

# Policy Paper

No. 5

June 2011



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## DEADLINES, DEMOCRACY AND A POPULAR, DEMOCRATIC CONSTITUTION

### Recommendations

1. Political authorities should make public concrete plans and time-lines for the completion of both the draft and final Constitution as soon as possible.
2. All political party leaders and all Constituent Assembly (CA) members should make public commitments to wide-spread and meaningful public consultations and debates.
3. Mandatory attendance at all CA meetings should be enforced with CA members excused only upon good cause. The specific reasons given should be recorded and maintained as public record. Strict penalties should be stipulated and enforced including fines and expulsion.
4. Political party leaders should honor the votes of citizens and commit to include in government only those that have been elected through the CA election process.
5. Political party leaders should commit to ensuring proportional representation in the formation of governments.



## Introduction

In a replay of a year earlier, a last-minute agreement between the three largest parties permitted the extension of the tenure of the Constituent Assembly (CA) on 28 May, 2011. Extended by three months, compared to the one year before, the extension also came with a new agreement.<sup>1</sup> The five-point pact among the three main political parties of the Unified Communist Party of Nepal – Maoist (UCPN-M), Nepali Congress (NC) and the Communist Party of Nepal – Unified Marxist-Leninist (CPN-UML) stipulated a three month extension for the CA; completion of the basic tasks of the peace process and the first draft of the Constitution from the CA within the same period; the effective implementation of various past agreements reached with the United Democratic Madhesi Front (UDMF), including making the Nepal Army (NA) more inclusive and the resignation of the Prime Minister (PM) Jhulanath Khanal (CPN-UML) and the formation of a national consensus government.

As in the agreement reached the year before, the agreement lacks detail and time-lines. As a political understanding, it is worth the commitment that stands behind it. In the backdrop of the past year's lack of progress on the peace process and Constitution-writing endeavors, the ambiguity of the document does not bode well.

To be recalled, the resignation of the then PM Madhav Kumar Nepal and the formation of a new government consumed much of the political attention and energy of the last year. Following PM Nepal's resignation in June 2010, it was almost seven months before Jhulanath Khanal assumed power according to a secret agreement reached with UCPN-M, an agreement that immediately came under fire once public. Causing particular political ire were the two points that stipulated rotating government leadership between CPN-UML and the UCPN-M and the Home Ministry to the latter party. Inter and intra-party differences resulted in the inability of PM Khanal to immediately expand his government. The formation

of his full cabinet three months after his election, with the Home Ministry along with other ministries given to the UCPN-M, resulted in furthering divisive politics within both the UCPN-M and Khanal's own party the CPN-UML as well as between other political parties.

The Khanal government, backed by the UCPN-M and the Madhesi Peoples' Rights Forum (MPRF)<sup>2</sup> had proposed an amendment in the Interim Constitution (IC) allowing for the extension of the CA for another year. The Jaya Prakash Gupta led split in the MPRF on 22 May 2010 virtually ensured that the required two thirds majority vote in the CA could not be met.<sup>3</sup> The new three-month extension is a function of political expediency as much as it is of compromise.

Unsurprisingly, differences in the interpretation of the agreement have already emerged, including the timing of PM Khanal's resignation – before or after the formation of a national consensus government. Without concrete agreement on what constitutes “basic tasks” of the “peace process,” a detailed time-frame and a real political commitment to consensus, it is difficult to gauge the exact gains of the extension other than averting an immediate political crisis.<sup>4</sup>

Large difficult issues remain. Along with constitutional roadblocks, the topic of integration and rehabilitation continues to be politically challenging. While the NA's proposal for a creation of a mixed force under a new NA directorate has been accepted by the UCPN-M, specifics of numbers, the issue of group entry, combat functions, the handover of weapons and the ratio of Maoist combatants to NA (or NA/Nepal Police and Armed Police Force as originally posed by the NA), remain to be decided.<sup>5</sup> In terms of timings, the UCPN-M

<sup>1</sup> The three points agreed upon in May 2010 were the resignation of the Prime Minister, the immediate conclusion of the peace process and the extension of the CA deadline.

<sup>2</sup> The MPRF is also often referred to in their Nepali acronym form, the MJF (Madhesi Janaadhikar Forum).

<sup>3</sup> Jha, Prashant. 2011. The Roots and Impact of the MJF Split. *The Kathmandu Post*, 23 May, p. 3.

<sup>4</sup> The formation of a parliamentary committee headed by CA Chair Subash Nemwang to monitor the implementation of the five-point agreement is a step forward. Dahal, Phanindra. 2011. House Set to Form Monitoring Panel. *The Kathmandu Post*, 31 May, p. 1, 4.

<sup>5</sup> Jha, Prashant. 2011. Nepal: Need for Workable Compromise. *The Hindu*. <http://www.hindu.com/2011/05/25/stories/2011052556201200.htm>. Accessed 26 May, 2011.



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has always linked integration with the constitutional process.

Leaving aside the questions of the “basic tasks” of the peace process and the resignation of PM Khanal, this Martin Chautari (MC) policy paper examines issues raised by other components of the five-point pact. More specifically, the first section of the paper focuses on time-lines, challenges and implications of the production of the first draft of the Constitution. This is followed by an examination of the post-CA “national consensus governments” – the much favored term of political elites across the ideological spectrum – in terms of adherence to democratic principles of inclusion and the honoring of citizens’ votes in the selection of ministers. The paper concludes with the issue of agreements and excluded groups and the completion of a Constitution that holds widespread legitimacy in the context of a limited time-frame.

### Understanding a “First Draft”

#### *Time-lines*

The new five-point pact states that the first draft of the Constitution will be completed within three months. While Article 64 of the Interim Constitution (IC), 2007 has been amended to read “three years and three months,” this formally refers to the preparation and promulgation of the Constitution itself; a goal that the parties have clearly not aspired to within this time-line. In other words, an extension of the CA is implicit in the new agreement. Given that the Supreme Court has ruled that the CA can only be extended for six months,<sup>6</sup> the new extension will likely be for only an additional three months, which would put the final completion of the Constitution in November 2011.

This is important for numerous reasons. At the time of the one-year extension of May 2010, the parties had claimed that 80 percent of the Constitution writing tasks had been completed, with the one year more than sufficient to complete the process. Critics within the CA have pointed to the political posturing involved in making

such claims.<sup>7</sup> Following political agreement on crucial issues, the completion of a first draft itself requires consolidation, CA discussions, suggestions from party-wise deliberations in the CA plenary, final amendments by the Constitutional Committee (CC), and publication in the Gazette.

Furthermore, the May 2011 five-point pact does not include any details on how the final Constitution will be produced. The steps remaining after the completion of the first draft have not been acknowledged. This includes public opinion gathering, the revising of the draft Constitution accordingly, and final completion and promulgation.

The 11<sup>th</sup> amendment to the CA schedule (18 July, 2010) had deleted all time-frames after the integration of the draft, stating that CA plenary discussions on the draft onwards would be completed within time-frames to be determined by the Business Advisory Committee.<sup>8</sup> In the 10<sup>th</sup> amendment to the CA schedule (10 March, 2010), the following times had been allocated: three weeks for public discussion of the draft; one week for the preparation and discussion of the report on citizens’ inputs; one week for the amendment of the Constitutional draft per citizens’ suggestions; one week for the revised draft discussion in the CA; one week for amendment proposals from CA members; two weeks for clause wise discussion and passing of preamble and all sections, and six days for the preparation of a certification copy, certification by the CA Chair and the final promulgation by the President. This amounts to a total of about 10 weeks; an additional two and a half months. In other words, if the draft is completed within the three months and if processes in the last detailed CA schedule (10<sup>th</sup> amendment) are followed, the final Constitution will require the six-month extension.<sup>9</sup>

<sup>7</sup> Stating that not even the sixth step of the 14 steps according to the CA operational calendar has been completed, and major political issues remain unresolved, a CA official claimed that actually 80 percent of the work remains to be completed. MC interview with CA Constitutional Committee official; 10 May, 2011.

<sup>8</sup> While unhelpful in planning, this manoeuvre meant that no deadlines would be missed.

<sup>9</sup> The same time period of six months for the completion of the Constitution was given by a CA official. MC interview with a secretary at the CA; 10 May, 2011.

<sup>6</sup> Gautam, Bimal. 2011. SC Says CA Extension Only for Six Months. *Republica*, 26 May, pp. 1, 2.



However, it is important to recall that the 10<sup>th</sup> amendment was made two months before the expiry of the initial two year CA mandate, which resulted in the compressing of all time-lines. The time-line set in this amended CA schedule was at that time seen as largely impractical. It is now widely acknowledged that process is as equally important to the legitimacy of a new Constitution as is the contents of the final document. Even if a Constitution is completed within six months, it is unclear how meaningful the processes followed will be and the consequences this will have on perceptions of the legitimacy of the final Constitution.

### **Progress Made**

Despite the emphasis given to the formation of government during the last year, some initiatives have been taken and progress has been made in the writing of the Constitution. This includes attempts to resolve gaps, overlaps and contentious issues in the concept papers from the committees of the CA, the last of which was submitted on 27 January, 2010.

The Gaps and Overlaps Committee (Preliminary Draft Reports Study Committee) headed by CA member Agni Kharel submitted a report to the CA chair on 30 September, 2010 listing 210 contentious issues from seven committee reports. The draft of the State Restructuring Committee had 78 points that required resolution. On 11 October, 2010, a seven member high-level political task force (with an assistance team) was established under UCPN-M leader Pushpa Kamal Dahal 'Prachanda' and 127 issues were resolved. The official report to the CA was approved by an all-party meeting on 4 January, 2011.

Following the amendment of the CA Rules and Procedures on 18 January, 2011, all the reports except the State Restructuring Committee report,<sup>10</sup> were sent to the CC on 26 January, 2011 for resolution. A month later on 25 February, 2011, a dispute resolution sub-committee was set up within the CC, once again under Dahal. This sub-committee was able to bring down the

number of contentious issues to 21. The draft concept paper of the State Restructuring Committee was also recently forwarded to the sub-committee.<sup>11</sup>

A number of issues have been decided upon. The Constitution will be officially titled the 'Constitution of Nepal,' without any adjective/suffix or prefix, including the year of promulgation. 'Maoist combatants' will not be mentioned in the Constitution, as the leaders agreed to resolve the issue of combatants prior to promulgation of the Constitution. There will be no compulsory military training. The Head of the State will have the authority to appoint and dismiss the Chief of Army Staff on the recommendation of the council of ministers. For issues to be resolved through referendum, a two thirds vote of the federal legislature is necessary. To amend the Constitution, any member of the federal legislature can table a proposal.

Other issues resolved include the nature of the legislative bodies. The central legislative body will be called the legislature-parliament and have two houses, namely the House of Representatives (Pratinidhi Sabha) and the National Assembly (Rashtriya Sabha). The provincial legislative will be unicameral and called the Pradesh Sabha. Both geography and population will be the basis of the delineation of constituencies.

An agreement was also reached on the issue of the independence of judiciary and constitutional checks and balance. The Maoist backed draft concept paper passed by the Committee on Judicial System had proposed parliamentary control/supremacy over judiciary.<sup>12</sup> A compromise was reached to form a Constitutional Court as the final interpreter of the Constitution. The proposed court's jurisdiction are: disputes over posts of national importance, debates indirectly related to politics, laws contradictory to the Constitution, disputes between the centre and provinces, impeachment, Constitution amendment and elections.<sup>13</sup> Furthermore, an independent

<sup>10</sup> This report was not sent to the CC on the grounds that it was first to be reviewed by the yet to be formed State Restructuring Commission as envisaged in the IC, 2007 (article 138.2).

<sup>11</sup> *Republica*. 2011. State Restructuring Draft Goes to Disputes Body. June 3, p. 2.

<sup>12</sup> For details, see MC Policy Brief No. 2, "Update on the Constituent Assembly," October 2009. Available at [www.martinchautari.org.np](http://www.martinchautari.org.np)

<sup>13</sup> The latest agreement on independence of judiciary has been welcomed, but the provision to create a separate Constitutional Court



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council (the name of the body is yet to be determined) will appoint the chief justice and other judges of the Supreme Court, as well as constitutional body members. The council will be headed by the head of the government, with members consisting of the chief justice, speaker of the federal parliament, leader of the opposition and minister of law and justice.

The State will now have a multi lingual policy and Nepali in the Devnagari script will be the official language of the central government and the judiciary. Languages listed by the permanent language commission (to be formed) will also be recognized as official languages. The provinces will have the right to choose their official language through the decision of their legislature. However, Nepali will be the language of communication between the center and the provinces until the language commission recommends other alternatives. It has furthermore been agreed to retain the old national flag but the meanings associated with the flag will be reinterpreted. The Nepali State will now declared to be multi-ethnic (bahu jatiya) instead of multi-national (bahu rashtriya).<sup>14</sup>

In matters of international agreements/treaty, the central government will need the consent of affected province(s) prior to the signing of agreements or treaties and provinces are required to obtain the consent of the federal government before signing agreements with foreign parties concerning financial and industrial matters.

Decisions have also been made on the issue of citizenship. No Nepali citizen will be denied the right to citizenship, and there will be a single federal citizenship.<sup>15</sup> To obtain the citizenship on the basis of descent, both mother and father must be Nepali citizens. Importantly, this provision is regressive. The Interim Constitution, 2007 states that “any person born at the time when his father or mother is a citizen of Nepal shall be a citizen of Nepal by descent.” This new provision will deprive citizenship

to a person born to a Nepali mother (citizen) but with the identity of the father unknown. Gender discrimination is further evident in the conditions for naturalized citizenship. If a foreign national marries a Nepali female citizen, is living in the country continuously for last 15 years and renounces citizenship of his country of origin, then the person is eligible to become a naturalized citizen. However, in the case of a woman married to a Nepali national, she is immediately eligible for naturalized citizenship if she renounces the citizenship of her country of origin. These decisions have been especially criticized by female CA members and activists, as well as international agencies for being discriminatory against women, and for creating a situation of statelessness.

It has also been agreed that a person has to be a Nepali citizen by descent in order to be eligible for the following posts: Head of the State, Deputy Head of the State, Prime Minister, Head of the Federal Legislature and Judiciary, Head of the Security Agencies and Head and Deputy Head of the Provinces. However, this provision only applies to men; women married to Nepali citizens are eligible. Non Resident Nepalis will be granted a “Non-Resident Nepali Citizenship Certificate,” but will not have “political rights.”

However, there still remain 99 questions yet to be resolved, 78 alone related to State restructuring. In terms of substantive issues, outstanding issues include the naming and numbering of boundaries and provinces, structure of government and the forms of election to central and State institutions. Other important issues include the role of the second chamber of the federal structure; fiscal relations; issues of protection within the provinces; modes of collaboration between the federal and the provinces; details of what will entail the local especially given the absence of districts in the draft papers, and concrete plans, structures and time-lines for the transitional period.<sup>16</sup>

## Representation and Citizens' Votes

### *Attenuating Attendance*

Over the past year of the CA's extended tenure, the full house of the CA met eight times for a total period of 95

has been criticized by some section of the legal community on the grounds that it will weaken the judiciary and democracy. See, *The Himalayan Times*. 2011. CJ Laments Idea of Constitutional Court. March 15, p. 3.

<sup>14</sup> However, that the country has multi-national features (bahu rashtriya visheshatayukta) has been added in the explanatory section.

<sup>15</sup> The certificate will also mention provincial identity and may also include caste/ethnic and geographical details.

<sup>16</sup> For more details, see MC Policy Brief No. 3, “Constitutional Complexities and Transitional Planning,” April 2010.



minutes. On average, these meetings have lasted for 12 minutes. They covered decisions on the formation of a CA Rules and Regulation amendment committee, the sending of thematic committee reports to the CC (as opposed to first resolving issues within the full house) and CA membership issues.

Attendance for this year-long extension period of the CA averaged 58 percent. This is a decrease of five percent compared to the average of 63 percent of the first two years of the original mandate period,<sup>17</sup> despite the limited number of meetings.<sup>18</sup>

**Table 1. Top ten attendees for whole 3-year period**

S.N	Name	Party	Attendance %
1	Agni Kharel	CPN-UML	97.25
2	Laxman Ghimire	NC	96.33
3	Man Bahadur Mahato	NC	94.50
4	Rajendra Khetan	CPN-ML	94.29
5	Chandriram Tamata	NC	92.66
6	Surya Bahadur Sen	UCPN-M	91.74
7	Nilamber Acharya	NC	91.43
8	Gopal Singh Bohara	CPN-UML	90.83
9	Dhyan Govinda Ranjit	NC	90.83
10	Bhim Prasad Acharya	CPN-UML	90.83

**Table 2. Top ten absentees for whole 3-year period**

S.N	Name	Party	Attendance %
1	Sher Bahadur Deuba	NC	2.75
2	Pushpa Kamal Dahal	UCPN-M	7.34
3	Bijaya Gachhedar	MPRF	10.09
4	Rajendra Mahato	Sadbhawana	11.93
5	Sharat Singh Bhandari	MPRF	15.53
6	Krishna Bahadur Mahara	UCPN-M	16.51
7	Khovari Ray	Sadbhawana	17.43
8	Saroj Kumar Yadav	Sadbhawana	17.43
9	Upendra Yadav	MPRF	18.35
10	Ram Bahadur Thapa Badal	UCPN-M	20.18

Disaggregating by party, among the three big parties, CPN-UML's average attendance rate for the extended period increased relative to its performance in the first two years of the CA. However, attendance rates of the NC and the UCPN-M declined. NC's average attendance

is 60 percent, and that of UML's is 66 percent, compared to the average attendance rate of 58 percent of the extended period. The UCPN-M's average attendance for the same period was below average at around 57 percent.

All Madhes based parties have below average attendance rates for the extended one year period. Compared to their attendance rates in the first two years of the original mandate, this year's average attendance rates for the MPRF (including members of all factions) and the Nepal Sabhawana Party-Anandi Devi increased slightly, whereas that of the Tarai Madhes Democratic Party and Nepal Sadbhawana Party decreased. The Rastriya Prajatantra Party-Nepal has the lowest attendance rate of 34 percent during this extension period.

### *Representation in Practice*

Much of the Comprehensive Peace Agreement (CPA) is related to addressing historical grievances and includes the issue of marginalization from political power. While the CA is the most representative elected body in the history of Nepal, actual processes within the CA serve to reinforce party hierarchies and marginalize the voices of CA members from the traditionally disenfranchised.<sup>19</sup> Analyses of the much stressed "national consensus governments" formed following the CA elections reveal that these governments have continued to under-represent the marginalized, despite the stated right in article 21 of the IC, 2007 to participate in state structures on the basis of proportional inclusion, as well as various laws and policies.

Since the result of the CA election in 2008, three coalition governments have been formed. The first government was headed by the UCPN-M's Pushpa Kamal Dahal (PKD), whereas the second and third governments have been led by CPN-UML's Madhav Kumar Nepal (MKN) and Jhalanath Khanal (JNK), respectively. There have been a total of 104 ministers of various capacity in the three governments.<sup>20</sup> All three prime

<sup>17</sup> For more details, see MC Policy Paper No. 4, "Attendance and Participation in the Constituent Assembly," September 2010.

<sup>18</sup> A fortnightly magazine, *Himal Khabarpatrika*, reported that a number of CA members only came to sign in the attendance register. See Gaha Magar, Santa. 2010. Gayal Hudai Hajir Gardai. *Himal Khabarpatrika* 20(22): 14-15.

<sup>19</sup> For more details, see MC Policy Paper No. 4, "Attendance and Participation in the Constituent Assembly," September 2010.

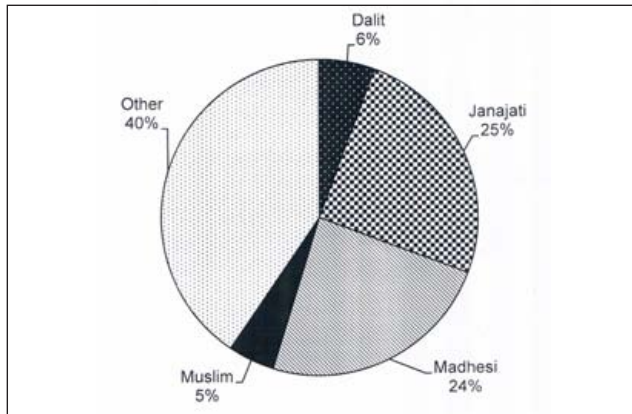
<sup>20</sup> There have been changes in the composition of all three governments. A few ministers have been relieved of their posts, while others have resigned. There have also been ministers who declined to join the government. Those who did not take the oath of office are not included in the figures given here.



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ministers are Brahmins, i.e., they come from the 'Other' category (comprising of Brahmin, Chhetri, Thakuri and Sanyasi). Of the eight deputy prime ministers, five belong to the 'Other', two belong to the Madhesi and one is from the Janajati category. As is evident from figure 1, Janajatis and the Dalits are under represented whereas people belonging to 'Other' category are over represented, a continuation of past trends. The only significant change is the increased participation of Madhesis in the government.<sup>21</sup>

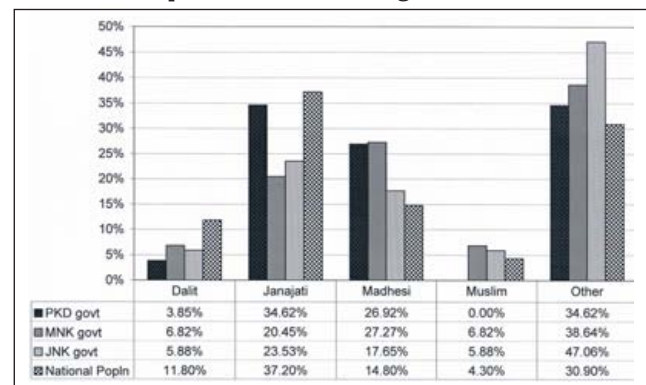
**Figure 1. Caste/ethnic composition of the post-CA election governments**



Comparing the three different governments separately, all have similar ethnic composition.<sup>22</sup> As noted above, Dalits and Janajatis have been under represented, while Madhesis and those from the 'Other' category are over represented relative to their national population (figure 2). While the PKD government was near to balance in terms of representatives from 'Other' and Janajati categories, it fared badly in the representation of disadvantaged groups such as the Dalits and Muslims.<sup>23</sup> Madhesis received significantly larger shares (26.9%) of the government

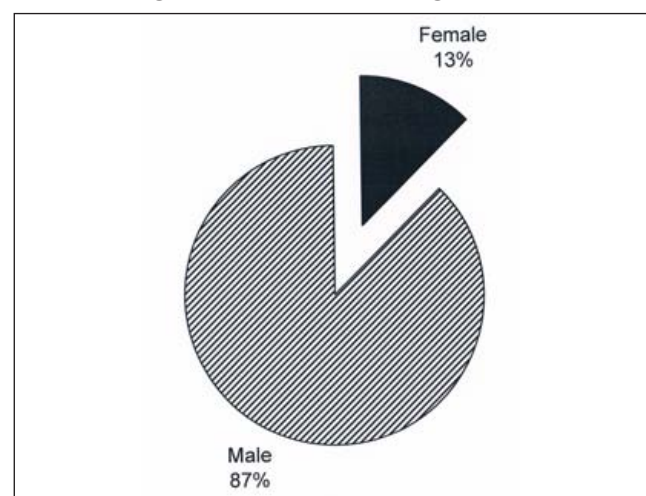
relative to their actual population (14.8%). The MKN government had the least amount of Janajatis and most number of Madhesis. The JNK government is heavily tilted towards the dominant group, i.e., the 'Other'; their share in the government is 47 percent.

**Figure 2. Comparative caste/ethnic composition of the three governments**



In terms of gender, the composition of all governments formed after the CA election has been far from satisfactory. On an average, only 13 percent of the ministers of the post-CA election governments have been women (figure 3). This is despite IC provisions and the fact that the reinstated parliament in 2006 had specifically made a commitment for 33 percent representation of women in all structures of the State.

**Figure 3. Cumulative composition of governments in terms of gender**



<sup>21</sup> The Madhes based parties emerged as key players in the formation of coalition governments, which has contributed in their increased numbers in the executive.

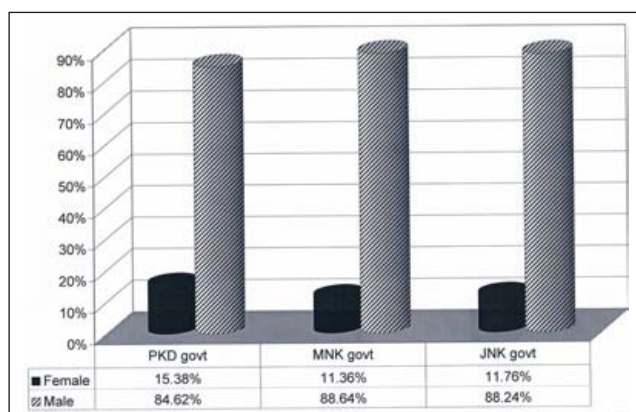
<sup>22</sup> Since the composition of the governments varied in numbers (PKD 26, MKN 44, JNK 34), percentage figures have been used for comparison. The figures include the total number of ministers during the entire tenure of the government.

<sup>23</sup> There was no Muslim minister in the PKD government. The sole Dalit minister was appointed later when Matrika Yadav resigned.



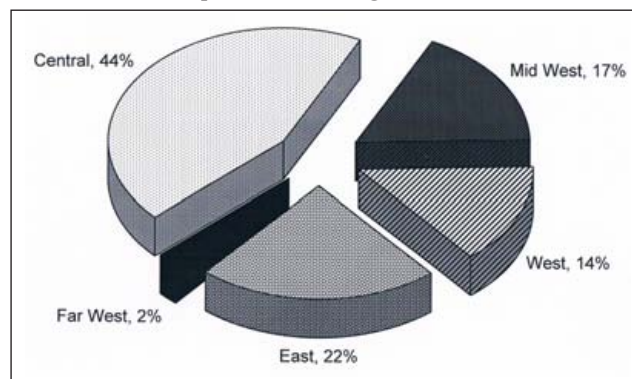
Comparatively speaking the PKD government has fared better in term of gender representation. While the PKD government had around 15 percent women ministers, the two other have less than 12 percent (figure 4).<sup>24</sup>

**Figure 4. Comparative gender composition of the three governments**



The Nepali State has been exclusionary in terms of geographic regions as well as caste/ethnicity and gender. Historically, political power as well as development has favored the central region. This trend has continued, as shown in figure 5. More than 44 percent of the ministers came from the central region. The eastern region comes second with a share of about 22 percent in the council of ministers. The mid western and western regions have around 17 and 14 percent share respectively. The least developed region, the far west, has less than two percent representatives in the governments formed since the election to CA. Of the three prime ministers, two are from the central region and one is from the east. And of the eight deputy prime ministers, five are from the eastern region, two from the mid west and one from the western region.

**Figure 5. Cumulative regional composition of the government**



### *Honoring the Vote of Citizens*

One of the fundamental tenets of democracy is periodic elections which allow citizens to elect their representatives to speak/work on their behalf. Elections provide an opportunity for citizens to voice opinions on leaders and overall policies and authorize representatives. In this respect, the “national consensus governments” formed following the CA elections have all revealed the tendency to over-ride the authority of citizens’ votes.

As high as 30 percent of the ministers of the past three governments in charge of the country’s policies and decisions affecting the lives of citizens did not win in either the First Past the Post (FPTP) or the proportional electoral system (LIST PR) of the CA elections (figure 6).<sup>25</sup> Of the three PMs, Madhav Kumar Nepal lost from two constituencies, and was later nominated to the CA by the government. Three deputy prime ministers were also rejected by their respective constituencies – Bamdev Gautam, Sujata Koirala, and Bharat Mohan Adhikari.

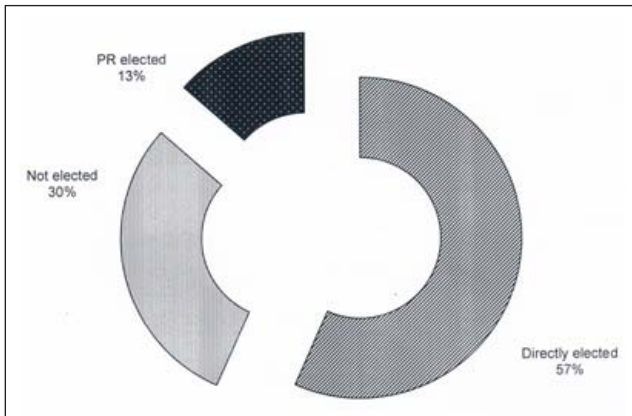
<sup>24</sup> Two female ministers, namely Radha Gyawali (of CPN-UML) and Jayapuri Gharti (of UCPN-M), appointed by PM JNK declined to join the government. While Gyawali declined stating that the position of state minister offered was below her political importance, Gharti rejected the offer stating that the government has not adhered to the 33 percent women representation commitment. However, Gharti’s decision is known to be related to the factional feuds within the UCPN-M; excluding Gharti, three other Maoist ministers close to senior vice-chair Mohan Baidya ‘Kiran’ also have not taken the oath of office.

<sup>25</sup> For purposes of clarification, even though Madav Kumar Nepal is legally part of the CA as he was nominated later, he has been included in the “not elected” category as he had lost in the CA elections. State minister Bhagawati Chaudhary is a CA member from the ‘nominated’ category but has been put under the PR category for the above calculations. As will be made clear in a later section, there is technically no real difference between the PR-elected and the 26 nominated CA members; both groups are selected by political party elites and not by the people.



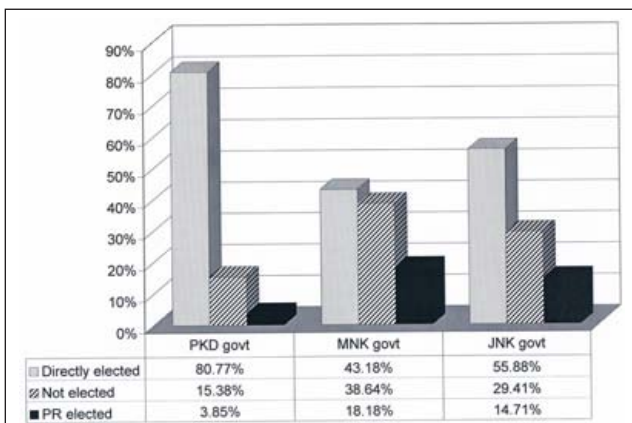
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**Figure 6. Cumulative composition of the government in terms of election method**



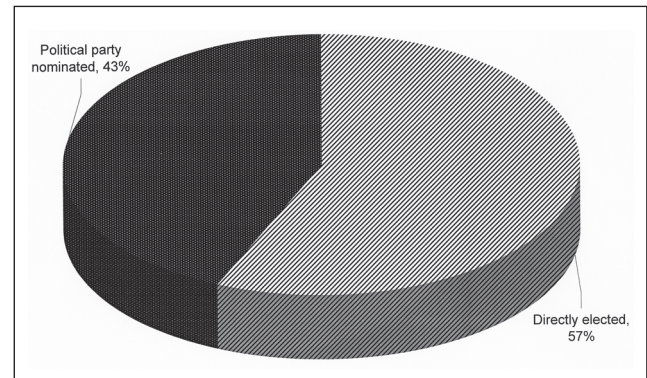
Comparatively speaking, the first government led by PKD had the most number of ministers that actually won in the CA election. However, the deputy prime minister Bamdev Gautam and three other ministers of that government had lost at the polls. The second post-CA election government led by Madhav Kumar Nepal fared the worst in terms of including in government those rejected by citizens. Including the twice-defeated PM and one of his deputy PMs, almost 40 percent of the ministers in that government were not elected in the CA elections. The third government led by JNK also has a deputy PM in Bharat Mohan Adhikari who was rejected by his constituency. Nearly 30 percent of the ministers of the Khanal government were not voted into power by citizens (figure 7).

**Figure 7. Comparative composition of the three governments in terms of elected officials**



In the calculation of the importance of citizens' votes, it is important to further consider the structuring of the CA elections. Political party elites at that time had decided on a LIST PR system that functioned very differently in Nepal compared to most other places. The LIST PR system was legally defined to be a "closed list" system in which voters were allowed only to cast a vote for the party but could not influence the selection of candidates on that list. It was up to the political parties themselves to fill the seats after the election from the list. This is at variance from common practice in closed list systems, in which seats are filled from the top of the candidate list so voters can influence selection.<sup>26</sup> With this mind, in terms of the composition of the post-CA governments, a recalculation reveals that 43 percent of the ministers responsible for the forming of policies and decisions that impact the lives of citizens, were not directly voted into power (figure 8).

**Figure 8. Cumulative composition of government in terms of representativeness**



**Conclusion**

Since the 2006 April movement, various governments have signed agreements with excluded groups. The issue of the implementation of these agreements is highlighted in the five-point pact commitment to past agreements reached with the UDMF. The inclusion of that clause

<sup>26</sup> Volla, Kare. 2011. Group Representation and the System of Representation in the Constituent Assembly and Future Parliaments of Nepal. <http://www.follesdal.net/projects/ratify/nepal/Volla-2011-The-development-of-an-electoral-system.pdf>. Accessed 3 June, 2011.



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continues the practice of ad-hoc promises made by political authorities. As in the past, it has been political expediency that has been prioritized. Unsurprisingly, some other marginalized groups immediately protested the lack of attention given to the implementation of other agreements made by the State.<sup>27</sup>

As a whole, State responses to the grievances of these groups have been ad hoc, individualized and reactive. Competing claims from different groups remain to be resolved and agreements signed have been selectively implemented. The CA has furthermore failed to provide a fully enabling forum for the issues and concerns of excluded groups. The upsurge of strikes leading up to the CA extension illustrate the continuing centrality of the issue of exclusion and justice, with the new Constitution key to guaranteeing the legitimacy of the new Nepal.

The May 2011 five-point pact does not include any details on how the final Constitution will be produced. To compensate for slow progress, past amendments to the CA schedule have increasingly cut into the time allocated for public opinion collection on the first draft. Importantly, while three weeks had last been officially allocated for public opinion collection, according to an

official of the Public Outreach Committee, a minimum of two months is actually required for this exercise.<sup>28</sup> This would necessarily extend the time-line over the six-month limit imposed by the Supreme Court. Along with the completion of the Constitution, there have been consistent demands for the right to have a say in the designing of the new Constitution. For example, point one of a 20 point memorandum from the Nepal Federation of Indigenous Nationalities (NEFIN) to the CA Chair and leaders of the main political parties on 18 July, 2010 demanded the distribution of the draft Constitution to villages, wards and districts for the feedback of citizens.<sup>29</sup>

There will be large political risks in the forgoing of meaningful public opinion collection in the completion of a popular, democratic Constitution. To be clear, the writing of the Constitution is part of the peace process in Nepal. And yet the time-line now appears severely limiting. The Supreme Court decision on the six-month CA extension limit has already come under different legal interpretations.<sup>30</sup> As the new deadline draws near, the Supreme Court is likely to be increasingly drawn into the political center, as are interpretations of the “doctrine of necessity” underscored in the ruling.



<sup>27</sup> See, Tharuhath, Limbuwan Torch 5-pt Pact. [http://www.myrepublica.com/portal/index.php?action=news\\_details&news\\_id=31819](http://www.myrepublica.com/portal/index.php?action=news_details&news_id=31819). Accessed 30 May, 2011.

<sup>28</sup> In terms of printing alone, according to the official, it will take more than 15 days to print the requisite five million copies if all four government press facilities work 24 hours a day. A further two weeks are required to just reach the copies to districts. MC interview; 4 May, 2011.

<sup>29</sup> <http://nefin.org.np/press-release/514-2010-07-18-16-31-43.html>. Accessed 3 May, 2011.

<sup>30</sup> See, for example, Luitel, Ananta Raj. 2011. SC Puts Six-Month Cap on CA Extension. *The Himalayan Times*. 26 May, p. 1.; Kharel, Pranab. 2011. CA can get 6-Month Lease, Rules Apex Court. *The Kathmandu Post*, 26 May, p. 3.; *The Himalayan Times*. 2011. Ceiling may Actually Help Break New Ground. 26 May, p. 1.