

# Roadmap to a New Constitution?

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## Preface

The purpose of this paper is to outline what the constitution making process might look like. It takes into account the present circumstances and realities of Nepal. It draws inspiration from the hopes and goals of the jana andolan and agreements between the Maoists and the Seven Party Alliance that reflect these goals.

The struggles of the people in April 2006 centred on the convening of a constituent assembly to determine the constitutional and political system of Nepal. There is now a broad agreement on the need for a constituent assembly which would bring all the different communities, regions, social and other interests together to negotiate a social contract that would bind them as well as future governments.

Many organisations and individuals have said that they do not understand how the process for making a new constitution would be conducted. Even persons who are engaged in current political talks have expressed the need to know more about constitution making processes. Although there has been much discussion in Nepal on the desirability of a constituent assembly to settle critical questions about democracy, inclusiveness, and social justice, Nepal has no experience of a constituent assembly (or of a fully participatory process of constitution making process). Nor have its neighbours held a constituent assembly in recent memory. Yet a large number of other countries in recent years have made constitutions through a constituent assembly. This paper does not explicitly discuss the experience of these countries—which one the authors has done in an earlier paper, in June 2006, on behalf of the International IDEA. Instead, this paper relies on these experiences to formulate suggestions for how the constitution making process could be designed and executed.

Some decisions that will be made as part of the political settlement will have an impact, some an important impact, on the constitution making process and the role of the constituent assembly. It is important therefore that those negotiating the settlement should be aware of the implications of their decisions on the constitution making process.

This paper aims to assist them as well as the general public to reflect on critical aspects of the constitution making process.



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## Introduction

The people of Nepal are agreed that there shall be a new constitution, and that the mechanism for deciding on that constitution is to be a constituent assembly. A constituent assembly is not the only way, even in a democratic system, to prepare a new constitution, though it is perhaps the most common way. And the constituent assembly in many countries is not the only body that is involved in the task. Not all constituent assemblies are alike in their composition, their procedures, and their responsibilities. This paper reviews the possibilities for the Nepal process.

### The destination: a new constitution

This document proposes an illustrative roadmap – to the destination of a new constitution. That constitution should be:

- Appropriate for Nepal
- Workable
- Comply with the standards now generally accepted of what is a ‘good’ constitution, including respect for human rights
- Be able to last for many years to come without constant amendment and disruption
- Meet the demands of the time which can perhaps best be found in the principles that can be derived from the 8 point and the 12 point agreements:
  - Sovereignty of the people
  - Democracy
  - National independence, sovereignty, geographical integrity of the country and national unity

- No discrimination or exclusion on basis of class, caste ethnicity, gender, region or religion
- no autocratic monarchy
- multiparty system
- rule of law
- civil liberties and human rights including media freedom
- permanent peace and the resolution of disputes through peaceful means
- righting past wrongs
- friendly relations with all countries of the world, especially India and China.

### **The process: Principles**

Drawing also from the recent agreements, and from international practice as well as from the history of Nepal, including the experience of making constitution in the past, the process of making a new constitution ought to comply with certain basic principles. These would include:

- Participation of all sectors of the community through membership of or representation in the Constituent Assembly, and other bodies involved
- Ensuring that participation by everyone at all stages is free and not inhibited by fear, influence, threat and violence
- Making decisions as far as possible by consensus
- Transparency – that is that the people understand what is happening, and can see how public input affects the result
- Effectiveness - that the outcome of the process is indeed a new constitution for Nepal

### **The process: possible effects**

In addition to leading to a new constitution, a good process for a new constitution could have the following effects and impacts:

- A new vision: that the entire process can give the people of Nepal as a whole the opportunity to develop a new vision of the nation
- Provide an opportunity for debating and clarifying national values and goals
- Empower the people with an understanding of constitutions and a sense that this is their constitution, and some ability to use it and to enforce it
- A change in national political culture, to avoid old habits reasserting themselves and nullifying the impact of the new constitution.

### **Participation**

A constitution could be made in many ways, but in the light of recent developments in Nepal, and of recent international practice, a constitution would have far greater legitimacy or acceptance in the eyes of Nepalis and others if the process for making it involved a great deal of participation. It is clear that this is what the people of Nepal are expecting. The words ‘participation’ is used to indicate more than representation. People may indeed be ‘represented’ by political parties if they vote for them, they may be

‘represented’ if a person from their community is present in the deliberations. But participation implies much more.

Participation means that every member of the society potentially has the chance to make an input into the process. This will mean that they must know what is going on, and they must have the opportunity to express their views, as an individual and/or as part of one or more groups, in a way that can actually have an impact on the ultimate outcome – a new constitution.

Many expectations have been raised by recent developments about a new beginning for the country, especially among marginalised communities. They not only expect to participate fully in the process, including the Constituent Assembly, but to make gains for their communities in the new constitution. Their claims must be fairly considered by the Constituent Assembly; otherwise, as we know from the experience of other countries, their discontent will turn into resentment and will fester bringing about fresh conflicts.

### **The steps to a new constitution**

To achieve the outcome – namely a new constitution with the characteristics outlined above, through a process that satisfies the need for participation - it is suggested that the following steps will have to be undertaken. This is without specifying by whom those steps should be taken.

- Agreeing on a broad set of principles and goals (as observed above this has been done to a considerable extent in the 8 and 12 point agreements)
- Agreeing on institutions and procedures for making the constitution
- Preparing people for consultation by providing civic education on the process, the country’s constitutional history, and constitutional options
- Consulting people (including, where relevant, the diaspora)
- Consulting experts
- Learning about and considering the relevance of experience of other countries
- Analysis of views and recommendations of the people
- Preparing a draft constitution
- Public discussions of the draft constitution
- Deciding upon the final version
- Technical legal drafting of the final version
- Enactment into law of the final version
- Bringing the constitution into force
- Implementing the constitution

### **Who does what?**

Some of the activities involved in the steps to a new constitution are in fact already being carried and will continue to be carried out – by NGOs, the media and other elements of civil society. Parties will do many of these things too. This civil society activity will mainly relate to civic education, and no doubt also will generate some ideas. It is also possible (even likely) that one or more groups outside the formal structures of the state will put forward a draft constitution. But much of this activity will be incomplete, rather uncoordinated, and partisan – not necessarily political party related, but stimulated and

organized by groups with particular agendas. There is room for some officially sponsored civic education, and many constitution making bodies have carried out such education.

While civil society organisations can also collect views, this is unlikely to be as systematic and effective as if an official body collects, and analyses views. Views collected by unofficial bodies may remain without thorough analysis. And it is often unclear how such views can actually have an impact on the decision making process.

Similarly organising some process by which decision makers can learn about comparative experience, and interact with experts on constitutions can be done by non-official bodies. But it may well be taken much more seriously if such activity is at least encouraged or sponsored by an official body.

And some of the steps can only be taken by official body or bodies – deciding on the final constitution, preparing the legal text and adopting the final document.

The ‘official body’ referred to could be the constituent assembly. There have been instances of Constituent Assemblies which have been responsible for every stage. On the whole such Constituent Assembly-led processes have not involved substantial amounts of civic education. A thorough process of educating the public will take some months. But once the Constituent Assembly is actually established there will be pressure on it – from outside and from its members within – to proceed to the business of making decisions. It is unlikely that a Constituent Assembly would be happy to adjourn for some months – or even to transform itself into an educational body. And its members are unlikely on the whole to have the necessary skills.

It suggested therefore that the responsibility for some of the processes be taken by another body – of a type often called a constitution commission. It is assumed that perhaps the Constituent Assembly Public Awareness Committee envisaged in the Interim Draft Constitution was just such a body.

### **A Constitution Commission**

A Constitution Commission is a technical body, charged with the responsibility of educating the people about the process for making a new Constitution, about the issues to be decided; encouraging and facilitating the submission of views –proactively; collecting and analysing views of all types; presenting those views (not simply in raw form but analysed) to the Constituent Assembly and the nation. It is not a negotiating forum between parties, though the members must be sensitive to political realities and possibilities. It is designed to facilitate the participation of the entire nation in the process of making a new constitution for Nepal. The possible composition organisation and roles of such a body is outlined here:

#### *Purposes*

- To educate the members of the public about the constitution making process and issues about a new constitution
- Brief the media on developments and generally to ensure that the public is kept abreast of what is happening
- To collect the views of the public throughout the country
- To preserve, analyse and make public those views

- To present either
  - those views to the Constituent Assembly in a way that makes them useful in drafting a new constitution OR
  - a set of concrete recommendations to the Constituent Assembly based on the views expressed by the public
- To keep the process moving towards the Constituent Assembly and an eventual new constitution
- To carry out orientation programmes for the Constituent Assembly members (on the nature of constitution, procedures of Constituent Assembly etc)
- Possibly to be the secretariat for the Constituent Assembly

#### *Membership*

- Between 12 and 20 members
- Representing the various sectors of society (not in detail, but the group itself should be diverse)
- Gender balanced
- Varied experience – including legal, political science, economic and administrative expertise, experience in public life and in civil society
- NOT serving politicians or recent political office holders
- Full time chair and in the light of the short time frame they could perhaps all be full time, at least until the Constituent Assembly elections
- Members of the Commission would be ineligible to be members of the Constituent Assembly
- Ideally not be by party nomination, or not exclusively so

#### *Output*

- Report
  - Covering mainly what people have said, submissions received etc; as well as accounting for resources used
- Set of recommendations as above

#### *Organisation*

- Head office in Kathmandu
- A number of District offices (ideally one for each district but timeframe might make this difficult) to carry out educational, organisational functions at local level.
- Library – major resource in Kathmandu, and smaller resources in Districts

#### *Staff and facilities*

- Experienced secretary/administrator (professional level, with knowledge of constitutions)
- Finance officers, Librarian, Research staff
- Secretarial staff, Staff in district offices, Media relations officer
- Services of expert adviser/s on constitution
- Access to vehicles for travel, Photocopiers, computers, Internet links, Books, relevant CD roms etc.

### *Independence*

- Must have guaranteed finance that does not need approval of any political office
- Commissioners must swear oath of office including political independence
- No dismissal of members unless for misbehaviour
- Staff not to be transferred against their will unless are incompetent or commit offences
- Must be clear statement that commission is not subject to any direction

### **The First Draft of a New Constitution**

Some constituent assemblies have began their work with a ‘clean slate’ – that is with no set of proposals to work with, just the mandate to draft a constitution. In fact this is unusual: even if there is no official set of proposals the lawyers in the Constituent Assembly will begin with some knowledge of the existing constitution; some political party or other group may present a draft (complete or not) and thus seize the initiative. There is some risk that these ‘unofficial’ starting points will subvert the process of popular consultation that has gone on before.

In many recent constitution making processes a constitution commission has prepared the ground for the Constituent Assembly by not only collecting and analysing public views (which include the views of political parties and official bodies and anyone else who wishes to submit views) but by preparing on the basis of those views, of its own researches, or the advice it has received from experts and of its own assessment of the needs of the country, a draft constitution or set of proposals.

If the constitution commission is really both competent and independent this procedure can offer the best starting point for the deliberations of the Constituent Assembly. It also means that the draft can be submitted to the public for discussion and feedback before the Constituent Assembly meets. The Constituent Assembly itself may not be the best forum for collecting such feedback.

The draft prepared for public comment and then submitted to the Constituent Assembly might be in the form of an actual draft in “legal language” – but there are various reasons against this. Legal documents (including, unfortunately, constitutions) are very often written in a way that non-lawyers find hard to understand. If the Constituent Assembly is faced with a draft actual constitution, non-lawyers may actually find it hard to participate fully in discussions. If they do not understand it, delegates may be tempted to focus too much on individual words, and not on the underlying issues. The solution to this dilemma could be to provide the Constituent Assembly with detailed suggestions but not in the form of the actual legal language. The legal drafters would produce the actual legal words once the Constituent Assembly had made the decisions about how they wanted the provisions to work.

### **The Constituent Assembly**

The Constituent Assembly is the central body; it should be viewed as the nation making its constitution, and no other body (including political parties and a constitution commission) should be allowed to diminish its central significance. The nature of its task should dictate its composition, its procedures and its decision making rules.

The nature of the task is rather different from anything carried out by an ordinary legislature. While an ordinary law can be changed if there is a change of government, this is not so for a constitution: it is supposed to last through many governments. Producing a constitution should be the work not just of one political party but of the whole country working together to ensure that the constitution has the acceptability that will sustain it during successive governments. It should certainly not ignore the interests of minorities, just because they do not have a strong voice in the body that makes it.

#### *Composition – types of members*

These considerations suggest that the Constituent Assembly ought to be constituted on different lines from parliament. Politicians and parties must of course play a major role. After a constitution is drafted, parties and politicians will have to operate under it. They should not be alienated by the process or the result – or they may be tempted to try to undermine it. And they do have more knowledge of what is workable in a political way than most other citizens.

It is also important – especially in the light of the nature of the demands made by the people through the jana andolan – that the Constituent Assembly reflect the full nature of the nation. A major aspect of the debate thus far on the Constituent Assembly has been concerned with its inclusivity. It must have women, Dalits, ethnic groups of all sorts in a rough proportion to their presence in the country. Political parties have been making suggestions on the lines: “no problem – we can organise that”. But they have never managed to achieve this in the past. Thus parties have not been seen as really representing these marginalised groups. There may be some people who do genuinely represent such groups who are not party active and would not necessarily wish to be co-opted by parties that have so studiously ignored them in the past.

But there is another reason why the route of everyone coming through parties is undesirable. If the Constituent Assembly is comprised only of people who owe their position to political parties, the debates are likely to develop on party lines. This will inevitably exclude some viewpoints, and particularly exclude discussion that tends towards regulation of political parties and other provisions in the new constitution that parties do not view as being in their interests as parties. Issues that parties tend not to take seriously – but may well be vital in the eyes of citizens – will be overlooked or given short shrift. Since a central focus of the people’s movement has been for inclusion especially in the Constituent Assembly, for this to be denied may be to invite further unrest.

Finally: a Constituent Assembly ought to bring in various people who are not normally involved in politics and would not wish to be; former officials, academics, business people, trades unionists, religious leaders – representatives of all sectors of society.

We can refer to these three groups of possible members in this way: members nominated by parties in the way normal for parliament as Type 1 members; members of groups otherwise usually excluded (women, Dalits, ethnic minorities, and this could include persons with disability) as Type 2 members; and the people with special skills or experience as Type 3 members. If the Constituent Assembly is to consist of these different groups of people, what should be the balance between politicians and others, and how should these various groups be elected or chosen?



## *Size*

Parliaments vary in size. Nepal's current House of Representatives has 205 members. India's Lok Sabha has 552. In parliament many debates are conducted with only relatively few members present; all Constituent Assembly members should ideally be present all the time. In parliament much important business is carried on in small committees; in a Constituent Assembly there will be committees, but not usually very many, and if the whole body is very large the committees will be too large to function effectively. In parliament members are used to working with rules of procedure; a Constituent Assembly that has people other than parliamentarians may be difficult to control if it is too large. It is impossible to prescribe an ideal size for a Constituent Assembly, but about 2-300 would be suitable.

### *Elections for the party members (Type 1 members) of the Constituent Assembly*

If the whole Constituent Assembly were to be no more than about 300, and a substantial proportion of the members were to be drawn from previously marginalised groups – and not through parties, it may not be possible to have 205 party-members elected by the existing system on single member constituencies. Electoral systems are complex, and the focus should be on the structure of the Constituent Assembly that is desired – and then a decision made as to which system would best achieve it. One relevant point is that the issues that are to be decided are not on the whole those that arise in relation to particular geographical areas or constituencies but are issues that affect interests within society across constituencies.

A decision would need to be made about (i) the total size of the Constituent Assembly and (ii) proportion of “Type 1 members”. Here are some suggestions about how to achieve a Constituent Assembly of between 200 and 300 of whom no more than about half would be Type 1 members (without any need to draw new boundaries):

**For a Constituent Assembly of about 200-220 with about 103 “Type 1 members”:** this could be done by joining together constituencies (two existing constituencies to form one Constituent Assembly constituency, leaving one, perhaps the biggest, alone); each Constituent Assembly constituency would elect one member using the existing ‘first past the post’ system. Then there could be 100-120 Type 2 and 3 members.

**For a Constituent Assembly of about 300 about half of whom are Type 1 members:** this could be achieved in two ways, neither of which would involve true redrawing of electoral boundaries.

- The whole country could be treated as one constituency and voters could vote for a party only. The actual members would be drawn from lists put forward by the parties. This would produce a group of Type 1 members Constituent Assembly members distributed between parties in a way that closely reflected the choice of the voters, and is the most proportionate type of electoral system.
- Alternatively, existing constituencies could be grouped together into multi-member constituencies, but with fewer members for each large constituency than the total for all the combined constituencies. If

constituencies were grouped into 41 large constituencies, each one comprising 5 existing constituencies, and each large constituency had 4 members, this would produce a total of 164 party members. This is still a little too large. An alternative would be to have 51 large constituencies: one combining 5 existing constituencies and 50 combining 4 existing constituencies. Each of these new large constituencies would elect 3 members to the Constituent Assembly. This would produce 153 party members. The overall composition might be a little more proportionate to the party preferences of the voters, but not much.

How would voters vote in such an election? The system could involve single non transferable votes: each person votes just for one candidate. Or it could be a transferable vote – in other words each voter can rank candidates, writing 1,2,3 etc beside the names of candidates, indicating an order of preference. The second is complicated, especially for non-literate voters, but produces a more proportionate result.

**The “mixed system”:** There has been talk of using the German/New Zealand or mixed system: 205 constituency members as in parliament, plus a certain number (about 100 or 200) members chosen from lists submitted by parties to reflect the party preferences of the voters. These list members should be women, Dalits, ethnic minorities. There are various problems with this proposal:

- It is complex for voters
- It makes all the members party people (which has been argued against)
- If 200 or so list members are elected the whole Constituent Assembly would be larger than desirable; if only 100 the numbers of women, Dalits, minorities etc would be small

#### *Method/s of electing/choosing the other members*

How would the Type 2 (women, Dalits, minorities etc ) and Type 3 members (*academics*, retired persons, business people etc ) be selected? It is suggested that the Type 2 members should be selected by relevant national organisations known to have good connections in the country: women’s groups, dalit groups, religious organisations etc. The Type 3 members could be selected in various ways – preferably not involving party nomination.

#### *Management of the Constituent Assembly*

There is need for careful record-taking, registering accurately the decisions of the assembly. Its proceedings should also be fully recorded and documented. The assembly should be provided with a specialist library. A team of constitutional lawyers, researchers, and political scientists could be established as part of the secretariat or a separate unit. The more work had been done by the constitution commission in advance, in terms of public consultation and making draft proposals, the less the Constituent Assembly would need to do and the less staff resources of this type it would need. And it would need the services of drafters to produce the final legal text.

### *Procedures of the Constituent Assembly*

Generally procedural rules are adopted by the assembly itself. Sometimes this can take up a great deal of the time of the assembly, which can be a critical factor if the time allotted to the assembly is limited. There is a risk that a body dominated by politicians would adopt parliamentary rules, but those are too technical and unnecessarily restrictive for a body making a new constitution, especially if a significant number of members are not experienced in parliamentary procedure. In order to facilitate the fullest participation of delegates, it is important that the rules should be kept as simple as possible, with minimum 'points of order'. Even then, it would be necessary to devote some sessions to enabling delegates to understand the rules.

Rules will have to cover quorum, length of speeches, role and management of committees etc. An important issue is voting rules. Rules can encourage consensus. They should ensure that a small minority cannot block a decision, but also that larger groups cannot push decision through in an arbitrary and oppressive manner. Popular participation is meaningless if at the end a party or two parties combined can simply ignore the wishes of a significant number of members.

### *Constituent Assembly and parliament*

Should the Constituent Assembly also act as Parliament? In some countries the task of the constituent assembly has been restricted to making the constitution. Sometimes the legislature has doubled up a constituent assembly; both the constituent assembly and the legislature operate with the same membership (although different procedures for their functioning and decision making may be adopted).

In some countries, the regular legislature is supplemented by additional members to become a sort of constituent assembly.

If the constituent assembly is a different body from Parliament, there can be a conflict between the two and tension can lead to the legislature refusing funding or other cooperation to the Constituent Assembly.

The argument in favour of total separation of legislature and Constituent Assembly is that it may be hard for a person to perform in both assemblies due to pressure of time, and the result may be the delay of the work of the constituent assembly as precedence would probably be given to parliamentary business (budgets and that sort of thing). A solution to this might be to insist (in the Interim Constitution or by agreements between parties) that the functions of the Interim Parliament are very limited. It is not the interim arrangements that are to usher in the new Nepal, this is the responsibility of the Constituent Assembly and the constitution it makes and the governments elected under that constitution. The IP must pass budgets, it must pass laws that cannot wait, and it should perform a watchdog function in regard to the Interim Government. But otherwise its members should concentrate on their work as Constituent Assembly members.

### **Who should decide on the design of the process?**

There are some risks if all these matters are decided in negotiation between political parties:

- Decisions will be rushed because the time frame is dictated by political pressures

- Technical details will be overlooked
- The result will not be acceptable to the people, because too party dominated

If the parties are not to do it, who should decide? Clearly there is need for some speed. A decision to appoint a constitution commission and to have a roadmap setting out what should happen and according to a rough time frame, further decisions about precise composition of the Constituent Assembly, elections system etc could be left to the Government in consultation with the constitution commission??

**Where should all this be laid down?**

The full details should not be specified in the IC, for the same reasons. Provisions of the IC will be hard to change and if the scheme decided on is unworkable there could be serious problems. It is suggested that the IC should include only:

- Principles for the process such as set out earlier
- A time frame – not completely inflexible
- A clear provision as to who is to decide on the next steps

This way the people would be reassured that progress is being made towards the Constituent Assembly and the ultimate goal of a new constitution, but built-in problems could be avoided.

**An example of a time frame**

A possible time frame is set out below as illustration:

Body	Months																		
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	
CC	Public education Prepares Constituent Assembly laws etc			Collect views  Analyses views					Draft Constit -ution		Public debate on draft (continues though constitution commission may have ceased to exist)								
EC				Prepares for Constituent Assembly elections  Education on elections								E							
CA																		Debates and adopts draft	
CC = Constitution Commission; EC = Election Commission; Constituent Assembly = Constituent Assembly; E = Election (for Constituent Assembly)																			