



International IDEA

The International Institute for Democracy
and Electoral Assistance

Discussion Paper 5

Public Consultation on a Draft Constitution

With Particular Reference to Women in Nepal

Public consultation on a draft constitution

With Particular Reference to Women in Nepal

Jill Cottrell

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International IDEA

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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 is the key knowledge tool for International IDEA’s Women and Constitution Building Initiative work in Nepal and entail dissemination of 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, electoral quotas and 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 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 Government of Finland.

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Public consultation on a draft constitution, with particular reference to women in Nepal

Introduction

This paper is directed at the non-specialist member of the public who has the opportunity to comment on a draft constitution proposed for adoption in their country. It assumes that it is probably worthwhile to take the trouble to respond and it suggests why and how you as a citizen might respond. It will, we hope, be especially useful to previously marginalized sections of society and their members, with special emphasis on women.

The second phase of the public consultation process on the new Constitution for Nepal is to be carried out in the near future¹. According to the draft Action Plan of the Public Opinion Collection and Coordination Committee (POCCC), the Constituent Assembly (CA) authorities plan to print some 5.3 million copies of the Draft Constitution. And they may also be able (depending on constraints of time) to produce a simple guide for citizens. Other agencies are preparing to carry out civic education and awareness programmes on the draft.

The Interim Constitution gives a deadline of 28 May 2010 for completing the entire process of constitution making, and views vary as to whether it is possible or wise to have an extension – which would make it perhaps possible to extend the time for consultation, which at present may only be as short as three weeks.

The format of the first draft is still unclear. Article 8(b) of the Constituent Assembly's Schedule (10th Amendment) states, "...give final shape to the first draft of the Constitution and publish it in Nepal Gazette for suggestions and comments from the people". The Committee to Study Concept Papers and Initial Drafts will study the concepts one at a time, the order of which is random. It will then give its observations regarding overlapping subjects, or missed out subjects by the eleven thematic committees of the CA and share it with the CA Chair. This observation will be then shared to the Constitutional Committee of the CA, which will then produce its first draft/report and will only contain one alternative excluding dissenting opinions on each of the concept papers prepared by thematic committees².

- **We suggest that citizens prepare for the opportunity by thinking about the main controversial issues (highlighted in boxes in this paper), as well as the issues that concern them particularly, so that they are prepared for both the possibility that time will be very limited, and the possibility that they may be presented with a draft with alternatives.**

¹ At the time of writing this paper, the time allocated for this process (as per the CA Schedule, 10th Amendment) is not very clearly demarcated. However, this task along with other necessary tasks have been clubbed together and requires May 28 as the collective deadline.

² According to the Terms of Reference (ToR) of the Committee to Study Concept Papers and Initial Drafts

What is a constitution – briefly?

A Constitution is the basic law of a country. It creates the government, lays down the main rules for the operation of that government, and provides for the protection of the rights of the people, and for bodies designed to ensure that government is effective, not corrupt, and is accountable to the people. Someone described a constitution as “the instruction book for how things work” – and by “things” they meant the system of government.

In a country, like Nepal, that has been involved in conflict, the constitution is often part of the peace settlement. So when evaluating a draft constitution it is important to ask whether it really does deal with the issues that gave rise to conflict. Those issues may concern who has access to power or resources. They may concern respect for certain communities, whether those communities are ethnic or religious or linguistic. These have been issues in Nepal – whether they were the cause of the many years of conflict or not. Domination by limited numbers of castes/ethnic groups, exclusion from not only political power but from economic resources, domination by one language, and discrimination against women, Janjatis and Dalits are all important issues that the constitution might deal with.

Because the constitution is the fundamental law, other laws, and government practices that conflict with the constitution are “unconstitutional” – they are invalid and can be challenged in court (See box). Administrative action that is unconstitutional may cause harm, and a person may be able to claim compensation for that harm.

A simple definition does not do full justice to the importance that a constitution can have in the life of a country. How important a place may depend on other things like: Do people

Cases in Nepal relying on the constitution include one where the Supreme Court held that an earlier retirement age set by Nepal Airlines for women air stewardesses than men was unconstitutional, and the recent case where the Supreme Court ordered the government to set up committees to consider the situation of the Kumaris (child “living goddesses”) on the basis of the Interim Constitution provisions about rights to education and health.

actually use it? Do they even know about it? Do they rely on it when making claims against government, do they use it as a guide to what they can expect from government and even for what their own duties are? Do political parties and other people in public life take the constitution seriously?

Although the constitution is of fundamental political significance, it is important not to forget that it is also a legal document. There may be parts of the constitution where some emotion is appropriate (in the preamble for example) but a document that may have to be interpreted by courts needs to be as clear as possible. People’s rights and the duties of public servants should be written in a language as direct as possible.

Why do constitution makers engage in public consultation – what do they hope to get out of it?

There are good faith reasons for involving the public in constitution making, and, unfortunately there may also be less honest motives. In deciding how much of your own effort to put into understanding the issues and into making comments you might bear these in mind. On the other hand, it often happens that participation has greater or different effects than those anticipated and engaging in the process now might bring benefits in the future. Moving from the most honourable to the least (not in a steady progression) one might identify:

When you read the draft, do you get a sense that this is a document intended for you to read – or just lawyers or just politicians? Does it read like a constitution for you – and people like you? And as you read, do you get a sense that that a woman could be President or lead the army or be the Chief Justice?

- The need to reach a national consensus on issues such as what makes the political unit a nation and on what values the national should be founded on etc.;
- The desire to have the best constitution possible for the nation;
- The desire to get the people's commitment to the constitution;
- A desire to educate the people about the constitution so that they will be able to use it in future;
- Pressure from the “international community”;
- Desire to leave one's mark on history;
- Desire to be identified for immediate political benefit as supporting the new constitution;
- Desire to manipulate public reaction that will undermine the document.

Of course the motives can also be mixed. It is not dishonourable to want to leave a mark on history – but hopefully that is combined with a desire to leave a good constitution that fulfils the aspiration of the people.

Why should you respond?

It will take you time and effort to participate in a consultation exercise, is it worth your while?

- **If you believe you have something to contribute and are prepared to take the time, and the exercise is not simply a purely manipulative public relations exercise intended to have no real impact, then do respond.**

Do not be discouraged because you are not an expert, the whole point of a genuine public consultation exercise is to get the views of non-experts. Sincere constitution makers need to know whether the public can understand the document, whether the public believe it will achieve at least most of the objectives they have for a constitution, and whether the public will have a commitment to the constitution and be prepared to use it.

- **If it is a genuine consultation process then you may be able to influence the contents on the constitution.**
- **Even if you do not find that your comments make a great difference to the contents, the very fact that the people were attentive to the issues will remind the politicians and the various public bodies and officials that the people do care about the constitution and that they will be watching how it is implemented.**
- **You will also benefit from the exercise of reaching a greater understanding of the issue when preparing for your comments and thus increase your chances to use the constitution to your benefit when implemented.**

The drafting and the passing of a constitution is of high importance but it is also crucial to remember that there is a 'life beyond' the constitution making – to use the constitution, and to shape the way it is used is as of as much importance for you, your community and the other interest groups to which you belong, such as women.

Understanding what is expected of you – the timetable, how to make submissions, the scope for changing the document etc.

It is also important to understand where this consultation exercise fits into the whole scheme of constitution making. The forthcoming consultation exercise in Nepal is the second such exercise. Earlier the people were asked to give their views in a rather general way about the constitution. Now they are to be asked to comment on a proposed complete document (subject to the issues raised in the Introduction to this paper).

To prepare for your input it is also important to understand the way the system is set up.

- How much time do you have?
- How much time will the body to which you are responding have to make changes?
- In what form can you make your comment and through what channels?
- What will happen to the input from the public?

What do we know about the draft?

- The Human Rights and Directive Principles Committee has produced a draft Human Rights chapter that draws heavily on the 1990 and Interim Constitutions, but with a number of additional prohibited grounds of discrimination that are of particular interest to women.
- They also propose many Directive Principles/State Policies etc. – for the limitations of which we will return to later in this paper.
- There are many proposed provisions requiring equal treatment, and even special rights for women, marginalized groups and minorities.
- Several economic, social and cultural rights, such as education, food, health etc. have been included among the rights – not just as Directive Principles.
- Rights for certain groups including women and children have been spelled out in some detail.
- The Committee on the System of Government has come up with three alternate models for Federal Executive, since none of the proposals managed to secure majority votes. While one of the proposals has recommended a parliamentary system of government (as Nepal has had in the past, though of course where will be no monarch), there is another that advocates a presidential system. The third proposal is a mixed, which is basically a Parliamentary system, with some powers to president as in a presidential system.
- The Committee on Restructuring of the State has come up with a model of federalism with 14 states, primarily based on issues related with identity like ethnicity, language, culture, geography and history; and secondly, based on the principle of feasibility including economic, infrastructure, natural resources and administrative ease.
- The Committee on the Legislative Structure has proposed a small national legislature with 76 members representing constituencies and 75 elected on party lists – with requirements about representation of women and other groups (as for the CA elections). But the Committee on the System of Government has also made proposals on the electoral system outlining alternatives.
- The legislature committee has also recommended a second house of the legislature with most members elected to represent the states/provinces and some elected by the first house.

You will find lots of references to rights in the constitution; do you find that these are clear and give rights to all sectors of the community (they need not mention all sectors) and not just for your sector? Are you sure that these are, where suitable, rights rather than just hopes for the future?

- The Committee on the Judiciary proposes a Federal Supreme Court, Provincial High Courts and district courts (no Constitutional Court).
- The committee proposes heavy involvement of the legislature in the appointment of judges, and in removal of judges.
- The committee proposes that the legislature has the power to interpret the constitution as it affects the position of the highest officers of state and ‘matters directly concerning politics’.
- The committee proposes the office of Prosecutor General – to be subject to directions by the Attorney General who is appointed and can be dismissed by the government.
- The Committee on Constitutional Bodies has proposed commissions of various sorts including: human rights, women, Janjatis, Dalits, Madhesis, Muslims and Persons with Disability and other marginalized groups etc., as well as the election and audit commissions and the Commission on the Investigation of the Abuse of Authority.
- Commissions should be appointed on the recommendation of the Constitutional Council (reviving a body under the 1990 Constitution).
- The Committee on Natural Resources also made recommendation on human rights and environmental issues as well as resources.

In Nepal after the people have given their views about the draft constitution, the Public Opinion Collection and Coordination Committee is to prepare a report about those views, and this will be discussed in the CA. Then the draft is to be revised to take account of the views of the people.

It is important to realise that not everyone’s views can be taken into a count. There will be some views that conflict with each other. And no doubt some views will be about things that are not really suitable to go in a constitution.

➤ **So people must be realistic about what changes can be made after the consultation.**

It is not really possible for the people to *reject* the draft constitution. The purpose of the consultation exercise is to improve the document and make it closer to what the people want. But Nepal is committed to having a new constitution, and realistically the people cannot stop it.

Improving the process

The last consultation exercise was something of an experiment. And there are lessons to be learnt:

- A questionnaire was prepared which many CA members themselves had difficulties understanding because of its complexity. It was not distributed in advance of a visit to the constituencies by the CA members and which the members of the public were not given much assistance in completing;
- There was limited time and resources put into the explanation of the meaning of a constitution;
- Meetings to collect views were not always well planned in advance, and not much notice was given to the people (though loudspeakers, banners and press and FM radio announcements were used in some areas);
- In some meetings there were few or no women, but at some meetings women, Dalits and other marginalized groups were able to participate well;
- Some meetings were organised so that women and other people who were reluctant to speak in public were able to speak in smaller, more private groups to CA members;
- Sometimes security for CA members must have been intimidating to members of the public and might have inhibited their speaking;
- There were no unified format for the consultation process, some meetings had time limits for the public (perhaps 5 minutes per person) while others did not limit early speakers so that later people who wanted to speak were squeezed out;
- Sometimes people were not told that they could make written submissions other than by using the difficult questionnaires. In some meetings the participants were encouraged to fill out the whole form, including areas and questions that they lacked opinion, and in other meetings they were recommended to leave questions blank;
- Records of the meetings were not unified and no system for consolidation had been developed before to the exercise.

The paper in your hand will probably be read more by civil society organisers than by the average citizen. If you have any hand in organising meetings, perhaps you can remember the lessons of the first round to improve the chances of your group's comments being included in the final draft of the constitution.

How to tackle the task of understanding the constitution

You may find the actual constitutional draft intimidating. Perhaps there will be an official report with the draft that explains what the draft says and why. Or there may be an official “popular” summary. These will probably be useful. It really is helpful to understand what lies behind a provision.

However, do not assume that what is said in summaries – even official ones - is always accurate. Unfortunately even lawyers and even people in public positions do not always understand constitutions very well. Sometimes, regrettably, misrepresentation may be deliberate. And maybe an official body that produces a draft will not want to raise any difficulties about it.

Similarly not all civil society organisations have good understandings. Constitution making is a major national event, usually, and in many countries there is a good deal of interest on the part of civil society but that interest (often supported by donor money) may exceed the capacity. Many NGOs have only a limited understanding of the nature of a constitution and less of the legal aspects. However, they may have good knowledge of some particular aspect – and if that aspect is something that interests you also, you may find NGO material useful. There are various international NGOs, and other bodies where you might find useful material. But it is important to realise that these bodies too may not have expertise on constitutions. They may set out a vision of what your gender or group may aspire to – but it does not follow that every claim is suited to being in a constitution.

It would be good also to read newspaper accounts, to discuss with members of your community (and there may be many communities that you belong to – your religious groups, your ethnic groups, your sex, your profession) to be sure that you do understand what is proposed and what problems there may be if any.

It might also be an idea to go back to the first concept paper from each thematic committee to read the section on ‘remarks’ in the matrix. It may give you a good idea of the pre-first-draft discussion. However, you will find that many of these “explanations” do not explain anything – they simply repeat, often with more words, what is in the proposed articles. But sometimes you may find that the committee claims more for the proposed draft article than is realistic. For example: the Human Rights Committee proposed:

‘Every citizen shall have the right to free basic health services’

In the “explanation” they said –

‘This provision has been made in order to ensure the right of every citizen to reproductive health service, immunization service, treatment of leprosy, treatment of tuberculosis (TB), treatment of child disease, right of the pregnant mother and children to nutrition, right the treatment of infection of uterine prolapse, primary dental treatment, primary treatment of deafness, basic treatment of ear, nose and throat (ENT), treatment of blindness, treatment of infectious disease

and epidemics, treatment of common diseases and injuries, primary treatment of mental disease, treatment of HIV/AIDS and to other health services determined by the State as basic health services and to define them as the same, and receive free basic health services from the health institutes of the State on the basis of the nature of treatment, available means and resources and technology.’

There are two problems. First - how can they be sure that this long list of important things would be included in the phrase ‘basic health services’? Second, they assume that it is for the State to define what basic health services are. In other words the ‘right’ is to something very vague that may mean nothing at all because it depends on the state.

You might find the notes of dissent and alternative suggestions (some committees had many dissenters) helpful as you might find your opinion well formulated in these documents and can refer directly to language already drafted.

On not being afraid of a Constitution

But do not feel that you *must* rely only on official or civil society summaries. Although citizens will not often need to understand the law about commercial companies, they ought to be able to understand a constitution. The CA apparently plans to print millions of copies (one for each household) of the draft – so there is a good chance you may be able to get hold of a copy.

‘Read, read, read! We must not allow others to interpret for us’ – A slum dweller representative at a session on the draft constitution in Kenya

If you form discussion groups, and try to understand the draft with your colleagues you may find it is not so difficult. The rest of this paper is mainly devoted to trying to help with that exercise.

The structure of a Constitution

At the end of this paper there is a list of topics that constitutions these days often deal with. You cannot necessarily expect to find that the chapters of the draft constitution correspond to these exactly. It is likely, however, that a draft constitution will begin with some general provisions about the nature of the state and some guiding values and constitutions. It may then look at who are the citizens of the country, followed by the human rights. Then there will be provisions about the structure of government: the President (and the Prime Minister if there is to be one), the cabinet (ministers) and parliament. Then there will be provisions about the courts, and perhaps about prosecutions.

Will the proposed electoral system guarantee that as far as reasonably possible all sectors of Nepali society are represented in the legislature?

Is there provision for a fair way to divide national revenue and resources among the various parts of the country through the federal system?

Will the proposed system of government be one that enables the government to operate effectively, but also that the people will understand, and that will enable the people to ensure that the government is accountable to them?

And then about independent commissions, and the police and the military. Finally you will find something about how the constitution may be changed in the future, and probably quite a lot about how and how quickly it will be introduced – because perhaps it is not possible to have a new system of government and other institutions all implemented in one day.

Things that constitutions do: different types of provision

Not every provision of a constitution does something similar. Here is a list of the main jobs that articles of a constitution do (one article may do more than one things):

- Explain the background (probably only in the Preamble);
- A few introductory articles may summarise what is found elsewhere in the constitution (not all constitutions have this type of provision);
- Set the spirit of the constitution by referring to values, culture etc (maybe the Preamble, and perhaps a chapter on values and principles);
- Give guidance to the courts on how to interpret the provisions;
- Require the courts to approach interpretation of the constitution in certain ways (e.g. by referring to international law);
- Create (in a legal sense) institutions – or you can say that it provides a blueprint which the human beings who set up institutions must follow in order that the institutions are legally valid (e.g. parliament, courts etc.);
- Set criteria which must be followed in order that actions (like making laws) are legally valid;
- Give powers to officers and institutions;
- Impose duties on officers and institutions;
- Give rights to officers and to ordinary people (in the Bill of Rights and to some extent in other parts like on the voting system).

This is not a complete analysis. It is important to understand the differences. But you need not worry about it too much. The main importance for most people is likely to be able to distinguish between rights and other provisions that may seem to deal with the same issues.

It is also important to understand that not everything that the constitution does is planned in advance. The courts sometimes use constitutional provisions in an unexpected way. How much

notice will they take of the Preamble or of statements about values, for example. The way the Indian courts have used the Directive Principles of State policy would probably surprise the drafters of the constitution. The best example is perhaps the case that held that there was a *right* to education even though the only mention in a Directive Principle.

The language

Unfortunately constitutions, like other laws, are not always written in very straightforward language. And legal Nepali is (we understand) particularly complex. It may help that lawyers are conservative – they may well have used language taken from the earlier constitutions, so if you understood that language you may be helped to understand the new one.

But the constitution is for *you* – if you really cannot understand it after making a good effort that is a valid comment in itself to the CA. In some countries a big effort has been made to simplify legal language – not only in constitutions. Lawyers may want to defend old and complex language, but it is not essential. There is a strong movement in the English-speaking legal world for *'plain English'*; why not for *'plain Nepali'*?

Focus on what concerns you

There follow two perhaps rather contradictory messages:

- If dealing with the entire document seem daunting, try to work out what it says about the issues that most concern you, and;
- You should not take a narrow view of what concerns you; you are not just a woman, or a dalit or an indigenous person. You have more than one identity. And you are all citizens (using the term in a broad sense). The system of government is important to everyone. All other aspects of the constitution will work better if there is a good system of government. There are other examples in the section below about not concentrating only on human rights.

The country is being divided into various units for the purposes of federalism or devolution; will those units be large enough to have capacity to make decisions, yet small enough to bring government decision making closer to the people?

However, some aspects may be really a matter for experts – for example the financial provisions. But this does not mean you should ignore them. It is important to try to ensure that *someone* looks at these.

How NOT to decide whether the constitution addresses your issues

A constitution is a general document. It cannot mention every issue or every community. In fact it is often unwise to do so: a list of certain communities will inevitably miss out someone. More detail means more room for mistakes. If the constitution says “men and women are equal”, it cannot go on to list every situation in which men and women might be treated differently and say that they are equal. For example, the constitution does not say that men and women must have the same retirement age – but this did not stop the Supreme Court deciding that an early age for women was discrimination. (See previous box).

Maybe it will help to focus on *how* the constitution will affect you to draw up a list of questions about the constitution and try to find the answer in the draft. You can find a beginning in ‘Annex 2: Questions for a Gender Audit of the constitution.’

How to find what concerns you

Here there is one very important point:

- **You should never assume that if you read one article, or even one chapter, of a constitution you have the complete picture of the issue!**

For example, a constitution might say ‘the President appoints the Prime Minister’. But if you read further you will find that the President only *formally* appoints the Prime Minister – he must appoint ‘the person heading the largest party, or the person voted for by Parliament’.

Try to get an overview of the entire constitution – maybe you can share this task among a group. Unfortunately, the Nepal style of drafting has not, in the past at least, included a table of contents of individual article headings. If the draft has this failing, you could include this as a criticism. Even lawyers will make mistakes, and fail to notice all the relevant provisions if there is no list of headings.³

On not focusing only on human rights

People often find the human rights chapter the easiest to understand. But it is important to understand the other parts of the constitution that may have an impact on you. Here are a few:

- The independence and effectiveness of the courts is important to all aspects of the constitution. The courts are the ultimate guarantors of the constitution;

³ The UNDP publication Bilingual Interim Constitution of Nepal did produce tables of contents of both the English and Nepali version. It can be done!

- Is there anything in the constitution that protects citizens' access to the courts, or will they be too expensive and too distant?
- In various other ways the constitution can help to deal with matters of impunity (that is with the practice that many guilty people, especially in important positions, are never held legally liable for what they do) – for example, look at:
 - o Are prosecutions carried out by an independent body?
 - o Is it clear that the police and other forces must respect human rights?
 - o Is there a mechanism to ensure that they respect them?
- It is especially important that if you have a particular interest in federalism you should not forget the national government. Federalism is about shared rule at the national level as well as self-rule at the local level;
- The election system is important – how will your vote be translated into seats?

On understanding the difference between rights and other things

Sometimes people get quite excited because they see something that they think is important mentioned in a constitution. But as we emphasised earlier, constitutional provisions do a lot of things, and they do not all create legally enforceable rights.

Here are some points to bear in mind about human rights as found in a chapter on human rights:

- Most of the provisions will create legally enforceable rights;
- But some of the provisions may go on to explain how the state should protect the rights, and it may be that a court would not use such a provision as the basis of making an order giving a remedy to a citizen;
- Courts have a number of ways of giving legal remedies; they may give compensation, they may order the government to do something (or to stop doing something), they may make a declaration that a law is invalid or a practice wrong – but this may not have any compulsory element; they will probably not treat a violation of a human right like the breach of a contract (where they would have very little choice of remedy);
- Even if they give compensation – this is not punishment; in other words, to get compensation a person may have to prove to the court that they have suffered some damage (though emotional damage might be enough; on the other hand, the amount of damages for emotional pain might not be very great);
- Very few rights are absolute; they can be limited – perhaps only by law; it is important to see what are the criteria for limiting the rights. But we are not saying that law is the only way to protect the rights – politics is just as important.

The various Nepali constitutions have had ‘Directive Principles’, and even ‘State Policies’ and ‘State Responsibilities’. Here are a few points to bear in mind about these:

As you read about rights, can you find in the constitution provisions about institutions and procedures that are clearly intended to protect and enforce those rights? Would those institutions be controlled by the government or politicians or the rich or is there some real hope that they will be independent?

- They cannot be used as the basis for a legal claim (they are not as powerful as rights);
- But the courts in Nepal have been able to use them sometimes to expand the rights (like the right to life which has been expanded to cover environment); but this is unpredictable;
- If the intention is that there should be a legal right it should be in the rights and not in Directive Principles; indeed the South African Constitution has no Directive Principles;
- There is absolutely no need to assume the rights like food, education, health and housing have to be in Directive Principles.

And there may be other provisions like ‘values’ or statements that ‘rights or interests are recognised’. It is not clear what these mean. It is unwise to put too much faith in such provisions.

Being strategic

Having an opportunity to comment on a draft constitution is a chance not to be wasted. Seize the moment! But how best to use the chance?

Perhaps you could think about a few specific topics, discussing with your friends, such as - who will really control the national finances, and does this seem fair to you? Will any single person have too much control over money, the police and how they are used, the military and how they are used?

- Try to respond to the invitation (right) to comment in the way in which you are invited. If much emphasis is placed on a questionnaire, try to use it. There may be good reason for using this method. And perhaps other responses will be taken less seriously;
- But if the method used, like a questionnaire, really will not accommodate what you want to say, then push to be allowed to use another method;
- If you have contacts that may get your submission noticed (especially if it is made in an unusual way) use them;
- Should you respond as an individual, as part of a group, signing a petition. It is not easy to know how to advise. Petitions (or large numbers of identical submissions) may be treated less seriously than reasoned submissions by a group or individual. But if time is short (as consultation periods sometimes are) and the body seeking your input is likely to resort to counting, then you might want to maximise your numbers by putting in many submissions (even if identical) or by putting in one but making it very clear that it represents the views of ‘500 people’ or however many you have;

- Try to explain *why* you disagree with something;
- Don't make only criticisms. If you think something is good – say so: you should defend it against the possibility that others might disagree with it. You may not need to go into detail.

On being realistic

As mentioned earlier, the consultation process is not designed to allow the people to reject the constitution. But unrest or disagreement between political parties might lead to such delay that a new constitution could not be adopted.

There are other things at stake. For example, will the expression of strong views about the constitution by certain sections of the community create dissension? So you may have to ask yourselves whether you are prepared to give up some things you want in order to get a generally good document and avoid conflict.

What you can do may be limited. This does not mean you should not respond to requests for public input – but it is wise not to expect too much.

CA members have put in a lot of effort and probably have a commitment to what they have done. They may feel that they have already responded to the demands of society, and may become a little defensive if they are attacked vigorously.

The draft is to some extent the result of political compromises within the various committees, and the draft prepared by the Constitution Committee will have involved further compromise. It is important to remember: *all constitutions require compromises.*

➤ **Be realistic in what you hope to achieve from the consultation.**

At an earlier stage you may have demanded a very great deal from the constitution: long lists of rights for your community or interest group, very detailed provisions about affirmative action. Women may have wanted 50% of the seats in every elected or appointed body. Some NGOs and other groups may have encouraged you to make these demands.

Let's think about quotas

- If you insist on 50% of elected bodies being women, won't men insist on 50% being men? This might be very hard to arrange without having every seat allocated either to women or men.
- Do you see any problem about the idea of a legislature in the future that has 60% women? But driving men to insist on not more than 50% women would prevent this healthy development.
- Women have supported the claims of third gender people (perhaps 10% of the people in most societies). If bodies are 50% women and 50% men where do the third gender people come in?
- Will not a 30% quota adequately form the basis for future proper representation of women without quotas?
- Won't some of the 'quota women' be tempted not to work hard?
- Won't some 'quota women' be there because of their connections and not because of their commitment or ability?
- Would you like to say 'I am a member of parliament because of the quota system'?
- Should there not be very different quotas for different types of activity? If only 10% of medical students are women, can it make sense to insist that 50% of all doctor appointed are women? Would you like to consult a 'quota woman doctor'?
- Quota schemes may obscure the real working of discrimination – which will be prejudice in the home and community, inappropriate systems of education, inappropriate tests for gauging ability to perform.
- Would a society in which every activity was distributed according to presence in the population be desirable? Should half the soldiers be women? Are there not activities that women may choose voluntarily in greater numbers than men? Does this matter – provided there is no discrimination in terms of pay etc?

As the end of the process draws near, it is important to be strategic. Try to think clearly about what are the really important things – the irreducible minimum of your demands. There is some risk that if a group makes demands that are very hard to satisfy in a practical sense, and they refuse to compromise, the people who make the final decision about the words of the constitution may reject the whole demand. It may well be more effective to have a lesser right clearly expressed than a broad right vaguely expressed, or even unworkable. A box makes some

arguments about quota demands for women. You may not agree – but these issues do need to be thought about. The Constitution should make it clear that the aim of equal opportunity for all, where people can freely choose their professions, and their involvement in public life. Perhaps it could be indicated that serious inequalities are to be treated as evidence of discrimination. And the State has the obligation actively to pursue these objectives.

Suppose you are going to have a very short time to comment

An approach is to prepare in advance on the assumption that certain provisions will appear in the draft. The box on ‘*What do we know about the draft?*’ gives an indication of some of the points that are likely to be in the draft. In the box below there are a number of points about the possible provisions as they affect women.

You could prepare a paper – even a petition – with an introduction saying that you will not have time to both read the draft and comment in time. Explain that you are commenting on the basis of an informed guess as to the likely issues.

Some possible issues affecting women in the draft

- If a foreigner married to a Nepali is not able to become a citizen for 15 years that is likely to affect women more than men. But it would affect Nepali women who marry foreigners who want to live in Nepal.
- Some committee drafts seem to create a risk that the children of a non-Nepali parent and a Nepali parent would be stateless; that is a serious situation.
- Most rights should be for all and not just for citizens (it could be serious for those groups who have found it hard to establish their rights and get citizenship certificates).
- It is important that the rights of women are protected at the provincial level as well as the national level – the constitution should make clear how this would be done.
- It is important for women that a full range of prohibited grounds of discrimination is identified, including disability, health condition, marital condition, pregnancy.
- Indirect discrimination (CEDAW says ‘effect’) as well as direct discrimination must be prohibited.
- Because most discrimination against women is a matter of social attitudes, it is important that the human rights apply ‘horizontally’ between citizens and not just against the state.
- Women should be entitled to equal pay for work of equal value.
- The State should have a *duty* to develop programmes of affirmative action for previously disadvantaged groups, including women.

- As far as possible rights must not depend on a law; there must be a right to be free from violence from all sources.
- As far as possible, rights should be rights – and not Directive Principles.
- Equal rights to make decisions about reproduction are important; a suggestion that women’s reproductive functions are a matter of social responsibility, or should be in accordance with national policy, could be worrying if it meant that women’s choice about number of children etc. was to be restricted.
- Is it clear enough that impunity must end? Military personnel should be tried by ordinary courts for human rights abuses.
- There should be a truly independent prosecution system – not subject to political/government control, as is proposed in drafts.
- There are serious concerns about the independence of the judiciary – in the initial draft of the relevant committee.

What next?

What happens after this stage (consultation on the Draft)? It is very important to try to ensure that the points you want made are submitted during the consultation period. But you should not cease to be vigilant. The Draft is supposed to be amended to reflect the public input. And then there will be discussion of the Draft clause by clause in the CA. At these various stages you or your organisations should watch what is happening to your suggestions (and be aware that new things may be introduced as the result of the comments of other groups). Continue to lobby, to provide suggestions, and to show an interest until the final stage when the CA adopts the constitution. This final, clause by clause consideration will be your last chance to influence the content of the constitution. If the public consultation period has been very short, this last stage will be especially important. Then the work of implementation begins!

Will the proposed legislature ensure that not only are representatives of the people present but they are able to make their voices heard? Does it make any allowance for the voice of the people independently – through sitting in public, rights to petition, even opportunities to make input into law-making?

Annex 1: A checklist of issues that a constitution is likely to deal with

Note: this checklist rather assumes a parliamentary system. The list will be a bit different in the case of a presidential or mixed system.

Topics/issues	Where might you find them in the constitution?
Rights of women	Human rights chapter Directive principles etc (see warnings above about the limitations of these) Electoral system Composition of legislature Composition of bodies like independent commissions Powers of human rights commission Citizenship
Rights of indigenous peoples	Human rights chapter Directive principles etc (see warnings above about the limitations of these) Electoral system Composition of legislature Composition of bodies like independent commissions Powers of human rights commission Land Provisions on federal system
Dalit rights	Human rights chapter Directive principles etc (see warnings above about the limitations of these) Electoral system Composition of legislature Composition of bodies like independent commissions Powers of human rights commission
Other specific groups (persons with disability, children etc)	Human rights chapter Directive principles etc (see warnings above about the limitations of these) Electoral system (not children) Composition of legislature (not children) Composition of bodies like independent commissions (not children) Powers of human rights commission
Citizenship	Chapter on citizenship

Guiding values	Preamble Specific chapter/article on values? Directive Principles etc.
Human rights of all	Human Rights/Bill of Rights chapter
Enforcement of human rights	Human Rights/Bill of Rights chapter Courts/judiciary Independent commissions
Electoral systems	Chapter on representation of people or elections Or – in chapter on parliament Don't forget chapter on federal states etc
Voting rights	Human rights Chapter on representation of people or elections Or – in chapter on parliament Don't forget chapter on federal states etc
How President is selected/elected	Executive or President chapter
Powers of President	Executive or President chapter
Removal of President	Executive or President chapter Maybe legislature Possibly a schedule (annex)
Choice/appointment of Prime Minister	Executive
Powers of PM	Executive
Removal of PM	Executive Legislature (vote of no confidence)
Appointment of Ministers (Cabinet)	Executive
Powers of Ministers	Executive
Removal of Ministers	Executive Legislature (vote of no confidence)
How many chambers of Parliament	Legislature
Role of second chamber if any	Legislature/Senate/National Assembly
Composition of first chamber	House of Representatives?
Composition of second chamber	Legislature/Senate/National Assembly
Functions of each chamber	Legislature OR under individual chambers
Law making	Legislature or Special articles?
What laws can national government make?	Federalism Schedule

What laws can lower level (state) governments make?	Federalism Schedule
Composition of state legislatures	Federalism
State executives	Federalism
Accountability of government	Executive Legislature (questions; committees) Provisions on removal Finance – budget; audit Independent offices (such as Auditor-General) Independent commissions Courts Right to information
Accountability of state/public officers etc	Executive Legislature (questions; committees) Provisions on removal/ discipline Public Service Commission Independent commissions Courts Principles of transparency
Combating corruption	Ethics Codes of Practice Independent commissions Transparency
Ending impunity	Attorney General Prosecutions Independence of Judiciary Independent commissions
Development	Values Right to equality Federalism Finance
Implementation of the constitution	Special chapter Any special body – e.g. under independent commissions? Schedules Powers of courts? Provisions on interpretation of constitution
Changing the constitution	Special chapter?

Annex 2: Questions for a gender audit of the draft constitution

1. Does the Preamble indicate an inclusive view of the people – especially as including women?
2. Is there a commitment to gender equality as a value?
3. Is there a recognition of both gender equality and gender equity?
4. Can a woman pass Nepali citizenship to her children?
5. Can a foreign man married to a Nepali become Nepali on the same basis as a foreign woman married to a Nepali man?
6. Is there a specific right to gender equality in the non-discrimination provisions?
7. Is there any elaboration of the right to equality – is there mention of different spheres of life, such as politics, economy etc? Land and inheritance?
8. Is discrimination banned on the basis of marital status, health status (which might include menstruation and HIV), pregnancy, birth (which would include whether one's parents were married to each other), occupation (which would include being a sex worker)?
9. Is the list of prohibited grounds of discrimination implied to be exhaustive or is there the possibility of “other grounds”?
10. Does the Bill of Rights apply only between the person and the state or does it also bind other individuals (and companies etc.)?
11. Is “affirmative action” recognised as permissible?
12. Is there any indication that women as such are possible beneficiaries of affirmative action programmes?
13. Is there an *obligation* to have affirmative action for previously disadvantaged *groups*?
14. Is there an *obligation* to have affirmative action for previously disadvantaged *persons*?
15. Is there any provision on what happens if there is no such programme?
16. Is there a *right* to health (NOT a Directive Principle)? How is it phrased?
17. Is there a right to food (NOT a Directive Principle)? And NOT “food sovereignty”.
18. Is there a right to water (NOT a Directive Principle)?
19. Is there a right to education (NOT a Directive Principle)?
20. Is there recognition of the right to free and compulsory primary education?
21. Is there any right to education at a later stage in life (e.g. adult literacy)?
22. Is there a right to housing (NOT a Directive Principle)?
23. Is there any recognition of the particular issues of Dalit women?
24. Is there any recognition of the particular issues of women with disabilities?
25. Is there any recognition of the particular issues of women prisoners?
26. Are gays and lesbians, transsexuals and transgender persons recognised as fully equal citizens?
27. Is there a right (for both men and women) of reproductive rights?
28. Is there a right to maternity leave?
29. Is there a provision giving equal right to all in marriage: in choice of spouses, in marriage and at its end?
30. Is there any recognition of the rights of women (and others) to be free from violence from whatever sources?

31. Is there any mention of the right not to be trafficked? Is this just rhetoric?
32. Is custom and tradition, including religious tradition, subject to the Bill of Rights?
33. When the courts and others interpret and apply the human rights provisions, are they encouraged to look at foreign cases?
34. When the courts and others interpret and apply the human rights provisions, are they encouraged or even required to look at international law?
35. Does an international human rights treaty have to be adopted into Nepali law, or does it apply automatically?
36. Is there any mention of the operation of the reporting system on human rights to international bodies (like the CEDAW committee)?
37. Are there guaranteed seats for women in the national legislature?
38. If so – would those women have equal status and functions with men?
39. Are there geographical constituencies? If so is there any effective way of having women at least one-third?
40. Is there any way of ensuring that women in the legislature are not all from a limited range of castes/classes?
41. Is there any suggestion that the procedure of the legislature must be such that all members, including women, are able to participate fully?
42. Are there guaranteed seats for women in the state legislatures?
43. If so – would those women have equal status and functions with men?
44. Are there geographical constituencies at the state level? If so is there any effective way of having women at least one-third?
45. Is there any way of ensuring that women in the state legislatures are not all from a limited range of castes/classes?
46. Is it clear that human rights must be respected at the state level as much as at the national level?
47. Can women have their own political parties?
48. If not – would it be possible for a political party to have “women’s rights” as part of its election platform?
49. Is there any recognition of the importance of having women in government?
50. Is there any recognition of the importance of having women in the judiciary?
51. Is there any recognition of the importance of having women in the forces and police?
52. Is there any recognition of the importance of having women in independent commissions?
53. Is there a Gender Commission?
54. If not – is there recognition of the role of the Human Rights Commission in protecting women’s rights?
55. Is the way in which the constitution is drafted really gender-neutral – or is there any suggestion that Presidents, soldiers and “important people” might be men? E.g. is the President the Rashtrapati?

Note: it is not suggested that the answer to every one of these questions ought always to be “Yes” for a constitution to be satisfactory. This is an aid to analysis, not a prescription.

About International IDEA

What is International IDEA?

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization that supports sustainable democracy worldwide.

International IDEA's mission is to support sustainable democratic change through providing comparative knowledge, assisting in democratic reform, and influencing policies and politics.

What does International IDEA do?

In the field of elections, constitution building, political parties, gender in democracy and women's political empowerment, democracy self-assessments, and democracy and development, we undertake our work through three activity areas:

- providing comparative knowledge and experience derived from practical experience on democracy building processes from diverse contexts around the world;
- assisting political actors in reforming democratic institutions and processes, and engaging in political processes when invited to do so; and
- influencing democracy building policies through the provision of our comparative knowledge resources and assistance to political actors.

Where does International IDEA work?

- International IDEA works worldwide. Based in Stockholm, Sweden, it has offices in Africa, Asia and Latin America.

Nepal Programme

Our work in Nepal dates back to 2004, initially anchored in the field of citizen assessment of democracy. Following the People's Movement for democracy in 2006 and the Comprehensive Peace Agreement, our programme supports the national actors in the process of constitution building by providing knowledge resources and orientations, and by supporting political dialogues and public participation to the constitution building process.



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