

Briefing Paper

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THE DEBILITATING DYNAMICS OF NEPAL'S CONSTITUENT ASSEMBLY (2008-2012)

Introduction

Nepal now appears to be moving closer to ending the political impasse that has existed since the end of the term of the Constituent Assembly (CA)/Legislature-Parliament on 27 May, 2012. Without a new constitution and in the absence of a legislature, this was, and continues to be, unchartered terrain. However, the agreement among political leaders on a way forward via new CA elections and a government headed by the Chief Justice for that purpose, has revived hope.

It is clear that the hopes and aspirations of Nepali citizens cannot be formalized under a new constitution until the latter is made and adopted by a CA.¹ However, as citizens in Nepal look towards movement out of a prolonged political impasse to a democratic future with a new CA, it is important that key lessons from the last CA be taken into account.

At the most obvious and general level, the writing of the constitution for a new Nepal was neglected in the past as political parties prioritized power distribution and consolidating power. The “consensus” principle legitimated power-plays and resulted in stalemates. There were numerous concomitant obstructions in the work of the CA² and key contentious issues of federalism and

¹ Bhusan, Bharat. 2012. Nepal: A Passage to Democracy. *Asian Age*, 27 February. <http://www.asianage.com/columnists/nepal-passage-democracy-473> (Accessed 1 March 2012).

² Apart from protests which blocked the functioning of the CA, other dynamics were also in play. For example, former Communist Party of Nepal – Unified Marxist-Leninist (CPN-UML) Constituent Assembly (CA) member Rabindra Adhikari states that there was a very clear divide in the CA between Maoists and non-Maoists following Maoist leader Pushpa Kamal Dahal's resignation as Prime Minister (PM) after his unsuccessful attempt to remove the then Chief of Army Staff Rukmangad Katwal in 2009. The divide was such that formerly agreed upon topics in the thematic committees responsible for drafting sections of the draft constitution were overturned and re-debated. Adhikari, Rabindra. 2012. Ek Purvasabhasadko Bayan. *Kantipur* (Koseli), 23 June, p. na.



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forms of government failed to be resolved. However, there are other issues connected to the functioning of the CA that must be understood particularly in terms of process. Demanding a new CA to produce a constitution without understanding these past procedural dynamics will not aid in producing a popular, democratic constitution.

This Martin Chautari (MC) policy brief serves as an update to previous MC policy reports on the CA process as a whole, and on attendance rates and political representation in particular³ with figures and analyses taken for the whole four year period of the CA (2008-2012).⁴ As noted before, the focus on attendance records and political inclusion is a means to highlight issues of accountability and transparency. Attention to political inclusion in post-CA election governments provides insight into the extent to which commitments made on inclusion and representation by political party leaders have been actualized in this transition period. The focus on attendance in the CA allows for insights into the activities of representatives elected to attend the CA to write a new constitution. Such analyses allow voters to possess information that will enable them to hold their elected representatives and political leaders accountable. However, at the core of this report is a concern to understand in what ways and why the CA did not function as initially conceptualized and anticipated by citizens following a ten-year conflict and a democratic movement.

This briefing paper begins with attention to attendance figures and trends at the CA, disaggregating by parties, leadership and various social groups. The second section focuses on representation of various groups in the governments formed in the post-CA election period. The last section analyses the dynamics central to making the CA democratically dysfunctional before moving to a few concluding remarks.

³ See specifically MC Policy Paper No. 4, "Attendance and Participation in the Constituent Assembly," September 2010 and MC Policy Paper No. 5, "Deadlines, Democracy and a Popular Democratic Constitution," June 2011.

⁴ As in previous analyses, the focus is on the role of the CA solely as a constitution drafting body and not in its parliamentary role.

Attendance Issues

Past MC reports have highlighted the limitations of analyzing the attendance records of the CA to look at issues of accountability and transparency including among other things, that one could sign in and then leave.⁵ CA members particularly questioned the high attendance rates of certain people cited in previous MC policy reports. They have pointed to their absence in the CA and other practices, including signing in and leaving,⁶ keeping open registration books an hour before and after sessions and possibly paying staff to sign in for them.⁷ However, overall the absence of the many from the CA pointed out in previous MC analyses has not been debated.

In the four year period, the full house of the CA met for a total of 122 meetings;⁸ 101 during the first two years (2008-2010), eight in the additional third year (2010-2011), and 13 in the last year (2011-2012).⁹ The average rates of attendance numbered around 62 percent over the four years, which is on par with the attendance rate of the original two year tenure – recorded at 63 percent¹⁰ and up from the 58 percent recorded for the third year.¹¹ However, it is important to note the differences in number of meetings held – there were only eight meetings in 2010-2011 period and 13 meetings in 2011-2012. Most importantly, these figures show that for the entire tenure of the CA, only two thirds of CA members attended. In other words, over a third of the members elected by the citizens of Nepal to write a new constitution for the

⁵ For more details see MC Policy Paper No. 4, "Attendance and Participation in the Constituent Assembly," September 2012, p. 3.

⁶ Martin Chautari (MC) interview with then CA member; 1 August, 2011.

⁷ MC interview with ex- CA member; 4 October, 2012.

⁸ During the 4 years of the CA, 25 meetings were postponed following the posting of announcements, the majority of them in the last month of the CA tenure. From 13 April, 2012 until 1 May, 2012 only two meetings were held. After this date, none of the 21 meetings called were held and the CA was dissolved before the 27 May, 2012 meeting was held.

⁹ CA meetings were held for a total of around 382 hours, the average meeting time was three hours and eight minutes, with a minimum of five minutes and a maximum of over eight hours.

¹⁰ For more details see MC Policy Paper No. 4, "Attendance and Participation in the Constituent Assembly," September 2012.

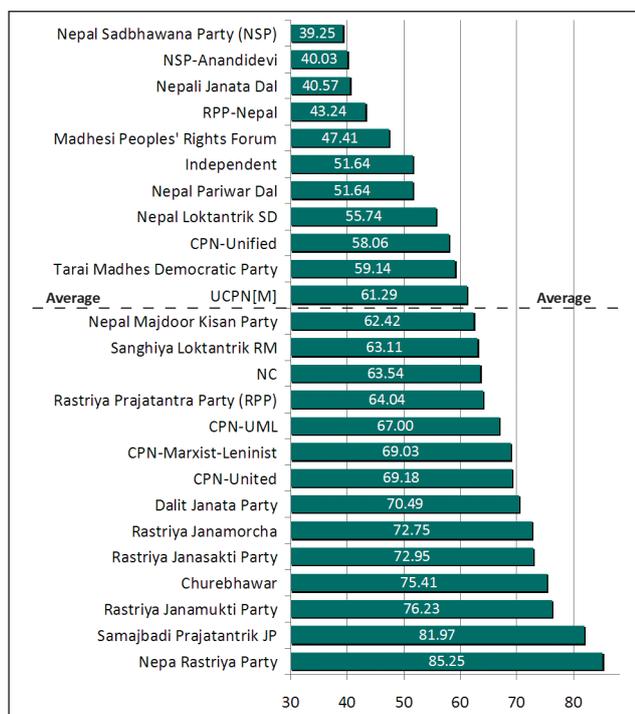
¹¹ For more details see MC Policy Paper No. 5, "Deadlines, Democracy and a Popular Democratic Constitution," June 2011.



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new Nepal to be built after ten years of a civil war and a large democratic movement, were absent.¹²

Figure 1: Average attendance rate of various political parties¹³



Breaking down attendance by parties, all three of the main political parties had average attendance rates as shown in Figure 1. The Unified Communist Party of Nepal – Maoist (UCPN-M) had attendance rate of 61.29 percent, which is slightly below the average attendance rate, while Nepali Congress (NC) and CPN-UML registered slightly higher than the average rate – 63.54 percent and 67 percent respectively. Continuing trends noted in previous MC policy reports, Madhes based parties all registered below average attendance rates, with the Nepal Sadbhawana Party and Nepal Sadbhawana Party – Anandidevi registering the lowest at around 40 percent and the

¹² For reasons given for low attendance in the first two years see MC Policy Paper No 2, “Update on the Constituent Assembly,” October 2009, p. 6 and MC Policy Paper No. 4, “Attendance and Participation in the Constituent Assembly,” September 2010, p. 10-12.

¹³ For comparative purposes, the data given on political parties members is based on their membership at the time of the beginning of the CA. For recent analyses of the various factions within political parties, see International Crisis Group. 2012. Nepal’s Constitution (II): The Expanding Political Matrix. 27 August.

Nepa Rastriya party – with its single representative – registering the highest attendance rate at 85 percent. Overall, attendance rates of all parties (including independents) basically reflected the same rates as in the initial two-year tenure period.¹⁴

Questionable Leadership

Mid-way in the CA process, a senior political party leader and CA member had had this to say about political party leaders, “They are supposed to show the way for their own CA members but that is not happening.”¹⁵ Leading by example and reflecting patterns established during the initial two year tenure of the CA, in the overall four year period, attendance in the CA of the main political party leaders figured overwhelmingly on the low side. Table 1 and Table 2 reveal the top and bottom ten attendees in the CA.

On the high side, Agni Kharel of CPN-UML and Laxman Prasad Ghimire of NC tabulated over 95 percent attendance rates, while on the other end, Sher Bahadur Deuba of NC came in at less than 3 percent with Pushpa Kamal Dahal of UCPN-M at 6.5 percent. Table 3 provides a glimpse of the attendance records of some of the top political and well-known figures of the CA.

Table 1: Top ten attendees for whole 4-year period

S.N.	Name	Party	Attendance %
1	Agni Kharel	CPN-UML	96.72
2	Laxman Prasad Ghimire	NC	95.08
3	Man Bahadur Mahato	NC	93.44
4	Chandriram Tamata	NC	92.62
5	Surya Bahadur Sen	UCPN-M	91.80
6	Bhim Prasad Acharya	CPN-UML	91.80
7	Dhyan Govinda Ranjit	NC	91.80
8	Rajendra Kumar Khetan	CPN-ML	90.68
9	Kalyani Rijal	NC	90.16
10	Gopal Singh Bohara	CPN-UML	90.16

¹⁴ See MC Policy Paper No. 4, “Attendance and Participation in the Constituent Assembly,” September 2010, p.5. This is unsurprisingly given that the largest number of meetings took place in the first two years.

¹⁵ MC interview with then CA member; 21 February, 2010.



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Table 2: Top ten absentees for whole 4-year period

S.N.	Name	Party	Attendance %
1	Sher Bahadur Deuba	NC	2.46
2	Pushpa Kamal Dahal	UCPN-M	6.56
3	Rajendra Mahato	Sadbhawana	12.30
4	Saroj Kumar Yadav	Sadbhawana	15.57
5	Sharat Singh Bhandari	MPRF	16.38
6	Khovari Roy	Sadbhawana	16.39
7	Bijaya Kumar Gachchedar	MPRF	17.21
8	Upendra Yadav	MPRF	18.03
9	Ram Bahadur Thapa Magar	UCPN-M	18.85
10	Krishna Bahadur Mahara	UCPN-M	18.85

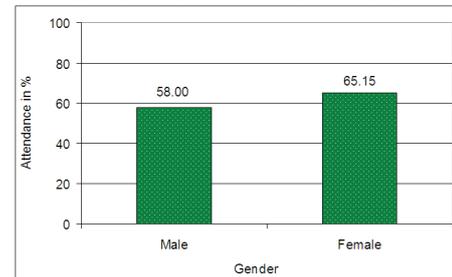
Table 3: Attendance rate of some familiar and influential political figures in the CA

S.N.	Name	Party	Attendance %
1	Arju Rana Deuba	NC	23.77
2	Pradeep Giri	NC	26.23
3	Renu Kumari Yadav	MPRF	27.05
4	Baburam Bhattarai	UCPN-M	27.87
5	Madhav Kumar Nepal	CPN-UML	28
6	Jhala Nath Khanal	CPN-UML	29.51
7	Narayanman Bijukchhe	NWPP	36.07
8	Mahanth Thakur	TMDP	38.14
9	Hisila Yami	UCPN-M	42.62
10	Bimalendra Nidhi	NC	45.90
11	Gagan Thapa	NC	45.90
12	Rajkishor Yadav	MPRF	46.72
13	Pampha Bhusal	UCPN-M	48.36
14	Chandra Prakash Gajurel	UCPN-M	48.36
15	Ram Sharan Mahat	NC	49.18
16	Jayapuri Gharti	UCPN-M	50
17	Pari Thapa	CPN-Unified	50.82
18	Ram Chandra Paudel	NC	51.64
19	Hridayesh Tripathy	TMDP	59.02
20	Nabodita Chaudhary	RPP	59.02
21	Sarita Giri	NSP-A	59.84
22	Barsha Man Pun Magar	UCPN-M	60.66
23	Narahari Acharya	NC	61.48
24	Pratibha Rana	RPP	62.30
25	Rabindra Adhikari	CPN-UML	67.21
26	Sapana Pradhan Malla	CPN-UML	71.31
27	Posta Bahadur Bogati	UCPN-M	72.13
28	Narayan Kaji Shrestha	UCPN-M	72.88
29	Amrita Thapa Magar	UCPN-M	72.95
30	Binda Pandey	CPN-UML	74.59

Attendance disaggregated

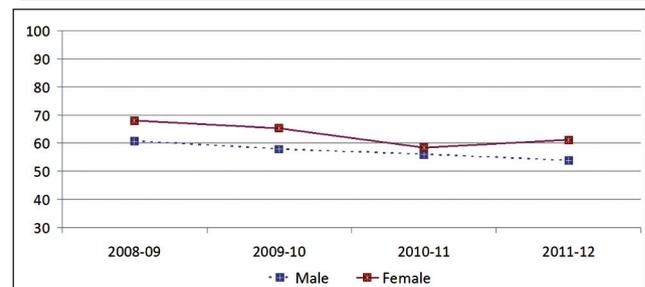
Disaggregating attendance records reveals interesting dynamics. Again reflecting previous trends, women CA members' attendance was higher than that of their male counterparts at 65.15 percent, compared to the 58 percent for men for the whole four year period (Figure 2).

Figure 2: Attendance rate according to gender



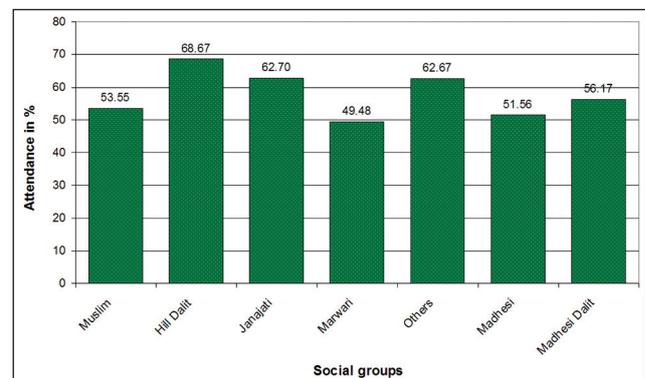
Analyzing attendance trend over the four years, women's attendance in the CA consistently surpassed that of men, although the third year sees a narrowing of the gap, while the last year sees a widening of the gap (Figure 3).

Figure 3: Gender attendance trends (2008-2012)



In terms of attendance according to different social groups, Hill Dalits had the highest attendance rates of 69 percent, with Marwaris at the lowest end with 50 percent (Figure 4).

Figure 4: Attendance rates by social group



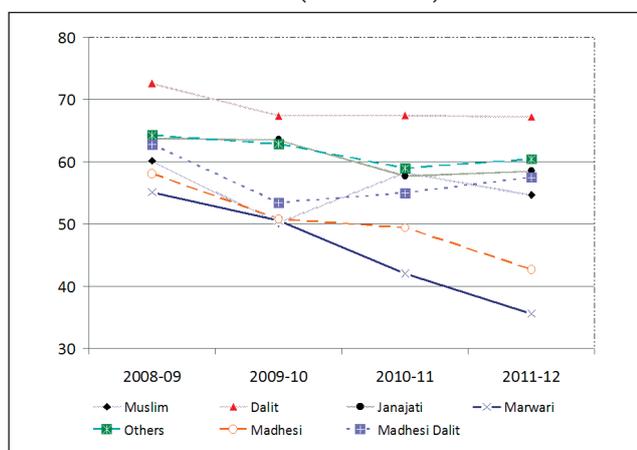
Over the four year period, the attendance trends reveal different dynamics among the social groups (Figure 5). All social groups, as with gender, showed a decline in attendance in the third year (even though there



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were only eight meetings in total),¹⁶ with the largest decline recorded by the Madhesis. However, while all other groups (and as revealed in the gender disaggregated data) showed an increase in the last year, Marwari attendance showed a steady decline throughout the four years. Along with the Marwaris, Madhesis and Muslims recorded lower levels of attendance at the end of the four years, than at the first year.

Figure 5: Social group attendance trends (2008-2012)



In terms of attendance by election method, over the four years CA members elected via the proportional representation (PR) method ranked higher in attendance (63 percent) to those elected via first-past-the-post [FPTP] (Figure 6) with about the same level of difference over the four year period (Figure 7).

Figure 6: Attendance by election method

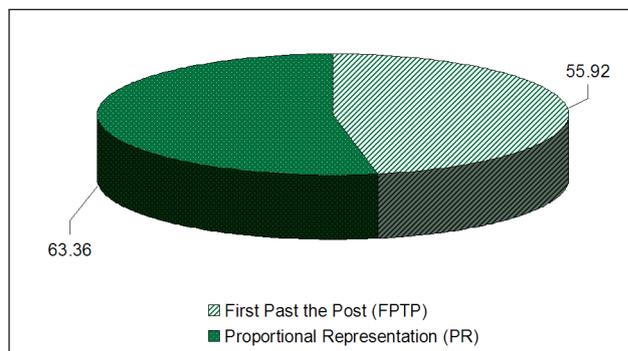
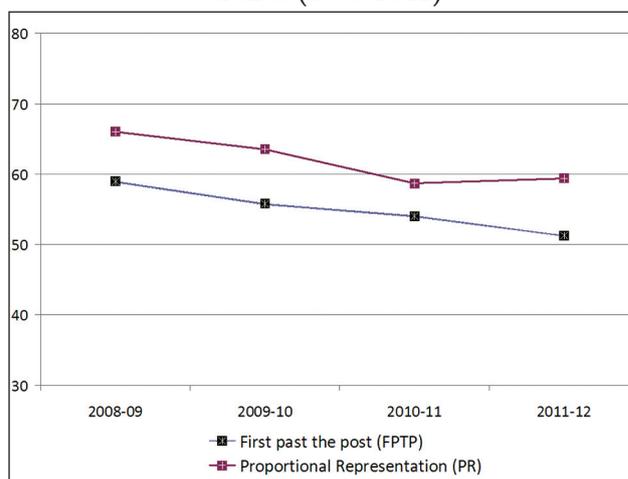


Figure 7: Election method attendance trends (2008-2012)



Revisiting Representation in Practice

As noted in previous MC reports, much of the Comprehensive Peace Agreement related to issues of excluded groups and their marginalization from political power. Since the CA elections, there have been four coalition governments, two of which have been headed by the UCPN-M, and two by the CPN-UML.

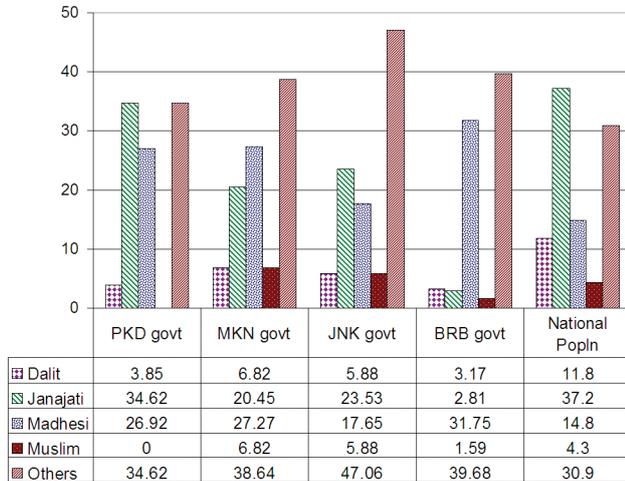
Analyses of these four post-CA election governments are revealing for the lack of adherence to various commitments to inclusion and proportional representation made by political leaders of various ideologies. A look at the data in Figure 8 reveals the under-representation of Dalits, Janajatis and women, with only Madhesis consistently over-represented – a reflection of their newly found political power.

¹⁶ The low attendance during this third year may be related to the fact that apart from the first meeting (which amended the CA work plan for the eleventh time); the fourth (which amended CA rules authorizing the Constitutional Committee to settle pending issues from the thematic reports) and the seventh (which sent disputed issues from the Restructuring the State and Distribution of the State Powers Committee to the Constitutional Committee), most of these meetings were administrative. According to the archived “Constitution Building Updates” on the UNDP website for the project “Support To Participatory Constitution Building in Nepal,” “...the substantial work related to constitution making was done in the High Level Task Force (HLTF) formed by the 27 political parties represented in the CA and by the Sub Committee within the CC, to resolve the remaining disputes.” See <http://www.ccd.org.np/index.php?cipid=11> (Accessed 4 January 2013).



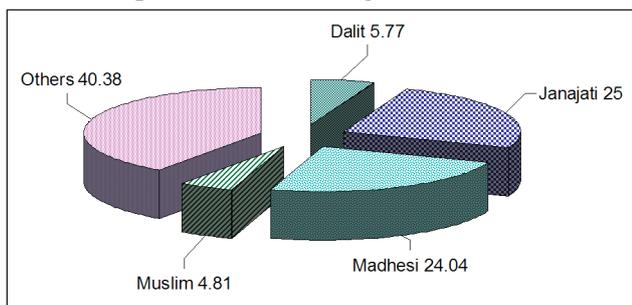
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Figure 8: Representation of social groups¹⁷ in different post-CA election governments¹⁸



In terms of overall social group composition in post-CA election governments, the figures remain unchanged after the addition of the BRB government as all governments have had similar compositions (Figure 9). Dalits and Janajatis continue to be under-represented while the Others and Madhesis are over-represented relative to their national population.

Figure 9: Total representation of social group in post-CA election governments



While much has been made of the 33 percent representation of women in the CA, in terms of women in government specifically, post-CA election governments have severely under-represented women

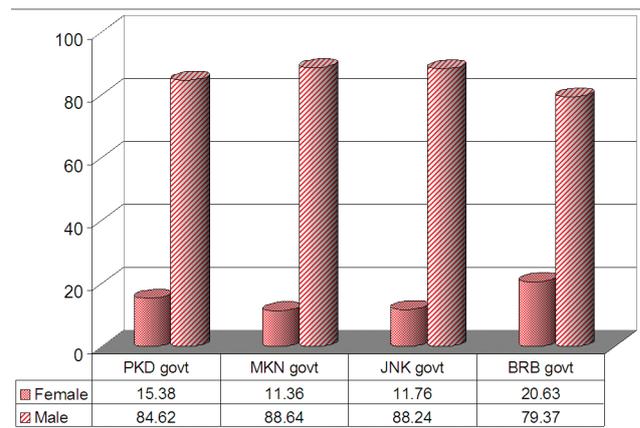
¹⁷ To keep consistency with previous MC analyses, the 2001 census data has been retained for comparative purposes.

¹⁸ The following acronyms are used for the various governments: Pushpa Kamal Dahal (PKD); Madhav Kumar Nepal (MKN); Jhala Nath Khanal (JNK) and Baburam Bhattarai (BRB).

with the most women in cabinet (21 percent) under the Baburam Bhattarai led government (Figure 10).¹⁹

The addition of BRB's government to the three governments of PKD, MKN and JNK has increased the total percentage of women in all post-CA election governments from 13 percent²⁰ to 15.5 percent.

Figure 10: Representation of women in different post-CA election governments



In terms of regional composition of the post-CA election governments (Figure 11), the addition of BRB's government to the three covered beforehand has seen a decrease in the representation of all regions except the Far West (increased by 1 percent) and the Central. The historically political dominant Central region recorded an increase by almost 3 percent (from 44 percent to 46.71 percent).²¹

¹⁹ However, under BRB the cabinet was reshuffled four times. Looking at the representation of women disaggregated by the four different cabinets constituted is telling. There were no women in the last cabinet, and the relatively large number of women overall during BRB's tenure is a result of 8 of the 22 state ministers in the second of BRB cabinets being women.

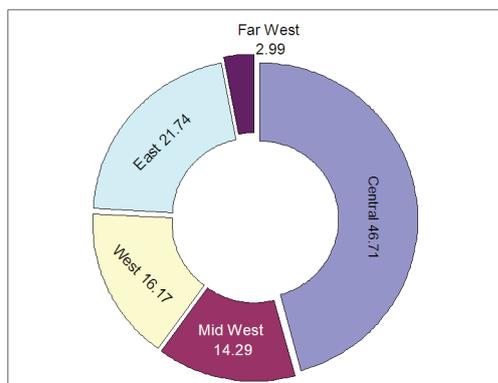
²⁰ See MC Policy Paper No. 5, "Deadlines, Democracy and a Popular Democratic Constitution," June 2011, p. 8.

²¹ Figures for regional composition of governments before the addition of BRB's government were as follows: Far West 2 percent, East 22 percent, West 14 percent, Mid West 17 percent and Central 44 percent.



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Figure 11: Regional composition of all post-CA election governments



Governments formed during the transition period have reflected little in the way of promises of a “New Nepal” in terms of access to political power for the marginalized. The post CA-election coalition governments have prioritized alliances for the political capture of government in the name of “consensus,” paying minimal attention to implementing laws and policies for proportional inclusion in state structures. Past historical exclusionary tendencies in access to political power remain in current practice for marginalized social groups and geographic regions.

Consensual Disobedience

The CA was to be the crucible of inclusive and democratic political practice in which historical grievances were to be addressed as part of the peace process. However, over the four year period initial euphoria gave way to popular mistrust of the CA and its members. The abrupt ending of the CA has only further increased distrust of politicians among the general population. However it is important to understand that while the CA was officially dissolved on 27 May 2012, constitution-writing by democratically elected CA members from within the CA was jeopardized much earlier.

The consistent absence of political leaders since the beginning of the tenure of the CA is indicative of dynamics debilitating the democratic and procedural functioning of the CA. The lack of attendance by top political leaders and its impact on the constitution writing process was remarked upon early in the process by the Chair of the CA Subash Nembang

who, in requesting leaders to attend, stated that the constitution writing exercise would be more effective and beneficial if the top leadership attended the CA sessions.²² Given the overall low rates of attendance of political leaders, attendance records at the thematic committee²³ levels where specific components of the draft constitution were written unsurprisingly reveal the same absence of political leaders. This is especially so in the Constitutional Committee,²⁴ the most important committee in which most of the political leaders sought to be, and in which the top leaders of all parties were included.²⁵ Constitutional lawyer Bipin Adhikari states that in the absence of these political leaders, consensus within the various committees was impossible.²⁶

It is also essential to note that the absence of political leaders right from the start of the CA undermined the authority of the CA as well as its importance.²⁷ The disregard of CA rules and regulations²⁸ as especially shown in the leaders unwillingness to submit required prior notice for absences for ten or more consecutive meetings if not notification of such reasons within three days of return to the CA,²⁹ is revealing for the contempt shown for CA rules and regulations.

²² See MC Policy Paper No. 2, “Update on the Constituent Assembly,” October 2009, p. 5.

²³ The CA had been structured with 11 Thematic Committees that were responsible for a specific component of the draft constitution.

²⁴ The Constitutional Committee had a dual responsibility – one to prepare a thematic committee report and the second to condense all papers into one draft constitution. The constitution committee was expanded from the originally proposed 15 to 63 members as a result of lobbying by the smaller parties and groups. See MC Policy Brief No.1, “The Constituent Assembly Process,” May 2009, p. 5.

²⁵ The top three absentees in this Constitutional Committee were Sharat Singh Bhandari [Mahottari], Bijaya Kumar Gachchedar and Pushpa Kamal Dahal with attendance rates of 21 percent, 24 percent and 27 percent respectively.

²⁶ Adhikari, Bipin. 2012. *The Status of Constitution Building in Nepal*. Kathmandu: Nepal Constitution Foundation (NCF), p. 28.

²⁷ MC interview with then CA member; 21 February 2010.

²⁸ For more details on official rules and policies on this matter see MC Policy Paper No. 4, “Attendance and Participation in the Constituent Assembly,” September 2010, p. 7, 8.

²⁹ After the initial media coverage of their lack of appropriate prior and post-applications for such leaves, political party leaders had submitted required documentation. However, this practice was short lived.



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The dominant political culture of Nepal has aided this process in numerous ways. As noted before,³⁰ while the CA rules and regulations are silent on what happens if these rules are violated, the onus for action is clearly on the CA Chairperson and the respective Committee chairs; the latter have the authority to expel the member from the Committee and inform the CA of the decision. The Interim Constitution states that the CA seat is deemed vacant in the case of absence from ten consecutive meetings without notice. However, neither Committee chairs nor CA Chairperson Nembang initiated any steps against the political leaders.

Given political hierarchy dominating Nepali politics, this was always a large task. Since the termination of the CA tenure, Nembang has come under severe scrutiny for his weak role and overall reluctance in utilizing his authority to bring the party leaders to decision and/or restoring authority to the CA body.³¹ According to an ex-CA secretariat member, a “towering personality” should have been picked to lead the CA; Nembang was not even a member of the Central Committee of his own party,³² let alone party leader and was thus unsurprisingly not called to important party meetings and generally left in the dark.³³ Nembang’s own lack of initiative and unwillingness to utilize his full authority aside, it was clear that he was consistently sidelined by political leaders who chose to disregard the legitimate authority and the sovereign institution that Nembang represented.

The undermining of the authority of the CA was further enabled by the removal of key decisions related to the constitution from the CA body. According to a CA member in 2010, the party leaders were always confident that they would ultimately deal with everything.³⁴ Political hierarchy had made natural the option to allow leaders to deal with the large and difficult issues related to the draft constitution.

However, a parallel process appears to have been assumed from the beginning – one within the CA and one outside; according to constitutional lawyer Adhikari, “even when the Committees were able to reach a decision, these were discussed all over again outside the CA by senior leaders.”³⁵ According to a 2012 International Crisis Group (ICG) report on Nepal, “[a]lthough assembly regulations allowed for a vote on issues when the committees could not agree, senior leaders were asked to reach consensus on them, which they often did informally and away from the assembly.”³⁶

The unwillingness of political parties to attend the CA but meet together outside to deal with such issues was termed by an ex-CA member as revealing how the leaders “put themselves above the constitution.”³⁷ Importantly, the removal of the process from the CA also resulted in the taking of authority to write the constitution from elected CA members, to those that had been rejected by citizens – key political leaders involved in political bargains and resolving various debates had lost in the CA elections. More specifically, Sushil Koirala, Madhav Kumar Nepal, Khadga Prasad Oli, Arjun Narsingh KC, Bam Dev Gautam and Ishwor Pokharel all lost the CA elections.³⁸ Thus, as ex-CA members themselves noted, the political culture legitimated by “consensus” resulted in the shrinking of the role of CA members and the bypassing of established, democratic processes for constitution writing.³⁹

The CA members themselves had long asked for issues to be resolved through voting.⁴⁰ Yet the

³⁵ Adhikari, Bipin. 2012. *The Status of Constitution Building in Nepal*. Kathmandu: Nepal Constitution Foundation (NCF), p. 28.

³⁶ ICG. 2012. *Nepal’s Constitution (I): Evolution Not Revolution*. Crisis Group Asia Report N°233, 27 August 2012, p. 6. Of the various bodies designated specific tasks of constitution writing – such as the State Restructuring Commission – the report further states that “In any case, these bodies have also become sideshows or distractions, as decision making has been concentrated in the hands of a few leaders who are usually asked to find consensus.” See p. 7.

³⁷ MC interview with ex-CA member; 3 July 2012.

³⁸ One ex-CA member argued that such individuals had the mindset that a CA without them was unnecessary. MC interview with ex-CA member; 26 June 2012.

³⁹ MC interview with ex-CA members; 26 June, 3 July 2012.

⁴⁰ MC interview with ex-CA member; 26 June 2012 and Durga Khanal. 2012. ‘Ceremonial’ Sabhadhyakshya, *Kantipur*, 9 June, p. 7.

³⁰ For more details see MC Policy Paper No. 4, “Attendance and Participation in the Constituent Assembly,” September 2010, p. 8.

³¹ For Nembang’s own defense in the face of such criticisms, see Durga Khanal. 2012. ‘Ceremonial’ Sabhadhyakshya, *Kantipur*, 9 June, p. 7.

³² Nembang had to resign from his position from the Central Committee once he took the position of CA chairperson.

³³ MC interview with ex-CA secretariat member; 29 June 2012.

³⁴ MC interview with then CA member; 21 February 2010.



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Constitutional Committee and the subcommittee headed by Pushpa Kamal Dahal responsible for tabling business for meetings and votes, never put forward anything; thus meetings were never held.⁴¹ Importantly, with only four days left till the 28 May, 2012 deadline, an ex-CA secretariat member stated that both Madhav Kumar Nepal of UML and Ram Chandra Poudel of NC had refused to entertain the idea of resolving the debates via voting in the CA⁴² although then CA member Sapana Pradhan Malla had seen this as an option at that time.⁴³

Since the demise of the CA various conspiracy theories have arisen.⁴⁴ Among excluded groups inside and outside the CA, there are strong sentiments expressed that there were always those who wanted the CA to be dissolved⁴⁵ and those who did not want the constitution to be made from within the CA.⁴⁶ Constitutional expert Purna Man Shakya has claimed that leaders of certain parties were surprised by the radical nature of the draft thematic committee reports once produced⁴⁷ and sought ways after that to disrupt the whole constitution writing process.⁴⁸ After remarking how everything had got stuck with the four leaders of NC, UML, United Democratic

Madhesi Front and UCPN-M, another ex-CA member stated, "If these four leaders were to make the constitution, then what was the need for us?"⁴⁹

The last moments of the CA were illustrative of all the debilitating dynamics – CA members were in the dark about what the leaders were doing⁵⁰ with many reliant on updates from the media;⁵¹ neither the CA chairperson nor party leaders came to the CA building⁵² and CA members felt that they had no other option but to wait.⁵³ One ex-CA member stated that on 27 May, "truly we were like distressed children without guardians⁵⁴ in the CA building."⁵⁵

The consensual disobedience by the political elite of CA rules and procedures that they themselves had agreed upon, their absence from the CA and the move to extract the decision-making process from the CA and its elected members reveal an overall refusal by political party leaders to see the CA as the sovereign and constitutional authority of the land.

According to Bhoj Raj Pokharel, former Chief Election Commissioner of Nepal,

Once the elections were done, the decision making should have been given to the parliament, but the parliamentary proceedings were not allowed to function. What happened was that the Agenda and decision making was hijacked by the political leaders – who were in fact outside of the CA – and everything had to be decided by them. The party leaders could not come to a consensus on federalism, but nor did they allow the House to make a decision either. So eventually the need to find a consensus of the party leadership group contributed towards the failure of the CA to produce a constitution.⁵⁶

⁴¹ Nembang has argued that the lack of consensus resulted in these meetings never being held. However, the question of why voting on these issues could not have been tabled by Dahal and other political leaders, is not touched upon. See Durga Khanal. 2012. 'Ceremonial' Sabhadhyakshya, *Kantipur*, 9 June, p. 7.

⁴² MC interview with ex-CA secretariat member; 29 June 2012.

⁴³ Malla, Sapana Pradhan. 2012. Antyahin Sambidhansabha. *Kantipur*, 24 May, p. 6.

⁴⁴ Basnet, Gyan. 2012. Investigate This. *The Kathmandu Post*, 4 June, p. 6.

⁴⁵ MC interview with ex-CA member; 3 October 2012.

⁴⁶ MC interview with ex-CA members; 3 October, 2012, 4 October, 2012 and 3 November, 2012. Adhikari, Rabindra. 2012. Ek Purvasabhasadko Bayan. *Kantipur* (Koseli), 23 June, p. na.

⁴⁷ As stressed by many, much work was put into the writing of the drafts by CA members in their respective committees in the first two years. Attendance records of the committees indicate not only the absence of senior politicians, but the high attendance levels of other "ordinary" CA members. According to a Maoist former CA member, the draft committee reports reflected principles of equality and social justice different from the current status quo, because of the large presence in those committees of those who wanted change, including the marginalized. MC interview with ex-CA member; 3 July 2012.

⁴⁸ Purna Man Shakya at the public talk program "Review of the four year period of CA and the preview of the declared 'CA election'" 56th Late Dr. Harka Gurung Lecture series, Centre for Ethnic and Alternative Development Studies (CEADS), 1 June 2012.

⁴⁹ MC interview with ex-CA member; 30 June 2012.

⁵⁰ MC interview with ex-CA member; 26 June 2012.

⁵¹ MC interview with ex-CA member; 30 June 2012.

⁵² MC interview with ex-CA member; 26 June 2012.

⁵³ MC interview with ex-CA member; 26 June 2012.

⁵⁴ The metaphor is telling of the dominant political mentality of hierarchy in which those in the lower echelons of political power are infantilized.

⁵⁵ MC interview with ex-CA member; 3 July 2012.

⁵⁶ Nepal: "Constitution Building Hijacked by the Need for Consensus." http://www.idea.int/asia_pacific/nepal/nepal-constitution-building-hijacked-by-the-need-for-consensus.cfm (Accessed 25 January 2013).



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Conclusion

There are a myriad of issues that the new proposed election raises⁵⁷ and new agendas, alliances as well as new actors can further be expected in view of electoral calculations. However, beyond all of this, it is important to understand that the CA and the constitution writing process from 2008-2012 operated in a non-democratic, non-transparent, non-inclusive and unaccountable manner.

The old CA never functioned in the manner originally conceptualized – as an historic opportunity for Nepali people themselves to lay down the foundations to transform old state and social structures into a new, just and inclusive Nepal. Past MC reports on the CA have revealed non-democratic and exclusionary practices in the CA.⁵⁸ These include: large parties occupying the front rows and allocated the largest amount of discussion time as talk-time is distributed according to member-strength; excluded groups speaking less than their member-strength and political hierarchy, the party whip and silence in the official CA rules and regulations on the vote of conscience ensuring conformity to party lines. Overall, the rules and regulations of the CA were designed by political party leaders to maximize political party control over members, maintain structured hierarchies and the exclusion of the marginalized.

Further “consensus” has become problematic in Nepal not only for the stalemates that have resulted, but also in the devaluing of democratic rules and procedures it has enabled in Nepal as a whole, and in the constitution-writing process in particular. Political negotiations have always taken place outside of the CA. In all “consensus” permitted the systematic undermining of the sovereign authority of the CA. It is unclear in this context how the new CA will function differently – as one ex-CA member noted, there is no guarantee that the rules and procedures will be obeyed by the next elected body.⁵⁹

⁵⁷ For analyses of issues around voter registration, see The Carter Center. 2012. Fifth Interim Statement on the Election Commission of Nepal’s “Voter Register with Photograph” Program. 28 February.

⁵⁸ See MC Policy Brief No. 1 “The Constituent Assembly Process,” May 2009 and MC Policy Brief No. 2 “Update on the Constituent Assembly,” October 2009 for more detail.

A full review of democratic and procedural problems of the CA is not possible here.⁶⁰ However, at the very minimal, democratic considerations need to be made in: structuring the CA rules and regulations to ensure that the main political parties are not privileged; re-debating the role of the party whip within the CA and the leveling of political hierarchy emphasizing all CA members as political equals involved in processes of democratic deliberations.⁶¹ Further, all political decisions related to the new constitution should be made democratically from within the elected body by elected representatives, according to stipulated processes and rules. If “consensus,” and not the majority principle, is retained for the new CA, “consensus” should be used in combination with voting on proposals and issues previously presented in the assembly.⁶² New CA members must also take the initiative to ensure that the constitution-making process remains intact and followed.⁶³ For example, there are provisions made in the CA Rules and Regulations for a CA Conduct Monitoring Committee to be formed.⁶⁴ The Committee would have the mandate to undertake required investigations into “publicly raised questions or notices given to the committee by anyone regarding violations by any member of the Code of Conduct, as stated in Rule 145, Sub-rule (1),” which include, abiding by rules and regularly participating in

⁵⁹ MC interview with ex-CA member; 26 June, 2012.

⁶⁰ Basnet has argued for an independent, fair and non-political judicial inquiry commission to investigate the failings of the CA. Basnet, Gyan. 2012. Investigate This. *The Kathmandu Post*, 4 June, p. 6.

⁶¹ Such is the importance given to political party hierarchy that a non-Maoist political party leader defended Pushpa Kamal Dahal’s low attendance in the CA, stating that Dahal could make more decisions and an impact in a few meetings, than the majority of those who attended regularly. This clearly misses the importance of democratic processes and deliberations among those seen as equals. MC interview with then CA member; 1 August, 2011.

⁶² ICG. 2012. Nepal’s Constitution (I): Evolution Not Revolution. Crisis Group Asia Report N°233, 27 August 2012, p. 23.

⁶³ As ICG notes, the CA members themselves should also be held culpable; “An unwillingness to allow parliamentarians to debate and resolve the difficult questions that they had been elected to address – and their fatalistic acceptance at being sidelined – have plagued the entire peace process” (emphasis added). International Crisis Group. 2012. Nepal’s Constitution (I): Evolution Not Revolution. Crisis Group Asia Report N°233, 27 August 2012, p. 6.

⁶⁴ For more details see MC Policy Paper No. 4, “Attendance and Participation in the Constituent Assembly,” September 2010.



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committee and plenary meetings as well as voting. The committee had not been formed in the previous CA as no such notices had been given.

Elections may offer Nepalis an opportunity for democratic renewal. However, the recent history of

the CA has taught us that the focus on CA elections as *the* source of democratic accountability is not sufficient. There is a need to think ahead today to how a popular democratic constitution can actually be written for tomorrow.

