

CONSTITUTION MAKING *in* NEPAL



*Report of a Conference organized by the
Constitution Advisory Support Unit, UNDP*

3 - 4 March 2007, Kathmandu, Nepal



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About the cover picture: this picture was taken on a CASU visit to a potters' village in the Terai. The discussion was about the Constitution.

As Yash Ghai said during the Conference "Making a constitution includes not just what happens at the Constituent Assembly, but all the meetings around the country, including in the villages, where people discuss what sort of constitution they want".



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Foreword

It is my pleasure to present the report of the first UNDP National Conference on “Constitution Making in Nepal”. The Conference, which was held in March 2007, was the first of a series of five national conferences organized by UNDP Nepal as part of our support to various partners who play key roles in Nepal’s constitution making process. The other four conferences cover the most important substantive issues that will need to be dealt with in a new constitution of Nepal, such as restructuring of the state and federalism, diversity, human rights and social inclusion, justice system, and systems of government. The major objective of the conference series is to assist in the stated objective of the Interim Constitution – that the people of Nepal should make their own constitution through the Constituent Assembly.

Since November 2006, UNDP Nepal has been providing assistance for the constitution building process in collaboration with the wider international community. The main focus of our support has been twofold – providing expert advice to key groups of stakeholders so that they are well prepared to participate in making a new Constitution, and increasing public knowledge of the constitution building process. A core team of experts led by Professor Yash Pal Ghai and Dr.

Surya Dhungel has been offering technical knowledge and often practical advice for a diverse group of people across the country. This conference report is one result of such efforts, and I am certain that it will be of practical use to many readers.

Throughout the conference series, a particular emphasis has been made to ensure Nepali experiences, views and opinions are shared and discussed thoroughly by engaging many national experts on various topics, while international experts bring in the most relevant experiences from abroad to enrich the discussions. This was regarded as extremely important given the fact that the responsibility of making a new constitution of Nepal lies with Nepali citizens, and that the process will have to be built on the historical evolution of this country.

It is certainly a challenging task to draw up a new constitution through a democratic, participatory process, especially for a country which is just emerging from a decade of conflict. However, it is a prerequisite to consolidating peace in the country, and it is the hope of Nepali citizens. I would like to take this opportunity to reconfirm that UNDP is committed to supporting the peace process in Nepal, and I believe that this report is a symbol of our commitment.



Matthew Kahane
UNDP Resident Representative, Nepal

Introduction

As part of UNDP's commitment to supporting Nepal's process of making a new constitution, the Constitution Advisory Support Unit (CASU) organized this conference on constitution making on 3rd and 4th March 2007 in Kathmandu. This was part of a series of national constitutional conferences aiming to bring together persons and organisations from all over the country to discuss specific issues of constitution making and options for the new constitution. Some of these have taken place after different groups have travelled throughout the country, given information about the process and the issues that will be determined by the Constituent Assembly. The aim is to promote discussions that will lead to an effective constitution making process that will reflect, both in the process of making the new constitution and in its substance, the principles and aspirations of the *jana andolan* of 2006. These conferences have been designed to ensure that different sectors of society meet and share ideas. Similarly, they should help in the work of the Constituent Assembly by raising awareness, by developing an agenda and raising issues about the new constitution, exploring in some detail the implications of different approaches that might be taken and different institutions that might be adopted in a new constitution. The conferences have built on the work of civil society, and hopefully reflect the views that people have been expressing. It is CASU's view that such events are themselves part of constitution building, because they generate ideas, and are part of the whole process of developing a constitution-consciousness that will be essential for the success of the new constitution. We also hope that this report will also serve as a record of what people were thinking about and discussing at the time the conference was held.

This conference took place at the Radisson Hotel in Kathmandu. During the two days, over 100

participants, drawn from a wide spectrum of individuals including, politicians, lawyers, and academics, prominent members of civil society, the media and some people from international organizations attended (for a complete list of participants, indicating chairs and speakers please see Appendix 4).

The main focus of the conference was on making a new constitution, rather than on the substantive issues that would have to be decided when making that constitution (though inevitably some issues related to substance were raised). A general discussion of the issues involved in making a constitution took place during two sessions of the conference. One session was devoted to a consideration of the 1990 Constitution, and to what lessons could be derived from that experience – both the process of making that constitution and from the constitution itself and from the way it was, or was not, implemented. Another session was devoted to the presentation by leaders of political parties of their perspectives on the process of making a new constitution. And one session concerned specifically the working of the Constituent Assembly.

This report is a summary of the observations and suggestions made at the conference rather than a consecutive account of the event. There was a good deal of overlap between remarks made by various speakers, and participants from the floor. An attempt has been made to remove overlap and repetition, while giving some sense of who made various remarks, and the importance given to a particular issue by participants.

CASU

CASU is a small Unit within the UNDP, Nepal. It is committed to helping to achieve the aims of the Peace Agreements and the Interim Constitution – “that the people of Nepal make their own Constitution

through a Constituent Assembly”. The Unit responds to requests for information from Government bodies, political parties and civil society. As well as organising conferences and workshops, its members participate in events organised by others. The Unit has assisted in the publication of materials designed to inform the public about constitutions and constitution making. And it has prepared papers, short and long, on many issues relating to the Constituent Assembly, and constitution making generally.

ACKNOWLEDGEMENTS

CASU wishes to acknowledge with thanks all those who participated in the conference. It is particularly grateful to Professor Fink Haysom who was the one expert from overseas; he gave the opening, keynote, address, and some reflections at the end in the light of what he had heard in the two days of the conference.

Professor Nicholas (‘Fink’) Haysom is one of the world’s most outstanding and experienced negotiators of constitutions. He was Nelson Mandela’s legal adviser during the framing of the South African

constitution and a key member of the negotiating team of the African National Congress. He helped to negotiate the Sudan peace and constitutional agreement between the central government and Southern Sudan. He was head of the UN team of legal advisors to the Iraqi parliament on the drafting of the Iraq’s constitution. In addition to other countries where he has provided advice he has visited Nepal on several occasions as part of an IDEA team

He has recently been appointed as Director for Political Affairs in the Executive Office of the UN Secretary-General.

Special thanks are also due to distinguished chairs of sessions including the Speaker Hon. Subhas Nembang and Honourable Bhoj Raj Pokhrel, Chief Election Commissioner.

CASU staff, Roberts Sila and Basant Subba, took notes of the event and listened to the entire recorded proceedings to prepare the first draft of this report, and together with Sakuntala Pradhan organised the conference. Jill Cottrell, Surya Dhungel and Yash Ghai were responsible for the programme. Yash Ghai and Jill Cottrell edited the report.

CONSTITUTION
MAKING IN
NEPAL

Summary:

Major points of the deliberations of the conference

THE ROLE OF CONSTITUTIONS AND CONSTITUTION MAKING IN CIVIL CONFLICTS

National conflicts are often about the structure and objectives of the state. Consequently a major focus is on the preservation or the repeal or reform of the constitution. The Maoist insurgency began with the denunciation of the 1990 Constitution and the demand for a new constitution to be made by a constituent assembly (CA). In the numerous negotiations and agreements between the seven party alliance and the Maoists, the end goal is the establishment of a new constitution. The making of a new constitution is an essential part of the peace process.

National conflicts produce (and are reflective of) deep social and economic divisions, anger and bitterness, and the lack of trust. These cannot be removed merely by the promulgation of a new constitution. In fact the successful operation of the new constitution itself depends on the removal of these negative features. It is easier to remove them if the process of constitution making provides opportunities for the review of the causes of conflict, acknowledgment of responsibility for past atrocities and violations of the rights of others, and for reconciliation.

Conflicts often cause groups to reflect on their history and identity, and the peace and constitution making

processes then become occasions for the definition of the identity of the nation itself. The constitution is then not only about state rebuilding but also but nation building. As nation building cannot be effective without the engagement of all groups, the process itself should be participatory and consultative. The attraction of a constituent assembly is that it is usually seen as a gathering of the nation, in all its variety, in order to develop a consensus on the definition, values and structures of their state.

HALLMARKS OF A GOOD CONSTITUTION MAKING PROCESS

It is widely accepted today that the most important aspect of constitution making is the widest possible *participation* of all the people and their communities and organizations. The sovereignty of the people is expressed fully in the constituent assembly only if it is truly representative of the diversity of the people.

A participatory process helps to refine the agenda of constitutional reform, to explore collectively the options for the new constitution, educate the people in the ways of state and government, and make a long lasting national consensus through a constitution which enjoys legitimacy among the

people. The participatory process can be a great way to empower people and to inculcate understanding and practices of democracy.

The constitution making process in Nepal has run into difficulties whenever it is seen as excluding certain social communities or groups. The inclusion of and justice for marginalized communities was frequently acknowledged by participants as not only morally rights but politically imperative.

A process cannot be effectively participatory unless it is *transparent*. Not every one can be a member of the many kinds of negotiations that are part of a good process, nor of the CA. Transparency allows any one who is interested to observe how the process is developing, the different views that are expressed, and to make comments and suggestions. Transparency is also critical to make the process accountable to the people. And it is vital for rebuilding of social and political trust so necessary in a society coming out of deep conflict.

A good process should also have good rules of decision making, aimed at building consensus. There should be adequate time for consultation and analysis of the views of the people.

Many participants felt that neither participation nor transparency has characterized the process so far in Nepal. Political parties have dominated the process so far. There was strong support for an *independent constitution commission* which would engage with the people and give them opportunities to understand constitutional issues and put forward their recommendations. This would also be of great assistance to the CA.

The quality of leadership is critical. Leaders must have vision and magnanimity and they must rise above personal and sectarian interests. Over cups of coffee and tea, many participants lamented the lack of a Mandela in Nepal.

INTERIM ARRANGEMENTS

When armed conflict ends, it is often necessary to make 'interim arrangements' for the governance of the country until a new constitution can be made.

Sometimes this can be a long period, and sometimes it is necessary that it should be brief, leading quickly to a new order. The context is important, as are the capacity and ambitions of political and military leaders. The interim arrangements now are governed by the Interim Constitution (IC) which deals both with the system of government until the new constitution is adopted and the procedure for the making of the new constitution (including the CA).

There were several criticisms of the way in which the Interim Constitution was conceptualized. It is unnecessarily long and has an ambitious agenda of reform which it is impossible for the present legislature or the executive to implement. The result is that instead of looking to the new permanent constitution, groups which feel excluded have sought amendments to it in order to get better representation and the acknowledgment of their specific interests. This has delayed progress towards elections and a new constitution. Political parties expressed concern at this delay, and wondered whether it would be possible to maintain alliance and solidarity among themselves. Meanwhile a legislature and government lacking democratic credentials are making important decisions, trying to pre-empt critical decisions that should be made by the CA. Indeed some participants feared that there may never be a CA.

On the whole, while participants appreciated the work of the political parties, there was much dissatisfaction with the politics of the transitional or interim period. The goal of the *andolan* II seems to have fallen out of sight; the levels of violence were unacceptably high; there was no effective rule of law; and the situation verged close to anarchy. Above all, little regard was paid to democratic principles by political parties, who had even excluded the smaller political parties from any meaningful participation in decision making or accountability. Civil society, which had played such a principled and vigorous role in the *andolan*, seems to have gone to sleep.

1990 CONSTITUTION

In order to determine the structures, values and procedures of the new constitution, it was important

to review the making and substance of the 1990 Constitution, to see if there were lessons. There were mixed views on the 1990 Constitution. Some said that the process for making it was the most participatory ever, and others said that the views of the marginalized groups had been ignored, entrenching the hegemony of Brahmins and Chhetris. Other views ranged from those who had little good to say about it, and blamed it for the conflict and turmoil that Nepal has faced in the last nearly ten years to those who thought that it heralded democracy, human rights and other liberal values—and that the roots of Nepal’s problems lay outside the constitution (as in the insurgency). Some said that political parties must shoulder some at least of the blame, with their squabbling and the greed for power.

But there was general agreement that the social and political circumstances now were fundamentally different from those in the late 1980s. At that time the concern was with the relationship of the King to political parties. Politicians were then in a hurry to make the constitution as they did not trust the King, who was trying to make his own constitution. Now the issue is the relationship between the government and the people. The old hegemony is challenged and the politics of identity have taken central place. The *jana andolan* II had greatly changed the social situation. People had ‘re-discovered Nepal, democracy and themselves’; they were now willing to defend their own interests and rights. A participant however said that one of the major issues in constitution making process was the feudal culture dominating Nepali society. Others wondered if the parties had absorbed the message of the *andolan*.

ISSUES IN CONSTITUTION MAKING

Bodies to make the constitution

The primary responsibility is that of the CA (it would for example prepare a draft constitution, debate it and adopt it—three tasks each of which was given to different bodies in 1990). But the responsibility to bring the CA into being is that of the interim government. Participants considered that it was imperative to convene it as soon as

possible. There was also strong support for the fair representation of all groups, not all of them necessarily through political parties. Parties were not trusted to look after the interests of minorities (including women) and hence the agitation for broader and fairer forms of representation.

The interim constitution says little about the procedure of the CA other than the system of voting (which aims to encourage consensus). A number of proposals were made for transparency and participation, including access to it by groups not at all or inadequately represented in the CA. There was also the view that, while the work of the CA should not be rushed, nor should it go on for ever.

The pace and the success of the CA will depend on the preparatory work before it is convened. The government was urged to set up a constitution commission; or at least the *High Level Commission on Restructuring* mandated in the IC, which is required to make its recommendations to the CA.

The IC provides a fundamental role for *political parties*: all representation in the CA will come through political parties (even the marginalized group hitherto ignored by them). Parties would probably be able to expel their members from the CA for disobedience; and their leaders have been given a central role in building consensus. On the other hand, parties have the reputation of being rather authoritarian (‘top-down’) and not very inclusive. [Amendments to the IC after the conference will now compel the parties to bring in members of marginalized communities, but it is likely that their relations with the parties will be uneasy due to the absence of a common agenda.]

An eminent political scientist commented that there was a perception that the crisis of trust is due to the lack of honesty on the part of leadership, including all the eight political parties. Another participant said that the process of making the Interim Constitution and many other decisions that have been made since the restoration of parliament are testimony to the absence of commitment to the fundamental ethos of democracy and understanding of the values or mechanisms of democracy. The parties therefore face

a major challenge in constitution making process, re-establishing trust and ensuring the observance of democratic principles and practices, to ensure a constitution that enjoys public legitimacy.

The prominence given to political parties so far (and in the CA) is at the cost of the role of *civil society*. In fact civil society has no formal role. It has, however, taken the initiative in providing civic education and providing opportunities to people to meet to learn about the process and to formulate their recommendations. Marginalised groups in particular have mobilized their communities and pressed their demands on the government. Although this has been successful in part, some participants were worried that there has been undue reliance on force and coercion, rather than democratic procedures. There should be place for violence and intimidation when making a constitution.

In order to increase the role of civil society, it was proposed that an independent body should prepare a draft constitution for consideration by the CA, after extensive discussions with parties and civil society organizations. It was also proposed that once the CA had debated a draft and reached some preliminary conclusions, it should be published and the people allowed a few weeks in which to debate it and submit comments to the CA before the final draft is enacted.

The *international community* plays an important role in the wider process of peace making, particularly UNMIN, but it has no formal role in the CA. However, the work of civil society has been facilitated largely by funds (and occasionally advice) from international and diplomatic missions. Foreign experts have visited Nepal for consultations with official and non-official groups. And then there are international norms of human rights and governance which influence the process and the outcome.

Some participants thought there should be no role for the international community, which was unlikely to appreciate the nuances of Nepali politics. Agreements on peace making and interim arrangements had been made entirely by Nepalis themselves. Others considered that while Nepalis

should find their own solutions to Nepali problems, there was considerable advantage in looking at foreign experiences, as so many states faced similar problems. Fink Haysom, formerly constitutional adviser to President Mandela, said that they had 'shamelessly copied from foreign experiences and constitutions' in South Africa.

What is the role of *experts*, whether foreign or indigenous? It was recognized that constitution making is a highly political process and involved the making of decisions about state structures and national policies (more appropriate for institutions with a democratic mandate). But the constitution is also, at one level, a legal and technical document, which has to be interpreted by courts and others. The restructuring of the state involves many technical decisions. Experts should not dominate the process, but their technical expertise and contribution to ensure coherence and feasibility should not be ignored either. Some thought that the process whereby the IC was made and its shortcomings may be due to the tendency of political parties to denigrate and ignore the role of experts. Dividing responsibilities between experts and politicians and other social groups may not be always easy, but certain principles can help and should be explored when preparing the rules of procedure of the CA.

Finally, the conference considered the role of the *media*. Their role is critical, in informing people of issues and debates, in providing a forum for discussion, and in exposing deficiencies in or abuse of the process. They can contribute significantly to participation and transparency. But the media are often not independent and impartial, and the use of the media can be biased and partisan.

Fundamental principles

Should the CA be bound by fundamental principles which it must follow in making the constitution? When political parties negotiated their alliance before the *andolan* and subsequently for peace and the future, they agreed on a number of important principles, which are now reflected in the Comprehensive Peace Agreement. Indeed they are also to be found in the IC. However, in the IC they are binding only on the

interim legislature and government (except for the commitment to federalism).

It is possible to develop a number of fundamental principles, values and goals from the agenda of the *jana andolan* and inter-party agreements (such as inclusion, democracy, human rights, rule of law, participation and social justice). Many participants considered that these should be made binding on the CA. This would reassure minorities and marginalized groups that their interests would be protected; the principles would provide the parameters within which the constitution would be framed. Frequent references were made to the experience of South Africa where a prior agreement on the principles greatly facilitated both the decision to have a CA as well as agreement on the contents of the final constitution.

Implementation of the new constitution

A major problem with the 1990 Constitution was the half hearted way in which it was implemented. This is not unlike experience in many other countries where the government chooses and picks provisions that it likes for implementation and ignores others. It is therefore necessary to pay special attention to implementation. A participatory process will mean that many people will be aware of the contents of the constitution and would have commitment to its full implementation. But more is needed and a suggestion was made that there should be an *independent constitution implementation commission* which would liaise with the government and civil society to ensure implementation—by periodic reports to the legislature, seeking the advisory opinions from the Supreme Court, and in some instances drafting legislation, etc.

The approach and contents of the new constitution

A number of observations were about the approach to the constitution and its focus, including views on the current and future status of the monarchy. This led to a brief discussion on what system of government would be the most appropriate for Nepal, either with or without monarchy. Concern was expressed at the centralization of state and

economic power in Kathmandu which did nothing to promote development throughout the country.

The most difficult issue was how the constitution should deal with multiplicity of languages, religions, and cultures? There was considerable focus on the situation in Madhesh and of Madheshis. One Madhesi delegate said that apart from the diversity in caste, creed, religion and culture, the Madhes was never viewed from the historical perspective. The Madheshis have been discriminated against since time immemorial and never accepted as Nepalis. The question of their identity and recognition should be addressed once and for all. Dalits complained that the IC had short changed them, notwithstanding that they have been and are the most victimised community. Janjatis said that their languages and cultures had been disparaged and for the most part they were excluded from participation in politics and economy. Women highlighted their own marginalisation and made a powerful case for the recognition of their rights.

Many saw federalism as the solution to these and other problems of ethnicity, diversity and identity; others feared that this would herald the disintegration of the country. A political scientist claimed that negotiating successfully ethnic or regional differences would strengthen national unity, and despite current controversies and troubles, the country was being integrated rather than falling apart. Others mentioned other constitutional options to accommodate diversity and the disadvantaged communities: fair forms of representation, the proportionality principle in public services (and other forms of affirmative action), self-government at local levels, fair language policies with greater use and development of 'minor' languages, secularism where all religious and beliefs would receive equal protection from the state—and above all policies of social justice for all.

The purpose of the conference was to discuss only the context and process of constitution making and these matters fell outside its remit. Nor was there sufficient time to pursue these critical issues. Nevertheless, the discussion was valuable because there is a close connection between process and

outcome. This is particularly the case in Nepal now where many old approaches and institutions are being questioned, and yet, as one participant commented, the task of making the new constitution has been given to classes, castes and parties who were the beneficiaries of the old system and have little interest in changing it. An inclusive and

participatory process is necessary—this was almost the universal view of the conference. The rules of procedure of the CA must ensure that minority views are heeded. Maybe the adoption of fundamental constitutional principles will also help to ensure that the full agenda of the *andolan* will find its way into the constitution.

Report of the Conference

THE MOMENT

The Conference was opened by the Speaker of the Legislature-Parliament Hon. Subas Nembang. He noted that Nepal was at a historic moment and faced with numerous challenges: such as successfully holding elections for the Constituent Assembly, drafting a new constitution and paving the way for a new Nepal. After outlining the situation current at the time of the conference, in terms of preparation for the Constituent Assembly elections, he concluded by observing that the whole country should engage in the exercise of constitution making process and deal with the demands of the Madhesis, Dalits, Janjatis, women, and the backward regions. He stressed that it would not be possible at

this stage to address all people's demands in the Legislature-Parliament, otherwise it would preempt the work of the Constituent Assembly. He emphasised the importance at the present time of showing unity and working in unison to help make a new constitution that will eventually pave the way for a new Nepal.

When the conference was held, in late March, it was anticipated that election for the Constituent Assembly would be held by June 20, in accordance with the Interim Constitution. However, the elections were later postponed, and therefore remarks made by participants as to whether the elections should or could be held by June have not been included in this report, as no longer being of current relevance.

"Without the
Constituent Assembly, the
spirit of jana andolan II
cannot be realized"

- Hon Speaker Subas Nembang

I. Comparative experience: Constitution Making In Post-Conflict Societies

Frank Haysom and Yash Ghai, who addressed this topic, both drew to a considerable extent on the experience of other countries, including ones in which they have themselves worked. Haysom observed that in 1989 in South Africa the situation for black South Africans particularly, and for the entire country which was still governed under the iniquitous apartheid system, looked hopeless, just as it did in Nepal at the beginning of 2006. But in few months, Nelson Mandela had been released from prison, the entire situation had turned round and the South African people were busily engaged not in conflict but in a process of trying to fashion a new constitution. The lesson to be drawn from this experience is that no matter how hopeless things appear to be, one has to seize the opportunity to respond to new openings. To do this, a vision is needed of what can be done in the post-conflict period.

Haysom suggested a number of benchmarks that he considered are important in evaluating a constitution making process, particularly, but not only, in conflict ridden societies. These are:

The benchmarks for successful constitution making

1. The process and product must enjoy support of the majority
2. The process must be transparent
3. It must be inclusive
4. It must be participatory
5. There must be adequate time for proper deliberation
6. Constitution making must be an occasion for nation building
7. Constitution making should be an occasion for education in democracy
8. Government must not stop during the process – so that there can be adequate security, and the basic needs of the people are met

1 There must be support of the majority for both the process and the product. In South Africa, there was one lobby group which preferred to see the constitution making as an elite process, in which the majority, and particularly those who had been disenfranchised and discriminated against, did not have a say in the process. But if a constitution is not made with the support of the majority, it won't enjoy the support of the citizens.

2 The constitution must be inclusive; it is a document for all and it is different from other laws. Its purposes include the protection of the vulnerable and minorities. To achieve this objective, it has to be recognized as a contract to which all citizens can look as an umbrella under which they can shelter, and not just the majority. As such, it is important to seek ways in which the constitution can have everyone in it and everybody's views reflected in it so that the constitution can really be accepted as a national document. When the South African constitution was adopted, Nelson Mandela said "this document doesn't only address my party's thinking - there is no single party that cannot find its own mark in this document". This is a testament to the fact that during creation of that constitution, people were willing to listen to each other and also to address and incorporate the interests not only of themselves but also of others.

3 The process must be transparent to promote inclusiveness and accountability. There is always suspicion about politicians making deals for their own interests. People have demanded a process that allows for civil society involvement or participation, simply because they want to be present when these deals are being made; to hear and know what is being done. Constitutions that are created and

discussed in closed rooms to which people don't have access raise suspicions, sometimes needless suspicions, that deals are being made, particularly in contexts where there is a history of scepticism about political parties. Constitution makers must go outside the constitution making chamber to ensure that the constitution making process includes, as an integral part, education programmes, and ways in which people can access the process and participate in it directly.

4 Participation in the process is essential – people have realized that simply having a nice process with all the minorities represented even in a majoritarian process is not enough in the 21st century. The man in the street has to believe that the process through which his constitution is being made is one in which he can participate and his views are genuinely heard. In South Africa for example, people were asked to write their views. It was expected that only about 10,000 submissions would be made but in fact this figure reached 2 million. This demonstrates that people will respond to an opportunity if offered. One should not expect submissions from them as if they were constitutional lawyers. It is up to professionals to turn their concerns of every day life into legal text. Women wrote about how they were treated by their husbands or the fact that they were not getting maintenance from husbands who left them. Farmers wrote about farming problems and so forth. Many people thought the South Africa process should not have dealt with such issues, but if you look at these they often involve issues of equality, or of governance – local government doesn't respond, courts don't give remedies etc., in other words constitutional issues. He added that it is important that the submissions of the people are processed –and the people must know their submissions are being analyzed and made use of. If people are invited to make submissions and are ignored, this will backfire. In some instances the process of consultation has been really window-dressing. In Nepal there were so many submissions in 1990 that they could not be coped with, at least in the time and with the resources available, were not really looked and analysed. Submissions, and the analysis, should be published. And photos of the report of the submissions being given to the Constituent Assembly could be published. This

approach also means that the constitution must be written not in complex legal terms but in terms that address the concerns of ordinary people and in a language they understand. In the South African constitution it is possible to see language that clearly reflects certain submissions made.

5 There must be adequate time for the process – it must not be rushed, as has been the case in some countries such as Iraq. There must be proper time for deliberation, and the procedures must ensure that there is time to address minority considerations even those of small communities. The technicalities of the process are important, in order to avoid opportunistic manipulation as it proceeds. Ghai added to this topic saying that a constitution making process should not be too drawn out either. Some people have an interest in having a long process. Constitution making is a political process and some people may have an interest in a quick conclusion and others in delay. For example, the Ugandan process took 7 years: Museveni had just come to power after a long struggle against Idi Amin, and wanted to consolidate his position before a constitution was formulated. He found many ways in which the process could be dragged out. Additionally, some people simply have an interest in delaying because they get good allowances!

6 The process for constitution making must facilitate nation building. Ghai said that the constitution making process is potentially divisive and conflictual. Most people ignore this, addressing it only as a nation building process, not recognizing its potentiality for being divisive. This is so because people have to come to the negotiating table and address their particular group and class agendas, anxieties and concerns. This recognition is important, because it gives room to strengthen the aspects of the process that are critical for nation building. Inclusiveness and transparency promote nation building. The process should emphasise a common destiny, common values and a sense of belonging to a common political community. Constitution making process can lead to the rebirth and development of the nation.

7 The constitution making process must be an educative process. In South Africa for example, the

constitution was trying to move away from a history of discrimination to equality; the process presented an opportunity to go out and teach the people about the importance of the new values as opposed to the old ones.

8 The quality of the leadership is critical to the success of the constitution making process. Leaders emerge in particular contexts and that is true, for example, of Nelson Mandela, and his role – and to some extent that of the white Nationalist Party leader De Klerk – was crucial. Reconciliation and nation building are two domains where leadership has a critical role to play. Where leadership fails, as in Burundi, Sri Lanka and to some extent Iraq, there have been gaps that have led to crisis. There is an obligation of leadership to lead, to rise above divisive conflicts and act in the interest of all. Government should create the environment in which the constitution making process is conducted, but government cannot stop at constitution making. There should be peace building exercises that address humanitarian concerns and as far as possible deal with critical social crises as an ongoing responsibility, even during the constitution making process. Deteriorating human conditions and environment affect the constitution making process negatively. In a post-conflict society, during the constitution making process, the people's personal security must be address constantly. Without a safe and secure environment, people cannot vote freely and there cannot be full deliberation on the constitution. In South Africa they did at one point stop the process to address the issue of violence. The same happened in the Sudan. People should have their basic needs met.

The first 4 benchmarks are important because they help the ultimate constitution to be legitimate in the eyes of the people. They confer a sense of ownership of the new document. It is not ultimately the lawyers

“It is not ultimately the lawyers and the politicians who will man the barricades to protect the constitution if it comes under attack – it will be the people, and they will only do this if they feel a commitment to it”

– Fink Haysom

and the politicians who will man the barricades to protect the constitution if it comes under attack – it will be the people, and they will only do this if they feel a commitment to it. Universal participation has the best chance of producing universal loyalty. Participation enriches the process and improves the product. A diversity of views makes it more likely that issues will be properly addressed.

South Africans were able to produce a constitution that was accepted unanimously, despite the country's terrible history of apartheid, injustice and violence which can be attributed to the

process adopted for making that constitution.

A Constitution is in a sense a country's biography. It reflects its past, values and builds on the values that emerge out of the conflict or its aftermath. For example, Germany set its face against Nazism after the Second World War, and restrains its military establishment and precludes it from assuming any posture in war because of its history of a strong military class. The South African constitution insists on equality of all citizens and on the prohibition against racial discrimination and perhaps on other values that reflect where it wants to go.

Haysom and Ghai both observed that modern constitutions and constitution making processes were rather different from in the past. Haysom said that in the last century, constitutions were being made for countries to proclaim their sovereignty or to separate themselves from their colonial masters. Now, constitutions have become contracts between groups within societies and between citizens. It's not enough to have wise men to do it, but the process must involve the people. There is a greater emphasis on how constitutions are made and not necessarily what they say. They no longer simply address the question of governmental structures but they try to establish the terms by which different groups of people in a society will live together. They give societies a lodestar (a

guiding star); and they celebrate what is highest in common values. Ghai said that when thinking about a constitution making process it is important to reflect on the aspirations of those who have initiated the process of change, not to start looking at the technicalities of the constitution or of a constituent assembly but at what are the fundamental challenges facing society.

Ghai said that the phrase ‘post-conflict’ is perhaps inappropriate, in the sense that conflicts do not end but the arena of conflict changes to other forums such as public debates and discussions. One role of a constitution is to defuse tensions by mediating peace in different frameworks of constitutionalism. The challenge of making constitutions, especially after a bitter history of conflict and competing

claims, was to ensure a suitably wide participation of communities. This is so because the process tends to be dominated by the parties to the conflict, while other parties who have legitimate claims to participate are excluded. Constitutions made after, or even during conflict are essentially negotiated instruments. Traditionally, constitutions were an imposition by the class or ethnic group that emerged victorious during the conflict, but most constitution making today during or after conflict is as a result of a stalemate, where it has been impossible by means of fighting to establish victory of one over others.

Haysom concluded his remarks (at the end of the conference) by saying that nothing he had heard over the last two days that indicated that Nepal had problems that could not be solved.

II. Reflections on the 1990 Constitution

This formed the topic of a specific session in the conference, in which the formal presenters were Nilamber Acharya, Kanak Mani Dixit, Surya Nath Upadhyaya, Arzu Deuba and Ram Bahadur Thapa Magar. In comments during that session and at various other points in the conference, observations were made about the 1990 Constitution. All these contributions are amalgamated here to form a coherent whole (but Surya Nath Upadhyaya's speech is also appended to this report (Appendix 2).

Nilamber Acharya, who was Minister of Law at the time the 1990 Constitution was adopted, observed that it would be quite wrong to say that the 1990 Constitution will not provide any guidance to the future constitution of the country. He said that the need for the constitution of 1990 arose because the constitution of 1962 was autocratic. There was growing demand to bring about change in the relationships between the king and the people and bestow the sovereign power in the people.

He and Surya Nath Upadhyaya (former Chief Commissioner of the Commission on the Abuse of Authority) commented on the manner of the making of the 1990 Constitution. They stated that that a Constitution Reform Recommendation Commission which comprised politicians and experts, was established by the council of ministers. But this did not get off the ground, as the designated chair declined to accept the position, and a Constitution Recommendation Commission was formed instead. However, a parallel draft was presumably prepared at the instance of the King in secret, and was

reportedly shared by the King with the Prime Minister. This draft was never disclosed to the public, though reports circulated about a few of its provisions. Acharya observed that, fearing that the situation would revert to that in earlier times, the political parties were in a hurry to make the constitution and go to the polls. The government did not agree to make an interim constitution and went ahead to complete the constitution in three months. In doing so many important issues were left unresolved.

Kanak Dixit (Himal Media) agreed that the submissions from the public during the 1990 Constitution making process were not looked at, but insisted that it is not true to say that the palace had control over drafting of that constitution.

A number of speakers made the point that either the 1990 Constitution was essentially a good constitution or that it was well received at that time and was thought then to be a good constitution. Nilamber Acharya said that that constitution was the product of the resolution of a conflict. It was made by democratic forces and the king had accepted the role of constitutional monarch. Despite shortcomings, the constitution was based on democratic values and he felt that the norms and values established by the constitution would continue to live in the times to

come. It is the time to ask ourselves what have we discarded and where are we heading for? Ghai agreed that democracy was one of the goals of the 1990 Constitution and perhaps history would show that it did achieve multi-party democracy of some kind and led to the electoral process which involved all citizens as voters at least.

“Despite shortcomings,
the 1990 Constitution
was based on
democratic values”

– Nilamber Acharya

Sagar Sumsher Rana, (NC-Democratic) quoted a small portion of a report (1997) on the Constitution of 1990 which was prepared by a team of experts affiliated with International IDEA. This comment should be seen in the context of Nepal's constitutional history and a comprehensive context of constitutions in South Asia. "Nepal's constitution is a progressive and innovative document with a sincere commitment to democracy. The provisions of constitutional council and judicial review make the constitution strongly democratic. The democratic character of constitution should be tested by Asian standards even though Nepal is a new entrant to democratic world." Everyone, he added, including Maoists, supported the Constitution; only now are they saying that its implementation was wrong. This view was opposed by some who considered that it won little support among Dalits and janjatis. The speaker said that the Maoists adopted extra-constitutional means and 13000 people died. History will judge. The King took advantage of the relationship between Maoists and 7 parties, and this was not the fault of the constitution. The government failed to control the army.

Kanak Dixit regretted that the 1990 Constitution had been let go without any looking back, and that its virtues had not been properly appreciated. He agreed that there were problems with it, and it was possible to make a better constitution, but to do this it was not necessary to denigrate the 1990 Constitution. Admittedly it was an elite process. And the substance included problems such as proclaiming a Hindu kingdom under a Hindu King, centralization (Kathmanduism), the position of Nepali language and Bahun/Chhetri domination. But overall the fault was not with the constitution.

Other speakers had more negative assessments of the 1990 Constitution. Speakers from the floor said that 1990 Constitution failed to address the grievances of the people, and was not inclusive in its language.

Some speakers attributed the problems with the 1990 Constitution to the manner of its making. A speaker

from the floor said that there had been suggestions that that constitution was democratic; this could not be so because it was drafted by only nine people. Among the consequences was that 3.4 million could not get citizenship.

A number of speakers suggested that another, or even the main, problem with the 1990 Constitution had been implementation. Kanak Dixit felt that this was the main problem. Looking closely at the issue of control of the army by the King, if the implementation of the constitution had been done well, the problems would not have occurred. But this did not happen – because of the behaviour of the King and the Maoists: the Maoists spread the kerosene and the king ignited it. A speaker from the floor added that when the principles could not be translated into practice, the 1990 Constitution paved the way for despotic moves. This was also due to a weak political system.

Some participants suggested that the 1990 Constitution could have been amended to remedy its shortcomings. Nilamber Acharya said that there should have been timely change and amendments to suit the needs of the changing times. Kanak Dixit said that it could have been amended: the references to being a Hindu kingship could have been removed; it could have been changed to read that the King is a Hindu - a Hindu King is not same as Hindu kingdom. Even the so called unamendable provision in Preamble could have been amended.¹ Amendment did not happen because the king and the army were playing games and by 1995 the Maoists had decided to go for an underground war. Another participant attributed the failure to amend to the rigidity of the constitution.

Arzu Deuba (SAMANATA) focused especially on the failure of the 1990 Constitution to address the position of women. She observed that the major victory of the 1990 Constitution was the recognition of Nepali people's supremacy, she also wanted to know what happened to women's issues. Though globally many movements had already occurred;

¹ This refers to the reference in the Preamble to a constitutional monarchy. Article 116 said that no Bill to amend the constitution could be "designed to frustrate the spirit of the Preamble" – eds.

such as the decade of women, adoption of the Convention on the Elimination of All Forms of Discrimination Against Women, and other events that could have guided the constitution makers at that time to make things more equal and equitable for women, they seemed to have had little impact on those constitution makers. She regretted that though women had tried to raise their voice about citizenship rights but it never worked – that was the biggest loss for women and for men too because women felt left out of the mainstream. There was no national discussion regarding these issues, and the country was not ready to engage with women and gender discussions. For example, after she left college after the 1990s, she opened a gender violence NGO – which people laughed at because they thought she was introducing foreign ideologies in Nepal. However, the 1990 Constitution acknowledged women for the first time and did have a provision for 5% women candidates in election to the House of Representatives, and for 3 seats in the upper house. It also had special provisions for women’s education, employment and health among others but these were never implemented. A participant from the floor agreed that the 1990

“In 1990 the country was not ready to engage with women and gender discussions” – Arzu Deuba

Constitution did not give much space for Nepali women, and suggested that this could also have been due to lack of confidence in women.

Kanak Dixit said that there were two reasons for having the Constituent Assembly and a new

constitution. First was to save the Maoists’ face: the Constituent Assembly became a reality after the Maoist made the country ungovernable. It was necessary for the sake of peace to reach a compromise with them. As a result, they got UN involvement in the monitoring process and the Constituent Assembly. The second reason beyond saving Maoist face is to make a new constitution now that the opportunity has been presented.

Winding up the session, the Chair Hon. Kalyan Shrestha (Supreme Court Justice) commented that the Constitution of 1990 was a result of a popular movement and the constitution of 2007 was made possible by it. The 1990 Constitution failed to accommodate and address the aspirations of Nepali people. The framers of the then constitution should take the credit and blame for the weak and strong points of the constitution.

III. Issues in Constitution Making in Nepal

THE CONSTITUENT ASSEMBLY

This was the main theme of the conference, the subject of two major sessions, and recurred in sessions devoted principally to more specific topics. Yash Ghai presented a background paper (annexed to this report) on the constitution making process as outlined in the IC. Although the preamble guarantees the ‘basic right of the Nepali people to frame a constitution for themselves’ the actual provisions fall far short of this objective. The CA was to consist of 205 members elected on single member geographical constituencies (as with existing constituencies) and 204 elected on party lists (on the basis of proportionality). The only provision for the marginalised communities was in nominating candidates for elections, that parties ‘shall take into consideration’ the principle for proportional representation for them. Women were not guaranteed proportionality even for nomination; it was enough that one third of candidates were women. This rule did not guarantee any marginalised group even a single seat! The fear was that, given the past record, the marginalised groups would be very poorly represented².

A third category consists of 16 members appointed by the government on the basis of consensus from among ‘prominent persons of national life’.

Second, it is clear that under these arrangements political parties would dominate elections, and any one seeking a seat would have to come under the auspices of one of the parties. This precludes the direct representation of the marginalised groups. The IC also provides the dominant role for parties in the procedures of the CA—party members have

to follow party directives and it seems that a party can effectively expel a member from the CA.

The date of elections is left to the interim government, provided that it is held by 20 June 2007 [this date was missed and the IC amended to specify a new deadline, middle of December 2007, and the government has specified 22 November 2007].

The CA has been given two years to finish its work, although a six month extension is possible (if the non-completion was due to an emergency). The system of voting (for the purpose of adopting constitutional provisions) is designed to promote consensus; failing that, by a two thirds votes of the members present (provided that a two-thirds quorum is present).

Although the IC is full of principles, goals and objectives (drawing in substantial part from the agenda of the *andolan*), the CA is not bound by them in adopting the constitution. The possible exception is in respect of restructuring state institutions (to which was later added the federal principle), but even here the final decision is left to the CA.

The IC does not provide for any programme of ‘awareness’ raising as was included in its first draft. Nor does it provide for any preparation in advance of the CA, other than a high level commission to recommend on the restructuring of the state.

A NEW NEPAL

Many of the participants spoke about the vision of a new Nepal – especially derived from the *jana andolan*

² The electoral provisions were changed subsequently after strong protests from the marginalized communities – see Appendix 3 for current provisions - eds..

II. Krishna Hachhethu (NCCS) said that we must look at the Constituent Assembly from the context of the *jana andolan II*, and how a new constitution should be drafted with a spirit of change. One participant observed that the new constitution must reflect the new Nepal but first the new Nepal must be defined. Yash Ghai said that note should be taken of the 12 and 18 point agreements between the political parties, as well as perspectives from scholars. People's aspirations from last year's movement must be considered; they were important in laying foundations for the new constitution. Sagar Sumsher Rana said the aspirations as shown by the people in the *jana andolan II* were:

- End armed conflict and bring peace in the country
- Put an end to the institution of monarchy
- Establishment of democratic norms and values, citizens' rights, and the commitment to human rights
- End traditional social structure and move towards a new Nepal by creating a democratic state system based on equality and inclusiveness.

But he added that whether the present government, parliament and the 8 parties have succeeded in fulfilling these aspirations or whether the interim constitution reflects all these remains to be seen.

Krishna Hachhethu said that though it appears vague, the popular mandate is for a change from a Kathmandu-centrist unitary system. It is also a departure from the methods of constitution making of the past when constitution used to be gifted by the king. Time has proven that the principles and the modalities adopted in the past were wrong. The mandate of the movement is that the constitution should be made by the Nepali people themselves. Even if the Constitution of 1990 was progressive and liberal it was not made on the basis of a social contract. Rather, it was by-product of a compromise among political actors.

One speaker suggested that when thinking about the new Nepal an approach similar to that in framing the millennium development goals should be adopted: that goals, targets and indicators should be defined, so that progress towards a new Nepal could be measured.

Shree Krishna Yadav (Public Service Commission) suggested that in the past constitution making processes, instead of human nature, human reason prevailed. As a result, the constitution did not work because it became a domain of few. The basic problem in constitution making should be how to incorporate human nature in the process. It should be based on both human reason and human nature.

Bishwa Kant Mainali, President, Nepal Bar Association, said that one of the major issues in the constitution making process is the feudal culture dominating the Nepali society. Unless there is change in the attitude of the elites towards the weak and marginalized groups in the society, the new constitution will remain only a piece of paper. The age of monarchy and feudalism had come to an end. There is now nobody willing to defend the ceremonial monarchy. The only question is how to do away with the institution. If it is done through foul means, questions could be raised later. For that reason we are headed towards the Constituent Assembly. And there is no alternative to the Constituent Assembly.

Yubaraj Sangroula (Kathmandu School of Law) said that, instead of talking about the impending storm or unprecedented upheaval in the Madhes and talking in divisive terms, we should be envisioning a new Nepal where Madhesi and hill people can live in harmony. Compared to the hills there is development of infrastructure in Madhes. Life is hard in the hills and mountains compared to the lowlands. The flaws in development policy must be reviewed. While recognizing diversity and talking about proportional representation in terms of the size of population, we should not forget the fact that a small group could also come up with workable ideology. He suggested that the time has come to practice "secularism" (in the sense that no one view has priority) not only in terms of religion but also in culture and identity.

2007 IS NOT 1990

A number of speakers compared constitution making now with that in 1990. Arzu Deuba acknowledged that a lot has changed since 1990; for example in 2003, the 11th amendment was made

to the Country or National Code (*Muluki Ain*) as a result of women's intervention, making various improvements in the position of women.

Lok Raj Baral (NCCS) said that the environment, the context and people's thinking are totally different from the last time Nepal made a constitution. Nepalis used to think that the 1990 Constitution was the best; but today, they have re-discovered Nepal, democracy - and themselves. There was a realization that the current democratic process and constitution are inadequate to address the people's aspirations.

Nilamber Acharya said that if the constitution of 1990 had to define the relationships between the king and the people, today's constitution should define the powers of the people.

Kanak Dixit thought that a lot could be learned from the discourse over the making of the 1990 Constitution. This is to say that the reasons that led to the failure of implementing the 1990 Constitution should not be ignored while drafting the new one.

Surya Nath Upadhyaya said that one of the important lessons learned from the past is that we should not ignore the social and economic issues of the country. The issues that had been neglected and sidelined in the constitution of 1990 are being raised forcefully today. It is very unfortunate that we have to make a constitution in every ten years. The marked features of the constitution of 1990 were constitutional monarchy and multi-party democracy. Today we have so many issues which we should address now or leave them for the Constituent Assembly to decide. The political parties that are in power today will be in the Constituent Assembly, and they might have a difficult time dealing with all these issues in the assembly. Compared to the issues of 1990 the present demands are decidedly different in nature.

He added that he hoped that attention would be

given to negotiating pertinent issues rather than avoiding them. And he was sure it would be a negotiated settlement this time around thus avoiding the creation of a situation that will lead to the making of yet another constitution in the near future.

INCLUSION, IDENTITY AND PARTICIPATION

Underlying much of the discussion was the theme of inclusion – the failure of the 1990 Constitution and the political system that operated under it to be inclusive, and the need for both the new process and the new constitution genuinely to include all the people of Nepal. The diversity of the nation, the sense of past marginalization, and the search for recognition of the many identities within the country, as well as for a new national identity, inclusion and participation are all interlinked. It is not easy, even analytically, to separate them, and contributions from participants did not always use the concepts in precisely the same ways.

Identity

Haysom and Ghai both identified this as a challenge facing Nepal today in making a new Constitution. Ghai commented that the identity that underlies the 1990 Constitution - of a homogenous country, a Hindu Kingdom characterized by high centralism and basically one official language of transacting state's business in Nepal - is no longer valid. Nepal is involved in a redefinition of Nepali nationalism. Now identity is a composite of many identities forming, hopefully, an overarching Nepal identity. This means Nepal has to engage with the issues of language, religion, affiliations and regionalism in order to sharpen the debate about identity.

Constitution making should be seen as a social contract; about what people are, what Nepal is and what the Nepali community is.

It seems there is no alternative to accepting the rich diversity of Nepal. It's important to develop institutions of state, means of communication of the state and the life of the

“Nepalis used to think that the 1990 Constitution was the best; but today, they have re-discovered themselves, Nepal and democracy”

– Lok Raj Baral

state that reflect this diversity. The Constituent Assembly is a good institution to deal with these issues, but they have to be negotiated and this calls for integrity, independence and sovereignty of Nepal. The challenge is how to recognize these cultural, linguistic, and regional differences and reflect that recognition in terms of representation in the executive and in other organs of the state including the army, public service, and other institutions. Reflecting on countries across the world that have faced ethnic claims and resurgence of identities, experience shows that it is very difficult to go back to the earlier paradigm - and this had been very evident in the previous few weeks in Nepal [referring to the agitations in the terai].

Ghai said that the issue of identity is more important to communities that have been marginalized because they don't feel recognised as part of the national identity of their countries. If well dealt with, ethnicity is emancipating because it promotes identity such as in language, music, literature but it also has its dark side, if it becomes divisive and especially if it leads to violence.

Both Ghai and Haysom observed that the process of constitution making may lead to divisions in society. Haysom said that it is important to try to ensure that people are working collaboratively to shape their destiny. Nation-building is not the same as imposing a national stereotype on everyone. In France, for example, they have to deal with Muslim Frenchmen. It is important that while shaping a national identity, sub-national identities are not undermined.

Both commented that diversity is a matter for celebration; it adds richness to a nation and everyone can benefit from that richness. Ghai observed that exclusionary governments do not encourage diversity. He emphasized that governments should prevent discrimination and facilitate the culture of minorities. This can be done by promoting different languages, cultures, religions and redesigning national

institutions. Yubaraj Sangroula also commented that diversity could be a core value in future. In the past we regarded one institution as the source of unity, but now it can come from other sources.

Ghai noted that the language issues must also be addressed because Nepali alone does not respond to the country's diversity. He said that what constituted a national language needed to be defined. The state should promote minority languages, music, literature etc. but it is important to note that a state needs a language/s. He also observed that a state does not need a religion; and in the same way doesn't need a national animal/plant etc., and suggested that having, as in Nepal, the cow as the national animal was unnecessarily divisive. In all cases, there should be equal rights of all citizens and proportionality in representation. There could also be decentralization to provinces or regions.

Every Nepali must be able to see himself or herself in the mirror of the constitution. Ghai said that deliberations over the new constitution must involve trying to understand precisely what is involved in different types of claims about diversity. For example, claims about language may have very different implications from claims of religious beliefs. The same can be said about social justice and democratization. The Constituent Assembly is a good forum for addressing these issues of diversity but unless it is representative, it will fail in this.

Inclusion and Participation

"Inclusion" as a concept tends to be used in two ways: firstly in reference to membership of the Constituent

Assembly, through adequate representation, and secondly to the substance of a new constitution and the polity that it creates – one that must provide for the inclusion of all in the decision making of the state, in the organs of the state, and in the life of the nation. In the second sense it is linked to issues like federalism. "Participation" is used here to refer explicitly to broad involvement in the making of the constitution. This would

Unless there is ownership in the constitution through the inclusion of people's aspirations and sentiments it will be no better than a paper document.'

– Honorable Bhoj Raj Pokhrel

include the question of actual representativeness of the Constituent Assembly, but is not limited to this. Whatever the nature of the body or bodies created to prepare a new constitution, true participation calls for the active involvement of the people in all sorts of ways. It is clear that many participants believed that for the new constitution making to be a success it must be both inclusive and participatory.

Many participants stressed that these days constitutions were usually made with wide participation (see Haysom's fourth benchmark, above). Bhimarjun Acharya (Lawyer) commented that the experience of many countries has shown that basically the constitution is made either by experts or through the participation of the people. And it is important to understand the substantial difference between a constitution made by experts and one made through the participation of the people. There is always a chance of compromise between the rulers and the experts when the constitution is made by experts. Haysom said that constitutions that are drafted by experts may also have very little relationship to the realities and capacities of the people and the country. But constitutions made without experts may have serious technical flaws.

Popular participation was identified by Fink Haysom and Yash Ghai as one of the main challenges facing the constitution making process in Nepal. Ghai said that participation is important because people must learn about democracy. Ordinary people get interested in the separation of power, sovereignty and rule of law because they can identify with the relevance of that in regards to what is going on in the country. Unless people can be engaged, educated and informed, the ground won't be prepared enough for a democratic constitution making process, or for implementation of the constitution that results. People can only participate in public affairs if they are aware of their own authority, aware of the mechanisms of the state

“How can the elections to the Constituent Assembly be inclusive and democratic unless all the caste groups and communities are represented there?”

– Padma Ratna Tuladhar

and particular ways in which they can participate. Participation has its challenges too. For example, in Kenya, the participatory process produced an agenda that was difficult to negotiate in the constituent assembly. Though people's awareness of constitutional issues was greatly enhanced as a result of the process, Kenya still does not have a new constitution. In fact there had

been a referendum in which a version of the draft constitution had been rejected by the people (for various reasons including that the government had changed the draft produced by the constituent assembly). In Nepal, the period between now and the convening of the Constituent Assembly is critical to the effective functioning of the Constituent Assembly. What is already happening – including this conference – is part of constitution making.

Haysom said that there must be public education. There are ways in which the media can be brought in. An informed dialogue should be generated. People should be encouraged to make submissions both orally and in writing. In Iraq there were radio talk shows about the constitution. One can use SMS messages, and the Internet. The primary means will probably be the radio however. Ghai stressed that the government is not the only source of information, ideas or views - the civil society and other institutions such as professional groups should be involved in civic education. The period between now and the formation of the Constituent Assembly should be used for this educational process.

Lok Raj Baral said there is a need to make the constitution more inclusive and participatory in order to address the agendas of the regions, groups, communities and women. Inclusion does not only represent people's participation, it is a process of empowerment, a kind of education that makes people feel that they are empowered, have access to power and have control over resources. A process that does not encompass this principle is likely to fail. All parties, groups, Dalits, Madhesis, Janjatis and women must be involved in the process and feel a sense of ownership. Sometimes there is a feeling

that Nepal is disintegrating because for example, the Madhesis have their own claims, and people from the western part of Nepal feel like they have been left out. These developments mean that the constitution making process must be more responsive, transparent and broad based.

He added that past efforts at constitution making have been unsuccessful because the processes lacked wide participation. These realities must be taken into consideration so that similar mistakes are not repeated. The new constitution must address the reality on ground, new aspirations, and new ways of thinking.

B K Mainali (Nepal Bar Association), said the Nepalese people comprise a mosaic of ethnicities belonging to Indo-Aryan and Tibeto-Burmese origin with a majority of the Hindus. There is a need to include all the caste, religion and cultural groups in the forthcoming Constituent Assembly. And Bimarjun Acharya said that the marginalized people should not only be limited to decorative representation. They should have due representation in political decision making. Padma Ratna Tuladhar (Human Rights activist) asked how the elections to the Constituent Assembly could be inclusive and democratic unless all the caste groups and communities are represented there?

Sumitra Manandhar Gurung (of National Campaign Against Racial Discrimination) pointed out that Nepal now had an opportunity to put behind it conflicts that had arisen from political injustice and to create an equitable society. Constitution making happens once in a lifetime and this opportunity should be seized to rectify and correct mistakes that have been created historically, acknowledge what has been done and removing disparities. She noted that Nepal is too centralized for its diversity and that is one of the reasons why some communities are marginalized. At the moment, only about 18% of the Nepalese society has access to information about the process. The issue now was to change this scenario. She emphasized the importance of increasing people's access to state mechanisms. Many people don't speak Nepali. They have limited access even to FM radio. Participation gives ownership but it is important to recognize that there are different languages spoken in Nepal. How can the people across Nepal participate in the process?

Important also is to ask the question of how the youth and Nepalis in diasporas can participate in the process.

Tek Tamrakar (project manager of the National Human Rights Commission) observed that constitutions should not be the work of experts and should be made through a consultative approach. He noted that constitutionalism of the 21 century is about economic, social and political aspects. People should be able to participate in the constitution making process without regard to their caste, race, colour, ethnicity or sexual orientation. He observed that the constitution making process is a peace building process and should be in tune with social inclusion. Tokenism should be avoided and social inclusion be genuine. Groups such as dalits that have endured marginalization should have special programmes so that they can catch up with the rest of the society – an issue that goes to inclusion in the final constitution, rather than merely in the processes of making it, and even to implementation of that final constitution.

Rounding up the session, the Chair, Bhoj Raj Pokhrel, Chief Election Commissioner, said that Nepal is at a critical time of nation building. It has had much experience in constitution making in the past. Unless there is ownership in the constitution through the inclusion of people's aspirations and sentiments it will be no better than a paper document. And no amount of national and international experience would make any difference as the document in itself will not be enough to fulfil people's aspirations.

Thus the mechanism for and the process of the elections to the Constituent Assembly should be able to incorporate the sentiments and aspirations of all the people for the integration of the country. Voters' education is very important. How can uninformed people be expected to make the right decision? Political parties and civil society groups can always go to the people to create awareness and educate them regarding Constituent Assembly. If there is anything lacking it is the political will. The Election Commission alone cannot be expected to accomplish the task of holding the elections in time as it needs support from all quarters of the society.

The deep-rooted problems and issues prevalent in the country cannot be resolved only by providing

representation at the political level. Apart from national experience, international experience should also be utilized in the constitution making process in order to have the desired result.

Madhesi issues

Jeetendra Dev (Democratic Madhesi Organisation) raised some issues from the perspective of Madhesi people, including the Janjatis, Dalits, minority groups, Muslims and women. If the Constituent Assembly is not inclusive the end result would also not be inclusive. So the system of elections to the Constituent Assembly is a cardinal issue.

Apart from the diversity in caste, creed, religion and culture, the Madhes was never viewed from the historical perspective. The Madhesis have been discriminated against since time immemorial and never accepted as Nepalis. The question of their identity and recognition should be addressed once and for all. The Madhes and Madhesi need a new definition. With the restructuring of the state, the Madhesis should have the right to self determination. Today the Madhesis are becoming minority in their own land, and losing influence in politics and economy largely owing to migration from the hills. There is a need for an independent census to ascertain the population in Madhes. The land reform introduced over the years is not in favour of the Madhesis nor has there been growth in productivity. If there is no change in the Kathmandu mindset and if the Madhesi issues are not taken seriously, the country may witness a major upheaval. The political parties, the Nepal Government and the civil society should work together to address the Madhesi issues.

Vijay Karna (JAGHRIT Nepal) added that there was a distinct lack of Madhesi presence and participation in this very conference.

Ram Prakash Yadav, Vice-chairman of the Poverty Alleviation Fund, specially addressed exclusion in the public sphere. He outlined how different castes have occupied different ministries and other public service office. For example, 80% of ministers have

“The question of Madhesi identity and recognition should be addressed once and for all”

– Jeetendra Dev

been from the Bahun/Chhetri/Newar castes, 95% of National Planning Commissioners have been Bahun/Chhetri/Newar, 100% of chief secretaries have been Bahun/Chhetri/Newar and a further 100% of finance secretaries have been Bahun/Chhetri/Newar. He argued that between 1951 and 2006, there has been centralization of power

largely in three caste groups namely hill Brahmin, Chhetri and Newar. These three groups constitute only 35% of the total population of Nepal while the rest (Dalits, Madhesi and Janjatis) constitute 65% but have largely been left out of policy and decision making levels of the government. They are deprived of the opportunity of realising their needs and priorities through government policies.

He said that this has led to what is called inequality trap which has been perpetuated through many years. Skewed social structures only protect the interest of the privileged. There should be power sharing. Policy makers should make provisions to level the political and economic playing fields such as investing in deprived people by creating reservation provisions, and expanding access to justice, physical and economic infrastructure and promote fairness in employment opportunities and markets.

On a different note, a participant observed that it is unfortunate that people still have to voice their demands on the basis of their caste, religion and culture.

THE ELECTORAL SYSTEM FOR THE CONSTITUENT ASSEMBLY

A number of observations were made in the course of discussion on the proposed electoral system for the Constituent Assembly. The electoral system is described as “mixed” – that is that some of the members will be elected from single member constituencies using the existing electoral system and most of the rest will be from party lists- “proportional representation”. A common message in references to “inclusion” was the need for communities to be represented in proportion to their presence in the

country, and many speakers referred to this issue. Krishna Hachhethu said that if the new constitution is to be a social contract it should propound a principle for the structure of the country, and an inclusive democracy that will have due representation of the social segments in proportion to the size of the population. For that reason the mixed election system was going to be adopted. Sumitra Manandhar Gurung pointed out the phrase “proportional representation” is used in two senses – one to refer to proportionality of party members in relation to votes, and the other to refer to representation of ethnic, caste and other groups.

Some unhappiness about the proposed system from the perspective of the latter type of proportionality were expressed, including by Jeetendra Dev, who said he would like to urge the government and political parties to think again about proportional representation and ensure as much participation of the people as possible.

Arzu Deuba and Tek Tamrakar commented that the Interim Constitution talks of 33% candidates being women but this does not ensure that one third of the members will be women. The Interim Constitution is not clear in the question of inclusive representation. And one speaker observed that Article 63 (4), refers to women, Dalits, indigenous communities, backward areas, Madhesi and other classes being included, and asked “What does “other” mean?”

BK Mainali said that not all people could be represented by the political parties. So they should think about designing mechanisms to represent them in the Constituent Assembly. Shekhar Koirala also made a similar comment, saying that it is important to deal with the issue of representation of those who are not affiliated with any political parties.

DEMOCRATIZATION

Ghai identified democratization as a challenge in making a new constitution. The 1990 Constitution failed to achieve many important objectives which were implicit in the directive principles of that

constitution: inclusiveness, decentralization and social justice were not pursued or not achieved. The habits of democracy are not very deeply rooted at the moment. The process of making the Interim Constitution and many other decisions that have been made since the restoration of parliament are testimony to the absence of commitment to the fundamental ethos of democracy and understanding of the values or mechanisms of democracy. Related to this are public accountability and corruption.

SOCIAL JUSTICE

Ghai commented that many communities are in deep poverty even in groups that are thought to be well off. Poverty, inclusiveness, social justice and democracy are some of the problems facing Nepal. How does one deal with these issues as part of the constitution making process and establishing a framework of government that promotes these? It is important to note that constitutions cannot solve all of a country’s problems. Haysom, while agreeing that socio-economic issues are very important, said that the constitution couldn’t deal with all the issues because it was a framework for the making of political decisions: it does not make those decisions and is not a self-executing political programme.

Ghai returned to this issue in his closing remarks, stressing the importance of dealing with poverty and deprivation; one worry is that if too much emphasis is laid on ethnicity, focus on the poor and the fundamental values of the society will be lost. The people who suffer the most are the poor both among both the privileged classes and the marginalized groups. He pointed out that an ethnic approach is not likely to solve the problem of poverty. There should be policies to address past injustices and past disadvantage and one of the ways to do this is by establishing special programmes to give marginalized groups a chance to catch up with the rest of the society.

Bharat Mohan Adhikari (UML) also said that all Nepalis should have the right to work, health, and education, and that the constitution must address pertinent issues for the social and economic transformation of society for a new Nepal.

“ All Nepalis should have
the right to work, health,
and education “

– Bharat Mohan Adhikari

FOREIGN INVOLVEMENT

A few participants made observations on the role of foreigners, experts and others, in the making of a new constitution. Kanak Dixit spoke about the lack of comprehension on the part of the foreign community – and for that reason spoke in English, so that those foreigners present could understand what he said. He said that the sophistication involved in the making of the 1990 Constitution is not acknowledged in the current discourse. This is especially so because of the power of the western donor community as well as advisers who are needed in making a professional constitution. He noted that it is important to have a bit of humility and cross the language barrier and try to understand that there is much out there that is missed by those that only speak and read the English language.

He stressed that Nepal is in the midst of a populist period. Being restricted to discourse in English means that you do not have access to much of what is really important to people and doesn't do justice to the deeply held beliefs of the people of Nepal of all ethnicities, regions and faith. The detailed discourse into how the 1990 Constitution was made needs to be translated so that those who advise Nepal understand the depth of talent and experience that is already available in this country. Discussions are largely being based on what is available in newspapers because discourses on the arena of law and constitution making do not exist in Nepal. There has been a lack of writing on constitutional matters especially since 1990. Nepal is no longer seen as exotic so fewer foreign scholars are writing on the subject.

A participant wondered whether the help rendered by the international community is questionable because they are finding Nepal a very interesting place? Educationalists or constitutional experts can explain some technicalities but the question of how far their countries' sociology compares to Nepal's is important.

“There should be
Nepali solutions to
Nepali problems“

– Fink Haysom

Jeetendra Dev remarked that ideas from outside should not override indigenous experience.

Fink Haysom observed that at the end of the day there should be Nepali solutions to Nepali problems. This does not mean that nothing of value can be gained from

other people and other experience. In South Africa they were quite shameless in borrowing from elsewhere, especially on the process of constitution making. Some imagination could be needed for some of the issues – and one of the purposes of foreign visitors like him was to help to expand the country's constitutional imagination

IMPLEMENTATION

Both Ghai and Haysom stressed implementation. Haysom said that this issue has been increasingly recognized as the most important part of making a constitution; 80% of African peace agreements have failed because of lack of implementation. The Constitution must address issues of time, transition from the old to the new; special institutions to ensure implementation may be required. Ghai said that no matter how good a constitution is, by itself it cannot bring fundamental change; constitutions need life breathed into them and that is a question of implementation and commitment to the values, norms and procedures of the Constitution. There are examples of many excellent constitutions which never experience any development because they are ignored or large parts of the constitutions are ignored that which don't suit the government of the day. Attention should be paid to how a constitution is implemented. He proposed that consideration should be given to creating, in the new Constitution, a special commission that would have the responsibility for 5 to 10 years to implement the constitution.

IV. Institutions and processes on the way to a new Constitution

A CONSTITUTION COMMISSION

Yash Ghai raised this matter in his own presentation. He suggested that there should be an independent constitutional commission that would be responsible for discussing with the people, a process where people will participate but also have options that can be used to resolve questions of identity, inclusiveness, social justice and so on. This body would produce recommendations to be put before the Constituent Assembly, and that would make the work of that body more effective. It would also have been valuable at the present juncture in the run-up to the elections for the Constituent Assembly. Because it had not been done, government has had to face all the pressures and feel that they have to respond to such pressure, which is hardly the way to go forward. If there had been such a constitution commission submissions could have been directed to that body, and the decisions could have been left to the Constituent Assembly.

Surya Nath Upadhyaya observed that in 1990, the constitution making team also consisted of experts and lawyers from political parties. The draft was made after holding consultations with people in different places. Whatever the method one may apply, an experts' committee will be needed to draft a constitution. And, leadership is also very important. At that time the commission had good relations with all sections of the society, which helped the commission to carry out its work. Constitution making would not be easy so he hoped the commission would work in conjunction with all the concerned stakeholders. The commission in the past was not transparent.

Tek Tamrakar supported the idea of a commission. People should not just be asked to submit their opinions but an analysis of their submissions should

be done and incorporated in the final draft of the constitution. A recent survey by a certain media house found that only 7% of Nepalis are aware of the Constituent Assembly and its functions. As such, there is a need to establish a commission to educate the people like was the case in Kenya.

A questioner was sceptical, asking: How should the Constitution Commission be constituted and who should constitute it? Political parties are not democratic and are exclusionary. How can they ensure a participatory constitution making process that includes all the people and all communities? Professor Ghai responded that such a Constitution Commission could be established compatibly with the Interim Constitution. The commissioners can either be appointed with broad consultations or vacancies advertised. But the most important aspect is that the commission must be completely independent and should report to the Constituent Assembly directly and not to the government.

Shekhar Koirala of the NC returned to this issue in his own presentation, suggesting that this was "a must". He said that a commission could address the issues relating to the deprived groups including the Madhesis, Janjatis, and Dalits by collecting views and analyzing them before submitting the recommendations to the Constituent Assembly.

Support for the idea of such a commission was also expressed by Bhimarjun Acharya who said public participation could be done through the establishment of constitution commission as was done in Uganda, Kenya, Afghanistan and some other countries.

Professor Haysom returned to this in his own final comments, observing that if there is a separate

constitution commission, as some, including Yash Ghai, have been urging, with the sole task of educating and consulting the people and collecting their views and making proposals to the Constituent Assembly, that would be the appropriate body and it would be better than the Constituent Assembly doing it itself.

INTERIM CONSTITUTION

A number of speakers commented on the way in which the Interim Constitution was made, and on its contents, and its relation to the constitution making process as a whole.

Nilamber Acharya commented that the eight parties did not bother to forward the Interim Constitution to the parliament for discussion - yet the parliament calls itself sovereign. There is not much transparency today and the legitimacy of the government and the legislature-parliament will come to an end in June 2007³. Now the Interim Constitution is there, but if the elections are not held in June the government and the Legislature-Parliament will have to look for a new basis for legitimacy. It appears that we have not learned anything from the past. (The same mistake was repeated when nominating members in the legislature.)

Mr. Ram Bahadur Thapa Magar (NeFIN) said that the Interim Constitution failed even before it came into force because the process with which it was made was wrong. It was made by the eight political parties by themselves, but when it came out, no party took responsibility for its discrepancies and shortcomings. It has failed to address religious and cultural sentiments of large sections of Nepali people. Madhesis, ethnic groups and the Dalits are protesting because the political parties framed the constitution in their own way. Since we have a heterogeneous society, there should be proportional representation of the Janjatis and other marginalized communities in the Constituent Assembly. There should be proper representation from all caste and ethnic groups in the constitution making process, and the new Constitution should win the hearts and

minds of the all the people and communities of the country, and should not end up like the previous constitution.

Tek Tamrakar observed that there are a lot of weaknesses in the Interim Constitution in regard to Dalit rights. For example, it does not address the issue of caste discrimination adequately. Caste discrimination is only banned in relation to public places and facilities, and so it seems that there are situations in which the Interim Constitution allows discrimination. Affirmative action is provided for, but it is never practiced. There is still a provision that says one needs 10,000 signature in order to form a political party - this does not encourage participation in the political process. Finally, appointment to constitutional bodies should be done through public hearings and not through parliamentary procedures.

Another speaker pointed to weaknesses in the Interim Constitution, including its failure to be clear on what is meant by 'abolishing all forms of feudalism' - what is feudalism in the context of Nepal?

There was also discussion of the uses of the Interim Constitution and its possible impact on the final constitution. Yash Ghai remarked that there is some confusion as to the precise function of the Interim Constitution; is it essentially a road map towards the Constituent Assembly or a long-term charter for administration? There are examples in other countries of very short Interim Constitutions, 2 - 3 pages long, which are roadmaps. If there was need for a comprehensive Interim Constitution to act as reference point to the final constitution, then 18 months to one year might have been needed to produce it, as in South Africa. If the Interim Constitution is used to solve problems, then some people might feel left out and become fearful about the end results of the final constitution. Nepal is in a difficult situation where people have to use the Interim Constitution to solve some fundamental problems and hence may demand amendments; and to some extent lose sight of where the fundamental responsibility to solve these issues lies, which is with the Constituent Assembly.

³ At the time of the conference it was anticipated that the elections for the Constituent Assembly would be held in June - see above.

Some participants raised the issue of whether the Interim Constitution might be used as the basis for discussion on the final constitution in the Constituent Assembly. Yash Ghai observed that in South Africa, the Interim Constitution was the model for the final constitution. And that, too, happened in Iraq (partly due to the short time allowed for the process), where the Interim Constitution provided most of the provisions of the final constitution. Badri Bahadur Karki raised a concern that the seven political parties together with the Maoists, being the architects of the Interim Constitution, will dictate the basic terms of the new constitution as well. This was in view of the recent activities of the political parties. The meaning of a constitution in the context of Nepal will largely depend on the political parties. The situation at the moment requires that there be a road map to work out issues in order to enact a new constitution. The new constitution should be a common heritage and property of Nepal. So far, it's been the property of a few and that is why it has become increasingly important to have a new constitution containing the basic principles of democracy. The former constitutions failed to achieve this. Any prescriptions in the new constitution must be practical, acceptable and it should be owned by the people it is enacted to serve.

POLITICAL PARTIES

Leaders' perspectives

At the session for political party leaders to give their perspective on the process towards a Constituent Assembly and a new Constitution, Mr. Bharat Mohan Adhikari (CPN-UML), Mr. Dev Gurung (CPN-Maoist), Mr. Shekhar Koirala, (Nepali Congress), Mr. Sagar Sumsher Rana, (NC-Democratic) and Mr. Dhruva Pradhan, (RPP) spoke. A major focus of their remarks was on the role of the parties themselves in that process. Leaders were particularly concerned about this period, and relations between parties during that time. Several of them stressed the need to ensure that the atmosphere was favourable for free and fair elections to the Constituent Assembly (Adhikari, Koirala, Pradhan). Bharat Mohan Adhikari said the parties should also develop

a culture of coalition, while Dev Gurung said that only by developing a culture of consensus building will we be able to hold the Constituent Assembly in time. The leaders emphasised the need for the parties to work together but also recognised that the eight parties do not encompass the whole of Nepali society. This point was made by Adhikari, while Sagar Sumsher Rana said if the 8-party alliance manages to include all sectors of the society there is a strong possibility of achieving our goals. Pradhan commented there are other political parties representing a considerable section of the population who are not in the 8 parties.

Dev Gurung said that it would not be possible to go to the Constituent Assembly without building consensus among the political parties, especially in the context of an interim arrangement. Besides being progressive, the Interim Constitution works as a bridge between the old and the new system. But the differences among the political parties are posing a threat to this and we still have not been able to address the issues relating to the Madhesi, Janjati, Dalits and the backward regions of the country.

Most of the leaders referred to the issue of grievances of various communities that see themselves as marginalized. Bharat Mohan Adhikari said their grievances must be addressed and the Madhesi, Janjatis, Dalits and the people of neglected Karnali region must be included in the Constituent Assembly otherwise the political parties would soon lose their credibility. Dev Gurung said parties would have to address the issues relating to the Madhesi, Janjati, Dalits and backward regions otherwise the regressive forces will take advantage of the situation. Shekhar Koirala observed that genuine issues raised by the Madhesi, Janjatis, Dalits will be addressed by the Constituent Assembly through dialogue and consultation. But he went on to say that the way with which these grievances were being currently ventilated cannot be justified. Over 30 people had already lost their lives in the agitation. The Nepali Congress believed that the issues should be settled

through consultation and dialogue. It is not proper to resort to street agitation without waiting for anticipated amendments to the Interim Constitution and

“Parties must work together”

– Party leaders

elections to the Constituent Assembly. Sagar Sumsher Rana said attention should be paid to the grievances of Madhesi, Janjatis, and the Dalits. Dhruva Pradhan said that the RPP had made several suggestions during the making of the Interim Constitution regarding the discontent among the marginalized people, and the eruption of Madhesi agitation proved that the party had rightly foreseen the situation. They had suggested the inclusion of Madhesi, Janjati, women and the backward groups, especially the Muslims, in all aspects of state affairs. He commented that the government has been forced to patch up Interim Constitution by bringing forward amendments.

Other views

A participant commented at the end of this session: the parties were complaining against each other rather than saying what should be done. He asked “What do you mean by restructuring the state? How can leaders with old ideas bring new Nepal? When will inclusive democracy start? In all activities - including civil society – one saw the same old faces; how can we have new ideas?”

A number of other comments were made about political parties in the course of discussion. Some speakers recognised the achievements of the parties in negotiating the peace agreement. For example, Lok Raj Baral said that, during those negotiations, the political parties did not think about ideologies but were broad based in their thinking; having wakened up to the new realities facing Nepal. Krishna Hachhethu added that the achievement of the *jana andolan II* were great but the actors were having difficulties in translating that into policy and giving shape to programmes for the future. Peace building has overshadowed everything and all the political parties and the government are preoccupied with this. There exists tension between those in power and those outside it, and between the included and the excluded. Those included are by nature conservative. And those excluded are collectively raising their demands. Tension is good but it is not being used in a constructive way.

Some speakers placed the main onus on parties. Padma Ratna Tuladhar said that he would like to request the 7-party alliance and the Maoists to create a favourable atmosphere for making a constitution of the people by

the people. Nepali people had always wanted to be independent and sovereign. After the April uprising the people have the historic opportunity to make a constitution by themselves. But, he said, the political parties have not yet created that kind of situation that they had promised the people. But a number of speakers also gave credit to the parties for their achievements in reaching the various peace agreements and moving the process towards a new constitution as far as it had already gone.

A speaker commented that there was a perception that there is a crisis of trust because of lack of honesty on the part of leadership, including all the eight political parties. Lok Raj Baral suggested that the decline of political parties has led to the rise of ethnic groups because the political parties have not been able to address people’s concerns. This is divisive and casts a cloud of doubt over the future. No single party can rule Nepal now so the constitution making process must be made a common enterprise.

B K Mainali commented that though a constitution does not necessarily address all the problems of the country, political parties should exhibit political will and commitment towards the people. The major political parties should try to include all the people and reflect their aspirations. They should listen to people’s voices.

Jeetendra Dev complained that after the introduction of multi-party system, the major political parties never succeeded in ridding themselves of the influence of money, muscle and the use of foreign resources and have failed to address the issues of Madhesis.

Fink Haysom said that political parties alone cannot achieve participation. However, elections are critical to the outcome of the constitution making project. Parties should not be abandoned but should be strengthened, though this is a long term project.

Padma Ratna Tuladhar said that the political parties should not make any compromise at the cost of democratic values, human rights and people’s aspirations and dignity - otherwise they will produce yet another compromise document. Since the political parties let people down in the past, the people want to ensure their representation in the Constituent

Assembly on the basis of their population and identity. The political parties should listen to the people and experts and then decide on the electoral system to make it inclusive and participatory. Unless and until the electoral system has a place for people from all sections of society, including professionals, one cannot say we will have a wonderful constitution made by the people for the people.

MEDIA AND CONSTITUTION MAKING

Prateek Pradhan (Editor of the *Kathmandu Post*) said that, when considering the role that media can play to contribute to the successful working of the Constituent Assembly, it is important to know that media is not homogenous but a heterogeneous group. It is imperative to understand the formation of media in the country.

Despite training and orientation a media house cannot be changed if it has vested interests and is supported by powerful institutions. If political parties support and run their own media houses one cannot expect them to rise above their vested interest and act with professional ethics and responsibility. How can anybody expect to change the attitude of a media person if he or she supports a particular political party for future gains? No amount of training can change such a mindset.

If the government has media to support it, it will disseminate only news in favour of the government. What will happen if the opposition parties start running parallel media houses? Often the state media are misused by those in the government. The media should be judged for their credibility. There should be investigations regarding how certain media houses are run or whether they pay taxes or not.

Some of the media houses are still not clear about matters like proportional representation. They should be orientated to ensure their credibility and make them contribute positively to the success of the Constituent Assembly. The media houses should also be trained not to glorify violence.

THE ROLE AND FUNCTIONING OF THE CONSTITUENT ASSEMBLY

This topic was the subject of presentations from Purna Man Shakya (constitutional lawyer), Bhimarjun Acharya and Jill Cottrell (CASU). Purna Man Shakya observed that the 1990 Constitution was drafted by one body, approved by another and promulgated by another. This time all 3 parts of the constitution making process will be merged into one under the Constituent Assembly (assuming that no constitution commission was appointed – see above). The objective of the Constituent Assembly is to draft, approve and promulgate a new constitution as the basis for lasting peace in Nepal.

He added that the source of authority of the Constituent Assembly is the sovereign power of the people and their inherent right to self determination. Similarly, the legitimacy of the Constituent Assembly rests on the people and as such it should be characterized by, free and fair election without fear and intimidation, effective representation of the people, deliberative participation of the people and acceptance by the people

He added that before the elections to the Constituent Assembly, there are processes that should take place. Among this should be negotiation among the conflicting parties, political forces, professional organizations and civil society; working out the basic guidelines for the election of the Constituent Assembly and allocation of seats, and the basic guidelines for the future constitution and enactment of the Constituent Assembly Election Act

He observed that there were certain challenges that the Constituent Assembly would face, including an intense power struggle over the Constituent Assembly elections, the maintenance of peace and security at

the time of those elections, proportional representation issues and the working out of a political consensus on the future model of Nepalese democracy.

As far as the processes are concerned, he outlined a likely series of events:

"the source of authority of the
Constituent Assembly is the
sovereign power of the people"

– Purna Man Shakya

- Summoning of the Constituent Assembly by the interim government
- Election of the chairperson and vice chairperson of the Constituent Assembly
- Passing of the Constituent Assembly procedural rules
- Formation of the drafting committee
- Constitution of the subject committees
- Creation of Constituent Assembly secretariat
- Formation of the technical advisory group / constitutional commission

He suggested that the process would likely follow this course:

- Reference of the specific chapters to different subject committees
- Subject committees interacting with experts
- Subject committees deliberating the issues and working out political consensus on the contentious issues
- Presentation of the report of the committee to the full house
- Discussion and adoption of the committee reports by full house.
- Revised draft prepared on the basis of committee reports, as amended by the full house.

The decision making process would include:

- Clause by clause discussion of the draft constitution
- Recording of the Constituent Assembly debate for future reference
- Referendum on major constitutional issues of sharp division of opinion
- Final voting on the draft constitution
- Promulgation of the constitution by the Constituent Assembly

Some speakers commented on the question of size of the Constituent Assembly. Yash Ghai said the size should be around 300 because a bigger body would be difficult to manage⁴.

Rules of procedure

Jill Cottrell focused especially on the rules of procedure for the Constituent Assembly. She noted that in the past some Constituent Assemblies fell

apart due to the issue of rules of procedures. She noted that for example, the Maldives Constituent Assembly has been involved in controversy over membership while Bolivia had problems over the rules for decision making. She suggested that the rules of procedure should aim to achieve the following:

- Best possible product
- Full participation – of the members themselves and of the public
- Reasonable speed
- Legitimacy
- Accurate and permanent record keeping

The structure of the Constituent Assembly

Purna Man Shakya said that basically the Constituent Assembly consists of the full house, a drafting committee and a secretariat. Jill Cottrell suggested that there should be at least 10 to 11 committees. There is a problem in the case of Nepal because the Interim Constitution states that the law must establish committees. Does that mean the law must precisely say which committees the Constituent Assembly should have? Such an approach might be restrictive, because there are a lot of people who think they know what should be in the constitution and may well say in advance there should be this or that in the constitution, and therefore there should be corresponding committees. The committee structure should facilitate not constrain discussion.

Draft

Various participants discussed the matter of the preparation of a draft constitution for discussion by the Constituent Assembly. Most constituent assemblies do start with a draft. Haysom said that it is not satisfactory if every party puts in its own draft; on the other hand, if the basis of discussion is the draft of one party alone the other parties may be reluctant to agree, precisely because the proposals are from that party. There must be what is sometimes called a “single text”, based on the proposals of the parties and the public, a complete set of proposals for a constitution which will form the basis of Constituent Assembly discussions. The draft constitution for discussion should be prepared by an expert or a technical drafting body.

⁴ The Interim Constitution has since been amended to provide for 497 members – eds.

Various speakers commented that preparing a draft could be a job for a constitution commission which could be followed by the phase of consideration and deliberation (see discussion of constitution commission above).

If there is no draft, speakers agreed, somehow the Constituent Assembly must turn itself into the draft producing body. This may be done by a drafting committee because it's not possible to have the whole Constituent Assembly drafting. Purna Man Shakya suggested this might be done on the basis of the policy guidelines prepared by an all party conference.

Experts

Jill Cottrell observed that getting the best product means that there should be full consideration of all the issues. In order to do that, there is the possibility of the use of experts; experts are there to assist, and should not dominate the process. Sometime experts can be problematic but a good chairman is necessary to deal with these issues. The chairman should be effective, and has the force of personality to say decisions are a matter for the committee and not for experts.

Full participation of members

Jill Cottrell suggested that the Constituent Assembly should begin with an orientation program for the members, explaining what the constitution is about and the sort of issues that they have to decide. The rules should not be too technical. They shouldn't be based on those of parliament which are a bit technical. There should be full participation including of women; rules should allow the women members, notwithstanding their family obligations, to participate fully; for example late night debates should be avoided.

Public participation

Bhimarjun Acharya emphasized the importance of participation, saying that if the constitution is made by the people it will be a document of consent. A constituent assembly will have little meaning if there is no full fledged participation of the people. Public participation should be done by preparing a format of specific questions. The findings could be submitted to the Constituent Assembly.

Fink Haysom suggested that (especially if there had been no commission consulting the people before the Constituent Assembly met) the Constituent

Assembly must be able to move and visit the people. In South Africa pairs of Members of Parliament from different parties were sent to constituencies where their brief was not to talk but to listen to the people.

He also said that there should be public access – the whole thing must not be done in secret. Should there be TV cameras in the chamber? He had reservations about this because there can be too much playing to the cameras, as was the case in South Africa. Coverage should be independent – not just official releases. But there should also be daily official releases – so that parties cannot put their own spin on the developments without any way to cross-check the accuracy of what they say. There should be no place for triumphalism in this process. Ghai suggested that there should be media access to the full house but possibly not to committees (or not to all committee sessions), because this might interfere with the process of working out compromises.

Jill Cottrell suggested that individuals should be able to appear before the committees of the Assembly. There should also be an arrangement by which members of the public could appear before a plenary, regular or may be weekly sessions for public hearings at which individuals and organisations could make representations. Maybe it is desirable not to entirely depend on the press for public information. There should be a system of informing the public what is going on; a regular newsletter and a website can be used. There might be problems especially pressure from the public; the rules should ensure the public does not overwhelm the committees and they do not interfere in its proceedings.

Purna Man Shakya suggested that:

1. People must be informed in advance as to the appropriate time for their input and intervention
2. Release of the preliminary draft for public feedback through internet, radio and other public media
3. Visit of the members of the Constituent Assembly to their respective constituencies for feedback

Jill Cottrell proposed that representative organizations or even people from ethnic groups who do not have proper representation could be involved by giving observers from those groups a right to attend and interact on informal basis with members of the Constituent Assembly, maybe over

lunch or tea breaks. That way, public views could get regularly drawn to the attention of the members.

Reasonable speed

Cottrell proposed that the chair must have adequate powers and the stature and personality to control the sort of members who might want to delay the process for personal or political reasons. The procedural rules must facilitate the deliberations of the Constituent Assembly; they shouldn't be used to hold up its activities. The Constituent Assembly is also to act as the legislature, according to the Interim Constitution. Hopefully that role wouldn't interfere with the consideration of the new constitution. The reason for having a committee to do the legislative work – as permitted by the Interim Constitution – is to enable the two bodies to sit at the same time.

Decision making

Cottrell suggested that the decision making rules should be such as to encourage consensus. According to the Interim Constitution, the final decisions are to be made ideally by unanimity - if that doesn't work, there has to be consensus efforts led by the political parties and if that too fails, then decisions have to be made by 2/3 majority.

Fink Haysom said that there will be times when discussions can be deadlocked over particular issues. It is necessary to think about mechanisms for resolving this in advance. In South Africa for example, they hit on the concept of "sufficient consensus" – namely that even if not everyone agreed, if the major parties agreed, they could move on. Sometimes the party leaders were kept out of the ordinary discussion, held them in reserve, as it were, in case others could not reach a decision.

Cottrell also asked whether there is any role for secret balloting in a Constituent Assembly. Ideally the answer is "no" in principle because that is inconsistent with transparency. But in Afghanistan, there was such intimidation from the warlords that they indeed had secret ballot. If there is risk of

intimidation, then sometimes it may be necessary to have secret balloting but not for all decisions. This method might encourage bribery and should be limited only to sensitive issues.

Record keeping

Constituent Assembly would have a dozen committees dealing with different aspects of the constitution. Perhaps it would not be possible to have experienced shorthand writers sitting with each committee (depending on how many of such people there are). With debates going on and in which people feel very strongly, and where some people may not be used to discussing issues in a very systematic fashion, it might be difficult to work out what actually is being decided. Thus it would be necessary to ensure that the secretariat is really equipped for recording what actually is decided.

For future reference, it may be necessary to know what the reasons were for a particular decision. Anybody who is familiar with the decisions of the Indian courts will know that they refer back to the debates in the Constituent Assembly in the 1940's to see what the point of particular provision is. This helps courts to interpret the constitution. Therefore records should be placed in the national archives and in university libraries so that in 50 years time future law students, historians, sociologists and so on can know how Nepal got its new constitution, and why it got it.

Principles

Bhimarjun Acharya said it was regrettable that no provision had been made in the Interim Constitution for fundamental principles of the new constitution. Constitutional principles provide a vision of the future besides assuring the end result and protecting minority rights. Otherwise, the Parliament can misuse the provisions. The Speaker, Hon Subas Nembang, also commented in his opening remarks to the conference that he had been very impressed with the South African process including the 34 principles laid down in the Interim Constitution for the final constitution.

"It is a pity that there is no provision in the Interim Constitution for fundamental principles of the new constitution "

– Bhimarjun Acharya

V. Substantive issues

Various participants spoke about the substantive issues that the Constituent Assembly would have to deal with in making a new constitution. Mr Badri Bahadur Karki (SCOPE) noted that to date the character, function, nature, powers, representation and territorial aspects of the new constitution are unclear. He suggested that it must avoid a centralist approach and include basic principles of distribution of power and of resources. The challenges of drafting the new constitution will be to determine what kind of executive, judiciary and legislature should be incorporated. He also stressed the importance of the independence of the judiciary. The most important aspect is for the various actors to agree on the kind of democratic system because a constitution is thought to reflect a consensus of opinions of the people.

A number of people mentioned monarchy and federalism as important. Purna Man Shakya added the system of elections for future parliaments and the whole question of the system of government – presidential or parliamentary. A speaker from Women in Environment asked about the place of environment and resources in a constitution.

MONARCHY

A few remarks were made about the question of the manner of the abolition of the monarchy. Some party leaders commented on the demand of the Maoists for the immediate abolition of the monarchy; Shekhar Koirala said this would be in contravention of the Interim Constitution and the peace accord, as, according to the Interim Constitution, the first meeting of the constituent assembly is to decide on the future of monarchy. Dev Gurung responded that *jana andolan II* had given a mandate, essentially to

the parties, to decide on monarchy. Therefore this Legislature-Parliament could do it.

FEDERALISM

There were a number of views regarding federalism. Political leaders commented that the need of the hour is to end the unitary system and move towards the federal system. And that though the 7-party and Maoists have already agreed on federal system we are not sure what type of federal structure will be suitable for the country. Bharat Mohan Adhikari said that since no caste group has domination over any particular region all caste, cultural and religious groups should be included when we envision the new federal polity. One thing was clear: that the unitary system will not work any more. UML had decided to go for federalism but it is open to debate on the question of what model of federalism. He suggested that the High Level Commission (see Article 138 of Interim Constitution) should start working straight away. It needed the support of people from all sectors. There must be a large scale national debate on the matter.

Yash Ghai said that there are two bases for federalism, one region/territory/geography and the other ethnic or linguistic groups. Federalism is just one of the avenues of dealing with disadvantage and culture.⁵ He also distinguished between two ways in which federations are formed: by aggregation when several existing units come together to form a country, and disaggregation, when a unitary state becomes a federation. The latter is much harder to organise. He said that there are different ways of combining state institutions, state policies and other initiatives at the local level. Haysom also observed that there is such a wide range of federal arrangements that to say (as the Interim Constitution does) that Nepal

⁵ The next CASU conference dealt with federalism. The report of that conference will be published shortly.

has decided on federalism says very little. The devil, as they say, is in the detail. There are two main areas to be decided: (i) what degree of autonomy should the constituent units have and (ii) how will the units share power at the centre (the national government); the latter issue, he commented, is usually neglected.

Arzu Deuba commented that among the issues to be resolved was “Is there enough money to run a federal state?”

Some speakers commented that there was concern that federalism would lead to a break-up of the country. Although Shekhar Koirala implied that federalism was an accepted fact he also expressed concern that the call for the restructuring of the state by some political forces is against national unity which might lead to the disintegration of the country. Ethnic federalism is fraught with danger, he said. Arzu Deuba also asked “What lessons does Nepal draw from Eastern Europe in drawing federal states on ethnic lines?” Bhirmarjun Acharya suggested that the experience of several countries shows that federalism on the basis of caste/ethnicity is not practically feasible. Federalism should also be guided by principles of coordination. And, it is also not logical to think that federalism will necessarily address the needs and aspirations of a heterogeneous population. Similarly Yubaraj Sangroula said that it is wrong to think that by establishing units through the constitution the country would become more prosperous. The nation may be weakened while creating units in the country as envisioned by some groups and communities.

However, most speakers said there was no necessity to be worried about disintegration. Lok Raj Baral said that after much thought he had decided that federalism was inevitable, and that it need not lead to disintegration. Nepal, he said, is integrating not disintegrating. Sometimes it is thought that identity politics is polarizing the country along ethnic/regional lines but the situation should be capitalized on so as to transform the process into one of more inclusiveness and equality than the country has had before. There are conflicting interpretations of federalism. The most important in the case of Nepal is creating trust or social capital. There should be trust among different regions of the country because it creates good understanding. Creation of regions on the basis of trust builds confidence and defuses

perceptions of threat. Within that federal structure, every group, community, region should have access to power and resources. A speaker from the floor also commented that the demand for the federal structure of the State should not be taken as a move to disintegrate the country. We need to free ourselves from feudalistic and centralized thinking and mindset.

Lok Raj Baral suggested that cooperative federalism was one form of federalism that Nepal could adopt. He explained that such a system of federalism, which was the model used in Switzerland and South Africa, relied on trust. Federalism should be created on the basis of understanding. There should be convergence not divergence of interests.

Yubaraj Sangroula made some concrete suggestions about a future federal set-up: he said that there should be two houses at the centre. The National Assembly (to use the terminology in the 1990 Constitution) should be comprised of people belonging to various religious, cultural and social groups, while the House of Representatives should have experts from various fields. There should be intermediary institutions between the centre and local bodies. Power should lie in local bodies so that people can exercise their rights at the grassroots level.

ECONOMIC IMPLICATIONS

Some speakers raised questions about the economic aspects of constitutions, apart from wondering about the cost of federalism. Yash Ghai said that the economic implications of constitutions are important but this should be thought about in a broad sense. Talk about social justice also implies economic resources. A constitution to some extent, and sometimes to a great extent, allocates resources among different public purposes. If a federal system were to be adopted, one of the major issues for negotiation would be the fiscal system: who collects taxes, how revenue is allocated among different levels of government, how to maintain an integrated economy and how political power is fragmented. These are fundamental questions regarding the economy, even the bill of rights has very clear implications on how resources are allocated, and thus has implications for the role and structure of the law. Globalization puts an enormous emphasis on the market mechanism and affects the way modern constitutions are made, as regards both the process and the content.

Appendices

APPENDIX I:

Background Paper prepared by Yash Ghai for the Conference The Interim Constitution on the Constitution Making Process:

INTRODUCTION

A principal purpose of the Interim Constitution is to ensure appropriate mechanisms for the preparation and enactment of the permanent constitution for Nepal. Although the Interim Constitution (IC) is wide ranging in its scope, it is the process for the making of the constitution which is of primary interest and concern, as the period during which the interim constitutional arrangements would operate is short, perhaps no more than 2 years. During this period there will be little time or opportunity to implement the ambitious agenda of the interim constitution (although this is not to detract from the ideological symbolism of the new social and political order presaged in the IC). This paper examines those provisions of the IC which pertain to the making of the permanent constitution. It is important to note that, quite sensibly, the IC contains the broad parameters of the constitution making process and does not aim to be comprehensive.

GENERAL CONSIDERATIONS

Before we turn to the IC provisions on constitution making, I discuss some criteria for a good process. The primary purpose, and the details, of a process are specific to the situation of the country seeking a new constitution—whether it is the restoration of democracy after a period of dictatorship or military rule, the re-establishment of peace and harmony after ethnic conflicts, or the modernisation of state institutions and procedures in an underdeveloped country. The notion that experts can, on their own, make a constitution is unfashionable today. In most cases the process is complex and many-sided. It consists of several components: the decision to undertake, and the framework for, the review, the

goals of review, the procedure to be followed, and the institutions and rules for decision making. In war torn societies, where the need for political and constitutional reform may be most evident, it may be harder to get to the review. Lengthy and complex negotiations between parties in conflict may be necessary to bring the war to an end and to initiate the process of constitution making. Ceasefire agreements may have to be the starting point, followed by a comprehensive peace agreement. Interim constitutions or arrangements may be necessary before the formal process for the new constitution can be initiated. Constitution making is thus part of complex and lengthy negotiations and settlements. I do not propose to discuss all these aspects (some of which have already been traversed in Nepal), and concentrate on the actual steps in the making of the constitution. But in order to assess the quality of a constitution making process, it is necessary to look at the broader objectives of the process beyond merely getting a new constitution.

In post-conflict situation, a principal purpose is reconciliation of parties in conflict as well as in communities which have been torn apart by the conflict. When the conflict arose out of the exploitation of one or more regions or sectors of society, the emphasis is on social justice—and on inculcating self-confidence in marginalised groups. When a country is coming out of a dictatorship, the process should seek to empower people and educate them in the values and mechanisms of democracy. In almost all these cases, the country, or sections of the people, may be going through a crisis of identity, engaged in acts of redefining the nation and the state, balancing identities and concerns of different communities. Most of these objectives are best achieved through inclusive and participatory

processes where all communities are able to advance and negotiate their claims—and a national consensus can emerge. Inclusiveness is often difficult, at least in the early stages of the process, when a country is coming out of internal conflict, as the parties to the conflict tend to dominate the process, with the help of their arms and their capacity to inflict violence and damage national peace and harmony. Such restricted participation often produces a narrow agenda, that of special concern to the warring factions, often ignoring fundamental problems of the country. Consequently lasting solutions are unlikely to be found if others are not brought in as speedily as possible.

On the more technical side, if public participation is seen as valuable, it is necessary to engage in a programme of education and dialogue with the people on constitutional values and procedures, national priorities, and the actual process for reform, including their own role. Few experiences can be as alienating and disempowering as when the people do not even understand the process which would determine their status, rights and duties, and indeed their very future—leaving aside that they have no influence on the outcome. So procedures for their participation, consultations and recommendations are critical. The analysis, and where possible, the synthesis, of public views and recommendations should be an essential part of the process to refine the agenda and to assist in the making of decisions. The body which makes the constitution should be fully representative, of interests, regions, communities. Its procedures should facilitate transparency, deliberation and consensus building. The rules for decision making should be based as far as possible on consensus, so that all interests are probably considered.

This approach to constitution making, and the tasks inherent in it, also require us to consider institutional arrangements. Which body should be responsible for these tasks, and what procedures should it employ? It is clear that different kinds of skills and status are required for the variety of tasks—some require independent and expert bodies, while others are better done by a body which has political legitimacy and accountability. There is also considerable role for civil society organisations, particularly in the provision of civic education and

in the promotion of debates on constitutional options—and to some extent as auditors of the process. Several countries have, with profit, appointed an expert body like a constitution commission, to promote public information, education, and debate, collect and analyse the views of the people, undertake or commission research, and make recommendations to the CA (and in some countries to draft a constitution).

THE INTERIM CONSTITUTION

When a country comes out of a conflict and state institutions have either collapsed, been discredited, or are unacceptable to one or more groups, it is common to adopt an interim constitution both to provide for the governance of the country until the establishment of government under the new constitution and to set out the road map (goals, institutions and procedures) for the making of the new constitution. Sometimes the interim constitution is short (especially when the previous constitution is modified) and sometimes long and comprehensive (when the previous constitution is completely rejected). Sometimes interim arrangements take the form of a political agreement among the key actors.

The seven parliamentary parties which had negotiated a political alliance with the Maoists in 2005 were in favour using the 1990 Constitution as interim constitution after deleting or modifying its unsuitable provisions, on the restoration of the House of Representatives (and in a Proclamation in May 2006 attempted to do precisely this). As so modified, it became the interim constitution (although doubts were raised by some of the legality of this procedure) for the period leading up to the inclusion of Maoists in the legislature (and ultimately the government). Maoists were not enamoured of the 1990 Constitution and insisted on its replacement by a specially tailored constitution.

That Interim Constitution was adopted by the former House of Representatives and ratified by the (new) Interim Legislature-Parliament, both on 15 January 2007. It is a lengthy document and covers most topics that one would ordinarily find in a permanent constitution. It sets out in considerable detail the aspirations of the people of Nepal, as expressed in

the *jana andolan* of 2006. However, these are stated not as legally binding principles and rules but as directive principles or state policies which cannot be legally enforced. The IC also contains detailed provisions on fundamental rights, the legislature, the executive, judiciary, other independent institutions, the electoral machinery and political parties. The wide scope of the IC has given rise to anxiety among communities or groups which do not see the inclusion of their special interests. The IC also does not contain a clear statement of the goals and principles of the new constitution which might have allayed these anxieties (although as I argue later, goals and principles reflecting the concerns of the *andolan* are probably meant to be binding on the Constituent Assembly).

CONSTITUTION MAKING PROCESS IN THE INTERIM CONSTITUTION

In the last three years or so, as the institutions of the state came under severe attack from the Maoist insurgency, the House of Representatives was abolished, and the authoritarian rule of the monarchy replaced the parliamentary system of government, there has been extensive discussion on how an inclusive and effective constitutional system of government could be established in Nepal. Negotiations between an alliance of seven parliamentary parties and the Maoists on 22 November 2005 led to an agreement that on the cessation of hostilities, a constituent assembly would be elected to frame a constitution. Considerable emphasis was placed on the sovereignty of the people and their participation in the constitution making process; this was emphasised in the second understanding among the parties, calling upon them and their civic organisations through 'their active participation to establish full democracy with the sovereignty and the state power of the country completely in people through the election of constituent assembly on the basis of the determined process'. The demands of the 2006 *andolan* were also that the new constitution should be made by a broadly representative constituent assembly. The IC gives effect to this agreement, guaranteeing a constituent assembly 'to formulate a new constitution by the people themselves' (art. 63). But it is doubtful if the provisions meet the test of an inclusive assembly. As I show later, that if the constitution is made in accordance with the existing

provisions of the IC, it cannot be said that it is the 'people who would formulate the constitution'.

THE CA: MEMBERSHIP AND REPRESENTATION (BEFORE AMENDMENT OF THE IC)

As originally enacted, the CA would have had 425 members, consisting of three categories of members (63(3)). 205 were to be elected in single member constituencies on first past the post system, i.e., the winner to be the person who wins the largest number of votes, even if it is short of a majority ('the first category'). It was not absolutely clear whether the constituencies must be the same as for the last elections or merely that they are drawn up on the basis of the previous law. 204 were to be chosen on the basis of party lists, by a system under which voters would vote for a party ('the second category'). A party would be given seats in proportion to its share of the votes, and it would draw its members from its list. The third category would consist of 16 persons prominent in national life, to be nominated by the Council of Ministers.

In order to promote inclusiveness, the IC provides that when parties are nominating candidates for constituency seats or composing party lists, they have to ensure 'proportional representation of women, Dalit, oppressed tribes and indigenous tribes, 'backwards, Madhesi and other groups' as provided in the law. The provision is more specific in the case of women: the total number of women candidates in the two categories must be at least one third.

It is first necessary to clarify the term 'proportional' or 'proportionality' as it is used in two senses in the is used in two senses: one refers to proportionality as between the parties; the other to proportionality among categories of communities/gender. Proportionality in the first sense may not necessarily achieve the second type of proportionality. The discussion on whether the results in the two categories of members should be linked (as in the Mixed Member Proportional (MMP)) or not (as in the Parallel System) has relevance to proportionality as between political parties (MMP being more proportional) but may not, as I show later, have much to do with the second kind of proportionality.

Unfortunately there is no guarantee that directions on the nomination of candidates will produce

proportionality of members from the marginalised communities. The experience under the 1990 Constitution which required that each party must nominate at least 5% of its candidates from women (art. 114) did not produce any significant crop of women MPs. There is widespread speculation that parties would place candidates from marginalised communities in those constituencies where the parties have least prospects of success, and in the second category, would place them towards the bottom in the party lists making it unlikely that they would make it to the CA.

It is possible that by requiring that parties both nominate a sufficient number of candidates from marginalised communities in constituencies and placed them high on the party lists in the second category, a significant number of such candidates would win seats. It is also possible to adopt a rule, in respect of the second category, that the prescribed number of candidates from the different marginalised communities is elected first from the list to fill the quota before other candidates are considered. Such rules of priority are difficult to establish in respect of constituency elections. The result is that either the lists would in practice have to be used entirely for marginalised community candidates (a result which is unfortunate for more than one reason) or that the proportionality among different communities will not be achieved.

If the law placed compulsory requirements on the structure of party lists (for example alternating women and men or requiring one woman in any three candidates) it would make little or no difference to inclusiveness whether the system was MMP or Parallel. The choice between MMP and Parallel systems would have significance only if certain parties had more inclusive lists of candidates, and if those parties did better in the PR race than they did in the geographical constituencies, and if those parties were reasonably large in terms of their share of the national vote. This is because the MMP system guarantees seats reflecting the share of the national vote, and parties that fit the electoral support profile mentioned would be entitled to far more PR seats under MMP than under the Parallel system – so their more inclusive candidate lists would have a bigger impact on the overall make-up of the house.

There are other important factors that might affect the outcome, however. If there is a two-vote system voters

will have more opportunity to calculate the impact of their votes, and to vote, if they so wish, for a geographical candidate on the basis of that individual's merit or party affiliation, and for a list on the basis of the gender or other make-up of that list. Secondly this will only work if people understand the system – if they have been educated about it. And thirdly it will only work if voters actually care enough about inclusiveness for it to affect their voting choices – and be more important than perhaps their traditional choice of party, at least in the second, list vote.

Even if members of marginalised communities were present in significant (if not proportionate) numbers, the extent to which they would be able to present and lobby for the interests of those communities will be affected by the fact that most of the representation will be through parties. Consequently they will be subject to the party whip which could inhibit their ability or willingness to lobby for these interests (as is evident from past practice where patronage politics had compelled marginalised community members to toe the party line, not particularly oriented towards the marginalised communities). This possibility has worried many sections of the marginalised communities, reinforced by the rule that a member may be removed if the party of which the member was a member at the time of the election notifies (to whom?) that the member has abandoned the party or no longer holds membership (presumably meaning that the party can effectively expel such a member) (art. 67).

There is also the fear that the 16 prominent persons will be distributed among the 8 political parties (as 46 members for the interim legislature were) for patronage purposes rather than to secure expertise and relevant experience. So they too will be subject to party discipline, which factor will reduce the value of such membership. It is interesting that the IC prescribes, as one criterion for the registration of a party is that its own constitution should provide for an effective system of discipline for its members (art. 142 (3)(d)).

In this context, it has to be said that the orientation of the electoral provisions of the IC are biased in favour of political parties, rather than ethnic, community, or professional concerns and interests. This bias is particularly evident in the IC provisions that while parties which are represented in the interim legislature are entitled to registration without showing significant support, other parties

have to present signatures of at least 10,000 supporters (art. 142 (5)). The second category of members will be elected on the basis of one national constituency, rather than regional or zonal constituencies (art. 63(3)(b)). This will increase the control of candidacy by the central committees of the parties, and in this way, apart from the dominance of political parties, the system will reinforce a form of centralism which seems incompatible with participation and inclusiveness. Moreover, only political parties will be eligible for party proportionality seats.

It is also assumed that inclusiveness or the second kind of proportionality would come through traditional type of political parties. Attempts to set up new parties more closely related to the marginalised groups will run foul of the rule that 'parties with objectives contrary to the spirit and norms of the preamble of this constitution shall not be considered qualified for party registration' (art. 11(3)). Also disqualified are parties which discriminate against membership on account of ethnic or gender grounds or if the objectives of a party 'would disturb the religious or communal harmony or divide the country' (art. 142(4)). And now as the details of the electoral system are being worked out, such as single or two ballots, all the decisions are being made by the 8 parties.

There is a danger that such exclusive membership through the mechanism of existing parliamentary parties will exclude scholars, professionals, social workers, and special groups like the disabled and linguistic minorities, whose participation is essential to ensure a balanced and professional constitution.

THE CA: MEMBERSHIP AND REPRESENTATION (AFTER AMENDMENT OF THE IC)

After protests by Madhesis about their under-representation, the 8 parties have shown some flexibility, principally by increasing the number of constituency seats (although the decision in favour of Parallel as opposed to MMP system reduces the degree of proportionality). Now the CA will consist of 497 members. This is a large size, not very congenial for detailed discussion or for consensus building. Careful thought would need to be given to the procedures of the CA to ensure proper

participation in this large assembly, without prolonging unduly the proceedings of the CA, and yet affording proper opportunities for debate.

The provisions of the CA Election Act are both more binding and more inclusive in their effect than the unamended IC, or even the first draft of the Election Bill. Now each party is to have 50% women among its list members under the second election. And both the list and the final allocations of seats is to take account of a formula based on the 2001 census: 31.2% of each party's list are to be Madhesi, 13% Dalit, "oppressed/indigenous tribes" 37.8%, 4% from backward regions and 30.2% "other" which seems to mean Hill Bahun/Chhetri not from backward regions. Each group must be half women and half men. There is some flexibility in this, partly to cater for the intrinsic problems, partly to help small parties. And the actual impact of the rules on the overall make-up of the CA will depend on the number of parties, especially the number of parties with only a few seats. The overall requirement for 33% women candidates remains, as does the vague proportionality requirement for geographical constituency candidates.

Finally it should be noted that there are now to be 17, not 16, other members appointed by the Council of Ministers from among those who have made distinguished contribution to society. Also that elections are now anticipated on November 22 2007.

OVERALL ASSESSMENT ON REPRESENTATION

It thus has to be concluded that the composition of the Constituent Assembly will not satisfy the test of a fully inclusive and participatory process. The approach to the composition of the CA does not reflect an appropriate conceptualisation of its functions or procedure, based as it is on a view that the CA is just like parliament (even to the extent of expelling a member from the CA on the say so of the party). But the CA is more than a law making body or a body that represents geographical constituencies or forms and dismisses government. It is a gathering of the nation, designed to develop a national consensus on critical social, economic and political issues, and to reaffirm (and where necessary redefine) national identities and unity (and for which the conscience of a member should be given higher value than the discipline of the party).

FREE AND FAIR ELECTIONS TO THE CA

Whatever the system of voting, there is general acceptance that the actual elections must be free and fair. The very first responsibility of the state is defined as ensuring the conduct of a free and impartial election for the CA by June 2007 (art. 33(a)). This principle is stated in the agreements between the SPA and the Maoists, and now constitutes the mandate of the United Nations Mission in Nepal (UNMIN). An independent electoral commission is to 'conduct, supervise, direct and control the elections' to the CA (art. 129). It is widely accepted that the weapons held by the Maoists (and a similar number by the army) must be stored away as a pre-condition for free and fair elections. All intimidation of citizens must stop. It is the responsibility of the Electoral Commission and the UNMIN to assess that these and other necessary conditions are met before elections are held.

The prime minister and other party leaders have made several public statements of their commitment to the CA, and to the June 2007 deadline. However, progress on finalising the details of the electoral laws is slow. Parties have taken a long time to agree on the details of the system which is set out in the IC and now there is the need to reach some settlement with the Madhesis, janjatis and Dalits on modes of representation for them. Doubts have been expressed about the feasibility of elections before June. The IC does not specify a time for the elections, other than that they must be held by mid-June 2007. Instead the decision on the timing is left to the Government of Nepal (government for this purpose presumably means the Interim Council of Ministers) (art. 63(2)) (and that for practical purposes means the 8 parties).

Although this gives some flexibility which might be useful in view of uncertainties about the feasibility of elections by mid-June, the absence of a deadline might make the people anxious about the commitment of the political parties in the Interim Council of Ministers to a proper process for the making of the constitution. The solution might be to specify the outer limit with a proviso for the extension of the time, if absolutely essential, by the Interim Parliament.

Moreover, since the feasibility of elections depends also on technical arrangements, the decision to postpone the election as well on the actual timing should be

made after consultation with the independent Electoral Commission (the IC gives the responsibility for the holding of CA elections to the EC. Art. 129).

PROCEDURE TO DEAL WITH ELECTION DISPUTES

A special court known as the Constituent Assembly Court (CAC) is to be established to resolve complaints regarding elections to the CA (art. 118). Petitions in respect of electoral disputes can only be raised in this court. Only this court, and not even the Supreme Court, can interpret the law on electoral issues (art. 102 (4)). Presumably the Supreme Court would have appellate jurisdiction on other aspects of election disputes, such as on matters of fact. But on one point, the Supreme Court has no jurisdiction and the final word is with the CAC—if the question is whether a member is disqualified or has ceased to possess the qualification specified for being a member (art. 66).

The details of the CAC's jurisdiction and powers are to be laid down in a law (the bill for which is now before Legislature-Parliament). The IC also says that once the process for elections has commenced, no question 'that hinders the elections' can be raised in any court (art. 118(3)). It is not clear what the 'process for elections' is. Is the process deemed to have commenced when the dates of elections are announced, or when the nominations have been filed, or when the actual voting begins? No doubt the forthcoming legislation would clarify these points. It is also clear that complaints can be raised after the elections, since the reference is to questions that 'hinder the elections'. The purpose of this provision is no doubt to prevent, or delay, the holding of elections by the abuse of the legal mechanisms, as it seems to have been past practice. While no one can quarrel with this purpose, it is important that the legislation to give effect to it should not sanction short cuts which might undermine the legitimate rights of candidates or voters.

FUNDAMENTAL CONSTITUTIONAL PRINCIPLES BINDING UNDERLYING THE MANDATE OF THE CA

Most constitution making processes are governed by fundamental principles which must be reflected in the new constitution. Sometimes these principles are expressly stated in a constitutional or political instrument (such as the interim constitution or an

inter-party or societal agreement) and sometimes they are generally understood and accepted as the rationale of the process. In Nepal, the IC does not clearly specify that the CA is bound by any fundamental principles. But the IC contains many fundamental principles of state policy and directive principles and it could be argued that these are intended to be the guidelines for the CA.

The most important of these is the restructuring of the state which appears in several places. The Preamble refers to the goals of 'the progressive restructure of the state in order to resolve the existing problems of the country based on class, caste, region and gender'. A major responsibility of the state is to 'carry out an inclusive, democratic and progressive restructuring of the State by eliminating its existing form of centralised and unitary structure in order to address the problems relating to women, Dalits, indigenous tribes, Madhesis, oppressed and minority community and other disadvantaged groups, by eliminating class, caste, language, sex, culture, religion and regional discriminations' (art. 33(d), see also art. 35(10) for affirmative action for these groups). The chapter on the form of state and local self governance calls, again, for the 'inclusive, democratic and progressive restructuring of the state' to bring about 'an end of the discrimination based on class, caste, language, sex, culture, religion and region by eliminating the centralised and unitary form of the state' (art. 138). A high level commission is to advise on how this might be done, although the final decision would lie with the CA (art. 138(2) and (3)).

The state is also bound to maintain conditions conducive to democracy 'through maximum participation of the people in the governance of the country by means of self-governance, based on tribe, language, culture and region' (art. 34 (5)). The emphasis on diversity and self-governance is balanced by the responsibility to pursue a policy of strengthening the national unity of promoting healthy and cordial social relations, based on equality and co-existence, among the various religions, cultures, castes, communities and the equal promotion of languages, literature, scripts, arts and culture (art. 35(3)). The Preamble expresses people's commitment to democratic norms and values, human rights, the rule of law, progressive economic-social change, and the independence and integrity of the country. Other

values which are mentioned in this chapter include social justice, access to health, education, food and shelter, and an open society (arts. 34 and 33(h)).

These goals are indeed the inspiration for and the aspirations of the *andolan*. Since the CA is the child of the *andolan*, it is not unreasonable to argue that these goals have the status of fundamental constitutional principles and bind the CA.

However, despite the emphasis on and the frequent reiteration of these goals, the IC does not provide for any method, on the adoption of the new constitution, to verify or certify that it has successfully and effectively incorporated them. It is not usual to have such procedures, although in South Africa the Constitutional Court had to certify that all the fundamental principles were incorporated, and in some countries where the UN played a key role (as in Namibia) the UN Security Council has reviewed the constitution before it came into effect. In Nepal it would be the collective responsibility of the members of the CA to ensure that these goals are included in the constitution; the Speaker and the chairs of thematic committees should constantly remind members of this responsibility. Informal audits of the constitution could be carried out by the legal profession, scholars, civil society organisations, and the media. A special committee of the CA (which could consult experts) could be set up for the express purpose of making a formal decision on the compatibility of the draft constitution with these principles.

HIGH LEVEL COMMISSION ON RESTRUCTURING

A High Level Commission is to be set up to make recommendations on the restructuring of the state (art. 138). The term 'restructuring' is used in Nepal to mean changes in the structure and institutions of government, measures to advance communities historically disadvantaged, a greater degree of public participation, etc. Here, however, it seems that it is used in a narrower sense, referring only to the elimination of the 'centralised and unitary form of the state', and responds to the demand for a federal or devolved system. This restructuring ('inclusive, democratic and progressive') is for a broad and ambitious agenda: to bring to an end discrimination based on 'class, caste, language, sex, culture, religion

and region' (not all of which might be compatible). There is considerable controversy on whether the basis of federalism should be ethnicity ('cultural') or geography ('developmental'). Article 138 does not resolve this controversy, as it refers to both 'caste, language, and religion' and 'region'. The implication of the article might be that the distribution of power and self-government by themselves, on whatever basis, will bring about greater equality and fairness. But it is not clear that federalism can achieve simultaneously all the specified objectives (particularly regarding sex and class).

Federalism or devolution is a complicated and controversial issue and will require careful thought. The High Level Commission, to be appointed by the Government, will provide a useful source of ideas, analysis and options for the CA, if it is independent and expert. It is unclear whether its recommendations would go directly to the CA or would be vetted by the Government, although article 138(3) states that the final decision on the restructuring would be made by the CA.

TIMELINES

The general principle is that the CA shall function for two years from the time of its first meeting (art. 64) (which must be held on the 21st day after the election results are announced (art. 69)). However, the CA may dissolve itself earlier by a resolution (art. 64). No explanation is provided as to the reasons for which an earlier dissolution may be made. The only justifiable reason would be if the constitution is adopted before the two years. But that possibility is already provided in article 82, which says that the CA would automatically be dissolved on the adoption (save for a temporary extension until elections to the legislature under the new constitution are held). There may indeed be a case for the dissolution of the CA if it fails to meet the deadline (or the extended deadline under art. 64) (as was stipulated in the Iraqi Interim Constitution). But might there be any justification for a pre-mature dissolution of the CA by its members (given that they were elected to enact the new constitution)? Could this power be used to disrupt—indeed permanently sabotage—the CA if the direction of constitutional change did not suit the political party with majority of members? And what majority would be required

for the passing of the resolution? (The normal voting is by the simple majority of members present and voting, unless expressly provided otherwise (art. 68) as for the adoption of the constitution).

It is also possible to extend the life of the CA for another six months, by a resolution of the CA, if the constitution is not ready due to 'an emergency situation in the country' (art. 64). Emergency situation is defined in article 143 as 'war, external invasion, armed rebellion or extreme economic disarray' which leads the Government to formally declare an emergency. Article 64 could therefore be read as requiring the CA to finish its task within the two years but for the exceptional situation, and even in that situation it has to complete the work within the period of extension (which presumably cannot be extended further?—in Iraq the word 'one off' was used to specify that no further extension would be possible, and in the case of failure, the CA would automatically be dissolved). The extension would require a resolution passed by a simple majority of members present and voting.

Presumably, to justify the extension it would be necessary to establish that the delay is caused by the proclamation of emergency. What if the proclamation takes place a week before the end of the two years? No provision is made for the situation that there is no proclamation of emergency and still the task is not finished? Should this result in the automatic dissolution of the CA?

On the question of the duration of the CA or the length of time allowed for the conclusion of the process there are generally two opposed views. One says that constitution making is so critical to the future of the country that it should not be rushed. People must be given ample opportunities to participate in the process; and there must be enough time for education to and consultation with them. Others argue that if too much time is allowed, members of the constitution commission or the constituent assembly, enjoying the prestige and financial benefits of membership, will drag out the process as long as possible. If the process is unduly stretched for this reason or other reasons (e.g., the opposition of the ruling clique to reform), the opportunity for change may be lost. Constitution reform is a highly political process, with great but

also narrow interests at stake, and there are always people who are willing to sabotage the process. A drawn out process gives them ample opportunities to do so. On the other hand, given the kinds of purposes served by the process (for example in learning about the purpose and structure of the state and questions of public policy), the presumption must be against a rushed process. What is a happy medium between too long and too short a process depends on the context, and on the degree of the preparedness of the people to engage in the process.

THE RULES AND PROCEDURES OF THE CA

The CA will perform a dual role—as a constitution making body and a legislature. To some extent the two tasks are different and may require different procedures. Parliamentary procedures are quite technical and those not familiar with them may find themselves at a disadvantage. The rules for the CA's constitution making function should be simpler and more facilitative of exchanges, without too many points of order! If the CA utilises the provision in the IC for it to set up a legislative affairs committee, it would be easier to have two different set of procedural rules (art. 83 (1)). In any case the CA as the legislature will be bound by the normal rules of financial procedure (art. 83(4)). In this paper our concern is essentially with the constitution making functions of the CA.

In general it is left up to the CA to determine the rules of its procedure, subject to the provisions of the IC (art. 78). The most important of these rules concerns the system of voting, which is discussed separately in this paper. The first meeting would be convened by the prime minister within 21 days of the elections; subsequently by the presiding officer or on the request, for good reason, of one fourth of the members (art. 69). The CA would elect its chairperson and vice-chairperson from among its members, subject to the proviso that both should not come from the same party (art. 71). The quorum is one fourth of the total membership for most purposes, but for decisions on the new constitution, it is at least two-thirds of the entire membership (art. 70(2)). Decisions other than on the new constitution are made by simple majority of members present and voting (art. 75); decisions on the constitution are described below. If a non-

member casts a vote, this does not invalidate the vote (art. 74). This rule needs to be reconsidered, for at least on the inclusion of provisions in the new constitution, a vote by a non-member may be decisive.

PRIVILEGES OF THE CA

In order to ensure complete freedom of speech in the Constituent Assembly, no member can be 'arrested, detained or prosecuted in any court for anything said or any vote cast in the Constituent Assembly' (Article 77). Persons who publish any document, report, vote or proceeding made under the authority of the CA are immune from any legal proceedings. Members cannot be arrested during the period of constitution drafting, except on a criminal charge.

The CA has been given considerable authority to protect its proceedings from external control as well as to discipline outsiders who criticise it. The CA and its committees have been given the 'exclusive power to decide whether or not any proceeding is regular' (art. 77(6)). Courts are excluded from any enquiry into these matters.

The Interim Constitution prohibits any comments 'about the good faith concerning any proceeding of the Constituent Assembly' as well as any 'publication of any kind' about 'anything said by any member which intentionally misinterprets or distorts the meaning of the expression' (art. 77(3)).

The violation of any of these privileges constitutes contempt of the CA. The CA is the sole judge of whether a violation has been committed. If the CA decides that a person has committed contempt, the Chairperson in consultation with the Assembly may reprimand or impose a fine or imprisonment on the person. Presumably there is no appeal from this decision to the courts or other authority.

The privileges of the CA seem excessive; CA should not be protected from judicial review if there are legal irregularities; the Chair should not be able to punish those who are critical of the CA ('judge in their own cause'); and the CA should be accountable. The issues that the CA will consider and decide on are so fundamental to the future of Nepal that there should be the least restrictions on free speech and debate.

SYSTEM OF VOTING ON THE NEW CONSTITUTION

The CA will vote separately on the Preamble and on each Article of the Bill for the Constitution (art. 70). At the first voting, the proposed provision will be passed only by unanimity (that is to say, only if no member votes against the provision, so presumably abstention from voting is not counted as a negative vote). If unanimity cannot be achieved, the political leaders of the parliamentary (legislative) parties ‘shall carry out mutual consultation to develop consensus’ (Article 70(3)). A maximum period of 15 days is allowed for consultation. Within seven days after the consultation is concluded, a vote may be taken again. If there is still no unanimity, a further vote may be taken at which if there is a majority of two-thirds, the provision will be deemed to have passed.

It is good to have a rule which encourages consensus, but unanimity is hard and rigid; almost impossible to achieve; also if the rule is that in its absence, a two-thirds majority suffices, the majority may have little incentive to compromise. In the third round, the proposal can effectively be adopted by 44% of the members. The rules also give those who want to delay the process an opportunity to do so.

It is also undesirable that only party leaders are involved in consensus building exercises—perhaps the drafting committee assumed that only parties will be able to contest elections.

PUBLIC CONSULTATION AND PARTICIPATION

As stated in the preamble, an object of the IC is to guarantee ‘the rights of the Nepali people to frame a constitution for themselves’. It also guarantees persons qualified to vote the right to participate in ‘free and impartial election of the Constituent Assembly in a fear-free environment’. Until the electoral legislation is enacted (for example in relation to the right to form parties and stand for elections, and specifies the precise method of voting), it would be difficult to assess the degree of participation.

The IC does not give the people the right to participate in the process preceding and during the CA. The original version of the IC had provided for an awareness raising committee to inform the public

about the process and to collect their views and recommendations to assist in the drafting of the constitution. The present version of the CA does not contain any such provision. It does provide for a commission to make recommendations on the restructuring of the state (art. 138, discussed above).

It would be possible for the CA to provide for a greater degree of participation (for example by setting up a committee of its members to consult with the people, or inviting views and recommendations from the public) as it is free to establish rules of its procedure.

Might it also be able to require that the new constitution be put for approval to the public in a referendum? Article 157 authorises the CA, by a vote of two-thirds of members present, to refer a matter of ‘national importance’ on which it is necessary to make a decision to a referendum, ‘except as otherwise provided elsewhere in the Constitution’. The purpose and scope of this article is not immediately clear. But some clues might lie in two points. First its location, in the chapter entitled ‘Miscellaneous’, just before the article dealing with the ‘power to remove difficulties’; and second, the referendum is to deal with a matter not ‘otherwise provided elsewhere in the Constitution’. It suggests something unexpected, sufficiently critical that it must be decided by the people, regardless of the cost or complexity of a referendum. As the procedures for the adoption of provisions of the new constitution are set out at some length in Part 7, it is unlikely that the referendum can be used to resolve an issue relating to the new constitution.

THE COMING INTO FORCE OF THE NEW CONSTITUTION

There are no express provisions about when the new constitution would come into force. Perhaps it is assumed that it would come into force on the day specified in the new constitution. That day could be the date of its adoption by the CA but it would be possible for the CA to postpone the time of its coming into force. Could the CA specify that it would become effective on approval in a referendum? I have indicated above that the likely answer is ‘no’. It is relevant to note here that article 64 envisages the maximum duration of the CA as two years (with

possibility of an extension for another 6 months). Presumably it would then be necessary to move to new constitutional arrangements. But article 82 envisages the possibility of the CA continuing until elections for the first legislature under the new constitution is held. It is unclear for how long the new elections can be postponed. It is also unclear whether the coming into force of the entirety of the new constitution is postponed or merely the part dealing with the legislature. It would be important for the CA to specify these matters clearly in the transitional provisions of the new constitution.

AMENDMENT OF THE IC

There is only one method of amendment for the entire IC. An amendment is passed if it is voted for by at least two thirds of all the existing members [an earlier translation suggested that was two thirds of those present, but I am assured that it means of all members]. Since members of parties are subject to party discipline, and because all important decisions are being taken by party leaders, the leaders of the four main parties would be able to change the IC at will. There is no real entrenchment of the provisions of the IC; indeed we have seen how easily it has been changed in the [two amendments – note there has been a second amendment since the conference for which this paper was written]. Normally an important function of an interim constitution is to entrench decisions on the road map, and in this way to give a sense of security to the people and predictability about the process. While there is an advantage in flexibility, that is desirable for the interim arrangements rather than for the roadmap to the new constitution. It is obvious that the IC provisions on the process will change even before the process has started. The willingness to change the IC may mean that more groups who are unhappy about the original provisions, or the changed provisions, will advance their own claims for amendment. It is unlikely that this ‘flexibility’ is good for the process.

Nor is the procedure whereby these changes are negotiated good for the process. These negotiations

take place between the 8 parties on the one hand and the ‘agitating’ community on the other. This sort of bilateral negotiations are inconsistent with the notion of a CA where all interest groups get together to examine all claims and to settle differences. Neither the 8 parties nor the interim government has any electoral mandate or legitimacy to negotiate these claims. This mode of negotiations also gives the impression that it is within the authority and grace of the 8 parties (for the most part representing the old elite) to make concessions to the marginalised communities—thus reinforcing forms of relations that are to be eliminated.

CONCLUSION

It is clear that the constitution making process will be dominated by political parties. And, among the political parties, the most influential members will be drawn from the same circle as dominated the 1990 process. This may not be fully compatible with the new credo of inclusiveness. It is from the widely held perception of lack of inclusiveness that many of the challenges to the IC have come. Even if excluded groups are now admitted to the CA, if they come in as members of established parties their influence will be small.

Secondly, it is essential that adequate preparations are made to assist the CA. An independent commission would make a big difference. If one is not set up, then civil society organisations, such as universities and think tanks and NGOs must make up the deficit. They must undertake research on the complex issues that will face the CA, as well as mobilise the people for participation in the process.

Finally, there is lack of space for the people in general and civil society in particular, contrary to the earlier commitments of the 8 parties now in government. The IC has no provisions for the involvement of the people, other than as voters. The participation of the people would depend on their own efforts or those of the private sector and civil society. Full and active participation is essential for the transition to a new Nepal. Civil society must take the matter in their own hands.

APPENDIX 2:

Paper by Surya Nath Upadhyaya on Making of the 1990 Constitution

Hon'ble Chairperson Judge of the Supreme Court, The co-coordinator of the programme, Fellow colleagues on the dais, Ladies and Gentlemen

It is indeed a great privilege for me to be invited to share some of my experience in the making of 1990 Constitution, particularly at this juncture when the country is preparing itself for the Constitutional Assembly election with a view to draft a new constitution for the country. As a matter of fact, the constitution which was drafted by the Constitution Recommendation Commission of which I had the rare honour to act as the secretary has already been replaced by an interim constitution by the same parties who will be in the future CA and thus one could see that the tentative constitutional layout has already been with us. We are undergoing here an unprecedented and fundamental change in the social and political history of the country which could not be addressed even by amending the 1990 Constitution and required a completely new constitution to reflect the changed aspirations of the people. If one goes through the constitutional making process and the issues that came up during the course of drafting of 1990 as well as the reservations, criticisms, assessment, projections and suspicions that were expressed in the public during or after the adoption of the that constitution and observes the developments of recent years one sees a natural progression of the social and political history. The issues that are coming up these days are not very different from what they were at that time, though expressed in subdued manner. This leads us to think that perhaps there were some inherent structural lacunae in the constitution which could not accommodate the aspirations of the people and at the same time guard against or

ward off the possible attack to it. It is also equally true that no constitution is made for ever and is sacrosanct. It requires changes and its failure and success depend much upon subsequent actions as the constitution is implemented.

As we are here on the verge of drafting a new constitution, it may be worthwhile to look to our history of constitution making. As a matter of fact, we have been a little generous in this respect. In a span of less than sixty years we shall be drafting our 6th constitution besides some amendments. Perhaps this shows that the basic issues have not been addressed so far and now it is the time for them to be addressed so that we don't have to go again and again through the pangs of constitution making. In this sense it is very important that we don't rush things. We should be taking enough time to discuss the pros and cons of the issues from various angles. In this context, the process of constitution making itself needs to be such that it should take care of the technicalities of the issues to ensure that they are properly and pragmatically addressed. Perhaps we may, in this light, draw upon our own experiences. As desired by the organizers of this seminar, I shall now briefly go through the main points of the process adopted for the drafting of the 1990 Constitution.

THE TERMS OF REFERENCE OF THE 1990 PROCESS

The Constitution Recommendation Commission was constituted on 30th May, 1990 by a Royal communiqué issued by the Palace. The Commission had a broad mandate to draft and recommend a constitution for the strengthening of the constitutional monarchy and multiparty democracy. The time prescribed for the commission was three months. The

members of the commission were drawn from the political parties who led the people's movement at that time and it was also supposed to have included the representative of the King. As the people's movement was supposed to have fulfilled its objective of that time by compromising with the king, the mandate and the constitution making process was a reflection of that compromise among the three parties: the Nepali Congress, the Communist Party UML and the King. The mandate of the Commission was wide and hence it enjoyed flexibility in setting the fundamentals of a democratic constitution. In all respect it was a technical Commission backed by political commitment. Compared to that process, in the one that we are witnessing now it seems that the CA will have less flexibility in the sense that the parties have already written and adopted not only the interim constitution but also are making amendments to ensure that the provisions are already to the satisfaction of all those who are going to be represented in the CA and are supposed to draft the constitution. The way it is being done means that not only are most of the basic issues being decided in haste and at the behest of Bandh and protests on the streets, but the draft itself seems to be finalized. Things are being done on the basis of sentiments rather than cool and practical thinking and hence have the potential of making the issue more complicated for the future. There is a legitimate feeling that not enough thought is being given to issues which are very complex and may face difficulty and even go counter to the aspiration of the people as we go along in the implementation phase. Once such issues are addressed in the interim constitution the positions of the parties may be hardened and there may not be enough room for negotiation and compromise in the CA later on. Perhaps prudence demands that one should not tie the hands of the CA too much and should leave enough space for debate and discussion to come up with practical solution. In the case of 1990 two fundamental parameters were laid and the Commission had all the flexibility for the drafting.

THE ORGANIZATION OF THE SECRETARIAT

As the time for the Commission was very short the first thing that came to our priority was to set up the secretariat of the commission. A new Secretariat was established by drawing personnel from various department of the government. They were divided

into two segments: professional and logistics. The professional groups mainly were drawn from the field of judiciary, legal services and university faculty, whereas the logistics group were drawn from the general personnel department. Some experts were also drawn from the concerned agencies as and when required. These groups as their name suggests were given the task of providing the technical and logistical support to the Commission. A small reference library which included the bare text of the constitution of about 150 countries and some books on constitutional process and law was set up for the use of the members of the commission and the experts and professionals. At one point of time there were about 40 experts and professionals providing help to the commissioners.

ASSIGNMENT OF TASK TO THE MEMBERS OF THE COMMISSION

The members of the Commission were given the task to study assigned subjects and bring out a report addressing the various topics in the draft. The members were assisted by the professionals of the secretariat. The subjects that were assigned were those which were to form the various chapters of the constitution such as the fundamental rights and directive policies of the state, legislature, its formation and the legislative process, constitutional organs like Auditor General, Commission for the Investigation of the Abuse of Authority, Public Service Commission, judiciary, citizenship, emergency, amendment of the constitution and miscellaneous etc. Mostly two members were to work on a group of subjects and to come out with a report. In certain cases the members differed within their group and in that case they were asked to present separate reports. In some cases the members even brought their draft of the relevant Article of the constitution; otherwise they were supposed to bring their conceptual framework on the subject and their suggestions. The report was to be discussed in the commission in length and the members were asked to give their opinion.

THE MEETING OF THE COMMISSION AND THE DECISIONS

The commission used to be meet almost daily, except for the period when the commissioners were outside Kathmandu in various districts to seek suggestions from the people and to hear their voice. In the meeting the

commissioners responsible for the chapter would present their report which was made available to the members a day in advance. The report would be discussed in detail. Observations would be made. Sometimes discussion took several days before a consensus was reached on the general concept and the provisions to be included in the constitution. The Secretary would take notes of the discussion. A verbatim record was made of all the discussions. The Secretary would, with the help of the professional who had worked on the subject with the commissioners, prepare the draft Article and present that in the meeting. The commissioners would discuss each Article so presented line by line and word by word and try to reach an agreed draft. This process would also take 3 to 4 days - sometimes even more - depending upon the subject matter. The job of the Secretary was to assist the meeting by suggesting alternative drafts, and facilitate the debate. Finally, a draft would be agreed and that would be taken as a final draft unless it was revisited by the meeting. If some commissioner thought that he had some valid point to be raised on the draft afterwards he could talk to the Chairman and bring it up again. All the decisions were made by consensus. However, after the final draft was signed by all the members of the commission the members belonging to the left parties registered their reservations. They basically wanted to limit the authority of the King. Their other points included other points omitting the reference to the state as a Hindu state etc. Some of these reservations have been taken care in the interim constitution now. It was observed that the commissioners participated on the discussion with the full knowledge and backing of the highest authorities in their respective parties. Sometimes the difference among them seemed to be very wide and led to tense moments and relationships. In that kind of situation it was always the practice to take time and broker a deal outside the formal meetings. The role of the Secretary had always been that of a facilitator. This really was enjoyable and fruitful. I personally had the rare occasion of experiencing and enriching myself. I had to co-ordinate all the work of the Commission. I had also the task to draft and redraft the provisions with the assistance of the experts

PUBLIC PARTICIPATION

Public participation was a major activity of the Commission. Various methods were utilized. First, professional societies relating to law and

constitution organized a series of meetings, seminars, symposiums etc in different parts of the country in which the Commissioners participated. Some commissioners even went abroad to meet the Nepali Diaspora at their invitation. Second, open suggestions were sought from the public, private and professional institutions, political parties etc. Thousands of such suggestions poured into the commission, and they were sorted and notes were made of the important ones. Third, exclusive meetings were arranged with the professional, religious and other interest groups at the Commission's secretariat. Fourth, the commissioners visited all the district headquarters of the country to organize open meetings, soliciting the suggestions of the people. Fifth, the media also played a very important role in educating the people of the importance of the subject and encouraging them to voice their opinion. Besides, the political parties with their and their sister organizations held several meetings on their own to address the masses. A series of writings in different forms was published. In all, the commission did what it could in such a short span of time and within the limits of its authority and size to get the people of the country involved in the process. However, it was perhaps far from what would have been ideal.

THE ROLE OF THE EXPERTS

It must be said that in a socio-culture setting like ours the proper discharge of the responsibility of the Commission depends quite a bit on the position, the personality and the knowledge that the Chairperson of such a body has as well as his interpersonal relationships. The Commission fortunately was under the stewardship of a person who not only enjoyed the confidence of the political parties across the board and of the king but had also earned high respect in the society. Added to that he had been an expert legal draftsman and a highly acclaimed jurist. It has really helped a lot in commanding the meeting of the Commission and to bring all the members together. The role of the experts is very crucial. As a matter of fact constitution making particularly preparing the draft of the Article is not a simple job. Legal drafting by itself requires years of continued effort and experience. It is very painstaking work. Not every lawyer would prove to be an expert legal drafter. Recent experience

of drafting the interim constitution very well exposed this requirement in the sense that first of all the members could not come to any conclusion on major issues and secondly even on the issues where there was agreement among the members of the group the draft could not be prepared as should have been the case in a draft constitution. It is also true that the commission lacked in the first place the confidence and support of even those who formed it. The role of the experts in the making of the constitution of 1990 was crucial. So far as the external assistance was concerned it was in the form of some logistic support. An expert was assigned by a bilateral agency to a local NGO and used to participate in the seminars and discussions organized by that NGO, and sometimes the commissioners also participated. The need for an expert consultant was not felt by the commission. On the contrary, when some overtures were made by the government to bring in outsiders the chairman of the commission publicly expressed the view that the constitution of Nepal should be drawn by Nepalese experts. In the making of the constitution by the CA the role of the experts will be great. In my opinion the parliamentary secretariat should organize the group of experts and provide the necessary technical support. It is also important to co-ordinate all the experts and their work, a task carried out by the Secretary in the case of 1990 Constitution and which could be done by the Secretary General of the legislature-parliament in the present context. As we have had long experience of drafting legal instruments, this should be helpful in the future drafting of the constitution as well.

The work of the experts lasted for more than six months even after the promulgation of the constitution. They identified the various laws that were to be drafted to implement the constitutional provisions. However, for long the laws in question were not drafted and hence many provisions did not come into operation. (I think we should take a lesson from this and keep the momentum of unity and joint work among the parties for some years to come even after the promulgation of the constitution. There would be a real need for conciliation and understanding among the parties in order to change the political behaviour which has been shaped over a long period.) During that extended

existence of the secretariat the transcription of the verbatim record was completed. All the important documents and the record of discussion were kept safely in the national archives and are available for research and study.

TRANSPARENCY IN THE WORK OF THE COMMISSION

The Commission chose to be non-transparent during the discussion in the commission. The discussion was in camera and the rule was that no member should divulge the contents of the discussion let alone the draft of the Articles. The reason perhaps was that there was a state of no-constitution in the country and it was risky to run the business of the state in that fashion for long. The promulgation of the constitution was to be made as soon as possible. If the discussion had gone to the public with the draft it might have caused more controversy and dissention in the public which could have been exploited to create confusion and chaos in the country. This might be true in that kind of situation but in the present situation the drafting process itself has to be transparent and participatory. The context is very much different from that in 1990. With hindsight I believe that the draft of the constitution should be made public and comments and suggestions be sought before the final reading and adoption of it. It must at the same time be said that the political parties at this stage - and continually till the final adoption of the constitution - would have to show wisdom, restraint and unity. They have to behave in a more responsible manner because of the volatile situation in the country and the rising of sentiments which could be exploited by nefarious elements. It would not be a bad idea to chalk out a code of conduct for all the political parties and the legislators till the constitution is made and such a code be followed in its letter and spirit. The stakes are very high and one can not afford to be obstinate. This is the most trying time in the history of the country and the destiny lies in the hands of the leaders. If sentiments are not controlled and things are done under pressure and haste there is a great chance that we shall be inviting more long and violent strife than that which we have just been through.

APPENDIX 3:

Provisions of the Interim Constitution on the CA

Note: we have extracted articles from the Interim Constitution that particularly mention the Constituent Assembly or are most relevant to it

EXTRACT FROM PREAMBLE...

To guarantee the basic rights of the Nepali people to frame a Constitution for themselves and to participate in the free and impartial election of the Constituent Assembly in a fear-free environment;

AND keeping democracy, peace, prosperity, progressive economic-social changes and sovereignty, integrity, independence and dignity of the country at the centre of our concerns;

NOW THEREFORE hereby promulgate this INTERIM CONSTITUTION OF NEPAL, 2063 (2007), prepared through a political consensus and to be in force until a new Constitution is framed by the Constituent Assembly in order to institutionalize the achievements of the revolution and movements till this date.

PART 4 RESPONSIBILITIES, DIRECTIVE PRINCIPLES AND POLICIES OF THE STATE

33. Responsibilities of the State: The State shall have the following responsibilities:

- (a) Recognizing the need for the functional realisation of the sovereignty that is inherent in the Nepali people, it is the obligation of the state to focus the

attention of the whole nation on the completion of the election for the members of the Constituent Assembly⁶ by Mangsir 2064 [by 15 December 2007 – tr.] in a free and fair manner

PART 6 LEGISLATURE-PARLIAMENT

59. Constituent Assembly to Exercise the Power of the Legislature-Parliament: After the termination of tenure of the Legislature-Parliament pursuant to clause (4) of Article 45 the power of the Legislature-Parliament under this Constitution shall be exercised by the Constituent Assembly.

PART 7 CONSTITUENT ASSEMBLY

63. Formation of the Constituent Assembly:

- (1) A Constituent Assembly shall be constituted to formulate a new Constitution by the Nepalese people themselves, subject to the provisions of this Constitution.
- (2) The election of the Constituent Assembly shall be held on a date to be specified by the Government of Nepal after the commencement of this Constitution
- ⁷(3) In accordance with the law, there will be the following members of the CA, either elected according to the mixed electoral system, taking account of the equality of population, geographical convenience and special characteristics, (and in the case of Madhesh on the basis of percentage of the

⁶ Amended on 2064 Jestha 30 (June 13, 2007) by the Interim Constitution of Nepal (Second Amendment) Act, 2064.

⁷ Revised on 2063 Chaitra 30 (April 13, 2007) by the Interim Constitution of Nepal (First Amendment), 2063. As originally passed it read:

(3) The Constituent Assembly shall consist of the following four hundred twenty five members, out of which four hundred and nine members shall be elected through Mixed Electoral System and sixteen members shall be nominated, as provided for in the law:-

(a) Two hundred and five members shall be elected from among the candidates elected on the basis of First-Past-the-Post system from each of the Election Constituencies existed in accordance with the prevailing law before the commencement of this Constitution.

(b) Two hundred and four members shall be elected under the proportional electoral system on the basis of the votes to be given to the political parties, considering the whole country as one election constituency.

(c) Sixteen members to be nominated by the interim Council of Ministers, on the basis of consensus, from amongst the prominent persons of national life.

population)⁸ or, nominated:

(a) One member elected, under the first-past-the-post system, from each geographical constituency, the number of such constituencies being determined by the Constituency Delimitation Commission under Article 154(a), based on the national census preceding the Constituent Assembly elections, and as far as possible maintaining the same relationship between number of members and population for all the administrative districts, while retaining the same administrative districts as hitherto.⁹

(b) A number of members, equal to the number elected under sub-clause (a), elected according to the proportional representation system, voting being for political parties, and considering the whole country as a single constituency.

(c) Seventeen members nominated by the Council of Ministers on the basis of consensus from among distinguished personalities who have made significant contributions to national life.

¹⁰(3a) Notwithstanding anything contained in Sub-clause (a), while determining the number of constituencies according to this Clause, the number of constituencies in each administrative district prescribed by the laws prevailing during the elections for the then House of Representatives in 2056 (1999), shall not be reduced, but the number of constituencies in the hilly and mountainous areas shall be increased on the basis of percentage of population growth, and, then in determining the constituencies in Madhesh, the number of constituencies in the administrative districts in Madhesh shall be increased in order to ensure that those constituencies are in proportion to the percentage of population

- (4) The principle of inclusiveness shall be taken into consideration by political parties while selecting candidates pursuant to sub-clause (a) of clause (3), and, while making the lists of the candidates pursuant to sub-clause (b), the political parties shall ensure the proportional representation of women, Dalits, oppressed community/indigenous groups, backward regions, Madhesi and other groups, in

accordance with the law.

- (5) Notwithstanding anything in clause 4, a minimum of one-third of the total number of candidates nominated shall be women, taking together the number of candidates on the basis of proportional representation pursuant to sub-clause (b) of clause (3) and the number of candidates pursuant to sub-clause (a) of the clause.
- (6) The election of the members of the Constituent Assembly shall be held through secret ballot, as provided for in the law.
- (7) For the purpose of election to the Constituent Assembly, every Nepali citizen who has attained the age of eighteen years by the end of Mangsir, 2063 (15th December 2006) shall be entitled to vote, as provided for in the law.
- (8) Subject to the provisions of this Article, elections to the Constituent Assembly and other matters pertaining thereto shall be regulated as provided for in the law.

64. Term of the Constituent Assembly:

Unless otherwise dissolved earlier by a resolution passed by the Constituent Assembly, the term of the Constituent Assembly shall be two years from the date of its first meeting.

Provided that the term of the Constituent Assembly may be extended for up to six months by a resolution of the Constituent Assembly, in the event that the task of drafting the Constitution is not completed due to the proclamation of a State of Emergency in the country.

65. Qualifications of the Members:

In order to be a member of Constituent Assembly a person must have the following qualifications:

- (a) be a Nepali citizen,
- (b) have attained at least twenty-five years of age,
- (c) not have been punished for any criminal offence involving moral turpitude,
- ¹¹(c1) not be ineligible under any law
- (d) not be holding an office of profit.

Explanation: For the purpose of sub-clause (d), "office of profit" means any position, other than

⁸ The brackets are not in the original but make it clearer that the point about Madhesh is something additional to the rest that applies to the whole country

⁹ This is not quite a literal translation, but we believe it reflects the meaning of the very complex Nepali original.

¹⁰ Added on 2063 Chaitra 30 (April 13, 2007) by the Interim Constitution of Nepal (First Amendment), 2063.

¹¹ Added on 2064 Jestha 30 (June 13, 2007) in accordance with the Interim Constitution of Nepal (Second Amendment), 2064.

a political position, to be filled by election or nomination for which remuneration or economic benefit is paid out of a Government Fund.

66. Decision about Disqualification of Members :

If a question arises as to whether any member of the Constituent Assembly is disqualified or has ceased to possess any of the qualifications pursuant to Article 65, the final decision shall be made by the Constituent Assembly Court.

67. Vacation of Seat of the Member:

The seat of a member of the Constituent Assembly shall be deemed to be vacant in the following circumstances:

- (a) If he/she resigns in writing,
- (b) If he/she does not, or has ceased to, possess the qualifications pursuant to in Article 65,
- (c) If he/she, remains absent in ten consecutive meetings without notification to the constituent Assembly,
- (d) If the party of which he/she was a member when elected provides notification in the manner set forth by law that he/she has left the party, or notifies that he/she no longer holds the membership of the party,
- (e) If he/she dies,

Explanation: The provision contained in sub-clause (d) shall not be applicable to the Chairperson or Vice Chairperson of the Constituent Assembly.

68. Oath of Members:

Every member of the Constituent Assembly shall take the oath as provided for in the law before taking part for the first time in a meeting of that Assembly or any meeting of its committee

69. Meeting of the Constituent Assembly:

- (1) The first meeting of the Constituent Assembly shall be held, as summoned by the Prime Minister, within twenty-one days after the final results of the election of members of the Constituent Assembly has been made public by the election commission, and the subsequent meetings shall be held on such a date and place as prescribed by the person presiding over the Constituent Assembly.
- (2) Notwithstanding anything contained in clause (1), if one-fourth of the members of the Constitu-

ent Assembly make an application, with reasons, to the Chairperson of the Constituent Assembly stating that it is appropriate to convene a meeting of the Constituent Assembly, the Chairperson shall convene such meeting within fifteen days.

70. Procedure for Passing of Bill Relating to the Constitution:

- (1) The Constituent Assembly shall, in order to pass a Bill relating to the Constitution, vote on the Preamble and each Article of such a Bill introduced before it.
- (2) To vote according to clause (1), at least two-thirds of the total members of the Constituent Assembly must be present and must pass the motion unanimously.
- (3) If a unanimous decision pursuant to clause (2) above, regarding the Preamble or any Article of the Bill relating to the Constitution is not reached the leaders of the Parliamentary Party of the political parties represented in the Constituent Assembly shall consult each other to achieve consensus in such matters.
- (4) The consultation to be carried out pursuant to clause (3), must be completed within a maximum of fifteen days from the date on which the unanimous decision could not be reached.
- (5) If consultation is carried out pursuant to clause (4), fresh voting on the Preamble or any Article of such Bill shall be carried out within seven days from the date of the completion of such consultation.
- (6) If a unanimous decision is not reached as provided in clause (2) even after carrying out the voting pursuant to clause (5), there shall be a further vote on such Preamble or Article on which a unanimous decision could not be reached, and if at least two-thirds of the total members of the Constituent Assembly for the time being were present in the meeting, and at least two-thirds of the members present voted in favour, such Preamble or Article shall be deemed to have been passed.
- (7) For the purpose of this Article a decision made during voting on the Preamble or any Article of the Bill relating to the Constitution introduced in the Constituent Assembly shall be deemed to be unanimous if none of the members voted against the Preamble or Article that is the subject of the vote.

71. Chairperson and Vice Chairperson of the Constituent Assembly:

- (1) The Constituent Assembly shall elect a Chairperson and a Vice Chairperson from among its members before the commencement of its work of formulating the Constitution.
- (2) In the elections pursuant to clause (1) the Chairperson and Vice Chairperson shall be from different political parties represented in the Constituent Assembly.
- (3) If the election of the Chairperson and Vice Chairperson has not taken place pursuant to clause (1), the senior-most member of the Constituent Assembly by age shall preside over the meeting of the Assembly.
- (4) The Chairperson and Vice Chairperson shall act as neutral persons and not favour any political party or parties while performing their duties in accordance with this Constitution.

72. Vacation of the Office of Chairperson and Vice Chairperson:

- (1) The office of the Chairperson and Vice Chairperson shall become vacant in the following circumstances:
 - a) if he/she submits a written resignation,
 - b) if he/she ceases to be a member of the Constituent Assembly,
 - c) if a resolution is passed by a majority of at least two-thirds of the total number of the members in the Constituent Assembly to the effect that his or her conduct is not compatible with his or her position, or
 - d) if he/she dies.
- (2) The Vice Chairperson or any other member shall preside over a meeting at which deliberations are to be held on a resolution that the conduct of the Chairperson of the Constituent Assembly is not compatible with his/her position, and the Chairperson can take part and vote in the deliberations on such a resolution.

73. Quorum:

Except as otherwise provided in this Part, no quorum shall be deemed to be achieved and no question or resolution shall be presented for decision

unless at least one-fourth of the total number of members are present.

74. Transaction of Business of the Constituent Assembly in the case of vacancy of Members:

The Constituent Assembly may conduct its proceedings notwithstanding any vacancies in its membership, and no proceedings shall become invalid even if it is subsequently found that a person not entitled to take part in the proceedings participated.

75. Voting:

Except as otherwise provided in this Part, all questions submitted for decision in the Constituent Assembly shall be decided by a majority vote of the members present and voting. Normally the member presiding shall not have the right to vote.

Provided that in case of a tie, he/she may exercise a casting vote.

76. Penalty for Unauthorized Presence or Voting:

If a person is present or votes in the meetings of Constituent Assembly or any of its committees as a member without taking an oath pursuant to Article 67, or knowing that he/she is not qualified for membership of the Constituent Assembly, he/she shall, on the ruling of the person chairing the meeting, be liable to a fine of five thousand rupees for every such presence or voting. The fine shall be recovered as government dues.

77. Privileges:

- (1) There shall be full freedom of speech in the meetings of the Constituent Assembly and no member shall be arrested, detained or prosecuted in any court for anything expressed or for any vote cast in such a meeting.
- (2) The meeting of Constituent Assembly shall have full power to regulate its internal business, and it shall have the exclusive right to decide whether any proceeding of the Constituent Assembly is regular or not. No question shall be raised in any court in this regard.
- (3) No comment shall be made about the good faith of any proceedings of the Legislature-Parliament, and no person shall, when broadcasting or publishing anything about

comments or suggestions made by any member, deliberately wrongfully interpret or distort their meaning.

- (4) No proceedings shall be initiated against any person in any court for publishing any document, report, vote or proceeding which is carried out under the authority given by the Constituent Assembly.

Explanation: The words “Constituent Assembly” shall mean the meeting of the Constituent Assembly or any of its committees for the purposes of clauses (1), (2), (3) and (4).

- (5) No member of the Constituent Assembly shall be arrested during the session of the Constituent Assembly.
Provided that nothing in this clause shall be deemed to prevent the arrest under any law of any member on a criminal charge. If any member is so arrested, the official making such arrest shall immediately inform the person chairing the Constituent Assembly.
- (6) Any breach of privilege stated in this Article shall be deemed to constitute contempt of the Constituent Assembly and the breach of privilege of Constituent Assembly shall be considered as the contempt of the Constituent Assembly. The Constituent Assembly shall have the exclusive right to decide whether or not any breach of privilege has taken place.
- (7) If a person is in contempt of the Constituent Assembly, the person who is chairing the meeting to that effect may, after a decision by the meeting, admonish, warn, or impose a sentence of imprisonment not exceeding three months or impose a fine of up to ten thousand rupees on, such a person. If the fine is not paid by such a person, it shall be recovered as government dues.

78. Procedure Relating to the Conduct of Business:

The Constituent Assembly shall, subject to the provisions of this Constitution, frame rules for conducting its business, maintaining order during its meetings and regulating the constitution, functions, procedures and any other matters relating to its committees. Until such

time as rules are made, the Constituent Assembly shall establish its own rules of procedures.

79. Committee:

There shall be Committees and Sub-Committees in the Constituent Assembly as provided for in the law. Services of experts may be obtained as required.

80. Secretariat of the Constituent Assembly:

- (1) There shall be a secretariat to conduct the business of the Constituent Assembly. The establishment of the Secretariat and other matters related thereto shall be as determined by law.
- (2) The Government of Nepal shall make available the necessary personnel required to conduct and manage the business of the Constituent Assembly.

81. Remuneration:

The remuneration and privileges of the Chairperson, Vice Chairperson, Members and the Chairperson of the Committees of the Constituent Assembly shall be as provided for in the law, and, until so provided, shall be as determined by the Government of Nepal.

82. Dissolution of the Constituent Assembly:

On the day of the commencement of the Constitution promulgated by the Constituent Assembly, the task given to the Constituent Assembly shall come to an end.

Provided that until the election of the Legislature-Parliament held in accordance with the Constitution promulgated by the Constituent Assembly, the proceedings of the Legislature-Parliament shall be conducted as specified in the Constitution promulgated by the Constituent Assembly.

83. Act in the Capacity of the Legislature-Parliament:

Notwithstanding anything contained elsewhere in this Part, the Constituent Assembly shall also act as Legislature-Parliament as long as the Constituent Assembly remains in existence, and the Constituent Assembly may constitute a separate committee to conduct necessary regular legislative functions.

PART 10

JUDICIARY

118. Constituent Assembly Court:

- (1) A Constituent Assembly Court shall be constituted to resolve complaints regarding election to the Constituent Assembly.
- (2) The constitution, jurisdiction and other matters relating to the Constituent Assembly Court established pursuant to clause (1), shall be as determined by law.
- (3) Notwithstanding anything contained elsewhere in this Constitution, unless a petition is filed in the court constituted pursuant to clause (1), in the manner prescribed by law, no question shall be raised in any court regarding the election of a member to the Constituent Assembly.
- (4) Notwithstanding anything contained elsewhere in this Constitution, once the process of election to the Constituent Assembly has commenced, no question shall be raised in any court in such a way as to hinder the election.

PART 17

FORM OF STATE AND LOCAL SELF GOVERNANCE

138. Progressive Restructuring of the State:

- (1) To bring an end to discrimination based on class, caste, language, sex, culture, religion and region by eliminating the centralized and unitary form of the state, the state shall be made inclusive and restructured into a progressive, ¹²Democratic Federal System.
- (2) A High Level Commission shall be constituted to make recommendations for the restructuring of the State in accordance with clause (1). The composition, function, duty, power and terms of service of such Commission shall be as determined by the Government of Nepal.
- (3) The final decision on ¹³the subjects relating to the structure of State and federal system shall made by the Constituent Assembly.

PART 18

POLITICAL PARTIES¹⁴

141. Prohibition on the Imposition of Restrictions on Political Parties:

- (1) Persons who are committed to a common po-

litical ideology, philosophy and programme shall, subject to the laws made under proviso (3) of clause (3) of Article 12 of this Constitution, be entitled to form and operate political parties of their choice and to generate or cause to be generated publicity in order to secure public support and cooperation from the general public for their ideology, philosophy and programmes, and to carry out any other activities for that purpose. Any law, arrangement or decision which restricts any such activities shall be considered inconsistent with this Constitution and shall *ipso facto* be void.

- (2) Any law, arrangement or decision which allows for participation or involvement of only a single political party or persons having a single political ideology, philosophy or programme in the elections, political system of the country or conduct of state affairs shall be inconsistent with this Constitution and shall *ipso-facto* be void.
- (3) Political Parties with objectives contrary to the spirit and norms of the preamble of this constitution shall not be considered qualified for party registration.

142. Registration Required for Securing Recognition for the Purpose of Contesting Elections as a Political Party:

- (1) Any political party wishing to secure recognition from the Election Commission for the purposes of elections shall be required to register its name with the Election Commission in accordance with the procedure determined by the Commission. Political parties that fail to register their names shall be removed from the list of the Election Commission.
- (2) While applying for the registration pursuant to clause (1) above, a political party shall, along with its constitution, manifesto and rules have to clarify the following details, in addition to other matters:-
 - (a) the name of the political party and address of its central office,
 - (b) the names and addresses of the members of its Executive Committee or any such other similar committee,

¹² Amended on 2063 Chaitra 30 (April 13, 2007) by the Interim Constitution of Nepal (First Amendment), 2063, introducing the word "federal".

¹³ Amended on 2063 Chaitra 30 (April 13, 2007) by the Interim Constitution of Nepal (First Amendment), 2063.

¹⁴ Although this does not mention the Constituent Assembly, this Constitution will only exist during one election – that for the Constituent Assembly.

- (c) the details of the sources of funds of the political party.
- (3) Political parties shall fulfil the following conditions while filing an application pursuant to clause (1): -
- (a) the constitution and the rules of the political party must be democratic,
 - (b) the constitution or the rules of the political party must provide for election of office bearers of the party at all levels at least once in every five years,
 - (c) There should be a provision for the inclusiveness of members from neglected and oppressed groups including women and Dalits in the executive committees at various levels,
 - (d) There should be an effective provision in the constitution of a party to discipline its members.
- (4) The Election Commission shall not register any political party if any Nepali citizen is discriminated against in becoming a member of the political party on the basis of religion, caste, tribe, language or sex or if the name, objectives, symbol or flag of such political party is of a character that may disturb the country's religious or communal unity or is divisive in character, or if the constitution or rules of such party have the objective of protecting and promoting a partyless or single party system of government.
- (5) For the purpose of the registration of a party for election, an application with the support and signature of at least ten thousand voters shall be necessary.
Provided that in the case of the parties representing in the Interim Legislature-Parliament, this provision shall not be applicable.

- (6) The establishment, registration, recognition and other matters, except those stated in this Part, shall be as provided for in the law.

PART 23 TRANSITIONAL PROVISIONS

157. Decision Could be Made Through Referendum:

- (1) Except as provided elsewhere in the Constitution, if the Constituent Assembly decides, by a two-thirds majority of the total number of existing members that it is necessary to make a decision on any matters of national importance, a decision may be reached on such matters through referendum.
- (2) The procedures pertaining to making decision pursuant to clause (1) shall be as determined by the law.

158. Power to Remove Difficulties:

If any difficulty arises in connection with the implementation of this Constitution, the Council of Ministers may issue necessary Orders to remove such difficulties, and such Orders require endorsement by the Legislature-Parliament or the Constituent Assembly within a month.

159. Provisions Regarding the King:

- (3) Notwithstanding anything contained elsewhere in this Constitution, the Constituent Assembly shall decide by a simple majority at its first meeting about whether or not to continue the monarchy in existence.

¹⁵(3.a) Notwithstanding Clause (3), a majority of at least two-thirds of the total number of the existing members of the Legislature-Parliament may pass a resolution abolishing the monarchy if it concludes that the king poses serious obstacles to the elections to the Constituent Assembly.

¹⁵ Added on 2064 Jestha 30 (June 13, 2007) in accordance with the Interim Constitution of Nepal (Second Amendment), 2063.

APPENDIX 4: List of Participants

INAUGURAL ADDRESS

Honourable Subas Nembang,
Speaker, Legislature-Parliament

KEYNOTE ADDRESS

Prof. Nicholas (Fink) Haysom

SPEAKERS AND CHAIRS OF SESSIONS

Mr. Bhimarjun Acharya, Advocate
Mr. Nilamber Acharya, Former Minister
Mr. Bharat Mohan Adhikari, NCP (UML)
Prof. Lok Raj Baral, Political Scientist, NCCS
Ms. Jill Cottrell, UNDP CASU
Mr. Subas Kumar Darnal, Jagaran Media Center
Dr. Sean Deely, UNDP
Dr. Arzu Deuba, SAMANATA
Mr. Jeetendra Dev, Democratic Madhesi
Organization & CPN (UML)
Mr. Daman Nath Dhungana, Former Speaker
(Chair: Session IV)
Dr. Surya Dhungel, UNDP CASU (Moderator)
Mr. Kanak Mani Dixit, Himal Media
Prof. Yash Pal Ghai, UNDP CASU (Chair: Session
VII)
Mr. Dev Gurung, CPN (Maoist)
Dr. Sumitra Manandhar Gurung, NCARD
Mr. Surya Kiran Gurung, Secretary General,
Legislature-Parliament (Chair: Session II)
Dr. Krishna Hachhetu, Tribhuvan University
Mr. Badri Bahadur Karki, Former Attorney General
Mr. Shekhar Koirala, NC
Mr. Ram Bahadur Thapa Magar, Secretary General,
NEFIN
Mr. Bishwa Kanta Mainali, President, Nepal Bar
Association
Honourable Bhoj Raj Pokhrel, Chief Election
Commissioner (Chair: Session V)

Mr. Prateek Pradhan, Editor-in-Chief, *The
Kathmandu Post*

Mr. Dhruba Pradhan, RPP

Mr. Sagar Shumsher Rana, NC (Democratic)

Mr. Yubaraj Sangroula, Director and Associate
Professor, Kathmandu School of Law

Mr. Purna Man Shakya, Lawyer, SCOPE

Dr. Amuda Shrestha, SDC (Chair: Session VI)

Honourable Kalyan Shrestha, Judge, Supreme Court
(Chair: Session III)

Mr. Bhim Bahadur Tamang, NC

Mr. Tek Tamrakar, CDNHR

Mr. Padma Ratna Tuladhar, Human Rights Activist

Mr. Surya Nath Upadhaya, Former Chief
Commissioner, CIAA

Dr. Ram Prakash Yadav, Poverty Alleviation Fund

OTHER PARTICIPANTS

(WITH AFFILIATION WHERE GIVEN)

Mr. Suresh Acharya, AGENDA

Hon'ble Radheshyam Adhikari, NC.

Ms. Anna Adhikari, ODC Inc

Mr. Dhruba Adhikary, NPI

Ms. Shiho Akamatsu, JICA

Mr. Laxman Aryal, Former Justice of Supreme Court

Mr. Kudan Aryal, INSEC

Mr. Niraj Aryal, *Telegraph*

Mr. Gopal Prasad Aryal, Election Commission

Mr. Gam B. Ale, Nepal Bar Association

Mr. Marcel Von Arx, SDC

Mr. Bal Gopal Baidya, New ERA

Ms. Pragya Bashyal, Women in Good Governance

Mr. Madhav K. Basnet, Supreme Court Bar Unit

Mr. Madhab Bastakoti, CoCAP

Mr. Krishna Belbase, Nepal Law College

Mr. S. Bhandari, Law Associates of Nepal

- Mr. B.P. Bhandari, Rule of Law project, UNDP
 Mr. Sharad Bhandary, National News Agency
 Mr. Krishna M. Bhandary, TUCL
 Mr. Ganesh Datta Bhatta, Nepal Law Campus
 Mr. Dev Raj Bhatta
 Mr. Kedar Bhattarai, *Gorkhapatra*
 Mr. Dipak Bhattarai, KTV
 Mr. Sher Bahadur Bhattarai, NC
 Hon'ble Gokarna Bista, MP, UML
 Mr. Shobhakar Budhathoki, HR Defender
 Mr. Ganesh Pd. Bhurtel, SCOPE
 Mr. Manohar Pd. Bhattarai, Parliament Secretariat
 Mr. Santosh Bista, Danida/HUGOU
 Mr. Roderick Chalmers, International Crisis Group
 Mr. Rajan Pd. Chapagain, Pro Public
 Mr. Kiran Chapagain, *The Kathmandu Post*
 Mr. Sharad Chirag, Nepal Samacharpatra
 Mr. Nabin Chitrakar, NC(D)
 Ms. Jemima Gordon Duff, British Embassy
 Mr. Dev Raj Dahal, FES
 Mr. Taranath Dahal, Freedom Forum
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 Mr. Madhu P. Regmi, Peace Secretariat
 Mr A. Rey, Law Courts
 Mr. Mukti Rijal, IGD
 Ms. Leena Rikkila, IDEA
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 Dr. Mohan Man Sainju, Former Vice-Chairman, PAF
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 Mr. Nabin Sharma, IGD
 Mr. Sagar Shrestha, Interface Nepal
 Mr. Udaya Nepali Shrestha, Nepal Law Society
 Mr. Sri Krishna Shrestha, Pro-Public
 Dr. Pramod Shrestha, TU
 Ms. Asha Singh, ODC Inc.
 Mr. Johan Sorensen, Embassy of Denmark
 Mr. Bhim Bdr. Tamang, NC.
 Hon'ble Romi Gauchan Thakali, NC
 Mr. H. R. Thani, Member of Legislative Parliament
 Ms. Savitree Thapa Gurung, RR Campus
 Mr. Khushee Tharu, OHCHR
 Mr. P.R. Tuladhar, FOPHUR
 Ms. Prateebha Tuladhar, Kantipur Television
 Mr. Shree Krishna Yadav, Public Service Commission

APPENDIX 5: Conference Programme

Day 1	
09:15 – 09:45 hrs	Opening Session <i>Chairperson:</i> Professor Yash Ghai, UNDP CASU <i>Welcome Remarks:</i> Dr. Sean Deely, Senior Peace and Development Advisor, UNDP <i>Inaugural Address:</i> Speaker Hon'ble Subas Nembang
Session 1 09:45 – 10:45 hrs	Constitution Making after Conflict <i>Keynote Speaker:</i> Professor Nick Haysom “Constitution Making in Post-conflict Societies”, <i>Comment:</i> Professor Lok Raj Baral, Political Scientist
Session 2 11:15 – 13:00 hrs	Constitution Making after Conflict (continued) <i>Chairperson:</i> Mr. Surya Kiran Gurung, Secretary General, Legislature-Parliament <i>Speaker:</i> Professor Yash Ghai “The Challenge in Constitution Making in Nepal” <i>Comments by local experts:</i> Mr. Badri Bahadur Karki, Former Attorney General Ms. Sumitra Manadhar Gurung, NCARD Mr. Tek Tamrakar, CDNHRC
Session 3 14:00 – 16:00 hrs	The 1990 Constitution Making Process: Lessons for 2007? <i>Chairperson:</i> Hon'ble Kalyan Shrestha, Supreme Court Justice <i>Speakers:</i> Mr. Nilambar Acharya, Former Minister Mr. Surya Nath Upadhyaya, Former Chief Commissioner, CIAA Dr. Arzu Deuba, SAMANATA Mr. Kanak Mani Dixit, Himal Media Mr. Ram Bahadur Thapa Magar, NEFIN

Session 4 16:30 – 18:00 hrs	Perspectives of Party Leaders on the Process <i>Chairperson:</i> Senior Advocate Mr. Daman Nath Dhungana <i>Speakers:</i> Mr. Bharat Mohan Adhikari, CPN-UML Mr. Shekhar Koirala, NC Mr. Dev Gurung, CPN-M Mr. Sagar Samsher Rana, NC-D Mr. Dhruva Pradhan, RPP
Day 2	
Session 5 09:30 – 12:00 hrs	Issues in Constitution Making for Nepal <i>Chairperson:</i> Hon'ble Bhoj Raj Pokhrel, Chief Election Commissioner <i>Speakers:</i> Mr. Biswa Kant Mainali, President, Nepal Bar Association Mr. Prateek Pradhan, Editor-in-Chief, <i>The Kathmandu Post</i> Mr. Yubraj Sangroula, Kathmandu School of Law Mr. Jeetendra Dev, Loktantrik Madhesi Sangathan
Session 6 13:00 – 15:15 hrs	The Role and Functioning of the Constituent Assembly <i>Chairperson:</i> Dr. Amuda Shrestha <i>Speakers:</i> Ms. Jill Cottrell, UNDP CASU Mr. Purna Man Shakya, Lawyer Mr. Bhimarjun Acharya, Lawyer Dr. Krishna Hachhethu, Political Scientist, Tribhuvan University
Session 7 15:30 – 17:30 hrs perspective	Closing Session/Reflections <i>Chairperson:</i> Professor Yash Ghai <i>"From a distance":</i> Professor Nicholas Haysom reflects from a comparative on what he has heard during the conference <i>"From home":</i> Dr. Ram Prakash Yadav, Vice-Chairman, Poverty Alleviation Fund Mr. Padma Ratna Tuladhar, Human Rights Activist <i>Closing Remarks:</i> Professor Yash Ghai



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