



**Nepal After the 2013 Constituent Assembly Elections
June 26, 2014**

I. Introduction

This brief report contains the findings of a limited Carter Center assessment of the political and constitutional process in Nepal after the 2013 constituent assembly (CA) election. The report's purpose is to summarize the accomplishments of the new CA to date, identify opportunities for and risks to further progress, and respectfully share recommendations for consideration by Nepal's political leaders, CA members, and civil society. The assessment is based on interviews conducted with representatives of political parties, civil society, other citizens, and the international community in Kathmandu in late May 2014 and in Kailali, Kanchanpur, and Kaski districts in early June.

The Carter Center maintained a full-time presence in Nepal between January 2007 and February 2014 to observe and support the peace process, constitution drafting, and election process, including voter registration.¹ Although the Center no longer maintains an office in Nepal, President Carter and his staff continue to follow with interest Nepal's efforts to produce a new constitution that fulfils the aspirations of the Nepali people and 2006 peace process. The Center offers this report in a spirit of mutual respect and support, and consistent with its long-term, cooperative relationship with the people and government of Nepal. The Center wishes to thank the Nepali political party members, civic activists, and citizens, as well as members of the international community, who generously offered their time and insights in support of this assessment.

II. National Context

After a period of delay in forming a new government following the Nov. 19, 2013, CA election, the Legislature-Parliament elected Sushil Koirala of the Nepali Congress as prime minister on Feb. 10.² On March 28, the CA adopted revised rules of procedure and unanimously agreed to inherit ownership of the work of the previous CA, in effect declaring the work of the new assembly to be a continuation of the achievements of the 2008-2012 CA. On April 4, the CA adopted a calendar under which it is to promulgate a new constitution by Jan. 22, 2015. The CA established five committees to undertake its work, and appointments to the committees were largely without controversy. The legislature-parliament also passed a long-delayed bill on transitional justice that will establish a Truth and Reconciliation Commission (TRC) and a Commission on Enforced Disappearances.³

¹ Previous Carter Center reports on Nepal's peace, constitution, and voter registration processes are available at: http://www.cartercenter.org/news/publications/peace/democracy_publications/nepal-peace-reports.html. Previous Carter Center election reports are available at: http://www.cartercenter.org/news/publications/election_reports.html#nepal.

² The Carter Center and other domestic and international observation groups found that the election was generally conducted peacefully and in accordance with international standards. Several parties, including the UCPN(M) and some Tarai-based parties, have alleged that fraud occurred during the process, and in June 2014, an interparty parliamentary panel was formed to investigate the allegations. Members of the constituent assembly also serve as the representatives to the unicameral legislature-parliament.

³ The bill was passed amid controversy over several of its provisions, particularly a provision that allows the TRC discretion to grant amnesty to perpetrators of serious crimes.

Three committees crucial to moving the process forward, and headed by senior leaders, are undertaking work in a timely manner perceived as credible by a wide range of Nepalis interviewed by The Carter Center. A Constitutional Records Study and Determination Committee, led by Bishnu Prasad Poudel of the Communist Party of Nepal – Unified Marxist-Leninist (CPN-UML), is charged with reviewing the documents produced by the first constituent assembly and identifying “agreed upon” and “disputed” issues. Agreed upon issues are being forwarded to the Constitution Drafting Committee, headed by Krishna Sitaula of the Nepali Congress (NC), and disputed issues to the Constitutional-Political Dialogue and Consensus Committee, headed by former Prime Minister Dr. Baburam Bhattarai of the Unified Communist Party of Nepal (Maoist; UCPN(M)). In addition to forging consensus within the CA, the dialogue committee is charged with consulting organized groups with little or no representation in the CA, including the Mohan Baidya-led Communist Party of Nepal (Maoist) and representatives of identity-based organizations.

On the basis of the work of the records committee, the CA has begun debate on major issues including land reform, state restructuring, and form of government. In many ways, the government and CA are off to a promising start, with an emphasis on consensus and outreach and with wide participation of members in debates on crucial issues. However, the process has been marred by controversy over judicial appointments and, in particular, the failure of the Council of Ministers to agree on persons for 26 CA seats that are to be filled by appointment.⁴ On May 12, the Supreme Court ordered the government to appoint the members within 15 days and according to the spirit of the interim constitution, which reserves these seats on a nonpartisan basis for eminent figures and for persons from underrepresented indigenous communities. Rather than comply, the government petitioned the court to review the ruling, a petition the court has accepted. The failure to appoint the 26 members deprives the CA of the diversity of voices that these seats are intended to guarantee, reduces public confidence in the constitution writing process and, potentially, exposes the work of the CA to future legal challenge.

In this context, political leaders, civil society representatives, and citizens alike expressed to The Carter Center a cautious optimism that the new CA would produce a widely agreed upon constitution within a reasonable period of time. Yet, there also was concern that old patterns of political deadlock could return, and that political will to address historical injustices and underlying drivers of conflict may have faded. The main findings of the Center’s limited post-election assessment, as of early June, are summarized below.

III. Findings

A. CONSTITUTIONAL AND POLITICAL PROCESS FINDINGS

- 1. A wide range of Nepalis told The Carter Center that they believed a spirit of compromise and consensus prevailed following the elections, which will facilitate the efforts of the new CA to reach agreement on contentious issues and draft a new constitution.**

There is broad agreement that the second CA has much potential and that, for the moment, a spirit of compromise and consensus prevails among major political actors. Government and CA efforts to promote an inclusive constitution-making process and produce a constitution on the basis of consensus rather than

⁴ Article 63(c) of the interim constitution specifies that 26 CA members are to be “nominated by the Council of Ministers, on the basis of understanding, from amongst the prominent persons who have rendered outstanding contributions to national life, and the indigenous peoples which could not be represented through the elections referred to in Clauses (a) and (b).” Available at: http://www.lawcommission.gov.np/index.php?option=com_remository&Itemid=52.

a two-thirds vote are in the early stages but, so far, are viewed as credible and welcome.⁵ Members of government parties stressed the need to include groups and political forces without extensive representation in the CA to ensure sustainability of compromises on constitutional issues. In Kathmandu and the districts, representatives of political parties and interest groups expressed willingness to be flexible on their issues of core interest in order to bring a new constitution, as much as possible, by consensus.

Several interlocutors noted that, unlike in 2009-12, factionalism within the major political parties does not map onto clear public disputes over policy and strategy. For the moment, this may make cross-party cooperation and agreement easier than in the past in spite of continuing difficulties within political parties. The successful passage of the bill establishing a TRC and Commission on Enforced Disappearances was suggested as evidence of the importance of this change to the political process. One probable reason for this development is the successful implementation of the 2011 agreement on former Maoist combatants, who had been in cantonments since 2006. The closure of the cantonments was seen by many as a decisive event that made the peace process “irreversible” and thus tempered disagreements within the NC and CPN-UML over the credibility of agreements reached with the UCPN(M).

2. There is broad concern that the CA's promising start, as well as opportunities for progress and consensus, may be squandered by a lack of effective, proactive leadership.

Party members, civil society representatives, and other citizens identified several failures of leadership that they worried posed risks to the constitution writing process, including a potential for a return to old patterns of deadlock. The failure of the Council of Ministers to agree on the 26 appointed members of the CA was the most widely cited instance of a lack of leadership. A senior UML member complained, “There can be no justification for the delays in their nomination. Many, many people expect positions and the parties have no way of sorting the competing demands. There is a real lack of leadership.” There was widespread worry that the government would use the positions as party patronage posts rather than in accordance with their purpose to promote a diversity of views in the CA.

A perceived disengagement of senior political leaders from core constitutional issues also was seen as slowing progress. In contrast to the robust debate underway in the CA, an NC member in Kathmandu observed that senior leaders of the political parties lacked a sense of “urgency” and warned that a “passive approach will not work” to build consensus on difficult issues. A lawyer who works closely with CA members affirmed, “There needs to be top-level discussion on state restructuring, forms of governance, the election system, citizenship, and the model of the judiciary. There needs to be some basic understanding at the most senior political levels.” A UML member suggested that “formal, high-level discussion is needed but not sufficient. Sometimes informal discussions can be more productive.”

3. In particular, a perceived failure of senior political leadership to unambiguously recommit to honoring foundational principles and core agreements of the peace process and first CA is causing doubt about the government's agenda.

A large majority of interlocutors believed that the government would honor past agreements within the CA, as well as the commitments of the Comprehensive Peace Accord (CPA) and subsequent agreements between the state and historically marginalized groups. However, despite the CA’s adopting ownership of the work of the previous assembly, there was a widespread perception that senior party leaders had failed

⁵ The principle of decision-making on the basis of all-party consensus has been a cornerstone of Nepal’s peace process. In addition, Article 70 of the interim constitution requires that the CA vote on each article of the proposed constitution and attempt to pass articles unanimously. If the CA is unable to reach consensus on any article, parliamentary leaders are required to attempt to negotiate an agreement within 15 days. If consensus is not reached, the article may be passed by a two-thirds majority of the CA.

to publicly and unambiguously recommit themselves to the accomplishments of the CA and peace process to date. Doubt about the government's commitment to past agreements was seen as undermining opportunity for constructive political debate and was reportedly making it more difficult to build confidence among historically marginalized groups and others. It also was seen as increasing the risk that contentious issues resolved in the first CA would be reopened and potentially undermine the ability to promulgate a constitution on the basis of broad consensus.

Uncertainty and disagreement about how to interpret the 2013 election results appeared to be one reason for the continuing ambiguity in political leaders' positions. Some analysts suggested the results simply reflected discontent with the leadership of the UCPN(M) and Tarai-based parties, while others believed the election was in effect a referendum on contentious constitutional issues, and particularly a vote against the creation of federal states based on single ethnic identities. The strong showing of the RPP-N, which advocates the restoration of the monarchy and of Nepal as a Hindu state, and the recent overwhelming electoral victory of the Hindu nationalist Bharatiya Janata Party in India, also have raised the question of whether the Nepali state's current secular character would be revisited.⁶ Without question, more conservative forces in Nepal appear emboldened by the election, and debate was widespread whether Nepal would return to the constitutional structure and less inclusive patterns of governance of the 1990s. Or conversely, whether such a reversion even would be possible given the rapid socioeconomic changes of the past two decades and widespread public demands for equitable development. How the significant changes in party representation in the CA should affect negotiations in that body and among parliamentary leaders, especially in the context of efforts to maintain a politics of consensus, is a challenging question that will require leadership and dialogue to resolve. However, interpretation of the results of general elections is a fraught exercise, and caution is warranted before extrapolating electoral mandates to specific policy questions.

Representatives of historically marginalized groups emphasized to The Carter Center that past political agreements were not partisan documents but were agreements made on behalf of the Nepali state, forged on the basis of consensus among the parties, and remain central to the peace process. A senior member of one Tarai-based party told the Center, "The peace process and the constitution are still interdependent. The interim constitution, CPA, and subsequent agreements are the foundation for us to go forward."

Several interlocutors also noted a sense that the scope of political discussion had narrowed in some ways as compared to the first CA. One civil society member worried that "outstanding issues that should have been addressed as a matter of routine in the political and peace process" were being left by the wayside, including discussion of the security sector and proactive policies of inclusion. Other analysts noted that many past political commitments were meant to address long-term drivers of conflict and observed that, in the absence of implementation of these agreements, many of the risks that confronted the state after the 2008 CA election would remain, such as discontent among landless people and former bonded laborers.

B. CONSTITUTIONAL ISSUES FINDINGS

- 4. Most stakeholders are optimistic that a broadly acceptable compromise on state restructuring is possible. At the same time, state restructuring, and particularly boundary delimitation of federal units, is once again seen as the most difficult issue for the CA to resolve and the one most likely to result in conflict.**

⁶ Nepal was an officially Hindu state from the time of its unification under King Prithvi Narayan Shah in the 18th Century until May 18, 2006, when the newly reinstated Parliament declared the state secular following the Second Jana Andolan. Article 4 of the interim constitution of 2007 affirms that "Nepal is an independent, indivisible, sovereign, secular, inclusive and federal, democratic republican state."

Most interlocutors, including advocates of varying forms of federalism, believed that a reasonable, broadly accepted compromise on state restructuring would be possible, but that it would require statesmanship among top party leadership and dialogue with potential spoilers. The early engagement of top political leadership on state restructuring was seen as crucial to promoting constructive dialogue, as was the work of the CA committee on dialogue headed by Dr. Baburam Bhattarai.

There also was widespread agreement that state restructuring, especially boundary delimitation, is the single most difficult issue before the CA and political leadership. State boundaries are emotive at both the national and local levels, raise difficult questions of identity and economic viability, and will have long-term consequences for economic and political life, nationally and locally. Finding common ground for debate is possible but requires creativity and flexible thinking on all sides. The Carter Center is encouraged by the willingness of Nepalis at the national and local levels to discuss fundamental concepts and dilemmas and not merely restate party positions. For example, a senior NC member believed there were ways to improve the discourse on state restructuring, and particularly on the question of identity, assessing that “the debate over ‘ethnic’ versus ‘non-ethnic’ provinces presents a false dilemma. Given how populations are dispersed in Nepal, no matter how you draw the boundaries provinces will inevitably be multiethnic. We need to get past this limiting language.”

5. The potential for widespread protests and possible tensions around state restructuring, of the kind experienced April to May 2012, is widely regarded as real but avoidable.

There was broad consensus that there remained potential for debates over state restructuring to result in widespread protests and isolated instances of communal tension. Both at the district level and in Kathmandu, Nepalis noted the potential for a re-emergence of the deep polarization of opinion of the sort experienced April to May 2012 in the run-up to the May 2012 CA deadline.⁷ In the Far Western Tarai, numerous stakeholders noted that such protests are typically reactive in nature and could recur when state restructuring again becomes an issue of negotiation in Kathmandu. In Kaski, stakeholders noted that since mutually conflicting demands over federalism persisted, there remained potential for tensions to resurface. Representatives of identity-based organizations and political parties expressed willingness to return to the streets to press for their viewpoints in the constitution should a suitable compromise not be found.

A healthy CA process and effective leadership from the senior level were seen as crucial to avoiding a repeat of tensions. Several groups in the Far Western Tarai noted that central-level political leaders had an important role to play in ensuring that serious tensions did not resurface, for example by avoiding making provocative statements or taking political advantage of local unrest. Broader consensus at the central level, they suggested, also would generate greater acceptability of agreements at the local level. In Kaski, a party leader suggested that “all the parties in the CA should try to have consensus for the issues in the constitution. This discourages tension among different groups.”

Over the longer-run, several interlocutors suggested that failure to reach an agreement in a timely way would increase the potential for less moderate forces to gain ground, making compromise more difficult. A Madhesi lawyer expressed concern that “extremists are trying to delegitimize the CA and moderate actors; this includes both conservative elements within Kathmandu and Tarai-based radicals.” Several interlocutors told The Carter Center that some actors in the Tarai are courting Madhesi professionals and youth to promote a less conciliatory agenda.

⁷ For more details on the events of April to May 2012, see The Carter Center, “Carter Center observations on recent identity-based mobilization in Nepal,” June 8, 2012.

6. There is a continuous need for public engagement on constitutional issues, particularly on state restructuring, as discussions progress toward an agreement and eventual implementation.

Several party members, analysts, and civil society representatives assessed that the amount and quality of education and dialogue efforts on federalism at the local level remained insufficient, a deficiency that could create difficulties for the CA process and, in the long-run, undermine public ownership and understanding of the implementation of state restructuring. Under the previous CA, The Carter Center consistently noted that stakeholders at the district and VDC levels, including members of political parties, complained of a lack of detailed, impartial information about what federalism meant in practice and how it would function in Nepal.⁸

The ambitious calendar for drafting a new constitution may reduce the ability of the CA to conduct the extensive, formal public outreach efforts that were envisioned by the first CA. However, as one lawyer close to the process remarked, “People who believe federalism is the way forward must respond to the reasonable fears that people have, for example about freedom of movement.”

7. There may be potential for compromise on the timing of local government elections and the mandate of local bodies.

Local government bodies have a fundamental role in setting development priorities and in the planning, implementation, and monitoring of government development projects. The Local Self-Governance Act, 2055 (1999) provides for elected bodies at the district, municipality, and village levels. However, local body elections have not been held since 1997, and their functions are currently being substituted for by interim structures headed by civil servants. Although successive governments have committed to holding local government elections, there has not yet been the broad political will needed to deliver on these commitments.

Many interlocutors suggested to The Carter Center that holding local government elections prior to the drafting of a new constitution would delay the constitutional process and would not be constructive. However, the need to return to elected local governance in a reasonable timeframe also was widely recognized, as was the fact that delaying elections until after implementation of federalism, as demanded by some advocates of identity-based federalism, could mean another several years without elected local bodies.⁹ The Carter Center assesses that there may be room for compromise on this difficult yet important issue.

The mandate and composition of elected local bodies, and especially their relation to a future federal system, should be open for discussion. Although elections to the current local structures may be one option for moving forward, it also is possible to discuss alternatives. For example, one senior party member suggested it might be possible to hold elections to interim local bodies after the promulgation of a new constitution, which would be replaced upon the implementation of federal reform. He suggested that these bodies could play a useful role in providing local input into the implementation of federalism, for example by identifying local concerns about the possible redrawing of future sub-state units such as districts and VDCs.

⁸ See, for example, The Carter Center, “Federalism and Constitutional Issues in Nepal: Perspectives from the Local Level,” Feb. 22, 2010, available at: <http://www.cartercenter.org/news/pr/nepal-022210.html> and “The Carter Center’s Observations on Identity-Based Activity and Mobilizations in Nepal,” March 13, 2013, pp. 35-37, available at: <http://www.cartercenter.org/news/pr/nepal-031313.html>.

⁹ Further discussion of public views on local governance and local elections can be found in The Carter Center’s report “Local Governance in Nepal: Public Participation and Perception,” Feb. 28, 2014, pp. 35-37, available at: <http://www.cartercenter.org/news/pr/nepal-022814.html>.

IV. Conclusion and Recommendations

Nepal is in a promising but potentially fragile moment. Compromise and progress on the basis of the first CA is possible, and many Nepalis assess that the process has begun reasonably well. The Nepali people and their political representatives are to be congratulated for overcoming the partisanship and deadlock that followed the dissolution of the 2008-12 CA, for holding credible and broadly accepted elections in 2013, and beginning work in the new CA in the spirit of compromise, consensus, and on the basis of the historic accomplishments of the previous assembly.

At the same time, there is a need for the government to exhibit stronger leadership in order to overcome significant risks to the constitution-making process and the eventual implementation of a new constitution. The slow pace of government formation and the CA process, and a perceived lack of engagement by senior political leaders on difficult constitutional issues, have raised unnecessary doubts about the commitment of the government and political parties to the principles of the 2006 peace process and subsequent agreements. Many Nepalis are optimistic about the ability of the CA and political leadership to produce a constitution that enjoys broad public support and that builds on the accomplishments of the 2008-2012 CA and the peace process to date. However, they also warn that underlying risks and drivers of conflict have not disappeared and that there is again a need for statesmanship and continued commitment to inclusive dialogue to ensure current opportunities for consensus and progress are not lost.

Over the long term, the second CA offers the Nepali people and their elected representatives an opportunity to further institutionalize democratic practice and deliver the gains in public security, economic well-being, and social equality promised by the 2006 peace accords. As a lawyer in Kathmandu told The Carter Center, “In Nepali politics, the street is more powerful than institutions. That needs to be changed.” The CA offers the institutional form to translate the aspirations of Nepal’s people into political practice. Much already has been achieved, but further leadership is required to deepen and sustain these accomplishments.

The following recommendations are offered in a spirit of mutual respect and support, and with the hope that they will provide useful discussion points for future action.

RECOMMENDATIONS:

- 1. The Council of Ministers should swiftly appoint the remaining 26 members of the CA in accordance with the letter and spirit of Article 63(c) of the interim constitution and of the May 12 decision of the Supreme Court.** The interim constitution requires the Council of Ministers to diversify representation in the CA by appointing to the CA, on a nonpartisan basis, 26 widely respected individuals or members of underrepresented indigenous communities. In addition to diversifying the voices within the CA process and strengthening the legitimacy and broadly representative character of the body, the appointments also allow the government an opportunity to demonstrate its commitment to conducting an inclusive constitutional debate within the framework of the peace process, interim constitution, and subsequent agreements.
- 2. Senior government leaders should reaffirm the state’s commitment to the principles of the 2006 peace process and to subsequent agreements reached among the political parties and between the Government of Nepal and historically marginalized groups.** The new CA is to be lauded for assuming ownership of the 2008-2012 CA process. The government and senior party leaders can reinforce the positive start of the new CA by reaffirming their commitment to the important milestones of the peace process to date, especially those that seek to address the long-

term drivers of conflict in Nepal by increasing participation and addressing the needs of historically marginalized and economically deprived groups.

3. **Senior political leaders should ensure that the work of the CA to reach consensus on contentious constitutional issues is supported by ongoing dialogue and understanding at the highest political levels.** Members of the constituent assembly have begun debate on difficult issues including the form of government and state restructuring. However, interlocutors in Kathmandu and in the districts expressed to The Carter Center their conviction that, while the constituent assembly's work is indispensable, for agreements to be sustainable and widely respected they will require the active involvement of senior political leaders as well as influential groups outside the CA.
4. **The constituent assembly, civil society, and advocates of state restructuring should invest in the capacities and structures needed to engage the public on the design, functioning, and eventual transition to a federal system.** State restructuring is a complex and long-term process, the success of which should be built on a foundation of consultation with the public, dissemination of impartial information that is accessible and relevant to citizens of all backgrounds, and broad commitment to ensuring that all citizens feel their interests are taken seriously in the design and implementation of new forms of governance. Interlocutors continue to express to The Carter Center a concern that there is a lack of understanding about federalism at the local level, which carries risks to reaching agreement on state restructuring in the short-term and, if continued over the longer term, to its eventual implementation. There is a need for continued, long-term efforts to educate and engage diverse groups about their relation to the state and their desires for and concerns about a federal future.
5. **Party leaders and civil society representatives should discuss options for a timely return to elected local government that will facilitate rather than impede the implementation of an eventual agreement on state restructuring.** Interim local bodies may be one option for discussion, but a range of alternatives may also be feasible. Some advocates of federalism are understandably concerned that a return to elected local government prior to the implementation of state restructuring may carry risks for the smooth implementation of future agreements. At the same time, citizens say that the lack of elected local bodies undermines the accountability and legitimacy of local government and places an unnecessary burden on the civil service. The Carter Center believes that, given sufficient political will, compromise on this question is possible, and that with the right mandate, local bodies have potential to facilitate rather than impede the implementation of state restructuring and other reforms under the new constitution.