Rules of Procedure for a Constituent Assembly
(Focusing on the situation of Nepal[1])

The adoption of rules can be a time consuming business. In Bolivia, where the Constituent Assembly is currently sitting, it took 5 months to decide finally on the rules of procedure. In East Timor where initially the UN had given the country 90 days to adopt a constitution, the first 2-3 weeks were taken up by the adoption of rules of procedure.[2] There was a feeling there that perhaps the members of the Constituent Assembly found this a manageable topic. It may even have served a useful purpose in inducting the members into the whole process of rule making. But much could be done to prepare the way for the adoption of these rules. Unless the process of adopting such rules is to be either, on the one hand, rather automatic and unreflective or, on the other, excessively time-consuming, it may be best for some thought to be given to this question in advance of the convening of the Constituent Assembly.

The potential importance of the rules is great; a leading scholar observed: "procedure affects the transformation, expression and aggregation of preferences in ways that can be crucial for the final outcome."[3]

Imagining the Constituent Assembly

Many members of Nepalese society have, various surveys tell us, very little idea what a constituent assembly means, even if they have heard of it.[4] Presumably political leaders have a clearer idea, but their ideas may not all be the same. We begin, therefore, by trying to envisage how the body will operate, because this will affect profoundly what procedural rules are appropriate. One factor is the size of the body. This is a matter of some concern. Under the Interim Constitution as it is there will be 601 members. This is large for such a body. Two hundred and forty of those people will be elected from single member geographical constituencies, and 335 on party lists, while there will be 26 nominated by the Council of Ministers. The criterion for the last, in theory at least, is that they should be "distinguished personalities who have made significant contributions to national life" or from communities that have not otherwise obtained seats in the elections been elected.

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 able to make an input into it. Parliament, with its rather arcane

[1] This a shortened version of a paper that is almost complete for International IDEA, which will be accompanied by draft Rules. For a final version for the *Handbook* it will be further decontextualised. But a lot of the discussion of the specifics of the Nepali Constitution, for example, although not in its details relevant to other countries, reflect a process that must be undergone in any country. The final paper therefore will be couched in terms of the necessity to take account of the constitutional requirements in the particular country, if they exist. A similar point could be made with respect to existing law and the general legal tradition. Regrettably there is something of a tendency on the part of some international advisers to overlook such contextual factors and behave as though a country is a blank constitutional slate.

[2] By way of contrast, in Bangladesh in 1972 the Constituent Assembly adopted its rules of procedure in its first two day plenary session (see Abul Fazl Huq, "Constitution-Making in Bangladesh" Pacific Affairs, Vol. 46, No. 1. (Spring, 1973), pp. 59-76, at p. 60). This was, presumably, because the assembly based those rules on existing parliamentary rules.

[3] Jon Elster " Arguing and Bargaining in Two Constituent Assemblies" 2(2) *J Constitutional Law* (2000) p 367

[4] A recent survey sponsored by International IDEA found that 50.7% of respondents had heard of the Constituent Assembly while 31.7% had not heard of it.

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. This body 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 nature of the Constituent Assembly is a manifestation of the sovereignty of the people; and assembly of the nation; the nature of parliament is as a representative body

- When making a law a Parliament debates proposal 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 for decision in the Constituent Assembly include the nature of representative democracy in the country and the role of political parties; in other words these are contested 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 or qualified to discuss

Parties or people?[5]

Conversations with at least some political leaders indicate that their vision of the Constituent Assembly is of something rather like the Legislature-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. They assume that the scope of discussion in the Constituent Assembly will not be extensive, because many issues will not really be controversial. Indeed, at one time politicians appeared to assume that many issues would have been decided before the Constituent Assembly met, leaving only a few issues to be discussed in detail. Much of the decision making would be, as it has been on issues like the Interim Constitution, and the CPA, over the last year or so, by a process of deal making between party leaders – at least leaders of a small number of key parties (which are assumed to be destined to share most of the seats in the Constituent Assembly). On this view, the Constituent Assembly need not last more than about 6 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 and a mirror of 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

[5] The likely make-up of the Constituent Assembly will be a factor in devising the rules. In this paper therefore some indication is retained of how the Nepali body will be elected.

system, including the parties and parliament, that the Constituent Assembly be "inclusive" and that its membership be "proportionate" – words that the IC uses freely. Some have even argued that there must be at least one person from each ethnic/caste group in the Constituent Assembly – a demand that seems to reflect a "gathering of the nation" vision. The Abbé Siéyes, prominent member of the French Constituent Assembly and a leading intellectual of his day, articulated the vision of the Constituent Assembly as a forum for developing a national view when he said, "It is not a question of a democratic election, but of proposing, listening, concerting, changing one's opinion, in order to form in common a common will".[6]

But hardly anyone has articulated either conception fully, and neither vision is destined to be reflected in the reality. What is clear is that all members (subject to the unlikely possibility that there will be independent members elected in the geographical constituencies) will come through parties. Ethnic and other groups that anticipate that their views will be forcefully put forward by "their" members may find that that those members are really the party's members. Already activists have begun to realise that this may be the case.

On the other hand, any parties' expectations that the members will all loyally toe the party line may be disappointed. In order to meet their "inclusion" obligations under the Interim Constitution and the Election Act, and to field more than twice as many candidates as they ever have before,[7] parties will have to put forward 'non-traditional' candidates. Some of these candidates will perhaps not have fixed party loyalties, while others may be lured from existing parties. Some may have no future ambitions but find the idea of serving in a Constituent Assembly more attractive than being a regular MP. Possibly some of the smaller, even new, parties[8] may attract more votes than in the past, reflecting either a generally jaundiced view of parties, or the appeal of regionally based groups to newly awakened sub-nationalisms.[9] Parties may be able to discipline a few wayward members, but if large numbers begin to caucus across party lines, on the basis of sex, religion, caste, region or ethnicity, the parties may lose their grip.[10] This factor, especially if compounded by a number of small parties, may produce a dynamic wholly different from that now envisaged by party leaders.[11]

This is not to suggest that it would be desirable to have no party positions or party cohesion in the Constituent Assembly. Parties are likely to give a structure to the proceedings. Dr Ambedkar, Chair of the Drafting Committee of the Indian Constituent Assembly observed,

> The task of the Constituent Assembly would have been a very difficult one if this Constituent Assembly had been merely a motley crowd, a tessellated pavement without cement, a black-stone here and a white-stone there in which each members or each group was a law unto itself.…The possibility of

[6] Quoted in Jon Elster, "Forces and Mechanisms in the Constitution-Making Process" 45 Duke LJ (1995-6) p. 164.

[7] The House of Representatives had 205 members, the Constituent Assembly will have575 elected ones + 26 nominated.

[8] It is reported that 74 parties have been registered for the elections, but only 37 submitted lists for the second, PR, election by the initial deadline of February 20.

[9] Strictly speaking sectoral parties are not permitted: no party may contest if it excludes anyone from membership on the basis of sex, ethnicity, caste etc. And all must have "inclusive" lists for the PR race in the sense that the lists must include certain percentages of candidates from certain groups, as well as 50% women. But at least the Madhesi Mukti Morcha, which has been registered, clearly has a Madhesi agenda, and others with leanings towards certain groups or regions may be among the 61.

[10] Yash Ghai reports that in the Kenyan National Constitutional Conference ethnicity proved to be a dominant factor, overriding party and often even gender. In that body, however, not much more than one-third of the members were there strictly by virtue of party.

[11] It would be wrong to imply that party leaders are unaware of these factors. Indeed, these uncertainties may well play a major part in what seems a lack of enthusiasm in most political quarters for elections at all.

> chaos was reduced to nil by the existence of the Congress Party inside the Assembly which brought into its proceedings a sense of order and discipline.[12]

While this may overstate the risks of a "no-party" body, because inevitably, it is suggested, members would form groups to press for their interests, there is some truth in it. The support of the parties for the ultimate product is also very important. They will be key institutions to operate the new constitution, and if they feel it was forced on them their commitment to it is likely to be weak. For this reason it would not be desirable for the Constituent Assembly to turn into a "parties against the rest" affair.[13] Hopefully the parties will not respond to different views within their ranks by disciplinary measures but by seeking consensus and recognising the need to deal with sectoral issues sympathetically and constructively.

Tasks of the Constituent Assembly

The main task of the Constituent Assembly is of course to produce a constitution. One might simplify it to say this involves two tasks: to discuss, and to decide. However, the task of making a new constitution is different in a number of ways from passing ordinary laws, of which process "discuss, and to decide" might be an adequate description.

Firstly, ordinary laws are passed by a process that involves a fully-fledged legislative proposal being placed before the legislature, complete with rationale from the government or other body sponsoring the law. In many constitution-making processes the debate has been initiated by the introduction of a draft constitution prepared before the Constituent Assembly sat. In some countries this draft has been the work of a constitution commission. In others it has been the work of a dominant party.[14] Countries that have had such commissions have included Papua New Guinea (1975), Fiji Islands (1997), Uganda, Eritrea, Kenya (2000-4)[15], Nigeria (1988). At the time of writing it seems unlikely that there will be some entire draft ready to form the basis of the Constituent Assembly's deliberations.[16] A draft to form that basis must somehow be prepared.

Secondly, it should be recalled that the Interim Constitution specifies that the "people of Nepal" are to make their own constitution "through the Constituent Assembly". This suggests that there should be provision for public input to a greater extent than is customary in law making. Further, there is a good deal of literature on the desirability of the public being involved in the process of making a constitution.[17] But in order for such participation to be meaningful, there must be some sort of outreach to the public, by way of education and by

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[12] *Constituent Assembly Debates* XI 974, quoted by Shibanikinkar Chaube, *Constituent Assembly of India: Springboard of Revolution* (New Delhi: Manohar, 2000) at p. 97 (note: these debates are available on the internet: http://164.100.24.209/newls/constituent/debates.html

[13] This is rather what happened in the Kenyan National Constitutional Conference (NCC). It was largely the fault of the parties themselves who failed to take the NCC or its non-MP members sufficiently seriously and thus allowed a confrontational situation to develop, to which they responded by staying away to an even greater extent. But the MPs had the whip hand in the sense that they also, without the other NCC members, comprised the legislature and, by a procedure of doubtful legality, and even more doubtful political morality, amended the law to subvert an NCC-agreed draft constitution. For an account see Ghai and Cottrell "Constitution Making and Democratization in Kenya (2000-2005)" 14(1) *Democratization* pp. 1-25 (2007).

[14] In East Timor the largest party had its own draft, much of the work on which had been done during the years of exile.

[15] See Cottrell and Ghai above n 13.

[16] At some stages there was talk of the possibility of a commission to prepare for the CA. A Commission for Public Awareness figured in an early draft of the IC; some prominent political figures were surprised to find that it was not in the IC as enacted. And there has been (in early December) some mention of a committee of some sort to prepare for the CA.

[17] E.g. Vivien Hart, "Democratic Constitution Making" (US Institute of Peace) http://www.usip.org/pubs/specialreports/sr107.pdf

way of seeking, receiving and processing ideas and suggestions for the new constitution. Constitution commissions, such as mentioned in the previous paragraph, will usually invite the views of the public, and then it will prepare a draft constitution on the basis of those views, as well as other input, from political parties, technicians etc. Sometimes such commissions have the responsibility to carry out civic education before the stage of public submissions. In Nepal no government body has been involved and though there has been a good deal of civic education its coverage is unclear. And that process has not generally involved seeking the input of the public; most organisations have a rather "top-down" approach and see themselves as educating the public and bringing awareness.

Many of the members will be new to this type of work. There will be some necessity for educating the members of the Constituent Assembly itself about constitution and constitution making processes.

So we must add to the "discuss and decide" tasks four more:

- Developing a draft for discussion
- Educating the members of the Constituent Assembly about the task before them
- Ensuring that the public understand what is happening with the process, and are able to make their input
- Collecting, processing and using public input.

Finally, we should add a task, or at least a function, that goes beyond the production of the new document. That is the function of fostering constitutionalism. This is closely linked to the notions of legitimacy. We can define constitutionalism as "the societal acceptance of the rule of law under the constitution".[18] Not just the actual constitution, and the legitimacy it may enjoy, is connected to constitutionalism, but also the process of making the constitution may itself act as an exemplar of constitutional and rule of law values: fair hearings, reasoned arguments, respect for human dignity.

Other processes

There are almost as many different ways of going about making a constitution as there are countries that have made them, because no process has exactly resembled any other. But we can identify a limited number of variables. The first is whether the process has involved a constitution commission or not; and a second major difference is whether there is a constituent assembly or not. By "constitution commission" is meant a body, probably with some pretensions to be politically independent, charged with the responsibility of informing the public about the constitution making process, collecting public views, and preparing a draft constitution for discussion at the next stage. The use of such bodies might be characterised as the Africa/Pacific model (also used in Afghanistan): constitution commissions were used in Papua New Guinea (1975), Fiji (1997), Eritrea (1997), Uganda (1995), Kenya (2000-4), Nigeria, Bougainville, and Afghanistan (2003).

A draft having been prepared, to what body does it go for further consideration and enactment? Sometimes it has gone to Parliament sitting as such (Fiji) or sitting as a constituent assembly (PNG). Sometimes it has gone to a body constituted as a constituent assembly and not sitting also as parliament.

[18] The definition is that of Richard Rosen, "Constitutional Process, Constitutionalism and the Eritrean Experience" 24 N.C. J. Int'l L. & Comm. Reg. (1998-1999) 263 at p. 276.

In some countries the entire process has been essentially under the umbrella of a constituent assembly. This is the Latin American and South Asian model. In the South Asian model the CA forms a drafting committee, and probably other committees as well (India, Bangladesh); in Sri Lanka (1971) the draft was prepared by the Minister of Constitutional Affairs and a committee. In the South Asian version the preparation of a draft does not follow upon significant public consultation, thought this may follow. At least in Bolivia (2006-7) committees consulted quite widely before preparing their elements of the final draft. This is also largely the model followed in South Africa and East Timor, and Iraq. Within this broad model there are variants: notably, is this a body that is really a parliament which also performs the functions of parliament (South Africa), or a specially constituted body designed as a CA which also performs as parliament (the Nepal model) or a CA that is not parliament? In some countries there is a separate body sitting as parliament (e.g. Bolivia) and in some there is no other body – in effect no parliament (e.g. East Timor).

It seems that in Nepal there has been an assumption in many quarters that the model will be the South Asian one. Though at one point it seemed that a constitution commission might be formed, this disappeared from the IC. True there is a promise of the High Level Commission on State Restructuring, but this has unclear scope and purpose.[19] Informal discussion indicates that there is an assumption that the CA will have a drafting committee, and it seems likely that the Indian or possibly the Bangladesh model is the one that dominates in the mind of those who have some idea of what a CA is about and how it might operate. The difference between India and Bangladesh is essentially that in the former the Drafting Committee produced a draft that was then discussed by the full CA for over a year, while in Bangladesh the plenary CA discussed the draft for only "10 sittings in 8 working days and about 32 hours".[20] Much as some Nepali political leaders might wish otherwise, India is more likely to be relevant than Bangladesh: in the latter there was almost complete dominance by the Awami league, "the Constituent Assembly was virtually a one-party house".[21]

What goes on behind the scenes?

A paper about the formal procedure of the Constituent Assembly cannot say much about the sort of bargaining that will inevitably be going on behind the scenes. It would be idle to try to pretend this will not occur. According to Granville Austin, writing about the Indian Constituent Assembly, "The Congress Party Assembly was the unofficial, private forum that debated every provision of the Constitution, and in most cases decided its fate before it reached the floor of the House".[22] And "Nehru, Patel, Prasad and Azad…constituted an oligarchy within the [Constituent] Assembly"[23], though debates within the party Assembly were vigorous and the oligarchy did not always dominate there.[24] There is surely no doubt that Constituent Assembly members understood exactly what was happening. The nature of the times and the enormous prestige of these few people probably meant that this situation was not seriously resented. Austin quotes a Constituent Assembly member to the effect that the government was in "the hands of those who (were) utterly incapable of doing any wrong to the people".[25]

[19] And even now, 6 weeks, supposedly, before the CA elections, it has not been formed.
[20] See Huq above fn 1 at p. 68.
[21] Ibid p. 69.
[22] P. 22.
[23] P. 21
[24] P. 23.
[25] P. 21-2 quoting Brajeshwar Prasad at Constituent AssemblyD VII, 18, 760-1.

In South Africa, vigorous negotiations were going on until almost the last minute. At one point a group of party negotiators were taken away for a 2-day retreat to iron out many of the remaining issues.[26] But meetings continued, with Nelson Mandela playing a part as groups came in succession to his house.[27] In Kenya a consensus building committee was formed under the chairmanship of a non-party member of the CA (a bishop). It did good work but in the end politicians thwarted its work. Its existence was open and reported in the press. By way of contrast, "Night meetings" became reviled as being conclaves of ethnic politicians conspiring to undermine the Constituent Assembly.[28]

In Nepal there is little doubt that such horse-trading will go on. It is even built into the system of government under the IC – though it is called "consensus". It is not easy to anticipate what reactions will be to this. People constantly say "The parties must decide…." about many things. But possibly members who are elected to the CA with a sense that they are there to represent the voices of the hitherto excluded may be less ready to allow the parties to take the initiative. And without any disrespect, it is unlikely that any current Nepali leader is held in the sort of respect "the oligarchy" enjoyed in 1947 India, and no party occupies the place that Congress did then, or the African National Congress in 1994 South Africa. Certainly it is easy for resentment to build up if there is a feeling that deals are being done to subvert the official – the people's - process. However, there is explicit provision in the IC for party leaders to meet if, during the final stages, consensus cannot be reached.[29] It may not be wise to assume in this way that party leaders exclusively will be the right people to achieve this consensus. Flexibility may be essential, and this may require broader membership of what may be necessary deadlock breaking mechanisms.

Nepali rhetorical style

Elster has suggested that the main forms of speech at a Constituent Assembly are arguing and bargaining; He has also conceded that there is a third type: "rhetorical statements aiming at persuasion".[30] Observation at many meetings and seminars and "talk programmes" suggests that the last may be closest to the preferred form of speech in Nepali discourse about matters political. It will be important that rules of procedure facilitate the necessary engagement with people, issues and details, while not leaving CA members with a sense that there had not been enough time to have what in Nepal is considered an adequate discussion.

Physical setting

The Legislature-Parliament sits in the faintly Moorish splendour of one of the halls of Singha Durbar.[31] It seems improbable that this space can accommodate 600 people, and certainly there would be no space for anyone else, so the body would be even more shut off from the public. It is not known what thought has been given to the physical setting, still less of what the impact of this might be on the dynamics of the body.

Even if the space would accommodate all the members of the Constituent Assembly, it is suggested that there would be reason perhaps not to use it. When Sri Lanka's republican constitution was being prepared, the Constituent Assembly was summoned not to the regular parliament building even though the parliament members constituted the Constituent

[26] Hassan Ebrahim, *Soul of a Nation* p. 196
[27] P. 202.
[28] Personal information, and press accounts of the time.
[29] Article 70(3).
[30] P. 371
[31] The building, one of those built by the Ranas in emulation of European grandeur, is reminiscent of a cathedral or a Granada mosque, with a touch of the ballroom.

Assembly, but to another hall, to make it clear that this was not a sitting of parliament as such.[32] For Sri Lanka this had a particular significance, namely to emphasise that this was to be its first autochthonous constitution, the first constitution having been one drawn up by Sir Ivor Jennings[33] and enacted as a colonial Order in Council; this issue does not arise in Nepal in the same way, at least. However, to have the Constituent Assembly sit in a different place from that traditionally associated with Parliament would help to mark it out as a special event.

Though this topic goes beyond the reasonable scope of a paper on rules of procedure, the importance of physical setting should not be overlooked; the way the rules will operate will depend on the atmosphere in the hall. There are two main arrangements for legislatures: the face-to-face arrangement used in the two House in the UK Parliament, and the horse-shoe arrangement used in the US Congress (and the Parliament in New Zealand, among others). The latter is believed to encourage a less confrontational style of debate, and also to be more adaptable to coalition politics. In Nepal at present, space has necessitated a shift from the Westminster style to something more like a church: members in rows all facing in the same direction; this was also the East Timor style. The National Constitutional Conference in Kenya sat in a circular cultural centre designed for those on banked seating to watch and hear what was happening in the middle. Its acoustic and visual features made it much less suitable for a scenario in which the chair, sitting on one 'side' of the seating, was supposed to be able to see and hear people sitting elsewhere on that seating.

Issues of where committees will sit are also relevant. Will this be in rooms designed to be committee rooms? Will there be enough room for all committee members? What about space for members of the public? Some of the committee rooms of the East Timor CA had virtually no space for anyone other than the members and a handful of others. In Kenya, most committees sat in tents – which meant that even if the committee wanted to exclude non-members these could eavesdrop without difficulty.

What should the rules seek to achieve?

The purposes of any set of procedural rules for a deliberative body are essentially the same, though the details will depend on the nature of the body, and the nature of the material which it is deliberating. There are principal and subsidiary objectives. The principal one, it is suggested is:

- The best possible 'product' of the Constituent Assembly's deliberations, namely the constitution.

To this should be added an objective that is as important because without it the "best constitution in the world"[34] would probably fail:

- An enhanced sense of national identity and purpose.

Other objectives are mostly relevant to achieving these main objectives:

- Completion of the work of the Constituent Assembly in the most appropriate time frame
- Full consideration of the issues

[32] J A L Cooray, *Constitutional and Administrative Law of Sri Lanka* (Colombo: Hansa?? Pub. Ltd, 1973) p. 77.
[33] Who was consultant on the 1959 Constitution of Nepal
[34] People often described the 1990 Constitution in these terms; now this accolade often goes to that of South Africa.

- Full participation in the making of the constitution
- A sense of national "ownership" of the product[35]
- Harmonious proceedings
- Keeping proper record of deliberations

The best product

In the context of a Constituent Assembly, the best outcome means a new constitution which is most appropriate to the circumstances and needs of the country, and which meets the necessary standards of technical quality (well drafted, clear, properly organised etc), and which is capable of being implemented. This one might say is the "technically best" product. Even more basically, there must actually be a product; that may seem obvious, but there have been many constitution making processes which have not actually led to a new constitution.[36]

There is another aspect to the "best" product: its legitimacy. However technically good a constitution is it will not be the best for a country if it does not command support. That support must come from the political parties and other groups and bodies actively involved in the negotiation and deliberation process; this is especially so in a country like Nepal where the new constitution is the culmination of a peace process. If the new constitution does not have such support, peace may not last. Also important is the support of the people – who must regard the constitution as legitimate, for without that the constitution will not command obedience, or certainly not willing obedience.

Time frame

This objective is partly independent and partly relevant to achieving other objectives. Too hurried a process is less likely to achieve the technical quality aspect of the primary objective. Too long drawn-out it may lose support – in other words defeat the legitimacy aspect of the primary objective. Too long a process is likely to be expensive, and while the Constituent Assembly is deliberating many possible government initiatives may be 'on hold'.

Full deliberation

The rules must ensure that the matter to be deliberated receives as full consideration as necessary. This is of course necessary to achieve the technical aspect of the primary objective: all aspects must receive the necessary consideration, in the light of all relevant facts. A constitution is hard to change, and mistakes cannot be easily rectified, and may lead to expensive litigation, or even to various sorts of stalemate. Intuition also suggests that full deliberation is also relevant to the legitimacy aspect: all demands must be dealt with, and all groups must feel that they have had a chance to be heard.

Participation and its paradoxes

Participation is an aspect of full deliberation – having a representative Constituent Assembly is somewhat meaningless if only a small proportion of the members actually have any impact

[35] This is one of the faintly objectionable, trendy "international aid-speak" words, like stakeholders and empowerment. But if it were possible to achieve a national sense of "this is ours; we made it" arguably something important would have happened. But consider the case of Uganda: those who participated felt little more supportive of the constitution than those who did not. Perhaps, however, the general perception that there was a lot of participation helped. See Devra Coren, "Public Participation and Support for the Constitution in Uganda".

[36] E.g. Kenya 2000-4, Eritrea 1993-7.

on the product. That impact takes place in two main ways – by participation in the discussion, and by voting. Neither alone is enough.[37] If the product does not involve the appropriate input of the membership of the Constituent Assembly, it will presumably risk not satisfying the product quality objective. And the proceedings will not satisfy the legitimacy objective – because the people, or certain sections of them, will feel that their representatives have not been able to represent them properly. The anticipation of at least some party leaders that not many members will need to speak in the plenary sessions suggests a concept of the Constituent Assembly that may not satisfy the requirements for legitimacy. The number of members of the Indian Constituent Assembly fluctuated (because of Partition (when it went down to 229) and because of the introduction of the princely states (when it went up to, but it was never more than 300, of whom 250 spoke in the plenary sessions and 200 did so frequently).[38]

But in modern constitution making, and even law making, legitimacy requires participation not just of the members of the deliberative body, but to some extent of the public more widely. In making a constitution – which, while it is a technical document, is also an intensely political one – such wider input is also relevant to the quality of the ultimate product, for more ideas are likely to lead to better solutions, and more channels for public input will lead to more issues being debated and hopefully resolved.

Most countries have found a great enthusiasm on the part of the people to participate in constitution making once they have some understanding of what was involved. Even in Iraq where circumstances were, to say the least unfavourable, the people showed great interest in contributing. Bereket Selassie says of Eritrea, "The most heartening feature of the Eritrean experience in constitution-making is the extent and quality of the public's involvement".[39]

It may be an over-simplification, however, to imply that full deliberation in the sense of popular participation and full technical consideration necessarily work in the same direction. In fact the pressures placed upon the process by popular demands may lead to a product that is in some technical, lawyer's sense, worse. This is especially so if the decision making is dominated by the popular voice. Such a scenario tends to produce more prolix documents, perhaps even some contradictions. Ideally the procedural rules would ensure that maximum realistic popular involvement is combined with highly skilled technical skills over the final form. But that is less easily achieved than conceived. Technicians must not be allowed to override the popular will under the guise of the best drafting. Nor must popular demands be allowed to lead to violations of international human rights obligations. And the concerns of the constitution making moment must not be permitted to hamstring future democratic governments. Bereket Selassie, making a similar point, quoted Abbé Siéyés: if a constitution is not "neutral' it may be associated with "the transient fortunes of a particular political party

[37] When speaking to groups, especially Dalits and women, who have put great store by "inclusion" in the CA, the author has frequently stressed this. Inexperienced, intimidated and subservient members may make little contribution to discussion. Many groups will find they have not enough members, even if they voted together across party lines, to carry or defeat a vote. For the first issue the only solutions are to choose candidates carefully, to use the vote carefully, and to support, in all sorts of ways, members of the CA to enable them to contribute fully to discussion. For the second the solution must be willingness to work with other groups or parties for mutual support in voting.

[38] Austin p. 316. In Bangladesh in 1972 by contrast only 48 members out of the full 404-strong Assembly were able to speak in the final debate, though 175 Awami League members had put down their name to do so. See Abul Fazl Huq above fn 2at p. 68.

[39] Above fn 40 at p. 29. In Bangladesh in 1972 only 98 memoranda were received. It has been suggested that this was because there was little disagreement on the form of the constitution, and also that the time allowed (3 weeks) was too short, see Abul Fazl Huq above fn.2 at p. 61.

or pressure group, and rise and fall with them".[40] And care must be taken to ensure that unworkable or incomprehensible provisions are not adopted.[41]

Nor is it entirely clear how far participation is linked to societal commitment and constitutionalism. Two apparently successful modern constitutions had little in the way of participation, though they did have rather special circumstances attending their birth. These are the constitutions of Germany and Japan. Both have survived well, and do not seem to lack legitimacy. On the other hand, Uganda's process was participatory, but the constitution got little support when Museveni decided to ask the people for an amendment to give himself a third term. And though Bereket Selassie may have believed that "people will feel that in the future, if anybody tampers with this thing that they own, then they will take up arms if necessary"[42] he was surely destined to be sorely disappointed for though "his" constitution did not come into force for some time[43] and has been systematically flouted, there has been no popular movement in its support.

Harmony

Especially where constitution making is connected to a peace process, a harmonious process is important. But constitution making can be a very contentious matter, and there is a serious risk that it will divide rather than unite the nation. It is very often the aspiration of designers of Constituent Assemblies that decision making should be by consensus. But inevitably there will be very contentious issues to be decided. Harmony may not always be easy to reconcile with the full consideration objective. A heavy burden rests upon the chair of the Constituent Assembly, but the rules of procedure can also help to maintain a peaceful and constructive atmosphere – which is more likely to lead to a product with broad support.

A proper record of deliberations

This is of relevance in three ways: to know what decisions have actually been made, in order to assist in interpretation of the final document, and for posterity.

It is extremely important to know exactly what decisions have actually been made (which may not always be easy to achieve in a large body, discussing an extremely complex document full of overlapping and interlinking issues). It is especially important if decisions are being made in different committees – but will eventually have to be harmonised into a whole.

Second it will be important to keep a record of why decisions were made in order to assist in interpretation of the final document. In India reference to the views of the 'Founding Fathers"

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[40] Bereket Habte Selassie, *The Making of the Eritrean Constitution: The Dialectic of Process and Substance* (Trenton NJ and Asmara: The Red Sea Press Inc., 2003) at p. 67 quoting Russell F Moore, *Modern Constitutions* (nd given) p. 12.

[41] An example of contradictory provisions that are impossible to apply is found in the Fiji Islands Constitution, though they result from changes made in Parliament rather than from popular pressures. The Leader of the Opposition has the right to nominate 8 members of the Senate (s. 64(2)) but must put forward the names proposed by the leaders of parties entitled to be in Cabinet (every party with more than 10% of the seats in the House of Representatives). Thus the nominees of the Leader of the Opposition must be representing parties which are included in government (though he/she is not). The original notion that some Senate members would represent a non-government view is completely lost. What possibly happened is that the drafter had prepared a draft based on the recommendations of the Constitution Commission– which had no power sharing in Cabinet – while Parliament was still debating the Report, and failed to capture the significance of some Parliament decisions inconsistent with those recommendations. This led to litigation very soon after the election - *In re the Constitution, Reference by HE the President* [2002] FJSC 1.

[42] Rosen above fn 18 at p. 302.

[43] See Professor Bereket's rather oblique reference above fn 40 at pp. 91-2.

are very commonly made in the literature and when arguing cases.[44] Although using the record of proceedings of a legislative body as a resource in interpreting a statute is to be approached with some caution, in the case of a Constitution this may help in doing what the Supreme Court of Nepal has identified as important: "its spirit should be given greater consideration than its letter".[45] Nepali courts will accept some reference to legislative intent, in order to enable lawyers to make use of the record for this purpose, it must be public.[46] It is obviously not right to permit a court to decide that a provision in a law as a certain meaning if the material on which that determination is made is the preserve of a chosen few.[47]

How should such a record be kept? It is suggested that a "belt and braces" approach should be used – namely that shorthand writers should be used, and also that an audio recording be kept. The former should be transcribed promptly and cross checked with the audio recoding in case of lacunae. But it is also extremely important, especially in committees which may lack the formality of the plenary, for the chairs to insist that a note is formally made of decisions, and that the chair and note-taker for the committee check daily that there is such a record.

In fact there is room for the use of information technology for the secretariat to keep a record of the process. If in each committee there was a person with the responsibility to enter decisions as they are made, this could be kept under review by the Steering, or similar, Committee, so that it was clear as soon as possible in what direction discussions were tending, and whether there was any risk of different committees making incompatible decisions. Drafters could be working on a first technical draft.

Finally, a record should be kept for posterity, most appropriately in the national archive.[48] James Madison wrote, explaining why he kept a detailed record of the proceedings of the Philadelphia Convention, that it would satisfy "future curiosity" as

> an authentic exhibition of the objects, the opinions & the reasonings from which the new System of Govt. was to receive its peculiar structure & organization. Nor was I unaware of the value of such a contribution for the History of a Constitution on which would be staked the happiness of a young people.[49]

In India and Kenya public submissions received were deposited in the respective National Archives. Apparently in relation to the making of the Nepal 1990 Constitution "All the important documents and the record of discussion were kept safely in the national archives and are available for research and study."[50]

Clarity of Rules

At the risk of stressing the obvious, it is desirable that no time and energy is wasted debating the meaning of the rules. Unfortunately the IC itself is not a model of drafting clarity. It does not seem to be a Nepali tradition to include significant definition sections in legislation (in

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[44] For example a case on the right of citizens to fly the flag: *UOI v Naveen Jindal* Civil Appeal No. 2920 of 1996.

[45] *Rina Bajracharya v. HM Government Secretariat of the Council of Ministers* Writ 2812 of 2854 (BS) translated and published in Timalsena ed., *Some Landmark Decisions of the Supreme Court of Nepal* (Kathmandu: Supreme Court of Nepal, 2003) 175, 180.

[46] At present in Nepal we understand that a record is kept of legislative debates but is not published.

[47] In the common law system it as accepted that only published documents can be used in this way.

[48] The Draft Truth and Reconciliation Commission Bill says that records of the work of the Commission must be kept in the Ministry of Peace and Reconstruction. This would seem less appropriate than the National Archives.

[49] "Preface to Debates in the Convention of 1787" in Max Farrand ed., *The Records of the Federal Convention of* 1787 (New Haven, Conn: Yale University Press, 1911, 193) Vol 1 p. 10, quoted in Berns above at p. 135

[50] Paper by Surya Nath Upadhyaya on "Making of the 1990 Constitution" at Conference on Constitution Making in Nepal, organised by CASU, March 2007 (see published conference report).

the IC the words that are defined seem obvious, while there are others that might have benefited from being defined).[51] In the East Timor CA a good deal of time was wasted discussing what was meant by "simple majority", an issue that could have been prevented by including a definition in the rules.[52]

Political Parties and the Constituent Assembly

Though parties must be important, as indicated earlier, there are good reasons why they should not dominate. The Constitution is not an ordinary piece of legislation on which parties may disagree along ideological lines. It is a framework not just for parties but for the nation. There are many issues to be decided and the disagreements may cut across party lines. Women may have a view that transcends party, as may ethnic groups, religious groups etc. Some issues are matters of conscience rather than of party. It is possible that party discipline may spontaneously weaken under claims of ethnicity etc., as occurred in Kenya.

Full participation of the members of the Constituent Assembly will be enhanced if party discipline is not tight. Full input from the public is likely to be enhanced also. Parties share many interests, which are not necessarily the best interests of the nation. Members should be free to express their own views, and those of the people, without running a risk of being penalised by a party machine.

It is interesting to note that recently the UK House of Commons voted on the future composition of the House of Lords, the Upper House – a constitutional matter. This was a free vote – members could vote as their own consciences dictated. And the view espoused by the Prime Minister (for a mixed elected and appointed upper house) was defeated (by the proponents of a fully elected house).[53]

It is suggested that seating in the Constituent Assembly could be on some basis other than party (alphabetical, for example, though that might produce ethnic blocs,[54] so perhaps simple order of registration on the first day might be used).

Hopefully the parties will not respond to different views within their ranks by disciplinary measures but by seeking consensus and recognising the need to deal with sectoral issues sympathetically and constructively. It is interesting to note that the Indian Congress used its party whip (to require members to vote in a certain way) relatively rarely during the Constituent Assembly (though exactly how rarely is unclear) [55], but worked hard internally to achieve consensus. And the whip was not backed up by the constitutional and legislative sanctions available to parties in Nepal, but served as a clear way of indicating the party's view on important issues.[56] In Bangladesh "the party-whip was rigidly exercised".[57]

How far does the law permit parties to dominate how the Constituent Assembly will work? Parties have, at least in theory, a powerful weapon to discipline members, for a member loses their seat:

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[51] Art. 165(1) where only "Remuneration" seems to require definition. There are of course numerous "explanations", in the Indian style, attached to individual clauses, some of which do resolve possible uncertainties.

[52] According to my own notes this took place on December 5 2001.

[53] There is an interesting account of this episode in Wikipedia: http://en.wikipedia.org/wiki/Reform_of_the_House_of_Lords

[54] In Nigeria many Yoruba names begin with A or O; in Kenya many Kikuyu names begin with K or M and Luos with O; many Scots have names beginning with M (Mc…).

[55] See various accounts of the Constituent Assembly including Chaube, *Constituent Assembly of India* p. 98 esp. fn 9.

[56] Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford: Clarendon Press, 1966) p. 316.

[57] Huq above fn 1 at p.69.

> If the party of which he/she was a member when elected provides notification in the manner set forth by law that he/she has left the party, or notifies that he/she no longer holds the membership of the party.[58]

Interestingly, this 'anti-defection' provision goes a bit further than that under the 1990 Constitution for Parliament, for that was restricted to situations where the member had left the party. The new formulation seems to permit the party to make the necessary notification when it has dismissed the member. The Interim Constitution also says (Article 143(3)(d)) that:

> in the constitution of the party there should be an effective system of making the members of the party disciplined.

Does such discipline entail dismissal from the party for disobeying the party whip, or other failure to toe the party line? Internal party codes of conduct indicate that members should "honour and uphold the decisions made by the authorized unit of the party and abide by the directives given" (NC)[59] or should not oppose the party's activities or programme (CPN (UML)).[60] Dismissal has been used as a sanction by parties on some occasions.[61] In addition the Anti-Defection Act 1997 provides that parties may dismiss members who disobey the party whip, and that this entails loss of seat in Parliament. There has been no court challenge in Nepal to the constitutionality of this law - which might arguably be challenged on the basis of infringement of freedom of speech, or possibly of freedom of association.[62] Anyway Articles 67 and 143 of the Interim Constitution would probably be held to insulate the provisions from challenge.

It remains very unfortunate that such a provision should be made for the Constituent Assembly. The purpose of anti-floor-crossing laws is usually to contribute to the stability of governments (or to prevent opposition members flocking to the winning party). But, as mentioned, earlier, the very different functions of a Constituent Assembly suggest that it is inappropriate in this context. Even if Rules can do nothing to mitigate the law, party restraint, whether voluntary or under constraints of realities within the Constituent Assembly, may do so.

The legal framework

The overarching legal framework for all public activities is of course the Constitution. The Interim Constitution makes limited provision for the functioning of the Constituent Assembly (here the rules for the composition of the Constituent Assembly are not our concern) (the relevant articles of the Interim Constitution are in Appendix II of this paper). An important preliminary point is to note that the Constituent Assembly is also to be the Legislature-Parliament (Article 83).[63] This paper discusses later whether the rules for the Constituent Assembly ought to be the same as for the Legislature-Parliament.[64]

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[58] Article 67(d).

[59] "Salient features of the Code of Conduct for Members of the Nepali Congress (Democratic)" para. 1.3 see Dwarika N Dhungel *Inside Out: Political Parties of Nepal* 2007 p. 187; see also RPP p. 192. The NC(D) has now merged with the NC.

[60] Ibid p. 191.

[61] Ibid p. 38-9.

[62] Dhungel et al., *Commentary on the Nepalese Constitution* at p. 317, also suggest it may violate the basic democratic principles of the constitution as standing in the way of a member fully representing his constituents. However, challenges elsewhere have not always been successful - India but Vanuatu

[63] This pattern was used in India, and in South Africa the body that made the constitution was, in form and method of election, a parliamentary body which performed the functions of both parliament and constitutional assembly.

[64] See below ???

Duration of the Constituent Assembly

The Interim Constitution has two articles dealing with the duration of the Constituent Assembly. Article 82 says that when the new Constitution is adopted the "task of the Constituent Assembly' is ended. Although Article does not say so explicitly, it seems that the Constituent Assembly as such then ceases to exist. This conclusion flows from the fact that the Article adds that until there is an election for the new Legislature-Parliament the body will remain in existence for this purpose. (This would no doubt also be dealt with in the transitional provisions of the new constitution.)

Article 64 specifies that "the term of the Constituent Assembly shall be two years from the date of its first meeting". It is going beyond the scope of this paper to discuss whether the Interim Constitution could be amended to extend the time; it is clear that even if this would be possible it would have to be done before the deadline expired.

Sittings

The first meeting of the Constituent Assembly is to be called by the Prime Minister, not later than 21 days after the final results of the elections have been made public.[65] Subsequent meetings are to be called by the person presiding (Article 69(1)).[66] The Chairperson of the Constituent Assembly must call a meeting, within 15 days, even if the Assembly is on recess, if one quarter of the members sign a request in writing (Article 69(2)).

Committees and experts

The Interim Constitution says there must be committees of the Constituent Assembly "as decided by law" (Art. 79). What does this mean? Some have argued that this could mean the Rules of the House. This is subject to two objections: firstly, the phrase "fixed by law" is sometimes used in a manner that clearly means statute: for example fixing the remuneration of L-P and Constituent Assembly members[67] must surely be by statute not by the Rules. And in other contexts too – such as in relation to limiting human rights or implementing human rights, the natural reading of "fixed by law" would be by statute.[68] Secondly, it is explicitly a matter for the Legislature-Parliament to make its own Rules under the IC (Art. 58)). The use of different language in relation to the Constituent Assembly would, on usual principles of interpretation, suggest that a different process was intended – but it is not possible to be fully confident in the intent of the drafters of the IC.

On the other hand, if in Article 79 "by law" does mean "by statute" the result is somewhat unsatisfactory. If a law decided what committees there were to be before the Constituent Assembly even sat, it might be difficult for those committees to respond to the issues that

[65] Art. 69. This presumably will mean when the last party to do so has determined the identity of its list members and this has been announced. This may take weeks or even months.

[66] It is perhaps a pity that this is not given to the membership to determine, but possibly the rules could give the decision to the membership, leaving the person presiding to make the formal announcement. This would also avoid a possible uncertainty or oddity: if the decision is made outside the house itself one would expect it to be made by the Chairperson, not the "person presiding" (who cannot be identified if the house is not in session). But the latter, whether the actual Chairperson or not, would obviously make the announcement if the decision is made by the house itself. On the other hand, the provision for the Constituent Assembly is an improvement on that for the L-P where the PM continues to have the power (Art. 51)

[67] Articles 62 and 81.

[68] There are many examples of articles providing that a right is to be enjoyed "according to law" e.g. Art. 17(2) "right to receive free education from the State up to secondary level as provided for in the law" or 19(1) right to property subject to law. It would be eminently unsatisfactory for limitations to be made by subsidiary legislation which is not often thoroughly scrutinise and really much publicised. A court would have to be well satisfied that this was permitted before they would recognise any such limitation.

arise for deliberation, and the committees might simply reflect a rather conservative view of what a constitution is about and thus what the Constituent Assembly will be discussing. Now that a statute is unlikely in advance,[69] no doubt the Constituent Assembly will in fact make provision for committees by its Rules.

The Interim Constitution also says that the services of experts may be used. Oddly this is in the same article as the provision about committees – but is presumably not intended to require that experts are used only by committees and not by the Constituent Assembly as a whole. The issue of experts is discussed more fully below.

Secretariat and Chair

Article 80 says that there shall be a secretariat as provided by law, and that the government must make necessary personnel available. This is essentially a 'copy and paste' from Article 61 on the Legislature-Parliament. It is typical of the rather ill-thought through nature of the drafting of the IC that there is another article (83) which says that the

> (2) The Chairperson and Vice Chairperson of the Constituent Assembly shall be respectively the Speaker and Deputy Speaker of the Legislature-Parliament.[70]
>
> (3) The Secretariat of the Constituent Assembly and its personnel shall also be the Secretariat and its personnel of the Legislature-Parliament.

It is suggested that this is unsatisfactory. The work of the Constituent Assembly is very demanding and somewhat different, and to make the work of both bodies the responsibility of the same group of people would be to place too great a demand on them. Administratively the Secretariat could have two divisions, one to deal with each body. But there is another reason for separating the secretariats of the two bodies, namely some possible conflict of interest: the body that runs the Constituent Assembly – which might be making decisions about the future management of Parliament – should not be the body that runs the current parliament and might run the future parliament. In South Africa, although the decision making bodies were constituted in the same way, there were two separate secretariats.[71]

And the Speaker could regularly take responsibility for chairing the Constituent Assembly and the Deputy that of chairing the Legislature (or vice versa). But this would mean that each of these functionaries would be without a regular deputy. Unlike some constitutions[72] there is no provision in the Interim Constitution for the Legislature (or the Constituent Assembly) to choose another person to preside if neither Speaker nor Deputy is available. However, this

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[69] No Constituent Assembly Act has been passed. This is somewhat surprising because in Nepal the tradition seems to be to assume that a law must be passed for almost everything. The absence of such a law reflects, it is suggested, either the general absence of any focus on actually what the CA is for (or even a lack of confidence that it will ever sit) or an assumption that it will really simply be Parliament by another name and otherwise needs no new law.

[70] The Speaker and Deputy of the Legislature-Parliament is to be chosen on the basis of political consensus, failing that by two-thirds, and if there is a vacancy there must be an election (Art. 50(1)). This clearly applies only to the L-P before the Constituent Assembly. The Constituent Assembly is to elect its chair and vice chair – no requirement of consensus (Art. 71(1)).

[71] Of course some conflict of interest is inevitable – notably for the members of the Constituent Assembly themselves, many of whom may hope for future office under the constitution they are preparing. The rules relating to the *Assembléé Constituante* (that made the Constitution of France) included a prohibition on its members holding public office for 10 years. This was disastrous because all the most qualified people, who understood the new constitution, were excluded from operating it. But at least future potential political office holders face some degree of uncertainty about whether they will actually be elected. Public servants in the joint secretariat of the legislature and the Constituent Assembly would have more confidence that they would be affected personally by any decisions made about the future role of the legislature's secretariat.

[72] E.g. Constitution of Bangladesh Art. 74(3).

could be dealt with in the Rules. Nonetheless, the situation would remain unsatisfactory: the constitutional design is for a Speaker/Chair of each body and a regular Deputy.

There is a further reason for concern about this merger of functions, especially of the chairs of the two bodies: it is also provided that "the Constituent Assembly may constitute a separate committee to conduct necessary regular legislative functions". One possible reason for this provision is to enable the two bodies to sit simultaneously, so that the work of the legislature does not hold up that of the Constituent Assembly (though it may also reflect a recognition that 601 people, or 425 as originally provided for, is very large for a legislature).[73]

The Chairperson or Deputy may be removed "if a resolution is passed by a majority of at least two-thirds of the total number of the members existing in the Constituent Assembly to the effect that his or her conduct is not compatible with his or her position" (Article 72(1)(c)).

Quorum

There must be a quorum rule – providing for a minimum number to be present before deliberations can begin. Article 73 provides

> Except as otherwise provided in this Part, no quorum shall deemed to be achieved and no resolution shall be presented for decision unless at least one-fourth of the total number of members are present.

Again this is a copy and paste from the legislature provisions. Such a quorum may be adequate for a legislature but for the Constituent Assembly it seems small. Even for the legislature it may be rather small – some legislatures now have a 50% quorum rule.[74] But this is undesirable for a Constituent Assembly which is supposed to be a true mirror of the nation. Attendance of a mere 125 out of 497 members would seem hardly to constitute the whole nation. Ideally at least half of the members should be present in order for the day's sitting to begin.[75] The South African Constitution requires 50% of members to be present for a vote on legislation and one-third for any other votes (s. 53(1)), but there is otherwise no quorum rule.

The quorum rule can be a source of delaying tactics.[76] Obviously the body should be well attended, but members should not be able to exploit the rule to adjourn debate for reasons of delay. The chair ought to be able to adjourn however, if the numbers present clearly make debate pointless. The IC provides that a member of the CA loses his or her seat if he or she, is absent from ten consecutive meetings without notification to the Assembly (Art. 67(c)). This is not a very demanding requirement: a member can miss 9 sittings then come once, then miss 9 more and so on. Further is no requirement that there be any good reason for the absence.[77]

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[73] Presumably however, when the Legislature-Parliament continues in office despite the ending of the work of the Constituent Assembly, by virtue of Article 82, all the Constituent Assembly members remain in office. Constitutionally it is the whole body that is the legislature.

[74] E.g. Iraq. Fiji's is 24 out of 71 members. There are, it is true, a number of parliaments with very low quorums. For example that of the UK has a requirement of only 40 out of 646?? members. In the Kenyan Parliament it is only 30 (out of a house of 222). Such low quorums are a legacy from the days of gentlemen-parliaments when members were very much part-time. Iraq has had problems because there has sometimes not been a quorum; even in Kenya, Parliament is frequently adjourned for want of quorum.

[75] Uganda had the 50% quorum rule – the chair said that this proved difficult to achieve especially as some members were Ministers - James Wapakhabulo, "Managing the constitution-making process in Uganda"

[76] As was Yash Ghai's experience in Kenya.

[77] In the Constitution of the Fiji Islands the seat of a Member of Parliament is lost if that person misses 2 consecutive meetings without the permission of the Speaker (Art. 71(1)(e)).

However, for formal adoption of the final document this quorum would not apply. Two thirds of the members of the House must be present for such a vote.[78]

Decision making

There is a detailed provision (Article 70) about how articles of the new Constitution are to be adopted. For this purpose the quorum is two-thirds of the total membership of the Constituent Assembly at the time. The new document must be debated article by article, and each must in principle be adopted by consensus. This is effectively defined as meaning unanimity – or at least no vote against (which means that abstentions count as votes in favour). However, recognising that this may be impossible, there is provision for deadlock-breaking meetings of party leaders, and then for the matter to be referred again to the Constituent Assembly. Ultimately, if no consensus can be reached, a two-thirds majority will suffice. This will require elaboration in the rules. This procedure would appropriately be used only for the adoption of the final text. Earlier stages should not require this rather rigid process, which is also very heavily party-dominated. It would perhaps be wise for the rules to make this clear. If all the disagreements can be resolved at earlier stages, each article might be accepted with no vote against at the final stage, and none of the other provisions of Article 70 be needed. Certainly the South Africans found it was helpful not to adhere to rigid decision making rules as they worked hard to achieve a conclusion to their process.[79]

For any matter other than adoption of the final constitution, decisions are made by a simple majority of those present and voting (which means that abstentions count as votes against) (Article 75). The person presiding has no "deliberative vote" (to use the expression in the South African Constitution[80]) but has a casting vote (the South African Constitution calls it a "deciding vote") in the event of a tie.

Other procedural matters in the Interim Constitution

There are rules of privilege, again copies of the L-P provisions. Firstly there is freedom of speech of members (and of voting) within the Constituent Assembly, and no member may be taken to court for anything said in the Constituent Assembly (Art. 77(1))[81]. Secondly, the Constituent Assembly is to have "full power to regulate its internal business" (though this cannot be contrary to the Constitution of course), and it also has "the exclusive right to decide whether or not any proceeding of the Constituent Assembly is regular. No question shall be raised in any court in this regard." These provisions apply equally to committees of the Constituent Assembly.

Provisions of this sort have been litigated in various countries. Does it mean that if the new constitution is passed other than by the necessary voting margin, for example, no court can hold that this was invalid? Any such approach would make nonsense of the supremacy of the constitution. The language itself is rooted in English history and in a system that recognised supremacy of parliament rather than of the constitution.

It is provided that no member of the Constituent Assembly may be arrested during the session of the Constituent Assembly, but this is immediately elaborated to exclude arrest on a

[78] Article 70(2),
[79] See the vivid account of Ebrahim.
[80] E.g., Section 53(2).
[81] Some translations suggest that this applies to criminal cases only (using the word "prosecution" but I am told that the Nepali word is not so limited, and the CASU revised translation has used the expression legal proceedings).

criminal charge. This means that only arrest for civil debt (if this is in fact possible under the law of Nepal[82]), or for detention without trial are prohibited.

There is also art. 77 (3):

> No comment shall be made about the good faith of any proceedings of the Constituent Assembly and no publication of any kind shall be made about anything said by any member which intentionally distorts or misinterprets the meaning of what he said.

This replicates a provision in the 1990 Constitution, but seems very restrictive. In many systems a comment about the good faith of the proceedings (which presumably means of members) could be actionable as a civil wrong (defamation). Such an action might fail if the person making the statement complained of could establish that the statement was one of opinion based on identified facts, and was one that a fair minded or honest person could make. This would establish the defence of fair comment in common law countries, and, in some countries at least, that defence could only be defeated if the person making the statement did not honestly believe it.[83] Vigorous public discussion of the Constituent Assembly is surely to be expected and welcomed and it would be regrettable if this provision was used to stifle it. Possibly the Rules could make it clear that the freedom of speech provisions of the Constitution also apply to CA members and are not automatically trumped by party discipline.

Any breach of privilege, including of the clause just discussed, is contempt of the Constituent Assembly, and the Constituent Assembly has the exclusive right to decide whether a breach of privilege has occurred, and may admonish or warn the person concerned, or impose a sentence of imprisonment not exceeding three months or a fine of up to ten thousand rupees. If the person in question apologises to the Constituent Assembly, it may either pardon the person or remove or reduce the punishment. Rules would in fact have to deal with the possibility that some person was arraigned before the Constituent Assembly on a charge of having violated this Article. The Rules of Procedure under the 1990 Constitution do in fact have provision for dealing with breaches of privilege.[84]

Referendum

There is also a slightly mysterious provision for a referendum in some circumstances. Art. 157 provides: Except as otherwise provided elsewhere in the Constitution, if the Constituent Assembly decides, by its two-thirds majority of the total number of members present therein, that it is necessary to make a decision on any matters of national importance, then decision may be reached on such matters through referendum. Some other countries' constitution making processes have provided for referendums on specific issues, if the Constituent Assembly or similar body could not decide.[85] Is order to understand the possible scope of this

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[82] Imprisonment is prohibited under the International Covenant on Civil and Political Rights Article 11 "No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation". Under the Treaties Act in Nepal treaties are part of Nepali law (other than overriding the Constitution).

[83] This summarises the current position in the law of England. Even if considered a statement of fact (though a statement alleging bad faith is probably almost always a statement of opinion) the defence of qualified privilege as expanded in many countries recently would apply to discussion of a body like the Constituent Assembly. This is a complex area of law.

[84] Chapter XXI.

[85] E.g. Kenya it was originally provided that the members of the National Constitutional Conference (NCC) – the Constituent Assembly, that any question could be referred to the people in a referendum. This was a device to resolve differences among delegates of the NCC, but it was not well thought out, for theoretically a number of provisions could have been submitted to the people, with various options on each. The NCC could make a decision on a constitutional provision only by a two-thirds vote of all the members, whether present or voting or not. A negative vote would have automatically triggered a referendum. It would not only have made it

referendum provision we need to identify what possible decisions are not "otherwise provided for" in the Interim Constitution. Arguably Article 70 with its detailed rules for passing the Bill on the Constitution is a provision "otherwise"; this would preclude a referendum on the substance of the constitution. And the Constituent Assembly is only to decide on the Constitution; it has no other function of decision on a matter of public importance. If so, it is hard to see what impact Article 157 can have.

The detailed rules for a referendum are to be laid down in statute and not in the rules. It is clear that the referendum is to be a binding, and not an advisory one: the "decision would be made through a referendum". The Rules would need to deal with the issue of when the referendum was to be possible – though this will not be an easy talk in view of the opacity of the Interim Constitution on this point.

Issues remaining to be decided

Certain issues are already dealt with in the Constituency Assembly Elections Act. This deals with qualifications for standing for election (thus it elaborates the Interim Constitution on this point[86]). But there remain some points that might best have been dealt with by an Act – but since Parliament has been prorogued no such Act can be passed.

Place of sitting

The Interim Constitution does not say where the Constituent Assembly is to sit. Ought it to be possible – or required – for the Constituent Assembly to hold some sittings away from the capital[87]? On the one hand this seems in principle desirable, so that people become aware of the existence and work of the Constituent Assembly. On the other hand, to hold a meaningful sitting of a body of 600 members, with their accompanying retinue of administrators, researchers etc outside Kathmandu would be immensely costly, and might well not be cost effective. This is also difficult in a parliamentary system, where the Constituent Assembly is also the legislature, where few towns would have the necessary facilities, and communications are poor. At least committees should be able to sit elsewhere. This would make it easier to respond to the wishes of the public, and enhance its legitimacy.[88] In the absence of any statement, it is presumably possible for the Rules to provide for such committee sittings.

Early decisions

Four things must happen at a very early stage of the work of the Constituent Assembly: election of a chair (which must happen "before commencement of its work of formulating the Constitution " - Art. 71), swearing in of members (which must happen "before taking part for the first time in a meeting of that Assembly or any of its committees" – Art. 68), "implementation of the republic" (which must be done by "simple majority in the first

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exceedingly hard to explain the choices to the people and conduct the referendum, but it would have been almost impossible to incorporate the results of the referendum in the draft as some of the questions were likely to be so fundamental as to require radical surgery or reconstruction. Amendments were therefore made to provide that decisions should be made by a two-thirds vote of those present and voting, and to require a referendum only if the NCC agreed by a similar two-thirds vote to refer an issue to the people. In the event, the NCC was able to adopt a draft without a referendum, thanks to these amendments. South Africa??

[86] The IC was in fact amended to make such elaboration possible – see now Article 63(c1).

[87] The experience of some Constituent Assemblies, notably the French, has led some to suggest that Constituent Assemblies should ideally sit outside national capitals and major cities because of possible disruption or intimidation by the mob (e.g. Elster "Forces and Mechanisms"). Hopefully the Nepal Constituent Assembly will not be as turbulent as some.

[88] Fink Haysom advocated such possibility in his remarks to the CASU conference on Constitution Making in Nepal, see *Report* at p. ??

meeting of the Constitutional Assembly" – Art. 159)[89] and adoption of rules of procedure (for which no time is fixed but which must obviously be very early on, the more so because there is no stated alternative: Art. 78 says "Until such time as rules are made, the Constituent Assembly shall establish its own rules of procedures". This piece of drafting nonsense (which is mirrored in the provision on the Legislature Parliament[90]) is based on the 1990 Constitution which said that until a house framed its rules it would be governed by rules made by the King (Art. 63).[91]

Obviously this plethora of things to be done all at the beginning must be approached in a common sense way. Election of a chair is a quick business, and should logically be carried out first. But that election presumably happens in "a meeting" of the Constituent Assembly, and no member may take part in any meeting until he or she has taken the Oath. The adoption of rules would take longest and should therefore happen last (leaving aside the impmenetion of the republic provision which us peculiarly Nepali).

The IC does provide that until the Chair and Vice-Chair have been elected the seniormost member must preside. Thus a procedure similar to that used at the opening of the Legislature Parliament in January 2007 is envisaged.

The Oath

Oath-taking should take place first (the seniormost member is sworn in and then swears in other members). But what oath? The substance of the oaths is to be fixed by law (Article 68). Here is an interesting "Catch 22" situation. No-one can participate in a meeting of the Constituent Assembly until they have taken the oath, but until members have been sworn in there is no way to prescribe the oath! The old Parliamentary oath was:

> I,.....hereby Swear in the name of God/solemnly affirm that I will bear full loyalty to the Constitution of the Kingdom of Nepal, 1990 and that I will uphold the integrity of the country and faithfully discharge the duty as a Member of the House of Representatives without fear or favour, affection or ill- will of or unto none.

It is suggested that there should be an oath specifically tailored to the Constituent Assembly and its work. In order to achieve this, it seems it would be necessary for the new Parliament to sit before the Constituent Assembly sits. Can or should this happen?[92] As one reads the IC it seems as though the Constituent Assembly will sit – but it will also be the L-P. This somehow suggests that the Constituent Assembly would sit first. The first sitting of the Constituent Assembly will also be an important symbolic moment – a moment which would be detracted from if the same body sits as L-P first.

Other points to be decided

There are some other, relatively minor, points that must be determined somehow (by an Act, by the Rules or possibly by an Ordinance).

1. Resignation of members: they may resign, but it is not clear to whom. Presumably this would be to the Chair. The IC is equally vague on the L-P. However, the House Rules do indeed provide that resignation is to the Speaker (rule 221).

[89] For the purposes of this version of this paper it is unnecessary to go in detail into this extraordinary provision, which was introduced in the Third Amendment of the Interim Constitution).
[90] Where it was less problematic because there were pre-existing parliamentary rules most of which remain perfectly suitable for the LP.
[91] Dhungel *et al* do not state the source for the rules actually used under clause (3) – p. 372.
[92] In South Africa the newly elected body sat as Parliament for some time before it sat as the Constitutional Assembly.

2. Other loss of seat: an Act could elaborate on the Interim Constitution provisions, but as with the old Rules of Parliament, this could be a matter for the Rules.
3. Fixing of first meeting: this is to be done by the Prime Minister. Presumably the Prime Minister will use a procedure similar to that for calling the first session of the Interim Parliament.
4. Experts: an Act could elaborate on the provision on experts, ideally making it clear that this does not apply only to committees. In the absence of an Act, Rules could deal with these.
5. Remuneration: the IC says:

   > The remuneration and privileges of the Chairperson, Vice Chairperson, Members and the Chairperson of the Committees of the Constituent Assembly shall be as provided for in the law, and, until so provided, shall be as determined by the Government of Nepal. (Art 81)

   In this context "by law" must surely mean by statute and not by the rules of the Constituent Assembly itself. Until there is such a law the remuneration can be fixed, and also reduced, by the Government.
6. Secretariat: it would be appropriate to deal with the secretariat, on the lines of the legislation on parliament. Later in this paper it is suggested that though constitutionally the two secretariats are the same there is need for a far more elaborate administrative structure for the Constituent Assembly than for the L-P.

Context: Existing Rules

Making and operating rules of procedure will not take place in a vacuum at least as far as experienced parliamentarians are concerned. A set of rules of procedure does exist and has existed for a considerable time, and may shape expectations about what might be included in rules of the Constituent Assembly, though it will be suggested below that there are reasons for the two sets of rules to be thought of separately.

The current rules were adopted following the coming into operation of the Interim Constitution and the formation of the current L-P, and again following the Second Amendment of the Constitution. They are little changed from the rules of 1998, except where constitutional changes make this essential, and comments in this paper are based on the latter (specifically the Rules of the House of Representatives) since they are available in English. It is understood that the Nepal Rules drew heavily on those of the Indian Parliament, which themselves are very much in the British tradition.[93]

How useful are these rules for the present task? In terms of topics, most of those in the L-P Rules are not relevant for the Constituent Assembly. These irrelevant topics include: Questions to Ministers, matters concerned with finance, motions of confidence, motions of impeachment, ratification of treaties and motions for declaration of emergency. The approach taken in this paper is not to begin with the existing rules, but to ask what the Constituent Assembly will have to do. In order not to depart without good reason from what is accepted practice in Nepal, the existing rules have been consulted where relevant. There is another reason for not beginning with existing rules: this type of lazy drafting is common among lawyers. It seems to have been used in the preparation of the Interim Constitution. But it leads

[93] Erskine May

to errors and to incoherence, as some of the comments made earlier on the Interim Constitution will have shown.

Where to begin?

Principles

In some constitution making processes there has been a stage at which guiding principles for the final product have been produced. In some countries principles have been imposed by the previous, usually non-democratic, government. It has been normal for the Nigerian military, when establishing a body to make a new constitution, to give it a mandate that significantly limits its scope.[94] In Egypt in 1971 President Anwar Sadat asked the National Assembly to prepare a new constitution, and set out various principles, most broad (such as sovereignty of the people) and some narrower (such as disability pensions).[95]

Such principles, even if they are generally benign in content, are a nullification rather than a realisation of democracy. But there are more democratic examples. The best known example is South Africa where the Interim Constitution of 1993 contained 34 principles that the final constitution must adhere to[96]. These were carefully negotiated by the parties to the settlement and were understood to be the basis for the final settlement (this is why there was insistence on negotiating that Interim Constitution before elections for the Constitutional Assembly). In India, there was an Objectives Resolution, drafted by Nehru and adopted by a working committee just before the Constituent Assembly actually met. This was adopted by the Constituent Assembly itself, after some weeks of debate. The key clauses of this read:

> (5) Wherein shall be guaranteed and secured to all the people of India justice, social, economic and political; equality of status, of opportunity, and before the law; freedom of thought, expression. Belief, faith, worship, vocation, association and action, subject to the law and public morality; and
>
> (6) Wherein adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes.[97]

In Bolivia, one of the committees of the Constituent Assembly was assigned the responsibility of studying the "Vision for the country". And the previous (or preliminary?) phase of the work of the committees is stated to be the Presentation of the proposals of the vision of the country of the political representations before the Plenary".[98] After this each committee would receive from the Constituent Assembly Directorate the systematization of that vision that was to define the strategic lines of work for the committees and sub-committees.[99]

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[94] See the accounts in Tahir Mamman, *The Law and Politics of Constitution-Making in Nigeria. 1862-1989: Issues, Interests and Compromises* (Maiduguri: Ed-Linform Agencies, 1998) at pp. 137-8 for 1975 and 259-61 on 1989. In both cases the first draft of the constitution was to be prepared by a drafting commission, and then go to a Constituent Assembly.

[95] Saleh at p. 310-1.

[96] Schedule 4 to the Constitution of 1993. The South African situation was unusual because these principles were binding on the Constitutional Assembly in the sense that after completion the new constitution could not be adopted without the Constitutional Court Certifying that it complied with the principles. See the court judgment *Certification of the Constitution of the Republic of South Africa*, 1996 (10) BCLR 1253 (CC). (see Ebrahim at p. 178.

[97] The entire text can be found in various places, including J.K. Mittal, "Nehru and the Objectives Resolution: A Historical Perspective" in Dhavan and Paul, eds., *Nehru and the Constitution* (Bombay: Tripathi, 1992) 22, at 38-9.

[98] Article 26 I of the Procedural Rules.

[99] Article 26 II (a) of the Procedural Rules. [On first reading of this paper by IDEA the following comments was received: "It is not correct. All the commissions have been working simultaneously, including the "vision of the country" commission. The 21 commissions have to write a report with the articles being proposed. If there is no consensus, the rules establish that the plenary should analyse the report of the majority and the report of

In Nepal, it has been suggested that the various agreements between the political parties and with the CPN-Maoists themselves include various principles which could be said to reflect the mandate of the *janaandolan* II for the making of a new constitution. It might be worth considering formalising these into a set of principles at an early stage of the Constituent Assembly. If not done before the CA meets, this would be a task for the plenary – possibly working on a draft prepared by a committee or small drafting team.

The purposes of such agreement would be to focus the minds of the CA members on the nature of the task in front of them, to forge a sense of unity, to introduce members who are not very familiar with the task to the issues in a form of discussion that is not excessively contentious or divisive.

On the other hand, there is a counter-argument: that while many of the issues are non-contentious, there are some that are potentially extremely divisive, and might risk derailing the process at an early stage. One of these is the issue of monarchy; but that is now intended to have been laid to rest in the "first meeting" of the CA. The other is federalism. Although there is now a provision in the Interim Constitution that commits the country to being a federation, there will undoubtedly be CA members whose platform, and mandate, is against federalism. A set of principles could hardly fail, in the eyes of some, to mention federalism. But agreement on federalism would be impossible to reach in the relatively cooperative fashion that the notion of "Principles" envisages. These considerations may suggest that, although in some processes this might be an acceptable way to proceed, in Nepal it may currently be 'contra-indicated".

Draft constitution

How are more specific issues to be introduced into the Constituent Assembly for discussion? What happens in countries that do not have such commissions? In East Timor the discussion at the Constituent Assembly was based around a complete draft constitution prepared by the dominant party, Fretilin. There were several other drafts, but these did not receive much attention in the discussions of the Constituent Assembly.[100] In the USA the State of Virginia got in first, as it were, by presenting a set of resolutions, which amounted to a blueprint for a system of government, and this formed the starting point for the discussions of the Philadelphia convention, "illustrating the importance of being first in the field with a plan of action".[101] The Spanish Parliament, elected after the death of Franco and the restoration of the monarchy, immediately handed responsibility for writing a draft over to a working group of lawyers/civil servants, itself a committee of the lower house of parliament. In fact the decisions were all made by deals between the parties.[102] Indeed, a number of crucial decisions

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the minority coming from each one of the commissions." But this does not seem to the author to conform to the rules which read in Spanish:
Artículo 26. FASES DEL TRABAJO DE LAS COMISIONES
I. Fase Previa:
Presentación de las propuestas de Visión de País de las Representaciones Políticas ante la Plenaria.
II. Primera Fase:
Conformadas las Comisiones:
a) Cada Comisión recibirá la sistematización de la Directiva de la Comisión 1 "Visión de País", que definirá las líneas estratégicas para el trabajo en Comisiones y Subcomisiones.]

[100] Despite one of them having been produced by a distinguished Portuguese professor of law. The author was present in some committee meetings and some sessions of the ET CA plenary and witnessed only one attempt to refer to another draft.

[101] Walter Berns, "The writing of the Constitution of the United States of America" in Goodwin and Kaufman, *Constitution Makers on Constitution Making: The Experience of Eight Nations (*Washington DC: American Enterprise Institute for Public Policy Research, 1988) 119, 136.

[102] Francisco Rubio Llorente, "The writing of the Constitution of Spain" in Goodwin and Kaufman, 239, 251-3.

had been made before parliament sat. But apparently there were also rules that parties could not produce complete drafts – only individual draft provisions.[103]

In India a draft of a constitution was prepared by a committee of the Constituent Assembly itself, working on the basis of a draft prepared by the Constitutional Adviser B N Rau.[104] This took place after the basics of the new constitution had been approved, after having been proposed by two major committees of the Constituent Assembly (the Union and the Provincial Constitution Committees).

In South Africa the draft was produced by a team of experts – comprising the Panel of Experts required by the Interim Constitution, plus legal advisers and language experts.[105] It based its work on the work of the Theme Committees, which had produced reports based on public submissions. Of course it also had the Interim Constitution itself, as well as the 34 principles laid down in that Constitution.

Beginning with the Interim Constitution?

It is possible that there will be a move to base the debates on the Interim Constitution. This idea does have some virtue. There were many perfectly good provisions of the 1990 Constitution which are reproduced in the Interim Constitution. Arguably there is no necessity to reinvent the wheel. It would be time saving to begin with the Interim Constitution. And such an approach would be more orderly and reduce the risk of breakdown that a free for all might entail. Many Nepalis feel that there were gains in the Interim Constitution that throwing the whole thing open would jeopardise. Among these groups are women, and those who favour federalism. Some people have expressed the view that the 1990 Constitution was a Nepali document and should not be replaced by some foreign import.

There are, on the other hand, a number of problems with this idea of beginning with the Interim Constitution. First of all is the very fact that something like 80% of the Interim Constitution is taken from the 1990 Constitution. True, this does not include the parts to which most objection has been taken in the years since that constitution came into force. But in view of the strength of rejection of that constitution there might be a reaction against the idea of its being the starting point. Secondly, though in the eyes of many the 1990 Constitution was a good document, it does not provide by any means the only model. Using it in this way might constrain the constitutional imagination of the makers of the new constitution. Thirdly, using the Interim Constitution as the basis could make the process too speedy. Before civil society had fully realised what was happening – even before some of the less experienced members of the Constituent Assembly realised - the Interim Constitution with minimum amendments could have been introduced and passed, satisfying the parties, but not satisfying the strongly felt need for this process to involve the people thoroughly, nor the desire for some well thought through guarantees of inclusion and accountability. Of course, the Interim Constitution has no real federal design, so the express route to a new constitution by use of the Interim Constitution would not be entirely possible. Or, if possible, would only be so at the expense of either inclusiveness, or autochthony or technical strength – or all three, especially so far as the federal aspect is concerned.

There is also a possibility that some party may produce an entire draft. This is unlikely; at the time of writing hardly any of the parties seem to have begun to get their "heads round" what

[103] Jon Elster,"Forces and Mechanisms" at p. 387
[104] Austin p. 34.
[105] Soul of a Nation p. 192.

making a new constitution means.[106] There is no reason to suppose that any political party has either the will or the expertise to produce anything radically new.

Public participation

Representation is not enough: the deliberations of the Constituent Assembly must be informed by input from the broader society on a continuing basis. This is even more so because it is clear that the membership of the Constituent Assembly simply cannot be as inclusive as many sections of society are demanding.

Public input can be divided into different stages. As suggested earlier, there will have to be some mechanism for generating a draft for discussion in the Constituent Assembly. There are different models of how this might be done, but this author would urge that it follow on a period of public education and of collection and analysis of public views. Secondly there will be a period of public debate on the draft. Finally, there could be – ought to be it is suggested, continuous public monitoring of the work of the Constituent Assembly, and continuing opportunities for public input. These are identified as stage 1 input, stage 2 input and stage 3 input respectively in this paper.

It would in fact be good for the members of the Constituent Assembly to get to grips with the realities of the country in the context of making a constitution. In South Africa, members of the parliament that was making the constitution travelled in pairs – from two different parties – around the country with the brief of listening to the people, not of lecturing them.[107] This proved a very valuable source of input into the process. In South Africa those members would not have been constituency MPs because they were using PR with the whole country as one constituency, and most of the members were new members. It is suggested that here it would be best not to use MPs to collect views from their own constituencies.[108] Free debate is likely to be constrained. Would people feel free to say "we are fed up with non-performing MPs; we want the power to recall them" to their own MP?

There is a question of at what stage this device should be used. In South Africa the Constituent Assembly held a series of public meetings after a period of public education through the media. 200 of the members (nearly half) of the Constituent Assembly were involved in these. Then there were public hearings - so that civil society could make its inputs into the Theme Committees.[109] Public hearings could be used more than once – for both stage 1 and stage 2 input.

However, members should not be the only conduit for public input. Organisations and individuals should be able to make written submissions at any time. Committees should be required to hold structured hearings on the issues within their remits. Groups (and occasionally, where appropriate, individuals) should also have opportunities to make presentations to the plenary, especially where the issues they wish to raise cross the boundaries of the work of thematic committees.

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[106] It is understood that there was at one point a Maoist draft – but their recent contributions on the subject of federalism do not suggest that they have any clearer idea than anyone else about how to craft a workable constitution on this topic. Some other organisations including NCARD (National Campaign Against Racial Discrimination) have produced full or partial drafts.

[107] Fink Haysom; others have no recollection of such a formal arrangement. However, Ebrahim refers to members attending public meetings with members from other parties – p. 245.

[108] One draft of the Interim Constitution spoke of members going to their own constituencies but this was later dropped.

[109] Ebrahim p. 245

It is important that opportunities for public input are well understood, and available to all groups, so there is no sense that some had favoured access. Last minute changes, and insufficient notice impair effective access.

As well as members in pairs or small groups visiting all constituencies, as suggested earlier, it might well be desirable for thematic committees to visit other parts of the country, especially if a number of groups from a particular area want to make submissions. The committee dealing with federalism ought to travel in order to see the sorts of places that might become regional capitals, and to collect views in different localities. A committee dealing with social justice issues also would surely benefit from rural visits, and the same would be true of a committee, if any, dealing with issues of democratic inclusion.

Dealing with different types of input

Experience suggests that there will be a wide variety of inputs into the task of drafting the new Constitution. A broad consultation process – which is recommended – will generate many submissions from people which are not very detailed, nor perhaps very sophisticated in terns of constitutional content. There will also be many more detailed and reasoned submissions from individual and groups. These will presumably include submissions from ethnic groups, professional groups, groups representing women, children, persons with disability, lesbian gay and transgender groups, dalits, police, military – and so on. There will – or should - be input from experts, Nepali and perhaps foreign. Some of these may even include suggested drafts of constitutional provisions, while many of the submission from ordinary people will not on the face if it relate to the constitution at all, but be concerned with issues like roads, education and water. There will be "Amnesty Campaign" types of submission: when many people submit identical letters prepared by an organization.[110]

Some strategy will have to be developed to deal with these different types of input. There is some merit in setting up a unit to process them, including by means of entering points into a database. The result cannot be statistically reliable (because the submissions are self-generated) – but it can be of some use to know that far more people expressed support for a particular institution than for another.[111] This is perhaps also not a satisfactory way to deal with the more detailed submissions, which may present not just a set of isolated suggestions but a coherent view of how the new constitution should work. And statistics are also not the best way to deal with the broad picture resulting from views submitted at public hearing.

There is another type of input that could easily be overlooked: that which comes from various seminars and workshops etc. There is good reason to believe that all sorts of organizations – national and international - will be offering different types of programme to Constituent Assembly members. Most of these will be ostensibly neutral; other less so. The fact is that there is almost no such thing as a neutral person or a neutral presentation or book etc. Human beings have views. A person who offers a programme on federalism is almost certainly to be a believer in federalism. There will be a message. This is not bad – indeed it is inevitable. But when the audience is members of the Constituent Assembly who are to decide on the federal system for Nepal there is another aspect: as far as possible it should be possible to understand where the members are "coming from". The process of deciding should be as transparent as possible. Obviously we should not expect members to declare all their reading matter! But if

[110] This was the experience of both South Africa and Kenya.
[111] Such analysis was done – under the supervision of the same Kenyan Statistician, Walter Odero – in Kenya and Afghanistan.

a member of a Constituent Assembly committee is drawing ideas from a book, ideally that fact should be placed on record, and the ideas discussed openly.

A possible model for handling these various types of submissions is firstly to appoint a committee/commission of the Constituent Assembly to carry out a programme of seeking public submissions, by means of public hearings around the country, and accepting written submissions. These hearings have a dual purpose – they not only collect the views of the public but they make the members of the public feel that they were involved and had a chance to submit their views. But this must not be a cosmetic exercise: there must genuinely be a way to process the submissions and pass them on to the relevant bodies within the Constituent Assembly. So staff would be needed to record the submissions, and write a report of each hearing or each district – a report than go back to the area from which it emanated, as well as to the Constituent Assembly.

As well as a rather "free-for-all" stage on which submission are invited in a sort of national brain-storming exercise, the next stage could, it is suggested, be the thematic committees operating on which I would describe as the "Select Committee model".[112] The committees should receive the reports from the public, analysed in statistical terms as appropriate. They would encourage bodies to make written submissions and then hold a hearing. They could even treat the reports of public hearings in a similar way – they could hold a discussion on those hearings, with experts available to discuss with the committee how the ideas raised in the public hearing could be put into a constitution, and also with a social scientist available to discuss the reliability of the data, and its relationship to Nepal society.

Experts could also come before the committees in the same way. Their views can be treated as "evidence" which the committee would hear and they would then question the expert. Even the submissions of foreign experts could be treated like this in some instances – rather than taking place in the meeting rooms of 5 Star hotels. Or the experts could both participate in the ubiquitous talk programmes and give evidence to the relevant committee or committees.

I recognise that committee members may wish to have some education stage which is more private. They may be reluctant to have their education on federalism or whatever conducted in the glare of publicity, and their ignorance revealed by their questions. But maybe a distinction could be drawn between an early stage of "orientation" and a later stage of "evidence taking".

It would be the work of the Thematic committees which would form the main basis for the draft constitution. This open process would make it less possible to run into the risk described by John Hatchard in the context of Zimbabwe[113]:

> Not surprisingly, the reports demonstrated a wide range of views on several important issues with phrases such as "the majority of the participants stated . . ."; "there was a view that . . ."; "a strong minority advocated . . ." being commonplace. In such circumstances it was quite possible for a reasonably competent drafter to produce several very different constitutions and find justification in the submissions made to the commission for each one of them.

Experts

The Interim Constitution says that "Services of experts may be obtained". This could be done in a number of ways. The Constituent Assembly could have its own constitutional advisor or

[112] For the mode of working of Select Committees in the UK Parliament, see
[113] Above fn **Error! Bookmark not defined.** at p. 211.

advisers. The Indian Constituent Assembly had BN Rau[114] who wrote the very first draft of the constitution as well as preparing a mass of material for the Constituent Assembly. The South African Constituent Assembly had a formidable range of technical expertise available Under the 1993 Constitution there was to be a panel of experts. Each Theme Committee had the support of a Technical Committee, and sometimes of other experts also.[115] In Eritrea the Constitution Commission had an Advisory Board of Foreign Experts, 15 of them, from various countries, many very distinguished.[116]

In Nepal it would be almost certainly impossible to find enough people with really good command of constitutional law to service every committee separately. But a core group of advisers could be available to all committees, which could call on them as needed. And other sorts of technical advisers – economists etc – might be available even for individual committees. It is suggested that care should be taken in choosing advisers. All lawyers study constitutional law, but this does not mean that they all have a good grasp of the subject – which they may not have looked at for years. More – they may have little knowledge of constitutional law in other countries. Yet because they are lawyers, they may have disproportionate influence on committees composed mainly of non-lawyers. In the Kenyan process the draft proposed that it be possible for The President to refer questions of constitutional interpretation to the Supreme Court for an advisory opinion – a mechanism used in a number of countries. A lawyer of many years experience sitting with the relevant committee thought that this meant simply that the President would write a letter to the Court and get a letter of advice back. By the time it was explained to him that this would involve a full hearing and be very much like any other piece of litigation save that it need not involve any concrete dispute, it was too late – the lawyer had persuaded the committee that this was a legal non-starter, and it had been removed from the draft.[117]

It is also important to strike a balance between the need for some expertise and the danger identified by Elster[118]:

> The role of experts should be kept to a minimum because solutions tend to be more stable if dictated by political rather than technical considerations. Lawyers will tend to resist the technically flawed and deliberately ambiguous formulations that may be necessary to achieve consensus.

In an ideal world the perspectives of the expert and the citizen could be harmonized. In the end a constitution may come before the courts, and except for the (diminishing) range of topics that courts decide are "political questions" with which they should not meddle, it is important that as far as possible the words are clear. It may be thought that future litigation is not a big price to pay for settlement now, but that future litigation may itself be damaging to the settlement.[119] It may be necessary sometimes to leave matters to the courts – an example is the way the South African body left to the courts the matter of the death penalty.[120] Maybe

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[114] "A legalist, an eminent advocate and judge, a student of constitutional history, and an able draftsman, ne of the more Europeanized intellectual in the Assembly…" Austin p. 20.
[115] Ebrahim 182-3.
[116] Rosen, at p.286.Rosen adds that the international input largely came before the serious business of drafting began (p. 309). However, it was undoubtedly important that the Chair of the Commission was a very distinguished Eritrean lawyer with many years of teaching experience in the USA (Professor Bereket Selassie).
[117] Personal information.
[118] Jon Elster,"Forces and Mechanisms" at p. 395.
[119] See the Fiji Islands example mentioned earlier; here leaving it to the courts was more an accident than a deliberate choice.
[120] Eventually the court decided that the death penalty was unconstitutional.

it may sometimes be necessary even to leave the ordinary person believing that something has been resolved when it has not, but hopefully this will not be needed often.

Foreign experience

John Hatchard writes that:

> In Zimbabwe, and in an apparent effort to provide legitimacy to the process, the Constitutional Commission invited international constitutional experts "to exchange ideas and experiences with commissioners and to provide comments and a critique of the draft constitution". This was always an unlikely scenario, especially given the tight time-frame involved. In the end, the experts came for a few days (… shortly before the Commission finished its work), and by that time it was too late for them to have any impact. An added complication was that, even at that stage, there was no draft document available for them to examine![121]

Dr Ambedkar, chair of the Drafting Committee of the Indian Constitution observed:

> One likes to ask whether there can be anything new in a Constitution framed at this hour in the history of the world. More than hundred years have rolled over when the first written Constitution was drafted. It has been followed by many countries reducing their Constitutions to writing. What the scope of a Constitution should be has long been settled. Similarly what are the fundamentals of a Constitution are recognised all over the world. Given these facts, all Constitutions in their main provisions must look similar. The only new things, if there can be any, in a Constitution framed so late in the day are the variations made to remove the faults and to accommodate it to the needs of the country. The charge of producing a blind copy of the Constitutions of other countries is based, I am sure, on an inadequate study of the Constitution. I have shown what is new in the Draft Constitution and I am sure that those who have studied other Constitutions and who are prepared to consider the matter dispassionately will agree that the Drafting Committee in performing its duty has not been guilty of such blind and slavish imitation as it is represented to be.[122]

Foreign experience and precedents have been important in previous constitution making exercises in Nepal. And now the country is positively deluged with foreign experts, resident or passing through. This is in no way unique – every modern constitution has owed a good deal to previous constitutions of other countries. There is in fact a wealth of experience of what has worked and what has not elsewhere, and, provided that the circumstances of Nepal are placed firmly in the forefront of consideration, that foreign experience can be useful. Much of the debate in civil society is drawing on such foreign experience – more or less well understood. It would therefore be wise for the Constituent Assembly to have access to advice that can take account of such material. It might be possible to appoint to the office of constitutional advisor one or more Nepalis who do have such comparative knowledge. Otherwise it might be worth considering the appointment of one or ore foreign experts in a position with the Constituent Assembly. In East Timor each committee of the Constituent Assembly had as adviser a young Portuguese lawyer. The draft they were considering was ultimately drawn from the Portuguese constitution so the advice of these people was most relevant.[123] The Assembly was also prepared, at the committee stage, to listen, occasionally, to advice from other foreign lawyers, though these did not work for the Constituent Assembly as such.

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[121] At p. 212.
[122] 37 of Constituent Assembly Debate Book no.2 Vol.VII quoted by the Delhi High Court in *Rashtriya Mukti Morcha v UoI* WP (C) No. 2960/1999 & CM 9837/2005 (2006)
[123] Personal observation.

Plenary/committee breakdown

CAs generally have two types of committee: one or more which are administrative, and several which are concerned with the substantive content of the constitution.

Administrative committees

The Indian Constituent Assembly had the following committees of the first type:

(a) Staff and Finance Committee: to deal with posts to be created in the secretariat of the Constituent Assembly, and with salaries of those people, with allowances to staff and members of the Assembly, and with framing the Constituent Assembly budget

(b) Credentials Committee: responsible for ensuring that members of the Constituent Assembly were properly elected and qualified

(c) House Committee: concerned with housing and other needs of members, and with library and other facilities

(d) Press Gallery Committee: to advise the Constituent Assembly President on the allocation of passes to the press

(e) Steering Committee: to arrange the substantive business of the Constituent Assembly day be day

(f) Order of Business Committee: to plan the future course of the Constituent Assembly.

The last of these committees was temporary only, existing from January to July 1947. It would have completed its business much sooner had the whole matter of Partition not intervened.

Substantive committees

The final adoption of the constitution must be by the full Constituent Assembly. But much of the earlier stages of discussion will almost certainly be in committees which are sometimes called thematic committees. Only in a group of moderate size is it really possible to discuss complex details of something like a constitution in real detail. And detail is extremely important. This is especially so of some of the more complex aspects like federalism, or issues relating to the economy. It may be necessary to carry out some education of the committee members on particular topics, and it is not feasible to bring 600 members of the Constituent Assembly all to the same level of understanding.

Formation of the committees is an important matter. In the Kenyan process there were no clear rules about this and the result was that certain committees were packed, especially with politicians. It is clear that in Nepal the same thing is likely to happen: almost everyone would want to be on the committees concerned with the electoral system or federalism, while politicians at least would have less interest in accountability mechanisms. It is common in parliamentary standing orders to have provisions about party balance in committees, and some such rule would be appropriate here. For example in the rules of the Scottish Parliament (Rule 6.3), it is provided:

> 3. A member may indicate to the Parliamentary Bureau his or her interest in serving on a particular committee.
>
> 4. In proposing a member to be a committee member, the Parliamentary Bureau shall have regard to the balance of political parties in the Parliament and, where that member has expressed an interest in serving on that committee, to his or her qualifications and experience as indicated by him or her.

Such a principle was used in South Africa where every Theme Committee had 30 members who were nominated by parties in proportion to their presence in the Constituent Assembly – but with some bias in favour of smaller parties.[124] Each committee had three chairs – in order to avoid domination by any party.

On the other hand, should there be any notions of "qualifications" for committee members in a CA? On the one hand members are there to represent the people and are not there for reasons of expertise (other than, perhaps, some of the 26 Council of Ministers nominees). It would be ridiculous to exclude an economist from a committee dealing with fiscal federalism foe example. But too broad a notion of "experience" would have exclusionary tendency – it would not be right to give priority to experienced members in a committee on systems of government.

The "inclusion" requirements for membership of the CA will be somewhat vitiated if committees, in which most of the substantive work will be done, are not inclusive. Committees should have a fair gender and other balance. The Bolivian Assembly Rules say:

> The Committee of the Commissions will be formed in a pluralistic manner to ensure the representation of the different groupings of citizens and respecting the principle of majority and minority, and taking into account the alternation of gender whenever possible.[125]

In this way the committees will have the full benefit of different knowledge and experience, and groups will have a better chance of influencing the outcome if they are actually represented there. The internal working of committees is very important. Chairs of committees must be persons with relevant knowledge and with the sort of personalities that can keep a discussion on track and lead to a final decision on issues.

The size of committees is also important. They should not be too small because a few people would dominate, but small enough to ensure that decisions can actually be made. Ideally no more than about 30 people should comprise one committee.[126] In a body of 600 this would require 20 committees, which is probably more than would be needed: too many committees, meaning many subjects, increases the risk that committees will have overlapping responsibilities and of inconsistent recommendations. Although it might be appropriate to have some variation in the size of committees, this should be limited in order to ensure that committees do not become unmanageably large. The Bolivian Assembly rules require that

> The number of members of each Commission [committee] will result from the division of the total number of Constituent Assembly members by the number of Commissions, in such a manner that the members called into each Commission are distributed in an equitable way.[127]

An alternative approach is not to assume that all members of the Constituent Assembly must be in a thematic committee – unlike Bolivia. In South Africa only about half the members could be in a Theme Committee. There are other committees, including ones with administrative responsibilities. The Drafting Committee could have no overlap with thematic committees.

Table I indicates the substantive committees formed by a number of Constituent Assemblies.

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[124] Ebrahim p. 182.

[125] La Directiva de las Comisiones estará conformada de manera plural por las Representaciones de las distintas agrupaciones ciudadanas y partidos políticos, respetando el criterio de mayoría y minorías, cuidando la alternabilidad de género donde sea posible.

[126] A figure also chosen by the French Assembly of Representatives of the Third Estate of 1789 – see Oliver J. Frederiksen, "The Bureaus of the French Constituent Assembly of 1789" *Political Science Quarterly*, Vol. 51, No. 3. (Sep., 1936), pp. 418-437.

[127] La cantidad de miembros de cada Comisión será resultado de la división del total de Constituyentes entre el número de Comisiones, de manera que los miembros titulares en las distintas Comisiones estén distribuidos de forma equitativa.

Thematic Committees in various Constitution Commissions and Constituent Assemblies					
India 1946-9 200-300 members	Nigeria 1976	South Africa 1995	East Timor 2001 78 members	Kenya 2000-4 629 members	Bolivia 2006 255 members
• Fundamental Rights (Sub-committee) • Minorities (Sub-Committee) • Union Powers • Union Constitution • Supreme Court (Ad Hoc Committee) • Provincial Constitution Committee	• National Objectives and Public accountability • Executive and Legislature • Judicial Systems • Economy, Finance and Division of Powers • Citizenship, citizenship rights, fundamental rights, political parties and electoral laws • Public service including armed forces and police	• Committee I – democratic state (preamble, citizenship, equality, supremacy of constitution, elections, freedom of information, accountability, separation of powers Committee II • Separation of powers, legislative procedures, constitutional amendment, structure of government at different levels, legislatures, electoral system, traditional leaders, executive • Committee III relationship between levels of government • Committee IV – Fundamental rights • Committee V judicial and legal systems • Committee VI – public administration, financial institutions, transformation, security services	• Committee I - Fundamental rights, freedoms and duties, national defence and security • Committee II - Organisation of the state/ Organisation of political power • Committee III - Economic, social and financial organisation • Committee IV - Fundamental principles, control of constitutionality and amendment of the Constitution; final and transitional provisions	• Preamble, Supremacy of Constitution, The Republic and National Goals, Value and Principles • Citizenship and Bill of Rights • Representation of the People • Executive • Judiciary • Legislature • Devolution • Public Finance, Public Service, Leadership and Integrity • Defence and National Security • Land Rights and Environment • Constitutional Commissions and Amendments to the Constitution • Transitional and Consequential Arrangements	• Vision of the Country • Citizenship, Nationalities and Nationality • Duties, Rights and Guarantees • Organization and structure of the new state • Legislative • Judiciary • Executive • Other state organs • Autonomy of departments, regions, indigenous autonomy and decentralization • Education and Interculturality • Integral Social Development • Hydrocarbons Minerals and Metallurgy Water resources and energy • Productive rural development, agriculture and agroindustry development Renewable natural resources, land, territory and environment • Integrated Amazon Development Coca • Economic and Financial development • National frontiers, international relations and Integration • Security and national defence

As mentioned earlier, the identification of which committees will sit could restrict the constitutional possibilities considered. There has been some talk among lawyers in Nepal that they basically know what must be in a constitution – a chapter on the executive, chapter on parliament, a chapter on legislative procedure etc. Such an approach can very easily ignore some of the issues that have come to the fore in recent constitution making exercises – including corruption, political parties and implementation. It will be apparent from the Table above that in many processes the committees have dealt with cross-cutting topics and there is absolutely no assumption that the work of one committee will appear in only one chapter of the constitution.

And it is not right to assume that there must be a chapter on Directive Principles – this was so with the Constitution of Ireland which influenced that of India and has been copied in many others including the 1990 Constitution of Nepal. But some constitutions have put the sorts of portions included in DP into the bill of rights – notably South Africa and the various drafts of a new constitution for Kenya. Again, the committee system should reflect the issues to be discussed, not shape them.

Possibly there should be a committee on women's issues – and possibly other committees with "inclusion" remits. But such committees should not be permitted to become a way to shunt non-traditional members into committees dealing with what some might think are marginal issues.

It is desirable to have a steering committee that tries to structure deliberations in a rational way, and keeps an eye on what the various committees are deciding, in order to avoid confusion and time wasting. There will also have to be a committee that puts together the reports of all the committees, to make a coherent whole this must have the power to refer a matter back to a committee if its recommendations are unclear, or incomplete. In East Timor this was known as the Systematisation and Harmonisation Committee.[128] In Bolivia, there were two mechanisms: a Coordination Commission[129] and a Mixed Committee to produce a joint report on a matter that is within the jurisdiction of more than one committee.[130]

[128] Such a committee can be very powerful. In East Timor it was chaired by a young Timorese academic. The committee introduced into the draft a prohibition on discrimination on grounds of sexual orientation. Having sat in the relevant stages of the Human Rights Committee, the author has no recollection of this having been mentioned. This attempt, if that is that it was, to introduce this provision failed because it was rejected by the Plenary CA. The author was present for that debate also and listened as members alternately said they felt young people had no need to be oriented to sex, or said they disapproved of the proposal.

[129] Artículo 29. Comisión de Coordinación
La Presidencia de la Directiva de la Asamblea Constituyente, podrá convocar a sesión de Comisión de Coordinación, cuando dos o más Presidentes de Comisiones lo soliciten, con la finalidad de tratar temas que sean vinculados a los proyectos inherentes a la redacción de la Nueva Constitución Política del Estado. En esta Comisión, se podrán intercambiar criterios con los Presidentes de las demás Comisiones y absolver las inquietudes e iniciativas de las y los Constituyentes
The presidency of the board of the CA can summon a session of the Coordination Commission, when two or more Chairs of Commissions ask for it, with the aim of dealing with the subjects that are bound to the plans [bills] inherent in the writing of the New Political Constitution of the State. In this Commission, opinions can be exchanged [interchanged] with the Presidents of the other commissions and to absolve the worries and initiatives of CA members.

[130] Article 30.

Full participation of members

Although there has been much discussion about the constitution, most members will not have a very sophisticated knowledge of constitutions – or even of the existing or the 1990 Constitution, even though they will probably be very conversant with the particular aspects that have caused concern among their own communities. This is likely to mean that members have opinions on the question of election systems, monarchy, linguistic rights, the place of Hinduism etc, but far less on the accountability of government, civil military relations, financial arrangements etc. Members will need to be 'empowered' in the popular parlance, or the debates will be dominated by party leaders and decisions on many matters 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.

It is therefore important that some form of education for Constituent Assembly members takes place. Many of them will have attended some (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. 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.

As the make-up of the Constituent Assembly is likely to be rather different from previous parliaments, and this to include many people who have no experience of structured discussion environments of this sort, it would be desirable that the rules be written in language as straightforward as possible, and that the whole organisation of the rules be clear. Unnecessary ritualistic formality should be avoided. For example, it is not clear why members should bow to the Speaker when entering or leaving the chamber. This is not actually required by the old HoR rules, though older members of the house do seem to observe the tradition. That tradition itself is derived from the practice of the UK House of Commons, and it began when that house sat in a hall which contained an altar and the bow was to the altar not to the presiding officer. Unnecessarily detailed rules about entering and leaving the chamber are still in the HoR rules, and it is suggested need not be replicated in the Constituent Assembly Rules; it would be sufficient to have rules requiring members to behave with respect and dignity. The Sri Lankan (Ceylonese) Constituent Assembly rules did not require the presence of the mace – which was a feature of parliament, in order to mark the difference between the Constituent Assembly and parliament.

Style of Drafting Rules

There will inevitably be many members of the CA who have never been members of parliament before. The last parliamentary elections were in 1999, and those were for a house of 205 members. Now there are to be 610 elected members, and they must include about 26% women (while the previous house had 5.8% women), they must have at least 6% Dalits (there has only ever been one Dalit member since 1990), and must include certain percentages of members of other marginalized groups.

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". These include New South Wales and New Zealand.

These considerations are only some of those suggesting that as far as possible the Rules should be expressed in language that is simple. Since there are no educational qualifications for members some may have limited literacy (the rate of literacy in Nepal is around 50%). Of course it is for the semi-literate, or those whose Nepali is not strong, however fluent they are in reading other languages, for whom complex Rules in Nepali would offer the greatest hurdle.

In fact, to judge by the English translation, the existing Rules are not excessively complex. However, there are some long sentences, and some provisions of excessive detail that might serve to confuse new members and could be omitted without loss.[131]

The previous House of Representatives Rules provided:

> **241. Language*:*** The proceedings of the House or the Committee shall be conducted in the national language.

The Interim Constitution does not address this issue specifically. Article 5 provides, however:

> **Language of the Nation**: (1) All the languages spoken as mother tongues in Nepal are the national languages of Nepal.

If the translations are accurate one might say that now there is more than one national language, and so a provision in Constituent Assembly rules on the lines of that in the old HoR rules would embrace all the mother tongues. But the Interim Constitution goes on to say:

> (2) The Nepali Language in Devanagari script shall be the official language.
>
> (3) Notwithstanding anything contained in clause (2), it shall not prevent the use of mother tongues in local bodies and offices. The State shall translate material in any languages so used into the official working language for the record.

If the Constituent Assembly is "government business" this suggests that no language except Nepali could be used – and the qualification in clause (3) offers no assistance since it applies only to local bodies.

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 East Timor the official languages of the Constituent Assembly were Portuguese and the local lingua franca, Tetum, but members could express themselves in English or

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[131] E.g. from Rule 34:

(f) No Member shall pass between the Chair and the Member who is speaking.

(h) A Member shall not walk across the House in front of the Speaker, nor shall sit with his/her back towards the Chair.

And for a long sentence from Rule 234 (though not one on a topic within the purview of the CA):

After closure of general discussion on the treaty or agreement under this Chapter the Speaker shall put to the House for decision the proposal for ratification, acceptance or approval or accession thereto in the original form as it was moved or, if any reservation can be made or any declaration can be made on the treaty or agreement, in the amended form as proposed with reservation or declaration or with amendment pursuant to Rule 233 in such reservation or declaration.

These Rules are less detailed than those of the Indian Lok Sabha it must be said.

Indonesian (despite hostility from some to the use of Indonesian - viewed as the language of the oppressors[132]). It is suggested that some equivalent provision would needed for the Nepal Constituent Assembly. In Bolivia the rules of the CA provide that Plenary and commission sessions rely on interpreters and translators so that members can express themselves in their mother tongues (Art. 52).[133]

Figures suggest that mother tongue distribution in Nepal is as follows:

Nepali	48.61%
Maithili	12.30%
Bhojpuri	7.53%
Tharu	5.86%
Tamang	5.19%
Newar	3.63%
Magar	3.39%

This accounts for 86.5% of the population.[134]

This issue becomes all the more important when we consider the issues which have been raised in the discussions and agitations since the jana andolan II, especially the issue of inclusion. We find that the Interim Constitution also provides that there must be no discrimination on grounds which include language, and also that the directive principles and objectives of the State include "To carry out an inclusive, democratic and progressive restructuring of the State by eliminating its existing form of centralized and unitary structure in order to address the problems related to women, Dalits, indigenous tribes, Madhesis, oppressed and minority community and other disadvantaged groups, by eliminating class, caste, language, sex, culture, religion and regional discriminations."

Another rule in the old House of Representatives rules has been abrogated, and was clearly contrary to principles of inclusion:

> **242. National Dress*:*** The Speaker, the Deputy Speaker, the Minister and the Member, while being present in the House, shall put on the national dress.

Though "national dress" was not defined in the Rules it clearly referred to the Muluki Ain[135] prescription of the daura saruwal for men and sari for women.

The rules– and the necessary back-up in terms of personnel - should also provide for the use of sign language for any members who are deaf. And there should be provision for facilities for any member who is sight impaired. Maybe these will not be used – though it would be unfortunate if there is no representation of person with disability, a group whose claims have been overlooked.[136]

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[132] This hostility was seen by the author when NGO members asked to speak before the Human Rights Thematic Committee in Indonesian. It was also felt, among those observing the procedures that this hostility accounted, at least in part, for the relative silence of younger Constituent Assembly members, for whom Indonesian would have been the natural language to talk about constitutional issues.

[133] *Las sesiones de Plenaria y el trabajo en Comisiones de la Asamblea Constituyente contarán con intérpretes y traductores, que permitan a las y los Constituyentes expresarse en su idioma de origen*.

[134] 2001 Census figures, as published in Central Bureau of Statistics *Statistical Pocket Book 2004*.

[135] The Codified law dating from the mid-19th century and overhauled in 1963.

[136] There have been various conferences on this topic, e.g. on December 21st there was a conference on "Role of Political Leaders and Human Rights Activists on the Participation of Disabled in the CA Polls" reported in *Himalayan Times* of 22nd December. But there is no provision in the IC or the Election Act that guarantees any participation of person with disability.

In some Constituent Assemblies there have been Rules on discussion - the order in which people can speak and how long they can speak for. It might be that in certain debates members can speak for no more than 5 minutes and that each members may speak only once on a topic. This may be more of an issue in the plenary than in committees. With 601 members, if each person spoke for 10 minutes this could generate a session lasting a month. Clearly it would be impossible to have the Ugandan rule that each delegate could speak for 30 minutes during the initial plenary debate. In some assemblies the procedure has been for members to indicate that they wish to speak on an article and the chair will call on them in the order in which they appear on his list (e.g. East Timor). Such an arrangement has the disadvantage that successive speakers do not respond to each other but simply deliver their prepared statement on the topic. But the sort of arrangement under which members have to "catch the Speaker's eye" may work against the less experienced members. In Kenya each member had a card with his/her "membership number" in characters large enough to be seen by the chair.

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. Parliaments have had to modify their sitting hours in order to accommodate the requirements of women members who have family obligations and are not able or willing to sit through the night, for example. Unfortunately in some Constituent Assemblies debate on issues affecting women has not been uniformly conducted in terms showing respect to women.[137] It is common to have provision in procedural rules requiring a certain decorum in members' language (in the Nepal HoR Rules "indecent or objectionable or unparliamentary 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 (thinking of dalit members and members with disabilities for example) might also be included.

Information

The secretariat of the Constituent Assembly should have the responsibility to ensure that there is a constant flow of accurate information to the public. In East Timor a short daily bulletin was put out in several languages. Other methods would be a newsletter and a website (which would be used by a limited range of groups but would be a resource for the media and for NGOs).

It should also take steps to ensure effective coverage from the regular news media. Since making a constitution is a technical business, it would be wise to organise orientation programmes for the media, and regular press briefings, in order to avoid deliberate misinformation by political and other interested parties, and accidental misinformation as a result of media misunderstanding and lack of competence.

Observers

One way to set up a structured relationship between the Constituent Assembly and the public is to have accredited observers to the Constituent Assembly. This is again based on the Kenyan process. Such observers would represent organisations or

[137] 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.

interests that did not otherwise have an adequate voice in the Constituent Assembly. These could be professions, religious groups, ethnic or linguistic groups, for example, or possibly certain major NGOs. They should not be too many in number – which means that they must represent substantial (in the sense of important) interest groups or issues. Narrowly focussed groups' concerns could be met by their having access to relevant thematic committees. It would be necessary to have a committee of the Constituent Assembly to accredit such observers. The observers could have the right to attend all plenary and committee meetings of the Constituent Assembly, but no right to speak or vote. They would have the right to interact with members in an informal way, having the right to eat where members ate etc. They could thus have the opportunity to persuade, but not in any way to coerce.

Openness

The whole process of the Constituent Assembly should be characterised by transparency. The public should know what is about to be debated, and by whom. Papers on which discussions are to be based should be publicly available and in time to permit interested parties to make submissions, contact observers etc.

But should sessions themselves be in public? And what considerations should be taken into account? And should the same rule apply to committees as to the plenary? The South African process was very open: all meetings of the Constituent Assembly and its bodies were open to the public.[138] There are risks in openness. Sometimes they can be extreme. In the French Constituent Assembly the mob terrorised the delegates. Even in more orderly circumstances the presence of a certain group might overawe the members. And there is the risk that members will be tempted to play to the gallery rather than concentrate on the business in hand. The South African Parliament when debating the constitution had some experience of this when committees were televised.[139] Apparently the Philadelphia Convention decided to sit in secret partly because of a fear that members would be reluctant to change their minds if those minds had been revealed in public. [140] The Spanish Constituent Assembly of 1978 had a secrecy rule for the committees.[141] Elster suggests that sitting in public "encourages stubbornness, overbidding, and grandstanding in ways that are incompatible with genuine discussion[142]. On the other hand, he also suggests that secrecy encourages more interest based bargaining, than deliberation.[143] His conclusion is that committees should sit in private and the plenary in public.

Reasonable speed

Some recent constitutions (notably East Timor, Iraq and to a lesser extent Afghanistan have been rushed under the influence of international pressure. Others have dragged on for so long that a degree of public fatigue sets in, and perhaps a moment most favourable to the adoption of a new document may be lost – this was to some extent the experience of Kenya. Sometimes lack of resources has meant that a process has been long drawn out. Sometimes this has been the result of delaying tactics on the part

[138] Ebrahim p. 180.
[139] Observations by Fink Haysom.
[140] Elster, "Forces and Mechanisms" at p. 384.quoting Madison: 3 *The Records of the Federal Convention of 1787*, at 479.
[141] Ibid p. 387
[142] Ibid p. 388
[143] Ibid p. 388.

of members – who are enjoying their role – or of politicians who do not want a new constitution.

A possible source of delay is the fact that the Constituent Assembly is also the Legislature. It may be difficult for RoP to prevent this entirely. But since the Legislature is a transitional one only it should not be making detailed laws. There is provision for a committee of the Constituent Assembly to deal with legislative business; the purpose of this is to make it possible for the Constituent Assembly deliberations to continue even though the Parliament has to sit. There is no compulsion on the L-P to delegate responsibility to such a committee, so it might decide to retain the power in the hands of the whole body. Nor it clear from the translation what would be embraced in the expression "legislative business" – does it mean law making only or all the work done by the legislature?

The Chair

The Nepal CA is shaping up to be a rather unwieldy body with 601 members and many people who have not been involved in this sort of activity before, coupled with the strong emotions that making a new constitution has already released, and which are likely to increase.

The powers of chair of the chair are most important in keeping the deliberations on track. The chair – backed up by some sort of committee – should be able to keep discipline to rule members out of order in some circumstances, to cut speeches short if necessary to avoid filibustering techniques.

Yash Ghai, who chaired the Kenyan process, says that in his view the qualities required of a chair of a CA include acknowledged impartiality, a willingness to be firm in matters of time keeping, and approachability and preparedness to interact with CA members in an informal way in order to keep his/her finger on the pulse of the process. In his view the chair must have a good grasp of the issues, because of the need to keep discussion moving, while ensuring that all views have the chance to be aired. The person must be prepared to keep his or her personal views on the issues largely to themselves.

Decision making rules

This can be one of the most difficult aspects of the process. There are various ways in which necessary majorities can be prescribed. For most decisions in most legislatures a simple majority is enough. By this I mean at least half (one more than half) of those present and voting. Of course there is a quorum rule, but even if the quorum is 50% the number voting in favour could be little more than 25% of the whole. In fact it can be less, because the quorum is satisfied by mere presence; it does not require those present to vote. Those who abstain are not counted. In order to ensure that abstainers are counted as having voted against, one can say "a majority of those present, whether voting or not". Sometimes a decision is required to be made by with the support of a certain percentage of all the members whether present or not. This is commonly known as an "absolute majority". As mentioned earlier, it is desirable for all these rules to be spelled out very clearly, not relying only on phrases like "simple majority" and "absolute majority".

In the case of Nepal, the adoption of elements of the final document is to be by two-thirds of all the members – and only if unanimity cannot be achieved. Other decisions

are to be made by a simple majority. Decisions in committee would be made by simple majority. However, it is anticipated that many decisions will be made as a result of discussion leading to consensus. This would be desirable.

Some Constituent Assemblies have had provision for secret ballots. This was possible in the Afghanistan Loya Jirga. In that case there was a genuine risk of intimidation by war lords. There is also a risk in some systems, and situations of bribery. This certainly took place in the Kenyan NCC. A secret ballot may encourage bribery – because no-one should know how an individual voted and therefore not know whether this has been influenced by factors such as bribery. On the other hand, as with intimidation, a secret ballot may make it possible for a person to take a bribe but not vote as agreed. On the whole, however, it would be better for members to be discouraged from taking bribes at all. It is rather different from the situation where there is risk of intimidation. In Kenya voting took place in three ways: members held up their number cards for Yes then No and the chair would rule if the outcome was clear. If the margin was less clear ushers would count the cards. And towards the end when there was great controversy, and great pressure, the chair ruled that the votes should be by ballot: each members being issued with ballot papers, marking them Yes or No and placing them in the ballot box without its being possible to see which way any individual had voted. The motive was less the secrecy than to guarantee accurate counting, in a place without any physical possibility of Division Lobbies.

There are various ways of indicating a vote: a voice vote, a show of hands, passing through division lobbies and a roll call vote – in which the name of each person is called out and they must indicate their vote out loud. In East Timor each members had three cards and voted by holding them up: green, red and blue (for, against and abstain). At one point it was suggested that rather than each group holding up their cards separately, all should hold them up together and they could be counted by three people simultaneously.[144] For some votes the roll call vote was used, for example in connection with the flag.[145] Interestingly, this was not a topic on which there was any doubt about the voting: the final vote was 75 for, 0 against and 8 abstentions. But there had been a heated debate, and the issue was symbolically important.

The existing rules of the Nepali legislature envisage various kinds of votes: voice vote ("The 'Ayes' have it" style), roll call vote, "Yes" and "No" voting slips, going through the Division Lobby, and use of voting machine.

With 601 members the Nepal CA will be limited in the methodologies it can use; at this point there is no apparent discussion of the use of electronic voting.[146]

[144] On December 14 2001 according to my notes.

[145] According to my notes this was done on December 12 2001. This technique was used in the French Constituent Assembly – " a procedure that enabled members or spectators to identify those who opposed radical measures, and to circulate lists with their names in Paris" – Elster p. 411.

[146] At the time of writing power cuts are routine and any method that required electricity might be unreliable.