and UML members described, on condition of anonymity, being threatened by leaders to stop being critical and vote "yes", or lose political careers and jobs.<sup>60</sup> There were also reports of tensions between Prime Minister Koirala and President Ram Baran Yadav (both NC), when the president asked the major parties to reconsider the controversial provisions in light of the protests.<sup>61</sup>

As the death toll rose, there were calls to halt the drafting process and negotiate with the protesting parties.<sup>62</sup> The government's answer continued to be primarily a security response, delegated to the police, armed police and army in areas that saw heavy protests: Tikapur, Birgunj, Lahan, Janakpur, and Saptari. Reports of violent action by the police and armed police against protestors, including women and youths, added fuel to the protests.<sup>63</sup> "Everyone [in these areas] knew someone who died or was injured", said a young NGO worker. "The movement [became] very personal".<sup>64</sup>

<sup>55</sup> Crisis Group interviews, senior diplomats, UN officials, Kathmandu, August-September 2015.

<sup>56</sup> Pradhan, "Wrong advice", op. cit.

<sup>57</sup> Crisis Group interview, October 2015.

<sup>58</sup> Crisis Group interview, NC, CPN-UML, UPCN(M) members, Constitution Drafting Committee, Kathmandu, September-October 2015.

<sup>59</sup> Crisis Group interviews, NC and UCPN-M leaders, Kathmandu, August-September 2015.

<sup>60</sup> Crisis Group interviews, Kathmandu, September-October 2015. While none reported physical threats, two said they were "seriously bullied".

<sup>61</sup> Crisis Group interviews, senior NC leader, diplomats, Kathmandu, September 2015.

<sup>62</sup> "Stop the process, start the dialogue", op. cit.

<sup>63</sup> See, for example, "Like We Are Not Nepali", op. cit., p. 33, for statements about police entering houses and beating women. Crisis Group telephone interviews, Dhanusha, Parsa, Kailali, August-

Two days before the 20 September deadline the parties had given themselves to pass the statute, the three major parties announced they were “pausing” the process to try talks with Madhesi parties. The pause was over a weekend, one day of which was a religious holiday in the Tarai. No groundwork had been laid by informal contacts or agenda discussion, and security forces, including the army, were still deployed in parts of the Tarai. The Madhesi parties rejected the offer.

The constitution bill was approved with an 89 per cent majority. 532 of the 598 assembly members voted; 25 members of the monarchist pro-Hindu Rastriya Prajatantra Party-Nepal (RPP-N) voted against.<sup>65</sup> The 66 who abstained included members of Madhesi, Tharu, and pro-federal parties, two from the Nepali Congress, one from the UCPN-M and one independent.<sup>66</sup> One person was killed by police fire in Birgunj as fireworks were being set off over the CA building in Kathmandu.

The night of 20 September revealed a deeply divided Nepal.<sup>67</sup> The NC and UML directed their parties and urged the public to welcome the new constitution with “Dipawali celebrations”, after the festival of lights, a major Hindu holiday. In Madhesi towns and villages, black flags came out, which in parts of the Tarai are still in evidence.<sup>68</sup> In telephone interviews Crisis Group conducted on 20 September with civil society activists, local human rights workers, journalists and ordinary members of the public, both Madhesi and Pahadi (hill-origin), in Kathmandu, Birgunj, Biratnagar, Janakpur and Saptari, a constant refrain was that it seemed not to matter how many Madhesis died or how large the protests were – Kathmandu just did not listen. A prominent Nepali political scientist and former ambassador to India said the country faced an “existential crisis” if Madhesi issues were not addressed.<sup>69</sup>

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September 2015; interviews, journalists, national Nepali-language dailies, Kathmandu, August-September 2015.

<sup>64</sup> Crisis Group telephone interviews, Parsa, Dhanusha, Saptari, August-September 2015; interviews, journalists, national Nepali-language dailies, Kathmandu, August-September 2015.

<sup>65</sup> The party accepts the constitution and is a significant member of the ruling coalition. “Despite reservations, RPP-N to embrace new statute”, *Republica*, 17 September 2015.

<sup>66</sup> <http://thehimalayantimes.com/kathmandu/61-lawmakers-do-not-sign-nepals-constitution-2072>.

<sup>67</sup> The divide was stark in towns dominated by Pahade (hill-origin groups around the East-West Highway). For example, in the Dhanusha town of Bardibas, mostly home to hill-origin groups, Pahade youth harassed Madhesi households for not lighting candles to celebrate. Crisis Group interview, Madhesi journalist, Janakpur, October 2015. There were minor acts of vandalism by Madhesi protestors, but local leaders were anxious to dial down the ethnic element, and this appears to have helped in ensuring that local conflicts did not escalate. Crisis Group interviews, Birgunj, Janakpur, Kathmandu, September 2015.

<sup>68</sup> “Bara, Parsa locals fly black flags to protest new constitution”, *The Himalayan Times*, 20 September 2015. Many Madhesis and sympathisers of the movement on social media have changed their profile pictures to black flags.

<sup>69</sup> Gyanu Adhikari, “Unveiling Nepal’s constitution amid deadly protests”, *Al Jazeera*, 20 September 2015.

### III. Pyrrhic Victory

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After 20 September, the CA was automatically transformed into parliament, albeit one that until the next election functions according to the 2007 Interim Constitution. Days after the constitution was passed, the ruling coalition, prompted in particular by NC figures who had earlier supported negotiations with protestors and argued for consensus over speed, filed to amend the controversial provisions on electoral representation, affirmative action and delineation of constituencies. This was meant to build bridges with disaffected Madhesi and Tharu groups and address janajati concerns but gained no traction, as politicians from all mainstream parties, including the MJF-D, spent the next six weeks politicking the change of government, cabinet composition and elections to constitutional positions. The new twelve-party UML-led ruling coalition includes the UCPN-M and a royalist party that voted against the statute. The exigencies of coalition and patronage politics have produced a large cabinet with six deputy prime ministers.

After the constitution was passed, the shutdown in the Tarai was swiftly succeeded by a blockade at the largest trade and transit point along the open border with India. It appears to have been instigated by New Delhi, unhappy that its cautions about the constitution-writing process were unheeded and concerned about instability along the open border. However, Madhesi parties and activist groups quickly claimed responsibility. Nepal imports nearly all its petrol, diesel, kerosene, cooking gas and aviation fuel from India and has poor storage capacity – no more than twenty days of stocks at a given time. Other goods vital for agriculture and raw materials for its limited industry are also largely imported via India, even if they originate in a third country.

#### A. *The Blockade*

On 23 September, the United Democratic Madhesi Front (UDMF), an umbrella grouping of Madhesi parties that emerged in 2007, announced it was blockading all customs points bordering India to express anger at the unilateral adoption of the constitution and to push for changes.<sup>70</sup> Within days, cargo and container trucks were massed six-deep and in ever-lengthening lines at some crossings, notably Birgunj, Nepal's busiest transit point for import of fuel, cooking gas and other goods. Protesters occupied a transit bridge on no-man's land between Birgunj and Raxaul in India and clashed often with police in the early weeks, as the government continued an aggressive approach.<sup>71</sup> In mid-November, when security forces tried to clear the route by force, protesters moved to the Indian end of no-man's land to enforce the blockade. A Madhesi leader explained:

We had no other option. The government declared curfews and prohibitory orders in urban centres and highways. When we tried breaching them, the police

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<sup>70</sup> "UDMF to intensify stir, block highways, customs points", *The Himalayan Times*, 23 September 2015; "UDMF to impose blockade at Birgunj border point", *The Himalayan Times*, 24 September 2015.

<sup>71</sup> At least two people were killed in the first week of the blockade by police fire, one an Indian teenager visiting family in Nepal. "Day after youth's death, ties strained on 'Friendship' bridge on India-Nepal border", *Indian Express*, 2 November 2015.

shot and killed the people. We couldn't just protest in villages and fields. No one would listen. So we decided to occupy the border.<sup>72</sup>

The occupiers were a mixture of party activists, ordinary Nepalis and some Indians who said they were there to show support.<sup>73</sup> In Birgunj, the protests started with an almost festive air.<sup>74</sup>

But even if the blockade was indigenous, the major parties and Kathmandu establishment were correct that India was in concert with Madhesi parties.<sup>75</sup> New Delhi had reacted frostily to the constitution, merely "noting" its adoption and stressing concerns about the violence along the border.<sup>76</sup> In following weeks, its position was that the "situation" was the result of internal Nepali political disturbances that had to be resolved by talks.<sup>77</sup> Madhesi protestors' efforts were bolstered from the Indian side by bureaucratic foot dragging, new complications for transit and customs procedures and suddenly absent officials.<sup>78</sup>

Negotiations in Kathmandu took weeks to gain even sporadic momentum. Sources in all parties gave similar accounts of the environment that developed over the months of the blockade: the UML-led government felt it had the upper hand and could not give into a blockade it described as imposed by India; the UDMF was divided, unable to agree on the blockade, a negotiating strategy and acceptable compromises. All actors dug in, waiting for opponents to tire.<sup>79</sup>

In late January 2016, the talks collapsed. The major parties unilaterally passed constitutional amendments on constituency delineation and quotas that the UDMF and Madhesi civil society activists felt were inadequate. In the Tarai, the protestors were tired, their numbers were falling and disillusionment with the UDMF was widespread.<sup>80</sup> There was growing anger on both sides of the border about lost economic opportunities even as the blockade's tactical utility was undermined by the quick rise of a thriving fuel black market. India's sympathy for the blockade was waning, because of the stalemate and domestic criticism of what some saw as the government's botched or bullying policy toward Nepal.

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<sup>72</sup> Hridayesh Tripathi, deputy chairman, Tarai Madhes Loktrantrik Party, speaking at a program in Kathmandu on 6 November 2015.

<sup>73</sup> Crisis Group interviews, Birgunj-Raxaul, September 2015, January 2016.

<sup>74</sup> Crisis Group interviews, Birgunj; telephone interviews, Kathmandu, November 2015

<sup>75</sup> Pradhan, "Wrong advice", op. cit.

<sup>76</sup> "Statement on the situation in Nepal", press release, external affairs ministry, 20 September 2015. The next day another statement sounded a louder alarm, that India was "deeply concerned over the incidents of violence resulting in death and injury in regions of Nepal bordering India" and that "our freight companies and transporters have also voiced complaints about the difficulties they are facing in movement within Nepal and their security concerns, due to the prevailing unrest", *ibid*, 21 September 2015.

<sup>77</sup> In response to a query on Nepal, external affairs spokesperson Vikas Swarup said that as soon as "Nepal set[s] its house in order", the situation would change, 8 October 2015.

<sup>78</sup> Crisis Group in-person and telephone interviews, Birgunj, October-November 2015, January 2016. For an early ground-level report, see Anup Kaphle, "India has halted the everyday goods Nepal needs to survive", *Buzzfeed.com*, 30 September 2015.

<sup>79</sup> Crisis Group interviews, members of Madhesi political parties, NC, UCPN-M, one UML member, October 2015-January 2016; Kathmandu-based analysts, February 2016.

<sup>80</sup> Crisis Group interviews, analysts and activists, January 2016. Also see, for example, "Madhesi front leaders divided on withdrawing blockade", *The Himalayan Times*, 28 January 2016.

On 6 February, traders from both sides of the border reportedly vandalised the protestors' camps and forced them out.<sup>81</sup> Two days later, the UDMF called off the blockade; it had lasted 135 days.

The blockade caused great hardship and threatened a humanitarian crisis, particularly for the poor and those affected by the earthquake. Parts of the Tarai had already been shut down before it. There had been scant progress on earthquake reconstruction, and the blockade allowed the government to deflect some responsibility; thousands spent the harsh winter under tarpaulins. Factories were shut and the construction industry verged on collapse. Agriculture was badly hurt by fertiliser and pesticide shortages.<sup>82</sup> The World Bank projection of 5.1 per cent growth in 2015/2016 was revised to 4.5 per cent after the earthquake, and 1.7 per cent during the blockade. Now, government, World Bank and Asian Development Bank economists fear negative growth.<sup>83</sup> Families hit by lost wages and the erosion of slender savings survived primarily because of the remittance economy and black market.<sup>84</sup> The blockade also emphasised Nepal's dependence on India, its shambolic and corrupt economy, and, like the earthquake did, its severe lack of preparation for dealing with major events, whether natural or manmade.<sup>85</sup>

## B. *The Significance of the Blockade*

### 1. The view from Kathmandu and New Delhi

By the time the constitution was issued, relations with New Delhi had already soured, following its calls for inclusiveness in the negotiations. For Kathmandu-based major party politicians and commentators who had argued that the agitation in the Madhes was fomented by India, the appearance just days after the blockade began of a newspaper report, sourced from the foreign ministry and describing amendments India

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<sup>81</sup> See, for example, "Birgunj blockade broken by locals after 134 days", *Republica*, 7 February 2016.

<sup>82</sup> Major falls in agricultural output are expected, given the shortage of fertiliser and seeds. Agriculture constitutes close to 40 per cent of GDP, mostly from grains and pulses. Wheat production is expected to drop by almost a third. Other vital sectors were also near collapse by the time the blockade ended. Nepal produces 40 per cent of its medical supply needs, but 90 per cent of the raw materials the factories require are imported from India, and the plants themselves, like most manufacturing industries, are in the Tarai. For a detailed economic analysis of the impact of the blockade, see "Docking Nepal's Economic Analysis: A Special Analysis of the Economic Crisis", *Nepport*, issue 23, January 2016, nepaleconomicforum.org.

<sup>83</sup> See, for example, "Global Economic Prospects: Spillovers amid weak growth, International Bank for Reconstruction and Development", The World Bank, January 2016.

<sup>84</sup> According to the World Bank, personal remittances account for 29.2 per cent of GDP in 2014. Proportionally, Nepal is one of the world's highest remittance-receiving countries. (<http://data.worldbank.org/indicator/BX.TRF.PWKR.DT.GD.ZS>). According to the 2011 census, two million Nepalis reside abroad. Bandita Sijapati et al., "Analysis of labour markets and migration trends in Nepal", International Labour Organization, 2015. There are estimated to be "anywhere between a few hundred thousand to a few million" migrant workers in India. "Taken for Granted: Nepali Migration to India", Centre for the Study of Labour and Mobility, 2013.

<sup>85</sup> The starkest manifestations of these dynamics were the government's response to the fuel shortage and the rise of a thriving black market in fuel and cooking gas. A litre of petrol, officially Rs 100 (about \$0.94), cost as much as Rs 500 (\$4.70) on the black market at the height of the blockade in late November, and at its end Rs 250 (\$2.35). A 15.3 litre cylinder of cooking gas – vital in an environment with rampant deforestation – ordinarily Rs 1,435 (\$13.50), was Rs 10,000 (\$94) in December and by the end about Rs 5,000 (\$47). By November, the government was selling firewood in Kathmandu for cooking.

wanted in order to give the constitution its blessing, was confirmation the blockade was an Indian affront to Nepali sovereignty.<sup>86</sup> The response was an assertion of sovereignty, manifested in attempts, particularly in the early weeks of the UML-led government that succeeded the NC in October, to play the China card: appeals to Beijing for assistance and grandstanding about enhanced cooperation were meant to make India nervous.<sup>87</sup> There was also reluctance to negotiate with Madhesi parties and expressions of contempt for the protestors.<sup>88</sup>

The blockade was not complete – other transit points than Birgunj functioned much of the time – yet journalists and researchers found it almost impossible to get a straight answer from the state-owned monopoly Nepal Oil Corporation about how much fuel and cooking gas was entering. A plausible explanation is that the government and parties relied on this ambiguity to divert supplies from the official distribution system to loyalists in parties, ministries, state institutions and social circles. Numerous media and private reports suggested the black market involvement of a cross section of society, including government employees, security-force members, political parties and ordinary Madhesi.<sup>89</sup>

The normalisation of black market supply chains, dispute over responsibility for the blockade, political expedience and the complex benefits that accrued to a range of actors all contributed to the assessment of key elite figures that there was little incentive to address the roots of the dissent. Also absent from the response was a sense

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<sup>86</sup> The amendments related to delineation of electoral constituencies, proportional representation in parliament and other state structures, greater representation from future federal states in the upper house or National Assembly, restoration of automatic citizenship for Indian women who marry Madhesi Nepali men (a common arrangement), provisions allowing naturalised citizens to hold the highest national offices and division of contested districts in the far-west and east to address some Madhesi demands. “Make seven changes to your constitution: India tells Nepal”, *The Indian Express*, 24 September 2015. Another popular interpretation was that the blockade was the result of pique: either the BJP was angry that Nepal refused to revert to being a Hindu state, or Prime Minister Narendra Modi, upset that his interventions were dismissed by Nepal, resorted to sledgehammer tactics.

<sup>87</sup> Nepal for the first time signed a memorandum committing to procuring as much as a third of its fuel needs from Beijing. This is seen by some as Nepal putting into operation a less restrictive reading of the 1951 Friendship Treaty with India, which has until now been interpreted as requiring reliance on New Delhi for most import and all military needs. China did provide emergency assistance via the Tibet Autonomous Region (TAR). However, enormous logistical challenges that will take years to overcome and require significant Chinese investment on the TAR side make it an unlikely solution to the supply problems. “Nepal-China fuel deal in limbo”, *The Himalayan Times*, 29 November 2015. Gopal Khanal, “Not bad, not bad at all”, *The Kathmandu Post*, 2 February 2015. “Challenges to diversifying fuel imports into Nepal”, blog, <http://kathmandupost.ekantipur.com/news/2015-12-16/challenges-to-diversifying-fuel-imports-into-nepal.html>, 16 December 2015.

<sup>88</sup> Madhesi protestors were stung in particular by comments of UML leader Krishna Prasad Oli, who became prime minister on 11 October 2015, for example, in early September, that with regard to the protestors, it did not matter if a few mangoes fell from trees, as they were bound to. “Dindine manchhe mardaichhan, Oli ‘aanp jhareko’ bhandaichhan”, *mysansar.com*, 10 September 2015. He also suggested that a veteran Madhesi politician go to the neighbouring Indian state of Bihar to ask for a Madhes province.

<sup>89</sup> Crisis Group interviews, Kathmandu-based analysts, entrepreneurs, journalists, members of political parties, January 2016. For an excellent analytical account of how the black market functioned, see “Nepal’s petrol black market: super citizens and an information blackout”, Jacob Rinck and Gyanu Adhikari, *The Record*, 19 February 2016; also, Kuvera Chalise, “Govt promoting black market in fuel”, *Republica*, 17 November 2015. In January 2016, Crisis Group visited rural Dhanusha border district and estimated that hundreds were involved there in petty smuggling.

of urgency to address the suffering of citizens – either that caused by the blockade or the longer term stresses felt by Madhesi groups.<sup>90</sup>

Over the course of the blockade, the government shifted from courting China and denouncing New Delhi to mending ties with India. Virtually all in Kathmandu agree Nepal should diversify its supply chain to escape being “India-locked”. Yet, given the geographic ease of trade and transit with India, it is unlikely to find another partner with whom it can replicate the scale of that connection.<sup>91</sup>

India's interjections into the constitutional debate had officially been aimed at encouraging the major parties to increase the document's legitimacy. One explanation for the difficulty India had in gaining traction with the government until mid-September is that the external affairs ministry, the national security adviser's office and the foreign intelligence agency (the Research and Analysis Wing, RAW), had struggled to structure a constructive, coherent and sensitive position that factored in the depth of the protests, the genuine concerns of all sides and the Kathmandu elite's resistance to making concessions. The Rastriya Swayamsevak Sangh (RSS), a Hindu nationalist organisation closely associated with the ruling Bharatiya Janata Party (BJP), is also understood to have urged the Delhi establishment to stop the blockade and remedy ties with the traditional elite.<sup>92</sup>

India's domestic politics were also a factor. When the blockade began, there was a common belief the ruling BJP was trying to win votes in Bihar state elections by appearing to protect the interests of the Biharis' kin across the border.<sup>93</sup> This fuelled the perception that Madhesi and Indian demands – and Madhesis and Biharis in India – were interchangeable.<sup>94</sup>

Madhesi activists counter that it is in India's interests to support communities along the open border. They also say that one of the most significant impacts of the blockade was the reduction in fatalities, as the government was pressured by increased international scrutiny of its actions in the Tarai.<sup>95</sup> While India's support for much of the blockade complicates the assertions of independence by Madhesi parties and activists, it does not automatically follow that Madhesi groups were acting in

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<sup>90</sup> For example, medical supplies, notably oxygen, ran perilously low, but the government did not airlift supplies. There were conflicting reports, even from government sources, about the shortages and reports of poor coordination between ministries to clear supplies that did enter. “Fuel, medicine shortage paralyses Valley hospitals”, *The Himalayan Times*, 8 October 2015; “Drugs worth millions rotting at TIA customs”, *Republica*, 17 November 2015.

<sup>91</sup> An English language weekly offered a pragmatic view: “We may be the aggrieved party, India may have come across looking like a bullying big brother, but we must realise that we need them more than they need us. We may be able to choose our friends, but we can't choose our neighbours. We are stuck with India, and have to be much smarter in our dealings with them. For its part, it is in New Delhi's own strategic interest to reach out and redress deep anti-Indian feelings here by being genuinely more magnanimous, and less overbearing”. “Fixing what's broke”, editorial, *Nepali Times*, 16-22 October 2015.

<sup>92</sup> Crisis Group interviews, analysts and journalists, Kathmandu and New Delhi, November 2015, January, March 2016.

<sup>93</sup> Prashant Jha, “Bihar BJP MPs ask Centre to do more on Nepal crisis”, *The Hindustan Times*, 15 September 2015; “Flag waving”, editorial, *The Nepali Times*, 6-12 November 2015.

<sup>94</sup> See, for example, “Lalu Yadav to talk to India govt on extending support to Madhes agitation in Nepal”, *The Himalayan Times*, 2 February 2015. Yadav is a prominent Bihar politician. India's policy toward other neighbours can also be affected by domestic political equations and state-level dynamics. See Crisis Group Asia Report N°206, *India and Sri Lanka After the LTTE*, 23 June 2011, for the influence of Tamil Nadu politics on India's approach to Sri Lanka.

<sup>95</sup> Crisis Group interviews, Madhesi analyst, Kathmandu, November 2016.

any interest other than their own, or that their acceptance of support, while it lasted, was other than a matter of tactical usefulness.

There is undoubtedly Indian influence in Nepal's politics, but the outcry over sovereignty can be specious. The media regularly reports on politicians' visits to New Delhi to seek support ahead of government changes in Kathmandu. Politicians and commentators are pleased to use Indian influence if New Delhi agrees with their position or can help their political fortunes.<sup>96</sup>

## 2. The blockade as seen from the Tarai-Madhes<sup>97</sup>

Some observations were commonly made by Madhesi activists, political parties and a cross-section of other Madhesis: the blockade was a social movement of unprecedented scale, expressing the common grievances of many sections of Madhesi society; the government's response highlighted the central state's power and hill-origin elites' resistance to change; the UDMF was not as strategic as it could have been; it was not India's but Madhesis' blockade; and Madhesis had suffered enormously since summer 2015, but neither that nor the loss of their lives seemed to matter to Kathmandu.

Between early November and the end of January 2016, twelve people were killed; there have been no fatalities since. Activists and analysts associated with the Madhes movement say this is a direct result of the blockade, which made the government sensitive to greater scrutiny. There was also less political pressure on the police and armed police to crush protests, since the constitution was already adopted. There was some UDMF activist violence against police posts and, later, those they accused of smuggling or illegally transporting smuggled fuel, as well as sporadic armed police charges against protestors; and some clashes between mainstream-party supporters and protestors, resulting in police action that mostly caused Madhesi deaths; and struggles over fuel and other resources.

The blockade was sustained for a long time with relatively low levels of coercion by political parties, indeed for the first months with enthusiastic support of many Madhesis, including entrepreneurs and students, the two groups among the hardest hit. The protests also seemed to lessen, up to a point, social divisions based on caste, which are strongly felt in Madhesi society and often politics.<sup>98</sup>

There is less agreement on other issues. The relationship between the Madhesi parties that comprise the UDMF and Madhesi activists, civil society and citizens is fraught. A prominent Madhesi analyst, Tula Narayan Shah, argued that the UDMF failed strategically, including by issuing ultimatums its members did not follow through on, such as to boycott the vote on the constitution but not walk out of the assembly, and, during the blockade, to participate in the election in parliament of the new government.<sup>99</sup> Another respected commentator, CK Lal, said Madhesi parties and some in civil society had plunged into an extreme form of protest with little

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<sup>96</sup> See, Crisis Group Report, *Nepal's Future*, op. cit.

<sup>97</sup> Some commentators, rather than referring to the Tarai, a neutral and traditional name for the plains, or Madhes, a new political name Madhesis may use, employ Tarai-Madhes to signal Madhesi identity and assertion, as well as the plains' multi-ethnic character.

<sup>98</sup> "Madhesma pheri andolan ta garnaichha kinebhne yespatak kehi hasil bhayena" ["There will be agitation again in the Madhes, since nothing was gained this time"], pahilopost.com, 29 February 2016.

<sup>99</sup> Tula Narayan Shah, "Kasari tuhiyo madhes andolan?" ["How did the Madhes agitation crumble?"], *Kantipur*, 15 February 2016.

forethought about exit strategies or room for manoeuvre in negotiations. He also said the parties needed to ask forgiveness of all communities in the Tarai for the hardship caused by the protest and its failure.<sup>100</sup> Neither view is popular with activists and mobilisers, who said such public criticism from within their ranks was demoralising and gave ammunition to those in Kathmandu who wanted to discredit the movement.<sup>101</sup>

Madhesi parties' failure to represent constituents effectively, remain united and dispense patronage efficiently were among the factors that led to their poor performance in the 2013 election.<sup>102</sup> Their handling of the constitutional negotiations and initial struggles to understand the protests have not helped.<sup>103</sup> Damaged though their reputation may be, they remain the main negotiators with the other parties, but they will have to consult more widely. Madhesi civil society will need to help forge a social consensus about how to move on from the blockade and devise new, constructive strategies to press for talks.

The end of the blockade is not the end of the protests and does not mean discontent has abated. "This is our last chance", a young woman from Birgunj said in early January, echoing others. "We are very tired and have to stop now, but we can't give up. We have to find some other way [to continue to push for amendments]".<sup>104</sup> Madhesi parties will need to understand better the sentiments of the general population in the Tarai, present a credible roadmap for negotiations and perhaps add prominent civil society figures to their talks team. Throughout, they will have to be cognisant of their own compromised position, limit grandstanding and be inclusive toward all groups.

### 3. The deeper existential challenge

Crisis Group has previously argued that the state and political system are dysfunctional by design: the former's role is not primarily to provide services to citizens but to ensure its own survival, including by creating patronage networks. Elites, old and new, thus are profoundly invested in the status quo. Granting access to power, which is closely linked to access to corrupt spoils, makes it easy to subdue or coopt opponents and difficult to mobilise public pressure.<sup>105</sup> Another central element of the organisation of the state and practice of politics is nationalism. One variant is expressed domestically, in the conception of Nepal as highly centralised and unitary and the essence of Nepaliness defined as hill-origin and Hindu- and Nepali-speaking. The other defines Nepal in opposition to its intimate enemy, India: the closest kin, but patronising, meddling, using extreme dependency to demand fealty, at worst, harbouring expansionist intentions.

Mobilisation around Madhesi identity politics thus challenges nationalist practice and ideology, posing possibly a more significant and fundamental challenge to the state than the Maoist movement. The political system's ability to absorb and co-opt

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<sup>100</sup> See, "Madhesma pheri andolan ...", op. cit.

<sup>101</sup> Crisis Group interview, Kathmandu-based journalist, February 2016.

<sup>102</sup> For a more nuanced analysis of the poor performance of Madhesi parties, see Daulat Jha, "Why did they lose CA-2 elections?", *Setopati*, <http://m.setopati.net/opinion/379>.

<sup>103</sup> See, for example, "UDMF decides to end blockade, tells Mahato to correct himself", *The Himalayan Times*, 9 February 2016.

<sup>104</sup> Crisis Group telephone interview, citizen activist, Birgunj, January 2016.

<sup>105</sup> See Crisis Group Asia Report N°194, *Nepal's Political Rites of Passage*, 29 September 2010.

dissent by offering a share of the pie – but rarely changing the rules of the game – is challenged by the fact that this is a deeply-rooted social movement of which Madhesi political parties are no longer the sole representatives.

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## IV. Disagreements and Politicking

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Throughout the peace process, the parties have compromised on substantive issues by making deals on government- and coalition-formation. Yet, though politicking over a new coalition will undoubtedly be part of the way forward, a share in cabinet for Madhesi parties could further alienate those in Madhesi communities who may consider the parties irrevocably co-opted, so increase radical groups' appeal. Political disagreements have diverted attention from earthquake reconstruction. Pressing the government to move faster on this is part of an equitable way forward.

### A. *The Remaining Disagreements*

There are four points of contention: state boundaries; constituency delineation; electoral representation and representation in state organs; and citizenship. Two, constituency delineation and inclusion, have been addressed by constitutional amendments but remain problematic for protestors and the UDMF.<sup>106</sup> Inclusion in state institutions and elected bodies is important also to janajati, Tharu and Dalit groups, women and religious minorities, and a source of anxiety for many in hill-origin upper caste groups. The male-dominated leadership of Madhesi parties may lower their challenge to the citizenship clauses, but this will remain critical for women.

**State boundaries** are the biggest sticking point, and also the most complicated to amend, in terms of parliamentary process. Even if agreement is reached, once restructuring begins, there may well be other disagreements over territories, including in the hills, and realisation that the new system is federal more in name than design.

There is agreement that a "mechanism" will resolve the disputes over boundaries. The word "commission" is avoided, due to association with past failure, such as the State Restructuring Commission of 2011/2012. Discussions in February 2016 between the UDMF and the NC, UML, UCPN-M and MJF-D failed to create terms of reference for this mechanism. The government, under pressure to show progress before Prime Minister Oli visited India in February, formed it anyway. The UDMF refused to participate in the absence of credible, legally binding terms of reference.<sup>107</sup>

**Constituency delineation** criteria are "population and geography", meant in part to allow representation from sparsely-populated hill and mountain areas. Madhesi criticism was that this would lead to over-representation for the hills. The January 2016 amendment makes population the primary consideration in constituency delineation and geography the second, while districts – to be contained within larger states – will each have at least one constituency. Madhesi groups say this leaves too much for interpretation and ask why districts remain the basis for delineation of constituencies when they will cease to exist as administrative units.<sup>108</sup> The role of districts in the new structure of the state is unclear. While the constitution mandates

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<sup>106</sup> See, for example, Binaj Gurubacharya, "Ethnic protestors in Nepal reject constitutional amendment", bigstory.ap.org, 24 January 2016. This section is based on widespread media coverage of the amendments, and Madhesi and Janajati analysis of their implications.

<sup>107</sup> See, for example, "UDMF rejects political mechanism; says it will now resort to agitation once again", *The Himalayan Times*, 20 February 2016.

<sup>108</sup> See Dipendra Jha, "Tarai will get 71 seats, not 80, even after amendment", madhesiyouth.com, 16 February 2016. Eight of the twenty Tarai districts will be in the predominantly plains State two, the others part of larger, more mixed states.

three levels of administration, central or federal, state and local, districts are mentioned elsewhere in the new constitution, including in provisions for retaining district courts, and those related to constituency delineation. An analyst said that districts are likely to continue to have political and geographic relevance.<sup>109</sup>

- Electoral representation and representation in state organs: proportional-representation seats have been reduced from the 330 mandated by the interim constitution to 110 in the future parliament. Since the present parliament has 601 seats and the next is to have 275, this means cutting proportional representation seats from 55 per cent to 37 per cent of the total.
- The affirmative action clause in the interim constitution refers to “proportional representation” in state structures and bodies, whereas the new constitution only mentions “representation”. The January amendment restores “proportional” but also notes “economically backward Khas Arya” (hill-origin upper castes including Chhetri and Brahmin) are eligible for affirmative action. Madhesi and janajati groups say they want quotas to redress discrimination that caused their communities to be under-represented and that economic distress could be addressed through other venues.<sup>110</sup>
- Some Madhesi groups, as well as some in the mainstream parties, are concerned that a third of all seats remain reserved for women, which they see as reducing the share of seats for ethnic identity groups. The inclusion of women, even if Madhesi women, is viewed as a burden that eats into the share of “experienced” – male – politicians.<sup>111</sup>
- Citizenship: the new constitution’s initial draft controversially would have disallowed single mothers, Nepali women married to foreigners and same-sex couples from conferring citizenship to their children. The current text allows citizenship to pass from either mother or father but says Nepali mothers’ children will be citizens only if born in Nepal and that children of Nepali women and non-Nepali men can only acquire naturalised citizenship. Naturalised citizens may not hold constitutional positions such as president, vice president, prime minister, speaker, chief minister of states, speaker of state parliaments, chiefs of security agencies and more. This new ban has consequences for some of Nepal’s most prominent women politicians, who are naturalised citizens.<sup>112</sup>

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<sup>109</sup> Crisis Group interview, analyst, Kathmandu, March 2016.

<sup>110</sup> See for example, Shradha Ghale, “Why Nepal’s Janajatis feel betrayed by the new constitution”, *The Wire*, 27 October 2015. An article in late March by a widely-respected retired bureaucrat and former election commissioner argued that there has been no progress on inclusion since the constitution was adopted. The author, Bhojraj Pokharel, estimated that of recent government appointments, only 6 per cent were women, 1 per cent Dalit, 10 per cent Janajati and 14 per cent Madhesi. “Sambidhan karyanvayan: abhyas ra chunauti”, *Kantipur*, 28 March 2016.

<sup>111</sup> Crisis Group interviews, Madhesi analyst, NC members, Kathmandu, October 2015.

<sup>112</sup> An excellent early assessment of the citizenship debate, including divisions between the predominantly hill-origin feminist activists and all-male Madhesi leadership, is Surabhi Pudasaini, “Writing Citizenship: Gender, Race and Tactical Alliances in Nepal’s Constitution Drafting”, unpublished paper presented at the Nepal and the Himalaya conference, Kathmandu, 22-24 July 2015.

## B. *The Business of Politics*

This is the ninth government since the war ended in 2006, but even by that standard the political landscape is in flux. Attempts to unseat the government and form new coalitions will invariably be part of the deal-making that could end or ease the crisis.<sup>113</sup> The ruling coalition joins the UML and UCPN-M, which have traditionally disagreed on key issues. The UML and NC, currently in opposition, are widely perceived as wary of meaningful federalism and statutory measures to promote inclusiveness. After its decade-long war for greater equality and an end to discrimination, followed by almost a decade of leading the pro-federalism, pro-secularism, pro-inclusion agenda that defined its post-war identity, the UCPN-M is a junior partner in the new informal alliance that might be called pro-constitution. Yet, this coalition is less surprising than it seems, in keeping with traditional politics, where leftists and royalists agree on the threat to sovereignty from India and the need to bolster a unifying national identity.

The NC is in opposition, but the three parties' joint efforts enabled the constitution. There is some discussion of a "national" or "unity" government led by the NC, which some in the major parties believe may be able to bring in some Madhesi parties also. The NC, whether or not it leads a future government, is no longer distracted by its internal politics and could use its long presence as a major political force in the Tarai – many leaders of the present Madhesi parties were originally in the NC – to refresh the environment for talks.

Non-Madhesi groups should also be consulted during broader talks about implementing the constitution. Janajati groups have various grievances over the document, including disappointment with dilution of the proportional representation commitment; the proposed division between states, for Magar and Gurung groups, of areas they have traditionally dominated; and a description of secularism many argue still privileges a particular strand of Hinduism as the norm.<sup>114</sup> Janajati leaders are split between smaller, newer parties formed before the 2013 election, and the big three parties. Janajati parliamentarians from the UML, NC and UCPN-M, though resenting they were forbidden to submit amendments in the fast-track process and in some cases still afraid to speak out, say a broader movement outside parliament would help them pressure their parties.<sup>115</sup>

As a result of the UCPN-M's support for a constitution that backtracked on the reform agenda, the party's vice chairman, former Prime Minister Baburam Bhattarai, resigned in October 2015. He has formed Naya Shakti Nepal (New Force Nepal), which is to stand for inclusive development and transparency.<sup>116</sup> The wildcard is the Maoist splinter group led by influential former Maoist army commissar Netra Bikram Chand (Biplov). He has significant support among ex-Maoist combatants and dis-

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<sup>113</sup> See, for example, Crisis Group Briefing, *Nepal's Fitful Peace Process*, op. cit.

<sup>114</sup> For a clear summary of Janajati concerns, see "Why Nepal's Janajatis feel betrayed", op. cit.

<sup>115</sup> A senior Janajati leader described the environment as follows. NC ethnic legislators conveyed unhappiness to party leaders but were not paid much attention. UCPN-M Janajati members were allowed to record their dissent in the CA, and Maoist leaders promised the agenda would not be abandoned, though compromise was the only way to make the assembly work. Janajati UML legislators were silent, muzzled by the leadership. Other major party members corroborated this account. Crisis Group interviews, Kathmandu, August-October 2015.

<sup>116</sup> Crisis Group interviews, October-November 2015. See also, for example, "Baburam Bhattarai forms new party", *The Hindu*, 25 January 2016.

grunted party functionaries in parts of mid- and far-western Nepal.<sup>117</sup> His group is carrying out actions reminiscent of wartime Maoist actions, including extortion from businesses and vandalising power transmission lines, government offices and Indian-owned businesses.

### C. *The Reconstruction Debacle*

Even before the political crisis and blockade, movement on earthquake reconstruction had been scant. Planning was hampered by competition between the NC and UML for control of the National Reconstruction Authority (NRA), which is in charge of the over \$4 billion pledged by donors. The NRA now has a compromise CEO. Nevertheless, donors say that nearly a year after the earthquakes, the government tells them planning is still held up by incomplete assessments of damage, community and individual needs and lists of victims.<sup>118</sup> There is also concern that the struggle to control the NRA and its reconstruction funds presages more corruption.<sup>119</sup>

Donors are largely unwilling to invest diplomatic capital in raising these issues with the government. One reason is the successful efforts in recent years by all political parties and the bureaucracy to make Western donors in particular engage with development on their terms. This means less space to engage on issues related to human rights and accountability and less ability to fund smaller, interest-based or more grassroots organisations directly.<sup>120</sup> Donors instead prioritise relations with the government. Given current volatility, it is imperative that they focus again on conflict-sensitive programming, particularly as the constitution is implemented. It is also critical that participation in a reconstruction drive not be viewed as an end in itself. Donors should be alert to the risk that poor needs assessments, misappropriation of funds or perceived preferential disbursement could reinforce social divisions and inequalities.

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<sup>117</sup> Crisis Group interviews, Kapilbastu, Dang, Rolpa, Banke, Kanchanpur, 2013; telephone interviews, January 2016.

<sup>118</sup> Crisis Group interviews, diplomats, UN and aid agency officials, July-September, December 2015, February 2016.

<sup>119</sup> Nepal fell from 126 to 130 in Transparency International's "Corruption Perceptions Index 2015". A survey by a Nepali-language daily concluded that politicians, bureaucrats, the security agencies and justice system were perceived as the most corrupt entities in the country. "Politicians, bureaucrats seen as most corrupt", *Republica*, 26 January 2016.

<sup>120</sup> See Crisis Group Report, *Nepal's Constitution I*, op. cit.

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## V. Addressing Current and Future Risks

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### A. *What the Risks Are*

The increasingly entrenched social polarisation could turn violent. Since summer 2015, Madhesi leaders have in private constantly spoken of the difficulty of reining in protestors and their own fears of being displaced by extremists, including those advocating armed resistance. New forms of protest will emerge, some provocative and threatening violence, such as sporadic shutdowns or targeting of government offices. More complex would be civil disobedience, such as refusing to recognise the authority of the local administration or providing government services in the name of a new, notional state. Some say they will declare a parallel, symbolic Madhes government with Madhesi citizenship.<sup>121</sup> Agitators will have to resist alienating hill-origin populations in the Tarai or making them feel insecure.

The Madhes movement risks mimicking the intolerance of dissent it says bedevils Kathmandu. A Madhesi civic activist said in late 2015 that the most significant change brought by the protests was “in the mood and environment of the Tarai-Madhes. There is no middle ground left. Either you are a sellout to the Pahade [hill-origin] establishment or you fully believe in the Madhesi cause”. This encourages radicalisation, not dialogue.<sup>122</sup>

The use of force to crush protests would produce more fatalities, empower radicals in Madhesi society, create space for armed resistance, of which the region has a recent history, and increase support for a fringe secessionist movement.<sup>123</sup> NC and UML counter-protests, particularly in the contested eastern Tarai districts, might fuel Madhesi-Pahade tensions. There have been reports of tensions in areas such as Biratnagar, a major urban centre in the eastern Tarai's contested Morang district.<sup>124</sup> The closeness of the NC and UML to the state, that their events or protests are dominated by hill-origin members and the use of security forces against protestors fuel Madhesi analysis that there is little difference between what activists call the “Pahade state” and the government parties.<sup>125</sup>

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<sup>121</sup> Crisis Group interviews and email interviews, Madhesi activists, September-November 2015. These ideas are not as outlandish as they seem. During the insurgency, the Maoist party had parallel governance structures in numerous districts. There is also some sympathy for the provision of services to undermine the state's reach. For example, many doctors in Tarai hospitals are Madhesi. “We see the consequences of what it means to be Madhesi or Dalits everyday. When there are protests, we see how the police has been shooting to kill, rather than below the waist to stop a protest. And then they storm the hospitals. We serve everyone, but how can we ignore something like this”, a doctor said. Crisis Group telephone interview, November 2015.

<sup>122</sup> Crisis Group interview, Kathmandu, October 2015.

<sup>123</sup> CK Raut, a former computer engineer, leads the secession movement. Arrested for sedition in September 2014 and released pending trial, he was arrested again at a public event in January 2015. A charismatic speaker, he drew growing audiences, particularly of younger Madhesis, who feel more empowered and with whom his message of liberation from discrimination and “slavery” resonates. “Hrithik Roshak riots turned me from Nepali to Madhesi, says CK Raut”, interview, *Hindustan Times*, 26 January 2016.

<sup>124</sup> On 21 January, when the UMDF aggressively disrupted one such program, three of its activists were killed by police fire. Even Madhesi members of the UML and NC in the districts participated in the agitation. “3 killed, 9 injured in Morang police firing”, *The Kathmandu Post*, 22 January 2016. Crisis Group telephone interviews, Biratnagar, Kathmandu, January 2016.

<sup>125</sup> Crisis Group interviews, Madhesi civil society activists, journalists, Biratnagar, Birgunj, Kathmandu, September 2015-January 2016.

Human rights actors, who could have an important role in mitigating tensions, are seen as polarised along party and identity lines.<sup>126</sup> The THRD Alliance says protest-related arrests are continuing and argues that local leaders are being targeted to pre-empt future protests.<sup>127</sup> The National Human Rights Commission is not always seen as responding quickly enough.<sup>128</sup>

Activists from all sides use provocative language and labels on social media, and there is little space for debate. With a few exceptions, national media has carried little on-ground reporting or investigative work that could make sense of the blockade, instead sowing confusion and reinforcing prejudice.<sup>129</sup>

If the discussion progresses to implementation of the constitution, particularly clauses related to state restructuring, there will still be risks of violence. The rules of the federal system in the new statute provide far less decision-making power and resources to the states than most had expected, either pro-federalism activists or those who reluctantly accepted the system.<sup>130</sup> Local disputes over resource sharing are likely. It could be harder to access services, with a bigger distance between village and state government than there is between village and district level, which could sow easy-to-exploit discontent.

## B. *Lowering the Temperature*

It is important to begin at once an independent inquiry into the protest-related deaths by a diverse, socially representative commission of inquiry. This could help bridge the trust deficit with Madhesi and Tharu groups and reduce fatalities when the agitation begins again, in whatever form. Likewise, agreement on a time-bound, constitutionally-empowered mechanism to resolve the state-boundaries dispute would also buy time for tensions to calm, but only if the process to form it appears consultative, conciliatory and fair, to counter the Madhesi sense of being patronised. The mechanism should feel to all like a victory. The composition will be important and could be a mix of politicians and civil society. While the latter would be political nominees, the parties could find candidates whose reputation goes beyond their communities. Deliberations should take weeks, not months. Parliament should be bound to accept the mechanism's recommendations.

To lower the tenor of public discussions, which have been vicious and included provocative and potentially dangerous social media use, activists on all sides could consider using fresh terms and new language and avoid labels their political opponents or other communities find offensive. Better-informed media coverage is also essential. Political negotiations and deals alone will not bridge social divisions. The government should consider creating a consultative body, with representatives of all communities, to report periodically with assessments of conflict risks and potential

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<sup>126</sup> Crisis Group interviews, human rights activists and analysts, Kathmandu, September 2015, February 2016.

<sup>127</sup> "Nepal's police in Madhesi hunting spree", statement by THRD Alliance and the Asian Human Rights Commission, 24 February 2016.

<sup>128</sup> An assessment of the NHRC's role and the need to investigate all protest-related deaths to build trust is in Dipendra Jha, "Dicing with death", *The Kathmandu Post*, 2 March 2016.

<sup>129</sup> See, for example, David Caprara, "How the mainstream Nepali media has skewed public perception of the Madhesi crisis", *caravanmagazine.in*, 27 January 2016. For Madhesi perspectives on this, see various commentaries at [madhesiyouth.com](http://madhesiyouth.com).

<sup>130</sup> Crisis Group interview, constitutional lawyers, Kathmandu, September 2015.

mitigation measures in contested plains and hills areas, particularly to inform any decision on local elections.

Measures could be set in place now to reduce medium-term risks and promote a measure of social reconciliation. A small, visible, multi-ethnic group of respected citizens representing diverse political and social interests, if formed soon, could begin a national conversation about the roots of the crisis and the broader concerns of all Nepalis, in Kathmandu and in districts, that were reflected in the CPA. Madhesi civil society activists could take the lead in reaching out to all communities that live in the Tarai. None of these elements is high cost, but the essential ingredients required are in short supply: political will, trust, acknowledgment of past mistakes and the need for change.

Donors cannot interfere in substantive discussions or lead on social reconciliation, but they should conduct critical assessments of previous and current training and support programs for the Nepal Police and Armed Police Force and the performance of the National Human Rights Commission in light of the patterns of excessive force and discrimination documented in recent months.

### C. *Local Elections*

Sections of the ruling coalition and some donors are keen to hold local elections (last conducted eighteen years ago) in 2016. The new constitution requires its implementation by January 2018 but also that local elections be held sooner. Some understand this to mean they can be conducted under the current transitional arrangements, which are largely a continuation of earlier processes and laws.<sup>131</sup> Local elections are conducted not on the basis of constituencies but of smaller sub-district units, Village Development Committees (VDC), and, in urban municipalities, wards. Elected VDC and ward chairs then elect officials to District Development Committees.<sup>132</sup>

In the present volatile context, however, such elections could be an invitation to violence in the plains. Many in the Tarai could see the drive for them as Kathmandu forcing unconditional acceptance of the new constitution. Discontent with the Kathmandu establishment and parties could lead local activists to disrupt polls, including by threats to candidates, election officials and voters. Madhesi parties are unlikely to opt out of elections entirely. If they have not mended relations with protest mobilisers and disaffected younger citizens, their participation could also spark resistance. Given the almost non-existent outreach to explain the constitution, voters have fears about the new system, and party local activists wonder if this is their last chance to gain a share of local development spoils, which could promote aggressive competition. The reduction in the number of seats in the national parliament affects district-level politicians, who could see the local elections as a critical element in staking out their path to parliament, which could also lead to potentially violent competition.

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<sup>131</sup> See, for example, "Parliamentary Development Committee directs govt to hold local elections at the earliest", *The Kathmandu Post*, 29 January 2016; and "E[lection] C[omission] urges govt to fix local election date", *The Kathmandu Post*, 9 January 2016.

<sup>132</sup> Nepal's 75 districts have 3,276 VDCs and 217 municipalities. See the federal affairs and local development ministry (<http://mofald.gov.np>) and the Central Bureau of Statistics ([cbs.gov.np](http://cbs.gov.np)). An unofficial translation of the 1999 Local Self Government Act is at [www.undp.org/content/dam/nepal/docs/reports/governance/UNDP\\_NP\\_Local%20Self-Governance%20Act%201999,%20MoLJ,HMG.pdf](http://www.undp.org/content/dam/nepal/docs/reports/governance/UNDP_NP_Local%20Self-Governance%20Act%201999,%20MoLJ,HMG.pdf).

Little attention is paid to groups that seem marginal, such as Biplov, the Maoist breakaway, or political ethnic groups in the hills that were active after 2007. Yet, locally these have proven ability to disrupt government activities. In all cases, a harsh security-force reaction to attempted disruptions could trigger a fresh cycle of violence and social alienation.

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## VI. Conclusion

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The fast-tracked constitution deepened ethnic, social and political fractures that were meant to be addressed by the 2006 CPA. The constitutional disagreements provided a lightning rod for years of barely contained resentment in the Tarai. Lifting of the blockade that strangled the country for more than four months is a victory for ordinary citizens but should not be interpreted as one for a particular ideology or political group. The underlying anger that fuelled the demonstrations and violence has not been assuaged and will re-emerge, potentially in more virulent form, unless all understand that without compromise and good faith Nepal faces an existential threat.

The first step toward de-escalation is for the sides to take each other seriously. The establishment's fear that an excessive focus on sub-national and ethnic identities and demands for ever-greater autonomy within a federal system could threaten unity and integrity is not unreasonable. Nor is the insistence on acknowledging the poverty even in hill-origin upper caste groups. Madhesis and other traditionally marginalised groups must persuasively argue that a nation with greater diversity, social mobility and inclusion would be significantly stronger to resist outside pressures.

The government is right that it is impossible in a democracy to satisfy all the people all the time but mistaken when it therefore ignores the real concerns of a large sector of the population. Years of marginalisation and discrimination have predisposed plains-origin populations and to a degree other social groups to perceive prejudice and arrogance in government acts. The traditional parties and Kathmandu elite need to understand that the anger in the south and west is organic, the result of generations of palpably-felt discrimination, not of foreign incitement or political machinations, and that their own resistance is viewed as an attempt to retain institutionalised privilege. Affirmative action may indeed be needed to foster a greater sense of equality and dignity between social groups. Institutionalising and hardening divisions between ethnic groups is not helpful in the longer term, but doing so will almost inevitably be part of the way forward, given the deep mistrust and the state's repeated failure to fulfil promises to redress discrimination.

A sustainable solution will not only have to be fair but also to look fair and consultative. To enable dialogue, an independent, credible investigation into the 57 deaths since July 2015, protesters, police and bystanders alike, is important. It is also important to expand dialogue beyond political actors; to make it productive by moving beyond slogans that have come to mask as much as reveal; and to keep in focus the foundations of the present moment, namely the CPA and other past commitments.

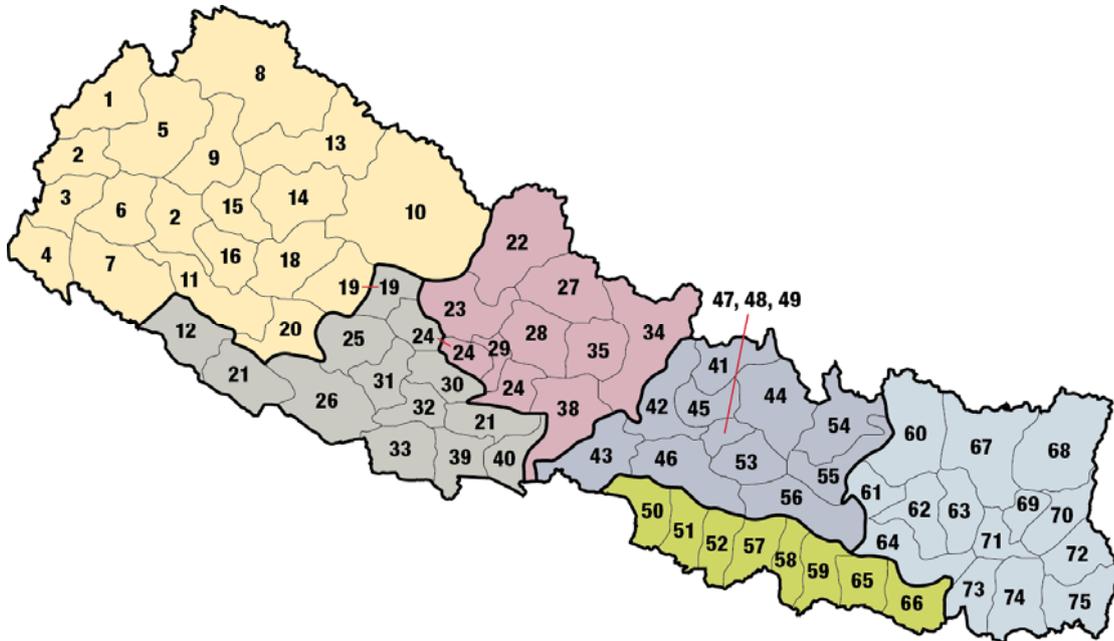
Nepal will find its own way back from the edge, but the international community also has a role, particularly to encourage the government and parties to revisit the CPA commitments and statutory bodies in order to uphold rule of law. India needs to measure its responses to ensure its intentions are not mistaken for interference or partisanship. Donors need to ensure earthquake reconstruction and development funds are used fairly and effectively, not siphoned into the pockets of corrupt politicians or, worse, used as a wedge that increases social divisions.

If it resists relatively manageable reforms to encourage all citizens to feel respected and equal, Nepal may invite precisely the fate it fears most: increasing attrition of national unity, integrity and sovereignty. The pause in protests provides a window of opportunity to move forward, addressing the alienation of the plains and assuaging

the fears of the hills. That requires good faith and a willingness to invest political capital in solutions that will rebuild a Nepal for all Nepalis.

**Kathmandu/New Delhi/Brussels, 4 April 2016**

Appendix A: Map of Nepal's Districts



- |               |                                    |                 |
|---------------|------------------------------------|-----------------|
| 1. Darchula   | 26. Dang                           | 51. Bara        |
| 2. Baitadi    | 27. Manang                         | 52. Rautahat    |
| 3. Dadeldhura | 28. Kaski                          | 53.             |
| 4. Kanchanpur | 29. Parbat                         | Kabhre          |
| 5. Bajhang    | 30. Gulmi                          | palanchowk      |
| 6. Doti       | 31. Pyuthan                        | 54. Dolakha     |
| 7. Kailali    | 32. Arghakhanchi                   | 55. Ramechhap   |
| 8. Humla      | 33. Kapilbastu                     | 56. Sindhuli    |
| 9. Bajura     | 34. Gorkha                         | 57. Sarlahi     |
| 10. Achham    | 35. Lamjung                        | 58. Mahottari   |
| 11. Surkhet   | 36. Syangja                        | 59. Dhanusha    |
| 12. Bardiya   | 37. Palpa                          | 60. Solukhumbu  |
| 13. Mugu      | 38. Tanahun                        | 61. Okhaldhunga |
| 14. Jumla     | 39. Rupandehi                      | 62. Khotang     |
| 15. Kalikot   | 40. Nawalparasi                    | 63. Bhojpiur    |
| 16. Dailekh   | 41. Rasuwa                         | 64. Udayapur    |
| 17. Dolpa     | 42. Dhading                        | 65. Siraha      |
| 18. Jajarkot  | 43. Chitwan                        | 66. Saptari     |
| 19. Rukum     | 44. Sindhupalchowk                 | 67.             |
| 20. Salyan    | 45. Nuwakot                        | Sankh           |
| 21. Banke     | 46. Makawanpur                     | uwasabha        |
| 22. Mustang   | 47. Kathmandu, Lalitpur, Bhaktapur | 68. Taplejung   |
| 23. Myagdi    | 48. Kathmandu, Lalitpur, Bhaktapur | 69. Tehrathum   |
| 24. Baglung   | 49. Kathmandu, Lalitpur, Bhaktapur | 70. Panchthar   |
| 25. Rolpa     | 50. Parsa                          | 71. Dhankuta    |
|               |                                    | 72. Ilam        |
|               |                                    | 73. Sunsari     |
|               |                                    | 74. Morang      |
|               |                                    | 75. Jhapa       |

*The district and state boundaries in all Nepal maps used by Crisis Group are indicative only, not a precise representation of official boundaries.*

## Appendix B: Glossary of Terms

**22-point agreement** – Agreement signed in August 2007, following the first Madhes Movement, promising among other things, proportional representation, autonomy in a federal system of governance, the issuing of citizenship papers to Madhesis and the use and promotion of languages other than Nepali. It was the most significant of numerous agreements between successive governments and Madhesi, janajati, Tharu and other groups regarding restructuring of the state, inclusion and redress for discrimination.

**Assembly, Constituent Assembly** – Unicameral body tasked with drafting a new constitution, which also served as a legislature-parliament; the first such assembly's term ended on 27 May 2012. The Second Constituent Assembly, elected in November 2013, was transformed into the parliament after a new constitution was adopted on 20 September 2015.

**Brahmin** – Members of the group traditionally considered the highest caste Hindus, sometimes called "Bahun" to refer to hill-origin Brahmin groups, broadly called upper caste.

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

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

**CPN-M, UCPN-M** – Unified Communist Party of Nepal-Maoist, commonly called "Maoists", which officially changed its name from Communist Party of Nepal-Maoist in January 2009. From 1996-2006, it waged a war, called the "People's War" by the party, against the state. The party split in 2012, and the splinters are named variations of Communist Party of Nepal-Maoist.

**Dalit** – Members of the group of Hindus considered outside the caste framework. Untouchability has been outlawed, but Dalits still face many kinds of discrimination.

**District** – Major administrative unit still in use. Nepal has 75 districts, each with district headquarters and administration, budgets, courts and records offices. Districts will be replaced by much larger states, as the middle administrative unit between the national capital and the Village Development Committees (VDC), but it is unclear if they will be abolished entirely.

**FPTP** – First-past-the-post, an electoral system in which the candidate with the most votes in a constituency, not necessarily an absolute majority, wins.

**Nepali Congress** – The largest party in the second Constituent Assembly, now parliament, a major traditional player in Nepal's democracy, currently in opposition.

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

**MJF-D** – Madhesi Janadhikar Forum-Democratic (Loktantrik in Nepali), party formed by Bijay Kumar Gachhadar when he and other members split from the original MJF in 2009.

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

**NA** – Nepal Army, until 2006 the Royal Nepal Army.

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

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

**RPP-N** – Rastriya Prajatantra Party-Nepal, one of three parties traditionally associated with the monarchy, it is the only political party that still advocates a return to the monarchy and reinstatement of the Hindu state. Led by Kamal Thapa, it came a distant fourth in the 2013 election but has gained significant leverage in coalition formation.

**State** – In Nepali, *pradesh*, sometimes translated as province, the seven new major administrative units that will now form the middle level of governance, between Kathmandu and the VDCs.

**State Restructuring Commission** – Commission formed in November 2011, tasked with recommending an appropriate state restructuring model to the assembly; it presented two reports in January 2012 – a majority report with ten states and a minority report with six states.

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

**Tharu** – Members of the indigenous populations of the Tarai plains.

**TMLP** – Tarai Madhes Loktantrik Party, member of the Madhesi Morcha, led by the widely respected politician Mahanta Thakur, it is one of the parties formed when the Congress lost its Madhesi leadership to the Madhes movement in 2007.

**UDMF** – United Democratic Madhesu Front, Samyukta Loktantrik Madhesi Morcha (SLMM) in Nepali, an alliance of numerous small Madhesi parties, including the Sadbhavana Party, Tarai Madhes Loktantrik Party and others. Its primary agenda is federalism and more equitable representation of Madhesis in state institutions. Some other smaller parties, such as the Sanghiya Sadbhavana Party, have a similar agenda but operate independently and claim common cause with janajatis.

**Upper-caste, Chhetri-Bahun, Khas-Arya** –

Terms used in the federalism debate to refer to members of the highest caste hill-origin Hindus, usually Brahmins, Chhetris and a few other small groups. Khas-Arya is the term used in official categories for quotas.

**VDC** – Village Development Committee, an administrative unit, of which there are almost 4,000 in Nepal.

**UML** – Communist Party of Nepal (Unified Marxist-Leninist), the second largest party in the second Constituent Assembly, present parliament. It has revolutionary roots dating back to the 1970s but is now a fulcrum of mainstream politics, perceived to protect nationalist interests and those of hill-origin upper caste Hindus.