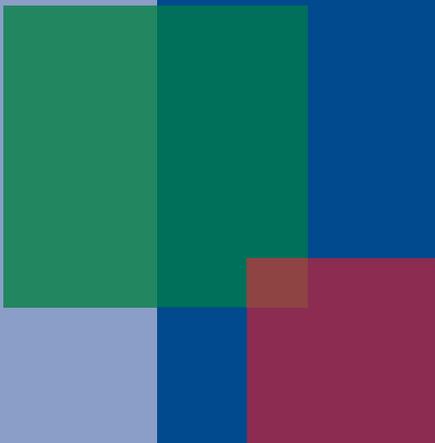


International IDEA

International Institute for Democracy and
Electoral Assistance

The Constituent Assembly of Nepal: An Agenda for Women

2 June 2008



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INTERNATIONAL IDEA - THE CONSTITUENT ASSEMBLY OF NEPAL: AN AGENDA FOR WOMEN

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ABOUT THE INITIATIVE

"Constitution building is a key component of democratization and conflict management in divided societies. International IDEA supports inclusive and participatory constitution-building processes that result in constitutions with the following features: they are nationally owned, sustainable and sensitive to gender and conflict prevention dimensions. Constitution-building processes with the above characteristics use dialogue to allow participants in the process to formulate long-term solutions and address their own democracy challenges. These may arise from deep political divisions, serious conflict, the denial of political participation, violations of other human rights, or from the failure to improve the quality of life for ordinary citizens. The voice of citizens is critical to the process due to the need to accommodate all legitimate perspectives if support for constitutional reform is to be achieved." (www.idea.int)

The Women and Constitution Building Initiative in Nepal was initiated (June 2008) in the spirit of a newly-formed Constitution Assembly (CA) which saw the election of a high percentage of women. International IDEA, together with its partners, identified a need for a greater understanding of how a constitution affects women's lives and how women can contribute to the process of making a new constitution. Strategies were needed to support the creation of an inclusive political environment in a crucial period of Nepal's history.

The initiative aims at: (1) Developing knowledge resources to support a gender inclusive process and a gender sensitive constitution, (2) Establishing a connection with international experts (cross-party and across all age groups) and, (3) Facilitating dialogue between key stakeholders working on constitution building with a gender perspective.

A Gender Folder: Toolkit for Constituent Assembly Members creates the core of International IDEA's Women and Constitution Building Initiative in Nepal and will disseminate discussion papers throughout the constitution making process with the aim of highlighting significant issues related to the constitution from a gender perspective. The discussion paper topics are identified by a national group of experts. These focus on the following topics: agenda setting, rules of procedure and public participation.

Expert groups with the ability to draw on international expertise are established at the national level. The member represents CA members, political parties, lawyers, civil society and academicians. These groups both draw on and inform International IDEA's gender work.

The national expert groups also conduct round tables and seminars which meet the immediate needs by addressing 'hot' topics that arise in the process of making a new constitution. The round tables and seminars are hosted by national and international experts and invite professionals working in this field to participate.

The initiative will be conducted throughout the entire constitution-building process in Nepal (2008-2010) and will be implemented in collaboration with international and national partners. The International IDEA project in Nepal is supported by the Royal Norwegian Embassy and the British Government.

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SUMMARY

Nepal is making a new constitution, which will be a culmination of the People's Movement, and thus must be based on the aspirations of the people of Nepal. However gender-friendly Constitution may seem, it will not automatically lead to an increase in gender equality, but the process of constitution making creates an opportunity for women to make some significant progress towards the realisation of their rights. Women should not miss this chance.

The representation of women in the principal law making body in the country has risen from 57 (and that only since January 2007) to 197 (32.77 percent of 601, or 33 per cent of the elected members). Women have the opportunity to make an impact for the benefit of all women in Nepal. It is also a moment for women with considerable experience in parliament or in public life or civil society to take a lead and to assist women with less familiarity with political settings. And it is a chance for women to show what they are capable of.

All the previous constitutions of Nepal have professed equal rights for all citizens, and since 1951, have specifically mentioned women's rights. The Interim Constitution has the broadest protection for women's rights. However, very few people were involved in making the previous constitutions of Nepal, and public participation (including, especially, of women) was limited or non-existent. Even though women have often been the most active group in constitution-making processes and to some extent have been able to secure worthwhile gains for women, there is also an assumption that women will have limited participation in public life or elected office due to Nepal's social structures, cultures and traditions.

To be able to influence the making of the constitution, the members of the Constituent Assembly will need to understand what a constitution is, to be receptive to what the public expects of the new constitution, and to make the effort to understand why in the past constitutions may have failed. They must be prepared to learn about the constitution-making process and to be alert to their responsibilities and to the possibility that others may try to influence them wrongly.

Women must begin to organise as soon as possible, within the Assembly and with organisations outside it, to ensure the full participation of women in the constitution-making process and to ensure the success of the women's agenda for change.

The women members of the Constituent Assembly will need support of different types: they will need practical and emotional support, and help in collecting and researching resource material. The more experienced women members must take responsibility for introducing the new members to the substance of the constitution and to the procedures that will be used in the Constituent Assembly and women outside the Constituent Assembly can help in this.

Women need to start thinking in a multi-dimensional way, approaching the making of the constitution from a gender perspective on all issues and with a focus on the areas of particular interest to women of Nepal. But women must also be full participants in the process, and not isolate themselves or allow themselves to be isolated in a 'women only' box.

And in order to develop their understanding and deliberation strategies further, women need to build their access to knowledge resources and create arenas for discussion.

There will be a number of challenges to be faced, but if women as a group can cross party and societal lines, share issues of common interest with the rest of the members of the Constituent Assembly, and work with everyone involved to fulfil the Constituent Assembly's aim of creating true equality between men and women on all levels of society, much can surely be achieved.

INTRODUCTION*

The 601 members of the Constituent Assembly who have been elected to make a new constitution face a task that may be daunting, but could be inspiring. The task, as described in the Interim Constitution, is that of making a new constitution 'by the people of Nepal themselves', through the Constituent Assembly. And the process is envisaged as involving the restructuring of the state (of which a major part is the adoption of a federal system): 'To bring an end to discrimination based on class, caste, language, gender, culture, religion and region' (Art. 138). Although the Interim Constitution itself does not offer a clear roadmap for the process, nor even for the principles to guide the making of the new constitution, there can be no doubt that the process should be one that takes as a minimum the rights of women as provided for in the Interim Constitution and build on them, producing a constitution that really reflects the needs and the concerns of the women of Nepal.

There is significant number of women members of the Constituent Assembly. Some of these members are women with great knowledge and experience and understanding of the possibilities that the Constituent Assembly opens up for women. Some of the others may have a less clear idea of what a constitution is and how they can, through this process; contribute to the improvement of the position of women. The purpose of this paper is to explore the issues that women members of the Constituent Assembly, and those who in the broader society will be supporting them and hoping to work through them, will need to address in order to achieve a good constitution for the women of Nepal. It is not a paper of answers - it is more an agenda.

* Working draft

WHAT IS THE RELEVANCE OF THE CONSTITUENT ASSEMBLY FOR WOMEN?

A constitution is not everything, but making a constitution offers the opportunity for women to make some significant progress towards the realisation of their rights. Women should not miss this chance.

What are the possibilities that a Constituent Assembly opens up for women - in other words, what is the relevance of a constitution, for women? It is of course foolhardy to assume that simply getting apparently valuable provisions in a constitution achieves anything. By itself, a constitution achieves nothing, and may do no more than induce a rosy glow - which might, in fact, be counter-productive (because people could be misled into believing that something concrete has been achieved when maybe nothing has been achieved). 'A constitution on paper is hardly a constitution at all, however progressive its contents and however careful its design' as Christina Murray has said.¹ It would also be fair to say that most of the advances that women have achieved over the last century have not been achieved on what might be called the constitutional plane. Even the right of women to vote is something that might not be mentioned in a constitution at all (and women's right to vote is not something that is likely to be contested in Nepal now). So is the constitution a sideshow?

At the very least, the constitution is a show that women cannot afford to miss. Any absence of, or lack of clarity about, women's rights in such a new document might be seized upon by future unenthusiastic governments, and perhaps by lawyers and courts, to deny women what they are expecting.² But, more positively, there is at least the chance that a new constitution, adopted by a participatory process and with strong public support, will be a factor for change in the ethos of public life. And well-drafted provisions targeting the issues that are of real concern to women in Nepal can offer a real possibility of change, especially if they are seized upon and used in political and legal ways. If we take, for example, the constitution of South Africa, which is a remarkably feminist legal document, we find that it has been used in the courts in a number of ways to support the position of women. The Constitutional Court of South Africa held in one case, for example, that the risk that a man might attack women was a relevant factor that ought to be considered when deciding whether to grant bail pending trial³; in another instance, the

1 'Negotiating beyond deadlock: from the Constitutional Assembly to the Court' Andrews, P. & Ellmann, S. (eds) *The Post-Apartheid Constitutions: Perspectives on the New South Africa's Basic Law*. (Johannesburg: Wits University Press, 2001) 103-127

2 Though in the last year or so the Supreme Court has been pro-active and pro-women, this cannot be counted on to continue. Under the 1990 Constitution, few would have imagined that it was unconstitutional for local authorities to use a local language other than Nepali, until the Supreme Court held it to be so in 1998, despite the mention of all mother tongues as 'languages of the nation.'

3 *Carmichele v Minister of Safety and Security* (2001) http://www.alrc.net/doc/pdf/hrcl_s_africa.pdf

Court held that a woman married under Muslim law could inherit her husband's estate under the statutory law, and that she was a 'spouse', although she was not married under statute.⁴ The Court also held that the government was liable for police officers who raped a woman while on duty - the lower courts had held the police authority not responsible.⁵ And the Court held that the government must have a programme for giving anti-retroviral drugs to HIV-positive pregnant women, to prevent transmission of the virus to their children. It is not only individual court cases that are important: government policies and laws also should comply with the constitution. Martha Nussbaum has observed of the Public Interest Litigation procedure, applying the Constitution of India, 'The Court receives thousands of petitions and hears only a fraction of them. Nonetheless, the right has been important to women'.⁶

There is another reason why women should be concerned about the constitution making process. With 197 women members of the Constituent Assembly, this is a chance to demonstrate that women can be effective politicians and law makers. If they are ineffective, political parties may slip back into the old sexist ways.

4 Access to these judgments is possible through the Court's website at <http://www.concourt.gov.za/text/rights/know/women.html>. The Women's Legal Centre is a useful source of information about court cases on women's issues: <http://www.wlce.co.za/index.html>.

5 *K v Minister for Safety and Security* (2005)

6 "India, Sex, Equality and Constitutional Law" in Baines and Rubio-Marin, eds., *The Gender of Constitutional Jurisprudence* (Cambridge: CUP, 2005) at p. 178, quoted in Helen Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design* (Cambridge: CUP, 2008) a p. 154n.

WHO ARE THE WOMEN MEMBERS?

There are 197 women members in the Assembly (32.77 per cent of the total). Some of these women have had considerable experience in Parliament or in public life or civil society.

In the First Past the Post elections, there were 369 women candidates from 55 political parties (as opposed to 3577 men candidates). And 30 women were elected (12.5 per cent of the total 240 constituencies). The PR elections produced a total of 161 women elected (nearly 48 per cent of the total, 335 seats), where as six women were nominated from the cabinet resulting total 197 women, or 32.77 per cent of women in CA. Of these women, 18 have been members of Parliament in the past, many only since the expansion of Parliament in January 2007, when the Interim Constitution was adopted.

The following Table indicates the numbers of candidates and persons elected from the various parties:

Political Parties	FPTP				PR		Nomination by Cabine		Grand Total
	Candidates		Elected		Elected		Nominated		
	Male	Female	Male	Female	Male	Female	Male	Female	
Communist Party of Nepal (Maoist) (CPN-M)	197	43	96	24	50	50	6	3	229
Nepali Congress (NC)	214	26	35	2	37	36	4	1	115
Communist Party of Nepal (United Marxist Leninist) (CPN-UML)	212	27	32	1	35	35	3	2	108
Madhesi Janaadhikar Forum (MJF)	100	3	28	2	11	11	2	0	54

Tarai Madhes Loktantrik Party (TMIP)	90	4	8	1	6	5	1	0	21
Rastriya Prajatantra Party (RPP)	210	22	0	0	4	4	-	-	8
Communist Party of Nepal (Marxist Leninist) (CPN-ML)	105	11	0	0	4	4	1	0	9
Communist Party of Nepal (United)	49	6	0	0	3	2	-	-	5
Sadbhawana Party	83	4	4	0	3	2	-	-	9
Janamorcha Nepal	175	28	2	0	3	2	1	0	8
Rastriya Prajatantra Party-Nepal	196	8	0	0	2	2	-	-	4
Rastriya Janashakti Party (RJP)	184	14	0	0	2	1	-	-	3
Rastriya Jana Morcha	107	15	1	0	2	1	-	-	4
Nepal Majdoor Kisan Party	71	27	2	0	1	1	1	0	5
Rastriya Janamukti Party	76	8	0	0	1	1	-	-	2
Communist Party of Nepal (Unified)	126	10	0	0	1	1	-	-	2
Nepal Sadbhawana Party (Anandidevi) (NSP-A)	91	13	0	0	1	1	1	0	3
Nepali Janata Dal	30	10	0	0	1	1	-	-	2
Sanghiya Loktantrik Rastriya Manch	43	2	0	0	1	1	-	-	2

Samajbadi Prajatantrik Janata Party, Nepal	43	7	0	0	1	0	-	-	1
Dalit Janajati Party	49	1	0	0	1	0	-	-	1
Nepal Pariwar Dal	-	-	-	-	1	0	-	-	1
Nepal Rastriya Party	5	1	0	0	1	0	-	-	1
Nepal Loktantrik Samajbadi Dal	11	0	0	0	1	0	-	-	1
Chure Bhawar Rastriya Ekta Party Nepal	21	1	0	0	1	0	-	-	1
Independent	774	42	2	0	0	0	-	-	2
TOTAL	3262	333	210	30	174	161	20	6	601

The result is better than expected by well-informed observers, though some women are disappointed that the number of women is not in proportion to the approximately 51 per cent of the population who are women. Interestingly, no party that has only one member has a woman member, and in the case of parties with uneven numbers of members, they all have more men than women.

Incidentally, the press reports that a number of women are relatives of male members of the Constituent Assembly. This is of course far from saying that these women members are not well qualified in their own rights, and many of them are strong and experienced women. But it may be that some of the women members are less autonomous than would be ideal. Particularly, this connection might strengthen these members' tendencies to support the parties' interests, as opposed to other interests.

Overall, it must be said, press reports about the women elected indicate that many of them have considerable backgrounds in politics of various sorts.

WHAT HAVE PAST CONSTITUTIONS ACHIEVED FOR WOMEN?

All the constitutions of Nepal have professed equal rights for all citizens and since 1951 have specifically mentioned women's rights. The Interim Constitution has the broadest protection for women's rights. Mostly, rights are binding between the citizens and the state - not between citizens - though some now may give rights against other citizens.

The first constitution of Nepal - the Constitution Act 1948 - gave the vote to 'all adults' (in relation to elections for village and town *Panchayats*-Arts. 16-17). It also gave to all citizens 'complete equality before the law' (Art. 4). However, it made no specific mention of women.

The 1951 Constitution—originally designed to be an interim document only, pending the election of a Constituent Assembly—was a distinct improvement in that it said, 'men and women equally have the right to an adequate means of livelihood', and that 'there is equal pay for equal work for men and women' (Art. 5). The government was not to discriminate on the grounds of sex, but affirmative action ('special provisions') for women was permitted (Art. 15). Discrimination in terms of gender in forming the voters' roll was prohibited (Art. 70).

The first attempt at a truly democratic constitution—the constitution of 1959—included some very clear statements to the effect that there was to be no discrimination on the grounds of sex in the application of any law, and none in terms of appointment to the public service. Indeed, the latter provision went on to repeat that service of the Crown was open to both sexes and there was to be no discrimination on grounds of sex (Art. 4). It is important to note, however, that these provisions all applied only to 'citizens': being a citizen was a threshold that had to be crossed before the rights could be enjoyed. Discrimination in the granting of citizenship was therefore not covered by the equality provisions.

The *Panchayat* Constitution of 1962 retained the equality provisions (without the additional flourishes on the matter of public service). Protection of women was a ground for limitation of human rights (so, presumably, women could be prevented from undertaking certain types of work). For the first time, this constitution included provisions about citizenship. And it was clear that, though a woman who married a Nepali could become a citizen; a man who married a Nepali woman had no right to become a citizen.

The 1990 Constitution made it clear that citizenship passed only through the male line (Art. 9) - though the child of a Nepali woman could become a naturalized citizen. The equality provisions brought together all the features of earlier constitutions (except the public service provision): no discrimination in the application of laws (which meant neither by the state nor by any other person), no state discrimination on the grounds of sex, equal pay for

equal work, and the permission to have special measures. The only innovation was in the form of non-justiciable directive principles, which included the following principle:

26 (7) The State shall pursue a policy of making the female population participate, to a greater extent, in the task of national development by making special provisions for their education, health and employment.

The extent to which such vague provision is implemented is not easy to measure.

Finally, when we come to the Interim Constitution, we find some distinct improvement in the citizenship provisions: both women and men may pass citizenship to their children. But the imbalance between the position of a woman married to a Nepali man and a man married to a Nepali woman remains (and though it is in one sense discriminatory against men, it is likely to hit women hardest: its tendency is to drive the husband to prefer to live in his own country, and take his Nepali wife with him). The equality provisions are the same as in the 1990 Constitution, so far as concerns women. A new right is " 18 (2) Women ... shall have the right to social security" but this is immediately qualified by "as provided for in the law." There is a totally new Article:

20. Rights of women

1. No woman shall be discriminated against in any way on the basis of gender.
2. Every woman shall have the right to reproductive health and other reproductive rights.
3. No physical, mental or other form of violence shall be inflicted on any woman, and such an act shall be punishable by law.
4. Sons and daughters shall have equal rights to ancestral property.

And there are provisions for the right to 'proportional inclusion' in state structures, as well as the provisions for representation in the Constituent Assembly (including proportional representation in the party lists, inclusiveness in the selection of candidates, and the overall requirement that one-third of the candidates had to be women). There is also a new directive principle for positive discrimination for various groups including women. And there are several references to the restructuring of the state to end discrimination, including on grounds of sex.

There is a clear agenda for research here: if the constitutions of Nepal have had such clear statements of the equality of women and men, why is it that the position of women in Nepal can be described in the following terms: 'The treatment of women as second class citizens is quite evident and prevalent in society.'⁷ It is not difficult to list various factors that may account for this situation, but further research into the dynamics of the various situations would contribute to the value of suggestions for the future constitution:

- Social factors such as the preference for boy children, which are bolstered by customs such as the requirement of dowry
- The persistence of laws, even if they are contrary to the constitution, which embody unequal treatment for men and women
- The inability of women to obtain access to justice which (i) may make laws that do favour them a reality and (ii) can declare laws that are against equality, contrary to the constitution
- The failure to implement orders that are in fact made by the Supreme Court

7 http://www.unescobkk.org/fileadmin/user_upload/arsh/Country_Profiles/Nepal/Chapter_5.pdf

- Reluctance of families to educate women equally with men
- Social attitudes that restrict women's place to the home
- Lack of reproductive health facilities that limit women's choices
- Child marriage, age differences in marriage and polygamy
- Double discrimination against Dalit women
- Religious traditions such as Deuki and Kumari (which affect a small number of women) or others that affect more women
- Traditions of, and attitudes towards, domestic violence
- Because of the more limited opportunities, including economic opportunities for women, like access to finance and resources.

While it is not difficult to list these and other factors, a full understanding of their significance and their impact on the likely success of any constitutional provisions is both important and complex.

Apart from the content of specific provisions, the issue of the constitutional language used must also be examined. Drafters who use the Nepali language to write the contents of the constitution are not plagued with the issue of the use of sexist language, an issue that writers of constitutions written in English are burdened with: it is difficult to write even a simple provision in English without running the risk of being sex specific ('he' or 'she', 'his' or 'hers'). It is possible to avoid this even in English - and the South African Constitution is a splendid example of a document that uses non-sexist language (it goes to the extent of saying that, in connection with any post, 'a woman or a man' can be appointed; the Interim Constitution in Nepal uses 'individual'). I am assured that generally in Nepali the constitutional language is not sexist. In future, however, the word '*rashtrapati*' for 'president' should be avoided, as it is based on the word for 'husband'.⁸

8 This is a new word in the constitutional context for Nepal which has until now had a King. On the particular issue of the 'right word', a contributor to a blog commented on India, 'rashtrapatni' or wife of the nation would hardly be appropriate either! http://mokshjuneja.blogspot.com/2007_06_23_archive.html. However, women members of the Constituent Assembly in Nepal were unsuccessful in attempts to argue that rashtrapati should not be used when the republic was declared and the Interim Constitution amended.

WHAT HAS BEEN THE PAST EXPERIENCE OF WOMEN IN POLITICS IN NEPAL?

In the past, women have had little opportunity to participate actively in public life or elected office.

The advent of the Maoists into the Legislature-Parliament in January 2007 produced a significant change in the make-up of the legislature, and a departure from the past. The 1999 elections led to a House of Representatives in which 5.8 per cent of the members were women. Most women involved in politics were closely related to male politicians. And women members of the House complained that it was difficult for them to get across their own points—they were essentially subordinated to the male members.

The Local Government Ordinance⁹ in 1997 reserved 20 per cent of VDC seats for women, and over 3,900 women took office after elections that year. But largely as a result of the disruption caused by the Maoist insurgency, local government has not really operated in many parts of the country.

⁹ See now the Local Self Government Act 1999.

WHAT IS THE TASK BEFORE THE CONSTITUENT ASSEMBLY?

In making the constitution, members will need to understand what a constitution is, to be receptive to what the public expects of the new constitution, and to make the effort to understand why in the past constitutions may have failed. They must be prepared to listen, to read, to think and also to be alert to their responsibilities and to the possibility that others may try to influence them wrongly, even to bribe them.

The task before the Constituent Assembly is to make a constitution. The members of the Constituent Assembly will also be legislators (though the legislative task may be delegated to a committee), but for the purpose of this paper, we concentrate on the constitution-making function. If one takes what might be thought of as a more conspiratorial view of the likely approach of the parties to this enterprise, the role of the individual members would be that of mere cannon fodder, voting as the parties tell their members to. (And potentially, the weapons at the disposal of the parties are considerable, as they could ultimately arrange the loss of seat of a non-cooperative member¹⁰). However, taking a more positive view, what would be the tasks of a member, especially a woman member, of such a body?

One can perhaps summarise the functions involved in making a constitution as follows:

- Analyse problems with the existing constitution, if any
- Consider what society needs
- Educate people about what a constitution is and what they are expected to do
- Collect people's views and analyse those views so they can be used in conceptualising the new constitution
- Prepare a set of proposals
- Put proposals into formal constitutional form
- Discuss, amend, finalise proposals
- Consult people about detailed proposals
- Adopt/approve document formally so it becomes the new constitution

The ordinary members of the Constituent Assembly may perhaps not always be able to analyse where the previous constitution failed, but they should be able to understand other people's analyses, as well as contribute their own

¹⁰ The Interim Constitution provides that a party may notify that a member has left the party-voluntarily or otherwise. A law is needed but there is a ready precedent: the Anti-Defection Act of 1997 which allows a party to give notification of defection if the member votes against the party line, is absent or abstains. The constitutionality of this under the 1990 Constitution was controversial, but the Interim Constitution is phrased more broadly.

knowledge and experience. They might be involved in hearing the views of the public. If they are constituency members, they will presumably visit their own constituency and hear the people's views. They may be involved with others, inside or outside the formal sessions of the Constituent Assembly, to put together concrete proposals, and would certainly be involved in discussing proposals put forward by others. They will, in the end, have to vote on the proposals.

Some women may have a good understanding of what a constitution is and how it can help women. But some members may never have read a constitution before (never even seen one, perhaps). It will not be an attractive task because constitutions are not exactly light reading matter, and apparently the Nepali style of legal drafting is particularly arcane, but at an early stage delegates ought to get to grips with what a constitution is. If they really do not understand the contents of the constitution, it will be far harder for them to argue convincingly for a particular position. One might break this task of understanding the contents down into three parts:

- What does a constitution say?
- What does it do?
- How is it made to do what it says?

A member will perhaps not get to grips with all of a constitution in any detail; most members will have some aspects about which they feel particularly strongly. But the less members understand, the more they will be subject to party direction and other forms of pressure.

A member ideally ought to be able to understand a written brief, at least on the areas that are of interest to him or her.

A member must be prepared to listen-especially to arguments of the 'other side'.

A member should be able to speak with some degree of confidence, at least in a committee. Maybe there will be few opportunities to speak, for most members, in the full Constituent Assembly.

Speaking confidently, so that people will listen is one thing, but if a person speaks irrelevantly and for too long, there will be little impact, and people will stop listening.

Incidentally, there may be issues of integrity also. There may be circumstances in which members are under improper pressure to vote in particular ways-in some countries, it has even happened that members have been bribed.

HOW WILL THE CONSTITUENT ASSEMBLY IN NEPAL WORK?

The Interim Constitution gives few details about how the Constituent Assembly will function. In the last few weeks, work has started in various quarters, especially in the existing parliamentary secretariat, to work through the issues of managing the Constituent Assembly and the rules of procedure.

Many members of Nepali society have, various surveys tell us, very little idea about what a Constituent Assembly means, even if they have heard of it. Presumably, political leaders have a clearer idea, but their ideas may not all be the same. There is no 'right' vision of a Constituent Assembly. But, if the promise that the people of Nepal are to make their own constitution is to mean anything, the members of the Constituent Assembly must be able to express their personal views and those of the communities and not just the parties from which they come. And the people as a whole must be able to understand what is going on, and be able to make an input. Parliament, with its rather esoteric procedures, with members sitting in party blocs, conducting its business in the presence of a small number of outsiders, and with a sort of glass wall separating it from the public who may listen but never contribute unless invited to appear before a committee, is not the appropriate model. The Constituent Assembly should be approachable, collaborative, and to a considerable extent, transparent. A Constituent Assembly is different from an ordinary legislature in a number of ways:

- The functions of Parliament are to make laws, vote finance, hold government, etc accountable; the functions of the Constituent Assembly are to make a constitution, to involve the people actively
- The Constituent Assembly is a manifestation of the sovereignty of the people; it is an assembly of the nation; the Parliament is a representative body
- When making a law, a Parliament debates proposals put forward by others; unless there is a pre-prepared draft before it, a Constituent Assembly generates the proposals - hopefully on the basis of the desires of the people
- The issues that are decided in the Constituent Assembly include the nature of representative democracy in the country and the role of political parties; in other words, these issues are contestable and should perhaps not be assumed, but Parliament is based on these assumptions
- Making a constitution is not just about government; it is about social justice, the place of the individual and the group within the nation... things parties are not necessarily interested in, nor qualified to discuss

Conversations with at least some political leaders indicate that their vision of the Constituent Assembly is of something rather like the Parliament, with tight party control, where most members will not need to speak in the plenary because the party leadership will have determined the party approach. It is assumed that the scope of discussion in the Constituent Assembly will not be extensive, because many issues will not really be controversial. On this view, the Constituent Assembly need not last more than about six months.

The polar opposite view is perhaps a bit romantic: this is of the Constituent Assembly as a great meeting of the nation, where all views are heard, and where a solution to the nation's structural and other problems are hammered out in a thoroughly participatory, and transparent, fashion, producing a document that is truly a charter for the new Nepal. Some elements of this vision perhaps underlie the insistence of women and various groups that think of themselves as having been marginalized by the traditional political system, including by the parties and Parliament; these groups want the Constituent Assembly to be 'inclusive' and that its membership be 'proportionate'-words that the Interim Constitution uses freely.

But hardly anyone has articulated either conception fully. It seems likely that neither vision is destined to be reflected in the reality. What is clear is that virtually all members (there will be two independent members elected from geographical constituencies) will come through parties.

On the other hand, the parties' expectations, if these exist, that the members will all loyally toe the party line may fall short in fulfilling expectations of gender equality. In order to meet their 'inclusion' obligations under the Interim Constitution and the Election Act, and to field more than twice as many candidates than they ever have before, parties had to put forward 'non-traditional' candidates. Some of these candidates may perhaps not have fixed party loyalties, while others may have been weaned from existing parties.

The Constituent Assembly should be participatory in two senses: all members of the Assembly must be able to participate to fulfil the trust the voters have placed in them, and the public more widely must be able to participate-in the sense of being able to submit their views and have them considered, knowing what is going on in the Assembly and being able to comment on any draft constitution before it is finally adopted. A constitution that results from a participatory process will be a better constitution for Nepal because it will respond to what the people want, and it will be a more acceptable constitution, from the perspective of the people. Participation is specifically important for women: "The process whereby the constitution is designed must ... be a relatively open, democratic and transparent one in which interventions by feminists are possible."¹¹

The Constituent Assembly has to adopt its own rules of procedure. They should be designed with a view to a number of objectives, of which the most obvious is to develop the best possible 'product' of the Constituent Assembly's deliberations, namely the constitution.

But there are a number of other objectives that ultimately serve this first one. These, it is suggested, include the following:

- Full participation of the public in the making of the constitution
- Full participation of the Constituent Assembly members
- A sense of national 'ownership' of the product
- Harmonious proceedings.

A sense of national ownership would be enhanced if the public were to have full opportunities to present their views, and to comment on the proposed constitution before it is adopted. To a lesser extent, it would be served by ensuring that all members-who represent the people-are able to participate. The last is perhaps a way of achieving the first.

¹¹ Georgina Waylen 'Constitutional Engineering: What Opportunities for the Enhancement of Gender Rights?' Paper delivered at Political Science Association conference, Edinburgh, 2006 at p. 15. see <http://www.sps.ed.ac.uk/gradschool/psafem/pdf/ConstitutionalEngineering.pdf>

The rules themselves should be clear-without many sub-rules, provisos etc. In the past, rules of procedure (at least in English speaking countries) have often been drafted in a wordy and unnecessarily technical way, but a number of countries have recently adopted revised rules written in 'plain English'.¹² Perhaps the Constituent Assembly rules could be in 'plain Nepali'.

Not all members of the Constituent Assembly are likely to be happy expressing themselves in Nepali, even if they are able to understand the language. Members should be allowed to express themselves in other languages. The rules of the Indian Constituent Assembly provided that Hindustani (Urdu or Hindi) or English could be used, but, if the President of the Constituent Assembly took the view that a member could not express himself or herself in one of those languages, that member could address the Constituent Assembly in their mother tongue and a summary could be provided for members in English or Hindustani. In Bolivia, the rules of the Constituent Assembly provided that plenary and commission sessions would have to use interpreters and translators so that members could express themselves in their mother tongues (Art. 52). This issue becomes all the more important when we consider the issues that have been raised in the discussions and agitations since *Jana Andolan II*, especially the issue of inclusion.

To ensure that women members can play their full part may also require some careful planning, and might require some provision in the rules. In the Kenyan Parliament, women members were for a while forbidden to bring handbags into the House (for fear of concealed weapons)! Parliaments have had to modify their sitting hours in order to accommodate the requirements of members who have family obligations and are not able or willing to sit through the night, for example; and Parliaments have also created schedules that show some respect for school holidays. Unfortunately, in some Constituent Assemblies, debates on issues affecting women have not been uniformly conducted in terms that show respect to women.¹³ It is common to have provisions in procedural rules requiring a certain decorum in members' language (in the Nepal House of Representatives Rules 'indecent or objectionable or un-parliamentary or undignified' or 'uncivil' language was not to be used), and specific reference to language demeaning to women members, and perhaps to other classes of members also (Dalit members and members with disabilities, for example), might also be included. Maybe there should be some mechanism, such as might be set up for women in a work places in some countries, to complain about harassment or an intimidating atmosphere.

Other factors that might affect women's participation include the possibility of a women's caucus, so that women can work together across party lines. An initiative to create such a caucus in the previous Parliament was taken on a non-compulsory basis and was serviced by a small staff from the parliamentary secretariat. Additional informal inter-party collaborations among women from the SPA and later the CPN-M took place throughout the working period of the Interim Parliament, but no institutionalised mechanisms were set up to create space for women in formal politics to bring gender issues into the public and political debate.

Then there is the issue of safety. Sittings that do not finish too late should minimize this problem, but there could also be provision for transport to be provided if it does become necessary to have a late sitting.

There is the question of child care. There are some very young members, especially from the Maoists. Probably, women will be able to leave children with relatives, in the time-honoured way, but would there be a case for a crèche, where women members can leave their children while they are in the plenary session or a committee? Are there sufficient facilities for women to bring and feed their young children?

¹² Examples are the Rules of the New Zealand Parliament. The language is simple but the rules are still very long.

¹³ Personal observation in attending hearings of both the East Timor and the Kenya bodies, all too often women's issues were the occasion for exhibitions of feeble humour about victims of female violence etc.

HOW HAVE WOMEN ELSEWHERE BEEN INVOLVED IN MAKING CONSTITUTIONS?

Women have often been the most active groups in constitution-making processes. They have been able to secure worthwhile gains for women in new constitutions.

Africa has been a major scene of constitution making over the last 10 to 20 years, and women have played a considerable part, and achieved some notable victories in terms of getting women-friendly provisions into the constitutions.

In Uganda, it was widely acknowledged that no other group was as organized and cohesive as women's organizations when it came to making a concerted effort to influence the Constitution writing process. Women's organizations wrote more memoranda submitted to the Constitutional Commission than any other sector of society.¹⁴

In the various African countries that have seen constitutional review recently, women have been active in civic education: they have formed caucuses inside and outside the constitution-making body, they have lobbied, and they have communicated with the broader public through constitution-making newsletters and radio programmes. They have prepared Women's Charters -- with more demands than could ever be put in a constitution, but from which constitutional provisions can be drawn. In Kenya, women's groups were among those invited to send members to the Constituent Assembly (about one-third of the members came through civil society and not political parties). They had a well-organized caucus in the Constituent Assembly, which met several times a week, to share experiences about how the process was going and ideas about the next stage. There was a draft constitution prepared by a commission, and a group of women's organisations prepared a detailed commentary on this draft, suggesting further improvements for women, and pointing out the parts of the draft that should be retained. This was a technical document drafted by lawyers. In all these countries, the constitutions that were produced included important provisions for women.¹⁵ But the women had to be constantly vigilant.

¹⁴ Aili Mari Tripp, "New Trends in Women's Political Participation in Africa" page 19.

¹⁵ Though the Kenyan draft never got to the point of being adopted as the constitution of the country.

In Malawi, recommendations by the National Commission on Women in Development (NCWID) to include women's concerns in the bill of rights and equal representation of men and women in the Senate (upper house in parliament) were incorporated and withdrawn four times prior to the ratification of the constitution in May 1994. A core of women in the NCWID lobbied the National Consultative Council every time they attempted to take out the recommendations.

In Rwanda, which made a new constitution in 1994, one woman who was involved said:

We got almost everything we asked for, including the 30 per cent quota for women. When writing the constitution, gender started off as a separate chapter. We refused and said that it had to be integrated. We got through to the people preparing the constitution by telling them that the women we were talking about were their wives and sisters. We didn't shout and demand but moved slowly. We asked them: 'Don't you want your daughter to have rights? Don't you want your wife to have rights? We appealed to them'.¹⁶

In Brazil, the National Council on Women's Rights coordinated women's activities, which included holding meetings all over the country to prepare suggestions for the constitution. It put pressure on members of the constitution body, and liaised between the women members and women's groups outside. In both Brazil and Argentina, women managed to exclude proposed anti-abortion clauses from the new constitutions.¹⁷

Not all these efforts have been as successful as women perhaps hoped, and in some cases the gains on paper have not been realized in the implementation. But they do show that, if well organized, women can make progress in this area. Women in Nepal do not really need women from other countries to suggest to them how they can organise! It is enough that they know that organising is worth while.

¹⁶ *Women Taking a Lead: Progress Toward Empowerment and Gender Equity in Rwanda* Women for Women International Briefing Paper September 2004 available at <http://www.womenforwomen.org/Downloads/RWpaper.pdf>

¹⁷ See Georgina Waylen, above.

HOW-IF AT ALL-WERE WOMEN INVOLVED IN MAKING THE PAST CONSTITUTIONS OF NEPAL?

Very few people were involved in making the previous constitutions of Nepal, and public participation (including of women) was limited or non-existent.

Not only have women not been involved in constitution making in Nepal-most men have been excluded. There was no public participation at all until the making of the 1990 Constitution. Even then, there was no systematic programme of public consultation, though the commission preparing a draft did travel around the country to some extent. And a considerable number of submissions were made by various bodies. There were two committees that prepared drafts--one appointed by the government and the other by the king. Neither of them included any women members.

When it came to making an Interim Constitution in 2006, a committee was initially appointed by the government, which consisted solely of 5 males (all Brahmins). There was something of an outcry and the committee was expanded to include a wider range of people, representing political parties. But there were 3 women.

WHAT ARE THE CHALLENGES THAT ARE LIKELY TO FACE WOMEN IN THE CONSTITUENT ASSEMBLY?

Challenges faced by women are likely to include their own lack of experience (in some but by no means all cases), the somewhat unreceptive attitude of some men members to what women have to say, the expectations of their parties that they follow the party line, the expectation of other communities to which they belong that their primary role in the CA is to represent those communities, and an expectation that women will be interested only in women's issues and will show no independence of mind on other issues.

Women are likely to face some hostility from men members. It is clear that many men were unhappy about the special quotas for women. In addition, a general social expectation that women know their place, even if diminishing, may make the task of speaking out and being effective especially hard for women. Many women will rise above such hostility, and many will have the necessary experience to do so. But for many, the effort required will be greater than for their male counterparts.

All the non-traditional members of the Constituent Assembly (Dalits and Janajatis, as well as women) will face something of a tussle between party and community loyalties. Parties may expect them to toe the line. Hopefully, parties will not try to suppress the inclusion issues--after all, this was the clear mandate of the Jana Andolan. But for the biggest parties, the hierarchy is still largely Brahmin.

For women, there is an additional issue--not just the pull of party but the pull of community. It has been said that members of the Interim Constitution Drafting Committee tended to put community before gender. For a Dalit woman, for example, it may not be easy to identify with the concerns of Brahmin and Chhetri women. There may be an expectation in some quarters that women will only be interested in women's issues, and be happy to be active only on those issues (perhaps only being involved in committees focussing on women's issues).

HOW CAN THE WOMEN MEMBERS OF THE CONSTITUENT ASSEMBLY ORGANISE TO MAKE THE MOST OF THE OPPORTUNITY?

Women must begin to organise as soon as possible, within the Assembly, and with organisations outside it, to ensure the full participation of women and the success of the women's agenda for change.

There has been a women's caucus in Parliament in the past and that experience may be useful (indeed, new members have already been meeting with old members to learn from their experience). As soon as possible, women members should arrange to meet and to develop a strategy for addressing women's issues. They could arrange a consultation with various women's organisations for brainstorming on women's issues. Each organisation could make a presentation on its priorities for women in the Constituent Assembly. Or maybe, related organisations could get together and make joint presentations - to reduce overlap. The women could also invite each party to make a presentation - might encourage parties to start addressing issues. They should establish a women's caucus - with the guidance of the experienced women. They could discuss funding with donors.

Specific tasks for the women at an early stage could include the following:

- Study party manifestoes
Work on those areas of relevance to women that are accepted by all women and develop materials and strategies, possibly with outside agencies and NGOs
- Study areas of disagreement and try to minimise them
- Link with women's caucuses and organisations in other countries
- Develop links with media

Then there are strategies they could develop within the Constituent Assembly:

- Insist on rules that help women participate fully (no derogatory language, etc-see above)
- Insist on proportionate representation of women in all committees. These must include administrative committees, such as a steering committee that will organise the work of the Assembly (so that women's agenda gets full attention) as well as in committees on the substance of constitution, not allowing women to be pushed aside into "women's topics"¹⁸
- Insist on women's being fully represented among the chairs of committees and among those who chair the entire Assembly, and in the staff of the Secretariat

¹⁸ A recent newspaper report in Kenya said that there were plenty of women in the catering committee of that country's parliament but not many in other committees!

- Insist on a committee on gender issues for the new constitution (which does not mean, as we saw earlier, that women's concerns are only relevant to one aspect of the constitution)
- Insist on special meeting place for women-so that they can have women-only meetings, and meet people who come to interact with them on women's issues.

Women also need to develop strategies for dealing with their own parties and making sure that their issues are firmly on the party agendas.

Strategies within the Legislature-Parliament would be similar to those for the Constituent Assembly. Again the legislature could include a committee for women's issues-to shadow the relevant ministry, to hold government to account on women's issues, to push for laws that can't wait until the new constitution is made, etc.

IN WHAT WAYS CAN WOMEN MEMBERS OF THE CONSTITUENT ASSEMBLY BE ASSISTED?

Women members will need support of different types, including practical and emotional, including human and in terms of research and resource material. Women outside can help in this.

12.1. Support of a personal sort

Since there has been so limited a history of women in Parliament, only a small proportion of the women members will have had any experience (and most of those members will have been in the legislature only since January 2007). The women members may have a wide range of experience, but of different types. And they will be coming into a context traditionally dominated by men. Some of them will be unused to Kathmandu and will have to leave families behind. In the case of the Maoist women, they will perhaps be accommodated together in facilities organised by the party. This will also provide some practical and emotional support. But some other members might find themselves in need of various types of assistance. Friendship and female company might well help them perform their roles in the Constituent Assembly better. Some of that support would be best given in Kathmandu and some at home-taking care of families so women do not have the stress of wondering how their children and elderly parents are faring.

12.2. Training

Members will need to be 'empowered' in the popular parlance, or the debates will be dominated by party leaders, and decisions on many matters will be dealt with by inter-party deals. This will defeat the objective of getting proportionate representation of communities as well as parties in the Constituent Assembly, and of getting a reasonable proportion of women members.

It is therefore important that some form of education for Constituent Assembly members take place. Many of them will have attended some (or many) of the plethora of workshops now being organised by local and overseas groups. After they become members of the Constituent Assembly, the size of the task facing them may come home very forcibly and they will recognise the need for education. This paper is not the place to go into this in any detail, but provision for such orientation should be built in the work-plan of the Constituent Assembly. Women should ask donors for training programmes specifically for women, where appropriate.

12.3. Back-up

Women members of the Constituent Assembly are unlikely to have a great deal of time to engage in research. Organisations outside the formal setting can back them up in all sorts of ways. For example, women lawyers could develop human and other resources for the achievement of the objectives of women in the new constitution. They could work together using their professional skills to produce strictly constitutional ideas. They could carry out a gender audit of the Interim Constitution. They could update existing material on laws

that discriminate against women. They could pursue research on the issues listed under section 13 here, especially on the issues of women's access to justice and how far the courts have been responsive to women's issues. They could hold seminars for women members, and produce short notes of guidance for them. And they could arrange a sort of 'hotline' for women members who want a rapid response on topics that are being addressed in the Constituent Assembly.

12.4. Resources

Constituent Assembly members need tools-information and techniques necessary to carry out their task. Resources can be of various kinds: material distributed to members for their own use, copies of fuller material that would be available for those who want more detail, reference material-a library essentially, internet access, and human resources, in the form of consultants, e-mailable contacts, etc.

The members will know a great deal about the realities of life in Nepal (and far more than any foreign experts!). But it is important not only to understand the 'what' of the situation but also the 'why'--why, for example, is the illiteracy rate higher for women? Why are there so few women judges? And so on. The women members will need tools to understand the constitution and what constitutions can and cannot do. This implies comparative material- what has happened in other countries. Except for lawyers, a constitution is a daunting reading project; indeed, even lawyers who do not deal regularly with the constitution will probably not be familiar with its details. For most delegates, material will have to be simple- but not simplistic. Material for individual delegates might perhaps be most useful if it does not use chunks of constitutional language, but says in accurate but simple terms what the constitutions of Nepal and what other countries' constitutions do.

For the various topics that should be addressed in designing the constitution, it is suggested that the following approach might usefully be generally adopted in the preparation of materials (and of workshops):

- The situation in Nepal- i.e. the reality of life as it affects women
- What changes are necessary to deal with the problem? This should include what we know about successful measures to deal with them-because this could indicate what sorts of behaviour the constitution might require or encourage
- Does the existing constitution deal in any way with this problem? If the existing constitution deals with an issue, has it helped?
- If the existing constitution is inadequate: does it ignore the problem or is it a cause of the problem? If it has been inadequate, what could be done to improve it so the next new constitution is effective?
- What do other countries' constitutions do and could they be of any help in Nepal?
- Do international treaties deal with this problem and do they offer any suggestions? (Note: putting international norms at the end is deliberate: the women of Nepal do not need international law to tell them what their problems are. The value of international law is providing arguments against the recalcitrant and formulations that might (though only might) be suitable for use or adaptation in the constitution)
- Suggested provisions for Nepal-note: wherever possible, this should be phrased in terms of possibilities not prescriptions. Alternatives should be explained. These may be between different approaches to constitutions (short and simple as opposed to detailed) or substantive alternatives (this would be relevant to federalism, for example)
- Anticipating arguments against-what are opponents of any suggested provision in the constitution likely to say? Arguments against might be of various kinds, including (but by no means restricted to the following):
 - All these suggestions will make the constitution too long
 - No well-reputed constitution has these provisions
 - Your ideas will be too expensive to implement
 - This has been in many constitutions and has not worked
 - This is not suitable material for a constitution.

WHAT ARE THE CONCRETE ISSUES FOR DISCUSSION IN THE NEW CONSTITUTION FOR NEPAL?

There are many provisions that could be included in a new constitution to strengthen rights for women. But there are many aspects that would be of concern to women even if this is not apparent at first sight—for example, the choice of system of government or the functioning of federalism.

Women members ought not, it is suggested, concern themselves only with 'women's issues'. They will be expected to vote on all the issues and should make the attempt to understand the basics, and for some topics at least, more than the basics. Some people would argue that women would bring a particular perspective to all issues. Here, however, we try to identify those issues that are most particularly of interest to women, or on which there may be a 'women's angle', even if they are not obvious at first sight. There is also an issue of the 'philosophy' of the constitution: does it conceive of women as true holders of equal rights, or as persons in need of protection?

It is not suggested that the new constitution would necessarily mention every one of these topics specifically, or specially with reference to women. In fact, most of them could be mentioned, and many of them have been mentioned. But one approach is to ask of each of these issues, 'what does the constitution do that would help deal with this issue?' - whether what it does is to make a specific mention of the issues, a right or a duty, or just that there is provision to enhance the rule of law, or accountability that would offer some hope of dealing with the issue. Women could, and should, go further and ask: 'Is there more that the Constitution could do?'

☞ Equality

No modern constitution could avoid having clear statements about equality and absence of discrimination, almost certainly mentioning sex as a prohibited ground. And in theory, many of the items in this section would be adequately provided for by such a provision. But past experience has shown the inadequacies of such technically sufficient provisions. And there is also the issue of communicating with the people--both those for whose benefit the provisions are made and those who are required to abide by them. So women should discuss how far specific equality issues should be identified in the constitution. Candidates for such mention could include the following:

- problems of special groups of women, including women with disability, Badi women, etc
- marriage (equal right to choose partners, equality in marriage, relationship with children, equal rights in divorce, etc)
- rights to own and to inherit property

☞ **Affirmative action for women**

Again, previous constitutions have permitted this (see above). Is there an argument for being more specific about the types of affirmative action that is permitted? Or even for requiring rather than permitting affirmative action for disadvantaged groups? Quotas, special funding, incentives for entrepreneurship among women, gender awareness for others, and programmes to identify and remove barriers to women's participation are among possible special measures (not all would usually be called 'affirmative action'). The constitution should not be too detailed in its prescriptions.

☞ **Citizenship**

Citizenship is treated in the law and the constitution of Nepal more as a privilege than a right. Many individuals, and whole communities, are unable claim their citizenship or its physical manifestation: the citizenship certificate. Women are among the groups adversely affected, despite improvement in the Interim Constitution. Women might join with others to formulate provisions that treat citizenship as a right, and ensure that no bureaucratic requirements unreasonably stand in the way of achieving that right.

☞ **Economic social and cultural rights**

So far these rights-which may include the right to a reasonable standard of health, right to education, right to food (and water) have not been recognized truly as rights. They are of course important for all. Arguably, they have greater significance for women, at least in a society in which women cannot always make their own choices. Even if they are so recognized, there is a further question about how far specific issues related to women should be mentioned. Reproductive health is one topic mentioned by the Interim Constitution. There is good reason for mentioning this (though its precise meaning would not be clear to the ordinary reader or probably the ordinary lawyer). The objective is to open the way to freedom of reproductive choice for women-especially in relation to abortion and contraception. Is there any good reason for mentioning gender-specific issues in regard to any other right (such as access to water-where, for example, discrimination against Dalits in the use of water sources hits women especially hard)? Similarly, it is clear that there are special issues for women in education, food and housing. It does not necessarily follow that a constitution could usefully be explicit about these problems-for many problems, there are several solutions and a constitution should not be a straitjacket in the sense of restricting government policy choices.

☞ **Exploitation of women**

Constitutions have included provisions about exploitation in general terms and specifically about forced labour, including trafficking. The Interim Constitution includes a statement that custom must not be a basis for exploitation. Is there room for identification of specific issues affecting women-such as the *kamlari* system? Would it add anything to mention the position of widows? How about sex workers? Do such provisions add anything? More seriously, do they actually create problems? For example, there is room for differences of view about how to deal with prostitution. Criminalization is not necessarily the answer. If provisions about exploitation could be read as requiring a certain legal approach, this might in the long run be counter-productive. Sometimes in a constitution, 'less is more'.

☞ **Domestic and other violence against women**

Violence against women, in Nepal as in other countries, is a serious problem. The especially vulnerable position of Dalit women is an additional issue. The Interim Constitution says it should not happen. But it is

hard to see how this provision adds anything to the law. To devise some sort of mechanism that deals with this problem is difficult enough; to do so in constitutional terms is even harder. But it is certainly worth trying.

☞ **Work and economic position**

The general equality provisions and affirmative action possibilities are specifically relevant here. But there are issues that are particular to women, such as sexual harassment. It is as ineffective for a constitution to say that women must not be sexually harassed as to say there must not be domestic violence. But it might be worth mentioning an obligation on the part of government to take necessary steps to remove the barriers to women's equal employment --which in fact is implicit in the right to work provision of the International Covenant on Economic Social and Cultural Rights. The long-standing provision on equal pay for equal work might be changed to equal pay for work of equal value (this has, for example, been part of Canada's human rights law for 30 years); this is designed to deal even more clearly with the possibility that men and women do different work so it is not easy to identify 'equal work'. Some constitutions actually mention paid maternity leave as a right even if it is one to be progressively achieved, rather than being immediately attainable. Dismissal of women because they are pregnant might also be mentioned. Women also find it difficult to obtain finance for small businesses. Broader rights to property may help in this, but so also might some reference to micro-finance.

A particular issue that requires debate is whether the human rights provisions should apply 'horizontally' as well as 'vertically' that is, between individuals (and bodies) as well as between the individual and the state. Occasionally, the Interim Constitution does have this effect (for example on untouchability), but most rights are against the state. The South African constitution applies the rights horizontally--should that be the case in Nepal also?

The Interim Constitution says that women have the right to 'ancestral property'. But how does this work? Does it mean that if land owners die, their daughters share the property equally with sons? Suppose the relevant law gives land only to the eldest son; does this become 'eldest child'? How is this change to work? How do people know about the change made? Suppose the rule is a customary law rule that is applied without the intervention of public official? And does this rule mean that individuals must leave property equally to sons and daughters in their wills, or only if they do not make wills? At present, any impact of this provision would probably depend on the courts--and this depends on someone bringing a case. Nor is it clear how the courts would react to the questions raised here. If the courts instructed that a law be passed, it might be years before the law had any impact.

☞ **Representation and Participation**

Women have had the same rights to vote as men, but this has not led to anything like similar participation in elected bodies, nor presence in public appointed bodies or active participation in public life. The quota systems for the Constituent Assembly elections have produced a dramatic difference. There is a great deal of experience now in quota systems, in various parts of the world, and also research on what contributes to greater participation by women in electoral politics, especially. Even without quotas, some electoral systems tend to lead to the election of more women. There are ways to give incentives to political parties to have more women candidates. The Interim Constitution does have rather vague provisions about 'proportional inclusion' in state structures, but there is room for discussion as to how these provisions might work for the benefit of individual women. And should this be clarified--should state structures be defined or spelled out, and should they, for example, include the military?

How could a constitution make it easier for people, including especially women, to participate in public affairs other than as members or voters? Provisions about the right to information, and the regulation of NGOs, the openness of the legislature to the public could all be relevant. There would be no need to make specific reference to women in this context. What is needed are firmer guarantees-rather than requiring that there be new law. It took 17 years to introduce a Right to Information Act after the 1990 Constitution required one. Implementation mechanisms for the Constitution are extremely important and should be 'built-in'.

☞ **Women and officialdom**

Various groups in society, including women, find it hard to deal with public servants. The latter reflect society and its values, and if society undervalues women, or Dalits or persons with disability, so will the public service. And officials often have to deal with people and issues that their personal backgrounds and training do not equip them for, even if they are willing. Participation of women helps, but is not the only answer. Members of the public service should be trained to understand the needs of the communities and the groups whom they serve. How far could a constitution require or encourage these developments? It might be an aspect of the right to fair administration.

A specific example of the need for 'women-friendly' procedures is the possible Truth and Reconciliation Commission. There is a great need to ensure that such a body understands how women will respond to its work and what is necessary to make sure that they feel free to give evidence. This is a topic that might be included in a final constitution (as it is in the Interim Constitution).

☞ **Women in the justice system**

The justice system (including the police, the judiciary and the prisons) are a sub-sector of officialdom where women may encounter special problems. There is no mention of the rights of prisoners at all in the Interim Constitution (other than the rights against torture). Understanding the circumstances of women (How do the police react to rape allegations? How are the needs of women met in prison? What about women who have children?) is important in considering what a constitution might say about the position of women in relation to the administration of justice and the penal system.

☞ **Institutions for the protection and advancement of women**

The courts and the Human Rights Commission are important bodies for protecting rights. Nepal has a Women's Commission, though it is not a constitutional body. There is a considerable debate in many countries about the desirability of having various distinct human rights bodies (an ombudsman, a human rights commission, a women's commission, etc) as opposed to a single body. The recent trend has been towards having a reduced number of bodies with a wide range of responsibilities, but with specialist sections within them to ensure the necessary expertise. Women tend to be attached to the notion of a separate Women's Commission. But in South Africa, for example, experience of such a commission has not been very encouraging, and it might have been more effective to group all rights-related roles under one human rights commission.

☞ **Systems of government and women**

The structures of government, including the almost inevitable introduction of a federal system in Nepal, are central to the constitution. At first sight, it is not clear that there are any particular women's angles to these issues. This is despite the Interim Constitution statement about restructuring the state to end sex discrimination, among other things. It is completely unclear how federalism can end sex discrimination, though it may end exclusion of other sorts.

But there are in fact a number of issues about federalism in relation to women. An obvious one is the question of culture—would new federal units based on ethnic divisions embrace their cultural roots and traditions, and would this be beneficial to women? There are other questions (and a growing literature in federal countries): which level is the most effective for delivering services for women? If 'women's issues' are dealt with almost entirely at the sub-national level, what does this do to the notion of woman as equal citizens? Are women more likely to gain public office in sub-national units than in a national government?

Even the whole system of government may have a 'women dimension'. The broad choice is between a parliamentary system and a presidential one. The latter, involving direct election of the head of state and government by the people, tends to focus more on the individual. The styles of electoral campaigning are different, and the style of leadership is different. It is often suggested that the parliamentary system of government is more appropriate to a multi-ethnic society (because a parliamentary system of government is more collective, individual leaders may find it easier to rise through the party than by directly appealing to the voters). It can be argued similarly that the parliamentary system is more accommodating to women—that women would find the style of government more comfortable, and that they would have a better chance of getting to the top in such a system. There is some evidence of this in that the first elected women heads of government were in parliamentary systems: even if we ignore the dynastic examples like India and Sri Lanka and Bangladesh, there were women prime ministers in Israel, the UK and New Zealand, before there were directly elected executive heads of government (as there now are in Chile, Argentina (another dynasty) and Liberia, among others). The Philippines is another country where the first woman head of government rode to power in the wake of her husband's death. Women non-executive heads of state may also be more possible in parliamentary systems, such as in India—though Ireland has had two directly elected non-executive women heads, while Iceland had the first directly elected woman head of state in the world. These examples suggest some evidence for the hypothesis, though not very strong. The best-known example of the presidential system, the system in the United States of America, is certainly not a great example of the empowerment of women at the level of national politics: for the first time, there may (or may not) be a presidential candidate who is a woman. And only three members of the Bush Cabinet are women—compare that figure with the figure for the UK (now five, until recently, eight) and for Canada (eight). The overriding factor is almost certainly general attitudes in society to the role of women, but structural factors may contribute too.

WHAT IS THE RELEVANCE OF FOREIGN EXPERIENCE?

Foreign experience can be useful and a 'trade' in constitutional provisions is common. It should not be allowed to dictate what Nepal does, of course.

Most of the constitutions developed in recent years have had provisions specific to women's issues, as a result of the vigorous efforts of women mentioned earlier. For this reason, it will be of interest to Nepali women to know what other countries have done. This does not mean that one is suggesting that Nepal should simply emulate the provisions of other constitutions. But it can be useful to know what has been included, and also how far these provisions have proven useful. Also, using the language of other constitutions means that lawyers and courts and others in Nepal can refer to the cases in the courts of those other countries that are interpreting the same language. Again, if a national constitution draws inspiration from international human right treaties, there is guidance to be obtained from the bodies that monitor those treaties about what the language means and how it can be used. These are in fact some of the benefits from international law.

Similarly, the experience of experts and activists from other countries may be useful—but in no way conclusive as to what is appropriate for Nepal. An advisory group of women experts might, for example, be used in various ways:

- To supply examples of constitutional and legal provisions from their own countries as well as court cases that have used those provisions
- To write background papers that can fall into the category of further reading, or papers that can be used as sources of information for simple material designed for Constituent Assembly members
- For rapid response: to emails, etc that ask for quick suggestions on a topic that is about to be discussed by the Constituent Assembly.

