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International Institute for Democracy and
Electoral Assistance

Constituent Assembly Procedures from a Gender Perspective



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INTERNATIONAL IDEA - CONSTITUENT ASSEMBLY PROCEDURES FROM A GENDER PERSPECTIVE

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ABOUT THE INITIATIVE

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

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

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

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

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

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

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

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INTRODUCTION*

This paper raises issues about how the Constituent Assembly will work, and how its procedures will have an impact both on the way in which women members will be able to play a part in its work, and on how women's issues will be dealt with in the new Constitution which it is the purpose of the Constituent Assembly to draft. This paper does not deal with public participation – which is the topic of the next paper in the International IDEA Gender Folder. Most of the procedures of the Constituent Assembly will be laid down in its Rules, a draft of which is currently before the relevant committee.

* Working draft

WHY DO WE NEED RULES?

A Constituent Assembly is a big discussion group – about a new constitution. When Constituent Assembly members first see a draft set of rules of procedure for that discussion, they may feel that the rules themselves are as long as a constitution! Why is it necessary to have so many, and such complicated, rules? Why not just talk, and eventually reach a decision by discussion?

We are concerned with a process to prepare a new constitution: and we need to think about both the product (the constitution) and the process (the discussion). The people of Nepal want, and deserve, a good constitution, which delivers to them – as far as a constitution can – the promises of the *Jana Andolan II*. They will not get such a constitution unless each issue necessary for an effective constitution is raised, receives full discussion, and is decided upon in the light of all the relevant arguments and facts, and the decision is properly recorded. They will not get such a constitution if some points are omitted entirely (so that the constitution is silent on an important matter, or an old provision that people really wanted to change is left unchanged), or if discussion is too rushed, or disorganized, so that important points are never raised. It is important not to have ‘decision by exhaustion’: when discussion has gone on and on so that people are so tired and confused that they make almost any decision – or the decision that some people are pushing particularly hard. And only an orderly discussion will make it possible to know what has been decided.

Making a constitution requires many hundreds of individual decisions to be made. This will be much easier if careful thought is given to the order in which discussion takes place. Once a decision is made it ought not to be re-opened. The Chair of the Constituent Assembly and the committee in charge of organising the business of the Constituent Assembly must ensure that the order of discussion is logical, so that, for example, the Constituent Assembly does not find at a late stage that it has approved contradictory decisions – for example in one chapter a President elected by the people, and in another Chapter a President elected by Parliament!

The Interim Constitution is designed on the assumption that as far as possible there will be consensus – in forming a government and in making the Constitution. The rules of procedure can help to make reaching a consensus easier. Consensus is important in constitution making: that way the Constitution should be more workable – because everyone is in broad agreement with it, and the Constitution can be a sort of symbol of the nation.

It is also important that not only the decisions, but the reasons for the decisions, are recorded. This is because in the future, when the courts and others come to use the new constitution – to

apply it to particular situations – they may find some phrases are unclear, and require interpretation. When interpreting, it is often helpful to know why a particular word or phrase or idea was used. Of course a well-structured discussion will reduce the risk that such uncertain phrases appear in the constitution.

The Constituent Assembly has a time limit of 2 years or maximum 30 months (an extension being possible only if delay has been caused by a state of emergency) to produce the new constitution. A well structured process will help timely completion. And there are good reasons for not taking too long: the people tend to lose interest if the process drags on for too long, and ordinary government is to some extent placed ‘on hold’ while the constitution is made, which is not fair to the people and their expectations, nor to political parties that have a programme they want to pursue.

And it is important that the people of Nepal feel that the constitution belongs to them, which is more likely if they have participated in the making of it. So the process is important not just to the content of the constitution but to the people’s acceptance of that constitution. People often complain that there was not enough consultation in the making of the 1990 Constitution (though there was some). It is important that the same mistakes are not made with the new Constitution.

We can summarise the purposes of Rules of procedure as being to ensure that:

- decisions are made – and are made neither too hastily nor in too protracted a manner
- it is clear what has been decided, and why
- decisions are made on the basis of the best available input in terms of factual analysis, reasons etc
- irrelevant matters are not taken into account
- all members are able to participate
- all members feel that they have had a fair opportunity
- the dignity of the institution is upheld
- the dignity of members is protected
- publicity is achieved when appropriate, and secrecy maintained when appropriate
- a good record can and is kept of decisions and process
- outside participation is possible when appropriate
- irrelevant pressures are excluded.

It is also desirable that participants understand why particular rules are included. This requires that there are no unnecessary rules, that the language in which the rules are expressed is clear. This would be better achieved, perhaps, if the rules themselves make clear what principles are to be applied, and what they are intended to achieve. The Rules might even begin with something on the following lines:

In applying these Rules, the person presiding, officers and members of the Constituent Assembly must apply the following guidelines:

- (a) the process of making a new constitution for Nepal must be characterised by openness, responsiveness to the needs and views of the people, respect and tolerance;
- (b) all members of the Constituent Assembly must be able to express their views within the Constitution, and these Rules;

- (c) particular care must be taken to ensure that members of hitherto excluded groups [including women....] within society are able to exercise their rights and responsibilities as members of the Constituent Assembly;
- (d) these Rules are to be used to facilitate and not to obstruct discussion and decision;
- (e) the people of Nepal must have adequate opportunity to put forward their views on the future Constitution, and the constitution that is to be prepared by the Constituent Assembly must be based on those views;
- (f) every stage of the constitution making process set out in these Rules must be allocated sufficient time;
- (g) as required by the Interim Constitution Article 70 the principle of consensus must be striven for; and
- (h) a New Constitution for Nepal should be achieved by the deadline provided in the Interim Constitution Article 64, namely two years from the beginning of the first meeting of the Constituent Assembly, unless an extension is necessary because of a state of emergency.

This is only an outline of the objectives, of course.

SHOULD WE BE FOCUSING ON WOMEN MEMBERS AT ALL?

Why is it considered important for women to be properly represented? Should we assume that women will be the only effective voice for women members? Of course there are other arguments for having women members: the simple fairness argument (if women want to be there they should have the equal right to be), or the ‘demonstration effect’ (having women there will encourage other, especially younger women, to aspire to similar things). But the main basis for arguments for women’s presence has been the assumption, that this will enhance the chance of a good constitution for women. Research suggests that the assumption is probably justified: ‘female legislators represent women better in terms of ideology and policy priorities’¹. Female legislators, when compared to their male counterparts, introduce and vote for legislation that is of more interest to women.²

Women face dilemmas, however. One relates to style – should they adopt the more confrontational style of men members – and run the risk of exposing themselves to ridicule as being ‘unfeminine’ or even ‘lesbian’? Or should they retain their ‘feminine’ approaches, and perhaps be seen as ineffective? Then there is the question of whom they represent: to what extent should a woman represent women? As Sawyer puts it:

As representatives of women, the careers of women politicians were very circumscribed; gender stereotyping of parliamentary roles meant consignment to health and welfare areas. The desire to break out of these roles and gain access to the more prestigious masculine portfolios or committee assignments led to the disavowal of gender (‘I’m a politician not a woman’).³

1 Kevin Arceneaux, ‘The “Gender Gap” in State Legislative Representation: New Data to Tackle an Old Question’ *Political Research Quarterly*, Vol. 54, No. 1 (Mar., 2001), pp. 143-160 citing Kathleen A. Frankovich . ‘Sex and Voting in the U.S. House of Representatives, 1961-1975.’ *American Politics Quarterly* 5 (2): 315-31 (1977); Beth Reingold.. ‘Concepts of Representation among Female and Male State Legislators.’ *Legislative Studies Quarterly* 17 (4): 509-3(1992); Susan Welch, ‘Are Women More Liberal than Men in the U.S. Congress?’ *Legislative Studies Quarterly* 10 (1) 125-34 (1985).

2 Arceneaux above, citing Sue Thomas, 1990. ‘Voting Patterns in the California Assembly: The Role of Gender.’ *Women and Politics* 9 (1): 43-56. 1991. ‘The Impact of Women on State Legislative Politics.’ *Journal of Politics* 53 (4): 958-76, and Thomas and Welch ‘The Impact of Gender on Activities and Priorities of State Legislators.’ *Western Political Quarterly* 44 (2): 445-56. Research on the Scottish Parliament (with 37% women) suggests that women members are more likely to raise gender issues - Fiona Mackay, ‘Women and the Scottish Parliament: Making a Difference?’ http://www.equalities.gov.uk/research/gender_research_forum/grf_papers_feb_june/mackay_summary.pdf

3 P. 374.

In Uganda, women with political ambitions showed reluctance to embrace some 'women's issues' which were very unpopular with men, including criminalisation of marital rape and restrictions on polygamy (also a problem for Muslim women).⁴ For women who do not have long term political ambitions this may be less of a problem. And they will also, hopefully, remember that clearly it was assumed that having more women in the Constituent Assembly would be significant for achieving a 'women-friendly' constitution. Nor should they forget the question of 'inter-sectionality' or multiple disadvantage – such as being a Janajati woman, a Madhesi Dalit woman or a woman with disability.

The nature of political parties also places limitations on the possibilities for individual members, including women, other than members of their governing ranks. Goetz comments:

They may be such blatantly hollow vehicles for powerful kleptocratic families or ethnic groups, lacking any but the flimsiest organisational structures, decision-making processes, and ideologies, that they simply offer no purchase for an internal democratisation project designed to promote gender equity. There may be no discernible party platform, if politics is a matter of appealing to ascriptive loyalties rather than broader interests. In other words, party systems, and the ruling party, may be insufficiently institutionalised for women to challenge rules which exclude women - simply because there are no firm rules and rights, only patronage systems and favours.⁵

There is another reason for concentrating on women (a point also made in Discussion Paper 1⁶) – it is important that they seize this moment to be effective, or the gains may be lost. A disappointed woman politician in Zimbabwe explained in 1995 (15 years after independence), [It] is much better to push what you want during the transitional period, before you are starting, before people get used to certain ways, when you still have the fever of victory ... We thought that we fought, that we won, and that is it.⁷

4 Anne Marie Goetz, 'No Shortcuts to Power: Constraints on Women's Political Effectiveness in Uganda' *The Journal of Modern African Studies*, Vol. 40, No. 4 (Dec., 2002), pp. 549-575, at p. 565.

5 Anne Marie Goetz, 'No Shortcuts to Power: Constraints on Women's Political Effectiveness in Uganda' *The Journal of Modern African Studies*, Vol. 40, No. 4 (Dec., 2002), pp. 549-575, at p. 551-2.

6 *The Constituent Assembly of Nepal: An Agenda for Women* p. 5.

7 Quoted by Geisler at pp. 606-7.

WOMEN IN LEGISLATIVE SETTINGS

Although women in Nepal argued that, since just over 50% of the population are women, ‘proportionate inclusion’ would require 50% of the Constituent Assembly members to be women, in reality only 197 of the 601 members are women (or 32.8% of the total). This achieves the ‘critical mass’ of 30% adopted as a benchmark at the Beijing 1995 conference, and is higher than in most of the law making bodies in the world. The time has come to consider how best that presence can be used. One can imagine that a new constitution that does not adequately reflect the rights of women in Nepal might be justified by an argument on these lines: ‘Women were well represented in the Constituent Assembly, so how can you say that the constitution does not reflect the women’s agenda?’ This sort of argument has apparently been made in Australia to justify the adoption of policies that do not favour women or ‘women’s issues’.⁸

Some people – women and men – would perhaps argue that there is no reason to assume that once women are present in a body like the Constituent Assembly they will behave any differently from men. But daily experience, and research in various countries, suggests otherwise. Aili Mari Tripp has written of women in Africa⁹ :

Popular perceptions often suggest that women’s ‘proper’ place is still in the home rather than in politics. Prohibitive cultural attitudes against women’s involvement persist among both men and women. These are reflected in voting patterns, media coverage of female politicians, and even in blatant attempts to suppress women’s assertion of their political rights and views.

This relates to willingness to stand for office, but the same attitudes do not simply disappear just because women are elected. Tripp also refers to ‘cultural prohibitions on women being seen and speaking in public in front of men. Where these prohibitions are strong, men do not listen to women who take the podium or are active in politics in other ways.’ This may be written of women in Africa, but the everyday experience of women indicates that is likely to be universally true.

8 See Marian Sawer ‘Parliamentary Representation of Women: From Discourses of Justice to Strategies of Accountability’ *International Political Science Review / Revue internationale de science politique*, Vol. 21, No. 4, Women, Citizenship, and Representation. Femmes, citoyenneté et représentation (Oct., 2000), pp. 361-380

9 ‘New Trends in Women’s Political Participation in Africa’ <http://democracy.stanford.edu/Seminar/AiliTripp.pdf>.

It has been observed that 'A fundamental obstacle has been the prevalence of a "masculine model" for political life. The historical and numerical pre-eminence of men in parliaments has meant that men have shaped the rules of parliament and defined the standards of behaviour'.¹⁰ Problems may go further than this. Women who are elected may face hostility. Tripp says – 'Even in parliamentary bodies, women have difficulty being taken seriously, being listened to, and are frequently subjected to humiliating stereotypes and derogatory remarks.' And it is not uncommon for men to 'roll their eyes or groan when issues of special concern to women are raised'.¹¹ Women in the South African Parliament elected in 1995 (which also made the 1996 Constitution) faced initial hostility, but found a year later that this was declining, and a woman said, 'just our presence here means that you no longer find people expressing themselves in overtly sexist ways'.¹² There may be suspicion of women who are elected; 'former Australian finance minister, Senator Peter Walsh, complained that the trouble with affirmative action was that you "do not end up with women...you end up with feminists"'.¹³ At least in Australia the private lives, especially the sexual relationships, of women politicians are viewed as 'fair game' at any rate by the media. Indeed, in that country (which is a somewhat 'macho' society) the position of women members may be particularly bad, with male members referring to women members in the chambers by their personal names instead of as 'Senator' or 'Member for [their constituency]' and it has been commented that 'gendered practices and discourses are immutable and intractable in the Australian Parliament'.¹⁴

There is also evidence of sexual harassment of women parliamentarians in some countries, including in South Africa and Uganda.¹⁵ And those who are inclined to have a rose-tinted view of democracy in Scandinavia might be distressed to know that women members of the Swedish Parliament are not immune. One said 'There are several old blokes in heavyweight positions on different committees who are known for coming on to young attractive women who are new here.'¹⁶

10 Inter-Parliamentary Union (IPU), 'Enhancing the role of women in electoral processes in post-conflict countries: Post-election support' presented at United Nations Office of the Special Adviser on Gender Issues And Advancement of Women (OSAGI) Expert Group Meeting on 'Enhancing Women's Participation in Electoral Processes in Post-Conflict Countries', 19-22 January 2004, EGM/ELEC/2004/EP.3.

11 Sawyer, above. This impression is borne out by observations by the author of this paper.

12 Gisela Geisler "'Parliament is Another Terrain of Struggle": Women, Men and Politics in South Africa' *The Journal of Modern African Studies*, Vol. 38, No. 4 (Dec., 2000), pp. 605-630, at p. 618, quoting Davis, G. 'Putting gender back on the agenda' *Weekly Mail and Guardian*, 5-11 May 1995.

13 Sawyer, above at p. 363.

14 Mary Crawford 'Gender and the Australian Parliament' *The Brisbane Line* on May 1, 2007 posted on On line Opinion <http://www.onlineopinion.com.au/view.asp?article=5808> Tuesday, 8 May 2007.

15 See Geisler citing South African Press Association (SAPA) 'Women leaders must break legacy of silence', 29 May 1998, and Tripp citing Tamale, S., *When Hens Begin to Crow: gender and parliamentary politics in Uganda* (Kampala: Fountain Publishers, 1999).

16 'Sexual harassment rife in Swedish parliament – MPs' published: 22 Apr 2007 on 'The Local – Sweden's News in English' <http://www.thelocal.se/7073/20070422/>.

Do women have a different style of operating in this type of environment from men? Of course this may depend on the style of the men. The more aggressive male styles are, the less women are likely to conform – at least this is an intuitive assumption. In Australia it is said, a ‘confrontational style’ is expected of politicians, at least of men, and women have found it hard to change this ‘gladiatorial style’.¹⁷ Women, it is said, favour more consensual styles of leadership and operation.¹⁸ And in Rwanda, women feel that they had achieved more by gentler means:

We didn't shout and demand but moved slowly. We asked them: 'Don't you want your daughter to have rights? Don't you want your wife to have rights? We appealed to them'¹⁹.

Some research has been carried out into male/female interruptions: in one study ‘males interrupting females accounted for 96% of all interruptions’²⁰, while ‘men were more likely to talk while a woman was speaking than while a man was speaking’.²¹ Procedural rules are designed partly to avoid this type of bias that occurs in ordinary conversation. However, research in legislative committees in the US shows that ‘Women entered the discussion later, spoke less, took fewer turns, and made fewer interruptions than men’.²² Some of the women’s style is undoubtedly a matter of preference. But some of it is a matter of lack of self-confidence, or of actual lack of skills. One South African woman MP was described as -

an excellent organiser, but lacked the skills to operate efficiently in parliament. In committee meetings she preferred to sit and listen to others, afraid of saying something wrong.²³

Fortunately, the stress laid on consensus by the Interim Constitution in Nepal, and by the current ethos, as well as the absence of a single dominant party in the Constituent Assembly may lead to more emphasis on consensual decision-making in the Constituent Assembly; indeed the parties constantly emphasise the importance of this. This may suit women more, and make their participation easier.²⁴ Again, the physical layout of the Constituent Assembly may lead to a less confrontational style than the layout of some ‘Westminster style’ parliaments (parties

17 Sawyer, above.

18 Sawyer.

19 *Women Taking a Lead: Progress Toward Empowerment and Gender Equity in Rwanda* Women for Women International Briefing Paper September 2004 available at <http://www.womenforwomen.org/Downloads/RWpaper.pdf>, quoted a little more fully in Discussion Paper No. 1 at p. 19.

20 Zimmerman and West, ‘Sex Roles, Interruptions, and Silences in Conversation’ in Barrie Thorne and Nancy Henley eds., *Language and Sex: Difference and Dominance* (Rowley, MA: Newbury House, 1975), cited in Lyn Kathlene, ‘Power and Influence in State Legislative Policymaking: The Interaction of Gender and Position in Committee Hearing Debates’ *The American Political Science Review*, Vol. 88, No. 3 (Sep., 1994), pp. 560-576 .

21 Willis, F. N., and S. J. Williams. 1976. ‘Simultaneous Talking in Conversation and Sex of Speakers.’ *Perceptual and Motor Skills* 43:1067-70 cited in Kathlene.

22 Kathlene at p. 565.

23 Gevisser, M. ‘From grassroots to ruminating in parliament’, *Weekly Mail and Guardian*, 18-24 November 1995.

24 Sawyer’s research suggests that legislatures with many small parties have a less confrontational style, and that women members favour this.

facing each other) - though the layout of the ICC, designed for an audience rather than active participation may also have an impact on the style of interaction. And, despite the odds, women in many parliaments do have significant gains to be proud of.²⁵

This may seem to lay stress on gendered stereotypes: but even in countries with considerable sexual equality, almost certainly more women than men members will have time-consuming family responsibilities. In many countries recently this has been taken into account in fixing legislative hours: 'In Tasmania the premier recently limited parliamentary sitting times to 6:00PM, stating that later sitting hours were discriminating against women with young families'.²⁶ This was an issue tackled early on the South African Parliament, after the introduction of votes for all.²⁷

In making the constitution, most of the serious decision-making is likely to go on in committees. Research has shown that women often prefer to operate in committee settings rather than in the full legislative house; they 'tend to feel more "at home" in more intimate forums'.²⁸ Many women members of the Scottish Parliament feel they prefer to work in a 'low-profile "solution-oriented" way'.²⁹ But, as mentioned earlier, women participate less even in this type of setting. It is not clear whether women chairs make female participation easier. And there is conflicting evidence about the impact of increased numbers of women on committees: on the one hand this may make it easier for women to speak; on the other, increased numbers of women may prompt a more aggressive male response.³⁰ 'The more women on a committee, the more silenced women became. It may be that women are particularly active in behind-the-scenes negotiations, but informal participation that alters a bill has to surface as formal participation in the form of amendments in committee or on the floor'.³¹ Kathlene concludes:

If male chairs have a propensity to interrupt speakers and choose the points to be discussed, women's issues will not receive a fair or (probably) informed hearing. If rank-and-file men are propelled to 'take up' and 'take away' the floor from rank- and-file women when a female sponsors a bill or the issue heavily affects women, then women's imprint on the policy process will be undermined. The alternative - looking to women chairs as potential power brokers of women's interests - assumes either that their leadership style is similar to men's or that their

25 E.g. see Geisler above.

26 Sawer at p 370 citing *Canberra Times*, 16 March 1999: 5.

27 See Geisler at p. 618. She adds, 'Jenny Schreiner, a single parent, was particularly punctual about leaving parliament every day at five in the evening, meeting or not, to spend time with her leaving parliament every day at five in the evening, meeting or not, to spend time with her small son', (citing Davis, G., 'Putting gender back on the agenda', *Weekly Mail and Guardian*, 5-11 May 1995.

28 Sawer p. 370. See also Geisler at p. 621.

29 Fiona Mackay, 'Women and the Scottish Parliament: Making a Difference?'

30 See Kathlene p. 569.

31 Kathlene citing Hall

‘different’ leadership style will have the same effect as men’s on controlling debate in hearings. But there may be little reason, theoretically, to believe that a more democratic or inclusive style that women tend to use will produce the same control over the agenda as the more commonly used autocratic style of men.³²

Despite all these odds, it is clear that women have had considerable success in constitution making processes in various countries. And women who have had experience in civil society may be able to make good use of the constitution making process. In Kenya women were active participants in both committees and the plenary sessions of the Constituent Assembly. They were supported by some women ministers, by women members of the Commission that had prepared the draft constitution, and by civil society members. It may also have been helpful to women that only one-third of the Constituent Assembly members came through the ordinary electoral process (they were Members of Parliament). So many men members were perhaps no more experienced than the women.³³

³² P. 573.

³³ Personal information from Yash Ghai who chaired the Kenyan Constituent Assembly.

THE PARTICULAR SITUATION OF WOMEN CONSTITUENT ASSEMBLY MEMBERS IN NEPAL

The circumstances of every country are different of course. However, there seems little reason to be confident that women Constituent Assembly members will find it any easier to function as effective advocates for women's issues than their sisters in many other legislatures. We must qualify this in two ways: firstly the fact that this is a Constituent Assembly and not a Parliament (or not only a Parliament) may require, and hopefully give licence to, some differences in style. And secondly— a related point – there is the emphasis on consensus mentioned earlier. Making the constitution should be a collaborative effort on behalf of the entire people.

But women will experience tensions: because their parties will expect party loyalty ('we put you there'), and because they are also members of other groups: Dalits, Janajatis, Madhesis, Bahuns/Chhetris. Anecdotal evidence suggests that women members of the Interim Constitution Drafting Committee sometimes identified with those other aspects of their selves, rather than as 'women'. And similarly there is reason to suppose that some parties will lay more stress on party loyalty in the Constituent Assembly than others.

These points aside, women in the Constituent Assembly face the challenge that hardly any of them have any real experience in a similar role. Of the 404 men members of the CA, 74 were in the recalled Parliament or the 2007-8 Interim Parliament; in other words they have previous parliamentary experience. Only 21 of the 197 women members have had such experience. Research in the US has shown that 'freshman status was negatively related to participation in congressional policymaking',³⁴ though one writer suggests that this is a more important factor in large bodies³⁵ – and few bodies are larger than the Constituent Assembly! But participation in committees, being smaller, may be less affected. Secondly, the Nepali party structure is hardly more democratic than that pictured by Goetz above. Thirdly, all the women members are there through parties, and none is there 'only' as a woman – all are also there by virtue of some other identity, as a Dalit, Janajati etc. Finally 161 of the women members came through the party lists elections, or 81.7% of the total women members, while 174 or only 43.1% of the men members came by that route. There is some risk that list members will be taken less seriously than constituency members who had to fight for their places in a way that list members were not – could not.³⁶

34 Hall, Richard L. 'Participation and Purpose in Committee Decision Making.' *American Political Science Review* 81: 105-27 cited in Kathlene.

35 Kathlene.

36 For a discussion about the roles and perceptions of list as opposed to 'riding' (constituency) members in various countries see <http://pnijjar.livejournal.com/25597.html>.

POLITICAL PARTIES IN THE CONSTITUENT ASSEMBLY

Two members were elected as ‘independents’; all the other members are in the Constituent Assembly through political parties - which makes the parties the ‘gatekeepers’ of the assembly. The people had no opportunity to select their Constituent Assembly members on any other basis. But clearly the parties will give a lead in the discussion, and it is important that parties accept the new constitution because they will have to operate it. Members should work with their political parties towards the objectives that they hope the Constituent Assembly will achieve. Political parties also should remember that making a constitution is rather different from governing. A government has to make decisions based on its political philosophy; it makes laws to carry out its policies. But a constitution is not mostly about policy; it is about a workable, just and accountable system of government. It must operate regardless of the philosophy of ruling parties, perhaps over a period of decades into the future. It should have a vision: but a vision for the entire nation.

Political parties and the Constituent Assembly members should also bear in mind that a constitution may contain provisions that regulate political parties. Just as lawyers must not dictate how the court system is structured, and women do not have the sole right to dictate what the rights of women are, so political parties cannot insist that a constitution is structured to benefit political parties, or politicians.

WHERE ARE THE REAL DECISIONS MADE?

This is a really difficult issue. 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’.³⁷ And ‘Nehru, Patel, Prasad and Azad...constituted an oligarchy within the [Constituent] Assembly’³⁸, though debates within the party Assembly were vigorous and the oligarchy did not always dominate there.³⁹ 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’.⁴⁰

In South Africa, vigorous negotiations went 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.⁴¹ But meetings continued, with Nelson Mandela playing a part as groups came in succession to his house.⁴² In Kenya a consensus building committee was formed under the chairmanship of a non-party member of the Constituent Assembly (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.⁴³

In Nepal there is little doubt that horse-trading will go on. It is even built into the system of government under the Interim Constitution – though it is called ‘consensus’. There is explicit provision in the Interim Constitution for party leaders to meet if, during the final stages, consensus cannot be reached.⁴⁴ It may not be wise to assume – as the Interim Constitution does - that party leaders alone will be the right people to achieve this consensus. Flexibility may be essential,

³⁷ P. 22.

³⁸ P. 21

³⁹ P. 23.

⁴⁰ P. 21-2 quoting Brajeshwar Prasad at Constituent Assembly D VII, 18, 760-1.

⁴¹ Hassan Ebrahim, *Soul of a Nation* p. 196

⁴² P. 202.

⁴³ Personal information, and press accounts of the time.

⁴⁴ Article 70(3).

and this may require broader membership of what may be necessary deadlock breaking mechanisms.

For women, a particular problem is likely to be that few women penetrate the circles that are likely to be involved in this behind-the-scenes decision-making. For some 'women's issues' this may not be a problem, because they are unlikely to be the stuff of secret meetings. But matters of women's representation and quotas (or reservations) may be politically contentious. While it is important that essential 'deals' are not undone on the floor of the assembly, it is also important that everyone affected has a fair chance to make an input. Women must insist that issues of importance to them are not resolved only in the proverbial 'smoke filled rooms'⁴⁵, if necessary by withholding their votes or threatening to do so.

⁴⁵ Another male concept in a world in which more men smoke than women!

CAUCUSES

In many constitution making processes where women have been able to make an impact, they have done so partly through caucuses, or groups with shared interests, within Parliament. In the last legislature in Nepal there was a women's caucus and even secretarial assistance provided by the Secretariat of Parliament. Though there may be some risk in such assistance, it has been suggested that 'An all-party women's caucus can turn into an effective tool in parliament if it obtains official recognition and technical support'.⁴⁶ Strong party discipline may make forming an effective caucus more difficult, as has been the experience in some countries.⁴⁷ In such situations it may be useful for women to work more informally. After all, women do not lose their freedom of association by becoming Constituent Assembly members. Nor, it is suggested, should women be compelled to join a caucus. This would be meaningless: the English saying 'You can take a horse to water, but you can't make it drink' comes to mind. And if the supposed compulsion emanated from the Secretariat, that would surely come with 'strings' attached. Individuals join a caucus for an alternative form of support to party; to permit the Secretariat, almost certainly party dominated, to impose conditions on membership and behaviour would be to re-impose party control.

Women's caucuses are common in legislatures around the world. Sometimes they are composed of women members from a single party, and sometimes are cross-party. Sometimes there is more than one. In the Finnish Parliament there is a 'Network' of women members which 'calls together women parliamentarians across all political parties to discuss political issues of particular interest to women, the objectives being to promote equality between women and men, to further the implementation of women's rights and to introduce the perspective of women into the drafting of parliamentary Bills'.⁴⁸

⁴⁶ See IPU above.

⁴⁷ IPU.

⁴⁸ <http://www.eduskunta.fi/efakta/opas/tiedotus/naisede.htm> The Terms of Reference of the Malawi Women's Parliamentary Caucus are (or were in 1996): To address women's issues across party lines; To promote the cause of women's empowerment and to raise the status of women in Malawi; To serve as a mechanism for lady MPs to remain informed on women's issues; To serve as a forum whereby Lady MPs can continuously liaise with other women's groups and activists to keep abreast of women's issues and to provide for a coordinated approach on women's issues; To develop the skills necessary to critically analyze legislation with gender in mind; To develop lobbying skills and strategies both individually and collectively to influence the legislative process where women's issues are concerned; To gather and disseminate information on legislation passed on women's issues; To develop public communication skills of Caucus members in an effort to facilitate broader press coverage; and To sensitize other members of parliament on women's issues. See 'A Special Meeting of the Malawi Parliamentary Women's Caucus' Sponsored by the National Democratic Institute for International Affairs, Lilongwe, Malawi, August 3, 1996

In the constitution making process in Uganda:

Women delegates to the Assembly formed a non-partisan Women's Caucus that carried out workshops for women delegates on speech making, constituency building, coalition building, parliamentary procedures and other related topics. The Caucus developed strategies to make sure that women's concerns were brought to the floor in the Assembly and publicized their views in a weekly radio program dealing with ongoing debates in the Constituent Assembly. The Caucus worked with Uganda Women Lawyers (FIDA), which gave them assistance on specific Constitutional matters. They also worked closely with a leading women's rights group, Action for Development, and other NGOs to promote civic education publications and seminars for women around constitutional issues.⁴⁹

Women should not forget that they will need allies. They should work to persuade men of the logic of their position; men must vote for women's causes even if they hesitate to take the lead on them. And women can ally with other groups such as Dalits and Janajatis who have specific aims they wish to achieve in terms of rights and inclusion.

⁴⁹ Tripp above at p. 21.

FACILITIES

This is an issue that goes a bit beyond procedures, but is very important. To make it easier for women to play a full part, certain facilities should be available for women. Are there sufficient toilets for women (this was an issue that had to be dealt with at an early stage in the South Africa process), and are these kept clean, and are they secure, so that women are happy to use them, and neither forced to spend a long time lining up to use them nor tempted to go home during the day? Is there somewhere for women with young children to leave them with supervision during the day (a number of countries' legislatures have such arrangements)? There are some women members with babies: is there somewhere for them to breastfeed the babies that gives some privacy and is clean? Ideally there should be a room that only women have access to, to rest, meet other women etc.

THINKING ABOUT PROCEDURES

Participation of members

It is important that communities within Nepal move on, accepting the make-up of the Constituent Assembly, even if they are not absolutely satisfied with it, and think about how they can make their full contribution. It has happened in other processes that some groups have continued to agonise over whether they have adequate presence, allowing others to push ahead in achieving their objectives within the body.

Rules that are unnecessarily complicated may make members, especially new ones, rather nervous, which may make it more difficult for them to participate. But if rules are there for a good reason, which, the members understand, the rules will be easier to remember and should not be intimidating. Ideally the rules should not only be necessary, but be written in as simple language as possible, without using unnecessary technical terms or mere verbiage.

An important aspect of the rules of procedure is to make sure that all those elected do indeed have a voice there. Inexperienced members, quiet members and minority group representatives must not be drowned out by more experienced politicians, self-confident speakers or representatives of big communities - or simply those who shout the loudest. Rules should be designed to make sure that every member has a fair chance to speak, and to understand, and to vote. Some rules are designed to achieve this are rules that limit the length of speeches, and rules that allow the chair to stop irrelevant contributions.

It is absolutely essential that there be a process for limiting the length of speeches. With 600 members, if every person insisted on speaking on a particular topic and could go on for an unlimited period, if the average length of speech was even 15 minutes this would total 150 hours. Allowing for breaks, late starts, discussion on other issues etc one could only expect about 6 hours a day of actual speeches, or 28+ days, which would probably be spread over at least 7 weeks. How much time has been allowed elsewhere? In Uganda there was a 30 minute limit, during the initial debate – but the body comprised only 214 members. In Kenya there was a ten minute limit. There may be different lengths of time allotted for different stages and to different speakers. In Bolivia the Rules provided:

Section 63. TAKING THE FLOOR

Deliberative sessions shall be based on the participation of the representatives; their speeches shall be limited to the time detailed as follows:

- a) At the stage where proposals for the Country Vision are presented, the political representations [members of the Constituent Assembly belonging to a particular party – not all members were party members – formed a ‘political representation’] shall have a maximum of three hours.
- b) At the stage where reports are presented by the majority and the minority, committees shall be granted two hours per report.
- c) At the voting stage to approve sweeping motions, regional representations [members from a particular regions formed a ‘regional representations’] and political representations shall be granted one hour at most.
- d) At the voting stage to approve details, representatives shall have a maximum of ten minutes per section.
- e) In order to make a motion, the maximum time shall be two minutes.

This shows that time may be allocated to individuals, or to groups – whether to a committee of the Constituent Assembly or to some other grouping within it. There is a risk that extended time periods might be given only to political parties, rather than to other interest groups. It would be good to have the possibility of other groupings – Dalits, persons with disability, women etc. - being given extended time. Time limits – with this sort of flexibility – are very important, and groups that might otherwise be shouted down or squeezed out, including women, stand to benefit from them. But they must not permit the rules to be circumvented by special extensions given to groups that exclude women (which would probably include party leaderships).

Members they must learn to make use of the periods available in the best way possible – this means that they must focus on the topic in hand, avoid irrelevance, and also coordinate contributions from women so that all the necessary points are raised. Being relevant is quite hard for members who really care deeply about some issue, and perhaps not very much about other issues. But it is useless to insist on talking about the wrongs of a particular group when the subject of discussion is whether there should be a second chamber of parliament – unless the second chamber would help the situation of that and similar groups. In fact it might be counter-productive to raise issues at the wrong time, because others will become impatient and stop listening. The chair should take the trouble to explain to members if they are being irrelevant. Again – if the topic under discussion is women’s property rights, and 6 women are likely to have the chance to speak, none of them must diverge from the topic to talk about rape, for example, and if only three minutes is to be allocated to each person, women must organise so that they between them cover all the aspects. It is also very important that members, including women, keep careful track of the issues to be discussed and plan well. Rules can help by requiring suitable notice.⁵⁰ Parties may have their ‘whip’; women must have their own whip.

Also important are rules that ensure that members are addressed and listened to with respect – that no-one uses insulting language, or reads the newspaper or gossips with their neighbour.

⁵⁰ The Bolivian Rules said: ‘The distribution of documents, whose publication has been ordered by the Plenary Council or the committees, shall take place at least twenty-four hours before the documents are discussed, except in case of urgency, which shall be defined and announced by the Steering Committee.’

Members should be alert to violations of the rules, and insist that they are observed. Rules could mention specifically the need for respect for women.

An important aspect of members' participation is the committee structure (see below), and it is likely that many of the most important decisions will actually be made in committees, where the rules can be rather different.

The right to speak

At least one party leader has privately stated that he sees little reason for party members to speak – that is for the leadership. Hopefully women members will not be alone in finding this a completely unacceptable restriction on the functioning of the Constituent Assembly.

A person who becomes a member of the Constituent Assembly retains her human rights – including freedom of speech, and the rules should recognise this. But how would a member indicate an intention to speak? In some parliaments a person must 'catch the Speaker's eye' - which may work against the less experienced members, and perhaps especially against women (see the earlier discussion of how women operate). 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. In the Kenyan National Constitutional Conference, which had 629 members, each member was provided with a large card on which the member's enrolment number was printed. A member wishing to speak raised the card.

Public participation

The Interim Constitution says that the 'people of Nepal' are to make their constitution through the Constituent Assembly. The Constituent Assembly members are to represent the people, but in order to ensure that the new constitution really reflects the wishes of the people it is really essential that there is some mechanism for groups and individuals within society to express their opinions. Ideally such public input should take place at various stages: including at an early stage, so that the views of the public can shape the draft constitution (once a complete draft constitution is prepared it may become hard to change it in major respects). Then the public should be able to make submission to be considered in the committees looking at different aspects of the constitution, which is where the most detailed discussion will take place.

Once a complete draft constitution has been prepared, the people should have the opportunity to read and discuss it and make their comment. And this opportunity must not come at so late a stage that those comments cannot be taken into consideration.

It is not enough to ask the people what they think: it is also important to have a method to record what the people say, to analyse it, and to convey what the people think to the people who are actually making the constitution: the Constituent Assembly members.

The next paper in this IDEA series will discuss issues of public participation in making the constitution, especially from a gender perspective.

Committees

The way the Constituent Assembly is organised can have an important impact on the participation of members. It is likely that many of the important discussions and decisions will take place in committees. So it will be very important to ensure that the voice of members is heard in committees as well as in the meetings of the entire Constituent Assembly. The whole point of a committee is to have a small group – where it is easier to have a detailed discussion and to negotiate decisions than in a huge body like the whole Constituent Assembly. But the ‘right people’ must be in the committees.

A committee on a specific aspect of the constitution should have some members who are knowledgeable about that aspect. But it must not be composed only of such people but rather comprise a mix of people with different backgrounds representing a variety of interests. Lawyers must not be allowed to decide everything about the legal system; women must not be allowed to decide everything about the rights of women; economists and bankers must not be allowed to decide about the role of the central bank. That is not ‘the people’ making the constitution. The constitution must be made to serve the nation as a whole. Lawyers may have their own interests uppermost in their minds. Women’s rights will affect the rights of men, and men must not be ignored. Bankers and economists may have a certain economic philosophy – and it is a matter for the Constituent Assembly as a whole, acting for the people, to decide how far the new constitution should reflect particular philosophies.

In many legislatures around the world, women are found in committees that deal with ‘women’s issues’ or ‘social issues’, while men are found in those committees that consider issues like defence, foreign affairs, finance and development. The Interim Constitution gives a right to proportionate representation in public bodies, which must cover the Constituent Assembly (Article 21), and all committees ought broadly to reflect the make-up of the Constituent Assembly as a whole: the political parties, the gender, the ethnic/caste composition and the age distribution. This is because the committees are acting on behalf of the Constituent Assembly (and the nation). The Bolivian Rules provided that ‘The Steering Committee shall be formed in a pluralistic manner by the representations of the diverse civic groups and political parties, observing the criterion of majorities and minorities, and ensuring gender balance whenever possible.’ It applied a similar rule to the members of certain Commissions of the Constituent Assembly, though not apparently to substantive committees. However, it may be appropriate to depart from a rigid balance for some committees.

This takes us to the question whether there should be a specific committee for gender issues. The Bolivian Constituent Assembly did not have one (though sub-committees could be formed which might perhaps have included such matters). The issue is how to ‘mainstream’ women’s issues into the process of making the entire constitution. An effective women’s caucus, which would monitor - and ensure good input into - all committees when issues of particular concern to women arose, might be more effective than having a specific gender-focussed committee. Perhaps women members should try to get the gender dimensions included in the mandate of every committee the requirement to consider (something which is done in the Swedish Parliament). The risk is that some of those committees would ignore this mandate; the main burden of ensuring that such scrutiny took place would rest on the women members of each committee,

with back-up from civil society which should be acting as a ‘watch-dog’ over the work of the Assembly and its committees.⁵¹

It is not desirable that Constituent Assembly members should be able to move about between committees: they might swamp committees with ‘popular’ mandates, and they would also not have time to attend properly to the committees of which they are regular members. But it would be desirable for committees to be able to ask members of other committees to attend for discussion of particular issues. Such a mechanism would be particularly valuable for groups with fewer ‘expert’ members.

Committee chairs

We have seen that women and men chairs may have rather different styles of operating. And it may well be that women chairs would be more receptive to women’s issues. Therefore it might be desirable to have a rule that each committee should have both a chair and a deputy chair, and that one of these must be a woman. However, women should also bear in mind some tactical issues: the most important role in the Constituent Assembly will probably be as committee member; women who would be very effective in arguing for certain content in the constitution should not be ‘wasted’ as committee chairs where they will be unable to argue for a certain position because of the necessity to be even-handed.

Decision-making in committees

Rules for the operation of committees, including how votes are taken or consensus reached, may also affect women’s impact. It is less important to have strict time limits on speaking in committees; in the Kenyan rules the time limits did not apply to committees. The committee chair/convenor would have overall control over the proceedings of the committee. This has the advantage of flexibility. But it creates the risk that the more reticent committee members may not be able to get their points across. The rules could perhaps include as an aspect of the chairs’ mandates the responsibility to proactively ensure that all members can participate fully. The Secretariat or the steering/management committee could also produce guidelines for committee chairs emphasising among other points the need to ensure such participation.⁵²

Experts

The Interim Constitution provides that experts may be appointed – though somewhat oddly this comes in an article about committees.⁵³ Some input from experts is essential. Very few of Nepal’s experts on constitutions are members of the Constituent Assembly. Of course there is nothing to prevent Constituent Assembly members, as individuals or as members of groups, from seeking the advice of experts, local or overseas. But, if there is no direct contact between experts and the Constituent Assembly as such, there is some risk that their expertise may not be fully utilized.

51 See the forthcoming paper on ‘Participation’ in this series.

52 According to Yash Ghai, in the Kenyan Constituent Assembly there was a seminar for committee chairs, and later meetings to discuss their roles.

53 Perhaps because under the old parliamentary rules experts were a matter for the support of committees.

Expertise may be consulted in various ways. Sometimes general public consultation will lead to truly expert input. And this is to be encouraged. But if the Constituent Assembly or committees feel that they require more information, or interaction with experts, one possible way is for hearings to be held: experts are invited to make presentations to the Constituent Assembly – or more likely to a committee (or a combined committee sitting), opening themselves to questioning by members. The East Timor committees conducted some such hearings – notably the committee dealing with financial issues had experts on banking to explain some complex issues of finance to them.

Another way is to appoint certain experts. The Kenyan rules provided:

There shall be an interdisciplinary Panel of Experts for the Conference [CA] consisting of such persons as may be appointed by the Commission [which acted as the Secretariat of the Constituent Assembly] whose functions shall be to—

- render advice on such specific issues pertaining to the work of the Conference and its committees as may be required;
- assist delegates and committees of the Conference in the preparation of such briefs or position papers other than amendments to the draft Bill as may be required; and
- assist the Conference in any other manner that the Chairperson or the Conference may request.

But this should not preclude other ways of bringing expertise to bear on the matter. It is for Nepal to determine whether such expertise could include some foreign sources.

Voting methods

Some Constituent Assemblies have had provision for secret ballots. This was possible in the Afghanistan Loya Jirga which adopted the Constitution in 2003. In that instance there was a genuine risk of intimidation by war lords. In the Nepal situation there is perhaps the possibility of some pressure on members from political parties. Indeed, in the former parliament there was a law designed to make it possible for a party to expel a member who voted against party wishes. Some members have expressed concern that they will be subject to pressure, and some civil society activists, and voters have been concerned that members from various groups, required by the ‘inclusion’ provisions of the Interim Constitution, will not have freedom to represent those groups, but will be essentially vote banks for their parties and their concerns. Secret voting would give members a way out of this dilemma.

However, it is suggested that there are strong arguments against secret ballots. Such voting is essentially anti-democratic: the electorate should know how the people for whom they voted carry out their responsibilities. Secondly, there is also a risk in some countries of bribery; bribery certainly took place in the Kenyan National Constitutional Conference. A secret ballot may encourage bribery – because no-one would know how an individual voted and therefore would not know whether this has been influenced by factors such as bribery. Some members might be tempted not to think hard about how they should vote, because they will not be answerable for it. Finally, most decision-making will probably take place in committees where secret voting is less feasible – either because voting will be a more open affair, or because smaller numbers will make it harder to conceal how members vote.

It is in fact unrealistic to expect parties to agree to secret voting if they are determined to exercise control. It would be better to try to persuade parties to be more relaxed about 'voting loyalty'. And, finally, members should try to persuade their parties - and members generally - by rational argument,.

Welfare of members

There are many Constituent Assembly members who have little experience in similar bodies. And the numbers are far greater than in the past, with some members coming from political parties that themselves have no experience. The Constituent Assembly should therefore have a mechanism for ensuring the welfare of the members. Issues like accommodation in Kathmandu, safety of members, especially of women, and possibilities of sexual harassment, are issues that may become of concern especially for women members, and for which they may not be able to rely on their parties (suppose for example a harasser is a senior party member).

It is common for bodies such as a Constituent Assembly to have a Code of Practice for members. Sexual harassment would be an appropriate topic to be included in such a document, and there are plenty of precedents from the world of employment⁵⁴ of Codes of Practice that explain what is and is not appropriate behaviour, which could be used as a starting point for the Constituent Assembly's Code.

It would be desirable for there to be a committee of the Constituent Assembly, with broad membership, including from vulnerable groups, to deal with issues of welfare. Perhaps that committee would also be the best for dealing with complaints, such as those about ethical behaviour of members and staff. The Kenyan National Constitutional Conference had a Committee on Privileges, Discipline and Welfare.

Discipline

There is a process designed to ensure that members actually attend assembly sessions— though it is rather weak. It is also normal to have some form of disciplinary process. This would not

⁵⁴ For example see the Equality Authority of Ireland's Code of Practice at <http://www.equality.ie/index.asp?docID=342> This includes the following:

[The Employment Equality Act] includes examples like those contained in the following list although it must be emphasised that the list is illustrative rather than exhaustive. A single incident may constitute sexual harassment.

Physical conduct of a sexual nature - This may include unwanted physical contact such as unnecessary touching, patting or pinching or brushing against another employee's body, assault and coercive sexual intercourse.

Verbal conduct of a sexual nature - This includes unwelcome sexual advances, propositions or pressure for sexual activity, continued suggestions for social activity outside the work place after it has been made clear that such suggestions are unwelcome, unwanted or offensive flirtations, suggestive remarks, innuendos or lewd comments.

Non-verbal conduct of a sexual nature - This may include the display of pornographic or sexually suggestive pictures, objects, written materials, emails, text-messages or faxes. It may also include leering, whistling or making sexually suggestive gestures.

Sex-based conduct - This would include conduct that denigrates or ridicules or is intimidatory or physically abusive of an employee because of his or her sex such as derogatory or degrading abuse or insults which are gender-related.

CA members are not 'employees' – and in some countries this had had the consequence that they are not covered, either as victims or perpetrators by laws against sexual harassment.

make it possible for a member to lose his or her seat – but it would permit a member to be reprimanded, or to be excluded from the Assembly for a short while after a hearing that gave the member a fair chance to answer any charge. This would be valuable to prevent or discourage sexist or otherwise derogatory language, and sexual harassment.

The party whip

Party discipline is exercised through the official known as the whip.⁵⁵ How far ought party members to be subject to a requirement to vote according to the ‘party line’ – or how extensive ought the party line to be? There are topics on which a party may genuinely have a firm position. But whips are not readily compatible with consensus – unless used to require party support for a consensus reached among leaders. Even then, if members have to be ‘whipped’ into support it seems hardly to be a national consensus.

The parties themselves will have to decide how far they find using the whip compatible with achieving genuine consensus. And members will have to decide how far they can go if the official party line goes against their deeply held convictions. In some countries it is common for matters of conscience to be not a subject for the party whip, but for a free vote. And absence of whip is also likely to produce a more informed debate.

Seating arrangements

Seating arrangements may also contribute to a fully inclusive Constituent Assembly environment. The questions to start with could be: How should members sit? With their parties? With others from their own group (ethnic, caste, gender etc)? Should the rules somehow try to encourage interaction across party, caste and other lines? It may be that women would wish to be able to sit at least with one other woman.

Quorum

The Interim Constitution already sets quorum rules – for most purposes at least 25% of the members must be present; but if there is to be a vote which requires a special majority (two-thirds of the membership) then at least that number must be present. Twenty-five per cent is quite low. It would make it possible for discussion to begin when only women were present in the chamber, or only men, or only Janajatis or only Madhesis. This would not be a participatory Constituent Assembly. This rule cannot be changed without amending the Interim Constitution. Members must therefore take the responsibility for ensuring that they attend. They should also remember that if any group decides to boycott a session, debate will almost certainly be able to continue without them – even a vote may take place without them. Once discussion begins, who can raise the question of whether a quorum is present? Such points can be used to derail the discussions – but it is also important that discussions do not take place in the presence only of a small number of Constituent Assembly members.

⁵⁵ It refers to the person charged with keeping party members in line in the house, or the abstract concept of party discipline. Perhaps a good example of the ‘male’ nature of discourse in the parliamentary context – men rather than women wielded whips!

The rules for committees could be different. They could also make it possible for the chair/convener of a committee to decline to allow discussion to begin if, for good reason, no representatives of a particular group were present. But no group – women or otherwise – should be allowed to hold the committee to ‘ransom’ by failing to turn up.

The Secretariat

Under the Interim Constitution (Article 21) the staff of the Secretariat of the Constituent Assembly ought to be as far as possible ‘proportionally representative’ of the people of Nepal. This is not an issue that affects only ‘employment equity’: it matters for the effectiveness of the Constituent Assembly itself, for the welfare and effectiveness of the various categories of members and for ensuring that accurate records are kept of all aspects of the deliberations.

Records

It is important for various reasons that proper records are kept. They should be kept so they can be used by lawyers to interpret the constitution. They should be kept for historians. And in the short term they should be kept in order that it is clear what has actually been decided. A full record of the deliberations in committee must be kept, as well as in the plenary. As far as possible, records should be open – keeping of records is a form of accountability of members to the public. In many countries a verbatim record is kept of debates, and often a first draft is available overnight. Only if negotiations are delicate and incomplete should records not be open. Certainly they should be open to anyone who was a party to the decision – so that they can check that a correct record is kept.

They may be concerned about statements causing offence. It is usually possible for the chair to order that inappropriate language be expunged – so insulting and inflammatory remarks could be prevented from appearing. Otherwise it is normal for members of a body like the Constituent Assembly to have immunity – so that they cannot be prosecuted or sued for remarks that defame. But members should be careful not to make unnecessarily unpleasant, hurtful or dishonest remarks.

A good system of record keeping would ensure that an accurate and full record is kept of all discussion and decisions. But there is always a risk of some failure in this respect. And one way in which records can be incomplete is because the chair does not always insist on making clear what decisions have been made. In such a situation, the person taking notes should request that it be made clear. A lack of understanding of women’s issues may mean that oversights happen more often when such issues are discussed; a woman note taker in such a situation could be a distinct advantage from the perspective of women.

GETTING TO GRIPS WITH THE RULES

As mentioned earlier, whether the rules adopted are obscure or clear, satisfactory or disappointing, it is most important that members, including women, take the trouble to master⁵⁶ them. Here is a suggested check list of questions that members should take time to find the answers to, so that when necessary they can use the Rules without hesitation. Perhaps women members can form discussion groups to go through the Rules, and even practise using them in a 'mock Constituent Assembly' situation.

1. When speaking in the plenary session of the Assembly, does a member have to stand up?
2. From where does a member speak – from her usual place or a special place?
3. How does a member indicate that she wishes to speak in the plenary?
4. In the plenary, what is the correct way to address the Chair? Suppose the person chairing is a woman?
5. What is the correct way to refer to another member?
6. If a member wants to raise an issue for discussion (a motion) how is it done?
7. If a member does not like a motion – but might vote in favour if it was changed somewhat – how does she propose a change in the wording to make it acceptable?
8. How much notice is required to move a motion?
9. How does a member object if some other member makes an objectionable remark in a session – for example mocking a woman member?
10. Where can a member complain if someone – a staff member or a Constituent Assembly member – behaves objectionably?
11. How does a member become a member of a committee?
12. How many members of a committee must be present before discussion can start?
13. How many member of a committee must be present before there can be a vote?
14. How does a member indicate that she wishes to speak in a committee?
15. How is a vote taken in a committee?
16. What do you do if you need to be absent from a meeting of the plenary or a committee?

⁵⁶ Another one of those sexist words!

