



ASIAN CENTRE FOR HUMAN RIGHTS

BRIEFING PAPERS ON NEPAL

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2013 PROPOSED ELECTIONS IN NEPAL: AN AGENDA FOR INTERNATIONAL COMMUNITY

1. Executive summary

Considering that Nepal failed to adopt its constitution even after thirteen amendments of the 2007 Interim Constitution during 2008 to 2012 and continuation of Dr Baburam Bhattarai as Prime Minister had already become untenable, the formation of the Interim Election Council (IEC) headed by Chief Justice Khil Raj Regmi on 14 April 2013 raised a glimmer of hope. The 11-point agreement signed by four big political parties of Nepal i.e. Unified CPN (Maoist), Nepali Congress, CPN-UML and United Democratic Madhesi Front on 13 April 2013 under the garb of High Level Political Mechanism facilitated the formation of the Interim Election Council.

The IEC has been mandated to conduct Constituent Assembly-Parliament elections within 21 June 2013 or within 15 December 15, 2013 if elections cannot be held within 21 June 2013 due to technical causes or intractable situation.

There is obviously no possibility to hold elections by 21 June 2013 and the dates for holding elections by December 2013 are yet to be announced. The IEC faces many challenges to conduct free and fair elections. These include questionable mandate of the four big political parties in the light of the vehement opposition by 33 political parties led by Communist Party of Nepal (Maoists) led by Mohan Vaidya, credibility of the IEC itself in the light of writ petitions pending before the Supreme Court of Nepal on the appointment of Justice Regmi as the Chairman of the IEC, spectre of violence looming large over Nepal, 1% threshold for proportional representation by the political parties, registration of all the eligible voters, delimitation of constituencies and question of accountability.

There are lots of “ifs and buts” before elections are held. If elections are indeed held in which even the Vaidya faction participates, the spectre of violence shall remain the most critical challenge for holding free and fair elections.

Therefore, Asian Centre for Human Rights *inter alia* recommends that elections in Nepal be held in five phases for five development regions i.e. Eastern Development Region, Central Development Region, Western Development Region, Mid-Western Development Region, Far-Western Development Region by making adequate security arrangements prior to holding of each phase of election by deploying Nepal Armed Police and Nepal Army alongside the Nepal Police to ensure free and fair elections.

2. The context

After a decade of armed conflict from 1996 to 2006 between the Government of Nepal and the Communists

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Party of Nepal (Maoists), the 12-point Understanding was signed between the Seven Political Parties and insurgent Communist Party of Nepal (Maoists) on 22 November 2005 “to establish full democracy by bringing the autocratic monarchy to an end through creating a storm of nationwide democratic movement of all the forces against autocratic monarchy by focusing their assault against the autocratic monarchy from their respective positions”. The process created by the 12 Point Understanding led to the signing of the Comprehensive Peace Agreement (CPA) between the Seven Party Alliance (SPA) and CPN (Maoist) on November 2006, thereby officially ending the 10-year long Maoist conflict.

The elections to the Constituent Assembly were held in Nepal on 10 April 2008. But no political party obtained two third majority, necessary to adopt the constitution. In the elections, the Unified Communist Party of Nepal (Maoist), or CPN (M) was placed first in the election with 220 out of 575 elected seats while the Nepali Congress

The adoption of the constitution remained a mirage in Nepal despite extension of the Constituent Assembly’s mandate to four years from two years originally stipulated.

On 25 November 2011, the Supreme Court headed by Chief Justice Khil Raj Regmi gave the Constituent Assembly one last extension of six months and refused to extend the term of the Constituent Assembly beyond 27 May 2012. Yet, Regmi became the head of the Interim Election Council based on the 11 point agreement signed by four major political parties which has neither legal basis nor the support of all the political parties of Nepal.

won 110 seats and the Communist Party of Nepal (Unified Marxist-Leninist) with 103 seats. The constituent assembly overwhelmingly voted to abolish monarchy on 28 May 2008 but the fight began in the earnest on the Prime Ministership rather than adoption of the Constitution and conclusion of the peace process. CPN(Maoists) Chairman Pushpa Kumar Dahal ‘Prachanda’ was elected as Prime Minister in August 2008 following agreements over power sharing. Soon Prime Ministership became the rotating chair of Nepal which saw as many as four Prime Ministers during the period i.e. Prachanda (18 August 2008 to 25 May 2009), Madhav Kumar Nepal of the CPN-UML (25 May 2009 to 6 February 2011), Jhala Nath Khanal of CPN-UML (6 February 2011 to 29 August 2011) and Dr Baburam Bhattarai of the Maoists (29 August 2011 to 14 March 2013).

There is no doubt that significant progress was made with regard to integration of the Maoists insurgents into the democratic process. The seven point agreement among four political parties on 1st November 2011 officially integrated the Maoists fully into the democratic process.

However, adoption of the constitution remained a mirage despite extension of the Constituent Assembly’s mandate to four years from two years originally stipulated. On 25 November 2011, the Supreme Court headed by Chief Justice Khil Raj Regmi and Justices Damodar Prasad Sharma, Ram Kumar Prasad Shah, Kalyan Shrestha and Prem Sharma gave the Constituent Assembly one last extension of six months and refused to extend the term of the Constituent Assembly beyond 27 May 2012. The Supreme Court while extending the term ordered that “...in case the writing of the constitution could not be completed within the given period, the tenure of CA will be ipso-facto terminated thereafter. Hence, this (directive) order is issued in the name of respondents, the chairperson of the Constituent Assembly and the Government of Nepal, Office of Prime Minister and the Council of Ministers, to conduct or have conducted necessary activities and make required arrangement either for conducting referendum under Article 157 or for holding election of the fresh Constituent Assembly or any other arrangements as provided in the constitution.”¹

However, the Constituent Assembly failed to adopt the constitution by 27 May 2012. Just before dissolving the Constituent Assembly the government made one last desperate attempt to extend the term of the Constituent Assembly to another three months by bringing a bill in the parliament on 22 May 2012. On 24 May 2012, the single bench of Chief Justice Khil Raj Regmi struck down the bill on the ground that it violates the Supreme Court order of 25 November 2011 and Articles 64 and 116 of the Interim Constitution.² This was despite the fact that the 25 November order of the Supreme Court clearly spelt out the options i.e. “to go for fresh elections, a referendum or some other way out” in case of failure to meet the deadline to adopt the Constitution.

The continuation of the Maoists Prime Minister Dr Baburam Bhattarai became untenable. In order to address the impasse, on 13th March 2013, Unified CPN (Maoist), Nepali Congress, CPN-UML and United Democratic Madhesi Front signed an 11-Point Agreement “to form a government of national consensus by removing the existing constitutional and legal difficulties and thereby pave the way for a democratic political way out by holding elections to the Constituent Assembly in a fair, free and fearless atmosphere”.³ The 13th March 2013

¹ http://www.supremecourt.gov.np/download/Constitution_Assembly_Case.pdf

² Available at: http://www.myrepublica.com/portal/index.php?action=news_details&news_id=35474

³ Considering the logjam in the parliament, Asian Centre for Human Rights in an editorial in The Kathmandu Post on 19 March 2010 had recommended “the formation of a national unity government in the spirit of the peace process that reflects the outcome of the CA election.”

agreement provided for a government under the leadership of the Chief Justice to form a Constituent Assembly through fresh elections to complete the task of drafting the constitution.

On 14 March 2013, a government known as the Interim Election Council headed by Chief Justice Khil Raj Regmi was installed though Regmi failed to resign as the Chief Justice of the Supreme Court of Nepal. Asian Centre for Human Rights has been opposed to Regmi holding dual position as it affects independence of judiciary in Nepal and his decisions as the Prime Minister must be subject to judicial review.

The task of the Regmi Government is to hold CA-Parliament by June 21, 2013. If election “cannot take place within June 21, 2013 due to technical causes or intractable situation, the Council of Ministers shall fix the date for holding the election within December 15 based on a consensus of the high-level political mechanism”.

There are lots of “ifs and buts” before elections are held. The consequences of not holding or not being able to hold elections are clear: it is more anarchy. The impatience with Regmi government including by four big political parties will grow while Regmi’s tenure as Chief Justice will expire in June 2014. President Ram Baran Yadav, despite being of Madhesi origin, has been remarkably successful to make himself popularly acceptable to Nepalese people. He must avoid any temptation or trepidation for direct governance.

From 3 to 5 May 2013, Asian Centre for Human Rights undertook a field mission to Nepal to identify the challenges and recommend measures to hold free and fair elections.

International community which welcomed the formation of the Government led by Regmi must immediately consider the challenges for holding elections and support measures to hold free and fair elections.

3. A layman’s guide to current challenges for holding free and fair elections

The Interim Election Council headed by Khil Raj Regmi faces a number of challenges for holding elections. These challenges get more complex as time passes. The key challenges are highlighted below.

i. Questionable mandate of the four big political parties

The 13th March 2013 agreement was signed by four big political parties of Nepal i.e. Unified CPN (Maoist), Nepali Congress, CPN-UML and United Democratic Madhesi Front. Considering that Nepal has more than 100 registered political parties, the credibility of the four political parties

taking all the decisions on behalf Nepal is being questioned by the Communist Party of Nepal (Maoists) led by Mohan Vaidya. The Mohan Vaidya faction which claims to lead 33 other political parties boycotted the discussions held on by the Government including the one held on 10 May 2013. While the demands of the Vaidya faction include scrapping of the 11-point agreement among the four parties under the garb of High Level Political Mechanism and the Presidential Order to remove obstacles on 14 March 2013 to appoint the Interim Election Council, it is clear that the UCPN has been treating Vaidya faction as an outcast.

ii. Credibility of the Regmi Government

The credibility of Khil Raj Regmi govt itself is in doubt. Regmi delivered the five member judgement limiting the extension of the Constituent Assembly beyond 27th May 2012 even though the political parties were not averse to extending the term of the Constituent Assembly. At the same time, Regmi went to become Head of the Government based

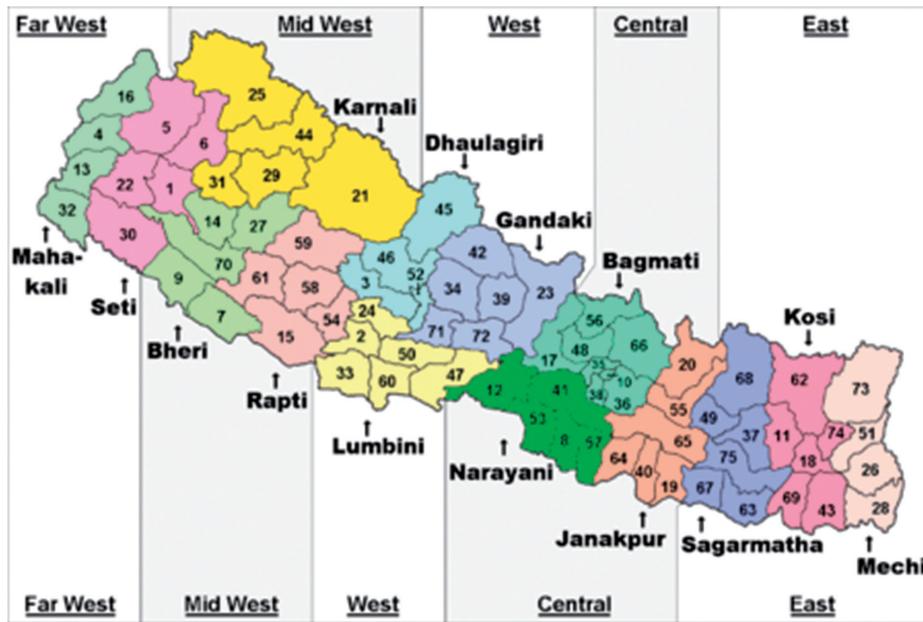
The legitimacy of both the High Level Political Mechanism set up by four major political parties i.e. Unified CPN (Maoist), Nepali Congress, CPN-UML and United Democratic Madhesi Front and the Interim Election Government is being questioned. Building consensus with over 100 registered political parties remains a challenge. The most serious challenge comes from the Vaidya faction known as the CPN (Maoist). The Unified CPN (Maoist) is no longer “Unified”, and both Prachanda and Dr Bhattarai are yet recognise the reality and the need to deal with their former comrades who have the potential to disrupt the process.

on 13th March 2013 agreement and the 25 amendments of the Interim Constitution through Ordinance of the President on 14 March 2013, both of which have no legal basis. Further the appointment of Regmi has been pending before the Supreme Court of Nepal. Should Regmi’s appointment be held illegal by the Supreme Court, direct rule by the President might be within the realm of possibilities.

iii. Spectre of violence looms large over Nepal

The spectre of violence looms large on Nepal. It is alleged that Maoists had not deposited all the arms including those captured from the Nepal’s security forces. It is alleged that the Maoists had deposited only the .303 Rifles and not the sophisticated arms. The allegations cannot be verified as the United Nations Mission in Nepal did not make the surrender of arms by the Maoists public.

Yet, there is no disagreement that there are enough arms in Nepal to create an atmosphere of fear and intimidation to decide the outcome of the elections.



iv. Threshold to stymie federalism?

Federalism remains the most divisive issue in Nepal though the genie of federalism can no longer be put back into the bottle.

While the Previous Constituent Assembly had 601 members, Section 3.1 of 13th March Agreement provides that *“There shall be 491 members in the CA with the proportional representations of all castes and communities including women, dalits suppressed caste and community, indigenous and nationalities, backward community, Madhesi, peasants and workers. Of them, 240 shall be nominated from the first-past-the-post electoral system, 240 shall be nominated from the proportional representation system and remaining 11 shall be nominated by the Council of Ministers on the basis of political consensus. The number of electoral constituencies shall remain as it is.”*

The reduction of proportionate representation is being seen as undermining the groups seeking federalism. Further the Election Commission of Nepal proposed that political parties must secure 1% of total valid votes cast in the election to get one seat in the Constituent Assembly. While the UML and Nepali Congress support the proposal, the Janjati groups have been vehemently opposing the same as it would have direct impact on their representation in the Constituent Assembly.

One of the key reasons for the failure to adopt the Constitution in the previous constituent assembly is the lack of agreement on federalism with China and India having their own perceptions and priorities.

The Nepali Congress and CPN (UML) consistently opposed federalism. It is clear that India did no work with the Nepali Congress and UML and limited its support to Madhesi

on federalism while ignoring Janjati groups. Even with respect to Madhesi, Indian embassy in Kathmandu has so far failed to access Madhesi activists who are engaged in the debate on the question of Madhes and federalism with Nepalese intellectuals, who themselves are struggling to relate to the issue of federalism. The Madhesi activists alleged that they are approached as only informers!

The zproponents of federalism i.e. Maoists too have developed cold feet on federalism as China has apprehension over the powers to be conferred to the federal states bordering China and its security implications on Tibet (read as Tibetan refugees fleeing).

v. Registration of voters

Registration of all the eligible voters remains one of the big challenges for holding elections. As per the Agreement reached among the four political parties, it was agreed as under:

“4.1. The Nepali citizens who have attained 18 years of age within the date fixed by the Election Commission (EC) shall be the voters.

4.2. For the purpose of the next election to the Constituent Assembly (CA), a special campaign would be launched in coordination with the Home Ministry, EC and other bodies to

a) update the voters’ list based on the citizenship certificate and to provide citizenship certificates to the Nepali citizens who have the right to get it;

b) to update the voter list of those having their names missed despite the provision (a) as per the clause 11 of the Voter Registration Act 2063 BS based on the voter’s registration of the 2064 and thereafter.”

The agreement reached with regard to updating the voter list is an uphill task in the light of the time constraint and the contentious issue of citizenship certificates, a requirement for registration.

First, a total 17.6 million voters were registered for the 2008 Constituent Assembly elections. However, of these, the Election Commission has updated about 10.11 million

eligible voters by the end of March 2013⁴ while another 1.19 million voters have been collected by the Election Commission as on 2 May 2013.⁵ At this pace it is highly unlikely that the Election Commission will be able to register all the eligible voters including those who have attained 18 years of age. About 15.4 million individuals have reached 18 years of age as per the latest census reports.⁶

Second, the lack of citizenship certificates, which is the basis for voter registration, among the Madhesi remains a critical issue. Madhesi claim that an estimated 3.5 million Madhesi have been deprived of citizenship. This remains one of the most contentious issues, and another anti-India sentiment appears to be brewing up on the question of Madhesi citizenship. The Election Interim Government has so far failed to ensure no obstruction/disruption from the cadres of the Vaidya faction during the reistration of voters.

vi. Delimitation of constituencies

The Madhesi political parties have threatened to boycott the upcoming elections unless the government draws up the constituencies afresh based on 2011 census. Madhesi urge that they have case for delimitation of constituencies in the Kathmandu valley (Kathmandu, Baktapur, Lalitpur), Terai (Sunsari, Sharlahi, Kailali, probably also Parsa, Rupandehi) and the hill/mountain districts (Kavrepalanchok, Gulmi, Nuwakot, Gorkha, Balgung, Palpa, Dhankuta, Parbat, Tapeljung) as per the 2011 census and the Interim Constitution of 2007.⁷

One of the Madhesi political leaders has already moved the Supreme Court of Nepal and on 17 April 2013, the Supreme Court had ordered the Interim Election Council and the Election Commission (EC) to form a Constituency Delimitation Commission to delineate the election constituencies afresh. The Court further ordered the Interim Election Council and the Election Commission to furnish written clarification within 15 days to explain why such a commission had not been formed yet. No substantive

progress has been made to comply with the orders of the Supreme Court so far.

vii. Accountability

Nepal has a number of political leaders who stand accused of gross human rights violations and corruption.

In December 2012, the Election Commission (EC) of Nepal proposed a new provision in election-related laws to provide that “a person who is convicted of killing, theft, robbery, fraud, forgery, fake currency use, misappropriation of foreign currency, kidnapping, rape, corruption, human trafficking, money laundering, banking irregularities, passport misuse, drug smuggling, jail break or abetting jail break by others, smuggling of prohibited wildlife or vegetation or objects of archeological importance, illegal trade and spying, among other illegal activities, or has shown moral turpitude, cannot be a member of any political party if he or she has not completed serving the sentence awarded by a court or any other legal authority”.⁸ The political parties have so far rejected the proposal.

Federalism will shape the future of Nepal simply because Janjatis and Madhesi constitute the overwhelming majority of the populations of Nepal. Any political party including the Maoists that backtracks on the issue of federalism will pay its price. The Maoists who sidelined independent Janjati leaders by taking a stand on federalism are likely to suffer more than Nepali Congress and CPN-UML in case of any reversal of their position on federalism. As this briefing paper goes to print, Nepal Federation of Indigenous Nationalities has formally dropped the idea of single ethnic identity-based federalism. This will lead to realignment of the federalists.

Accountability remains a critical issue for holding free and fair elections. This has been vitiated by President Ram Baran Yadav's appointment of former chief secretary Lokman

⁴ Many challenges for June polls: EC chief Uprety, The Kathmandu Post, 25 March 2013

⁵ Nepal's poll chief urges consensus for elections, Zee News, 2 May 2013, available at: http://zeenews.india.com/news/south-asia/nepal-s-poll-chief-urges-consensus-for-elections_846102.html

⁶ Many challenges for June polls: EC chief Uprety, The Kathmandu Post, 25 March 2013

⁷ Sub-clause 3(a) of the Article 63 of the Interim Constitution of Nepal, 2063 (2007)

“One member elected, under the first-past-post system, from each geographical constituency, two hundred and forty as determined by the Constituency Delimitation Commission under Article 154(a), based on the national census preceding the Constituent Assembly elections, and as far as possible maintaining the same relationship between number of members and population for all the administrative districts, while retaining the same administrative district as hitherto.”

Sub-clause 3(a) of Article 63 of the Interim Constitution of Nepal, 2063 (2007):

“Notwithstanding anything contained in sub-clause (a) of Clause 3, while determining the number of constituencies according to this Clause, the number of constituencies in each administrative district prescribed by the laws prevailing during the elections for the House of Representatives in 2056 (1999), shall not be reduced, but the number of constituencies in the hilly and mountainous areas shall be increased on the basis of percentage of population growth, and, then in determining the constituencies in Madhesh, the number of constituencies in the administrative districts in Madhesh shall be increased in order to ensure that the constituencies are in proportion to the percentage of population.”

⁸ EC proposes banning tainted from politics, 30 December 2012 available at http://www.myrepublica.com/portal/index.php?action=news_details&news_id=47364

Nepal needs to address the issue of accountability. The Election Commission of Nepal needs to recognise the increasing demands for accountability. While Nepal may not yet be ready for legal measures as shown by the appointment of Mr Karki as the anti-corruption head, candidates filing nomination must declare their incomes, whether income tax return filed or whether any case of corruption or human rights violations pending before the Courts, Ant-Corruption Commission and/or National Human Rights Commission with the caveat that submission of false information shall be a ground for disqualification.

Singh Karki as chief commissioner of the Commission for the Investigation of Abuse of Authority (CIAA) on 8 May 2013. Karki's name had been recommended by the four parties though CPN-UML changed its position later. The Rayamajhi Commission had found Karki guilty of suppressing the April 2006 people's movement. On 15 May 2013, the Supreme Court issued a show cause notice to the government over the appointment of Mr Karki.

4. Recommendations for holding free and fair elections

Despite the existence of High Level Political Mechanism, political violence and intimidation, especially in rural areas remain high. Apart from violence, access to illegal funds by the political leaders and use of the same to determine outcome of the CA-Parliament elections remains another obstacle to holding free and fair elections.

While the challenges identified above ought to be addressed by the Interim Election Government, Asian Centre for Human Rights recommends the following for holding free and fair elections:

1. To the Interim Election Government of Nepal
 - In order to hold violence free elections, elections in Nepal be held in five phases for five development region of Nepal i.e. Eastern Development Region, Central Development Region, Western Development Region, Mid-Western Development Region, Far-Western Development Region by making adequate security arrangements prior to holding of each phase of elections.
 - In order to hold violence free elections, Nepal Armed Police and Nepal Army, be deployed as Nepal Police are inadequate in numbers and do not have human and material resources to ensure free and fair elections.
- Issue order to the effect that all civil officers and security forces drafted for election duty at the time of elections stand deputed to the Election Commission of Nepal and they come under its superintendence, direction and control for all purposes.
- A violence free election need not necessarily be a free and fair election and therefore, conduct training for the Nepal Police, Nepal Armed Police and Nepal Army under the superintendence of the Chief District Officer to respect and comply with instructions to be issued by the Election Commission of Nepal regarding maintenance of law and order, execution of non-bailable warrants, seizure of illegal arms, surrender of licensed weapons, enforcement of excise law, action against bootleggers, restriction on use of vehicles, instruction regarding prior permission for campaign vehicles, ban on use of any vehicle for transporting voters on the day of poll by the political parties etc.
- Conduct vulnerability mapping to identify sensitive and vulnerable areas including the number of police stations affected by highly pronounced rivalry between political parties in every district, number of police stations which are highly politically sensitive, number of police stations affected by pronounced presence of criminals, number of police stations affected by communal tension, number of police station affected by inter ethnic or caste based tension, among others.
- Ensure that nomination form, *inter alia*, provides for declaration of income tax return filed by the candidates and information as to any case of corruption or human rights violations pending before the Courts, Ant-Corruption Commission and/or National Human Rights Commission with the condition that submission of false information shall be a ground for disqualification.
- Develop and notify code of conduct on the political parties and that it shall come into force 120 days prior to holding of elections.
- Develop "Election Expenditure Monitoring Mechanism" including monitoring day to day expenses to control abuse of money power and control of powers.
- Develop/create dedicated Flying Squads in each Assembly Constituency for tracking illegal cash transactions or any distribution of liquor or any other items suspected of being used or bribing the voters and Static Surveillance Team to put

check posts and keep watch on movement of large quantities of cash, illegal liquor, any suspicious item or arms being carried in their area.

- Develop measures for prevention of intimidation to the voters of vulnerable sections of electorate.
- Develop Complaint Monitoring Control Room and Call Centre at district level to operate from the date of announcement of election. The 24X7 call center will be given toll free telephone number with 3 or 4 hunting lines which will be widely publicized for the public to inform corrupt practices related to election. A senior officer will be put in-charge of the control room and call center who will be responsible for receiving and recording the complaints and passing them on to the officer concerned or the flying squad for action without any delay. The call center will be provided with sufficient staff to man the telephone lines round the clock.
- Issue guidelines on the vehicles to be used for campaign purpose by candidates and political parties during the Constituent Assembly elections to provide that vehicles for the campaign purpose may ply only with the prior approval of the Returning Officers and must display the permit issued in original (not photocopy) prominently on the windscreen. Permit issued should be of sufficient dimension so that it could be seen from a distance. The permit must bear the number of the vehicle and name of the candidate in whose favour it is issued.

To the International Community

- Provide all necessary assistance to Nepal for holding phase-wise elections and movement of the security forces prior to the elections.
- Deploy international elections observers in advance considering that election monitoring should not be considered as monitoring of voting on the day of elections but as a process leading up to the day of elections.

Annexure- I: The full text of the 11-point agreement, 13 March 2013

Agreement reached among Unified CPN (Maoist), Nepali Congress, CPN-UML and United Democratic Madhesi Front

As the term of the Constituent Assembly expired before the task of constitution making was completed and also in consideration of the Supreme Court's verdict, to

institutionalize federal democratic republic in the country by guaranteeing the rights of the Nepali people to draft a constitution on their own, Also considering that the Constituent Assembly does not exist after May 27, 2012 and the subsequent political consensus reached for holding fresh elections to the new Constituent Assembly and the principle of necessity to constitute a national consensus government for the same, and the need to form a Constituent Assembly through fresh elections to the Constituent Assembly by a government formed under the leadership of the Chief Justice on a political consensus and,

To form a government of national consensus by removing the existing constitutional and legal difficulties and thereby pave the way for a democratic political way out by holding elections to the Constituent Assembly in a fair, free and fearless atmosphere, we have agreed as follows:

1. Structure, function-duties and term of election government

1.1 The election to the Constituent Assembly shall be held within June 21, 2013. For this an Interim Election Council of Ministers would be formed comprising of a Chairperson and Ministers.

1.2 The Chairperson of the Interim Election Council shall carry out all the functions and task of the Prime Minister as mentioned in the Constitution. The allocation of portfolios of the Ministers shall be carried out as per the Constitution by the Chair of the Council of Ministers.

1.3 The ministers to the Interim Election Council shall be appointed from among the former distinguished class civil service officers of the Government of Nepal.

1.4.1 The Chief Justice of the Supreme Court shall chair the Interim Election Council.

1.4.2 The major task of the Head of the Interim Election Government shall be to hold the election to the Constituent Assembly Legislature-Parliament within the stipulated timeframe.

1.4.3 The Interim Election Council of Ministers shall perform all other tasks to be carried out by the Council of Ministers. But, the interim election council shall not carry out any task of long-term nature.

1.4.4 All the tasks of the Chief Justice will be carried out by the Acting Chief Justice.

1.4.5. The task of the Executive and the Judiciary will be executed as per democratic norms and values and the principles of independent judiciary, separation of powers, checks and balance.

1.5. The maximum number of members of Council of Minister shall be 11. The Chairman of Council of Ministers shall elect the ministers and the principle of inclusion shall be considered while doing so.

1.6. The tenure of the Interim Election Council of Ministers shall automatically come to an end with the new prime minister, to be elected from the Legislature Parliament following election to the Constituent Assembly-Legislature Parliament, takes charge.

1.7. If CA-Parliament election cannot take place within June 21, 2013 due to technical causes or intractable situation, the Council of Ministers shall fix the date for holding the election within December 15 based on a consensus of the high-level political mechanism.

1.8. The Chairman of the Interim Election Council of Ministers shall return to his previous post following the nomination of the next Prime Minister.

2. Formation of a high-level political mechanism and jurisdiction

2.1. A high-level political mechanism with the representation of major parties shall be formed to assist the government run its activities as per the spirit of joint people's movement, political consensus and cooperation and to resolve possible problems in the political sector.

2.2 Its jurisdiction shall be as follows:

2.2.1. To create atmosphere conducive to holding the election within the scheduled date and to recommend to the Council of Ministers the next date for fresh elections if the election cannot be held within the scheduled date due to intractable situation.

2.2.2. To work towards maintaining atmosphere of consensus among the political parties.

2.2.3. To provide necessary consent, feedback and consultation to the interim election government.

The Committee shall itself determine working procedures to that end.

3. The number of Constituent Assembly members and tenure

3.1. There shall be 491 members in the CA with the proportional representations of all castes and communities including women, dalits suppressed caste and community, indigenous and nationalities, backward community, Madhesi, peasants and workers. Of them, 240 shall be

nominated from the first-past-the-post electoral system, 240 shall be nominated from the proportional representation system and remaining 11 shall be nominated by the Council of Ministers on the basis of political consensus. The number of electoral constituencies shall remain as it is.

3.2. The CA shall function as the CA and Legislature Parliament until the completion of the constitution-drafting. A new constitution shall determine the post-constitution matters.

4. Voter's List

4.1. The Nepali citizens who have attained 18 years of age within the date fixed by the Election Commission (EC) shall be the voters.

4.2. For the purpose of the next election to the Constituent Assembly (CA), a special campaign would be launched in coordination with the Home Ministry, EC and other bodies to

a) update the voters' list based on the citizenship certificate and to provide citizenship certificates to the Nepali citizens who have the right to get it;

b) update the voter list of those having their names missed despite the provision (a) as per the clause 11 of the Voter Registration Act 2063 BS based on the voter's registration of the 2064 and thereafter.

While doing so, the biometric voters' list prepared by the Election Commission based on the voters' roll for the 2064BS CA elections.

4.3. After the next CA election, all eligible Nepali citizens would be provided the national identity cards based on their citizenship certificates thereby making the national identity card the basis for the preparation of next voter's list.

5. Process to remove difficulties and issues

5.1. Consensus shall be forged among the political parties, and the issues to be included in the ordinance on removing difficulties shall be determined accordingly. Regarding the removal of the difficulties, the Council of Ministers shall prepare a proposal and recommend it to the President. Accordingly, the President shall administer the oath of office to the Chief Justice as the Chairperson of the election government. All these activities shall be carried out simultaneously.

5.2. The arrangements made with the implementation of the removing of the difficulties as per the recommendation shall automatically cease to exist after the purpose has been fulfilled.

6. Necessary arrangements regarding election

As per this agreement, the EC shall make necessary legal and other arrangements for fresh election in consultation with the political parties.

7. Appointments in the Supreme Court and Constitutional Bodies

7.1. Necessary constitutional arrangements shall be made for the appointments in the vacant posts for justices in the Supreme Court as quickly as possible.

7.2. The appointments in vacant posts in the constitutional bodies shall be made as quickly as possible as per the agreement at the high-level political mechanism.

7.3. The ambassadors to be appointed except from the Foreign Affairs service shall be selected as per the agreement at the high-level political mechanism.

8. About the ownership of the works of the dissolved CA

The agreements made among the political parties in the dissolved CA shall be owned.

9. Remaining task of the Peace Process

9.1. The remaining task of the peace process shall be completed as quickly as possible. In this regard, decision on allotment of ranks to former Maoist fighters, who are now in Nepal Army training, shall be taken through the army integration special committee as per the past agreements, and based on necessary training, practice and procedures.

9.2. Necessary laws shall be formulated immediately for the formation of the commission on truth and reconciliation, and forced disappearance.

9.3. The UCPN-Maoist shall fully cooperate in the process to immediately return the property including land and houses seized during the insurgency.

10. On Citizenship

The children of the Nepali citizens who have acquired citizenship by birth shall be provided certificates of Nepali citizenship by descent. As it was immediately necessary for the election purpose, such citizenship would be provided by removing difficulty in the constitution.

11. On local body elections

The government to be formed following the next CA election would fix the date of election in the local bodies within 2070BS.

Signed by:

Pushpa Kamal Dahal 'Prachanda', Chairman President
Chairman on behalf of UCPN-Maoist

Sushil Koirala, Nepali Congress

Jhalanath Khanal CPN-UML

Bijay Kumar Gachchhadar, United Madhesi Democratic
Front

13 March 13, 2013

Source: <http://www.titanherald.com/2013/03/13/nepalese-parties-reach-to-consensus-to-pave-way-for-cj-led-government/>

Annexure –II: Presidential Order to remove Obstacle, 14 March 2012

The President Mr. RAM BARAN YADAV has issued the Order pursuant to Article 158 of the Interim Constitution of Nepal, 2006 on the recommendation of the Council of Ministers on 14 March 2013.

“Whereas, grave political and constitutional difficulties emerged in the functioning of the state affairs despite various efforts made to bring the constitutional process back in track following the expiry of the term of the Constituent Assembly on May 27, 2012 without completion of the task of making the new Constitution and the Legislature-Parliament as well is not in existence, thus, in order to end the political stalemate by ensuring the election of the Constituent Assembly having considered the principle of necessity as well;

Whereas, it is essential to complete the process of Constitution-making having formed the Constituent Assembly through new election of the Constituent Assembly and for that purpose, it is necessary to hold the next election of the Constituent Assembly as soon as possible having formed an interim Council of Ministers under the chairpersonship of the Chief Justice of the Supreme Court based on consensus of political parties;

Whereas, there are difficulties emerged in the functioning of the state as there is constitutional provision that appointment to the vacant positions in the Supreme Court, constitutional bodies and to Ambassadors shall be made only after parliamentary hearing thereby no appointment could be made in those positions and there is

no Legislature-Parliament at present, thus, in order to make such appointment without the parliamentary hearing;

Whereas, the constitutional provisions made in various Articles of the Interim Constitution of Nepal, 2006 has created hurdles and difficulties;

Now, therefore, the President has, on the basis of the eleven-point consensus concluded among political parties on March 13, 2012 to remove such hurdles and difficulties and on the recommendation of the Government of Nepal Council of Ministers, issued the following Order to remove such hurdles and difficulties pursuant to Article 158 of the Interim Constitution of Nepal, 2006:-

1. Since clause (a) of Article 33 of the Interim Constitution of Nepal, 2006 (hereinafter referred to as the "Constitution" in this Order) contains a provision that the election of the Constituent Assembly will be held within the year 2064 BS (12 April 2008) and the said clause has created hurdle for holding election to another Constituent Assembly, to the effect of holding the election to the Constituent Assembly within the month of Mansir of the year 2070 (15 December 2013);
2. Clause (1) of Article 38 of the Constitution provides that the Prime Minister shall be appointed and the Council of Ministers shall be formed under his/her chairpersonship, however, in order to implement the political consensus to form the Council of Ministers under the chairpersonship of the Chief Justice of the Supreme Court, there is hurdle created by sub-clause (b) of clause (7) of Article 38 of the Constitution providing that the Prime Minister will be relieved from the office if he/she is not a member of the Legislature-Parliament, to the effect of forming the Council of Ministers under the chairpersonship of the Chief Justice of the Supreme Court;
3. Clause (3) of Article 38 of the Constitution provides that the structure of the Interim Council of Ministers and allocation of the portfolio shall be determined by mutual consent, however, in case of the Council of Ministers to be formed for the purpose of holding the next election of the Constituent Assembly, there is hurdle to form the Council of Ministers having determined the structure of the Interim Council of Ministers and allocation of the portfolio by mutual consensus, to the effect of forming the Council of Ministers under the chairpersonship of the Chief Justice of the Supreme Court and the Chairperson of the Council of Ministers to form the Council of Ministers comprising of Ministers from amongst the persons retired from special class of the civil service with a view to maintain impartiality of the Council of Ministers to hold election;
4. Clause (5) of Article 38 of the Constitution provides that while appointing Ministers by the Prime Minister, he/she has to appoint minister from amongst members of the Legislature-Parliament on the recommendation of the concerned party, however, as there is no Legislature-Parliament at present and it has created hurdle to appoint ministers, to the effect of appointing ministers by the chairperson of the Council of Ministers in case of the Council of Ministers to be formed for the purpose of holding election to the next Constituent Assembly;
5. Sub-clause (c) of Clause (8) of Article 38 of the Constitution provides that the Prime Minister shall relieve a Deputy Prime Minister, Minister, State Minister and Assistant Minister from the office on the recommendation of the concerned party or in consultation with such party, to the effect of removal of such ministers by the chairperson of the Council of Ministers in case of the Council of Ministers to be formed for the purpose of holding election to the next Constituent Assembly;
6. Article 40 of the Constitution provides that the any person who is not a member of the Legislature-Parliament may be appointed to the position of Deputy Prime Minister, Minister, State Minister and Assistant Minister on the basis of political consensus, however, such a clause has created hurdle by requiring political consensus for such appointment, to the effect of making a provision that the chairperson of the Council of Ministers may make such appointment;
7. To the effect that the word "Prime Minister" appearing in the Constitution and other laws in force for the time being also means the chairperson of the Council of Ministers to be formed for holding election to the Constituent Assembly;
8. Since Chapter 7 of the Constitution does not envisage next election to the Constituent Assembly and there is no situation of formation of another Constituent Assembly, to the effect of holding election for the next Constituent Assembly according to the main purpose and spirit of the Constitution;
9. Sub-clause (a) of Clause (3) of Article 63 of the Constitution provides that the Constituent Assembly

- shall be formed in such a manner that one member elected, under the first-past-the-post system, from each geographical constituency, by the Constituency Delimitation Commission under Article 154A, based on the national census preceding the Constituent Assembly elections, and as far as possible maintaining the same relationship between number of members and population for all the administrative districts, however, in the present context of the new census conducted in 2011 and its result has been already made public, there is hurdle to delineate the election constituency again and hold the election by June 21, 2013, to the effect that the 240 election constituencies will remain as they are for the election to be held by June 21, 2013 as it was in the 2008 election;
10. Sub-clause (b) of Clause (3) of Article 63 of the Constitution provides that three hundred thirty five members to the Constituent Assembly shall be elected according to the proportional election system, to the effect of electing two hundred forty members according to the proportional election system for the purpose of the next Constituent Assembly;
 11. Sub-clause (c) of Clause (3) of Article 63 of the Constitution provides that the Council of Ministers shall nominate twenty six persons from among distinguished persons making significant contribution in national life, to the effect of nominating eleven persons for the purpose of the next Constituent Assembly;
 12. Clause (7) of Article 63 of the Constitution provides that for the purpose of election to the Constituent Assembly, every Nepali citizen who has attained the age of eighteen years by the end of Mangsir, 2063 (15th December 2006) shall be entitled to vote, thus, there emerges constitutional hurdle to confer voting right to the Nepali citizens having attained the age of 18 years thereafter, therefore, to the effect of holding the election having incorporated names of the citizens having attained the age of 18 years on the date specified by the Election Commission in the electoral rolls and giving recognition to the electoral rolls prepared by the Election Commission pursuant to section 11 of the Electoral Rolls Act, 2006 and the Electoral Rules, 2007 and on the basis of citizenship;
 13. Part 9 of the Constitution provides for introducing to the Legislature-Parliament estimates of revenues and expenditures, however, there is hurdle to implement this constitutional provision as there is no Legislature-Parliament as present, to the effect of preparing the estimates of revenues and expenditures by the Council of Ministers to be formed under the chairpersonship of the Chief Justice as may be necessary and to submit it for approval pursuant to Article 88 of the Constitution;
 14. Clause (1) of Article 106 of the Constitution provides that the Chief Justice or a Justice shall not be engaged in any work other than the position of a justice or deputed elsewhere, however, the said clause has created hurdle to assign the Chief Justice other responsibility, to the effect of forming a Council of Ministers under his/her chairpersonship for the purpose of holding election to the Constituent Assembly;
 15. Since the Council of Ministers to be formed under the chairpersonship of the Chief Justice of the Supreme Court will hold the next election of the Constituent Assembly and to provide for the Chairperson shall no longer continue as the Chairperson of the Council of Ministers after formation of the next Council of Ministers, to the effect of continuing the position of the Chief Justice in lien until he serves as in the office of the Chairperson and to pave the way for the seniormost justice of the Supreme Court to be the Acting Chief Justice pursuant to clause (4) of Article 103 of the Constitution, having expressed full commitment to independent judiciary and rule of law;
 16. To the effect that the word “Chief Justice” appearing in the Constitution and other laws in force for the time being also means the Acting Chief Justice as well;
 17. Since the seniormost Justice of the Supreme Court will also work as the Acting Chief and also preside over the Judicial council and Judicial Services Commission as well, he/she may not represent as a member thereof, to the effect of allowing the seniormost justice of the Supreme Court after him/her to become a member of the Judicial council and Judicial Services Commission for the time being the Seniormost justice of the Supreme Court also acts as the Acting Chief Justice pursuant to clause (1) of Article 113 and clause (2) of Article 114 of the Constitution;
 18. The proviso to clause (5) of Article 142 provides that the support and signature of at least ten thousand voters shall not be necessary in the case of the parties represented in the Interim Legislature-Parliament, however, there is hurdle in the implementation of this constitutional provision as there is no Legislature-

- Parliament at present, therefore, to the effect of not requiring the signature of at least ten thousand voters in the case of the parties represented in the Interim Legislature-Parliament elected during the election of the 2008;
19. Sub-clause (d) of Clause (1) of Article 145 of the Constitution provides that three ministers representing three different parties amongst the parties represented to the Council of Ministers as selected by the Prime Minister shall be members, however, as there is no provision of appointment of ministers from political parties in the Council of Ministers to be formed for the purpose of holding the election to the Constituent Assembly, to the effect that the ministers selected by the Chairperson of the Council of Ministers shall be the members;
 20. Since there is no Legislature-Parliament, there are no Speaker of the Legislature-Parliament and the Leader of Opposition Party in the Legislature-Parliament, who are ex-officio member of the Constitutional Council pursuant to sub-clauses (c) and (d) of clause (1) of Article 149, thereby the Constitutional Council is remaining incomplete and it has cause hurdle to the appointment of constitutional positions, to the effect of three ministers specified by the Chairperson of the Council of Ministers to become members in sub-clause (d) of clause (1) and also to the effect that appointment of the constitutional positions to be made on the basis of political consensus;
 21. According to the provision made in the proviso to clause (5) of Article 8 of the Constitution, there is hurdle to confer citizenship to the children born to the persons who have acquired citizenship by birth according to the prevailing law before the time of their acquisition of the citizenship by virtue of the provision made in sub-clause (b) of clause (2) [of the same Article], to the effect of conferring citizenship by descent to those of the children of the persons acquiring citizenship by birth in such a manner;
 22. Since clause (1) of Article 155 of the Constitution provides that prior to appointment to constitutional posts on the recommendation of the Constitutional Council according to this Constitution, and to the appointment of the Justices of the Supreme Court and ambassadors, there shall be a parliamentary hearing in accordance with the provisions of the law, however, as there is no Legislature-Parliament at present and it has created hurdle to appoint in such positions according to the Constitution, to the effect of making appointment to such positions according to the Constitution and to submit such appointments to the Legislature-Parliament to be formed after the election of the Constituent Assembly is held within one month from the date of commencement of the session of the Legislature-Parliament;
 23. Article 158 of the Constitution provides that if any difficulty arises in connection with the implementation of the Constitution, the President may issue an order to remove such difficulties on the recommendation of the Council of Ministers, and such Order shall have to be got endorsed by the Legislature-Parliament within one month, however, as there is no Legislature-Parliament at present and there is constitutional hurdle to get such order to be endorsed by the Legislature-Parliament as required by Article 158, to the effect of getting this Order to be endorsed within one month from the date of commencement of the session of the Legislature-Parliament after the next election of the Constituent Assembly;
 24. In case the office of the Chairperson falls vacant for any reason whatsoever or the election could not be held within the said timeframe for emergence of any situation beyond one's control, to the effect of making necessary provisions on the basis of political consensus;
 25. To the effect of *ipso facto* termination of this Order after completion of the tasks implemented by removing the hurdles and difficulties according to this Order.”

ASIAN CENTRE FOR HUMAN RIGHTS

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 C-3/441-C, Janakpuri, New Delhi-110058, India Phone/Fax: +91-11-25620583, 25503624
 Email: director@achrweb.org; Website: www.achrweb.org