

# Nepal Observer

An internet journal irregularly published by Nepal Research  
Issue 21, September 7, 2014

ISSN 2626-2924

## **Nepal after CA-II elections: Constitutional process and prospects for stability and development**

by Karl-Heinz Krämer

*(This article has been written for South Asia Democratic Forum, Brussels)*

After one and a half years of legitimacy crisis, elections to a second Constituent Assembly (CA-II)<sup>1</sup> that took place on 19 November 2013, have brought back democratic procedures, a legitimate government and options for concluding the process of constitution writing that had been interrupted by the dissolution of the first CA on 27 May 2012. This article tries to discuss a number of issues like: How have the political parties been using this second chance? What are the main shortcomings? What are the differences and similarities compared to the situation under CA-I? How do the political parties deal with the disputed aspects of the new constitution like secularism, federalism, form of government, justice and reconciliation, etc. that finally caused the failure of CA-I? Is there better inclusion and participation of all sections of society? What is the importance of foreign politics, especially of good relations with the country's two big neighbours, India and China? Has the new government been able to set the course for economy and development?

### ***Aspects and reasons of the failure of CA-I***

CA-I had been the logical consequence of *Jana Andolan II*, the people's movement of April 2006 that ended a Maoist insurgency of ten years and a royal putsch of three and a half years. During their demonstrations in April 2006, the people had demanded a durable peace, an inclusive society and state, and a federal and secular nation. All these aspects became reflected in the interim constitution of 15 January 2007 that was to open the way to a new constitution that was to be devised by a generally elected CA. For some time, the political parties having similar aspirations closely cooperated. They developed an election system that ensured a reasonable participation of all social groups in the CA.

The elections of 10 April 2008 brought back legitimacy to Nepal's political system. Thanks to the election system, CA-I that also functioned as parliament was socially inclusive as no other political institution before. The electorate proved democratic understanding and maturity when it punished the two dominating parties of the 1990 political system, Nepali Congress (NC) and Communist Party of Nepal – Unified Marxist-Leninist (CPN-UML). These two parties had got themselves into power games instead of concentrating on the development of the young and still incomplete political system during the 1990s. This failure of the dominating parties of the 1990 political system literally had invited a Maoist insurgency (1996-2006) and a royal putsch (2002-2006). The organizer of the insurgency, the Unified Communist Party of Nepal – Maoist (UCPN-M)<sup>2</sup>, had joined mainstream politics after the end of the royal putsch in 2006. In the

1 Throughout this text the term CA-I will be used for the first Constituent Assembly that had been elected on 10 April 2008 and that was dissolved on 27 May 2012 while CA-II will be used for the second Constituent Assembly that was elected on 19 November 2013.

2 The party's name originally was Communist Party of Nepal – Maoist (CPN-M). The name UCPN-M was adopted in early 2009 after the party was joined by some smaller communist parties. On later occasions, two factions split off from the party calling themselves CPN

election campaign of 2008, it made big promises for a better Nepal that obviously impressed the voters. Besides, it was a new party in elections and showed better inclusive behaviour with respect to the selections of candidates.

All this was reason enough for the electorate to give them a chance. The UCPN-M got 29.28% of the votes and won 220 of the 575 seats that were to be determined by voting.<sup>3</sup> NC and CPN-UML got only 21.14% and 20.33% respectively winning only 213 seats together. But irrespective of this result, a close cooperation of the three big parties would have been necessary since the passing of the new constitution demanded a two thirds majority. Right from the beginning, the parties proved incapable to master this situation. Power struggle between the three big parties as well as between the several factions that existed in each of these parties dominated the politics for the whole period of CA-I. Because of these struggles, the CA often became stalled for months.

Committees of the CA drew up suggestions for different aspects of the new constitution until the end of 2009 but they were never presented for discussion within the CA. If at all, then they were discussed among the top politicians of the three big parties who stuck to their principles and were not able to compromise. Among the most disputed aspects of the new constitution were the federal system, the combination of ethnic identity and federalism, number and borders of the provinces, the names of the federal provinces, the form of government and parliament, the judicial system, the integration and rehabilitation of the former Maoist fighters, and the question of justice and reconciliation with respect to the victims and perpetrators of the times of Maoist insurgency and royal putsch.

In the last year of CA-I under the government of Baburam Bhattarai (UCPN-M), at least the integration of a small number of former Maoist insurgents into the army could be managed. But this left many dissatisfied former fighters. They felt betrayed by their party that had promised them a better future when they risked their lives for the Maoist revolution. This also added to the tensions within the party leadership. The radical faction around Mohan Baidya was against numerous concessions that were made by the Bhattarai government towards NC and CPN-UML during the last months of CA-I as a last effort to pass the new constitution until May 2012. Baidya`s faction split off shortly after the dissolution of CA-I.

### ***Elections to CA-II as a second chance***

The elections to CA-II on 19 November 2013 were facilitated by numerous violations of the interim constitution. Some of these infringements had been unavoidable since the dissolution of CA-I had led to a vacuum of legitimation. This situation could not be completely settled without violation of the constitution. But many things that were decided and enforced by the leading politicians of the big parties could have been solved in a more constitutional way. As often in the past, they gave priority to aspects of power instead of adhering to the rule of law.

The interim constitution neither provided for an untimely dissolution of the CA nor for elections to a second CA. After the dissolution of CA-I there was no legitimate way to introduce the constitutional and legal changes that were necessary to hold elections to CA-II. This was the gravest legitimacy problem after the dissolution of CA-I. The replacement of the government of Prime Minister Baburam Bhattarai, that had been elected and legitimised by CA-I, was of secondary importance but the NC, that was not a part of this government, prioritised this aspect far more than the elections to a new CA. Yes, the NC made the replacement of the Bhattarai government a precondition to elections to a new CA. Of course, this had been once again part of power struggles; the NC did not want that new elections were held under the control of the UCPN-M.

President Ram Baran Yadav also had got his legitimation by CA-I, but since Yadav had been elected from among the NC politicians the party took the view that he could remain in office.

(Maoist) and CPN-M respectively.

3 26 other seats were later nominated by the government as prescribed by the interim constitution. Thus, the total number of MPs was 601.

The NC leaders referred to the passage of the interim constitution that claims that the president should stay in office until a new constitution has been promulgated, i.e. for many years if necessary. The NC leaders even went one step further and asked President Yadav to unseat the Bhattarai government and replace it by a new one under the leadership of NC president Sushil Koirala.

This suggestion was based on a widespread misinterpretation of the role of the president. According to the interim constitution, the President is merely a representative head of state. Many people, however, including many politicians, believe the President of the Republic had as much power as once the king under the 1990 constitution. But President Yadav was well aware of his limited power and opposed to the suggestion of the NC.

Nine valuable months passed about this conflict. It was only in March 2013 that the leaders of the three major parties – UCPN-M, NC and CPN-UML – as well as those of the alliance of Tarai parties that was part of the Bhattarai government sat together and agreed on the formation of a transitional government headed by the Chief Justice of the Supreme Court (SC), Khil Raj Regmi. This government should only have the task to carry out elections for a CA-II as soon as possible. But the real power should be in the hands of a so-called High Level Political Committee (HLPC), i.e. the leaders of the just mentioned parties.

Both steps once again meant serious violations of the Constitution and the rule of law. An election government headed by the President of the Supreme Court could have been a perfectly rational option if Regmi had resigned from his judgeship before. But Regmi refused this because he was afraid to compromise his future pension benefits as a judge. Consequently, from now on executive and judiciary were in one hand. Although Regmi let his judgeship rest and an acting chairperson of the Supreme Court was appointed, the partiality of the Supreme Court became obvious whenever the legality of the whole process was addressed before the SC. The SC simply refused any discussion of this topic.

Similarly, the formation of the HLPC and its authority to exert power were not covered by the constitution. An option for a more democratic approach would undoubtedly have been a short-term reinstatement of the dissolved CA solely in its capacity as parliament. This reinstated parliament would have decided all the necessary constitutional and legislative changes and possibly also select a choice government. The necessary cooperation from the major parties seemed so given in March. Many legal experts had suggested exactly this way.

Despite of all these constitutional concerns, however, one has to certify in retrospect that the transitional government of Khil Raj Regmi has accomplished its task of holding elections to a new CA in an exemplary manner despite numerous adversities. The elections of 19 November 2013 were very peaceful, had an enormous turnout and gave the country back the lost legitimacy basis.

### ***Differences and similarities of the two constituent assemblies***

Four and a half years after the first elections to the CA, the voters rebuffed the former winners of the UCPN-M in November 2013.<sup>4</sup> Judging by the fact that this party had promised so many things to the voters in 2008 but later hardly could implement any of these promises, their defeat may appear as another testament to the democratic maturity of the voters. However, the latter had hardly any alternative than to bring NC and CPN-UML, that had been punished by them in 2008, back to power in 2013 even though these parties had a similar responsibility for the failure of CA-I as the UCPN-M.

Nine months after these elections, we can already say that the dominating parties of the failed political system of 1990 that have now returned to power have hitherto hardly caused positive

4 For the results of the elections to CA-II and first analyses see David N. Gellner, The 2013 elections in Nepal, *Asian Affairs*, 45:2, 243-261 (<http://www.tandfonline.com/doi/pdf/10.1080/03068374.2014.909627>) as well as Karl-Heinz Krämer, Elections to a second Constituent Assembly, In: *Think South Asia* 11, pp. 24-28 (<http://sadf.eu/home/wp-content/uploads/2013/12/TSA11.pdf>)

changes in comparison to CA-I. Western diplomacy likes to transfigure this since it still likes to identify "democracy in Nepal" with the rule of the NC.

Generally, the search for positive changes towards CA-I seems to be difficult. The victorious parties may carry other names, but still has no party an absolute majority, what has been shown to be a major problem in Nepal since 1994; Nepali parties have proved not to be able to form coalitions so far.

The election turnout was encouragingly high, however, doubts already come with the question of the registration of the voters if one considers that in November 2013 about 4.5 million voters less were registered than for the elections in April 2008. In view of the steady growth in population, this can hardly be explained with irregularities with the voter registration in 2008 or the high working migration. This migration predominantly involves the younger generation of voters. Thus, this generation became excluded from voting since there was no possibility to vote from abroad.

Although the election winners and election losers carry other names, there is a huge number of parallels compared to elections of 2008. Thus, for example, in both cases the losers did not want to accept their defeat, at least in the beginning, and spoke of electoral manipulations, although there was no evidence for this, neither in 2008 nor in 2013. And what does it mean winner or loser? The internal cohesion of the winner and loser parties leaves much to be desired as well, as will be discussed in the following subsection.

The adoption of a new constitution requires a two-thirds majority in the CA. CA-I was miles away from such majority because of the lack of cooperation between the three major parties, but also in CA-II do the winning parties NC and CPN-UML not have the needed majority.

There had been differences in CA-I not only between the UCPN-M on one side and NC and CPN-UML on the other side. At that time, all three major parties more or less stuck to contradictory positions on the key areas of the new constitution. This situation has not changed until today, because the time between CA-I and CA-II was not used for dialogue in relation to the disputed parts of the new constitution.

One of the most important steps that led to power abdication of King Gyanendra in April 2006 was the commitment by all major parties to work together to create a republican state that was based on inclusion, i.e. the equivalent and appropriate participation of all groups of society, the principles of democracy and the rule of law, as well as a federal structure of state. To guarantee inclusion, a mixed electoral system was created in which nearly about 60 percent of the deputies were elected by so-called, proportional representation lists (PR lists). The composition of the deputies elected in this way had in number exactly to correspond to the percentage of the primary groups of society. This should ensure that the representatives of these groups could represent the interests and concerns of their respective groups in the discussion of the new constitution.

Even in CA-I the reality, however, soon looked different. Inclusively composed committees were formed, that worked out proposals for the different areas of the new constitution, but the major parties that were almost exclusively dominated by male Bahuns (Brahmins) later did not allow any discussion of these proposals by the CA. At the latest, from the beginning of 2010 the leaders of the major parties put the rules of the interim constitution ad absurdum. Obviously, many of the proposals worked out by the committees were opposite to the interests of the highest party leaders. So they explained the discussion and elaboration of the new constitution a matter of themselves. Shortly before the dissolution of the CA-I, they declared publicly that they still wanted to find a last minute compromise and that the members of the CA should agree to this compromise without any discussion. Anyway, the interests of the traditionally marginalized groups were no longer recognizable in last traded compromise option.

In CA-II, even the attempt of a larger inclusion has fallen by the wayside. The interim constitution encourages the parties to take the idea of an inclusive participation of all social groups also into account when they nominate their up to 240 candidates for the direct election system (FPTP = First Past the Post). However, this is not binding and, hence, has been hardly

respected by the parties already in 2008. Maybe, the slightly more inclusive selection of FPTP candidates by the UCPN-M had then helped this party to win half of all direct mandates. But in 2013 the UCPN-M, as well, had adapted to the behaviour of the other major parties. In 2013, they all had significantly less FPTP candidates from among the traditionally marginalized social groups. At the bottom line, this means that CA-II is composed significantly less inclusive than CA-I. This aspect is even reinforced by the fact that the parties have also misused the PR system, by making the PR lists submitted by them confusing and later used this system to plant relatives, friends and other clients into CA-II.

### ***Factionalism within political parties***

To create a new constitution, sufficient majorities are required in the CA. The two-thirds majority that is prescribed for the adoption of the constitution can only be achieved through close dialogue and compromise of all three major parties. Not even the two current government parties, NC and CPN-UML, collectively have such a majority. Should there be a break-up of this government alliance, for which there are currently some indications, it would be even more difficult. In case of a coalition of any of the two current government parties with the UCPN-M, it would not even have an absolute majority in CA-II; it would need other coalition partners from the smaller and regional parties.

But the strength of the current government coalition with almost two-thirds of the deputies is deceptive. The problem is in fact that all three major parties – partly this is valid in similar manner also for many smaller parties – are not self-contained units. Factionalism within parties has a long tradition in Nepal. Usually, they are geared more to the leadership claims of certain party leaders than to ideological differences. The latter are more likely among left-wing parties, as it happened in recent time within the UCPN-M, but also in this case, individual claims to power played a major role. The problem with the evaluation of potential majorities in the CA is that the internal factions of a party often fight among themselves as if they were different parties. In this way, various governments were brought down by factional struggles within one of the parties to the government after 1990.

Within NC, the largest party in CA-II, which is also the main government party, three groups can be identified. One of these fractions is dominated by the Koirala family, that, with B.P. Koirala, not only provided for the founder of the party but also produced three other prime ministers. At least for this party wing, the NC is more or less indispensably connected with the name Koralala. Parallels to the Gandhi family within the Indian National Congress come here in memory. The head of this Koirala clan is currently Sushil Koirala, party leader and Prime Minister, who at least at the last party convention early this year could still unite 60 percent to his fraction.

The second strong fraction within the NC is that one led by Sher Bahadur Deuba. Among the top level leaders of the three major parties, he is the only Chhetri; all others are male Bahuns. Deuba's opposition to the Koirala fraction goes back to the mid-1990s. At that time, as a much younger politician he was the party's internal opponent of Girija Prasad Koirala, the most often prime minister of the political system of 1990. Though Deuba could not directly challenge Girija as party president, he nevertheless managed to become prime minister several times. Every time he played an inglorious role. In 1996, he ignored the 40 demands of the Maoists though most of them were reasonable and backed by the constitution; the Maoists then started their insurgency. In 2001/2 he was responsible for the mobilisation of the army in the fight against the Maoist insurgents, what led to a total escalation of the conflict. He split the NC, dissolved the parliament and, thus, paved the way for King Gyanendra's coup.

The third faction that is to be assigned to Ram Chandra Paudel only plays a minor role at the moment. Most recently, Paudel assisted the Koirala wing, nevertheless, is he discontented because no functions were intended for him and his followers on the part of Sushil Koirala.

Also in the other major ruling party, the CPN-UML, three fractions can be identified in which the claims to power of the party leaders Krishna Prasad Sharma Oli, Madhav Kumar Nepal and Jhala Nath Khanal play an important role. Oli is characterized by a very conservative stance

that one would rather suspect in the ranks of the NC than in a so-called "communist" party. Supported by other conservative politicians of this party, as Bam Dev Gautam and Bidya Bhandari, Oli initially was elected the parliamentary party leader of his party. Recently, he was also elected as the new president of the CPN-UML on the national convent of this party in July. His opponent in this election, Madhav Kumar Nepal, was only slightly inferior to him. When choosing the highest party positions both fractions performed equally strong. This may complicate the internal unity of the party and its external performance. Oli's predecessor, Jhala Nath Khanal, had renounced his candidacy, after it became clear that he would have no chance to be reelected. At the party convent, he supported the fraction of Madhav Kumar Nepal.

In the coalition government with the NC, the Oli faction of the CPN-UML has a strong presence with Bam Dev Gautam as interior minister and deputy prime minister. Gautam repeatedly struck by ultraconservative perception perspectives, for example in respect to position and rights of women. He is also one of the biggest supporters of impunity for crimes that were committed in the decade of the Maoist insurgency. At the same time he showed special bondage to China, when he wanted to prevent the cremation of a deceased high Tibetan Buddhist Lama on Nepalese territory in July. Currently, his ministry is once again in the critics because of the government's extremely poor handling of numerous natural disasters that have met Nepal this monsoon.

Currently, the CPN-UML seems to distance itself a bit from its coalition partner. Background is the fact that Prime Minister Koirala refuses to comply with some of the coalition agreements. The CPN-UML, for example, had pushed through in the coalition agreement that the president should be re-legitimized by CA-II. Koirala seems to care less so. Originally, the CPN-UML had even demanded that the president should be a leader of the CPN-UML. Most legal experts regard a renewed legitimisation of the president by CA-II as absolutely necessary. Besides, the CPN-UML is also discontented with the way in which the government is run by Sushil Koirala. But despite such differences, there should be no rational alternative to the current government coalition; only the person of the Prime Minister or some of his ministers may be disputed sooner or later.

Similar to the two ruling parties, the UCPN-M as well was split into three major fractions for a longer time. The largest group is still behind party chairman Pushpa Kamal Dahal, who in the past jumped on bandwagons quite opportunistically, depending on whether he turned to the more radical forces or to the more democratic forces within his party.

Dahal's main opponent within the party is Baburam Bhattarai, who has distanced a bit from his ideological sharpness in recent years and today appears rather as a rational party leader within the UCPN-M. His time as Prime Minister during CA-I was at least the phase with the most intensity in the work on the peace process and the new constitution. But the integration and rehabilitation of former Maoist guerilla fighters that was concluded under his government, was from the perspective of his party only partially successful. Regarding the passage of a new constitution, he has slumped completely in cooperation with all other top politicians of the country. His reputation which he had partly acquired by his government work, has been more or less ventured by his supportive attitude of impunity for crimes from the time of the insurgency.

Currently, Bhattarai tries to put Dahal under pressure within the party. For weeks, parallel party structures have been built up by followers of Bhattarai. Officially, both leading politicians stress that they want to preserve the party unity. Nevertheless, the trend to a possible further split in the party is quite recognizable.

Such a split hit the UCPN-M in mid-2012, shortly after the dissolution of CA-I. At that time, the most radical faction under the lead of Mohan Baidya split off from the mother party and called itself CPN-M what had been the original name of the Maoist party. With his call for a boycott of the elections to CA-II Baidya has definitely afflicted damage to the UCPN-M. Presumably, the loss the party would have been considerably less if it had gone united into these elections, but all in all this would not have prevented the party's defeat. The strength of the new CPN-M is difficult to assess, because this party did not participate in the elections. Its leaders often deliver very radical speeches and even threaten with a new revolution. But for

this the party is currently lacking strength and organization. In addition, there has lately been a tendency to the formation of factions within the CPN-M as well. Baidya wants that the new constitution should not be worked out by the elected CA-II but by a roundtable of all parties.

### ***Most disputed aspects of the new constitution<sup>5</sup>***

Rather cockily had the leaders of the three major parties claimed in early 2014 that the new constitution would be adopted by January 2015. More than nine months have passed since the elections. Most of the committees that have been formed to prepare a draft of the new constitution have no chairman till today, because the parties cannot agree on the distribution of these jobs among themselves.<sup>6</sup> This complicates the work of these committees. So far, the committees have managed the compilation of all those decisions and agreements that had been made among the party leaders during CA-I. It is generally agreed that these agreements should be retained. And with this, a number of problems start again, because at that time agreements were repeatedly changed. The final compromise of the major parties in the CA-I for the design of the federal states had at that time, for example, triggered nationwide massive ethnic unrest, because traditionally excluded groups realized that their main concerns would be disregarded once more, while the original suggestions of the responsible CA-I committee had taken the interests of the disadvantaged sections of society into account. The party leaders did not want these suggestions in 2012 and they still do not want to accept them in 2014.

The committees of CA-II have also concluded agreements on issues for which no agreement could be reached in CA-I. For a number of contentious areas compromises have since been solved. This is not least seen as a merit of Baburam Bhattarai (UCPN-M), who heads the Political Dialogue and Consensus Committee (PDCC) of CA-II. But by mid-August one had hardly dealt with those issues that ultimately led to the failure of the CA-I in early 2012.

This includes, for example, the form of the future government system: Should it either be a presidential or a parliamentary system? Another fundamental question in this context is what role and position the president will have in the future and how and by whom he will be selected. Should Parliament have one or two chambers?

Recently, there are signs that the top politicians will probably agree on a two-chamber parliament with certain parallels to the shape of the failed system from 1990. The number of Members of the House shall be limited to 235. Of these, 118 are to be elected by direct suffrage, the remaining 117 on the basis of proportional representation lists.

The Upper House is to include 65 members and shall be chaired by the Vice President. Of its 65 members, ten seats shall be reserved for experts from various fields. 13 seats will go to oppressed and marginalized groups in society; they shall, however, be nominated by the government, which would definitely not mean a representation of these groups. The parliaments of the federal provinces shall have 35 MPs each.

After the elections to CA-II, especially NC and CPN-UML plugged for the abolition of the proportional election system. This, however, would mean the abolishment of a key instrument for improved participation of traditionally marginalized social groups. According to the state of the negotiations, this suggestion seems to be off the table, but the plans also mean that the proportion of MPs determined under the PR system would drop from the current 60 percent to just under 50 percent. Because politicians from among the marginalized social groups only have a very limited chance to be set up by the male Bahuns at the top of their parties as direct

5 While this article is written, there is intensive discussion of the most contentious issues of the new constitution under way. Preliminary decisions change almost on a daily base. The author tries to keep the state of affairs up-to-date, but the reader must be aware that the situation may change the very next day. A first draft of the new constitution has been ready in early September if the new constitution shall be promulgated in January 2015.

6 It has now been announced that the election of these committee heads shall take place on 27 August, though this doesn't mean much.

candidates, the much-needed inclusion of all groups in society would be prevented once again. Therefore, a fundamental revision of the direct election system would be important. In the past, this system has been misused by all party elites in order to maintain their privileges. This should go hand in hand with the commitment of the parties to internal democratization and transparency of their finances.

The UCPN-M has recently proposed to reserve some of the direct mandates for the marginalized sections of society in future. This proposal could help to make the direct election system more inclusive. Since NC and CPN-UML, however, oppose this proposal, the future electoral system is an issue to which a compromise is not in sight at the moment.

There was another proposal to introduce a run-off vote for the direct election system, if the winning candidate of a constituency cannot achieve an absolute majority of votes in the first ballot. This proposal was immediately contradicted by the Election Commission with regard to effort and costs of such proceedings; in view of the experience, the expectingly high number of candidates would make a second ballot more or less the norm.

The areas of justice and security, as well, require urgent revision and adaptation to modern needs. The number of army personnel, for example, was extended at the time of the Maoist insurgency and an Armed Police Force (APF) was introduced between it and the police. The integration of former combatants, even if it were relatively few, has further increased the army in number. The external defence of the country is rather a secondary objective of the Nepal Army. It could not match up to any of the two neighbouring countries as a defence force in case of external aggression. But the country has huge internal problems in whose solution the security forces are likely to play an even greater role in the future. This does not only concern the control of militant groups and rising crime incidents, but also the army employment in case of natural disasters and the maintenance and expansion of infrastructure. Here the army has already done a good job in the past, however, this job will come to the fore in future more and more. For this purpose, the structure and equipment of the security forces must be urgently revised. In particular, a control of the security forces in regard to the respect of fundamental human rights must be made, which are more or less ignored by them so far. The requirement of a conscription, as it was demanded by some leftist parties including the UCPN-M, on the other hand, does not seem up to date and is unlikely to find a majority in CA-II.

Even the justice sector is waiting for a fundamental reform. The current system appears to be completely overloaded and understaffed. Courts are often not staffed for a longer term. In case of restaffing, there are often irregularities as the professional competence of the judges is given only subordinate importance. In more or less every court, the pending cases pile up often for years. One decision already seems to be in the offing within the framework of the new Constitution: There shall be a Constitutional Court in future, that would then be responsible for all constitutional interpretations. So far, this task has been done by the Supreme Court. But the ongoing discussions show that this issue is not yet off the table.

The biggest unsolved problem, however, is without any doubt the design of the federal state. The discussion of this topic had contributed decisively to the failure of CA-I in 2012. Not only were there irreconcilable differences between the political leaders of all parties, but the discussion among the politicians also led to nationwide riots on the streets. One can say, that the design of the federal state will have fundamental importance, if the new constitution shall be the basis for lasting political and social improvements.

It is a big problem that the major parties did not have any serious dialogue on this topic after the failure of CA-I. Yes, There has actually not even been any interest in this topic within any of the parties. The situation was extremely messy in 2012 and determined by misleading arguments. A clarification and convergence of these positions today appears impossible within the remaining months before the proposed date for the adoption of the new constitution. The parties have not even signified any intention that they are ready to move away from their former hardened positions.

In principle, the political leaders actually failed in 2012 on secondary issues, such as the name of the future federal constituent states, their number and their boundaries. The interests and

privileges of the male members of the few castes that dominate the state elite has unmistakably played a very crucial role. They constructed specific fears that the creation of the federal provinces could possibly help that traditionally marginalized ethnic groups and cultures could obtain a relative majority in the future federal provinces. It was suggested that this would endanger the unity of the country and lead to the emergence of separatist movements.

Such fears were further encouraged by the misinterpretation of ethnic interests and demands.<sup>7</sup> Fact is that some 250 years ago the current centralized unitary state has been created by the military subjugation of numerous small states and areas that had been inhabited by larger ethnic groups. This central state has been exclusively identified with the culture and language of a few so-called high Hindu castes of the highlands, whose prominent position was further strengthened by a modification of the caste system and it even became enshrined in the laws of the country. All other social groups of the country neither had nor have approximately equal chances of participation in this system.

This bad state of affairs has to be eliminated under the new constitution. This means that the present exclusive beneficiaries of the unilateral system will have to lower their sights in respect to their own privileges. They will have to recognize the ethnic languages and cultures as equal to their own ones and they must start to deal with them.

Nepal today is not only in its entirety a multiethnic, multilingual and multicultural country, but also all future federal constituent states will have these aspects as well, no matter how they are named and how their boundaries will be. The current state elite paints the spectre of so-called single ethnic identity based federal states and fails to recognize that the current system of central state is one based on single ethnic identity as well.

Such one-sided focus of the future federal provinces has certainly to be avoided because it only means that the current national problems would be transferred to the future federal states. However, it is hardly to explain why these provinces should not correspond to traditional ethnic territories and why they should get traditional names. This would be a kind of recognition of ethnic history and inclusion, it could strengthen the self-esteem of the disadvantaged ethnic groups and give them a better chance to obtain and maintain their languages. This is what has been denied to them by the central government to this day. Such a concession would rather have an integrating effect than a separatist one.

But all this would still only concern the framework of the federal system. Far more complicated will be the appropriate treatment of the economic and fiscal aspects of this system. The number of future provinces as discussed in the CA-I had only been based on ethnic aspects. The proponents of a stronger ethnic emphasis of the new states have so far paid little attention to the economic potential of the proposed provinces. But their opponents as well, mainly concentrated on the avoidance of relative majorities of other social groups in these federal states.

Already under the non-party Panchayat System (1961-1990) that was introduced by King Mahendra, the country was divided into three, later four, then five so-called development regions. As in case with the administrative division of the country into 75 districts, were traditional ethnic settlement areas deliberately cut. Today's proposals by the two ruling parties, NC and CPN-UML, for the allocation of the six or seven federal sub-states are very similar to those development regions that have been created in Panchayat times. These proposals are therefore less likely to encounter greater support by the ethnic groups. The UCPN-M has long acted as if it would identify itself with the demands for ethnically-based provinces. Their corresponding compromise with many demands of NC and CPN-UML - who were then in a minority - in the final stages of CA-I led to nationwide ethnic unrest and may have played a major role for the heavy losses of the party in the elections to CA-II. Supporters of the proposals of NC and CPN-UML interpret this vice versa when they explain the losses of the UCPN-M with its commitment to ethnic and regional interests of relative minorities.

7 Nagendra Kumal, the president of Nepal Federation of Indigenous Nationalities (NEFIN), the umbrella organisation of about 60 ethnic organisations, has made this recently clear in an interview: That Janajatis want 'ethnic states' is baseless propaganda, The Kathmandu Post, 25 August 2014

The design of the federal state will be crucial for the future of the country. It requires a middle course between economic rationality and better social inclusion and integration. How the parties want to manage this balancing act, is not visible at the moment. It seems impossible that this task can be solved within the few months that remain until the proposed date for the promulgation of the new constitution.

### ***Politics and stability of the current government***

The current government led by Prime Minister Sushil Koirala (NC) had great initial problems that have still not been overcome to some extent. Because of the great share of votes for the two parties, there was hardly any rational alternative to the current coalition government of NC and CPN-UML. Both parties are almost equally represented in the CA, with a slight advantage for the NC. Therefore, it was logical that this party would also provide the Prime Minister. But this was already the beginning of the dilemma. Both government parties actually don't have a charismatic leader who might appear suitable for the task of leading the government in this critical phase of the country. The choice finally fell on Sushil Koirala, after he could prevail as parliamentary party leader of his NC in the CA.

Koirala has always been a good party worker, but he has previously never held any public state office. In the elections of 2008, the voters had rejected him in two constituencies. His weaknesses are serious after just over half a year in office. The dissatisfaction with his non-existent style of government is more and more openly expressed. Since neither Deuba nor Paudel represent a rational alternative, the NC makes up for a little stable future perspective. This is complicated by the fact that the NC, as the other major parties also, has so far refused to give the youth from their own ranks any chance in the party hierarchy.

Prime Minister Sushil Koirala already was of poor health when he took office. Recently, he was diagnosed with lung cancer and he stayed several weeks for treatment in New York. Even after his return to Nepal the health problems do not seem to decrease; in September, further treatments will be necessary in New York. In this critical phase, Nepal actually would need a strong leader with charisma. But this gets lost to Sushil Koirala not only because of his health problems.

Sushil Koirala is not able to manage the difficult tasks he is confronted with, neither within the government nor within his party. Thus, several ministries are still without ministers. Half of the diplomatic missions of Nepal are without ambassadors, partly for over a year. Many positions within government bodies and commissions are still not filled, including the National Human Rights Commission (NHRC). Important bodies of his party are not occupied, conventions, such as national one of the student organization of his party, the Nepal Students Union, are postponed time and again. Many envisaged and partly urgently needed reforms cannot be tackled because of the inaction of the government.

The remaining 26 MPs of CA-II who actually should have been nominated by the government of Khil Raj Regmi before the first meeting of CA-II are still missing. According to the Interim Constitution should all decisions of CA-II, including the election of the government, have only been taken after the nomination of these MPs. This may only be forgivable in respect to the election of the Koirala Government, because the Prime Minister would have been elected by the large majority of the two governing parties anyway. But it does not explain and apologize that the missing 26 MPs are still not named after more than half a year.

When it was announced in late August that these 26 MPs are now to be nominated at last<sup>8</sup>, i.e. at a time when the CA is already trying to complete the first draft of the new constitution, it became immediately clear that the government as well as the opposition parties do abide neither by the provisions of the interim constitution nor its interpretation by the Supreme Court. As indicated already for months, the positions of the 26 MPs shall now be distributed to the parties according to their strength in the elections: 9 for the NC, 8 for the CPN-UML, 4 for the UCPN-M, 1 for the RPP-N and 4 for smaller parties. According to the interim constitution,

8 This plan had already failed once again when this paper was sent to the publisher.

these mandates have to go to deserving public figures and members of groups that are still not represented in the CA so far. The Supreme Court had already interpreted this passage of the interim constitution in this way a few months ago.

The economic policy of the government, as well, is rather disappointing. With Ram Sharan Mahat, Koirala has an experienced and capable Finance Minister to his side, but the annual budget recently presented by him is far away from what had been hoped for. Its focus is on improving the infrastructure, i.e. especially the construction of new power plants and the improvement and extension of the road system. Particularly disappointing is the education budget, which is the lowest for ten years with 13.91 percent of the total budget. Basic approaches to reduce the huge unemployment by creating jobs in Nepal, one of the biggest economic problems of the country, are not really recognizable. The better educated youth anyway prefers to look for better paid jobs abroad. For the less well or not at all educated young people, the only exit is labour migration to countries such as the Gulf States and Malaysia, where they only find poorly paid and exploitative jobs. Their remittances are of great importance for the country. But Nepal must find a way to provide jobs for her young society at home on a greater scale. More than half of the population is younger than 23 years.

One of the most controversial decisions of the government was the adoption of a law to establish a Truth and Reconciliation Commission (TRC) and a Commission on Enforced Disappearances (CED). Since the TRC Act gives the aspect of reconciliation priority over justice for the victims of crime from the time of the Maoist insurgency, it has encountered massive national and international criticism from human rights activists and lawyers. In its current form, the law opens the door to impunity for capital crimes from the time of the insurgency. Interested in this are not only the perpetrators, who at that time came from the ranks of the security forces and the Maoist rebels, but also politicians of the current coalition government, who as members of the then governments had at least a political responsibility for those crimes. Like so many other things tackled by the current government, the controversial TRC law only exists on paper. A commission that was formed to make recommendations to the occupation of the TRC, is marking time, because, for example, the NHRC is still not occupied, but it has to be involved in the TRC commissioners by law.

Dissatisfaction with the government comes both from Koirala's own party and the coalition partner CPN-UML. The latter is particularly unhappy because the coalition agreements are not observed. The media and civil society, as well, increasingly blast the government. The inability of the Koirala government to deal with the natural disasters that affect Nepal in recent weeks is seen by the general public as another example for the weakness of this government.

### ***Relations to India and China***

Good relations with her two large neighbours, India and China, are vital for Nepal. Both neighbouring countries see Nepal as a buffer state, that plays an important role in their security ambitions. Due to the geographical location, the relations of Nepal to India have always been intense. But with the improvement of the infrastructure across the Himalayan chain have also relations with China gained in intensity. Both countries are investing in further development of Nepal's infrastructure and China is well on the way to contest India's leading role.

Mao's ambitions of the early 1950s to "reintegrate" Nepal and other Himalayan States into China are no longer an issue. For a long time, the focus of Chinese interest had been to stop political activities of Tibetan refugees in Nepal and at the same time to make the common border as impermeable as possible. Today, China sees Nepal as an important transit country for intensified trade with India and for access to the Indian Ocean. The expansion and improvement of cross-border roads with active and financial support from the Chinese speaks for itself. Now it seems that even the connection to the Tibet Railway, which has been completed up to Shigatse in these days, is a realistic feature. At several common border crossings, China is going to build dry ports on Nepalese territory to facilitate the common trade. The number of flights from Nepal to Tibet and China has been extended. Chinese

nationals show a growing interest in travelling to Nepal, as the tourism statistics show. All this paints a very positive picture of Sino-Nepalese relations.

In contrast, the relations between Nepal and India did not make much progress in recent years. A fresh breeze has come up only with the new Indian government under Prime Minister Narendra Modi. His recent visit to Nepal, that had been preceded by a visit of his Foreign Minister Sushma Swaraj, has regenerated hopes that the relations with India could finally take a better turn as well.

There are still great resentment on both sides, that is based on recent experience. Basis of Indo-Nepalese relations is still the Treaty of Peace and Friendship of 31 July 1950, that had been concluded between the young independent India and the Nepalese Rana oligarchy which, at that time, had been fighting for its survival. Some of the treaty's passages are nowadays detrimental to Nepal and require adaptation to the modern realities, but this has so far been rejected by India. In addition, Nepal still has memories of the first years after the abolition of the Rana system, when Indian politicians left no doubts that they considered Nepal as another Indian princely state, from which they expected that it would be rapidly integrated into the Indian Union.

But even after India had resigned herself to an independent state of Nepal at its northern border, it still made Nepal feel her dependence as a landlocked country on many occasions. Nepal is clearly on the receiver side, as the extremely one-sided trade relations between the two countries testify. The behaviour of India towards Nepal fluctuates today between generous giving and the exploitation of the Nepalese situation by misusing the inexperience of its representatives in arranging agreements.

Actually both countries should have an interest to draw their benefits from a good cooperation. Both countries share common river systems with their benefits as with their dangers. Nepal, for example, is attributed to have an enormous energy potential that is so far hardly used. Nepal needs Indian investment for better exploitation of this potential. This would help Nepal to meet her own needs, and India is in urgent need of energy from Nepal. In general, it had been expected that a corresponding agreement would be concluded during Modi's state visit to Nepal in early August. But on the one hand, Nepal's politicians were not prepared enough for such negotiations, on the other hand, some of the Indian requirements brought back memories of earlier agreements in which Nepal had been treated at a disadvantage. Modi, however, has made clear that India continues to be interested in a quick agreement.

When Modi took office as Prime Minister of India, concerns had arisen that he could try to interfere in the internal politics of Nepal. Officially, Nepal has come out in favour a secular republic within her current interim constitution. There had been fears that India's ruling party BJP (Bharatiya Janata Party) as a member of the Sangh Parivar, the large family of Hindu nationalist-oriented groups in India, could at least stand up for a return to a Hindu State in Nepal. In recent history, Hindu nationalist forces of India had repeatedly praised Nepal's Hindu state and eulogised its Hindu monarchy as the ideal form of government. In his speech in front of the Nepali parliament on August 4, Modi made clear that he does not want to interfere in the internal affairs of Nepal. Instead, he urged the Nepalese politicians strongly to rapidly complete the chosen path of reforms, and this sounded credible.

### ***Perspectives for stability and constitution***

So, the image of Nepal after the elections to CA-II is a mixed one. A very great achievement is that politics has returned to a state of legitimacy, viz. in terms of both the legislative and the executive. But major problems persist despite this legitimacy in respect to the tasks ahead.

The Government is not up to their tasks. Many things that should have been settled immediately after the formation of the current government have still not been settled. Not only Prime Minister Sushil Koirala but also the chairperson of his coalition partner CPN-UML, Krishna Prasad Sharma Oli, have both major health problems, which lend doubt to their qualification to address the urgent tasks. Generally, the coalition government is even after more than half a

year still not the necessary unit that could be a basis for trust.

But the work of the opposition, whose main force is the UCPN-M, is disappointing as well. Its job should be to control the government and to draw attention to its errors and omissions, of which there are really enough. Whether it comes to the still not nominated 26 CA members the unoccupied ministries, the numerous unoccupied state commissions and organizations, the missing ambassadors, there is no pressure from the opposition. A total of 34 much-needed economic legal initiatives have been launched by the government in recent months, but no one knows why these processes are not completed. It just is not going smoothly, what may be interpreted as a weakness of the government.

In addition, a general election at the local level is urgently needed. The last local elections took place in 1997. Since the then Prime Minister Sher Bahadur Deuba (NC) dissolved these bodies unceremoniously in July 2002, their duties are perceived by officials. Local development projects are inhibited and corruption runs wild, because the actually intended control functions no longer exist. Even if the new constitution, which will provide for a federal system, is concluded next year, it will take years until this system will actually be implemented in full. After the elections to CA-II, the politicians had announced local elections within only a few months and the Election Commission then made necessary preparations. But political leaders make no attempt to actually conduct such elections. And the opposition also shows little interest since, at the present time, it must fear to suffer a similar defeat as in the previous November elections on the national level.

CA-II, which simultaneously functions as the legislative, has completed the reprocessing of the agreements of CA-I within the self-imposed time frame. Also some of the contentious areas of CA-I could be settled. But the discussion of the real problem areas, such as the federal government, has only started in recent days. The respective attitudes of the major parties still seem to be continued and hardened.

If the new constitution, as announced by the leaders of the major parties, shall actually be adopted on January 22, 2015, then a first draft must already be completed in early September 2014. This seems simply impossible. Moreover, the sense of a hastily assembled new constitution, which only bears the signature of the exclusive party elites and ignores the concerns of marginalized groups in society once again, is more than questionable. Precisely this development seems to be in the offing at the moment. The foreseeable consequence of continued crisis is deliberately concealed by the ruling state elite and often misunderstood by the western world. Democracy means not only the presence of seemingly democratic structures. As long as these structures serve only the currently prevailing and socially extremely one-sidedly composed elite to safeguard their interests and privileges, it is more of an oligarchy than a democracy.

It be particularly important, therefore, that option for later changes and additions to the new constitution are regulated in a rational way. In any case, with respect to the present approach it has to be assumed that not all areas of the new constitution will be regulated in a form that actually would be necessary, not least because the concerns of traditionally marginalized groups in society are again not taken into account.

Including the not promulgated constitution of Prime Minister Padma Shamsheer J.B. Rana of 1948 and the transitional law of 1951, Nepal has already received six constitutions in the last 75 years. If the seventh constitution shall be aligned for a long run, then the shortcomings of the previous constitutions must be avoided. This is especially true in comparison to the Constitution of 1990 This was the first constitution of the country, that could be described as democratic. But it had very serious shortcomings, because it did not treat all people of the country as equal. This contributed to the emergence of the Maoist insurgency and the failure of the 1990 political system.

The inclusion of all groups in society must be enshrined in the new constitution. There must be no different treatments and opportunities, whether for women, men, Dalits, Madheshis, Janajatis, Bahuns, Chhetris or Muslims. The intended federal state must contribute to decentralization and to an upgrading of the rural areas and, at the same, time it has to provide economic viability. Taking into account the traditional areas of greater ethnic territories and

their ethnic names, would give these traditionally excluded groups self-esteem and it would thus contribute to national integration. All cultures and languages in the country must be recognized and promoted, though the role of Nepali, the mother tongue of 44 percent of the country's population which is the native language of the ruling elite, must remain untouched as the national language for rational reasons.

Eventually, various areas of public life require comprehensive reforms to promote stability of the future system. A few such reforms have already been initiated by the current government, though, it seems, half-heartedly as many other things done by this government. These reforms should be enshrined in the new constitution. They include, for example, the judiciary, education, health and the security forces. Human rights need to be better enshrined and protected in the constitution. The close linkage of politics and criminal elements must be stopped in the same way as the enormous corruption that prevails in all areas and on all levels. Nepal only has a chance of lasting stability when all this will be addressed and implemented. Doubts remain that this will be possible with the current generation of politicians.