Nepal: Design Options for the New Constitution

Bipin Adhikari
Editor

Nepal Constitution Foundation (NCF)
Tribhuvan University Faculty of Law
Supreme Court Bar Association
Kathmandu, Nepal
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Nepal is presently governed by the Interim Constitution of Nepal that was promulgated in 2007. It provides for a sovereign Constituent Assembly to represent the nation and draft a new, full-fledged democratic constitution for the country. It also sets out the fundamental law of the land for the interim period, until a new constitution has been framed and promulgated.

This is, however, not the first time that Nepal is writing a new constitution. In 1951, the then Nepalese monarch had ended the century-old system of rule by hereditary prime ministers and instituted a cabinet system of government and also promulgated a transitional constitution. After a long period of instability, a new constitution was enacted in 1959, but not through an elected constituent assembly as originally planned. General elections for a national assembly were also held to form a government under the 1959 constitution. However, persistent contentions between the cabinet and king Mahendra, led the king to dismiss the Nepali Congress government in December 1960 and to imprison most of the party's leaders, including the Prime Minister. Subsequently, the constitution of 1959 was abolished in 1962, and a new constitution was promulgated that denied any role to the political parties. After a 1980 referendum approved a modified version of the Panchayat system, direct parliamentary elections were held in 1981. Following a mass movement, a new constitution based on the parliamentary system was promulgated once again in 1990, which established multiparty democracy within the framework of constitutional monarchy in the country.

The development of politics in Nepal did not progress smoothly even after promulgation of the 1990 constitution, which strongly backed democratic institutions. After about six years, an insurgency led by the Communist Party of Nepal (Maoist) broke out, challenging the political system, with a 40-point demand. This led to a ten-year civil war between the insurgents and government forces that claimed about thirteen thousand lives and internally displaced about 100,000 to 150,000 people. The conflict resulted in the dissolution of the cabinet and parliament and assumption of absolute power by the king. Armed conflict officially ended in Nepal with the signing of the Comprehensive Peace Agreement between the Government of Nepal and Maoists on 21 November 2006. This brought the Maoists and the major political parties together, and replaced the 1990 Constitution with the Interim Constitution, setting the stage for further changes.
The Constituent Assembly was established following a nation-wide election held in April 2008. It started its official business on May 28, 2008 with the mandate of drafting a new democratic federal and inclusive constitution for Nepal within the stipulated time period of two years. The Assembly has 601 members: 240 elected through first past the post election system, 335 through the proportional system and 26 nominated by the government. The house is multilingual, multiethnic, multi-religious, multicultural and an inclusive body in terms of representation of political parties, geographic regions, castes, gender, and other variables. The Assembly declared Nepal a federal democratic republic and abolished the monarchy during its very first meeting.

The Constituent Assembly works through the following eleven thematic committees, which have individual terms of references but follow the same working procedures.

- Committee on Fundamental Rights and Directive Principles
- Committee on Protection of Rights of Minority and Marginalized Communities
- Committee on Judicial System
- Committee on Determination of the Structure of Constitutional Bodies
- Committee on Determination of Bases for Cultural and Social Solidarity
- Committee on the Preservation of National Interest
- Committee on the Determination of the Form of Legislative Organ
- Committee on Allocation of Natural Resources, Financial Powers and Revenues
- Constitutional Committee
- Committee on Determination of the Form of Government
- Committee on State restructuring and Distribution of State Powers

The Constitutional Committee is the principal drafting committee of the Constituent Assembly, which is responsible for reviewing and compiling all the reports submitted by the thematic committees and cleared by the full house into a viable integrated constitutional draft.

The constitution drafting process is currently in the last leg of its mandated two year period. The interim constitution provides for the new constitution to be adopted and promulgated by May 28, 2010. The country is finalizing the ongoing discussions on important issues of the new Constitution that is being conducted both within and outside the Assembly. This participatory approach to constitution-making is being adopted to ensure
that the inherent right of the people to be governed by their own ‘consent’ is recognized. This ensures that the people get an opportunity to make a choice on issues such as forms of government, methods of participation and decision making, and methods of governing institutions.

Democracy must be geared toward certain higher principles that safeguard the interests of the people by recognizing that all citizens are equal before the law and have equal access to power. The ability of elected representatives to exercise decision-making power is subject to the rule of law and the principles of constitutionalism. While it is essential to establish democracy and provide sufficient power to elected leaders to realize the shared purposes of a community, it is equally important to make sure that the government is structured and controlled so as to prevent oppression.

Yet, the national task of devising a new democratic constitution is not an easy process. It is characterized by the need for a high level of transparency and broad based public participation. A nationwide campaign of public and civic education, media campaigning, and solicitation of public comments and suggestions have featured in this process. The use of different modes of bargaining and public dialogue, as well as structured participation in the constitution making process by all concerned stakeholders - women, dalits, janjatis, minorities, political parties, opposition groups and civil society members - have intensified positions in issues related to constitutional policies and choices. There are several contentious issues including a proper form of government and restructuring of the state. A wide variety of solutions are also being proposed. The higher up divisions along partisan lines have further escalated the points of divergence. Therefore, the challenges before the nation are enormous. However, all the issues that have been raised must be settled amicably, and to the satisfaction of all. Truly, the negotiations between the political parties, state and stakeholders, and between different social, political and regional groups have been further intensified.

The Assembly, which is under tremendous pressure to complete the constitution-making process, does not have its own group of experts. The process is being supported by legal officers of the government right from the beginning and is also being supported externally by specialized constitutional lawyers, as well as other relevant experts such as political scientists and economists. The procedures of the Assembly have given an opportunity to individuals and civil society organizations alike to make submissions to the Constituent Assembly. The Consortium of Constitutional Experts that I formed and led also supported the process, and contributed to the constitution making business in different ways.
The public discussion phase of the draft reports of the Constituent Assembly Thematic Committees is not over yet. An integrated draft constitution is being worked out by the Constituent Assembly. Its progress, however, depends on how fast the full house of the Assembly deliberates on the thematic reports received from the Committees, and sends them to the Constitutional Committee - the principal drafting body in the Constituent Assembly. At this important juncture, the role of local and international constitutional experts in jointly deliberating and analyzing important constitutional issues, and thereby providing a much needed international perspective to Nepal’s constitution-making process, cannot be overlooked. It is the experts, rather than politicians, or the common people, who can help the Assembly in identifying technical and substantive gaps on the draft at this stage. They can suggest revisions, where necessary, to ensure that the draft constitutional text complies with international democratic standards, basic rights of the people, and principles of constitutionalism.

We are drafting our new constitution in the twenty-first century. We are doing it as a part of the peace building process. This gives us an incomparable opportunity to learn from the experience of other countries. The proceedings of the Constituent Assembly, and the draft thematic reports, have been a matter of interest to many academicians and professionals outside the country. They have been closely watching the developments taking place in Nepal. Therefore, the idea of engaging international experts directly on these preliminary drafts is indeed a very good way of getting their invaluable feedback, suggestions and inputs for our constitution making process.

- Surya Dhungel
(Convener)

Welcome Speech

"We are drafting our new constitution in the twenty-first century. We are doing it as a part of the peace building process. This gives us an incomparable opportunity to learn from the experience of other countries. The proceedings of the Constituent Assembly, and the draft thematic reports, have been a matter of interest to many academicians and professionals
outside the country. They have been closely watching the developments taking place in Nepal. Therefore, the idea of engaging international experts directly on these preliminary drafts is indeed a very good way of getting their invaluable feedback, suggestions and inputs for our constitution making process.

This book contains more than twenty-five papers contributed by international experts from different countries. These experts are from locations as diverse as North America, Europe, Africa, and Asia including the Asia Pacific region. Some are leading constitutional experts, some have strong human rights orientations, and some have been prominent resource persons in the area of federalism and devolution of powers. A couple of them are leading politicians in their countries. The papers they have contributed were requested from them in view of their particular expertise in the given field.

All these papers were originally presented in Kathmandu at a high profile international conference on the Dynamics of Constitution Making in Nepal in Post-conflict Scenario held from January 15-17, 2010. The conference, which was organized by Nepal Constitution Foundation in cooperation with Tribhuvan University Faculty of Law and the Supreme Court Bar Association, was inaugurated by Dr Ram Baran Yadav, the President of Nepal and the inaugural key note speeches were delivered by Nepal’s Constituent Assembly Chairman Mr. Subhash C. Nemwang, and Dr Minendra Rizal, the Minister for Ministry of Federal Affairs, Parliamentary Affairs, Constituent Assembly and Culture. The closing ceremony of the conference was chaired by Ms. Purna Kumari Subedi, the Vice chairperson of the Constituent Assembly, and the send-off remark was given by Prime Minister Madhav Kumar Nepal.

There were 204 participants in the conference, about 57 of which were international participants. All 25 papers shortlisted for the conference were presented by 25 international participants in 11 different sessions. 24 Nepali and 2 international experts commented on these papers which were subsequently discussed at the floor. 29 Constituent Assembly members were also among the participants. The experts chairing the sessions, most of whom were key figures at the Constituent Assembly, also moderated the proceedings. Moreover, the Conference also ensured the participation of a wide cross section of the Nepalese population. The presence of a big pool of Nepalese experts helped in making the discussions very fruitful.

Instead of talking about hard theoretical issues, the experts focused directly on the available draft documents of the Constituent Assembly Thematic Committees. Not only the papers, but also the discussions on them, centered on the concept papers and preliminary drafts of the Constituent
Assembly Thematic Committees. They were concentrated on the contentious issues being debated in the Assembly. The keynote speech, delivered by Chairperson Subhash C. Nemwang encouraged the international experts to freely express their opinions and comments on what the Constituent Assembly has so far produced.

There is no doubt that such a review by recognized international experts has provided the Constituent Assembly members an opportunity to revisit the drafts in light of the proposed expert suggestions. It has also provided the political stalwarts patronizing the Assembly an opportunity to focus on issues that must be reconsidered at this level. Examination of the preliminary thematic drafts by internationally well-known experts has indeed been helpful in understanding the challenges of managing our transition towards a ‘New Nepal’ and developing appropriate implementation tools as well. Moreover, such a review by independent international experts with extensive knowledge and varied experience in different countries will be helpful in generating consensus among political parties on many contentious constitutional issues, such as devolution of power and forms of governance.

All the papers presented in the conference were reviewed by the editor of this book afterwards, and feedback and comments, wherever necessary were made available to the experts. Where there were none, experts were requested to reflect on the floor discussion and revisit their papers, if necessary. The articles that you find in this book are therefore revised papers, each aptly responding to the contentious issues so well.

In a nutshell, this book intends to achieve the following objectives:

- Improving the quality of the new constitutional draft being prepared by the Constituent Assembly and its technical and conceptual soundness through inputs from national and international experts;
- Enabling Constituent Assembly members and key political and civil society leaders, especially members of the Constitutional and other technical committees of the house to benefit from comparative experiences;
- Enhancing the jurisprudential/theoretical foundation and democratic contents of the draft Constitution to international standards by bridging the identified conceptual gaps through open debates and deliberations;
- Offering the international community an opportunity to understand and appreciate the dynamics of Nepal’s post-conflict country situation and priority areas that need to be addressed by the
constitutional framework by adopting an appropriate form of governance and devolution structure;

- Sensitizing Constituent Assembly members, political actors and the common people about the comments and feedback received from national and international technical experts on the nature and contents of the new constitution and its implementation tools.

I am glad that the book is in your hand. In order to give emphasis to the substantial part of the conference, I have dropped many formal parts of the proceedings from the book including my own welcome note delivered at the inaugural ceremony as the convener of the conference, as well as the closing speech at the end of the conference. Similarly, the formal notes of my colleagues Dr Bipin Adhikari, Dr Amber P. Pant and Advocate Indra Kharel have also been not included. I believe that the book as it stands now talks about substances, and has a professional look in its approach.

As constitutional lawyers, we have tried to contribute as much as possible to the constitution building process from our side. The rest is in the hands of the Constituent Assembly.

As a convener, I must thank the members of the conference organizing committee, especially my colleague, Dr Bipin Adhikari for his initiative in undertaking this project with all sincerity and commitment. He has been a good planner, a good organizer, and a very thorough editor as well. I understand the rigors involved in publishing this kind of a book in such a brief span of time. I must thank him for his untiring efforts and professionalism.

Finally, I strongly believe that this project has made a timely and worthwhile contribution to the country’s constitution making process, by soliciting feedback and inputs from national and international experts at this important juncture of constitution-making in the country.

Surya Dhungel, PhD
Convener
International Conference on Dynamics of Constitution Making in Nepal in Post-conflict Scenario (January 15-17, 2010)
March 2010
Message

The book that you have with you - Nepal: Design Options for the New Constitution is the first of its kind in Nepal.

It aims to provide international professional inputs to the preliminary thematic drafts of the new democratic constitution prepared by the Constituent Assembly of the country. It is based on the papers presented at the international conference on Dynamics of Constitution Making in Nepal in Post-conflict Scenario organized in Kathmandu in mid-January this year.

A lot of effort has been made to ensure the usefulness of this book to the members of the Constituent Assembly, its technical hands and also the stakeholders working in the constitution making process.

As its name suggests, the book offers various design options that encompasses almost all the contentious issues of the present constitution drafting process. Therefore it will be of immediate use to the framers of the constitution.

We would consider our efforts to be successful if the decision makers responsible for finalizing the contents of the Constitution are informed by the expert opinions of many national and international experts discussed here.

Amber Prasad Pant, PhD
Professor of Law
Dean, Tribhuvan University Law Faculty
March 2010
Foreword

We are proud to have been able to bring out this book titled “Nepal: Design Options for the New Constitution” based on the International Conference on ‘Dynamics of Constitution Making in Nepal in Post Conflict Scenario’ held in Kathmandu in January 2010.

This book is a result of the thorough and untiring efforts of the entire team involved in this project. I hope the book will offer a new insight on many contentious issues that the Constituent Assembly of Nepal has been dealing with. The Supreme Court Bar Association will be happy if the book is successful in contributing to the constitution making process in Nepal by providing relevant feedback and inputs of national and international experts to the process.

The Association will continue to work in the area of constitution making and provide its support in whatever way possible.

We encourage all stakeholders to make use of such reference materials and contribute to the national task of writing a new democratic constitution for Nepal as per the aspirations of the Nepalese people.

Indra Kharel
President
Supreme Court Bar Association
March 2010
Acknowledgements

If one were to consider the debts incurred in bringing out a book such as this, one would probably hesitate to begin the project in the first place. We are indebted to many friends, colleagues, and national and international organizations for their invaluable support to the wide range of activities leading to the publication of this book.

This book was indeed an ambitious initiative in view of its objective and intended output, and the limited timeframe of completing it within the constitution making schedule of the Constituent Assembly. It builds on resources assimilated at the international conference on the Dynamics of Constitution Making in Nepal in the Post-conflict Scenario, held in Kathmandu from January 15-17, 2010. Even after the conference, there was much work involved in getting this book into its present form. All the papers presented in the conference needed to be revised and compiled based on the interactions of experts in Kathmandu, including the conference floor discussions. We also wanted some paper presenters to link their analysis with the issues on the table at the Constituent Assembly. It was indeed a huge task that was made possible by the efforts and commitment of numerous colleagues and friends, who were not just kind to us, but also very enthusiastic about supporting the constitution making process in Nepal.

As constitutional lawyers, working consistently in different areas of the constitution making process, we started thinking as early as May last year, about the need to organize an international conference to discuss the first draft of the constitution with experts working in this area from across the world. The idea of the conference was first discussed with our colleague, Dr Martin Hala, an international civil society institutionalization expert from Hungary who received it with great enthusiasm. We talked about it with Dr Horst Matthaeus, a German public policy expert who encouraged us to explore the idea further. Leena Rikkilä, Markus Heiniger and George Varughese, our international friends working in Nepal, also thought of it as a worthwhile intervention. Both Hari Sharma and Suresh Acharya, our local professional partners, extended their helping hands as soon as we mentioned this to them. Professor Cheryl Saunders was very helpful right from the
beginning in providing necessary advice and helping us find relevant resource persons. We sincerely appreciate their encouragement and support.

As soon as we decided to go ahead with the conference, we drew a list of potential resource persons, and consulted with the Chairman of the Constituent Assembly (CA), Subhash C. Nembang, Minister for Federal Affairs, Parliamentary Affairs, Constituent Assembly and Culture, Dr Minendra Rizal, Minister for Finance, Surendra Pandey, and Minister for Peace and Reconstruction, Rakam Chemjong. The Constituent Assembly was very positive and receptive to the idea. The Ministers encouraged and assured us of their support. We express our sincere gratitude to all these key figures of the country for their support and encouragement.

Then a conference checklist was drawn and our preparatory activities commenced from mid-October 2009. It happened to be a stormy season for us. Sending out invitations and finalizing the list of experts coming to Kathmandu to present their papers was not an easy task. Some paper presenters and participants who accepted the invitation in the beginning declined the offer later. Those who expressed inability to participate initially changed their mind and expressed their willingness to come. The list was never final until the very end. This of course destabilized us at times, and also tested our patience.

Finally, the conference was able to assemble a group of distinguished presenters from around the world in Nepal. They included Dr Bob Rae, Dr George R. M. Anderson, Dr Larry Taman and Mr. Vincent Calderhead from Canada; Dr Pekka Hallberg from Finland; Professor Wictor Osiatynski from Poland; Professor Steven Greer, Professor Jill Cottrell, and Professor Paul Flodman from the United Kingdom; Dr Alexander Wegener from Germany; Mr. Markus Heiniger and Dr. Nicole Töpperwien from Switzerland; Professor Cheryl Saunders and Professor John Pace from Australia; Professor Thio Li-ann from Singapore; Professor Jiunn-rong Yeh from Taiwan; Professor Satya Arinanto from Indonesia; Professor Rohan Edrisinha and Professor Mario Gomez from Sri Lanka; Dr Hashim Mohammed from Ethiopia; Professor Yash Pal Ghai from Kenya; Professor Wang Zhenmin and Professor Jie Cheng from China; and Advocate P. S. Kulkarni, Dr Kumar Suresh and Advocate Menaka Guruswami from India. The conference would not have been a successful enterprise without the 55 international participants including these experts, and their academic and professional contribution. We sincerely appreciate their cooperation and commitment.

We thank the President of Nepal, Dr Ram Baran Yadav for inaugurating the conference and delivering the welcome speech amidst a sizable gathering.
"It was indeed a huge task that was made possible by the efforts and commitment of numerous colleagues and friends, who were not just kind to us, but also very enthusiastic about supporting the constitution making process in Nepal."

of approximately 450 people. His presence in the inauguration ceremony provided a much needed profile to the event, which helped in drawing the attention of stakeholders towards the conference objectives. It was a great honour for us to have the key note speech delivered by the Chairperson of the Constituent Assembly, Subhash C. Nembang. The Chairperson honestly and effectively flagged up the areas where international input had been expected by the Constituent Assembly. His speech summarized the core message that the country had for the participants including international experts. The Government of Nepal was represented by Minister Dr Minendra Rizal, who also joined the forum by delivering his key note opinion on some contentious issues. We do not have words to express our gratitude to these national dignitaries for providing a sincere background to the conference and deliberations to be pursued therein.

Additionally, Professor Wiktor Osiatynski, a visiting professor at the University of Siena (Italy) shared his insights on key considerations in the constitution making process during the inauguration ceremony, as a representative of the academicians and professionals participating in the conference. Robert Piper, Resident Coordinator of the United Nations was also available to express his good wishes on the occasion. We take this opportunity to thank them for their goodwill and support.

We also thank Professor Amber Prasad Pant of Tribhuvan University Faculty of Law and Indra Kharel, President of the Supreme Court Bar Association for addressing the inauguration ceremony in their capacity as Conference Organizing Committee members and for expressing their institutional solidarity towards the conference.

All twelve thematic sessions held at the conference were chaired and moderated by a team of very efficient national experts renowned for their professionalism. They included Constituent Assembly members Dr Ram Sharan Mahat, Dr Baburam Bhattarai, Mohammadi Siddique, Khim Lal Devkota, Sapana Malla, and Justice Kalyan Shrestha; Senior Advocate
Bishwokant Mainali, Professor Bidya Kishore Roy, Dr Parshuram Tamang and CA Secretary General Manohar Prasad Bhattarai. The plenary session, held after parallel sessions in two different groups, was chaired by former speaker of the House of Representatives, and senior advocate, Daman Nath Dhungana. We are grateful for their chairpersonship and efficient moderation during these sessions.

We are delighted to have top notch national experts to comment on the papers presented by the international constitution builders. We take this opportunity to thank Constituent Assembly members Dr Indrajeet Rai, Radheshyam Adhikari, CP Mainali, Lal Babu Pandit, Anil Jha, Khimlal Devkota, Hari Roka, Sapana Malla, and Binda Pande for their contribution as commentators. Additionally, we also thank lawpersons Tirth Man Shakya, Badri Bahadur Karki, Professor Surya Sebedi, Dr Bal Bahadur Mukhiya, Purna Man Shakya, Dr Ram Krishna Timalsena, and Dr Bhimarjun Acharya. Dr Om Gurung, Geja Sharma Wagle, Lt General (retd.) Sadip Shah, Major General (retd.) Kumar Phudung, Dr Narayan Manandhar, Durga Sob, and Ashish Thapa also commented on the papers in their respective areas of expertise. Two external experts - Professor Yash Pal Ghai and Dr Jyoti Sanghera - also contributed as commentators. We thank them all for their kind support.

We thank Prime Minister Madhav Kumar Nepal for kindly gracing the closing ceremony with his honorable presence and delivering a speech focusing on the current issues of the constitution drafting process and his government's position on the peace process. Similarly, Vice-chairperson of the Constituent Assembly, Purna Kumari Subedi obliged us by making herself available as the chairperson of the closing ceremony. Her address at the end has offered some valuable insights to the delegates on the key positions of the United Communist Party of Nepal (Maoist) in the constitution building process.

Dr Shambhu Ram Simkhada, Dr Horst Matthaeus, Dr Markus Böckenförde and Rudra Sharma helped us in preparing wrap up notes at the end of each day, and presented it before the participants, and invitees, at the closing session. The perspectives of the international participants were shared during the closing session by Dr Bob Rae (Canada), Justice Pekka Hallberg (Finland), Professor Jie Cheng (China) and Advocate P. S. Kulkarni (India). We thank them all for their kind support.

We thank Suresh Acharya for coordinating media relations and Keshab Poudel of New Spotlight News magazine, which served as the official media of the conference. We have been instrumental in distributing relevant
information about the conference to concerned stakeholders. I also thank
Suraj Subedi and Oscar Travels, the official travel agent of the conference,
for providing efficient travel services. Shyam Shrestha and Prabha Poudel of
De-Luxe Radio Service took charge of the video and sound recording tasks.
Lecturer of English, Mukunda D. Shrestha and Mona Adhikari provided
simultaneous interpretation of the conference proceedings in English and
Nepali. Raju Paudyal handled photocopying professionally at the conference
support office.

We are also obliged to the young women lawyers, and postgraduate law
students at Tribhuvan University who volunteered to help us in almost all
preparatory activities during the last week prior to the conference. They also
served as floor volunteers. We were indeed very fortunate to have Yogita Rai
(Master of Ceremony), Rukamanee Maharjan, Ritambhara Basnet, Pabitra
Raut, Dikchhya Pradhananga, Kavita Shrestha, Sharda Dongol, Pravinata
Osti, and Karuna Shrestha by our side to accomplish such a huge task. We
would have suffered without them.

We thank our colleagues from the Conference Organizing Committee -
Professor (Dr) Amber Prasad Pant, Tribhuvan University Faculty of Law,
Advocate Indra Kharel, Supreme Court Bar Association, Professor Bidya
Kishor Roy, Head, Central Law Department, Tribhuvan University;
Professor Kusum Saakh, Associate Professor of Law, Tribhuvan University
Faculty of Law; Ganesh D. Bhatta, Vice President, Society for Constitutional
and Parliamentary Exercises (SCOPE); Phurpa Tamang, Advocate and Social
Activist, Rasuwa; Sombhojen Limbu, Advocate, Asian Law Firm and
Research Center; Bhagwat Das Chaudhary, Member, Nepal Constitution
Foundation (NCF); and Suresh Acharya, Chairperson, Media Initiative for
Rights, Equity and Social Transformation (MIREST). In the planning phase,
we also received support from B. P. Bhandari, Pragya Basyal, Lalit Basnet,
Sanjeev Pokharel, Raju Chapagain, Budhi Karki, Vickal Khadka, and Nicole
Töpperwien. We appreciate their support very much.

This conference was made possible through the moral and financial
support of different agencies in Nepal and abroad. We thank the Constituent
Assembly Secretariat and the Government of Nepal for being so positive and
cooperative. The Foundation Open Society Institute (FOSI) gave us a firm
backing as a lead support agency from the very beginning. We also received
financial support from the German Technical Cooperation (GTZ) and Swiss
Development Cooperation (SDC). The IDEA International was also kind to
fund some of our paper presenters directly. The United Nations Development
Programme (UNDP) provided support in sponsoring some additional
international experts of our choice. The Asia Foundation also joined this initiative by sponsoring some paper presenters from India. The Finnish Embassy in Kathmandu, the Forum of Federations (ForumFed) and Office of the High Commissioner for Human Rights (OHCHR) also supported us in this process. The Alliance for Social Dialogue (ASD/Nepal) and MIREST shared the conference expenses with us. Kamala Acharya, Bandana Baral and Anupama Sigdel helped us with much needed loans at the time when we had insufficient funds as the donor support had not reached us. We truly appreciate the timely support and encouragement from these national and international agencies, and our well-wishers.

We must thank all participants of the conference including members and technical staff of the Constituent Assembly, legal and constitutional experts, the representatives of the civil society organizations, bureaucrats, women, leaders of indigenous communities, minorities, and others for making it a productive venture. We value their contribution to our constitution building efforts very much.

We thank our team at the Nepal Constitution Foundation that worked remarkably well in implementing the conference successfully. Sabita Nakarmi, Lalit Chaudhary, Phurpa Tamang, Sombojen Limbu, Umesh Gautam, Jeni Gurung, Roshani Chalise, Shyam Nagarkoti, Chhedilal Chaudhary, Abhishekh Adhikari, Badri Bhujel and Shanti Poudel were all exceptional in their respective tasks. The conference in the end is their achievement.

Developing the conference materials into this book was another challenge. It was made possible with the help of Abhishekh Adhikari and Rukamanee Maharjan, who took great pains in transcribing the conference proceedings and contributing to the development of this book. In this process Prabin Lama and Surabhi Pudasaini assisted us with the language, and Subodh Pokharel helped us with the cover page design and page making. We have sincere appreciation for their support.

Finally, we have attempted to assure the quality of editing and extend our sincere thanks to all those involved in this process. Inevitably there are bound to be some mistakes and lapses, for which, we are sorry.

Surya Dhungel, PhD                        Bipin Adhikari
Convener of the Conference                Chairperson
March 2010                                 Nepal Constitution Foundation (NCF)
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Towards an Inclusive, Secular and Federal Constitution

Ram Baran Yadav

Distinguished Constitution experts, ladies and gentlemen, I feel greatly honoured to inaugurate this international conference on the *Dynamics of Constitution Making in Nepal in Post-conflict Scenario* in such an important period of our peace process.

Experiences from around the world have shown that constitution making is not an easy task in countries, which have suffered the trauma of armed conflict. Since it is a blend of political and technical processes, consensus building on a common constitutional framework needs skills and serious commitment on the part of stakeholders engaged in the process.

Although Nepal has come a long way since the comprehensive peace accord was signed in November 2006, the political parties have been trying their best to accomplish the task of formulating a new democratic Constitution for Nepal within the stipulated timeframe through an inclusive sovereign Constituent Assembly of 601 members. We have full confidence that our political parties, vibrant civil society leaders and people are capable of working together to produce a constitution, which they may be able to own.

Like many other post-conflict societies, we are also at war against violence, impunity, lawlessness, discrimination, poverty, underdevelopment and social injustice. As we know, “injustice anywhere is a threat to justice everywhere,” we are not only struggling for peace and rights, we are fighting
for social justice as well. World leaders like Lord Buddha, Mahatma Gandhi and Nelson Mandela, who successfully fought for world peace, non-violence, social justice and equality, are role models for us and the world. However, we have a huge challenge before us to establish peace and justice through democratic order, the rule of law and democratic constitutionalism. International experiences in this regard will be valuable to us.

Now is the time for Nepal and its friends from the global community to demonstrate to the enemies of peace and humanity that there is no space in this world for violence, lawlessness and injustice anymore. I appreciate the generous gesture of this august gathering from abroad and within. I am confident that Nepal will benefit from your proven scholarship and experience in drafting a democratic constitutional framework that can secure human rights for all and ensure justice to the deprived.

In the process of establishing peace through democratic and egalitarian constitutionalism, we don't have to make anyone poorer and weaker. Let us make all citizens prosperous and equally strong. I hope the new constitution will create a basis for Nepal and the Nepalese people to ensure unity in diversity, and pave a roadmap for establishing sustainable peace and prosperity in Nepal.

The principles of democracy, rule of law, human rights and social justice are universal. Therefore, the fundamentals of constitutionalism cannot be confined to any state's boundary. Institutions like an independent judiciary, a human rights institution and a free press are essential watchdogs to protect and strengthen constitutionalism and democratic values.

A new constitution is meant not only to establish Nepal as an inclusive, secular and federal state, but also to provide clear avenues for conflict transformation, restorative justice, reconciliation, development, and efficient leadership. I hope this conference is able to achieve its objective through candid discussions of all pertinent issues. This is also a part of the participative constitution making process, wherein the organizers have invited many acclaimed international constitution builders to work with our experts and share their experience. I am sure this is going to be an enlightening exercise for all of us in Nepal, especially for constitution makers, and political parties.

I thank you all, especially those who have travelled half way around the world to come here in this chilly season to contribute to this process. I have high appreciation for all of you. I wish you all a grand success in achieving your objective! Thank you.

*****
Flagging Up Constitutional Issues

Subhash C. Nemwang

Mr. Chairman, Rt Honourable President, Honourable Ministers, Honourable Members of the Constituent Assembly, Distinguished International Guests, National Experts, Journalists, and Ladies and Gentlemen!

It is a great pleasure and honour for me to address this august gathering of distinguished constitutional experts assembled here from around the world to participate in this international conference on the Dynamics of Constitution Making in Nepal in the Post-Conflict Scenario.

The Constituent Assembly of Nepal has been in operation since 28 May 2008. It has 601 members representing almost all the major political groups of Nepal. Being the first inclusive house of the country, the Assembly is a mosaic of Nepalese diversity and pluralism representing the interests of all the multi-religious, multi-lingual and multi-ethnic communities of Nepal. It is the house of peasants, the house of industrialists and the house of the marginalized people. It has been formed to draft the new constitution of Nepal as part of the comprehensive peace process underway in the country.

As you are aware, we have eleven thematic committees in the Assembly working on different components of a modern constitution. These thematic committees are assisted by other administrative and public relations counterparts within the Assembly. Each thematic committee is required to produce a concept paper and prepare a preliminary constitutional draft within the constitutional area allocated to it as per the Assembly Rules. All committees are of equal strength and capacity, and are empowered to make
proposals to the full house on the new constitution. The Constitutional Committee of the House is entrusted with the responsibility of preparing the
final draft of the constitution by building on the reports of the thematic committees and the recommendations and directions of the full house on the
debate of each committee report.

We are following a bottom up approach in our constitution making exercise. We have not engaged experts to draft the constitution with a view
to take it to the Constituent Assembly for focused discussions. Rather, we have started from scratch, and enabled the thematic committees to work on
their respective components of the constitution, right from the beginning. All this is being done according to the rules laid down by the Interim Constitution of 2007 and the Rules of the Constituent Assembly adopted by it in early 2008. Certain policy prescriptions have been made by the Interim Constitution as well. The final constitutional draft has to be taken to the
plenary meeting of the Constituent Assembly for a clause-wise discussion and voting as per Article 70 of the existing constitution. Once an agreement
is reached on each provision, the entire draft will be taken for adoption by the House before it is promulgated. According to the present interim
arrangement, the new constitution must be adopted and promulgated within two years i.e. by May 28, 2010.

We are presently on the last leg of the constitution writing period. The count down for the promulgation of the new constitution has already started.
Although our deliberative process has been a bit slow, as the chairperson of the House, I have already received the concept papers and preliminary
constitutional drafts from nine of the eleven thematic committees. They all have been tabled at the Constituent Assembly and discussions have been held
in the full House, as well as in the wider civil society. The two remaining thematic committees - i.e. the Committee on the Restructuring of the State
and Allocation of State Powers and the Committee on the Determination of the Form of Government - are still working on the issues under their terms of
reference. We expect these committees to wrap up their discussion very soon, and submit their concept papers and preliminary drafts at the earliest.

Nepal has already abolished monarchy, been described as a federal republic and a secular country. The constitution is being drafted in an
environment where there is nothing to contain the sovereign House as a matter of principle. Over the last nineteen months, the nation has gone
through a participative constitutional process emphasizing the importance of public participation in the constitutional drafting process. This has been done
as a means to promote legitimacy and encourage the participation of citizens in government. An array of methods has been employed to reach out to
members of the public and include their views. The thematic committees have not only tried to discuss major issues of the transition with the public, but have also tried to factor their input into their concept papers and preliminary drafts at the committee level. We will go through the second round of this consultative process again after we complete the first comprehensive draft of the new constitution. Although we had several constitutions in the past, this method of framing a new constitution through an elected Constituent Assembly is really a new experience for us.

This is also, probably, a forum to touch on issues which have been very demanding in the Constituent Assembly process, and highlight before you what we have achieved so far, and where we are heading in terms of the principles of constitutionalism. We are debating on various issues, such as a suitable federal framework or a system of devolution of power, the features of an inclusive state, the nature of secularism to be adopted by Nepal, the strategies to ensure local control on local resources, and a decent model for the republican form of government. As the deliberative process is still on, and the move towards drafting the final constitution has not yet started, it is probably not a ripe time for me to be definitive in my opinion. However, I can tell you what seem to be time consuming issues at this stage.

In this regard, consensus on a suitable form of government for the country under the new constitution must be taken as the first and foremost issue. Some parties have favoured giving continuity to the existing parliamentary form of government, while some have strongly emphasized on a presidential system. Another group is keen on a parliamentary system, where the prime minister is directly appointed by the people. Still, another group prefers a model similar to the French system. The challenge here is to find a form of government, which not only gives stability to the nation, but also ensures modern democratic features in terms of its structure and accountability. Electoral issues definitely arise and need due consideration. Most people believe that there must be solid foundations for an inclusive system of representation in the new constitutional set up.

The issue of state restructuring, especially the quest for a suitable model for federalization has received serious attention of the Constituent Assembly. There has been considerable debate not just on how many provinces this country should have, but also on how the provinces should be demarcated, and how national power should be shared between federal constituent units. Many people, especially those indigenous communities that have been excluded from the national mainstream, want to be assured of their right to self determination. Similarly, there are issues involving fiscal federalism or sharing of resources between the centre and the provinces, and among
provinces in the new set up. The House is as much divided over these issues as the civil society watching it from outside.

The civil society of Nepal is still deliberating on many important features of the reports produced by the nine thematic committees. The report of the Committee on Judicial System has been keenly studied. I can probably point out that these reports may entail further debate. Important dimensions of fundamental rights and directive principles have been proposed by the Committee on Fundamental Rights and Directive Principles. It is also a time to ensure that the rights guaranteed by the new constitution have adequate sanctions. The system of separation of powers between the main organs of government and checks and balances are important in every constitutional system that is based on a foundation of liberty and freedom. Similarly, a constitution must also provide for a just and efficient security system, electoral procedures, public accountability institutions, and different constitutional watchdogs.

There is no doubt the country is more or less united in its pledge to resolve all existing problems relating to caste, ethnicity, regional disparity and gender discrimination. But in an era of globalization, in all types of society, regimes of constitutional law and good governance may be regarded as vital as the issues I have so far touched on. To meet the challenges of globalization, there have been dramatic developments in democratic and legal reforms in different countries since the end of the cold war. Post conflict societies have been faced with the challenge of establishing a system of law and governance that fulfills the new requirements. In addition, societies already firmly based on constitutional governance and the rule of law, have also recently undertaken constitutional changes and experimented with the introduction of modified institutions and new forms of governance. Comparative analysis reveals that constitutional systems worldwide have been subject to varying degrees of cross-fertilization. As such, this is also the time to think beyond current requirements, and get ready for the future as well.

I have gone through the programme and schedule of this three - day conference with interest. It is very exhaustive. It has tried to cover most of the important constitutional issues of Nepal that needs to be addressed through a new constitution. I will consider this conference as being successful if it stimulates discussions on the forms, institutions, procedures and values of constitutionalism relevant for Nepal at a time when the debate on the new constitution is being finalized. A new constitution, which is being written by the people themselves through an elected Constituent Assembly for the very first time in the history of the nation.
Making value choices is not always easy. It is human nature to have differences in perceptions and attitudes. But we need to sort out our differences, and move ahead, keeping in mind the best interests of the people that are deprived, downtrodden and marginalized. An objective attitude is always essential in this process. I am very sure that you will be keenly looking into what we have produced so far and providing a much needed international perspective on the issues we are dealing with. I am happy that you will be interacting and sharing your international perspectives with Nepalese experts from the government and outside. This is a very welcome step.

While we do this, we also have to make sure that we respect basic human rights, democratic principles and our thrust for nationalism. We are not just going through a constitution making process. We are also going through the process of building a nation. A constitution building exercise is by all means tougher than the constitution making exercise. The former aspect has a number of political contents. These must be settled through dialogue and deliberations. It has to be done on the strength of our shared values and loyalty to the nation. There is stress and pressure for sure, but we have to overcome the current challenges in the interest of our future.

Before I conclude this note, I want to thank Nepal Constitution Foundation, Tribhuvan University Faculty of Law, Supreme Court Bar Association and others for organizing such a timely forum at a very critical point of time. I also have very high regards for the international constitutional experts who have come from different countries to provide their invaluable inputs to our constitution building exercise. I encourage you to feel free in your analysis and recommendations. This is a noble enterprise which will have far reaching significance only when you take it as your own project.

Your efforts to help this national initiative will not go in vain. The organizers will definitely do whatever is necessary to give appropriate treatment to the inputs received here in their capacity as academic and professional institutions. The Constituent Assembly of Nepal and its different thematic committees have always given high importance to consultative processes like this, and the inputs received here will also be welcomed by them as usual. You can count on my support wherever you need it.

I wish you all a grand success and thank you once again!

*****
Mr. Chairperson, Right Honourable President Dr. Ram Baran Yadav, Right Honourable Chairperson of the Constituent Assembly Mr. Subhash C. Nemwang, Honourable Members of the Constituent Assembly, Excellency Ambassadors, Honourable Justices, Eminent Jurists and Lawmakers, Professors, Ladies and Gentlemen!

I feel indeed honoured and privileged to be invited to this important gathering on constitution making which Right Honourable President Dr. Ram Baran Yadav has kindly graced. Right Honourable Chairperson of the Constituent Assembly Mr. Nemwang has just delivered a very important keynote speech. This gives us a clear picture of the current state of the constitution making process. I do not have a prepared speech to make, but would like to frankly share some of my thoughts about the ongoing process, and my observations about the contentious issues.

One of my favourite quotes has been what English novelist, Charles Dickens had to say in *A Tale of Two Cities*, "It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to heaven, we were all going direct the other way - in short, the period was so far like the present period, that some of its noisiest authorities insisted on it being received, for good or for evil, in the
superlative degree of comparison only." That's exactly where we are in constitution-making. This journey has not ended. We are still trying to move this journey to a point where we can really end the "winter of despair" and assure a "spring of hope."

We all understand that writing a constitution is difficult. Writing a constitution in a post-conflict society is even more difficult. Countries like Congo, Angola, and Algeria come to my mind. First round of elections could not stop the rebels or the army from killing the entire democratic process in those countries. I am also aware of the experiences of Northern Ireland where the first elected legislature could not meet even for a single day. Even after the second election to the legislature when the negotiation process was at the final stage, a diamond shaped table had to be prepared to make sure that Ian Paisley could refrain from shaking his hands with Martin Mc Guinness. This is despite the fact that Ian Paisley knew in just about few days, he would become the first minister and Martin Mc Guinness would become his first vice minister. This incidence is quite telling about the inherent difficulty of peace building in a post-conflict society.

This and many other experiences give us one unambiguous lesson and that is, in a post-conflict society we have to make sure that everyone feels he or she is included and has a say in future governance. The “winner takes it all” system does not bode well as a constitutional norm in a post-conflict society. I would not like to make comments on what form of government is good for Nepal, or similar other issues. However, I certainly would like to remind everyone that if we do not move in the direction of a consensual form of government, we probably would not be able to bring the peace process that started from the 12 point agreement between the parliamentary political parties and the Maoists to a natural fruition.

The 12 point understanding clearly outlines establishing peace, democracy and progression as its objective. And to do so, the conflicting parties agreed to a number of follow-up understandings and agreements. The Interim Constitution promulgated later in 2007 enshrines all these agreements and is the guiding document to peace building and constitution making. We are currently in the process of completing the peace process and writing a new constitution to institutionalize federal democratic republic with a yearning to usher in an era of peace, prosperity and development in Nepal.

I would now like to very humbly remind you about the three different types of consensus referred to in the Interim Constitution. These are: “political consensus,” “consensus of major political parties,” and “mutual consensus.” Political consensus implies almost universal consensus, the consensus of major political parties is akin to the concept of “sufficient
"Although Nepal has come a long way since the comprehensive peace accord was signed in November 2006, the political parties have been trying their best to accomplish the task of formulating a new democratic Constitution for Nepal within the stipulated timeframe through an inclusive sovereign Constituent Assembly of 601 members. We have full confidence that our political parties, vibrant civil society leaders and people are capable of working together to produce a constitution, which they may be able to own."

- Ram Baran Yadav
  President (at p. 1)

consensus” and mutual consensus is consensus of political parties in the government that command a clear majority in the parliament. As the Interim Constitution has it, every article of the new constitution has to be adopted by consensus. Only if there is no political consensus in the first two rounds, then a two third majority can write an article into the new constitution. This is a humble reminder to us that we should strive for more than just a consensus of major political parties to write the new constitution; otherwise we will end up with a document which many others will not be willing to honour as a living social and political contract for generations to come.

Another provision of the Interim Constitution that I wanted to mention was Article 146. It states that "the Council of Ministers shall form a special committee representing the major political parties in the Constituent Assembly to supervise, integrate, and rehabilitate the combatants of the Maoist Army, and the functions, duties and powers of the committee shall be as determined by the Council of Ministers.” This article reminds us that an important facet of the peace process is the consensus between major political parties in deciding the fate of the Maoist combatants.

I would like to mention Article 144, the provision relating to Nepal Army. It lays down that a political consensus (not just a consensus of major political parties) is required for the process of democratization of Nepal Army. Clause (3) of this Article provides that "the President on the recommendation of the Council of Ministers shall control, mobilize and manage the
Nepal Army in accordance with the law. The Council of Ministers shall, with political consensus and consent of the concerned committee of the Legislature, formulate an extensive work plan for the democratization of the Nepal Army and implement it.

Article 43 lays down the rule for the conduct of government. It is not exactly how a typical Westminster government conducts its business. "The conduct of business of the Government of Nepal shall be carried out consistently with the aspirations of the united people's movement, political consensus and culture of mutual cooperation. The common minimum programme prepared through mutual consensus shall form the basis of the policies of the Government of Nepal."

The reason I am bringing these up is because the Interim Constitution is a living contract that we entered into. We all signed in this document with a clear understanding of what rule of games we needed to honour to complete all the tasks incumbent upon us. We should all therefore approach all our tasks: writing the new constitution, completing the peace process, running the government on a day to day basis, differently as each of these processes require different parameters as a bare minimum for successful conduct. I would not elaborate more on this, because then I might probably enter into a turf that I do not want to do today.

On the constitution writing process, as Right Honourable Mr. Nemwang rightly pointed out that a lot of work has already been completed by the thematic committees of the Constituent Assembly. However, the task ahead is still quite intractable but not impossible. We still need to work out an understanding among political parties on major contentious issues, e.g., form
of government, electoral system, fundamental rights, judicial system and its independence, and delineation of provinces of federal Nepal.

We all know that no party’s manifestos can be written as a constitution. We all have to negotiate with a spirit that some of the things that I like will be there but some other things that I do not like much is also likely to be there. If we work with this mindset we should still be able to complete the process of writing a constitution for which, generations of Nepalis, still to be born, will be grateful to our generation. They will say with great pride, “Our forefathers lived in a very difficult time, a time when not just peace, tranquillity and constitution-making but the very existence of the nation itself was at doubt, but they were able to rise up to the challenge and were able to write a constitution that laid a foundation for a prosperous Nepal that we proudly call our home.” That is what the American Constitution has been able to achieve. That is what many other successful constitutions in many other countries have been able to achieve.

On the issue of delineation of the provinces, the Committee on Restructuring of State and Division of State Powers has done a pretty good job. After a long deliberation, the Committee has come up with two proposals on province delineation. I do not like either of these two proposals but still honestly believe that a compromise can be struck on the basis of these two. For this to happen, the State Restructuring Commission as provided for by the Interim Constitution could be of help to the Constituent Assembly. The commission can develop a province delineation to be finalized by the Constituent Assembly. Such delineation will not be an exact replica of a political map proposed by any single political party but will still be a minimum acceptable level to all.

Let me also say few words about the High Level Political Mechanism that has just been created. Given the situation we are in today, the High Level Political Mechanism will certainly be of great use to help us move the peace process forward, iron out our differences on constitution making and much more. I have tremendous confidence on the High Level Political Mechanism as its leadership would not be tempted by the day to day politicking. And they would not move beyond what exactly is expected of the High Level Political Mechanism.

I will close by expressing my gratitude to the organizers and wishing this conference the very best.

Thank you very much.

*****
IV

The Commitment of the United Nations

Robert Piper

Right Honourable President, Dr. Ram Baran Yadav, Right Honourable Chairman of the Constituent Assembly, Mr. Subhash C. Nemwang, Honourable Ministers, Honourable Members of the Constituent Assembly, Distinguished Guests and Friends!

The Comprehensive Peace Agreement (CPA) offers an extraordinary vision of equity, inclusion, human rights, good governance and justice. We are all gathered here today because we recognize that the successful completion of Nepal’s constitution building process is a vital key to unlocking the potential of the CPA. The work of the Constituent Assembly (CA), the support of Nepal’s international partners and attention to the importance of implementation are all vital to this effort.

Yesterday was the first anniversary of the appointment of the CA Committee Chairs. In that challenging year, the CA has accomplished so much. Nine of 11 thematic reports have been delivered, and the tenth is well under way. The early recommendations from the committees carry much promise. None will satisfy all demands, but they all satisfy many important demands. Draft provisions on the representation of women in the parliament and other elected bodies and the substantial inclusion of child rights in the early texts, for example, have the potential to set new global standards.

There are some hard questions still to be resolved of course. About the form of government, the names and number of provinces, the electoral system and other matters. The CA Committees have nevertheless already
brought this process to a point where the features of the new Nepal have begun to show clear contours, and where hope can legitimately grow for real and tangible changes in the way Nepalis live and in the way they are governed.

I take this welcome opportunity to congratulate the CA Members and the CA Secretariat for their achievements to date and to wish them well for the drafting and adoption of the new Constitution in the months to come. I want particularly to draw attention to the role of the Speaker in successfully guiding, for these many months, a process that international experience shows us is one of enormous difficulty.

The UN respects the sovereignty of the people of Nepal in drafting their constitution. We are working to ensure that the best possible expertise is available to the drafters, and that relevant experiences in constitution building are made available. In so doing we keep in the forefront, the principles on which the United Nations is based – human rights, the rule of law, and democratic governance. And an abiding concern that the constitution is one that further cements peace. Lasting peace on which prosperity can be built.

The whole UN system has been supporting this process one way or another. UNDP has taken a lead role in establishing the Centre for

"The issue of state restructuring, especially the quest for a suitable model for federalization has received serious attention of the Constituent Assembly. There has been considerable debate not just on how many provinces this country should have, but also on how the provinces should be demarcated, and how national power should be shared between federal constituent units. Many people, especially those indigenous communities that have been excluded from the national mainstream, want to be assured of their right to self determination."

- Subhash C. Nemwang

Chairperson, CA

(at p. 5)
Constitutional Dialogue. OHCHR and UNHCR have provided advice on fundamental rights provisions, ILO on indigenous rights, United Nations Children's Fund (UNICEF) on child rights. United Nations Population Fund (UNFPA) and UNIFEM have led from our side on gender and inclusion. UNESCO and WHO have helped look down the path towards the upcoming challenges in ensuring adequate health and education services in a future federal system. As our visitors will now appreciate, Nepal is blessed – or cursed as some might have it! – With the full array of UN agencies. And in all of this, we have worked with an array of international partners and donors who have shown I believe, a singular commitment to work in a coordinated and coherent fashion in order to not add more burdens to the Speaker and others, who are shepherding a process which is already complex enough.

It bears repeating, that the constitutional challenge faced by Nepal does not end when the new constitution is promulgated. At that point, a whole new set of challenges will begin. The final design and implementation of sub-national units provides a striking example of the demands of the road ahead. Many countries, and particularly those with challenging issues of regional diversity, have turned to federations or other regional structures. Hardly any federation in the world still looks like and operates in the way it did when it was first born. Change will continue to occur, and the rules must be sufficiently adjustable to changing realities.

Building the right provisions for transition, for implementation, and for future amendment is as vital as providing for fundamental rights and the system of government. I am very glad to see that this conference will also address some of these questions at such a timely moment.

Let me close by welcoming the impressive group of experts who have come to participate in this important discussion. And recognizing the equally impressive group of local experts gathered in this room. And to reaffirm the commitment of the United Nations to stand by Nepal in its future efforts to build an effective, responsive and capable state. We are committed to do everything we can to help bring about real and tangible change for the people of Nepal, in whose name this constitution will be written.

Thank you.
Some Preliminary Issues in Constitution Making

Wiktor Osiatynski

Right Honourable President, Right Honourable Chairperson of the Constituent Assembly, Honourable Guests and everybody present here, I especially want to greet all the ladies present in this room, because I come from a country where the access of women to the public sphere and decision making is extremely slow and painful despite the constitution. I just finished taking part in collecting over hundred thousand signatures of citizens for a legislative initiative to ensure parity of sexes on the electoral list. I am very happy to know that this kind of parity exists in the Nepali electoral law for the constituent assembly. Nepal should be proud of this feat.

I have been involved in many constitution making processes for over ten years. I was the co-director of the Centre of Study of Constitution Making in Post-Communist Transition Countries at the University of Chicago Law School. I was also involved in the constitution making and amending process in my country, Poland. Just two days ago, we finished a report on changes in the constitution of Poland, which our Prime Minister has forwarded to parliament.

I am proud that I can take credit for one distinctive provision in Poland’s constitution, which I know, cannot be found in any other constitution. I persuaded the assembly to incorporate the provision that states that a child has a right to be heard. Whenever a decision concerning a child is made by public authorities, the child has a right to be heard. He does not have a right to be listened to. Sometimes people in power and authorities have to do
something against the child’s will, but the child is not a piece of furniture that can be moved without being heard. This is just one example of something larger. I find it extremely important that constitutions and laws should be useful to people. That they help us to treat other people with respect and dignity and have our respect and dignity. Keeping this in mind, I want to share some of my experiences and thoughts related to constitution making, especially in transition countries. I will try to be brief and not too boring.

To begin with, I would like to share an observation of the existence of something that may be called a constitutional momentum. It is witnessed usually after a huge change, such as a revolution, war and some other upheavals. During such a momentum, the elites and the people that have power or have acceded to power think that they have to introduce some new rules and change the ways in which politics is conducted, and relations between authorities and citizens are defined. This is a short term phenomenon. Sometimes it takes, like pregnancy, just nine months. And if you don’t pass a constitution within that period it becomes more and more difficult as people will start getting used to the status quo and get back to their businesses as usual.

I know many countries that have missed this momentum. In some cases, I was personally involved as an advisor. In 2005, Kyrgyzstan missed the momentum when the President that came to power through a contract between various groups, won the subsequent election with an overwhelming majority before adopting a new constitution. Then he said “I am very happy with the former dictatorial constitution that my predecessors had. I don’t want to abide to our contract and I don’t want to go for any changes.” It is difficult to pass a constitution during the momentum. But constitutions are important for the stability of the entire system.

I claim that an imperfect constitution is better than a perfect one because the latter quite often means no constitution. And an imperfect constitution is definitely better than no constitution. Therefore, I think that somehow an appetite for perfection may be counterproductive.

Also, I think that sometimes it is good to do what the Hungarians did, namely to adopt a constitution in installments. They could not agree about some basic issues. It is very difficult for everyone to agree with everyone else, especially during a simultaneous transition to constitutionalism and democracy. I will talk about this a little later, in more detail. They could not agree because every player could easily say, “No, I don’t agree with that particular provision.” Further, because a constitution contains many provisions the room for disagreement increases. In Poland, there were just three disagreements but we almost failed to draft the constitution because
political parties and political leaders that wanted to get political support for themselves were playing their power games on these disagreements.

The Hungarians first made some major changes to their former constitution. Next, they enacted something called as the organic law that required a super majority to adopt any changes. Then, they passed six separate organic laws regulating individual rights, freedom of expression, freedom of religion and some other things. They were able to create different majorities for each of these laws. Some resulted in centre and right wing majorities while some in centre and left wing majorities. Therefore, the resulting constitutional order that was established in installments worked pretty well.

Sometimes constitution-making is enhanced through constitutional delegation. Quite often, if the constitutional body cannot reach an agreement, they can deal with the issue by formulating a statute that could be adopted in the future. That is what the Slovaks did in their constitution. The Czechs did it differently and it is very funny. The supreme judge who thought he would be the Constitutional Court leader, delegated things to the Constitutional Court. How you do that? You put some very confusing and unclear provisions into the constitution and then it is assumed that the Constitutional Court will have to decide about it later. He thought he would assume that power himself as the supreme judge of the Constitutional Court. Alas, he was never appointed to that post.

So, the first important thing is to have a constitution either in installments or in some other way. The second important issue in many transition constitutions is the problem of legitimacy and the content of the constitution.

About ten years ago, the Ford Foundation and the Helsinki Foundation for Human Rights in Poland put together a group of constitution makers and human rights specialists from East Central European and African countries. There, we could see extreme visible differences. We spoke the same English, we spoke the same language, and we spoke the same terms but we understood different things that had different values for the participants.

For us in East Central Europe, good constitutional content was what was actually important. For the delegation from Africa, the most important issue was a participatory and inclusive approach in the constitution making process to ensure that everyone will participate and no one will be excluded. We East Europeans were afraid that such a participatory and inclusive constitution may actually be worse. But the African delegation didn’t care, for they had never been heard. People in Africa were never heard. They had colonist or
post colonist powers who were deciding for them. But now they wanted to be heard. And this is valuable and important by itself.

From this point of view, the electoral law to the Constituent Assembly in Nepal is exemplary. I think it is the most inclusive law I ever heard about. I have been sharing it as a model of inclusiveness in my lectures all over the world. Therefore, I have a vested interest that you come up with a good constitution with such an exemplary electoral law. But, there is also the problem of legitimacy and borrowing in the constitution-making process here in Nepal.

Earlier today, Honourable Speaker of the House, Mr. Subhash C. Nemwang talked about constitutional cross fertilization. Borrowing is an issue which is important because there are only few things that can be invented for a particular constitution and there are many things that are similar. Most of the constitutions of the last twenty years have borrowed the rights from international human rights treaties and documents. But borrowing can be pretty tricky and difficult. Robert Gooding has already demonstrated in 1996, the difficult issues involved in borrowing in sharply divided societies. In such societies, borrowing should be limited, because what is important is ownership of the constitution by the actors. I will quote two or three sentences from a work by my compatriot, a constitutional lawyer, Rett Ludwikowski “An engineer or surgeon requires some degree of exactitude. Their freedom to experiment is limited. In contrast the constitutional gardeners do not try to construct their products from well tested components or to transplant organs into accomplished social organisms. Rather, they pick seedlings from different gardens and implanting them, piece by piece, into living and constantly changing vegetation composed of rules, norms and institutions. The new gardens do not resemble traditional British or French parks. They have a mixed character, blending together features produced by different tastes, cultures and styles.” I wish constitutional makers in Nepal to be good gardeners in that sense.

One issue related to legitimacy is the conflict between democratization and constitution making. We usually do not realize this, but a simultaneous transition to constitutionalism and democracy creates incredible problems. In Western democracies, constitutionalism and democracy were implemented in stages. Both England and the United States got their constitution first followed by the process of democratization. Western Europe focused first on democratization and only very recently became constitutional regimes, even though they had constitutions prior to that. But conflicts abound in a simultaneous transition. For democratization requires conflicts. Let’s assume that we want to establish democracy out of nothing and you are our voters.
We cannot come in front of you and say how much we agree among ourselves about everything. We have to disagree in public and say, “I have this vision of future Nepal and you have another vision and I disagree with you.” And more the conflict better are chances for each of us.

For the constitution however, we have to agree about the most fundamental things. And it is difficult to agree and disagree at the same time. The politicians will always be tempted to emphasize political and conflicting aspects rather than reaching towards an agreement. Therefore it is so difficult. The ways out of this is to separate the assemblies from the government. Insulate conflict from rule making. The most effective strategy is to put some important issues outside the realm of political conflict. This happened to some degree in India, in South Africa or in Spain, which had the most effective constitutional regime. In the so called Monclova Pact, the major political forces agreed that they will not contest five or six major issues. Let us hope that the high level meetings that I have been hearing about may lead Nepal into this kind of agreement.

The participatory approach of constitution making may have some dangers. I appreciate the Nepali attempt to include everyone, but constitution makers should be aware about at least three dangers in this regard. The first one, as mentioned earlier, is political use of the constitution making process. Politicians may raise issues and take it to the public primarily to get more votes, political ammunition and political support. Often, it takes place in the form of making promises, particularly when the constitution or constitution making process permits referendums. This is usually used and abused for political purpose.

Secondly, it is extremely difficult to achieve compromise in the public process. To compromise means to give something. I am afraid that in my constituency, my voters will dislike me if I compromise by giving something. Therefore, compromises are done not in public but in chambers. In the public process, compromises are usually reached by adding new provisions to the constitution. This is dangerous and very ineffective, and may lead to some unintended consequences in the future. Here, once again, we encounter the problem of constitutionalism and democracy. The more you put in the constitution, the more you will limit democracy in the future because democracy is essentially about having discussions and conflicts on public policy goals. If everything is predetermined in the constitution there is not much room to quarrel. And then people quarrel about the stains in the President’s gown, they quarrel about religion and about some other abstract things because too many issues of rational conflict, such as resources or rights and other things are precluded.

Another important area of post-conflict constitution making is power structure and conflicts over different forms of power structures in the
constitution. Usually the power structure defined in a constitution, reflects the power structure at the moment of constitution making or at the moment of laying out the rules for constitution making. This is most often the case. The most important issue here is the need for clarity - as much clarity as possible. Too much of checks and balances and high expectations of consensus are dangerous and counterproductive. For example in many countries the president has veto over the legislation and 60% or even a larger majority is needed to overrule the veto. In a parliamentary system, this actually increases the power of small parties that have lost elections. The small parties will be in an advantageous bargaining position and may ask the winners who need their votes, for a lot of things.

I want to say two more things. The momentum that I mentioned above will not last. The commitments of elites is usually short lived and short termed. Therefore, it is extremely important, not only to include rights in the constitution but also to have in place protection mechanics for rights, including individual remedies and civil society institutions that will help to protect constitutional rights.

Finally I want to say something about my own experience. At the beginning of my involvement, I believed that the process of constitution making should also be an educational process. During the constitution-making process, elites can educate people in the constitutional context. Today, I think that was very naïve. I think it was naïve to assume that politicians will educate the people, once they have learned about the constitution by themselves. Today I am afraid that the majority of politicians in any system have no time or willingness to learn and that they are almost unable to teach anyone else. So why should we burden them with such an educational task. Being a scholar, I believed that we should learn before acting. I learned that practical skills, life skills and political skills are learnt in action rather than in theory.

Today I still read constitutional treaties and teach constitution related issues. But I try to spend as much time helping non-governmental organizations to use constitutions in pursuit of their own goals. I therefore wish that the civil society in Nepal gets a constitution sooner so that components within it can flourish.

Thank You!

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Walter Bagehot, the insightful political commentator over a century ago, wrote in his English Constitution that “governments by discussion” came in essentially two types, a presidential/congressional and parliamentary system. He also emphasized the importance of distinguishing between the “dignified” and “efficient” elements of any constitution.

With the making of the American Constitution in 1787, the modern world was immediately presented with two potential models for governance: the presidential and the parliamentary.

The United States and the United Kingdom were not democracies in 1787, but both systems were committed to extending the rule of law and increasing accountability. Both followed the basic rule that a division between the executive, legislative and judicial functions was a necessary feature of modern government, and the evolution of these forms of government has now become a feature of constitutional discussions throughout the world.

Some issues in the ever-changing international context
Nepal’s decision as to what form of government to choose will clearly reflect Nepali preoccupations and priorities. The purpose of this brief paper is not
to dictate a course, but rather to set out some issues in the ever-changing international context.

The Americas (with the exception of Canada and the Caribbean) have adapted the American model, with a division between a popularly elected President, an elected Congress (often two houses, particularly in federal systems like Mexico, Brazil and Argentina), and a judiciary with guarantees of independence from both the other branches. The principles of judicial independence and judicial review under a written constitution are important hallmarks not always sufficiently respected.

In this model, the Presidency combines the ceremonial head of state function with the leadership and management of the executive, with a strict distinction from the legislative role of the Congress.

Historically, the advantages of this system are its origins in a healthy rivalry between the three different functions, the absence of a concentration of power in any one branch of government, and the assurance of a balance of power.

This is, of course, not always the case, and the existence of an elected executive Presidency quite separate from the legislature can give rise to a centralisation of power in one individual who uses the instruments of state to his or her advantage. In Latin American parlance this is referred to as the “caudillo factor” - the risk of too much power accumulating through both the political party and the modern executive to give excessive control to the individual who is also the Head of State. In this instance the ceremonial role gives an added lustre to the “elected dictator”.

Indeed, this issue was front and centre in the constitutional debate of the 1780’s, with many critics, including Thomas Paine, arguing that the President had too much power, that the independence of the states was threatened by the accumulation of power at the centre, and that America risked becoming a virtual monarchy by another name.

On the other hand, more recent American experience would lead to another concern: the risk of deadlock and the power of lobbies to influence a Congress that can stymie the agenda of an elected President.

The British parliamentary system (the so-called “Westminster model”) has its advantages and drawbacks as well. In the eighteenth century the fight between “court and country” was about reducing the patronage power of the King and giving more authority to parliament. In the nineteenth century the English political writer Walter Bagehot noted that “parliamentary government” really meant “Cabinet government”, and that the combined power of the executive and legislative branches were increasingly being
centralised in the Cabinet. Today a legitimate concern is the concentration of power in the hands of one individual, the Prime Minister, whose leadership of party and parliament can lead to its own risks of abuse of power. The Prime Minister appoints members of the cabinet, and controls his party in the House of Commons. In turn, he or she can set an agenda which is difficult to stop.

Recent events in Canada are a case in point, where the Prime Minister has prorogued Parliament twice in one year, and no one has been able to stop him. The lack of clarity of parliamentary governance precedents, and the fact that in many “pure” parliamentary systems the role of the head of state in deferring to the wishes of the elected government is unclear and in many instances unwritten (and therefore difficult to challenge in court) is now leading to increased efforts to clarify these roles.

Similarly, the role of the ordinary member of parliament, the powers of political parties to discipline “independent” thinkers, and the concentration of power in the office of the prime minister has led many to complain about the lack of “real” (as opposed to “apparent”) power in parliament itself. There are moves afoot in most parliamentary systems for reform to assert more power for backbenchers.

The first past the post electoral system compounds these problems, although it is more likely to produce majority governments. In the minds of some this produces more clarity of decision making.

In the minds of others it creates parliaments with artificial majorities that is majorities greater than the popular vote in the country would permit. Hence the prevalence of some kind of proportional voting in most European countries, and many other parts of the world. The advantage of this system is parliaments closer in representation to the actual vote. However without safeguards small parties can manoeuvre themselves into positions of great leverage and influence.

Parliamentary systems with proportional voting usually produce coalition governments, which have the advantage of greater balance around the centre of the political spectrum, and the disadvantage of a politics said to be incapable of great change or movement.

The existence of such coalition results points to the creation of a model that is increasingly popular in the world today, so-called “hybrid” systems, where the ceremonial head of state - the president - takes on more responsibility, but with a Prime Ministership working within the legislative structure as well as with the head of government.
The French Fifth Republic in 1958 is perhaps the most famous example, but Russia is now another and Kenya is currently debating whether to follow suit formally in its adoption of a new constitution, or to seek a clearer parliamentary or presidential system.

The risks in the hybrid approach are clear - conflicts between the Presidency and the Prime Ministership in event of a difference of party, and the potential for “the disadvantages of both systems”, an imperial Presidency and a deadlocked Parliament.

The key proviso here is to be as clear as possible about the powers and responsibilities of each, and to set these out in either the constitution or a specific law. Constitutional lawyers - like all lawyers - need to think about what happens when things go wrong as well as when things go right. This means that the role of the courts in resolving constitutional disputes - between the provinces/states and the federal government, between citizens and their governments, and between national office holders - has to be clear from the outset. This reinforces the point about judicial independence I made earlier.

In a “pure” parliamentary system the head of state still has an important function, whose prestige and power can play an important symbolic role. In some countries - Ireland, Finland, to name just two - the Presidency is popularly elected, and yet the President has few real powers. In others - India and Germany most notably - the President is chosen by the Legislature to emphasize his or her purely reserve power.

It is a matter of interest that a division of opinion over the method of choosing the head of state meant that the constitutional monarchy was maintained in the Australian referendum of the 1990’s.

It is well known to all of us that the question of the form of government is a matter of some contention in the current constitutional discussions. It would be quite inappropriate for foreign observers to recommend one system or another. Rather, as resource persons to the process our task is to answer questions about potential risks and advantages of a range of proposals.

Successful constitutional politics transcends partisanship, and looks ahead instead of attempting to redress old grievances. It is not afraid to draw on international experience, but refuses to follow slavishly any foreign model.

My principal advice would be that of warning. Don’t govern in the name of a theory. Make the changes that are “sufficient unto the day” - it is a framework you are seeking, not a detailed blueprint for every detail of decision making. Constitutional politics is about making the foundation and
the framework, setting out basic principles, the underlying values as well as the essential institutions.

By contrast, real politics and events are about building the walls and ceilings, the furniture and above all the spirit that makes a home.

**Top of Form**

I have been active in Canadian politics, law, and public life for thirty years, have been the leader of the opposition and Premier (First Minister) in Ontario, Canada’s most populous province, was the founding Chairman of the Forum of Federations, an international NGO dedicated to federal governance, and am now once again a Member of the federal parliament of Canada and the Liberal Party’s spokesman on foreign affairs, having been elected ten times to federal and provincial parliaments.

So what I have to say is not necessarily true but it is certainly the product of experience.

When I last spoke to a Nepali audience, the focus of my remarks was the question of federalism. I reminded people that a famous philosopher once asked three questions:

“- if I am not for myself, then who will be for me?
- but if I am only for myself then what am I?
- and if not now, when?”

Let me use these three questions to frame the rest of my remarks.

The first question is about recognizing the simple fact that all politics starts with the individual - the individual citizen, with his or her own responsibility. But the first question is also about two broader trends in political life. The first has to do with markets and the role of private enterprise; the second with the persistence of the politics of identity, be it family, region, tribe, or ethnic group.

We can see two seemingly contradictory trends at work - “globalization” driven by economic forces that create innovation and change.

The second is the persistence of local politics.

We call this trend “glocalization”.

My observation would be that like many countries Nepali politics has, over the last fifty or sixty years, been dominated by the struggle for independence, and then by the question of the economic and political model to be followed.
Worldwide the debate is no longer capitalism versus socialism. It is really what kind of capitalism do we want, how do we create jobs and growth in a sustainable way, and how do we use public policy - the forces of government and politics - to do that most constructively.

A few points emerge around the world. Education and innovation go together, which means education is a key economic policy. Natural resource development has to be sustainable. And political structures have to get closer to the people, which is why there’s such a continuing interest in constitutions and federal type structures.

Let’s now turn to the second question. if self-interest had not been set aside the country would not have been born.

You in this room know far better than I the costs of over-indulging individual and sectional interest. From where we watched in Canada the country has seemed on the edge of a conflict that could have spiralled out of control. Even as it was thousands have died unnecessarily in fighting that has persisted for a long time, often unreported and unrecognised in the western media.

But there are other, less obvious costs. Many of you will be familiar with the expression we all hear on the London Tube - “mind the gap”. It’s an important reminder.

“Both the presidential and semi-presidential systems have the attraction of offering a new start. On the other hand, their unfamiliarity in the distinctive circumstances of Nepal makes their operation less predictable in practice. A key question for the CA, drawing on its understanding of the political culture of Nepal, is the extent to which their potential disadvantages can be sufficiently neutralised through institutional design.”

- Cheryl Saunders
(at p. 53)
“Mind the gap” means paying attention to the growing gap between rich and poor, within countries and between countries.

“Mind the gap” means paying attention to the growing gap between regions of the country, between people hiding behind age old barriers of caste, language and ethnicity.

“Mind the gap” means paying attention to the gap between the people and the politicians that if left unaddressed is a sure fire recipe for even greater cynicism, mistrust, and lost opportunity. If constitutional debate goes on too long, or seems to involve a preoccupation with abstractions by competing elites, it will quickly be discredited in the minds of the people.

“Mind the gap” means paying attention to the gap between what we say and what we do.

“Mind the gap” means paying attention to all too critical space between our brain and our mouth (for politicians an often fatal mistake!)

While these gaps go unattended, other countries that pay attention to them will succeed in attracting investment, in making growth happen.

Dysfunction can’t continue.

How can Nepal become a more prosperous, trusting, and sustainable society?

It is not just about processes and programmes. It is about leadership, creating the habits of trust and confidence that will make a difference, and the institutions that reinforce these habits, at both the national and the local level. It means fighting corruption, the cancer that gnaws at trust and is the great and insidious enemy of the rule of law.

I am very self-conscious about being an outsider in this gathering, and while I have followed events in Nepal with great interest, I am hardly an expert. But you must have invited me here for a reason. So let me make a few simple points.

While some of the gap has been narrowed between the parties, everyone in this room knows there are competing rivalries and ambitions which create mistrust.

You have to put these on hold for a while to get certain issues resolved:
- getting clear agreement on the rules of the game for the next election
- giving clear, unambiguous direction to individual Ministers to achieve the elements you decide are the most critical for the country.
Some guidelines in this process:
- Do not set dozens of priorities. Stick with a few.
- Do not ask a partner in negotiation to do something he can’t do or achieve.

Conduct all proceedings with civility and trust, and insist that your staffs do the same
- Hold regular sessions where you assess how you’re doing. Feedback, dialogue, discuss, execute. Give clear responsibilities to particular people to get the work done.
- Always leave something on the table in a negotiation. You’re going to be back, and it’s not a “winner takes all” game. Make your negotiating partner look good, and as you change the culture he will do the same.

And so we come to the third question “if not now, when?” There’s always an excuse to deny a problem and to delay dealing with it. But it gets worse!! Leadership is about having a vision of the future and how you want to achieve it. It requires humour, a thick skin, persuasiveness, and persistence. Great leadership is not about force, or “getting my way”. Mandela, Gandhi - these examples of goodness, humility and effectiveness are all around us. Your deliberations are of great importance. Sitting at the top of the world, with two large neighbours around you, Nepal is a country of great strategic significance. May your ambitions be tempered by humility, your determination be guided by grace, your efforts be crowned with success and your achievements be marked by wisdom.

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This paper deals with the form of government that might be adopted for Nepal. I understand the topic to encompass the way in which the government is constituted and by extension the relationship between the legislative and executive branches of government. This is one of the key design features of any Constitution. All parts of a constitutional system are interdependent with each other, but this feature is particularly closely linked with at least two others: the composition and operation of the legislature and the form and operation of any federal-type arrangements. I will necessarily deal with aspects of both in this paper.

1. Introduction

(a) Structure and purpose

Current world practice suggests three principal options for the structure of a form of government in a multi-party democracy: a parliamentary system; a presidential system; and a mixed or semi-presidential system. There is potential for considerable variation within each, but there are relatively clear conceptual distinctions between these three basic categories that make them useful for organising purposes. This paper will analyse each in turn, by reference to the general goals of designing a form of government and
the particular circumstances of Nepal. In each case, it will consider whether the potential advantages of the model could be maximised and its potential disadvantages minimised from the perspective of Nepal. I note that, in the event that Nepal establishes a federal form of state, similar questions will arise about the form of government at the regional or provincial level. Decisions also would need to be made about the distribution of executive power between the spheres of government, with potential implications for the structure of the public service.

While the paper draws some brief conclusions, it does not contain recommendations. In the end, these are choices that can be made only by Nepalis for themselves, drawing on their innate understanding of their own circumstances.

(b) Parameters

In preparing this paper I have been guided by three sets of factors: any relevant decisions of the Constitutional Assembly (CA) committees; the likely objectives of choosing a particular form of government, both generally and with specific reference to Nepal; and historical experience of Nepal that might have a bearing on the form of government.

When this paper was first written, the CA Committee on the Determination of the Forms of Governance of the State (Form of Governance Committee) had not yet publicly reported. While the Committee has subsequently reported, the recommendations in its report are deeply divided between forms of presidential and parliamentary arrangements. The ultimate choice thus must be made by the Constituent Assembly and the full range of options, effectively, is still open.

Parts of the Report of the Committee on the Determination of the Form of the Legislative Body (the Legislative Body Report) are also relevant to the form of government. Proposals in this report that are relevant for present purposes (some of which also are subject to dissenting views) include the following:

- That the Parliament should be bicameral, with a House of Representatives and a House of Assembly
- That the House of Assembly, as the second Chamber, should be constituted so as to enhance both the inclusiveness and expertise
of the Parliament; and also to play a role in the federal structure of government, details of which are still undetermined

- That the term of the House of Representatives should be five years; a strong implication in the Report that it might be dissolved early, during its term, depends on the Report on the form of government.
- That the House of Assembly should be a continuing House, with the tenure of 1/3 of its 51 Members expiring every 2 years.
- That steps should be taken in the Constitution to protect the independence of the Speaker
- That the Head of State should be a component of the Parliament, with authority to address and send messages to the Parliament and at least formal authority to summon, prorogue and dissolve the Parliament, to assent to legislation and to return bills to the Parliament with a message before giving assent.
- That the Head of State should be able to make ‘ordinances’ with the force of law in specified circumstances and subject to a requirement for subsequent parliamentary approval.
- That the national Constitution should prescribe key features of the system of government for the provinces; as proposed, these largely mirror those for the federal sphere, except that the provincial parliaments are required to be unicameral.

I will make further references to these proposals in the discussion of models for a form of government that follows.

The second set of factors relevant to choosing a form of government concerns the ultimate goal. I have assumed that Nepal is seeking a form of government for a multi-party democracy that is a republic, in the sense that there is no hereditary head of state. I have also assumed that Nepal is seeking a form of government that is:

- Responsive and accountable
- Effective and stable
- Inclusive, with respect to both previously marginalised groups and geographic regions.

These assumptions are confirmed by the recommendations in relation to good governance by the Form of Governance Committee.

A third set of factors concerns Nepal’s own history. Nepal has a history of parliamentary government. All else being equal, there are
advantages in path-dependency, in terms of familiarity and compatibility with existing structures and practices. In at least three respects, however, Nepal’s previous experience of parliamentary government was problematic. First, as head of state, the monarch played a more intrusive role than is usual in contemporary parliamentary systems. Secondly, it tended to be unstable, with frequent changes of government. Thirdly, it tended to concentrate power, to the disadvantage of less powerful communities and regions and women. Each of these concerns needs to be born in mind in designing a new form of government.

2. Parliamentary form of government

(a) Definitions

The central feature of a parliamentary system is that the government holds office because it has the support, or confidence, of a majority of Members of the popularly elected House. The Parliament itself is elected at regular intervals that vary in different parliamentary systems from 3-5 years; the Legislative Body Report proposes 5 years for Nepal. The government is indirectly elected, in the sense that it owes office to the support of the House.

The link between the government and the majority in the popularly elected House means that a parliamentary system is relatively efficient, in the sense that as long as the majority continues to support the government, the latter typically can implement its policies quickly and in a coherent form. At its best, in addition, a parliamentary system offers significant accountability. Members from the governing party or parties have the opportunity to critically scrutinise proposed government action in the privacy of the party room, if they choose to do so. The government is subject to critical scrutiny in the public forum of the Parliament, at least by non-government Members. A parliamentary committee system offers another important tool for enforcing accountability for proposed legislation, public finance and executive action. If a government is not performing, it can be forced to restructure or removed altogether. Of course, Members of Parliament do not always act in these ways; trying to adjust the incentives to enable parliamentary government to realise its full potential is one of the challenges of designing a system of this kind.
Typically, in parliamentary systems, members of the government initially are elected as Members of Parliament. This is not always the case, however, as the example of Germany shows. In this case, political leaders have a wider pool of talent on which to draw for Ministers. Even where Ministers are required to be elected in the first place, parliamentary systems differ in relation to whether Ministers to remain Members of Parliament after their appointment to the Ministry. Some systems, of which the arrangements in France are an example, require Ministers to retire from Parliament on appointment to the Ministry, under procedures that enable their parliamentary seats to be filled by others. One advantage of an approach that does not require Ministers to act as a Member of Parliament at the same time is that they can devote their time to the business of government, free from constituency and some parliamentary responsibilities.

By way of contrast, parliamentary systems derived from the British parliamentary tradition typically require Ministers to be elected (or otherwise chosen) as Members of Parliament and to remain Members of Parliament. There are advantages of this approach too, in terms of accountability. On the other hand, continuing membership of Parliament further increases the workload of Ministers. And sometimes, the response is to limit the frequency with which Parliament meets or the obligations of Ministers to attend Parliament when it is in session. Measures of this kind weaken the institution of Parliament. It is necessary to find a suitable balance between these two conflicting sets of considerations.

A requirement for Ministers to be chosen from Members of Parliament limits the pool of talent from which government Ministers are drawn. Generally, although there are some occasional exceptions, Ministers come from the parties with a majority in the lower House, on which the government depends for office. The more narrow the membership of parties, the greater the significance of this limitation. It can be tackled in part by requiring the parties themselves to be more representative or by providing them with the incentive to do so through measures to ensure transparency and thus greater accountability. In some parliamentary systems, the problem also is eased by enabling a minority of ministerial positions to be filled by non-elected
people. This is achieved relatively easily in a bicameral Parliament where all or part of a second chamber is appointed. There is no reason, however, why a new Constitution could not provide for some people from outside the Parliament to be appointed Ministers, with seats in the popular House as well. On the other hand, if extended too far, this practice has implications for the accountability of government to Parliament. It follows that it should be used with caution, if the selection of Ministers from amongst elected Members is proving a genuine problem.

The discussion so far has focused on the relationship between government and Parliament. In parliamentary systems, however, there is another key relationship, between the government and a largely ceremonial Head of State. The existence of a separate position of Head of State in a parliamentary system is partly an historical hangover but also has some contemporary rationales. A Head of State can act as a symbol of the state as a whole, whereas a Prime Minister is more likely to be associated with the majority party or grouping. A Head of State can perform a range of symbolic and community-oriented tasks, thus freeing some time for the Prime Minister and other Ministers. And a Head of State can play a role in assisting to maintain the key assumption on which the parliamentary system rests: that the government has the support of a majority in the popular House. As long as the government has majority support it is entitled to govern, subject to overriding obligations to act lawfully and to respect constitutional limits. But parliamentary systems often rely on the Head of State as a form of umpire where no group has majority support after an election or if the government loses its parliamentary majority but attempts to continue in office nevertheless. In such circumstances, by definition, it is not practicable for the Head of State to rely exclusively on advice from an incumbent government.

The limits of the function of the Head of State in these circumstances are typically contentious and unclear. For this reason, many newer Constitutions try to restrict it as far as possible, by providing other ways of resolving such difficulties or by conferring responsibilities to resolve some of them on other public officers. Alternatively, it is possible to constrain the way in which the function is exercised, by requiring the Head of State to act on the advice of another group in cases of this kind. While
it was established for another purpose, the Constitutional Council created by the 1990 Constitution of Nepal is an example of the kind of group that might be used. There is also some contemporary interest in the question of the extent to which a separate office of Head of State might be abolished altogether in parliamentary systems. This has been achieved most notably in South Africa, where the President is chosen by the Parliament after an election but thereafter resigns his or her seat and performs the functions of both Prime Minister and Head of State. Removal of the leader of the government from the Parliament inevitably affects the dynamics of accountability; the effects of its transplantation would be difficult to predict.

The remainder of this part deals separately with the relationship between the government and the Parliament and the government and the Head of State. In relation to each, the paper identifies a range of issues likely to be relevant in Nepal.

(b) Parliament and government

This sub-part deals with the following four issues: the tools for achieving an appropriate measure of stability in a parliamentary system; the composition and function of a second Chamber; mechanisms for tackling the ‘winner-take-all’ syndrome; and ways of strengthening the role of Parliament vis-à-vis the executive branch.

Stability

The claim was made earlier that a parliamentary system can deliver stable and efficient government in which Parliaments serve the term specified under the Constitution, enabling governments to implement their policies, subject to legal and political accountability.

This potential strength of the parliamentary system can be undermined, however, in at least two ways. Most obviously, the government majority in the Parliament may be fragile and changeable. This is most likely to occur where there is a multitude of parties; where party loyalties are weak; and where the practices and procedures that can underpin the stability of coalition governments are underdeveloped. One set of solutions draws attention to the electoral system, which can assist to consolidate a smaller number of effective parties, although at some cost to representation. Another set
seeks to discourage behaviour that would cause a government to lose office without good reason. The traditional mechanism for this purpose was the power of the Prime Minister to cause the Head of State to dissolve the Parliament, thus precipitating an election, which fractious Members may not want. Additional tools for this purpose now include significant restrictions on the number and timing of no-confidence motions during a parliamentary term; restrictions on a no-confidence motion unless it is accompanied by a successful vote of confidence in another group; and mechanisms to discourage change of party affiliation by Members during the parliamentary term. The Legislative Body Report would require a Member to vacate his or her seat in the event of such defection and would also give discretion to the Head of State to refuse an early dissolution to a Prime Minister if another group was able to form a government.

The stability of the parliamentary system can also be undermined by the government using its authority to advise the Head of State to call an early election for no better reason than the government’s own political advantage. This possibility remains open under the Legislative Body Report. It would be possible to control it to a degree by fixing the term of Parliament and thus the date of future elections unless the government loses the confidence of the House. In this case there is a question whether a shorter parliamentary term of, say, 4 years would be appropriate. A shorter term in any event might diminish the incentive for destabilising parliamentary behaviour.

Second chambers
Strictly speaking, the question of a second chamber or upper House of the Parliament falls within the subject-matter of the form of the legislature. It is the subject of a series of proposals in the Form of Legislature Report. In accordance with those proposals, a House of Assembly would have 51 Members, 38 of whom would be elected by the provinces in a manner that is not specified and 13 of whom would be elected by the House of Representatives in a way intended to increase the inclusivity and expertise of the Parliament. The House of Assembly would be a continuing House, with one-third of its Members retiring every 2 years; it is not clear how these proportions would work with the two proposed categories of Members. The proposed functions of the House of Assembly would enable it only to delay bills for a relatively short period. In their present form, the
proposals of the Committee do not make provision for committees in the House of Assembly.

Despite the relative detail of these proposals, the question of a second Chamber is linked with both the form of government and with federalism and may need to be revisited in the context of the reports of both these committees.

The proposal for a House of Assembly is relevant to the form of government in several respects. First, it potentially widens the membership of Parliament and thus the pool from which Ministers might be drawn in a parliamentary form of government. If the CA ultimately decided on a parliamentary system with a bicameral Parliament it would be necessary to consider whether Ministers should be able to be drawn from the House of Assembly. Secondly, typically, a second Chamber is not controlled by the governing party (although it may be) and thus has a role to play in strengthening the accountability of the government to Parliament and through Parliament to the people. This consideration is relevant to its powers and functions. It is important that the powers of a second Chamber do not unduly obstruct a government with the support of the House of Representatives, thus undermining the strengths of a parliamentary system. Subject to this caveat, however, the second Chamber needs to have sufficient authority to be taken seriously, so as to maximise its potential contribution to accountable, transparent and responsive government. In this regard, consideration might be given to the following matters. First, is the period for which the Assembly can delay legislation long enough particularly if, for example, public
hearings on important bills are held? Secondly, should specific provision be made for a committee system in the House of Assembly? Thirdly, are there other functions that can usefully be conferred on the House of Assembly in the interests of accountability, given the composition presently proposed for it? Possibilities include, for example, a role for the House of Assembly in ratifying treaties or agreements made in the course of intergovernmental relations.

The composition and function of a second Chamber may also depend on the detail of any federal arrangements, in ways that have some relevance to the form of government. In many federations a second Chamber is constituted so as to represent the regions, equally or on a weighted population basis. Depending on a variety of local factors, however, including the electoral system and local political culture, such Houses may not play any greater role in relation to federalism by, for example, representing regional interests or protecting regions from central interference. Germany uses its federal chamber, the Bundesrat, in a quite different way, reflecting the circumstances of a federation that divides power horizontally as well as vertically, leaving the Lander to administer most federal laws. As a complement to this manner of dividing competences, Land governments themselves are represented in the Bundesrat, where they take part in deliberation on proposed laws that, ultimately, the Lander will administer. This approach has implications not only for the way in which the second Chamber is constituted but for its powers. The Bundesrat has veto powers where certain laws affecting the Lander are concerned; in other cases, it has only power of delay. Depending on the decision that the CA takes in relation to federalism in Nepal, it may be necessary to revisit the proposals for the House of Assembly for this reason as well.

**Countering the winner-take-all syndrome**

A parliamentary system gives the government very considerable power during its time in office. As long as the Parliament is prepared to support it, the government is impregnable, subject to decisions of courts and any other independent accountability bodies. In these circumstances there is a perception that too often is a reality that supporters of the government are unduly favoured in appointments to public office, in the distribution of public resources and in a host of other ways. No doubt the ‘winner-take-all’ dimension of a
parliamentary form of government enhances the incentive for competition at election time on which the system depends. Taken to extremes, however, it is counterproductive and brings government into disrepute.

In traditional theory, at least, there are brakes on this practice. In principle, it remains the case that in a parliamentary system the civil service is supposed to be permanent, expert and impartial; that public power is supposed to be exercised in the public interest, meaning the interest of all; that Members of Parliament are supposed to make decisions in the interests of the polity as a whole and not merely of their own constituencies; and that judges are selected on a basis that respects the independence of adjudication. But these principles are ignored often enough to merit reinforcement in a new Constitution, at least rhetorically and by institutional means in cases that lend themselves to this. By way of example, the manner of appointment of judges under the 1990 Constitution was a reasonably progressive base on which the new Constitution could build.

In the interests of inclusive government, attention might be paid to other ways of breaking down the winner-take-all character of parliamentary government as well. The provision under the Constitution of 1990 for the appointment of key office-holders by a Constitutional Council, on which different sides of politics were represented, again was a progressive measure, in this respect. Whether or not the state is formally federalised, consideration might be given to establishing a practice, if not a rule, that, as far as possible, Cabinet represents different regions and communities in Nepal. A federal or regional distribution of positions might be required by law or practice in constituting other public bodies as well. The Nigerian constitutional requirement for the ‘federal character’ of the state to be taken into account in filling public positions is an interesting initiative to this end.

The converse of a system of ‘winner-take-all’ is power-sharing. Power-sharing tends to attract particular attention in the context of the constitution of a government, but it can and arguably should affect the composition of other significant public authorities including the civil service, the armed forces and the police. Except as a relatively short-term measure, however, power-sharing in constituting a government in a traditional parliamentary system has inherent difficulties, at least if power sharing is taken to mean the proportional distribution of governing authority by reference to
representation in the Parliament. In this form, power-sharing weakens and may even eliminate the opposition to the government in the Parliament and thus undermine a critical accountability mechanism. On the other hand, there is no reason why a Cabinet should not include some members from outside the ranks of the governing parties, if the Prime Minister so decides as, indeed, occurs in South Africa.

**Strengthening Parliament**

One of the dangers of a parliamentary system is executive domination of the Parliament, as the members of the majority governing party faithfully support the Ministry, many of them in the hope and expectation of becoming Ministers themselves. The problem is exacerbated by a degree of ambiguity about whether Parliament is supposed to have any independent deliberative capacity under a system of this kind or whether its role is simply to support the government; provide a public forum within which key public decisions must be made; and offer a public platform on which the Opposition can present itself as the alternative government at the next election.

Confining Parliament to this lesser role is a wasted opportunity. Parliament represents the national community as a whole and is a mechanism for accountability and the assurance of government integrity on which considerable weight is placed. If this is accepted, it becomes necessary to consider ways in which Parliament can be strengthened to enhance the accountability, transparency, quality and inclusiveness of government. Mechanisms to this end include the enhancement of the positions of committee chairpersons, so as to provide an alternative to the Ministry for talented parliamentarians, including those who are not members of the governing parties; provision for public participation in parliamentary committee deliberations; a requirement for a parliamentary response to public petitions; and greater publicity for parliamentary business. The protection for the independence of the Speaker in the Legislative Body Report is another useful measure for this purpose.

From the standpoint of strengthening the role of Parliament, there are several other proposals in the Legislative Body Report that may merit reconsideration. These include:
Acceptance that 6 months might elapse between sessions of the House (11)
Acceptance that 6 months might elapse between the dissolution of the House and the subsequent elections (11)
A requirement that all bills ‘concerning’ the army or police force must be government bills (26)
The vote of credit procedure that limits financial accountability to the Parliament on security grounds (39)
The somewhat open-ended provision for a Contingency Fund (40)

The extensive powers of the Head of State under proposals in the Legislative Body Report also have an impact on the Parliament and are taken up in the next sub-part.

(c) Government and head of state

This sub-part deals with the following issues: the constitution of the office of Head of State; the constitutional functions and powers of the Head of State; and the justiciability of decisions of the Head of State.

Constitution of the office of Head of State

For reasons that will appear, it is not practicable to consider the question of appointment and removal of the Head of State in isolation from the functions of the office. In the early 21st century, heads of state in parliamentary systems typically have very few functions that are exercisable in accordance with their own discretion. Insofar as they have such functions at all, typically they are designed to help to preserve the key principle of parliamentary systems that the government derives its authority to govern from the support or confidence of Parliament. Thus the Constitution might authorise the Head of State to exercise a discretion in inviting a parliamentary leader to form a government if the outcome of an election is not clear; to refuse an early dissolution of the Parliament to a Prime Minister who has lost the confidence of the House; or to dismiss a Prime Minister who no longer has majority support but refuses to advise an election or to resign. There are variations between parliamentary systems in the way in which the
constitutional role of the Head of State is conceived. In Australia, for example, largely for historical reasons, there is a significant (although not universal) view that the Head of State can dismiss a government with a parliamentary majority if it is acting unlawfully or is unable to secure the passage of finance bills through the Senate.

Much of the confusion that attends the question of the powers of the Head of State derives from Constitutions that confer additional formal powers on the Head of State in the expectation that they will be exercised on the advice of the government with a majority in the Parliament. There is a danger that provisions to this effect are misleading, or that their drafting leaves loopholes that can be exploited in marginal cases. Whether the practice should be abandoned in the interests of transparency and certainty is a question that is taken up again below.

The point here, however, is that it has some bearing on the manner of the appointment and removal of the Head of State. If the position of Head of State is conceived as essentially ceremonial, there are risks in filling the position by direct election, because elections confer democratic legitimacy and may encourage the Head of State to act without or against government advice. Despite the difficulty, some parliamentary systems have a directly elected ceremonial Head of State: Eire is an example. But in a case of this kind, it is desirable to pay particularly careful attention to the way in which the powers of the Head of State are expressed. On the other hand, if the position of Head of State is conceived as ceremonial, it is likely to require the Head of State to act in a way that symbolises the polity as a whole. In this case, it is desirable for the appointment to be made on an inclusive, rather than a party partisan basis. This might be achieved through election by a special majority in the Parliament. In a federal polity, the Head of State potentially should represent all spheres of government in the state as well. In this case, the manner of appointment should also be designed to include some element of approval of the provinces or regions, either through the consent of an upper House, if it is sufficient of a federal House, or by involving the provinces or their people more directly.

The question of procedures for removal of the Head of State can also be complicated by the powers of the office and the way in which they are constitutionally expressed. Typically, there are likely to be two possible grounds for removal: misbehaviour of some kind, or incapacity. In principle, they lend themselves to different procedures;
the former to impeachment and the latter to a procedure involving a medical opinion. In designing an impeachment procedure, however, it is important to be alert to the possibility that a Head of State who has an umpire role in the parliamentary system in some circumstances might be able to play the government and opposition off against each other to avoid successful impeachment proceedings.

**Constitutional functions and powers**

A Constitution may confer two types of powers on a Head of State in a parliamentary system. One type is ceremonial; formally exercised by the Head of State on the advice of the government with a majority in the Parliament. The second type is not exercisable on government advice. These are often left to be exercised by the Head of State in his or her own discretion although sometimes they are exercisable on the advice of another, more independent or at least multi-partisan group.

There are at least two possible rationales for conferring purely formal powers on a Head of State. One is to try to ensure an additional measure of dignity in the exercise of the power in question. The other is because an extra procedural step in the decision-making process, of the kind involved in the formal receipt and acceptance of advice by a Head of State, is considered to be beneficial. If neither of these rationales applies, it is likely to be preferable, in the interests of transparency and simplicity, to draft the Constitution in a way that confers the power directly on the Prime Minister or Cabinet, as the responsible decision-makers. In any event, it is important for the Constitution to distinguish very clearly between the formal powers of the Head of State and those that are exercisable in the Head of State’s discretion or, at least, without government advice.

The proposals in the Legislative Body Report confer a range of functions on the Head of State. It is not clear from the Report in its present form which, if any, of these functions is intended to be discretionary, because of the interdependence of this part of the Report with the deliberations of the CA Committee on the Form of Government. If the CA ultimately decides on a parliamentary form of government with a largely ceremonial Head of State, it would be useful to reconsider the need for the following provisions:
- The tentative suggestion that the Head of State is a component part of the Parliament (1)
- The conferral of power on the Head of State to summon, prorogue and dissolve the House of Representatives and to specify the date for new elections (11)
- The various procedures by which the Head of State may directly address the Houses of the Parliament, including the power to summon the Members for that purpose (12)
- The requirement for the Head of State to assent to bills passed by both Houses and the capacity for the Head of State to send a bill back to the Houses with a message requiring reconsideration (29)
- The power of the Head of State to issue ordinances when ‘satisfied that circumstances exist which render it necessary for him to take immediate action’, with the force and effect of an Act of Parliament but without parliamentary authority (30).

The question of whether a Head of State should be given formal or discretionary constitutional authority is likely to be raised in other contexts as well, including the entry into treaties on behalf of Nepal and the exercise of any authority to pardon.

**Liability to suit and justiciability**

In a parliamentary system, it may still be possible to justify the immunity of a Head of State in a parliamentary system from suit on the ground that he or she is not a substantive decision-maker and therefore is not in a position to commit a legal error for which legal action might lie. If a Head of State is given conditional authority by a Constitution, however, that assumption clearly is incorrect. If a Head of State acts inconsistently with a Constitution in principle that action, like all other unconstitutional action, should be subject to restraint by the courts. If the functions of the Head of State are confined to a small number of discretionary powers, exercisable in highly charged political circumstances, it might be argued that they should nevertheless be non-justiciable, because of the difficulty of engaging the courts in questions of this kind. This may be right: it might be preferable, however, for the courts to be left to develop doctrines that enable them to take a more nuanced approach to cases
where the solutions are primarily political, rather than imposing a blanket constitutional ban on actions against the Head of State.

3. Presidential form of government

(a) Definitions

It is possible to deal more briefly with the other two, primary categories of forms of government, not because they are less important but because at least part of the preceding discussion applies to them as well.

The central feature of a presidential system is that the head of the government, generally called a President, is elected separately from the legislature and holds office independently of it subject to the rare possibility of impeachment. The President is also the Head of State, performing the ceremonial functions of that office as it tends to operate in parliamentary systems. By definition, there is no need for a President to perform the particular constitutional functions that the Head of State may play in a parliamentary system. It is sometimes claimed, nevertheless, that the President has a role as guardian and protector of the Constitution, despite his or her position as an elected official. This claim adds further to the power and prestige of the presidential office.

A presidential form of government is efficient insofar as it confers governing authority on the institutions deemed most suitable for the task. It is not necessarily conducive to speedy and comprehensive decision-making, however, and is notable for the effectiveness of the checks and balances that, at least under some conditions; it imposes on powerful elected organs of state. Members of the Cabinet typically are not members of the legislature but are chosen by the President alone, subject to any constitutional requirements for legislative confirmation. The lines of accountability for Cabinet Ministers thus lie through the President. The lines of accountability for the President and members of the legislature lie directly to voters, through their respective electoral systems.

This system has its own inherent logic. It enables the President to draw on a wider range of talent in forming the Cabinet. In doing so, the President is not necessarily confined to members of a particular party. In some presidential systems, the effect of such a structure is to enhance the independent authority of both the executive and the
legislature. The United States is an example, where the independent deliberative capacity of Congress distinguishes it sharply from legislatures in most parliamentary systems. In other presidential systems, however, the dynamics work differently: the President becomes the dominant organ of state and the legislature is further weakened by the absence of even formal control over the government. One of recommendations from the Form of Governance Committee would establish a presidential system with members of the cabinet drawn from the legislature. This mixture of designs has the potential to deliver the worst of both worlds.

(b) Key issues

This sub-part deals with the following issues: executive dominance in a presidential system; the composition and role of a second parliamentary chamber; the resolution of deadlocks; and the potential for the system to be inclusive.

Executive dominance

As a generalisation, world experience suggests some tendency for presidential systems to become authoritarian. This is at least in part because the office of President has its own source of electoral legitimacy, which enhances the inherent authority of the executive branch in relation to, for example, security, defence and foreign affairs. Typically also, in a presidential system, the conception of executive power is broader than in a parliamentary system, in which executive power in any event can often be overridden and controlled by the legislature.

Under traditional principles of presidential government a President necessarily relies on the legislature for significant law-making, the imposition of taxation and the approval of public expenditure. In some presidential systems these are major hurdles, requiring negotiation between the branches. Where a President commands the support of a majority in the legislature, however, laws may be made and finance approved in response to presidential wishes; and without the opportunities for public accountability of the executive that a parliamentary system provides. The President is most likely to command such support where the legislative majority has the same party affiliation as the President, in circumstances where party allegiance is more disciplined than in the United States. The proposal in the Form of Governance Report for a President to draw
members of Cabinet directly from the legislature may have the same effect. A President often also has leverage over the legislature as a result of the extensive potential for patronage that lies within the executive branch. It should be noted here also that even these impediments to presidential power are likely to be weakened or removed altogether during times of a formal emergency, in declaring which the President also is typically the dominant figure.

Techniques for attempting to minimise the potential for the President to dominate the workings of government include the following: more frequent elections for members of the legislature, to try to enhance their accountability directly to their constituencies; careful delimitation of executive power, so as to preclude executive law-making that might enable the legislature to be by-passed; careful design of procedures for calling and dealing with emergencies, so as to involve the other branches of government and enhance public accountability; procedures to attempt to secure legislative involvement in final decisions about security and defence; involvement of the legislature in other aspects of government including the confirmation of office-holders and the ratification of treaties; effective and deliberative procedures for removing a President who is acting in breach of the Constitution or otherwise abusing the position.

**Bicameralism**

The question of whether to have a bicameral legislature arises in presidential as in parliamentary systems. For the most part, the arguments for and against bicameralism are the same in both systems. In a presidential system it might be argued that bicameralism is important for one additional reason as well: that a relatively powerful second Chamber is a further check on the dominance of the office of President. In other words, where the political dynamics of the state are such that they enable the President to dominate legislative decision making, the assumption here is that it is in principle more difficult to dominate one House than two. This assumption may of course be rebutted by the circumstances of a particular state. The proposal for the House of Assembly to be appointed in part by the House of Representatives is relevant in this regard.

Broadly similar questions about the composition and role of a second Chamber also arise in presidential as in parliamentary
systems. In at least one respect, however, they are different. By definition, the second Chamber of a legislature in a presidential system has no capacity to interfere with the tenure of a government based in the lower House, so that it is not necessary to constrain its powers for this reason alone. There may be other considerations, stemming from democratic proprieties, which suggest that a second chamber should not be able to defeat the will of the first, particularly if the second Chamber itself is appointed, in whole or in part. The primary authority of the House of Representatives in the United States over the initiation of financial legislation reflects a consideration of this kind. As the example of the United States also shows, however, in some respects the second Chamber in a bicameral legislature in a presidential system may be more powerful than the more popularly elected House.

**Deadlocks**

An opposite but equally important potential difficulty in a presidential system concerns deadlock in the governing and decision-making process. This difficulty is exacerbated by bicameralism. Where each of two powerful Houses of a bicameral legislature under a presidential form of government has substantial deliberative capacity in its own right, deadlocks can arise between the two Houses, between the legislative and executive branches, or between all three. In designing such a system, it therefore is necessary to consider whether provision should be made to attempt to resolve such deadlocks by institutional means or whether to accept that decisions over which the institutions are in disagreement simply fail. The latter is not always a viable solution: in particular, as it is clearly not feasible to govern at all without money, it is likely to be necessary to make specific provision in the event of deadlocks of this kind. Where deadlocks arise frequently, the inevitable result is weak government, suggesting that the problem should be anticipated in the constitution-making process, if this, rather than presidential domination, is likely to be a feature of the operation of the system in practice.

**Inclusivity**

A presidential form of government raises several distinct questions for the accommodation of a diverse society. The first concerns the position of President itself. The President is the sole elected member
of the executive branch and therefore bears the sole weight of legitimacy and democratic accountability. The President combines both the operative function of head of the government and the symbolic function of Head of State. There is a challenge in designing such a significant office, concentrated in single person, so as to adequately reflect the diversity of society, whether considered in terms of regions, ethnicity or other social groupings. Various attempts to do so have been made in other presidential systems. In a sense, the unusual electoral college system in the United States originally served this purpose. The requirement in Nigeria for the President to receive at least $\frac{1}{4}$ of the votes cast in at least $\frac{2}{3}$ of the states and in the capital is another example. One proposal in the Form of Governance report attempts to deal with this problem in part by requiring the vice-president to be different in terms of nationality, region and gender. Whether this makes a difference depends on the significance of the office of vice-president. In this regard, it should be noted that both the President and the vice-president would be elected on a single ticket by a majority vote and both could be from the same political party.

On the other hand, inclusiveness in the appointment of Cabinet is relatively easy in a presidential system. Unlike in a parliamentary system, a President is not constrained by the need to appoint Ministers from amongst Members of the Parliament. It is not necessary for a President to confine appointees to a particular party, or for appointees to have any political affiliation at all. The downside is that an extensive presidential discretion of this kind can also be abused; hence the requirement in many presidential systems for some kind of legislative confirmation process. If this dimension of a presidential system were considered important from the standpoint of the President’s capacity to make appointments in an inclusive way, it may be desirable to formalise this expectation, as has been done in Nigeria.

4. Mixed or semi-presidential form of government

(a) Definitions

The typical feature of a semi-presidential form of government is that the executive is headed both by a President with significant executive power and by a Prime Minister. The President, who also performs the role of Head of State, is likely to be directly elected.
The Prime Minister depends on the confidence of the legislature, although the capacity of the legislature to withdraw its confidence may be inhibited by the extent of presidential power: to decide when to dissolve the legislature and thus to bring on an election, for example. Ministers are appointed by the President on the advice of the Prime Minister and therefore, usually, are initially elected as Members of Parliament. In France, with which this form of government is most closely associated, Ministers resign their seats on appointment to the government, although this is not an essential feature of the arrangement.

There is no fixed blueprint for the powers that are exercised by the President and the Prime Minister respectively in a system of this kind. One consequence of this flexibility is that such systems have the potential to shade into a parliamentary system at one end of the spectrum and a presidential system at the other, either in design or in practice. Depending on where a particular semi-presidential system is situated on this spectrum it is likely share some of the advantages and disadvantages of the other form of government that it most closely resembles.

(b) Key issues

Many of the points that have been made already in relation to, for example, the composition and role of a second Chamber, the potential for inclusiveness in the executive branch and the justiciability of executive decisions apply to this form of government as well.

This sub-part deals with the following issues, which take on a particular dimension in relation to a semi-presidential form of government: the division of power and authority within the executive branch and the related issue of the relationship between the President and the Prime Minister.

Division of power

As noted earlier, there is no blueprint for the allocation of executive power to the President and the Prime Minister respectively under this form of government. One line of division that typically is assumed, however, is that the President has responsibility for external affairs leaving the Prime Minister with responsibility for internal affairs.
This division had an historical rationale and continues to be employed in most systems of this kind. The effects of internationalisation and globalisation in the world of the 21st century, however, make it increasingly difficult to maintain in practice and there is a tendency for the presidential sphere of power to expand for this reason.

In addition to conferring authority on the President over external matters, systems of this kind often assume or provide that the President has responsibility for the integrity of the system of government, including compliance with the Constitution. There are overtones here of the role of the Head of State in a parliamentary system. There is a question in both parliamentary and semi-presidential systems whether a Head of State can effectively fill this role or whether such a function should in large part be recognised as the responsibility of the courts or other independent agencies specifically designed for the purpose. In any event, however, the assumption in a semi-presidential system that a directly elected official can be entrusted with responsibility for constitutional compliance depends heavily on local constitutional culture and needs to be treated with some caution. The equation of a President in a semi-presidential system with the role of a Head of State in a parliamentary system also typically confers power on the President over the summoning and dissolution of the Parliament, providing another means by which the President can become the dominant figure in the executive branch.

Relations between institutions
A second, and obvious issue, concerns the relationship between the President and the Prime Minister. Logically, one or other will come to prevail. On balance, this is likely to be the President, by virtue of the legitimacy secured through direct election; the relatively higher profile of the office; and the significant powers associated with it, including power in relation to the legislature. In practice, however, the outcome will depend in part on local political dynamics, and may vary over time with electoral results. Where the President, the Prime Minister and the majority in the legislature belong to the same party, the institutions have the theoretical capacity to work harmoniously, although there may still be competition for primacy between the two executive leaders. Where the President and the Prime Minister come from different parties, the competition will be more significant and
overt, with results that depend on local political circumstances and, sometimes, on personality. In France, attempts have been made to reduce the likelihood of such periods of ‘cohabitation’ by adjustments to the electoral cycles to make it more likely that the majorities will coincide. It is still too early, however, to tell how successful these attempts have been.

5. Conclusions

This paper is written in the hope that some of the points raised will assist in understanding and evaluating the proposals of the Form of Governance Committee and making final decisions in the CA as a whole.

Consideration of the principal options for design of a form of government and of possible variations on them in relation to Nepal suggests the following broad conclusions:

- There is no perfect form of government; to a degree, each system relies for its effectiveness on the quality and integrity of those entrusted with public power and on the vigilance of civil society.
- Each of the three principal options has its strengths but also potential weaknesses from the standpoint of Nepal.
- The parliamentary system has the advantages of familiarity and the consequential disadvantages of having been proved by experience to be unsatisfactory in some respects in the circumstances of Nepal.
- One question for the CA there is whether these flaws could be overcome, in the light of that experience, in the design of a new parliamentary system. In considering this question, it is necessary to take account of the very significant change effected in Nepal through abolition of the monarchy, enabling the CA to rethink the structure of the office of Head of State and the powers vested in it in a republican Nepal.

Both the presidential and semi-presidential systems have the attraction of offering a new start. On the other hand, their unfamiliarity in the distinctive circumstances of Nepal makes their operation less predictable in practice. A key question for the CA, drawing on its understanding of the political culture of Nepal, is the extent to which their potential disadvantages can be sufficiently neutralised through institutional design.

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Designing a Legislative Body
Representation and Accountability Issues, with Reference to Nepal

Thio Li-ann

There is no perfect constitutional solution or set of prescriptions able to precisely address the questions and particularities for all societies and states, for all times. As Professor Lutz noted “A fundamental fact about constitutional design is that there is no optimal model, no clear set of rules for matching a people and their situation with a set of institutions, and no inherently stable or superior constitutional system.”\(^1\) An appreciation of context, the history, culture, religion, stage of economic development, political ideology is key. Constitutions are designed to solve the problems of the societies under consideration and thus, the need for a constitution itself, and its structure and content, should be discussed against the background of the social and political problems facing that society\(^2\), since different political cultures and histories give rise to different attitudes to political institutions.

The Primacy of Context

Ultimately, the process of designing a constitution and its institutions is best left to the people who will live under it, as they are best positioned to

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maximise the goals and values of the polity to which they belong. Outsiders should be sensitive to this.

Nonetheless, as an invited interlocutor, one is committed to the belief of the utility of comparative studies. This external input should facilitate self-reflection in the process of constitution-making in Nepal, through providing occasion for the evaluation of options adopted in other jurisdictions; this can serve as models to embrace or cautionary tales to refrain from embracing. Comparative studies, which stress both similarities and differences among societies, may provide an illuminating source of learning from the experience of others.

I speak from the perspective of one with an interest in comparative constitutional law, particularly in Asia, with particular expertise in the evolution of the Westminster parliamentary system in two former British colonies, Malaysia and Singapore. While Nepal was never a British colony, it was historically nonetheless inspired to adopt a version of the Westminster system. Legislatures influenced by the Westminster model of government are predicated on the idea of multi-party democracy and alternating political parties, as determined by the casting of votes at the ballot box, as an expression of the People's popular sovereignty. Nonetheless, for the political machinery of government to be directed and wielded effectively, political parties holding the reins of government must be sufficiently cohesive to provide direction to government and its ability to provide collective goods in a less-developed country. The lack of party cohesion can thwart this. The government must be sufficiently strong to keep the peace and eschew violence, as well as committed to political pluralism in the face of the fact of social diversity. Without peace, development will not take place.

The Singapore version of the Westminster system had to operate in a situation of a plural society, which was divided along racial and religious lines and which, when it gained independence in 1965, faced all the problems of nation-building a nascent nation encountered in that era. Economic development was prioritised and to that end, the maintenance of social-political order was considered integral to providing a stable environment,

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matched with a stable commercial legal framework which encouraged foreign investment and trade through robust protections of contractual and proprietary rights. Although there is no restriction on the forming of political parties, Singapore's People's Action Party (PAP) monopolised all seats in Parliament until 1981, but have nonetheless retained a overwhelming legislative majority which has enabled them to implement policies which have brought Singapore from the Third World to the First World over the span of a single generation. En route to this, the trade unions were leashed, the constitutional right to property abolished, the press muted and civil and political liberties were restricted in the interests of public order as a key requirement of sustained economic development. This was accomplished legally and in accordance with due procedure, through parliamentary enactments of regulatory legislation. The official government position is captured thus:

If political institutions fail to deliver a better life to their people, they will not ensure over the long term. Human rights will not be accepted if they are perceived as an obstacle to progress. This is a fact that some zealots would do well to ponder. There is already evidence that at some stage an excessive emphasis on individual rights becomes counter-productive...Development and good government require a balance between the rights of the individual and those of the community to which every individual must belong...where this balance will be struck will vary for different countries at different points of their history...In the early phase of a country's development, too much stress on individual rights over the rights of the community will retard progress. But as it develops, new interests emerge and a way to accommodate them must be found. The result may well be a looser, more complex and more differentiated political system.4

In addition, to promote integration and racial and religious harmony, the government has taken steps to implement its constitutional obligation under art 152:

152.—(1) It shall be the responsibility of the Government constantly to care for the interests of the racial and religious minorities in Singapore.

(2) The Government shall exercise its functions in such manner as to recognise the special position of the Malays, who are the indigenous people of Singapore, and accordingly it shall be the responsibility of the Government to protect, safeguard, support, foster and promote their political, educational, religious, economic, social and cultural interests and the Malay language.

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Pursuant to this, the electoral scheme was amended in 1988 to introduce the Group Representation Constituency (GRC), whereby three former single member wards were combined to form one mega-ward to be contested by a team of 3, one of which member had to belong to a stipulated minority race. A voter in a GRC ward cat one vote for a team of 3. Team sizes were later supersized to a ceiling of 6 though this will be reduced to 5 in the next General Elections which must be called by 2011. Aside from economic programmes to improve the socio-economic status of ethnic minorities, particularly Malays, minority legislative representation was constitutionally guaranteed without resort to quotas and all the attendant problems of inferiority and discontent that can invoke. Having minority candidates contest in 'teams' weakens the "racial" dimension of the scheme, which takes 'race' into account in its construction. It also institutionalises the political practice of running a multi-racial slate of candidates every election.

Some have argued that the price of economic growth has been the 'trade off' between economic development and curtailed civil liberties and the resilience of a dominant party, semi-authoritarian state. Singapore's critics commonly lash out against its preventive detention laws, restrictive rules on free speech, assembly and association; they advocate models of western liberal democracy with a robust multi-party democracy, adversarial press and more robust conceptions of fundamental rights, preferably subject to judicial review. Imperfections aside, two points are worth noting. First, there have been attempts to liberalise the political system, by relaxation of laws on public assembly and through encouraging political criticism and viewpoint diversity. This has been done through consultative mechanisms available to citizens as well as through innovative constitutional institutions such as the creation of two categories of non-elected parliamentarians: the Non-Constituency Member of Parliament scheme (NCMP) and the Nominated Member of Parliament scheme. The first is designed to ensure the representation of political opposition in Parliament while the second seeks to induct a small number of non-partisan nominated Members into the House to provide alternative views. These schemes have their share of critics, as non-elected MPs have lesser powers than 'normal' MPs (e.g. no vote on Supply Bills or motions of no confidence), and further, are said to perpetuate the

5 PM Lee Hsien Loong, Debate on the President's Address, Singapore Parliament Reports, May 2009.
political status quo of a dominant one party state which promotes 'consultation' rather than 'contestation,' an example of a managed democracy. Second, the PAP government commands wide political support as testament to the power of performance legitimacy, combined with democratic accountability at regular elections. True to the PAP government's brand of constitutional pragmatism and antipathy for abstract theories or quests for legal perfectionism, it judges itself by the "more rigorous test of practical success." It might well ask: would you prefer a "right" to housing, or a house? 8

The point to note is in the Singapore model of non-liberal 'communitarian' democracy, minority group interests have been broadly secured without the recognition of group rights or quota systems, as part of a larger interventionist government approach towards meeting minority concerns, without undermining the strong dominant party state. Thus, minority voices have been co-opted into the mainstream of Singapore politics and indeed, the dominant political party. The wherewithal to implement its schemes flows from the fact that in Singapore, what Bagehot called the "efficient" secret of the English Constitution has been honed to a fine art:

There are two great objects which every constitution must attain to be successful, which every old and celebrated one must have wonderfully achieved: every constitution must first gain authority, and then use authority; it must first

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7 The Singapore Constitution will be amended sometime in 2010 to raise the number of Non-Constituency MPs from the current 6 to 9 and to render permanent the Nominated MP scheme under which 9 persons are selected and chosen by a parliamentary Special Select Committee. Members of the public may put forth names and certain functional constituencies (e.g. academia, sports, articles, people sector, labour etc...) are also invited to submit names. In making the selection the Committee must choose people "who have rendered distinguished public service, or who have brought honour to the Republic, or who have distinguished themselves in the field of articles and letters, culture, the sciences, business, industry, the professions, social or community service or the labour movement; and in making any nomination, the Special Select Committee shall have regard to the need for nominated Members to reflect as wide a range of independent and non-partisan views as possible." Fourth Schedule, Singapore Constitution. Text available at http://statutes.agc.gov.sg/


win the loyalty and confidence of mankind, and then employ that homage in the
work of government.10

While the "dignified" part of the Constitution excited and preserved the
"reverence of the population, the "efficient" parts related to how it "works
and rules." Bagehot described the efficient secret as "the close union, the
nearly complete fusion, of the executive and legislative powers....The
connecting link is the cabinet. By that new word we mean a committee of the
legislative body selected to be the executive body. The legislature has many
committees, but this is the greatest. It chooses for this, its main committee,
the men in whom it has most confidence."

To summarise, in Singapore the Constitution has been amended to
consolidate the system of dominant party rule and political stability, while
addressing the demands for more political participation by various methods:

a) **Enhancing political pluralism in the sense of viewpoint diversity:** First,
to placate the demand for a more politically plural legislature, the
constitution has been amended to create two categories of non-elective
parliamentarians to represent the 'opposition' and alternative non-partisan
perspectives in the House.11

b) **Guaranteeing minority representation without quotas through the multi-
member constituency:** Opposition parties (who hold 2 of 84 elected seats
today) have yet to win a 'team MP' constituency since its inception in
1988.12 This is perhaps largely due to the People's Action Party (PAP)
strategy of fielding 'anchor' MPs in every team who will staff the team of
cabinet ministers and under whose expansive wings fledging politicians
may nestle and find succour, until they find their own political legs.
Indeed, Senior Minister Goh candidly described GRCs as a useful
vehicle for PAP self-renewal, by virtually guaranteeing first-timers with
ministerial calibre a parliamentary seat.13 The multi-member
constituency system, one of whose candidates must belong to a stipulated

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10 Walter Bagehot, The English Constitution 1867. Online text available at
http://www.cooperativeindividualism.org/bagehot-walter_on-english-constitution.html

11 For further developments, including extending the size of non-constituency MPs to be
appointed per term and making permanent the institution of the Nominated MP, as well as make
minor downsizes to the GRC team sizes, see PM Lee's speech in debating the President's

12 The Prime Minister acknowledged that if GRC teams were too large, as many critics have
argued, "it becomes harder for voters to identify with the whole GRC", or indeed, for MPs to get
to know voters in wards they do not look after." Ibid.

13 Remarks, Goh Chok Tong, South East CDC Members Appointment Ceremony, 26 June 2006,
available at http://www.cdc.org.sg. See also Goh Chok Tong, 66 Singapore Parliament Reports,
minority group, precludes a "freak result" in the form of a Parliament "all of one colour or of one faith" which would precipitate a crisis.

c) **Strengthening the party system through anti-hopping provisions as a shield against unstable politics:** The Singapore system is no longer oriented towards the individual parliamentarian but to party political systems, reflected in the fact than 75 of the 84 elective seats come from GRC wards\(^\text{14}\) and the anti-hopping provisions which ties an MP to his party.\(^\text{15}\) The passage of government policy is thus effected by obedient submission to a powerful "whip."

d) **Rejecting all forms of proportional representation (PR) as weak coalition governments are anathema, in the political worldview of the Singapore government.** The nightmare of "the politics and factionalism of coalition or competing parties" and the paralysis flowing therefrom is to be assiduously avoided. The modified "first past the post" system which applies to both single member and team constituencies tends to produce "decisive majorities" which enables effective government, in contrast, Proportional representation systems are feared as these are likely "to produce weak governments, based on shifting coalitions of different parties". This might work in homogenous or mature divided societies (Scandinavia, Switzerland).\(^\text{16}\) However it is seen to privilege small extremist parties with narrow agendas who might be able to hold government policy to hostage or otherwise wield a disproportionate influence on policy as the governing party might need the small party as partner in a weak coalition government. Aside from producing weak coalition government, the Singapore Prime Minister opined that a proportional representation system would not work for Singapore because it was a multi-racial and multi-religious society:

Proportional representation will encourage parties to form based on race and religion, or, for that matter, based on cause-related issues, to push stridently for the narrow interests of their group, at the expense of other groups, and this would polarise and divide our society. Instead of politics bringing people together, politics will pull people apart and make them clash, and Singapore will fail.\(^\text{17}\)

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\(^\text{14}\) GRC wards have only ever been contested by political parties since 1988 though conceivably, a group of politically unaligned independents could contest one.

\(^\text{15}\) Art 46, Constitution.

\(^\text{16}\) In Israel, any party can get a party in Parliament so long as it earns 1% of the total votes of the entire electorate.

\(^\text{17}\) Prime Minister Lee Hsien Loong, Debate on President's Address, May 2009.
c) **The absence of political turnover and extolling continuity and consistency in government:** The government asserts that "maintaining growth depends on getting our politics right." This is located in the development of the social capital of trust between the government, the people and different sectors, the forging of "strong social cohesion" and the common enterprise of working for a better future inclusively "for all sectors of our society." Further, there is continuity in the execution of policies in the various fields, e.g. education, security, politics, from year to year, and systematic political succession at each general election pursuant to PAP self-renewal, thereby ensuring "a long period of stable, competent government" which implements good policies. This is contingent on the variable of having wise and competent leadership which a legal system cannot guarantee. Tyrants and incompetents in a strong state can do much to harm a country.

While the modified Singapore system of parliamentary government may have produced a strong state, with the attendant possibilities of abusing powers, it has, within a racially and religious diverse society, managed to preserve social cohesion. Over the course of a generation, this has provided time for relational development and some degree of mutual trust and confidence to develop amongst the distinct ethno-cultural groups in Singapore, thereby keeping the peace, which is an important public good. In so doing, it has stabilised the polity. A constitutional order should be a stabilising force in plural societies, which facilitates human development. This, together with economic development, sustains the conditions for democracy, which transcends the entitlement to take part in multi-party and secret elections, towards nurturing an educated citizenry which practises a certain civil culture and enjoys a certain socio-economic quality of life and is actively engaged, rather than apathetic towards, the public affairs of their polity. This requires that attention be paid towards ensuring the people do no feel alienated by remote representatives. As a facet of justice and to ensure civil peace, it is important too in a modern pluralistic state to ensure that the rights and interests of the diverse ethnic, cultural, linguistic, religious and economic groups constituting the nation are balanced. There must be a faith or trust in the workability and functioning of the system and the effective wielding of the ultimate political sanction of not re-electing an ineffectual or bad government, at the next general elections.

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18 Prime Minister Lee Hsien Loong, Debate on President's Address, May 2009.
19 The chief issue today being what will happen when the levels of economic growth taper off and the citizenry become more politically mature and demanding.
Legislatures and Democracy

Objectives and values to consider in institutional design

Legislatures play important roles beyond serving as a site for political decision-making by the deliberation and creation of legislation. They are institutional expression of a democratic system which vindicates the value of popular sovereignty and symbolise the concept of majority rule; in the context of a political order predicated on a normative commitment to constitutional democracy, this is tempered by the adoption of a bill of rights which is in general judicially enforceable.

Legislatures are the chief institutional link between the citizen and the state, with the citizens choosing their representatives to articulate their concerns and enact laws for the common weal. Legislatures subvert the purposes of government when laws are enacted to serve private or sectoral interests, rather than the common good.

The construction of the legislature and electoral system will determine the ways in which citizens are represented by the state (representation) and have influence over it and the governing apparatus (accountability); the design will affect the emphasis to be given to various democratic values or objectives such as representation, participation, accountability, consultation etc...It will shape the nature of democracy - whether it is primarily conceived of as being a framework for making decision (aggregative democracy) or a process of deciding (deliberative democracy). In a nutshell, a democratic system rests on the twin pillars of popular accountability and political equality of citizens.

Is there a minimum core to the concept of representative democracy? Three different models may be identified in this respect.

a) Protective theory

First, the 'protective theory' emphasises the need to hold political rulers accountable to the people through regular elections and other constitutional checks and balances. Free speech and other associated political liberties are crucial to informed voting and public debate. Parliamentarians should enjoy immunities to debate issues freely, as the institutionalised expression of organised dissent.

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b) **Elite theory**

Second, the 'elite theory' of 'rule by politicians' views elections primarily as the vehicle for choosing governors; while the people have a role in ensuring the smooth circulation of elites, they play no part in governing.

c) **Participation theory**

Third, the 'participation theory' focuses on the maximum participation of all citizens in the political decision-making process, necessary as a means of their development as individuals and as members of a polity. This goes beyond participating in regular free and fair elections under conditions of universal adult suffrage; it also includes citizen participation in public policy debate in between elections.

**Westminster in Nepal?**

In the context of Nepal, which has suffered from social conflict, experienced forms of monarchical sovereign rule, was previously a Hindu Kingdom, suffered weak coalition government and saw the implosion of political parties through internal rivalries and revolving prime ministers, the issue is what are the objectives that should be taken into account in the design of a Nepalese legislature, against the broader move towards a secular democratic polity? Clearly, attention must be given to methods of constructing the legislature to enable a reasonably strong parliamentary executive to be drawn from it, able to regulate national life effectively. Concomitantly, it is important to ensure sufficiently muscular checks to prevent abuses of power. Anaemic government is ineffective government. Unrepresentative and unresponsive government is alienating. How then can sufficient consensus be fostered, in the face of pre-existing polarities?

Furthermore, given the contemporary demand by marginal groups such as religious minorities or dalits\(^21\) (who have been subjected to more than 2000 years of systematic caste discrimination), for fair representation,\(^22\) whose concerns have been previously sidelined or otherwise perpetually marginalised, and who are placed in asymmetrical power relations vis-a-vis the dominant groups in society, provision must be made for a more plural composition of the legislative body. *Unity without diversity* through coercive and homogenising assimilation degenerates into authoritarianism; *diversity*  

\(^21\) The Dalits of Nepal and a New Constitution, UNDP 2008.
\(^22\) WD Handcock, 'What is Represented in Representative Government' (1947) XXII No. 82 Journal of the British Institute of Philosophy 99
without unity devolves into fissiparous chaos which thwarts sustainable peace by eroding a robust conception of the common good and the shared life of a plural nation; unity in diversity requires the recognition of an irreducible plurality and a shared commitment to an indivisible unity. This must be the desired goal and the constitution can play a central (but not exclusive) role in accommodating or managing these conflicting or competing diversities. Still, it is compossible for the recognition of differences to co-exist with the sharing of a joint nation-building enterprise.

Certain factors ought to be borne in mind, in the difficult task of seeking unity in diversity in the construction of legislatures and electoral systems. First, John Stuart Mill argued that a system of representative government best operated in a context where a "feeling of nationality" or solidarity was present. This could be generated by "community of language" or of religion which governs the choice of collective bodies of human beings to associate with each other. He argued that where a people who were ready for free institutions, a "more vital consideration" had to be considered:

Free institutions are next to impossible in a country made up of different nationalities. Among a people without fellow-feeling, especially if they read and speak different languages, the united public opinion necessary to the working of representative government cannot exist.23

In divided societies, different sections of the country were affected by the same system of government in different ways such that "each fears more injury to itself from the other nationalities than from the common arbiter, the state. Their mutual antipathies are generally much stronger than jealously of the government." They might consider their best course of action to seek the favour of the government against the other sectors of society, precipitating further fragmentation, which facilitates political control by a strong state. It is unrealistic in today's world to expect that states can be structured along the lines of nationality (one nation, one state) and the fact of plural societies with diverse ethnic, cultural and religious groups, cannot be dismissed. Nationalities in Mill's estimation are blended where the smaller groups feel they are treated with equal justice and consideration, which helps them to be amalgamated into the larger whole. The difficulties is where there are nationalities or groups which are about equal in strength with each other and able to maintain an equal struggle with 'others' in the refusal to be assimilated. However, where there is a despotic government which is a stranger to all nations or groups and assigns privileges to none, "in the course

23 John Stuart Mill, Chapter 16, 'Of Nationality' in Representative Government (1861)
of a few generations, identity of situation often produces harmony of feeling and the different races come to feel towards each other as fellow-countrymen. In other words, when different groups share the same enemy (the government), this is the basis for some sentiment of unity and fusion. This is the predicate, Mill argues, for the aspiration for free government to be actualised in a plural society.

The question is whether Nepal has reached this point where there is some commonality in fellow-feeling, despite being divided along lines of caste, ethnicity, language, religion or political ideology. If not, then the danger of schemes designed to protect group interests, such as proportional representation schemes or reserved seats, might while ensuring a greater diversity of interests are represented and articulated in the legislative forum, further polarise society and precipitate civil unrest.

While unanimity of opinion is not possible in a modern democracy in a plural setting, John Rawls argues that as a conception of justice, it is important that social and political institutions do not rest on self or group interests as this will not promote stability from one generation to the next. The point of a constitution is to have a durable fundamental document which requires that in design, a constitution as the basis of legal order must articulate democratic ideals and values which are shared by groups which may hold fundamental postures in questions of moral controversy which cannot be resolved by a mathematical head count. That is, the political conception of justice founding a constitutional regime characterised by the fact of pluralism must be capable of gaining the support of what Rawls calls "an overlapping consensus", which is a consensus affirmed by opposing comprehensive viewpoints, whether religious, philosophical or moral, extant in a democracy, which he considers to be permanent divisions rather than a contingent or temporary historical condition: "the fact about free institutions is the fact of pluralism." Should the state wish to maintain one common comprehensive doctrine, it will need to resort to force to maintain this political community. For example, in the Middle Ages, the state affirmation of the Catholic faith required the punishment of heresy. Thus, for a democracy to endure, a "substantial majority of its politically active citizens" must freely support the existing regime. To mediate differences in political

life and debate, a commitment to a form of deliberative democracy which values and nurtures a culture of reasons is needed. as is a commitment to acting reasonable. Reasonable people can reasonably disagree, expect deep differences of opinion, credit others with good faith "and accept this diversity as the normal state of the public culture of a democratic society."26

Institutions that accept the permanence of differences, whether of opinion or traits such as race or religion, and offer protection to vulnerable minorities may generate sufficient allegiance to ensure their stability. If there is space for co-existence where minority concerns may be articulated and ministered to, this may mute the turn to 'tribalism' and us/other differentiation and shift the focus on common citizenship. Legal frameworks which, for example, protect the right to religious freedom to practise, profess and propa gate one's faith, are consistent with the principle of free conscience and democratic equality. John Locke linked a free conscience to the autonomous exercise of the moral competence of each person as a democratic equal, indicating that religious pluralism buttressed democracy.27 Such an accommodative system may promote social cooperation and stability, by managing the excesses of identity politics. Public deliberation based on a shared 'public reason' is an exercise in social learning and familiarising one with the concerns of other sectors of society. A deliberative democratic "would hope that reflection stimulated by interaction could contribute to less vicious symbolic politics, not tied to myths of victimhood and destiny."28 Faith is placed in the civilising force of deliberation to diffuse conflict and in the belief that minds can be changed (which may be Herculean where one's position is tied to one's identity).

Alternatively, some like Lijphart believe in a form of consociational democracy as the only way to manage democracy in deeply divided societies. This relates to an agreement by leaders of each group to share government, including by "grand coalition, segmental autonomy, proportionality and minority veto."29 This model of government guarantees group-based representation based on a technique of power-sharing amongst different social groups in a divided society, with the goal for managing potential

26 John Rawls, 'The Domain of the Political and Overlapping Consensus' (1989) 64 New York University Law Review 233 at 239
28 John Dryzek, 'Deliberative Democracy in Divided Societies: Alternatives to Agonism and Analgesia' (2005) 33 (3) Political Theory 218 at 223
conflict, avoiding violence and preserving political stability. Some argue this is the optimal or most realistic option in deeply divided societies than an assimilationist model based on integration where the focus is on the individual rather than the group and members of minority groups are brought into the mainstream of society, gaining full access to the opportunities, rights and services available to members of mainstream society.

This also distances the connection between voting and collective decision. In this context, deliberation is not 'at large' but only takes place within segments, thus possibly 'freezing' social cleavages and promoting group polarisation, insofar as talking to the like-minded only confirms one's own prejudices. One should that for this mode of government to work, there must be a sense of overarching loyalty to the state as the unifying factor, which requires a mature democratic regime where ties of solidarity exist between citizens, beyond their distinct traits.

**Review of the Preliminary Draft on the Determination of the Form of the Legislative Body**

**General**

1. There is a clear rejection of a pure majoritarianism model (ensuring winning candidate gets overall majority of votes) based on the first past the post (FPP) system. While this tends to produce decisive majorities (strong single party but responsive party government without need to engage in post-election negotiations with coalition partners) through a "counting heads" approach by exaggerates the share of seats of the leading party to produce an effective working parliamentary majority for the government30 (an aggregative democracy as a form of collective decision-making which speaks more to process than substance), this in effect penalises smaller political parties31 as the larger parties win. The focus of FPP is effective governance, not representation of all minority views and an absolute majority is not needed (nor a threshold) to be elected. What counts for government formation is not the percentage of the popular vote but the number of parliamentary seats won. A party can be returned to power with less than a majority of votes.32 The spatial

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30 Parliament serves as a kind of electoral college to produce an effective and stable government
31 This may be perceived as a virtue insofar as fringe extremist groups are kept out of parliament and cannot attain representative legitimacy, avoiding a fragmented parliament
32 E.g. Margaret Thatcher had a parliamentary majority of 144 with the support of 30% of the electorate in 1983.
concentration of votes is what counts and this rewards the winner with a bonus of seats (small lead in votes, larger lead in seats).

As moral questions are not mathematical questions and as the majority can act immorally or oppressively, this may lead to intolerable conditions for minority groups who fear maltreatment and whose concerns warrant pacification.

2. The principle of inclusivity and the electoral system, of ensuring the effective representation of views is evident. The nature of the electoral system can be structured in a way which allows the range of opinions and aspirations in a country to be expressed and to facilitate confidence-building amongst minority communities fearing majority maltreatment. A hybrid or mixed system is adopted incorporating both the FPP and a proportional representation system.

The proportional representation element is designed to include the excluded. It is a method of allowing small or numerically inferior minority groups to gain representation. Proportional representation systems operate on the basis of the concept of "power of numbers" and indicate to voters that every vote counts, which may promote higher voter turnout and citizen engagement rather than apathy. This is because under a FPP system, there is 'vote wastage' i.e. theoretically, if there are 3 candidates in one constituency, a candidate with 40% of the vote (the other 2 having 30% each) can be elected, even if 60% of the voters did not select him. A proportional representation system thereby provides greater representation for minority parties as only a fraction of the total vote is needed to gain a seat, correcting the distortion.

Proportional representation can bring and ensuring a broader range of voters are politically represented, not just those who share the most popular partisan viewpoint.

Furthermore, proportional representation systems weaken the executive and strengthen the legislature. If no political party has an outright majority, there is a need to form coalition governments, forcing cooperation and consultation between parties who recognise the dangers of non-cooperation. The danger is that a weak majority may be held captive by a strong minority - the 'tyranny of the minority' scenario.

The introduction of the Mixed Member proportional representation system in New Zealand terminated the dominance of the parliamentary
executive and made coalition government and even "Ministers outside Cabinet" drawn from coalition partners a regular feature of the Kiwi political landscape; it thereby changed the way the constitution operated by subjecting the government to greater restraint than previously when New Zealand used to be known as an executive's paradise.  

To arrive at a condition where a constitution was thought to be necessary, it would mean that New Zealand governments would have to surrender part of their freedom of action. But of course their freedom of action is greatly circumscribed now in ways that it used not to be by the electoral system. It is for that reason that MMPR (Mixed Member Proportional Representation) rates as the most important constitutional change of the twentieth century in New Zealand, not because it changed the constitution in any formal sense, but because it changed the way it worked and destroyed the pre-existing two-party duopoly on power. This has apparently revitalised Parliament by shifting power to the Parliament by reducing the power of the executive as political parties do not expect outright majorities of seats in Parliament but must bargain with potential partners to form a government.  

It must be noted that there is a school of thought that proportional representation systems do not deliver what they promise and may reduce the influence of voters on political decision-making and so be self-defeating, destroying effective representation by providing too much

33 Bound by collective responsibility only on the matters in their portfolio; such Minister do not sit on the front bench with the Cabinet but near the Cabinet on the cross benches.  
35 The first contest in 1996 was contested by 34 parties; 6 were elected and a coalition government was formed.  
36 As Palmer notes: "Under MMP representation every policy and legislative initiative is the subject of formal negotiation between parties in the search for a majority position in the House of Representatives. Instead of the authority of a decision made within one organization (the governing party in Cabinet), government decisions are now the results of individual political transactions. These negotiations have decentralized the reality of the exercise of power by the New Zealand government. There are now more pressure points at which various groups in society can discuss and influence the exercise of government power. A greater range of political opinion is now represented in Parliament, is heard in public political debate, and can influence New Zealand government decisions. Matthew Palmer, 'Constitutional Realism about Constitutional Protection: Indigenous Rights under a Judicialized and a Politicized Constitution' (2007) 29 Dalhousie Law Journal 1. See generally Geoffrey Palmer and Matthew Palmer Bridled Power – New Zealand Government and MMP (Oxford University Press, Auckland 1997) 317.  
37 Even if citizens are dissatisfied with particular parties, they have less power to determine their fate as it is the post-election process of coalition-building that determines the allocation of cabinet seats.
Proportionality is difficult to evaluate in the abstract, depending on legal factors (vote thresholds, assembly size, one or multi-member constituencies) and environmental and behavioural factors (cultural and social cleavages, number of political parties, voter preferences). It has been argued that greater proportionality reduce politician certainty about voters’ reactions, "reducing the spur-effect of political competition."

By having a mixed proportional-majoritarian system, the advantages of the FPP system, the relationship or connection between the constituent and representative, is kept. The proportional representation element makes every vote count and produces results proportionate to what voters want.

3. **Securing Greater Female Representation in Parliament** There is a concern to increase the representation of women MPs, in accordance with international standards and the recommendations of the Committee which oversees the Convention for the Elimination of All Forms of Discrimination against Women (CEDAW). Indeed, in its General Recommendation No. 26 (16th Session 1997) in relation to article 7 (participation in political and public), the Committee stated that "Societies in which women are excluded from public life and decision-making cannot be described as democratic." The under-representation of women in law-making offices would deprive policies dealing with development, equality and peace of a gender perspective. Research indicates that "if women's participation reaches 30 to 35 per cent (generally termed a "critical mass"), there is a real impact on political style and the content of decisions, and political life is revitalized." (Para. 16)

**Sovereignty**

'Sovereignty' is a protean term, which is capable of meaning various things. In its medieval conception, it was understood as the locus of absolute authority, as in the case of monarchical sovereignty ("l'etat, c'est moi") or the concept of territorial sovereignty at international law. In the modern democratic era, sovereignty is considered to inhere in the people, i.e. popular representation.\(^{38}\) Gianluigi Galeotti, 'On Proportional non-representation' (1994) 80 Public Choice 359-370.
sovereignty, whereupon only a regime based on the will of the people is legitimate. Many newer constitutions indicate this normative commitment to democratic legitimacy in express terms. Public power is to be exercised on behalf of the demos and to serve the welfare of the People and if the elected government fails in this respect, it is held accountable at the ballot box. Indeed, it may be argued that the stability of an electoral democracy depends on the loser accepting defeat in the expectation they might win the next elections, or because they fear the alternative of disorder more than defeat.

Part I: Federal Legislature Art 1 & 2 Constitution of the Legislature

Legislative power is constitutionally vested in the Legislature and is a constituted power, flowing from the 'constituent power' of We the People. In this sense, as the interpretive comments of the Constitutional Assembly Committee on Determination of the Form of the Legislative Body (the Committee' comments) observed, "the legislature alone has the crucial role of exercising the sovereignty of the people."

As it exercises a delegated power, the issue of accountability (to citizens) and autonomy (from the interference of other government institutions) arises in the context of a parliamentary system; in the case of a federal system, there needs to be an authoritative arbiter in the event of jurisdictional conflicts; this should be through a legal mechanism, above the political fray, such as judicial review.

So too, legislators must be called to account before their constituents as "sovereignty" should also be understood as a relational concept, which resides in the nature of the political relationship between the people and the sovereign, who are bound together by the concept of representation, which sustains allegiance to government authority. Democracy can be characterised as "an organisation of the process of collective discussion about the right..."

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39 E.g. Part 1 Section 1 of the 2002 Timor Leste Constitution reads: "1. The Democratic Republic of East Timor is a democratic, sovereign, independent and unitary State based on the rule of law, the will of the people and the respect for the dignity of the human person." Section 2 provides: "1. Sovereignty rests with the people, who shall exercise it in the manner and form laid down in the Constitution. Section 2 of the 2007 Constitution of Montenegro: "Bearer of sovereignty is the citizen with Montenegrin citizenship. The citizen shall exercise power directly and through the freely elected representatives. The power that is not stemming from the freely expressed will of the citizens in the democratic elections, in accordance with the law, shall not be established nor recognized."

standards on which to organise public life". The democratic power belongs to people, not corporations, a religious group or the military. An express provision locating sovereignty in the people is prudent.  


Representation  
Translating the votes of citizens into legislative seats is important in a democracy; in this respect, electoral rules, which are not neutral, and the basic design of representative institutions will help determine the type and size of political coalitions that will form within a country.  

One important aspect of constructing a legislature able to contribute towards a sustainable peace and durable constitutional order is to ensure that felt needs for representation are met as a question of justice by securing equality of political power among the electorate. In divided democracies, the quality of a representative institution is implicated. The issue has arisen as to the compatibility of proportional representation systems and stable cabinet government as proportional representation systems facilitate the emergence of a multi-party system:  

Proportional representation will...create a situation where everyone has his will represented exactly but here no one's will is carried out. The single member plurality system...tends to create two unified parties in constant competition with each other and thereby makes possible a responsible and consistently planned exercise of power....in any country where PR with cabinet instability is substituted for a plurality system with cabinet stability  

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42 I note that legislative power used to be vested in the King according to art 20(2) of the Panchayat Constitution: “The sovereignty of Nepal is vested in His Majesty and all powers - executive, legislative and judicial emanate from him.” Surya Dhungel et al (ed), Commentary on the Nepalese Constitution (Kathmandu, DELF, 1998)  

43 “The core debate concerns whether countries should adopt majoritarian systems which prioritise government effectiveness and accountability, or proportionality systems which promote greater fairness in minority parties and more diversity in social representation.” Pippa Norris, ‘Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems’ (1997) 18(3) International Political Science Review 297-312 at 298.
the voter trades power distributed with slight short-run inequalities for permanent impotence parcelled out with mathematical precision.44 Competing considerations may include the importance of having a strong core executive, the desire for members to be connected to their constituents and the desire for effective political representation, even at the expense of less effective government. This shows a contest over competing conceptions of representative democracy and ultimately, a conflict between values. Relevant factors to be considered in the institutional design include:

a) Effective government - allow leading party to try implement their programme without need for support of minority parties.45

b) Responsive government and accountable at elections

c) Fairness of outcome to minority groups or small parties with significant vote shares; checks to party government; representation of minority social group; promotion of voter turnout given less vote wastage

d) Social Representation to current under-representation in terms of class, race and gender 46; produce a parliament reflecting the composition of the electorate (race, religion, gender)

e) Increase in number of parties and presents more choices to electorate

In this respect, four main types of electoral systems have been identified: 47

<table>
<thead>
<tr>
<th>Classification</th>
<th>Examples</th>
</tr>
</thead>
<tbody>
<tr>
<td>Majoritarian formulae</td>
<td>Plurality, second ballot,48 alternative voting systems49</td>
</tr>
<tr>
<td>Semi-proportional</td>
<td>Single transferable vote,50 cumulative vote,51 limited</td>
</tr>
</tbody>
</table>

45 PR can produce indecisive outcomes, unstable regimes, disproportionate power for minor parties in "kingmaker" roles and lack of clear-cut accountability and transparency in decision-making (Norris, 310)
46 Methods include legally binding gender quotas (Argentinian senate), dual member constituencies designed by gender, affirmative action in party organisations or in social composition of party list e.g. designating every other position on list for female candidates, balance list by region, occupation or religion.
47 Norris, ibid. 299.
48 Second Ballot Majority-runoff systems: First round: absolute majority is winner. IF not, second round - who gets highest number of votes - aim is to consolidate support behind victor and encourage broad cross-party coalition building (France presidency)
49 Alternative Vote: Voters rank preference amongst candidates (1, 2, 3). Absolute majority needed. If none, then candidate at bottom of pile eliminated and their votes redistributed. Continued until absolute majority is secured (Australia House of Representatives) - translates a close lead into a decisive majority of states for leading party
systems | vote
--- | ---
Proportional representation | Open and closed party lists using largest remainders and highest averages formula
Mixed systems | e.g. Additional Member system combining majoritarian and proportional elements e.g. Germany

While majoritarian systems based on direct elections for a single member in a single member constituency based on FPP emphasise effective government, proportional systems focus on including minority voices whereby a voter could vote for a political party with seats allocated proportionally according to the number of votes received.

In a plural society, identity citizens of a polity with a commitment to shared ideals may be superceded by other identificational markers or affective loyalties such as race, caste, religion, geography etc... In this case, it may be that sectors of society feel that their interests can only be effectively represented by members of their own community. A PR system which provides that parties with a minimum threshold should gain legislative seats in rough proportion to their level of electoral support promotes a process of conciliation and coalition building within government, and policy-making based on consensus between power-sharing coalition partners. All citizens then have their voice and concerns articulated in the legislature and hence it is more inclusive. This promotes consociational democracy and a greater voice for minority groups. Contrariwise, detractors of majoritarian systems which usually involve 2 main parties, consider that the winner is over-

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50 Single Non Transferable vote: electors cast single vote in multi-member district and Single Transferable Vote: multi-member constituencies with 4-5 representatives; parties put forward any number of candidates per constituency. Voters rank preference. Total no of votes divided by number of seats to produce a quota e.g. 100 votes, 5 seats = 20 vote quota; Candidates must reach minimum quota. Count first preference, no winner, least votes eliminated and votes redistributed as per second preferences etc
51 Cumulative Vote: Voters have as many votes as representatives - can cumulate on single candidate
52 Limited vote: Voters given fewer votes than number of members to be elected
53 Combination of single member and party list constituencies. Electors have 2 votes. Half the members of the Bundestag are elected in single member constituencies based on simple plurality of votes. Remaining MPs elected from closed party lists in each region with minimum threshold of list votes (5%) - Seats are proportional to votes cast for party lists. E.g. smaller parties winning 10% list vote but no SMC outright topped up till they have 10% of all seats in Parliament.
54 Seats sin a constituency are divided according to the number of votes cast for party lists. Open Lists: parties express preferences for particular candidates on the list or closed: voters select the party and ranking of candidates is determined by the political party, Rank order determines who elected i.e. 10-15 top names
rewarded in the 'zero-sum game' as the system produces an 'elected dictatorship'; this precludes the need for consultation and consensus-building and insulates the government from democratic checks and balances. Minor parties are then systematically excluded from parliament. Nonetheless, it supporters argue that large, broad-based and ethnically diverse political parties in a plurality system are more likely to promote stable, democratic politics than the politically extreme, racially homogenous regional parties a proportional representation system may produce.55

On the negative side, proportional representation systems can produce *indecisive outcomes* which hampers the process cabinet formation and the execution of a single consistent program difficult; it confers *disproportionate power for minor parties* in "kingmaker" roles and a *lack of clear-cut accountability and transparency in decision-making*.56 Furthermore, the use of rigid party lists strengthens the hand of party bureaucrats and *dilutes the ties between representatives and the voters*. It can precipitate *unstable regimes* through parliamentary stalemates and further aggravate party fragmentation if groups break away from existing groups to form independent ventures, given their superior prospects for getting votes and parliamentary seats, compared to the FPP majoritarian system.

In societies which have deep ethnic and religious divisions, proportional systems may be more inclusive, which promotes legitimacy; however, it can also reinforce social cleavages and instability.

Rustow makes the recommendation that the prospect of stable cabinet government and the suitability of a proportional representation system depends on the degree of political coherence or consensus existing in a country, whether the consensus is low or high. If it is a case of low consensus, the smooth flow of cabinet government, which requires a legislative majority united behind a legislative program and a single set of ministerial aspirants, would need a two-party system where one of the parties commands such a majority. In such a context, a multi-party system may be fatal to cabinet government because of the continuing possibility of a 'negative majority' (capable of ousting a cabinet but incapable of agreeing on a new one). If it is a case of high consensus, a cabinet government would probably run smoothly under a dual or a multi-party system as a shared commitment by the parties to the common interest "could be counted upon to

56 Norris, 310.
prevent their forming negative majority alignments."\textsuperscript{57} This could be illustrated thus:\textsuperscript{58}

\begin{table}
\centering
\begin{tabular}{|c|c|c|}
\hline
\textbf{High consensus} & \textbf{A} & \textbf{B} \\
\hline
Parties will refrain from forming negative majorities & Parties will not refrain from forming negative majorities & \\
\hline
No crystallized majority in country or in substantial number of constituencies & & Crystallized majority in country or in substantial number of constituencies \\
\hline
Stable cabinet government compatible with two- or multi-party system & Stable cabinet government compatible with two-party system only & \\
\hline
Equality can be assured by P.R. (with proper districting), i.e., by either two- or multi-party system & Equality can be assured by P.R. (multi-party system) only & \\
\hline
Demands for stable cabinet government and equality can be fulfilled by either P.R. or single-member plurality (two- or multi-party) system & Demands for stable cabinet government and equality can be fulfilled by single-member plurality (two-party) system only & Demands for cabinet stability and political equality are (given the present boundaries) incompatible \\
\hline
\end{tabular}
\end{table}

\textbf{The proposed electoral system and the Nepal legislature}

The current draft proposes a bicameral legislature operating within a federal system and a mixed electoral system which serves various objectives, including reconciling the majority will while paying due attention to the needs of regional and other recognised groups. The House of Representatives (HR) (151) is larger than the National Assembly (51) (NA), following usual practice. The primacy of the House of Representatives is evident in the provision that Finance Bills may only be introduced in the House of Representatives (Part 2, article 26)

\textsuperscript{57} Rustow, 114
\textsuperscript{58} Rustow, 120
Under Part 1, article 3, a 'plus one' majority is to be elected by direct election while the other 75 will be by proportional election. This mixed approach, reminiscent of the structure of the German Bundestag\textsuperscript{59} mixes both direct and proportional electoral system. The first, based on spatial (population & geography) criteria and the one representative per election constituency structure (plurality system), may cause the focus to be on the individual as an autonomous political personality; the latter system is party-centric i.e. candidates as seen as party agents. Here, the other half (minus one) of the House of Representatives will be elected by proportional election, guaranteeing representation for members belonging to specified sectors of society (classes, genders, regions, castes, languages, religions, cultures, etc. The interpretive comment provides that the intent is "to ensure equal and meaningful representation of the entire stratum of different sections of Nepal", with such sectors being identified by reference to "population, geography, economic capacity and representation." This will ensure that all political parties will be represented according to their relative strength in the population, as a reflection of the national composition.

That is, both spatial and non-spatial indicia will determine the quality and quantity of representation. While the plurality system may be designed to ensure a decisive majority, effectively allocating half the other seats in the House of Representatives to the proportional representation regime may not guarantee a decisive result, necessitating the consultation and consensus-building of coalition-building. This will certainly ensure a broader range of views and representation, without guaranteeing a sufficiently effective government. Much depends on the socio-political conditions but an essential question for the framers to ask is whether the division of seats is optimal. If a stronger government is desired, the number of proportional representation seats could be reduced by e.g. one-third, which still guarantees about 50 proportional representation seats for minority representation in a house of 150, which is a third. If a country with fractured consensus, the more optimal solution might require a stronger lower chamber. Directly elected representatives presumably will have a closer link with voters, which is important to prevent voter alienation, and holds out the hope that eventually, a legislator can represent all the concerns of his constituents, rather than only a sector thereof which is important for a mature democratic ethos to take root. If the number of proportional representation seats is too high, it might

\textsuperscript{59} Only 50 percent of Bundestag deputies are directly elected to represent a specific geographic district; the other half are elected as party representatives.
institutionalise polarisation and a sense of entitlement among the beneficiary groups which they will not easily surrender.

In relation to the criteria for proportional representation, there is the question of identifying who the relevant beneficiaries are to be and the most equitable method of allocating seat percentages. Is proportional representation to extend to historically and clearly defined groups e.g. caste, ethnicity, religion, language, culture, or to any sector of society which presents itself as a group (issues of who legitimately represents the group also arises) e.g. based on political ideology, lifestyle politics etc? Will these criteria be determined by law or left-opened? Excluded groups might be a source of discontent. Thus, proposals for group representation are difficult when it comes to specifying which groups count and how much representation they are to have.

It appears from a reading of Part 1 article 3(3) that political parties should be restricted in their selection of candidates by law to ensure a representative slate of candidates: "law shall ensure that women, madhesi, tharu, dalit, indigenous peoples, janajati, muslims, backward classes, regions, minorities, and other communities are equally represented on the basis of population." What if there are parties based on e.g. ethnicity or caste? Alternatively, could this clause be read to mean that contested seats will be reserved for specific groups e.g. 10 dalit seats, which a dalit specific group or a bigger inclusive party encompassing a range of groups can then contest? Clarification is necessary.

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60 As a sociological matter, 'culture' can be defined broadly to include any disadvantaged social group - various lifestyle enclaves, social movements, voluntary associations based on class, gender, sexual orientation, religion, moral belief and political ideology. At international law, a more restrictive, non-sociological approach towards identifying the beneficiaries of minority group protection is adopted, the distinguishing criteria being their religious affiliations, linguistic, ethnic, racial, national and cultural traits. However, the particular concerns of interests groups such as women and children or the disabled are not ignored at international law, but addressed through the general human rights regime, whose focus is the individual. The basis for distinguishing traditional minorities such as ethnic groups does not rest simply on immutable traits (rather than preference traits, such groupings being contractarian) such as ethnicity but on also their communal solidarity and aspirations to maintain a separate collective existence or communal life, as opposed to groups which seek to be integrated into the mainstream of society and need temporary, rather than permanent measures, to effectuate this. Groups differentiated by their ascriptive traits which are largely inherited and permanent (or not easily changed, as in the case of religious affiliations) like race, language, and indigeneity are potential candidates for some kind of special, permanent political status as their aspirations transcend mere integration into society. Outside of minority rights law it is up to domestic law to decide which groups to recognise. See Li-ann Thio, Managing Babel: The International Legal Protection of Minorities in the Twentieth Century (Brill, 2005) at pp. 8-10.
Provision for gender representation in the House of Representatives: Part 1, Article 3(4)

(4) Following the House of Representatives elections, in case women do not constitute at least one-third of the elected representatives in accordance with clauses (2) and (3), an arrangement shall be made under clause (3) to ensure that at least one-third of the representatives are women.

The reasoning appears to be that voters should in the first instance vote on the basis of merit, by choosing "who they believe to be the most capable and desirable candidate," on the basis of respecting "the principle of free and fair elections." That is, meritocracy governs round 1 voting. Should electoral will not be in favour of female candidates, then and only then does the law kick in to require that the stipulated quota be met by means of "an arrangement." This bears comments.

First, the quota to be set for women pegged at one-third of the total representatives, consonant with CEDAW Recommendation No. 23 of 1997. Article 7 of the Convention for the Elimination of All Forms of Discrimination against Women (to which Nepal is a party) provides that "States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country", including elections and the formulation of government policy. Given the fact of negative gender stereotype, article 5 enjoins state parties to modify the social and cultural patterns of conduct of men and women to eliminate sexual stereotyping and recommends temporary special measures to facilitate this under article 4. Second, while there is value in appreciating the importance of achieving substantive equality, the problem with this safety net arrangement is that it might throw up a stigma - candidates selected after their failure to cross the bar of meritocracy and may be perceived as being of inferior merit.

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61 16. The critical issue, emphasized in the Beijing Platform for Action, is the gap between the de jure and de facto, or the right as against the reality of women's participation in politics and public life generally. Research demonstrates that if women's participation reaches 30 to 35 per cent (generally termed a "critical mass"), there is a real impact on political style and the content of decisions, and political life is revitalized.

17. In order to achieve broad representation in public life, women must have full equality in the exercise of political and economic power; they must be fully and equally involved in decision-making at all levels, both nationally and internationally, so that they may make their contribution to the goals of equality, development and the achievement of peace. A gender perspective is critical if these goals are to be met and if true democracy is to be assured. For these reasons, it is essential to involve women in public life to take advantage of their contribution, to assure their interests are protected and to fulfill the guarantee that the enjoyment of human rights is for all people regardless of gender. Women's full participation is essential not only for their empowerment but also for the advancement of society as a whole.
and ability, second choice. Indeed, it may cause, as it has in certain African jurisdictions, the development of a sense of hierarchy between elected and unelected women. Third, if women are to be equally represented "on the basis of population" (article 3(3)), should not the one-third minimum be increased? Fourth, if the applicability of this law is contingent on the results of the House of Representatives elections and applies only post-elections, if insufficient numbers of women are elected, and the law then fills in the gap, will this not make the numerical composition of each parliament one that varies? Is this desirable?

Gender representation is desirable but ensuring a certain number of unelected female representations in the House and thus according women preferential treatment may in fact strengthen sexual stereotypes (they cannot get into the House by themselves, so they should just stay at home etc...). An alternative may be to reserve a certain number of seats for women and let them compete for election, whether as independents or party candidates. At least the seats will be filled by those who 'win' a limited election, even if the quota itself may bear negative connotations. The introduction of a quota, could be temporary, awaiting the equalisation of gender relations and the maturing of democracy, consonant with CEDAW principles.

Part I Article 4 The National Assembly

With respect to the National Assembly, this is to be a smaller, permanent house (51), the tenure of whose members is to be staggered. The composition of the National Assembly as proposed under Part I art 4 seeks to serve certain objectives.

First, to guarantee provincial representation. 38 of the 51 members (73%) will be elected by the Provinces in equal numbers as prescribed by law.

Second, the House of Representatives is to serve as a sort of electoral college in electing 13 of 51 members (25%) on a proportional representation system by single transferable vote on the basis of two distinct criteria. The first appears based on the principle of inclusivity by choosing National Assembly members "from amongst: minorities, women, castes, languages, religions, backward groups or other communities that have not been able to participate in the House of Representatives." This contains several ambiguities. First, is it a binding obligation that House of Representatives members only elect candidates who are not already represented or under-represented (an informal quota not satisfied?) in the House of Representatives? Or is this a guideline? Second, how are votes / seats to be
apportioned between the un/under-represented groups? Will there be an informal apportionment/quota, will this be pre-existing or will it be contingent on the actual composition of the House of Representatives post-elections? Certainly the lower house will have at least 30% female members on the basis of section 3(4) so why the category of ‘women’ is in general (as opposed to women as double minorities e.g. dalit women) included here? Third, does "have not been able to participate" mean that certain groups which are not well-organised may not have put up candidates and hence their 'voice' is unrepresented? Or that they did run candidates but failed at the polls? Fourth, how are "other communities" to be defined? Is this confined only to organised groups, which will disadvantage diffused or politically unorganised groupings? What criteria will be used to decide which group is worthy of protection? Will this depend on volume, the most vociferous claims etc? From article 4(2) it appears that it may be considered useful for the range of beneficiary groups to be kept open-ended giving the primacy accorded to the "principle of inclusiveness" in composing the National Assembly. Nonetheless, indicative criteria may be of use.

The third objective is apparently to inject a technocratic or 'dignified' element of sorts into the composition of the National Assembly: through the House of Representatives electing "people of high reputation who have rendered prominent service in various fields of national life; and experts." Presumably they will lend their expertise and expertise to promote legislative scrutiny. The interpretive comment states the hope that "subject matter will be sufficiently discussed, and there will be opportunities for comments and correction."

Presumably the National Assembly will promote provincial representation and maintain "a creative and mutual relationship between the central and provincial governments." Experts will be better positioned, insulated to some extent from politics and able to serve a more 'senatorial function' or 'statesmanlike' role in focusing on national rather than regional/provincial matters. This is reflected in the requirement set out in Part 1 article 5 which provides that only individuals of a minimum of 35 years qualify for the National Assembly (the expectation being that of "mature personalities), as opposed to 25 years (to attract "young and energetic people") for the House of Representatives. No functional qualifications are spelt out e.g. in one incarnation of a recent Thai constitution, candidates had to possess a Bachelor of Articles degree to qualify. It may be prudent to enlarge the qualifications for membership not necessarily by reference to educational qualification but the capacity to
participate in debates e.g. in terms of language.\textsuperscript{62} What language(s) will parliamentary debates be conducted in?

There are some indications on what the role of the National Assembly in a bicameral system is meant to be; the interpretive comments express the hope that "it will contribute some new, fundamental changes and be effective for the nation, in comparison to the previous, bitter experiences of our country." In this respect, the expectation is that it will "play a significant, complementary role to the House of Representatives in building the road map of new Nepal." It is useful if this could be spelt out in greater detail.

\textbf{Internal management of the legislature - Injecting an impersonal element?}

\textbf{Section 1 Article 6 (decision as to disqualification of members)}

According to the judiciary the power to determine issues relating to the disqualification of members is a departure from other Westminster models where Parliament decides issues pertaining to disqualification, and such decision is final. The principle is that it has power to regulate its own internal affairs. Given the technical nature of the disqualification criteria (age, citizenship, not holding an office for profit), which do not seem to involve a legal question, it may be considered more prudent to leave this decision to Parliament, perhaps to be handled by a pan-party or inter-party committee to minimise political bias.

Notably, Parliament alone decides on the issue of whether there has been a breach of parliamentary privilege or whether a person has been in contempt of parliament (art 20)

\textbf{Section 1 Article 7 Vacation of seat}

Could it be clarified why "30 consecutive meetings" are provided for? How often will the legislature meet? Does the "meeting" count for one sitting (assuming Parliament sits once a month) or is the thinking that a legislator should only be absent for up to a month? If the former, it may be prudent to

\textsuperscript{62} For example, in the Singapore context, art 44(2)(e) of the Constitution requires of Members of Parliament that "he is able, with a degree of proficiency sufficient to enable him to take an active part in the proceedings of Parliament, to speak and, unless incapacitated by blindness or other physical cause, to read and write at least one of the following languages, that is to say, English, Malay, Mandarin and Tamil."
shorten the number of absences, if the purpose is to "emphasise duty to the members."

Section 1 Article 7(f) Inclusion of anti-hopping provisions to prevent intra-party conflicts and implosion

The provision that a member's state be vacated "if the party of which he/she was a member when elected provides notification in the manner set forth by law that he has abandoned the party" aims to strengthen the bond of the legislator with his/her political party. Presumably, this is to avoid the past practice of parties imploding when members cross the floor. As the interpretive note states: "The intent of this provision is to discourage members from changing political parties by being enticed or influenced by post, position and money, which not only creates political instability, but also disrespects the trust of the people."

Stability will only be promoted if that political party commands a sizable number of seats in the House; if not, the system may fail for weak coalition parties and the resulting paralysis of not being to cooperate.

Part I Article 9. Speaker and deputy-speaker of the House of Representatives

Requiring that the Speaker / Deputy-Speaker be removed by a two-thirds majority in Parliament insulates the holders of these offices from the fear of being subject to the displeasure of single dominant party as it will require broad support in a House which is envisaged to be multi-party. This enables them to discharge their duties freely and fairly and without fear of bias in treating all members equally regardless of party affiliation.

What might perhaps warrant some clarification is the scope of art 9(4)(c) which deals with grounds for vacancy of the office. This provides for vacancy "if a resolution is passed by a majority of two-thirds of the total number of members in the House of Representatives to the effect that his /her conduct is not compatible with his position." This is open-ended and it is desirable that at least some guidelines for stipulating what is and is not compatible be provided. Does this relate to his/her conduct within the House or outside.63

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63 For example grounds for dismissing the president in Singapore include under art 22L(3): (a) intentional violation of the Constitution; (b) treason; (c) misconduct or corruption involving the abuse of the powers of his office; or (d) any offence involving fraud, dishonesty or moral turpitude.
The same observations would apply to the Chairman/Vice-Chairman of the National Assembly under Article 10(4) (c).

**Part I Articles 14, 20 Restriction on discussion, privileges**

Freedom of discussion is what Dicey has called "the very soul of parliamentary government;"\(^{64}\) Article 20 protects free speech in relation to "anything said or any vote cast in the House." This is to protect the independence of legislators to speak as representatives of the people immunised from undue influence or threat. This is critical to the role of Parliament in scrutinising legislation, debating policy or expressing dissent.

Free Speech however is not an absolute value. Article 14 qualifies it in affirming the separation of powers by preventing either House from discussing a matter under judicial proceedings or anything done in the course of judicial duty (excepting impeachment proceedings). In addition, article 20(3) provides that “no publication of any kind shall be made about anything said by any member which intentionally distorts or misinterprets the meaning of the speech." This appreciates that free speech is not an end to itself but a means to an end: to promote truth, accuracy, viewpoint diversity in the process of democratic debate. There is no right to promote distortion or misinformation as this serves no public interest. As Lord Hobhouse noted: "The working of a democratic society depends on the members of that society, being informed not misinformed. Misleading people and the purveying as facts statements which are not true is destructive of the democratic society."\(^{65}\)

**The Legislative process**

The powers of state officials are better checked by the bifurcating of the legislative branch into two chambers. This sets both chambers against the supervision of each other which can provide greater honesty in both. Where both chambers are involved in the passage of legislation, debate over issues of public importance is improved as both chambers have to engage each other and negotiate their differences in perspectives. As Mortimer Sellers points, the two advantage of bicameralism is (a) the limits this places on

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\(^{64}\) AV Dicey, (1899) 13 Harvard Law review, 67-79 at 72

\(^{65}\) Reynolds v Times Newspaper [2001] 2 A.C. 127 at 238.
corruption (b) minority protection. However, it also can slow down the process of legislation in the face of disagreement.

Finance bills
The general principle is that a bill can be introduced in either House of Parliament except for Finance Bills which as government bills, are only to be introduced in the House of Representatives: Part 11, Art 26. This is because there shall be no taxation without representation (Part II art 31) i.e. no tax to be levied without law and finance bills, as the interpretive note indicates, deals with taxes. Thus, "the Finance Bill will only be introduced in the House of Representatives so that representatives directly elected by the people will determine the tax and other matters related to it." Some clarification is needed here: does this mean only the 76 members elected directly or all 151 members will vote on Finance bills? If so, this would introduce a differentiated powers regime. In the National Assembly, the majority of members are elected by proportional representation, same as for 75 members of the House of Representatives, while the remainder is indirectly elected by the House of Representatives.

A Finance Bill must be transmitted and debated in the National Assembly and returned to the House of Representatives "within 15 days" from receipt with recommendations. That is, the National Assembly has no 'veto' power, but in making non-binding recommendations serves as an 'advisor' or 'interlocutor' taking part in a conversation, even though the houses sit separately except where otherwise specified (bills referred to joint sitting under art 27(9)). The House of Representatives deliberates a returned bill and after doing so, presents it to the Head of State for assent.

Other bills: Part II, art 27
Both the House of Representatives and National Assembly as well as the Head of State are involved in the legislative process. The National Assembly should send any non-Finance bill transmitted to it back to the House of Representatives with approval or recommendations "within two months from the date of receipt". (Article 27(5). If the National Assembly does fail to do so, the House of Representatives can present it to the Head of State provided it passes a resolution of more than fifty percent of the sitting members. The

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House of Representatives is not bound by the National Assembly. Thus, if the National Assembly rejects a bill, the House of Representatives can pass it again (with or without amendments) as it was or amended provided it can muster a majority of more than fifty per cent of its sitting members before presenting it to the Head of State: Article 27(7). The time limits and provision for the House of Representatives to pass a bill rejected by the National Assembly prevents undue delay in passage of legislation and 'gridlock'.

**Delaying power of the Head of State: Article 29 assent on bills**

The Head of State has the personal discretion under Article 29(2) to delay legislative proceedings if he determines that any Bill (other than a Finance bill) "needs further deliberation." He can send a Bill back to the House of origin within 1 month of its presentation to him for assent. Such bill shall be "reconsidered by a joint sitting of the two Houses" and if reconsidered Bill is passed, with or without amendments, the Head of State must assent to it within 15 days of such presentation. This reflects the desire to promote a culture of reasons, particularly over sensitive or controversial issues. It also indicates the Head of State has more than a merely symbolic role and that this discretion is entrusted to him to exercise with prudence. This is reflected too in the ability of the head of state to pass ordinances subject to restrictions, as governed by Part II, art 30. This is an exceptional power.

**Conclusion: beyond rules and systems**

There are two main difficulties which pose a challenge to formulating a constitutional solution to stabilise a plural society, given the need for restraints on majoritarian rule.

To promote a sense of stake-holding in the polity, the state, through its constitution, should be defined in a manner which reflects its ethnic, linguistic, religious, cultural diversity. The first is managing political dissent (viewpoint / ideological diversity) and opposition, in the interests of preventing political instability while allow free debate. The second is to manage ethno-cultural-religious differences (racial and religious diversity) to avoid polarisation in society which also augurs instability. To the second, this may be accommodated through a legal framework which delineates a 'separate domain' where group autonomy and identity can be expressed and flourished, as well as a shared or common domain where citizens can interact qua citizens in pursuit of the common good, rather than as members of a
particular group with single issue agendas. Minority representation in legislative bodies is one way to ensure a group remains engaged in mainstream society.

The eternal conundrum is that governments must be sufficiently strong and sufficiently weak. For example, a weak government will not be able to undertake unpopular but necessary courses of action if it holds only a weak popular mandate. A government which is too strong may abuse its power and ignore the legitimate concerns of minority groups. Sustainable peace will be promoted if all parties consider that the constitution, as a joint product based on democratic consent and consultation, safeguards their interests, is fair, promotes justice. This will promote a durable constitution if citizens feel they can abide by the rules of the game, be heard, potentially change policies etc...

Constitutional durability is contingent upon political stability, which is also necessary for the realisation of human rights and fundamental freedoms, which cannot co-exist with lawlessness or despotic authoritarianism.

In a functioning democracy, as Karl Popper noted in *The Open Society and its Enemies*: "the rulers can be dismissed by the ruled without bloodshed"; that is, there can be peaceful transitions of power (political turnover) within the constitutional order according to the results of the ballot box. To prevent politics from degenerating into single issue agendas, rather than the deliberative pursuit of the common good, the people of a country must be willing to transcend parochial concerns and treat each other with the respect a common citizenship warrants. While constitutions can contribute to good government, a country also needs leaders who will act for the public good, not selfishly for personal or sectarian benefit.

**Points for clarification**

1. Does the Head of State act on the advice of the Cabinet in general? Is there an express provision for this?

2. Is there a reason why under Article 43 (provincial assembly), there is a clarificatory note as to what "other communities' mean but none for the House of Representatives under Part I, Article 3(3)?

3. Why is there a stipulated 30% minimum for women to be elected into the House of Representatives under Article 3(3) but not any other group?

4. Is the intention that the National Assembly should reflect regional interests and the House of Representatives, national interests? If so why are there non-regionally based seats in the National Assembly? Is this a
‘safety’ net to remedy any un/under-representation of a group in the National Assembly?

5. Is there a mechanism by which political parties will be required not to discriminate in terms of membership, leadership or nomination for political purposes or otherwise impelled to have a broad-base of members? Will a law providing criterion for determining which groups warrant recognition?

6. Will the proportional representation system to be adopted be based on open or closed party lists?

Suggestions

1. To safeguard minority interest, consider having a parliamentary body or committee devoted to review legislation to see if it contains discriminatory measures. This could assure minority groups.

Formulate a scheme to promote inter-party co-operation prior to elections as opposed to post-election coalition consensus wrangling. For example, if political parties are organised on the basis of race or religion or caste, and if a multi-member constituency scheme is created, which requires, for example, in a team of 3-5, that one member belong to a specific group, it will force insular groups to be more inclusive or to socialise them into making alliances with other parties, so as to field a team with the requisite slate of candidates.

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Let me begin by thanking you Mr. Chairman and the organizers of the conference for inviting me to speak this morning. We in Sri Lanka have been watching the constitution making process in Nepal with very keen interest. Those of you, who are familiar with the constitutional and political developments in Sri Lanka, will know that we have been struggling for the last 15 years to change our constitution. Our process has not been half as participatory or as inclusive as your process has been. But we live in hope because fundamental constitutional reform is essential for our country, and the process to achieve it is very important. When another attempt is made, hopefully, in the not too distant future, we shall certainly look to the developments of Nepal in the last two to three years for inspiration and guidance.

I will like to share with you the Sri Lankan experience on one of the topics that I am led to understand the Nepal process is struggling with. I understand that the Constituent Assembly (CA) Committee on Determination of the Form of Government has presented a report in the form of a compilation of the official positions of the major parties rather than as a consensus document agreed to by all the parties. The stand of the UCPN (Maoist) in favour of a “consensual presidential system and multi-member direct proportional election system” comes as the first among them. The Nepali Congress has voted for the continuation of the parliamentary executive system with a nominal head of state (the President) and a mixed-
member proportional electoral system. The third group has opted for a presidential form of government elected by the legislature and a mixed electoral system. There is a fourth proposal from CA member Pradeep Giri (Nepali Congress) who has espoused the proposal of 25 NC legislators last year pleading for a directly elected prime minister and a ceremonial president elected by provincial and federal legislatures. This proposal is similar to the Israeli experiment in the 1990s, which was subsequently abandoned because of systemic contradictions that emerged in the implementation process. None of these proposals are, however, based on established parameters.¹

I would like to, if I may in the same spirit Mr. Bob Rae referred to, highlight the dangers of the presidential system through the Sri Lankan experience. In our 61 years of independence we had the parliamentary executive model for 30 years and the presidential executive model for 31 years. I do think Sri Lanka offers a very good case study for you as you debate whether you should have a presidential executive or a parliamentary executive. I might also remind you that Bangladesh had a similar debate and after a brief flirtation with the presidential model, reverted to the parliamentary executive model.

I have used deliberately in the topic of my presentation the “Perils of Presidentialism” which is the topic of a seminal 1990 article written by Professor Juan Linz, the Sterling Professor of Political Science at Yale University.² Although it was written a long time ago I think the literature and the scholarship that has followed has critiqued the Linz thesis somewhat, but has really not refuted the basic argument that Professor Linz made in the article. I suggest the members of the Constituent Assembly and civil society who are interested in this issue of forms of government read a copy of Linz’s article.

Linz's basic thesis was that the presidential system generally promoted authoritarianism and undermined liberal democratic values and institutions. I quote from his article.

“A careful comparison of parliamentarism as such with presidentialism as such, leads to the conclusion that on balance the former i.e. the parliamentary system is more conducive to stable democracy than the latter. This conclusion applies especially to nations with deep political cleavages and numerous political parties.”

² Journal of Democracy - Volume 1, Number 1, Winter 1990, pp. 51-69
Linz focused primarily on several countries of South America and the Spanish speaking world. He mentions Sri Lanka in passing at the beginning of the article, but I believe that Linz’s thesis applies to Sri Lanka very much given our experience of presidentialism from 1978 to the present. In the interest of time I shall briefly outline the Sri Lankan experience and then comment on it using some of Juan Linz’s arguments, wherever relevant.

When Ceylon/Sri Lanka became independent in 1948, its first post independence constitution, the Soulbury Constitution, provided for a British style Parliamentary Executive with a Prime Minister as its head. The Queen of the United Kingdom continued as a constitutional monarch with a local Governor General as the head of state in her absence. When the United Front Government of Sirimavo Bandaranaike took the lead in espousing the need for a homegrown or autochthonous constitution in the early 1970s, the Constituent Assembly rejected a proposal to introduce a presidential system and opted to continue with a parliamentary executive model. The First Republican Constitution of 1972, therefore, which was operational until 1978, was similar to the Soulbury Constitution in terms of the form of government but replaced the Queen with a nominal President appointed by the Prime Minister.

When the United National Party won a resounding victory at the parliamentary elections of 1977, it decided to introduce a new constitution and proposed the introduction of an executive presidency, largely at the insistence of its leader, J.R. Jayewardene. Though this was opposed by most of the other political parties since the ruling party could obtain a two-thirds majority vote in Parliament on its own, it was able to introduce the Second Republican Constitution of 1978 with an executive presidency, unilaterally. The dangerous trend of unilateral constitution making rather than consensual constitution making, or the instrumental use of constitutions by governments in power to suit their interests, which had commenced in 1972, continued much to the detriment of constitutionalism in the country.

In 1978 the advocates of presidentialism basically put forward two arguments in favour of the presidential model. The first was the need for stability and a strong government. The second was that the presidential system would actually empower the minorities as the main political actor, the President, would have to be elected by the whole country rather than from a small constituency. The justification was that since a successful presidential candidate would have to attract votes from the north and south of the island and from all ethnic and religious groups, this would also encourage moderation in the policies of the candidates.
One has to seriously reflect upon these two justifications for the presidential system. What do we mean by stability? I think this is a very important question. Prior to 1978, we had in Sri Lanka nearly 50 years of franchise. Every five years, we changed our governments at elections that were basically free and fair. While some people may describe this as a sign of instability I would argue that in the long term it was actually a sign of stability. It is significant that post 1978 we have had much more instability in terms of respect for constitutionalism, the rule of law and the legitimacy of democratic processes. I believe that the proponents of the presidency for stability argument really were suggesting that a “third world” country like Sri Lanka needed a strong government, that the political and economic challenges of a developing country required that there should be a strong government that could take tough, unpopular decisions that was in the long term interest of the country. The chief architect of the 1978 Constitution President J.R. Jayewardene famously once said, “We need an executive freed from the whims and fancies of the legislators”. How this statement fits with the principles of liberal democracy is of course an interesting question.

The second argument that the presidential system empowers the minorities is, in my opinion, the more powerful one. It needs to be examined carefully. I think the experience in Sri Lanka has demonstrated that the minorities are empowered, but only at the time of the presidential election or during the campaign. The empowerment is, therefore, limited and not a continuing one. The problem is that once the President is elected he or she is so secure in power, is so powerful, that s/he becomes a virtual elected despot. Thereafter it is extremely difficult, not only for the minorities, but for anyone for that matter, to exert influence or pressure or for public opinion to influence the President. This is a huge problem in Sri Lanka. Indeed, at the forthcoming presidential election in Sri Lanka, the voters face a terrible choice. They have to choose between a very authoritarian incumbent President and a former military commander with no experience or record of commitment to democracy. Many voters agonize over such a horrible choice which highlights, I think, one of the fundamental flaws of our presidential system in particular but also many presidential systems in general. The dilemma faced by the voters in Sri Lanka is that though they know that the candidates may make various positive promises or state all the correct positions or appear to be committed to the rule of law, they also recognize that on the day after the election, on 27th January 2010, whoever is elected will be virtually uncontrollable and unaccountable because no person or institution can exercise an effective check on the office of the President under the Sri Lankan Constitution.
I must emphasize one more feature of the presidential system in Sri Lanka. We have what has been described as a mixed or hybrid Presidential/Parliamentary system or a semi presidential model. Our system has also been described as Gaullist by Professor A. J. Wilson, who was a champion of the 1978 Constitution and a well known political scientist, because he argued, that it had several features of the French system. It seeks to combine some of the features of a purely presidential system with the British parliamentary executive model. So we have a President directly elected by the people for a 6 year term. The President is the head of State, head of government, Command in Chief of the armed forces with a special defense responsibility. S/he is the head of the Cabinet of Ministers, chooses the Prime Minister and appoints the cabinet ministers who hold office at his/her pleasure.

A feature of the British parliamentary system that we have adopted in our model is that the President has to choose his or her cabinet members from the members of the legislature. The President can also assign to himself any cabinet portfolio. Much to our concern, the Presidents of Sri Lanka since the early 1990s have also retained the portfolio of finance which, in my view is unconstitutional and violates fundamental principles of parliamentary democracy. If one examines the history of parliamentary democracy, one sees that the main way by which parliament exercises control over the executive is by controlling the purse strings and through the effective control of public finance. Parliament cannot exercise such control if the Minister of Finance is outside the legislature.

The President of Sri Lanka can dissolve the legislature virtually at any time without having to consult anyone. S/he has wide powers to appoint judges, persons to key institutions such as the armed forces and the police, commissions, election commissioners, secretaries to ministries and other public servants, governors of provinces and the Attorney General. In 2001, a constitutional amendment, the 17 Amendment to the Constitution was adopted to reduce these powers of appointment by requiring them to be exercised on the recommendation of a Constitutional Council with nominees from several political parties and the Leader of the Opposition, a feature that was inspired by the Nepal Constitution of 1990. Though it worked reasonably well from 2001-5, the amendment has been intentionally violated by the government of Sri Lanka since 2005.

The President wields even more power when the country is under a state of emergency. In Sri Lanka, since 1970 a state of emergency is more the norm rather than the exception, particularly because of the ethnic conflict we have had for many years. In such circumstances, the President can
promulgate emergency regulations which even trump or override the laws of the parliament. Furthermore, the President has a sweeping, blanket immunity from judicial surveillance. S/he cannot be made a party to any legal proceedings for anything done in his official or even private capacity. So if you are married to the President, you probably won’t be able to divorce the President while he is in office! The President can also appeal to the people directly, over the heads of the legislature, at a referendum seeking popular endorsement for a Bill that has been rejected by the legislature.

The only check that we have in the Sri Lankan constitution and indeed one that Linz argues, is one of the checks in all presidential systems, impeachment. Under the Sri Lankan Constitution, however, an impeachment is virtually impossible. Two-third majority votes in the legislature on three separate occasions and the finding of guilt by the Supreme Court is needed. The whole process could take months like during one occasion when an impeachment was attempted in Sri Lanka, the President could make use of the time and of course his enormous powers to “persuade” legislators to change their minds.

We have, therefore, in Sri Lanka what Professor C.R. de Silva, in a critique of the presidential system in Sri Lanka, has called the “overmighty executive”. This is compounded by the fact that the rival centres of political power i.e. the legislature and judiciary, have very little countervailing power or control. Such a combination, therefore, is a recipe for authoritarianism. We have experienced this increasingly in the last four to five years in Sri Lanka. I would like to also take this opportunity to warn against the dangers of hybridity or mixedness. Bob Rae has already referred to this in his presentation this morning. Sometimes when you mix two systems the danger is that you leave out the checks and balances of each system. If you had a pure presidential system where there is strict separation of powers, as our colleague from Finland highlighted this morning, between the legislature and executive, then perhaps the legislature would have functioned more effectively as a watchdog on the executive. Similarly a parliamentary executive model, where the most powerful political actor is a member of the legislature and continues to wield power only so long as s/he commands the confidence of the legislature, promotes humility, accountability and responsiveness. But since in Sri Lanka, we have neither, the situation undermines good governance and constitutionalism.

Every system has its rationale, logic and its own scheme of regularized restraints. As mentioned above, there is a danger that some checks and balances could be left out when two systems are mixed. This is the reason why in Sri Lanka the presidential system has contributed significantly to the
rise of authoritarianism, the rise of unaccountable and unresponsive government in Sri Lanka. It has also had a rather corrosive and negative impact on liberal democratic institutions and values. I would like to expand on this on the time I have left referring to some of the arguments Juan Linz made in his article.

One of his powerful points in my view is that the presidential system encourages a personalized style of politics and a kind of crude populism, which is the very antithesis of constitutionalism. It builds on the style of politics which focuses on the individual rather than people with political experience, capacity and commitment to liberal democratic values.

Some scholars have even pointed out that the presidential system is better for political outsiders to come in and take power as opposed to people from within the political elites and they see this as something positive. But I think it could be argued that this is negative. Think of Chavez in Venezuela, Morales in Bolivia, Correa in Ecuador, Estrada in the Philippines, Takshin Sinawatra in Thailand, Wahid of Indonesia and of course Rajapakse in Sri Lanka. It would probably have been difficult for a Gordon Brown, a John Major, a Manmohan Singh or a Kevin Rudd to have become President if their respective countries had presidential systems. I am sure you have your parallels in Nepal. In Sri Lanka we have the example of one of our most experienced politicians, the perennial leader of the opposition, Ranil.

"Capable people don’t want to enter parliament any more in Sri Lanka because parliament is no longer the main political institution in our constitutional structure. The quality of parliament has, therefore, suffered. The deliberative and scrutinizing functions of Parliament have suffered drastically. Not only has the parliament been devalued but I would argue that the institution of the cabinet of ministers has been devalued as well. It is no longer the focal point for policy debate and formulation."

- Rohan Edrisinha

(at p. 98)
Wickremasinghe, who just can't win a presidential election because he lacks some of those charismatic, populist attributes that has made Rajapakse such a success as President. We need to reflect on whether we need a system that encourages a personalised, charismatic and populist style of politics. We need to be conscious that such a system is likely to promote authoritarianism as it has done in Sri Lanka.

The other danger relates to how the President is affected in terms of ego, and power and authority by the fact that s/he is elected by the whole country. It fosters a mindset where the President tends to think that because s/he is elected by the entire country s/he has the authority and legitimacy to basically do anything. It gives a person an exaggerated sense of his/her own importance. To use Linz’s own words “the risk that he will tend to conflate his supporters with the “people” as a whole.” For example if you look at Sri Lanka, President Rajapakse has deliberately and intentionally not implemented an entire chapter in our constitution designed to promote good governance, the Seventeenth Amendment to the Constitution. While various bizarre and unconvincing justifications for such violations have been trotted out by friends of the government, the basic reason seems to me the fact that the President just did not want to implement a chapter in the constitution that reduced his discretion, patronage and power. It is almost as if he took the position “I am the President; I am elected by the people; I should be able to appoint whomever I want to key institutions.” In Sri Lanka therefore, presidentialism has certainly fostered a kind of crude populism that is very dangerous from a liberal democratic perspective. As you know as constitutionalists we are not only concerned about how people are elected, but we are also perhaps more concerned about the extent of their power and restraints on their power. Populism as described earlier is the very antithesis of constitutionalism.

Linz also discusses the defence of presidentialism in terms of stability and rigidity. I was struck by the stability argument that is used often in the Nepal debate. I think the experience of Sri Lanka is that what is often used to justify stability has resulted in a kind of unresponsiveness and strong government that goes against the interest of the people. The corruption, nepotism and the abuse of power that Sri Lanka has experienced in recent years has created enormous problems with respect to good governance and generated widespread cynicism about politics in the minds of the people. In recent years, Sri Lanka had to deal with a strong separatist movement led by the Liberation Tigers of Tamil Eelam or LTTE that promoted, not surprisingly, an obsession with national security. The cumulative effect of all these factors created a negative kind of stability-authoritarianism.
The third argument that I would like to borrow from Linz is the danger of the presidential system in promoting a winner takes all or zero sum game outcome. A good example of this will be the forthcoming presidential election in Sri Lanka. The future of the Rajapakse Administration, members of his family who occupy important positions, cronies and party are all at stake. The stakes are very high. In fact the outcome of the presidential election will impact upon the parliamentary election which is due in April/May. You will recall the argument made last evening by the Minister of Federal Affairs on the need to promote consensual politics, coalition politics and power sharing arrangements. This becomes extremely difficult when you have a presidential model because the President is so powerful that it is very difficult to have a meaningful power sharing arrangement because the Prime Minister and other cabinet ministers will have relatively far less power. In Sri Lanka, we had a brief and positive experience of cohabitation - the President from one party with the Prime Minister from another, from 2001 to 2003. It proved extremely difficult to work and lasted for a short time because powers were so loaded in favour of the presidency.

The fourth point that Linz highlights is the danger that the presidential system could devalue democratic institutions. This has certainly happened in Sri Lanka since 1978. It is particularly tragic in the Sri Lankan context because as you know, we had a very strong tradition of the rule of law, parliamentary democracy and universal franchise since 1931. If you read the Hansards, the debates in the parliament in the 50s, 60s and 70s, the quality of parliamentary debates was very high. Parliament functioned as a deliberative assembly as indeed it is expected to. We had a strong committee system. In fact in the early 1990s, I had a meeting with a delegation from the Nepal parliament that came to Sri Lanka to study our public accounts committee, which was considered a model committee. All that has gone today. That tradition has ended and we have had in the last 20 years or so a shift from parliament as the main locus of political power, debate and discussion to the presidential secretariat. The presidential secretariat is full of unelected presidential advisors, subject to little if any parliamentary oversight and is part of the presidential patronage politics that I referred to earlier. This has had a corrosive effect on parliament as an effective democratic institution.

Capable people don’t want to enter parliament any more in Sri Lanka because parliament is no longer the main political institution in our constitutional structure. The quality of parliament has, therefore, suffered. The deliberative and scrutinizing functions of Parliament have suffered drastically. Not only has the parliament been devalued but I would argue that the institution of the cabinet of ministers has been devalued as well. It is no
longer the focal point for policy debate and formulation. Linz made this point in his article. He says that a presidential cabinet is less likely to include a strong minded people because all the people appointed to the cabinet hold office at the pleasure of the President. In a parliamentary executive model, on the other hand, you will find that though cabinet ministers and the Prime Minister are sometimes from the same party, the Prime Minister has to appoint to his cabinet some invariably strong members of the party whether s/he likes them or not, and therefore there is greater likelihood that the quality of the cabinet will be enhanced. Cabinet ministers could resign from the cabinet, go to the back benches and then make matters extremely difficult for the Prime Minister.

A related point that I think is very important in the context of South Asian politics is that the parliamentary system promotes a system where there will be less arrogance on the part of the wielders of power. In 1971, one of our Marxist politicians, Colvin R de Silva, defending the parliamentary executive model, stated that "a virtue of the parliamentary executive model is that the Prime Minister has to be continuously accountable to the parliament." The Prime Minister knows that s/he can lose his/her position at anytime if s/he ceases to command the support of the house or the confidence of the house, for instance by a vote of no-confidence. In a presidency it is virtually impossible to remove the President. Furthermore, the Prime Minister is a member of the parliament, sits in parliament with his parliamentary colleagues, and is not cocooned in a presidential office far away from parliament. During Question Time, for example, we have all seen how Gordon Brown gets a hard time in the British House of Commons. This is very healthy and it creates a sense of humility, accountability and a healthy sense of irreverence for the person who wields the main political office in the country.

In South Asia where generally our political culture is so hierarchical, where we have very little internal party democracy, where we have a strongly entrenched welfare state with patronage politics etc. the weaknesses, the dangers and the perils of presidentialism highlighted by Linz apply even more forcefully given this political context and reality.

I would like to briefly comment on the proposal that is floating around in Sri Lanka and which I believe has been floated in Nepal as well - the idea of a nationally elected, so called, executive Prime Minister. It was tried in Israel from 1992 to 2001. It was applied or worked for three elections. There were some very Israel specific reasons for the introduction of this strange model. It was felt that the system of proportional representation practiced in Israel gave too much power to small parties. But after three elections it was
abandoned and it was acknowledged as a failure. I think it is important to study why Israel flirted with the idea and then abandoned it, before we think of introducing it either in Sri Lanka or in Nepal.

Let me conclude, Mr. Chairman, by summing up my arguments. The Sri Lankan experience with presidentialism has been a negative one when viewed from the perspective of constitutionalism, the rule of law and the protection of liberal democratic values and institutions. Our democratic traditions have been seriously undermined as a result of presidentialism. In 1971 when the proposal to introduce the presidential system in Ceylon/Sri Lanka was made, one of our most distinguished liberal Prime Ministers, Dudley Senanayake made this statement which has turned out to be prophetic.

“The presidential system has worked in the United States where it was the result of a special historic situation. It worked in France for similar reasons. But for Ceylon it would be disastrous. It would create as tradition of Caesarism. It would concentrate power in a leader and undermine parliament and the structure of the political parties. In America and France it has worked but generally it is a system for a Nkrumah or a Nasser, not for a free democracy.”

Secondly I have tried to use Linz's "Perils of Presidentialism" article as the basis of the critique to suggest to you that perhaps the lessons from Sri Lanka may be of universal application. The particular form of presidentialism in Sri Lanka is problematic but perhaps the Linz thesis highlights the fact that the concept of presidentialism also has serious flaws.

Finally, many constitutional commentators in Sri Lanka have quite often, unfortunately in my view, cited an English poet when they have talked about the subject of forms of government. Alexander Pope said “For forms of government let fools contest, whate’er is best administered is best.” I hope I have convinced you, however, that the form of government is very important. It is a very important topic. It can have profound implications on constitutionalism and constitutional governance as a whole. So in a nutshell, Mr. Chairman, my message is simple. Please don’t follow the advice of Alexander Pope (or any pope for that matter). Please don’t follow the mistakes of Sri Lanka and beware of the perils of presidentialism. Thank You.
In this paper I would like to consider what lessons Nepal might learn from European understandings of judicial independence and impartiality, particularly those which stem from the European Convention on Human Rights. But I’d like to begin by making a few introductory remarks.

1. Introduction

Independent, impartial, and professional judicial systems are integral to the effectiveness, the legality, and the legitimacy of decision-making in modern democratic states committed to human rights and the rule of law. In the contemporary world it is increasingly widely accepted that whether any state is democratic and respects the rule of law and human rights or not, is fundamentally a matter of compliance with international norms. Therefore, although states like Nepal undergoing a democratic transition, are free to fashion their national constitutions and public institutions as they choose, if the transition is to be successful, the end result must conform with basic international standards.

Many documents, including academic studies, statements of principle from UN and other international agencies, and the provisions of international treaties, seek to identify these standards. But I would like to argue that the most authoritative international norms relating to judicial processes are those
entailed by the right to fair trial as expressed in several global and regional human rights instruments, including Article 10 of the Universal Declaration of Human Rights, Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention on Human Rights.

While the right to fair trial is framed differently in different instruments, broadly speaking it contains the following four or five core elements: (1) In the determination of rights, obligations and criminal charges; (2) Everyone is equally entitled; (3) To a fair and (subject to some exceptions) a public hearing; (4) By an independent and impartial tribunal established by law. Some instruments also add, fifth, that trials should be conducted ‘within a reasonable time’. National courts are also sometimes required to resolve constitutional disputes between public institutions, although these tend to be rare compared with the determination of rights, obligations and criminal charges.

Nepal is a party to the International Covenant on Civil and Political Rights. But it is not, of course, a party to the European Convention on Human Rights. Nevertheless, for three main reasons I would like, in this paper, to consider how the European Court of Human Rights in Strasbourg has interpreted the right to be tried by an independent and impartial tribunal established by law, under Article 6(1) of the European Convention on Human Rights. The first reason is that the jurisprudence of the European Court of Human Rights is by far the most developed of any international human rights tribunal on these and other issues. In the 50 years it has been in operation, the Strasbourg court has delivered some 10,000 judgments. Over 90 per cent have found at least one Convention violation, and over 70 per cent of these have been violations of the right to fair trial under Article 6. The second reason is that the European Court of Human Rights has attempted to derive a number of subordinate principles from the abstract terms of Article 6(1) without dictating to states particular ‘modalities of implementation’. It has, in other words, been careful to recognize that there are many equally legitimate ways in which the relevant basic principles can be applied in the diverse legal systems of the Convention’s 47 member states. Thirdly, for both these reasons, this rich case law can be highly instructive even for non-European states, such as Nepal, where the Convention is not formally legally binding.
2. Judicial independence and impartiality under Article 6(1) of the European Convention on Human Rights

Before looking more closely at how the Strasbourg court has understood the right to be tried by an independent and impartial tribunal established by law, let me say something briefly about two other characteristics of modern democratic legal processes – transparency and accountability – identified by the Nepalese Constituent Assembly’s Committee on the Judicial System in the Preface to its Report on the Preliminary Draft Constitution and Concept Paper.

It cannot be denied that democratic judicial processes should be transparent and accountable. But these concepts do not mean the same in judicial as in non-judicial contexts. Indeed, the European Convention on Human Rights does not refer to ‘transparency’ and ‘accountability’ of judicial processes as such at all. Instead, Article 6 seeks to make national judicial processes accountable to law, and to make trials transparent by requiring them to be held in public and for a reasoned judgment to be publicly delivered.

Tribunal established by law

The term ‘tribunal established by law’ has been taken by the European Court of Human Rights to mean a judicial institution with several core characteristics. First, it should be established by statute, although it may be regulated by delegated legislation provided this is subject to judicial review. Second, it must have jurisdiction to examine all relevant questions of fact and law. Third, it must be governed by rules of law. Fourth, it need not be staffed by professional judges, providing professional legal advice is available, as is the case with the English lay magistracy. Finally, its decisions must be legally binding. They must neither be pre-determined by any binding interpretation of relevant law from a non-judicial authority, nor be capable of being subsequently overturned by any non-judicial authority.

This issue is relevant to the debate in Nepal about whether the Federal Supreme Court or a Committee of the Legislature should have the final say on how the constitution is to be interpreted. The Strasbourg court has, however, not favoured judicial over parliamentary supremacy or vice versa. Nevertheless, over the past few decades, there has been a clear trend in Europe and elsewhere, away from legislative and towards judicial supremacy. But not all states have gone the full distance. For example, since the Human Rights Act 1998 came into force in 2000, the UK has modified its
commitment to legislative supremacy but without opting for full-blooded judicial supremacy instead. It has, in other words, chosen a hybrid model. The Act allows the higher courts to condemn legislation as incompatible with the European Convention on Human Rights, effectively declaring it ‘unconstitutional’. But it does not permit the legislation to be annulled as the US Supreme Court can annul Acts of Congress for breach of constitutional rights. Instead, Parliament must either revise the offending provision or risk a constitutional crisis by refusing to do so.

Independence
Turning to ‘independence’ and ‘impartiality’ we find that the Strasbourg court regards these as interwoven concepts. Nobody would disagree. Nevertheless, I would like to suggest that they can and should be distinguished more sharply.

‘Judicial independence’ is fundamentally a characteristic of the judiciary as an institution. It requires that the judiciary should be structurally separate from the parties, and from other public and private institutions, particularly the government. However, ‘judicial independence’ is not an absolute nor an objective quality but a matter of degree and judgment. It does not mean, for example, the total isolation of judges from other public institutions including the executive. This would be neither possible nor desirable because the administration of justice, as with the exercise of all other types of public power in a democracy, must be publicly accountable, not least because it involves the spending of public funds.

The Strasbourg court has taken judicial independence to include, in particular, the following four elements. First, judges must be appointed in a manner which guarantees they can discharge their functions without interference. However, the European Court of Human Rights has no objection to judges on national courts being appointed, either directly by the government, or by the legislature, provided once appointed, there is no attempt to influence how they adjudicate. Indeed the 47 judges on the European Court of Human Rights itself are chosen by the Parliamentary Assembly of the Council of Europe (albeit a consultative rather than a legislative body) from the lists of three candidates presented by the governments of each of the 47 member states. Although each appointee is the nominee of a particular state, once appointed they are expected to act independently and not as a representative of that state. Judges nominated by a specific state are, nevertheless, included on the 7 or 17 member panels which adjudicate individual complaints that the Convention has been violated by
The lack of the appearance of independence was the main reason why the Supreme Court of the United Kingdom, which began to operate in October 2009, was established by the Constitutional Reform Act 2005. Hitherto, the UK’s highest court, the Judicial Committee of the House of Lords, was formally a committee of the upper chamber of the legislature which sat and delivered its judgments in the same building. In modern times nobody seriously suggested that the Judicial Committee of the House of Lords was under the control of the upper chamber of the legislature, nor that otherwise it lacked independence. But, as a result of the consistently expressed view of the European Court of Human Rights in a series of cases against other states, the government of the UK thought it necessary for the sake of the appearance of independence, physically to remove these judges from the Palace of
Westminster where the House of Lords is accommodated. They now sit as a Supreme Court in their own building adjacent to Parliament.

Fourth, the Strasbourg court is very committed to the separation of powers doctrine and regards the involvement of judges in the drafting of legislation before it is passed, as a breach of judicial independence. However, the Court accepts that judges may legitimately refer legislation back to the legislature for revision once it has been passed, particularly when its constitutionality has been successfully challenged.

**Impartiality**

Judicial ‘independence’ then concerns the character of the judiciary and the courts as institutions. Judicial ‘impartiality’, on the other hand, concerns the character of judicial proceedings. They must, in other words, be conducted in a manner which avoids the risk of actual personal judicial bias, and/or the appearance of personal judicial bias, towards either party which could prejudice the trial process and/or the verdict. However, unlike independence, ‘impartiality’ is an absolute standard. Total impartiality is required. Being ‘more or less impartial’ is not enough.

The relationship between judicial independence and impartiality can, therefore, be described as follows. A tribunal which is not structurally independent is unlikely to be impartial. But, even a fully independent tribunal may not be impartial for other contingent reasons. For example, by chance a judge’s personal interests may happen to coincide with the subject matter of the litigation over which he or she is expected to preside. Or, also by chance, it may turn out that the judge has a personal connection with one of the parties. All legal processes which respect the right to fair trial will require

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- Steven Greer
(at p. 103)
these contingencies to be disclosed where they arise, and will permit trials to proceed only if the judge in question gives adequate assurances that their impartiality will not be affected, or, better still, before a different judge. Problems can, however, arise about the degree of personal connection with the issues or parties in the trial.

Let me give a British, rather than a Strasbourg, case as an example. A decade or so ago a decision of the Judicial Committee of the House of Lords (then the UK’s highest court) was set aside because a member of the panel, Lord Hoffman, had failed to declare that his wife worked as a secretary for Amnesty International. The case concerned whether the former Chilean military dictator Augusto Pinochet was immune from prosecution in the UK for alleged crimes against humanity committed in Chile, and Amnesty International was one of the parties to the litigation. Although Lord Hoffman was not himself personally connected with Amnesty International, there was a risk, albeit a remote one, that he might have been subtly influenced by his wife’s connection. But, perhaps more importantly, his wife’s involvement with Amnesty International created the appearance of a lack of impartiality even if Lord Hoffman had, nevertheless, not been influenced by it. The best solution, therefore, was to set the decision aside and to conduct a rehearing.

3. Conclusion

I would like to finish by drawing the following three conclusions. First, the key to the effectiveness, legitimacy and legality of any court in a modern democracy lies fundamentally in its compliance with the international human right to fair trial. This requires that everyone’s rights and obligations (including criminal charges) should be determined by independent and impartial tribunals established by law, in fair and (mostly) public hearings within a reasonable time. Second, although this right is found in the International Covenant on Civil and Political Rights, to which Nepal is a party, I have suggested that Nepal and other non-European states can learn a great deal about what this means from the rich jurisprudence of the European Court of Human Rights on Article 6 of the European Convention on Human Rights. Third, a key characteristic of this case law is that it derives a range of secondary principles from the primary principles stated in the text of Article 6(1). Yet the Court, correctly in my view, refrains from seeking to prescribe precise mechanisms of implementation, on the assumption that member states can legitimately comply with these principles in a range of equally acceptable ways.
Constitutional Review in Nepal: Principles and Compromises

Jie Cheng

The significance of constitutional review has been recognized worldwide, especially after WW II, after the tragedy in Germany under the Weimar Constitution. A good constitution without a proper institutional entrenchment will turn into a disaster by serving as a tool for dictatorship, manipulation of government powers, and violation of human rights under the name of peoples’ will.

The constitution-making process in Nepal is a very encouraging event for constitutional development in Asia and may create a new model for the rest of the world. As the youngest republic, there is a consensus among various political players on certain values, such as democracy, rule of law, secularism, inclusiveness, equality and other basic rights.

This is an important step. However, there is an old Chinese saying which states that “One who is on a 100 mile journey shall take 90 miles as just half”. Therefore, we can say that a constitution with good values and provisions has already gone through 90 miles of the march, while the remaining 10 miles are probably most important to complete the journey. Failure of the last 10 miles results in the failure of 90 percent of the earlier achievement as well.

Constitutional review is the final resort of constitution entrenchment. Proper institutions will ensure that the journey to democracy and liberty is safe and sound.
In this respect, China has many lessons other than experience to address this issue. On one hand, failure to create an independent judiciary and a workable constitutional review system has outshone economic success and created social instability and potential social confrontation. On the other hand, because of the dynamic experiments in various regions in China, it has been proved that even in a non-western culture society, it is possible to have independent judiciary and a workable constitutional review system.

I. Different models of constitutional review and question of accommodation

As addressed by various observers, there are many constitution models and constitutional review models. These models reflect different theories of political thought and constitutional practice.

As early as in 1989, Professor Mauro Cappelleti categorized constitutional review systems into two basic groups: centralized and decentralized models, also known as American and European models respectively. Over time, other new experiments have developed out of these two major models. More and more comprehensive constitutional review models have come to our sight. Here, I have tried to categorize the models into four groups to reflect the new development and different principles underlying each model.

1. Decentralized judicial review model and the principle of rule of law

First of all, the earliest practice of judicial review is represented by the United States, where rule-of-law is firmly believed by the Supreme Court as well as the common people. From the very first case, Marbury v. Madison 1803, the Court made it clear that the Constitution is the highest law and should prevail if it is in conflict with other laws. Secondly, the Constitution is regarded as law and the courts as having the power to interpret laws. As a result, the courts have the authority to interpret laws, including constitutional law and to decide whether they are in conflict.

However, this view that regards the constitution as law is not sufficient for many other jurisdictions, including some countries with a long history of rule-of-law. On one hand, the constitution is not only law, but also a political document. On the other hand, as the supreme law, a supreme authority is needed to interpret its meaning. As a result, the centralized judicial review model prevails in some civil law jurisprudence like
Germany, Italy, and has gradually expanded to other countries like Korea with similar traditions.

2. Centralized judicial review model and principle of constitutionalism

The principle of constitutionalism is emphasized here because some of the pioneers that adopted this model had a disastrous history of human rights violations, even though rule-of-law was well rooted in the society. The formalist application of rule-of-law created opportunities for tyrant-like dictators to ‘enforce’ laws that ignore human rights and basic values like democracy and freedom of expression, sometimes over a seemingly democratic process.

The principle of constitutionalism is a combination of democracy, rule of law and human rights entrenchment. As a new principle, a new type of authority was created to review the constitutionality of laws as well as some government actions with constitutional significance, especially political parties and election issues.

3. Centralized non-judicial review body and principle of parliamentary sovereignty

The third type is represented by the Council of Constitution in France, where the Council is composed of politicians and judges. The Council reviews (at least before 2008) only the constitutionality of laws before they are formally promulgated. By doing so, the supremacy of the parliament is ensured. At the same time, an independent body intervenes in the law-making process to provide a second check on the bills passed by the legislature.

4. Comprehensive review system and principle of parliamentary sovereignty

There are different reasons for this comprehensive review system. But most of the endorsers have considered the presence of a strong tradition of principle of Parliamentary Sovereignty or popular sovereignty in a state as being important. Finland seems to provide an example of how the Constitutional Committee and the courts work together as constitutional review bodies. In some other countries, it could also be a
combination of ordinary court and constitutional law court, like in Portugal.

II. Principle and compromises
As a social contract, a constitution tends to have a nature of compromise. America provides some rich references of how the first written constitution in the world was made as a Great Concession. Recent studies of newly made constitutional laws, like Poland and South Africa also represent some aspects of compromise between the conservatives and the liberals, the old regime and the new institutions.

On the other hand, compromise should not be made without principles. A consensus achieved through concession and compromise by sacrificing some of the divided issues, makes it possible to nail down a structure of government with the principle of democracy and rule-of-law. This way, some of the difficult issues can be left for later amendments through continuous discourses under the constitutional law.

1. Political issues and limits of rule-of-law are the fundamental reasons for compromise
Compromises are made to accommodate the political needs and recognize the limits of the courts. For historical or practical reasons, compromises are made between the old and the new regime, the dominant class and the revolutionary class, and between the conservatives, liberals and radicals. For example, a compromise was made to avoid devastating social divide in the States after the American War of Independence. In some other countries like Poland and South Africa, compromises were made to end social confrontation and prepare for a new start.

Also, the constitutional review mechanism tends to emphasize judicial power under the principle of rule-of-law. However, the courts may hesitate to deal with political issues that are often the topics of constitutional review. Consequently, a non-judicial constitutional review body might be an alternative option as a compromising measure.

2. Separation of powers is the legal reason for compromise
Among other things, the constitutional review mechanism itself may also become a target for debates and compromises. This is particularly so
because the judiciary is not taken as the proper review body due to different understandings of separation of powers.

In France, for example, Sieyes proposed a Grand Jury as early as in 1793 to protect the citizens against the oppression of the legislative and the executive, which was quite a judicial review body. However, it was not until the Fifth Republic of 1958 that the Council of Constitution was created with a semi-judicial nature. One of the major oppositions of judicial review is that the judiciary shall not interfere with the law-making process as a principle of separation of powers. Instead, according to the principle of Parliamentary Sovereignty, the congressional body is supposed to undertake this ‘obligation’.

3. Needs of interest groups are the realistic concern for compromise

Different interest groups play important roles in the constitution-making process. They have an impact on the form of government, the qualification of the candidates for public services, and the relationship between the government and the citizens. They also have different preferences over judicial review or political control of the constitutionality of laws. This is most demonstrated in the selection of members of constitutional courts, if any. Whether or not the judges should be solely selected from the legal profession is often the major dispute among political parties and interest groups. To compromise, some

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(at p. 125)
recently established constitutional courts may have a combination of lawyers, politicians and people with other qualifications like in Thailand.

4. **The principle is to create a sustainable constitution that has the potential to continue progressive reforms on the basis of certain values**

Although the above mentioned reasons lead to different forms of constitutional review mechanisms, a compromise has to be made with principles. Otherwise, all the concessions make no sense if the constitution is no longer enforceable. In this sense, the creation of a constitutional law as the platform for further deliberation among various interest groups is very important. Even if the constitutional review authority is not agreed upon at the beginning, the constitution itself will sustain as long as different parties can still sit and talk after the constitution-making process. A better constitutional review method that is acceptable to every party will come about sooner or later.

III. Some observations on the constitutional review authority in the draft

Based on the generalizations of constitutional review models and the underlying thoughts behind them, it is noteworthy that the Draft provided by the Constituent Assembly of Nepal is very unique and needs further examination.

First of all, based on the Concept Paper by the Committee on Judicial System of the Constituent Assembly, the Supreme Court will be the interpreter of the constitution and the review body.

According to Topic 5(3) of the Draft, the Federal Supreme Court shall be a Court of Record. The interpretation of the constitution and law or precedent produced in course of the interpretation of law shall be binding to the government of Nepal, provincial governments and other courts and judicial institutions. It may initiate proceedings and impose penalties in accordance with the law in case judicial proceedings are obstructed and its orders are not abided.

Topic 10 (2) also provides that “Except otherwise provided for in this Constitution, the Federal Supreme Court shall have the jurisdiction to hear original cases as follows:

(a) Disputes between the centre and provinces,
(b) Disputes between the provinces,
(c) Disputes between the Constitutional Bodies
(d) Disputes related to national security, currency, and foreign affairs.
All these seem to vest the constitutional review power to the Federal Supreme Court.

However, there is a limit to the above review. According to Topic 5 (4) of the Draft, except the position and rights concerning persons of national importance, and on the matters directly related to politics and contradictions between the constitution and laws, the Federal Supreme Court shall have power to interpret the federal laws and provincial laws. By “person of national importance”, it means “the head of the state or the executive head or any position elected by the legislature”. This will exclude not only the chief executive but also many of the major government posts that are elected by the legislature from the ambit of the power of judicial review.

Also, lower level courts are not expected to interpret constitutional laws either. In the Draft, neither provincial high courts nor local district courts are authorized to review constitutional issues. This means the review model in the new Republic is not a simple decentralized judicial review like in the United States of America.

On the other hand, the Judiciary is not the sole review body in the Draft. As a matter of fact, the Federal Legislature Special Judicial Committee has the power to interpret the constitution and federal laws and the matters relating to the positions of persons of national importance and matters directly concerning politics. (Topic 29)

According to Topic 29, there shall be a Special Judicial Committee in the Federal Legislature with the following authority:

(a) Subject to this Constitution, the federal legislature Special Judicial Committee shall, in the case of contradiction, have power to interpret the constitution and federal laws and the matters relating to the positions of persons of national importance and matters directly concerning politics.

This statement is not different from authorizing the Special Judicial Committee the final authority to interpret the Constitution and Federal Laws, including those provisions that even the Federal Supreme Courts shall not construe.
IV. Reflections regarding the current design

The picture of constitutional review in Nepal is therefore, not as clear as it seems initially. At first sight, it is a centralized judicial review model. However, with the Special Judicial Committee, the role of the Federal Supreme Court is limited to an extent that may paralyze its role as a constitutional reviewer. Below are the reasons for the confusion:

1. Without a full authority of interpretation, the judicial authority may become a lame duck and will have to concede to parliamentary sovereignty as well as the chief executive in this sense.

   As the federal Supreme Court has no authority to adjudicate cases regarding persons of national importance, the Court will have to take for granted or ignore the petitions to correct any action taken by the chief executive or any other important decisions made by politicians holding a post elected by the parliament.

2. Without a full authority of interpretation, the Supreme Court’s jurisdiction to hear cases between the constitutional bodies and between the centre and the provinces will make little sense.

   From the judicial practices of many other jurisdictions, cases or disputes between the constitutional bodies and between the centre and the provinces will inevitably have an impact on the positions of national importance. Or it could be easily interpreted as related to those people or these kinds of issues.

3. Legitimacy of the Special Judicial Committee to review constitutionality of federal laws is not sufficient given the fact that the members are elected by the legislature and that the rights and duties of the committee will also be created by law. (Topic 29(4)).

   Firstly, the committee is not directly elected by the people or by any special electoral procedures that would inherently grant more respect and authority to members. Secondly, from the experiences of many other countries, it is almost not workable for a subordinate committee to review the constitutionality of the whole body of the legislature. In fact, the nature of the committee’s role seems to be to balance the power of the judiciary rather than to supervise the legislature.
V. Some further questions regarding the current review system

It is noteworthy that the judiciary does not have to be the review body for either theoretical concerns or practical concerns. For example, the French do not have a judicial review for constitutionality because during the revolution, the judges were conservative and thus lost the confidence of the people. It is also the case in many other countries where parliamentary sovereignty is taken as the foundation of constitutional law. However, a constitutional review body has to have sufficient authority and competence in order to enforce the constitutional law and to entrench the rights of the people. In this sense, the current design could be confusing in the following aspects:

1. If the Special Judicial Committee is to interpret the constitution, especially when it comes to political issues, what will be the proceeding? Will the Special Committee work like a judicial body with a court proceeding?

   If the committee is to interpret the constitution, or if the committee is to function as the final interpreter of the constitution, it will become the Court of Final Appeals in Nepal. If that is the aim of the constitution, it means that separation of powers in Nepal is abandoned and is replaced with a full version of the Westminster type of legislature.

2. Which authority is to tell whether or not a specific case is related to “Positions of the Persons of National Importance and matters directly concerning politics”? In some other jurisdiction, this has been a controversial question itself. In case of China, the Central Government and Court of Final Appeals of Hong Kong once had a different understanding of what fall into ‘autonomous issues’ ‘and central-local related issues’. It almost created a constitutional crisis for that reason.

   In 1999 in a right to abode case, the Court of Final Appeals of Hong Kong decided a case on the basis that whether or not a person has the right to reside in Hong Kong is purely an autonomous issue. Afterwards, the decision was addressed by the Central Government of China, which believed that right to abode of mainlanders in Hong Kong is an issue of central-local relationship nature. In a later case, the CFA conceded by reversing the first case.

3. As a federal republic, will there be provincial level constitutional law? And correspondingly, what kind of role should the local courts as well as the legislature play in this case?

   At least from the Draft, neither the provincial courts nor the districts courts are vested with powers to review the constitutionality of
provincial laws. On the contrary, according to Topic 29, the Special Judicial Committee is to interpret the provincial law if a conflict is seen between the federal and the provincial law. One possibility is that there will be no provincial constitutions in the new Republic as in some other federations. However, this may also undermine the principle of federation with a very powerful and centralized legislature at the federal level.

VI. Final comments and some preliminary recommendations

It is not fair to judge a new constitutional review model without allowing its practice, especially when judicial review is not necessarily the only option for every country with different legal and political traditions. However, experiments in many other countries that have tried different models of constitutional review provide enough lessons to refuse a constitutional review mechanism dominated by the legislature.

And as a second thought for a constitutional review system with or without the involvement of the legislative body, the following deserve some consideration:

First of all, either for historical or theoretical reasons, the courts are not taken as the best reviewer of the constitutionality of laws and government decisions. Therefore, a more independent body should be created. This would be more feasible and more legitimate than to authorize part of the legislature to work as a reviewer.

Secondly, for a comprehensive or fusion type of constitutional review system, more procedural rules should be articulated to avoid conflicts among review bodies.

Finally, whether or not a review system will work needs time to be tested. Many of the constitutional courts, including the U.S. Supreme Court did not have its first case until several dozen years (1787-1803) or even more in France (1958-1971). But a review body, especially the judiciary with a common law tradition may also create history by judicial activism practice.

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Constitution of Finland and Prospects of the Rule of Law: Implications for Nepal

Pekka Hallberg

It is a great honour indeed to visit beautiful Nepal, a country which for decades has had the most cordial of relations with Finland, the considerable distance notwithstanding. The bonds between Nepal and Finland are strong. Both Nepal and Finland joined the United Nations in 1955, diplomatic relations were established already in 1974, and our countries have been engaged in development co-operation for more than 25 years. Also our cultural relations are extensive.

Nepal, in the Himalayas between China and India, is a fabled place for travellers. At the same time, Nepal is one of the most open economies in the world and, like Finland, she depends on international trade. We thus share the same concerns about the global economic crisis. Our differences, again, are the much larger population of Nepal - 28 million compared to five million - as well as Nepal’s federal structure and her multitude of cultures and ethnic groups.

It is a great pleasure to follow the Nepali constitutional process, which I believe has begun under auspicious circumstances. I am quite certain that the main task of the Constituent Assembly, under the Interim Constitution of 2007 - to formulate a new Constitution by the Nepali people themselves - will be brought to a conclusion.

There are certain essential elements in the development of the rule of law and the framing of a new constitution. These are the greatest possible
openness of participation and the achievement of a sufficient degree of concord. Also in this respect, I have great faith in the successfulness of the Nepali process, aim as it does to reach the broadest possible inclusiveness in the various parts of the country.

There are similarities to Finland, in that also we have stressed in the past few years that the constitution is not merely an instrument governing state institutions. As a matter of fact, it is the very foundation of society, the guarantee of public participation and fundamental rights. Indeed, we do have a lot to learn from you regarding the openness of the legislative process.

There are, after all, many significant similarities between our two countries. Finland gained her independence and constructed her democratic constitution between the East and the West and as the small neighbour of a very large country.

Introduction
The current Finnish Constitution, of the year 2000, is the internationally modern constitution of a democratic and parliamentary welfare state. As a whole, it functions quite well. The Constitution contains basic provisions on the exercise of legislative, executive and judicial powers, subject to the principle of separation of these three branches of powers. The rule of law and the independence of the judiciary are very essential elements in the Finnish legal thinking.

In addition to fundamental civil and political rights and liberties, it also lays down certain economic, social, and cultural rights. One innovation is the primacy of the Constitution, that is, the review of the constitutionality of legislation in the context of actual cases. This means that a court cannot apply an Act if it is in evident conflict with the Constitution.

Political and historical background
In any country, the basis of the system of government lies on its social structure and on the political experiences of the nation. The Nordic concepts of self-government and rule of law as an ideal form a historical basis that continues to have an influence even today. As a matter of fact, the roots of Finnish political organisation can be traced back to prehistory and to the rising local communities, the self-governing villages. In the Middle Age people began to be represented also at the regional and the national level.
The principle that the law is binding not only on the people, but also on the authorities, from the lowest to the highest, was emphasised towards the end of Finland’s period of autonomy. During that time, the Finns fought for their own constitution and their own legal order against external Russian interference.

For over a century, between 1809 and 1917, Finland was an autonomous Grand Duchy in the Russian Empire. The developments of that period were not without their paradoxes, even though the construction of a state and a nation did proceed in a significant manner. Upon independence, Finland enacted her first own mixed constitution, which entered into force in 1919.

**The mixed Constitution of 1919**

The Constitution was drafted and adopted under conditions of heavy ideological and hegemonic crosswinds among the national community. A power structure with the ruler at the apex had been solidly established during the preceding centuries. But from Europe there was influx of democratic thought, to be concretised in a republican constitution and a parliamentary system of government, with the Ministers being politically responsible to the legislature.

To simplify matters greatly, the result was a constitution where many progressive structural elements were combined with old-fashioned ones. The basis of the Constitution was the principle of popular sovereignty as framed in section 2: “Sovereign power in Finland shall belong to the people, represented by Parliament convened in session.” Finland has a system of proportional representation, which means that it is possible also for minor factions to be heard on the political arena.

For the purposes of solidity of government, a parallel, presidential focus of authority was also created, with important functions of government and regulation. The President had a broad authority to issue legislative decrees and to ratify legislation, thus wielding a suspensive veto at his, or her, own discretion. Furthermore, the President had broad competence in official appointments, was the commander-in-chief of the armed forces, and had the right to issue pardons and grant exemptions.

In decision-making, however, the President had close ties with the government. Admittedly, both legal and political practice had throughout the decades recognised the competence of the President to decide against the position and the recommendations of the ministers. But nevertheless, the
government came to exercise its own broad competencies in separate sessions, out of bounds for the President.

Accordingly, the search for a working balance between the presidential and the parliamentary focus of authority emerged as the main problem of constitutional practice.

From a mixed Constitution to parliamentarism in 1999

After three decades of constitutional debate and many small reforms and preparatory works, the Parliament passed the new Constitution in 1999 practically unanimously. The count in the final vote was 175 for and 2 against. The great shift of political culture in Finland was evident in the fact that the opposing party ideologies did not collide in the course of this process.

The first three sections of the Constitution of 2000 define the political system of Finland as a republican parliamentary democracy. The principles of popular sovereignty and representative government, the principle of rule of law and the status of the highest state organs and their general fields of competence have been defined in accordance with the regular functional three-way separation of powers. (Annex 1)

There is a new feature in the Constitution, in the emphasis given in the first two sections on the guarantees of the freedoms and rights of the individual and the right of the individual to participate in and influence public affairs. The rights and liberties are made more concrete and specific in chapter 2. (Annex 2)

The Parliament

The Finnish Parliament is characterised by its unicameral structure and by its function as a multi-party forum for fundamental national decisions and for the oversight of the realisation of those decisions. Party pluralism is ensured by the electoral method, with proportional representation and large electoral districts.

The main task of the parliament is to exercise the legislative powers. One of the important constitutional changes also was for strengthening the parliamentary aspect. This was the move of the focus away from the President and towards the parliament in the formation of the government. It is now the parliament that elects the Prime Minister. The role of the President is limited to the formal appointment of the Prime Minister and, on the
proposal of the latter, the other ministers. The new government must submit
its programme to the Parliament immediately after being appointed. This
procedure opens the doors for broader public debate on the policies to be
adopted.

The parliament has no role in appointing or dismissing judges. Nor has it
competence to give recommendations how an Act should be interpreted.
Likewise, the parliament cannot intervene in court proceedings in a single
case, but can steer legal development by amending laws.

The President

There was no clear foresight of what the status and the role of the President
would become. Thus, the objectives were limited to a general restriction of
the powers of the President and the binding of the exercise of the remaining
powers more tightly to the co-operation of the government.

The submission of bills, proposals for new legislation, state budgets or
international agreements to the parliament is a decision made by the
President in a plenary session of the government. In effect, however, the
President cannot disregard the preparatory position of the government. The
President continues to confirm the adopted acts of parliament and use a veto
in this context; in this event, however, the legislative proposal is without
delay returned to the Parliament, whose position will prevail.

The new Constitution, dealing at a general level with competence in the
area of foreign policy issues, is a compromise reached in party negotiations,
combining the presidential tradition and the calls for more parliamentarism.
The Constitution binds the President operatively to the government. A lot of
latitude remains, and we have seen some problems in the introduction of
European affairs into the political system at the time of Finnish accession to
the European Union. The competence of the government in EU affairs has
been firmly set in the new Constitution. Nowadays, the conclusion is that the
Prime Minister represents Finland in the meetings of the European Council.

Prospects of parliamentarism

In the Constitution of Finland now in force, the parliamentary aspect of
presidential decision-making has been reinforced in two ways. On one hand,
the rule that the decisions of the President must be based on the
government’s proposal is now virtually without exceptions. On the other
hand, it has been made more difficult for the President to diverge from that
proposal. Thus, in the issue of legislative proposals or budget proposals, it is
now the position of the government that ultimately prevails. Also in other respects, it is a rare event that the President makes a decision that is contrary to the position of the government. Hence, overall, presidential decision-making in Finland already has a pronounced parliamentary aspect. *(Annex 3)*

In the context of the current Finnish debate on the possible need for constitutional reform, I have presented a position where the President’s present duties would be retained, but where the procedures would be further developed. This would mean that in the event of disagreement, the President would ultimately be bound to the position of the government, with its requirement of parliamentary confidence. This would constitute the main rule. Derogations would be possible by way of specific legislation.

A reform along these lines would not compromise the status of the President as a role model. Also in other respects, the participation of the President in decision-making has a balancing effect, as well. In my opinion, this would at least in Finland be a better solution than one where the President is stripped of his or her duties and these transferred to the Prime Minister. There is a popular demand for an embodiment of the national character, but less so for one with far-ranging actual powers. Even though governments normally sit for a period shorter than the President’s term in office, they remain fully responsible for the preparation of decisions and for their execution.

It is essential, for the whole of the decision-making machinery, that the constitution direct the highest organs of state to clearer co-operation and ensure that major policy issues would be approached in parallel, whether national or international in character. I dare say that the harmonious coexistence of the President and the government will in the future be the norm in Finnish politics.

**The government**

The government, or the Council of Ministers, has a straightforward composition. There are one Prime Minister and at most 17 ministers. There being only 13 ministries, the most important of these will have two Ministers. The government exercises general authority in the broad field of state administration. In other words, it is competent to deal with all matters that have not been specifically reserved to the President or another public authority.

The parliament decides on the initiation on proceedings for the determination of the legal liability of a minister for unlawful conduct in
office. Charges can be brought by a simple majority vote taken on the preliminary position of the Constitutional Law Committee. There is a special court to hear such charges and charges against the President. This court, the High Court of Impeachment, is convened only as needed.

**Courts of law**

Judicial power is exercised by independent courts of law, with the Supreme Court and the Supreme Administrative Court as the highest instances. *(Annex 4)* According to the Constitution, judges are nominated by the President of the Republic. Judges (Justices) of the supreme courts are nominated upon the proposal of these courts. There is also an independent Judicial Appointment Board, established by an Act, which prepares and makes a proposal on an appointment to a permanent post of other judges. Majority of the Board’s members represents the judiciary.

The right of judges to remain in office is guaranteed in Section 103 of the Constitution. A judge shall not be suspended from office, except by a judgement of a court of law. In addition, a judge can not be transferred to another office without his or her consent, except where the transfer is a result of a reorganisation of the judiciary.

The legal system includes everyone’s right to have a decision affecting his or her rights and duties reviewed by a court. In Finland, the general right of appeal and guarantees of a fair trial are guaranteed by law. The traditional right to appeal against decisions of the authorities was confirmed by law in 1950. The provisions relating to administrative court proceedings are given in the Administrative Judicial Procedure Act of 1996.

**Control of constitutionality and legality**

There is a novel emphasis on the primacy of the Constitution (Section 106) in real application situations. The Constitution is a part of the law applied by the courts, and the courts must give primacy to the provision in the Constitution, if the application of a provision in a regular Act would in the case at hand be in evident conflict with it. This is an important change from the earlier principle. Namely, the courts were deemed not to have the right to refrain from applying an Act of Parliament merely because they considered it to be in conflict with the Constitution. *(Annex 5)*

Nevertheless, the aim of the new provision is not to give the courts carte blanche to assess or generally to look into the constitutionality of legislation. The primary preventive control of constitutionality, in the future as in the
past, is the advance evaluation done by the Constitutional Law Committee during the progress of the bill through the Parliament.

This control, internationally quite exceptional, consists of the Committee issuing statements on the constitutionality of the bills and other matters submitted to it, as well as on their relation to international human rights treaties. The system has worked in practice, but any loopholes left in the control have now been plugged by the introduction of the new provisions.

There are many states, especially federal ones, which operate specific Constitutional Courts. Even though this solution offers a clear mechanism for the control of the constitutionality of legislation in actual cases, it may involve also certain problems. Such problems include the disengagement of constitutional issues from all other forms of judicial decision-making, delays in the issue of rulings, and controversies regarding the composition of the Constitutional Court. For Finland, it has proven to be a well working solution to emphasise the control of constitutionality already at the legislative stage and to provide the courts with the possibility to take action in relation to clear breaches of constitutionality in concrete cases in accordance with section 106 of the Constitution. Consequently, the parliament or its Committees have no competence to give recommendations on the interpretation of laws or to intervene in a single judicial case after the Acts have entered into force.

**Prospects of the rule of law**

Although the Constitution has been concretely formulated and its importance increased, the main thing, nevertheless, is to continually develop legislation, good governance and access to justice in practice.

The rule of law is like a house built on solid ground. As a house, it has four corners: (i) The principle of legality in the exercise of power, (ii) the balanced separation of powers between state organs, (iii) the implementation of human rights and, more generally, of rights and responsibilities, and (iv) the functionality of the house, that is, transparency, clear decisions and no delays. We in the West still have much to do in respect of these issues. *(Annex 6)*

The four corners need to be supported by mutual trust, that is, social capital. A solid structure promotes economic growth and welfare. Also the World Bank has deemed the rule of law to be the greatest competitive advantage. In some administrative sectors, such as environmental law, Finland has come up with advanced solutions.
Clear legislation and legislative policy crucial *(Annex 7)*

Legislation plays a key role in the development of the rule of law. As legislation develops, the rule of law gains substance. In this regard the rule of law is a dynamic principle. Therefore, law should be seen as a means, not as the outcome.

However, the law of today is not unambiguous as building material. Legislation has become more fragmented and somewhat more indirect. The problems of legislation lie in its distance to reality. In this connection, I would like to note that one of the greatest problems in legislative policy today seems to be that laws are too often prepared short-sightedly and with reference to individual administrative sectors only.

In several fields, the number of supranational principles reinforcing good practices is clearly increasing. This phenomenon could be called global norm production, and its results are often called ‘soft law’. Different standards have also been growing in importance. Norms are more easily accepted internationally if they are not legally binding.

Development of the separation of powers *(Annex 8)*

Separation of powers is the second cornerstone of the rule of law. The doctrine of the separation of powers is usually associated with Montesquieu’s writings and the Constitutional Convention of Philadelphia. However, there had been practical applications of the separation of powers already before that time.

The independence of the courts is essential to the development of the rule of law. However, I would like to emphasise that independence does not mean isolation but rather dependence on general social development.

In connection with the balanced separation of powers, we should not forget the floors of the house, that is, the local level and the immediate surroundings, the day-to-day operating environment of democracy.

Importance of human rights obligations *(Annex 9)*

In the process of globalisation, international human rights obligations play an important role. However, international human rights obligations are not a sufficient measure for fundamental rights. If there are financial and realistic
possibilities, further steps should be taken to safeguard everyone’s rights and obligations. On the other hand, it is important that fundamental rights should be realistic. In Finland we have tried to fulfill our human rights obligations.

Another point is that rights and obligations should be viewed as a single entity and in accordance with modern fundamental rights law in order to pursue a balance between conflicting rights. In connection with news media, for instance, it is sometimes difficult to strike a balance between freedom of expression and protection of privacy. As a political right, freedom of expression is naturally a social cornerstone, and it should not be restricted unless there are extremely well-founded reasons for it.

**Functionality of the rule-of-law house (Annex 10)**

The fourth corner of the house is the functionality of the system: Acts should be comprehensible, bureaucracy should decrease, decisions should be taken promptly, and access to justice should be simple. In some fields, unfortunately, costs are still too high and proceedings too lengthy.

Many find my house metaphor too simplistic. In my opinion, however, this four-corner examination lays a firm and sound foundation for the observation of legal development - it creates a kind of a rule-of-law indicator. *(Annex 11)*

To progress, we must notice the need to shore up the corners of the house with interlocking support structures. This highlights the importance of social capital - a field studied by political scientists and sociologists. The rule of law is considered in a social context. An even more important step forward is to consider the question of the connection between the legal system and a broader social system.

**Conclusions**

I have tried to make a few remarks about the Finnish Constitution, as well as about certain aspects of the development of the rule of law, which I suspect may be of interest also in the context of the Nepali constitutional process. When examining the Finnish constitutional tradition, the following trends can be seen:

1) The tension between the governmental powers and parliamentarism has loosened when the Constitution has been amended. The role of the parliament and the government, which has to enjoy the confidence of the Parliament, has been strengthened.
2) The parliament has a decisive role when government is appointed and also in its actual functioning.

3) The powers of the President have been diminished and the use of powers is bound to the opinion of the government.

4) The rule of law and separation of powers to legislative, governmental and judicial powers are followed. Parliament can interfere in the judiciary only by enacting laws, and judges are independent of other state institutions.

5) The Constitution has become closer to the people, as fundamental rights guaranteed in the Constitution have been applied all the more at the courts of law.

Annex 1 - Fundamental provisions

Section 1: The Constitution

Finland is a sovereign republic.

The constitution of Finland is established in this constitutional act. The constitution shall guarantee the inviolability of human dignity and the freedom and rights of the individual and promote justice in society.

Finland participates in international co-operation for the protection of peace and human rights and for the development of society.

Section 2: Democracy and the rule of law

The powers of the State in Finland are vested in the people, who are represented by the Parliament.

Democracy entails the right of the individual to participate in and influence the development of society and his or her living conditions.

The exercise of public powers shall be based on an Act. In all public activity, the law shall be strictly observed.

Section 3; Parliamentarism and the separation of powers

The legislative powers are exercised by the Parliament, which shall also decide on State finances.
The governmental powers are exercised by the President of the Republic and the Government, the members of which shall have the confidence of the Parliament.

The judicial powers are exercised by independent courts of law, with the Supreme Court and the Supreme Administrative Court as the highest instances.

Annex - 2 Basic rights and liberties (chapter 2, Sections 6-23)

6 Equality
7 The right to life, personal liberty and integrity
8 The principle of legality in criminal cases
9 Freedom of movement
10 The right to privacy
11 Freedom of religion and conscience
12 Freedom of expression and right of access to information
13 Freedom of assembly and freedom of association
14 Electoral and participatory rights
15 Protection of property
16 Educational rights
17 Right to one's language and culture
18 The right to work and the freedom to engage in commercial activity
19 The right to social security
20 Responsibility for the environment
21 Protection under the law
22 Protection of basic rights and liberties
23 Basic rights and liberties in situations of emergency

Annex 3

Section 57: Duties of the President
The President of the Republic carries out the duties stated in this Constitution or specifically stated in another Act.
Section 58 (1-2): Decisions of the President
The President of the Republic makes decisions in government on the basis of motions proposed by the government.

If the President does not make the decision in accordance with the motion proposed by the government, the matter is returned to the government for preparation. Thereafter, the decision to submit a government proposal to the parliament or to withdraw a government proposal from the parliament shall be made in accordance with the government’s new motion for a decision.

Annex 4: The Finnish court system

Annex 5

Section 106: Primacy of the Constitution
If, in a matter being tried by a court of law, the application of an Act would be in evident conflict with the Constitution, the court of law shall give primacy to the provision in the Constitution.
Section 107: Subordination of lower-level statutes
If a provision in a Decree or another statute of a lower level than an Act is in conflict with the Constitution or another Act, it shall not be applied by a court of law or by any other public authority.

Annex 6: Rule of law on the basis of four corners

“A house built on a solid ground”

The four corners are:
- the principle of legality
- the balanced separation of powers
- the fundamental and human rights
- the functionality of “the rule of law house”

Annex 7: Regulatory system quality and policy
Annex 8: Organs of the state- separation of powers

Annex 9: Status of the people
Annex 10: Functioning of the rule of law

Annex 11: Durability of the rule of law

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Towards a Suitable Federal Framework for Nepal

George R. M. Anderson

I first visited Nepal in February 2007. At that point the King was still in his palace and the ceasefire was shaky. The timing of the election was very uncertain and there was lack of consensus on such issues as the future of the monarchy, the official status of religion and federalism. When I came back in September 2008, there had already been an amazing shift: the country had resolved on becoming a republic; there had been a successful election and a broad coalition government was in place; there was a large consensus that Nepal would be a secular country, with no official religion; and there was also a consensus that the new Nepal was to be federal in form.

I returned last November and the mood was less optimistic, largely because it was felt that the Constituent Assembly was not making very much progress. At that stage, it had really produced very little. But now, here we are in January 2010 and we have several reports from the various committees, of the Constituent Assembly. So perhaps there is room for at least some guarded optimism that Nepal will soon have agreement on a new constitution.

The last stage in constitution-making is almost always the toughest. The easier issues have been dealt with and the hardest remain. Their resolution will inevitably involve some difficult negotiations and painful compromises. The result will not be fully satisfactory to anyone and there may be internal contradictions or at least tensions in the new arrangements. But the goal must be a compromise, consensus text. Getting to such a document cannot happen in a forum of 600 people, but must result from the key leaders actually taking
the lead, either by engaging in negotiations themselves or by being very close
to their chief negotiators. I think it is encouraging in that regard that some of
the key parties’ leaders have agreed to form a mechanism to try to resolve
some of these issues. In doing so, it’s very important not to lose sight of the
value of the deadline in May and to make every effort to respect it because if
it slips you may never get quite the same opportunities with the same
pressures.

Making a constitution is of course an incredible challenge but it’s also a
tremendous historical privilege. Not everybody gets to do this. This is
something one hopes is done only very periodically—a legacy from one
generation for many future generations. If the Constituent Assembly and
your leaders succeed in this, they may win historic recognition as the fathers
and mothers of the new Nepal. Success in this enterprise holds the prospect
of enduring peace, of a sustainable path to prosperity, and of giving the
people of Nepal a framework for democratic government which it certainly
deserves.

Suitable Federal Framework
I have been asked to address the issue of a suitable federal framework for
Nepal. Let me be clear at the outset that I do not have a precise proposal for
you because at the end of the day such a framework must reflect your own
discussions, desires and compromises. So I shall be more modest in my
ambitions and simply share some observations and reflections that I hope
might be of some use as you work towards a federal design.

There are some 25 federations in the world and the history of how they
were formed varies a good deal. Some emerged from former colonies or
separate units coming together to form a federal country—as in the US,
Switzerland and Australia. Others are the product of a devolutionary process
from a formerly unitary regime—as in Belgium, Spain, South Africa and
Ethiopia. There are a few cases which mix these two histories—as in India
and Canada.

In Nepal’s case, you are looking to devolve from a unitary regime
towards some kind of a federal unit. But what is quite distinctive about your
case is that you are committed to devolving into regions, but there is great
uncertainty about the number of new provinces, their boundaries, and even
their nature. In other countries which have devolved towards federalism, this
issue has not taken on the same dimensions as it has in Nepal. It was quite
clear what the basic new units were to be in Belgium—though the problem of
Brussels eventually forced a new kind of federalism with regions and cultural
communities existing for different purposes. Spain’s regions were well
established. The regions were also relatively clear in Italy and South Africa, as well as for most of Ethiopia. In all of these countries, the number and boundaries of the new states or provinces was not the central issue that it has become in Nepal.

Nepal’s challenge is also more difficult in that you have such a plurality of political parties. A lot of new constitutions written in recent years were written in an environment where one dominant political party was in a position to shape the new political regime. This was true of India with the Congress Party, of South Africa with the African National Congress, of Ethiopia with the EPDRF and in a number of other cases. However, some other countries have had to develop federal constitutions in environments of quite fragmented politics: Spain and Belgium in Europe; Iraq and Sudan after their conflicts. It can be done. Of course, in Nepal’s case, you have all the conflicts and tensions around the constitution being interlinked with the still unfinished business of the peace settlement and with the tensions over the current government of the country, where the largest party is now outside the governing coalition.

Thus Nepal’s lack of consensus on the new provinces, your deeply divided politics, and your unresolved issues of the peace agreement and the sharing of power all contribute to constitution-making in this country particularly difficult. This reinforces the need for creative leadership and for compromise.

Nepal has become committed to federalism without actually having a large consensus on what this means in practice. As a practical matter, a regime can be defined as federal if it meets some very simple criteria. There should be two orders of government: a central government and regional governments, each of which will be constitutionally defined and have some genuine autonomy, which means some defined powers and functions. There will be an arbiter of the constitution, which are usually the courts. But that’s about it for the essence of federalism. One of the striking things about federalism is its enormous variety. We have centralized and decentralized federations, and we have parliamentary and presidential ones. We have those with many units and those with very few. We have those of common law and civil law. Federalism is a very broad concept indeed and it has been adapted to very different ways to very different needs. This means that saying Nepal is to be federal does not take you very far. The devil, as always, is in the details.

However, even with the very basic elements I have defined for federalism, I would argue that the core of the federal idea brings together the concepts of the rule of law and the respect for diversity. There is something intrinsic to federalism about respect for pluralism, for multiple identities and
variety. After all, it is a system of government which says that all parts of the country need not be the same. Thus, the adoption of federalism in Nepal will actually represent a huge change from the historical Nepal, which did not reflect the diverse character of the country. Federalism offers the chance to reflect your diversity, while still permitting you to recognize your common values and aspirations as Nepalis. I have been struck by how strongly the concepts of pluralism and multiple identities are reflected in the work of the Constituent Assembly.

In designing a federal regime, a number of key decisions must be made. I shall address these briefly without going too far into detail. It is important to remember these big decisions, what we might call the architectural elements of your federal design, have relations to one another. Thus what you decide about the number and character of the constituent units, minority rights, the division of powers, fiscal arrangements, central political institutions and the legal regime are all interrelated to a greater or lesser extent.

On the number and character of constituent units, as I have already noted that you are in a unique situation, with this being such a central issue of your debate. If you look at federations around the world, we have federations of as few as 3 units and as many as 85. Very few units can be very problematic because if there are only two or three or four units it is very hard to maintain equilibrium within the system. And if there are many units then this tends to lead to a strong central government because the states are relatively weak compared to the central government. The discussions in Nepal seem to range between 6 provinces at the lower end and 16, 17 or 18 at the upper end. This range for a country of 27 million people would normally be quite manageable, but here in Nepal, where you have regions with a very weak presence of government, relatively few educated people to run bureaucracies and minimal local fiscal resources you may find that having relatively fewer provinces will be more affordable and practical.

Then there is the issue of the relative sizes of your new provinces. In Pakistan, for example, Punjab has over 55% of the population and thus is bigger than the other three provinces combined. Nigeria once had one state that was over half of the country. In both cases, this proved a source of disequilibrium. Nigeria eventually moved to break up its big states and to create 36 states which are all relatively similar in population. In Canada, Ontario has had just fewer than 40% of the population in a country of 10 provinces; the country has survived with this, but it has been a constant source of tension. So in addition to thinking about the number of provinces, Nepal needs to consider whether you are going to have one federal province which is much bigger than the rest. Some have suggested that all of the Terai be one province. If so, it could have about 50% of the population. I note that
the proposals of the various parties do not envisage this, but I would suggest that you would really need to think about the dynamics of such a structure should it be seriously advocated.

Perhaps the most difficult question regarding the creation of new provinces is the criteria for doing so. This issue of ethnic federalism is treated separately in this conference, but I would like to make a few observations. Many federations have some states or provinces which are linguistically or ethnically distinct. There is nothing wrong with that. But even in these federations, there are almost always some units that have a diverse character. Thus in Ethiopia, which embraced ethnic federalism, its very large state in the south is highly diverse. The geographic reality here in Nepal is that it will be very difficult to come up with a map of a reasonable number of provinces where all have a distinct ethnic, linguistic or caste character. In fact, the likelihood is that ethnically distinct provinces will be very few, and that even they will have significant diversity.

There have been experiences with creating ethnically or linguistically based federations. At the time of independence, India resisted the idea of linguistically based states. However, in the 1950s, it decided to redraw boundaries to create 14 linguistically based states. Over time, there has been pressure for ever more linguistically defined states and the number of Indian states has now doubled, to 28. These are very big units in India given the size of the country—in fact, some are several times larger than all of Nepal. Nigeria sought to break up its big tribal groups. It started with only 3 states. Now it has tried to create states with roughly equal population based on language and ethnicity. Many consider that they now have too many states, at 36, but their approach has created significant problems with minorities, to which I shall return. Ethiopia has also taken an approach to developing ethnically based states. However, in all three of these federations these linguistically or ethnically defined states frequently have significant minorities. And in some cases, it has proven impossible to define a state on the basis of a linguistic or ethnic majority. Certainly every new province in Nepal will have significant minorities and many will have no majority.

That brings me to the issue of minority rights. In Nepal, I suggest you will have a strong need to address the issue of minority rights not only at the national level, but also with the new provinces. It is one of the critical issues that you will confront. If you can persuade people that their rights will be respected no matter what province they live in, then this will make the process of map drawing for new provinces far less dramatic. By contrast, if you give the sense that the winner takes all, that whoever constitutes the majority in a province will be able to ride roughshod over the rights of the
minorities in those provinces, then you are going to have a very high stakes game in defining the boundaries of your provinces.

I think Nigeria provides an example of what not to do in this regard. In that country, they have the concept of “indigenes”, those who are native to a particular state. It is not strictly mono-ethnic in that in some states a number of ethnicities may qualify as indigene. However, those whose origins are deemed to lie outside the state do not qualify—even if their families have been in the state for several generations. These non-indigenes constitute a significant share of the population in many states and their numbers are growing because the population is becoming more mobile. Non-indigenes are second-class citizens: they cannot work in the state government, be teachers, or represent the state in the federal cabinet. Nigeria has done a great deal to promote a culture of diversity and tolerance, but this weakness in regard to the rights of non-indigenes is very serious and has given rise to violence as well as a good deal of discontent.

So the issue of minority rights is probably the most fundamental issue that you are going to confront in establishing a stable federal regime. Will all those Nepali citizens living in a new province have the same basic rights, wherever they may come from? Of course, there are practical reasons why some rights, notably language rights, cannot be the same for all people everywhere in the country, but I would encourage you even in this case to seek to be as accommodating as reasonably possible so that minorities feel they have been dealt with fairly.

You will also need to consider how constitutionally established minority rights will be protected and enforced and this will presumably require a significant role for the courts. I recognize that the work of the Constituent Assembly demonstrates a great deal of concern for minority rights—for example, with the large number of commissions that are proposed. My suggestion is that you might consider somewhat fewer commissions, but also consider making such commissions truly national, in that they would be mandated to address minority rights issues at both the national and provincial levels. This is likely to be far more coherent and effective than having a multiplicity of commissions at both the federal and provincial levels. If you adopted such a design, the provinces could be given a role in naming commissioners.

Let me turn now to the division of powers. In the older federations that were first being set up in the 18th and 19th centuries, life was much simpler when they designed their constitutions. In the Anglo-Saxon countries there was an attempt to distinguish very clearly between federal responsibilities and those of the states or provinces. Let’s call them dualistic federations. In these cases, a federal civil service was created to administer federal laws
while each state or province had its civil service to administer its laws. However, the experiences of federal governments in the 20th century has been that it is often hard to draw very clear lines between federal and provincial subjects on the basis of what is of national or local interest. Take education for example. In most federations, primary and secondary education is a provincial responsibility, while universities are a federal responsibility. But such hard and fast lines don’t fit with the reality that there can be a national interest in what is happening in schools and a provincial interest in universities. So how do you deal with that? A country such as Australia has a long list of concurrent powers, where both orders can make laws, but the state or provincial laws must not contradict the federal laws. This permits national framework legislation, within which state or provincial governments can still exercise some independence.

On balance, building concurrent powers into your constitution is probably preferable to creating very strong special federal powers. In some federations the federal government may be able to invoke a general supremacy or a doctrine of necessity or be able to use its spending through conditional grants to strongly influence how states or provinces act. Every federation needs some flexibility regarding how the real division of powers will evolve over time. In Nepal’s case, the use of concurrency is probably the best, first choice.

There is also the fundamental question as to which governments will administer which laws. As I mentioned, in the older Anglo-Saxon federations, each order of government administers its own laws, even in cases of concurrency. Thus in Canada, for example, agriculture is a concurrent jurisdiction, so we have offices of the federal department of agriculture across the country, often just down the street from the offices of the provincial departments of agriculture. The two must then sort out who does what. In continental federations such as Germany, Switzerland and Austria, the constitutions provide that many federal laws are actually to be run by provincial administrations. Thus the federal government leads in setting the legal framework in many policy areas, and the constituent units can supplement that with their own laws but they get a good part of their “federalism” through the flexibility they have in administering federal laws.

I suggest that Nepal, which has a limited history of devolved governance and a need to build administrative and political capacity in the regions, could learn quite a bit from these approaches to sharing power. It may be that the continental model of administrative federalism—which, by the way, has also been a feature of the Indian constitution—would suit you well in many areas of public policy.
On fiscal arrangements, money is power as we all know. In most federations the central government collects most of the money because they are more effective in running tax systems. There are few exceptions to that, but they are in rich countries such as Canada and Switzerland. In Nepal, we need only look at the current tax bases to realize that for the foreseeable future the federal government is going to dominate tax collection. The two biggest revenue sources will be border taxes and the value added tax, both of which are most effectively administered at the federal level. Moreover, some parts of the country have very limited fiscal capacity, so that provinces in those areas will necessarily depend heavily on funds collected by the federal government.

So the key fiscal issue is probably going to be more about how taxes are distributed after they are collected and less about who collects them. Federally collected revenues can be distributed through tax sharing arrangements or through federal transfers, which can be conditional or unconditional. In India, there is a strong mix of shared taxes and conditional transfers. There is also the question of equalization. I have already mentioned the tremendous variation amongst regions in their potential to raise taxes. At the same time, Nepal has been marked by very unequal government spending amongst the regions of the country, with the poorer regions having poorer government services. You cannot write all the details of a fiscal regime into a constitution because these arrangements inevitably evolve over time. So you need a way to make adjustments to your fiscal architecture. There is talk of having a finance commission. This has worked very well, particularly in India. By contrast, experiences in Pakistan and Nigeria have not been very successful and I think the difference has had much to do with the design of the different processes. The Indian approach has focused on having a few highly qualified and respected experts who are politically neutral constitute the finance commission. The equivalents in Pakistan and Nigeria have been far more political and in Nigeria’s case too large as well. So the idea of a finance commission is to be welcomed and the Indian experience of an expert, arms-length group provides a good model.

I would like to conclude with a few brief comments on the central institutions of the new federation. Other papers examine the issues of presidential versus prime ministerial regimes and courts, so my observations are limited. The first is that in a highly diverse country, such as Nepal, the devolution to provinces in a federal structure can be only one part of an overall approach to creating institutions that respect and protect your diversity. You must also consider how your central institutions will be structured in this regard. Many federations have quite elaborate procedures to ensure that all major groups, for example, are well represented in the cabinet, in the civil service and in the army. Typically these provisions are achieved
through a combination of constitutional provisions and principles along with legislative and informal arrangements. Thus central institutions are a key part of the larger federal architecture. Views in Nepal are strongly divided on the issue of parliamentary versus presidential regimes. My own view is that this may be an area where there will be a need for creative compromise, perhaps with some inspiration coming from the French hybrid model. No model is perfect, but it is possible to address some of the weaknesses of each by seeking a blend along with special provisions.

I think there is less room for compromise on the independence of the courts. Virtually every successful federation has given its courts the final word on the interpretation of the constitution. The Swiss, with their long and unique tradition of direct democracy, are the exception but I do not believe their experience is transferable to Nepal. Ethiopia also has a special arrangement in that its House of the Federation is the final arbiter of the constitution, but their approach is new and it has not been proven over time and in periods of real stress. My suggestion would be that the focus here should be on how to ensure that the courts are properly staffed, truly professional and independent, and perhaps with some need for a more representative composition. It may be that success on those questions would pave the way for a consensus on giving the courts their normal role in the constitutional area.

It is you Nepalis, clearly, who will write your constitution. Every constitution is very much a product of its society and only those with a deep knowledge of the society can have firm views on what might be most appropriate. So I have tried to be relatively tentative or modest in my observations, while still giving you a sense of directions you might pursue. At the same time, I would encourage you to be modest. The history of constitution making—even with the most successful constitutions—is that the ultimate functioning of the constitutions has usually been quite different from the visions or expectations of those writing the constitution. Constitutions are, after all, only pieces of paper whose real impact depends on how they are brought to life by a society. Perhaps this might also be a good reason for no one party to be too dogmatic about what provisions it wants in the constitution.

Nepal’s greatest need now is to have a constitution, which will certainly not be perfect, but which demonstrates that the leadership of the country is capable of principled compromise and consensus. Thus the spirit of negotiation in the next few months will be as critical to your success as a particular provision in the final document. I wish you, and all Nepalis, every success in your historic endeavour.

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Comments on the Report of the Preliminary Draft of the Constitution by the Committee of Natural Resources, Economic Powers and Revenue Allocation

Alexander Wegener

This paper is structured as follows:

- First, three guiding questions on public finance are formulated based on commonly accepted design principles of intergovernmental fiscal relations,
- Second, some observations and comments are given relating to the overall design, structure and content of the draft, and
- Third, commentaries are given article by article, paragraph by paragraph, and, where necessary, proposals for rephrasing are given.
- Fourth, some examples of public finance related constitutional articles are presented based on the German federal system.
1. Introductory remarks on sub-national finance

(1) Three guiding questions

A key mark of public finance is the ability for a public body to control its own finances. A key issue is how finance is distributed between levels of government and administrative levels. Three basic questions that allow for an assessment of a public finance system:

- **Who does what?**
  This question is asking which levels of government and which administrative levels are responsible for which tasks (expenditure assignment).

- **Who levies what taxes, user charges and fees?**
  This question is asking which levels of government and which administrative levels are responsible for the setting of taxes and tariffs (decision-making authority) and which levels of government and administrative levels are responsible for the collection of these taxes, user charges and fees (collection authority).

- **How are imbalances in funding requirements (expenditures) and funding options (revenues) resolved?**
  This question is asking whether there is, and if, which form of vertical imbalance in expenditure needs and actual revenues is existent and how these imbalances are equalised (equalisation mechanism).

The last question already addresses a crucial issue in public finance that touches the overall normative role and function of levels of government within a state. In a perfect world, each level of government should have sufficient funding sources to cover its funding requirements. However, given the very different design of revenue assignment and functional assignment, most countries in the world have to address the problem of vertical imbalance.

In the past – prior to the rise of decentralisation policies – the existent vertical imbalance allowed central or regional levels of government a rather tight control over local government, and usually the control was both in terms of functions, and in terms of finance:

- Typically, unitary states, and other state constructions that can be classified as highly centralised for historical reasons, clearly regard local government as “creatures of state” and local governments may only perform those functions that were explicitly transferred to them.

- Decentralised states, often federal, in which the core of policy development and executive, operational service delivery is not on the
Central level, local government enjoys often specific rights. The most common right is that local governments are responsible for all functions and tasks that are of local concern. This is the operational expression of the idea of local self-government.

(2) What is institutional symmetry for?
The institutional symmetry between decision-makers, beneficiaries and the funding body is a corner stone for a decentralised local government finance system. The more decentralised, regionalised or even federalised a state is structured the more important is the design of a sub national finance system according to this institutional symmetry.

The institutional symmetry reflects three relationships between users and beneficiaries, the decision-makers, and the funding body.

Principle of congruence
This principle demands that a local government body should be responsible for those tasks which are used by or benefit mostly the local residents in its administrative boundaries. There should be a spatial identity between decision-makers and user or beneficiaries.

Decision-makers, beneficiaries (users) and responsible funding bodies should be located in the same spatial area (institutional symmetry)

Principle of connectivity
This principle demands, that decision-makers that decide on an issue that affects budgets should also be responsible to fund this decision by their own means. For example, a federal government should not decide on a law, which incurs costs on sub-national governments without accompanying funding.

Principle of fiscal equivalence
This principle demands, that the beneficiaries of locally produced services should also pay for these services. In consequence, this principle demands that local services should be funded by the local community. The community is set up by natural and legal persons. By that principle, it becomes evident, that funding for local government should be balanced between all beneficiaries of the local government, citizens and businesses.
Regarding the tax assignment among different tiers of government, international experience suggests that some taxes are better suited for subnational governments than others. International lessons provide a number of economic rationales of taxation in a federal setting. Maintaining efficiency is often emphasized for the assignment of local taxes. This is because decentralizing tax systems can often interfere with the efficiency of nationwide economic integration. Commonly emphasized criteria are as follows:

- Local taxes should be independent from national policy goals such as income redistribution objectives and economic stability.
- The local tax base should exhibit low mobility between jurisdictions.
- Benefit taxes and user charges are appropriate to local taxes.

Figure 1: Design principles of local and sub-national taxation

<table>
<thead>
<tr>
<th>Local Authorities</th>
<th>Citizens and Residents</th>
<th>Businesses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Local revenues need to be adequate to meet the cost of the services and infrastructure they are intended to finance.</td>
<td>The framework for local taxation needs to be simple, transparent and easy to understand.</td>
<td>The local tax system needs to be fair and equitable in both design and administration.</td>
</tr>
<tr>
<td>Local revenues need to be buoyant (the tax base should grow automatically when prices rise, population grows or the economy expands) to meet expanding demands for service delivery. Revenue collections need to be stable and predictable to facilitate planning and budgeting.</td>
<td>The local tax system needs to be fair and equitable in both design and administration. • Everyone should pay something. • The tax burden should be proportionate to the ability to pay (vertical equity). • Taxes should be applied</td>
<td>• All enterprises pay something. • Similarly situated businesses pay similar taxes. • Local taxes need to support a conducive business environment. • Taxes should not distort economic</td>
</tr>
</tbody>
</table>

Collection and administration costs need to be minimized.

| Consistently for individuals at the same income level (horizontal equity). |
| Intensive users of municipal services should pay more (benefits principle). |
| Local revenues should enhance accountability and strengthen the social contract at the local level. |

Local revenue autonomy and flexibility need to be reinforced.

| Local taxes need to be linked to services provided. |
| Compliance costs for taxpayers need to be minimized. |
| Compliance costs for taxpayers need to be minimized. |

Tax instruments need to be politically acceptable.

| Taxes should minimize barriers to enterprise development, especially for small and medium-size enterprises. |
| • Intensive users of municipal services should pay more (benefits principle). |

In addition to the aforementioned efficiency criteria, economic principles, such as national equity, administrative costs, and fiscal needs are important for developing countries. Thus,

Sub-national engagement in perverse redistributive policies, using both taxes and transfers, should be restrained.

Rules to allocate tax revenue among jurisdictions, restricting tax evasion and avoidance, will be required.

Revenue means should be matched as closely as possible to revenue needs.

3. General comments on the underlying assumptions

In general, the report of the committee on natural resources, economic rights and revenue allocation for the preliminary draft of the constitution published by the Constituent Assembly is in some aspects very detailed, much more detailed than in any other federal constitution world-wide.

A rather obvious assumption in the report is that the federal government is the most powerful level in the proposed state structure of a federal level, provincial level and local government level.

**Key messages are:**

A constitution should not make detailed provisions for central, provincial and local levels of government. Rather, a constitution should express and define the underlying principles for public finance.

The proposed articles and paragraphs are largely unsuitable to form a chapter on public finance in a federal constitution. Some of the articles are better to be part of a law on budget principles, and some issues are even subject to regulations rather than to be content of a law. The mixture of technical aspects, fundamental principles and details must be divided that only the key principles, the fundamentals of public finance and intergovernmental fiscal transfers are laid down in the constitution.

Most of the proposed articles refer to technical and administrative issues, but not to key principles of the state, principles of coordination between levels of government and rights and duties of these levels of government. Many of the articles are too specific to be part of a constitution, but too general to form the basis of "normal" draft laws.

There seems to be a major misunderstanding of the role and function of a constitution compared to other legislative decisions and administrative decisions following laws. There should be a clear hierarchy in terms of constitution, laws passed by parliament and regulations providing guidance based on laws issued by line ministries. This hierarchy seems to be absent. There should be a hierarchy of legal terms used in Nepali and official translations (i.e. Act, law, regulation, ordinance, decree, etc.), as well as for other terms (such as tax, fee, user charge, etc.).

Revenue assignment should not become subject to political majorities, but should be designed to fund the functional assignment.

In combination with the list of revenues assigned to various levels of government, it is rather obvious that neither provincial nor local governments will have sufficient funds to deliver the functions assigned to them, making them heavily dependent on federal government policy decisions and administrative behaviour. The proposed revenue assignment leaves the provincial government with little power in practice, and their scope of activities is rather small compared to the
federal level. The approach in the draft is predominantly centralistic and leaves very few and rather small discretionary power to provincial and local governments.

The budget process is described vaguely, while a number of crucial issues are not mentioned (borrowing, deficits, audit, democratic control, disclosure, parliamentary process).

The proposed unitary accounting system is a setback compared to the existing Local Self-Governance Act of the early 1990s, which requires municipalities to introduce accrual accounting.

Comments on the proposal
This chapter discusses proposal made in the report. To ease reading, the unofficial translation of the articles is being repeated for each of the paragraphs. The comments refer to the articles

"Distribution of Economic Rights (see Article 5 on page 149)
"Budget Formulation" (see Article 6 on page 150)
"Distribution of Sources of Revenue" (see Article 7 on page 150)
"National Consolidated Fund" (see Article 8 on page 151)
"Finance Bill" (see Article 9 on page 151)
"Expenditure from the National Consolidated Fund" (see Article 10 on page 152)
"Expenditure Charges on the National Consolidated Fund" (see Article 11 on page 153)
"Estimates of revenue and expenditure" (see Article 12 on page 154)
"Appropriation Act" (see Article 13 on page 155)
"Supplementary Estimates" (see Article 14 on page 155)
"Votes on Account" (see Article 15 on page 156)
"Special provisions for revenue and expenditure" (see Article 16 on page 157)
"Votes of Credit" (see Article 17 on page 158)
"Contingency Fund" (see Article 18 page 158)
"Act relating to financial procedure" (see Article 19 on page 159)
"Meaningful distribution of revenue" (see Article 20 on page 159)
"Budget of Provincial Governments" (see Article 21 on page 163)
"Budget of Local Governments" (see Article 22 on page 167)
"Management of Account of Revenue and Expenditure" (see Article 23 on page 168)

(1) **Article 5: Distribution of economic rights**
The proposal makes the federal government the most powerful level. This in contrast to many other federal state systems, in which the regions or provinces have larger powers and share those with local governments.

(a) **Article 5, paragraph 1**

*Current proposal*

(1) *The distribution of economic rights among the different level of governments shall be as set forth in List 1. Economic rights that do not fall under the jurisdiction of any government, shall be deemed under the jurisdiction of central government.*

In combination with the list of revenues assigned to various levels of government, it is rather obvious that neither provincial nor local governments will have sufficient funds to deliver the functions assigned to them, making them heavily dependent on federal government policy decisions and administrative behaviour. The revenue assignment is in sharp contrast to the principles of institutional symmetry which would seek to balance functions with own source revenues.

(b) **Article 5, subsequent paragraphs**

The provisions made do not allow local self-governance or provincial self-government. There is no distinctive mentioning of the principle of subsidiarity, in contrast, all functions and tasks are assigned to the federal (central) level if not specified in the list 1 or the constitution.

The proposal is in contradiction to ideas of decentralisation and local self-governance and will result in a very powerful federal government overruling provincial and local governments.

The smaller provisions on local or provincial discretionary authority (for example paragraph 5, 9, 12, 15 for local governments) are guiding in the right direction, however, with all the powers allocated to the central level, they will remain without any larger importance in creating true local self-governance.
(2) Article 6: Budget formulation

Current proposal

(1) The budget of federal, provincial and local governments shall be formulated so as to strengthen effective management of the entire economic system, transparency and accountability.

(2) The framework of budget, time to present the budget, and the relation with the federal budget management shall be as prescribed by federal law.

The two paragraphs are too vague to guide the budget process. It has not even said which period a budget should cover and under which principles a budget should be prepared. See, as a proposal, chapter 4 for some ideas.

This article will not be able to ensure proper and transparent budget formulation under democratic control. A constitution should mention the principles of budget preparation, while details are to be dealt with in specific budget laws regulating procedures, processes, formats and time lines.

(3) Article 7: Distribution of sources of revenue

Current proposal

The federal, provincial and local governments may impose tax and collect revenue from the sources as set forth in List 2. Provided that, the federal government shall specify the sources that are not in the list of any level of government. No tax shall be levied and collected by the federal, provincial and local governments except in accordance with law.

The list 2, which allocates various already existing sources of revenue to levels of government, suffers from several key problems that cannot be accepted in a constitution:

The revenue assignment to provincial and local governments will be not enough to fund their assigned task. Thus, the list is violating all principles of public finance theory and best practices derived from decades of decentralisation.

The revenue assignment is much too detailed for provincial and local governments, as the underlying assumption is that the federal government alone may invent and implement new taxes. Therefore, the provincial and local governments are doomed to sustain from the mentioned revenue titles without having a chance to change the revenue sources.
The shared revenues, as shown in list 2, are not mentioned in the constitution.

The constitution should include provisions which types of income are assigned to local governments (i.e. land-based taxes) and which taxes are to be shared between federal and provincial government and which taxes are subject to supplements by provincial and/or local governments. The allocation of revenues should follow the cost of service delivery of assigned tasks.

The constitutional consequence would be that any new tax revenue would need a change of the constitution.

The proposed revenue assignment is violating ideas of local self-governance and public finance theory in federal state structures.

(4) Article 8: National Consolidated Fund

Current proposal

Except for the revenues of religious endowments, all revenues received by the Federal Government of Nepal as set forth in Table two, all loans raised on the security of revenues, and all the money received in repayment of any loan made under the authority of any Act and any amount received by the Government of Nepal shall as be credited to a Government Fund to be known the Consolidated Fund.

No comments.

(5) Article 9: Finance Bill

Current proposal

Any Finance Bill shall be introduced only as a Government Bill. Finance Bill means a Bill concerning any or all of the following subjects

(a) the imposition, collection, abolition, remission, alteration or regulation of taxes,

(b) the preservation of the Consolidated Fund or any other Government fund, the deposit of money into and the appropriation or the withdrawal of money from such funds, or the reduction, increment or cancellation of appropriations or of proposed expenditures from such funds,
(c) the regulation of matters relating to the raising of loans or the
giving of guarantees by the Government of Nepal or any
matter pertaining to the amendment of the laws concerning
financial liabilities undertaken or to be undertaken by the
Government of Nepal,

(d) the custody and investment of all revenues received by any
Government fund, money acquired through the repayment of
loans, and the grant of money, or audit of the accounts of the
Government of Nepal, or

(e) matters directly related to sub-clauses (a) to (d),
Provided that a Bill shall not be deemed to be a Finance Bill
by reason only that it provides for the payment of any fees
such as license fee, application fee, renewal fee, or it provides
for imposition of any penalty or imprisonment, or by reason
that it provides for the imposition of any tax, duties or fees by
a local authority.

The article denominates certain draft laws as financial bills but without
saying why there should be a special title for these laws, because there is
no specific procedure assigned to these finance bills. Again, the details of
budgeting and accounting should be regulated under a specific budgeting
and accounting law.

(6) Article 10: Expenditure from the National Consolidated Fund

Current proposal

No expenditure shall be incurred out of the Consolidated Fund or
any other Government fund other than the following.

(a) money charged on the Consolidated Fund,

(b) money required to meet expenditure under an Appropriation
Act,

(c) advance money authorized by an Act required to meet
expenditures, when an Appropriation Bill is under
consideration, or

(d) expenditures to be incurred in extraordinary circumstances
under a Vote of Credit Act which contains only a description
of expenditure
This article is regarded as redundant if the word and legal content of the term "budget" would have had defined in the proposed constitution. Again, the details might also be regulated in a specific budgeting and accounting law.

(7) **Article 11: Expenditure chargeable on the National Consolidated Fund**

**Current proposal**

*The expenditures relating to the following matters shall be charged on the National Consolidated Fund:*

(a) *the amount required as remuneration and benefit to the President and Vice-President,*

(b) *the amount required as remuneration and benefits and pension payable to the Chief Justice of Nepal and other Judges of the Supreme Court,*

(c) *the amount required as remuneration and benefits payable to the following officials –*

   (i) *the Speaker and Deputy Speaker of the Legislature-Parliament,*

   (ii) *the Chief Commissioner and Commissioners of the Commission for the Investigation of Abuse of Authority,*

   (iii) *the Auditor General,*

   (iv) *the Chairperson and members of the Public Service Commission,*

   (v) *the Chief Election Commissioner and other Election Commissioners, and*

   (vi) *the Chairperson and members of the National Human Rights Commission.*

   (vii) *the Chairperson and members of the National Financial Commission.*

   (viii) *the Chairperson and members of National Natural Resources Commission.*

   (ix) *Other Constitutional Commissions*

   (d) *the administrative expenses of the Supreme Court, the Commission for the Investigation of Abuse of Authority, the Office of the Auditor General, the Public Service Commission.*
the Election Commission and the National Human Rights Commission,
(e) all charges relating to debts for which the Government of Nepal is liable,
(f) any sum required to be paid under any judgment or decree of a court against the Government of Nepal,
(g) any other sum declared by law, including grants to be provided to provincial and local governments and expenditure, to be chargeable on the Consolidated Fund.

Typically, a budget would include next to the federal institutions, agencies and offices also the expenses of each and every line ministry (which seem to be absent and being referred to as Appropriation Act). It might be more comprehensive and consistent to have one budget showing all planned revenues and expenditures rather than to have an artificial split between the National Consolidated Fund and a separate Appropriation Act.

(8) Article 12: Estimates of revenue and expenditure

Current proposal

(1) The Finance Minister shall, with respect to every fiscal year, present before the Legislature-Parliament annual estimates including the following matters
   (a) an estimate of revenues,
   (b) the money required to meet the charges on the Consolidated Fund; and
   (c) the money required to meet the expenditure to be provided for by an Appropriation Act.

(2) The annual estimate to be presented pursuant to clause (1) shall be accompanied by a statement of the expenses allocated to each Ministry in the previous financial year and particulars of whether the objectives of the expenses have been achieved.

(3) Article 12, paragraph 1

The paragraph outlines the duties of the Minister of Finance in the presentation of the budget and the preliminary figures - i.e. estimates on revenues and expenses.
What is missing in the proposal is a procedure in the decision-making of the budget itself.

(4) Article 12, paragraph 2
No comments.

(9) Article 13: Appropriation Act
Current proposal
The money required to meet the expenditure to be provided by an Appropriation Act shall be specified under appropriate heads in an Appropriation Bill.

A budget should always include income and expenses. There is no need to have two Acts (laws). The budget should be one annual Act only, showing estimated income and estimated expenses. The budget plan must be balanced.

(10) Article 14: Supplementary estimates
Current proposal
(1) The Finance Minister shall, in respect of any financial year, present supplementary estimates before the Legislature-Parliament, if it is found –
   (a) that the sum authorized to be spent for a particular service by the Appropriation Act for the current fiscal year is insufficient, or that a need has arisen for expenditure upon new services not provided for by the Appropriation Act for that year, or
   (b) that the expenditures made during that fiscal year are in excess of the amount authorized by the Appropriation Act.

(2) The sums included in the supplementary estimates shall be specified under separate heads in a Supplementary Appropriation Bill.

(3) Article 14, paragraph 1
No government may incur expenditures that are higher than the budget. Therefore, a supplementary budget after exceeding the
The constitution should only provide provisions for the definition and the procedure of a supplementary budget.

**(4) Article 14, paragraph 2**

This paragraph is of technical nature and relates with specific budgeting and accounting law.

**(11) Article 15: Votes on Account**

**Current proposal**

(1) Notwithstanding anything contained in this Part, a portion of the expenditure estimated for the financial year may, when an Appropriation Bill is under consideration, be incurred in advance by an Act.

(2) A Vote on Account Bill shall not be submitted until the estimates of revenues and expenditures have been presented as aforesaid and the sums involved in the Vote on Account shall not exceed one-third of the estimate of expenditure for the financial year.

(3) The expenditure incurred in accordance with the Vote on Account Act shall be included in the Appropriation Bill

The article is obsolete if a general clause as proposed in this paper (see comment to article 16, paragraph 2) is introduced.

**(4) Article 15, paragraph 1**

See comment to Article 16, paragraph 2

**(5) Article 15, paragraph 2**

Proper budgeting always needs forecasts. Delayed budget submission to Parliament cannot be justified by poor preparation, but by political disputes on spending only. The article and this paragraph allows too much freedom for federal government to bypass sound public finance policies.
(6) Article 15, paragraph 3
See comment to previous paragraph.

(12) Article 16: Special provisions for revenue and expenditure

Current proposal

(1) Notwithstanding anything contained in this part, if, due to the special circumstances, the estimates of revenue and expenditure for the forthcoming financial year is not introduced before the Legislature-Parliament until the end of current financial year, the revenue may be collected pursuant to the Fiscal Act of the Current Financial Year.

(2) If the circumstance is occurred as stated in clause (1), The Finance Minister shall, by explaining the reason thereof, not exceeding one-third of the total expenditure of the current financial year, present a Bill before the Legislature-Parliament to authorize for the expenditure of forthcoming financial year.

(3) The amount of expenditure made pursuant to clause (2), shall be included in the Appropriation Bill.

(4) Notwithstanding anything contained in this Constitution, the Bill introduced at the Legislature-Parliament pursuant to clause (2) may be discussed and passed on the same day.

Article 16, paragraph 1

Revenue collection is not legally based in the annual budget, but in taxation laws and other regulations. Therefore, there is no need to underline the right to collect revenue in case of the non-existence of a budget in a new fiscal year.

Article 16, paragraph 2

It might be better to reduce the spending to operational expenses to secure the ongoing work of the administration except entering new obligations. It would be not wise to have a fixed sum (such as one third).

In case that a budget has not been passed in time at the beginning of a new fiscal year, the government is entitled to expenditures that secure the ongoing work of public bodies and legally binding
expenditures.

Article 16, paragraph 3
See previous comment.

Article 16, paragraph 4
Parliamentary procedures should be regulated in the standing orders of parliament and are not be laid down in the constitution.

(13) Article 17: Votes of Credit

Current proposal
Notwithstanding anything contained elsewhere in this Part, if owing to a local or national emergency due to either natural causes, a threat of external aggression or internal disturbances or other reasons, and it is impractical or inexpedient in view of the security or interest of the State, the Finance Minister may present a Vote of Credit Bill before the Legislature-Parliament giving only a description of the proposed expenditure.

This article would allow government to by-pass the formal budgetary process. The justifications given in the article are too vague and may be misused. Instead, an ordinary budget management always offers options in cash flow management. Even extraordinary events must not result in non-transparent budget behaviour. The article should be rephrased into regulations on supplementary budget.

(14) Article 18: Contingency Fund

Special funds do not need to be regulated in the constitution. What should be regulated, however, is the right to establish special reserve funds on the federal level and whether these special funds have the right to borrow.

Federal government may create by law special reserve funds for a limited time period. Special reserve funds must show in the budget. Special reserve funds must not take loans.
(15) **Article 19: Act relating to financial procedure**

This article refers to the interchangeability of budgeted expenditures and is of technical nature. Regulations on budget flexibility should be generally regulated in a Public Finance Law or/and in detail in the annual budget law. There is no need to have such a provision in the constitution.

(16) **Article 20: Meaningful distribution of revenue**

**Article 20, paragraph 1**

**Current proposal**

(1) *Federal government shall make an arrangement for meaningful distribution of its revenue, collected from its sources, among central, provincial and local governments*

The term "meaningful" allows far too much discretion for the federal level to determine the amount and the criteria for allocation to both provincial and local level.

It is recommended to formulate:

*Federal government must ensure appropriate funding to provincial and local governments for delivery of tasks assigned to provincial and local governments.*

**Article 20, paragraph 2**

**Current proposal**

(2) *An independent Financial Commission shall be constituted so as to recommend the financial transferrable amount to be received by provincial and local governments*

The proposed article (2) establishes a Financial Commission to "recommend" the gross fund available for intergovernmental fiscal transfers. Although it might allow to increase legitimacy, the article does not tell anything about the composition (especially the power of provincial and local levels) and the decision-making authority of that commission, as it will "recommend" only. Revenue assignment should not become subject to political majorities, but should be designed to fund the functional assignment.

Further, the proposed commission will not have any decision-making rights, and the representation within this commission remains unclear. The proposed commission reveals that the underlying basic principle of revenue allocation will not be based on needs, nor will the the own sources of revenue of both
provincial and local governments sufficient to fund their assigned tasks. This is a severe problem and gives federal government strong power which are usually not to be found in a federal state.

There is no need to have the establishment of such a commission to be in the constitution anyway. The commission, if needed, should be established through law. This law should precisely regulate

the size of the commission,

the members of the commission,

the rights of provincial and local governments towards that commission and within that commission

the decision-making authority of that commission,

the rights of that commission towards parliament.

**Article 20, paragraph 3**

*Current proposal*

(3) The central government shall distribute a financial equity grants to the provincial and local governments on the basis of need expenditure, and capacity and efforts to revenue collection.

The proposed paragraph (3) deals with equity grants to provincial and local governments which should be allocated based on "need", "capacity" and "efforts" in revenue collection. The paragraph suffers from two key assumptions: First, the paragraph assumes that "backward regions" and "local government" will not have sufficient funds to provide "general standards", indicating a poor revenue assignment for sub-national governments in general. Further, equity grants seem to be distributed by federal government only, leaving the provincial governments without any responsibility to ensure appropriate funding of local governments within their boundaries - and thus also telling much about the poor revenue assignment to provincial levels. Finally, it seems that the equity grants are additional - typically, equalisation mechanisms do not provide additional funds, but are about supplements provided to some public entities financed through charges on others.

In addition, the notion of needs, capacity and efforts in the constitution would make impossible any improvement of the design principle of equalisation. Given economic growth and demographic change, the three criteria might not be appropriate for the future. Therefore, they should not be
mentioned in the constitution to avoid the necessity for permanent constitutional changes.

Again, if the recommended paragraph 1 is accepted, there is no need to mention equalisation in the constitution anyway.

**Article 20, paragraph 4**

**Current proposal**

(4) Provincial governments shall, from the grant as provided by the central government, and collected revenue from its sources, distribute a financial equity grant among the local governments, as determined by law, on the basis of need of expenditure, capacity of revenue and efforts to collect revenues.

Similar to the paragraph 3, the paragraph 4 provides some information on how provincial governments should establish an equalisation system between local governments based on the same criteria. The comments on the criteria remain the same, please refer to the previous section.

The paragraph 4 will establish a second equalisation system, and will suffer from the same problems as mentioned above. There should be only one equalisation scheme, and therefore, the constitution must only provide information whether there should be an equalisation system between provinces and/or an equalisation system between local governments within one province, or an equalisation system between all local governments throughout the country.

**Article 20, paragraph 5**

**Current proposal**

(5) The federal government shall make an arrangement to distribute other grants (conditional grant, supplementary grant or grants for other purposes) provided via National Consolidate Fund

This paragraph empowers the federal government to have intergovernmental fiscal transfers and may include both conditional and unconditional grants. It seems that the federal government should have authority to provide these grants to both provincial governments and local governments. Federal
government may thus contradict provincial policies, if there is no participation of the provinces in the design, amount, and conditions of these fiscal transfers. There should not be any unconditional grants from federal level to local level, otherwise the provincial level has little or no political function.

Article, 20, paragraph 6

Current proposal

(6) The distribution of revenue among the central, provincial and local governments shall be transparent.

This paragraph demands transparency of revenue distribution across levels of government. More important are issues such as
whom to decide
whom to participate (provinces, local governments)
what to redistribute
according to which criteria
are not mentioned.

Any fiscal transfer to any level of government must be rule-based, transparent and according to defined criteria.

Article 20, paragraph 7

Current proposal

(7) While enacting Acts relating to revenue distribution, national necessity, autonomous of provincial and local governments, services to be delivered by governments to the people of province and local level and economic rights provided to them, capacity to collect revenue, assistant to provide for development, regional imbalance, poverty and inequality, deprivation, emergency work, and assistance to provide for temporary needs etc shall be included.

This paragraph refers to a design principle of the state. Therefore, articles such as "Nepal is a federal, democratic and social state" should be stated at the beginning of the constitution to underline the general importance. Based on these design principles, a number of provisions proposed would become obsolete. What is missing, however, is the notion of the principle of connectivity in the constitution. This is a must for any federal state and
reflects the main problems in states that rely on decentralised service
delivery, but do not know this principle. Therefore, the constitution should
include the following provision:

(Principle of connectivity) No level of government may allocate
or transfer tasks to any other level of government without full
funding of the respective task.

(17) Article 21: Budget of provincial governments
A constitution should not make detailed provisions for central, provincial and
local levels of government. Rather, a constitution should express and define
the underlying principles for public finance.

The comments of the article 21 refer to the current proposal only. It should
be noted, however, that there should be only one article for all levels of
government regarding financial transparency and budgeting.

Article 21, paragraph 1

Current proposal

(1) Provincial government may, among the list of federal
government, subject to existing laws, impose surcharges. The
detail provisions regarding the policy and fundamental base to
prescribe the rate of such taxes shall be as determined by the
federal laws. The governments at different level shall not
introduce double taxation.

The paragraph allows provincial governments, not local governments, to
have surcharges, while the federal government reserves all regulatory rights,
including the determination of tax basis, and presumably tax assessment
procedures.

The third sentence of the paragraph prohibits double taxation. While there is
an enumerated list of revenues in the annex, this sentence may be understood
as a fundamental right to invent new taxes, if there is not already a tax
existing that taxes the same tax base.

No rights are given to local government which is not acceptable for a federal
state.
Article 21, paragraph 2

Current proposal:

(2) The provincial governments shall collect taxes on the basis of their revenue capacity and base of taxation. In the case that the provincial governments are unable to secure such amount, no grant or compensation from the federal government is provided.

This paragraph just regulates that low capacities in tax collection and coverage must not be used as an argument by provincial governments to claim additional funding from central (federal) government. This regulation is not a key issue to be placed in a constitution. Instead, the constitution should be limited to define public finance and to lay down principles of revenue assignment and fiscal transfers only.

Article 21, paragraph 3

Current proposal

(3) Responsible provincial financial authority shall present provincial budget to the Provincial Legislature stating estimates of revenue for every financial year, necessary amounts to be charged on Regional Consolidated Fund, and expenditure from Appropriation Bill.

The paragraph just regulates that there must be a budget on the provincial level, that this budget must be approved by provincial elected bodies. In addition, the paragraph deals to some extent with budget forecasting for revenues and expenditures.

The provision is repeated for other levels of government. In a constitution, this provision is too detailed to be included as a constitutional clause, but there is no provision on public finance in general.

Article 21, paragraph 4

Current proposal

(4) The Appropriation, Supplementary Budget, Vote on Account, Votes of Credit and other especial provisions relating to revenues and expenditure shall be as determined by law.
The paragraph regulates the amendments to the budget - in case of economic problems or unrealistic forecasts - have to obey to procedures according to law without any further explications.

This should not be regulated in the constitution, as this would limit the subsequent law-making to the issues and topics as defined in this paragraph only. It is more restricting future decision-making processes than it enables future decision-making on these matters.

**Article 21, paragraph 5**

**Current proposal**

(5) Every provincial government shall have a Fund to be known as Consolidated Fund. All the revenue collected from the sources stated in List 2, grant to be received from federal government, loan and sum received from other sources shall be deposited to this Fund.

The paragraph requires provincial governments to have one fund only to avoid shadow budgets. However, the details are not required in the constitution. The issue is to avoid any shadow budget, therefore the paragraph should read:

*Federal government, provincial governments and local governments may have one fund only. The fund is to be named General Fund.*

The rephrasing is valid for all levels of government and not only for provincial governments.

**Article 21, paragraph 6**

**Current proposal**

(6) Only the responsible financial authority of province shall, subjects related to taxes, appropriation, financial responsibility, audit and other related issues under the jurisdiction of provincial government, introduce in the Provincial Legislature as a Provincial Financial Bill

The paragraph takes away from parliament the most important right: The right to prepare budgets, including the setting of taxes. This paragraph is totally incompatible with the concept of democratic governance.
Article 21, paragraph 7

Current proposal:

(7) No tax by a provincial government under its jurisdiction shall be imposed in contrary with national financial policy, flow (movement) of goods, capital, service and labour, and neighbouring provinces.

The paragraph reduces the tax setting authority of that level of government. While it may be reasonable to prohibit double taxation (not to be misunderstood with shared taxes or supplements on existing taxes of other levels of government) the notion of national financial policy flow of goods, capital, service, labour, and potential impact on neighbouring provinces is by far giving much to much power to the federal level. Any tax will always affect at least one of the aspects mentioned.

The taxation powers of each level of government must not reduce the taxation power of other levels of government.

Article 21, paragraph 8

Current proposal

(8) If a provincial government shall have to formulate deficit budget, it shall have to present the sources to recover the deficit as well, as determined by federal law.

Each level of government and each public body is responsible to have balanced budgets. No other level of government shall have the duty to take over debts occurred on other levels of government. There should be no restriction on sub-national borrowing, however. Therefore, the paragraph should read:

Sub-national levels of government, provincial governments and local governments have the right to borrow on their own risk.

Any type of borrowing is limited to capital expenditures only.

The two proposed paragraphs avoid:

- that current expenses (consumptive expenditures) are funded through debts;
- that bailouts promote moral hazard in deficit spending and excessive expenditures.
(18) Article 22: Budget of local government

Again, there is no need to have all levels of government separately mentioned in the constitution. Instead, there should be one chapter on Public Finance only.

Article 22, paragraph 1
Current proposal
(1) Every local government shall have a local Consolidated Fund. All the revenue collected from the sources stated in List 2, grant to be received from federal and provincial governments, loan and sum received from other sources shall be deposited to this Fund.

Article 22, paragraph 2
Current proposal
(2) The local governments shall collect taxes on the basis of their revenue capacity and base of taxation. No grant or compensation shall be given if they are unable to collect taxes.

Article 22, paragraph 3
Current proposal
(3) A representative of local government shall present the income and expenditure for every financial year to the council of the local government and shall approve it from the council.

Article 22, paragraph 4
Current proposal
(4) No tax by a local government under its jurisdiction shall be imposed in contrary with national financial policy, flow (movement) of goods, capital, service and labour, and neighbouring provinces or local governments.


**Article 22, paragraph 5**

Current proposal

(5) If a local government shall have to formulate deficit budget, it shall have to present the sources to recover the deficit as well, as determined by federal and provincial laws.

(19) **Article 23: Management of account and revenue expenditure**

**Article 23, paragraph 1**

The article refers to similar coding and classification of revenue titles and budget items. This is usually organised through a chart of accounts and subject to a law, there is no need to have this regulation in a constitution.

Current proposal

(1) There shall be the similar classification of statement of revenue and expenditure of federal, provincial and local governments. Other provision in relation to this shall as determined by the federal laws.

It is recommended that there should be a law on public finance defining terms rather than to fill the constitution with technical issues.

**Article 23, paragraph 2**

There is no need to have the same accounting system on all levels of government. An accounting system should be adopted that supports the primary functions of a distinctive level of government. Local governments do invest in infrastructure, they own assets and they provide services, while central government predominantly redistributes funds, especially in a federal state. Given these different functions, different accounting systems suit more the distinctive needs of the various government levels. Cash based accounting not suitable for local government.

One of the main benefits from introducing accrual principles into government finance is the recognition of all assets, both financial and non-financial, and liabilities of a government unit. Such recognition will, among other, strengthen the unit’s accountability, its asset and liability management, and its making and buying decisions. In contrast, cash-based accounting does
not allow an analysis of non-financial assets, and cash-based accounting has no information on uncollected receivables and current liabilities.

Because accrual accounting provides much more information than cash based accounting, there is no problem for accrual accounting systems to provide the information cash based systems operate with (i.e. National Statistics, etc.).

**Current proposal**

(2) The federal, provincial and local government shall adopt the same accounting system. The manner and system of this shall be as determined by the federal laws.

The proposed unitary accounting system is a set back compared to the existing Local Self-Governance Act of the early 1990s, which requires municipalities to introduce accrual accounting.

**Article 23, paragraph 3**

**Current proposal**

(3) It shall be the duty of provincial and local governments to follow the classification of revenue and expenditure and accounting system.

Similar regulations can be found in Local Bodies Financial Regulations (LBFR). The content of the regulation addresses technical issues that should be organised in regulations based on one law (Public Finance), which itself is based on the constitution.

**Article 23, paragraph 4**

**Current proposal**

(4) If a provincial government does not follow the prescribed classification of revenue and expenditure and accounting system, the federal government may prohibit the grant to be provided until the provincial government follow it.

Similar to the previous comment, conditions under which grants are distributed are to be regulated in the annual law on intergovernmental fiscal transfers based on the budget (law). There is no need to have this issue regulated in the constitution.
Article 23, paragraph 5

Current proposal

(5) If a local government does not follow the prescribed classification of revenue and expenditure and accounting system, the provincial government may prohibit the grant to be provided until the local government follow it.

See previous section for comments.

Article 23, paragraph 6

Current proposal

(6) Budget shall be presented by including the estimates of expenditure making division of current and capital part.

In no constitution in the world reference is made on how to prepare budgets. This should be content of a law on budgeting.

Article 23, paragraph 7

Current proposal

(7) If it is necessary to obtain a loan to recover losses, an analysis should also be presented if it is going to impact on the entire financial system.

Although the content of the proposed regulation is well understood, there is no need to have this feature of deficit budgets and sub national borrowing in the constitution. Again, this aspect should be content of a law on budgeting.

Article 23, paragraph 8

Current proposal

(8) The management of loan to be received by provincial and local government shall be as determined by the federal laws (for instance Financial Responsibility Act).

See previous comment.
Proposal for a chapter on Public Finance

a) Principles of budgets

all levels of government have independent budgets and are responsible for their budget only, including authority and responsibility for sub national borrowing

all revenues and expenditures have to be included in one budget for one or more years, separated by years

if a new budget is not approved at the beginning of a new fiscal year, the government is entitled to have expenditures for maintaining the work of the administration and to fulfill legally binding expenditures

the government may not exceed the total approved spending. Changes requires parliament approval.

the annual statement of accounts have to be verified by the General Auditor

federal government loan taking needs approval by parliament

b) Principles of revenue assignment

principle of connectivity

principle of subsidiarity

definition of taxes, shared taxes and supplements to taxes other levels

taxes assigned to federal government

types of income assigned to levels of government

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Ethnic Federalism in Ethiopia: Some Lessons for Nepal

Hashim M. Tewfik

Ethiopia is characterized by great linguistic, cultural and religious diversity. Ethiopia is home for more than 80 ethnic communities with different languages. Except in a few urban areas such as the capital city, most of Ethiopia's ethnic communities predominantly live in their respective distinct geographic areas of habitation. No one ethnic community in Ethiopia is a majority comprising a population of more than 50% of the total population of Ethiopia. But there are relatively significant majority ethnic communities such as the Oromo and Amhara ethnic communities. Most of Ethiopia's ethnic communities are divided along mainly two religious cleavage lines: Islam and Orthodox Christianity. By crosscutting Ethiopia's ethnic cleavage lines, religion plays a moderating role in limiting the intensity of the ethnic factor in politics, giving rise to overarching loyalty.¹

The 1995 constitution of Ethiopia establishes a federal system that is organized on the basis of the right of Ethiopia's ethnic communities to self-determination.²

¹ See tables 1-4 below.


**Introduction**

The recognition of the right of self-determination has become imperative to establish peace and democracy in the country and has demanded the reconstitution of the Ethiopian state on the basis of a federal political system that guarantees the maintenance and promotion distinctive ethno-cultural identities while building a common polity that allows them to pursue their common interests. In as much as ethnic federalism institutionalizes the self-rule and shared-rule of Ethiopia's territorial ethnic communities by guaranteeing their representation and participation in the governance process, it is a viable constitutive means to democracy. The federative arrangement in Ethiopia is not only aimed at enabling ethnic communities to maintain and promote their distinctive collective identities and their particular forms of life. It is also directed at building one political and economic community for the promotion of their common interests collectively, in a mutually supportive manner.³

In this paper, I attempt to present the factors that have necessitated the adoption of federal system in Ethiopia and to discuss the salient features the later.

1. **Historical background**

Following the imperial intrusion in the horn of Africa in the closing years of the 19th century, Emperor Minilik of the Amhara, the second largest ethnic group, had expanded the kingdom of Shawa, which was one of the loosely associated kingdoms of the Abyssinian Empire, from the present day North Central Ethiopia to the South. As a result of the successful conquests and expansions, the modern Ethiopian state was created and emerged as a unitary and centralized state.⁴ And its shape was delineated by the boundary agreements made after the battle of Adwa in 1896 with the adjoining colonial powers.⁵


⁵ Ibid. The Peace Treaty of Addis Ababa, signed between Ethiopia and Italy on 26 October 1896, the 1906 Tripartite Treaty concluded between Britain, France and Italy, and the fact of Ethiopia's admission into the League of Nations in 1923 testified its sovereignty and territorial integrity. See <http://www.ethiopians.com/abay/engin.html#1902>
One major effect of the process of the creation of the modern Ethiopian state process was the dispossession of the land of the peoples of the conquered regions and its subsequent allotment among the new settlers of administrators, judges, soldiers and priests from the centre. This led to conflicts and antagonism between the tenant and the soldier-settlers in most of the South of the Empire. The other serious consequences of the empire building process were the process of imposition of the culture, language and religion of the ruling elite and the subsequent suppression of all others. The process of national integration (nation-building process) meant forced assimilation to the culture of the ruling elite.6

During the reign of Emperor Haile Sellassie (1930-1974), the process of imposition of the language, culture and religion of the ruling Amhara ethnic group was accelerated through the monolingual bureaucratic structure of state, educational system and mass media.7 Emperor Haile Sellassie also followed the precedent set by Minilik with regard to the land tenure system and the mechanism of appointing regional and local rulers from the centre to the provinces had continued.

Emperor Haile Sellassie was deposed in September 1974 by a military coup and the monarchy was formally abolished in 1975. A military regime referred to, in subsequent years, as the Dergue (1974-1991) was established and declared itself to be a socialist.

During the reign of the military dictatorship, Ethiopia experienced the worst period in its history. Its economy was shattered, and it was also hit by famine in 1984/85, worse than the one in 1973/74. The military regime had aggressively repressed political dissent and damaged the social cohesion of the country by its endless military campaigns against national liberation movements. According to Paul Henze, ‘The legal unaccountability of officials that was pioneered by Haile Sellassie took even more authoritarian direction under Mengestu, this helped fuel regional rebellion and an increased ethnic consciousness.’8

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6 The culture of the empire builders, wrote Markakis, had a religious foundation that blended together faith, state and nation, and it was no exaggeration to say that Christianity was “the most profound expression of the national existence of the Ethiopians”. John Markakis, Ethiopia: Anatomy of A Traditional Polity (1974) 30.

7 The promotion of Amharic as a national language of Ethiopia was accompanied by the proscription of all other indigenous languages as a medium of education and press.

Neither military might nor socialist ideology was able to sustain the military regime in power. Just like its predecessor, the military regime (1974-1991) had failed to address the questions of nationalities (ethnic groups) for self-determination. It was brought down in May 1991 as a result of the culmination of the struggles of national liberation movements, particularly, Ethiopian Peoples’ Revolutionary Democratic Forces (EPRDF), a coalition comprising Tigray Peoples Liberation Front (TPLF), the Ethiopian Peoples’ Democratic Movement (EPDM), Oromo People’s Democratic Organization (OPDO), and Ethiopian Democratic Officers Revolutionary Movement (EDORM). With the demise of the dictatorship, Eritrea got its de facto independence while the whole institutional pillars of the Ethiopian State had collapsed incurring tremendous damage to human and economic resources.

To be sure, the political history of the modern Ethiopian state shows: 1) the unsuitability of a centralized unitary government for harmonizing the interests of heterogeneous ethnic communities; 2) the failure of a project of nation-building process that was based upon the imposition of state-nationalism and the concomitant suppression of the demands of ethnic communities for equality, power and power-sharing; 3) the contribution of authoritarian political rule in aggravating problems of ethnic diversity; 4) the imperativeness of the recognition and accommodation of ethnic diversity in the process of governance for the sake of ensuring peace, stability, and inter-ethnic harmony; and 5) the need for the democratic reconstitution of state and state power.

2. The road to a new constitution

The demise of the military dictatorship that had ruled the country for more than seventeen years in May 1991 broke new ground for reorganizing state power in Ethiopia. The Transitional Period Charter, which was drafted and adopted by a conference involving representatives of different liberation movements, ethnic groups and prominent individuals, expressly declared that “freedom, equal rights and self-determination of all peoples shall be the governing principle of political, economic and social life”. Consequently, it established a transitional period government that was composed of a Council of Representatives and Council of Ministers. The Council of Representatives was made up of the representatives of national (ethnic)

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10 Ibid Article 6.
liberation movements, other political organization and prominent individuals.\textsuperscript{11} It exercised legislative and supervisory functions.\textsuperscript{12} The Council of Ministers, on the other hand, was constituted by a Prime Minister who was appointed by the President and approved by the Council of Representatives, and other Ministers, nominated by the Prime Minister and appointed by the Council of Representatives.\textsuperscript{13} The requirements for selecting the members of the Council of Ministers were not only based upon the criteria of technical competence and compliance to the Charter but also on broad national (ethnic) representation.\textsuperscript{14}

In addition to reorganizing the central government, the Charter took two important measures. One, it provided for the promulgation of a law which would establish local and regional councils for local administrative purposes defined on the basis of nationality.\textsuperscript{15} Two, it laid down that the Council of Representatives would constitute the Constitutional Commission to draw up a draft constitution.\textsuperscript{16} Accordingly, the “National/Regional Self-Governments Establishment Proclamation No1992 was promulgated “with a view to giving effect to the right of nations, nationalities and peoples to self-determination.”\textsuperscript{17}

This Proclamation, first, established two parallel systems of government; namely, the central transitional government and the national/regional self-governments.\textsuperscript{18} Secondly, it divided the legislative, executive and judicial powers between the two. While the central government was vested with powers in respect of “such matters as defense, foreign affairs, economic policy, conferring citizenship, declaration of state of emergency, deployment of army where situations going beyond the capacity of self-governments arise, printing currency, establishing and administering major development establishments, building and administering major communication networks and the like, which are specifically reserved to the central government because of their nature, the self-governments were given powers on all other

\textsuperscript{11} Ibid Article 7. The members of the Council of Representatives were not elected; they were representatives of national liberation movements, ethnic groups and others.

\textsuperscript{12} Ibid Article 9.

\textsuperscript{13} Ibid Article 9 (a). 6

\textsuperscript{14} Ibid Article 9 (c).

\textsuperscript{15} Ibid Article 13.

\textsuperscript{16} Ibid Article 10.

\textsuperscript{17} A Proclamation to establish National/Regional Self-governments, Proclamation No.7 of 1992, Negarit Gazeta, 51st Year, Preamble, para. 3.

\textsuperscript{18} Ibid Articles 2 and 9.
matters within their respective geographic areas.\(^{19}\) Thirdly, the Proclamation empowered the self-governments to issue constitutions within the areas of their geographic jurisdiction and in compliance with the laws of the central government.\(^{20}\) Fourthly, the Proclamation made a link between the central government and the self-governments by providing for: a) the supremacy of the constitution,\(^{21}\) b) the accountability of the self-governments not only to the peoples that elected them but also to the central government,\(^{22}\) c) the allocation of budget by the central government,\(^{23}\) and d) the subordination of the self-governments to the central government.\(^{24}\)

The effects of the Charter and Proclamation No/1992 were significant for the devolution of state power. Non-centralization, shared power and self-governance replaced the hitherto existing highly centralized unitary state power. The right of self-determination not only was recognized but also was put into operation in such a way that the people could constitute self-governments of their own within their respective geographic areas. The self-governments had legislative, executive and judicial powers in all matters other than those expressly given to the central government. In spite of the wide range of powers still enjoyed by the central government, the self-governments had supreme authority over those matters falling under their competence. Nevertheless, it could not be said that the law establishing the central and self-governments had set up a federal political system. Examined against the salient features of federalism, they did not only lack constitutional legitimacy but also the self-governments were made subordinate to the central government.\(^{25}\)

The Charter served as an interim constitutional framework that provided not only for basic governmental structures that opened adequate political space for Ethiopia’s ethnic communities to share political power and to exercise self-rule but also for the protection of individual and group human rights as well as the rule of law. Hence, it helped to establish peace, political stability and a democratic context that would enable the full participation of the people in the process of constitution making.

The Transitional Government of Ethiopia created the Constitutional Commission in 18 August 1992. Pursuant to Article 7 of the Constitutional

\(^{19}\) Ibid Article 9.
\(^{20}\) Ibid Article 15(1) a.
\(^{21}\) Ibid.
\(^{22}\) Ibid Article 14.
\(^{23}\) Ibid Article 53.
\(^{24}\) Ibid Article 3.
\(^{25}\) Ibid.
Commission Establishment Proclamation No. 24/1992, the Commission was organized. Accordingly, it was composed of seven members from the Council of representatives, seven members from various political organizations, 3 members from trade unions, 3 members from the Ethiopian Chamber of Commerce, 2 members from the Ethiopian Lawyers Association, 2 members from the Ethiopian Teachers Association, 2 members from the Ethiopian Health Professionals’ Association, and 3 members Women’s representatives. As is shown in the table below, the members of the Commission fairly represented contending political parties, civil society and different ethnic groups in Ethiopia. The Commission comprised both the supporters of the EPRDF and the opposition. (See table 2)

The Proclamation authorized the Commission:
1) to draft, in conformity with the spirit of the Charter, a constitution;
2) to prepare and conduct educational discussions, seminars and symposiums on constitutional principles;
3) to organize and hold public discussion on the draft constitution;
4) to submit the draft constitution to Council of Representative;
5) to publicize and distribute to the public the draft constitution after approval by the Council of Representatives;
6) to receive the comments of the National/Regional and Wereda Councils on the draft constitution;
7) to give explanations on the draft constitution and to respond to the inquires of the public;
8) to compile the comments of the National/Regional and Wereda Councils as well as the comments of other sectors of the public on the draft constitution;
9) to incorporate public comments in the final draft constitution and submit the same to the Council of Representatives;
10) to submit the final draft constitution for adoption to the Constituent Assembly to be elected pursuant to the final draft constitution;
11) to submit periodically to the Council of Representatives reports on its activities.

In other words, the Commission was specifically called upon to conduct civic education and popular consultation in connection with the constitution-
making process, to compile a draft of the constitution which would take into account the consultations and comments of National/Regional Councils, political parties, civic organizations, individuals and then to complete a draft constitution.

The work of the Commission involved mainly two interlinked phases: civic education phase and public consultation phase. These phases were regarded as important vehicles to ensure the participation of the public in the constitution-making process and to provide the public with a sense of ownership over the future constitution. During the civic education phase, the Commission disseminated information on the role of a constitution in building democratic system and the basic concepts of constitution and constitutional law, and the constitutional process. It used the state media to educate the public and stimulate discussions on these issues. It was during this phase that the Commission determined as to what questions were the most important for the public at large. During the consultation phase, the Commission published and presented to the public a series of key questions and issues regarding the constitution and the public was consulted for their response on these questions. The Commission organized public assemblies in various regions of the country to elicit the views of the public, and receive and compile their responses. After taking into account the consultations and comments, the Commission compiled and submitted a draft constitution for deliberation and adoption to the Council of Representatives on April 8, 1994.

In May 1994, the National Electoral Board conducted the election of the members of the Constituent Assembly and 543 delegates were elected on the basis of free, direct and equal universal adult suffrage.

Pursuant to article 11 of the Charter, upon adoption of the draft constitution by the Council of Representatives, the Commission presented the draft constitution to the people for discussion and consultation. It then submitted the final draft of the constitution, which took the discussions and consultations into account, to the Constituent Assembly for deliberation and ratification. The Assembly deliberated on the final draft constitution as of October 28, 1994 and ratified it on December 8, 1994.

Although some observers remarked that the opposition forces had little influence in the process of constitution making in Ethiopia, I strongly dissent from their point of views for the following reasons.

1. The Charter’s guarantees of human rights that would govern the transitional period and the devolution of state power along ethno-territorial lines provided adequate political space for all parties to participate and debate constitutional issues.
2. Although the views and positions of the majority of the members of the Commission reflected the position of EPRDF, the views and positions of the minority on all controversial constitutional issues were presented to the public and the Regional/National Councils for debate and consultation.

3. The Commission conducted a carefully planned civic education and popular consultation. The process of civic education and popular consultation took almost two years, which should be regarded as adequate for effective public education and consultation. Comparisons could be made with East Timor where the time allocated for such process was only one month.

4. The Constituent Assembly was organized not only elected on the basis of a free and fair electoral process but also reflected broad democratic representation of the various peoples of Ethiopia.

5. The debates in the Assembly dealt with the positions and views of both the majority and the minority positions and views on hotly contentious constitutional issues. The draft constitution was ratified by more than a two-third majority of the Assembly.

Therefore, it is my argument that the constitution-making process in Ethiopia reflected a robust process of public engagement and democratic representation.

After a four-year transitional period, Ethiopia adopted a federal constitution and organized state power accordingly.26

3. The right to self-determination: A typical feature of the Ethiopian federal system

Ethiopia’s federal political system is underlined by the right of Ethiopia’s ethno-territorial communities (or nations, nationalities and peoples according to the Ethiopian constitution) to self-determination. According to Article 39(1) of the Ethiopian constitution, every ethno-territorial community has ‘an unconditional right to self-determination, including the right to secession,’ and this right cannot be suspended even during national emergencies.27 Furthermore, as is expressly declared by paragraph 1 and 2 of the


constitution, it is by exercising their respective right to self-determination that Ethiopia’s ethno-territorial communities have entered into a federal compact with the objectives of ensuring ethno-territorial self-rule and inter-ethnic shared-rule of these communities.

The Constitution of Ethiopia singles out ethno-linguistic communities as its authors and beneficiaries. The Constitution opens up with the term “We, the Nations, Nationalities and Peoples of Ethiopia ... ratified the Constitution of the Federal Republic of Ethiopia.” Accordingly, Ethiopian citizens are first categorized in their different ethno-linguistic groups, but not in their entirety as citizens. To be sure, in the words Professor Fasil Nahum, an Ethiopian constitutional law scholar, “it is not as simple as all ethnic groups simply coming together to form the federation. Some minority ethnic groups (i.e., those significantly with less population) have joined with much larger ethnic groups within a state, or have joined together to form a state. And these states formed on the basis of ethnicity have come together to form the federation. These states have retained the characteristics of their ethnic groups for governmental and other on-going constitutional purposes. The ethnicity of states is not just of historical importance, it is of actual significance in the everyday life of the people and of the federation as a whole.”

Article 8 of the federal constitution of Ethiopia provides:

1. All sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia.
2. This Constitution is an expression of their sovereignty.
3. Their sovereignty shall be expressed through their representatives elected in accordance with this constitution and through their direct democratic participation.

The constitutional declaration of the sovereign character of Ethiopia’s various ethno-territorial communities arises from the recognition of the right of each ethno-territorial community to self-determination, including the right to secession.

Article 39 of the constitution states:

1. Every nation, nationality and people in Ethiopia has an unconditional right to self-determination, including the right to secession.

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2. Every nation, nationality and people in Ethiopia has the right to speak, to write and to develop its own language; to express and promote its culture; and preserve its history.

3. Every nation, nationality and people in Ethiopia has the right to a full measure of self-government, which includes the right to establish institutions of government in the territory that it inhabits and to equitable representation in regional and national governments.

4. The right of nation, nationality and people to secession shall come into effect:
   a) When a demand for secession is approved by a two-thirds majority of its the legislative council;
   b) When the federal government organizes a referendum for the concerned people within three years from the time it has received the concerned council’s decision for secession;
   c) When the demand for secession is supported by a majority vote in the referendum;
   d) When the federal government transfers its power to the council of the nation, nationality or people who has voted to secede; and,
   e) When the division of assets is made in a manner to be prescribed by law.

Before discussing what the concept of self-determination entails, it is necessary to make a couple of points about the bearers of the right to self-determination in the context of Ethiopian constitution. The first point relates to the definition of the term ‘nation, nationality and people’. It is defined as ‘a community that has a large measure of common culture or analogous customs, a mutually understandable language, a sense of collective or related identity, a common psychological make-up and a generally contiguous territory.’ 29 This definition is an aggregation of objective and subjective components. The objective components are common culture or related customs, common language, and a contiguous territory and the subjective components are a sense of collective identity and common psychological make-up. Accordingly, a community that fulfills both components is a

29 This is my translation of the Amharic version of Article 39(5) because I have found that the English version of this provision does not reflect the Amharic version, which has the final legal authority, as it is. For reference the English version reads as follows: “Nation, nationality and people for the purpose of this constitution, is a group of people who have or share a large measure common culture, or similar customs, mutual intelligibility of language, belief in a common or related identities, and who predominantly inhabit an identifiable contiguous territory.”
'nation, nationality and people' that is the bearer of the right of self-determination. Since it represents a sense of collective identity that emanates from and based upon shared objective attributes such as language, culture, customs, common habitat, such a community could also be regarded as an ethnic community. The second point is that although the constitution elsewhere uses the concept of minority nationalities or peoples (minority ethnic communities) for the purpose of special representation in the federal legislature, the right to self-determination is vested in every ethnic community, regardless of whether one is a minority or a majority community. After all, Article 39 does not make any distinction between ethnic communities on the basis of their respective numerical size or positions.

The concept of the right of self-determination under Ethiopian constitution has three important and interrelated aspects. These are 1) the aspect of the preservation and promotion of linguistic and cultural diversity, 2) the aspect of the right of every ethnic community to political autonomy and participation in the federal decision making process, and 3) the aspect of the right to secession.

The linguistic and cultural diversity aspect of the right of self-determination comprises the right of every ethnic community to use and develop its language, to express and promote its culture, and to preserve its history. In Ethiopia, as in most other African countries, cultural and linguistic groups that have been suppressed by the homogenizing impulses of state-nationalism have deployed ethnic self-definition, which is an ordinary aspect of selfhood and a basic social relation, in the struggle for survival. As has been pointed out in the preceding sections, some of the major causes for ethnic conflicts in Ethiopia were the linguistic and cultural repression that several ethnic communities had suffered under the hitherto existing ethnocentrict governments. The policies of the latter to homogenize and assimilate politically subordinated communities into the milieu of the dominant ethnocultural community had obviously failed to obliterate ethno-cultural differences, rather generated internal conflicts. These experiences have made the recognition and promotion of ethnic diversity imperative for establishing sustainable peace and social harmony, and for building a political, social and economic community constituted by the free will of the ethno-cultural communities of the country.

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30 Article 54(2) & (3) of the Federal Constitution of Ethiopia.
The autonomy and participation aspect of the right of self-determination establishes the entitlement of every ethnic community to self-government and to proportional representation in regional and federal states. This aspect of self-determination ensures the devolution of state power to ethno-territorial communities and thereby makes it difficult for all power to be concentrated and centralized in one centre. In Ethiopia, as in several other African countries such as Nigeria, Cameroon, Sudan and Kenya, whose populations are divided ethnically into geographic territories, the devolution of power along ethnic lines becomes imperative not only to reduce ethnic competitions and conflicts for state power but also to provide the concerned communities with the opportunity to participate and advance their interests in the governance process. The participation aspect of self-determination is also aimed at developing common identity and unity among ethnic communities. As evidenced in history, the strategy of attempting to develop common identity premised on the denial and suppression of ethnic diversity among the heterogeneous populations of Ethiopia, as in much of other African countries, has failed, spawning centrifugal ethnic-based political forces. Unless giving autonomy and sufficient cultural space to the politicized ethnicity reverses the policy of suppression of ethnic diversity, it is impossible to bring about sustainable peace, democracy and development, nor is possible to create unity among the various ethnic communities. The entrenchment of autonomy and participation aspect of the right of self-determination is, therefore, a requirement of peace, democracy and development in accordance with which the participation of territorially based ethnic communities in the political process from the level of their respective habitats to the level of regional and federal state is ensured.

The implementation of the right of self-determination is manifested, at the grass root level, by the establishment of self-governments of ethnic communities in their respective habitats, and, at higher level, by their proportional representation in the State and Federal governments. Accordingly, the Federal Democratic Republic of Ethiopia comprises nine States, which are organized on the basis of the geographic habitation, language, identity and consent of ethno-territorial communities. These States are: the Tigray State, the Afar State, the Amhara State, the Oromo State, the Somali State, the Benshangul / Gumuz State, the State of the Southern Nations, Nationalities and Peoples, the Gambela Peoples State, and

31 The English version of Article 39 (3) speaks of ‘equitable representation’ whereas the Amharic version reads as ‘proportional representation’. I have used the Amharic version in my citation of Article 39 above.
32 Article 46(1) & (2) of the Federal Constitution of Ethiopia.
the Harari people State. Simultaneously, the Constitution recognises the right of each ethnic community within the above-mentioned States to establish, at any time, its own States. Thus, while at the grass-root level every ethnic community is entitled to establish its own self-government, each has to be proportionally represented in all organs of the State and Federal governments. For instance, the constitution realises the right of each ethnic community to proportional representation in the Federal State by providing that each ethnic community is represented in the House of the Federation by at least one member for each one million population; and by providing that there should be at least 20 seats reserved for minority ethnic communities in the House of Peoples’ Representatives, which consists of a maximum of 550 seats for representatives elected on basis of the system of plurality of votes. The proportional representation of the ethnic communities of Ethiopia in the federal state is not only to be limited to the two houses of the federal parliament, but it should also be reflected in the other branches of the government. The same holds true in the case of the constituent States.

The aspect of secession is the most complex and highly controversial part of the right of self-determination under the Ethiopian constitution. Some argue vigorously against it on the ground that such a right is the exclusive right of nations under colonial domination and that its recognition leads the country to fragmentation. It has also been objected to on the ground that “the right of secession will stimulate a surge of nationalism, and it is inconsistent with competitive politics under federal arrangements: rather than practice the political art of compromise, some or most opposition parties will simply threaten to leave the state”. Others hold that the constitutional inscription and recognition of the right to secession is not only a guarantee for respecting the right of nations, nationalities and peoples to self-determination but it is also an affirmation of the consensual basis of the federal union. Furthermore, the latter argue that the acknowledgment of the right to self-determination, including secession, might help in diffusing

33 Ibid Article 46(2).
34 Ibid Article (1) & (3).
35 However, to what extent that the constitutional provision guarantees the proportional representation of ethnic communities in all branches of the constituent States and the Federal State realized depends upon whether it is adequately ensured in the concerned electoral laws as well as the specific practices regarding the representation of ethnic communities in governmental branches other than their parliaments.
ethnic discontents, that its ready availability of will so colour Ethiopian politics as to make its exercise less likely and less violent.\textsuperscript{38}

Ethiopia’s political history has proved that the unity of the peoples of Ethiopia could be achieved only through their mutual consent to live together in order to pursue their common interests. A unity that is based on the denial of the right of self-determination could not be maintained for long by coercion, and instead of bringing about real and viable unity, it would become a breeding ground for ethnic discontent and secession, resulting in civil wars. Hence, Ethiopia’s exclusion of any resort to violence in order to secure the unity of its peoples and its attempts to bring about consensual unity by devolving political power to its constituent people are not just bold but courageous attempts to tame the centrifugal forces engulfing the country. However, if and when a people might demand secession, the Ethiopian constitution attempts to avoid its potential for violence by providing a peaceful and democratic path for its realization.

The significance of the right to secede should be examined and weighed up in relation to the purpose and object of Ethiopia’s federal dispensation. First of all, Ethiopia’s nations, nationalities and peoples have entered into a federal compact by the “free and full exercise of their respective right of self-determination” in order to build “one political community based on their respective free will and consent, and the rule of law.”\textsuperscript{39} Such a federal political community is set up with the objectives of establishing a lasting peace and democracy in the country and enhancing economic and social development for its peoples.\textsuperscript{40} In their federal compact, they have made it clear that the fulfillment of the objectives requires guaranteeing respect not only for individual and group fundamental rights but also for the promotion of cultures and religions without any discrimination.\textsuperscript{41} Thus, since the principal goal of federalism is achieving and promoting unity in diversity, the more the objectives of the federal compact are fulfilled, the lesser will be the likelihood for resorting to secession. Secondly, the Ethiopian constitution endeavours to unite distinct ethno-territorial communities within an overarching political system by distributing power among their common and


\textsuperscript{39} Paragraphs 1&2 of the Preamble of the Federal Constitution of Ethiopia. (This is my translation of the Amharic version). The English version, as it is, reads: “We, Nations, Nationalities and Peoples of Ethiopia: Strongly committed, in full and free exercise of our right to self-determination, to building a political community founded on the rule of law and capable of ensuring a lasting peace, guaranteeing a democratic order, and advancing our economic and social development.”

\textsuperscript{40} Ibid.

\textsuperscript{41} Ibid paragraph 3.
respective governments in a manner designed to protect and promote the existence and authority of both. Hence, it in no way encourages any secession. Thirdly, it recognizes not only the fact that every ethnic community in Ethiopia has its own distinct culture and territory, but also that Ethiopia is a country wherein its ethnic communities have long lived together building relationships among one another through various levels and walks of life and thereby creating collective interest and outlook. Besides, it declares the conviction of the various ethnic communities to build one economic community in order to maintain and promote their rights, freedoms and interests in a mutually supportive manner. Therefore, it gives more leverage to unity in diversity than secession.

4. Pros and cons of ethnic federalism

In Ethiopia's political discourse, there are two opposite lines of arguments on the necessity of ethnic federalism. One line of argument opposes ethnic federalism on the ground that it may give rise to inter-ethnic conflict and dismemberment of the country. For instance, Walle Engedayehu holds the view that ethnic based politics in Ethiopia fosters conflicts and rivalry among many cultural communities and therefore thwarts any prospect for the establishment of lasting peace and political stability. His argument is based on the assumption that Ethiopia has been homogenized and has to a large extent become a unified entity, and hence ethnic federalism not only stands in the way of the advancement of common interests of the populace but would also be a threat to the unity of its people and to the maintenance of its territorial integrity. He also argues that the adoption of ethnic federalism in Ethiopia might disrupt 'the natural course of peaceful integration among members of different population groups, which could come over time with improved education and communication systems. Dividing them on linguistic, religious, or regional differences will not only lead to social disharmony but will also arouse the desire by groups to press for secession in

42 Ibid paragraph 4.
43 Ibid paragraph 6.
45 In his article, although Engedayehu seems to have acknowledged the existence of cultural, ethnic, linguistic and religious diversity in Ethiopia, he emphasizes that Ethiopia's diverse ethnic communities 'have lived over the centuries migrating from one area to another, intermarrying, intermingling in all levels of activities and sharing a sense of cultural and political unity.' Accordingly, he argues 'while cultural differences had always existed among them, the sense of unity and nationhood still remained strong.' Thus, the establishment of governmental units along ethnic lines is 'an unnecessary intrusion into their personal lives.' Ibid 34-37.
the future. Similarly, Daniel Kendie contends that ethnic federalism would inhibit the possibility of establishing a flourishing national economy by curtailing the mobility of labour and capital.

In contrast, Endreas Eshete argues that ethnic federalism is the optimal institutional means, i.e., effective, possible and ethnically permissible means of transition to democratic rule in Ethiopia since it allows not only free expression by ethno-linguistic communities of their collective identities and their peculiar forms of living but also ensures their representation and participation of in the process of governance, hence, it is the best workable constitutive means to democracy in Ethiopia. Mengestab also contends that since the military, like the Haile Selassie regime, had perpetuated Amhara dominance over Ethiopian state and its people, setting ethnic groups against one another, the policy of ethnic federalism is necessary to diffuse ethnic conflicts. I also share similar viewpoints with Endreas and Mengestab simply because as the political history of modern Ethiopian state testifies the centralized, authoritarian and unitary approach to government in Ethiopia had generated centrifugal ethnic movements that have ultimately brought about the breakdown of the state, and failed to create and sustain the unity of the various ethnic communities of the country. Consequently, the key lesson that can be drawn from our history is that if unity among the diverse ethnic communities of Ethiopia is to be achieved, it has to be based upon their will and commitment to live together while maintaining and promoting their diversity. In other words, the attempts to reconstitute the Ethiopian polity must be predicated on the recognition of cultural diversity and the will of its various cultural communities to live in political unity.

5. Structural aspects of Ethiopia’s federal system

The Ethiopian constitution establishes a federal and democratic state structure comprising two distinct entities, the federal state and the regional (member) states. It defines and distributes powers and functions of the two

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50 The Federal constitution of Ethiopia: Article 1 and Article 50(1).
entities. It requires both entities to respect the powers of one another. Each entity exercises legislative, executive and judicial powers within its allocated sphere and is autonomous from one another. The powers of the federal state are limited to matters expressly enumerated under Article 51 and Article 55 of the constitution while those of the regional states include all matters not given expressly or concurrently to the federal state.

According to the Ethiopian federal constitution, the following responsibilities are included under the residual powers of the component states:

Establishing a state administration that best advances self-government and democratic order based on the rule of law.

Enacting and implementing their own constitutions and laws.

Preparing and implementing economic, social and development policies and plans of their respective states.

Levying and collecting taxes and duties on state revenue source.

Preparing and administering their own budgets.

Administering land and other natural resources in accordance with federal laws.

Enacting and implementing laws on the administration of state employees and conditions of their work.

Establishing the police force and maintaining public order and peace within their respective territories.

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51 Ibid Article 50(8) cum Articles 51, 52, 55 & 98.

52 Ibid Articles 50(8). The lists of matters under the federal jurisdiction are: defense, public security and order; international relations; citizenship and immigration; international and inter-state trade; fiscal and monetary policies, currency, banking and domestic borrowing by states; air, rail, waterways and sea transport and major roads linking two or more states, postal and telecommunication services; general economic, social and development plans and policies; national standards and policy measures for public health, education, science, technology, and for the protection of cultural and historical heritages; land and other natural resources; political parties and elections; patent and copy rights; possession and bearing of arms; and declaration of state of emergency. Ibid Article 51. "All powers not given expressly to the federal government alone, or concurrently to the Federal Government and the States are reserved to the States.” Ibid Article 52(1).

53 Ibid Article 50(2).

54 Ibid Article 52.

55 Ibid Article 52(2).
As self-determining ethno-territorial polities, the component states are immanently entitled to use and promote their respective languages, cultures and histories. The role of the federal state in this regard is limited to the delineation and implementation of 'country-wide standards and basic policy criteria for public health, education ... for the protection and preservation of cultural and historical legacies.' For instance, the federal states cannot transgress the exclusive power of the component states in determining their own working languages.

This pattern of allocating specified powers to the federal entity and unspecified powers to the component entities is the result of the process of reconstructing the Ethiopian state on the basis of the recognition of the right of ethno-territorial communities to self-determination and the need to create a federal union. As the bearers of the right to self-determination, up to, and including, secession, the ethnic communities are essentially the sovereigns. However, recognizing the need to live together for pursuing common social, economic and political interests, they have freely and expressly agreed to give up some parts of their sovereignty to the federal entity.

Although the jurisdictions of the federal state and the regional states are distinctly delineated, they are interdependent in a wide range of matters. First, in economic, social and development matters, the federal state is authorized to formulate and implement the overall policies and strategies of the country while the jurisdiction of the regional states is limited to specific policies and strategies. Second, in matters of education, health, science, technology, protection of cultural and historical legacies, the federal state sets the national standards and basic policy criteria while the regional states are the conduits for the protection and promotion of the languages, cultures and histories of their respective constituent ethnic communities. Third, while the federal state is responsible to enact laws for the utilization and conservation of land and other natural resources, the administration of such resources within the bounds of the federal laws is left for the regional states. Fourth, the judicial authority of the federal High Court and First-Instance Courts is delegated to the state Supreme Courts and High Courts respectively. Fifth, although each orders of government is, in principle, assigned executive authority in the same matters for which it has legislative

56 Ibid Articles 5(3), 39(2).
57 The federal state "shall establish and implement national standards and basic policy criteria for public health, education, science and technology as well as for the protection and preservation of cultural and historical legacies." Ibid Article 51(3)
58 Ibid Article 5(3).
59 Ibid Articles 51(2), (3), & (5); and see, for instance, common Article 47 (2.1) & (2.3) of the Constitutions of Tigray, Amhara and Oromo States.
authority, federal laws are in practice largely executed through the regional states. Therefore, in all the foregoing matters, the interdependence of the federal state and the regional states necessitates their cooperation and makes it crucial for the smooth and efficient application of their responsibilities.

A) The federal legislature

The federal government has two different assemblies, namely, the House of Peoples’ Representatives and the House of Federation. Each differs from one another in their respective powers and functions except in those constitutionally specified matters falling under their concurrent competence. For instance, both the Houses are required in a joint session to take “appropriate measures when state authorities are unable to arrest violations of human rights within their jurisdiction”.

The House of Peoples Representatives is the legislative organ of the federal state. It has powers to legislate in all matters assigned by the constitution to federal jurisdiction. The role of the House of the Federation in the law making process is, however, limited to such specific matters as constitutional amendment, initiation of draft civil laws, approving draft procedural rules for the Constitutional Inquiry Council and adoption of its own internal administration rules.

The competences of the House of Federation are interlinked with the need to maintain and promote the constitutional compact among the various ethnic groups of Ethiopia. The latter are not only the authors of the constitution but they are also its guardians who have bound themselves in mutual commitment to its fulfillment. The House of Federation, which is the House of the nations, nationalities and peoples, was created to maintain and develop their consensual relationships on the basis of equality and respect for their respective diversity while realizing their commitment to uphold the constitution.

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60 Ibid Article 53. The word ‘to arrest’ is a wrong translation of the Amharic version; it has to be read as ‘to stop’.
61 Ibid Article 55(16) and Article 62(5).
62 Ibid Article 55(1) and (29).
63 Ibid Articles 104 and 105.
64 Ibid Article 62 (B).
65 Ibid Article 84(4).
66 Ibid Article 62(11).
The most important competence of the House of Federation is the power to interpret the constitution.\(^68\) Unlike many other federal systems, the umpiring of constitutional issues in Ethiopia is not vested in either a Constitutional Court or a Federal Supreme Court. In Ethiopia, the umpiring of constitutional disputes is not a purely legal matter but it involves a political solution. Although it is the House of Federation that has the authority to decide on “all constitutional disputes,”\(^69\) it is supported by a Council of Constitutional Inquiry,\(^70\) which is established by the Constitution with the power to investigate constitutional disputes and to submit its recommendations to the House of Federation\(^71\) if it finds it necessary to interpret the Constitution.

B) The federal executive

Pursuant to the Ethiopian Constitution, a political party or a coalition of political parties that has the greatest number of seats in the House of Peoples’ Representatives form(s) and lead(s) the Executive,\(^72\) and assumes the power of the federal state.\(^73\) This direct linkage makes the executive not only subservient to the House of Peoples’ Representatives but also its conduit through which the political programs of the majority party or a coalition of parties are implemented. Therefore, one can see a Westminster style executive government in the Ethiopian case.

The executive is made up of the Prime Minister and the Council of Ministers. They exercise the highest executive powers of the Federal State.\(^74\) While the Prime Minister is elected from among members of the House of Peoples’ Representatives, the members of the Council of Ministers are selected by the Prime Minister and appointed by the House of Peoples’ Representatives.\(^75\) Both are responsible to the House of Peoples’

\(^68\) Article 62(1), the Constitution of the Federal Democratic Republic of Ethiopia. For a detailed discussion of constitutional umpiring in Ethiopia, see section 6 of the next chapter.

\(^69\) Ibid Article 83(1).

\(^70\) The has 11 members comprising the President, Vice President of the Federal Supreme Court, And 6 legal experts nominated by the House of Peoples Representatives and appointed by the President, and 3 persons appointed by the House of Federation from among its members.

\(^71\) Articles 82, and 84 (1), the Constitution of the Federal Democratic Republic of Ethiopia.

\(^72\) Ibid Article 56.

\(^73\) Ibid Article 73(2).

\(^74\) Ibid Article 72(1).

\(^75\) The Prime Minister has a discretionary power in selecting the nominees for ministerial posts. He/she can select the nominees either among the members of the two Federal Houses or among other persons. Ibid Article 73(1) and Article 74(2).
The Council of Ministers is also responsible to the Prime Minister.77

C) The federal judiciary

The Ethiopian judiciary is composed of two parallel systems of federal and state courts, among which judicial authority is distributed.78 Federal judicial power lies in federal courts whereas state judicial power is given to state courts.79 The organization of both court systems envisages three-layered hierarchical structures and corresponding divisions of jurisdictions. At the federal level, the Constitution establishes only the Federal Supreme Court, leaving the establishment of Federal High Courts and First Instance Courts to the House of Peoples Representatives, which may decide by a two-thirds majority vote to set up such courts nationwide or in some parts of the country when it deems it necessary.80 In the absence of such decision, the jurisdictions of the Federal High Court and the First Instance Courts are allocated respectively to State Supreme Courts and State High Courts.81

Conclusion

As the political history of modern Ethiopian state testifies, the political prevalence of ethnicity and conflict in Ethiopia is largely the consequence of the usurpation of institutions of self-governance and the consistent exclusion of ethnic minorities from the political process under the pretext of national integration. The suppression of group identities has become ideological and a mobilizing factor against state nationalism. The state has collapsed as a result of the struggles of national liberation movements.

The collapse of the authoritarian, centralized, and ethnocratic state by itself could not necessarily lead to a successful transition to democracy. The democratic reconstitution of the state in Ethiopia partly made it necessary to

76 Ibid Article 72(29).
77 Ibid Article 76(2).
78 Ibid Article 78(2) and (3).
79 Ibid.
80 Ibid Article 78(3). In the federal capital, Addis Ababa, as well as in Dire Dawa, the House of Peoples’ Representatives has established the Federal High Courts and the Federal First-Instance Courts. See the Federal Courts Establishment Proclamation No. 13 Negarit Gazeta, (Addis Ababa, 15th February 1996) Article 24(2) & (3).
81 Article 78(3) and Article 80(2), the Constitution of the Federal Democratic Republic of Ethiopia.
establish a federal institutional setting that entrenches political space for the participation of ethno-territorial communities in the governance process. This raised an immense challenge for reconstructing the state from the bottom-up based on the right of self-governance of identity groups and on their consent to live together for mutual economic, social and political benefits under one political order.

The advocacy of reconstructing the Ethiopian state on the basis of a federal system of ethno-territorial communities is reinforced not merely to maintain the unity of Ethiopian peoples but to create sustainable peace that is immanently essential for the much needed social and economic development of the country. The entrenchment of institutions of self-government of ethno-territorial communities and their participation in the governance of the federal polity would help to manage disputes through negotiations and consensus rather than violence. In fact, the last ten years, since the devolution of state power along ethnic lines, have been marked with relative internal peace and stability. Moreover,

"To be sure, the political history of the modern Ethiopian state shows: 1) the unsuitability of a centralized unitary government for harmonizing the interests of heterogeneous ethnic communities; 2) the failure of a project of nation-building process that was based upon the imposition of state-nationalism and the concomitant suppression of the demands of ethnic communities for equality, power and power-sharing; 3) the contribution of authoritarian political rule in aggravating problems of ethnic diversity; 4) the imperativeness of the recognition and accommodation of ethnic diversity in the process of governance for the sake of ensuring peace, stability, and inter-ethnic harmony; and 5) the need for the democratic reconstitution of state and state power."

Hashim M. Tewfik
(at p. 175)
instead of generating internecine ethnic conflicts, the empowerment of ethno-territorial communities in the governance process has become a solid ground for maintaining their unity and pursuing their common interests.

### Tables

**Table One**

<table>
<thead>
<tr>
<th>Distribution of Ethnic Groups (100,000+) in Ethiopia, 1994</th>
<th>Population</th>
<th>% Of Total Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ethnic Group</td>
<td>Population</td>
<td></td>
</tr>
<tr>
<td>------------------------------------------------------------</td>
<td>------------</td>
<td>-----------------------</td>
</tr>
<tr>
<td>Oromo</td>
<td>17,080,318</td>
<td>32.1</td>
</tr>
<tr>
<td>Amhara</td>
<td>16,007,933</td>
<td>30.1</td>
</tr>
<tr>
<td>Tigraway</td>
<td>3,284,568</td>
<td>6.2</td>
</tr>
<tr>
<td>Somali</td>
<td>3,160,540</td>
<td>5.9</td>
</tr>
<tr>
<td>Guragie</td>
<td>2,290,274</td>
<td>4.3</td>
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<tr>
<td>Sidama</td>
<td>1,842,314</td>
<td>3.5</td>
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<tr>
<td>Wilaita</td>
<td>1,269,216</td>
<td>2.4</td>
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<td>Afar</td>
<td>979,367</td>
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<td>Hadiya</td>
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</tr>
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<td>Kulo</td>
<td>331,483</td>
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Federalism as a Means of Conflict Mitigation in Peace Process

Markus Heiniger

First of all I should tell you that I am working for the Foreign Ministry, especially as a peace advisory, for a long time now. We and other international experts have been asked from time to time to give some ideas and share our experiences regarding federalism. Our support of course is not in favour of any particular system nor do we have any intention to export the Swiss model of federalism to Nepal. Apart from sharing our experience, very often we also provide support to Nepali experts to help them learn from our experience. They are the ones who really have to advice the Constituent Assembly. However, we have also tried to help, as far as possible, in coordinating the external support to the process. External assistance should in no way be an impediment to the process of working out a federal model in Nepal; rather it should be helpful in making a positive contribution.

The Swiss model is quite well known in Nepal. In the beginning, we were often asked about this model over and over again. That phase is now nearly over. Now we need to have very practical discussions. I will discuss and reflect some of the practical issues here. Just by way of hinting, let me point out that even our federal system has been born out of a war. The year was 1918. We had an internal war of a low scale like the ones we see in Europe. Our forefathers who made the new constitution agreed to adopt a federal system. There were winners and losers, but they worked out a satisfactory arrangement.
I will like to share few observations by first looking back to see what actually was the problem in the past. Why did we have this war? We have to ask ourselves what we are going to solve here with the new constitution. We had asked these questions ourselves. It is about a country reflecting on its past but not remaining confined to it. Participation of the people is necessary to solve the current problems of the people of Nepal. In the public sphere, this means how can minorities be protected? How can democracy be promoted? How can economic development be promoted as far as possible? There could be many such questions.

But if we see what is happening now, we can say that some of the goals that Nepal is trying to achieve through state restructuring under the proposed federal system are related to a) power sharing between Kathmandu and the provinces, b) efforts to bring the state closer to the people in terms of delivery and also in terms of legitimization of exercise of power. This involves trying to recognize to the extent possible diversity of the country, and their requirements. Most probably in a long term perspective, this will contribute to nation building in a way which is more effective than the processes which started before 1950. It has taken a long time in our experience too.

Fortunately, now we can say that the dispute about how to organize Nepal for that future is not there anymore. The Constituent Assembly has provided the platform, and probably that is what makes it so important. Most of the actors as far as I can see have been represented in it. This is sufficient.

The key features of the 12 point agreement and Comprehensive Peace Accord (CPA) were to end monarchy, end centralized form of state, and somehow reorganize, reform or restructure the state, and go for democratization. But at the time of the CPA, it was not formally decided how the state would be restructured and what form it would take.

After the CPA, there was a general consensus that the state needed to be reorganized. Although it was unclear how this could be achieved, there was an indication that it would be more towards decentralization. And then you have different readings of your own experiences regarding the decentralization initiatives of the 1990s. The formal and legal framework of decentralization was quite strong, I would say. However, what was lacking was implementation and assessment. So in a way, it makes sense to opt for decentralization in a strong way now.

What usually happens after peace agreements is that other movements that were not at the table earlier also start coming out. They want to use the changed context for their cause. They also want a share in the peace process.
It is very common in all peace processes. This has happened very strongly also in Nepal’s case. Movements from the terai were the most strongest. The 8 point agreement of February 2008 was, in a way, one of the first documents that maintained that Nepal is going to be a federal state. However, the fact that Nepal is going to be a federal democratic republic has been acknowledged in writing before this too. The second point of the 8 point agreement read categorically that in the federal structure, power is to be divided between the constituent units of the state. In a way, this has given a sense of direction on how the state should be restructured.

More movements have arisen in the mean time, namely, under the identity banner, the so called ethnic movements, which have made the arena more complicated. Earlier you had two-three hundred main actors, now you have a multitude of quite complicated actors, which makes it all the more difficult to hold negotiations.

I have observed in the beginning that federalism was regarded more as a philosophical idea, three four years ago. Now it seems to me that there is an explosion of learning on this subject. I must say I am very impressed. There are many people now who are so aligned to this concept. Of course there could be much more. Many people far away from Kathmandu are still not so clear about it. But I want to stress that there has been effort, and this is happening. It is becoming very concrete, and discussions have become even more practical.

The exposure phase has led the people to come up with strong demands. This is based on the maximalist approach also. And I think the compromise making phase has quite already started. The maps which are circulating through the different political parties about future provinces are an example. They are getting actually quite closer and closer, if I read optimistically. So the country is heading towards the end game. Of course, federalism is one of the contentious issues. I want to emphasize a little bit about the parallel efforts, competitive politics and consensus, which we can also observe in the new process.

During the time when Nepal worked on the CPA, there was a seven party alliance which worked as an institution for consensus politics and enabled rapid progress in the constitution making process. Then of course with the new movement that came up, following elections, competitive politics came about very strongly. The seven party alliance was not given continuity very formally. Maybe before the end game, the politics of consensus can resume through the creation of the high level political mechanism. This is an optimistic vision. The high level political mechanism can additionally help to iron out some of the very difficult issues.
Actually what I also wanted to tell you as a friendly observer over the years is that there are chances, I think, for success. In my view, in the upcoming months it is quite important to be very precise about transitional arrangements, once a decision is made on the type of federalism that you would adopt.

Apart from transitional arrangements, it is important also to think about oversight responsibilities. The question is who will oversee the implementation of federalism - the government administration, high level mechanism, or what? And may be the future provincial government would want to be a part of that process. It is difficult to answer. But the provision of oversight must also come with a timeline. It also involves resources because that will be costly for the moment. If there is a good plan, there will be support for that. Sequencing is also very important for prioritization. Sequencing of the election was not perfect in my reading. Therefore, in future, more attention should be given to sequencing.

I am not sure if constitutional arrangements have to answer whether it is necessary to have a very parallel build up of all the provinces. You should decide. You can also start with a few, I am not sure. I am just thinking out loud here. Some might think of moving faster for actual political reasons. These are some of the things which we should not forget. It has a valid point. Of course, it is a risk not to implement the transition very carefully.

Now I come to the conclusion. Even after an end there will be no end. We will have to bear in mind that the process of transforming the conflict will continue. I wish you have the determination sometimes, to put yourselves in the shoes of others for a moment. I also wish you luck to overcome this existing deadlock and arrive at a good end game and more. Thank you very much.

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Sharing Powers in Federations
Some Insights

Nicole Töpperwien

This article is based on my presentation at the international conference on “Dynamics of Constitution Making in Nepal in Post Conflict Scenario” held in Kathmandu in January 2010. Since then, the State Restructuring Committee of the Constituent Assembly (CA) of Nepal has presented its concept paper to the Constituent Assembly. During the presentation at the conference, remarks on the current debate on federalism in Nepal had to be based on reports in print media and discussions with CA members. Now it is possible to rely on the concept paper. Therefore, some changes were made to the original text. However, comments on the concept paper included here have to be taken with care because only the unofficial English translation was consulted. This might have led to some misunderstandings or inaccuracies.

The Interim Constitution gives a relatively clear mandate to the Constituent Assembly. Nepal shall be organized as a federation:

Interim Constitution Article 138 based on Amendments of April 13, 2007 and July 12, 2008

1 To bring an end to discrimination based on class, caste, language, gender, culture, religion and region by eliminating the centralized and unitary form of the state, the state shall be made inclusive and restructured into a progressive, democratic federal system.
(1a) Accepting the aspirations of indigenous ethnic groups and the people of the backward and other regions, and the people of Madhes, for autonomous provinces, Nepal shall be a Federal Democratic Republic. The provinces shall be autonomous with full rights. The Constituent Assembly shall determine the number, boundary, names and structures of the autonomous provinces and the distribution of powers and resources, while maintaining the sovereignty, unity and integrity of Nepal (italics mine).

Federalism is a principle of state organization and combines vertical and horizontal power-sharing. Federations are composed of federal units (frequently called provinces or states) and powers are shared between the centre and the federal units (vertical power-sharing). In addition, federal units are represented at the centre, normally in a second chamber of parliament, and thus their representatives take part in central decision-making (horizontal power-sharing).

Here only vertical power-sharing will be considered because other forms of power-sharing are taken up in other parts of this publication. In particular, this paper will look at the distribution of powers between the different levels or orders of state. The distribution of powers determines the fields, in which federal units can take and implement their own decisions and thus have the right to self-rule. Quite often when federalism is promoted the proponents of federalism mainly think of vertical power-sharing. Federalism is understood as an alternative to a centralized system of governance. Also in Nepal, more debate is taking place on defining the federal units and their powers than for instance on the representation of federal units in central decision-making.

The definition of federal units can be highly contentious because ultimately, by defining the federal units, it is also determined which regions and populations can gain power, in different words who has the right to self-rule and to shared rule. The concept paper has proposed a map that shows the federal units and also defines their names and capitals. It has also proposed a procedure for changing the boundaries of federal units. The concept paper does not only deal with the federal units (states or provinces). It also includes provisions on local government. In addition, the concept paper has introduced special structures to give rights to self-rule to areas in which a particular ethnic or linguistic community is dominant (called autonomous region), and to areas which are economically and socially backward (called protected area).

The distribution of powers establishes how powers are distributed between the different levels and orders of government (centre, federal units, local government, and special structures). The distribution of powers is one of the elements that determine the scope of self-rule. However, it is not the
sole element that is of importance. Fiscal federalism, the sharing of financial resources is at least as important for determining the level of self-rule as the distribution of powers as such. Without the necessary resources, powers remain empty.

Any discussion about the distribution of powers appears to be technical. However, in the labyrinth of technical terms one must never forget the underlying objectives. Why was federalism promulgated in the first place and can the proposed constitutional provisions be implemented in a way that they serve the objectives? With regards to the distribution of powers too, readers will have to keep this question in mind: What will be the implications of the distribution of powers “to bring an end to discrimination” and for addressing the aspirations of ethnic indigenous as well as “the people of the backward and other regions, and the people of Madhes”? (see Article 138 of the Interim Constitution). Furthermore, the distribution of powers should contribute to efficient and effective governance close to the people.

The following four issues will be further considered (1) How shall the distribution of powers be embodied in the constitution? (2) How shall powers be distributed? (3) How to foster cooperation and provide dispute resolution? and finally, in the form of conclusions, (4) How shall the distribution of powers be implemented?

1. How shall the distribution of powers be embodied in the constitution?

The distribution of powers should be drafted in a way that rights and responsibilities of each order of government, in particular the centre and the federal units, are clear. The distribution of powers should establish who will make the policies and deliver services. The objective is to avoid disputes about who is in charge and who has the right (and duty) to decide and act. Ambiguities in the distribution of powers easily lead to disputes between federal units and the centre. It can happen that both, the centre and the federal units claim to be in charge or that none of them gets active. Both can have very negative consequences for the citizens.

No matter how carefully the distribution of powers is drafted, it is never possible to encompass everything while attributing powers to others, because the human mind cannot imagine all the tasks that might arise (internet, genetic research, nuclear energy are all relatively new fields). Also the notion of what matters fall under the private sphere can change over time and thus should be removed from or added to state regulation as the case maybe. For instance, until relatively recently, in most countries many forms of domestic
violence were considered as a private matter while today almost all states prohibit and punish domestic violence.

Because there will always be gaps in the distribution of powers, federal constitutions regulate which level of state has the residual power. The residual power determines who is in charge when the constitution is mute and does not attribute the power to any order of the state. In most of the older federations, the residual power is attributed to the federal units. In this case, the federal units are in charge whenever nothing else is explicitly regulated in the constitution. Newer constitutions sometimes give the residual power to the centre, e.g. India. The State Restructuring Committee followed the Indian example and proposed that the centre shall have the residual power (Article 9 (11) of the concept paper). In this case, whenever there are gaps in the distribution of powers or when new issues come up the centre will be in charge. If the residual power rests with the centre, it is particularly important to be very careful in defining the powers of federal units so that the centre cannot too easily assume powers based on the residual power.

Once the residual power is attributed it would suffice to only enumerate those fields in which other levels of government are in charge. This was done by the older federations. The powers of the centre were enumerated in the constitution and all other powers that were not mentioned remained with the federal units. In the case of Nepal, from a legal point of view, it would have sufficed to just enumerate the powers of the federal units. All other powers are automatically with the centre as the bearer of the residual power. However, today more and more federations list the powers of the centre and of the federal units. This can make it more predictable for the citizens to determine which order of government is in charge.

In older federations, federal units normally were in charge to determine the powers of local governments. There were no or only very few provisions on local governments in federal constitutions. Today, however, there are some federations that provide a list for the local government. As a consequence the powers of local governments are constitutionally protected. This is done to acknowledge the importance of local governments. In particular, if there is the wish to have a strong local government it can be advisable to regulate its powers (and resources) directly in the constitution instead of leaving it to the parliament of the centre or of the federal units to attribute powers to the local government. Those who argue for strong federal units are often critical of including too detailed provisions on local governments in the constitution because the constitutional guarantees render local governments relatively independent from the federal units which can have positive and negative consequences for the overall power balance.
The concept paper follows this newer approach and lists all powers. There are separate lists for the centre, the federal units, and local government as well. This shows that the drafters of the concept paper aim at attributing powers to different levels or orders of government in a transparent manner and that they want to establish a relatively strong local government. The drafters of the concept paper want to have the list of powers of local governments understood as a list enshrining the minimum powers of the local government. Federal units can accord additional powers to local governments (Article 9 (10) of the concept paper). It seems that local governments have to be understood as VDCs and municipalities. It is not completely clear what will happen to the districts. Will they be abolished or remain as purely administrative units under the federal units or will local governments after all be interpreted so as to also encompass the districts?

In line with the establishment of special structures (see above) the concept paper includes an additional list to the above mentioned three lists. There is a list with powers of autonomous regions within federal units. However, there is no list with powers of protected areas. The federal units can determine the powers of protected areas (Article 9 (9) of the concept paper). Furthermore, the concept paper provides the possibility that powers are given directly to certain groups (tribal people, indigenous nationalities, Madheshi) (Article 12 (1) of the concept paper).

One issue that will need further exploration, is the relations between the autonomous regions on the one side and the federal units and local governments on the other side, as well as between the powers of groups (tribal people, indigenous nationalities, Madheshis) and of territorial entities (federal units, local governments, special structures).

In constitution drafting, normally a distinction is made between exclusive powers, powers that are attributed to just one order or level of state and concurrent powers that establish tasks that shall be assumed jointly by different levels of state. Therefore, in addition to lists for each level or order of government providing for exclusive powers, it is possible to establish an additional list with concurrent powers that shall be assumed jointly by two or even more than two state levels. The concept paper also provides for such a list of concurrent powers. Powers in the concurrent list should be assumed by the centre and the federal units. For instance, there are no concurrent lists for the federal units and local governments or for the federal units and autonomous regions.

According to the concept paper, in the fields of concurrent powers the centre shall mainly formulate laws with directive principles and standards (framework legislation). Within the framework established by the centre the federal units can regulate (Article 9 (3) of the concept paper). The federal
units will have to comply with the central legislation in these fields. Lists of concurrent powers are often established based on the realization that many tasks and subject matters are so complex and interrelated that more than just one state level should be involved to find adequate regulations. Long lists of concurrent powers, however, also bear the risk that the centre provides more and more detailed directives and thus in effect, these powers remain centralized.

In many federations, the centre can also delegate powers to federal units. In this case, the federal units assume powers on behalf of the centre normally by being paid from the centre for these tasks. This is a rather common practice at least in the continental European tradition. There is always a question of whether federal units can hand powers to the centre (for instance if they feel they do not have the capacity to assume powers) and also whether the centre can unilaterally decide to assume certain powers of federal units. The concept paper provides for the possibility that two or more federal units can ask the federal parliament (the parliament of the centre) to draft laws on matters of federal unit powers (Article 10 (3) of the concept paper). It is not completely clear whether these laws will then just apply to the federal units that demanded the legislation or also to others. According to the commentary of the drafters this provision is part of the centre’s engagement in managing the relations between federal units.

2. How shall powers be distributed?

The major question remains: what powers should each level of state or each entity have? There are some federations which allocate many powers to the centre (and thus remain rather centralized) and others in which the federal units have substantial powers. There are no fixed rules as to what kind of power each level or order of states should have, however, there are some thumb-rules. According to the subsidiarity principle, higher levels of government shall only assume those powers that cannot be effectively managed by lower levels of government. Based on this principle, normally at least local infrastructure, basic health care and parts of education are attributed to lower levels of government. In line with the subsidiarity principle the concept paper for instance attributes basic health and sanitation, local roads and local level development projects to the local level. Typical (minimum) powers of the centre are foreign affairs, defence, currency, coinage and customs. Also in the concept paper these are included in the list of the centre. Experiences show that it is not good if the centre is too weak. There needs to be a balance of power between the centre and federal units. Though the subsidiarity principle can give some guidance, the issue of power distribution remains vague. It can be fiercely disputed which level of
government is better equipped to assume power. It will also depend on the capacity of the federal units and capacity is connected to the boundaries of federal units as well as to the resource allocation.

As a further general rule, especially if federalism is introduced as a conflict management device, areas of decision-making which are of importance for identity expression (as e.g. culture) can be left to lower levels of government so as to foster (internal) self-determination and avoid conflict at higher levels of government. In the concept paper some powers that are related to identity are in the concurrent list (e.g. historical monuments and museums), others are in the list of the federal units (e.g. protection and use of language, culture and religion) or of autonomous regions (e.g. protection of language, culture, script and religion, library and museum). Additionally, tribal people, indigenous nationalities, Madheshis can be provided e.g. with powers concerning politics, culture, religion, language, education (Article 12 of the concept paper). In some cases, it can also be of advantage to provide for powers in the area of police though this requires cooperation and coordination between different entities. The concept paper proposes that the centre is in charge of general defence and security as well as the central police force, the federal units of the police and the administration of law and order, the local level of city and community police, and the autonomous areas of police (see annexes 3, 4, 6 & 7).

However, all such powers related to identity should be paired with protective mechanisms to prevent these rights from being misused, for instance to discriminate against those who do not share the identity. For instance, if a federal unit is attributed with the power in the field of religion the central level can retain the competence to protect the freedom of religion and to take measures for promoting peace between religious communities.

It is also possible to attribute different powers to the different federal units (asymmetric distribution of powers). For instance one federal unit might receive the power to establish its own police force while others might not. According to the concept paper all federal units would have the same amount of powers. The powers of local governments could vary to some extent because the concept paper provides a minimum list and the federal units can attribute additional powers to their local governments. This can be a good approach to guarantee a minimum level of local autonomy without preventing federal units to provide extra powers to their local governments. Also the status of autonomous region would imply a somewhat different set of powers than what local governments or federal units have.

The distribution of powers has to be harmonised with the distribution of resources. Any attribution of powers must be paired with the attribution of the respective financial means. In this sense, federal units that attribute
additional powers to their local governments should also allocate additional finances. This harmonisation is of course a challenge, particularly in poor countries where there are simply not enough funds to provide services to all. However, it is a risk to delegate powers and the associated costs, without allocating income.

Another important issue is who will administer the legislation of the centre and of the federal units. Will the centre have its own administration in the federal units to implement central legislation or will it mandate the federal units to implement central laws? There are examples of both approaches. For instance, in Germany and Switzerland the central legislation is implemented by the administration of the federal units while in the United States of America branches of the central administration administer central law in the federal units. Which approach is adopted will have decisive consequences for the structure of the administration as well as for the allocation of resources. In the Swiss and German approach the centre only needs a small administration, in the American case the administration needs to be much bigger. From the concept paper it is not completely clear yet which approach Nepal envisages.

3. How to foster cooperation and provide dispute resolution?

A federation is one country. Though federalism can be used to acknowledge diversity and to provide possibilities for self-rule, it is still based on the idea that the centre and federal units are parties in a social contract and owe each other support (comity). In particular, if there are concurrent powers governments have to cooperate. But also in other fields, governments will have to work together because issues are interconnected and governments of all levels are interdependent. For instance, though police matters are not in the concurrent list, all orders of state have certain powers in the field of police. Effective public security will require coordination and cooperation.

The framers of the concept paper took up this spirit. The relations between the different orders of the state shall be based on the principles of cooperativeness, coexistence and coordination (Article 10 (2) of the concept paper). It also provides that federal units shall assist each other (Article 10 (9) of the concept paper). It does not establish an institutionalized cooperation mechanism but proposes an interstate council that could take up such a role in the future.
Furthermore, whenever there is more than just one actor disputes can arise and these disputes can also be related to the distribution of powers. Therefore, dispute resolution mechanisms are of importance. From the idea of cooperativeness also follows that, as far as possible, disputes should be resolved in non-confrontational ways. The concept paper points out that alternative ways of dispute resolution including bilateral and multilateral talks, reconciliation, coordination and mediation can be adopted at any time (Article 11 (20) of the concept paper). In addition, the concept paper includes a range of non-judicial and judicial dispute resolution mechanisms.

In federations, the centre can be attributed with the role as mediator or arbiter between federal units. The centre should assume this role in a way that is respectful of the distribution of powers and does not lead to undue interference of the centre in the affairs of federal units. The concept paper provides for a strong role of the centre. The federation shall carry out the management role for the mutual relations between federal units (see Article 10 (2) of the concept paper). On matters of national importance and to coordinate among the federal units the centre can issue directives to the federal units and the federal units must adhere to the directives (Article 10 (4) of the concept paper). If not carefully phrased and used, broad powers of the centre to ‘coordinate’ activities of federal units might endanger the powers of federal units.

In addition to this more general role of the centre as manager of relations between federal units the concept paper provides for an interstate council, which according to the proposal mainly has (non-judicial) dispute resolution functions. The interstate council is composed of representatives from the centre and the federal units to avert or resolve any disputes between the federation and the federal units as well as among the federal units. The composition of the interstate council guarantees a certain political weight and legitimacy in respect to the federation and the federal units. If a dispute arises, the council will try to resolve the dispute or will refer the unresolved matter to central parliament (Article 11 (1) of the concept paper). Central parliament can discuss the matter and pass legislation if necessary or it can

"All such powers [as are] related to identity should be paired with protective mechanisms to prevent these rights from being misused, for instance to discriminate against those who do not share the identity. For instance, if a federal unit is attributed with the power in the field of religion the central level can retain the competence to protect the freedom of religion and to take measures for promoting peace between religious communities."

-Nicole Töpperwien (at p 206)
refer the issue to the central government for a referendum (Article 11 (4-8) of the concept paper). Disputes within federal units shall be resolved by the parliament of the federal unit.

In addition to forms of non-judicial dispute resolution, federations normally provide for some judicial avenues for dispute resolution, sometimes through a constitutional court, sometimes through other courts. Through these mechanisms, for instance a federal unit can make a complaint that the centre violated the distribution of powers and illegally interfered with the powers of the federal unit. The distribution of powers merits protection because it is enshrined in the constitution. Any deviation from the distribution of powers is a violation of the constitution.

Also, the concept paper proposes some judicial forms of dispute resolution. Whenever a dispute arises that concerns the distribution of powers or the interpretation of the constitution the constitutional court “shall have the rights to initiate action and settle such dispute” (Article 11 (11) of the concept paper). From the language proposed in the concept paper (in its English translation) it is not completely clear who can lodge a complaint and whether the court has the obligation to adjudicate the dispute.

For legal disputes within a federal unit, the high court of the federal unit can take action and give a verdict. If the matter concerns the constitution, e.g. the distribution of powers, the decision of the high court can be challenged in front of the constitutional court (Article 11 (17-18) of the concept paper).

From the above follows that the concept paper provides a whole range of mechanisms to avert and/or resolve disputes. This is foremost a positive thing. The table shows the dispute resolution mechanisms that would be at hand for disputes between the centre and the federal units or among federal units (based on a reading of the unofficial English translation of the concept paper).

<p>| Table 1 |
|----------------------------------|----------------------------------|----------------------------------|
| In cases of national importance and for coordination, binding directives by the centre (Article 10 (4)) | Interstate council, if unsuccessful central parliament, if unsuccessful referendum | Constitutional Court | Alternative way including bilateral and multilateral talks, reconciliation, coordination and mediation |</p>
<table>
<thead>
<tr>
<th>Political disputes</th>
<th>If deemed of national importance, probably yes</th>
<th>Yes</th>
<th>No</th>
<th>Yes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal disputes that do not concern constitutional matters</td>
<td>If deemed of national importance, probably yes</td>
<td>Yes</td>
<td>No (it is not clear whether recourse can be taken to any other court)</td>
<td>Yes</td>
</tr>
<tr>
<td>Legal disputes that concern constitutional matters</td>
<td>If deemed of national importance, probably yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

In order to avoid overlaps, in particular between the dispute resolution procedure initiated by the interstate council and the courts, it could be provided that the interstate council can discuss all disputes, however those disputes that concern constitutional and other legal issues can be taken to court at any time by any party to the dispute.

4. **In the form of conclusion: How shall the distribution of powers be implemented?**

The constitution is supposed to be the highest law of the land. However, unfortunately in many cases it just remains a piece of paper. A constitution that is not implemented is an empty promise. Once the distribution of powers is established and the constitution is promulgated, federal units and local governments will expect to effectively receive ‘their’ powers. If the necessary steps are not taken so that federal units and local governments can become operational and exercise their powers, frustrations will develop. It will also create frustrations if implementation falters because adopted constitutional provisions are unrealistic and non-implementable, for instance because of lack of capacity, or if there are fights on ‘who has to do what’ or how to finance the transitions. Frustrations can bring new potentials for conflicts.

It can have positive effects to include provisions on implementation in the transitory provisions of the constitution, provisions on ‘who is doing what with what kind of resources when’. Who will take the initiative to implement, who will coordinate? What ministries will have the lead, for
instance to operationalize the distribution of powers in respect to health. What steps are necessary to realize that different levels of state can effectively assume their powers, for instance what legislative acts are required, what infrastructure has to be created so that federal units and local governments can provide health care? What kinds of resources are necessary in order that different state levels can assume their powers, what will the transition cost? And finally: When can it realistically be expected that a transfer of powers (and resources) can take place, what are the timelines, what are the different steps? Implementation cannot all take place all at once. Therefore it needs prioritization and phasing. It can also be useful to determine what shall happen if the implementation of one specific aspect does not proceed as planned. Monitoring and dispute resolution mechanisms can help to keep the implementation on track.

In general, a debate on implementation can be useful for the work of the Constituent Assembly.

1. Debates on the implementation of provisions will provide a quality and reality check (are provisions clear and consistent, are they implementable?) For instance, a debate on how to implement the distribution of powers in respect to health would very easily show whether the distribution of powers is clear enough or whether there are ambiguities or unintended overlaps.

2. It will provide a clear idea about the time lines and thus can also contribute to managing expectations, and

3. It can establish responsibilities and can improve the legitimacy of the transition process (CA defines the responsibilities, priorities and phases of transition with consensus or 2/3 majority).

In different words, to include provisions on implementation in the constitution can improve chances of an effective and timely transition and reduces the risks of conflict on and during implementation. Though formally a chapter on implementation is not required the existence of such a chapter in the constitution will make the complex process of implementation easier.

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Constitutional Foundation of Local Self-Government in Federal Polity

*Kumar Suresh*

The matrix\(^1\) model of federalism necessitates a non-concentration model of federal power-sharing. Within this framework, varying amount of powers and responsibilities are shared between different spheres/levels/orders of a federal structure. The amount of power and responsibilities enjoyed by the units within a federal system is expressed through the concepts of non-centralization, non-concentration, decentralization, de-concentration, devolution, and delegation. Besides implying the amount of power and responsibilities that are shared between different orders/spheres of a federation, the pattern of distribution of power and responsibilities also indicates the level and amount of empowerment of the units within a federal structure. The distribution of power and responsibilities are, of course, determined by the context in which the federal system takes shape and operates. The context of “coming-together” may vary from the context of

\(^{1}\) The *Matrix Model* of federal power-sharing as against the *Power-Pyramid Model* and the *Centre-Periphery Model* qualifies as the most non-centralized model of federal power sharing in which there are no higher or lower power centres, only larger or smaller arenas of political decision making and action. In the matrix model, the distribution of power can be seen as involving differential loadings in different arenas for different purposes. See Daniel J. Elazar, *Exploring Federalism*, Tuscaloosa: University of Alabama Press, 1987, pp 34-38.
“holding-together” federations. In this context it hardly needs to be emphasized that federalism as ‘multilevel governance allows decision makers to adjust the scale of governance to reflect heterogeneity’. ²

Federal context and the logic of local government

In most federations, powers and responsibilities are shared between two orders of a federal structure. It is only the dual polity structure that is formally and constitutionally recognized. There are very few federations which make provision for a third order of government at the local level. It hardly needs to be additionally emphasized that the non-concentration model of federal structure postulates de-concentration of power and off-loading of responsibilities. The federal practice of off-loading of competences is best articulated through the principle of subsidiarity. The principle of subsidiarity, as practiced mainly in the Swiss model of federalism, implies that the task must be performed by the concerned level of the federal structure themselves and “…a task has to be transferred to the higher level of government only if the lower level cannot, or is no longer able, to carry out this task….“³ It is this principle of subsidiarity and the federal requisite of de-concentration of power and responsibilities that strengthen the case of local government within a federal structure. However, it does not essentially imply recognition of local governments as order or sphere of the federal structure.

Local governments across the federal polities are embedded with the responsibilities of delivering services at the community level. However, the local governments do not enjoy the same level of competence in every case of federal polity. We find a great degree of variation in the status, role and competence of the local government. Despite the variations in the status and competence in different contexts, local governments have assumed critical significance in recent years.


From the perspective of multilevel governance in a federal structure, local governments are now seen as an important sphere of governance. This sphere of governance is loaded with the responsibilities of efficient and cost-effective delivery of services at the local level. But more than playing the role of a service delivery mechanism, local governments in recent years are also being perceived as a model of local democracy. This perception has been a major factor behind the creation of local self-government institutions in India. This has also been one of the prime movers of the decentralization debate in India. Similarly, the Swiss Constitution of 1999 has carved out a distinctive space for the municipalities and communes under its Article 50 which was not a part of the Constitution prior to 1999. Under the dispensation of federal practice in Switzerland, the local governmental structures constitute the vehicle of direct democracy. The Swiss model of federal structure is premised on a de-centred structure with substantive cantonal autonomy. However, the sphere of local government was not constitutionally guaranteed till 1999. The municipalities and communes under the provision of Article 50 of the Swiss federal structure not only constitute constitutionally recognized entities but also enjoy substantive autonomy and competence within the cantons. This undoubtedly moves around the intents of enhancing democracy at the local level.

The significance of local governments also lies in its capacity to reconcile the imperatives of people/community centric governance with the scale of economy and efficiency of local governance. The people/community centric governance facilitates participatory decision-making. It also helps in setting in motion the developmental priorities at the community level. It hardly needs emphasis that the local government within a federal structure must be empowered with competences to perform. Empowered local

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4 For a critical insight on this dimension see Harvey Lazar and Christian Leuprecht eds., *Spheres of Governance: Comparative Studies of Cities in Multilevel Governance Systems*, Kingston: Institute of Intergovernmental Relations, 2007.


governments could ensure a greater degree of participation, democracy and development at the local level.

**Constitutional status and competence of the local government in federal polities**

As pointed out earlier, local governments across the federal polities do not show uniformity in terms of their constitutional status, degree of competence and assignment of responsibilities, fiscal capacity in terms of their resource base, fiscal autonomy and revenue generating capacity and mobilization, role assignment; and their representative and inclusive character.

We find a great deal of variation in their constitutional status. Whereas they have constitutional sanctions in countries like Mexico, Brazil, Germany, Switzerland, India, Spain and South Africa, the same status is not accorded in classic federations like USA, Australia and Canada (See Table-1). In most of the federations, they do not enjoy constitutional status. Even in those cases wherein they are constitutionally recognized, they do not form the third order of federal structure in true spirit.

Moreover, mere constitutional recognition does not guarantee an empowered and competent local government. There could be a hiatus between the “institutional realities” and “operational realities” of a local government. For instance, the Swiss municipalities and communes were not a part of the constitutional structure of the federation till the 1999 Swiss Constitution; still they had important role assignments in the sphere of local governance within the cantons. Whereas in India, the local government, especially after the 73rd and 74th Amendment to the Constitution, is constitutionally recognized, yet it has not emerged as the third order of government. Though the local government under the Panchayati Raj Act is empowered with jurisdictional competence over 29 subjects listed under the Eleventh Schedule of the Constitution along with a wide range of power and responsibilities linked with the line departments of the state and union governments, the Panchayati Raj Institutions (PRIs) are yet to take the shape of a third order of federal structure and the institutions of self government in true spirit. Similarly, in South Africa where the local government is formally recognized as the third order of government under the 1996 Constitution and has been assigned competence and responsibilities under the Schedule 4B

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and 5B, the operational contexts do not allow the local government a favourable condition of enjoying full autonomy to decide and perform. Most of the time the provincial and national governments elude the jurisdictional responsibilities. ‘The match between the developmental mandate of the local government and the allocated competences is questioned. The discrepancy between the functional areas listed in the Schedules and the holistic vision of developmental local government contained in the *White Paper on the Local Government* and the *Municipal System Act of 2000* is a case in point.’

Table-1

**Status of the Local Governments in Select Federal Countries**

<table>
<thead>
<tr>
<th>Countries</th>
<th>Constitutional Status/ Source of Creation</th>
</tr>
</thead>
<tbody>
<tr>
<td>USA</td>
<td>Constitutional provision of only dual polity - federal and state. Municipalities are state creation. States laws determine the competence and functional responsibilities of the local government.</td>
</tr>
<tr>
<td>Canada</td>
<td>Provincial Creation.</td>
</tr>
<tr>
<td>Switzerland</td>
<td>Constitutional status in the Constitution of 1999. Cantonal creation under the Article 50.</td>
</tr>
<tr>
<td>Australia</td>
<td>Provincial creation.</td>
</tr>
<tr>
<td>Germany</td>
<td>Constitutional status Article 28 of the Basic Law. Part of the Land Administration.</td>
</tr>
<tr>
<td>Spain</td>
<td>Constitutional status under Article 137 of the Spanish Constitution.</td>
</tr>
<tr>
<td>Mexico</td>
<td>Constitutional status. The 1999 constitutional reforms define municipalities as formal units of government rather than sub-state structure.</td>
</tr>
<tr>
<td>Brazil</td>
<td>Constitutionally guaranteed autonomy to the municipal order of the government under the 1988 Constitution. Municipal governments constitute the third order of government and share responsibilities with the federal and state governments.</td>
</tr>
<tr>
<td>India</td>
<td>Constitutional status. Created out of the mandatory provision of the central legislative Act of 1992. Enacted through the framework of a central legislation under the provision of Article 243. Creation under the conformity law of the state under the framework of central legislation.</td>
</tr>
<tr>
<td>South Africa</td>
<td>Constitutional status. Forms a third order of government.</td>
</tr>
</tbody>
</table>

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9 ibid, p.234.
A variety of institutional and operational constraints limit the jurisdictional competence and discharging of responsibilities of local governments. However, the merits of constitutionalising local governments cannot be undermined despite the gap between the “institutional reality” and “operational reality” of local governments across federal polities. The Indian experiences in this regard are worth considering. Constituionalising the local government in India, for instance, has substantially changed the representative character of the local government during the last fifteen years of its experiment. Numerous institutional changes have been witnessed including regular elections to the local bodies that have been brought about by the constitutional status of the local government with many mandatory provisions of compliance.

The two constitutional Amendment Acts of 1992 - 73rd relating to Panchayats containing Articles 243 to 243 O and the 74th relating to municipalities containing Articles 243 P to 243 ZG mark a fundamental departure from the past. As per the provision of the 73rd Constitution Amendment Act, it has been made mandatory for every state – i) to constitute a three tier structure of Panchayat with exception of only those states having a population of less than two million to constitute or not to constitute the intermediate level Panchayat; ii) the conduct of regular elections at every five years; iii) reservation of seats for the Scheduled Castes and Scheduled Tribes in proportion of their population in the jurisdiction; iv) reservation of seats for women, including the offices of Panchayat chairpersons at all levels; v) constitution of State Finance Commission; vi) establishment of State Election Commissions for conducting regular elections of the local bodies. There is mandatory provision under the 74th Amendment Act for setting up of the District Planning Committees to prepare plans for development as a whole. The mandatory provisions have assured an enabling environment for the local bodies. Prior to this, the institutions of Panchayati Raj were nearly non functional. Elections to these bodies were very irregular. The states had vested motive in making the institutions of Panchayat defunct for all practical purposes. The situation has
substantially changed on account of the constitutional status provided to these institutions and accompanying mandatory provisions included there in.

The point which emerges out of this is that the constitutional foundation provided to the local government can substantially change the *locus standi* of the local government within the structure of government. It at least provides a context in which the competence of the local government could be determined. The competencies and spheres of autonomy constitutionally guaranteed to the local government, have the potentials of bringing the government nearer to the community. The governance process in this case could minimize the gap between the government and the people. It can unfold a process of participatory governance and development.

### Table-2

**Competence of the Local Governments in Select Federal Systems**

<table>
<thead>
<tr>
<th>Countries</th>
<th>The areas of competence and functional responsibilities</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>USA</strong></td>
<td>Variations in competencies and functional responsibilities of the local government. Despite the creation of state laws, local governments have substantive administrative and fiscal autonomy. They are loaded with the responsibilities such as fire protection, cemeteries, housing, water supply, sewage services, drainage, general health and school.</td>
</tr>
<tr>
<td>Canada</td>
<td>Since provincial creation, variations in power and competence are seen. Seen as a mechanism of service delivery of the provinces. The main source of authority is derived from Municipal Acts. In some provinces, local policing is the task of the local government.</td>
</tr>
<tr>
<td>Switzerland</td>
<td>Competence of the municipalities and communes is determined by the subsidiarity principle. The model of direct democracy empowers communes. Article 50 of the 1999 Swiss Constitution makes provision of the local government. They are loaded with considerable competences and functional responsibilities within the provision of cantonal autonomy under Article 3.</td>
</tr>
<tr>
<td>Australia</td>
<td>Since creation of states, most of the functions are assumed by the state government. Maintenance of local streets, sewers, garbage and waste management, local utilities, public utilities, local environment management and planning; and recreation and parks. Besides these, they also function as an agency of service delivery of the state.</td>
</tr>
<tr>
<td>Country</td>
<td>Description</td>
</tr>
<tr>
<td>-------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Germany</td>
<td>Competence to manage the local affairs as per the provisions of Basic Laws and land administration. They are loaded with the responsibilities of discharging ‘multi-functions.’ Both administrative and functional powers.</td>
</tr>
<tr>
<td>India</td>
<td>The 11th and 12th Schedule of the constitution lists out competence and responsibilities to be discharged by the local government. However, the transfer of subjects to the local bodies is to be made by the respective states within the central framework of Act of 1992.</td>
</tr>
<tr>
<td>Mexico</td>
<td>As per the provision under Article 115, local water and sewerage system; garbage collection and public sanitation; local streets; public lighting; police and local transit, civil protection; parks and open spaces; environment; land use and urban planning; and civil and cultural activities.</td>
</tr>
<tr>
<td>Brazil</td>
<td>Wide range of power and responsibilities including policing and criminal justice. Management of public transport, pre-school education, preparation of urban development plans. Shared responsibilities in the areas of health, education and infrastructure.</td>
</tr>
<tr>
<td>Spain</td>
<td>Public lighting, cemetery, refuse collection, street cleaning, potable water to home, sewage system, paving of public streets; food and beverage control.</td>
</tr>
<tr>
<td>South Africa</td>
<td>As per the provision of the Schedule 4B and 5B, the local governments are empowered with 38 areas of competences listed under the Schedule. However, both the federal and provincial governments exercise extensive control and regulate competences of the local governments.</td>
</tr>
</tbody>
</table>


The table-2 clearly indicates that the competence and responsibilities of local governments vary from one case to another. In most cases the competences of the local governments are very limited. In such cases, local governments act only as mechanisms of service delivery of the national and provincial governments rather than a sphere of the federal structure.
Obviously in the given context, the local governments continue to exist as a subordinate structure of the provincial/state/unit of the federal structure.

Even if local governments are provided with significant responsibilities, they lack an enabling environment. In a majority of the cases, local governments are subjected to various constraints in discharging their assigned responsibilities. The most apparent constraint is experienced in terms of a mismatch between the listed areas of competencies and lack of enabling environment to exercise them. This apparent gap is more visible in those cases wherein the state/provincial governments perceive an empowered and competency loaded local government as constraining and trimming the competencies of the second order of the federal structure. In such cases, the state/provincial units are reluctant to share competencies and responsibilities with the local government.

This is precisely the context that the states in India have not transferred all the functions, functionaries and funds to the local bodies. As per the provisions contained in the Eleventh and Twelfth Schedules of the Constitution, states are mandated to transfer the functions enumerated in the list with accompanying functionaries and funds. But the states have shown reluctance in transferring the same. It is for this reason that the Union government through the Ministry of Panchayati Raj and the Planning Commission has introduced an exercise of Activity Mapping.

The concept of Activity Mapping denotes a ‘way of unbundling subjects into component activities and mapping them against functions related to these activities to create a matrix. The cells in the matrix are to be filled up by indicating particular levels of Panchayats. The primary principle universally adopted in such exercises is the principle of subsidiarity. The operative question in working with the activity mapping matrix is to ask what is the lowest level, from among the levels, that requires stepping aside from the issue of jurisdiction as it exists, and through analysis of actual ground level situation, to determine how to populate the cells of the matrix.’  

Through the exercise of activity mapping the states are being compelled to transfer the listed competencies to the local bodies through conformity laws and instruments. However, the intervention of the union government in this direction is yet to realize the goal of competent local bodies in India both in letter and spirit. The situation is not very different in many other cases across the federations. There is a long way for local governments to go in the

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direction of becoming a coordinate structure of a federal governmental structure. This applies to almost all the cases, be it the case of classic and established federations, or new federations of the newly emerging federations.

Table-3

Fiscal Capacity and Sources of Revenue of Local Governments

<table>
<thead>
<tr>
<th>Countries</th>
<th>Fiscal Capacity and Sources of Revenue of Local Governments</th>
</tr>
</thead>
<tbody>
<tr>
<td>USA</td>
<td>Sales tax, income tax, property tax main sources of revenue besides federal and state transfers. Intergovernmental transfers create dependence of the local government over the state and federal governments.</td>
</tr>
<tr>
<td>Canada</td>
<td>No constitutionally assigned competence of revenue generation. Provincial transfers are the main source of revenue. Income tax, sales tax, fuel tax, user fees; and hotel and motel occupancy fees are other shared sources of revenue. Tied fund transfers by the federal government to municipalities for programme implementation and development.</td>
</tr>
<tr>
<td>Switzerland</td>
<td>Greater degree of financial competencies emanating from the principle of subsidiarity. Right to raise taxes and set the rate of taxation are important indicators of fiscal autonomy and competency. Surcharge on cantonal direct taxes; property tax, taxes on rents, indemnities and sales are important sources of revenue besides federal and cantonal transfers.</td>
</tr>
<tr>
<td>Australia</td>
<td>Despite the state creation, there is considerable amount of fiscal autonomy. Own revenue is far higher than the intergovernmental transfers. Property tax, rates and user charges are important revenue sources. The ‘general purpose assistance’ grants is tied with the federal transfers to local government.</td>
</tr>
<tr>
<td>Germany</td>
<td>Tax revenue shared with the Länder constitutes main source. Federal transfers for fulfilling the assigned responsibilities made to the local government.</td>
</tr>
<tr>
<td>India</td>
<td>Though constitutional competencies of revenue raising power provided under the Article 243 of the constitution, very limited resource and revenue base. Fiscal dependence on state. Inter-government transfers and tied and untied grants are the main sources of revenue.</td>
</tr>
<tr>
<td>Mexico</td>
<td>Article 115 provides fiscal competencies to the local government which include their revenue collection areas. Property tax, fees and charges for the local services; and certain fines are the main sources of revenue of the local governments. However, local governments do not have taxing authority. They can neither introduce a new tax nor set the tax rate.</td>
</tr>
</tbody>
</table>
Brazil
Fiscal autonomy and competence is very limited. Inter-governmental transfers are the main revenue source. Fiscal dependence on the superior orders.

Spain
Three sources of revenue - own tax sources, shared taxes and inter-governmental transfers. Direct taxes and fees are main revenue sources.

South Africa
Fiscal dependence of the local government over the state and federal governments. Inter-governmental transfers mainly as conditional grants from the federal government. Property tax, user charges, tariffs, fines etc are the main sources of revenue of the local government.


The most problematic issue in the context of local governments is the issue of their fiscal capacity. Local governments in a majority of federations have a very limited revenue base. Table - 3 clearly shows that there are hardly any cases in which local governments can solely depend on their own revenue base for discharging their responsibilities. The sources of revenue in most of the cases are either inter-governmental transfer or grant for implementing programmes and service delivery of the federal or state governments. Even in those cases where local governments enjoy considerable fiscal autonomy, their revenue base is not congruent with their assigned responsibilities. This creates a mismatch between the assigned responsibilities and the fiscal capacity of the local governments. This mismatch finally creates a situation of fiscal dependence of the local government on the state and federal government. In this situation of fiscal dependence local governments cannot assert their authority and hence they emerge as dependent structures. To create a fiscally autonomous and competent local government is a major challenge, especially in developing countries. In the context of South Asia, the problem is even more serious.

**Inclusiveness in the local government**
The thrust of inclusion and empowerment is inextricably linked to the structure of a local government, especially in those societies which are cut across by the two axes of diversity and inequality. In such cases, the local
government structure is loaded with twin moral concerns of making the institutions diversity reflective and inclusive.

In this regard, it is important to note that the local community may not essentially be homogeneous and undifferentiated. There may be the case of unequal power relations between groups and communities at the local level. In such cases, the structure of inequality may be reinforced if the existing structures of inequality are twined together with the structure of governance. Since the institutions of governance in such cases, could be under the monopoly of the dominant community at the local level, providing competence to the extent of converting such institutions as institutions of local self government may result into legitimating the structure of unequal power relations.

At the local level some groups may be deprived and disadvantaged than the others. If the groups are disadvantaged and non-dominant, there would always be a possibility of exclusion and further disempowerment of such groups. In this case, an empowered local government may act against the interests of the disadvantaged groups. This is especially important in the South Asian context, wherein the structure of inequality cannot be defined merely in class terms but also requires reference to its ethnic roots. This was precisely the context in which Dr. B.R. Ambedkar, the chairman of the Drafting Committee of the Constitution of India and the leader of the depressed classes, was diametrically opposed to Gandhi’s approach of celebrating the village as a self-fulfilling unit of community life. He was very much apprehensive of recognizing the village as a unit of self government.\(^{11}\) In the traditional set-up of the caste ridden power relations at the village level, the ‘lower’ castes and other disadvantaged groups had hardly any say. In this case, treating the village as homogeneous and undifferentiated entities and as units of self government would have been an exercise of reinforcing the prevalent exclusion. Creating such institutions without carving a protected sphere for the excluded and disadvantaged in the structure was nothing more than to recognize the structure of inequality. The way the Panchayati Raj had been implemented in India prior to the 73\(^{rd}\) Constitutional amendment reflected continuity of the sectional domination over the institutions which acted in the interest of the dominant sections of society. This has been one of the major factors prior to the 73\(^{rd}\) Constitutional Amendment that the Panchayat could not get the required legitimacy and

\(^{11}\) For a detailed exposition to this view see, B. R. Ambedkar’s Writings and Speeches, Mumbai: Government of Maharastra, 1989 and subsequent publications of volumes.
support across the segment of the Indian population. It is, therefore a 
requisite for the legitimacy and support base of the local government that it 
should also appear as an institution representing and reflecting diversity.

Given the fact of cultural contiguity between India and Nepal, this 
dimension is specifically important while designing the state structure on one 
hand and the local government structure on the other. It is, however, not to 
suggest that the local governments should not be empowered but needs 
qualification. If the local community is differentiated, heterogeneous and 
unequal, a certain kind of protection is needed for the disadvantaged groups. 
This would ensure that some groups are not excluded at the cost of the 
others. The constitutional space guaranteed to the local government could 
ensure better prospect of accommodation and inclusion of the disadvantaged 
groups.

Moreover, from a federal-democratic perspective the local governments 
are not merely administrative units of governance organized along the 
principle of administrative division of power and responsibilities. They are 
also seen as a vehicle of enhancing democracy and community participation. 
But more than that, local governments in recent years have emerged as a 
mechanism of inclusion and empowerment of disadvantaged groups and 
communities.12 This is more pronounced in case of India especially after the 
73rd and 74th Amendment to the Constitution in 1992. India has experienced 
a kind of democratic upsurge in the institutions of local government during a 
decade and half. The available figures on representation amply prove this 
point. The major reason for this participatory upsurge could be attributed to 
the constitutional status given to the local government which has mandatory 
provisions for inclusion of disadvantaged groups. See Table - 4 for an 
overview.

12 For a more insightful discussion on this issue see Nico Styler, “Enhancement of 
Democracy through Empowerment of Disadvantaged Groups”, in John Kincaid and 
Rupak Chattopadhyaya eds., Local Government in Federal Systems, New Delhi: 
| Total No. of Elected Representatives from Scheduled Caste Category | 514284 (18.25%) | 478808 (18.10%) | 32690 (20.88%) | 2690 (17.3%) |
| Total No. of Elected Representatives from Scheduled Tribe Category | 317425 (11.26%) | 304345 (11.5%) | 11364 (7.26%) | 1716 (11.01%) |
| Total No. of Elected Representatives Women | 1038045 (36.84%) | 974255 (36.82%) | 58012 (37.1%) | 5778 (37.08%) |
| Representation of Women Highest in a state (Bihar) | 54.12% | 54.6% | 49.2% | 49.87% |


Note: The above figures pertain to 24 states and six union territories where Panchayats have been constituted. As per the provision of the Panchayat Raj Act, intermediate level of Panchayat is not constituted in the states of Goa, Manipur and Sikkim.

Though the level and extent of inclusion and empowerment of disadvantaged groups through local government institutions vary from one case to another, depending upon the context of the local government and its locus standi in terms of its constitutional recognition and competence, the merits of the local government and its inclusionary potentials can not be undermined. There is no doubt that mere recognition of the local government in the constitution cannot provide guarantee to its emancipatory potentials. It much depends on the context and intents under which these institutions are created. The amount and extent of inclusion and empowerment of groups and communities are inextricably linked with the issue of whether these institutions are created merely as a mechanism of administrative convenience or their creation is also informed by the imperatives of a multicultural mode of power-sharing.

The very concept of power-sharing within a federal structure implies inclusion of communities and groups at various levels of the structures of federal governance. There could be various means and measures of power-sharing even within the structure of local government. There could be various kinds of protection ensured constitutionally or through an array of public policies. Constitutional protection may include the provisions of quota or reserved seats at the level of the local government for the members of disadvantaged groups. This could ensure participation of such groups in the institutional structures and in the process of governance. In this case, local governments can not only enhance participatory democracy and inclusive citizenship but they can also lead to empowerment of disadvantaged groups.
India, for example, has experienced both these situations. In its current phase of local government, the disadvantaged groups such as Scheduled Castes, Scheduled Tribes, Other Backward Castes in case of Bihar-one of the states in India, and Women are provided constitutionally guaranteed space in the structure of local government. A significant percentage of seats are reserved for these disadvantaged groups at the various tiers of local government. This has ensured the political representation of the disadvantaged groups at various levels of the local government. A cursory glance at table-1 shows the number of representatives elected at the various levels of the local government. It is significant to note that the representation of women has drastically increased over the years. The figures of women representation clearly shows that their number has gone much higher than the mandatory provision of 33% reservation for them at various levels of Panchayati Raj Institutions (PRIs). The representation of women in this case is not merely a calculus of number and quantitative representation. The current phase is qualified by qualitative character of representation also. Despite the lack of qualitative representation and effective participation in the initial phase of the Panchayati Raj, which is also known as the first generation of Panchayati Raj, women as a group have made their presence felt after the 73rd constitutional Amendment. Similarly the other disadvantaged groups who have remained at the margin for centuries in the given social and historical context have also started claiming rights, entitlements and a share in the available structure through the institutional mechanisms of local self government.

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The Transitional Provisions in the 2010 Nepal Constitution

Larry Taman

For the United Nations, the successful completion and implementation of the constitution is a vital part of building the peace and bringing an end to years of conflict. At the opening, Robert Piper noted the great progress made so far in building the constitution. He congratulated the members of the CA the Secretariat and the Speaker.

They have benefited from the input of civil society organizations and from international friends, some of whom are represented here. I join in those congratulations to all of you and assure you of our support in your next challenges.

As many of you know, I have been in Nepal for nearly 1½ years as the head of the UN’s constitution support team. This does not make me an expert on Nepal, but I can tell you about what I have learned in 4 propositions:

- Federalism is about power sharing and power sharing through federalism is now the key to unlocking the potential of the new constitution.

- The success or a failure of the constitution will depend heavily on the people's perception of whether the transition to federalism is a success or a failure.

- To be a success, the transition to federalism must address some basic principles.
• The guiding framework for transition to federalism must be provided for in the constitution itself.

Let’s look at each of these in a little more detail.

**Proposition I**
Federalism is about power sharing and power sharing through federalism is now the key to unlocking the potential of the new constitution.

I think it is vital for Nepalis and their international friends to accept one political reality: a root cause of the long and painful conflict was the conviction of many that

• previous political regimes, their ideas and their governance systems, had deprived most Nepalis of the most basic opportunities of life – they made Nepal the poorest country of south Asia
• that until power is taken from elites and the centre and transferred to ordinary people and outside the valley, the situation will not improve
• that previous efforts to decentralize have been an effort of elites to maintain power rather then to share it: they are at best a failure and at worst, as Purna Man Shakya said yesterday, a ‘gimmick’ that was never intended to share power.

For those of you who suspect that federalism is not the answer, of course it is not the only answer. And for those of you still seeking to negotiate another course, of course this is an issue for the Nepali people to debate and decide. But let me remind you that Nepal is already a ‘federal republic’ under the terms of the Interim Constitution, that federalism is the fundamental principle that underpins all the work of the Constituent Assembly, and that in one form or another it is clearly the way forward that the people, through their representatives, are now working on.

So, if the new constitution provides for meaningful power sharing through federalism, and if it is successfully implemented, than life may improve. If not, there is a real chance of a return to conflict.

**Proposition II**
The success or a failure of the constitution will depend heavily on the people's perception of whether the transition to federalism is a success or a failure.
By transition, I am thinking about the path to power sharing through federalism. I am thinking particularly about the early steps, about making a good start and then making steady progress to building the newly structured state.

Let’s think together about May 29, 2010, the day after the Constitution is proclaimed. On that day, there will be happy people and there will be unhappy people. The unhappy people, who did not get a province they say they were promised, or a right they say they is guaranteed, will not quickly become happy. For some of them, bringing them into the new nation will take time.

But there will be happy people those who see in the constitution a vision of a new future, and those who are just glad that debating is over and building is beginning. They have been told that federalism is the key. It will, they have been told:

- Increase their influence in the local matters that concern them the most
- Create state and local institutions that are closer to them and that are more subject to their control
- Open the door to new political leadership and new public servants who will break with the old ways.

So, these happy people (and maybe some of the unhappy ones) will now wait to see whether their lives improve. And here, I speak of all lives, not just some:

- Will their security improve? Or will impunity survive?
- Will public infrastructure improve? Or will corruption take money from roads and dams and airports and local projects?
- Will health, education, job training and other social services improve?
- Will their property be fairly dealt with? Will their business prosper?
- Will civil servants who do not wish to leave Kathmandu be fairly dealt with?

I have said they will wait, but how long will they wait? In our work, at the Centre for Constitutional Dialogue and in our loktantrik sambads or democracy dialogues all over Nepal, we have talked to nearly 200,000 people from all parts of Nepali society. Any one can see that Nepal’s political system has for a long time benefited from the fact that Nepalis are a patient people. But our meetings tell us that their patience is running out – I believe they will not wait a long time, and that they must quickly see tangible
benefits from constitution making or they will join the unhappy people and big trouble will follow.

So, that is why the transition to federalism is so important.

**Proposition III**

To be a success, the transition to federalism must address some basic principles.

You might think of others, I would suggest these:

- **Be Fair**: Just as there are many people who are optimistic about federalism, there are many who are fearful. They fear that the winners will be rewarded and the losers will be punished. At each step, the transition must aim for fairness.

- **Plan**: The transition to federalism should be well planned – When will it start? What comes first, second and third? Who pays or lends? How much?

- **Do No Harm**: No one who depends on a government service should be worse off under the transition than they were before. School and hospitals and roads – they must all remain open.

- **Improve Services**: The people’s need for services will not stop just because new governance is being built. Look for ways to show immediate impact in service improvement.

- **Accountability**: Who is responsible at each level for making sure that the necessary things are done?

- **Tell the Truth**: People are not foolish or naïve. They do not believe that their lives will change overnight. But, they have reason to be skeptical of their political leaders. So, make promises, even small ones, and keep them.

**Proposition IV**:

The guiding framework for transition to federalism must be provided for in the constitution itself.

The report of the Constitutional Committee has already dealt with one part of the transition provisions in the new constitutions. These are what might be called the stability provisions. Broadly speaking they provide for how the basic functions of the state will carry on until restructuring comes into effect. They do not yet deal with the restructuring itself.
Let’s go back again to May 29. On the day after proclamation, none of the new institutions will exist. It is the constitution itself that must answer the basic questions:

- Do new states and local governments come into being immediately, or only after a period of time?
- If they come into effect immediately, how will they be governed until their first elections?
- If they come into effect after a period of time, is it on a date fixed (after 1 or 2 or 3 years)? Do they all come into existence at the same time?
- Do states receive all their powers and resources at the beginning, or is it a harmonized process so that they get powers and resources when they are ready to take on their functions? Who decides if they are ready? Who helps them get ready?
- Who is responsible for overseeing the practical elements of building the new federal state? Is it the new national executive through government ministries? Is it a high level body – a “Constitutional Implementation Commission” – perhaps structured as an independent constitutional body with a limited life span of, say, 7 years? Is it the Legislature through a Parliamentary Committee?

In each of these areas, there are many examples around the world. In Spain, for example, the constitution allows regions to declare their autonomy when they determine themselves. In India, there were important national planning bodies that helped to develop the states. In some countries, transitions were managed by government ministries.

Our job at the UN is to help you identify the relevant examples from all over the world, and to make sure that their experience and expertise is available to you, if and when you wish it. That is our commitment to you and we look forward to working with you in this next important period. We wish you continuing success in this great enterprise. You are the fathers and mothers of a new nation, and we will be there to help you.

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A Commentary on the Place of Minorities and Indigenous Communities in Nepal

Yash Pal Ghai

The paper is in two parts. The first part discusses the provisions on minorities and indigenous peoples in constitutional instruments since 1990 (the 1990 Constitution and the Interim Constitution), against the context of the people’s struggle in April 2006 for a just and democratic order, and subsequent discussions and negotiations on the future constitutional dispensation. The word minority is used less to refer to the size of the communities as to their subordinate place in society, and for the purposes of this paper refers primarily to dalits, janjatis (indigenous peoples), and Madhesis (with only passing reference to Muslims). The status and aspirations of women (most of whom also qualify as marginalised), are dealt with by Jill Cottrell in another paper in this volume). Various terms are used in constitutional documents to refer to these, and other, groups, collectively or separately (marginalised communities, oppressed groups, disadvantaged communities, backward communities, backward regions, excluded communities, minorities). But there is relatively little on groups which might well be termed minorities, both by virtue of their size and socio-economic status, such as kamaiyas.

The second part of this paper comments on the proposals dealing with minorities and indigenous peoples adopted by various thematic committees of the Constituent Assembly; the third part discusses some drafting and implementation issues; and the final part has some concluding observations.
on the resolution of tensions that arise from the commitment to a fundamental restructuring explicit in the provisions on minorities.

I argue that the place of these communities has to be seen against the emerging concepts of nationalisms in Nepal. The old basis of Nepali nationalism (centring around the monarchy and the hegemony of Brahmans, Chettris and Newars), seen as exclusionary by many communities, has been challenged by several groups and communities. To provide an inclusive basis of nationalism, they are asking for a fundamental restructuring of the state with an emphasis on participation and social justice, and seeking a new balance between individual and group rights. Consequently claims and rights of minorities and indigenous peoples cannot simply be discussed in terms of “rights” in the traditional sense, but must include state structures and institutions. This is the approach in this paper. The conclusion is that the Interim Constitution, as amended under pressure, including extreme forms of violence, from the marginalised groups, secures to them most of the rights they have been claiming. The proposals of the thematic committees of the Constituent Assembly consolidate and elaborate these gains. But so far these gains are “paper gains”, and minorities (even though now collectively a majority), are marginalised even in the forum which is to secure them constitutional guarantees of their new place, and dignity, in Nepal.

Part I
Context
Nepal is faced simultaneously with problems of nation-building and of state-building. The country is undergoing multiple transitions:

- from monarchy to republic;
- from authoritarianism to democracy and human rights;
- from a hegemonic to an inclusive and participatory system of governance;
- from a state wholly pervaded by one religion to secularism; and
- from a heavily centralized unitary system to one characterized by decentralization and autonomy.

Above all, the country is moving from a hierarchical society in which one’s place was dictated by gender, caste and ethnicity, to one that aspires to making human dignity and equality its fundamental principles. The concern of the marginalised communities (“minorities” in sociological but not necessarily numerical sense) has been to ensure their rightful place in the
political and economic spheres, while the concern of the old and current establishment has to been maintain their hegemony in these spheres, which involves both intra-establishment competition and a united front against the new pretenders. To a considerable extent, the dynamics of the constitution making process have revolved around these contestations.

1990 Constitution

Superficially, the political situation in Nepal when the 1990 Constitution was negotiated seems to be greatly different from the situation for the drafting of the 2010 Constitution. At that time the principal pre-occupation of political parties was ‘multi-party’, parliamentary democracy and constitutional monarchy. Democracy was based on universal franchise (even if there were differences on the question as to who were entitled to be treated as citizens). There was broad agreement on the restrictions on the power of the king, inclusion of a bill of rights and directive principles to guide state policy, the establishment of an independent judiciary with the power to enforce the Constitution as the supreme law of the country, and a number of independent institutions to discharge politically sensitive functions, like elections and the audit of accounts of the state.

The 1990 was also pre-occupied by the concern with maintaining the traditional social character of Nepal. For the first time Nepal was defined as a ‘Hindu’ state. Although its definition of ‘Nation’ included people of all religions, the kingdom was characterized as ‘multi-ethnic’ and ‘multi-lingual’ but not multi-religious. Kingship, to be confined to adherents of Aryan culture and Hindu religion, was exalted, ‘the symbol of the Nepalese nation and unity of the Nepalese people’. Even the freedom of religion was restricted in order to preserve the dominance of Hinduism and traditional practices (such as untouchability): what is guaranteed to a person is belief or practice as ‘coming down to him hereditarily having regard to traditional practices’ (which seems both to deter conversion as well as safeguard practices which may be offensive to many, adherents and non-adherents alike). This formulation was drawn from past precedents, but added that ‘every religious denomination shall have the right to maintain its independent existence and for that purpose, to manage and protect its religious places and trusts’. The cow, sacred in Hindu thought but not other beliefs, was declared the national animal. These formulations were adopted in the face of considerable pressure from an alliance of numerous groups belonging to Buddhists, Muslims, Christians and indigenous peoples for the declaration of
secularism, in which state and religion were separate and all religions were treated equally.

Only one official language was recognised, Nepali in the Devnagari script. Nepali is the most widely spoken language in Nepal, but one among 91 languages. The use of another language even at a local level administration was declared unconstitutional by the Supreme Court. Proposals for minority rights, particularly related to social advancement, were also rejected, because the commission feared that their inclusion would promote ill feelings between different communities, threatening national unity. Instead the constitution enjoined the government to promote ‘amongst the people of Nepal the spirit of fraternity and the bond of unity on the basis of liberty and equality’. But this spirit of fraternity was hard to cultivate if many members of several communities were excluded from citizenship, either by the constitution or practice; and Madhesi were regarded by Kathmandu as properly belonging to the southern neighbour.

The 1990 Constitution could also be read as preventing the constitutional recognition of political rights associated with other cultures. The constitution prohibited a political party ‘on the basis of religion, community, caste, tribe or regionality’ (Article 112(3)). An elaboration of this rule was the prohibition of any party which ‘prejudicially restricts’ membership on the basis of religion, caste, tribe, language or sex’. A party is also prohibited if its ‘name, objective, symbol or flag indicates as belonging to any particular religion or being communal or of a nature tending to disintegrate the country’ (Article 113(3)). The effect of this was that existing parties, dominated by upper caste Hindus, could not be challenged and regional interests not advanced. Such is the concern with “communal harmony” that even the right to move freely in the country and to reside in any part of Nepal can be denied if it ‘disturbs harmonious relations subsisting among various castes and communities’ (Article 12(2) (4)).

The character of the state, oriented towards the majority religion, the majority language, and the majority culture was exclusionary. The unitary nature of Nepal and the centralisation of power accentuated the consequences of the existing dominance of traditional caste and regional elites, and denied others the possibilities to determine policies at the local level or to use their language for official purposes.

The principal marginalised communities are: indigenous peoples (janjatis), dalits (the so called untouchables), Madhesis, tribal communities, and women (although not all the members of these communities are in a disadvantaged position). The dominance over them of three communities,
Brahmins, Chettri and Newars, is manifest in a whole range of sectors: judiciary, cabinet, parliament, public service, professions, party leadership positions, and the economy. In most of these areas Brahmins/Chettris account for 60% to 70%, followed closely by Newars. Dalits, as a community, are the worst off, with almost no representation in any of the public services or party leadership. Janajatis are next worst off (though some janjati communities fare no better than dalits). Dalits are additionally subject to social ostracism and endless humiliations.

All the “marginalized” communities have suffered in this way. For many long years, they have asked for fair representation, fair treatment and fair opportunities. They have not rejected the state, but asked for their rightful place within it. Whether one looks at Nepali statistics for the economy, education, public service posts, representation in the legislature or the government, one comes away with an overwhelming impression of the monopolization of power, authority, and opportunities by Brahmans and Chhetri (and, to a lesser extent, Newars). Dalits have been oppressed for centuries, the Janajatis’ languages and cultures have been ignored; women suffer from severe discrimination across the whole of society; and Madhesis have long felt that they were not accepted as Nepalis, and labelled disparagingly as Indians. Most people, especially in the rural areas, feel – with good reason -- that they cannot communicate with state officials: most of these representatives of the central government do not speak local languages.

These communities played an important role in the people’s struggle of April 2006. The main agenda, apart from the restoration of democracy, was political inclusion and social justice. These goals were adopted by the mainstream parties (especially as agreement on a ceasefire and constitutional reform with the Maoists was being negotiated).

The initial resistance of the eight-party alliance to the participation of the marginalized communities in decisions about the Interim Constitution and the future – in some cases, a refusal to acknowledge the legitimacy of the claims of these communities -- prompted a vigorous development of ethnic politics and organizations and disrupted the national unity of the janandolan. As in many countries, a strong sense of ethnicity is most frequently a response to discrimination and deprivation. In this way the traditional elites, by their intransigence, have created a situation which was one of their worst fears. Smarting under their exclusion, Dalits, Janajatis, Madhesis, and women (frequently referred in the IC as “mariginalised communities”) formulated their own agenda and recommendations for the new constitution, realising also that the dominance of Brahmins and Chettri had little to do
with numbers, for out of 100 ethnic/caste groups, the largest single group, Chettri, are about 15%, followed by Brahmins at 12%. All communities have had suffrage for many years, and constitutional provisions for equality. Instead, the deprivation was the result of lack of education, hierarchical social structure, the ideology and system of caste to which even non-Hindus were assimilated. Their demands therefore centred around:

- equality and elimination of all forms of discrimination;
- fair and effective representation in state institutions;
- affirmative action, including “reservations” or quotas;
- secure citizenship;
- a secular state;
- constitutional recognition of the diversity of cultures and languages; and
- self-government through a federal type of autonomy, preferably based on language and ethnicity.

Not all communities place equal emphasis on these demands. Madhesi, being a major group in the terai, have an interest in federalism, while the more dispersed janjatis favour autonomy—neither of which is of particular relevance to the dalits. Nor is it clear that women will benefit from federation or autonomy, which, associated in Nepal with the preservation of culture, might actually be to their disadvantage. Dalit and women have a particular interest in social justice, proportionality and affirmative action. It is important to disaggregate the specific interests of the marginalised communities, without jeopardising solidarity among them.

Self-determination, understood in terms of group rights, has in some cases become the leading principle of state reorganization for many of these groups. Understandably, the elite is uneasy with this agenda -- and not only because it would chip away at its privileges. Yet the factors underlying these reform agenda lie at the heart of Nepal’s problems and will not go away. For stability and development, the constitution-making process must deal with it. Nepal faces the challenge of squaring the recognition of diversity with the benefits of the “nation-state” (community cohesion, common values, willingness to sacrifice for the common good, prospects of democracy, common public spaces, the expression and development of culture). Ultimately the constitution-making process is about identity in a New Nepal, which emphasizes common bonds and interests while respecting differences.
Interim Constitution

The Interim Constitution (IC) is unlike many interim constitutions: it is comprehensive and long. Only a small part of it concerns the process for the new constitution. It is full of constitutional principles, political values, and directives on inclusion and social justice, signifying a new constitutional order. This profusion of values and visions is unusual in a constitution designed (if not destined) to last for two years. Along with some amendments (primarily to reflect “concessions” to indigenous peoples and Madhesi), the principles and directives closely follow the reform agenda of the jana andolan. Except for one instance, these principles and directives are not stated to be binding on the Constituent Assembly, as was the case in South Africa. The exception is the decentralisation of state power in the form of federalism, but even here the IC does not provide for any method, on the adoption of the new constitution, to verify or certify that it has successfully and effectively incorporated it. But these goals are nevertheless the inspiration for and the aspirations of the jana andolan and since the Constituent Assembly is the child of the andolan, it is not unreasonable to argue that these goals have the status of fundamental constitutional principles and bind the Constituent Assembly.

The principles and directives, as well as some substantive provisions, go a long way to incorporating the demands of the marginalised communities. The nation is defined in an inclusive way, reflecting its diversities, but also “united by a bond of allegiance to national independence, integrity, interests and prosperity” (Article 3). The use of local (“mother”) languages is permitted “in a local body or office” (Article 5(3), but the cow is still the national animal (Article 7(2)—why does a state need a national animal?).

For practical purposes, the most important principle is the restructuring of the state which appears in several places in the IC. The Preamble states that the people of Nepal have “determined upon the progressive restructuring of the state in order to resolve the existing problems of the country relating to class, caste, region and gender”. Article 33(d) specifies, as a responsibility of the state the “inclusive, democratic and progressive restructuring of the state by eliminating its existing form of centralised and unitary structure in order to address the problems relating to women, Dalits, indigenous tribes [Adivasi Janajati], Madhesi, oppressed and minority communities and other disadvantaged groups, by eliminating class, caste, language, gender, cultural, religious and regional discrimination”. An amendment, in 2007 under pressure from the marginalised communities, specifies another state
responsibility as enabling “Madhesi, Dalits, indigenous ethnic groups [Adivasi Janajait], women, labourers, farmers, the physically impaired, disadvantaged classes and disadvantaged regions to participate in all organs of the State structure on the basis of proportional inclusion” (Article 33(d1)).

Article 138(1) says that “to bring an end to discrimination based on class, caste, language, gender, culture, religion and region, by eliminating the centralised and unitary form of the state, the state shall be made inclusive and restructured into a progressive, democratic federal system (the italicised word being added in April 2007 under pressure from the Madhesi). Madhesi and janajatis were not satisfied by this formulation and insisted on “autonomy” (perhaps unclear as to what federalism entailed), and another amendment was made in July 2008, as Article 138 (1A), which provides for autonomous provinces “with full rights”. What it means is not clear. Nevertheless, these amendments were considerable achievements for the marginalised groups, for they represent a change from “decentralisation” (also in the 1990 constitution but with little impact on the distribution of power and resources) to federalism and autonomy, long resisted by the establishment.

A large number of other “Responsibilities of the State” are prescribed—for our purposes, they include; (i) enabling “Madhesi, Dalits, indigenous ethnic groups (Adivasi janajati), women, labourers, farmers, the physically impaired, disadvantaged classes and disadvantaged regions to participate in all organs of the State structure on the basis of proportional inclusion” (how does a disadvantaged region participate on the basis of proportionality? What is proportional inclusion, especially for a region?) (Para (d1)); (ii) “a common minimum programme for socio-economic transformation to eliminate feudalism and implement it gradually” (Para (e)); (iii) “ensuring socio-economic security and providing land to economically backward classes, including the landless, bonded labourers [kamaiyas], tillers [haliyas], farm labourers and shepherds [haruwa charuwa]” (Para (i)); (iv) rehabilitating displaced persons; and (v) repealing “all discriminatory laws” (Para (n)).

The IC contains a number of Directive Principles some of which are relevant to marginalised communities: (a) “following economic policies which will “prevent economic inequality and exploitation of any caste, gender, class, region or individuals” (Article 34 (4))—this seems to cover every body and every part of the country, though the idea of exploiting a region is unclear—problem with lumping regions with human categories; and (b) “establishing a healthy social life on the foundation of justice and morality, by eliminating all types of economic and social inequalities and by
establishing harmony among diverse castes, tribes, religions, languages, races, communities and sects” (Article 34(5)) (tribes, races and sects appear for the first time; and how can you establish harmony among languages?)

The third category under which principles/state policies appear is State Policies, a number of which are also relevant to the marginalised communities (Article 35). Policies include: (i) maximum participation of women in national development by making special provision for their education, health and employment (Para (8); (ii) special provision for social security for the protection of and welfare of “single women, orphans, children, the helpless, the aged, disabled, incapacitated persons and tribes on the verge of extinction” (Para (9)); (iii) “uplift the economically and socially backward indigenous ethnic group [Adivasi janjati], Madhesis, Dalits, as well as marginalised communities, and workers and farmers living below the poverty line by making provisions for reservations in education, health, housing, food security and employment for a certain period of time” (Para (10)) (what is “reservations in food security”; what is meant by “marginalised communities” in this para, in addition to the groups listed? Would it be necessary to establish who are below the poverty line? What is the criteria for poverty line?

Article 36 says that Directive Principles, State Policies and State Obligations are not justiciable, but the state must “raise resources for the implementation of the principles and policies”. But it says nothing about “responsibilities”. Is this an omission or are responsibilities pegged at a lower level than principles and policies?

Citizenship

The foundation of membership in a modern state is citizenship. Vis a vis the state, a person’s rights and obligations depend on citizenship. In many countries minorities have been excluded from citizenship, and thus from rights. Whether intentionally or not, the 1990 constitution excluded many communities from citizenship and the right to vote. The IC dealt with some deficiencies of law and administration regarding the recognition or grant of citizenship, and under it special arrangements were made to grant citizenship to a large number of people who were entitled to it but for technical or bureaucratic reasons, were unable to register as citizens (Article 11). These arrangements resulted in the grant of a significant section of people becoming citizens, particularly among the Madhesi, redressing, among other matters, the inequality in representation in parliament. The IC also broadened the category of persons eligible to become citizens, although even then the
qualifications on becoming citizens are more restrictive than in most countries.

**Individual and collective rights**

The guarantees of human rights are contained in Part 3, “Fundamental Rights” which, unusually for constitutions, appears after sections on Responsibilities, Directive Principles, and State Policies. Unlike them, fundamental rights are enforceable through the courts.

There are various restrictions that can be imposed on rights. I want to draw attention to one proviso: some rights, particularly of speech and political organisation can be limited if they: “jeopardise the harmonious relations subsisting among the people of various castes, tribes, religions or communities”. This has, potentially, great significance for the ability of the marginalised groups to establish an independent political mobilisation and base—a point I return to in later in the paper.

The right to equality is a strong theme of the IC. Apart from the general equality provision, which guarantees equality before the law, and rules out discrimination on grounds of religion, race, gender, caste, tribe, origin, language or ideological conviction (Article 13), there is the prohibition of untouchability and of racial discrimination. This is done through Article 14, whose reach is broader (and somewhat unclear) than its title suggests for it says in clause (1), “No person shall, on the grounds of caste, descent, community or occupation, be subject to racial discrimination and untouchability in any form”. This clause, as other clauses in the Article, deal with discrimination by non-state actors as well as the state, for much of the discrimination, indeed oppression of, Dalits and some other communities, takes place in the domain of society. Together these clauses cover most kinds of social, religious, and economic discrimination against them. Article 29 has a similar orientation; it provides protection against exploitation, particularly human trafficking, slavery or bonded labour, or “in the name of custom, tradition and practice” (although there is no definition of exploitation).

The general right to equality is qualified for one reason: “for the protection, empowerment or advancement of women, indigenous ethnic tribes, Madeshi, farmers, labourer or those who belong to a class which is economically, socially, or culturally backward, or children, disabled or those who are physically or mentally incapacitated” (Article 13 (3)). This theme of affirmative action is reflected in Article 21: “Women, Dalits, indigenous ethnic groups, Madhesi communities, oppressed groups, the poor farmers and labourers, who are economically, socially or educationally backward, shall
have the right to participate in state structures on the basis of principles of proportional inclusion”.

The IC also protects cultural rights. Article 17 gives every community (presumably meaning members of the community) the right to receive basic education in their mother tongue. Unfortunately this may be impractical in many cases, for various reasons, including financial, capacity of teachers, as well as the capacity of the language. It is perhaps for this reason that the right is “as provided in the law”—a formula which deprives the “right” of any real significance. Likewise, the right of every community to “preserve and promote its language, script, culture, cultural civilisation and heritage” may turn out to be quite meaningless unless there are state resources and facilities, which are not part of the right. Article 23 is the right to “profess, practise and preserve” one’s religion, but religion is rather restrictively defined as “handed down to him or her from ancient times paying due regard to social and cultural traditions” (which, it has been argued, can be used to justify, among others, restrictions on the right of Dalits to participate in general Hindu ritual and practices). Every religious denomination has been given the right to maintain its independent existence (Article 23(2)).

Finally, there are a set of Articles, which without singling out the marginalised communities, are of special relevance to them. Article 12 gives every person “the right to live with dignity”. Most members of the marginalised communities are frequently, some constantly, humiliated; the social opprobrium shown towards them destroys their self-confidence; the poverty in which most of them live denies them basic necessities of life without which there can be no dignity. However Article 12 by itself does not give any material resources, although it can be called in aid when invoking the affirmative policy potential of Article 13(3)). Also relevant is Article 16 which gives every person the right to live in a “clean environment”, but this time the right is accompanied by partial redress: “every citizen shall have the right to basic health services free of cost from the State”—and here is the catch—“as provided in the law”. Article 17 (2) gives every citizen the right to free education from the state up to the secondary level—but only “as provided for in the law”.

From this examination of enforceable rights, one can conclude that the marginalised communities have obtained most of their demands. They have the guarantee of a federal state in which they may be able to enjoy considerable autonomy, and preserve their culture, including languages, which otherwise would be threatened with extinction. The links of the state to Hinduism have been severed through recognition of Nepal as a multi-cultural state (though not a secular state) (Article 3). Entitlement to, and the
rights of citizenship are greatly improved. Legal impediments to legal equality have been removed, and affirmative action to facilitate equality in practice is now permitted and recognised as essential. They have assurances of access to and participation in the state, in proportion to their size of the population. There is the commitment to remove social stigma that attaches to them. There is the promise to provide for some of their basic needs, in education and health.

However, political rights like the right of representation are not guaranteed. And nor is the right to form political parties of their choice. The prohibition against ethnic or regional parties in the 1990 constitution and electoral laws is effectively maintained in the IC. The right to form political parties or other associations can be restricted if it “may jeopardise the harmonious relations subsisting among the people of various castes, tribes, religions or communities” (Article 12 (3)). (The same type of restrictions can be placed on the freedom of opinion and expression, publication and union). This restriction is reinforced by the power given to the Election Commission to refuse to register a party whose symbol, name, objective are regarded as divisive or likely to jeopardise harmonious relations, etc (Article 142(4)). If this rule is enforced with the same rigour as under the 1990 Constitution, it would mean that marginalised communities would not be able to organise politically on their own, but must seek participation in established parties run so far by members of the well off communities, thus playing a supportive rather than a major role (and which is evident in the politics of the Constituent Assembly). However, the current Election Commission has shown considerable wisdom and flexibility in this regard, and the Madhesi at least have been able to form what are essentially regional, indeed ethnic, parties.

On the actual representation for the future, some sort of precedent may have been set by the way in which the Constituent Assembly was composed, to include specified, minimum representation of the marginalised communities—once again not in the original IC, but in the amendments forced on the elites of the eight dominant parties. This is the party list system under which each party has to ensure that it brings a prescribed quota of the members of the marginalised communities to legislative bodies. This system is not ideal, as the identity of representatives of the marginalised communities depends less on the communities than established political elites, drawn so far from the old hegemonic groups. On the other hand the dynamics of the andolan and subsequent political developments have released political forces and energy that each community and social group is
likely, in due course, to find representation in the political sphere, though some more quickly than others.

**Part II**

**Proposals for the draft constitution**

There is a major problem in commenting on the proposals for inclusion on minorities and indigenous peoples in the new constitution on minorities and indigenous peoples. There are two special committees on this topic (the Committee on Fundamental Rights and Directive Principles (CFRDP) and the Committee on Rights of Minorities and Marginalised Communities (CRMMC)). In addition, most other communities also speak to this topic, including the Committee to Decide the Basis of Cultural and Social Solidarity (committee on solidarity for short), the Committee for Preserving the National Interests (committee on national interest for short) and the Committee on Natural Resources, Economic Rights and Revenue Allocation (committee on natural resources for short). So far the proposals on minorities and marginalized communities have not been pulled together by the Constitution Committee and working one’s way through the reports of these other committees is confusing—and tedious. However, their recommendations confirm a broad commitment to an inclusive political system, formal and genuine equality for all citizens and communities, social justice, respect for cultural differences, and a measure of self government. However, in most cases there is little guidance for implementation.

In this paper I examine the proposals primarily of the CFRDP and CRMMC (proposals of other committees are not significantly different, although the emphasis varies, and are referred to when appropriate, particularly when discussing the vision for Nepal and the identity of its people).

The other problem in assessing proposals for minorities and indigenous peoples is that on two critical constitutional issues, the federal system and the executive, there are no reports. The former is a big omission for the purposes of my paper, for federalism and autonomy have been the most important recommendations of the marginalised groups, and power sharing at the national level is also a concern. However, a number of committees have proposals relevant to federalism, including the structure of the legislature (by the committee on the determination of forms of legislative organ) and the allocation of powers and resources (by the committee on resources). There are problems with this piece meal approach, as each committee may have its own approach. The sensible procedure would have been to have the
proposals of the committee on restructuring first, on the basis of which
details in the relevant areas could have been developed by other thematic
committees. The work of the CA did not, unfortunately, begin with a plenary
session where the broad issues could have been discussed and some
understanding, if not consensus, developed. That would have made the task
of the thematic committees easier, as well as that of the pulling together of
the reports of the committees.

Most proposals on minorities seem inspired by, and are similar to, the IC,
in the general approach and ideas. They also seem to follow the structure of
the IC. Since on the whole the IC reflects well the agenda of the andolan, this
is no bad thing.

Vision of the country
The way the constitution describes the nation is part of the vision of the
country. It is particularly important for minorities to see how they are
represented in the nation and state. I have indicated that the 1990
Constitution represented a vision of Nepal which denied the culture and
religion of many communities and alienated them from, at least, the state. I
have also pointed out that the IC encompass a more broad based vision,
inclusive of its diverse communities and, in moral perspectives, driven by the
imperative of social justice.

Reports from several thematic committees reproduce and reinforces this
vision. The CRMMC has a slightly expanded version, but some of the points
in its version (like proportionality) more properly belong in Principles,
Goals, etc. (as indeed they appear in the IC).

The committee on social solidarity proposes a Directive Principle
(Article 9) that, “It will be the social objective of the State to remove
political, economic, social, cultural and all other kinds of inequality and
maintain harmony among various classes, regions, caste and ethnic groups,
religious groups, ancestry, gender, linguistic groups, communities, and build
a society based on justice and equality” (Article 9). Even more emphatic is a
State Responsibility (Article 10): “The State shall adopt the policy of
strengthening national unity by developing extensive social relations on the
basis of equality among various communities and people belonging to
different language, religion, and cultural groups and associated norms and
values, and encourage social harmony by providing equal protection, and
promoting the practice and development of all languages, cultures and
associated norms and values”.

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Citizenship

The proposals of the committee on human rights and directive principles have very elaborate provisions on citizenship, in comparison with the 1990 constitution and IC. It recognises that a citizen might have regional identity which the certificate of citizenship would record (this falls short of, and may be an attempt to pre-empt, regional citizenship). In some ways the grant of citizenship has been broadened—for example a person living permanently in Nepal whose parents are/were citizens is entitled to citizenship (this formulation requires both parents to be citizen, while the explanation says that one parent is citizen). Obtaining citizenship if one parent is a foreigner gets quite difficult, requiring at least 15 years residence. Dual nationality is not permitted but former Nepali citizens living abroad may obtain a certificate which gives them many benefits of citizenship. For some political posts, a person must be citizen by descent.

Unfortunately this restrictive attitude is reflected in the proposals of CFRDP which has detailed provisions on citizenship. It provides for a single citizenship, to be granted by the federal government, to indicate that provinces (federal units) will not be able to grant citizenship. But the citizenship would indicate the regional affiliation of the citizenship, although its purpose is not expressed. There are some dangers in designating regional affiliation, for when a citizen moves from the region with which s/he is identified, the citizen is likely to face discrimination in the region to which s/he has moved (Nigeria is a good example of the oppression of “minorities” seen to come from another region). It is preferable to identity everyone by one, Nepali citizenship.

There are other problems too with the committee’s proposals. A person, though born in Nepal of Nepali parents, can become a citizen only if that person and her/his parents live “permanently” in Nepal. What “permanently” means is not defined. It is strange to require a newly born baby that it has permanently resided in Nepal! In some cases even though a person is born of a Nepali parent, that person cannot be registered as citizen by birth, but only naturalised, in cases where the mother is Nepali but the father is unknown, or where one parent is a Nepali citizen but married to a foreigner, living permanently in Nepali. It is unclear why such persons should be naturalised rather than be regarded as citizens by descent—particularly as the former would be disqualified from the posts of president or vice-president of Nepal or head of a province.

Proposals in the CRMMC on citizenship are concerned more with identity documents (e.g., surname, sexual identity) than with acquiring
citizenship (which, along with deprivation of citizenship, is left to be dealt with the law). It wants equal rights of citizenship, and has a long list of prohibited grounds of discrimination. There may be some conflict between the recommendations of the two committees, the CFRDP being more restrictive and suspicious of “foreigners” and indeed with some gender bias, the CRMMC more concerned with equal rights.

All in all, it has become easier for members of marginalised communities to become citizen, under the IC and would under the committees’ proposals than under the 1990 constitution, but is still unnecessarily restrictive. And there is an odd quality to the provisions, moralistic and chauvinistic—and counter to the global trends which make it easier to become citizen as well as to secure dual nationality.

Representation

The question of legislative representation has been dealt with most extensively in the report of the Committee on Determination of the Forms of the Legislative Body (CDFLB). As regards the national legislature, the proposal is for two houses, the House of Representatives and the National Assembly. The former will consist of 151 members, of which 76 shall be elected directly in single member constituencies and the rest by “proportional election”. Political parties will be required by law to ensure that “women, madhesi, tharu, dalit, indigenous peoples, janjati, muslims, backward classes, regions, minorities, and other communities are equally represented on the basis of population”. Although not absolutely clear, the expression “equally represented on the basis of population” implies proportional representation. The precise method to achieve this result is not specified; this is left to a future law. An exception is representation of women, which, somewhat inconsistently with the principle of “equal, proportionate representation”, requires the law to ensure that there are at least one-third women, if sufficient number are not elected (presumably meaning after the direct election). The onus is on political parties to ensure the principle of proportionality, presumably by the way in which it nominates candidates for the direct and “list” elections. It remains to see how the law will regulate this matter, particularly if there is any requirement for some proportionality in the nomination for direct election, and whether the list is closed or open, in other words, how free is the party to disregard the ordering of names on the list.
If the majority of the members of marginalised communities come through the proportional party list, they are seen as coming in by the grace of the leadership of the old parties, rather than the support of their own communities, or by the virtue of their own leadership qualities. Even more serious, they do not have clear connections with a body of electors/constituents, and the development of their skills as politicians, and consequently their careers, may consequently be retarded.

This state of affairs is highly unsatisfactory. I realise fully that Nepal is faced with delicate and difficult problems of political integration in a multi-ethnic state, a central component of which is representation. Is it really in the interests of Nepal or the marginalised communities that this form of “separate” representation of communities should last for long? The Constitution Committee should consider the various options for representation of all interests and communities without the fragmentation of the political community that is Nepal. This matter is also closely connected to the rules about the formation and functioning of political parties, on which the committee says little, but which the committee on human rights and directive principles sets limits, not explicitly tied to ethnicity or region, but which could have that effect. This matter needs to be considered afresh, for under federalism some regional parties are bound to arise (as experience in other federal systems show). But the recommendation of the committee on the form of legislative bodies that these matters should be dealt with in legislation, within the broad principle of proportionality, is sensible, to retain flexibility for adjustments in the method, for the future.

For the other chamber, the National Assembly, 51 members are proposed. 38 will represent provinces (in equal numbers—the mathematics may be problematic). 13 members will be elected by the House of Representatives from three categories (whose numbers are unspecified): (a) “minorities, castes, languages, religions, backward groups or other
communities that have not been able to participate in the House of Representatives”; (b) “people of high reputation who have rendered prominent service in various fields of national life; and (c) (“experts”). The voting will be by the single transferable vote. It is not clear (a) why the House of Representatives should elect members of the other house, especially if is a federal upper house, representing provinces; (b) why any group should not be represented in the House of Representatives given the proposal that political parties have to ensure proportional representation of all groups; and (c) why eminent people and experts should sit in this rather than the other house. The inspiration seems to be the 1990 Constitution, for a unitary state, and which did not work effectively.

For provinces, a similar scheme is proposed. Out of “no more than 35 members”, 18 are to be directly elected, and the rest by proportional representation. Women must have at least one third representation, but another recommendation gives them “proportional” representation, as it gives to the other groups identified for the House of Representatives. Details would be dealt with in legislation, but it is hard to see how proportionality would be secured in these circumstances. Again, there is need for proper mathematics!

**Equality, non-discrimination, and affirmative action**

The human rights scheme of the IC is largely followed in committee reports. It is somewhat elaborated, but the essential principles remain the same. The provision of dignity is retained, with its potential as a guide to interpretation of rights; and its importance to communities which has been constantly humiliated and subjugated.

The equality provisions of the IC are maintained and strengthened; and the prohibited grounds of discrimination have been extended to sexual orientation, disability, physical condition, Muslims, Madhesi, Terai people, colour, social origin, and property. And the groups for whom affirmative action may be taken are increased (e.g., “people from backward regions, communities on the verge of disappearance, youths, senior citizens, sexual minorities” and people with disability or those in poor health (although given the confusing terminology regarding the disadvantaged) it is hard to be sure whether the seemingly expanded list really represents a change. It is now proposed that in addition to affirmative action, there would be compensation for the victims of past discrimination. Discriminatory behaviour would be “punishable as heinous social crimes against humanity and the victim shall get due compensation as per the law”.
Socio-economic rights
There is significant increase in socio-economic rights. They would now cover education, employment, health, food, shelter, drinking water, and employment. CRMMC goes so far as to advocate free education up to university level. It also wants the state to “ensure the right of all religious, cultural and linguistic communities to open and run educational institutions as run by them.”

Language
The scheme of the IC under which Nepali will be the official language at all levels (with limited use of local languages) is modified by greater recognition of local languages (and one proposal goes as far as accepting that Hindi might be admitted for this purpose: referring no longer to “local languages” of Nepal, but languages “spoken” in Nepal). But in all proposals Nepali would remain the official state language and the “link language” (although one proposal is that the link language could be negotiated, especially as among the provinces, and another recommends English as the language of “international contacts”). The committee does farthest in this respect in its proposal that if a language “fulfills certain criteria as recommended by the Language Commission and if duly passed by the Central Legislature”, it must be recognized as official language of the Central government.

There is widespread support for education in “mother tongue”, at least at the primary level. There is considerable support for the translation by the state of documents “received in the mother tongues into the official working language of the Central Government”.

There is special concern that the state should facilitate communication for the deaf and the blind, by promoting use of sign language and of Braille, but also other, new, technologies.

So, all in all, there is certainly more flexibility on language policy than ever before, although it is not clear that all of the proposals would be endorsed by the CA.

Religion
There is considerable expansion in the notion of the freedom of religion. The religion that is protected is no longer restricted to the religion of “ancestors”, which might lead to the liberalisation some religions or sects. A believer may
propagate his or her religion. There is explicit recognition of the right to change one’s religion; or indeed not to have a religion at all.

Culture
The right of marginalised communities to the practice, protection, and promotion of their culture is guaranteed (in addition to the protection of language and religion already noted). Some texts accord the right to define one’s identity and in particular to assume “their original identity”. Following the new approach in Europe about border communities, the CFRLDP proposes that “minorities, marginalised and excluded communities shall have the right to establish relationships with a foreign community which has a similar identity and participate in activities in a manner that will not affect their national interests”. This would be particularly welcomed by Madhesis and Tibetan communities.

Structure of the state
So far this paper has examined the rights of minorities and their members. Experience in many countries has show that if the overall system of government is not hospitable to human rights and minorities, for example through an enormous concentration of power and lack of effective checks and balances, rights will not be respected. I examine proposals on two aspects of the structure of the state: federal and autonomy, and the executive.

Federalism and autonomy
In accordance with the IC, the committee on restructuring has proposed a highly refined form of federalism “proportionate federal republic with fully inclusive democracy”), with three principal levels of government (federal, provincial, and local), but with possibilities of additional levels for special purposes (“special structures for political, economic, social, cultural, linguistic and physical development of the country by”).

The principal criteria for provinces (of which 14 are proposed) are geographical continuity and ethnic concentration; linguistic concentration; cultural homogeneity; and historical and communal features. These criteria are to be qualified by economic capability and potential, availability of natural resources and means and administrative accessibility should be considered. As the committee notes, “In this way, each province of Nepal will have the dominance of a major ethnic group, a major lingual group and a
major cultural group…. Evidently, a province formed in such a way will be multi-ethnic, multi-lingual and multi-cultural”, even though it may use a local language.

The special purposes for which additional levels may be established are the recognition of an ethnic community which may be a majority in a particular area, a backward community, and a community or region which requires special protection. The first of these purposes is based on the principles of self-determination internally “for tribal people, indigenous nationalities, Madheshi…in the form of politics, culture, religion, language, education, information, communication, health, settlement, employment, social security, financial activities, commerce, land, mobilization of means and resources and environment”. Some, perhaps many, will lead to the domination of a particular ethnic or lingual community. In these instances, preference will be given to members of that community, but only for a limited period, generally two terms of government. The committee has proposed a number of these and other special areas, the establishment of which is the responsibility of the province, although the consent of the federal legislature is necessary (although for the third tier, local government, the essential principles will be laid down by the federal government).

The committee has proposed in considerable detail the allocation of powers among the different levels of government as well as co-ordination between them and mechanisms for dispute settlement (including a constitutional court). There is considerable overlap of powers and functions between the different levels, with the ultimate authority in these areas with the federal legislature and government. Nevertheless, the powers given to other levels are considerable.

It is clear that the proposals meet the demands that minorities (particularly indigenous peoples) have advanced. In some respects some other groups may be less content (for example Madhesis who wanted terai to be one unit). There is some danger that the really small minorities will suffer discrimination, and that some special areas will be exceedingly small if the principle of a dominant ethnic community is observed. The proposed federal system will be complex requiring considerable capacity at all levels. While there are serious doubts about the feasibility of what has been proposed, there is little doubt that the interests and claims of minorities have been influential, and even if the proposals are not fully implemented, they would produce a very different state until now, reflecting the diversity of Nepal.
System of government

No consensus was achieved in the committee on the system of government, at the federal or provincial level. Accordingly it has produced three different proposals. The majority (composed of 18 members) favours an executive presidency, in which is supported by the smallest group (of three members). The major difference between them is that under the former, the president is elected by the entire people and under the latter, by an electoral college (of federal and provincial levels). The third group (of 16 members) favours a fairly traditional parliamentary system in which the president would be largely ceremonial (though not without some important powers, especially about the formation and dismissal of government) and would be elected by the electoral college favoured by the second group. Consequently there is no recommendation of the committee, leaving the matter to be resolved by the constitution committee.

It is not necessary for the purpose of this paper, concerned with minorities, to evaluate the different options advanced by the committee. In general it can be said that a parliamentary system is more likely to be favourable for minorities than the presidential, as the former is a collective form of the executive in which room can be found for them in the cabinet. Also, it is not infrequent in parliamentary systems that representatives of minorities may hold the balance between the two leading parties, and thus able to negotiated favourable policies for their communities.

In this case, however, it is important to note that despite the disagreement in the committee, the differences between the options are less marked than be suggested by their labels. The presidential system has significant resemblance to the parliamentary. Thus the president has to work through the council of ministers, and though it is the president who appoints them, his control over them is less than in most presidential systems. She has to constitute the council on the principle of proportionality between political parties (ignoring those with less than 5% of the seats). In respect of ministers other than from her own party, she has to consult with the leader of the relevant party—and cannot remove the minister except with the consent of the minister’s parliamentary leader. Ministers must be drawn from the legislature, which also significantly restricts presidential choices. The council of ministers must decide by consensus; only if fails, may it decide by majority. Nor is the tenure of the president as secure as in many presidential systems.

On the other hand, the proposed parliamentary system also requires that the council of ministers be composed on the principle of “proportional
inclusion” (although it is unlikely that it means that they must be drawn from all political parties). Ministers must be drawn from among the members of the legislature.

There is general agreement in the committee on what is called Basic Principles of Public Administration which provides for a number of independent commissions, particularly for the appointment to public or state services. An important principle is concerned about the proportional recruitment of minorities.

Thus minorities are likely to do well out of restructuring of the state. They will be proportionally represented in the legislature and in the council of ministers. However, the principle of proportionality in the government is tied to political parties, not ethnic groups, and this may disadvantages minorities, as has been already explained.

Part III
Problems in drafting and of implementation

A constitution is many things: manifesto, national symbol, set of values, a vision, and the country’s supreme law, to which other laws, and policies, must bend. Perhaps for this reason, we can find different styles of drafting. The symbolic and aspirational parts must inspire and can, and perhaps must, be poetic (like the US Declaration of Independence). The “legal” part dealing with rights and obligations, the structure and powers of the state, relations between the centre and the sub-national units, must be precise and clear; for otherwise there will be disputes about the meaning of the text and it will be hard to implement. Both the political and legal difficulties are compounded by lack of clarity if some provisions are the result of hard negotiations and compromises, as many provisions of Nepal’s new constitution are likely to be.

At this stage it is not possible to assess the quality of the drafting of the new constitution—as no text exists yet. But the drafting by committees seems to follow the style of the IC, unclear, rambling, wordy, and repetitious, rather than the succinct and, on the whole, the clear style of 1990 constitution (whatever its other faults). In criticising this drafting, I realise that the reports are not in the final language as it might appear in the constitution, as well as that the text I am reading is a translation, done hurriedly. But it would certainly have helped if the committees’ report were written in plain, non-technical language, instead of legal text. Unless an excellent draftsperson has
prepared the text, ambiguities are bound to occur, making the text inaccessible.

The first problem is repetition. The same ideas can appear in several places—e.g., preamble, directive principles, state policies, state responsibilities, and the bill of rights. The IC and the committees’ drafts abound in this practice. Repetition does not add anything but words, and makes for tedious reading. As the phraseology frequently differs, it is hard to fathom whether subsequent formulations are for emphasis, extensions or restrictions. When the same idea appears in different Articles, the lawyer interprets by comparing them and trying to establish if the subsequent formulations affect the meaning of the original. Often this is probably not intended in the IC or the drafts of the CA committees. But lawyers could certainly argue to the contrary.

The drafts use many expressions whose meaning cannot be gleaned from their dictionary meaning (e.g., exploitation, community). It is therefore necessary to convey the meaning intended in the text. The usual way this is done is to define it for the specific purpose of the text in a definition section. The definition section in the IC must be the world’s shortest section. And the same is the case with committees’ drafts.

Expressions like minorities, marginalised communities, oppressed minorities/communities, excluded communities, disadvantaged communities, and backward regions are used repeatedly, without any explanation what they mean. It is often not clear which community is entitled to what special treatment or what is the redress if special provisions are not granted or are violated. Sometimes there is a list of communities entitled to some special protection, and after the list, expressions like “and other marginalised communities” or just “and marginalised communities” are added. One has to think hard what these communities might be since the list seems comprehensive. The use of differing descriptions/terms for the marginalised is confusing and give rise to considerable dispute as to which group is entitled to what.

As far as I can tell, the only place in which terms designating collectivities are defined is the CRMMC. But the definitions are not helpful. I reproduce the definition of three critical terms:

“Minority community means the community which suffers from all forms of discrimination and exploitation. The term also indicates ethnic, religious or linguistic community with less [small?] population suffering from such discrimination and exploitation.”
Following queries could be raised: what is meant by “all forms”; what if the community suffers from some or not all forms? What function is served by the second sentence? Are the communities listed there not covered by the first sentence? Does it mean that a community, despite “all forms of discrimination and exploitation”, is not entitled to redress if it cannot establish that it is not an “ethnic, religious, or linguistic community”? Are not all communities in Nepal, indeed throughout the world, covered by one or the other, or all of these characteristics? What if a “small community” suffers from such discrimination but the cause of discrimination is not ethnicity, religion, or language? Are we concerned with deprivation as such or do we need a link to another factor such as ethnicity? Could a deprived group of Brahmans or Chettris (and there are examples in both communities), claim the protection of these provisions? Does a backward region qualify although its backwardness is not due to any discrimination but unfortunate geography and climate? Do women qualify as a community? or a depressed group of men? What is exploitation? Low wages or no wages? Harsh working conditions? Would women from a particular community forced into prostitution qualify? What if there is discrimination but no exploitation?

“Marginalised community means the community which is backward from the economic, social, educational, political, religious, linguistic, gender, health and sexual viewpoints”

How this is different from “minority”—is it that the community does not have to prove any discrimination or exploitation, but merely show that it is backward? What exactly does backward mean? For example, how is a community backward in religion, or from gender or sexual “view point”? What is “view point”? What does it mean to say that a community is backward in linguistic?

“Excluded community means the community which has not been included into the State power, because of caste, linguistic, economic, social, religious, cultural, sexual, regional discrimination and exploitation, or because of physical or mental incapacity or disability”

The focus here seems to be exclusion from state institutions (parliament, government, judiciary, public service). How would one prove that the exclusion is due to the listed factors? What can be done to redress the exclusion of the mentally incapacitated, and what remedy can the courts order if the government fails in its obligations? How would one
determine whether a community has been excluded because of language? Because its members cannot answer civil service examinations? How is exclusion related to “exploitation”?

The only other group defined is “very poor”, in the CFRDP, as: "very poor" means “the poor people living below the average poverty line”, which must be a huge category, perhaps a majority of the population of Nepal. Several other terms referring to “disadvantage” are not defined, including “backward regions”, “suppressed regions”, “tribes”, “sects” and sometimes, “other communities”. The clarification of “other communities” in respect of the composition of the National Assembly (and presumably also for the other house?) as “all other communities” is not particularly helpful. What other communities? On one reading it seems to cover all the rest? Is this intended?

The concept of backward region is unclear concept, although it is central to the scheme of the constitution for redress. Does it mean that it economically or socially underdeveloped; and if socially, what does that mean? What if the cause of “backwardness” is not discrimination or “exploitation” but natural geographical or climatic conditions? Can a backward region get special assistance only if it can establish “discrimination”? Is this the basis of sensible regional policy? How does a disadvantaged region participate on the basis of proportionality: what is proportional inclusion, especially for a region? Do the more “advantaged” members in the “backward region” also qualify for special assistance?

Does it make sense to lump a “backward region” (a geographical entity) along with human categories like minorities, dalits, oppressed groups, to establish qualification for special assistance, and the form of assistance?

Words like “feudalism” and “exploitation” occur frequently in the IC and reports of thematic committees (e.g., “a common minimum programme for socio-economic transformation to eliminate feudalism and implement it gradually”). The definition of feudalism offered by the committee on natural resources is circular and unhelpful. Is it sensible to use such emotive terms, rather than describe the circumstances of the group which qualify it for assistance? (Feudalism in a preamble may be alright!)

**Implementation**

The implementation of a constitution like the IC (towards which the draft constitution is headed) is hard enough, without these linguistic confusions (of which I have given only a few examples). A major problem of implementation is that despite some apparent consensus that may “emerge”
in the CA, several contentious areas will remain. And even if genuine consensus emerges on the objective (like some form of assistance to the disadvantaged), there is likely to be disagreement, even serious disagreement, on the means to achieve them (particularly if they take the form of quotas). For some remedial measures, such as proportional representation, a great deal of data on population, identities etc is required (the lack of data is likely to be acute in the design and implementation of federalism—which itself is likely to remain contentious).

Committee drafts say little about implementation—perhaps sensibly. It is best not to burden the constitution with details best left to legislation (for example the proposals on the system of securing inclusive representation, based on the model for the CA, is best left out as it may not be in the interests of the “marginalised communities”). It is more than likely that much of the constitution will be in the form of “directive principles”—lots of objectives, few methods; a sort of framework document. Or a menu, for it is unlikely that all the items up for redress can be easily digested in a short period. So choices would have to be made, hopefully by an “inclusive” legislature and executive. It is clear that the difficulties confronting the marginalised communities can be resolved fully neither by federalism/autonomy nor by species of affirmative action. It would be necessary to be quite strategic, at least in the short run. An example is how to apply “collective rights” which are the centrepiece of the IC and likely to be that of the new constitution. Are such rights best perceived as the rights of the community as a collective or those of its members, individually? Both aspects are important; but one more acceptable than the other, one more difficult to administer than the other.

Nor is much guidance given as to the institutions for implementing provisions for inclusion and social justice. This is not surprising at this stage, at the proposals on the executive and federalism/autonomy have yet to be tabled. But one institution has been proposed by more than committee is a set of commissions to promote the interests of the marginalised communities. The Committee to Decide on the Structure of Constitutional Bodies recommends setting up (a) the Human Rights Commission; (b) women commission; (c) Dalit commission; (d) commission on janjati; (f) commission for the Protection of the Rights of People with Disabilities, Minority and Marginalised Communities and the People of Backward Regions [but does this not cover dalits, women, adivasi who already have their own commissions]; (g) Madhesi Commission; and (h) Muslim Commission.

This makes no sense. The Committee wants the member of each commission to reflect “proportionate representation and inclusiveness”. How
is it possible to achieve this if most commissions are to have three members? Does it make sense to have so many ethnic/gender commissions? Where are the resources to come from—experts, staff and money? Will not the commissions take over policy functions that belong to elected and accountable governments? Will not separate commissions entrench ethnic divisions within society, competing against each other for limited resources? Or be played against each other by others (e.g., government)? Who will coordinate policy in this vital area? What lessons has the Committee learnt from the experience of past and existing commissions? Or from the experience of other countries?

Would it not be better to have a Commission on Minorities and Marginalised Communities to deal with all of them, with sectoral responsibilities for each community assigned to one or more commissioners, allowing a measure of specialisation? Most communities share common problems and are seeking similar solutions. There will be economies of scale and a “one stop shop” if there were only one commission. This would also be the way to develop broader national policies on inclusion and political integration, rather than narrowly sectarian.

CFRDP has also proposed a commission to identity communities or classes that satisfy the criteria of minorities, marginalised, excluded, and “make arrangements for their protection, development and empowerment for proportional representation at every level”. Is a commission necessary for this: does not there exist voluminous reports and other data on this matter?

As the task of implementation of the constitution involves a complex set of institutions, values, claims (to considerable extent competing), multiple levels of government, all in the case of fundamental restructuring, and as the constitution is in substantial part a framework, would it not be best to set up an independent implementation commission, working closely with governments, legislatures, and communities at all levels, to ensure the necessary legislation and policies, and administrative backup? The commission itself would need to assemble within its members and staff a variety of disciplinary knowledge and skills.

Part IV

Conclusion

The IC does, and now hopefully the new constitution will, set up an excellent framework for the protection and participation of minorities. I believe it is completely consistent with international instruments for the protection of
individual and collective rights. The exception to this statement might be certain provisions of instruments on the rights of indigenous peoples (which are based on the situation of indigenous peoples in the Americas and Australia, where they still, to a considerable extent live in compacted communities, in some isolation from other communities—a situation not common in Nepal).

The range of rights and the style of language that the marginalised communities are making is in large part a reflection of the nature of dialogue and negotiations. On the one hand, the privileged, established castes have been negotiating about the structure of the state and their access to power, concentrating on national structures and resisting federalism; on the other the marginalised communities have been having their own internal discussions, separately, reciting endlessly the discrimination against them, their humiliation and suffering, and asking for reparation and equality, rights rather than directly political power, interested in autonomy and the exclusion of others, even if neighbours, and not focussing at all on central institutions. It is not helpful too lump all the marginalised groups as a collectivity, not distinguishing them by history or culture, while the oppressed are trying desperately to establish their specific identity and suffering. Constant references to communities, proportionality and inclusion suggests that social and political integration may not be on the agenda. There is the danger that the forms chosen for inclusion may themselves become exclusionary, citadels of communities desperately trying to fend of legitimate claims of others.

Perhaps the dilemma facing Nepal is perfectly captured in the almost universal restriction on rights on grounds of creating disharmony: A restriction on human right is justified if an act may jeopardise the harmonious relations subsisting among the people of various castes, ethnic groups, religion, and community. It is broad and vague, and the tendency (and some would say the objective) to preserve the status quo; intended perhaps to stop that is reform is likely to upset the privileged. It is perhaps inconsistent with the general orientation of the constitution for a fundamental re-ordering of society and state which is bound to cause stress, tension and even conflict. There is clearly need for sensitivity in implementing the provisions of the new constitution. But this cannot be achieved by trying to “stop” politics, and pigeon holing the people in ethnic categories, which the new policies try to do. Nepal must aim for national unity and political integration through open and not controlled politics.

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The Draft(ing) Constitution: What do Nepal's women want - and what they may get?

Jill Cottrell

In a participatory constitution making process, one way to approach an evaluation of the Draft constitutional provisions is to ask what women’s groups have been asking for in that constitution, and trying to measure how far they would get what they had asked for if the suggested provisions are actually adopted. But perhaps at least two additional questions should be asked

- Are women asking for the right things in terms of what they want to achieve?
- If they get the provisions they want – how likely are these to achieve the results they want.

I. Introduction

This is not the place to discuss the latter in detail – save to recognise that the results may be disappointing. Indeed – so great are the expectations (not in Nepal alone and not on the part of women alone) – that the results are bound to be disappointing. Nepal’s earlier constitutions have mostly outlawed discrimination on grounds of sex or stated that men and women are equal; actually before than many constitutions. The results have been limited. In recent years, law has been passed permitting abortion far more freely than in the past, and to equal rights to ancestral property, as well as giving women
(as well as men) the right to seek divorce on
grounds of adultery – all in amendments to
the National Code in 2002\(^1\). In 2006 a law
to amend various laws to achieve greater
gender equality was passed. There have
been some cases brought before the
Supreme Court on women’s rights issues,
relying on the constitution. But the
constitution had not changed since the
1990s during which little had happened;
what did change was a greater
consciousness on the part of women.

Women’s groups have tended to focus
on structural aspects of the constitution –
the Preamble should say this, the Human
Rights Chapter should say that, the
Directive Principles (DP) should say the
other – and so on. In fact the whole debate
on the new constitution has tended to be
organised like this – heavily influenced by
the structure of the 1990 and Interim
Constitutions. And this “strait-jacketing”
approach has been followed by the CA
itself to some extent in setting up
committees and in the questions directed to
the public. The shortcomings of this
approach include that it does not focus on
how a constitution works, so much as the
appearance of certain words and notions.
And it tends to repetition of ideas – so the
same “claim” may appear in various
proposed chapters, without the proposers
apparently being aware of the risks of
repetition (or even more of slight
differences of wording on the same issue). It also tends to encourage keeping
the extremely prolix style in the most recent constitution – the Interim
Constitution (IC) – which multiplied the types of “non-justiciable”
provisions, in language severely lacking in precision, and in legal effect.

\(^1\) There is a summary: “Nepal: Country Code (eleventh amendment) bill and women's rights” at http://www.wluml.org/node/732 (Women Living Under Muslim Laws website)
Women in Nepal: A Snapshot*

Nepal is a poor country, and a country of very uneven distribution of power and resources. And for 10 year to 2006 it was affected by a widespread insurgency. Within even all the disadvantaged and marginalized groups on other criteria – dalits, janajatis, madhesis, persons with disability, “backward regions” women will invariably be the most disadvantaged. For example

- in 2001 maternal mortality rate per 100,000 births was 415
- two-third of pregnant women are anaemic
- the under-five mortality rate for boys was 104.8 and for girls 112.4
- in all communities except dalits more boys than girls were fully immunised
- early and repeated child-bearing and lack of care have consequences including perhaps 600,000 women suffering from untreated uterine prolapse and fistula
- literacy rate in 2001 was 65.5% for men and 42.8% for women
- agricultural wage ratios (men: women) are 85:65 and non-agricultural 137:101
- in 2001 82.9% of households had no female-owned property
- in the House of Representatives elected in 1999 there were 12 women members (6.4%) – but 197 of 601 Constituent Assembly members are women
- 30% of primary teachers were women, but only 3.4% of primary heads
- 10% of professional and technical posts in government were held by women
- about 2% of debts to banks were owed by women
- in 2001 1.8% of girls aged 10-14 were or had been married (this had been markedly declining)
- in 2001 half a million women were in polygamous marriages
- widows are treated in very demeaning ways (see footnote below)
- higher education, and consumerism, drive up dowry
- certain cultural and religious practices survive such as chaupadi (excluding menstruating women from the home), deuki and jhuma (dedicating young girls to Hindu priests and Buddhist monasteries respectively), kumari (child goddesses)
- many girls are trafficked, internally to Kathmandu and elsewhere, especially to India; on one estimate there about 100,000 Nepali female prostitutes in Mumbai; many are HIV+
- a report sys that “women from the marginalised Dalit (the so called ‘untouchable’) community are routinely accused of practising ‘witchcraft’ and tortured”
- violence against women is a major concern for women’s groups, and is particularly problematic when combined with the caste system, and also exacerbated by the conflict.

Nepal’s performance in many respects has improved markedly. It may achieve the MDG goal of gender parity in primary school enrolment by 2010. More women are owning land. Women are marrying/having children later with favourable consequences for mortality rates and birth-related medical conditions.

I have tried to move away from this approach, especially when discussing rights (that is by not discussing sequentially rights and directive principles etc). So this paper is organised in terms mainly of issues not of constitutional solutions.

II. Substantive suggestions

Since the Jana andolan II there have been many proposals. There have been several documents called “Women’s Charter”, and a variety of women’s organisations, often funded by or working with international NGOs and UN agencies, have held endless workshops and produced many documents. Some are more detailed than others, but there are not marked differences between them. In this paper I have taken as a starting point one long document – “Issues relating to the Rights of Women to be included in the New Constitution-Handbook, published by Pro-public with support from Ministry of Women, Children and Social Welfare and UNIFEM-N, Falgun 2065”.  

Quotations are from there unless otherwise specified.

Preamble

The “where” question is not irrelevant? Some parts of a constitution do serve somewhat different purposes, and there may be good reason for focussing on these. The Preamble is one such. Women’s groups in Nepal have argued that the Preamble should explicitly mention non-discrimination as a fundamental basis for the State, and also more positively the resolution to end “the prevailing political, economic, social, cultural, religious, legal and administrative discrimination against women including the prevailing class based, ethnic, regional and gender related problems”. The CA women members3 wanted the Preamble to refer to these points, as well as the right to live with dignity and respect, and abolishing all exploitation, suppression and violence against women.

The Proposals

Various committees have suggested forms of words for preambles. The Committee on Minorities proposes something about the building of a just,
inclusive State that will ensure proportional representation of persons from all castes, tribes, religions, colour, sex...

Comment
Even people who may not read beyond page 1 may the Preamble with its the almost mandatory “We the people…..”. This is not to be sneered at. Courts have used preambles to good effect. But many people perhaps do not realise that the Preamble is only the cover and not the content of the constitution, nor the risks of repetition. Courts will probably use the Preamble only in a very limited way – to resolve uncertainties. It is better to avoid the uncertainties, and not to rely on the Preamble as having legal effect, but as something that reaches out to the people. Preambles may relate the new constitution to past travails, sketch a vision of the future, and capture the identity of the community (perhaps not a bad idea in a constitution that may end up rather fragmenting the people).

Citizenship
Women have insisted that equal rights to citizenship for women and men should be specified. This should include that a foreign man who marries Nepalese woman should be able to be naturalized citizenship, if he desires, “pursuant to the laws in force”. And that a child of a Nepalese woman married to a foreigner should be able to take citizenship of Nepal by descent. And the CA women members wanted a child to be able to choose to use either parent’s name.

The Interim Constitution
The IC removed most gender distinctions, but left the distinctions between the right of a foreign woman marrying a Nepali and a foreign man marrying a Nepali.

The proposals
The Human Rights Committee proposes that citizenship should pass automatically only if both parents are Nepali – this seems to apply to those born in the country or overseas. But the person born can only get citizenship if they are living permanently in Nepal. One good proposal is that if the father of the child of a Nepali woman is
unknown the child can get citizenship. This is to deal with communities such as the Badi – a Dalit caste which traditionally were prostitutes among other roles. But such a child can become only a naturalized citizen.

The Minorities Committee proposes that people should be able to obtain citizenship in the name of their father or their mother or both. This refers to the citizenship certificate. It is a curious feature of Nepali citizenship law that as much emphasis is laid on the certificate – which ought presumably to be simply evidence of citizenship – as it is on the nationality of the person itself.

**Comment**

The citizenship proposals are largely neutral or favourable to women. But there are some problems. How can one tell whether a child just born outside the country is “permanently resident” in the country (unless this refers to the parents)? Suppose the child is born in a country that does not recognise place of birth as giving citizenship – as Nepal does not? The person could be stateless. Again if a person is born in Nepal of parents only one of whom is a citizen, that person can only become a citizen if the other parent becomes Nepali. But a foreign spouse cannot become Nepali until they have lived in the country for 15 years [several dissenting committee members thought that a foreign wife should be able to get citizenship immediately if she renounced her foreign citizenship]. What does the child do until this period has elapsed? Suppose the other parent does not want to become Nepali – and why should they do so since they have to give up their other citizenship? This is on the face of it gender neutral. But even in the modern world most mixed marriages are probably patrilocal. More Nepali men are likely to be in the position of having stateless children than Nepali women.

On the provision about children of unknown fathers: if any positions are restricted to citizens by birth those children will not be eligible because they are “naturalized”; discrimination against the Badi will continue.

**Federalism**

Initially women’s groups tended to join a clamour from various marginalised groups for federalism. Thus the Women's Rehabilitation Centre (WOREC) Women’s Charter said

Women are forced to face numerous forms of violence, abuse and discrimination. Therefore, appropriate steps must be undertaken to end ongoing discriminatory practices and ensure women's role in decision-making processes at all levels of the structure of society. This provision
shall be implemented in each and every sector of women's life. While the discrimination may continue under unitary state, we demand to declare federal structure of state polity

Gradually women realised that perhaps federalism was not inevitably a good idea from the perspective of women – or that it need not be. The CA women members were concerned that “gender benefits should be considered” when creating the federals system, and there should be an assurance that laws produced by the states should be “women friendly”.

The Committee on the form of the legislature has proposed that state assemblies must include one-third women (see below). The Committee on constitutional bodies has proposed that there should be a human rights commission for every region, but has said only that at the lower level the issue of a women’s commission should be decided by (presumably regional) law. Similarly the committee on restructuring wants commissions at national and state/provincial level.

The last committee also proposes that the distribution of powers – to make laws etc – should be distributed between the national, provincial and local level. Thus, “Management of elderly, disabled, women, single women and helpless” is a local matter. Family law is to be a concurrent matter (in the power of both province and national government).

Comment
There are various risks in a federal system, as well as possibilities, for women. There may be opportunities for women’s involvement in government at the local level. But there may also be risks that a rejuvenating effect on traditional culture (and for example the Committee on restructuring proposes that “Tribal people, indigenous nationalities, Madheshi shall have the rights of self-determination internally and locally in the form of politics, culture…” may be detrimental to women. Do traditional institutions have a role for women? Would customary law protect women’s rights? It is important to clarify whether customs are subject to the Bill of Rights (the restructuring committee includes a provision on women’s rights, but if it appears as having the same status as right to self-determination as to custom, it might give rise to argument in court. And the mechanisms need to be there. Should enforcement at the local level be left to regional institutions? It is the state as a whole that has committed the country to human rights through

\[4\] The present author wrote a paper on women and federalism a version of which was published in the newsletter of WIGG – Women in Good Governance.
treaties – and the constitution of some countries explicitly recognises that this is a role of the federal government. Consigning what happens at the state level to state human rights commission may be to consign women’s rights to the dustbin.

Putting family law as a concurrent subject means that national laws will prevail – since the relevant CA committee has proposed this rule. They also proposed that the national government would set out guiding principles in these concurrent areas, that the provinces would follow (this is not a universal feature of federal systems – in some each level may make equally detailed laws). Even if the human rights provisions did not include a prohibition on polygamy (as many women’s groups have demanded) the national level could include this and bind the provinces to follow suit. On the other hand, it is not necessarily the case that national laws and polices will be more progressive from a women’s rights points of view than the provinces.

III. Fundamental Rights

Equality

The women of Nepal suffer from extreme discrimination, like the women in most developing countries. In addition to all the “usual” manifestations of gender equality, there are some specific issues including what might be described as discrimination on the basis of menstruation, or of having given birth (women in some communities are required to leave the house and live in an outhouse for a period - chaupadi).

Women have asked for guarantees of non-discrimination (by the state in any form) on grounds including religion, race, sex, caste, ethnicity/tribe, origin, language, physical or mental disability, sexual orientation or ideological conviction [Pro-public] and have added “No woman should be discriminated against in any way merely for being a woman” and no discrimination on grounds of marital status. Discriminatory practices, traditions, customs and laws have been identified – as requiring to be prohibited, or repealed as the case may be. (In the Pro-public submission, repeal of discriminatory laws appears as a possible directive principle).

The proposals

The CFRDP committee proposed to prohibit discrimination on:

- religion, colour, caste, tribe, gender, sexual orientation, biological condition, disability, health condition, marital condition, pregnancy, economic condition, origin, language or region, ideological conviction or other similar
The committee also proposes a separate article for women’s rights which includes “no gender discrimination against women, in any form”.

Other committees also propose non-discrimination provisions. The Minority Committee mentions “birth” but not marital or health status or pregnancy. (Oddly they seem to include non-discrimination in the Citizenship Chapter – but also in the Human Rights Chapter).

This committee includes some horizontal application: generally there must be no discrimination against persons on prohibited grounds. And again – “on grounds of indigenous peoples, dalits, Terai people, Madhesis, Muslims, the disabled, religion, colour, sex, region, caste, tribe, descent, community or occupation, be subject to discrimination and untouchability in any form” Specifically in relation to access to goods, services and public places this is repeated. They must not be deprived of access and, in a following clause, must not be “prevented from purchasing or acquiring such goods, services or conveniences”.

On the question of custom and tradition, on the one hand there is some emphasis on tradition, with the Minorities Committee saying that

Every person, family or community residing in Nepal shall have the right to protect, promote and use his or her language, script and culture, customs, traditions, rituals and practices that are inconsistent [sic – presumably consistent is meant] with universal norms and values of human rights.

The same committee also said

The State shall discourage discrimination or a feeling of superiority or ethnic intolerance, indignity or hatred to be taking place on ethnic, linguistic, religious, cultural, economic, social, educational, political, physical, health, sex, sexual and gender identity, origin or regional or any other grounds among citizens

And the CFRDP committee says that

No physical, mental, sexual, psychological or other form of violence or exploitation shall be inflicted on any woman on the basis of religious, social, cultural tradition, custom or any other grounds, and such an act shall be punishable by law and the victim woman shall have the right to receive proper compensation.

Comment

The very wide range of grounds would include various issues of particular concern to women including marital status (which would embrace widows)
pregnancy, HIV, no doubt menstruation, as well as pregnancy. In discussions with women’s groups I had proposed the inclusion of “fertility”, having in mind the treatment of women who are unable to bear children – or who bear only sons (not their “fault” of course). But there might also be other situations. Helen Irving mentions a US case in which being sterilized was a condition imposed by a company on women who wished to remain employed in work hazardous to an unborn child.  

The translation indicates that the Human Rights Committee proposes no discrimination on the listed “or other similar grounds”. If this is accurate, is there a risk that certain grounds may be excluded because they are not “similar”? The South African Constitution says there must be no discrimination “on one or more grounds, including…..”.

One concern is the continued tendency to restrict rights to citizens – though not all rights. The Human Rights Committee seems to consider this a positive virtue and says “Most of the civil and political rights are provided only to the citizens. Moreover, the citizens should show their dedication and loyalty towards the nation.” International law – and plain justice – requires that most rights be enjoyed by all within the country, unless there is good reason (in most countries voting is restricted, and standing for public office, and rights to education, at least beyond primary school, and right to work may reasonably be limited). In Nepal where many have in the past failed to get citizenship certificates, it is particularly important to recognise as many rights as possible as belonging to all.

Two particular issues are indirect discrimination and horizontal application. On the first, this is not generally mentioned in committees’ suggestions. CEDAW defines discrimination as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women”. The point here is the use of the word “effect”. This is ‘indirect discrimination”. Some constitutions do use the expression “direct or indirect discrimination”.

Horizontal effect means that that individuals and legal persons (companies, corporations etc) are also bound as far as this is appropriate. This is already done in the IC of Nepal in the context of untouchability, and some proposals have extended that to other forms of discriminatory

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behaviour, as mentioned earlier. This is important as much discrimination is found in society rather than in the state – and the treatment of women like that of Dalits is very much an issue in society even though the state should work to eliminate it. See South Africa:

A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

This leaves it to the courts to decide whether a particular right can usefully be enforced against non-state bodies.

The specific provisions indicating that custom is not an excuse for ill treatment are valuable (especially because there was a sense that under the 1990 Constitution freedom of religion was used as an excuse for practices like untouchability. But the Explanatory note in the CFRDP committee matrix suggests that this provision would deal with, for example, mistreatment during menstruation. But, if correctly translated, “exploitation” and “violence” might not cover this situation.

Affirmative Action

Women also ask, in various formulations, for affirmative action for various groups including single people (which I have rather assumed is mainly a code word for widows), persons with disabilities, Dalits, third gender, indigenous peoples, janjatis, Madhesis, Muslims, adding that these must “include women belong to minorities and backward communities, so that they can fully enjoy their personal liberty as provided by the constitution.

The Proposals

The CFRDP committee proposes:

Provided that, nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or advancement of women, dalits, indigenous ethnic tribes (adivasis janjatis), Madhesis or

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6 “The death of the husband opens the floodgate of hell for her and the ocean of miseries fall on her if the woman happens to be quite young. A young single woman (widow) is often viewed as an adversary and the family often taunts her as being responsible for her husband’s death. One of the biggest traumas single women undergo after their husband’s death arises from her apprehensions about her and her children’s future. They are put through a life of humiliation and are always looked at with hatred and suspicion. The moment they become single they lose their independence and every means of happiness and get tied down by the ancient iron rules, culture, systems and beliefs of the society.” – Lily Thapa, “Nepal’s widows” http://www.opendemocracy.net/blog/nepals_widows She says “(of whom we use the term ’Single Women’ due to the agony and humiliation attached in the word widow in Nepali)”.
farmers, workers, oppressed region, Muslims, backward class, minority, marginalized and endangered communities or destitute people, youths, children, senior citizens, gender or sexual minorities, disabled or those who are physically or mentally incapacitated and helpless people, who are economically, socially or culturally backward.

*This is permissive only. However, they also say, in the specific article on women:*

Every woman shall have the right to special opportunity in education, health, employment and social security on the basis of positive discrimination.

The restructuring committee also recommends affirmative action: “special rights in the areas of education, health, employment and social security”. This seems to be included under rights, and is similar to the CFRDP proposals.

**Comments**

Affirmative action is always controversial – especially among those who believe they have been ‘sacrificed’ to bring up someone else. The Indians have identified the particular problem of the “creamy layer” – within a disadvantaged group there may be a layer that is not disadvantaged at all. And that group may benefit from special opportunities – often they are best situated to do so. Sometimes constitutions have tried to ensure that individuals who benefit are genuinely needy even if the group is not. Various Kenyan Draft constitutions did so. There are risks in this – including that special provisions are not intended only to benefit individuals but the group, and it may be a valid argument that it is important to have role models within a particular community even if this means giving special treatment to “non-needly”. And it is also true that disadvantage may not be wiped out in a generation of good fortune; social attitudes - within or outside the groups - that support disadvantage may still operate. But blanket benefits potentially for every woman are neither just nor practical.

In fact it is unclear how an individual woman could claim the benefit of a special constitutional right. Legislation would be needed to flesh out the rights – giving procedures and criteria and setting specific quotas possibly. Arguably such provisions are little more effective as “rights” than they were in earlier constitutions under directive principles. This is not necessarily a bad thing. Large amounts of litigation trying to give effective operation to constitutional provisions may not be very desirable – as India has found.
Unfortunately for the disadvantaged of all groups, setting constitutional deadlines is not easy. The obligation to fulfill these rights must be a continuing one. It is not possible to say that by a certain date a fully fledged legislative scheme for affirmative action must be in place. However, it may be possible to protect existing schemes in transitional provisions (see below).

**Freedom from violence and exploitation**

A major area of concern (as for women elsewhere) has been violence against women. Women have asked that all women, and specifically single women and third gender (lesbian, gay, transgendered, and bisexual- LGTB) people should be “provided the right” against any form of violence, generally, and also violence, discrimination and dishonour in the name of religion or culture. And they also argue that “violence, sexual harassment and sexual exploitation against women at work place, in public places and inside the home should be made punishable and that victims should be entitled to compensation”.

**Exploitation**

Various types of exploitation have been mentioned, including generally “sexual exploitation”, but especially trafficking (many Nepali women are trafficked, especially to India). One particular form is connected with caste: the Badi, a Dalit caste, are traditional prostitutes. Other women work overseas as domestic workers. Women’s groups have asked that the constitution should provide that the State has the responsibility to rescue women who are trafficked, forced to become sex workers or otherwise forced to work against their will – the women CA members included this among their DP recommendations. (They also added “restricting” child labour” in this category). But the same group included among “state policies” (SP) the recommendation that the “flesh trade” and trafficking should be capital offences!

**The proposals**

*The CFRDP committee has proposed that:*

1. Every person shall have the right against exploitation.
2. No person shall be exploited in the name of religion, custom, tradition and practice, or in any other way.
3. No person shall be subjected to human trafficking, slavery or bonded
labour. Such an act shall be punishable in accordance with the law and the victim shall have the right to receive proper compensation from the victimizer.

And they also have the specific article on women which says:

“No physical, mental, sexual, psychological or other form of violence or exploitation shall be inflicted on any woman on the basis of religious, social, cultural tradition, custom or any other grounds, and such an act shall be punishable by law and the victim woman shall have the right to receive proper compensation.”

On children they propose: “No child shall be employed in factories, mines or in any other hazardous work.” But they also have as a DP: “To end all kinds of labour exploitation including child labour”.

The Solidarity committee propose a “responsibility of the State” to – “Make special arrangements for social security of the families of … girls who were trafficked”. And a “state policy” “….also adopt the policy of providing special rights to women and Dalits, and form a women commission”, and in the same article – “special programmes for the economic and social development of … women, …’ and “special arrangements (of social security) for the protection and development of the single women, orphans, children, the helpless, …”

Comment

“Exploitation” is not a precise concept, and may prove hard for the courts to apply. It is not used in CEDAW other than in relation to “exploiting prostitution”. However, violence is easier to identify, and most of the likely forms of exploitation are probably mentioned specifically (economic rights are also relevant – see below). The problems with the current types of issue lie in enforcement. A woman could argue that a contract is invalid because exploitative. But very often it is a matter for criminal law. To say “shall be punishable by law” leaves it to the law makers, unless the courts are bold enough to step in. Similarly relying on directive principles is likely to be ineffective, especially if they are vaguely worded (see below).

This is not to propose that the constitution should set out some sort of schedule of punishment. That is not an appropriate role for a constitution. The main point of emphasising the shortcomings of constitutional provisions in this sort of context is to suggest that it is important to focus on the underlying causes. Maybe provisions on equality, including in the economic
field, will in the long run be more effective. A Gender Commission may also be valuable as a mechanism for approaching deep-seated social problems of this sort (again see below). However, there is merit in having a clear, unequivocal right to be free from violence, not implying that it is necessary to wait for a law, which the CFRDP committee’s proposal does not actually have.

On children’s rights, many activists would wish to see all child labour on a commercial basis outlawed, and even child labour in family business that is exploitative. The provision quoted here deals with some of the “worst forms of child labour”\(^7\). There are serious problems of truly exploitative child labour in Nepal,\(^8\) but arguably less serious forms offer a serious obstacle to the fulfillment of child rights generally (to education, to recreation).

**Family**

In relation to maternal role of women, there has been pressure for women have asked for the protection of rights to reproductive health and for the protection and promotion and safeguard of maternity. Pro-public also suggested that there should be a DP requiring the state to “pursue an effective policy to increase equal participation of male members of the family in the domestic works as well for the personality development of women”. Less specifically related to reproductive issues, Pro-public asked that “The state should pursue a special policy to increase access of women in health on the basis of regional, ethnic, community and economic and social condition as well as to increase access to reproductive health related services and facilities women in detention and prisons” (DP).

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\(^7\) In other contexts, I have suggested that some relevance of a constitution to violence against women might include:
- helping to establish more peaceful environment.
- the rights to education and housing (including for women driven out of their homes by violence)
- a proper and independent prosecution service
- other measure for ending impunity, including insisting that the security forces are subject to law, and obliged to respect human rights.

\(^8\) To use the language of ILO Convention 182 which defines this as:
- All forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- The use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- The use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
- Work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

The 2007 Charter also called for women’s work to be properly valued. Women have asked that polyandry and polygamy should be made punishable, and “equal right to decision making in (her) marriage, divorce and reproduction” (Pro-public).

The proposals

*The CFRDP proposes that:*

- It shall be the common right and responsibility of the parents for the nurturing, care and all round development of the children”

*and a state policy*

To calculate the economic value of the domestic chores as national income while developing a culture of partnership (sharing) among all the family members in domestic chores and making an economic evaluation of such work and contribution as nursing children and caring family”.

Under rights they include a prohibition on having more than one spouse (there are some polyandrous communities in Nepal) “to uproot polygamy or polyandry”. They also say that “Every person shall have the freedom to marry and divorce in accordance with law” and no-one should be coerced into marriage. Finally “The couple shall have the right to property and in family affairs.”

Comment

On the value of “state policies” see below. The prohibition on polygamy is unlikely to be acceptable to the Muslim community (though actually most polygamous households are in the hills whereas as most Muslims are in the plains).

The right to marry or divorce “according to law” is very weak.

Economic social and cultural rights (ESCR)

Under the 1990 Constitution, similar to the Constitution of India, most ESCR were included at most as DPs. The Interim Constitution includes the right to education as a right, and it also includes a rather odd provision about food – giving a right to “food sovereignty” – to citizens (see below).

There has not been a good understanding of the nature of ESCR from the perspective of their legal force among most groups in Nepal. Few have asked
for something on the lines of the South African constitution’s justiciable rights.

Education

In terms of education, various groups have asked for free education for up to degree level, as well as a DP “The state should pursue a special policy on free and privileged effective education on the basis of regional, ethnic and community as well as economic, social and physical situation in order to increase the women’s access to the education”.

The proposals

The CFRDP committee has proposed free and compulsory primary education as a right, and a right to free education up to secondary level. Destitute classes of citizens are to have free education up to higher level – but only “as prescribed by law”.

There are also proposals for DP and SP, for example the CFRDP Committee’s suggestion:

To make higher education easy, standard and accessible and gradually make it gratis.

Comment

The International Covenant on Economic Social and Cultural Rights (ICESCR) (to which Nepal is a party) makes free primary education a right, and this seems appropriate. But a right to free education up to secondary level is not realistic in Nepal (or many other countries). Free higher education is a dream in many richer countries (though some have managed to keep it very cheap). Arguably including impossible rights rather detracts from the force of the whole idea of rights – if we accept that one is not really attainable why do we insist that some are?

Use of the phrase “as prescribed by law”, should be kept to a minimum. It means that the right is “given with one hand and taken away by the other”. Ideally rights should be self-executing – not depending on fresh laws. However, in this instance it is realistic.

Health

Groups have asked that guarantee the right to health – but without any detail or use of the ESCR language of “right to the highest attainable standard”. Most emphasis has been on reproductive health. Little detail is given about
what women imagine is covered by this phrase. The country is in an unusual position because abortion is now permissible – though implementing the law in the sense of ensuring that women do have a real chance to get an abortion is a different matter. The CA women mentioned reproductive and also sexual health (under rights).

The proposals
The CFRDP committee proposes free basic health services for all, that no-one shall be denied emergency health services, that everyone has the right to reproductive health services, and to “informed health services” and to such services there must be equal access. Specifically under women appears “the right regarding reproduction”. The restructuring committee also proposes “Reproductive health and rights regarding reproduction” and “(b) Rights of safe motherhood”.

The CFRDP committee also proposes some DP or SP on health including the policy: “To reduce maternal and child mortality and increase average age while encouraging family planning for population management on the basis of the capacity and needs of the nation”.

Other SPs include:

1. To increase necessary investment of the State in the field of public health in order to keep the citizens healthy,
2. To ascertain easy, simple and equal access of all to quality health services while keeping in mind the basic health as a human right,
3. To discourage commercialization of health sector by regulating and managing the private investment in this sector while enhancing the state investment in this field,
4. To increase the number of health institutions and health workers while stressing on health research in order to make health services accessible to all and qualitative.

They also include as a SP:

To ascertain [secure] the use of necessary services and conveniences by women in all conditions of reproduction while keeping in mind the women’s reproductive responsibility as social responsibility.”
Comment

Helen Irving says that no constitution addresses the full range of issues related to reproductivity, including not only rights but needs interests and duties.\footnote{p. 199.} And the CFRDP proposals do not – though their explanatory notes to spell out some issues, suggesting it means:

highest level of sexual and physical and mental health, delivery service, post-delivery service and newly born child service as well as the right regarding safe motherhood and newly born child’s health, safe abortion service, family planning service, HIV and other sexually transmitted diseases (STD) and prevention and treatment of infertility (sterility), right regarding adolescent, youth and middle aged people’s health, right against sexual exploitation and forced flesh trade, right to access to information regarding sexual health, right to access to intensive sexual education, and right regarding secrecy of health.

And under the “right with regard to reproduction” they explain:

to bear or refrain from bearing children, right to determine the number of children to be borne or the time interval of such births without any discrimination and pressure and in accordance with national policy, right to safe motherhood and right related to the health the newly born babies, right to safe abortion, right to family planning and making other decisions, right regarding family plannings\footnote{They are in my copy of the translated paper.}, right to safe reproduction, right to keep mother and child safe, right against undesirable pregnancy and other rights.

The actual phrase used “reproductive rights” might not be read by many people as embracing all this; indeed there is a risk that it will be read (as Americans would tend to read it) as referring to abortion, and perhaps contraception. But these extracts do indicate a detailed conception of reproductive rights.

The phrase underlined in the extract form the proposed right – “while keeping in mind the women’s reproductive responsibility as social responsibility” is not very clear, but does seem to suggest that women’s reproductivity is a matter of social interest as well as personal and family. This phrase possibly reflects one in CEDAW (family education must “include a proper understanding of maternity as a social function” – Article 5).

CEDAW may intend to ensure respect for women – though even women who
support it are not agreed on what this means. But the use of “responsibility” gives rise to two concerns (however much the underlying idea might be accepted): does it open to the way to the family control of woman’s reproduction functions and health to an unacceptable extent, and does it open the way to something like India’s much criticised family planning policy under Sanjay Gandhi, or even China’s “one-child policy”? The phrase in the explanation “in accordance with national policy” might give rise to similar concerns.

Food and water

There has been little discussion in the civil society inputs about the right to food as a legal right. The WOREC women’s charter said “The right to food is interrelated with right to life. Both of these rights are must be recognized as fundamental human rights”.

The Proposals

However, proposals from the CFRDP committee have included rights. Among these are the right to food for everyone, as well as every citizen’s right “to protect himself or herself from the vulnerable condition of life owing to the scarcity of food” and also to “food sovereignty” – but “according to law”. There is also a citizen’s right to “access to clean (pure) drinking water and sanitation”. However, the explanatory notes suggest that the first right may actually be of citizens only. There is no particular “women” angle to this right as expressed (though there are of course gender specific angles to food in real life).

Comment

The most striking of these is the second – which conjures up the vision of self-help of the starving! The explanation indicates otherwise, saying “….The State should provision for a condition in which every citizen remains safe from falling vulnerable in lack of food”. This suggests a role for the state in food security and in emergency situations. If the translation is accurate, the objective may not have been achieved in the drafting.

Food sovereignty is not a phrase with a precise meaning in international law. I pressed translators of the IC (wondering whether this actually meant “food

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security” – which would make sense at least as a group right, or simply as part of a right to food (not only accessible and acceptable but also secure). But I was assured that “sovereignty” was the correct translation. I came across the Constitution of Bolivia, which says (translation by IDEA):

**Section 407.** The objectives of the State’s comprehensive rural development policy, in coordination with autonomous and decentralized territorial entities, are:

1. To guarantee food sovereignty and safety, giving priority to the production and consumption of food of agricultural and livestock origin produced in the Bolivian territory.

This is very different from the notion of the individual’s right to food of course. Similarly in the 2008 constitution of Ecuador “food sovereignty” is defined: it “constitutes a strategic objective and an obligation of the State to guarantee that the individuals, communities, peoples and nationalities achieve self-sufficiency in a permanent form of safe and culturally appropriate food”. It goes on to set out a long list of state “responsibilities” to achieve this. This seems to combine notions of food sovereignty and security.

Food First defines it as “the right of peoples, communities, and countries to define their own agricultural, labour, fishing, food and land policies which are ecologically, socially, economically and culturally appropriate to their unique circumstances. It includes the true right to food and to produce food, which means that all people have the right to safe, nutritious and culturally appropriate food and to food-producing resources and the ability to sustain themselves and their societies.” It cannot be sure what the courts would make of it.13

**Social Security**

The IC introduced provision on social security, saying that “Women, labourers, the aged, disabled as well as incapacitated and helpless citizens shall have the right to social security as provided for in the law”. However, there is the question of what is meant by “social security” It is usually used to refer to schemes such as unemployment benefit. The ILO includes 9 types of scheme/benefit (such as maternity benefit, old-age pensions) of which all except medical care are forms of payment. There are some small schemes of social security in Nepal including small allowances from the Ministry of

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13 This is not to say they will make nothing of it. The tradition of the Supreme Court of Nepal is closer to that of India in dealing with ESCR and similar provisions, rather than to the rigour displayed by the Constitutional Court of South Africa in cases like Grootboom.
Local Development for the aged (over 75) and widows (over 60).\textsuperscript{14}

There have been some demands for social security (especially for vulnerable groups such as widows – for example the Worec women’s charter).

The Proposals

The CFRDP proposes equal rights to social security – which presumably would only “bite” if there was any social security scheme. However, they also propose that all workers should have a right to social security. And they add and expanded version of the IC provisions: “Destitute class, incapacitated and helpless people, single and helpless women, disabled people, children, senior citizens, people who cannot take care of themselves, and citizens of endangered tribes shall have the right to social security as prescribed by the law.” The Solidarity committee but it has a different conception – they explain “The State should ensure food and a place to live in for those (with different social conditions) who do not have any access to the resources of the State, or the poor, or people with disabilities, or those who are physically impaired.”

The CFRDP committee add, for good measure, an SP: ”To give priority to the destitute people of all genders, regions and communities while the State provides social security and social justice to them”.

Comment

The use of an expression like “social security” will naturally lead to reference to the ICESCR. But here, as with the other ESCR rights, the Covenant has the important concepts of “progressive realisation” and “to the maximum of available resources” which are reflected specifically in the Constitution of South Africa. The idea is to reflect the impossibility of achieving these rights at once. The rights are sometimes described as entailing obligations of conduct on the part of the state, and not obligations of result.

The Nepal drafts on the one hand seem to suggest a fully fledged right now to social security. This falls into the trap of over ambition (discussed briefly under education). On the other hand, by saying “as prescribed by the law” the CFRDP committee largely negates the right and return it to a matter

\textsuperscript{14} See Meena Acharya “Efforts at Promotion of Women in Nepal” (Kathmandu: Tanka Prasad Acharya Memorial Foundation and Friedrich-Ebert-Stiftung (2003).
of law and policy.

Why should single women be assumed to require social security? This perpetuates the idea of women as weak and dependent on men.

Women in political and public life

Like other groups in Nepal, women have been concerned to achieve what is often called “proportional representation” in all aspects of life. Initially the demand was often set at 30% - at least for membership of elected legislative bodies. This is the Beijing (1995) Plan of Action figure – based on the argument that a certain critical mass of women is needed both for them to be effective in the legislature and to form the basis for an assured representation of women into the future. But more recently Nepali women’s groups have often asked for 50%.

Thus we find Pro-public asking for not only the general right to “proportional participation of women in all structures of the state including constitutional, legal, political and administrative bodies”, but also

- When political parties put up a slate of candidates for President and Vice-President, one must be a woman
- half the ministers must be women
- at least 50 per cent of the total members of the Legislative-Parliament should be women (and of those there must be special provision to ensure the participation of from single, Dalit, indigenous, minority ethnic, Madhesi women and those from other backward groups
- parties nominating a candidate to the Speaker and Deputy Speaker must ensure that one nominee is a woman
- Chairs and members of committees of the legislature must be women.
- at least half of the judges must be women
- at least 50% of the members of the various independent commissions must be women
- at least 50% of the members of the National Security Council must be women
- at least 50% of Nepal’s ambassadors etc must be women.

And on the subject of political parties, the Pro-public submission has a slightly mysterious recommendation (at least in English translation) “There should be 50 per cent representation of women in the political parties, from
the grassroots level to the central level organization. Such representation should be made considering diversity and inclusion of Dalit, indigenous and ethnic peoples, Muslim, Madhesi, disabled and backward women” and no party that does not meet the 50% criterion should be registered to contest elections. 8

After this catalogue of what would seem to be mandatory requirements, it would seem rather redundant to add that there should be a DP “The state should pursue a special policy related to empowerment and leadership development of women to enhance their equal and meaningful participation and representation in every level of the state”.

The proposals
The CFRDP propose that “Every woman shall have the right to proportionate participation in all agencies of the state mechanism on the basis of inclusiveness.” And they gild the lily by adding a state policy:

To keep women, dalits, Madhesis, adivasis janjatis, backward class, Muslims, minority and marginalized communities, oppressed class, sexual and gender minority, disabled (differently able) people, backward pushed region, the poor, farmers, workers, youths participating in the state structure of the nation on the basis of the principle of inclusiveness and in public services on the basis of the principle of proportionate participation.

And more: an SP “To make a special provision for inclusive proportionate participation of women in all the organs of the State”.

They and some other proposals (e.g., Solidarity committee) repeat essentially Article 21 of the IC – headed ‘social justice” but really entrenching a right to “proportionate representation” for various groups including women.

Another side of the political activity coin is the suggestion that it should be permissible (not contrary to the right of association) to bar parties formed on the basis of various factors including gender (CFRDP) or even to propose (reflecting what is in the Interim Constitution) that such parties be constitutionally prohibited.

The Committee on the form of the Legislature proposes a system not dissimilar to the electoral system used for the CA – presumably a parallel system (they do not say but this was used for the CA) with almost equal number of single-member constituencies elected by FPP (one assumes – there are few other possibilities and no one in Nepal seems to have advocated
a run-off system or the Alternative Vote – instant run-off) and list seats.

**Proportionality in the Nepali sense is to be assured: 3 (3)**

While sorting out the candidates by Political Parties for the purpose of proportional election of members to the House of Representatives, the law shall determine a provision to represent women on the basis of population, madheshi, tharu, dalit, indigenous, Muslim, and backwarded people from region, or from minorities or others on the basis of regional close-list.

And (4) “In case one-third women representation cannot be secured in the election to the House of Representation ..., an arrangement shall be made under clause (3) for the representation of one-third women in the House of Representatives”. (Similar provisions are made for the states/regions.)

The committee also proposes an Upper House – called the National Assembly as under the 1990 Constitution - with 51 members of whom 38 members would be elected by the states equally (tentative until the number of states are fixed), and 13 to be elected by the House of Representatives by means of the single transferable vote, from minorities, women, caste, language, religion, backward groups or communities who have not been able to get representatives in the House of Representative and the people of high reputation who have rendered prominent service in various fields of national life.

At the State level either the Assembly Speaker or the Deputy must be a woman (Article 49) but not at the national level it seems.

The restructuring committee also proposes proportionate inclusion of women in legislatures etc, and also special additional laws about “leading positions in policy making level”.

**On the Judiciary, the relevant committee has proposed:**

Women, indigenous and ethnics, madhesis, dalits, Muslims etc., shall also be included while appointing judges following the proportional method and principle of inclusiveness.

**Comment**

As against the 50% sought by many women’s groups, the legislature committee proposals have a target of one-third women. In the views of this commentator this is a more appropriate. It is not realistic to aim for precisely 50%, and there is no reason for men to accept less than 50%. If gender minorities are also to be accommodated, neither men nor women could have 50%! However, the restructuring committee seems to support “proportional”
inclusion of women – which would presumably be interpreted to mean around 50%.

I would personally argue that rigid quotas are not ultimately the best approach. They are very difficult to dismantle. How many women would like to admit to being a “quota woman”? Ultimately I would suggest that the solution lies more in programmes that empower women and electoral systems that encourage parties to put forward a wider range of candidates (such as proportional representation. However, that is a matter for Nepalis. But there is a question about whether the proposals will achieve even one-third. The somewhat similar (on a larger scale) system for the CA succeeded in getting 197 women out of the total of 601 (and in fact did achieve one-third of the elected members since 28 are nominated). But if old habits reassert themselves and only, say, 10% women were elected for the constituencies (say 8 women) even half the list members (say 38) would not achieve one-third overall (it would produce 46 – 4 or 5 short of one-third.

Similarly in connection with posts and employment. There is a serious need for more women judges. But “proportional” is unrealistic for some time to come. It seems to this author that a balance must be struck between experience and competence and proportionality. How many people would want to be judges by a “quota judge” or treated by a “quota doctor”? Of course there are arguments in support – if this is the only way to get doctors for women or for the rural areas etc. But in this writers view quotas are a blunt instrument.

On the specific proposals: in connection with the mechanism to ensure one-third women in the House of Representatives - the only way this adjustment can be done is for the parties somehow to be required to adjust their list members after the results to ensure that there are enough women. In other words the order of the lists is not made known in advance or is only tentative. This gives great power to the parties: a power not necessarily to be exercised in the public interest – indeed perhaps corruptly. This after the event allocation of list members was done for the CA elections. Are women satisfied with the system used for the CA elections in terms of the quality of women elected?

Other problems exist with the 2 election system. There may continue to be two types of politicians: the old type, representing geographical constituencies, and the new type (including most of the janajati, dalit and women members) mainly from the lists. The former may be regarded as the “real politicians”. And the role of the latter may be unclear.

On the National Assembly, there is a mis-match between the basic
purposes of the body and the representation of women. Presumably the main function is to represent the interests of the regions. But who will the women and other minorities represent? Elected by the House of Representatives they will reflect parties. If they want to remain in politics they will have to tow the party line. But how will they represent the interests of the regions? Will they not be viewed by other members as some sort of “fifth column” in their midst representing the interests of the lower house?

**Work and economic activity**

Pro-public made the case for women to have the right to work, and to unemployment benefit. There should also be recognition of the right to a safe and clean environment and a gender friendly work place. Every woman worker should have the right to form trade unions, to organize themselves and to engage in collective bargaining for the protection of their interests “in accordance with the law”. And forced labour or work without appropriate remuneration must be banned and punishable.

Affirmative action (in the form of “special programmes” is mentioned in this context – both in connection with the achievement of equality – “These special arrangements should include special reservations (quotas) for women in education and employment for a certain period, taking into account their social and economic status, ethnicity and region”. And again there should be “Special privileges from the state for promotion of trade and industries, employment and profession.” Here again there is a demand for a DP – “The state should pursue a special policy, accompanied by affirmative action, to increase access of women to employment opportunities”.

Many Nepalis work abroad for at least part of the year, and there is also stress on the need for rights to be protected not only within the country. And outside the employment area, another DP is suggested: “The state should pursue a special policy as per need to ensure participation, investment and representation of women in the fields such as industry, trade and commerce, small and cottage industry, agricultural promotion, banking etc. in order to empower women economically.”

Women have also asked for “Equal right to access and ownership over natural resources as well as equal access, responsibility and participation of women in the resources of the State” as well as for equal pay for equal work.

**The proposals**

The CFRDP has a state policy: “To make overall arrangement for livelihood of helpless, single women by giving them priority in employment”.
The Minorities Commission also proposes DP including “make the national economy independent and self-sufficient by prioritizing and protecting the domestic private and public businesses after establishing as a civil right the equal access to economic opportunities and achievements and just distribution thereof to … the people of all … sex, … on the basis of the principles of economic and social justice, without letting the economic resources available in the country be centered among limited persons”

The Natural Resources committee proposed a state policy:“” State shall establish equality of women in economic rights.”

More specifically on rights, The CFRDP committee proposals include:

- equal pay for equal work
- equal rights of children without gender discrimination to ancestral property (plus another provision about equal ancestral right for women in the “women” article).

Comments

Specifically on equal pay the modern formulation is something like “equal pay for work of equal value” to avoid the problems of comparing female dominated professions with male – and always the female dominated ones lost out.

Gender Commission

Women have generally been keen that there should be a specific Gender/Women’s Commission. Pro-public proposed “a National Women and Gender Justice Promotion Commission”. Here they proposed that one of the commissioners should be from the third gender community.

The proposals

The Committee on Constitutional Bodies has proposed that there be a Federal Women’s Commission. Each member must be:

a. a woman who has contributed significantly in the field of women’s rights, interests or gender justice or women development or human rights for at least ten years,

b. in case of the Chairperson, somebody who holds a Bachelor’s degree from any university recognized by the Government of Nepal,

c. at least forty years of age,
d. not a member of any political party immediately before the appointment,
e. possessing a high moral character and social prestige.

The functions of the Commission include “drafting federal policies and programmes pertaining to women’s rights and interests, and presenting the same to the Government of Nepal for implementation” among various other functions. There are also to be commission for all the other disadvantaged groups: dalits, Muslims, janjatis, Madeshis and “Commission for the Protection of the Rights of People with Disabilities, Minority and Marginalized Groups and People of Backward Regions” as well as the Human Rights Commission.

Comment

There is a move in various countries to merge sectoral commission (e.g. South Africa, Australia, and UK). Gender Commissions may suffer from a second class status (in Nepal the same would be true probably of the Dalit Commission). And there is a problem reminiscent of the mediaeval court systems: how to know which to do to? Does a disabled dalit child go to the Human Rights Commission, the Women’s Commission, or the Dalit Commission? This sort of approach negates the idea of intersecting disadvantage.

It also seems that these commissions will carry out functions that are appropriately the role of elected government. If every group has a commission (except the non-disabled Bahuns/Chhetris from better off regions outside Madhes), what is government left to do?

Youth (sometimes defined as 18-35) have been demanding inclusion also. But the proposal on the Women’s Commission requires commissioners to be over 40. This seems to exclude the voice of youth. Yet there is no youth commission!

Sexual stereotypes and derogatory attitudes

Looking at some other particularly important issues for women, Pro-public asked for provisions designed to avoid the use derogatory language, sexual stereotypes, treatment of women as sex objects in advertising. They specially related these issues to the freedom of the media and the press, suggesting that specific allowance should be made for “reasonable restrictions” to deal with acts that might infringe on “decent public behaviour or morality to women or gender sensitivity or undermine the rights and respect of women or
negatively affect the public health, or anything that advertises women as a product or sexual object.” They went so far as to include “anything may violate the fundamental rights of women”. In fact they seem to have wanted obscene images of women to be banned in the constitution. And they suggested that there should be a “right against use or presentation in sexual, consumer products and in any discriminatory gender role”.

The proposals
The CFRDP committee proposes that it should be a permissible limit on media freedom to pass laws designed to any “…to discourage untouchability and racial and gender discrimination”.

Comment
The previous system of long lists of exceptions to fundamental freedoms is retained. These overshadow the freedoms in terms of length. And they are not subject to any effective “reasonableness” requirement. There is no provision that they be justifiable in a democratic society or proportionate to the need. The style goes back go the Indian Constitution adopted 60 years ago, not learning from the European Convention of the Canadian Charter.

I wonder whether there is not too strong an emphasis on women’s vulnerability. On the one hand women insist – quite rightly – that they are entitled to play an equal role in the governance of the country. On the other they suggest constantly that women are in need of (male) support. Perhaps here the techniques of the South African Constitution might again be useful. That says that the state has the duty to “respect, protect, promote and fulfill rights”. In other words, the emphasis is on rights, not on dependency. It also picks up the ICESCR – or the glosses upon it by successive Committees on ESCR and Special Rapporteurs. A right means primarily that one acts oneself. Others must not stand in one’s way. I do not read this as meaning some sort of selfish individualism. Indeed the ICESCR emphasises that one has a right to food and the other essentials of a decent life for “oneself and one’s family”. And most rights only make sense in the context of a society. To whom will you talk with your right of free speech or associate with your freedom of expression? But rights are not a recipe for dependency on the state or on men. We all have the duty to respect the rights of others (horizontality). The state has a special responsibility to use its power to protect our rights from the infringement of others. And when necessary it has the obligation to take positive steps to protect.
III Some Broader Issues

Directive principles (etc)

In previous papers, and meetings, I have tried to suggest to women’s groups the value of at least considering whether it makes sense to have both these categories. In those earlier papers I tried to explain the difference between a “right” and a “directive principle” and added a few other points. I observed that very often countries have included “economic social and cultural rights” among those in the Directive Principles, but these are rights, and should be treated as such. I have suggested that it is confusing to include the same right in a fundamental rights chapter and in a directive principles chapter. And since the government already has a duty to fulfill the rights, it is unnecessary to repeat this duty in the directive principles chapter – in fact it weakens the rights. I commented that there seems to have been a tendency to put “new” claims into the directive principles. But this tends to lead to poor drafting (because there is no real legal claim being created), and it may mislead people to believe they have actually achieved some benefit, when perhaps they have not.

In the other hand, at least in the context of Nepal, I am not necessarily saying that there is no role for principles. In many developing countries (this may be less true in Nepal in some) that parties are rather weak on policy. They do not go to people with clear policies that they want to follow. So the argument that the directive principles somehow interfere with the parties’ democratic decision making which may not be very strong. Secondly, Nepal is going through the process of nation building through building the constitution. Directive principles may allow people to give some shape to the country that goes beyond the institutions, rights and procedures as this will give some guidance to policy. But I would insist that directive principles should be used only when they serve a real purpose. Most of the DPs in the committees’ proposal for the new Constitution repeat something that is in a right, or ought to be treated as a right, and require heavy pruning. Indeed, I would personally propose to the Harmonisation Committee that it concentrate on the rights and then ask if anything is missing. Then ask if it is a right. And only if the answer is that it cannot be included as a right ought it to be given some less effective status.

Drafting and structural issues

A constitution is not a political manifesto, though it should – at least when made in the way Nepal’s constitution is being made – encapsulate the nation’s vision of its future. Whatever else it may be, it is a legal document,
and must be capable of being read, understood, interpreted and used as a legal document. It is precisely in areas related to rights of particular groups that have been, quite rightly, vocal in insisting on their place in the constitution that the greatest risks arise of failing to ensure that what actually gets into the constitution is legally watertight (or as watertight as possible, which is never completely so).

Lack of clarity may have the result that the courts decide that they are not intended to confer rights, or find difficulty in attributing meaning, so that the results of using the constitution is very unpredictable. The risks arise in various ways, including:

- using words that have vague meanings, or more than one meaning
- using different words or phrases for the same idea
- using the same word or phrase for different ideas
- repetition generally.

Legal readers of constitutions do not believe that it is simply a matter of “What I say three times is true”. They ask: “why is it there more than once?” “Does it mean the same thing each time?” They will invest any slight difference with meaning.

There are a number of rules or approaches likely to be applied by courts that ought to be borne in mind when preparing the final draft, including:

- every part of a constitution has meaning
- no part of a constitution can be unconstitutional
- if a word or phrase has been used in a previous constitution it will be presumed to have the same meaning as under that previous constitution
- if a different word is used, the courts will assume this is for a reason
- if a phrase has been interpreted by the courts in the past, in the constitutional context at least, in a certain way, the courts will assume that the constitution drafters wished the courts to continue to interpret that phrase in that way (because the drafters could have changed it if they wished)
- if a phrase is clearly derived from international law (such as a human rights treaty like CEDAW) the courts are likely to be prepared to

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consider how those words have been used elsewhere and how they have been elaborated by international bodies (different countries have different traditions, but willingness to look at international law is generally growing)

- they will be concerned about detail. e.g.,
  - includes is not the same as means
  - shall [or must] is not the same as may
  - or is not the same as and.

Particular risks come from cutting and pasting from other constitutions, especially when one has little idea about how the constitutions are used in their “home” countries. Constitution makers should recognise that if they put into the constitution words and phrases that are new in their own country, they are putting potentially a good deal of power into the hands of the judges who will have to interpret and apply these new phrases, and may not read them in the same way as the drafters did. Of course the lawyers will play an important role too.

The different styles of drafting bills of rights

A number of structural issues exist when drafting a bill of rights. These include:

- Should each right be qualified by appropriate limitations or should there be a general provision permitting limitations? Some mixture of these approaches is sometimes used but this must be done with care. If there is a general limitations provision (which will probably say limitations must be reasonable, necessary, proportionate etc.\(^\text{16}\)) and for some rights there is a specific limitation, if it is intended that this limitation also should be reasonable etc. this must be made clear.

\(^{16}\) E.g. A limitation is valid only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) whether the limitation is proportionate to the purpose; and
(e) whether there are less restrictive means to achieve the purpose.

(based on sources such as the European Convention on Human Rights but not entirely the same as any existing provision).
• To what extent should rights be spelled out for particular groups – for example for women? If this is done for one group, many others will also want it. One might observe that at present there is little specific to the elderly members of society, for example.

• If there are clauses on the “rights of women” for example, which rights are included there and which are left under the general rights? Women will object that in the past “equality” has not been enough to ensure all rights for women. But bills of rights hold not get too long and repetitive. The more lists of rights there are the greater the risk that something will be omitted, or that slightly different ways of saying the same thing will be used. Strategy may sometimes suggest that a specific right for women may be less acceptable than the same right for all. But equally women may insist on seeing the rights important for them expressed in relation to them.

• In the case of economic social and cultural rights, the International Covenant calls for progressive realisation, to the maximum of a country’s available resources. And the rights have been spelled out in international committee reports and those of special rapporteurs to include the duty of the state to respect protect and fulfill the rights. Not to try to encapsulate these ideas exposes these rights to the risk of ridicule and marginalisation. If a decision is made to include language of this sort (as the South African Constitution does) should it be applied generally by one clause applicable to all ESC rights, or should the progressive duty be expressed for each separately? Care should be taken if the former technique is used not to make “progressive” duties that are immediate such as in relation to primary education, or emergency health care.

• How much detail should be given about “new” rights? “Reproductive rights” may be read in different ways. Some people probably think of abortion, others of family planning, or maternity leave. Some think of women; others will insist that men also have reproductive rights.

• Should the rights apply horizontally – as between citizens? The South African Constitution says that the state must respect protect, promote and fulfill all rights (section 7(2)). This means that not only must the state itself not violate (it must respect) but it must also try to ensure that others respect the rights (it must protect). And “A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right” (s. 8). The South African courts reflect this provision mainly by their development of the general law relating to private disputes. This would work best in
a system where the courts develop the law (rather than applying only law in codes and statutes) and it requires a creative judiciary.

- Should the constitution expressly try to bring in international law – and if so how? Some countries have a tradition that international law applies as national law – without the necessity to pass national law. Some say that it does not apply unless national law is passed. Some say that certain treaties can apply directly (are “self-executing”) while others need national laws to be passed. It is tempting to try to apply the first rule. It sounds like an easy way to bring the country into compliance with its international obligations. There are problems about such a general approach, including:
  - if not clearly expressed it may have unexpected consequences, including changing the law on the basis of treaties that are perhaps now outdated and were adopted without democratic scrutiny;
  - it may create a temptation not to concentrate on passing laws tailored to the country’s needs
  - the treaties may be hard to apply in concrete terms – they are not drafted for national use but are international compromises.

South African has a different approach: “When interpreting the Bill of Rights, a court, tribunal or forum - … (b) must consider international law”.

**Looking beyond rights**
Ultimately the best protection for the rights of all is a properly functioning system of government. Women should focus on the protection of democracy as well as rights. Modern concepts of democracy go further than elections; the people must be able to know and understand what is being decided and done on their behalf and in ways that affects them; there must be consultation mechanisms on laws and other decisions; and their must be mechanisms for people to submit their views even if they are not asked. A constitution can include various provisions relevant to this broader concept of democracy:

- a right to information
- perhaps a requirement that laws be expressed in language that is as straightforward as possible, and translated into as many local languages as is reasonable
- requirements that normally the legislature sit in public
- provisions about public hearings on important issues in the legislature
provisions about consultation on law making

The South African constitution again provides a good example of the last – and the Constitutional Court actually applied it to hold that a law had not been made in a way that complied with the constitution.

Transitions

It is tempting to think that transitional provisions are of interest to lawyers only. But they are important – they can specify what must be done to bring in the constitution including timetables, which should be realistic. Whether the constitution gets implemented may depend on who has the responsibility to do it.

Nepal has a lot of law already, and there have been a number of improvements for women in recent years, as mentioned earlier. These must be preserved. Some possible provisions might include:

- Existing laws must not be repealed/changed except to be replaced by something at least as good (some might even be mentioned by name in the transitions provisions)
- The relevant commission (human rights or gender etc) must as a matter of priority (2 years) study the existing law and propose changes
- A law implementing an Article of the Constitution should be required to say “A law to implement Article….”
- Perhaps the new law should go to the Supreme Court for an advisory opinion on whether it satisfies the constitution (this raises problems, and would bring into Nepal’s law a practice from other systems such as France of “abstract” rulings on constitutionality, and may need careful consideration).
- Responsibility for implementation should perhaps be given to an independent Commission on Implementation, to which all other units should report to this body
- There should be a system of annual reports to the people on implementation of Constitution, on such matters as
  - What laws have been passed?
  - How many women are in Parliament?
  - and so on.

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Enforceability of Economic, Social and Cultural Rights under the Draft Constitution

Vincent Calderhead

Part 1: What are Economic, Social and Cultural (ESC) Rights?

They are Human Rights to what is required in order to live a dignified life: food, clothing, housing, health care, education, employment, etc.

Where do we find ESCRs?

- Internationally: In the International Covenant on Economic, Social and Cultural Rights (ICESCR) and in other human rights treaties which Nepal has ratified.
- Nationally: In a variety of constitutions around the world including, notably, South Africa

What kind of duties do ESCRs impose on government?

Government’s duty is to implement the rights by using: “the maximum of its available resources, with a view to achieving progressively the full realization of the rights.”

Question: For example, regarding the right to food, what does it mean to say that government must “fulfill” the right to food by “using the maximum of its available resources”?

Answer: Government must do what it reasonably can! No more…and no less!
Seen in this way, ESCRs create a right to accountability. ESCRs enable individuals and groups to claim their rights in Court and, if they have not been met, they require governments to set out exactly what their plan is, what they have done/not done and what limitations they face in ensuring the full realization of, for example, the right to food or the right to housing.

A recent example concerning a claim from South Africa regarding the right to water illustrates the point. In Mazibuko v City of Johannesburg,1 the claimants had argued that the allotment of water to low income people in Johannesburg was inadequate to meet their daily needs. The case ended up with the Constitutional Court which carefully reviewed the extent of need, the governments’ commitments by way of supply of water and the financial limitations it faced:

“National government should set the targets it wishes to achieve in respect of social and economic rights clearly.....government should be accountable, responsive and open. [The standard] set by the Minister informs citizens of what government is seeking to achieve.

-and-

In so doing, it enables citizens to monitor government’s performance and to hold it accountable politically if the standard is not achieved. This also empowers citizens to hold government accountable through legal challenge if the standard set is unreasonable.”

Part 2: Why Economic Social and Cultural Rights (ESCRs) are needed in Nepal’s constitution?

There are several reasons why ESCRs are urgently needed to be incorporated in the new constitution of Nepal. They range from a history of discrimination and marginalization of members of historically disadvantaged groups, truly unspeakable levels of poverty, social exclusion and the accompanying ill health, the social injustice roots of the 1996-2006 conflict and, finally, the fact that political powerlessness means that, in the circumstances it would not

make sense to entrust the protection of ESCRs to any institution besides the judiciary. In particular, ensuring accountability for the protection of ESCRs makes sense given the following:

(1) **Historical Facts:** Women, ethnic and caste minorities, people with disabilities have been subjected to terrible social injustice in Nepal.

(2) **Current Examples from Nepal**

- Cholera epidemic in 2009: some 400 people died. Even though Dalits are less than 15% of the total population in affected districts they were 39% of those affected.
- 50% of the population of Nepal lack toilets.
- Almost 50% (1.7 million) of children under five in Nepal are stunted, or suffer from chronic malnutrition.
- In some districts 50% of people lack access to safe drinking water.
- Extreme hunger in the west of Nepal: is a chronic and severe crisis that appears to be beyond the abilities of the government and international donors to address.
- Of Nepal’s 29 million population, only 1.6 million households have access to electricity.
- Access to basic health care is unavailable in many areas.
- Pervasive caste discrimination exists in access to services.
- 43% of Nepali adults are illiterate.

(3) **Roots of the Conflict:** All political sides agree that one of the main causes of the 1996-2006 conflict was widespread social injustice in Nepal—especially outside Kathmandu Valley.

(4) **Lack of Political Influence:** As with many other forms of human rights violations, they often arise from political voicelessness and marginalization: Democracies everywhere in the world have a sad history of violating human rights; including rights to freedom of expression, rights against discrimination etc. Historically, those groups whose basic needs and whose equality rights are most likely to be
violated are the ones whose political voice is weakest or even non-existent. In this situation, it only makes sense for those without political power to have access to independent courts in order to ensure that their rights are respected.

In this context, constitution drafting as a key component of the peace process cannot afford not to incorporate ESCRs into the constitution. Long term peace, stability and social justice all point to the need to have ESCRs in the Constitution of Nepal, 2010.

Part 3: Are ESCRs possible in a poor country like Nepal?

Question: Why it is especially in a poor country that ESCRs are not only possible but also necessary?

Answer - Because, in developing countries, the most disadvantaged people are far more likely to have little or no political voice to affect government decision-making and, therefore, need some way to ensure that their government is doing what it can to respect their human rights.

Part 4: Some ESCR and Equality-related comments on the draft text from the paper of Committee on Fundamental Rights and Directive Principles

The text from the Fundamental Rights Committee released in November 2009 represents an extremely good foundation on which to build. The text demonstrates considerable commitment, dedication and concern for the interests of all Nepalis.

There, however, significant improvements that can be made and the following selection contain some of the more important areas where additional work would enable Nepal to have a fundamental rights chapter that is remarkably modern and progressive.

(a) Equality Rights

Articles 3, 9, 23 & 25: Despite the fact that the most prevalent grounds of discrimination such as sex, religion or caste have been prohibited bases of discrimination since at least 1951, discrimination continues to characterise Nepali society. The current text is unlikely
to address this lack of significant progress because it appears only to guarantee ‘identical treatment’ (or what is often called ‘formal equality’) rather than substantive equality. It is advisable, therefore, to revise the current provisions (Articles 3(2), 3(3), 9, 23, 25) to ensure that every individual is entitled to substantive equality under the law and to substantive equality in the protection and benefit of the law without discrimination.

Such a provision would allow judicial review regarding the substance and effects of legislation and government actions. Courts should be permitted to look at the historical causes of discrimination against disadvantaged groups. In its current form, the courts would instead be restricted to looking only at formal distinctions on the surface of challenged legislation.

Therefore the current wording of articles 3(2) and 3(3) should be modified to state in positive wording that the right to equality protects against both direct and indirect forms of discrimination and to also include a guarantee of “substantive equality”. The general guarantee of equality could be worded along the following lines:

There shall be no discrimination, whether on purpose or in effect, against any citizens in the application of general laws or any other state action or inaction on grounds of religion, race, caste, tribe, gender, sexual orientation, physical condition, disability, state of health, marital status, pregnancy, economic condition, origin, language or region, ideological conviction or any other similar grounds. The right to equality requires positive measures to address both the needs of groups identified by prohibited grounds of discrimination and the removal of barriers confronting these groups.

(b) “...as provided by law”: The following articles each contain some variation of wording which, effectively, conditions the protection of the rights upon some subsequent legislation being enacted. This phrase completely undermines the constitutional protection of a right and, instead of a right being enshrined in the paramount law of the state, it makes it depend entirely on whether a law is subsequently enacted to protect the right and is protected only to the extent that that subsequent legislation chooses to protect it. This is not constitutionalization of ESCRs, it is only the illusion of it.
16(3) Right to Education: “Citizens belonging to a disadvantaged class shall have the right to obtain higher education free of cost as provided for in the law.”

18(1) Right to Employment: Every citizen shall have the right to employment. Terms and conditions of employment shall be as determined by law.

(3) Every unemployed citizen shall have the right to receive allowances as provided for in law.

19. Right to Labour:

(3) Every labourer shall have the right to form trade unions, to participate in them, and to engage in collective bargaining and go on strikes as provided for in the law.

28. Right to Social Security:

(1) The disadvantaged class, the incapacitated and the helpless, persons with disability, those in childhood, youths, senior citizens, persons who are unable to take care of themselves and citizens of the disappearing communities shall have the right to social security as provided for in law.

In each of the articles set out above, the headings and text of the article make it appear that a substantive ESC rights protection is being recognized. However, the underlined text limits any substantive rights protection by providing that it is guaranteed only insofar as is provided for in the law. The expression ‘as provided for in the law’ effectively means that the right to social security is not constitutionally protected. The phrase should be dropped.

(c) Article 31

What does it mean? Article 31(1) is drafted in very ambiguous terms so that its clear meaning cannot be reliably determined.
(i) Under one likely interpretation, Article 31(1) could easily make any of the articles referring to “education, health, employment, housing, food, social security and social justice” into directive principles and/or “...as provided by law” clauses.

(ii) The scope of the risk/danger created by article 31(1) crosses over into, not just the substantive articles dealing with these specific rights (the rights to education, right to health, right to employment, right to housing, right to food, right to social security and the right to social justice) but, also, the wording of Article 31 [and the absence of specific article references in Article 31(1)] would make it appear that the scope of the directive principles problem extends to any other Articles which even mention these interests (“education, health, employment, housing, food, social security and social justice”). Thus, the article concerning rights of women (specifically Article 23(3) and 23(6); the Article relating to rights of children especially 24(2); rights of Dalits, especially Article 25(3), the Article relating to social justice Article 27(3); and the Article relating to social security (Article 28) are all at risk of being gutted by Articles 31(1) and (2).

(iii) Alternatively, if the purpose of Article 31(1) is simply to remind government that it needs to implement the rights, then such a provision is unnecessary and ought to be dropped.

(iv) Finally, if the intention of Article 31(1) is to remind and encourage government vis-à-vis its obligations in the area of ESCRs, one option would be to have clearer wording such as the following: “The rights relating to education, health, employment, housing, food, social security and social justice are binding on all levels of government and are fully justiciable in court. The state shall take all appropriate measures to implement these rights.”

(d) Remedy provision

The chapter contains no clear provision on remedy and reparations and simply refers [in Article 31(3)] to another Part of the Constitution. This needs to be clarified and bolstered. Human rights and remedies for their violation are unique and specialized and deserve their own provision; reliance on a generic remedy provision
imported from elsewhere in the civil law cannot provide the full range of remedies which human rights violations can require.

There should also be a statement that claims for enforcement of rights can also be made in subordinate courts. In other words, any court with jurisdiction to determine rights violations should also have full remedial jurisdiction to order any and all remedies that may be appropriate and effective in the circumstances of the case.

Anyone whose rights or freedoms, as guaranteed by this Chapter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers necessary in order to impart full justice and which provides an appropriate and effective remedy and reparation in the circumstances.

-or-

Anyone whose rights or freedoms, as guaranteed by this Chapter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers necessary in order to impart full justice and which provides an appropriate and effective remedy and full reparation in the circumstances. Without limiting the generality of the foregoing, a court may issue orders such as ones for, reparation, (including compensation, satisfaction, guarantees of non-repetition, restitution and rehabilitation) declarations, etc. ………., and writs including the writs of habeas corpus, mandamus, certiorari, prohibition and quo warranto.

Other issues that are yet to be addressed

(a) Interpretation Clause: As a way of informing the interpretation of the rights, freedoms and duties, it would be appropriate to include a provision which directs the government and the courts to interpret and apply the provisions in the chapter in full accordance with international law and standards, including with international treaties to which Nepal is party, customary international law.
Proposed wording

“When applying a provision of the fundamental rights chapter a court shall ensure full conformity with the Nepal’s legal obligations and international law and standards.”

(b) Fiscal Federalism: While not technically part of the fundamental rights provisions, it cannot be stressed enough that the constitutional drafters must be keenly aware of the fiscal federalism considerations that certain of the ESCRs will trigger. Thus, the Reports of the Committee on State Restructuring, the Committee on the Division of Natural Resources, Financial Powers and Revenues and the Committee on Determination of Bases for Cultural and Social Solidarity all raise crucially important rights/fiscal federalism considerations. The drafters of the Constitutional Committee must juggle the relevant considerations underlying i) the recognition of ESCRs, the distribution of corresponding powers to the provinces and, in addition, ensuring that that level of government which has potentially very costly constitutional obligations (e.g., for health care) will also be granted the fiscal capacity to meet its obligations. Thus, will the fundamental rights chapter apply and bind provincial (and district/municipal) units? Also, insofar as certain parts of the fundamental rights section will have primary application to provinces, it needs to be ensured that, for example:

(i) A violation of the right to education or housing will be remediable against the level of government which has constitutional responsibility for that area; and

By the same token, the relevant level of government will, for example, have access to sufficient fiscal resources available in order to adequately discharge its obligations created by the Fundamental Rights part (e.g., that a provincial government must have sufficient revenues to reasonably discharge its obligation with respect to the right to housing, or the right to education). There is no point recognizing ESCRs in the constitution if the level of government responsible for their implementation is not also accorded adequate resources to discharge its constitutionally imposed obligations.

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Implementing Socio-Economic Rights in the New Constitution of Nepal

Mario Gomez

One of the features of modern constitution making is the inclusion of enforceable socio-economic rights with civil and political rights as part of the Bill of Rights. Where many of the previous constitutions, especially those in the global South, placed socio-economic rights as part of the Directive Principles of State Policy, several modern constitutions, now give both categories of rights equal value and make them both justiciable.

This trend in modern constitution making reflects developments at the international level. Since the Vienna World Conference in 1993 there have been several attempts at the international level to eradicate the hierarchy between these different categories of rights and to introduce a level of parity. The adoption of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in 2008 is a culmination of these efforts.

Accompanying these trends at the international level is the huge burst of litigation around socio-economic rights. In common law countries and in civil law countries, in the global North, and in the global South, and in almost all regions of the world, courts have begun to interpret socio-economic rights and provide remedies.
This has happened in two ways

In those countries where there is no explicit charter of socio-economic rights, courts have recognized socio-economic rights by implication and through a process of interpretation. South Asia provides an illustration of this approach. ¹ Most of the countries in South Asia do not explicitly recognize socio-economic rights in their constitutions, barring a few labour related rights. Yet this has not prevented the courts of Bangladesh, India, Pakistan and Sri Lanka from giving effect to socio-economic rights by way of constitutional interpretation.

In other countries like South Africa, Colombia and Argentina, the constitution recognizes socio-economic rights and this has provided a stronger conceptual base for courts from those countries to recognize these rights. Several regional human rights bodies have also begun to interpret socio-economic rights as part of their work.²

Previously the debates in this area revolved around whether socio-economic rights were capable of supervision and review through the courts. Today the debates have moved on. Today the debates centre on how best can the courts recognize these rights; what new remedies should the courts devise to ensure effective implementation; how can they be enforced against private actors; and how should courts balance progressive realization with immediate implementation.

Progressive realization v immediate enforcement

One of the features of the international formulations of socio-economic rights is the progressive nature attached to most of these rights. According to the International Covenant on Economic, Social and Cultural Rights (ICESCR) the rights are subject to the qualification that their ‘full’ realisation must be progressively achieved according to maximum available resources.³ Despite this formulation the Committee on Economic, Social and Cultural Rights has identified the following rights in the ICESCR as being capable of immediate implementation:


³ Article 2 of the ICESCR.
Non-discrimination in the enjoyment of rights\(^4\)
Fair and equal wages; equal pay for equal work by men and women\(^5\)
The right to form trade unions and the right to strike\(^6\)
The protection of children from economic and social exploitation\(^7\)
Compulsory primary education\(^8\)
The right of parents to choose schools for their children\(^9\)
Right to establish and direct schools\(^10\)
Freedom for scientific research and creative activity\(^11\)

The Committee has also noted that a state where significant numbers are deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, would prima facie be failing to discharge its obligations under the Covenant.\(^12\)

One of the challenges for human rights lawyers, judges and social movements, is to strike an appropriate balance between the progressive realization of these rights and their immediate enforceability. This is a challenge both at the stage of constitutional formulation and at the stage of argument and judicial interpretation.

The South African Bill of Rights still remains a source of much inspiration. Although much has been written and spoken about it, the way the South African constitution entrenches socio-economic rights provides guidance for any other constitution making exercise.

One of the key points about the South African constitution is the distinction the constitution draws between one category of socio-economic rights which are immediately enforceable and another set which must be implemented progressively, reasonably and in accordance with available resources.

Thus the right to emergency medical treatment; the right to a basic education and the right against forced evictions are among those rights that

\(^{4}\) Article 3.
\(^{5}\) Article 7(a)(i).
\(^{6}\) Article 8.
\(^{7}\) Article 10(3).
\(^{8}\) Article 13(2)(a).
\(^{9}\) Article 13(3).
\(^{10}\) Article 13(4).
\(^{11}\) Article 15(3).
\(^{12}\) General Comment No 3, 1990.
are subject to immediate implementation. In these cases the state cannot argue that the lack of resources prevents it from guaranteeing these rights immediately since the constitutional right is couched in categorical terms.

Other rights such as the right to adequate housing; the right to health care services; reproductive health care; sufficient food and water, and to further education are to be achieved progressively. The constitution recognizes that these rights cannot be enforced immediately and instead requires the state to take reasonable measures, within available resources, to achieve the realization of these rights in a progressive way.

There have been a number of cases on socio-economic rights in South Africa and some elements of the Constitutional Court’s jurisprudence merit closer attention.

The Grootboom case still remains one of classic cases in the area. The case dealt with the right to adequate housing as laid down in the Constitution and the claim of approximately 900 persons who had been evicted in inhumane conditions from a private land they were occupying illegally.

In this case the Court observed that the main question to be decided was whether the legislative and other measures taken by the state were reasonable.

According to the Court there were three elements of the state’s obligation in relation to the right to housing: (1) to take reasonable measures; (2) to achieve the progressive realization of the right; and (3) to do so within available resources. This required that the state put in place a coherent public housing programme that was aimed at progressively realising the right to housing. The measures that the state put in place must also be capable of being reasonably implemented.

To meet the test of reasonableness the measures taken by the state must take into account short, medium and long term needs and pay special attention to housing crises. It should be sensitive to the circumstances of all groups in society and those groups who are most in need should not be ignored. Thus although the programme may be statistically successful, it must pay attention to the needs of all groups to pass the test of reasonableness.

The Court observed that in this case there was no provision in the state’s housing programme to meet the needs of those who were in desperate need.

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13 See sections 26, 27 and 29 of the Constitution of South Africa.
or who were in situations of crisis. People in desperate need were those who had no access to land, no roof over their heads, people who were living in intolerable conditions and people who were in crisis because of natural disasters such as floods and fires, or because their homes were under threat of demolition.15

Colombia

A similar notion of ‘vulnerability’ or ‘crisis’ has had a bearing on the way the Colombian Constitutional Court has interpreted socio-economic rights. Colombia entrenched socio-economic rights in its 1991 Constitution and entrusted the Constitutional Court with the task of safeguarding the ‘integrity and supremacy of the constitution’. Since then the Constitutional Court has begun to develop these rights in an imaginative way.

While many of the socio-economic rights are progressive in nature the Court has held that some of the rights may be immediately enforceable given the right set of circumstances.16

Where it could be established that the violation will affect fundamental rights such as the right to life, personal dignity or integrity; or where there was a violation of the minimum conditions for a dignified life; or where there was an unconstitutional state of affairs, then the Constitutional Court of Colombia has shown a willingness to immediately enforce socio-economic rights.

So for example although the right to social security is not immediately enforceable the Colombian Constitutional Court has recognized that the right may be immediately applicable in the following circumstances:

1. Where the individual is in a situation of manifest vulnerability because of his or her economic, mental or physical situation.
2. Where there is no possibility for the individual or his or her family to take action to remedy the situation.
3. Where the state has the possibility to remedy or mitigate the situation.
4. Where the state’s inaction or omission will affect the individual’s ability to enjoy minimum conditions of a dignified life.

15 Paragraph 52.
If these conditions are met the Court has shown a willingness to order the state to immediately comply with the duty to provide social assistance.17

‘Human dignity’ has also attracted the Indian courts. While the Indian Supreme Court has acknowledged that socio-economic rights were resource linked and bore a close strong link with a country’s level of economic achievement, it has observed that there were minimum levels below which even socio-economic rights could not sink. One of those threshold levels was the concept of human dignity.18

The Colombian Constitutional Court has also used the notion of an ‘unconstitutional state of affairs’ to enforce socio-economic rights.19 The Court has found that an unconstitutional state of affairs will exist where:

1. There are systematic and widespread violations of several constitutional rights that affect a significant number of people
2. The violations of these rights cannot be attributed to only one State authority, but are due to structural deficiencies.

In these situations the court has encouraged collaboration among different state agencies to resolve the unconstitutional state of affairs. We saw above that the Committee on Economic, Social and Cultural Rights took a similar stance in its General Comment No 3.

Elements of the human dignity approach are also contained in the concept paper released by the Constituent Assembly’s ‘Committee for Fundamental Rights and Directive Principles’. This would allow a future Nepali court to order the immediate implementation of socio-economic rights where the violation is widespread or gross as to violate a person’s personal dignity.

What the jurisprudence from South Africa, Colombia and India show is that although many socio-economic rights are progressive in nature, in some cases the violation may be of such a nature as to require immediate implementation.

**Formal inclusion v judicial interpretation**

While the courts of many South Asian countries have teased out a chapter on socio-economic rights through a process of judicial interpretation, this is clearly not the preferred option. Where an opportunity exists, as it does in the

17 See Sepulveda above.
18 Francis Coralie Mullin v The Administrator, Union Territory of Delhi (1981) 2 SCR 516 at 529.
19 See Sepulveda above
case of Nepal now, to entrench an explicit chapter on socio-economic rights, then this opportunity must be seized rather than leave it to the courts to develop socio-economic rights through what will no doubt be an ad hoc process of interpretation.

Remedies

Should Nepal go ahead and include socio-economic rights in its Bill of Rights, then one particular challenge that the courts will face will relate to remedies. What remedies are best suited to enforcing socio-economic rights and converting a legal judgement into something concrete that can potentially make a difference in the lives of the poor and the disadvantaged?

While the courts of South Asia have come up with several important judgements on socio-economic rights over the years, several of these judgements have remained in law reports and have not been implemented as a matter of practice.

One particular issue is: how does the court respond to the case before it and also deal with others, similarly situated, who may not be before the court? Beyond this how does the court address the larger structural or systemic issues that can only be redressed over a period of time?

These challenges are illustrated by an Indian case on emergency medical treatment. The Indian court found that man who had suffered a head injury as a result of a train accident was entitled to compensation for a violation of the right to life. He had sought emergency treatment in four state hospitals all of which had turned him away. He was then forced to seek treatment at a private hospital at his own cost. The court he said that there was a violation of the right to emergency medical treatment which was part of the right to life and gave him compensation.20

However, the court went to make several recommendations to hospitals on the need for an effective system to cope with emergencies. Monitoring these recommendations has to take place over a period of time and may be an ongoing exercise. Exercising a continuing supervisory jurisdiction over these larger systemic recommendations will stretch the resources of the courts.

Partnerships with independent institutions such as human rights commissions; gender equality commissions and other such bodies may be of use in such circumstances. In some countries the courts have asked these

institutions to monitor the implementation of their orders, especially where continuous monitoring is required.

The *Grootboom* case also illustrates these challenges. The claimants in the case sought enforcement of the right to adequate housing. However, there were many other ‘Grootboom type’ communities who did not come before the court. In devising a remedy the court must clearly be conscious of victims who may not be before the court at that point of time.

How far should the court get involved in the detail or the ‘nitty gritty’ of a case will also pose a challenge. When Justice Goldstone of the South African Constitutional Court was interviewed after the *Grootboom* case, he said that the court should not get involved in the ‘nitty gritty’ of a case. The Court could tell the government that it must devise a plan to cope with the housing needs of those in a situation of crisis. However, it should not dictate to the government the details of such a plan. That would be a violation of the separation of powers doctrine, he said.\(^{21}\)

However, the South African courts have got involved in the ‘detail’ in at least one case. In the *Madzibuko* case the court held 25 litres of water per day or 6,000 litres per household per month was inadequate. In this case the Court also held that the installation of pre-paid water meters in a poor neighbourhood in Soweto was unconstitutional and asked the local council to increase the daily quota of water to 50 litres a day and discontinue the use of water meters.\(^{22}\)

Indian courts on the other hand have tended to get involved in the detail when they give orders with regard to socio-economic rights, which has attracted the criticism that the court is going beyond its appropriate role.

The Colombian Constitutional Court has on occasions got involved in the detail by ordering the state to provide a dignified retirement home for an elderly man or by asking the state to provide an indigent mentally ill woman with a home, among other cases.\(^{23}\)

**Negotiation**

Court supervised negotiation has been used by some courts to enforce socio-economic rights. In a case from Argentina a court supervised negotiation

\(^{22}\) Mazibuko v City of Johannesburg Case No. 06/13865, High Court of South Africa (Witwatersrand Local Division).
\(^{23}\) See Sepulveda above.
process led the local council to agree to provide homes to 180 people who had taken possession of an unoccupied building. Part of that settlement was that in constructing these homes, preference would be given to builders who took at least 20 per cent of their workforce from the homeless community.24

In South Africa too the Constitutional Court asked a local council to engage ‘meaningfully’ prior to evicting people from what was deemed to be unsafe accommodation.25

Private actors
The liability of private actors for violations of socio-economic rights is likely to emerge as a major issue. In South Africa the Bill of Rights applies to private actors in certain conditions. According to Section 8(2) the Bill of Rights ‘binds a natural person and juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right’.26 The Colombian Constitutional Court and the English courts have also shown a willingness to enforce orders against private actors, especially where those actors are exercising a public function.

Private actors could be addressed by way of separate legislation (the ‘responsibility to protect’ or the standard of ‘due diligence’) or by making the Bill of Rights directly enforceable against private actors.

Implementing Socio-Economic Rights in the new Nepal
Nepal is currently well placed to take the lead in South Asia by including a coherent and justiciable Bill of Socio-Economic Rights in its new constitution. It is also well positioned to address some of the socio-economic issues associated with the recent conflict through a set of directly enforceable and constitutionally guaranteed socio-economic rights.

The concept paper released by the Constituent Assembly’s ‘Committee for Fundamental Rights and Directive Principles’ does contain several socio-economic rights. However, there are some ambiguities and problematic areas and the Committee may want to reflect further on some of these issues with a view to enhancing the paper’s clarity and coherence.

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25 Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v. City of Johannesburg and others, CCT 24/07.
26 Section 8(2) of the Constitution of South Africa.
The most striking ambiguity is whether socio-economic rights in the new Nepal will need supporting legislation, to be passed within two years, as suggested in the concept paper, or whether these rights could be legally enforceable even if Parliament fails to pass such legislation. The preferred approach would be to make socio-economic rights directly enforceable by entrenching them in the constitution and providing a remedy. These constitutional rights may then be supported by additional legislation, but their enforcement should not be dependent on the supporting legislation.

If Nepal proceeds to include socio-economic rights in its constitution the following are some issues constitution makers would need to keep in mind.

1. Rights

First among these questions is what socio-economic rights should be included in the Bill of Rights. Apart from the socio-economic rights contained in international instruments and other Bills of Rights, a right to live with dignity would be a useful instrument for a future Nepali court to respond to large scale or widespread violations of socio-economic rights, especially to secure immediate implementation of rights in appropriate situations. The Constituent Assembly’s ‘Committee for Fundamental Rights and Directive Principles’ in its concept paper has already recommended the inclusion of a right to live with dignity.

2. Immediate enforcement v progressive realization

Perhaps the most challenging concept relates to progressive realization: which of the rights should be subject to progressive realization, and which rights should be made immediately enforceable?

Here again the concept paper of the Constituent Assembly’s ‘Committee for Fundamental Rights and Directive Principles’ is ambiguous. While the concept paper suggests that some rights like the right to basic education, the right to basic health care, and the rights of underprivileged groups, are to be enforced immediately, it then suggests that Parliament pass legislation within two years to ensure the implementation of these rights.

As we have discussed above some socio-economic rights must be immediately enforceable. This is the approach taken by the constitutions and courts of other legal systems that do recognize a regime of socio-economic rights.
Rights like the right to a basic education; the right to basic health care; the right to emergency medical treatment; the right to reproductive health care; the right to emergency medical treatment; the right to a minimum supply of water; and the right against forced evictions, should ideally be made immediately enforceable in the new constitution.

Other rights like the right to further education; the right to other forms of health care; the right to housing; and the right to a clean and healthy environment, may be progressively realized in accordance with available resources.

What constitutes basic education; basic health care; reproductive health care; a minimum supply of water; and a forced eviction, is best left for the courts of Nepal to determine through a process of judicial interpretation.

3. **Private actors**

In other areas of the law private action is being reviewed by way of public law review. Private entities are now increasingly performing what were previously deemed to be public functions either on their own, or in partnership with governments. Private action clearly has the capacity to violate rights and where the exercise of private power intersects with an important public interest then there is a case for applying human rights norms to review the exercise of that power.

Private actors may be covered directly by way of the Bill of Rights or by way of separate legislation. As we noted above the South African Bill of Rights makes provision for actions against private actors. However, the formulation is ambiguous and may not be a good model to follow.

4. **Standing**

The Bill of Rights would also need to address the question of standing: who could bring an application for the enforcement of fundamental rights? Here again the South African constitution is instructive and allows a range of actors to file action alleging a violation of rights: According to Section 38:
Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened …. The persons who may approach a court are –

(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.27

5. The litigation model

A litigation model that is inclusive and permits third parties to intervene would be more democratic and assist the courts in their task of interpretation. The victim is not always the best placed person to argue a case and well resourced public interest petitioners may be better equipped to present the range of matters that socio-economic rights adjudication requires. The courts should encourage bona fide third party interventions including those from the independent institutions such as the Human Rights Commission and the Women’s Commission.

6. Remedies

If court orders are to translate into action then Nepali courts should be willing to explore a broad range of new remedies. Permitting the courts to issue a remedy ‘that is just and equitable in the circumstances’ will enable the court to develop remedies that are appropriate for the enforcement of socio-economic rights.

7. The use of independent institutions

The use of the independent institutions to monitor and supervise the implementation of remedies could assist in the implementation of court orders in relation to claimants who come before court and in relation to those who may not be before court. Independent institutions also have

27 Section 38 of the Constitution of South Africa.
the capacity to monitor and supervise the implementation of broader systemic issues that the court may choose to include as part of its remedy.

**Litigation and socio-economic rights**

Litigation around socio-economic rights is only one aspect of a larger struggle for social justice. Yet if employed smartly and in partnership with social movements and human rights lawyers, it can be a useful and effective process in delivering socio-economic justice.

Litigation can clarify the meaning of rights; it can help set benchmarks for the state and private actors; it can force the state and private actors to justify their policies and actions as part of a structured dialogue; it can raise awareness on rights; and it can help mobilize communities.

A model of litigation that is transparent, inclusive and participatory, flexible with regard to procedures, and employs different forms of remedies and processes for implementation is likely to be more effective in securing social justice.

The question for the legal systems of today is not whether socio-economic rights should be part of a constitutional Bill of Rights. That question has been answered positively by many of the world’s recent constitutions. Rather the questions that modern legal systems face is how should the courts interpret these rights; how should the legal regime balance progressive realization with immediate implementation; what new remedies should the courts explore; and how can the legal system ensure that remedies are implemented as a matter of practice.

Nepal should take the bold step of including a set of directly enforceable socio-economic rights in its new constitution and buttress this with a constitutional remedy that will allow both victims and public interest petitioners to seek relief where these rights are violated.

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Oliver Wendell Holms emphasized: "Constitutions are intended to preserve practical and substantial rights, not to maintain theories."\(^1\)

As has been rightly observed, the constitution should be considered from the point of view of a common man and as a safeguard of his interests and rights. The fundamental rights and the directive principles in the constitution in a way, theoretically, make provisions for social and economic justice in a democracy. However it is observed that apart from cases brought before the constitutional courts, little is done to ensure the proper implementation and enforcement of the fundamental rights and directive principles and thereby achieve social justice. The poor and needy people are ignored or only lip service is done to them. It is necessary to build in a mechanism in the constitution itself to ensure that the rights and the directive principles are enforced and implemented in proper, genuine and honest manner.

**Important aspects of social justice**

The constitution tries to ensure social justice basically by incorporating provisions of fundamental rights and directive principles of state responsibility. In the draft constitution of Nepal the fundamental rights

\(^1\) Davies vs Mills 194 U.S. 451, 457, [1904]
proposed are right to education, health, food, shelter, clothing, irrigation, developed seeds, fertilisers and food sovereignty. The said proposal is certainly to meet with expectation of a common man from the government. Whether the basic needs, rights are provided and distributed to the all needy persons or not is usually not brought before the people. On the basis of the provisions in the Constitution and considering the need of the poor, many schemes are launched for the common and poor people, for example right to education or supplies of bare necessity to the persons below poverty line (food grains or other necessary things), help to the people affected by natural disaster etc. The schemes are announced by the government, the funds are allocated and then what happens to that is forgotten or rather not brought before the people. In majority of the cases, the aid and help declared for the poor people evaporates and nobody knows as to what has happened to the money shown to have been spent for such schemes.

Corruption has been a major obstacle in implementation and enforcement of the principles and fundamental rights and directive principles mentioned in the constitution. This has been the experience in many developing countries. This is a main and serious obstacle for enforcing social justice in a country. Many steps are taken to curtail or eradicate the same but nothing seems to be working. Taking the example of the same issues in other countries, if some mechanism is provided in the constitution itself for protecting the rights and dignity of a citizen and upholding the ideas of social justice, the purpose of the constitution may be fulfilled to some extent. Making provisions for the same in the constitution would achieve some effects. Firstly, such measures will have supreme sanctity. A constitutional body, like election commission, can be created. The draft constitution of Nepal has proposed number of Commissions and their detailed structure and powers; like the Human Rights Commission, Dalit Commission, Adibasi/Janjati Commission, Commission for the protection of the rights of the people of backward region, Madhesi Commission, Muslim Commission, etc. On the same lines a Commission for Fundamental Rights and a Commission for Directive Principles of state responsibility or social justice can be constituted.

The said Commission will supervise the proper enforcement of the rights declared by the constitution, schemes of social justice and collect reports of injustice in different regions, make surprise visits to a particular areas and collect information and take corrective measures. It can set up regional offices, fix accountability and liability of the offices and officers and take or propose to take immediate action wherever corruption, impropriety or fraud is found out. Once people know about existence and control of such an
authority, complaints can be made which would put a check on the
government officials and authorities. In case of abuse of authority in this
regard, the matter may be handed over to the Commission for Investigation
for Abuse of Authority or such other agency or authority.

The provisions in the constitution can be made to supervise the proper
implementation of the schemes, to prepare a report and submit the same to
the government. This in turn would assist the government for further
planning of appropriate schemes wherever and whenever the need arises
based on such report from the government officers. This will ensure the
transparency in the work of the bureaucracy and there will be accountability
and liability for proper implementation of the directive principles for
providing help to needy citizens. The above mentioned Commission
established under the Constitution can be empowered to suggest different
needs of people in different areas of the country to the concerned ministry,
pursue the ministry for declaration of the same, allocation of funds, ensure
proper enforcement and implementation of the same, etc. so that a common
man can also question the same if any impropriety or fraud is involved. The
details in this regard may also be published. The Commission so established
under the constitution may also work as a vigilance commission like the
office of the Chief Vigilance Commissioner in India, with power and
authority of making *suo moto* inquiry.

If a separate body is created outside the constitution, then it may work as
any other government organ or department will certainly be subject to
various pressures and inducements. It is well said the ‘Power tends to corrupt
and absolute power corrupts absolutely. ‘If a body is created in the
constitution itself, then there is a possibility that it may work fiercely
independently like the working of the Election Commission in India,
sometime back.

The rise of the militant organisation in many countries is perhaps a
universal phenomenon. The most important reason for the same is lack of
social justice and unsatisfied poor people. The aid of the government does
not reach to these people and therefore they easily fall pray to the instigation
of militant leaders or organisations and resort to arms and violence. Taking
extra care that the schemes of the government reach to the poor and proper
social justice is achieved, may also result in substantial decrease in such type
of organisations and their activities. Though it would be too naive to think
that this is the only reason for rise of such militancy, this can certainly be
said to be main reason i.e. unsatisfied poor people. If a poor person is
satisfied by the work of his government and can peacefully live and feel that
his government is taking due and proper care of his basic needs then he
would not succumb to pressure of such undemocratic activities or resort to armed activities or struggle. A mechanism created by some internal law may be felt inadequate. If constitution itself provides for the mechanism, then it will also create a sense of assurance that the government has genuine interest in helping the people.

Another safeguard which can be thought of proper enforcement of fundamental rights and directive principles and achievement of social justice is on the lines of Right to Information Act in India. The said Act has been recently enacted. It is felt that it serves some purpose for the benefit of common man and holds the government officers and other persons, organisations, bodies liable to furnish the information. This has created to some extent transparency in the working of the government. No doubt, there are some deficiencies in this law but improvements can be made considering use and abuse of the said law. The said Act in India is felt to be misused or abused to some extent. People, many times, for no reason keep asking for information from the government offices, educational institutions, etc. causing harassment to such offices or officers. Considering such aspects and experiences in the said law, improvements can be made as to ensure expected achievement of such laws.

It may also be considered that the courts in a country like India are overburdened. A separate bench of the court may be created only for cases of fundamental rights and enforcement of directive principles. If the access to such remedy is made convenient and less expensive then it would put a check on government or abuse of power and proper implementation and enforcement of fundamental rights and directive principles and social justice will be ensured. Presently only financially capable or educated persons or organisations with financial backing can afford to approach the higher courts for redressal of their grievances relating to fundamental rights and directive principles.

The need is felt for the reasons that most of the constitutions in the world enumerate lists of fundamental rights or basic rights and directive principles but a mechanism/scheme for enforcement of the same is left to the ordinary laws. Making a provision for the same in the constitution will put the government on its guard and may ensure that the government does not shirk in its responsibility in working for poor citizens and meeting the ends of social justice. Developing nations like ours have followed different political and social processes and hence need different treatments. In other words, needs of a developing country are different and more complex because of the processes which they have gone through and which they are yet to go through – political, social, cultural or economic. Hence, these need a
different treatment, and bodies like the one I have suggested here, are keeping in mind these aspects.

In India, a number of schemes are announced by the government, for example relief for poor farmers especially during draught. Of late there has been increase in suicides of the farmers. The government has announced packages of crores of rupees for the farmers. How the same is implemented, how many farmers have received the same, nobody knows. Different bodies, organisations and media complain about pilferage of the money but ultimately report regarding the same is not made public. The number of suicide of the farmers has not come down. In such situation if some body or commission is created by the constitution itself, then accountability and liability can be fixed and it would act as strong deterrent for dishonest persons ensuring proper working in the future. The government aid is declared in case of natural disasters but very little reaches to those for whom the scheme is declared for. It is necessary that anticipating such contingencies, provisions be made to deter the dishonest and corrupt officers or so called middlemen.

In India, constitution provides for reservation to the backward class in various fields. Considering the abuse, harassment met by such people, such a step was welcome. But it appears that the genuine purpose for social justice to backward class and improvement of their standard of life is no longer attained. Politics, rather vote politics, has crept in.

All the factions of the backward class are not benefited by the government schemes. Originally the constitution proposed reservation for the backward class persons in employment, education etc. for limited period. This was a properly thought measure taken by the government.

"It must be kept in mind that such judicial activism is no answer or remedy for social justice. The constitution has defined the role of its three organs and the sphere within which they are supposed to work. However, as the legislature and the executive have not taken actions to the expected extent, the judiciary has stepped in. Judicial activism has its own limitations."

- Purushottam Kulkarni (at p. 325)
Constituent Assembly. This would have helped the people in making efforts on their part, with government help, to improve their life conditions. But by continuing such provisions indefinitely, lethargy has crept in the backward class. They feel that due to their caste, they would receive all the benefits without struggle. Such persons do not try to excel themselves in different fields.

The continuation of such reservation policies for political and en-masse vote without applying mind is creating its serious side effects. There is degradation in quality for employment. Its serious effect is felt in the field of education. Due to the reservation in employment in educational institutions, public as well as private, incompetent persons are being appointed as teachers or lecturers. The educational institutions are required to fill in the quota of reservation proposed by the government. If a person belonging to particular category of backward class is not available then the post can not be filled in permanently. For years together the post is required to be filled in as temporary appointment. For this reason no person belonging to non-backward class, who is otherwise very qualified and competent, applies for the said post. Educational institutions feel helpless and the standard of education is slowly degrading.

There is no doubt that the constitution and the government should provide for social justice to such backward class people. But at the same time it is absolutely essential that care should be taken to inspire these people to come to the main stream on their own efforts. After few years of reservation policies, the government should shift the focus of reservation to economically weak and needy but competent persons. The attitude of people of backward class that they have right to everything without working for the same should be changed. There is a danger felt in the last few years, of resentment of non-backward class people against the backward class people. There is a danger of division in the society on these grounds.

It is absolutely necessary to recognise that merit has no alternative for the development of a nation. It is very necessary that a constitutional mechanism be created for avoiding the issue of social justice to backward class people from becoming or rather making a political issue and a point of vote bank politics. Nepal also has its share of Adivasi Janjati, Madhesis other minorities etc. for the upliftment of whom, efforts should be taken. Proposals are made for the protection of the rights of minorities and marginalised communities. However great precaution must be taken that while doing social justice to a faction of the society, it does not become cause of social injustice to the others.
Judicial activism

Judicial activism in India has been on increase in the last few years. It is true that this has helped India to some extent for achieving social justice on some level. Restricting the idea of judicial activism to social justice related to fundamental rights and directive principles of state responsibility, it can be said that this role of judiciary came into existence due to the apathy of the government in reaching to the poor and probably corruption in implementing various schemes for the poor and needy.

It must be kept in mind that such judicial activism is no answer or remedy for social justice. The constitution has defined the role of its three organs and the sphere within which they are supposed to work. However, as the legislature and the executive have not taken actions to the expected extent, the judiciary has stepped in. Judicial activism has its own limitations. The judiciary cannot take upon itself the function of executive and start dealing with the everyday problems of the society. Secondly, there is a danger of clashes between the judiciary and legislature and the judiciary and the executive which would disrupt or affect functioning of all three wings of democracy.

These three wings are required to function in consonance with each other. Thirdly, there is a danger of the judiciary transgressing its limits under the guise of social justice principles and judicial activism for the same. It should not happen that people start depending and relying on the judicial pronouncement and interference in their day-to-day life rather than the responsible executive. Occasional supervision or decisions of the judiciary for the purpose of social justice would be accepted. To avoid all the problems likely to be faced by Judicial Activism, it is necessary that the constitution should be made self-sufficient to deal with all the problems likely to be created in proper enforcement and implementation of the principles laid down therein.

Conclusion:

A new constitution is being framed in Nepal and therefore, the advantages, disadvantages, rights and wrongs of Indian experience can be used to provide appropriate solutions at the time of making of the new Constitution. If the shortcomings and difficulties in implementation of methods for achieving social justice are known then it would be wise to provide inputs for a new constitutional beginning.
In conclusion, it can be said that comparison between neighbours proves more fruitful, as both have similar social, cultural, historical backgrounds, and India and Nepal go a long way back. This dialogue and sharing of notes between South Asian neighbours would strengthen relations and prove beneficial to the entire region.

On the basis of the above discussion and the points referred to therein, following aspects may be considered while finalising the draft of Nepalese constitution:

a) To create a body/Commission in the constitution itself for the proper enforcement of fundamental rights and directive principles of state responsibility. This body will hear complaints, ensure that in various parts of the country there is no abuse of powers, proper schemes are declared by the respective ministries for the provision for the poor and needy, declare the schemes, its implementation report and make public the use of finance, expenditure etc. to ensure that the funds allocated for a particular project or scheme are used for the same purpose, prevent corruption at all levels in a particular project or a scheme.

b) Enact a law on the lines of Right to Information Act in India, by removing the defects therein as have been faced in India, declare strict penalty for corruption in the matter of public utility services, government schemes, and make proper provisions therein to prevent abuse of the right conferred upon a citizen in such an Act.

c) If reservation for backward class persons is proposed, then the same should not be a blanket one. Such facility or reservation should be for a fixed period and be not extended indefinitely. Emphasis should be more on self help rather than making them lazy and dependant upon such facilities or reservation. To ensure that while giving such reservation or facility, injustice is not caused to non-backward categories and that a rift is not created between the backward class and non backward class persons.

d) If the reservation is already provided or promised, then a careful thought should be given and steps be taken to see that the same does not become burden upon the state.

e) To ensure proper working of the government in the field of social justice so that there is minimum scope for judicial intervention.

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Managing Protection of Human Rights in Transition

John Pace

Transition takes various forms. Many, if not most transitions are characterised by conflict. Although one must presume that transitions follow upon conflict, they may well also be the cause for ensuing confrontations and conflict. This is often the case when they are not properly managed.

There is no such thing as instant transition, and some transitions take longer than others. One may describe some transitions as a form of accelerated evolution, whereas others may be described as a change of cataclysmic proportions.

In any event, most transitions are usually in the making over extended periods and only become manifest as and when they surface, usually as a result of a combination of circumstances that trigger them.

Each transition has its own particularities. Compare, for instance the transitions that have taken place in the recent past:

* in South-East Asia, in the Philippines, in Indonesia, in Cambodia,
* in Eastern Europe, the end of the Soviet Union and the formation of the Commonwealth of Independent States,
* in the Americas, in Chile, in Argentina, in Nicaragua, in El Salvador, and so on.
* in Europe, with the emergence of the European Union.
* in Africa, where the historic transition in South Africa is perhaps among the most significant of all.
By the same token, transitions are in the making around us. Some are easier to detect than others, particularly when conflict is involved, since conflict is symptomatic of failure to effect change through transition.

Transitions may be said to reflect a revolution of one sort or another. They may present different characteristics but they do have one clear and unquestionable common denominator - and that is the quest for the recognition and realisation of human rights as a common denominator of the system by which society governs itself.

Transitions present opportunities for change, to address the causes of past confrontations and conflict, and redress them, thereby providing for positive change. Thus if managing transitions is of critical importance, managing human rights in transition is vital. Managing human rights in transition takes the form of institution building, or strengthening, very often seen in the context of introducing a culture of the rule of law. Although this is often seen as related to institutions in the field of administration of justice, it is not limited to them, important as they are.

The management of human rights in transition requires addressing all human rights, and if indeed, as one should, a culture of the rule of law is seen as the objective, there should be no doubt that this culture is intended to further the dignity and well being of society and the individual. The respect for economic, social and cultural rights is as vital as the respect for civil and political rights. No transition can be successful unless this principle is respected in its implementation.

This reflection is based on the experience and involvement that I have been privileged to make over the years. Over the last 40 years or so, I have been involved directly or indirectly in the human rights aspects of several transitions including in the countries I have mentioned.

Managing human rights in transition involves three major elements:

- in the first place, the agreement on the substantive norms that constitute human rights
- secondly, the identification of the institutional mechanism by which these norms are to be realised and
- thirdly, the political will to ensure that the first two are effectively carried out, notably through respecting their freedom to act and the outcome of their actions, and guaranteeing the requisite resources to enable them to carry out their mandate.
As for the first point, laudable as it may seem, this common denominator, that is, the search for recognition and realisation of human rights standards has also provided further cause for conflict, as governments and other parties responsible for effecting transition choose to interpret clear and universally recognised norms, in ‘relative’ terms when it comes to their application.

Differences in appreciation in regard to implementation processes are not uncommon in human rights work, and therefore one should not be surprised to have such differences emerge from time to time. They have existed at the national level, as they have done at the international level. There has never been any doubt as to the content, but there are often differences when it comes to the modalities of their realisation.

The so-called movement for ‘cultural relativism’ in the application of human rights, which emerged in the early nineties as the World Conference on Human Rights was in preparation, is a manifestation of this phenomenon.

A common feature of this confusion is rooted in the refusal to accept the priority to be given to the treatment of human rights in their totality. Some countries hold that civil and political rights take priority over economic, social and cultural rights, whereas others hold the opposite view. Both are wrong: international standards have long established and reiterated the interdependence and indivisibility of these sets of rights. Certainly, ensuring this interdependence is extremely complex, and imposes a challenge, even a burden, on governments that not many are prepared to face.

As stated earlier, transitions, to be effective, need to ensure not only the recognition (there is rarely any doubt about that) but also the realisation of human rights whether in the civil and political sector, or the economic, social and cultural sector.

In societies that are made up of diverse groups, ethnic, religious, etc, this is particularly important. Most transitions, of course, are related to the need to reconcile access to respect for human rights in their totality to all components of society.

This debate is not new: it marked the drafting of the UDHR. The UDHR established the integral nature of human rights. Regrettably this was not maintained when it came to their realisation. The “common standard of achievement” of 1948 was soon separated into two standards by 1952, when the General Assembly of the United Nations reluctantly agreed to the preparation of what became the two International Covenants.
This absence of recognition of the need for a holistic and integrated approach to the realisation of human rights proved to be a major obstacle in the fulfillment of one of the fundamental principles of the UN itself, as set out in its Charter.

All this to say that managing transition has to take into consideration and give priority to the integral realisation of human rights norms. There should be no doubt as to the dimensions of the challenges. Recognition – and even realisation – of civil and political rights - is but a step in a process, at best a platform for the realisation of economic, social and cultural rights. Although the two sets of rights are different, they are complementary and cannot be treated separately.

In regard to the second point, the institutional human rights focus will need to involve the widest spectrum of public participation. For the political leadership to successfully manage transition, it is vital that the concerns of society are received, understood and reflected in the process.

Public consultation/referendum is a good tool but of little use without a thorough understanding by the participating public, of the content and implications of the process.

Thus a process of education is an essential element of transition. In this context, civil society and in particular, human rights NGOs have a vital role to play, and they must be enabled to do it, whilst respecting their independence.

Civil society can consist of a very wide range of institutions; the wider the spectrum, the more likely it is to have a better prepared public participation. Often, politicians consider civil society a nuisance at best, and hostile at worst; whereas this may be understandable, it is, of course, unacceptable, since the contribution of civil society is an essential component of ensuring awareness and acceptance by the people.

Somewhere between the political leadership and civil society are NHRIs – national human rights institutions. Although recognised relatively recently at the international level, such institutions can/should play an important role in the management of transition. Indeed, very often the establishment and/or strengthening of such institutions is itself the product of transition. Examples may be cited in Indonesia, in the Philippines, and indeed in this country, among many others.

Other institutions that facilitate transition are the so-called transitional justice institutions including truth and reconciliation commissions, commissions to investigate disappearances, and the like. They have worked
well in many countries – although this does not necessarily mean that should
work equally well in all cases.

Although these are mostly focused on addressing the past, they are really
about ensuring a better future. They may be intended to forgive, but certainly
not to forget, since it is in facing the past that one is best prepared for the
future. Neither are they to invoked instead of judicial proceedings when the
violations in question constitute crimes punishable by law.

The third element, which is the need for the political will to ensure that
the first two are effectively carried out, is key to a successful transition. As is
well known, “the road to hell is paved with good intentions”. It is counter-
productive to first define the norms, then to set up the institutions, and after
all that to watch these institutions not work.

Politicians, particularly once they are in Government, tend to try to
exercise control over the efficiency of national institutions *inter alia* by
limiting their resources. This is, regrettably, not uncommon. The national
commission of Australia, for instance, was severely circumscribed in its
work by draconian cuts to its funding under the Liberal Government between

The wider civil society is often controlled through limitation of their
freedom of expression and/or freedom of movement, thus denying them the
space that is vital for them to act.

Transitional justice institutions are set up with the best of intentions, but
they can also be subject to such pressures as civil society and national
institutions, thus reducing if not neutralising any positive influence that they
might have on the process of transition.

One should not be surprised at the cynical resort to the adoption of
measures such as the setting up of national institutions, by governments
whose only objective is to stave off criticism of inaction in the face of serious
allegations of human rights abuses. There are numerous national human
rights institutions existing today that are purely cosmetic.

In this context an interesting situation arose when Indonesia established
its national human rights commission in 1993. At the time the move was
widely viewed with much cynicism – it was said that President Suharto had
agreed to its establishment as window dressing to counter criticism at the
World Human Rights Conference that was a few weeks away. Experience
showed other wise – KOMNAS HAM, the human rights commission played
a critical role in the transition from his dictatorship.
Concluding remarks

These three elements are also relevant to the current constitution making process in Nepal. The constitution is the benchmark that will determine the next step in the transition of the country from internal conflict and instability, to peace and stability.

In regard to the first element, judging by the information available, and by the existing interim constitution, it would seem that the substantive human rights provisions are consistent with Nepal’s international human rights treaty obligations. Whether they reflect the concerns of the people will only be determined once the public consultation process is completed prior to its final adoption. One should ask oneself whether the involvement of the people has been accomplished fully and fairly.

In this context, one may mention the experience in Iraq after the invasion and in the initial process of drafting the constitution; an interim document, drafted without any meaningful consultation of the people (the Transition Administrative Law or TAL), although technically an excellent document, was largely ignored by the Constituent Assembly elected in 2005.

In regard to the second element, there is a need to be cautious in not reflecting too much zeal. The current proposal coming out of the CA in Nepal, for instance, would see not one national human rights institution as a constitutional body, but seven. No doubt this reflects a political consensus, but unless arrangements are made to ensure streamlining and coordination, the work of all seven human rights bodies is bound to be drastically and negatively affected. All the more so when one considers the current situation of these bodies, of which only one, the NHRC, has constitutional status under the Interim Constitution.

The question needs to be asked whether this is the best way to institutionalise the protection of human rights in the country as a whole, and of the particular groups on the other; some other national institutions have addressed the dilemma by enabling a national commission which incorporated the various sectoral bodies.

"The creation of multiple constitutional bodies dealing with various aspects of the same subject matter, i.e. the protection of human rights, is bound to have considerable negative effect on the provision of resources."

- John Pace
(at p. 333)
Related to our third element, in addition to eroding the substantive effort at ensuring a successful human rights transition, the creation of multiple constitutional bodies dealing with various aspects of the same subject matter, i.e. the protection of human rights, is bound to have considerable negative effect on the provision of resources.

Furthermore, the existing Commissions, not yet constitutional bodies, are seriously under-resourced in spite of their vital areas of concern, [The National Women’s’ Commission, The Dalit Commission and the National Foundation for Indigenous Peoples] and therefore of dubious value in ensuring the successful implementation of their mandates.

A general consideration that needs to be kept in mind in this context is the proportion between what national institutions are asked to do, and the means and the recognition that the government and its agencies dedicate to them.

Therefore management of transition should be seen as a long-term process that needs focused policies, harmonised around the essential values underlying international human rights standards, namely the dignity of the individual as an element of society.

This in turn implies a political will shared among the parties in the transition, so that the realisation of human rights standards as defined (i.e. across the board) is truly a national and a commonly shared priority, and not an element on the bargaining table.

This is no mean feat, but I ask those concerned to take heart. They can derive much inspiration from the fact that human rights have always intimidated some governments.

I might recall that the articles of the UN Charter which refer to human rights – and includes the fundamental principles of the organisation – were not in the original draft, and were only included as a result of an amendment proposed unanimously by the Four Great Powers of the time (China, the UK, the US and the USSR).1

The Charter is not only a historic document, but it should also be seen as the embodiment of the Transition “par excellence”, a Transition at which the international community continues to chip away, in the quest of fulfilling the objectives of the UN.

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Constitution making is an important step in establishing a (new) nation. Under the present post-communism and post-authoritarian era, some countries have begun writing new constitutions, or amending existing ones. They have been trying to adopt some new thinking and schooling in the area of constitutionalism in the modern world.

With the collapse of the Soviet Union and the fall of the Berlin Wall, the question of transitional justice took on renewed urgency. Those of us, who had been involved in issues concerning the Latin American transitions, and may have participated in debates convened in East and Central Europe, most have noted one thing - i.e. there the debate over punishment broadened to include the implications of the sweeping decommunization measures pervasive in the region.¹

A. Introduction

In recent decades, societies all over the world – throughout Latin America, East Europe, the former Soviet Union, and Africa – have overthrown military

¹ For an interesting discussion, see Ruti g. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000), at vii; See also Satya Arinanto, *Hak Asasi Manusia dalam Transisi Politik di Indonesia* [Human Rights in Political Transition in Indonesia] (Jakarta: Pusat Studi Hukum Tata Negara Fakultas Hukum Universitas Indonesia, 2003).
dictatorships and totalitarian regimes for freedom and democracy. In these times of massive political movement from illiberal rule, one burning question recurs. How should societies deal with their evil pasts? This question leads to more questions that explore the relationship of the state’s past to its future. How is social understanding in support of a new regime committed to the rule of law created? Which legal acts have transformative significance? What, if any, is the relation between a state’s response to its repressive past and its prospects for creating liberal order? What is the law’s potential of ushering in liberalization?²

B. Constitutional amendments and the rule of law: Indonesian experience

One of the agenda of reform in Indonesia as a new transitional state was amendment of the 1945 Constitution, which had been drawn up by the founding fathers of the state in 1945. With the amendments of the 1945 Constitution, the text of the Constitution, which originally contained 71 provisions, now has 199 provisions. Out of the 199 provisions, only 25 (13 percent) retained its original form, while the remaining 174 provisions (87 percent) are completely new. Although it is still referred to as “The 1945 Constitution”, it may be called a new constitution as it has changed substantially from the original version which had been adopted during proclamation of independence of the Republic in 1945.³

The amendments have focused on revision of fundamental laws that regulate the governance of the state so that the transition to democracy may be duly managed. This is deemed crucial and urgent given the conviction that the agenda for democracy can be successful only if it is supported by a comprehensive, modern set of basic laws, to help transform the nation’s vision and mission into reality.

One of the most important and fundamental principles adopted in the constitution is that Indonesia is a rechtsstaat (state governed by law), not a machtsstaat (state governed by power alone). In the rechtsstaat, we would find acknowledgement of the supremacy of law and the constitution; adoption of the principle of separation and limitation of power; protection and promotion of human rights; a free and impartial justice system which

² Id., at 3.

guarantees due process of law; equality before the law; and access to justice for everyone, including against the abuse of power by people in power.

As a state adopting the principle of rule of law (a rechtsstaat, or state governed by law), there ought to be some kind of guarantee that the law itself is built and enforced according to the principles of democracy. Therefore, the principle of rule of law (rechtsstaat) is built, developed, and enforced in line with the principle of democracy (democratische rechtsstaat, or democratic state governed by law). Law may not be devised, enacted, interpreted and enforced with an iron fist based on power alone (machtsstaat). On the other hand, democracy or the sovereignty of the people itself must also be executed according to the constitution. Therefore, it must be underlined that the implementation of democracy must be balanced by the application of the principle of the rule of law, as prescribed in the constitution.

Lexically “constitutional governance” could be translated as “the action or manner of governing relating to or in accordance with a constitution”. In this event of global economic crisis, in my opinion, we need to reconcile between the phrases of “constitutional governance” and “global economic crisis”. In this context, I propose that we do something to our own constitution. If our constitution doesn’t provide any system of checks and balances as a remedial measure to combat the global economic crisis, we have to make relevant changes to it. From this point of view, it would do us good to depart from the “positivist” view of the constitution. In sum, I want to see more countries in the Asia-Pacific region amend or change their constitutions in accordance with the need to combat the global economic crisis.

C. Transparency institutions in the Indonesian constitution: The Supreme Audit Board

The Supreme Audit Board is one of the oldest transparency institutions in Indonesia, which has been in existence by virtue of the Indonesian Constitution since independence in 1945. This idea of creating this kind of institution was taken from the Dutch state institution, Algemene Rekenkamer.

After the constitutional amendment of the Indonesian Constitution in 1999-2002, this institution is regulated in Chapter VIIA on “Supreme Audit
Nepal Constitution Foundation

Article 23E which regulates the power and authority of the Supreme Audit Board consists of 3 paragraphs as follows: (1) To examine the management and accountability of state finance, there shall be a single Supreme Audit Board which shall be free and independent; (2) The result of any examination of state finance shall be submitted to the House of Representatives, the Regional Representative Council, and the Regional House of Representatives in line with their respective authority; and (3) Action following the result of any such examination will be taken by representative institutions and/or bodies according to law”.

And then Article 23F which regulates the mechanism of choosing its members and leadership consists of 2 paragraphs as follows: (1) The members of the Supreme Audit Board shall be chosen by the House of Representatives, which shall have regard to any considerations of the Regional Representative Council, and will be formally appointed by the President”; and (2) The leadership of the Supreme Audit Board shall be elected by and from the members.

Lastly, Article 23G as the last article in the constitution concerning The Supreme Audit Board consists of 2 paragraphs which regulates the office of the institutions as follows: (1) The Supreme Audit Board shall be based in the capital city of the state, and shall have representation in every province; and (2) Further provisions concerning the Supreme Audit Board shall be elected by and from the members.

D. Some notes to the transparency institutions under the draft of the new constitution of Nepal: The Federal Audit Commission

The Constituent Assembly (CA) Committee level Draft of the New Constitution of Nepal has proposed that a Federal Audit Commission will be established, and that it would be included as a separate Part of the Constitution. According to the CA, the Commission for Audit has been provided constitutional protection to enable it to audit public property and

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4 See the Constitutional Court of the Republic of Indonesia, The 1945 Constitution of the Republic of Indonesia and The Act Number 24 of 2003 on The Constitutional Court of the Republic of Indonesia (Jakarta: Secretariat General of the Constitutional Court of the Republic of Indonesia, 2003), at 77.

5 For the draft articles on the transparency institutions - especially its Federal Audit Commission - in the Draft of the New Constitution of Nepal, see Constituent Assembly, Committee to Decide on the Structure of Constitutional Bodies, “Preliminary Draft 2066 (2009)” (Singha Durbar, Kathmandu; 2009).
draw the Legislature’s attention towards improper expenditures, if any. The provision for an Auditor General has been made right from the beginning of the constitutional development process in Nepal, in order to audit the accounts and ledgers of the government departments and offices and courts. And as mentioned above, a constitutional provision has already been made for a Federal Audit Commission in the present constitution to make it gradually oriented towards collective leadership.6

Based on this reasoning, the Constituent Assembly has proposed that there shall be a Federal Audit Commission in Nepal comprising a Chairperson and two other members on the basis of proportionate representation and inclusiveness. The chairperson and the members of the Federal Audit Commission shall be appointed by the President on the recommendation of the Constitutional Council (there is an option for this, i.e., if the appointment is to be made by executive head of the government, the Legislature-Parliament shall have to endorse it).7

The Constituent Assembly has designed that the term of office of the Chairperson and members of the Federal Audit Commission shall be six years from the date of appointment. Provided that: (a) before the expiry of their term, if the Chairperson and members of the Federal Audit Commission attain the age of sixty-five, they shall retire; and (b) The Chairperson and members of the Federal Audit Commission may be removed from their office on the same grounds and in the same manner as has been set out for removal of a Judge of the Supreme Court.8

According to the Constituent Assembly, the reasoning of this is that it is highly imperative that the Chairperson and two other members of the Federal Audit Commission are independent and impartial in bearing the responsibility of conducting audit of government departments and offices and courts. Thus, the present provision has been made since it is proper to have them appointed by the President on the recommendation of an independent constitutional council.9

In my opinion, a transparency institution like the Federal Audit Board should have functions and power as follows: (1) state finance management audits; and (2) state finance accountability audits. If Nepal embraces a

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6 Id., at 9-10.
7 Id., at 9.
8 Id., at 9-10.
9 Id., at 10.
federal model, I propose that an institution like the Federal Audit Board should also exist at the state level; and if a unitary state model is adopted, the same institution must also exist at the provincial levels. The draft of the new constitution prepared by the Constitution Assembly has considered this by regulating that in general, there may be a branch of the Federal Audit Commission in every province/state.10

In the case of Indonesia, according to Law Number 15 of 2006 concerning the Supreme Audit Board, especially as regulated in Article 6 paragraph (1) to paragraph (6), the Supreme Audit Board has the obligation to audit the management of and accountability for state finance implemented by the following:11 (1) the Central Government; (2) the Regional Government; (3) other State Institutions; (4) Bank Indonesia (the Central Bank); (5) State-Owned Enterprise; (6) Public Service Bodies; (7) Region-Owned Enterprise; (8) other institutions or bodies managing state finance.

The audit implemented by the Supreme Audit Board is based on the Law concerning the Audit of Management and Accountability of the State Finance. The audit includes the following: (1) finance audit; (2) performance audit; and (3) audit for special purposes.

Based on these experiences in Indonesia, I propose that the new constitution of Nepal also regulate the power and authority of its Federal Audit Commission in detail. I have come across an explanatory note by the Constituent Assembly stating that the present constitution has made a provision for, and fixed the functions, duties, and powers of the Audit Commission to examine the book keeping system of public expenditures and examine the regularity, economy, efficiency, effectiveness, and the propriety thereof in the accounts of all the government offices and courts.12

Based on this reasoning, the Constituent Assembly has designed that the accounts of the Supreme Court, Legislature-Parliament, Constituent Assembly, Commission for the Investigation of Abuse of Authority, Public Service Commission, Election Commission, National Human Rights Commission, Office of the Attorney General, and other offices of constitutional bodies and the Nepal Army and Armed Police Force, Nepal Police, National Investigation Department, as well as all other government offices, courts, local bodies, government academic institutions and public

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10 Id., at 13.

11 For an interesting discussion, see, Jimly Asshiddiqie, The Constitutional Law of Indonesia (Malaysia: Sweet & Maxwell Asia, 2009), at 693.

12 See Constituent Assembly, loc. cit., at 12.
institutions shall be audited by the Federal Audit Commission in the manner
determined by law, with due consideration given to the regularity, economy,
efficiency, effectiveness, and the propriety thereof.\footnote{Id.}

In accordance with the principle of public accountability, I agree with the
Constituent Assembly draft that the Federal Audit Commission shall submit
to the President an annual report on the work the office has performed, and
the President through the Prime Minister shall make arrangements to submit
such reports to the Legislature-Parliament. Our experience in Indonesia is
that the Supreme Audit Board must publish every final result of its audit in
its website, so the public can directly access the final result of its audits.

\section{E. Conclusion}

Transparency institutions are basic constitutional bodies that must be present
in every modern constitution. The Federal Audit Commission is an important
transparency institution that has been regulated in the draft of the new
Constitution of Nepal.

The draft which is prepared by the Constituent Assembly has designed
the existence of a Federal Audit Commission at the central level of
government and the possibility to establish the said institutions at the
regional (province or state) levels. The draft must also, in future, regulate the
type of audit power and authority to be implemented by the Federal Audit
Commission.

To maintain the principle of public accountability, based on Indonesian
experiences, the Federal Audit Commission should also publish its annual
report and the final audit results on its website, so that the public can have
access to them.

\footnote{Id.}
Integration of Combatants, Democratization of the Army and New Constitutionalism in Nepal

Menaka Guruswamy

The Constitution-making process in Nepal is dramatically poised amid uncertainty on many significant issues, while the deadline of 28 May 2010 looms large on the horizon. With a Constitution-making committee, ten subject-matter committees and three procedural committees in place, the process is critical in not just the creation of a new constitution for the country, but also, significant in the context of post-conflict societies committing themselves to democratic constitutionalism.

I. Introduction

Nepal’s twelve-year conflict between the Maoist – People’s Liberation Army and the State (represented in battle by the then Royal Nepal Army) arrived at a precarious peace, culminating in popular elections in early 2008. The People’s Liberation Army (PLA) has been described as one of the largest non-state military formations in the world.¹ At present the PLA is estimated to have a little over 19,600 members eligible for potential or possible

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¹ The main Cantonments are to remain in the following locations: 1. Kailali, 2. Surkhet, 3. Rolpa, 4. Nawalparasi, 5. Chitwan, 6. Sindhuli and 7. Ilam. Three sub-cantonments were to be placed in the periphery of each of these main cantonments.
integration. These members in turn have been organized into divisions, brigades and battalions. The hierarchy of the PLA resembles any other significant standing army. The Nepal Army or the Royal Nepal Army has a strength of about 95,000 soldiers at present. The Royal Nepal Army before the fall of the monarchy owed allegiance to the King of Nepal.

Given the violent conflict that ravaged the country, the issue of integration of armed combatants has become critical in Nepal. The tenuous nature of the peace between former-combatants was in evidence when as recently as in mid-2009, when Prime Minister Pushpa Kamal Dahal-Prachanda of the Maoist Party dismissed the Chief of Army Staff over alleged insubordination. However, this dismissal was reversed by the President Ram Baran Yadav, leading to the Prime Minister resigning, and the other parties in turn forming a new coalition government.

There has been serious formal commitment expressed in various instruments and representations for the integration of eligible armed combatants. Yet, the process has run into serious trouble, both in terms of disagreement with the principal of integration, and dispute over the scale and nature of integration from within the Army. The issue of the reconfiguration of the Royal Nepal Army, into one representative of a multi-ethnic people’s democracy has also posed serious challenges. These have been framed in terms of any character change as either compromising or strengthening national security. Activists have demanded better army-civil relations, and the Maoists characterize the Army as a ‘feudal’ institution unwilling to embrace the values of the new Republic.

This paper first commences with a section each, on the Comprehensive Peace Agreement, the Interim Constitution 2007, and the Draft Provisions of the Committee for the Protection of National Interest. The paper describes relevant portions from each, as they pertain to the theme that is being addressed- integration of the Nepal Army (previously the Royal Nepal Army) and the People’s Liberation Army, along with possibly shaping of a very specific character of the Nepal Army- that of democratic values and a respect for human rights. Section five deals with the political path of the process of integration and rehabilitation, including the Prime Minister’s Action Plan for Integration. And the final section – the conclusion, looks to values from the Comprehensive Peace Agreement, the Interim Constitution,

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2 The specific number of PLA combatants eligible to be in the camps is a matter of some dispute. Allegations have been made that the CPN -Maoist leadership added to the number of combatants in the camps, after peace was arrived at. However, the United Nations Mission in Nepal estimates the number of eligible combatants at around 19602.

II. The Comprehensive Peace Agreement

The Comprehensive Peace Agreement (CPA) was signed between the then Government of Nepal and the CPN (Maoist) on November 21, 2006. This ‘contract for peace’ was meant to signify the end of twelve years of civil war. It was meant to encapsulate the agreement between the Maoists, the Nepal Government and seven major political parties, through meetings, agreements, mutually agreed codes of conduct, representations to the United Nations - essentially a process towards a managed end of hostilities. Significantly, the CPA has a detailed section on ‘Management of Army and Arms.’ It has been noted that all significant peace-building processes have a special purpose-from the signing of understandings to peace accords, to disarm the combatants and government security forces, demilitarize their armies or revolutionary character and structure – and reintegrate them into civil life.3

The CPA is categorical that the ‘democratic restructuring of the army was along with free and fair elections to the Constituent Assembly the most significant commitment necessary. The content of ‘democratic restructuring’ was never quite specified. Through interviews of key decisions makers, the paper will in subsequent sections construct an understanding of what might comprise ‘democratic restructuring’ of the Nepal Army. As the CPA related to the People’s Liberation Army, it draws from the commitment expressed in the letter sent on behalf of the Government of Nepal and the CPN (Maoist) to the United Nations on August 9, 2006.

The CPA had some of the following as its significant ingredients for a managed peace process. The Maoists' Army combatants were to remain within the specific cantonments.4 The UN was expected to verify and monitor these cantonments. After placing the Maoist combatants within the cantonments, all the arms and ammunition except those required for providing security to the cantonments were to be securely stored and the keys to the single lock was to remain with the side concerned.5 The UN was to monitor the process of placing the weapons under the single lock by keeping records and fitting a device along with siren. In case of need to examine the

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3 Bishnu Pathak, Modeling the Integration of the Maoist Combatant: DDR or SSR, Conflict Study Centre, December 14, 2008, p. 3.
4 See supra note 1.
5 Comprehensive Peace Agreement (CPA), Para 4.2.
weapons placed under the single lock, the UN was to do so under the presence of concerned side.

"The issue of security and integration is especially critical in countries that arrive at peace and democracy after intra-nation conflict or internal strife. This is a situation that is different from freedom from colonizers in that the issue of integration of sections of citizens who challenge a certain status-quo through a violent struggle must be carefully thought through in a manner that is sensitive to inclusion, while being committed to stability."

- Menaka Guruswamy  
(at p. 352)

The government of Nepal was to make all the necessary arrangements including ration needed for the Maoist combatants after placing them within the cantonments. The Interim Council of Ministers was to form a special committee in order to inspect, integrate and rehabilitate the Maoist combatants.

Similarly, in the context of the Nepali Army (or the Royal Nepali Army as it was) was, to be confined within the barracks. A guarantee was expected that arms would not be used for or against any side. The Nepali Army was to store the same amount of arms in accordance with that of the Maoists and seal it with single-lock and give the key to the concerned side. In case of need to examine the stored arms, the UN would do so in the presence of the concerned side.

The Council of Ministers would control, mobilise and manage the Nepali Army as per the new Military Act. The Interim Council of Ministers was expected to prepare and implement the detailed action plan of democratisation of the Nepali Army by taking suggestions from the concerned committee of the Interim Parliament. This included tasks such as determining the right number of the Nepali Army, preparing the democratic structure reflecting the national and inclusive character and training them as per democratic principles and values of human rights.

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6 CPA, 4.3.  
7 CPA, 4.4.  
8 CPA, 4.6.  
9 CPA, 4.7.
At the time of the Comprehensive Peace Agreement it was agreed by all sides that the Nepali Army was to continue with fulfilling tasks such as border security, security of the conservation areas, protected areas, banks, airport, power house, telephone tower, central secretariat and security of VIPs.\(^{10}\)

The CPA called for the termination of military action and armed mobilization and affirmed that both sides express a commitment to refrain from carrying out activities including:\(^{11}\) use of any type of weapon or acts of attack against each other, searching or confiscating weapons belonging to other side with or without weapons at the place where the arms have been stored as per the understanding reached between both sides, being involved in murder, detention, imprisonment or violent activities, spying and sabotaging.

Importantly, both sides committed not to recruit additional armed forces or conduct military activities, including transporting weapons, ammunitions and explosives.\(^{12}\) Armies of both sides were not to bear arms or show their presence wearing combat fatigue during any public programme, political meeting or civil assembly.\(^{13}\)

The Nepal Police and Armed Police Force were to give continuity to the task of maintaining the legal system and law and order along with criminal investigation as per the norms and sentiments of the Jana Andolan and peace accord as well as the prevailing law.\(^{14}\) Finally, both sides agreed to maintain a record of the government, public, private building, land and other property seized, locked up or not allowed to use in course of the armed conflict and return them back immediately.\(^{15}\)

III. The Interim Constitution of 2007
The Interim Constitution of Nepal came into force on January 15, 2007. An agreement to have a Constituent Assembly and a new Constitution was one of the results of Jana Andolan II in 2006.\(^{16}\) In principle, the Constituent Assembly can ignore the provisions of the Interim Constitution. However, in reality constitution-making processes elsewhere have shown that interim

\(^{10}\) CPA, 4.8.
\(^{11}\) CPA, 5.0.
\(^{12}\) CPA, 5.1.2.
\(^{13}\) CPA, 5.1.5.
\(^{14}\) CPA, 5.1.6.
\(^{15}\) CPA, 5.1.8.
provisions are often reflected in final versions, or conversely can act as absolute negatives and inspire complete moves away from such values. Either way Interim-Constitutions act as legal sounding-boards for constitutional dialogue. Often Interim Constitutions are much more instruments of compromise, whereas Final Constitutions which come into being post-elections, might well reflect the philosophy of the victorious party or parties. This is especially the case, if there is one party which has an absolute majority.

The Interim Constitution contains in Part 20, “Provisions Regarding the Army”. Article 144 provides for an institution of the Nepal Army, and provides that the Council of Ministers shall appoint the Commander-in-Chief of the Army. The Interim Constitution also provides that the Council of Ministers shall control and manage the Nepal Army, and significantly shall with the consent of ALL political parties and by seeking the advice of the concerned committee of the Legislature, formulate an extensive plan for the ‘democratization of the Nepal Army and implement it’.

The Interim Constitution further provides that the “action plan that the Interim Constitution in 144(3) declares shall include determination of the appropriate number of the Nepal Army, its democratic structure, and national and inclusive character. And further that training shall be imparted to the army in accordance with the norms and values of democracy and human rights.

Finally, the Interim Constitution deals with the establishment of a National Defence Council, which comprises of the Prime Minister, the Defence Minister, the Home Minister and three ministers designated by the Prime Minister. The task of this Council is to provide “recommendations to the Council of Ministers on mobilization, operation and use of the Nepal Army”.

IV. Draft provisions by the National Interest Preservation Committee

The Committee for the Protection of National Interest, one of the ten thematic committees of the Constituent Assembly, has as per Rule 66 of the Constituent Assembly Rules and Legislative Parliament Rules, specified the working areas of the Committee to include; the identification and definition of national interest; measures for constitutional protection of sovereignty,

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17 144 (2) of the Interim Constitution.
18 144 (3) of the Interim Constitution.
19 144 (4) of the Interim Constitution.
integrity and national unity; national security; and duties of the Nepal Army and its operation.

Rule 73 of the Constituent Assembly and Legislative Parliament specifies the preparation of a preliminary draft as one specific function of a thematic committee. This would include a concept paper on the subject of the working areas of the Committee, and the thematic committee is required to submit its report to the Constitutional Committee.

The preliminary draft prepared by the Committee for Preserving the National Interests of the Constituent Assembly of Nepal details the proposed provisions of the constitution along with their ‘possible slot’ in the constitution. On May 25, 2009, the Committee for Preserving the National Interests was the first among the ten thematic committees to present a draft on their respective topics at the Constituent Assembly.

Dissent was registered by seven members on specific portions. The Member from the Nepali Congress objected to the clause that supported the integration of the Maoists People’s Liberations Army’s members into the Nepal Army, as per the Comprehensive Peace Accord. Others objected to conscription.

As per the concept paper of the Committee, seven provisions shall be included under the part on ‘National Security.’ It must be noted that while members of the committee were in agreement over most issues under consideration, few members expressed reservations on the provisions regarding Nepal’s National Army. It will be worthwhile to discuss the provisions intended to be included in ‘National Security’ in detail.

Draft Article 22 deals with the ‘National Defence Council.’ It provides that the National Defence Council shall formulate policies about Nepal’s overall national interests, security, and defence and make recommendations to the Council of Ministers/Head of the Executive on mobilization and management of the Nepal Army. The Council shall be headed by the ‘Head of Executive’ who will be its Chairman and the other members will be the Defence Minister, Home Minister, Foreign Minister, Finance Minister and two ministers from Council of Ministers, nominated by the Head of Executive as per requirement. To oversee the issues of appointment and promotion of Nepal's National Army, the concept paper provides for the constitution of a Military Service Commission.

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21 Concept Paper, § 22 (1)
22 § 22 (1)
23 § 23
The concept paper also has detailed provisions regarding Nepal’s National Army. It calls for the institution of Nepal National Army for safeguarding the sovereignty, integrity, independence and national unity and for national development and construction works.\textsuperscript{24} The constitution of the Nepal Army with a national character is to be in accordance with the proportional, inclusive and democratic principles with the objective of ensuring sustainable peace, political stability, and economic prosperity.\textsuperscript{25}

Importantly, the concept paper talks about the rehabilitation, management and integration of the combatants living in cantonments (People's Liberation Army) and Nepal Army on the basis of the 12-point agreement and the Comprehensive Peace Agreement.\textsuperscript{26} This provision has been severely criticized and there were major differences among members on this issue during the drafting process. The concept paper also provides that the Head of State shall be the Supreme Commander of the Nepal Army\textsuperscript{27} and shall appoint the Commander-in-Chief of the Nepal Army on the recommendation of the Head of the Government/Council of Ministers.\textsuperscript{28} The Head of State is also made responsible to control, mobilize, run and manage the Nepal Army in accordance with the law on the recommendations of the Council of Ministers.\textsuperscript{29} The Commander-in-Chief can be removed by the Council of Ministers in accordance with the appropriate law.\textsuperscript{30}

Finally, the concept paper seeks to ensure accountability of Nepal National Army, paramilitary force, intelligence agencies and police organizations and states that these bodies shall remain accountable to the government.

V. The path towards integration

In his comprehensive paper on integrating Maoists combatants, Bishnu Pathak helpfully documents what he calls the ‘seven school of thoughts’ (Complete, None and Partial) on the integration and rehabilitation of the armies.\textsuperscript{31} He notes that first, the Maoists want integration of the PLA converting the Royal Nepal Army into a National Army. Second, the Nepali Congress being against integration, but want rehabilitation and management...
of the Maoist Army, alleging that the Maoist Party has been working against the peace accord. Third, the Madhesi Janadhikar Forum (MJF - representing the Terai/Madhes) does not favour integration but, only want management of the Maoist combatants.

Fourth, the United Marxist Leninists (UML) wants a partial Maoist army integration into the national army. Fifth, small communist factions have said that there should be neither integration nor rehabilitation if the Maoists seek the People’s Republic, as the Nepal Army is a “bourgeois army”. Sixth, there is neither any proactive role for integration nor is there any interest shown in rehabilitation by civil society stalwarts and institution. Seventh, United Nations Mission in Nepal (UNMIN) wants to extend its role in the integration and rehabilitation process, but hold the SSR (Security Sector Reform) as a small part of the DDR (Disarmament, Demobilization and Reintegration) due to lack of interest in the SSR model. And finally, the security forces particularly the chief of the Nepal army have been against the integration of the Maoist army consistently, but are ready to accept it if the individual candidates meet the criterion of recruitment. Pathak's descriptive analysis is useful in getting a sense of what have been the divergent positions of various influential entities. There has been some change in these positions in the last few months, as the deadline to complete the Draft Constitution rapidly approaches.

In many ways, the Maoists situation is somewhat similar to South Africa (not in this table), where by the African National Congress at the time of the coming into being of a new republic enjoyed large-scale popular support, which was reflected in their representation in the Constituent Assembly.

The integration in South Africa of what were called Non-Statutory Forces (those who resisted apartheid) into the new South African National Defence Force, is considered one of the great success stories of the post-apartheid nation state. The former military, Afrikaner dominated was considered one of the great pillars of the apartheid regime. The ‘non-statutory’ forces were anti-apartheid revolutionary soldiers, trained mainly in foreign countries. These were mainly drawn from the military wing of the ANC- the Umkhonto We Sizwe (MK) and the Azanian People’s Liberation Army (APLA).32

James A Higgs writes that The Interim Constitution provided for a Transitional Executive Council and Sub Council on defence- and these were provided future armed forces.33 The Sub Council drew members from the

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33 Id.
major political players. The Interim Constitution of 1993 allowed all MK and APLA members to register to enter the South African National Defence Force (SANDF) except if they were unhealthy, uninterested or old. Higgs writes about a racial shift that took place in the first three years of the integration process, with the Africans coming to comprise half the army (from one-third), Whites dropping to one-third (from half) and while others comprised the rest.

Issues like ranks and promotions were sorted through by compromise. For instance an MK might rank an individual as a lieutenant Colonel because of his standing in the organization while the statutory forces might assess his experience as that of lieutenant. In compromise, the officer might be given the rank of a major, along with training to bridge any gap.

Prashant Jha observes that “Maoists are stronger than many other parties put together. They have 240 members in the House, a substantial mass base, the PLA and the Young Communist League (YCL), a party organization capable of reconciling internal differences and penetrating across social spheres, a lot of money, and multiple front organizations.” In addition, Jha notes that the Maoists are committed to the idea of ‘democratization of Nepal army’.

In terms integration and rehabilitation, Jha comments that the problem is of ‘timing and nature’. He writes that Non-Maoists insist that “question of the PLA should be settled before the constitution is written, and that is essential to level the playing field.” Jha feels that there is resentment among the Non-Maoists that the Maoists have increased their bargaining strength due to the PLA even as the State is funding it. The Maoists are clear that integration and rehabilitation will happen once the constitution is written or after, and even then it would be unit wise integration, thereby the nature of the “feudal” army will change. Jha suggests that integration and rehabilitation could begin now, but can be completed after the constitution comes into being, but, before the next elections are announced.

Meanwhile the CPN- Maoists also feel that integration is a political question. Barshaman Pun “Ananta”, a Constituent Assembly Member, former PLA Commander and spokesman for the Maoists insists that the terms for integration and rehabilitation must be settled before the constitution is finalized. He felt that details like the number of the combatants to be

34 Prashant Jha, Conflict 2.0 or CPA 2.0, Republica, January 1, 2010.
35 Id.
36 Id.
37 Id.
38 Conversation with the author in Kathmandu on January 19, 2010.
integrated could be decided by the ‘High Level Committee’ consisting of leaders of the three major political parties. But, in essence the question of integration must be settled as per the terms of the Twelve-Point Program, the Comprehensive Peace Agreement and the Interim Constitution. He also added that the feudal nature of the Army must change.

Mr. Pun offered some details on the suggested process, whereby in every cantonment there would be three camps- one for those who wanted to integrate; a second for those who wanted to join politics, or the political process; and a third for those who wished to be rehabilitated – given educational benefits or vocational training.

Some suggest that the integration of PLA combatants should mainly comprise women and marginalized groups. The Maoists have always wanted any plan for reintegration to include space in the command structure of the Nepal Army, unit level entry and possibly gradual merger of the two armies.

More recently the Prime Minister announced the establishment of a Special Committee on the Supervision, Integration and Rehabilitation of (UNMIN Verified) Combatants. He also announced an ‘Action Plan’ would pave the path for integration and rehabilitation within four months. The urgency of the timing is tied both to the term of the UNMIN (extended till April 30, 2010), as well as the final date for completion of the constitution-drafting process (May 28, 2010).

Broadly, such integration and rehabilitation of the eligible combatants would be into three streams- of politics, integration in forces, and rehabilitation per se in the context of education and employment assistance (including vocational training). Combatants will be chosen based on interviews that the committee will conduct in the cantonments. The Prime Minister’s Action Plan considers integration of combatants to include absorption in the Nepal Army, the Armed Police Force, the Nepal Police and the National Investigation Department.

The Action Plan also provides for an UNMIN supervised destruction of weapons of the People’s Liberation Army, and discharge of disqualified combatants from the cantonments. The disqualification process, which is extremely contentious has already been made operational.

Most recently, the Special Committee on Supervision, Integration and Rehabilitation of Combatants (referred henceforth as ‘Special Committee’) is...
reported to have ‘reached an understanding on the modalities of the chain of
command and control of the combatants living in 28 camps.’ 42 Barshaman
Pun “Ananta” one of the members of the eight members of the Special
Committee is reported to have said that the Maoist Combatants would come
under the chain of command and control of the Special Committee, which
will have its separate secretariat to execute decisions on supervision,
rehabilitation and integration. 43 JP Gupta another member of the Special
Committee is reported to have said that a mechanism headed by Nepali
Congress President G.P. Koirala will decide the number of combatants to be
integrated into the national security force.44

Mr. Pun also articulated the CPN – Maoists expectation of the
‘Democratization’ of the Nepal Army.45 He explained that ‘democratization’
would mean that the Nepal Army would be ‘inclusive’ (in the context of
gender, caste and also have a secular character) and would be imparted
training and education in the respect for human rights. Mr. Pun also felt that
democratization warranted a strong defence ministry unlike its state at
present with just twenty-nine staff members, and in general felt that there
must be Security Sector Reform.46

Conclusion

The issue of security and integration is especially critical in countries that
arrive at peace and democracy after intra-nation conflict or internal strife.
This is a situation that is different from freedom from colonizers in that the
issue of integration of sections of citizens who challenge a certain status-quo
through a violent struggle must be carefully thought through in a manner that
is sensitive to inclusion, while being committed to stability. In the case of
Nepal, a detailed pre-interim constitutional framework, culminating in
provisions within a progressive interim constitution provides guidance for
such integration of those who have a challenge, and restructuring those who
have fought a challenge to the status-quo.

42 Arjun Bhandari, Headway Made on PLA Chain of Command, The Himalayan, 19 January,
2010 at page 1
43 Id.
44 Id.
45 Id.
46 Id.
47 Conversation with the author in Kathmandu on 19-1-2010.
Constitutionalism cannot be equated with a constitution. Louis Henkin postulates a seven point template for Contemporary Constitutionalism. These seven points are:

1. Constitutionalism is based on popular sovereignty, i.e. the will of the people is the source of authority and the basis of legitimate government.
2. The government must conform to the constitutional blueprint.
3. Constitutionalism requires an absolute commitment to political democracy even in times of emergency.
4. Limited government, civilian control of the military, police governed by law and judicial control, and an independent judiciary.
5. Constitutionalism requires that individual rights akin to those in the Universal Declarations of Human Rights be guaranteed.
6. Constitutional governance includes institutions to monitor and assure respect for the constitutional blueprint.
7. Right of people to choose, change or terminate their political affiliation.

Constitution-making is a contested terrain. Nepal’s interim constitution marked a definite shift from the erstwhile Monarchy. The Interim Constitution committed the nation to all the above discussed ideals- including those of democracy, universally recognised human rights, accountability of all institutions- including the army, police and judiciary. It contains a right like that against preventive detention, a development which is unique to Nepal in South Asian context. Most importantly, the Interim Constitution places the army under categorical objective civilian control- yet another feature of constitutionalism.

In many ways this is an obvious step after the Comprehensive Peace Agreement, which not only ensures that the two warring entities the Army and the PLA were contained in separate areas, with their arms locked away, put an embargo on recruitment and prohibited all from wearing their weapons or their combat fatigues in public gatherings. But, the CPA goes a step further in mandating that the Interim Council of Ministers were expected to prepare and implement the detailed action plan of democratisation of the Nepali Army by taking suggestions from the concerned committee of the

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Interim Parliament. This included tasks such as determining the right number of the Nepali Army, preparing the democratic structure reflecting the national and inclusive character and training them as per democratic principles and values of human rights. The Interim Constitution reiterates this commitment to democratization of the Army.

Therefore, clearly there is an apriori understanding and commitment made to reconfigure the institution of the Nepal Army. The integration of the Maoist Combatants will only further aid this process of reshaping the character of the Army. Clearly the laying down of weapons by the PLA was premised on an understanding of integration. All transition processes in conflict countries have worked only when there has been meaningful integration and rehabilitation. Peace in Nepal depends on this, and its constitutionalism demands it.

In real terms demands for integration of PLA combatants have only involved between 4000-8000 members. Even if these were integrated as units it is unlikely that these would radically alter the existing army of 95,000 soldiers. In any event integration of combatants would be spread over the Army, the Police, the Military Police and other entities.

Further, demands for democratization of the Army- that includes allegiance to the nation and control by an objective civilian leadership, while strengthening the Defence Ministry are inherently desirable institutional changes. Professionalization of the Armed Forces through training programs for all ranks, established within the country, induction of women and ethnic communities that are under-represented in the forces are also objectives that indicate an institution representative of a diverse constitutional democracy.

South Africa is indeed a good example to learn from. However, South Africa also enabled us to understand that moral legitimacy and credibility is key in bringing peace after conflict and in moving beyond a previous order that meant systemic discrimination. Nelson Mandela bought that moral force to his political leadership. It is important for Nepal’s political parties and forces to leave aside their past mistrust and come together to reach an equitable settlement while integrating and rehabilitating combatants. However, political will is also needed to understand that democratization of all institutions including the Army is imperative in creating the new constitutional democracy that is Nepal.

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48 Conversations with representatives of various political parties, the PLA and the Army.
Achieving Economic Constitutionalism through a New Constitution

Wang Zhenmin

Constitutions were originally created to limit political powers and to regulate behaviours of political institutions and persons. Another very important mission of a constitution is to safeguard human rights. Therefore early constitutions (18th and 19th centuries) were “pure” political law. They had nothing to do with economy. The 1918 Weimar Constitution in Germany for the first time in the world constitutional history introduced economic stipulations. Generally speaking, capitalist constitutions simply provide for private property ownership, without significant stipulations about the economic system. In contrast, socialist constitutions are not only charters for political matters, but also charters for economic affairs.

When we talk about constitutionalism we usually mean that the distribution of governmental powers amongst various branches and levels must be scientific and rational; government behaviours must be subjected to strict supervision and constraints; any government agency or any leader, whether appointed or elected, must be bound by the constitution, must abstain from abuse of power and corruption, must be held accountable to the people, and the basic human rights and freedom must be protected. Constitutionalism and rule of law are inseparable from each other: constitutionalism is necessarily a system under the rule of law, and a government of constitutionalism is necessarily a limited government abiding by the constitution and laws.
Based on this understanding of constitutionalism, economic constitutionalism encompasses: first, what economic freedoms and rights the constitution can provide for the people; second, to what extent may the government intervene into economic affairs, and where the boundary lies of government powers in the economic arena – in other words, how the government re-distributes resources and social wealth amongst members of the society.

The constitution of the People's Republic of China was made by the first National People’s Congress (NPC) in 1954. In 1975, it was completely revised to become the second constitution. Three years later this constitution was re-written, which was then adopted as the 1978 Constitution. In 1980 the Chinese authority decided to establish a high-profile Constitution-Revising Committee with the purpose to thoroughly review the 1978 Constitution and make a new one. After two years’ consultation and deliberation, the new constitution was passed by the Fifth NPC in 1982 which is the current Constitution.

The 1982 Constitution has been amended for four times, in 1988, 1993, 1999 and 2004 respectively. All these changes were related to economic freedoms, especially the constitutional and legal status of private economy. As a socialist constitution, the 1982 constitution and its amendments are not only a document for political affairs, but also an economic document that provides for strong guarantee for economic development and economic justice.

According to many authoritative international and national statistics, China has been the fastest-growing major economy for the past 30 years with an average annual GDP growth rate above 10%. China’s economy is the third largest in the world after the US and Japan with a GDP of US$ 4.6 trillion (2008) when measured in exchange-rate terms. It is the second largest in the world when measured on a purchasing power parity (PPP) basis. China's per capita income has grown at an average annual rate of more than 8% over the last three decades, drastically reducing poverty. China's per capita income was raised from 379 RMB in 1978 to about $3,180, and $5,943 (PPP) in 2008, according to the IMF. China is the third largest imports country next only to the US and Germany in 2008. China already overtook Germany as the world’s largest exporter in 2009 and its share of world exports jumped to almost 10%, up from 3% in 1999.

There are many reasons for such a remarkable economic miracle made by China in the past three decades. One important reason is that the new

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Constitution and its timely amendments have played a very crucial role in the economic development process. We see a successful story of how to achieve economic development through making a new constitutional system, especially new economic constitutionalism.

I. The basic economic system established by the 1982 Constitution
The birth of the People's Republic of China in 1949 was the result of political revolution that aimed to build China into a socialist country. However this new China was not yet socialist in nature. The 1954 Constitution defined the nature of the country as new-democratic one, because it permitted the existence of capitalist ownership and protected private property rights. The life of the 1954 Constitution was very short. In fact it was frozen several years later, especially during the ten-year “Cultural Revolution”.

The “socialist reform” was completed in late 1950s. China was no longer a semi-capitalist country and had become a socialist one since then. But China didn’t change its constitution until 1975 when China decided to make a new constitution, the 1975 Constitution, which announced that China was a pure socialist country. In making the 1975 and 1978 constitutions, all clauses about constitutional protections of private economy in the 1954 Constitution were abolished. One important feature of socialist constitutions is the protection of public ownership, with no permission for any elements of private economy.

During the 1982 Constitution-making process, a main consideration was how to build an economy-friendly constitutional system and establish a rational economic system. In its preamble, the Constitution stipulates that “the basic task of the nation in the years to come is to concentrate its effort on socialist modernization”. There are several aspects of economic system, detailed below.

1. The nature of the economic system in China
Chinese economic system is socialist in nature. As a socialist constitution, Article 1 of the 1982 Constitution provides that:

The People's Republic of China is a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants. The socialist system is the basic system of the People's Republic of China. Sabotage of the socialist system by any organization or individual is prohibited.
Thus the fundamental economic system is based on socialist thoughts and concepts. Constitutionally and legally China is not a communist country, even though the name of the ruling party is Communist Party, and the Charter of the Communist Party does mention the ultimate goal of the Party is to build communism.

2. Socialist public ownership of the means of production and distribution principles

Article 6 stipulates that “The basis of the socialist economic system of the People's Republic of China is socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people.

Article 6 also provides for the distribution principles: the system of socialist public ownership supersedes the system of exploitation of man by man; it applies the principle of “from each according to his ability, to each according to his work.”

There are two forms of socialist public ownership. First, ownership by the whole people: Article 7 says that “The state economy is the sector of socialist economy under ownership by the whole people; it is the leading force in the national economy. The state ensures the consolidation and growth of the state economy”. Secondly collective ownership by the working people: Article 8 provides that “Rural people's communes, agricultural producers' co-operatives, and other forms of cooperative economy such as producers' supply and marketing, credit and consumers co-operatives, belong to the sector of socialist economy under collective ownership by the working people. Working people who are members of rural economic collectives have the right, within the limits prescribed by law, to farm private plots of cropland and hilly land, engage in household sideline production and raise privately owned livestock. The various forms of co-operative economy in the cities and towns, such as those in the handicraft, industrial, building, transport, commercial and service trades, all belong to the sector of socialist economy under collective ownership by the working people. The state protects the lawful rights and interests of the urban and rural economic collectives and encourages, guides and helps the growth of the collective economy.”

The 1982 Constitution permits the individual economy of urban and rural working people, but it is only a complement to the socialist public economy. The official policy towards individual economy is that the state protects the
lawful rights and interests of the individual economy. The state guides, helps and supervises the individual economy by exercising administrative control.

Although the 1982 Constitution did not permit Chinese citizens to run private companies, it permits foreign enterprises, other foreign economic organizations and individual foreigners to invest in China and to enter into various forms of economic co-operation with Chinese enterprises and other economic organizations in accordance with Chinese law. All foreign enterprises and other foreign economic organizations in China, as well as joint ventures with Chinese and foreign investment located in China, shall abide by the law of the People's Republic of China. Their lawful rights and interests are protected by the law of the People's Republic of China. (Article 18)

3. Property rights

According to Article 9, mineral resources, waters, forests, mountains, grassland, unreclaimed land, beaches and other natural resources are owned by the state, that is, by the whole people, with the exception of the forests, mountains, grassland, unreclaimed land and beaches that are owned by collectives in accordance with the law. The state ensures the rational use of natural resources and protects rare animals and plants. The appropriation or damage of natural resources by any organization or individual by whatever means is prohibited. This is very important for the state to maintain economic stability.

Also very importantly, land in the cities is owned by the state. Land in the rural and suburban areas is owned by collectives except for those portions which belong to the state in accordance with the law; house sites and private plots of cropland and hilly land are also owned by collectives. The state may in the public interest take over land for its use in accordance with the law. No organization or individual may appropriate, buy, sell or lease land, or unlawfully transfer land in other ways. All organizations and individuals who use land must make rational use of the land. (Article 10)

The 1982 Constitution emphasizes that socialist public property is sacred and inviolable (Article 12). The state protects socialist public property. Appropriation or damage of state or collective property by any organization or individual by whatever means is strictly prohibited.

As for the private ownership, Article 13 stipulates that “The state protects the right of citizens to own lawfully earned income, savings, houses and other lawful property. The state protects by law the right of citizens to inherit private property”. Therefore according to the 1982 Constitution, citizens cannot have “large” property such as factories or companies.
4. Management of economic affairs
According to the 1982 Constitution, China practices economic planning on the basis of socialist public ownership. It ensures the proportionate and co-coordinated growth of the national economy through overall balancing by economic planning and the supplementary role of regulation by the market. Disturbance of the orderly functioning of the social economy or disruption of the state economic plan by any organization or individual is legally prohibited. China practiced very strict economic planning for many years.

Capitalist constitutions do not mention how to manage the economy. In this aspect, Chinese Constitution has very detailed provisions. For example, Article 14 says “The state continuously raises labour productivity, improves economic results and develops the productive forces by enhancing the enthusiasm of the working people, raising the level of their technical skill, disseminating advanced science and technology, improving the systems of economic administration and enterprise operation and management, instituting the socialist system of responsibility in various forms and improving organization of work. The state practices strict economy and combats waste. The state properly apportions accumulation and consumption, pays attention to the interests of the collective and the individual as well as of the state and, on the basis of expanded production, gradually improves the material and cultural life of the people”.

The Constitution also provides that State enterprises have decision-making power in operation and management within the limits prescribed by law, on condition that they submit to unified leadership by the state and fulfill all their obligations under the state plan. State enterprises practice democratic management through congresses of workers and staff and in other ways in accordance with the law.

Collective economic organizations also enjoy decision-making power in conducting independent economic activities, on condition that they accept the guidance of the state plan and abide by the relevant laws. Collective economic organizations practice democratic management in accordance with the law, with the entire body of their workers electing or removing their managerial personnel and deciding on major issues concerning operation and management.

5. Economic freedoms and rights
The 1982 Constitution provides for a wide range of freedoms and rights related to economic affairs.
All citizens are equal before the law. Every citizen enjoys the rights and at the same time must perform the duties prescribed by the Constitution and the law. (Article 33)

The freedom of person of citizens is inviolable. No citizen may be arrested except with the approval or by decision of a people's procuratorate or by decision of a people's court, and arrests must be made by a public security organ. Unlawful deprivation or restriction of citizens' freedom of person by detention or other means is prohibited; and unlawful search of the person of citizens is prohibited. (Article 37)

The personal dignity of citizens is inviolable. Insult, libel, false charge or frame-up directed against citizens by any means is prohibited. (Article 38)

The home of citizens is inviolable. Unlawful search of, or intrusion into, a citizen's home is prohibited. (Article 39)

The freedom and privacy of correspondence of citizens are protected by law. (Article 40)

Citizens have the right as well as the duty to work. Using various channels, the state creates conditions for employment, strengthens labour protection, improves working conditions and, on the basis of expanded production, increases remuneration for work and social benefits. Work is the glorious duty of every able-bodied citizen. All working people in state enterprises and in urban and rural economic collectives should perform their tasks with an attitude consonant with their status as masters of the country. The state promotes socialist labour emulation, and commends and rewards model and advanced workers. The state encourages citizens to take part in voluntary labour. The state provides necessary vocational training to citizens before they are employed. (Article 42)

Working people in the People's Republic of China have the right to rest. (Article 43)

The state prescribes by law the system of retirement for workers and staff in enterprises and undertakings and for functionaries of organs of state. The livelihood of retired personnel is ensured by the state and society. (Article 44) Citizens have the right to material assistance from the state and society when they are old, ill or disabled. (Article 45) Citizens have the duty as well as the right to receive education. (Article 46)

Citizens have the freedom to engage in scientific research, literary and artistic creation and other cultural pursuits. The state encourages and assists creative endeavours conducive to the interests of the people made by citizens
engaged in education, science, technology, literature, art and other cultural work. (Article 47)

It is the duty of citizens to pay taxes in accordance with the law. (Article 56)

The exercise by citizens of their freedoms and rights may not infringe upon the interests of the state, of society and of the collective, or upon the lawful freedoms and rights of other citizens. (Article 51) This is the general principle for citizens to exercise their rights and freedoms.

II. Economic reforms and constitutional amendments in 1988, 1993 and 1999

The current Constitution was made in 1982. The large-scale and wide-ranging economic reforms were just at the beginning stage at that time. There were various restrictions. For example the 1982 Constitution didn’t permit citizens to own and run private companies, even it did permit foreign citizens to do so in China. China was still practicing a planned economy. Those constitutional clauses became obstacles to economic reform. Since 1988 China has for four times made constitutional amendments with an aim to further liberalize its economy and give more economic freedoms to citizens.

1. The 1988 constitutional amendments

On April 12, 1988 the 7th NPC made two constitutional amendments. The first Chinese constitutional amendment concerns private economy. It reads:

"The State permits the private sector of the economy to exist and develop within the limits prescribed by law. The private sector of the economy is a complement to the socialist public economy. The State protects the lawful rights and interests of the private sector of the economy, and exercises guidance, supervision and control over the private sector of the economy."

Since then to own and run private companies is no longer a crime. Some citizens were put in jail before 1988 simply because the person owned and ran a factory that employed 7 or more workers. If private business owners only had 6 or fewer helpers, that was fine because it would fall under the “individual economy” classification protected by Article 11 of the 1982 Constitution. Therefore the first constitutional amendment decriminalized private economy. This left the door wide open for the development of market economy.

The second amendment also relates to economic development. Article 10 which provides that "no organization or individual may appropriate, buy, sell or lease land or otherwise engage in the transfer of land by unlawful means"
was amended as "no organization or individual may appropriate, buy, sell or otherwise engage in the transfer of land by unlawful means. The right to the use of land may be transferred according to law." This lay down a sound constitutional foundation for the development of the real estate industry.

2. The 1993 constitutional amendments
On March 29, 1993, the 8th NPC made more amendments to the 1982 Constitution. Important changes are as follows:

The 3rd constitutional amendment states that “China is at the primary stage of socialism” and introduces “the theory of building socialism with Chinese characteristics”. This explains why private economy is permitted in China and what the rational is.

The 5th amendment changed the "The State economy” into "The State-owned economy”. This paves the way for private sectors to manage state-owned enterprises.

The 7th amendment is fundamental. Article 15 which reads “The State practices economic planning on the basis of socialist public ownership. It ensures the proportionate and coordinated growth of the national economy through overall balancing by economic planning and the supplementary role of regulation by the market. Disturbance of the orderly functioning of the social economy or disruption of the State economic plan by any organization or individual is prohibited,” was changed to:

"The state has put into practice a socialist market economy. The State strengthens formulating economic laws, improves macro adjustment and control and forbids according to law any units or individuals from interfering with the social economic order."

According to this constitutional amendment, the economy in China was no longer a planned economy but a market-orientated one, even though many Western countries still do not recognize the market economy status for China.

3. The 1999 constitutional amendments
On March 15, 1999, China for the third time made constitutional changes. 7 amendments were passed. Important changes on economic system include:

1) Deng Xiaoping Theory was incorporated into the Constitution as the State guidance together with Marxism-Leninism and Mao Zedong Thought.
2) China will stay in the primary stage of socialism for a long period of time.

3) Rule of law was introduced. Article 5 is added "The People's Republic of China practices ruling the country in accordance with the law and building a socialist country under rule of law."

4) The original text of Article 6 is "The basis of the socialist economic system of the People's Republic of China is socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people." "The system of socialist public ownership supersedes the system of exploitation of man by man; it applies the principle of 'from each according to his ability, to each according to his work'." It is revised into:

"The basis of the socialist economic system of the People's Republic of China is socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people. The system of socialist public ownership supersedes the system of exploitation of man by man; it applies the principle of 'from each according to his ability, to each according to his work'." "During the primary stage of socialism, the State adheres to the basic economic system with the public ownership remaining dominant and diverse sectors of the economy developing side by side, and to the distribution system with the distribution according to work remaining dominant and the coexistence of a variety of modes of distribution."

5) The original text of Article 11 is: "The individual economy of urban and rural working people, operating within the limits prescribed by law, is a complement to the socialist public economy. The State protects the lawful rights and interests of the individual economy." "The State guides, helps and supervises the individual economy by exercising administrative control." "The State permits the private economy to exist and develop within the limits prescribed by law. The private economy is a complement to the socialist public economy. The State protects the lawful rights and interests of the private economy, and guides, supervises and administers the private economy." It is revised into:

"Individual, private and other non-public economies that exist within the limits prescribed by law are major components of the socialist market economy." "The State protects the lawful rights and interests of individual
and private economies, and guides, supervises and administers individual and private economies."

From these constitutional changes, we can see the status of the non-public economy was substantially raised.

III. The 2004 constitutional amendments

On March 14, 2004, for the fourth time China made changes to the 1982 Constitution. The 2004 constitutional amendments are more significant compared with the previous revisions.

1. From “socialism with Chinese characteristics” to “Chinese-style socialism"

"... along the road of building socialism with Chinese characteristics..." was revised to "... along the road of Chinese-style socialism..." This change means the socialism in China is made in China, not imported from any other country or copied from textbooks. The development model in China is Chinese in nature, not capitalist, nor traditional socialist. History proved that both capitalist or traditional socialist models have their merits and demerits. China recognizes the value of both systems. But how China develops shall be based on Chinese circumstances and current world situations. China will not transplant economic systems from any other countries.

2. The important thought of “Three Represents”

"...under the guidance of Marxism-Leninism, Mao Zedong Thought and Deng Xiaoping Theory..." was revised to "...under the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thought of 'Three Represents'..."

Since 1988 when the first constitutional amendment gives green light to private economy, the private sectors have achieved substantial development. In many coastal provinces, private sectors already dominate the local economy. But according to the Constitution, China is a country for workers and farmers, not private sectors. The Chinese government constitutionally did not represent non-public sectors. "Three Represents" mean that the Party and State (Government) must always represent the development trend of China's advanced productive forces, the orientation of China's advanced culture and the fundamental interests of the overwhelming majority of the Chinese people. This means the Chinese Communist Party and the Government shall also represent
private sectors. According to this amendment, China is not only a country for workers and farmers, but also a country for the new private sectors. This is the crystallization of the Party’s collective wisdom and a guiding ideology the Party and the Government must follow for a long time to come. The following amendments are also related to the constitutional status of private economy.

3. **State compensation for the land expropriated or requisitioned**

   Article 10: "The State may, in the public interest, requisition land for its use in accordance with the law." was revised to:

   "The State may, in the public interest and in accordance with the provisions of law, expropriate or requisition land for its use and shall make compensation for the land expropriated or requisitioned."

4. **Protection of lawful rights and interests of the non-public sectors**

   Article 11: "The State protects the lawful rights and interests of the individual and private sectors of the economy, and exercises guidance, supervision and control over individual and the private sectors of the economy." was revised to:

   "The State protects the lawful rights and interests of the non-public sectors of the economy such as the individual and private sectors of the economy. The State encourages, supports and guides the development of the non-public sectors of the economy and, in accordance with law, exercises supervision and control over the non-public sectors of the economy."

5. **Citizens' lawful private property is inviolable**

   Article 13: "The State protects the right of citizens to own lawfully earned income, savings, houses and other lawful property" and "The State protects according to law the right of citizens to inherit private property" was revised to:

   "Citizens' lawful private property is inviolable" and "The State, in accordance with law, protects the rights of citizens to private property and to its inheritance" and "The State may, in the public interest and in accordance with law, expropriate or requisition private property for its use and shall make compensation for the private property expropriated or requisitioned."
For the first time, a socialist constitution provides for the protection of private property.

6. Social security system
   Article 14 is added: "The State establishes a sound social security system compatible with the level of economic development."

7. The State respects and preserves human rights
   Article 33 is added: "The State respects and preserves human rights." Again this is very fundamental. Chinese Constitution formally recognizes the values of human rights. China is taking actual measures to improve human rights protection.

IV. Conclusion
Today when we look at the Chinese constitutional law, we should read not only its original text, but also the four-time amendments since 1988. Constitutional text and the 31 constitutional amendments are indispensable components of Chinese constitutional law. The 1982 Constitution and the constitutional amendments lay a solid constitutional and political foundation for China’s economic reforms. The credit for China’s economic miracle should also go to these constitutional amendments. As a developing country, the China story might be of interest to the on-going constitution-making in Nepal.

1. The constitutional and economic reforms should be coordinated in a gradual and orderly manner. It took many years for China to recognize and accept the concepts of private economy, market economy, private property rights, human rights and rule of law, among other ideas. We do not need to make a perfect constitutional document before we exercise constitutionalism and conduct reform programs. Actually there is no perfect constitution in the world. Constitutional development is a never-ending process.

2. Secondly the constitution should be based on the history and actual situation of the particular country. One country can draw experiences from other countries, but it is impossible to completely transplant a constitutional system from a foreign country. Even if technically it can be done, this is detrimental to the interests of the people of the country.

3. To achieve national modernization, experiences have shown that democracy alone is insufficient; there must be constitutionalism and
rule of law. The presence or absence of constitutionalism and/or rule of law is crucial to the success or failure of democracy. The development of democracy and constitutionalism can be categorized into two models: the success of British-American model lies in the establishment of constitutionalism and rule of law in the first place, followed by democracy under a ready and stable constitutional and legal framework. The French model aims to introduce full democracy first and to establish constitutionalism/rule of law later. Thus the French people paid much more heavy price in order to achieve a manageable democratic constitutionalism. Emphasizing constitutionalism does not mean that we may ignore the development of democracy. We shall at the same time continue to gradually expand democracy. For countries like Nepal and China, the best political system might be the combination of both constitutionalism/rule of law and democracy. This is the ultimate goal.

4. The past and current financial crises proved that free market economy is not omnipotent. And the government involvement and re-distribution of resources and social wealth are not always terrible ideas. Early constitutions in Western countries established a complete free market economy system, which were very suspicious and hostile toward any government involvement. Given the current world situations, it is very important for governments to intervene into economic affairs. Therefore a 21st century constitution should give the government reasonable powers to regulate the market economy and allocate crucial resources. This has nothing to do with ideology. It is a matter of science.

5. There are a couple of other important issues that Nepal might consider at this stage. International treaty can be negotiated and signed by the executive branch. But in order to protect national economic interest, it is very important that all treaties must be submitted to the national parliament for final approval, and then to the head of state for final signature. As to the energy requirements, which I think is a major economic issue, it is very important to guarantee the state ownership of natural resources. The new constitution should have stipulations on how to manage emergency situation in the context of internal crisis management, such as separatist movement. The government should be granted special powers (the use of armed forces etc) once such crisis occurs. The constitution should give necessary power to the government to exercise control over critical infrastructures during emergency. Diversification of international trade may also be accepted as a
constitutional policy. The policies of free trade and moderate government interference should be integrated.

6. I think the most pressing issue is to establish rule of law and strong government. Rule of law is as important as democracy to countries like Nepal, however at this stage rule of law should be the priority on the agenda.

7. I don't think federalism is appropriate for countries like Nepal. Economically federalism is very costly because there are too many officials and too many governments. Most countries naturally tend to be unitary ones, and federalism is only exceptional. For example the US had to be a federal country from the beginning. When we look at the US politics today, on many issues the US actually practices strict unitary system such as military and foreign affairs. It seems more and more powers and functions go to Washington DC. My observation is that the US is a federal and unitary country today, no longer a pure federalist country. Unitary system is much more efficient and effective economically and politically accordingly to Chinese experience. Of course for special regions like Hong Kong, we do introduce some federal elements, even super-federalism. Hong Kong enjoys many more autonomous powers which the US states do not enjoy.

We can say today the distinction between federalism and unitary system is not as big and crucial as they used to be. Most importantly any system eventually adopted by a country must be good to settle the special problems of that country. If this system cannot settle the special problems of that country, even if it looks very beautiful and is practiced by many countries, I do not think it is a good idea to adopt such system. In summary, the question - whether a country should adopt unitary or federalist system, should be based on the special historical and social situations of that country, and should be decided by the people and government of that country.

As Daniel Webster once said, “One country, one Constitution, one destiny.” To a great extent, the nature of a country’s constitution determines the destiny of a country. I am sure the Nepalese people have the wisdom to make an excellent constitution for their country.

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Nepal is drafting its new constitution. It will become evident why this paper has been given this title even though my intention is to review the various issues on the international stage that have relevance and significance to Nepal in this regard.

It is very coincidental that quite recently I was approached by a few of my friends to stand as a Parliamentary Candidate in the area where I live in forthcoming General Election that has to take place by June of this year in the United Kingdom. Our present Member of Parliament is choosing to stand down and therefore a vacancy will exist and it is well known that I have worked closely with her on number of very serious legal issues and brought issues regarding Nepal and other States’ to her attention for notification to our Foreign Office.

I queried them as to why and they stated that I knew and understood the legal system and government structure and the value and benefit of politics both on the local, national and the international stages more especially the European Union and understand the importance of human rights. As President Ram Baran Yadav stated at the opening of this conference to assist in the making of the constitution makes its politicians know about their country and its basic laws. The same is not true of politicians in my country or others.
Reason, Passion and the position of Politics

Nevertheless, I welcome this opportunity to add my contribution to the others being made during this conference but please do not expect negativity from me as I firmly believe Nepal has an opportunity that it should grasp. Winston Churchill (1874-1965), the former English Prime Minister, once remarked, ‘What is the use of living, if it be not to strive for noble causes and to make this muddled world a better place for those who will live in it after we are gone’ 1 The noble cause in this instance is the achievement of an agreement to introduce a new constitution. It would be true to say that the international community also wishes to see this resolution as whilst Nepal is in a state of limbo, so, it should be noted, is the international community as the presence of the United Nations and visits by representatives from the European Union indicate.

The present forms of impasse in Nepal are totally understandable and these have been seen in other countries not least in part of my own home namely in Northern Ireland. Indeed even they have not fully resolved their difficulties but the political parties there are still committed and have found a political accord that allows that country to function. Nevertheless, there are still some who attempt by violent means to upset that peace process. The previous terrorist groups have now found that it is in the interest of them and their country to reason, re-direct their passion and use politics for the good of Northern Ireland. Terrorism had been a destructive force for in excess of three decades which caused the deaths of thousands of people. Mainland UK had not been isolated from that political unrest. Even as this paper is being written there is still political unrest.

International Law has long since changed its shape and form. In its infancy it was to justify the use of force and this is still epitomised by the presence of Article 51 within the United Nations Charter.2 International law has now become the setter of behaviour norms for the international community. Sadly, and thankfully on only a few occasions, the international community has had to respond to severe issues within States2 with the setting up of an Institution to reconcile these problems and the establishment of the International Criminal Court in the Hague, Netherlands through the Rome Treaty3 is a sad reminder of events that all had hoped and believed had disappeared.

2 It reads - Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations,
Conflicts will always exist but it would be unfair for me to comment on these as it would be less than helpful save to say that International Law has attempted to set down standards of behaviour which States’ have incorporated in to their legal systems admittedly with some difficulty and the latest is the inclusion of Human Rights and Fundamental Freedoms. Many commentators remark that until the inclusion of Human Rights legislation within the UK legal system there was never a true separation of powers and I agree with this and it is this area that I will concentrate in greater detail later in this work and I believe it is a key to peace and stability when it is incorporated in to a constitutional structure.

I believe that the present political parties in Nepal have seen the reason to work together and with the passion that they have with this opportunity for a better Nepal they can now harness their brand of politics to this end. Some believe that ‘it is premature to forecast how smooth or fragile the transition of Nepal from a dictatorial monarchy to a federal republican state will be, until the Constitutional Assembly succeeds in promulgating a new constitution satisfactory to all the interest groups.’ That said the news that I became aware of via the internet on 10th January that the political party leaders at least have seen the reality of consensus and coordination suggests that nothing is stalled even though it is suggested that it is outside of the set framework.

The German philosopher, Georg Hegel, remarked, ‘What experience and history teaches us is that people and governments have never learned anything from history, or acted on principles deduced from it’ I do not subscribe to this more especially as it really referred to a Europe of the 18th to the early 20th centuries past but it is a sobering thought that conflict is easier than the maintenance of Peace. Rather I follow the thinking in Swami Rama’s statement that the ‘wise long for a state of tranquillity.’

**Bullet or ballot**

The history of Nepal since the late 1950s would make many believe that stability cannot be achieved by politics alone. Indeed the bullet has featured to a great extent in the recent period for Nepal but this has been recognised by the Nepalese people and more especially by the political parties

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4 ‘Do some forms of democracy consolidate more easily than others?’ and was financed by NWO - Organization Social Sciences Research Council, the Netherlands
5 German Philosopher and Inventor, 1770-1931
6 Swami Rama (1925 – 1996)
themselves. It should, if not must, be understood that political tensions in times such as these run high and misunderstandings and mistrust can distort the genuine and practical endeavours of those who wish to reach a solution. The necessity for clarity and transparency in discussions and decision making should be uppermost in the minds of the political parties to facilitate the work of the Constitutional Assembly.

Anyone who has reviewed the Interim Constitution of Nepal 2063 [2007] cannot but be impressed by it provisions. They are comprehensive, precise and with the inclusion of the core objective of human rights from the Universal Declaration of Human Rights of 19487 the real equality for the citizens of Nepal is provided. Human Rights are becoming a key stone in international law and in this instance forms a bridge between what this proposed Constitution is intended to achieve than what its 1990 predecessor was unable to do. As Barack Obama quite rightly states, ‘If you're walking down the right path and you're willing to keep walking, eventually you'll make progress.

The Council of Europe recently announced on their web site8 ‘The Russian Federation is key to building Europe’s future," the Secretary General declared after his meeting with President Dmitry Medvedev in Moscow on 23 December. The President confirmed Russia’s wish to strengthen its engagement within the Council of Europe and its commitment to enhance respect for human rights across the European continent. The Secretary General welcomed the signal given by the President of the State Duma, Boris Gryzlov that the Duma will resume the process to ratify Protocol No. 14 to the European Convention on Human Rights in January 2010. Russian ratification of the protocol would clear the way for much needed reform of the European Court of Human Rights.

This is a major step for the Russian Federation but it underlines that the inclusion of Human Rights within a Constitution is a must for the international community rather than an option. Sadly the events of the break up of the former Yugoslavia still resonate and a brief reminder will help to appreciate the sensitivities and as many will recall events in this area resulted in the international community setting up a Tribunal in the Hague to deal with what we now refer to as ‘crimes against humanity’.

7 Preamble - Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
8 Russia and Council of Europe share common ground and future vision http://www.coe.int/ - accessed 11/01/2010
Yugoslavia

Yugoslavia was first formed as a kingdom in 1918 and then recreated as a Socialist state in 1945 after the Axis powers were defeated in World War II.

The constitution established six constituent republics in the federation: Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia. Serbia also had two autonomous provinces: Kosovo and Vojvodina. By 1992 the Yugoslav Federation was falling apart. Nationalism had once again replaced communism as the dominant force in the Balkans. A further conflict had broken out in Bosnia, which had also declared independence. The Serbs who lived there were determined to remain within Yugoslavia and to help build a greater Serbia.

They received strong backing from extremist groups in Belgrade. Muslims were driven from their homes in carefully planned operations that become known as "ethnic cleansing".

It is this last phrase ‘ethnic cleansing’ that now drives us all to ensure that any grouping within any State that is identifiable as against others within the same State and which the International community refers to as Indigenous should and must be protected. Indeed the European Union responded to the events in the Former Yugoslavia by requiring any State wishing to apply for Membership of it from that region had to adopt democracy as its form of government, adopt the European Convention on Human Rights and Fundamental Freedoms and to protect any ethnic groupings within their State.

Indigenous groups

The following is an extract from the Peoples Movement for Human Rights Education web site [PDHRE] and I have included this to provide a better overview than I could. It underlines the sensitivity of indigenous groups throughout the International community.9

What are the human rights of indigenous peoples?

Human Rights are universal, and civil, political, economic, social and cultural rights belong to all human beings, including indigenous people. Every indigenous woman, man, youth and child is entitled to the realization of all human rights and fundamental freedoms on equal terms with others in

9 http://www.pdhre.org/rights/indigenous.html - accessed 11.01.10
society, without discrimination of any kind. Indigenous people and peoples also enjoy certain human rights specifically linked to their identity, including rights to maintain and enjoy their culture and language free from discrimination, rights of access to ancestral lands and land relied upon for subsistence, rights to decide their own patterns of development, and rights to autonomy over indigenous affairs.

The human rights at issue

The human rights of indigenous people and peoples are explicitly set out in the ILO Indigenous and Tribal Peoples Convention (No. 169), the Universal Declaration of Human Rights, the International Covenants, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, and other widely adhered to international human rights treaties and declarations. They include the following indivisible, interdependent and interrelated human rights:

The human right to freedom from any distinction, exclusion, restriction or preference based on their indigenous status which has the purpose or effect of impairing the enjoyment of human rights and fundamental freedoms.

The human right to freedom from discrimination in access to housing, education, social services, health care or employment.

The human right to equal recognition as a person before the law, to equality before the courts, and to equal protection of the law.

The human right of indigenous peoples to exist.

The human right to freedom from genocide and 'ethnic cleansing'.

The human right to livelihood and work which is freely chosen, and to subsistence and access to land to which they have traditionally had access and relied upon for subsistence.

The human right to maintain their distinctive spiritual and material relationship with the lands, to own land individually and in community with others, and to transfer land rights according to their own customs.

The human right to use, manage and safeguard the natural resources pertaining to their lands.

The human right to freedom of association.

The human right to enjoy and develop their own culture and language.
The human right to establish and maintain their own schools and other training and educational institutions, and to teach and receive training in their own languages.

The human right to full and effective participation in shaping decisions and policies concerning their group and community, at the local, national and international levels, including policies relating to economic and social development.

The human right to self-determination and autonomy over all matters internal to the group, including in the fields of culture, religion, and local government.

It is perhaps a coincidence that that On September 13, 2007 the UN General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples.

When revisiting the Constitution 2063 [2007] it can be seen that the issues outlined by PDHRE have been addressed.

**Separation of powers**

The proposed constitution clearly adheres to the doctrine of the separation of powers which for the United Kingdom had not truly been a feature of our constitution until we adopted the European Convention on Human Rights and Fundamental Freedoms of 1951. Even we failed to give it the force of law until we introduced our Human Rights Act 1998. Since then many changes have occurred to give the State a more modern outlook on citizens’ rights.

The establishment of the Supreme Court in the United Kingdom was the final issue to be dealt with regarding our separation of powers. Indeed the web site for the court sets out its vision in very clear terms:\(^{10}\)

‘Courts are the final arbiter between the citizen and the state, and are therefore a fundamental pillar of the constitution.

The Supreme Court has been established to achieve a complete separation between the United Kingdom’s senior Judges and the Upper House of Parliament, emphasising the independence of the Law Lords and increasing the transparency between Parliament and the courts.

\(^{10}\) [http://www.supremecourt.gov.uk](http://www.supremecourt.gov.uk) – accessed 11/01/2010
In August 2009 the Justices moved out of the House of Lords (where they sat as the Appellate Committee of the House of Lords) into their own building. It will sit for the first time as a Supreme Court in October 2009.

The impact of Supreme Court decisions will extend far beyond the parties involved in any given case, shaping our society, and directly affecting our everyday lives.’

The introduction of a Supreme Court for the United Kingdom provides greater clarity in our constitutional arrangements by further separating the judiciary from the legislature. It has assumed the jurisdiction of the Appellate Committee of the House of Lords and the devolution jurisdiction of the Judicial Committee of the Privy Council. It is an independent institution, presided over by twelve independently appointed judges, known as Justices of the Supreme Court.

Even so all law students in many parts of the world will have been introduced to Albert V Dicey11 who is credited with providing the logical foundation upon which the modern notion of the rule of law is based. He laid out his three principles of the rule of law in An Introduction to the Study of the Law of the Constitution (often abbreviated as Law of the Constitution 1885):

- everyone is equal before the law
- no one can be punished unless they are in clear breach of the law
- there is no set of laws which are above the courts.

The proposed Constitution 2063 [2007] takes these issues in to account in an appropriate fashion.

**Forms of government**

Provided that there is a clear respect that the powers within a State namely Executive, Legislative and Judicial should be separate and used by the different institutions independently and impartially then the form of government is a matter for the Constitutional Document.

The Constitution suggests that a Federal Structure is a requirement when a fuller reading of it also implies a Unitary State. In both instances there is a devolvement of responsibility to the various regional and local bodies but power remains at the centre with the Parliament.

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11 Albert Venn Dicey (February 4, 1835 – April 7, 1922) was a British jurist and constitutional theorist. The principles it expounds are considered part of the uncodified British constitution.
The reluctance by some that Federalism is a step too far insofar as it grants powers to the local and regional bodies that cannot be easily changed may be a step too far at this stage is an understandable belief. If the Constitutional Assembly sets down clear and transparent rules and procedures with the appropriate checks and balances that follow the Rule of Law and provided that an appropriate budget is set aside for its purposes then the local or regional organisations are more than likely to wish to take up the challenge with the right level of commitment.

I have had the opportunity of reviewing a presentation by Sujit Choudhry of the Faculty of Law, University of Toronto which was dated the April 2007\(^{12}\) and I think this is a clear exposition of the type of Constitutions that exist and work throughout the International community. As is clear from it there are no simple solutions. What exists within Nepal at this time in terms of local and regional institutions can form the basic framework from which changes can be made. What is concluded in the presentation is:-

- federalism cannot guarantee democracy or good governance any more than unitary government can
- federalism not inherently superior form of democracy

It would be true to say that my experience of Federalism is very limited and is more as to a Unitary State, namely the United Kingdom. We have decentralized two significant regional bodies - the Welsh Assembly and the Scottish Parliament and it must be said that the electorate in both areas were less than enthusiastic when asked to vote in a referendum but now and since they have been functioning successfully for a number of years everyone is more than satisfied.

**Further issues of concern**

I also want to comment on a number of other major issues that are of serious concern to Nepal. I will deal with these issues individually under separate headings. Every country has sovereign powers in reference to them under international law. However, while I deal with them, the standpoint in relation to them will be that as a UK national with experience of the UK Constitution but some attention will be given to how some other democracies view and deal with issues via their Constitutions.

The issues are as follows

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\(^{12}\) Federalism: An Overview – assisted by George Anderson, Forum of Federations; Professor Yash Ghai, UNDP; Dr. Jill Cottrell, UNDP; Sheri Meyerhoffer, CBA
1. Treaty Ratification processes under the draft constitution
2. Management of a Standing Army
3. International border management
4. Immigration policies
5. Emergency powers in the event of a national emergency

The thematic report of Nepal's Constituent Assembly Committee on Preservation of National Interest has tried to cover the first three issues, and the fifth issue has been covered by the report of the Constitutional Committee. I am not aware of any committee report dealing with the requirements of immigration policy so far. It is certainly one of the leading issues which have implications for Nepal's national interest.

1. Treaty ratification processes

Some basic information is included here to enable non-lawyers to have a better appreciation of the issues.

A treaty is an agreement under international law entered into by States which are principally Sovereign States but in more recent times international organisations that are recognised by the United Nations are included and given powers to enter into Treaty obligations and one of the oldest being the International Red Cross and Red Crescent. Many will be more conversant with the European Union which is an International Organisation that is recognised by the United Nations but which has a representation there even though it has no voting rights in the General Assembly.

A treaty may also be known as an:-

1. International agreement,
2. Protocol,
3. Covenant,
4. Convention
5. Exchange of letters.

Regardless of which term is used all are international agreements under international law and have equal status to treaties and the rules affecting them are the same.

The Vienna Convention on the Law of Treaties 1969 has codified the customary international law on treaties and this entered into force in 1980. States that have not ratified it are still expected to comply with it as it is a
restatement of customary law. Put simply Customary International Law is the custom and practice of States which has occurred and developed over the centuries but which has become a norm for the manner in which States behave towards each other.

**Terms in international law**

Article 2 – of the Convention gives guidance as to the use of terms in Treaties

1. For the purposes of the present Convention:

   (a) 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

   (b) 'ratification', 'acceptance', 'approval' and 'accession' mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

   (c) 'full powers' means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty;

   (d) 'reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;

   (e) 'negotiating State' means a State which took part in the drawing up and adoption of the text of the treaty;

   (f) 'contracting State' means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force;

   (g) 'party' means a State which has consented to be bound by the treaty and for which the treaty is in force;

   (h) 'third State' means a State not a party to the treaty;

   (i) 'international organization' means an intergovernmental organization.
2. The provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

States

Many compare Treaties with contracts as both are the result of those involved assuming obligations between or amongst themselves. If one party fails to live up to their obligations they could be held liable under international law. The maxim *pacta sunt servanda*—‘pacts must be respected’ is indicative of this attitude but it is not in the interests of any State to fail to follow customary international law as other States affected by an act or omission may choose to take unilateral action of a non-military nature.

The term State gained a definition following Montevideo Convention on the Rights and Duties of States which occurred in 1933 in Uruguay and Article 1 sets this out insofar:-

‘The State as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other States.’

As mentioned earlier much has altered and democracy and human rights are now the accepted norms for a State.

Treaty procedures in the UK Houses of Parliament

Until very recently the basic procedure regarding treaties, conventions and the like were that of our Foreign and Commonwealth Office who would provide guidelines regarding the UK standpoint in negotiations and what would or would not be acceptable to be contained in an International Document which would be likely to place obligations upon the UK State. The procedure following these negotiations were that the signing of the document would merely be an agreement as to its contents since our dualistic constitution would prevent it becoming part of our domestic law unless a specific piece of legislation was introduced to enable that to occur.

(a) The European Communities Act 1972 is a prime example of this insofar as our signing of the Treaty of Rome did not cause us to become a Member State of the European Economic Community (EEC) until this legislation was passed by our Parliament. Until that occurred we could neither accede to the Treaty or be required to fulfill its obligations.

(b) Governance of Britain
(c) Since Gordon Brown became Prime Minister in the UK much discussion has taken place regarding not least the Power of the Executive [Government] to Declare War but also the Power of the Executive [Government] to ratify Treaties without a decision by Parliament.

(d) In *The Governance of Britain*\(^\text{13}\) Green Paper the Government stated that the procedure for allowing Parliament to scrutinise treaties, known as the Ponsonby Rule, should be formalised and placed on a statutory footing. The key features of the Ponsonby Rule\(^\text{14}\) are the publication of a treaty as a Command Paper and the laying of the Command Paper before both Houses of Parliament for at least 21 sitting days before ratification. Coupled with this is a Government undertaking to provide time for a debate should one be requested.

*Parliamentary Control: The effect of negative votes in the Commons and Lords*

**213.** Clause 21 of the Draft Bill proposes that the Commons should have the power to prevent a treaty from being ratified for so long as it continues to oppose it. A negative vote in the House of Lords would only be able to delay the ratification of a treaty, if the Government still wished to proceed and the Commons was not opposed. The Lord Chancellor told us that this was "the fundamental, substantive difference" that the Government's proposals would bring, because at present "even were Parliament under the Ponsonby Rule to vote against a treaty, it could still be ratified. I believe that to be unacceptable."

This Green Paper [proposed legislation] indicates a sea change on the part of the UK Government and Parliament as to Treaties and their obligations. For the most part little will alter with those historic Treaties which have been ratified but for future action on the International Stage parliamentary scrutiny will be the order of the day.

Nepal for different reasons has incorporated this attitude in their proposed Constitution and is looking towards the re-opening of negotiations as to Treaties that have been concluded by previous political generations insofar as they have placed Nepal in a position which seems at this point to be against its national interests. The international community would expect that following the referendum that a re-alignment of Treaty obligations


\(^{14}\) Established by Arthur Ponsonby, Parliamentary Under-Secretary for Foreign Affairs, in 1924.
would occur. This will be an ambitious project but where politics and the economy of Nepal are concerned it is a ‘nothing ventured – nothing gained’ ideology.

To round this point off given that the UK Parliament is seeking to award itself greater powers of scrutiny over its international obligations whether by Treaties or other forms of international commitment and this appears to be a positive step.

The latest position regarding the Green Paper is that the concerns regarding ratification of Treaties is that agreement should be by parts of the House of Parliament namely the House of Lords and Commons and the inclusion in legislative form of the Ponsonby Rule is now part of the Constitutional Reform and Governance Bill that\footnote{Occurs at Part 2 Constitutional Reform and Governance Bill - http://www.publications.parliament.uk– accessed 23.02.2010} is presently passing through the procedures of the Houses of Parliament.

The United States position

The United States of America is a federal republic comprising 50 states, together with a number of other territories. The federal Constitution establishes a democratic system of governance at the federal level and guarantees a republican system at the state and local levels. The executive branch of the federal government is headed by the President who is also commander-in-chief of the armed forces.

Under the Constitution, the President is the federal official primarily responsible for relations with foreign nations. The President negotiates treaties with other nations which are binding on the United States when approved by two thirds of the Senators present and voting. The President may also negotiate executive agreements with foreign powers that are not subject to Senate advice and consent, based on statutory authority as well as inherent constitutional powers.

Treaties as law in the United States

As a matter of domestic law, treaties – like statutes – must meet the requirements of the Constitution; no treaty provision may have force of law in the United States if it conflicts with the Constitution. \cite{Reid v. Covert} Thus, the United States is unable to accept a treaty obligation

\footnote{Reid v. Covert, 354 U.S. 1 (1957), is a landmark case in which the United States Supreme Court ruled that the Constitution supersedes international treaties ratified by the United States Senate.}
which limits constitutionally protected rights, as in the case of Article 20 of
the International Covenant on Civil and Political Rights, which restricts the
freedom of speech and association guaranteed under the First Amendment to
the Constitution.

Consequently, when deliberating on ratification of a treaty concerning
the rights of individuals, Congress must give careful consideration to the
specific provisions of the treaty and to the question of consistency with
existing State and federal law, both constitutional and statutory. Where treaty
provisions conflict with the Constitution, the United States makes
reservations to them simply because neither the President nor Congress has
the power to override the Constitution. In some cases, it has been considered
necessary for the United States to state its understanding of a particular
provision or obligation in a treaty, or to make a declaration as to how it
intends to apply that provision or meet that obligation.

Reality for Nepal

This is further evidence that the position likely to be adopted by Nepal would
fit with the attitude of the United States insofar that if a Treaty does not
comply with the proposed constitution then it must be re-negotiated.

The military forces in Nepal - A standing army

Ministry of Defence in the UK

The purpose of the Ministry of Defence and the Armed Forces in the UK is
to defend the United Kingdom, its Overseas Territories, its people and
interests, and to act as a force for good by strengthening international peace
and security.

This is also true for Nepal. However, no military force is of any consequence
unless they are trained to the standards equal to those set for major States
within the International community.

There are many concerns to be considered here not least the size and
whether that national conscription is the rule for Nepal. Most States now do
set pay and conditions and entry requirements to attract the best candidates
and have a career structure that will retain them and therefore have a
professional army. If it is to perform the role asked of them then they must be
treated appropriately.

Conscription, compulsory military service, is still retained by some
States including the United States and Germany but it was stopped in the UK
during the 1950s as being too costly to maintain. Most States prefer to have a
professional Standing Army or Military Force which is trained and funded to provide the best service. Indeed all States prefer this as it means there is less likelihood that others will be called upon to help resolve essentially internal problems.

The serious issue is the allocation from national financial resources for the Military Services. In the UK defence financial resources are agreed each year and fall under a Ministry of Defence who is responsible for using the same. This is subject to democratic control of the Government of the Day and subject to Parliamentary Control through a Select Committee who vets the use of the funds and causes the Politicians and the Military leaders to answer for the use of them.

The overriding issue is that any Military Force is subject to democratic control and the choice of the leaders of the Military is by Parliament through competition – that the best candidate is chosen. Competition is the norm in the upper echelons of the Military in the UK and enables power and control is placed in the right hands and that the right people lead the Military but, more importantly, that they are accountable. Parliamentary control is necessary for more than one reason not least that the electorate can play a part through the ballot box.

Germany has a system of conscription whereby a conscript can elect to perform service either in the military or in some other form of public service. Personally, I do not favour conscription as it does not get the best candidates for a professional army. Provided that an army offers career opportunities to all staff within it in addition to the normal requirements of military service namely training in such as mechanics, aircraft maintenance, signaling and communications and other employment opportunities then candidates will leave the military with a skill that offers Nepal opportunities previously not open. In addition by such training opportunities being offered competition can exist for the entrants to the military causing a natural form of control as with employment.

In the UK service in the Military can be for set periods or is open ended provided that the person concerned is physically capable to perform the duties required. Male and female entrants should be treated alike.

**Immigration and border control**

In recent times and due to the opening up of our borders the UK has seen a major movement of people from other parts of the European Union. This has necessitated the decision to set up Border Control Force. Particularly, as many people have entered the UK for a visit from outside of the European
Union and have then overstayed this period. In addition we have been affected by what are known as people smugglers and there has had to be more serious attention paid at the ports of entry in to the UK.

Where Nepal is concerned consideration should be given to a system of National Identity Cards. All persons over the age of 18 years should be required to have an ID card containing a photograph and fingerprint and a hologram to prevent counterfeiting. It can also serve to be a proof for voting in local and national elections and if made compulsory to carry the same at all times which can assist with the monitoring of movements from within and without Nepal especially if they are linked to a national computer system. Non Nepalese people could be required to carry Passports at all times as they are required to do in mainland Europe and other States. If they are linked to health with the blood type included and licensing systems such as with driving licenses it would make them more likely to be accepted.

Consideration is being given to this in the UK but Human Rights are always pleaded in that they are claimed to be an infringement of privacy. The Labour Party sees a benefit whereas the Conservative Party just opposes therefore there is a political impasse here in the UK.

The logistics of introduction is the major hurdle and again there is a cost consequence but in reality it would be of immense practical benefit to Nepal and as it would be a form of answer to the monitoring of people it should be seriously considered.

Emergency powers
Emergency Powers legislation exists in every State within the International community and are used in times of extreme need. The earthquake in Haiti is a prime example.

The essential factor is that the State, normally a President or a Prime Minister, would lead and utilise all personnel whether the Army, Police or Fire Services in a specific way to deal with a national emergency. Ordinarily a cabinet of people across the political divide is drawn together by parliament under a main leader but would include members of the Military, Police and Fire Services as their expertise is special and no politician would be capable of directing them appropriately. In other words it is a coalition of people.

This is an issue that should be given clear legislation by the Parliament in Nepal.

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This is a great and yet challenging moment for Nepal and world constitutionalism as well. Among issues surrounding constitutional engineering, the issue of national interest has emerged as one of the most important concerns in the flux of transitional constitutional change in Nepal. Are we in a position to tackle this concern of national interest with its broad and multi-faced ramifications? Observing the current flux of social-economic-political context in Nepal, one can easily recognize the salient importance of this concern. But, why not? We have to take national interest into consideration when it comes to signing a treaty, or devising an immigration policy, or settling trade negotiations. However, it is constitution making engineering that we are talking about. To what extent and in what way should we reflect national interest concerns in the substance and process of constitutional making is the present focus.

1. Introduction
For our present purpose, three questions are in order. First, how does one define national interest? How can national interest for a given nation/state, such as Nepal be identified? What is the time frame for such a consideration? Secondly, to what extent and in what way can the identified national interest
be linked to constitution making? Thirdly, how can national interest concerns be reflected in constitution making? Are they going to be written in the final text of the constitution? Or, should they be incorporated even in the process of constitution making as well?

2. Nepal’s national interest: Space, time and perspectives

The term “national interest” is multi-faceted. In the international level, it usually refers to whether a nation-state can prevent exploitation from other states or international community in safeguarding its sovereignty and territorial dignity. The flip side of the concern is the requirement of maintaining a unified approach to state diplomacy regardless of how divided the political forces are on issues at the home front. In the domestic level, pursuit of prosperity, social harmony and preservation of cultural heritage and environment preservation are usually important national interests.

The identified national interest is not self-explaining, however. Even in an abstract level, one wonders whether the national interest is too remote to satisfy current needs. Some argue for shallow national interest issues that may just be like a chameleon changing with political realities. Indeed, one needs to distinguish between lasting national interest issues and short term political gains among political forces particularly in the flux of political transition. In this regard, one may identify national interest issues in three categories: sovereignty and territorial integrity, people’s survival and basic level of social security, institutional capacity-building for good governance.

For Nepal, as for other nation/states, national interests could be identified in the three categories mentioned above. However, many pressing concerns in the post-1990 polity have to be observed. National interest as reflected in Nepal could mean very basic things about survival. Nepal, which is undergoing a democratic transition, has to hold the nation from falling apart on the one hand, and to maintain its safety and security while sandwiched between super powers on the other.

Nepal is a highly diverse country rich in geography, culture, and religion. According to available literature, Nepal has at least 60 recorded castes and ethnic groups and 70 languages and dialects. Besides, Nepal has an extremely unequal distribution of population. On May 28, 2008, lawmakers in Nepal legally abolished the monarchy and declared the country a republic, ending 239 years of royal rule in this Himalayan nation. During the transition toward democracy, the absence of monarchical control has triggered vibrant social and political movements, and also exaggerated social cleavages. People of different ethnicities, religions, and geographies are forming distinct
identities and asking for different degrees of autonomy and self-determination. Political tensions and consequent power-sharing battles thus have become a salient issue in Nepal. The conflicts among different political powers have raised the uncertainty of Nepalese politics and the new constitution. Although the Nepalese generally accept the proposal of federalism, political parties in the Constituent Assembly are still divided about the structure of central-local relationship. Some politicians are worrying that the constitutional proposal of federalism may eventually lead to disintegration. Indeed, how to maintain the integrity of Nepal is the first national interest for Nepal.

In addition to internal conflicts, as a small and new democracy sandwiched between two super powers, Nepalese national interest can easily be affected by foreign powers. Under the shadow of strong foreign neighbours, Nepal sometimes is incapable to maintain its security and to make political decisions autonomously. Nepali people are living in insecurity as a result.

In the present moment, Nepal also has to be prepared for upcoming challenges from the changing global order. Globalization has triggered a wide range of transformation. The global market and emerging legal order is challenging the sovereignty of Nepal. The converging global order may also endanger Nepali cultural heritage, language, and social capital. Natural disasters due to climate change have been perceived in Nepal at the same time when international cooperation and transnational networks for various purposes are developing.

In this connection, people begin to raise and argue over issues such as border control, immigration policy, building a defence force, diplomatic royalty, building friendly relationships with India and China and the like. These are all critical and pressing issues that Nepal confronts today, but are all these connected to the new constitution?

3. National interest and constitution making

To what extent and in what ways are the identified national interest issues linked to constitution making? It has to be related with the function of constitutionalism, particularly a transitional one.

In the face of internal conflicts, external threat, and global challenges, Nepal is undertaking the task of making a new constitution. There have been concerns that the new constitution might be issued by sacrificing vital
national interest issues and making the transition not just controversial but sensitive as well.

It should be pointed out that constitution making itself bears tremendous national interest, for it is one of the most fundamental and profound bases of state building and governance. But that does not mean that all the national interests as set forth above could be properly served through the making of a new constitution. Current border conflicts or general distrust in the political process cannot be “solved” through constitutional means only. The vehicle of constitutional change, nevertheless, could provide institutional betterment that in the end could help solve the problems in a more desirable way.

With divergent views to digest and pressing issues waiting for swift resolution, this constitutional moment may make Nepal’s national interests even more vulnerable. However, the constitutional moment is valuable as it provides opportunities for Nepal to examine herself and to establish a comprehensive foundation for sustainable governance.

In this critical constitutional moment, Nepal’s national interest could be addressed in three dimensions. First, despite complex foreign relationships, Nepal has to remain committed to drafting a new constitution through the Nepalese people themselves on the one hand, and to seek help to design the new constitution from the international community on the other. Second, Nepal has to build up long-term institutional capacity to resolve internal and external conflicts. The resolution should not serve immediate needs, but keep an eye on establishing a long-term institutional foundation. Third, the constitution should also be forward-looking, establishing its capacity for even more complex and difficult global challenges as it is going to be the most recent constitution making process on the globe.

4. Constitutionalizing Nepal’s national interest

How can national interest concerns be reflected in constitution making? Should they be included in the final text of the constitution? Or, should one also try to honour national interest concerns in the process of constitution making?

4.1 National interest in the process of constitutional making

Transiting from past monarchy, Nepalese people for the first time have become the sovereignty of the nation. However, democratic transition and social consolidation has never been easy, especially when Nepal has insufficient experience of democracy and divided identities.
The process of constitution-making provides valuable opportunity for people to have a chance to learn to exercise their sovereignty and rights through a credible new constitution. Moreover, the process may also play the function of constructing a shared identity of “we the people.” The constitution should reflect the social and constitutional history of Nepal; it should also reflect the value, principle, and future picture of Nepali society.

The process should be open and inclusive. People with different ethnicities and religions are all entitled to play a role. In addition, the process also provides appropriate channels for communication and deliberation, so that different opinions can be compromised and negotiated. Regarding this point, the 2007 Interim Constitution correctly established the principle of inclusion. The representation of minorities such as women and oppressed tribes is also emphasized. However, commentators argue that, not all voices are heard and taken seriously. It would be a waste of the constitutional moment if the committee of constituent assembly ignores suggestions and proposals of others. Besides, animosity between conflicting political campaigns sometimes deters rational communication and deliberation. Constitution making by a committee can be more effective; however, people will loose the opportunity of building democratic capacity and a shared identity. Efforts should be made to improve the deliberation and communication process in the ongoing constitution making process so as to ensure that the constitution is made by Nepal and for Nepal.

In addition to its widely noticed function in democratic consolidation, a properly designed and operated constitution making process could contribute to Nepal in many other ways. One underestimated function is how it can transform current violence into rational politics. The deeper all conflicting parties participate in the constitutional discussion, the more likely they are to recognize the legitimacy of the constitution. Only in that way, all parties can accept democracy even if they lose the election and seek a democratic way to assert their rights rather than resort to violent conflicts. In the flux of transition, a shared constitution making process is more likely to render control of the armed forces into the hand of the democratic government.

The national interest associated with the process of constitution making is vulnerable especially when the current Government of Nepal needs support from other nations. For a new democracy, foreign experience can be helpful in designing a new constitution. For example, in a rather too dramatic way, it is believed that without the involvement of MacArthur, the Supreme Commander for the Allied Powers, Japanese road to democratic constitutional transition and consolidation after World War II would have been much more difficult. Nevertheless, the risk of undermining democratic
legitimacy should not be underestimated. American involvement in Iraqi constitutional making may be helpful in forming a “good” constitution. However, whether it undermines the Iraqi people’s identity is debatable. Thus the crucial national interest for Nepal here is to not only get support from international society, but also retain its sovereignty. How to make a constitutional foundation that is good for Nepal, instead of a product of political competition, is the most important task at hand.

4.2 Incorporating long-term capacity building in the new Constitution

In the face of conflicts and danger, some may seek immediate solution through constitution making. For example, the establishment of a strong central government and military and intelligence capabilities could effectively deter internal armed conflicts and external invasion. Some also believe that federalism can better resolve the ethnic conflicts and disparate development in Nepal. However, without a vision of long-term capacity building in the government structure and basic right protection, immediate problems will dominate the constitution making process and eventually undermine the long-term sustainability of democratic Nepal. Both Nepali government and the civil society need to build their capacity for sustainable development through this constitution making.

At least three dimensions should be noticed. The constitution should first provide a mechanism for integration and inclusion. Second, more than the establishment of institutions, the constitution should also provide a foundation to build up the capacity of constitutional institutions. Third, the new constitution should aim at empowering a stronger civil society and an independent judiciary.

The first concern is integration and inclusion. In addition to the process, the content of the constitution should also be capable of constructing a shared identity. Most fundamentally, the constitution must treat all citizens equally, regardless of their origins, religions, and ethnicity. Discrimination and exclusion will seriously damage national interests. All citizens should be entitled to full protection of fundamental rights. The constitution should also emphasize the sovereignty of the people and regulate the exercise of powers that is derived from it.

Furthermore, in the face of social cleavage, the constitution should have a vision for future integration even though managing existing differences are difficult. Whether the constitution should reflect political needs at central governmental level, and how it should design federalism to balance different needs are all crucial for Nepal’s national interest.
In this regard, accommodationists and integrationalists are still debating a better way whereby constitutions may manage social divisions. Accommodationists such as Lijphart argue for the need to recognize and institutionalize differences. Integrationalists argue that such practice may entrench and exacerbate the divisions they were designed to manage. As an alternative, they propose a range of strategies that transcend and blur or crosscut differences. The debate applies to both the representation of parliament and the design of federalism. The answer, however, is far from clear now. In light of the changing nature of identity, the constitution should aim at future integration without neglecting current divisions.

The capacity of constitutional institutions is the second concern. For a government to enrich its capacity to deal with national interests, a document called “constitution” is never enough. A well-functioning constitution relies on capable institutions. Institutional improvements in the political, economic, and social spheres are the foundations of sustainable development. The wisdom required in the quest for sustainable development lies in the betterment of traditional human institutions, especially political and economic systems, and shared human values, especially scientific truth, market function, representation, information, participation, due process, human dignity and the like. These may sound too basic in an established industrial democracy, but they are of vital importance to countries in transitions.

The constitution may incorporate various mechanisms for institutional capacity building. First, the design of check and balance between different governmental branches should be incorporated to imply the constitutional entrenchment of a procedural requirement for balancing different institutional concerns, various sources of legitimacy and diverse interests. Second, procedural rationality required by the constitution should include transparency and public participation in governmental decision-making processes to balance competing interests. The treaty ratification, although it usually operates under the table, should be incorporated with procedural rationale as well. The result of the process may be good or bad, but public interests are more likely to be known and reflected in the decision-making mechanism. Third, all legal institutions should be required to fulfil rule of law. Rule of law is not only a foundation for normal democratic government, it is also a crucial mechanism to manage unstable politics and prevent violence during democratic transition.

One underestimated issue in Nepal is the capacity of the government to fulfil fundamental rights. The preliminary draft of the Committee for
Preserving the National Interests suggests that fundamental rights should include the right to protection of heritage, the right of education, food, shelter, clothing, irrigation, developed seeds, fertilizers, and food sovereignty. These rights might be attractive; however, whether they can be fully realized is the question. These rights require active government measures, involving complex issues of resource distribution. It is beyond the capacity of any government to provide sufficient food or shelter to all citizens in a short time. Once the fundamental rights scheme fails to function as promised, the constitution’s authority and the institutional capacity will be distrusted.

Building sustainable institutional capacity is not easy for democratic Nepal in its early transition. However, a constitution of separation of powers, of reasonable procedures, and of rule of law is the foundation for further development. In the early phase of democratization, the constitution should focus on the most essential fundamental rights such as liberty and equality, instead of making empty promises of social rights.

The third concern along the line of constitutional capacity building is the empowerment of civil society and independent judiciary. The long term solution for sustainability eventually lies in the civil society. Empowered civil society is believed to be the basis for a successful democracy.

Civil society is composed of the totality of voluntary civic and social organizations and institutions that form the basis of a functioning society as opposed to the force-backed structures of a state and commercial institutions of the market. An active civil society committed to the rule of law and able to trigger necessary discussion on public issues can not only promote the government, but also check it when necessary.

In the present context, civil society in Nepal needs to be empowered. Too often, public issues are divided by regions, ethnicities, religions, or castes. The constitution has to facilitate the emerging civil society. Freedom of speech, of association and publication should be highly protected for the growth and empowerment of civil society. Furthermore, the constitution should also actively promote education, non-governmental organizations, and civil activities. With active associative life in civil society, people begin to develop social trust, understand differences, and learn the skills of argumentation and communication.

In addition, the independence of the judiciary is also something which is very important. Fundamental rights will remain unfulfilled in the absence of an independent judicial review power. During the
turbulent transition, some people stopped to seek justice in the courts. The constitution must establish an independent judiciary and judicial review to implement fundamental rights.

A Supreme Court which lacks independence, which has to be accountable to a legislative committee, and which is always under the threat and duress of a legislative majority cannot protect any fundamental rights whatsoever. The new constitution must ensure the capacity and independence of judicial review, so that the power of government can be checked and restricted.

Another controversial issue is national security and military management. In order to preserve Nepal from external threat and internal conflicts, enhancement of the national military could be an expected and desirable policy. However, the army is a double-edge sword. It could also bring violence and turbulence if misused. As the early history of Republic of China has shown, separatist regimes of the army may lead to endless internal conflicts and undermine the basis of a democratic government. With an eye for long-term capacity building, military professionalism may not be the most crucial task for a new constitution. The primary focus should be to incorporate the currently scattered armed forces into the central control of the government and to maintain its neutrality in all conflicting politics. The power of the army cannot be used as a means of political struggle. The army should be subjected to the legitimacy of government. In the process of constitution making, democratic participation and deliberation should certainly pre-empt any armed conflict. When the concern of national security declines, Nepal may also consider following the route of a neutral state in response to the outcry of the global peace order.

4.3 Responding to emerging global order
The emerging global order brings about all kinds of challenges and opportunities. In the constitution moment, unlike in other nations, Nepal has the chance to facilitate itself through constitutional making. Various regional and international organizations have important roles in decision-making. International decisions can seriously affect Nepali policies and institutions. The constitution can respond to the global order in various ways.

First, the constitution can incorporate provisions on foreign policy or the exercise of treaty-making powers. Since foreign affairs are no longer the decision of the king, the constitution should establish reasonable procedures and conflict-resolution mechanisms in order to preserve national interests in
global interactions. One task on hand is to take international treaties seriously. At a time when globalization has triggered a convergence of laws between nations, the international legal system can help in dealing with national issues on one hand, and to fertilize the capacity of domestic institutional capacity on the other hand. The process of treaty ratification should go beyond partisan competition and narrow understanding of “national interest.” In fact, the global order may redefine the meaning of national interest. For example, the international human rights treaties may require Nepal to concede part of its sovereignty, which may be negative from the narrow interpretation of national interests. However, if Nepal incorporates the emerging global human rights laws, Nepal’s interest can be preserved and enhanced. Although the concrete treaty ratification process depends on the choice of a government system, one basic principle is to introduce more deliberation among branches of the government and political parties.

Regarding border control or immigrant policy, national interest is usually understood to maximize the economic and political welfare of a nation. However, the border must be understood not as a hard demarcation line, but the site of a complex and often ambiguous relationship. It is a site of economic, social and cultural symbiosis. The frontier of the border with policing agents and concrete-and-barbed-wire walls has not and will not alter the symbiotic relationship; rather, it could physically scar the nation. An appreciation of the multifaceted nature of the border and its meaning to people should be done right at the beginning when national interest issues are being conceived.

Second, the constitution can reflect the global legal order or values. Recent development of constitutional law incorporates international human rights law into the constitution. Canadian Charter on Human Rights, for example, introduces international human rights law in the constitutional system. Another example, Article 7 of the Hungarian Constitution requires the courts to refer to international human rights law when interpreting the constitution. The emerging global legal order of human rights may further contribute to preserve Nepal’s national interest. Current issues, such as armed intrusion from foreign powers, food and living, as well as immigration problems, may all find legal solutions in existing human right conventions and treaties. In its initial transition, Nepal may not be capable of fully resolving human rights issues which have arisen because of perceived threats from India or China. However, Nepal may consider resorting to the international human rights regime, resolving these issues through
international law. Nepal could be much more relieved by making the best of the existing international legal order.

Third, emergency power for global terrorism and large-scale natural disaster should be considered. In the face of possible global terrorism and natural disaster, the state must be equipped with emergency power. Emergency power, similar to the armed forces, should be subjected to democratic legitimacy and check and balance. As the Taiwan experience of martial law has reflected, emergency power could easily go astray. The situation and scope of emergency power should be clearly prescribed. In many other countries, the exercise of emergency power requires the approval of the legislature. Periodical renewed approval is also a way of preventing emergency power from going unrestrained. In Nepal’s case, nationalization of armed forces must be taken as the pre-condition to emergency power. In light of the global order, the constitution may also take the chance to consider possible ways of international cooperation.

5. Conclusion

In the last two decades, the concept of constitutionalism has changed much, if not entirely altered. The most important aspect of such transformation has come from the democratic transitions that began in the late 1980s and throughout the 1990s and took place all over the world including many parts of Asia such as Taiwan, South Korea, Mongolia, the Philippines, Thailand, and Indonesia. During these profound political transitions, constitutionalism has functioned quite differently. At the time of social-political disintegration, a constitution may function as a primary mechanism to forge new political agendas and help form social consensus. It would play a vital role in steering new agendas, reconstructing societies and even empowering the next generation of leaders, certainly departing from our understanding of the limiting focus of traditional constitutionalism.

What Nepal is facing is long-term institutional capacity building in the process of constitution making. Provisions for long term institutional betterment in the new constitution do not preclude the derived values from the dynamics of the constitution making process. Public awareness, sense of participation and collective responsibility for a credible new constitution may be one of the most critical national assets for Nepal at this juncture where a new constitution is being drafted.

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Constitutions Matter not as Abstractions

Bob Rae

Thank you very much dear colleagues and Madam Chairperson! Firstly let me thank the host for the kind hospitality and welcome to all of us. I think I have been asked to speak, as well as others, on behalf of the international guests participating here. May I be bold just to say "thank you all" for allowing us this opportunity.

I think by way of conclusion I will have some comments to make. The first one is, why have so many of us come here such a long way for such a short visit. And the answer, I think, will be not only the beauty of Nepal and the great interest many of us have in coming back, but our commitment. If I may describe, this very broad community of such international experts are interested in constitutions around the world. Many of us are fans and we know each other, exchange papers and we visit many of the countries that are building their constitutions, and we have advised governments from time to time.

I think the common values that inspire us are very simple. It is that constitutions matter not as abstractions. It is the expressions of the deepest values of society and is a critical framework for future politics in all countries. We are moved very much by the success of the process till this point. The commitment that people have made to a democratic, republic and federal Nepal is laudable. It is based on rule of law which is backed by unity and diversity, human rights and human opportunity.

We have heard some brilliant presentations from China, from Indonesia and from around the world on subjects as varied as economic
constitutionalism, the importance of the rule of law, and the dynamics of the federal principle. From far and wide we have come with a desire to recognize the importance of the constitution process and to respect the values shown by the people of Nepal at this difficult point. We have also come here to listen and learn and to have some essential things to say and share our common experience. A very important perspective of those of us who are involved not only in advising the constitutional process but also watching this process from abroad is that once the principles and issues seem to be settled, it is important to get quickly into the drafting process.

The focus now and forever more has to be on implementation. This process is not simply about just writing a document. It is not simply about interpreting the text. It is also about building a nation and making change happen. It is that increased and heightened focus that we have seen on the part of the Nepali collaborators. I think it is a widely shared notion that a deadline is crucial to reach a conclusion.

In the interest of time I will not say too much. I think others have already spoken about the group outcomes that have come out in many of the papers that have been provided. Much of what has been said in other contexts has also been noted. May I simply express on behalf of the international visitors the hope that your ambitions will be tempered with humility, that your determination will be guided by grace, that your approach will be crowned with success and that your achievements will be marked with wisdom. Thank you very much!

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"May I simply express on behalf of the international visitors the hope that your ambitions will be tempered with humility, that your determination will be guided by grace, that your approach will be crowned with success and that your achievements will be marked with wisdom."

- Bob Rae
(at p. 399)
Honourable Chairperson, Excellencies, participants of the conference, and dear friends, namaste to you all. During the opening ceremony of this conference, President Dr. Ram Baran Yadav expressed the need to influence and induct democratic principles in the constitution, and to ensure independence of the judiciary, human rights, freedom of press, rule of law and justice for all. This international conference has been organized extremely well toward this end with many papers and active participation in the discussions. I want to express my thanks and sincere gratitude.

In this conference, the international participants actually had the privilege to join you and discuss in real time about many constitutional issues. We got news and new proposals on what is going on. The process of constitution making is moving at a very fast speed. Nine thematic committees out of 11 committees at the Constituent Assembly have already given their concept papers and preliminary constitutional drafts to the full house and we are just waiting for the final results.

I hope that the Nepalese constitutional process continues under special circumstances. We had the privilege to follow it in the spirit of dialogue by providing support, sharing our experiences, and sharing what we have learnt.

One of the important things is the model of separation of powers, especially relations between executive, legislative and judicial branches of the state. An essential question was and still is the presidential or parliamentary model. I mentioned that in Finland, in our first constitution, we had a mixed model where many progressive democratic elements were combined with old fashioned ones with presidential order. That constitution
was adopted under very heavy conditions, such as hegemonic constraints of the civil war in our country. After decades of constitutional debates, a stable environment has now been created for a positive constitutional and legal culture, which has strengthened the parliament and democracy. The members of the government shall have the confidence of the parliament. It is natural that the parliament elects the Prime Minister. And the role of the President is limited to the formal appointment of the ministers. The President still has quite important duties. But the president is obediently bound to the government. That also strengthens the position of the parliament in our country.

One of the key questions in the conference has been federalism. The conditions between different levels have to be acknowledged. There has to be an objective balance between unity and diversity in development of the state. The principle of ‘subsidiarity’ is among the basic principles. The question is how to allocate the functions and real power to each level. Our discussions have also underlined the need for economic resources.

My last point is about independence of the judiciary. It is an important topic not only for a functional court system but also to fulfill the rights and duties of ordinary citizens. There will be a need for a balanced and independent nomination system for judges. The right of the judges to remain in the office against external pressure has to be guaranteed in the constitution. In our system I repeat that the parliamentary committees have no competence to give recommendations on the interpretation of laws, but of course the parliament has legislative power and can speed up legal development by abrogating existing laws.

We also discussed human rights and basic rights in the conference sessions. The existing circumstances of deprived people have also been one of the issues. The economic social and cultural rights are now included in almost every new constitution. They are very relevant for minorities and marginalized people living in exclusion. Social life is very complex in present times. It must be estimated from the citizen’s point of view. When the provisions on fundamental rights are clear, the courts and other authorities can directly apply these provisions. That is also a sense of wisdom. That way the constitution comes closer to the daily lives of citizens and constitutional reform takes legitimacy.

Mrs. Chairperson, you asked my opinion on the conference. I have great hope on the success of the Nepalese constitutional process. A balanced constitution is real backbone of democracy, justice, economy and welfare. I extend my best wishes to the Nepali people for this very important process. Thank you very much!

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Anxieties during Pregnancy

Jie Cheng

Thank you, Honourable chairperson, colleagues and dear friends. First of all I would like to express my gratitude to the organizers of this dynamic conference, Nepal Constitutional Foundation, Tribhuvan University Law Faculty and Supreme Court Bar Association. There is one old Chinese saying that close neighbours share more affection than remote relatives and here we find all the affection and hospitalities as a close neighbour. Secondly I would like to thank all the participants for all their insights. We are here not only to share our expert opinions but also to learn and understand from each other. And I find that the last two and a half days, has been both very educational and very informative. I feel that now I know more about the complexity of the situation in Nepal and I would like to learn more and to further the discussions in future.

When we look back at the past two and a half days, within this very limited time, we went through some of the very important issues in constitutional law. We addressed the form of government and we addressed the allocation of powers between the vertical governmental systems, as well as how to create an independent judiciary. We also tried to understand how to create a better relationship between the people and the government. In this sense, I feel that constitution making is only the beginning of a longer process - i. e. the process of building constitutionalism over time. So when the new constitution of Nepal is made in May this year, it will only be the first step towards this end.
I would like to share my personal feelings regarding the new constitution of Nepal. Earlier during the Inauguration session of this conference on January 15, Professor Wiktor Osiatynski rightly used the analogy of pregnancy for the constitution making process. I am a pregnant woman and expecting my baby in the end of April. The interest of the new born has to be protected by those who give birth to a child. This applies in the case of the new constitution as well. Here we have all the fears as well as hope just like the anxieties during pregnancy. We are also hoping that it will be a healthy one and we need to understand that we will have to nurture him or her after it is born. So in this sense, I have all my hope for the new constitution.

I also hope we can further this message and discussion in the future. Again on behalf of my law school, the Tsinghua University Law School, I would like to invite the organizers of this conference to probably form a delegation in the near future to China to exchange our experiences further. Chinese constitution is not the best model in constitutional review matters. But there are some other institutions which could be helpful in this regard.

As a Chinese, I would like to express thanks to the organizers once again. I have a small gift - Paper Card, in advance. February 14th is the Chinese New Year according to the lunar calendar. We use this Card during the spring festival. This is for Dr. Bipin Adhikari in the name of all. Thank you!

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"Today when we look at the Chinese constitutional law, we should read not only its original text, but also the four-time amendments since 1988. Constitutional text and the 31 constitutional amendments are indispensable components of Chinese constitutional law. The 1982 Constitution and the constitutional amendments lay a solid constitutional and political foundation for China’s economic reforms. The credit for China’s economic miracle should also go to these constitutional amendments. As a developing country, the China story might be of interest to the on-going constitution-making in Nepal."

- Wang Zhenmin
(at p. 367)
Comparative Aspects of Design Options

Purushottam Kulkarni

Honourable Chairperson, Honourable members of the Constituent Assembly, and ladies and gentlemen! It has been indeed a great honour and opportunity for me to participate in the discussions and deliberations on constitution making in Nepal. The discussions held during the conference, views expressed at this forum, and the opinions of experts have already been summarized by my colleagues. So I won’t go into that.

I do feel that the conference has been successful in achieving its objective. The participants expressed their views on the comparative aspects of different constitutions. We had an exchange of opinions and discussions on what is good, what is bad, the good experiences, the bad experiences, advantages and disadvantages. The discussions were held before the members of the Constituent Assembly. And in this sense, our inputs have been put before the Constituent Assembly.

We in India are also anxious regarding the constitution making process in Nepal. I do feel that the Indian situation and the Nepali situation have got so many similarities, so many advantages, disadvantages, good things and bad things. Therefore, we are also anxious how Nepalese constitution makers are coming out of the debate, and trying to address these difficulties in constitution making.
I feel that the comparative aspects of design options have been brought before the Constituent Assembly and certainly the members of the Constituent Assembly and people of Nepal will consider all these aspects in proper perspective and form a constitution which will be most beneficial and suitable for Nepal and its people.

I once again thank Dr. Surya Dhungel, Dr. Bipin Adhikari and the organizers of this particular conference for giving me this opportunity here. Thank you very much.

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"The more you put [details] in the constitution, the more you will limit democracy in the future because democracy is essentially about having discussions and conflicts on public policy goals. If everything is predetermined in the constitution there is not much room to quarrel. And then people quarrel about the stains in the President’s gown, they quarrel about religion and about some other abstract things because too many issues of rational conflict, such as resources or rights and other things are precluded."

- Wiktor Osiatynski
(at p. 20)
The Wisdom to Kneel Down

Horst Matthaeus

Honourable Chairperson, Rt. Honourable Prime Minister Madhav Kumar Nepal, Honourable members of the Constituent Assembly, Ministers, Excellencies, Ladies and Gentlemen.

This conference on “Dynamics of Constitution Making in Nepal in Post-conflict Scenario” was a great experience. We have spent two and half days together. It is a great honour for me to wrap up the proceedings of the sessions I attended yesterday and today.

Before I go into some of the contents, I feel like ending this discussion with a narrative of a story I heard many years ago. The story went like this: imagine a narrow, shaky, and difficult pass in the high mountains. There is a deep gorge echoing the sound of a river below. Now from both sides a goat enters into the pitch and they meet in the middle. They cannot go back as goats cannot walk backwards. They cannot turn. The usual behaviour of goats is to fight each other. But on this pitch, fighting would mean that they would fall down. But let us say one of the goats had the wisdom to kneel down and let the other goat climb over it. And thus both would reach their destination. Who won in this story then? The answer is, both. They helped each other to win.

I think this issue was very much the essence of the debate of the last two days. How to come to a win-win situation of the many controversial aspects of the constitution making process in your country? The attempt by all to
arrive at the goal equally. The question is - is this possible? Yes, I am optimistic, particularly after the discussions we had for the last two days.

And another point, in my relatively long experience here in your country, there is one point which I always admire. Crisis and conflict seem very often insurmountable, but at the very last moment a solution is found. The importance of the constitution will invite activities of all stakeholders to come to a positive agreement.

In the short time I have been allotted, I cannot summarize much of the eleven papers, sixteen commentators and many questions and comments which came from the floor in the sessions I attended. So, I would like to go only to a couple of points which I consider very important here.

One of the issues which came up in the first session, the plenary session, was regarding the question of presidentialism or parliamentarianism. There were two extremely different viewpoints or experiences on this issue. Some argued for the presidential system as the suitable system for Nepal, and some emphasized the parliamentary system. And allow me to emphasize that there is a need of a strong person to settle the debate which is at hand. I am looking for a safer example for myself. I am sure many of you know the history of my country [Germany], which has been referred to in many sessions of the conference. We had the so-called parliamentary experience in the Weimar Constitution. Armed groups and semi-armed groups were fighting for dominance in the streets. There was chaos all around. A charismatic leader was searched and found to run the republic. He established a strong government. It had all sorts of problems. But a big catastrophe befell the country, and the rest of the world. After that we established a new parliamentary system, which is stable, which is functioning and which has not created any problems ever since. I am not saying that presidentialism must give way to the parliamentary

"I think [the issue of helping each other win] was very much the essence of the debate of the last two days. How to come to a win-win situation of the many controversial aspects of the constitution making process in your country? The attempt by all to arrive at the goal equally. The question is - is this possible? Yes, I am optimistic, particularly after the discussions we had for the last two days."

- Horst Mattheaus (at p. 406)
system, but the question of one dominant man in our opinion is very dangerous.

The second comment in the session I participated in was regarding the judiciary under the draft constitution. There was a consensus on the need of the independence of the judiciary and also the need for its restructuring to meet the new challenges. However, there was a long debate and different opinions came up on how this independence can be achieved and guaranteed. One important issue was the question of the power of interpretation of the constitution. Several proposals were presented with various experiences from different countries. There was also a certain agreement that the interpretation of the constitution requires an independent institution - otherwise it may be a lame duck. One of the commentators asked the question, “Would the establishment of a constitutional court be a practical solution for Nepal?” Here I would like to end this issue.

The third point I would like to raise is the topic of managing the transition under the new constitution, and the protection of national interest and security. These were long sessions with many papers. We had a question, what is national security or a national security interest of today. These issues cannot be resolved without taking into account the integration of the Maoist combatants, the democratization of the National Army and other controversial issues. A commentator had three superb statements. The issue is political, but political leaders do not have a shared vision. Another participant expressed the need for the National army to have a new mission.

At the end of my rapport, I would like to congratulate the organizers for this international conference, for their ability to gather distinguished national participants and so many experts from different countries. There were politicians and eminent persons as well, to discuss the issues of constitutional options and dynamics of constitution making. I hope the proceedings of this conference will soon be available. It can still be used for the wider audience and particularly for the members of the Constituent Assembly in their deliberations. Thank you very much!

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Conceptual Level Dilemmas

Shambhu Ram Simkhada

Honourable Chairperson, Rt. Honourable Prime Minister, Honourable Ministers, Excellencies and members of the Constituent Assembly, Dr Adhikari and Dr Dhungel, Distinguished Scholars and International Friends, and dear Nepali Brothers and Sisters.

To present a report of a two-day long workshop of six sessions chaired by six distinguished individuals, with 17 paper presentations made by internationally renowned constitutional experts, jurists and scholars of very high calibre, not to mention the notes of commentators and floor discussions, all in five minutes is, as you can well imagine, a difficult task. I would have liked to enumerate some of the very valuable issues that were raised in the papers as well as comments or build my wrap up note around some themes and relate those to our constitution making exercise. However, because of time constraints, these options are out of the question.

I will simply say that a constitution is a contract between the state and the individual around some values and institutions. Nepal’s political parties and leaders are so divided on those values and institutions that at times, there are moments of despair. But this very important conference reflects the goodwill and friendship of the international community towards Nepal and their willingness to extend the required support and cooperation to this important exercise. The active participation of scholars and politicians from all spectrums of Nepali society and politics in this conference has clearly demonstrated that we can come together to achieve the goals that we have set for ourselves.
The papers that were presented in the sessions were excellent. The comments were of very high calibre and the discussions clearly pointed out the critical points of compromise and convergence, which are essential if we are to produce and promulgate the constitution by 28th May, 2010. Having made these remarks, let me simply present some issues around which I believe the conference was most focused.

The inaugural and the concluding sessions as well as the other sessions highlighted the imperative that all human endeavours must be judged on the trajectory of time and space. In that sense, the current Nepali constitution making process too is influenced by significant complexities; a nation-state is much more than the physical territory. It is the intrinsic unity of the multitudes of people bound together around some shared values and a sense of common destiny. The Nepali nation-state came into existence through a successful exercise in military conquest but the requisite state-formation and nation building process faltered. So, we are now trying to address the problem of nation-building through state restructuring and creation of an appropriate form of governance. This is happening within a specific context of peace building that started with the end of a long violent conflict. Thus the constitution making process is simultaneously a nation-state building and peace building exercise. One cannot forget this.

Being a multiple undertaking that encompasses state and peace building activities, the present constitution...
writing exercise is influenced by significant dilemmas at conceptual-philosophical and practical-behavioural levels. The balance between local autonomy and central authority for self-rule within shared rule has historically been a complex dilemma in state formation and nation building experiences everywhere in the world, but more so in Nepal because of its diversity and location. Time and technology have added to the geo-political complexity. Nation-states today exist in a bizarre dichotomy of globalization of economics in which the world is becoming more and more integrated but increasingly localized in terms of politics where smaller units are demanding greater autonomy and rights. Consequently, the demands for federalizing the traditional Nepali state must be seen with proper considerations of the pressures on the state system with vertical or upward evolution towards supra-national arrangements and downward devolution to sub-national units. Horizontally, non-state and non-governmental actors are gaining greater power and influence in relation to the state. In such a context, for the current state building, peace building and constitution making exercises to be meaningful and durable, there must be inbuilt arrangements to reconcile the significant complexities and contradictions arising out of the dichotomy in economic and political management of societies being experienced in the world.

These challenges are further complicated by the notion of security, national versus human, which is arguably the central responsibility of the state. It is the rationale behind the peace process and the key tenet of the new constitution. The traditional nation-state system was built on the foundation of monopoly over the legitimate use of violence. How can you conceptualize a nation-state system where multiple non-state actors challenge the state with force? Yet, as Aristotle wrote so long ago “justice is the principle of order in society”. Unjust use of force will not be seen as legitimate and hence will be challenged. So, the state will not be able to monopolize it. With terrorism, the whole notion of use of force and security needs to be viewed in a new approach.

Amidst these complexities and contradictions, one of the most significant issues that came up for discussion during this conference is this idea called the constitutional moment and momentum. The desire to be governed democratically under a constitution written by their own elected representatives is a historic aspiration of the Nepali people. Today, we are at that moment of history. But as a distinguished professor pointed out, the momentum of this moment is not unlimited. So it is essential to seize the moment and keep the momentum. I think that is one of the key conclusions of the discussions of the last two days.
Secondly, the discussions revolved around the forms of government. Here, one of the salient parts was Honourable Bob Rae’s clear message, “constitutions are not either imported or exported”. So, it is the responsibility of the Nepalese themselves to try and come to a consensus as to what kind of a constitution we want. But in this process Justice Pekka’s view “It’s an exchange, an educational and learning process” is equally noteworthy. In his view, there is no question of imposition. This conference has been a great success in that process of exchange between leading scholars, jurists, constitutional experts and senior politicians from Nepal and abroad. At the end of this session, it has become clear that there is no one magic formula for a form of government, there a great variety of them. It is for the 601 members of the CA and of course all Nepalese around them to ultimately decide.

Restructuring of the state and the federal framework also came up for discussion. There was a whole range of debates by experts but ultimately, the critical points were sharing of power, the capacity of the restructured state to deliver the goods, manage the ever present diversity of Nepal and contribute to the exercise of nation building. A rich discussion also centered on the right to self determination.

The final session revolved around the broader notion of bill of rights, human rights, minority rights, civil and political rights, economic, social and cultural rights and of course the importance of protecting these rights at times of transition through transitional arrangements. Implementing what we write in the constitution and making those rights justiceable is equally important.

There is a saying, “what starts well ends well.” Significantly, one of the salient features that came up for discussions in all the sessions is the crucial role of leadership. It is most fitting that this conference started with the Rt. Honourable President recalling the great names of Buddha, Gandhi and Mandela. The Chairman of the CA presented the key note address in the inaugural session. Senior leaders of almost all major political parties either chaired or participated in the conference. Now this closing session is being chaired by you madam, Vice Chairperson of the CA. And the Chief Guest is the Rt. Honourable Prime Minister. I believe we can safely take these as a demonstration of the commitment of the Nepalese political leadership to complete the constitution writing exercise on the due date. Let me conclude my brief wrap note by thanking the organizers for their excellent organization and you, Madam Chairperson for your excellent Chairmanship.

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Looking for Appropriate Alternatives

Markus Böckenförde

One aim of this conference was to exchange views on various constitutional issues as addressed by the relevant documents, prepared so far within the constitutional process. My wrap-up intents to reflect the discussions we enjoyed during the last two days. I attended the sessions of Group A and will therefore refer to the deliberations of this group.

The first day was dedicated to issues related to federalism, one of the most sensitive issues in the Nepalese context. Before addressing the pertinent issues, we should always keep in mind the actual challenges that were meant to be resolved by considering the concept of federalism. If the concept remains an end in itself, but doesn’t help to satisfactorily meet the challenges of Nepal, one shouldn’t shy away from looking for appropriate alternatives.

- One specific challenge with regard to federalism in Nepal has been the determination of sub-units which is not always such a contested and dominant issue in the federal debates elsewhere. Two options are presently discussed: Should the sub-units be created along territorial lines (about 5-6 sub-units) or rather along ethnic lines? Listening to the distinguished expert from Ethiopia and the experiences of his country, we learned about the challenges of ethno-federalism that it is sometimes unavoidable, but comes at a price: what happens with minorities within ethnic sub-units? Do they feel somehow “stateless” by not having their own sub-units thereby being a potential source of new unrest?
We also learned from the Ethiopian experience that ethnic dynamics might require a country to include a right of secession for its ethnically drawn sub-units in order to keep the country together. My feeling was that such an element is something the Nepalis are not too keen to have.

- Vertical distribution of powers: There seems to be an agreement to have three levels of government in Nepal. Yet, it is still unclear what competences are to be assigned to which level of government and how they are assigned. The concept of federalism is based on the elements of self-rule and shared-rule exercised by different levels of government. It implies that there are some areas of regulation that are explicitly allocated at the level of the sub-units. This aspect of exclusive self-rule for the sub-units is still not fully appreciated in Nepal.

In addition, it is not yet very clear what concurrent / parallel powers means in the context of Nepal. To be precise in this respect is important for an effective implementation afterwards. Often, by allocating too many tasks as concurrent powers without a clear idea on what it actually means rather postpones than resolves conflicts. In addition, the more you share, the less you might feel responsible.

The issue that is directly linked to the above discussion and that had been addressed in Group A as well is the question of the depth of fiscal federalism: If the element of self-rule is taken seriously, one also needs to address the financial autonomy of the federal sub-units and the assignment of revenue raising competences at that level. Should there be distinct revenues for distinct levels of government? If you want to enable sub-units to regulate their own policy autonomously they need to have their own money. A strong dependency on national grants might result in a scenario in which sub-units become de facto implementing agencies rather than bodies of self government. Right now, with regard to DDCs, only 5% of their expenditures to fulfill their assignments are covered by own revenues.

In the morning session of the second day, two issues were addressed: The right of minorities and indigenous people as well as the right of women. The first issue that was addressed was the need of a coherent legal document. The directive principles listed in Article 31 of the present draft and the actual rights might mutually devaluate each other. Furthermore, the proliferation of various commissions for distinct but overlapping minority groups might lead to a "forum shopping" for one individual person that qualifies for several minorities. Minority groups might refrain from demanding their own
commission for underscoring their cause but rather focus on one or two commissions that cover several concerned groups. Otherwise various challenges will come up at the implementation stage that do not further an effective promotion of valid rights and demands.

Another issue that was addressed was the character of the Economic and Cultural Rights in the constitution: The importance of the legal status of those rights was addressed in order to give the political voiceless a voice. It was highlighted that not only formal equality needs to be regulated, but also substantive equality in order to allow for an equal de facto enjoyment of those rights. Another element to be addressed is the constitutional depth of those rights. Right now, many rights are guaranteed “as provided by law”. Hence, as long as there is no law, the right is not operational.

**Final comment**

The German constitution celebrated its 60th anniversary in 2009. It was praised as a success story. However, when constitutional lawyers in Germany were asked what actual features this constitution offered in order to become such a success in contrast to the previous constitution in Weimar that somehow allowed the Nazi-regime to emerge, the answer was surprising: The strongest factor of success had been attributed not specifically to provisions in the constitution, but the “Wirtschaftswunder” (economic growth) that was partly initiated by the Marshall fund. In contrast, the constitution of Weimar had to struggle with the reparations as set forth in the treaty of Versailles, the hyper-inflation of 1923, and the economic crisis of 1929. Whereas external support allowed the 1949 constitution to flourish, the constitution of Weimar was confronted with many economic challenges. Donor countries active in the constitutional process in Nepal should therefore not neglect the fact that the retrospectively perceived success of a constitution largely depends on whether the era of the new constitution improves the lives of the people.

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Design Options for the New Constitution
Some Important Considerations

Bipin Adhikari

As part of its transition to peace, Nepal is currently in the process of drafting a new constitution through an elected Constituent Assembly (CA). The international conference entitled Dynamics of Constitution Making in Nepal in Post-conflict Scenario was an immense project undertaken to facilitate this process. Keeping in mind the current dynamics of constitution making, and drawing on the experience of many national and international experts, the gathering brought information and knowledge on modern constitutional thought to the designers of Nepal’s new constitution. Furthermore, the conference provided a platform for the numerous international constitution builders invited to Kathmandu to engage with the concept papers and the preliminary constitutional drafts prepared by the thematic committees of the CA.

The idea behind the conference was to receive international comments and feedback on the basic documents, which have already been cleared by the thematic committees. As a result, when the full house deliberates on the papers, and the Constitutional Committee subsequently begins to write an integrated comprehensive draft based on the instructions of the full house, it will have the comments of international experts on hand. These inputs are not only expected to help in sorting out contentious issues, but also to play a role in improving the existing draft. It is to further these objectives that the
The motivation of the Nepal Constitution Foundation and its partners in organising the conference and publishing its proceedings is based on the simple premise that those drafting the constitution will benefit from the comments of international experts on the most recent proposals of the CA. The comprehensive set of options provided by the conference participants, especially on the design of governing institutions, will be useful. The conference participants tackled a series of issues including the most suitable form of government for Nepal, ensuring independence for the judiciary and creating mechanisms for the devolution of powers, all topics which are central to the recent concept of constitutionalism. The speakers also provided information on trends and patterns in a variety of constitutional provisions across the world, as well as representative excerpts from a number of jurisdictions to illustrate the array of choices that exist for each issue. Important as this global picture is, there is a general consensus that any draft constitution must be tailored to fit the local situation in Nepal.

This document highlights the main focus of the keynote speeches presented at the inaugural session of the conference; summarises the presentations of the international paper presenters in the context of these keynote speeches; discusses the local commentators’ take on the keynote

"Although Nepal has come a long way since the comprehensive peace accord was signed in November 2006, the political parties have been trying their best to accomplish the task of formulating a new democratic Constitution for Nepal within the stipulated timeframe through an inclusive sovereign Constituent Assembly of 601 members. We have full confidence that our political parties, vibrant civil society leaders and people are capable of working together to produce a constitution, which they may be able to own."

- Ram Baran Yadav
(at p. 1)
speeches and presentations; and provides an overview of the comments received from the floor. Indeed, the papers and the floor debates, summarised here in the language used by the commentators, were very lively in each of the 11 sessions, and helped to place the suggestions of the presenters within the local context. We must note here that the objective of the conference was not to reach a conclusive ‘answer’ on any issues – something that is neither feasible nor desirable for a forum such as this. Instead, the intention was to explore the contentious issues and design options as well as provide inputs for the CA to contemplate.

**Keynote speeches**

The conference started with a welcome note by Surya Dhungel, the senior partner of Nepal Consulting Lawyers, Inc, and the convener of the event, who pointed out that this is perhaps the first time the world’s legal and constitutional luminaries have assembled in Nepal in such large numbers. In this context, Dhungel noted that the ongoing constitution writing is Nepal’s first attempt to draft a constitution through a participatory and inclusive process. Indeed, the conference itself is also a part of the participatory process, he said, with those gathered engaging with the preliminary drafts and using their expertise to analyse its pros and cons. Dhungel described the 601-member CA as an inclusive, elected and sovereign body in internal negotiations about the form the constitution of Nepal should take. It goes without saying, noted Dhungel, that this process is complex and challenging, especially with the 28 May deadline now looming close.

Following the welcome note, three pivotal figures from the state delivered their keynote speeches – Dr Ram Baran Yadav, the president of Nepal, Subhash C. Nembang, chairperson of the CA and Dr Minendra Rijal, minister for Federal Affairs, Constituent Assembly, Parliamentary Affairs and culture. Inaugurating the conference, Yadav began by saying that the new constitution is meant not only to establish Nepal as an inclusive, secular and federal state, but also to provide clear avenues for conflict transformation, restorative justice, reconciliation, development and efficient leadership. Yadav rightly pointed out that drafting a constitution is particularly difficult for countries which have suffered the trauma of armed conflicts. He further added that as the final document is a blend of political and technical processes, building consensus on developing a common constitutional framework needs the unequivocal commitment of the stakeholders. In this regard, Yadav said that the experts, with their proven
scholarship in their own countries, provide necessary perspectives on the ongoing process in Nepal.

The next speaker was Subhash C. Nembang, whose keynote address served as the main course of the inauguration ceremony. Nembang highlighted the fact that Nepal is following a bottom up approach in building the new constitution. In this context, he noted that Nepal had not taken the route of engaging experts to prepare a draft of the constitution, which would then be taken to the CA for focused discussions. Rather, Nepal started from scratch, he said, enabling the thematic committees to engage with the issues on the ground, starting from zero. Nembang admitted that though the countdown for the promulgation of the new constitution had already started, the deliberative process has been somewhat slow. According to Nembang, the most significant problem at the moment is the continuing lack of consensus on the following issues: Establishing a suitable federal framework, deciding on a system for the devolution of powers, identifying the features of an inclusive state, pinpointing the nature of the secularism to be adopted by Nepal, articulating strategies to ensure the local people’s control over local resources and establishing a model for the republican form of government.

Nembang emphasised that the foremost issue before the CA is the search for a suitable form of government for Nepal. The issue of state restructuring, especially the quest for a suitable model for federalism is another area which has received the serious attention of the CA, he said. Nembang also noted that there has been much debate within the body on how many provinces the country should have, how the provinces should be demarcated and how the national powers should be shared between constituent federal units. Nembang also noted that many people, especially the indigenous communities who have historically been denied access to the national mainstream, want their right to self determination to be assured. Similarly, there are issues surrounding fiscal federalism or the sharing of resources between the centre and the provinces, as well as among the provinces in the new set up.

Nembang was very categorical in stating that the report of the CA Committee on Judicial System had been keenly studied – suggesting that there is much to worry about and that the report may entail further debate. In addition, Nembang stressed that there are also important dimensions to the fundamental rights and directive principles that have been proposed by the Committee on Fundamental Rights and Directive Principles, and it is time to make sure that rights guaranteed by the new constitution have adequate sanctions. Of course, provisions for the separation of powers among the main organs of government as well as checks and balance are essential in every
system which considers liberty and freedoms as its foundation, he said. Similarly, Nembang added that a constitution must also provide for a just and efficient security system, electoral procedures, public accountability institutions as well as ensure the existence of a variety of constitutional watchdogs. Nembang ended by saying that he would consider the conference a success if it were able to inject innovative ideas into the discussion about the forms, institutions, procedures and values of constitutionalism relevant for Nepal. This is particularly important, said Nemwang, at a time when the country is finalising the debate on the first constitution in the nation’s history to be written by the people themselves through an elected Constituent Assembly.

Following Nembang, Minendra Rijal, referring to the 12-point understanding,¹ called it a clear commitment by the parties to establish peace, democracy and progress. After the initial April 2006 accord, the conflicting parties agreed to a number of follow-up understandings and agreements. The Interim Constitution promulgated in 2007 enshrines all these agreements, he said, calling it the guiding document to peace building and constitution writing. Rijal noted that the country is currently on its way to completing the peace process and writing a new constitution to institutionalise the federal democratic republic, viewing the document as the means to usher in an era of peace, prosperity and development in Nepal. Rijal emphasised that three different types of consensus are mentioned in the Interim Constitution – “political consensus,” “consensus of major political parties,” and “mutual consensus”. While political consensus implies an almost universal consensus, the consensus of major political parties is akin to the concept of “sufficient consensus” while mutual consensus refers to the consensus among the political parties in government that command a clear majority in the parliament.

According to the framework laid out in the Interim Constitution, explained Rijal, each article of the new constitution has to be adopted by consensus. Only in the case of a political consensus not being reached in the first two rounds of consensus building in the CA can an article be introduced into the constitution with a two-thirds majority. This is a humble reminder that we should strive for more than just a consensus among the major political parties to write the new constitution, said Rijal, adding that the other alternative is the promulgation of a document which many stakeholders will

¹ See http://www.peace.gov.np/admin/doc/12-point%20understanding-22%20Nov%202005.pdf
be unwilling to honour as a living social and political contract for generations to come.

Meanwhile, Rijal was quick to point out that Article 146 of the Interim Constitution reminds us that an important facet of the peace process is the consensus between the major political parties in deciding the fate of the Maoist combatants. Similarly, Article 144 states that a political consensus – not just a consensus of major political parties – is required for the democratisation of the Nepal Army. Clause (3) of this Article states that “the President, on the recommendation of the Council of Ministers shall control, mobilize and manage the Nepal Army in accordance with the law. The Council of Ministers shall, with political consensus and the consent of the concerned committee of the legislature, formulate an extensive work plan for the democratization of the Nepal Army and implement it.” Rijal also stated that Article 43 lays down the rules for the conduct of government, based on the Westminster system: “The conduct of business of the Government of Nepal shall be carried out consistently with the aspirations of the united people’s movement, political consensus and culture of mutual cooperation. The common minimum programme prepared through mutual consensus shall form the basis of the policies of the Government of Nepal.” In light of this, it needs to be noted that no party’s manifestos can be adapted into a constitution, Rijal said. Given the current political dynamics, Rijal maintained that the High Level Political Mechanism will certainly be of great help in moving the peace process forward, ironing out differences on constitution making and much more.

Next on the podium were non-political stakeholders, namely Amber Pant, professor at the Tribhuvan University Faculty of Law and Indra Prasad Kharel, an advocate with the Supreme Court Bar Association. Both spoke along the same lines. Emphasising that Nepal is at a critical juncture in its history, Pant laid out the three major points requiring further contemplation: The contents of the constitution, the processes being followed in drafting the constitution and the readiness of the people to accept the outcome of the process. As regards the contents, Pant stated that the constitution should adopt universal and democratic constitutional values recognised throughout the world. He rightly pointed out that incorporating provisions which are likely to once again be contested is ultimately damaging. Underlining the importance of an independent judiciary and respecting fundamental rights, he stated that these must be taken into account to safeguard the rule of law and the supremacy of the constitution. Pant concluded by saying that the process must be participatory and able to solve the problems that it was tasked with addressing. Pant urged the conference participants to also spend time
discussing these aspects of the debate. Kharel also emphasised that the Supreme Court Bar Association deemed the conference an opportunity as rich debate was certain to emerge from it.

In this broader context, the topics explored in the presentations and the subsequent discussions during the 11 sessions of the conference have been reorganised, for the purposes of this document, into the following seven categories:

1. Forms of government and legislature
2. Independence of the judiciary
3. A suitable federal framework for Nepal and the devolution of powers
4. Rights of women, minorities and indigenous peoples
5. Economic, social and cultural rights
6. Preservation of national interests and security issues
7. Economic constitutionalism and aspects of international law

1. Forms of government and legislature

During the conference, four papers on the possible forms of government and the choices before Nepal were presented.

Bob Rae, a former premier of Ontario, spoke on the theme “Presidential and Parliamentary Models: Some issues for Nepal”. Cheryl Saunders, a professor at the University of Melbourne, evaluated the principal options categorically, delving into the way in which the government is constituted and, by extension, the relationship between the legislative and executive branches of government. Thio Li-ann, a professor at the National University of Singapore, explored the major issues in designing a legislative body, focusing on representation and accountability aspects of the legislature in the Nepali context; Rohan Edrisinha, a professor at the University of Colombo, cautioned the constitution builders to keep in mind the perils of presidentialism, citing Sri Lanka’s experience over the last three decades.

As a package, these papers covered a great many of the critical concerns before the Constituent Assembly in settling on a form of government and legislature. Lively discussion followed all four presentations on forms of government.

The discussions on Bob Rae’s and Rohan Edrisinha’s papers was chaired and moderated by Dr Baburam Bhattarai, senior leader of the Unified CPN (Maoist), while Manohar Prasad Bhattarai, secretary general of the CA, led
discussions on Cheryl Saunders’ and Thio Li-ann’s presentations. A number of participants commented on these papers including Professors Surya Subedi, Bal Bahadur Mukhiya and Wiktor Osiatynski, CA members Lal Babu Pandit and Hari Roka, advocates Dinesh Tripathi, Kumar Regmi, Matrika Niraula and Shambhu Thapa and Leena Reekila, political scientist.

Thematic presentation

Juxtaposing two major models on the form of government – presidential and parliamentary – Rae pointed out that though “the United States and the United Kingdom, were not democracies in 1787, both systems were committed to extending the rule of law and increasing accountability. Both followed the basic rule that a division between the executive, legislative and judicial functions was a necessary feature of modern government, and the evolution of these forms of government has now become a feature of constitutional discussions throughout the world.” Rae also noted that the constitution of France’s Fifth Republic of 1958 and the present constitution of Russia are a mix of the presidential and parliamentary forms.

Citing further examples, Rae drew attention to the ongoing debate in Kenya on whether to formally adopt a mixed system in its new constitution or to seek a clearer parliamentary or presidential system. All the same, Rae underscored the weaknesses of the hybrid system – notably the risk of conflicts between the presidency and the prime ministership in the event of two separate parties holding the two positions. This could well lead to an imperial presidency and a deadlocked parliament. Rae’s principal advice was one of warning: do not govern in the name of a theory. “Make the changes that are ‘sufficient unto the day’” he said, emphasising that a framework is being sought, not a detailed blueprint for the minutia of decision making. Constitutional politics is about making the foundation and the framework, setting out basic principles, the underlying values as well as the essential institutions, he concluded.

Similarly, Saunders also spoke about the three principal systems suitable as a form of government in a multi-party democracy: A parliamentary system, a presidential system and a mixed or semi-presidential system. Though there is potential for considerable variation within each system, Saunders spoke about relatively clear conceptual distinctions between these three that make them useful for comparison. For each option, Saunders considers whether the potential advantages of the model could be maximised
and its potential disadvantages minimised, keeping in mind the realities of Nepal.

Saunders concluded by saying, “there is no perfect form of government. To a degree, each system relies for its effectiveness on the quality and integrity of those entrusted with public power and on the vigilance of civil society.” She further noted that considering Nepal’s long experience with parliamentary institutions, the country will enjoy the advantage of familiarity if this system is adopted by the new constitution. If Nepal does want to continue with the parliamentary system, it will be important for the nation to identify the flaws in the erstwhile system, and fix on ways to overcome them, she said. “In considering this question, it is necessary to take account of the very significant change effected in Nepal through the abolition of the monarchy, enabling the CA to rethink the structure of the office of the Head of State and the powers vested in it in a republican Nepal”, she said. Saunders pointed out that both the presidential and semi-presidential systems have the attraction of offering a new start to Nepal. Then again, Nepalis are not familiar with either of these systems, and their operations might thus prove unpredictable in practice. “A key question for the CA, drawing on its understanding of the political culture of Nepal, is the extent to which their potential disadvantages can be sufficiently neutralised through institutional design’, she concluded. Saunders, as in the case of Rae, did not offer any recommendations.

The next presentation, by Li-ann, revolved around the designing of a legislative body as well as representation and accountability issues. She stated:

Legislatures influenced by the Westminster model of government are predicated on the idea of multi-party democracy and alternating political parties, as determined by the casting of votes at the ballot box, as an expression of the people’s popular sovereignty. Nonetheless, for the political machinery of government to be directed and wielded effectively, political parties holding the reins of government must be sufficiently cohesive to provide direction to government and its ability to provide collective goods in a less-developed country. The lack of party cohesion can thwart this. The government must be sufficiently strong to keep the peace and eschew violence, as well as committed to political pluralism in the face of social diversity.

In the context of Nepal, she posed the question of what the objectives that should be taken into account in the design of a legislature are, especially against the backdrop of a broader move towards a secular democratic polity. Clearly, attention must be given to the methods of constructing the
legislature to enable a reasonably strong parliamentary executive able to effectively regulate national life said Li-ann. Concomitantly, it is important to ensure sufficiently muscular checks to prevent abuses of power said Li-ann, arguing that an anaemic government is an ineffective government. With unrepresentative and unresponsive government alienating the public, how can sufficient consensus be fostered in the face of pre-existing polarities, asked Li-ann?

Li-ann suggests considering a parliamentary body or committee devoted to reviewing legislation to monitor whether it contains discriminatory measures to safeguard minority interests. This could assure minority groups. She also suggests formulating a scheme to promote inter-party cooperation prior to elections as opposed to post-election wrangling to form a coalition. For instance, if political parties are organised on the basis of race or religion or caste, a multi-member constituency scheme can be created. This would require that, in a team of between three to five people, one member must belong to a specific group.2 This will force insular groups to be more inclusive or socialise them into making alliances with other parties so as to field a team with the requisite slate of candidates.

Edrisinha presented the fourth and final paper on the various forms of government. Taking Sri Lanka’s experience as an example, Edrisinha highlighted the dangers of the presidential system. Referring to his country’s 61 years of independence – Sri Lanka had the parliamentary executive model for 30 years and the presidential executive model for 31 years – Edrisinha said the presidential system had generally promoted authoritarianism and undermined liberal democratic values and institutions. Focussing on the problem in Sri Lanka, he concluded that the parliamentary system is more conducive to stable democracy than the presidential one. This conclusion especially applies to nations with deep political cleavages and numerous political parties, he said.

As Edrisinha explained, in 1978, the advocates of presidentialism in Sri Lanka put forth two central arguments in favour of the model. First, it would allow for a strong government, thus bringing about much-needed stability. Second, it would empower the minorities because the main political actor, namely the president, would be elected by the whole country rather than from a small constituency. Emphasising his point, Edrisinha said “Think of Hugo Chavez in Venezuela, Evo Morales in Bolivia, Rafael Correa in Ecuador,

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2 This electoral model was also proposed to the Constituent Assembly by Bipin Adhikari, *The Model Constitution for Nepal 2066* (Kathmandu: Consortium of Constitutional Experts, 2009)
Joseph Estrada in the Philippines, Thaksin Shinawatra in Thailand, Abdurrahman Wahid of Indonesia and of course Mahinda Rajapakse in Sri Lanka. It would probably have been difficult for a Gordon Brown, a John Major, a Manmohan Singh or a Kevin Rudd to have become president if their respective countries had presidential systems”. Edrisinha concluded by highlighting his use of Juan Linz’s “Perils of Presidentialism” article as the basis of his suggestion that the lessons from Sri Lanka may be of universal application. “The particular form of presidentialism in Sri Lanka is problematic. But perhaps the Linz thesis highlights the fact that the concept of presidentialism also has serious flaws”, he said.

**Thematic discussion**

Baburam Bhattarai began by agreeing with Rae that “democracy is not an exercise in imperialism”. He stated that one cannot impose the same model of democracy in different parts of the world, arguing that democracy is an evolutionary process during which it is important to keep in mind the historical stages of the development of society. A model formulated in the developed countries of Europe and America might not, according to Bhattarai, be suitable for developing countries such as Nepal. Ultimately, he pointed out, Nepalis will have to discover their own model of democracy, one suitable for the unique situation of the country. Bhattarai stated that Nepal is now discussing all three systems – presidential, parliamentary and mixed. Bhattarai shared that the Committee on the Determination of the Form of Government as well as the sub-committees of the CA have been working out the proposal and will be submitting it to the full house very soon. Naturally, he said “the opinion is divided on whether to go for a presidential system or a parliamentary system. But in case of Nepal, the 10-year people’s war was directed not only against absolute monarchy but also partially against the conventional Westminster system which failed to deliver the dividend to the mass of people.”

Given the national context, Bhattarai called the attention of the floor to the fact that the discussion was not only about the instruments of the revolutionary system, but also instruments of the traditional Westminster system, especially in third world countries. The Westminster model has been promoting instability in our society, he said, one that is politically, socially, culturally and economically fragmented. This model has not served very well in the third world. Opinions on this issue are strongly divided in Nepal, he concluded. Commenting on Edrisinha’s presentation, Bhattarai conceded that the former’s arguments against the presidential form of government were
very strong. All the same, he did say that there are others who would put forward equally forceful arguments against the parliamentary system, especially as practiced in South Asia. There has been a virtually guaranteed system of hereditary prime ministership in the region, whether in India, Bangladesh, Pakistan, Sri Lanka and even Nepal to a degree, he added. Ultimately, pros and cons can be put forth for both forms of government.

Surya Subedi, on the other hand, said Nepal needs a presidential system of government for many reasons. The first, he argued, is that the country has recently gone from a unitary to a federal structure, with the demand for ethnicity-based federalism especially strong. Second, a proportional system of electoral politics has already been partially implemented in Nepal. As a result, over 25 parties are today represented in the Constituent Assembly. Third, with over 101 ethnic groups, Nepal is not a homogenous society, as so many others are. Fourth, the process of power sharing, especially the way it has been practiced in Nepal in the recent past has been dismal. Finally, though various political appointments have been made for the constitutional commissions and other bodies, the officials have not been able to work effectively.

"The people of Nepal truly expect that promulgation of the new constitution would permanently end conflict and address the widespread grievances afflicting the population. Thus, the drafting process has to address the twin objectives of peacebuilding and long-term political, social and economic reforms. The broad objectives of our home-driven peace process include, among others, the integration and rehabilitation of the Maoists into mainstream democratic politics and resolution of long-standing ethnic, regional and caste fissures in our society."

- Madhav Kumar Nepal

(at p. 515)
because even professional bodies are today so highly politicised.

It is for these reasons that Subedi believes the country needs a rallying figure. Though Subedi believes that the parliamentary form of government is not a bad one, he believes that the country has departed from the basic ingredients necessary for parliamentary democracy to work. “The cocktail that we have is not a healthy cocktail”, he said, noting that “if we had maintained the first-past-the-post system, if we had maintained the unitary system of governance, if we had not tackled this unhealthy and destructive form of consensual power sharing arrangement, then parliamentary democracy could have worked”. As a result of political instability within the country, there has been a change of government more or less every year since 1990. Nepal has thus been unable to achieve meaningful economic cooperation even with its neighbours. In this age of globalisation, Nepal’s number one priority should be economic development to deliver services to the people. Sadly, said Subedi, the state has not been able to make headway in this area, and it is unlikely that the situation will improve in the near future. Citing these trends, Subedi said, “my direct message is, let a visionary Nepali lead the nation for at least five years, based on the presidential system of government. The leader will have a political manifesto to implement and will remain in power for a defined period.”

Drawing examples from history, Subedi pointed out that it was a parliamentary form of government that failed during the 1990s, leading the country to civil war. Though fully aware of the deficiencies, risks and dangers associated with the presidential system of government, Subedi stated that the constitution can have checks and balances to keep the system moving efficiently. These checks and balances could go beyond impeachment and limiting presidential powers by strengthening the independent judiciary. According to Subedi, the judiciary is the weakest link in Nepal, and part of the reason for the country’s state today.

Subedi was, however, quick to point out that he was neither advocating the creation of a power centre outside of the constitutional framework, nor does he believe there should be a power centre outside of the government. Rather he stresses that the answer lies in making the institutions within the government as powerful as possible by strengthening the judiciary and the parliament. Subedi states, “even today, during the process of transition, the vital decisions are taken in Baluwatar [the residence of the prime minister] rather than in Singh Durbar [the parliament house]. The parliament has been used as a rubber stamp parliament in this country”. He goes on to say that even under the parliamentary system of government, Nepal can have its own
original approach to governance – more control over the power of the
president as well as minimised misuse and abuse of power. All the same, he
maintains that the way forward should be the presidential system of
government.

In putting forth this argument, Subedi is not saying that the presidential
system would be a panacea. Instead, he is returning to his initial position that
a visionary leader, whoever the person may be, can at least run the country
for the next five years. If such stability were to become a feature of Nepali
politics, argues Subedi, the people could at least use the next election to
decide whether the commitments made by the parties were implemented or
not. As things stand today, with a government collapsing every year, the
Nepali parties have never had to live up to their electoral promises to the
people. With a stable, five-year government, parties will have to become
more responsible and more accountable to the people.

Switching to a different aspect of the process, Lal Babu Pandit
highlighted the reality that Nepal does not have a history of a constitution
being sustained for many years. Part of the problem in this regard is the fact
that the constitution is oppressive to the people said Pandit, citing the
problems in implementing the 1990 constitution. Pandit stated that the CA is,
during this fragile time, considering the form of government to adopt, while
remaining mindful of the doctrine of the separation of powers. Taking a
historical view, he pointed to the problem of unstable governments
throughout the 1990s, highlighting how successive prime ministers kept
increasing the number of ministers in their cabinet in order to remain in
power. It if for these reasons that many of us are leaning towards having a
directly elected chief executive rather than a parliamentary executive, said
Pandit. In such a scenario, the parliament cannot keep destabilising the
government. Attempts must, of course, be made to check the presidential
executive’s power by other means, said Pandit. The legislator maintained that
while various options have been discussed in the CA, the streets become
powerful at times, something that affects thoughtful decision-making within
the body.

The next comment from the floor came from Bal Bahadur Mukhiya, who
opined that the decision on the form of government to adopt should be based
on the fact that the country will have a federal structure. In light of this, the
decision should be coloured by how the choice helps the future federal
structure of the country. Mukhiya also reiterated Montesquieu’s plea for the
separation of powers in order to prevent tyranny. At its core, the government
should be stable, accountable and transparent, he said. Furthermore, with
many marginalised peoples facing the problem of non-representation in
government, the constitution must accommodate them, providing for representation in the parliament, in government as well as at all levels of decision-making. How exactly to ensure representation of marginalised groups in parliament, government as well as at all decision-making levels is the main issue at hand, said Mukhiya. Speculating on which form of government can best ensure their participation, Mukhiya concluded by saying that, after listening to Rohan Edrisinha, he believes that the quasi-presidential system could be the appropriate one for Nepal.

Switching tracks, Wiktor Osiatynski emphasised that the most important things for the functioning of the political system are those beyond the constitutional provisions. Agreeing with Edrisinha’s assessment, Osiatynski categorically stated that the presidential system is almost inevitably disastrous in a multi-party system, where the set-up can almost immediately lead to abuses of power. When there are many smaller parties, and there are divisions between them, the effort is always towards control and manipulation, said Osiatynski. Having ruled out the presidential executive, Osiatynski spoke about the numerous forms of the parliamentary system available. He began with the Westminster model, which he called a dictatorial one – the leader of the parliament forms the government, his party has won the majority of seats in the parliamentary elections, the government relies on its strength in the house and is accountable to it, it has parliamentary support in order to keep going but can also dissolve parliament. In this way, the government decides the business of the house.

Osiatynski also referred to the parliamentary model of Italy, a multiparty democracy that is greatly unstable. He also referred to the so-called German Chancellor model, which allows for a strong parliamentary government as well as ensures the stability needed for good leadership. There are, however, two tricks in the German Chancellor model. First, the system has mechanisms which diminish the number of parties, thus avoiding the pitfalls of the Italian system and its instability; second, the provision calling for a constructive vote of no confidence means that the prime minister can be dismissed only if a new one is elected in the same voting. If this is not achieved, the parliament must be dismissed. As it is far easier to cobble together a majority to dismiss government than it is to forge ties to create a new one, the system naturally leads to greater stability.

While it is easy to use these considerations to say the parliamentary system is better, says Osiatynski, it is important to settle upon a variation that is both effective as well as relevant to the local context. Implementing such an appropriate model is, however, impossible for Nepal said Osiatynski, who
believes that a parliamentary monarch is the most stable form of democracy. Supporting his argument, Osiatynski points out that there are dual executives in the most fragmented transitional countries with a struggle between the prime minister and the president. Such tussles have proven to be painful and usually extremely costly to the nation. It is for this reason that Osiatynski advocates for a system where the functions of the head of the state, or the monarchy, and the prime minister are unmistakably divided. The crux of Osiatynski’s argument lay in emphasising the attention those drafting the constitution must pay to avoiding conflict between dual executives; to avoid any possibility of a struggle, the constitution should, for instance, say the president ‘must’ play a particular role, rather than saying he ‘may’ or ‘can’.

Carrying the debate forward, Dinesh Tripathi pointed out that while the debate over stressing accountability versus stability in selecting a suitable form of government is important, it is significant to keep other elements in mind, as well. At the outset, Tripathi stated that he considered the belief, held by a number of commentators from the floor, that the parliamentary system had failed in Nepal to be hasty. Instead, he argued that the system had been subverted, and not been allowed to work in the country. Since it is the question of diversity which is the issue here, he argued, the parliamentary system is always a good option for inclusiveness. In a presidential system, on the other hand, there is less possibility to accommodate diverse national groups. While the latter model has worked in a number of states, mostly with a vibrant civil society and media, the enormous powers vested in the president will be used to weaken accountability in a country like Nepal, argued Tripathi. Considering Nepal’s decades-long political socialisation as a parliamentary system, Tripathi stated that the new constitution stick within this larger framework, while implementing modifications. Some of these adjustments could include more checks and balances, better safeguards, efficient mechanisms for ensuring accountability, and the implementation of a constructive vote of no confidence motion to check frequent changes in government.

Next to speak was Kumar Regmi, who echoed Tripathi’s concern about the dismissal of the parliamentary system. Recalling Professor Edrisinha’s presentation, Regmi thought it important to distinguish between institutional errors and individual errors when evaluating the successes and failures of the parliamentary system. Consider, he said, the fact that the Nepali parliamentary system only functioned for six years, from 1990-1996, before the Maoist insurgency took off, slowly putting the brakes on the proper functioning of the system. Considering the small window during which the model was allowed to function, how can anyone judge the parliamentary
system a failure, asked Regmi. It is inevitable that the multi-party system and its accountability procedures would suffer when there is instability and a weak government, argued Regmi. It was as a result of the conflict, and its negative impact on the structures of the state, that resulted in power hungry policies, corruption and other similar challenges. While conceding the importance of stability, Regmi argued that allowing for an inclusive democratic system is far more important in Nepal, with its numerous castes and communities, estimated to number more than 101. Can a presidential system ensure representation to them all, wondered Regmi.

In this context, Hari Roka argued that though Nepal has recognised some form of the Westminster system since 1950, governments never functioned effectively. Much of the problem lays in the fact that the people’s participation in the system has been largely lacking, he said. Even in 1990, when a new constitution was promulgated, and political issues were sorted out, there were significant differences between king and government. The movement of 1950 and even that of 1990 were implemented top down said Roka, arguing that the 2006 uprising, in contrast, was a grassroots movement motivated by the lack of development outside Kathmandu as well as by an assertion of identity. The issue at hand is to establish which form of government can address these demands, said Roka.

Roka also spoke against the parliamentary system, arguing that the existence of two power centres can lead to disharmony, with both executives eager to outdo the other. Referring to the current situation in Nepal, Roka maintained that the country’s ceremonial president is eager to take on more powers even though an executive prime minister is in office. Citing these reasons, Roka argued against adopting both the semi-presidential system and the parliamentary system. On the issue of the electoral system, he argued that half the representatives should be chosen through a proportional representation system while the other half should be elected directly. While we need a presidential system, he said it should be reformed and its powers should be checked by the parliament. Roka also argued that the president should have full powers for one term, regardless of the length of that term. Equally, the president should have the right to choose the cabinet members from both within and outside the parliament, said Roka.

The next speaker, Tirtha Man Shakya, stressed the importance of all political parties coming together to promote democracy and pluralism. If this does not happen, said Shakya, the constitution will not be implemented even if it passes the CA by the required number of votes. If the in-fighting continues, Nepal might be pushing through an amendment every month, said Shakya. Take, for instance, said Shakya, that under the Interim Constitution
of Nepal, there are five constitutional bodies including the Election Commission, Commission on the Investigation of Abuse of Authority, Public Service Commission, the Office of the Auditor General and the National Human Rights Commission. Now, the CA Committee on the Determination of Constitutional Bodies has presented a draft proposing five additional constitutional bodies, centred on minority rights, women and children, among others.

Keeping this in mind, Shakya pointed out that if there are 10 provinces with one centre making 11 power centres in total are formed, there will be many right honourable members of the constitutional bodies. It is because of these weaknesses that people are asking for decentralisation or regionalisation in the country, he noted. Today, some stakeholders are thinking of having a Singh Durbar in every province, said Shakya, adding that it should be discouraged as it is not helpful to either the presidential or parliamentary forms of government.

Shambhu Thapa added to this, saying that those who plead for a presidential form of government should also plead for an independent judiciary. A party which argues for a presidential system should not strip off the power of judicial review and hand it to a parliamentary committee, he said.

Dinesh Tripathi further noted that since Nepal has opted for federalism, it is important to have a bicameral legislature. A unicameral legislature may not be able to represent the diversity of the country, a crucial matter today, he said. Similarly, if the system is without a powerful and independent judiciary, it will suffer in the absence of a referee, and be unable to protect the rights and liberties of the people. Similarly, if many independent constitutional bodies with overlapping jurisdictions are prescribed, the government will not be able to function with adequate power. For instance, if there is a Muslim commission then why not a Christian Commission, he asked.

Regarding the system of government, Tripathi noted that Nepal has a strong tradition of political parties creating institutions to mobilise public participation in political processes, which affect the nature of power in the country. But the presidential system undermines the role of the political parties he said, citing the example of the United States, where the electoral process is akin to a beauty contest – the smarter, more charismatic person gets elected, even if the issues s/he addresses hardly relates to the common people. In all this, the political parties have no role. Even in its day to day functioning, the government runs oblivious to the political parties which provide tremendous opportunities to the voters for political participation.
Tripathi again noted that the geopolitics of Nepal is not suitable for the presidential model. Pointing out that Nepal shares borders with both India and China, the two Asian powers, Tripathi argued that the presidential system may be a risky one to adopt as it will make it easier for the two powers to pressurise an individual to do their bidding. Within the domestic context, Tripathi stressed that the non-inclusive nature of the presidential system makes it inappropriate for a country like Nepal.

Continuing to speak about the forms of government, Bijay Kant Mainali, referring to Saunders’ presentation, opined that Nepal has, to date, accepted the mixed electoral system of proportional representation along with the first-past-the-post system. Meanwhile, Matrika Niraula stated that Nepal should consider a majoritarian system, meaning that a government cannot be formed by a party receiving less than fifty percent vote. If there are a number of parties participating in the election and the winner does not have a true majority of votes, the two bigger parties should contest a second round of elections, thus ensuring that the system is always a majoritarian one, said Niraula.

Contrary to most of the commentators, Leena Reekila shared her view that the presidential system might also be made workable. She pointed to some good examples of the presidential system around the world, speaking specifically about some Latin American governments, though without elaborating on the details.

Kumar Suresh underlined some of the issues Saunders identified as likely to make the government responsive, effective, stable and inclusive. Likewise, he emphasised Li-ann’s points about minority representation without the courts in Singapore, also referring to anti-hooping mechanisms and the rejection of proportional representation. All these points should be considered during the CA and its committees’ deliberations, said Suresh. In addition, Suresh stated that the creation of constitutional bodies for ethnic and gender groups is not going to further the cause of fostering unity among the diverse groups of the country. Instead, he said, all the proposed additional commissions should be unified and their needs should be addressed by one overall commission. Taking an example from Nepal’s southern neighbour, Suresh highlights the fact that during deliberation in the course of the Indian constitutional process, there was a proposal to form a National Cohesion Commission instead of formulating a Dalit Commission, a Women’s Commission or a Muslim Commission. Today, the major issue for Nepal is to decide upon an electoral process which will determine the nature of the democracy, establish the mechanisms of the constitution and lay down rules
for the formation of parliament to ensure equality and non-discrimination, he concluded.

Moderating discussions on the paper presented by Cheryl Saunders, Manohar Prasad Bhattarai, pointed out that no system works without a commitment to abide by the established norms and standards. Meanwhile, speaking about Thio Li-ann’s presentation, Bhattarai commented that Singapore cannot offer an ideal model for Nepal. He also stressed that ideological positions should not be rigidly defended, thus allowing principles and pragmatism to go hand-in-hand to bridge the gaps among the conflicting parties.

Ending the debate on the forms of government, Baburam Bhattarai recapped the discussions, maintaining that Nepal today has an immense opportunity to learn from the experiences, both positive and negative, of the last 200 years of revolution and democracy across the world. Bhattarai concluded with an appeal:

I request our friends [from the Constituent Assembly] who have joined this session, to please give serious thought to this issue. We have got a good opportunity to learn from the failure of the capitalist system and the failure of the bureaucratic socialist system in 20th century. In the beginning of the 21st century, we learned that we will be able to evolve a full democratic model. But if we stick to our ideological convictions and our dogmas, whether from the classical capital side or classical bureaucratic socialist side, then there is never-ending debate leading us nowhere. My own request is that we learn from the positive and negative experiences of both sides and try to evolve a system which will be best suited for a 21st century Nepal.

2. Independence of Judiciary

In the previous session, passing references were made about the independence of the judiciary during discussions on the presentations. These comments were made in the context of design options in deciding the form of government. Beyond this, three papers dealing exclusively with the theme of judicial independence, covering most of the issues of concern to Nepal, were also presented in the conference.

The first paper, presented by Steven Greer, a professor at the University of Bristol, revolved around judicial independence and impartiality in Europe. Greer focussed on what lessons Nepal could draw from the European experience. Going beyond the basics, Dr Jie Cheng presented a paper on the kind of judiciary proposed in Nepal, commenting mainly on the power of the federal Supreme Court to interpret the constitution and pass judgement on
constitutionality. In the final presentation of the session, Dr Pekka Hallberg spoke about the prospect of the rule of law in the framework of the Constitution of Finland. All these papers dealt with the issue of an independent judiciary in the context of the concept paper and preliminary draft of the constitution released by the Committee on Judicial System of the Constituent Assembly. While Hallberg chose not to directly refer to the draft CA document, Greer and Cheng made them the basis of their presentations.

Discussions on the papers by Greer and Cheng were moderated by Justice Kalyan Shrestha while Hallberg’s presentation was chaired by Dr Baburam Bhattarai. The commentators included advocates Shambhu Thapa and Badri Bahadur Karki, CA members Radheshyam Adhikari, Khim Lal Devkota and Lal Babu Pandit, Judge Deepak Raj Joshi, Professors Bal Bahadur Mukhiya, Cheryl Saunders and Surya Subedi and lawyers Krishna Man Pradhan, Ganesh D Bhatta, Phurpa Tamang and Sombhojen Limbu. This summary attempts to capture the essence of the views put forth during the discussions.

**Thematic presentation**

The main objective Greer’s presentation was to consider the lessons Nepal might learn from European understandings of judicial independence and impartiality. Greer focused particularly on the lessons which stem from the European Convention on Human Rights, noting that the end result of the ongoing efforts must conform with basic international standards if the transition is to be successful. These standards, said Greer, are found in the international human rights conventions and treaties. As far as the protection of the right to a fair trial is concerned, Greer noted that it is best expressed in several global and regional human rights instruments, including Article 10 of the Universal Declaration of Human Rights, Article 14 of the International Covenant on Civil and Political Rights, and Article 6 of the European Convention on Human Rights. Greer noted that the key to the effectiveness, legitimacy and legality of any court in a modern democracy lies fundamentally in its compliance with the international human right to a fair trial.

Greer also noted that while the right to a fair trial is framed differently within different instruments, it contains some broadly similar core elements. For instance, in the determination of rights, obligations and criminal charges, everyone is equally entitled to a fair and, subject to some exceptions, public hearing by an independent and impartial tribunal established by law. Another important element is that the trials should be conducted ‘within a reasonable
time’. In this regard, even though Nepal is not a party to the European Convention on Human Rights, Greer suggested that the jurisprudence created by the European Court of Human Rights in Strasbourg under Article 6(1) of the European Convention on Human Rights could serve as a helpful learning tool. A key characteristic of the case law on Article 6 is that it derives a range of secondary principles from the primary principles stated in the text of Article 6(1). Additionally, he noted that despite this fact, the court refrains from prescribing precise mechanisms of implementation, assuming that member states can legitimately comply with these principles in a range of equally acceptable ways.

Cheng, meanwhile, focussed both on the proposed system of constitutional review in Nepal as set out in the concept paper and preliminary constitutional draft as well as pointed to the principles that have been compromised by these documents. Emphasising the point that the significance of constitutional review has been recognised worldwide, Cheng said a good constitution without a proper institutional entrenchment will only serve as a tool for dictatorship, for the manipulation of government powers and for the violation of human rights, all in the name of the people’s will. Cheng elaborated on different constitutional review models: a decentralised judicial review model and the principle of rule of law; centralised judicial review model and the principle of constitutionalism; centralised non-judicial review body and the principle of parliamentary sovereignty; and the comprehensive review system and the principle of parliamentary sovereignty.

Cheng noted that when making a constitution, a document that is a social contract, people must make compromises. As an example, she elaborated on how America provided some rich references as to how the first written constitution in the world was made as a ‘Great Concession’. Recent studies of newly made constitutional laws, such as those of Poland and South Africa, also represent some aspects of compromise between the conservatives and the liberals, the old regime and the new institutions. All the same, she contended that compromise should not be made without principles. A consensus achieved through concession and compromise, by sacrificing some of the contentious issues, makes it possible to nail down a structure of government with the principles of democracy and rule of law intact. In this course of action, some of the more difficult issues can be left for later amendments through continuous discourses under constitutional law.

In Cheng’s opinion, political issues and the limits of the rule of law are the fundamental reasons for compromise. The doctrine of separation of powers is often the legal reason for compromise, and a variety of interest groups play important roles in the constitution-making process. These
institutions have an impact on the form of government, the qualification of the candidates for public services, and the relationship between the government and its citizens, she argued. The principle is to create a sustainable constitution that has the potential to continue progressive reforms based on certain values. Although the above mentioned reasons lead to different forms of constitutional review mechanisms, a compromise has to be made with principles, said Cheng.

Analysing the draft of the constitution, Cheng noted that the compromises made in Nepal are “very unique and need further examination”. For one, it has been proposed that the federal supreme court function as interpreter and review body of the constitution. It also has been given vast powers on federal issues. There is, however, a limit to the review aspect, noted Cheng. For instance, she explained that the court has the power of constitutional review only when the issues are not concerned with the position and rights of persons of national importance and with matters directly related to politics and contradictions between the constitution and laws. Furthermore, lower level courts are not expected to interpret constitutional laws.

The judiciary is not the sole review body in the current draft explained Cheng, noting that the Federal Legislature Special Judicial Committee has greater powers than the court. The latter body is also empowered to interpret the constitution and federal laws, take decisions on matters relating to persons of national importance as well as matters directly concerning politics. At first glance, it is a centralised judicial review model. Considering the extensive powers of the Special Judicial Committee, the role of the Federal Supreme Court may be limited to an extent that may paralyse its role as a constitutional reviewer, she said.

Expanding on the reasons for the confusion, Cheng concluded that the judicial authority may become a lame duck without the full authority of interpretation. In this case, it will, to an extent, have conceded to parliamentary sovereignty as well as to the authority of the chief executive. In Cheng’s opinion, the Supreme Court’s jurisdiction to hear cases between the constitutional bodies and between the centre and the provinces will make little sense without full review powers. Finally, the legitimacy of the Special Judicial Committee in reviewing the constitutionality of federal laws is not sufficient given that its members are elected by the legislature, which also establishes law on the rules and rights of the Committee. With this conclusion, Cheng was quick to add that the judiciary does not have to be a review body for either theoretical concerns or practical ones. But a constitutional review body must have sufficient authority and competence in
order to enforce the constitutional law and to entrench the rights of the people. In this sense, the design currently suggested by the committee could be confusing, said Cheng.

The third paper on the judiciary was presented by Pekka Hallberg on how one of the newest constitutions of the world is dealing with the prospect of the rule of law. The Finnish Constitution, promulgated in the year 2000, not only contains basic provisions on the exercise of legislative, executive and judicial powers, but also institutionalises rule of law and the independence of the judiciary. In addition to fundamental civil and political rights and liberties, it also gives recognition to the review of the constitutionality of legislation in the context of actual cases. This means that a court cannot base its decisions on an act of parliament that clearly conflicts with the constitution. Under previous laws, the courts were not allowed to refrain from applying an act of parliament even if they considered it to be in conflict with the constitution.

Hallberg provided an overview of the Finnish system, where judicial power is exercised by independent courts of law, with the Supreme Court and the Supreme Administrative Court the highest of these. Lower level judges are nominated by the president, and the judges of the supreme courts are nominated upon the proposal of these courts. There is also an independent Judicial Appointment Board established by a parliamentary statute, which proposes the appointment of judges to a permanent post. The majority of the Board’s members represent the judiciary. The right of judges to remain in office is guaranteed in the constitution, whereby a judge cannot be suspended from office, except by a judgement of a court of law. In addition, a judge cannot be transferred to another office without his or her consent, except where the transfer is a result of a reorganisation of the judiciary. The legal system includes everyone’s right to have a decision affecting his or her rights and duties reviewed by a court, and the general right to a fair trial and to appeals are guaranteed by law.

Hallberg noted that even though the Supreme Court has the power to judge the constitutionality of any parliamentary legislation, the aim of this provision is not to give the courts carte blanche to look into the constitutionality of legislation. Instead, the primary preventive control, in the future as in the past, is the advance evaluation done by the Constitutional Law Committee as the bill passes through parliament. Hallberg concluded by saying that the tension between the governmental powers and the parliament had eased since the constitution was amended. According to Hallberg, the role of the parliament and the government, which has to enjoy the confidence of the former, has been strengthened, the powers of the president have been
diminished; there is a separation of powers between the legislative, governmental and judicial branches, parliament can interfere in the judiciary only by enacting laws, and judges are independent of all other state institutions. The Constitution, said Hallberg, has come closer to the people, as guaranteed fundamental rights have been applied more seriously by the courts of law.

**Thematic discussion**

Starting the discussions, the chair Kalyan Shrestha said the session was very important in the context of the ongoing debates at the CA. The central issue highlighted during the presentations was the power of the superior courts to pass judgement on questions of constitutionality. The discussions too focused on this topic.

Shambhu Thapa pointed out that the topic is extremely controversial at the CA, especially as the concept paper and preliminary constitutional draft have taken away the judicial review powers of the Supreme Court. The report is the majority opinion of the Maoist members of the Committee, who regard every judge as corrupt and inefficient, and deem the court process a vicious circle, said Thapa, who believes that such allegations have a purpose. As Cheng highlighted, Thapa argued that if the existing arrangement in Nepal is not satisfactory, there could be other viable models. The basic question is one of fairness – can a judiciary which has been designed according to the Committee report maintain fairness, both in terms of the appointment of judges as well as of judicial decision-making. The power of judicial review was accepted in Nepal even as far back as 1951, when the *Pradhan Nyayalaya Ain* (Supreme Court Act) was promulgated, and it should remain intact, said Thapa.

Thapa emphasised that the proposal of the 11-member legislative committee resembles the provision of the Chinese constitution, whereby the Supreme Court will be accountable to the people’s Congress. Thapa pointed out that several international experts at the conference were particular in highlighting the dangers in hybrid documents which do not establish the recognised parameters. Independence of judiciary and the committee proposal within the legislature to control and monitor the judiciary do not go hand in hand, he said. As things stand, Thapa noted that if any provision of law is inconsistent with the provisions of the constitution, the former cannot be set aside by the court through the review jurisdiction and can only be viewed by the committee of the legislature.
In a vibrant society like Nepal, said Thapa, nobody thought the review power of the courts would be taken away in the name of the sovereign CA. Thapa stated that there are limitations to the power of the Assembly, which cannot set aside the bill of rights of the people. These rights must be protected through an independent judiciary. According to Thapa, another important point needs mentioning: the questionnaire issued by the CA to make note of public opinion never included a question as to whether the power of judicial review should be taken away from the courts.

The differences between the Maoist members of the Committee and others at the CA were further explored by Radheshaym Adhikari. As a member of the Committee on Judicial System, Adhikari said the committee report consisted of the majority as well as minority views. The major difference between the two groups lay in deciding who the final interpreter of the constitution should be – will it be the Supreme Court or a judicial committee in the federal legislature? Another fault line revolved around who should appoint judges. The majoritarian view in this regard was that the judges should be accountable to the people – in other words, they should be accountable to the federal legislature. And therein lies the problem, said Adhikari.

The implications of allowing the federal legislature to interpret the constitution are enormous, said Adhikari. If the proposal of the majority is adopted, the elected members of the house will essentially decide what is right and what is wrong, he said. In other words, different interpretation of the constitution will come from time to time on the basis of which party has a majority in the legislature. Adhikari noted that the Committee will reflect the composition of the house, and the majority party will be making the judgement. In a federal system, the dispute between the centre and the provinces could never be settled on the basis of constitutional and judicial principles, said Adhikari. Instead, it is the politicians in the said committee who decide on questions of rights and responsibilities. In that case, how could the federal legislature be impartial and independent in handling the cases? Who will protect the constitutional design in the matter of division of powers between the federal government and its constituent units?

Coming back to the appointment of judges, Adhikari said that appointment by a legislative committee would not be worrying if the judges could work independently after their appointment. The minority view in the Committee in this regard was that it could scrutinise the appointment in appropriate ways to ensure that the judges remain accountable to the legislature. This, said Adhikari, was not enough for the majority, who wanted a bigger role extending to the transfer and dismissal of judges as well as the
curtailment of their power to pass judgement on issues of constitutionality, law and policies. The arrangement, as it stands today, affects the separation of powers between the different organs of the government, and avoids creating checks and balances, said Adhikari. While acknowledging that state organs including the judiciary should be accountable to the people, Adhikari asked how such a reality can be achieved. If the will of people is reflected in the constitution, then an independent judiciary is necessary to check whether all components within the power structure are adhering to the document, he said.

Commenting on Greer’s paper, Adhikari stressed that although nobody raised questions about the UK’s compliance to international standards, London decided to establish an independent Supreme Court to exercise the judicial powers of the House of Lords. In this way, the Supreme Court replacing the House of Lords in exercising judicial powers could be seen as the departure from the past, he said. Adhikari agreed with Greer on the point that the move was implemented to give off an appearance of having an independent judiciary. Similarly, Adhikari found force in Cheng’s argument that if the courts are not appointed the reviewer of the constitutionality of laws and government decisions, it is possible to think of an even more independent body within the constitution. Such a body will be more feasible and legitimate than authorising a part of the legislature to work as the reviewer, argued Adhikari. Additionally, Nepal could also set up a constitutional court, if all the parties reach an agreement that the power of judicial review of the constitution should be given to this body rather than the Supreme Court.

The basic issue, according to Khim Lal Devkota, is whether the power of judicial review should be invested in a body based on the system of government Nepal is going to devise; alternatively, the system of judicial review could be established first with the decision on the political structure coming after. In Devkota’s opinion, the political system should come first. Devkota cited the American experience, pointing to the fact that the founding fathers experienced doubt over how to choose the representatives of the people. All the same, they drafted a constitution and expressed their faith in the document. This led to the concept of the limitation of power, an idea that was further expanded upon by the Supreme Court in the case of Marbury vs. Madison (1803).

In contrast, said Devkota, the British people expressed faith in their representatives, and vested enormous powers in their elected leaders. In essence, they supported parliamentary sovereignty, a concept that stands in opposition to the idea of judicial review – the elected MPs are accountable to
the people while judges are either selected or nominated. As such, they are not accountable to the people. Devkota argued that if a society has faith in democracy, the power of judicial review should be vested in the parliament, not in an unelected body of individuals. That is why the British system developed in a different direction than the American system, he commented.

Coming back to Nepal, Devkota pointed out that the report of the Committee on Judicial System is only a preliminary one, with the full house of the CA still to take a decision. Devkota also referred to the immense changes, “revolutionary or evolutionary” that have taken place in the country, commenting that he found it strange that the dissenting members of the house remain unmoved by these changes. There is no dispute about the independence of the judiciary, something which has to be ensured by the conduct and activities of judges, said Devkota. He further emphasised that a judge worthy of his position need not worry about the powers vested in the special judicial committee at the legislature.

Referring to the earlier discussion about the European Parliament’s appointment of judges to the European court, Devkota said that the Constitution of Finland also allows the parliament to judge the constitutionality of a law by a simple vote. There is no reason why such a procedure can be acceptable in Europe and not in Nepal, argued Devkota. Those who take decisions in the legislature are representatives elected by the people, said Devkota, and if they go against the principles, or abuse their responsibilities, the people can always reject them. Furthermore, it is important to note that there are problems in the services being provided by the judiciary in Nepal, said Devkota. Consider for instance, he said, that the courts have not entertained many cases on the plea that there are political or policy issues involved. Among the cases they have heard, the court’s decisions have been deemed controversial. The challenge is to deal with these problems and restructure the judicial structure if that is necessary, said Devkota. He concluded by saying that those who think the Maoist formulations are problematic should suggest alternatives.

Meanwhile, Badri Bahadur Karki found Greer’s emphasis on British practices ill-fitting to the Nepali context. Britain does not have a written constitution, said Karki, pointing out that it relies on European human rights conventions and other international human rights instruments. As a result, the judgments of the British courts are ultimately reviewed by the European Court of Human Rights. Karki said that Nepali lawyers use the expression ‘judicial review’ rather than ‘constitutional review’. Karki further stated that the proposal of the Committee on Judicial System appeared to be provisional, and calculated to provoke discussion. Karki argued that the report was
perhaps the Maoist party’s effort to demonstrate to the party cadre that they have brought the issue to the CA. Finally, they will give up and say to the people: “Look, we have done well but these capitalists finally got away,” he claimed. Karki felt, however, that Cheng’s paper had approached the issue from the right perspective. “Even for a Chinese professor who is supposed to be well-versed in Maoist philosophy, she has been very critical about the formulation of the Committee on Judicial System”, said Karki.

Judge Deepak Raj Joshi made the next comment, stating that the issue is not just about making a constitution that everybody can own, but also a constitution that is good. Joshi argued that the existing system of an independent Judicial Council is adequate to oversee the matter of appointments, transfers and other disciplinary actions if it also has representation from the legislators, and has some role for them. Going on the same logic, Krishna Man Pradhan made the point that there is a convergence of opinion on the need to have an independent judiciary. The divergence comes in deciding how to implement such a system, he said. Pradhan too argued that the Maoist CA members need to consider the dissenting opinions, and attempt to tone down their positions. Pradhan concluded by saying that the international experts should also assist in finding a middle way.

Taking a bigger picture view, Cheryl Saunders commented that the next issue for the CA to take on is putting all the ideas together. Even if its committees agreed unanimously, there is still the question of how the recommendations of one group fit with those of others, she said. As Radheshyam Adhikari earlier mentioned, Saunders argued that fitting the committee proposals into the structure of federalism is a significant problem. People understand that federalism requires some sort of an independent arbitrator to negotiate between the centre and the regions said Saunders, pointed out that the central legislature is not such a body. Saunders shared her belief that Nepal is likely to adopt a presidential system. As for the remarks made during the course of the conference about ensuring that the presidency does not become an authoritarian institution, Saunders argued that ensuring such an outcome will require some form of judicial and independent reviews. Ultimately, said Saunders, a great deal of work still needs to be done in putting all these bricks together in order to develop an integrated constitutional system.

Saunders brought up another important point, asking why the judiciary should not be restructured at a time when the whole state is being redesigned. Saunders argued that when there is a new constitutional dispensation, it is necessary to look at all institutions being introduced. When introducing the federal system into a polity that has obviously been unitary, it is all the more
important as it is crucial that the judiciary understand its role in the federal system, she said. The Sri Lankan example is instructive, where there has been an attempt at devolution without any judicial contribution, said Saunders. Instead, Saunders suggested that Nepal might look to South Africa, where the constituent states were entirely restructured when a new constitution came into being. At the same time, they also addressed the question of the judiciary and how the new constitution would be interpreted, all leading to the establishment of the Constitutional Court of South Africa. Saunders said a look at the South African system might be relevant to the CA.

Noting that different perspectives have come to the fore, Greer pointed out that there are many systems at work. He argued that no one model can be judged to be better than another, with each working in its own context, something that is also evident in the constitution-making process. Greer was keen to highlight the importance of context, saying that while a system better than others around it can be developed, it cannot be transplanted. Indeed, even if a system is transplanted, the context under which the system works cannot be imported, he said. As a result, Greer argued that if the constitution is to be made for the Nepali people, it should reflect their interests, aspirations, and visions. On the other hand, it should not be said that information about the experiences under other systems is unimportant, he said, as both systems will be enhanced over time by the exchange of experiences.

Regarding the judiciary in the post-conflict scenario, Greer noted that judiciaries in many countries are in transition, struggling to break free from the historical domination by elites, militaries, political parties and executives. No judiciary is completely free to act on its own, bound as it is by the laws and conditioned by the values under which it has to work, said Greer, arguing that this ensures the absence of judicial hegemony. Greer pointed out that people want a constitution to function as supreme law – while the day-to-day will of the people will be expressed through the legislature, the original will of the people will be expressed through the CA. It is for this reason that a constitution is sacrosanct, prevailing over other wills.

Professor Greer remarked that with Nepal embarking on the path to federalism, which is also being seen as a means to protect minority rights, judicial review will be crucial to the system functioning properly. Greer’s point of view was that if the Nepali people really adhere to the rule of law, then the rule of law should be there in a perfect sense, with no parliament above it. If the parliament is above the constitution, it makes little sense to
draft a constitution in the first place, argued Greer. These are the serious matters that should be regularly debated on the floor of the Constituent Assembly, he said.

Giving the concluding remarks, Dr Baburam Bhattarai, noted that while a constitution cannot be exported or imported, the document can be a good reference material for others. In this way, Nepal is keenly following the experiences in Finland and others Nordic countries, he said.

3. A suitable federal framework for Nepal and the devolution of powers
A major focus of the conference was on state restructuring and the devolution of powers, an especially important subject that is new to the Nepali people. Significant points needing attention were tackled by several different individuals, each with noteworthy experience in this area. The first paper, a sort of primer on a federal framework suitable for Nepal, was presented by George R M Anderson, president of the Forum of Federations. Next, Dr Alexander Wegener focussed on the report of the preliminary draft of the constitution by the CA Committee on Natural Resources, Economic Powers and Revenue allocation. Ethnic federalism was discussed by Dr Hashim M Tewfik, while Markus Heiniger and Dr Nicole Töpperwien, both experts from Swiss Development Cooperation, dealt with other aspects of federalism, including issues related to sharing powers. While Dr Kumar Suresh explored the constitutional foundation of local self-government in the federal polity, Larry Taman, a UNDP professional and the final speaker, shared notes on the transitional provisions that must be considered integral to Nepal’s smooth transition into federalism.

The opening session with speakers George R M Anderson, Hashim M Tewfik and Markus Heiniger was chaired and moderated by Ram Sharan Mahat, a leader of the Nepali Congress and a CA member. The second session with speakers Alexander Wegener, Kumar Suresh and Nicole Töpperwien was chaired and moderated by Mohammad Siddiqui, also a CA member. The final session with speaker Larry Taman was chaired and moderated by Daman Nath Dhungana, a former speaker of the parliament. Following the presentations, CA members C P Mainali and Anil Jha, Dr Bishwambhar Pyakurel, Dr Dwarika Dhungel, advocate Purna Man Shakya, and Professor Yash Pal Ghai made comments from the floor.
Thematic presentation

George R M Anderson began by highlighting that the last stage of constitution-making is almost always the toughest – the easier issues have been dealt with and only the hardest remain. Saying he could offer no precise proposals on federalism for Nepal, Anderson spoke about the 25 federations that exist in the world today, and the greatly varied history of how they came to adopt the system. Speaking specifically on Nepal, Anderson noted that the country is committed to federalism – to devolving from a unitary regime towards a federal unit – without actually having a significant consensus on what this means in practice. It is, after all, currently not clear what form these new units are going to take, noted Anderson. In this context, Anderson pointed out that having relatively fewer provinces will be more practical in a country like Nepal – a land where a great many regions have weak government presence, relatively few educated people and minimal local fiscal resources.

According to Anderson, the geographic reality in Nepal is such that establishing a reasonable number of provinces, each with a distinct ethnic, linguistic or caste character will be a herculean task. In fact, Anderson believed there will be only a few ethnicity based provinces, and that even they will be significantly diverse. Certainly, every new province in Nepal will have a significant minority population, and many will have no majority group, he said, adding that it is necessary to be as accommodating as reasonably possible so that minorities feel they have been given a fair deal. Anderson also felt that Nepal should have fewer national commissions than currently proposed. As to the division of powers between the federation and the provinces, Anderson argued that building concurrent powers into the constitution is preferable to creating very strong special federal powers.

Anderson remarked that there is unequal government spending amongst the regions of the country, with the poorer ones having poorer government services. Arguing that the details of a fiscal regime inevitably evolve over time, Anderson spoke against striving to establish all the arrangements in the constitution. He noted, however, that there is less room for compromise on the independence of the courts. Nepal’s greatest need now is to have a constitution, one which will certainly not be perfect, but will demonstrate that the leadership of the country is capable of principled compromise and consensus, concluded Anderson.

Following Anderson, Alexander Wegener provided detailed comments on the report of the Committee on Natural Resources, Economic Powers and Revenue Allocation, which defines the nature of federalism vis-à-vis the
issues it handles. Wegener began with an overview, discussing the guiding questions on public finance, sharing observations on the overall design, structure and content of the draft, providing commentary notes article by article, and presenting examples of public finance-related constitutional provisions based on the German federal system.

Overall, Wegener found the committee draft very detailed, much more so than any other federal constitution in the world. A rather obvious assumption in the report, according to Wegener, is that the federal government occupies the most powerful level in the proposed state structure, ranking above the provincial and local governments. Wegener argued that a constitution should not make detailed provisions for central, provincial and local levels of government. Rather, the document should express and define the underlying principles of public finance. In Wegener’s opinion, the proposed articles and paragraphs are largely unsuitable to form a chapter on public finance in a federal constitution. He also maintained that most of the proposed provisions refer to technical and administrative issues, at the expense of key principles for coordination between the different levels of government and their respective rights and duties.

Carefully analysing the draft, Wegener categorically stated that it is rather obvious that neither the provincial nor the local governments will have sufficient funds to deliver the services they are tasked with providing. This will, of course, make them heavily dependent on federal policy decisions and administrative priorities. Wegener found that the proposed revenue assignment leaves little practical power to the provincial governments, whose scope of activities is rather small compared to that of the federal powers. The approach in the draft is predominantly centralistic and leaves very few and rather small discretionary power to provincial and local governments, said Wegener. Further, he noted that the budget process is itself described vaguely with a number of crucial issues – borrowing, deficits, audit, democratic control, disclosure and parliamentary process – not mentioned. Indeed, Wegener found the proposed unitary accounting system to be a step back from the existing Local Self-Governance Act of the early 1990s, which required municipalities to introduce accrual accounting. Concluding his presentation, Wegener proposed the inclusion of a chapter on public finance in the new constitution dealing specifically with principles of budgets and revenue assignment.

Hashim M Tewfik presented the third paper of the session, exploring aspects of the ethnic federalism being practiced in Ethiopia. His major focus
lay on explaining the framework of the country’s 1995 constitution, which established a federal system organised so as to ensure self determination for the various ethnic communities of the land. Tewfik began by providing a summary of the Ethiopian context, with an overview of the arguments for and against the system. For instance, explained Tewfik, one line of argument opposed ethnic federalism in Ethiopia on the ground that it may give rise to inter-ethnic conflict and the dismemberment of the country. In contrast, another line held ethnic federalism to be the optimal institutional means, deeming it an effective, practical and ethnically permissible means of transition to democratic rule. The latter argument, according to Tewfik, is that the system allows for the free expression of collective identities by ethno-linguistic communities while also ensuring their representation and participation in government.

Dealing with the structural aspects of the Ethiopian federal system, Tewfik explained that the federal state and the regional (member) states have defined powers and functions; each entity exercises legislative, executive and judicial powers within its allocated sphere and is autonomous from other units. Meanwhile, the powers of the federal state are limited to matters expressly enumerated under Article 51 and Article 55 of the Constitution, including national security, foreign relations and the like, while those of the regional states include all matters not given expressly or concurrently to the federal state. According to the Ethiopian Federal Constitution, the residual powers of the component states include the power to establish state administration, enact and implement their own constitutions and laws, frame development policies and plans, levy and collect taxes and duties, prepare and administer their own budgets, manage land and other natural resources in accordance with federal laws, enact and implement laws on the administration of state employees and the conditions of their work, and establish the police force and maintain public order. Tewfik explained that as self-determining ethno-territorial polities, the component states are entitled to use and promote their respective languages, cultures and histories.

Tewfik concluded by saying:

Advocacy for the reconstruction of the Ethiopian state on the basis of a federal system of ethno-territorial communities is reinforced not merely to maintain the unity of the Ethiopian peoples but also to create sustainable peace, something that is essential for the much needed social and economic development of the country. The entrenchment of institutions of self-government within the ethno-territorial communities and their participation
in the governance of the federal polity will help to manage disputes through negotiations and consensus rather than violence. In fact, over the course of the last ten years, since the devolution of state power along ethnic lines, the country has been marked with relative internal peace and stability. Moreover, instead of generating internecine ethnic conflicts, the empowerment of ethno-territorial communities in the governance process provided solid ground for maintaining their unity and pursuing their common interests.

Following Tewfik, Markus Heiniger concentrated on several issue important in the Nepali context. Apart from transitional arrangement, it is also important, in his opinion, to think about oversight responsibilities. Who will oversee the implementation of federalism, is the crucial question. Will it be the government, the high level mechanism or some other body? Are the future provincial governments also likely to want to be a part of that process? While these questions are impossible to answer in the current situation, Heiniger argued that the provision of oversight must also come with a timeline. Heiniger also stressed that sequencing, to decide the order in which activities will be undertaken, is an important aspect of prioritisation and should be given adequate attention, whereas he believes such care was lacking in the April 2008 elections.

Next, Nicole Töpperwien spoke about the issues that emerge around sharing power in countries functioning under a federal system. In particular, Töpperwien looked at the distribution of powers between the different levels or orders of state, and attempted to answer four specific questions: how will the distribution of powers be embodied in the constitution, how will the powers be distributed, what mechanisms will be used to foster cooperation and provide for a dispute resolution process, and how will the distribution of powers be implemented.

Töpperwien emphasised that the distribution of powers should be conceptualised so as to ensure clear rights and responsibilities for each order of government, in particular the centre and the federal unit. As gaps in the distribution of powers are inevitable, federal constitutions regulate which order of the state has the residual power. While there are no fixed rules as to what kind of power each order of state should have, Töpperwien provided some broad guidelines. First, referring to the subsidiary principle, Töpperwien argued that higher levels of government should only assume those powers that cannot be effectively managed by lower levels. Second, federal units are parties in a social contract and owe each other support. In order to avoid overlaps, in particular between the dispute resolution procedure initiated by the interstate council and the courts, it could be provided that the interstate council can discuss all disputes, she said. At the
same time, those disputes that concern constitutional and other legal issues can be brought before the court at any time by any party to the dispute. On the issue of implementation, Töpperwien noted that once the distribution of powers is established and the constitution is promulgated, federal units and local governments will expect to effectively receive ‘their’ powers. If the necessary steps are not taken so that federal units and local governments can become operational and exercise their powers, frustrations will develop, she concluded.

Kumar Suresh’s presentation also dealt with federalism, focussing on the constitutional foundation of local government. In most federations, it is only the dual polity structure that is formally and constitutionally recognised and local governments across the federal polity are embedded with the responsibilities of delivering services at the community level, he said. Suresh, noted, however, that local governments do not enjoy the same level of competence in every federal polity, acknowledging that a variety of institutional and operational constraints limit the jurisdictional competence and discharging of responsibilities by local governments. Though acknowledging the gap between the “institutional reality” and the “operational reality” of local governments, Suresh maintained that the merits of constitutionalising local governments cannot be undermined. Analysing the Indian experience, Suresh concluded that fiscal capacity is the central problem.

Emphasising the importance of local government, Suresh argued that the thrust of inclusion and empowerment is inextricably linked to the structure of governance at the community level. This, he said, is especially true in societies cut across by the axes of diversity and inequality. In such cases, the local government structure is loaded with the moral concerns of making the institutions diverse, reflective and inclusive. Concluding his presentation, Suresh said:

Given the fact of cultural contiguity between India and Nepal, this dimension is specifically important while designing the state structure on one hand and the local government structure on the other. It is, however, not to suggest that the local governments should not be empowered but that it needs qualification. If the local community is differentiated, heterogeneous and unequal, a certain kind of protection is needed for the disadvantaged groups. This would ensure that some groups are not excluded at the cost of the others. The constitutional space guaranteed to the local government could ensure better prospects of accommodation and inclusion of the disadvantaged groups.

The last paper of the session on federalism was presented by Larry Taman, and focussed on transitional arrangements. Taman started with the four
propositions considered important for the purpose of effective transition. To begin with, he argued that power sharing through federalism is the key to unlocking the potential of the new constitution. In his opinion, the success or failure of the constitution will depend heavily on the people’s perception of whether the transition to federalism is a success or a failure. Consequently, the transition to federalism must address some basic principles. For instance, he argued that the guiding framework for transition to federalism must be provided in the constitution itself.

Noting that the report of the CA Constitutional Committee had already dealt with one part of the transition provisions by stating that the current governmental- and judiciary-related arrangements will continue until new ones are made, Taman argued that many more issues still require attention. He ended his presentation with a series of questions: Do new states and local governments come into being immediately or only after a period of time? If they come into effect immediately, how will they be governed until the first elections? Do they all come into existence at the same time? Do states receive all their powers and resources at the beginning, or is it a harmonised process so that they get powers and resources when they are ready to take on their functions? Who decides if they are ready? Who helps them get ready? Who is responsible for overseeing the practical elements of building the new federal state?

**Thematic discussion**

Dr Ram Sharan Mahat, who chaired the sessions by George R M Anderson and Hashim Mohammed Tewfik, noted that federalism is a crucial issue for Nepal. The first person to comment on the presentations was CA member and Madhesi leader, Anil Kumar Jha, who maintained that Nepal would gain something by seriously considering the presentations of Anderson, Tewfik and Heiniger. Recalling the past, Jha said that the word ‘federalism’ entered Nepali politics after the late Gajendra Narayan Singh of the Nepal Sadbhavana Party introduced it in the party’s manifesto after the 1990 moment. Singh’s proposal calling for a five-province Nepal was intended to uplift the status of all gender, caste, tribes, religions and Madhesis of the country, said Jha. Meanwhile, it was only recently that the Maoists came to accept ‘federalism’. Jha noted that even the Seven Party Alliance protesting the then-king, Gyanendra, in 2005-2006 was not willing to accept the word ‘Madhesi’ in their declaration without pressure from his Nepal Sadbhawana Party (Anandi Devi). It was the popular movement led by the Madhesi Janadhikar Forum (MJF) that established ‘federalism’ as a major issue for the
country. In light of the current political dynamics, Jha expressed concern that the hard won ‘federalism’ would devolve into a form of decentralisation.

Mahat emphasised Jha’s point that federalism came to be formally accepted as the future structure of the Nepali government only after the Madhesi Movement of 2007. Addressing Jha’s concerns about the future – how the federation will be conceptualised and how the territory will be demarcated, among other critical issues – Mahat said the leaders must proceed in a way that will satisfy all sections of the society. All the same, with the federal structure impacting the whole nation and not just the terai or Madhes, Mahat stressed that compromises will have to be made in order to satisfy all stakeholders.

Praising the presentations of Anderson and Heiniger, C P Mainali said they had given Nepal much food for thought. Mainali did not, however, find the Ethiopian ethnicity based federalism highlighted by Tewfik to be of relevance to Nepal’s needs. All the same, he conceded that Nepal can draw lessons from the Ethiopian experience, as it can from the Swiss model. As for political theories, Mainali argued that whether a country is a democracy or a dictatorship has little influence on whether it follows a unitary or a federal model. Speaking about the constitutional amendment adopting federalism following the Madhesi movement, Mainali criticised the decision as having been made without consulting the people. His party, the Communist Party of Nepal (UML), has long argued that a referendum was the best way to respond to the demands of the Madhesi people, he said. The Maoists had, however, given up on this demand by accepting federalism for political reasons, said Mainali.

Mainali deemed the demand, coming from some quarters, that the adoption of federalism be put to a vote as untimely. The issue, he argued, should have been raised before amending the constitution, though the case for a referendum might be reopened later when Nepal is in the right stage of its development, and wants to look back. It should be understood, said Mainali, that people have agreed to formulate a ‘federal state’ through dialogue and negotiation. Mainali went on to critique the government for not having constituted a state restructuring commission. Instead, said Mainali, the widely varied proposals on how the country should be divided – suggestions ranging from six to 16 units – is being pursued solely on the basis of political bargaining without the technical support of a competent commission.

Mainali argued that Nepal needs a state restructuring commission so that a scientific methodology is used to analyse the merits and flaws of all proposals. Ultimately, said Mainali, it is not feasible for the political parties
to pass judgement on any possible model of federalism without the technical part of this work being done by such a commission. Addressing the argument that federalism will break the country up, Mainali maintained that a federal arrangement suitable to the country’s requirement is bound to be an asset for Nepal. If the federation is structured with the ground realities in mind, it will undoubtedly empower the people, said Mainali. On the flip side, Mainali warned that a form of federalism created to satisfy those at the bargaining table is going to be costly for the nation. According to Mainali, the best set-up for Nepal is a “holding together model”. While the historical figures who unified Nepal deserve the people’s gratitude, Mainali stressed that the contribution of more contemporary leaders such as B P Koirala, Pushpa Lal Shrestha and Pushpa Kamal Dahal (aka ‘Prachanda’) in unifying the country should not be underestimated. The point, said Mainali, is there should be no attempt to define unification as inherently feudal.

Providing a brief glimpse into the multi-ethnic, multi-religious and multicultural identity of the country, Mainali argued that the creation of ethnicity based provinces would be to sow seeds of discord. Accepting that ethnic discrimination has been a problem in Nepal and requires attention, Mainali maintained that the state must respond to the demands for the recognition of identity, ethnicity and regional rights in a way that effectively addresses the inequalities. With so many ethnic groups, tribes and castes constituting the country, and with members of each group scattered across the land, Mainali said that it is impossible to form provinces along ethnic lines.

Mainali also opposed the suggestion that the provinces follow the geographical division of the country into mountains, hills and plains. Indeed, Mainali also stated that dividing the country into three distinct provinces along those lines as impractical and unjust, as one region would physically and psychologically block the others. Mainali proposed that the most suitable system for Nepal is that of an inclusive province – one which addresses all concerns, and extends to mountains, hills and plains. It is possible, said Mainali, to provide ethnic territories within each inclusive province, and enable the territories to send their representatives to the legislature. Further, there could be an upper house for ethnic representatives in the provincial legislature as well as provisions for ethnic autonomy. When the whole system is inclusive, argued Mainali, there is no doubt that all discriminations and inequalities will end. Equally importantly, this will also make Nepal safe from powerful neighbours, said Mainali, arguing that experts are necessary to work out these solutions.

The next comment from the floor was made by Haribansha Jha, who stressed the fact that the country is considering the federal model because of
the demands made by the oppressed and suppressed communities. All the same, maintained Jha, Nepal will not be able to manage a large number of provinces. Instead, in direct contrast to Mainali, Jha argued that the country should be divided into three parts – terai, hills and mountains. Jha considers such a set-up sensible, saying that each region is distinct in terms of characteristics and the groups of people living there. As for the issue of ethnic rights, Jha believes that this can be addressed by creating different autonomous regions within the three larger units.

Lal Babu Yadav followed Jha, asking Anderson about what form of federalism – full federal, quasi federal, semi federal, cooperative federalism or competitive federalism – are suitable for Nepal. Speaking about the “coming together” model of the United States and the “holding together” model of India, Yadav noted that “getting together” is also being considered in Nepal. In a country which has over 100 ethnic groups, how the state can preserve the rights of minorities while establishing the federal system, he asked. Yadav also brought up the issue of the fiscal set-up, pointing out that as things stand, seven districts account for over 82 percent of the collected revenues, with the remaining 68 districts bringing in only 16 percent.

Adding to C P Mainali’s point, Binit Kumar Jha also expressed surprise about the fact that a state restructuring commission had not been established. It is not possible to draft the constitution without the report of this commission, said Jha. He further argued that the constitution, the seventh one in Nepal’s history, is being delayed because the major issues raised by the people have not been addressed. Whenever an issue involving the Madhes is raised, argued Jha, it is immediately connected with India, and thus considered suspicious. Even the Madhesis’ demand for federalism is linked with India. Consequently, Jha expressed concern that the Madhesis might again be deceived in the constitution-writing process.

On a different track, CA member Mohammed Siddiqui said that the presentations, while informative, did not answer the question of how a federal Nepal will ensure the rights of women. Siddiqui expressed deep dissatisfaction with the political parties for having distributed slogans of ethnicity as “chocolatiers”. Rather than be designed in the name of ethnicity, Siddiqui argued that Nepali federalism should be based on natural resources or historicity. As a representative of the Muslim community, Siddiqui expressed confidence that an inclusive framework ensuring political and social rights for all as well as protecting the identities of the numerous communities would be formulated. Siddiqui was especially curious about how the Ethiopians had secured the rights of Muslim women, and how their constitution addressed issues of social justice. Explaining that Nepal has a
uniform set of civil laws, with no explicit recognition for specific Muslim traditions, Siddiqui asked whether the new constitution should recognise Muslim law in areas such as marriage, divorce and other such issues.

A discussant from Morang District, who did not identify himself, suggested that the issue at hand is about inclusion, and not just the recognition of space for the various ethnic groups. With large swathes of poor and deprived with limited, if any, access to state resources, the number of governmental levels in the federal system will have little impact in improving the problem of access, he said. The discussant also reiterated Siddiqui’s point about the belief of many Nepali Muslims that they should be allowed to practice what is stated in the Quran. Similarly, he maintained that Maithili, considering the population share of those who speak the tongue, should be recognised as the third official language of the country.

Taking the discussion in another direction, Dinesh Tripathi asked the presenters for their opinion on whether Nepal should continue with a bicameral legislature or convert to a unicameral legislature, as has been proposed. Tripathi also asked whether federalism, a complex system with the distribution of power between provinces and the centre, can work without a competent and active judiciary. Similarly, Tripathi wondered about how to make provisions for a constitutional recognition of local self-government units in the provinces.

The following few comments revolved around the concept of self determination in the Ethiopian context. First, Neeru Shrestha asked Tewfik how the provisions for self determination had contributed to the social, political and economical development of Ethiopia. Next, Shanti Kumari Rai expressed surprise that many are taken aback by the concept of the “right to self-determination”, even as discrimination is ongoing and countries are fragmented because this basic right is denied. Along the same lines, Bal Bahadur Mukhiya asked whether there is a close link between the denial of the right to self determination and cessation. Mukhiya ended by asking what ‘remedial substantive self determination’, an idea that is being discussed, entails.

An international participant who did not identify himself noted that people have invested incredible expectations which may well be impossible to fulfill in federalism. It is highly unlikely that a federal system alone will be able to address inequality and discrimination, he said. On the debate over territorial vs. ethnic federalism, the discussant claimed that the former model would be efficient at dealing with a society as complex as Nepal. The CA and experts could, however, also consider combining some other concepts, such as demands based on identity and those of deprived peoples, he noted.
The discussant also stressed that crucial issues such as minority rights and protections within the federal units will be extremely important, and are not inherently addressed by federalism. Keeping the Nepali context in mind, the discussant maintained that it might be useful to consider giving autonomy by allowing for self governance by indigenous and small groups.

Responding to the comments from the floor, Hashim M Tewfik clarified that democracy is built upon the right to self determination, including territorial and self rule, in Ethiopia. At each level of government, every community has the right to self rule in the arenas of cultural, language and other areas in which they have distinct traditions. The communities also have the right to political participation through power sharing as autonomous units. Tewfik, however, acknowledged that a big question mark hangs over the extent to which these constitutional provisions are implemented. All the same, Tewfik explained that Ethiopia, for all its ongoing problems, has today achieved relative peace – constant conflicts between ethnic groups and member states, each fighting for recognition and equality, are no longer the norm. Tewfik also maintained that even as widespread poverty remains an immense challenge for Ethiopia, the state has achieved a great deal in the socio-economic sphere. With the state deeply engaged, and the people gaining access to political power, Tewfik explained that there is significant mass participation in education, health and self rule, among other things.

On the relationship between separation and self determination, Tewfik maintained that the whole idea of self determination is, in the Ethiopian case, recognition of the fact that each ethnic community is free and sovereign. The sovereign people come together and maintain the union for own benefits – they have no other incentive for remaining in the union. On the issue of cessation, Tewfik explained that the Ethiopian federal states committed to maintain the union on the condition that their right to self rule is ensured. Even so, the right to cessation is constitutionally recognised in Ethiopia, said Tewfik, although no group has attempted to secede through legal peaceful means.

Clarifying questions about his presentation, Anderson explained the difference between full-fledged verses quasi federalism: the latter system allows the central government to retain the power to intervene in provincial affairs by suspending the provincial government or disallows the laws it has passed. Anderson warned that there is risk associated with getting caught up with categories and definition. Instead, he advised that each country consider its circumstance, assess what the people are trying to achieve and explore how these goals may be fulfilled. Responding to the query about the bicameral legislature, Anderson noted that Venezuela is the only federation
to have a unicameral legislature today. Usually, he explained, there are attempts to define the upper house of the legislature as having different functions (namely representation in terms of ethnic, cultural, religious and minority grounds), and an alternate form of representation from those of the lower house. Anderson highlighted that this is also evident in Nepal, with the CA suggesting potential relationships between the upper house and the special commissions being discussed.

As for the question of whether local governments should have a constitutional status, Anderson explained that they do in a number of countries including India and Brazil. The issue to consider, however, is not their constitutional status but rather how to avoid undue rigidity in the system. The answer, according to Anderson, is not to get stuck in the concepts, but to identify the problems on the ground and identify solutions.

Meanwhile, Markus Heiniger emphasised the importance of acknowledging the fact that the CA was elected against the backdrop of conflict. In this regard, the different peoples of Nepal do have different ideas on how the state should be structured. According to Heiniger, Nepal can accommodate the various demands through federalism.

Commenting on Wegener’s paper, Bishwambhar Pyakurel mentioned that Nepalis widely believe that the new political structure will also decentralise public finances in a country where natural resource endowment and property prices vary widely across regions. These differences in the human development index, skill levels and resource availability must be taken into account, he said. The biggest challenge, according to Pyakurel, lies in ensuring the equitable sharing of revenues among the local units. Study shows that more than 60 percent of Nepal’s districts generate less than 10 percent of the total resources they need. Merely empowering these local governments will not make them economically viable units said Pyakurel, arguing that their dependence on the centre must be reduced.

As the question of economic viability is discussed in the CA, Pyakurel pointed out that the body is not functioning in a vacuum of absent rules, regulations, acts and governing principles. Citing examples, he pointed to the Local Self Governance Act 1999 and Local Self Governance Regulations 2000, both of which establish frameworks for decentralisation, policies and legislation to ensure local participation through local government, INGO and NGOs are already in place. The problem, said Pyakurel, lies in the general perception that local representatives are subordinate to the central government. Pyakurel pointed out that there was even a time when it used to be said that local government was the only permanent establishment in Nepal. This was meant in a sense that local governments were elected for and
operational during a defined time period, even as there were several different formations at the centre during the same timeframe. According to Pyakurel, these local units did not yield substantial results because no institution existed to ensure that expert recommendations were implemented.

Pyakurel also addressed the issue of how equity can be promoted by exploring what kind of binding constraints can be implemented to make local, regional and central units more functional. For instance, Pyakurel highlighted the importance of coming to a consensus on whether the provinces will be autonomous, with the powers of the provinces and local bodies constitutionally defined. Alternatively, the provinces could opt for the full-fledged decentralisation system within their territory, he said.

Pyakurel stressed that peoples have consistently been able to solve individual and even institutional problems at the community level. A constitution of elders’ groups at the local level has been very effective in the Nepali experience, he said. With regard to sharing power within the federal framework, Pyakurel agreed with Töppperwien that the number of tiers of government needs to be sorted out. He pointed out that this number and the population covered by the local government varies at present, as is common in the federal system. Ultimately, Pyakurel believes that an understanding of the economic realities will provide clear guidelines on what federal model to follow.

Based on the discussions within the CA, Dwarika Nath Dhungel believes that a three-tier system of federalism is being planned in Nepal. Recapping the presentations, Dhungel referred to Töppperwien’s question of what would happen to three existing institutions – VDCs, District Development Committees (DDCs) and the municipalities. He also reiterated Suresh’s point that the constitutional foundations for local self government, including the need for the 73rd Amendment in India in which they included the provision of the Panchayati Raj institution. The Balwant Ray Mehta Committee (1957) recommended several measures based on the fact that the states in the Indian Union were supposed to enact the laws on the Panchayati Raj institution. They had three important models – Rajasthan Model, Maharashtra Model and a model for the rest of the countries. Suresh rightly indicated that these institutions should have been well received by the state government, said Dhungel. For many years, elections through the Panchayati Raj institution did not take place and as a result, pressure was created through the 73rd Amendment to develop a framework for local self government. Dhungel recommended that CA members in Nepal look into this process, as well as the Constitution of South Africa, which has umbrella provisions for a system of local self governance.
Dhungel pointed out that there is a debate ongoing among the major political parties on whether local self-government should remain under the purview of the provincial government or should be granted constitutional status. In Dhungel’s opinion, the constitution should provide a broad framework in terms of powers, responsibilities and functions of local government. Further, Dhungel argued that Nepal will have no need for districts if it forms more provinces, though a re-engineering of local bodies to enlarge the size of the VDCs is necessary. It is time Nepal started to treat urban and rural problems separately, providing for planning mechanisms at the local level to deal with the problems of rural and urban areas. From that perspective, Dhungel said he stands with Suresh. He said that he would, however, like to remind Suresh, who believes that financial recommendations for the provincial commissions should not be mandatory, that an inter-governmental coordination mechanism must be worked out. Dhungel also argued that local government should be facilitated along with community-based organisations to provide services to the people.

Adding to what the previous commentators said, Purna Man Shakya explained that the country is divided into two schools of thought. One view is that the state should be restructured along ethnic lines while the other maintains that territory, economic viability, resources distribution and national security perspectives must form the basis of the model. The first school views federalism as a political exercise, where the inclusion of all groups ignored by the unitary system is the primary concern. As things stand, the CA members ascribing to the ethnic federalism model are proposing the establishment of 14 states. Meanwhile, members from other schools of thought are proposing between five to six states, going north to south from the mountains to the plains. While nobody can predict the ultimate outcome, Shakya pointed out that each unit will have an average population of 2.5 people in a 14-province structure, making access to government services easier. If this were to happen, it will be a new reality for Nepal, he said.

Providing a historical overview, Shakya explained that Nepal has always worked within a centralised governance system, with most decisions made in the Kathmandu Valley. Consequently, the people have had limited access to government services, and bureaucrats have not been held accountable by the public. It was as a reaction to this that the call for a decentralised governance system came about. Unfortunately, said Shakya, talk about decentralisation, and the various laws introduced on the matter, were never implemented on the ground. It is thus, concluded Shakya, that federalism emerged as a reaction to the denial of opportunity, power and resources to the people based at the sub-national level.
Shakya also argued that local governments will weaken and lose their relevance if Nepal carves out 14 or more provinces. In the past, districts were established without taking the communities or the regional aspirations into consideration. Today, once the provinces are restructured, the map of the districts within the province is also likely to be altered. In this context, Shakya agreed with Dhungel’s assessment that the districts will have less of a role to play. Instead, there will be village- and city-level governments, with the size and territory of the villages also changing. Further, with the restructuring of the political map within the provinces, local governments in different parts of the country are likely to have their own language, culture, religion and dispute-settlement mechanism, argued Shakya. Indeed, if the janjati communities of Nepal including the Lepchas, Hayu, Jirels, Surel demand autonomous areas, it paves the way for a new model of competing political units, replacing the VDCs and the municipalities. Similarly, Shakya stated that the future federal framework must provide for a sharing of the benefits from the sale of natural resources, something that is extremely centralised today.

Talking about the changes taking place in the public sphere, Shakya pointed out that Nepal is moving from the politics of social inclusion to that of identity. Indeed, the discourse on identity is progressing so rapidly that the political parties are finding it very difficult to contain the movements. Issues of language rights at the local units, the provinces and the centre will also be worked out in this new changed context. For this reason, Shakya predicted a very detailed division of power at the different levels of governance, with each community trying to assert its identity through the federal government. Further, with one community likely to be dominant in each province, the smaller communities within that unit will compete with the majority group in regional politics. Therefore, argued Shakya, a mechanism for the adequate representation of local communities in the provincial legislature, possibly through the provision of the upper house, will be necessary. Shakya highlighted that such a mechanism will have to respond to conflict between the communities such as the peoples of the hills and the terai as well as disputes between janjatis versus non-janjati people.

Beginning with Suresh’s presentation, Binod Kumar Bhattarai wondered whether the Panchayat Raj strengthened India’s states, and asked whether there is a correlation between the strengthening of local government and the tendency to secede. If it is accepted that local government is the force countervailing the excesses of provincial governments said Bhattarai, noting that local government must be the demand side factor and the state government the supply side. Perhaps the supply side is far more focussed and
the demand side weaker in Nepal’s constitutional framework, said Bhattarai. Considering that local bodies – forest groups, community organisations, electricity producing groups and education groups, among others – are more transparent and democratic, Bhattarai asked why it is that we do not recognise these institutions directly, by giving them representation at the provincial and central levels.

Referring to Wegener, Bhattarai commented that Nepal’s poverty as well as resource distribution must be explored properly to ensure what he described as the equalisation of funds. Saying that it may well be a unique German practice, Bhattarai asked how the funds were to be redistributed in Nepal; with poverty so pervasive here – unlike the existence of only certain poor pockets in Germany – equalising may not be possible. Moving to Töpperwien’s presentation, Bhattarai pointed out that she did not state the fact that the ILO’s Instrument 169 was originally worked out for Latin America, where the indigenous peoples were being exploited by multinationals. Bhattarai asked whether simply photocopying and transplanting the Instrument into Nepal’s new constitution would be of much use.

Sombhojen Limbu emphasised that when there is a talk of devolving powers, it is advisable not to forget the importance of incorporating local dispute settlement systems in the scheme. Many ethnic communities still have traditional dispute settlement mechanisms, although these are not part of the formal structure yet. Limbu argued that people find the traditional systems pragmatic, easy to access, culturally acceptable and think they result in a win-win situation for both parties. The judiciary structure in Nepal, argued Limbu, is a representative of state and maintains hegemony in terms of language, processes, cost, and even the ultimate judgements.

Neeru Shrestha then asked whether there is any difference in the rights guaranteed to local people vs. indigenous people. Shrestha specifically wished to know how far Germany, Switzerland and India have been able to incorporate prerogative rights (agradhikar) and special rights for indigenous people on access to natural resources. Shrestha concluded by asking whether such rights, where they exist, are included in the constitution as well as the extent to which they have been delivered to the people.

Chhabi Subba wondered if the Nepali leadership is clear on what the ‘post-conflict’ situation means. He argued that the term, in the country’s context, means ending the discrimination of ethnic and other communities by the ruling classes. As long as the ruling elite fail to acknowledge the oppression of the Nepali people, no solution to the conflict will be found, argued Subba. If the Bahun oligarchy, which replaced royal anarchism,
continues, said Subba, the constitution-making process will certainly fail, and peace will be elusive. Meanwhile, reacting to Binod Bhattarai’s comment, Subba said that Nepal had already ratified ILO 169, with the provision deemed a law in the country. All that is needed is for the constitution to prioritise it, and recognise the rights of indigenous peoples. This also means giving continuity to Article 33(c) and fulfilling its requirement. In response, Purna Man Shakya argued that it is very difficult to define the rights and privileges of indigenous communities unless one clearly identifies which communities can be termed indigenous in the context of a particular location and where they are to exercise their rights.

Meanwhile, Alexander Wegener said that the VDCs, the DDCs and the municipalities have their own internal revenues, even though the three units do not have a system of cooperation. As a result, one unit may be in a rather good area with low income and one may very well be in a poor area with high per capita income, said Wegener. Moreover, the main finance-related problem, according to Wegener, is that the VDCs generate internal revenue of less than five percent of their needs, with the rest coming from the central government. Municipalities receive about two billion rupees a year from the Ministry of Local Development, explained Wegener, arguing that there is a need to increase the internal revenue sources of local government. Acknowledging that an equalisation scheme will be needed across the country, Wegener noted that the implementation of such a programme will be dependent on the number of provinces Nepal establishes.

In response to Bhattarai’s comment, Töpperwien clarified that she mentioned ILO 169 because it is relevant to the ongoing debate in Nepal. Töpperwien said that she does not have any explanation as to how it should be interpreted in Nepal. Noting that a very broad interpretation is given to the convention in Nepal, Töpperwien said that there may be a demand for group rights or powers over resources. The idea of parallel local governance structures for indigenous people also exists, she said. In this case, from a technical point of view, the question of whether the territorial unit and the indigenous people can exercise power over the same resources comes into play, concluded Töpperwien.

In response to Dhungel’s query regarding the institution of Panchayati Raj in the pre-73rd Amendment period, Kumar Suresh said he specifically mentioned the 73rd Amendment because it had gotten constitutional status. While not denying the existence of Panchayati Raj institutions in the pre-73rd Amendment period, Suresh argued that these institutions were basically defunct because they lacked a constitutional mandate. Moreover, these institutions were envisaged as a vehicle of community participation in the
centralised planning system with community initiative not at all functional at
that stage, he said. Suresh noted that there is also a departure in the context of
the argument of empowerment and inclusion of the disadvantaged groups.
Suresh also though it important to note that even as central level framework
institutions are present in the states, the states are also bound by conformity
laws. As per this law, they are supposed to devolve functions, funds and
functionaries to the local government, he said. All the same, if the states do
not abide by these laws in exact accordance with the 11th planning
commission guidelines, there is also a provision of activity mapping, he said.
(Activity mapping means that funds to the states are linked to the extent the
states have transferred funds, functions and functionaries to the local bodies.)
Suresh argued that this system serves as a control mechanism to enable the
local government by ensuring that states devolve the required functions and
funds to them.

Concluding the session, Ram Sharan Mahat expressed his belief that the
demand for federalism is a response to three issues – identity, empowerment,
and economic development and delivery. Any model of federalism that fails
to recognise these three factors will have no meaning, he argued. In this
context, Mahat stated that discussions on empowerment and the economy are
often sidelined in the heated debate over federal demarcation, as was also
evidenced in the sessions. While identity has been at the centre of the
national conversation on federalism, Mahat maintained that ensuring an
economically viable federation is equally important in a country as poor as
Nepal. Consequently, the fiscal sustainability of the federal models available
should also be recognised, something that is regularly ignored. According to
Mahat, economic considerations are an effective guide to deciding how many
provinces Nepal should be carved into. In this, while Mahat found
Haribansha Jha’s recommendation of three provinces interesting, he also
argued that it lacked viability.

On the rights of the local units, Mahat maintained that the empowerment
of the individual and then the local community is crucial in a democracy. A
decentralised federation is the means to achieve this, and ensure that the
centre does not encroach on the rights of local governments, said Mahat.
Pointing to the Nepali reality, Mahat highlighted the fact that the VDCs in
the country are allocated far more resources than they are in India, for
example. The local VDCs of Nepal are more powerful than the VDCs of
similar size in India. The right to self determination is crucial in this context,
said Mahat, stressing that the constitution must guarantee that the centre
cannot force any VDC or district to be part of a particular province designed
along ethnic lines or any other criteria.
Bringing in the political dynamics on the ground into the discussion, Daman Nath Dhungana maintained that the challenges are not only associated with implementation but that the very fundamentals which have been agreed upon are problematic. Dhungana maintained that the political parties signed the peace accords only half heartedly, with an eye to strategic gains rather than to ushering in peace. Consequently, the agreements were ambiguous, and Dhungana believes that the parties are still unwilling to review these agreements. As Dhungana concluded, the goals set out for the transition period have become excessively politicised, providing fertile ground for spoilers to hamper the process.

4. Rights of women, minorities and indigenous people

Two papers were presented in this session – Professor Yash Pal Ghai commented on the place of minorities and indigenous communities in Nepal under the draft constitution while Dr Jill Cottrell spoke about provisions for women’s rights. Both presentations were chaired and moderated by CA member Khim Lal Devkota. Dr Om Gurung, CA member Binda Pande, Dalit leader Durga Sob and Dr Ram Krishna Timalsena, a lawyer, commented on the papers from the podium. Meanwhile, advocates Dinesh Tripathi, Biswakant Mainali, Shanti Rai and Neeru Shrestha, social activists Binod Lama Hyolmo and Kamala Acharya, business professional Pragya Basyal, local governance expert Binod Bhattarai, journalism lecturer Bijay Mishra, and Professors Bal Bahadur Mukhiya and Ganesh Dutta Bhatta added their thoughts from the floor.

Thematic presentation

Opening the session, Khim Lal Devkota termed the discussion on the bill of rights and remedies, an issue that is certain to form a major chapter of the draft constitution, an important one. While acknowledging that the objective of the constitution is manifold, Devkota stressed that a rights based approach – guaranteeing civil, political, economic, social and cultural rights – is essential to the process. The question, said Devkota, is whether such rights have been sufficiently recognised or ensured in the preliminary drafts of the forthcoming constitution.

Professor Yash Pal Ghai began by providing an overview assessment of the provisions on minorities and indigenous peoples included in the constitution of 1990 and the Interim Constitution of 2007. This was followed by more detailed comments on the proposal adopted by the various thematic committees of the Constituent Assembly on the rights of minorities and
indigenous peoples. Though the committee-level suggestions have yet to be consolidated, Ghai said they confirm a broad commitment to an inclusive political system, formal and genuine equality for all citizens and communities, social justice, respect for cultural differences and a measure of self government. On the flip side, he said there is little guidance on how to implement such ideas on the ground. Moreover, said Ghai, the real scenario on the rights of minorities and indigenous people will be clear only after the committees working on the federal system and the executive release their reports. Ghai explained that a number of committees have proposals relevant to federalism, including the structure of the legislature (being handled by the Committee on the Determination of Forms of Legislative Organ) and the allocation of powers and resources (by the Committee on Natural Resources, Economic Powers and Allocation of Revenues). The problem with this piece meal system is that each committee may have its own approach, said Ghai. On the whole, Ghai found that most proposals on minorities appear to be heavily influenced by the provisions of the Interim Constitution.

Based on the current proposals, Ghai believes that the new constitution will set up an excellent framework for the protection and participation of minorities. While confident that the provisions are likely to be consistent with international instruments for the protection of individual and collective rights, Ghai clearly stated: “The exception to this statement might be certain provisions of instruments on the rights of indigenous peoples which are based on the situation of indigenous peoples in the Americas and Australia, where they still, to a considerable extent, live in compacted communities, in some isolation from other communities – a situation not common in Nepal.”

In this context, Ghai suggested that lumping all marginalised groups into a collective, while paying little attention to their history and culture, is unhelpful, especially at a time when the oppressed are trying desperately to establish their specific identity.

Even as the constitution contains constant references to communities, proportionality and inclusion, Ghai expressed fear that social and political integration may not be on the agenda. There is a danger, he said, that the forms chosen to ensure inclusion may themselves become exclusionary, citadels of communities desperately trying to fend of the legitimate claims of others. Ghai also pointed to the provision in the preliminary draft put together by the Committee on Fundamental Rights and Directive Principles stating that a “restriction on human right is justified if an act may jeopardise the harmonious relations subsisting among the people of various castes, ethnic groups, religion, community”, critiquing it as too vague. Indeed, Ghai
argued that it facilitates (some would say it knowingly attempts) to preserve the status quo, which is friendly to the privileged. Ghai commented that reform is perhaps inconsistent with the general orientation of the constitution, as a fundamental re-ordering of society and state is bound to cause tension and possibly even conflict. While there is a great need for sensitivity in implementation, Ghai argued that this cannot be achieved by trying to “stop” politics, and simply pigeon-holing the population into ethnic categories.

Also analysing the draft constitution, Jill Cottrell spoke about the provisions made to ensure women’s rights. Much as it is with minority rights, Cottrell found the provisions included in the new draft to have been heavily influenced by the constitutions of 1990 and 2007. According to Cottrell, the draft focuses on the structural aspects of the constitution – emphasising what the preamble or the human rights chapter should say. Terming this a “strait-jacketing” approach, Cottrell points out the risks of such a process, saying:

it does not focus on how a constitution works, so much as the appearance of certain words and notions. And it tends to repetition of ideas – so the same “claim” may appear in various proposed chapters, without the drafters apparently being aware of the risks of repetition (or even more of slight differences of wording on the same issue). It also tends to encourage keeping the extremely prolix style in the most recent constitution – the Interim Constitution (IC) – which multiplied the types of “non-justiciable” provisions, in language severely lacking in precision, and in legal effect.

Moving away from this criticism, Cottrell explored a wide range of important gender aspects in the new constitution. Some of these issues were: the place of women in the preamble, discriminatory citizenship provisions, federalism in the context of women, the right to equality, affirmative action, freedom from violence and exploitation, educational rights, the right to health, political and public life, work and economic activity, establishing a gender commission, and sexual stereotypes. Cottrell’s basic argument was that a properly functioning system of government should focus not just on the protection of democracy but also that of rights. According to Cottrell, institutions like the right to information, public hearings on important issues and a consultative law making process, among other, are of vital importance. After all, said Cottrell, democracy must go further than elections, with the people able to understand what is being decided on their behalf.

Thematic discussion
Commenting on the papers, Om Gurung agreed with Ghai that the various thematic committees of the CA use confusing terminologies. In this context,
Gurung said the CA has wrongly lumped the indigenous communities together with minorities, maintaining that the two can be conflated in Nepal only when it comes to power sharing, as is agreed in South Asia. According to Gurung, the Committee on the Rights of Minority and Marginalized Communities, which has taken this approach, has complicated matters by addressing the two groups as one. It is with this in mind that the indigenous communities are asking for a special thematic committee to address their demands, said Gurung, adding that their problem and aspirations are distinct from those of other minorities such as Dalits, Madhesis and women.

Gurung agreed with Ghai on the point that the draft constitution contains many weaknesses, especially due to the lack of clarity on words such as nation building, national unity, state building and communal harmony. Gurung disagreed, however, with what he terms Ghai’s “assimilative approach” saying that there should be a single citizenship for all Nepalis. In contrast, Gurung explained that the indigenous people feel diversity should be maintained, and can even be a source of national unity. Gurung also termed the commonly held belief that Nepal historically enjoyed communal harmony a fiction, pointing to the numerous revolts of the Tamangs, Limbus, Rais and Gurungs – most of which were not recorded in writing – as proof.

It was in order to resolve these conflicts, said Gurung, that a state restructuring on the basis of ethnicity, language and territory as well as proportional representation on the basis of ethnicity was sought. There were also demands for the formulation of special provisions for minorities and other indigenous communities to ensure equal opportunity, power and access to resources. Ghai’s paper touches on these issues lightly, critiqued Gurung. Specifically, Gurung highlighted Ghai’s point that representation should be based on the population of Dalits, Madhesis, women and other marginalised groups in the country. Here, Gurung asked whether Ghai wanted ethnic representation on the basis of the ethnic population or on the basis of the total population of the country. Gurung explained that the indigenous communities have been arguing that representation should be based on the population of the ethnic group, as this is proportional representation in its true sense. Gurung also commented on the concern Ghai expressed about the implementation of the constitutional provisions. For instance, Gurung said that though Nepal has been declared a secular state, the indigenous communities have no experience of secularism. Along the same lines, Gurung also stated that the Nepali language (Khas kura) will continue to hold a privileged position in the new constitution.

Equally important, according to Gurung, is the restructuring of the state with autonomy for the indigenous people, based on the principle of the right
to self determination. The thematic committee is, however, not very clear in its formulation. While Ghai spoke briefly about autonomy, Gurung noted that the former’s paper is silent about the forms of autonomy available. Ultimately, however, Gurung agrees with Ghai’s conclusion, where the latter clearly states that the minority should not be lumped together, but rather be assured a place in society as per their history, culture and aspirations.

The second commentator, Binda Pande, stressed the point that fundamental rights are meant for all citizens. Further, the designation of rights should not happen just on the basis of the size of the population, but also take into consideration the current status of the people as well. Consequently, it was agreed during debates at the CA, said Pande, that special arrangements should be made for economically, socially and culturally marginalised people. In this context, the issue of national identity or equality in the matter of citizenship was also emphasised, she said. There were discriminatory provisions based on established cultural practices, which have now been scrapped.

Pande also spoke about the many fundamental rights recognised as directive principles of the state. While the fundamental rights are binding to the state, the directive principles are not binding in the same sense. As such, there is now an understanding that policies which are already recognised as fundamental rights should be deleted from the list of directive principles in order to avoid confusion. As far as these directive principles are concerned, they are also discussed in the legislature periodically and will be more meaningful now than they were in the past.

Giving continuity to the discussion, Durga Sob reiterated the point that the ongoing discussions on the rights of excluded, marginalised and indigenous peoples must be taken positively, with the draft constitution having created a positive environment. All the same, Sob was quick to state that the Dalit community, which also demanded federalism, is being given inadequate attention. According to Sob, a similar abandonment of women is also taking place. If the intention of the new constitution is to not contribute to the further exclusion of already marginalised groups, Sob argued that the federal system must clearly demonstrate how it is empowering these communities. Sob also strongly argued against a federation that benefited one group at the cost of another. In this context, she highlighted the fact that Dalits, indigenous peoples and other marginalised communities had all demanded a fully proportional system, which Sob considered essential to ensuring equal representation for all. Sob also termed the establishment of a powerful and autonomous Dalit Commission as essential. All the same, Sob acknowledged that the criterion for establishing minority status is very
important in Nepal. As Sob pointed out, whether Dalits should be considered a minority or an indigenous community remains debated.

Approaching the issue from a somewhat different tack, Ramkrishna Timalsena argued that the minorities of Nepal cannot be defined until there is a consensus on who falls in the majority category. Considering its more than 100 ethnic groups, Nepal is a country of minorities said Timalsena. Among these, some communities are described as indigenous. As Timalsena points out, there is no anthropological or sociological research about whether the caste system is an indigenous practice or not – whether the Bahun and Chhetris are an indigenous group or not remains to be established. In this context, Timalsena asks whether it is not unjust to define this community as non-indigenous. He was, all the same, quick to acknowledge the injustices these ruling communities perpetrated by perpetuating a hierarchical, caste-based system where people were discriminated upon on the basis of their language and culture, among other things. Timalsena argued that there must be a way to empower the people who were affected, with the constitution having a modality for this purpose. Timalsena further added that there are ongoing debates about issues such as equality versus discrimination, representation versus participation and empowerment versus reservation. As such, Timalsena argued that the culture of equality and dignity should be promoted.

Referring to Ghai’s presentation, Timalsena agreed that federalism may not work if there is deviation from a commitment to economic empowerment and informed judgment on the viability of state restructuring. To run an effective federal state may require at least 20 years of assessment and work. There is little done in Nepal in this regard, he said, with the restructuring being designed around a false notion as to what constitutes ‘indigenous’. Timalsena also pointed out some problems relating to citizenship rights, with underlying issues in distributing citizenship certificates to non-Nepalese people, such as the Indians living in the country. Even the concept of secularism has been misunderstood said Timalsena, in that secularism does not equate to an anti-Hindu state. With roughly 85 percent of the national population identifying themselves as Hindu, Timalsena said that the state cannot exclude them from the religious mainstream, regardless of whether the country is secular or not. The state must not be theocratic, said Timalsena, it must be secular.

Switching to another arena, Timalsena emphasised that the preliminary drafts of the constitution are gender neutral. He did, however, note that one should take into account the operative aspect of gender justice while interpreting the constitution. For instance, Timalsena stated that while many
of the rights enumerated in the 1990 constitution as well as the present one respect international standards, the problem lies in the implementation. Timalsena also lauded the judiciary for interpreting these provisions liberally, responding to public interest litigation to give equal status to women and men as well as to protect the rights of minorities. The key problem, according to Timalsena, is economic disparity, limited access to justice due to the lack of education and other similar considerations.

Sanju Shah noted that it is important not to lose sight of the rights of people with disabilities, something that was omitted even as the discussion invoked the right to citizenship and to health. As things stand, the disabled have no right to security or household safety, while the implementation of existing arrangements appears lax, said Shah.

Dinesh Tripathi stressed that while, on the one hand, the fundamental rights of people are subject to national law and the constitution, they are also subject to international law. While agreeing that the bill of rights is the heart and soul of the constitution, Tripathi argued that rights without remedy is merely a static definition. Saying that the bill of rights needs to be strongly protected, Tripathi criticised the concept paper of the CA Committee on Judicial System for virtually doing away with the power of judicial review.

While appreciating Ghai’s presentation, Binod Bhattrai asked if and how the proportional system adopted in the draft constitution would solve the problems of identity, empowerment and economic wellbeing. Bhattrai also posed the question of how the proportional model would help in balancing the emergence of elitism in the indigenous communities themselves.

Shanti Rai concurred with Cottrell’s proposal that women should have 50 percent representation at all levels of the state mechanism. Rai expressed hope that the women members in the CA, who make up one-third of the body, are able to achieve that goal. Referring to one commentator's presentation, Rai satirically suggested that the definition of what constitutes ‘indigenous’ should perhaps be changed to define the Bahuns and Chhetris as having faced persecution for over 280 years instead.

Binod Lama Hyolmo noted that Ghai appeared largely satisfied with the draft constitution saying, at the same time, that many issues were yet to be solved. Hyolmo had little disagreement with Ghai regarding the definition of minorities and indigenous people, noting that it is said that the indigenous are not minorities and vice versa. In this context, Hyolmo referred to two models being debated on state restructuring. Giving an example, he said that the Hyolmo community to which he belongs is both a minority as well as an indigenous community. Why should it not have its own province, asked Hyolmo? Further, he also asked about the status of other indigenous peoples
in Nepal who are not going to get a province based on their ethnicity. As they are going to be ‘province-less’, Hyolmo said it is necessary that their rights are also protected.

Raising some practical issues, Neeru Shrestha asked whether the provisions on enforcing the rights of minorities as well as other laws to be formulated in the two years after the promulgation of the constitution are workable. Shrestha also asked why Nepal needs so many commissions to protect the rights of minorities. Shrestha concluded by suggesting that it might be appropriate to allow judicial review on the progressive realisation of directive principles in the draft constitution.

A participant from the terai, who did not identify himself, doubted the effective enforcement of the bill of rights in the draft constitution, and argued that the equal protection of languages must be achieved this time.

Speaking along the same lines, another participant, again without identifying herself, said that drafting a new constitution does not mean the last six constitutions were problematic in terms of fundamental rights. No matter how effective a constitution, it has little impact unless the leadership creates the necessary laws and enforces them, she argued.

Kamala Acharya shared her concern that while the CA reports focus extensively on fundamental rights as well as the rights of minorities and indigenous people, there is little said about the right to self-determination. There is little mention of how the demands of the indigenous people are going to be fulfilled, said Acharya.

In contrast, Bijay Mishra argued that rights based on ethnicity or caste is bound to serve the nation badly, as they result in discrimination and lead to the fragmentation of society. Rather, Mishra called for an inclusive process, with the state extending special treatment to the marginalised, excluded and economically poor.

Quoting Cottrell as saying that the attorney general – who is appointed by as well as has the length of his tenure defined by the prime minister – is not an independent figure, Bishwakanta Mainali asked Cottrell how Nepal can ensure an independent public prosecutor directorate. Mainali also asked how the country can make a distinction between the public prosecutor and the attorney general in the situation where the decision is affected by political considerations.

Referring to Timalsena, Bal Bahadur Mukhiya expressed doubt over the statement that there has been no anthropological study of the people of Nepal. After all, the laws in place at present must have been made based on certain considerations, he argued. Mukhiya suggested that no academic proof
is necessary to make the point that the Varna system has been in place in Nepal for centuries, and that the model has no place for indigenous people. Instead, Mukhiya points to other indicators; for instance, 89 percent of vacancies in the civil service are filled by Bahuns, Chhetris and Newars, with the participations of indigenous peoples very limited. Should these factors not be used to decide which communities classify as minority or indigenous peoples, asked Mukhiya.

Pragya Basyal asked Ghai to share his international experience on how the issues of social exclusion are addressed in the constitutions of other countries? She asked Cottrell to clarify how federalism should ideally be devised from a gender perspective.

Summing up his position, Ram Krishna Timalsena maintained that while establishing frameworks in the constitution to solve problems is laudable, the document should not be dragged into discussions when the problems clearly lie in implementation. Giving an example, Timalsena echoed Mukhiya in saying that the drafting and implementation of particular laws will be effective in ensuring the adequate representation of indigenous and minority peoples in the state system. Timalsena emphasised that creating classifications just for its own sake will hold the constitution-writing process hostage. Many of the problems discussed during the session stem, according to Timalsena, from a weak culture of establishing the rule of law and the ineffective implementation of equal opportunity clauses.

Clarifying his position, Om Gurung maintained that the classification of a ‘minority’ cannot be based solely on the size or population or numerical string of a community. There are other criteria that need to be kept in mind such as discrimination and economic plight, he said. Like Timalsena, Gurung argued that issues such as exclusion and political subjugation need to be considered in addition to specific constitutional provisions when it comes to minority and indigenous rights. Explaining that the Bahuns and Chhetris are identifying themselves as indigenous based on their long settlement in Nepal, Gurung maintained that there are also other criteria to establish who is indigenous.

Durga Sob also explained her position, saying that she is simply asking for the participation of Dalits and an acknowledgement of their human dignity – the country must be made free of ‘untouchability’. Sob was quick to clarify that there is no claim for a ‘Dalitland’ which would challenge the territorial integrity of Nepal.

Referring to the question on legislative review in case of directive principles, Binda Pande shared that the proposal is strongly likely to be adopted by the full house. At the same time, Pande pointed out that there is
no provision for judicial review of the implementation of directive principles. Many individuals, especially rights activists, want all the contents of directive principles to be included as fundamental rights which are immediately enforceable, she said. A majority of experts, however, caution against it. Pande concluded by saying that as the right to self determination comes directly under the purview of the Committee on State Restructuring and Division of Powers, the Committee on Fundamental Rights and Directive Principles did not propose anything in this regard – there is no conspiracy.

Reacting to the queries and comments, Yash Pal Ghai emphasised two points. First, he focussed on the framework of human rights as a basis for resolving issues, and argued that the older human rights instruments are unable to capture the new realities of sharpened inequalities. In this context, Ghai maintained that it is time to reconsider the effectiveness of the framework of human rights in dealing with the issues that have been raised. All the same, Ghai expressed confidence that the human rights framework could provide the basis for negotiations between the competing rights, such as those drafted by the ILO and the UN on minorities, indigenous peoples, women and children, among others.

Drawing from his experiences, Ghai talked about how he used the framework of rights to look at how competing claims were resolved in four countries – India, Canada, South Africa and Fiji. Ghai found that when it came to cases such as those of exclusion, certain fundamental principles can enable individuals to balance competing claims despite the coherence of the rights framework. Referring to the comments made during the session, Ghai noted that deep emotions were reflected in the discussion. Ghai argued that it is important to go back to the essentials of the human rights framework as a resolution mechanism to avoid getting stuck in strongly held, self righteous positions. In a country as diverse as Nepal, Ghai claimed that the constitution is unlikely to provide any firm solutions to the issues being raised. Ghai also noted that the Nepali leadership had failed its people badly by not formulating a proper framework and by not engaging in sincere negotiations.

Jill Cottrell responded directly to questions and comments from the floor on her presentation. Speaking to Biswakant Mainali, Cottrell shared the view that Nepal is unlikely to need an attorney general at all. Even if the office does exist, Cottrell said that it does not need to be a part of the constitution. Citing an example, Cottrell noted that the South African constitution does not provide for an attorney general, with the office bearer in fact the public prosecutor. Cottrell also stressed that she would like to see a progressive constitutional draft in terms of human rights, with the implementation of directive principles applied more generally to human rights. Cottrell
suggested that it would be possible to institutionalise human rights in the
constitution by making provisions for a national human rights day, where the
various concerned bodies report on the state of rights in the country as well
as report on their own work. Switching topics, Cottrell argued that Nepal has
too many commission, whereas other countries have been merging theirs. A
commission is not just there to show that some sections of society are
important, said Cottrell, arguing that they exist to insulate certain activities
from political interference.

5. Economic, social and cultural rights

The session focussed on laws relevant to socio-economic and cultural rights
and the problems seen in their enforcement. Some issues not covered by the
earlier session on the bill of rights and remedies were also covered here. Four
papers were presented.

In a presentation chaired and moderated by Daman Nath Dhungana,
former speaker of the House of Representatives, Professor John Pace spoke
about managing the protection of human rights during a transitional period.
Vincent Calderhead, a professional from the International Commission of
Jurists, focused on the enforcement of socio-economic rights under the draft
collection while Professor Mario Gomez commented on comparative
experiences in this regard. Both the latter presentations were chaired and
moderated by Professor Bidya Kishore Roy. The final presentation by
advocate Purushottam S Kulkarni revolved around the lessons learnt in India
about some aspects of economic, social and cultural rights, and was chaired
and moderated by Justice Kalyan Shrestha.

Comments were made from the podium and the floor by Dr Bhimarjun
Acharya, Dr Jyoti Sanghera, Professors Bal Bahadur Mukhiya and Wiktor
Osiatynski, advocates Biswakant Mainali, Shambhu Thapa, Badri Bahadur
Karki and Phurpa Tamang, and lawyers Neeru Shrestha, Bipin Adhikari and
Tek Tamrakar.

Thematic presentation

Kicking off the presentation, John Pace argued that if managing transitions is
of critical importance, managing human rights in transition is vital. Further,
he said a proper transition management requires addressing access to all
human rights as well as establishing a culture of the rule of law. In Pace’s
opinion, managing human rights in transition involves three major elements:
an agreement on the substantive norms that constitute human rights, the
identification of the institutional mechanism by which these norms are to be realised, and the political will to ensure that the first two are effectively carried out.

The search for the recognition and realisation of human rights standards, as Pace noted, has also provided further cause for conflict, as governments and other parties responsible for effecting transition choose to interpret clear and universally recognised norms in ‘relative’ terms when it comes to their application. According to Pace, a common feature of this confusion is rooted in the refusal to accept that priority must be given to the treatment of human rights in their totality. This debate is not new, said Pace, explaining that it has been ongoing since the drafting of the Universal Declaration of Human Rights. All this is to say that managing transition has to take into consideration and give priority to the integral realisation of human rights norms, said Pace. There should be no doubt as to the dimensions of the challenges, he said. Pace argued that the recognition, and even realisation, of civil and political rights is but a step in a process, at best a platform for the realisation of economic, social and cultural rights; although the two sets of rights are different, they are complementary and cannot be treated separately.

Pace’s second point revolved around the need to ensure the widest spectrum of public participating possible in institutionalising human rights. Acknowledging the importance of public consultation and referendum, Pace argued that the tool is of little use if the participating public does not have a thorough understanding of the issues, as well as clarity on the content and implications of the process. Pace identified the main players involved in this endeavour: the political leadership and civil society are at the forefront with national human rights institutions (NHRIs) such as the so-called transitional justice institutions including truth and reconciliation commission, commission to investigate disappearances, and the like, in between.

The third element discussed by Pace was the crucial role of political will, not just through resource control over national institutions, but also in exercising control over the expression and movement of the civil society. Pace argued that these elements are relevant to the current constitution-making process in Nepal. In this, he noted that the substantive human rights provisions established to date are consistent with Nepal’s international obligations on human rights. All the same, Pace pointed out that coordination problems are likely to emerge from the current CA proposal establishing seven NHRIs instead of one. In addition to eroding the substantive effort at ensuring a successful human rights transition, Pace argued that the creation of multiple constitutional bodies dealing with various aspects of the same subject matter is bound to have considerable negative effects on the provision
of resources. Furthermore, the existing commissions, such as the Women’s Commission or Dalit Commission, which are not yet constitutional bodies, are seriously under-resourced said Pace, and therefore of dubious value in ensuring the successful implementation of their mandates. In this context, Pace stressed that the management of transition should be seen as a long-term process needing more focussed policies.

Presenting his paper on the enforceability of economic, social and cultural rights under the draft constitution, Vincent Calderhead began by defining these rights in the context of Nepal. Calderhead emphasised that economic, social and cultural rights are not only possible in this country, but also necessary. Indeed, Calderhead underlined the fact that the most disadvantaged peoples are likely to have little or no political voice to affect government decision making, therefore making it all the more important to ensure that the government is implementing measures to respect their rights. In Calderhead’s opinion, the November 2009 report of the Committee on Fundamental Rights and Directive Principle represents a solid foundation on which to build these economic, social and cultural rights. Praising the text for demonstrating commitment, dedication and concern for the interests of all Nepalis, Calderhead called for significant improvements on the proposed draft to ensure that Nepal has a modern and progressive chapter on fundamental rights.

Calderhead suggested that the proposal on equality rights be strengthened by including the requirement of “substantive equality” under the law without discrimination, saying that the guarantee of equality could be worded along the following lines:

There shall be no discrimination, whether on purpose or in effect, against any citizens in the application of general laws or any other state action or inaction on grounds of religion, race, caste, tribe, gender, sexual orientation, physical condition, disability, state of health, marital status, pregnancy, economic condition, origin, language or region, ideological conviction or any other similar grounds. The right to equality requires positive measures to address both the needs of groups identified by prohibited grounds of discrimination and the removal of barriers confronting these groups.

Calderhead stressed that provisions along the lines of “... as provided by law”, as is seen with most of the guaranteed rights, only undermines the constitutional protection of a right.

Another issue that Calderhead made a strong point about was that the committee’s preliminary draft contains no clear provision on remedy and reparations when these rights are violated, and simply refers (in Article 31(3)) to another part of the constitution for these issues. Arguing that remedies for human rights violations are specialised and deserve their own
provision, Calderhead stressed that a reliance on a generic remedy provision imported from elsewhere in the civil law cannot provide the full range of remedies which human rights violations can require. Calderhead also argued that any court with jurisdiction to determine rights violations, including subordinate courts, should also have full remedial jurisdiction to order any and all remedies that may be appropriate and effective.

Calderhead also suggested that it would be appropriate to include a provision directing the government and the courts to interpret and apply the provision in full accordance with international law as a way of informing the interpretation of the rights, freedoms and duties. Further, Calderhead highlighted the need to ensure that a violation of the right to education or housing will be remediable against the level of government which has constitutional responsibility for that area; and by the same token, the relevant level of government will, for example, have access to sufficient fiscal resources in order to adequately discharge its obligations created by the fundamental rights. In other words, Calderhead noted that a provincial government must have sufficient revenues to reasonably discharge its obligation with respect to the right to housing or education.

Offering additional perspectives on the issue, Mario Gomez presented a paper on implementing socio-economic rights. Gomez noted that a progressive nature is a feature of international formulations on socio-economic rights; for instance, in the International Covenant on Economic, Social and Cultural Rights (ICESCR) the rights are subject to the qualification that their “full” realisation must be progressively achieved according to maximum available resources. Despite this formulation, the Committee on Economic, Social and Cultural Rights has identified some rights in the ICESCR as being capable of immediate implementation. Gomez stressed that the challenge lies in striking an appropriate balance between the progressive realisation of these rights and their immediate enforceability, a duality that is present both at the stage of constitutional formulation and at that of judicial interpretation.

Gomez analysed the developments in this area by using the South African Bill of Rights as a source of inspiration, saying that it treats the rights that are immediately enforceable and those subject to progressive realisations differently, based on the capacity of the state. Gomez also referred to Columbia, where, while many of the socio-economic rights are progressive, the courts have held that some of the rights may be immediately enforceable given the right set of circumstances. Similarly, Gomez noted that while the Indian Supreme Court has acknowledged that socio-economic rights are resource linked and reflected in the country’s level of economic achievement, it
observed that there were minimum levels below which socio-economic rights could not sink. The concept of human dignity was one of the established minimum threshold levels, said Gomez.

Gomez urged Nepal to seize the great opportunity available in writing a new constitution rather than allow the courts to develop socio-economic rights through what will no doubt be an ad hoc process of interpretation. Gomez criticised the current CA suggestion that socio-economic rights be tackled in supporting legislation to be passed within two years as being strikingly ambiguous.

According to Gomez, the preferred approach would be to make socio-economic rights directly enforceable by entrenching them in the constitution and providing a remedy. While these constitutional rights may then be supported by additional legislation, Gomez emphasised that their enforcement should not be dependent on supporting legislation. Gomez also stressed that Nepal must take decisions on what socio-economic rights must be immediately enforceable. In Gomez’s opinion, fundamental rights such as basic education, the right to basic health care, the right to emergency medical treatment, the right to reproductive health care, the right to emergency medical treatment, the right to a minimum supply of water, and the right to safety from forced evictions should ideally be made immediately enforceable in the new constitution.

In this, Gomez suggested that private actors responsible for providing these services may be covered directly by the bill of rights or by separate legislation. The bill of rights would also need to address the question of who could bring an application for the enforcement of fundamental rights, he said. Gomez’s personal understanding was that an inclusive litigation model that would permit third parties to intervene would be more democratic and assist the courts in their task of interpretation. The use of independent institutions to monitor and supervise the implementation of remedies is also appropriate, he said. Gomez advocated for a transparent, inclusive and participatory model of litigation, one that is flexible with regard to procedures and employs different forms of remedies and processes for implementation. Above all, Gomez argued that Nepal should take the bold step of including a set of directly enforceable socio-economic rights in its new constitution, buttressing this with a constitutional remedy to allow both victims and public interest petitioners to seek relief where these rights are violated.

The last paper on the issue was presented by advocate Purushottam Kulkarni, who focussed on the Indian experience of social justice. Kulkarni began by stating his belief that the constitution should be considered from the point of view of the common man, and function as a tool to safeguard his
interests and rights. Speaking about the draft constitution, Kulkarni said that the proposed fundamental rights – education, health, food, shelter, clothing, irrigation, development, seeds, fertilisers and food sovereignty – are certain to meet the expectations of the common man. All the same, Kulkarni noted that corruption has been a major obstacle in implementing the fundamental rights and directive principles enshrined in the constitution. If the constitution provides some mechanism to protect the rights and dignity of citizens as well as to uphold social justice, Kulkarni said that the purpose of the constitution may be fulfilled to some extent. Along these lines, Kulkarni called for the constitution to establish a Commission for Fundamental Rights and a Commission for Directive Principles, tasked with supervising the proper enforcement of the rights and social justice schemes as well as documenting injustices and recommending corrective measures. Kulkarni also proposed another safeguard for the enforcement of fundamental rights, namely something along the lines of the Right to Information Act in India, which holds government officials and bodies accountable.

Moving to the topic of reservation for the backward classes, Kulkarni argued that provisions should only remain in place for a fixed time period and not be extended indefinitely. In Kulkarni’s opinion, emphasis should be placed on self help rather than making communities dependant on reservation. Kulkarni also noted that it is important to ensure that there is no injustice caused to non-backward categories through reservation. Further, Kulkarni said care should be taken to prevent reservation, if the provision is already in place, from becoming a burden upon the state. Kulkarni concluded by stressing that judicial activism is no remedy for the absence of social justice – the judiciary cannot take upon itself the function of the executive and tackle the day-to-day problems of society.

**Thematic discussion**

Starting off the discussions, session chair Bidya Kishore Roy praised Gomez’s overview of comparative experiences in ensuring socio-economic rights. Roy found Gomez’s distinction between immediately enforceable socio-economic rights and those that could be pursued progressively by the state over a period of time to be helpful in the Nepali context.

Admiring the presentation of Calderhead and Gomez, Jyoti Sanghera commented that the national security of Nepal is endangered by internal tensions – rather than the alleged encroachment by neighbours – related to human security as it is linked to human development. Consequently, Sanghera stressed that the nation’s problems are intricately linked to the
denial of economic, social and cultural rights, pointing out that the decade-long conflict itself was related to economic and social justice. If constitution writing is to be recognised as the tool for nation building, Sanghera asked that priority be given to ensuring these rights, something that would help ward off the fear that many people have.

Sanghera also stressed the absence, in both the Global North and South, of jurisprudence on economic, social and cultural rights. Nepal faces a historic moment, she said, pointing out that constitutionalism is about a combination of text and process, with the latter particularly important in the context of economic, social and cultural rights. In this regard, Sanghera pointed out that there has been a conflict between competing rights in some of OHCHR’s work, particularly when it comes to economic, social and cultural rights. Sanghera provided an example of a village where water wells and other sources of water were provided for the community. Initially, the wells happened to be located in the more well-off part of the village, implying that Dalits could not access the water source. The concerned organisation then provided a well in the Dalit section of town as well. While both the Dalits as well as the elite could now access the source, Sanghera noted that the entire effort was discriminatory and thus problematic.

Providing another example, Sanghera noted that the right to women’s mobility is also being contravened in Nepal by provisions formulated to ensure the right to freedom from abuse. As things stand, women are not able to travel to certain countries in the gulf, a measure self-professedly put in place in order to protect them from trafficking and other forms of exploitation. When it really comes to implementing economic, social and cultural rights, Sanghera argued that a better understanding of how rights compete and contravene each other is needed, with lessons available even within the sub-regions of South Asia.

Gomez and Calderhead have, Sanghera noted, pointed out some of the key issues around economic, social and cultural rights – for instance, the tension between immediate implementation and progressively realisable rights. Acknowledging the importance of the justiciability issue, Sanghera asked how these tensions can be resolved on the ground. As communities demand the immediate implementation of rights, Sanghera asked about the criteria used to pick which rights, from the long list present, should be granted immediately. She further argued that this gives credence to the notion of progressively realisable rights. Sanghera urged the government to think these issues through in depth, drawing lessons from the work already done on substantive equality and special temporary measures, especially through the Convention on the Elimination of all forms of Discrimination
against Women (1979) and the Convention against Elimination of Racial Discrimination (1969). Sanghera noted that the CEDAW in particular has taken the notion of substantive rights ahead in many ways.

Focusing on Calderhead’s paper, Sanghera stressed that providing substantive and formal equality does not lie merely in opportunity but also in the equality in outcomes, something that is particularly critical in the context of disadvantaged communities. Referring to the call for ‘equal wages for equal work’, Sanghera noted that special measures are necessary in the context of women’s work. Perhaps the conversation can become one about work of equal value, said Sanghera, which would also place a greater burden on the state.

Bhimarjun Acharya stated that much of the problem in ensuring socio-economic rights arose from the politics involved in the process. Noting that all six previous constitutions of Nepal guaranteed equality, he raised the question of why Nepali citizens, particularly Dalits, Janajatis and other marginalised peoples, did not enjoy socio-economic rights to the same degree as other citizens. In Acharya’s opinion, politics and political ambition is a major reason for the failing. In this, Acharya highlighted two trends across the world. The first, he explained, is the political elite’s cooption of the language of socio-economic rights to grab power. Quoting the political philosopher John Rawls, Acharya noted that justice is the first virtue of the state, which is obligated to ensure the equal distribution of benefits and burdens. This responsibility has been ignored by political actors, who continue to deprive large chunks of its people of their socio-economic rights, which explains the continuing marginalisation of indigenous and other communities in Nepal.

The other trend, said Acharya, is that of states rejecting the notion that citizens are entitled to socio-economic rights at all times, and approaching the issues in terms of progressive realisation. In Nepal, as elsewhere, these rights have not been guaranteed to the same degree as equality or property rights have been, he said. Acharya further pointed out that though landmark judicial orders have been issued to help realise socio-economic rights, these have yet to be implemented in Nepal. Taking the argument further, Acharya argued that socio-economic rights will not flourish in an environment that does not guarantee economic freedoms. In Acharya’s opinion, a free market is the only reliable means to ensure economic security, pointing out that the term labour rights have no meaning when industries and factories are under attack.

In the Nepali context, Acharya pointed out that while the right to strike is guaranteed in the draft prepared by the Committee on Fundamental Rights (a
right that Nepal is obligated to grant under the numerous ILO treaties to which it is a party), there is no provision to prohibit strikes on the basis of access to essential commodities. In bringing up this point, Acharya attempted to highlight the delicate balance that exists in guaranteeing the sometimes conflicting demand for socio-economic rights and economic freedom. Noting that the CA is discussing a proposal that would allow the state to seize property when it deems fit without providing due compensation, Acharya criticised the legislators for not working to protect private property and promote competition.

On the matter of enforcement raised by Calderhead, Acharya argued that Nepal’s unique situation must also be understood. With the country having adopted the dualist model of implementation of international law, Article 1 of the Interim Constitution establishes the supremacy of the constitution, meaning that all international laws are subordinate to the constitutional framework. Consequently, international law must first be domesticated in the country before it can be enforced. This is not to say that Nepal is not obligated to comply with the international laws it has chosen to ratify. Similarly, the Supreme Court has been given exclusive authority to enforce fundamental rights and to interpret constitutional law. In this regard, Acharya reiterated Gomez’s question: Are socio-economic rights enforced against private sector entities, or are these groups exempt? This question was raised in the context of the current draft on fundamental rights, accepted at the committee level, which has a proposal on the right to live with dignity. Acharya agreed with Gomez on the utility of the practice of third party intervention, which has been a long-standing tradition in Nepal.

Reacting to Calderhead, Bal Bahadur Mukhiya made the point that though Nepal is a signatory to more than 16 international human rights instruments, the country still has pervasive problems of malnutrition and hunger as well as of access to drinking water. What then is the meaning of including the right to food sovereignty in the committee draft, asked Mukhiya? Mukhiya also asked Bhimarjun Acharya whether he was asking for the right to economic freedom to be separate from the right to property. In this context, Mukhiya also asked whether Acharya recommends a separate provision for the right to intellectual property. Similarly, in light of the traditional skills the different communities of Nepal boast, Mukhiya asked whether there is a need for a separate constitutional provision acknowledging the preservation of this knowledge as the right to property.

Most of the social, economic and cultural needs, commented Wiktor Osiatynski, are satisfied by the concerned people themselves within their family, the community and market system. Osiatynski explained that the
rights that cannot be satisfied in this way can be divided into two groups. One group can be a matter of state or local public policy while the other group should undoubtedly be available as an immediately enforceable right. On the subject of directive principles, Osiatynski noted that enforcement can be secured by establishing proper channels for implementation during the constitution-drafting process. Saying that the parliamentary machinery being proposed in Nepal is appropriate, Osiatynski maintained that the formation of a commission for this purpose could also be considered by the CA. In turn, the constitution could also have a provision obligating the government to propose a motion every year to convert some of the policies into rights. If there is majority support for such a move, the policies will be converted into enforceable rights. Some percentage of the GDP should be committed to the right created, said Osiatynski.

Giving an example, Osiatynski explained that these rights are not in themselves enforceable by the courts in South Africa. Instead, the courts maintain that the state must have a policy, say for instance, on housing, the constitutionality of which is then decided by the judiciary, which may say that it is not constitutional as it does not, for example, provide for the most excluded. Though there is a dispute between socio-economic and other rights, a conflict that lies in the historical experiences of communities should not be considered secondary to others, argued Osiatynski. After all, said Osiatynski, socio-economic rights can be made contingent upon contribution to the community rather than the state.

A participant, who did not identify himself, made the point that not only Dalits or Janjatis have problems in accessing socio-economic rights, an issue that applies equally to all people affected by poverty and marginalisation for long time periods. In the participant’s opinion, much of the problem rests in the fact that the distribution system of economic goods in this country is not effective. Before one suggests what constitutional guarantees are necessary, it is important to know why the programmes aimed at the poor and the marginalised are not yielding many results, he said. Only after understanding that all programmes stop short of implementation can one suggest what rights should be prioritised, argued the participant.

Noting that Nepal is party to the World Trade Organization (WTO), which behaves like a business entity, in addition to having ratified all major humans rights instrument, Neeru Shrestha asked how these concerns can be harmonised without impacting the delivery of socio-economic rights. Shrestha was particularly interested to know how Columbia and South Africa have been able to balance both instruments.
Biswakant Mainali shared that the United States’ Constitution does not recognise any group rights in its text. Meanwhile, at least three independent commissions have been proposed in Nepal to deal with group rights, especially those focusing on sectoral interests. If one needs to have one commission to deal exclusively with all these sectoral interests within group rights, Mainali asked whether it will be at all possible to keep the balance between fundamental individual rights and group rights?

Arguing that a competent and independent judiciary is a prerequisite for the effective implementation of human rights, Sanghera termed as problematic the proposal that a parliamentary judicial committee look at the constitutionality of laws. Meanwhile, Sanghera called for the strengthening of national human rights institutions such as the Dalit Commission, which advocate for the rights of disadvantaged communities.

Responding to Bal Bahadur Mukhiya’s question on the provision for food sovereignty, Bhimarjun Acharya explained that the draft of the Fundamental Rights Committee has two mutually contradictory provisions in this regard. On the one hand, it says that the people will have the right to food, while, on the other, it grants the state the power to maintain food sovereignty. On the issue of economic freedoms, Acharya clarified that he was referring to the freedom of individuals to work, produce, consume and invest as they please. In Acharya’s opinion, not only should these freedoms be protected, but there should also be no constraints on the part of the state. Acharya argued that economic freedoms will persist only when government allows labour, capital and goods to move freely, refraining from imposing coercion and constraint on these liberties.

Commenting on John Pace’s presentation, a participant from the floor who did not identify himself said that while the three steps of the transition appear excellent, the problem in Nepal rests in the face that the political leadership and parties are so diametrically divided on the basic issue of values and norms. In fact, he argued that a greater sense of political courage and will becomes counter-productive at times, though he did not expand on this point. The question here, according to him, is how one would advocate for the protection of human rights by avoiding a relapse into conflict? While conventional human rights wisdom has focussed on the protection of individual rights from the coercive authorities of the state, what is to be done in a situation like Nepal, where the state is either non-existent or dysfunctional, he asked? Considering that a broad range of non-state actors have come forward to challenge the state, he raised the question of what the best institutional arrangement to avoid more violence is.
Providing a different perspective, Bipin Adhikari called the realisation of economic, social and cultural rights a universal challenge. While lauding the efforts to bring torture, arbitrary detention and capital punishment to an end, Adhikari said these measures are of little value if people are then killed by a lack of access to drinking water or by hunger or disease. Noting that it is not within the sole capacity of a developing country like Nepal to commit to these rights, Adhikari argued that it is the duty of the international community, especially countries with abundant resources at their disposal, to assist the developing world to implement pledges in favour of socio-economic rights, and their progressive but steady realisation. Adhikari advocated that the developed countries be compelled to respond to these situations through well-defined international channels. Adhikari pointed out, for instance, that Article 28 of the Universal Declaration of Human Rights states that everyone is entitled to a “social and international order in which the rights and freedoms set forth in this declaration can be fully realized”.

While increased attention has been paid in recent years to the collective responsibility of states to ensure respect for human rights and humanitarian principles, Adhikari argued that this should not prevent individual state from doing what they can through an effective rights regime. In Adhikari’s opinion, the right to self determination should include internal aspects of the relations between the people and their state – the democracy and self-government component of this internal aspect is always important for the protection of human rights. Adhikari maintained that Nepal, even though it cannot guarantee all of the many socio-economic rights at the moment, should undoubtedly provide the basic level of all these rights.

Stating that guaranteeing what cannot be achieved only leads to frustration, something that is harmful in the long term, Adhikari laid out the details of a model constitution he had presented to the CA. In Adhikari’s draft version, the chapter on fundamental rights had expanded on which socio-economic rights could be immediately enforced by the state, if the government demonstrated a degree of commitment. For example, Adhikari pointed out that while the Nepali state may not be able to guarantee cost-free cancer treatment as an enforceable right to health, it could have taken on the obligation to provide preventive medicine and, for instance, emergency treatment. According to Adhikari, the draft approved by the committee level is more ambitious than implementable.

On a somewhat different note, Adhikari noted that taking economic, social and cultural rights seriously also implies a commitment to social integration, solidarity and equality, including the question of income distribution. Built on the strength of equality, pluralism and non-
discrimination, Adhikari stressed that these rights are a major concern for the protection of vulnerable groups, such as the poor, the handicapped, Janjatis, minorities, caste-discriminated and regionally marginalised people.

Getting back to the discussion on food sovereignty, Vincent Calderhead said that the term is not much in use in international law and international human rights law. In the Interim Constitution, Calderhead noted that it could relate to food security, though some used it in the context of traditional agriculture, the protection of seeds and other related issues. Calderhead stated that the current draft from the fundamental rights committee convenes the right to food, something he deems to be one of the most important provisions that it can contain.

As to the question about the contradiction between international trade agreements and international human rights arrangements, Calderhead clarified that the Nepali approach is appropriate. It is possible to mend the laws through an interpretational clause which can guide an informed judicial interpretation of human rights provisions Nepal has agreed to stand by, he said. All the same, noting that human rights and trade agreements can be quite different, Calderhead emphasised that judicial interpretations ought to be guided by human rights agreements as opposed to WTO provisions. Additionally, Calderhead commented that he sees no conflict between the realisation of economic rights and the realisation of group based rights. For instance, he explained that when the existing Canadian constitution was revised 25 years ago, a charter of rights was adopted, although it had absolutely no provision for the protection of property rights at the constitutional level. Calderhead stressed that this has not been a problem in any way, with property rights protected by the common law provisions.

Concurring with Calderhead, Mario Gomez noted that whether Nepal constitutionalises economic rights or chooses to go the legislation route is essentially a question for the Nepal people. Gomez, however, also argued that if the decade-long conflict was spurred by socio-economic concerns, and if the people look to the constitution to be transformative, there is a strong case for having directly enforceable social and economic rights in the constitution. Commenting on Wiktor Osiatynski’s understanding of economic and social rights, Gomez cautioned that socio-economic rights are being played out in jurisdictions all across the world. Getting involved is much more than having policies in place. According to Gomez, more and more courts are beginning to recognise socio-economic rights, as is evidenced in the different effective remedies they are ordering. As for the debate on the relevance of international law, Gomez said it varies from case to case. As an example, he highlighted that the South African courts have
pointed out that international law is not relevant to the interpretation of the South African constitution. Along the same lines, Gomez argued that domestic jurisdictions supersede international developments in the arenas of economic and social rights.

Saying that society changes faster than law, Bidya Kishore Roy noted that the subject of socio-economic rights and their enforcement is a burning issue in Nepal’s constitution-making process. How these rights should be formulated is a difficult question according to Roy, as the bill of rights cannot be a comprehensive encyclopaedia. If everything is made justiciable through the judiciary, it can pose a difficult situation especially in the context of the Nepali state, he said. There must be consultation and compromise on how to move about on these issues said Roy, adding that reconciliation between the maximisation of liberty and the right to equality, especially in the field of equality, is important.

Moderating the presentation of Purushottam Kulkarni, Kalyan Shrestha began by noting that there are many similarities in the politics of Nepal and India. In the Nepali context, Shrestha noted that though there is a long list of rights mentioned in the constitution, even though many experts believe that directive principles and policies are more relevant to the people, and though the rights seldom get implemented. It is natural, therefore, to question who will be taking care of these principles and policies said Shrestha, pointing out that the judiciary has been trying to provide some answers on this critical issue. Indeed, the courts have quite often asked the parliament to enact laws on these constitutional commitments, sometimes even asking the government to design programmes on particular issues. Shrestha did, however, concede that the initiatives taken by the judiciary are barely enough to ensure the degree of remedies people are demanding. Overall, Shrestha found the mechanism suggested by Kulkarni to be an important one for the CA to consider.

Shrestha also noted that implementation of the Right to Information Act is a heated issue in Nepal as well as India. The other issue that the Interim Constitution has underlined is reservation, with the new constitution likely to make some headway on this, said Shrestha, highlighting the important of understanding the context behind the reservation policies. Clarifying that the idea behind reservation is to promote temporary special measures to elevate the status of marginalised people, Shrestha noted that more problems will arise if the provision is overused, misused or abused.

Also commenting on Kulkarni’s presentation, Shambhu Thapa referred to the response of the common people on the Mandal Commission, headed by Indian parliamentarian Bindheshwari Prasad Mandal during the Janata
Party government and put together to discuss the increasing number of reservations in India. Part of the impetus behind the Mandal Commission came from the fact that a significant number of people burnt effigies and expressed strong dissatisfaction with reservations, arguing that the meritorious and the competitive had been sidelined. Though the policy of reservation has continued, Thapa argued that issues of Dalits and other backward groups remain the same. According to Thapa, the Indian judiciary has keenly upheld the rights of the marginalised communities through judicial activism. In Nepal’s context, nobody knows whether a commission will be tasked with studying the daily realities of Dalits and other discriminated-against sections of society, said Thapa. As to the right to information, Thapa said whether the property and financial dealings of the judge should be transparent or not was also an issue in India.

Commenting on the judicial activism being practiced in India, Badri Bahadur Karki argued that Kulkarni’s warning about reservation politics is much needed. Though accepting that reservation will be a reality in Nepal for many years to come, Karki reiterated Kulkarni’s point by quoting him as saying “social justice to one community should not be injustice to another community. Otherwise the very concept of equality and the very concept of merit will wither away”.

Expressing reservation about Kulkarni’s definition of social justice, Tek Tamrakar noted that the term is not limited to economic justice. Similarly, Tamrakar also argued that reservation, rather than being a welfare mechanism, is a human rights issue dealing with structural discrimination. Going by this logic, Tamrakar stressed that the constitution will need a real mechanism to end structural discrimination. Although poverty is a clear manifestation of this discrimination, Tamrakar argued that simply focusing on it is insufficient to deal with the larger issue in any real sense. Urging lawmakers to define the jurisprudence of social justice more comprehensive, Tamrakar argued for a social structure free of discriminations based on caste and gender, among other issues.

Picking up on the issue of merit, another matter emphasised by Kulkarni, Tamrakar said the subject had been elaborated upon by the Indian Supreme Court during a number of cases. There are dozens of examples where merit has been simply defined by stakeholders, the term does not only provide qualification on the basis of education said Tamrakar, arguing that it needs to be explored more deeply. All the same, Tamrakar agreed that the reservation policy must be protected from abuse, with an oversight mechanism instituted to ensure that the provisions are implemented effectively. Tamrakar also brought up the issue of federalism, saying that the discussions have paid
scant attention to the rights of individuals belonging to dispersed communities. Tamrakar argued that there should be an affirmative action policy to protect the rights of these individuals. Tamrakar concluded by pointing to one commentator's use of the term ‘untouchable’, and cautioning that the term is not sensitive to the Dalit community.

Disagreeing with Tek Tamrakar on the issue of reservation, Phurpa Tamang argued that a holistic development of poor communities can be equated to social justice, which is not the exclusive right of certain individuals or communities. Consequently, Tamang argued that the concerned actors should provide quality education to all instead of simply making political appointments of individuals from disadvantaged communities.

Bidya Kishore Roy, the last speaker of the session, agreed with Kulkarni on the point that judicial activism can prove dangerous in the long run. Roy, however, asked what mechanisms can exercise control over the judiciary when the doctrine of the separation of powers is in place?

6. Preservation of national interest, including security issues

The session on how to mould the new constitution to preserve the national interests of Nepal had two components. The first focused on national interests as perceived in the modern sense while the second dealt with security issues, including the integration of combatants and the democratisation of the national army. These topics are important in the context of the commonly held belief that the decade-long conflict weakened Nepal’s ability to preserve its national interests vis-à-vis its mighty neighbours to the north and south.

As a post-conflict society, Nepal needs to address these issues in order to provide stability under the new democratic constitution. From another point of view, it is also time to look back on Nepal’s own security apparatus, identify the contentious issues, and decide on which constitutional provisions are necessary to sort out the existing inadequacies.

Professor Jiunn-rong Yeh and advocate Menaka Guruswamy presented papers during the session. While Yeh concentrated on strategies to build institutional capacity and to preserve national interests through the new constitution, Guruswamy focussed on security issues, the integration of the Maoist combatants and the democratisation of the national army. CA member Sapana Pradhan Malla chaired and moderated the session with
comments from analyst Geja Sharma Wagle, retired lieutenant general, Sadip Shah, Dr Indrajeet Rai and retired army official Kumar Phudung. Advocates Dinesh Tripathi and Bijay Kumar Mainali as well as lawyer Sakuntala Kadirgamar-Rajasingham provided inputs from the floor.

Thematic presentation

Jiunn-rong Yeh began his presentation by noting that the national interest has become among the most discussed issues surrounding the transition and the constitutional process in Nepal. Providing an overview, Yeh stated that the term national interest is internationally used in the context of whether a nation-state can prevent exploitation by other states so as to safeguard its sovereignty and territorial dignity. In the face of internal conflicts, external threat and global challenges, Yeh highlighted the concern of many Nepalis that the new constitution apparatus would be advanced even by sacrificing issues vital to the national interest.

As Yeh pointed out, drafting the constitution, a fundamental basis of state building and governance, is itself of tremendous importance to Nepal’s national interest. The establishment of a strong central government as well as the consolidation of military and intelligence operations could effectively deter internal armed conflicts and external invasion, he said. According to Yeh, the priority of the constitution should be to first provide mechanisms for integration and inclusion followed by capacity building for the constitutional institutions. After completing these two activities, Yeh stressed that the new constitution should aim at empowering civil society and working towards an independent judiciary. Furthermore, in the face of social cleavage, Yeh argued that the constitution should have a vision for future integration without clinging to existing differences.

Yeh also shared his views on how to tackle a number of controversial issues. Key among these is the enhancement of the national military, which Yeh considered necessary to protect the state from external threats and internal conflicts. Yeh also suggested that Nepal consider incorporating provisions on foreign policy or the exercise of treaty-making powers into the constitution as well as include emergency powers in anticipation of terror attacks or natural disasters. On the issue of borders and migration, Yeh called for an assessment of the multifaceted nature of the border and what it means to the people before deciding what is best for the national interest.

Focussing largely on security concerns, Menaka Guruswamy began with a summary of the peace process, culminating in the elections in early 2008. Guruswamy mentioned as important the Comprehensive Peace Agreement.
(CPA) signed between the seven-party government and the CPN (Maoist) on 21 November 2006, a ‘contract for peace’ meant to signify the end of twelve years of civil war. Guruswamy specifically mentioned two significant parts of the CPA: a detailed section on the ‘Management of Army and Arms’ and the provision for a democratic restructuring of the army along with free and fair elections to the CA to draft a new constitution. Subsequently, as Guruswamy pointed out, the Interim Constitution of Nepal came into force on 15 January 2007 and included provisions about security issues, the Maoist combatants and the Nepal Army.

Referring to the draft provisions of the Committee for the Protection of National Interest, one of the ten thematic committees of the CA, Guruswamy mentions that a detailed pre-Interim Constitution framework culminated in provisions within the progressive interim constitution. In other words, Guruswamy explained that there is an apriori understanding and commitment made to reconfigure the institution of the Nepal Army, a process that will only be aided by the integration of the Maoist combatants. In this context, Guruswamy pointed out that the laying down of weapons by the Maoist combatants was premised on an understanding of integration. All transition processes in conflict countries have worked only when there has been meaningful integration and rehabilitation, said Guruswamy, adding that peace in Nepal also depends on this, even as constitutionalism demands it.

According to Guruswamy, the demand for integration refers to somewhere between 4000-8000 combatants. Considering how small the number is, Guruswamy argued that integration, even if it is done in units as opposed to individually, is unlikely to have a significant impact on the existing army of about 95,000 soldiers. In any event, integration of combatants would be spread over the army, the police, the military police and other entities, she said. Further, Guruswamy noted that demands for the democratisation of the army, including allegiance to the nation and control by an objective civilian leadership in addition to strengthening the Ministry of Defence are inherently desirable institutional changes. Professionalising the armed forces through training programs for all ranks as well as the induction of women and under-represented ethnic communities would also indicate an institution representative of a diverse constitutional democracy. Guruswamy concluded by urging Nepal’s political actors to leave aside their past differences and come together to reach an equitable settlement while integrating and rehabilitating combatants. At the same time, it is also important to understand that the democratisation of all institutions including the army is imperative in creating the framework for a new constitutional democracy in Nepal.
Thematic discussion

Getting the floor discussion started, CA member Sapana Pradhan Malla argued that the time had come to redefine the meaning of the term ‘national interest’. While the term usually brings to mind the protection of national territory and sovereignty, Pradhan urged the gathering to consider the socio-political and cultural context of ‘national interest’. There are two different perspectives – one of the government and the other of the people – on what national interest means, she said. Presenting the point of view of the latter group in Nepal today, Pradhan said that the politics of identity is the main concern even when speaking of the national interest. Maintaining a balance between the individual versus collective rights with an eye to achieving unity in diversity is critical, argued Pradhan. All the same, Pradhan was quick to acknowledge that the country’s external relationships, treaty jurisprudence and other security issues are undeniably of importance as the state has an obligation to safeguard the people from threats, both external and internal. With internal threats such as insurgencies often caused by poverty or unbalanced development, Pradhan once again made her case for a wider interpretation of what national interest means.

Bringing the discussion back to security, Geja Sharma Wagle maintained that the real issue is the integration and rehabilitation of the combatants, as opposed to Guruswamy’s focus on integration alone. Although a hugely contentious issue, Wagle argued that the political forces are taking the challenge of integration and rehabilitation seriously, with both the Interim Constitution and the Comprehensive Peace Accord addressing the issue. Guided by Article 146 of the Interim Constitution, a nine-member special committee made up of representatives from the six major political parties, and headed by Prime Minister Madhav Kumar Nepal, is supervising the integration and rehabilitation process, said Wagle. Likewise, a technical committee under the special committee has been tasked with drafting the specific policies in this regard. In this way, even though the political parties continue to be bitterly divided, Wagle argued that the matter appears to be moving forward. In making this argument, Wagle pointed to the fact that the process of discharging disqualified combatants has already started and is slated to be completed within months.

In more encouraging news, Wagle referred to the agreement between the parties that only those Maoist combatants who have been properly registered in the cantonment site will be considered eligible for integration into the security forces. Those who are not placed in the army or the police will be rehabilitated into society. It is consequently clear, argued Wagle, that all
19,602 combatants verified by the United Nations Mission in Nepal (UNMIN) will not be integrated into the security forces; this addresses the legitimate concern that the Nepal Army should not be politicised in the pretext of integration.

Wagle then shared his thoughts on the democratisation of the Nepal Army, saying that this process should be part of a broader reform of the security sector. Wagle urged policymakers to keep Nepal’s legitimate security interests in mind while avoiding the unnecessary and unaffordable militarisation of Nepali society. In Wagle’s opinion, the national army should be transformed into a democratic and inclusive institution which respects the rule of law. At the same time, Wagle also stressed the importance of not politicising the NA on the pretext of democratisation. Wagle cautioned against another incident similar to standoff between then-prime minister, Pushpa Kamal Dahal (aka ‘Prachanda’), and the now retired army chief of staff, Rukmangad Katuwal, which ultimately led to the UCPN (Maoist) to resign from government.

The democratisation of the NA should occur in line with the principles and values in the constitution and with an eye to improving civil-military relations, said Wagle.

Wagle ended by sharing case studies about successful transitions from violent conflict to sustained peace. Pointing to South Africa, considered a successful transformation, Wagle noted that it took the country over a decade to settle the issue of integration and rehabilitation, even under the popular and respected leadership of Nelson Mandela. South Africa allowed for integration, including the acceptance of group entry of the former insurgents into the armed forces. Indeed, combatants of the African National Congress (ANC) were made generals, one of whom became the chief of army staff of the South African Army, going on to join politics after his retirement. In contrast, none of the combatants were inducted into the army in El Salvador, with most opting for rehabilitation and some were inducted into the police force. Wagle noted that Nepal could draw lessons from both of these two divergent paths.

Approaching the issue in a different manner, Sadip Shah, argued that globalisation has made it impossible for any state to pursue its interest unilaterally. Shah argued that increased interdependence has, in a way, exposed weak and poorly governed states which are unable to meet their sovereign responsibilities both within and beyond their boarders. In this context, Shah pointed out that weak states also allow for trans-national non-state actors to seek asylum in and manage their illegal activities from their territory, with the concerned nation destabilised in the process. Considering
the nature of the governments in the region, Shah argued that South Asia is likely to experience heightened violence and instabilities. The remedy, he argued, demands that one address one’s internal weaknesses rather than engage in blame games.

In Shah’s opinion, every country should be able to identity its sense of purpose and establish an independent sense of identity to motivate its citizens to survive, grow and prosper. This purpose is also known as a core value, said Shah, and will establish a cause and a faith for citizens to live by. If the purpose is an end, the national interests are means, said Shah. In a traditional sense of the term, Shah defined national security to be a reference to the relationship between the population and the government, and the capacity of the state to protect itself. Consequently, a weak state lacks social cohesion and is unable to secure its core values. Therefore, said Shah, a nation incapable of defending its vital national interests is on the path to becoming a failed state. Political instability over an extended period will impel the nation to be a failed state. In this context, Shah asked whether national institutions and citizens should themselves analyse the ground realities and implement corrective measures or wait for external forces to stage an intervention.

Speaking specifically about Nepal, Shah classified identity as the country’s centre of gravity – both a function and an outcome of inter-ethnic, inter-cultural and inter-regional harmony. Shah noted, however, that the insurgency and the subsequent transition phase have distorted and disturbed the national fabric. According to Shah, the result has been the emergence of a polarised younger generation, entirely disillusioned by the prevailing national stalemate and willing to adopt any path that offers a brighter future. Considering the current politics, Shah maintained that he could well imagine a scenario where the national army suffers a serious disintegration. Along the same lines, Shah noted that the National Security Council (NSC), an agency tasked with identifying the national interests and the manner in which threats to this interest should be handled, is virtually non-functional. Unless the fundamental needs of the people, both physiological and security-related, are met to a reasonable degree, will the starving people care to die for subjective concepts such as sovereignty, independence and democracy, asked Shah?

Ultimately, said Shah, maintaining international credibility demands the presence of a centripetal force able to redress internal vulnerabilities as well as external pressure in a bid to preserve national cohesion. In this context, Shah noted that access to water is likely to become a key security issues in Sino-Indian ties, with Nepal in the middle of the two giants. Any short-sightedness on the part of the Nepali state in developing a strategy to manage water may harm the integrity of the nation, said Shah. If the state is to
safeguard its interests, it must ensure the existence of provisions to manage natural and man-made disasters, he said. Unfortunately, noted Shah, the state has failed in its duty and does not possess any effective mechanism to prepare for or mitigate potential problems.

The currently strained civil-military relations are also noteworthy in this context, said Shah, reminding participants that the Nepali nation and the Nepal Army share a symbiotic history. While Shah agreed with the need to democratise and professionalise the army in the process of making it accountable to the civilian government, he argued that the civilian hierarchy must refrain from hindering the professional activities of the force. Part of the problem, according to Shah, is the contradictory work culture that exists in the military, the bureaucracy and the political leadership; bureaucratic norms are relaxed and flexible, political leaders often offer ambiguity and the military seeks timely decisive decisions. The question, said Shah, is where and how to compromise.

A point of doubt for Shah is what he sees as the double standard of the political leadership: Even as the government continues to maintain the army, assigning it to missions, it appears reluctant to train and sustain operational readiness. Such a state of affairs reflects adversely upon the capabilities of the civilian leadership. In Shah’s opinion, the top hierarchy of the Nepal Army is keenly aware of the nature in which the civil-military relationship should proceed, and are prepared to function within the confines of a democratic system. The problem preventing a smooth functioning of the army, according to Shah, is the dysfunctional nature of the National Security Council, the inefficiencies of the Ministry of Defence, the absence of parliamentary oversight of the defence budget and politics, and of course a political leadership not entirely sincere in its dealing with the military.

On the subject of integration, while acknowledging the impetus behind the political decision, Shah argued that the process should not be allowed to degrade the security sector or weaken civil-military ties. In this context, Shah called upon civil society to provide the necessary oversight on the issues of accountability and defence. Shah concluded his presentation by quoting what the late Dr Shaubhagya Shah had to say on the matter: “Civil military relationship is dynamic, country specific and constantly evolving in response to the political sects, external imperatives and technological innovations. However it is not a static…”

Emphasing another line of thought, Indrajeet Rai shared his hypothesis that while the vital national interests – territorial integrity, sovereignty and independence, among others – are the long term national interests, short term national interests also exist. The completion of the ongoing peace process is
the short term goal for Nepal, said Rai. What is then Nepal’s primary and vital national interest at present, asked Rai? He answered the question by referring to Susta and Kalapani, the territories occupied by India. Rai noted that only the Maoists have raised the issue of these territories, with Susta larger than Kathmandu in terms of landmass, while the rest of the parties have remained silent. Rai paraphrased Captain Little Hart as saying, if you want peace, understand war, and urged Nepalis to pay heed to these words. Rai agreed with Jiunn-rong Yeh on the point that territorial integrity is the first national interest. Speaking about Guruswamy’s paper, Rai also commented that when somebody talks about the role of the Nepal Army, the person must know where the threats are coming from. There is no doubt, said Rai, that the people of Nepal are also suffering from lack of access to food, health care and education, among other things. With this in mind, Rai argued that the low level of human development is also a threat for Nepal.

According to Kumar Phudung, the problem lies in the fact that although monarchy has been abolished, the institutions built under the monarchy are still intact. That the political culture and mindset of the state remains unchanged has complicated matters, he argued. Phudung pointed to the strict security, rivaling the often absurd measures put in place to protect the monarch, surrounding President Ram Baran Yadav’s arrival at this conference. Providing a brief background, Phudung explained that the Hindu king, who ruled the country for over 240 years, imposed the Hindu religion and culture on the nation, giving power to the ethno-religious group of people who followed the same traditions. Consequently, said Phudung, state security was essentially about the security of the king and the national interest became that of the ruling ethno-religious group. The present system still has this post-monarchy inheritance said Phudung, and the present population can be defined as comprising of three groups: the ruling ethno-religious group, the ethno-linguistic Madhesi group – who were only 20 percent of the population till the monarchy was there but have grown to 33 percent now, though did not elaborate on how this dramatic shift occurred – a strong force today, and the politically weak indigenous ethnic groups. Phudung argued that these three groups are going to define the country’s national interest from their own perspectives. In addition, Phudung maintained that Nepal’s national security is also likely to be affected by the regional or neighbourhood powers.

These security concerns brought Phudung to the issue of army integration, which he called a fundamentally political problem caused by a lack of vision among the leadership. After all, said Phudung, the Interim Constitution is clear that it is necessary to democratise the Nepal Army as
well as make it more inclusive. Phudung argued that the weaknesses of the Nepal Army must be rectified, with the soldiers trained to defend the state against external and internal threat. Even Maoist combatants are assets to the country said Phudung citing their years of experience in waging guerrilla warfare as well as their understanding of the chain of command. As a result, Phudung deemed it important to consider and channel the skills of the Maoist combatants to further the national interest. Arguing that state-making is equivalent to institution-making while nation-building is power-sharing, Phudung argued that integration will be a minor issue if approached from the appropriate perspective.

Calling the constitution a sort of identity card for the nation, Dinesh Tripathi said that the document must keep the vital national interests in mind. In terms of the military, Tripathi also agreed that it must be brought under civilian control. As for the issue of national security being discussed in Nepal’s post-conflict scenario, Tripathi argued that a proper response to the process of transitional justice is necessary. Highlighting the fact that no Nepal Army cadre have been held accountable for the atrocities committed during the war, despite Nepal having signed all four of the Geneva Conventions, Tripathi feared that the situation could become disastrous.

Arguing that the ‘national interest’ is not a static concept, Sakuntala Kadirgamar-Rajasingham argued that the term must be redefined in a post-conflict society. The challenge is immense said Kadirgamar, requiring a new way of organising institutions that can take the country forward without threatening the military while simultaneously not undermining the political forces. The discussion about civil-military relations requires a fresh look at budgets, transparency issues, and all other matters needing to be constitutionalised. This is the time to do that, said Kadirgamar, arguing that timing and sequencing of these actions are important. Even so, Kadirgamar argued that not all issues should be addressed by the constitution, with some requiring the engagement of the political process. The nature of the army in a federal Nepal is an issue of concern said Kadirgamar, pointing to the dangers inherent in having a force that does not ensure a wide representation of the various ethnic groups.

Criticising the ongoing discussion, Bijay Kant Mainali maintained that the points made about civil-military relations were not based on ground realities. Referring specifically to Guruswamy, Mainali commented that all armies, combatants and politicians are looking out for their own interests. In this context, Mainali asked why the conversation revolved around the democratisation of the army, while the flawed system within which the
combatants, CA members and politicians function is ignored. The nation is not in a post-conflict phase said Mainali, arguing that the conflict is still on.

7. Economic constitutionalism and aspects of international law
The final session of the conference focused on ensuring economic constitutionalism as well as fulfilling the transparency standards agreed to under international law. Three papers on the subject were presented: Professor Wang Zhenmin spoke about how economic constitutionalism could be achieved, Professor Satya Arinanto spoke about the need to establish transparent institutions and Professor Paul Flodman discussed aspects of international law the constitution builders might consider. CA member Sapana Pradhan Malla moderated the first session while Dr Parshuram Tamang moderated the following two presentations. Policy analyst Geja Sharma Wagle, retired lieutenant general, Sadip Shah, security expert Indrajeeet Rai, retired major, Kumar Phudung, Dr Narayan Manandhar, transparency professional Ashish Thapa and lawyer Sheri Meyerhoffer commented as the members of the panel while Pancha Kumari Manandhar, advocates Bijay Kant Mainali, Phurpa Tamang and Abhisekh Adhikari as well as indigenous activist Chhabi Subba raised issues from the floor.

Thematic presentation
Presenting the first paper, Zhenmin Wang explained that economic constitutionalism refers to the economic freedoms and rights the constitution provides for the people as well as the extent to which the government can intervene into economic affairs – in other words, how the government redistributes resources and social wealth amongst members of society. Wang began by providing an overview of the constitution of the People’s Republic of China. The first constitution was drafted by the Chinese National People’s Congress (NPC) in 1954, with a complete revision undertaken in 1975 with yet another version adopted in 1978. Two years later, in 1980, the Chinese authority established a high-profile Constitution-Revising Committee, whose work was accepted by the fifth NPC in 1982. This is still the constitution of China though it has already been amended four times, in 1988, 1993, 1999 and 2004.

According to Wang, all four amendments were related to economic freedoms, especially the constitutional and legal status of a privatised economy. As a socialist constitution, the 1982 Constitution and its amendments form not only a political document, but also an economic one providing a strong guarantee of economic development and justice, he said.
In Wang’s opinion, this basis in economics is responsible for the remarkable growth of the Chinese economy. Explaining the socialist nature of the Chinese economic system, Wang notes that the individual economy of the urban and rural people, though permitted, only complements the socialist public economy. The official policy, said Wang, is that the state protects the lawful rights and interests of the individual economy while also supervising it by exercising administrative control.

Although the Constitution did not, in the beginning, permit Chinese citizens to run private companies, Professor Wang explained that foreign enterprises, organisations and individuals can invest in China as well as enter into various forms of economic co-operation with Chinese enterprises. Wang noted that all mineral resources, waters, forests, mountains, grassland, unreclaimed land, beaches and other natural resources are either owned by the state or by collectives in accordance with the law. Wang argued that such economic planning on the basis of socialist public ownership ensures the proportionate and coordinated growth of the national economy. Along these lines, Wang noted that the disturbance of the orderly functioning of the social economy or disruption of the state economic plan by any organisation or individual is legally prohibited.

Wang explained that the third constitutional amendment states that China is at the primary stage of socialism and introduces the theory of building socialism with Chinese characteristics, which explains why a private economy is permitted. The status of the non-public economy was substantially raised in 1999 when seven amendments were passed to modernise economic concepts, explained Wang. Further, the 2004 constitutional amendments are more significant compared with the previous revisions, said Wang, adding that it redefined China as a country that also welcomes the private sector. Along these lines, Wang stressed that compensation for the land appropriated or requisitioned by the state has been recognised and the constitution protects the legal rights and interests of the non-public sectors. While the private property of citizens is inviolable, Wang noted that there is also a guarantee of a social security system compatible with the level of economic development.

Wang emphasised that as a developing country, China’s experiences might be of interest to the ongoing constitution-making in Nepal. Wang urged Nepali lawmakers to consider the historical situation of the country while drafting constitutional and economic reforms, which should be coordinated in a gradual and orderly manner. Experiences have shown that democracy alone is insufficient said Wang, maintaining that there must be constitutionalism and the rule of law. Arguing that the free market economy
is not omnipotent, Wang stressed that a combination of both constitutionalism/rule of law and democracy might be the best political system for countries such as Nepal and China.

Maintaining that the transparent functioning of institutions is essential to the constitution, whether in economic or political terms, Satya Arinanto provided an overview of Indonesia’s attempts to formulate constitutional provisions to ensure transparency. In this context, Arinanto referred to the CA draft constitution’s proposal that the Federal Audit Commission be established, and be included as a separate part within the constitution. According to the CA, this Commission has been provided constitutional protection to enable it to audit public property and draw the legislature’s attention towards improper expenditures. The provision for an auditor general has been made right from the beginning of the constitutional development process in Nepal, in order to audit the accounts and ledgers of the government departments, offices and courts. And as mentioned above, Arinanto highlighted that the present Interim Constitution also has a provision to gradually orient the Federal Audit Commission towards collective leadership.

In Arinanto’s opinion, an institution such as the Federal Audit Commission, which is devoted to ensuring transparency, should have the power to manage and audit state finances as well as conduct audits to judge the level of accountability in state finances. If Nepal embraces a federal model, he proposed that an institution like the Federal Audit Commission should also exist at the state level; if a unitary state model is adopted, the same institution must also exist at the provincial levels. The draft of the new constitution prepared by the CA has considered this by regulating that there may be a branch of the Federal Audit Commission in every province or state, said Arinanto.

Based on Indonesia’s experience, Arinanto proposed that the new constitution also regulate the power and authority of its Federal Audit Commission in detail. Arinanto shared that an explanatory note by the CA defined the functions and duties of the Audit Commission as examining the book keeping system of public expenditures as well as examining the regularity, economy, efficiency, effectiveness and propriety in the accounts of all government offices and courts. Arinanto lauded the Federal Audit Commission for pledging to submit, in accordance with the principle of public accountability, an annual report to the president on the work the office has performed. The president will then make arrangements to get the report to the legislature-parliament through the prime minister. Citing efforts in
Dealing with aspects of international law in devising a constitution, Paul Flodman noted that international law has changed shape and form since its birth. While its purpose during its infancy was to provide justification for the use of force, as epitomised by the presence of Article 51 within the United Nations Charter, Flodman argued that it now exists to establish behaviours and norms for the international community. Praising the 2007 Interim Constitution, Flodman called the document comprehensive, precise and adhering to the core objective of human rights as encapsulated in the Universal Declaration of Human Rights of 1948. With human rights key to international law, Flodman argued that it, in this particular instance, forms a bridge between what the proposed constitution intends to achieve and what its 1990 predecessor was unable to do. Flodman argued that the Interim Constitution provides a solid foundation to ensure equality among all citizens. He noted that the draft proposal is explicitly aware of the following international instruments: The ILO’s Indigenous and Tribal Peoples Convention (No. 169), the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, and other widely adhered to international human rights treaties and declarations.

Thematic discussion
Referring to indigenous groups, Dalits and numerous other identities present in Nepal, Parshuram Tamang, an indigenous grassroots leader, shared his opinion that these groups want the various international human rights treaties to which the country is party to be reflected in national legislation. According to Tamang, international law provides guiding principles for this purpose and ultimately leads to equality among all citizens.

Commenting on both presentations, Naryan Manandhar maintained that the speakers failed to highlight some crucial issues. Manandhar specifically brought up the matter of anti-corruption and good governance, which are now termed a fourth generation of human rights. In this context, the matter of how governance functions and how state affairs are managed is critical, he said, noting that the CA Committee on Fundamental Rights and Directive Principles failed to include good governance on the list of 31 fundamental rights in the proposal they submitted to the full house of the CA. Manandhar noted that the opinions collected by the members of the Committee from the
field show that people recommended that good governance provisions be a part of fundamental rights.

The new provision proposed by the Committee on Determination of Structure of Constitutional Bodies states that the Commission on the Investigation of Abuse of Authority (CIAA) can file a case only after the Office of the Attorney General suggests such a move. This measure may have been included as a check and balance, said Manandhar, as the CIAA can currently pursue or file a case on its own accord. This new kind of check and balance needs to be seriously looked into, he said. Manandhar, however, cautioned against this new arrangement, saying that in the case of the lack of proper mechanisms between the two offices it may further retard Nepal’s already dismal anti-corruption drive. To prove his point about the lack of political will, Manandhar pointed to the fact that Nepal’s anti-corruption body has been without a chairman for the last three years. From having five anti-corruption commissioners until just recently, the country does not have even a single one today, he said.

In Manandhar’s opinion, this deterioration is, at least in part, a result of a conflict between the different kinds of oversight mechanisms. In an example, he noted that the CIAA can suggest that the government take departmental action, but this recommendation has regularly been thwarted by the Public Service Commission, which is responsible for processing all departmental proceedings. In this context, Manandhar argued that the preliminary draft of the constitution is not much of an improvement from the 1990 version; it is simply copying what has been mentioned before with a slight change in the approval of the Attorney General and the creation of provisions for a federal arrangement.

Ashish Thapa pointed out that constitution-making exercises have been going on for quite some time in Nepal – the country is framing its third constitution since 1990. According to Thapa, from the point of view of international law and human rights, democracy and all other relevant issues were already incorporated in Nepal’s previous constitutions, with federalism the only new topic. Nevertheless, Thapa believes that the current process provides an opportunity to take a fresh look at the problems of the past and address them in the new constitution. In this, Thapa agreed with Paul Flodman on the importance of compromising to develop a document that is likely to benefit everyone. He also agreed with Flodman’s assessment that the constitution should ensure additional rights and benefits for the indigenous peoples.

Moving to Arinanto’s presentation and the emphasis he put on the role of the Office of the Auditor General, Thapa pointed out that Nepal has had this
supreme audit institution for decades now, starting from the *Panchayat* Constitution of 1962. In Thapa’s opinion, while the body carries out its work quite efficiently, the problem lies in the fact that its recommendations are not implemented properly. It is a kind of institution that tries to bark but does not bite, said Thapa, arguing that this was one pervasive problem with transparency enhancing institutions in Nepal.

Another problem, according to Thapa, lies in the appointment of the leadership of the transparency enhancing institution of Nepal. Thapa explained that the Constitutional Council is empowered to finalise the appointment of commissioners and chiefs to constitutional bodies such as the Public Service Commission, the Office of the Auditor General and the CIAA. While this is a common practice everywhere, Thapa highlighted the specific difficulties that emerge in Nepal – with some seven political parties often ruling through a fragile coalition, each is eager to appoint their people to these posts, resulting in the overt politicisation of these bodies.

Thapa stressed the need to ensure a separation of powers between organisations as well as the need to institute checks and balances to avoid this pervasive problem. Though it is possible to have a debate about the role of the presidency, Thapa argued that there should be no such ambiguity when it comes to the powers and limitations of the auditor general. Another equally important issue, according to Thapa, is that of political accountability. Indeed, he attributed the widespread frustration that resulted in two people’s movements in 20 years to a lack of political accountability. Thapa argued that another people’s movement is likely to emerge somewhere down the line and overthrow the constitution that is currently being drafted unless the issue of political accountability is tackled. To this end, Thapa stressed the need to establish basic minimum standards for politicians. Thapa urged the CA to look into this mechanism.

Commenting on Professor Flodman’s presentation, lawyer Sheri Meyerhoffer shared her opinion that the issue at hand is the best manner in which international law can be used to establish transparent and accountable national institutions. Meyerhoffer agreed with Flodman that there is, in fact, no one right path to achieving this. The focus should be on progression and not perfection, she said. Referring to the discussion around corruption, fundamental rights and federalism, Meyerhoffer argued that ensuring diversity is the key issue, regardless of the nature of the institution. Echoing Flodman, Meyerhoffer stressed that the state must consider the interests of all peoples, regardless of whether a particular group is sitting at the table or raising their voices.
All the same, Meyerhoffer did acknowledge the immense problem corruption proves to be. It is because of the issue of corruption that the report of the CA Committee on Judicial System proposed that a committee in the legislature do the interpretation of the constitution of Nepal as opposed to the court – this is essentially saying that the courts of Nepal are corrupt. In this context, Meyerhoffer, while agreeing with the grievance, disagreed with the formulation of the said Committee. Jie Cheng had previously made a good point on this very matter, saying that there are many ways of filling the gap, said Meyerhoffer. On the one hand, a wholly independent judiciary can be given the power to interpret the constitution. On the other hand, if all the power is vested in one competent body, say the legislature, to both enact and interpret the law, there can be no separation of powers.

Referring to Cheng’s statement, Meyerhoffer suggested that if Nepal does feel that the existing court is not a place to place the power of constitutional interpretation, and that vesting that power in the legislature would be harmful to the separation of power, it can create another independent body and give it the power of interpretation. Meyerhoffer pointed out that Arinanto had similarly spoken about a new independent body to interpret the constitution being created in Indonesia. Meyerhoffer was quick to note that regardless of the nature of the body interpreting the constitution, attempts must be made to ensure inclusive representation from all the different groups of Nepal. Agreeing with Manandhar’s point, Meyerhoffer argued that if corruption is an issue, freedom from corruption must be a right.

Panch Kumari Manandhar asked how exactly the independence of judiciary as a human rights issue is important from the perspective of self determination and regional autonomy. Since particular groups from the provinces or states might have their own cultures and religions, they may be apprehensive of having a strict separation of powers, she said. Considering the experience of Northern Ireland, how important is it to address the issue of self determination and autonomy, asked Manandhar.

Noting that Nepal had already committed to federalism, Bijay Mainali asked Paul Flodman for his recommendations on how to set up a workable federal system in the country.

On a similar note, Chhabi Subba, an indigenous activist, also inquired about residuary power in a federal system, arguing that provinces cannot sustain themselves democratically without these powers. As the centre also needs these powers, Subba asked whether they could be shared between the centre and the provinces.
Referring to ILO 169, Phurpa Tamang brought up the issue of natural resource ownership by the indigenous groups. Tamang explained that the national parks of Nepal, which are home to numerous indigenous groups, are governed by rules established at the centre. Saying that the priority right to own and use the resources in these areas goes to the communities under the ILO convention, Tamang asked whether the central government should withdraw from these areas.

Commenting on the issue of the separation of powers, Zhenmin Wang pointed out that there are between two to five powers, with China having five. No operation and no constitution have been chaotic because one additional power centre is added to the existing separation of powers scheme, he said. It is the constitution’s job to regulate the numerous bilateral relationships between state institutions, he said. Wang put forth a hypothetical scenario to explain his point: If there are three members in a household, three persons and three relationships need to be regulated. If the number goes up to five, the number of relationship will also go up. The constitution regulates five persons but 10 bilateral relationships, which is a complicated matter. In this way there may be 81 powers today instead of the separation between two or three powers, said Wang, stressing that there is a need to pay attention to institutional ways to make such a system materialise.

Speaking about the 1997 UK election, Paul Flodman explained that there was a major attempt to get more women to become members of parliament. According to Flodman, education is the biggest key to having more women MPs and other improvements in the political system. If the people know what they can and cannot do, he argued, they may represent themselves or tend to represent themselves. Giving an example, Flodman noted that when the Labour government was elected, all the Labour MPs were educated on how to be MPs. Flodman also highlighted that schools within the United Kingdom incorporated within their curriculum an idea of citizenship, on the understanding that citizens need to be educated about the political system, to understand how democracy and self-government works. Democracy in the true sense of the word is the meeting of local representatives, said Flodman. In this, Flodman highlighted that individual citizens, though not elected, can participate in these local gatherings and make their points.

As to the federalism, Flodman stressed that he was not against the system in any way. His point during the presentation was more about the fact that the system is of less importance than having clear, transparent and accountable roles in the decision-making process, said Flodman. The other important point, according to Flodman, is that the allocation of adequate financial resources to the component units is essential if responsibility is to be
devolved to them. If the central government will not allocate financial resources to a community, whether regional or local, the community is entirely helpless, noted Flodman. Citing an example, Flodman spoke about the issue of centralisation in the UK, saying that local governments always struggle to get resources. Flodman called this state of affairs a result of Margaret Thatcher’s premiership, as she channelled the money away from local units.

Flodman also emphasised that the denial of the rights to natural resources is an infringement of human rights. It goes without saying, noted Flodman, that people are entitled to anything that occurs in nature. All the same, he pointed out that people even pay for water in the UK. The unfortunate part, according to Flodman, is that while the decision to allocate resources is open in the interim period, the cost consequences will rapidly follow. Even so, Flodman emphasised that people are ultimately entitled to natural resources.

Satya Arinanto clarified that some other transparency institutions, besides the Supreme Auditor Board, were also expected when the Indonesian constitution was made, and while an anti-corruption commission and an ombudsman were formed, this was done by the legislature and not the constitution.

Thanking Wang Zhenmin, Sapana Pradhan Malla concluded that his contribution – especially on the Chinese experience in establishing economic constitutionalism – is important in the Nepali context where economic development is a major issue. It is also important to think about the concept of limited government, and what lessons Nepal can draw from the Chinese experience of economic visioning through the constitution, she said.

Concluding the session, Parshuram Tamang divided international law into three categories: Individual rights, collective rights and special rights for special groups. According to Tamang, incorporating individual rights into the constitution is not problematic because those in power are comfortable with the idea. The problem emerges when collective rights are demanded, said Tamang. In the same way that self determination is the fundamental basis for all human rights, Tamang argued that there are special rights for special groups. In this context, Tamang also pointed to the fact that some indigenous and ethnic groups are not quite convinced about the proposed restructuring plan. As socio-economics is the background creating the existing structure of Nepali society, Tamang said that the state is the reflection of this socio-economic formation. This reality, according to Tamang, is the reason behind the indigenous peoples demand that both the state and the socio-economic formation of Nepal be restructured. With this in mind, international law should be explored to understand the ways in which it will allow the state
"The idea behind the conference was to receive international comments and feedback on the basic documents, which have already been cleared by the thematic committees. As a result, when the full house deliberates on the papers, and the Constitutional Committee subsequently begins to write an integrated comprehensive draft based on the instructions of the full house, it will have the comments of international experts on hand. These inputs are not only expected to help in sorting out contentious issues, but also to play a role in improving the existing draft."
- Bipin Adhikari
(at p. 416)

structures to reflect the diversity of the country, he said. Similarly, Tamang argued that there is a need to design Nepal’s audit mechanism according to the structure of Nepali society. Keeping the diversity of the country in mind, Tamang said Nepalis have no need to fear federalism, but should strive to create an effective system which reflects the democratic values important to the nation.

Conclusion
As noted in the beginning of this document, the international conference titled Dynamics of Constitution Making in Nepal in Post-conflict Scenario was an immense project. With key note speeches, papers and wrap-up notes, the conference was a significant undertaking that allowed conversations on the draft constitutional documents produced by the Constituent Assembly of Nepal. Indeed, the conference was able to stimulate conversations on most of the key areas of constitutional debate in Nepal.

The conversation focussed on forms of government and legislatures, independence of the judiciary, a suitable federal framework for Nepal and the devolution of powers. Discussions also took place on the rights of women, minorities and indigenous peoples as well as ensuring economic and social rights. In
addition, time was also devoted to the subject of preserving national interests, security issues, economic constitutionalism and aspects of international law. The conversation were not limited to commentary on the constitutional documents worked on by the CA over the period of twenty months, but also on the current dynamics of constitution making and the options available to the designers of Nepal’s new constitution.

It must be noted that it is not the goal of a national or international forum such as this to find answers to all contentious constitutional issues in Nepal. That is the job of the Constituent Assembly. The goal of the Nepal Constitution Foundation and its partners in hosting this conference was to provide the designers of Nepal’s new constitution with free and frank design options drawing on the expertise of leading constitutional, legal, human rights and devolution of powers experts from different parts of the world. These scholars and practitioners came together to discuss constitutional drafting and formation, constitutional design and interpretation, and important developments in the operation of different constitutional systems around the world.

The participants were motivated by the simple premise that the drafters of the constitution will benefit from a comprehensive set of options when designing governing institutions, with the understanding that any particular draft must be tailored to the local environment. Efforts were made to provide information on trends and patterns in the choice of different constitutional policies, with objective suggestions coming from individuals with no political biases in the local Nepali context.

With the Constituent Assembly still deliberating on most issues of vital concerns to Nepali people, these design options are a very timely intervention. After the detailed discussions held during the conference, the cards are now on the table, with the pros and cons of each alternative no longer unclear. This should definitely help the Constituent Assembly to make wise decisions before finalizing the new constitution within the given deadline.

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The Position of the Unified Communist Party of Nepal (Maoist)

Purna Kumari Subedi

Rt. Honourable Prime Minister, international guests, participants, intellectuals, experts, journalists and ladies and gentlemen!

First of all, I want to thank the organizers for organizing this conference during this important phase of constitution-making in Nepal and initiating discussions on several important issues in this forum amidst constitution builders and other experts from around the world. This is definitely going to be helpful in drafting a constitution that reflects international experiences as well. I firmly believe in this.

I want to sincerely thank the participants, specially those experts who have come from abroad to join this conference. This three-day conference has held important discussions. A constitution is by all means, a document of balance of power, reflecting the real equilibrium between the political and social forces in the country and their relations with each other. Such a document must represent the current balance of power, and also represent the innate desires or feelings of the people. In terms of number of times, we are in fact drafting a constitution for the seventh time. There are many problems before us, and some of them are very challenging. We must be proficient in addressing these problems. We will address them for sure. The people [of Nepal] have repeatedly resorted to historical movements against discriminations, inequalities, injustice and oppression existing in our society. They have resorted to rebellion and revolution for this purpose. The 10-year-
long people's war that we fought was a major revolution. I also took part in it. Together with it, we also had a 19-day mass movement and a Madhesh Movement after this. The new constitution has to build on them.

There are different procedures involved in a constitution-making process. First, we have a Constituent Assembly of the elected representatives of the people. We have also been collecting suggestions from the people at the grassroots level, from the huts and settlements of the commoners, the poor and working people of the country. Another way is learning from national and international experts, their opinions, suggestions, and conclusions of discussion forums like this. We have, for example, consulted experts on issues like federalism. We have been moving forward based on these procedures.

We have now established a republican form of government by abolishing monarchy in the country. However, we still have to go a long way to eliminate the remnants of feudalism here. This is what has been felt by our people. There has been commitment to move forward to a federal form of government from the unitary state that we have at present. The federal structure to be created by the new constitution must be able to address the problems that we have. We are not ignorant of the working of the political system and form of government we have been following so far. We should not repeat our past mistakes. We must not forget that the present form of government, which we have employed so far, has failed. It failed in many other countries as well.

We believe in democracy. The mandate of the people is the foundational stone of democracy. That's why we all must look into what we are doing;

"We are following a bottom up approach in our constitution making exercise. We have not engaged experts to draft the constitution with a view to take it to the Constituent Assembly for focused discussions. Rather, we have started from scratch, and enabled the thematic committees to work on their respective components of the constitution, right from the beginning. All this is being done according to the rules laid down by the Interim Constitution of 2007 and the Rules of the Constituent Assembly adopted by it in early 2008. Certain policy prescriptions have been made by the Interim Constitution as well."

- Subhash C. Nemwang (at p. 4)
how we are doing it; who we are; and how the people are watching us. Apart from this, the leaders who have been trusted by people are expected to be of good conduct. One should not take democracy just as an event. The people are testing our character and conduct directly from the front or discreetly from behind. As such, we must understand democracy through proper ways. The important issue is how to address the desires, expectations and the feelings of people. We must therefore call the attention of everybody in this regard. We are building the constitution on this background. The thematic committees at the constituent assembly have been progressing forward successfully. But it is also necessary that the political parties concentrate on constitution-making by giving priority to the Constituent Assembly.

The process of building a constitution is a peace process as well. It must strengthen peace. Therefore, the journey that has started with the signing of 12 point understanding, between the seven party alliance and the Maoists must be reflected in the new constitution for sustainable peace. The need of the hour is to recognize that a new constitution can be made only by giving proper respect to the peace accord.

Finally, the most important thing is whether the constitution fulfills the desire of the people of Nepal for forward looking changes. In the economic and social sectors, this change means guaranteeing the basic rights of the people. But it is not possible to instantly change things that have been in existence for many centuries. There must be consistent efforts. We can solve the existing problems of our society only by addressing the expectations and feelings of all the deprived people who have been left behind for a long time and suffered injustices. They are women, dalits, indigenous people, minorities, and marginalized classes and communities. Let's hope we will be able to solve all our problems including those related to class, and those based on ethnic, regional, gender, linguistic discrimination and problems of the dalit community through a new constitution.

I believe that the conclusions drawn from the discussion between internal and external experts from this three day conference and their suggestions are going to be important resource materials for the Constituent Assembly in building the constitution. I want to thank everybody who has contributed to this process. I hope that the stay of our international guests in Kathmandu during the last couple of days was comfortable and amusing. I wish you a pleasant journey back home. And finally, I also thank Nepal Constitution Foundation and other organizers for kindly giving me this opportunity to chair the closing session. The conference stands closed now.

Thank you very much.
Mr. Chairperson, Honourable Ministers, Honourable Members of the Constituent Assembly, Esteemed Diplomats, Legal Experts and Professionals, Distinguished Delegates, Media Persons, Ladies and Gentlemen.

I am very pleased to attend the concluding ceremony of this three-day international conference on “Dynamics of Constitution Making in Nepal in Post-Conflict Scenario.” I am aware that this conference has focused on interactive sessions with international experts on the most pertinent areas of the constitution making process in Nepal. I thank Nepal Constitution Foundation for organizing this event and other partner organizations for taking part in such an important exercise, especially at a time when the Constituent Assembly and its thematic committees are engaged in giving final shape to core elements of our new constitution.

I am happy to extend a very warm welcome to you all at this concluding ceremony. I am glad at having this opportunity of exchanging opinions with such a galaxy of colleagues, legislators, intellectuals, experts and our friends and well-wishers from abroad. I am told that our international friends have had extensive deliberations and interactions on the major aspects of our constitution making process with our national colleagues. I am confident that this would go a long way in providing valuable feedback to our most essential task of drafting a new constitution for Nepal within the given deadline.
Apart from being a fundamental legal and political document, the constitution of a land not only determines the relationship between the state and its citizens, but also defines the future course of a nation. All of you are familiar with our constitutional history and our constitution making experiments of the past. We have already promulgated half a dozen constitutions under different political dispensations over the past six decades. Lack of ownership by the people is attributed as a major reason for the failure of most of our past constitutions. This in turn could be a consequence of two possible factors. Firstly, these documents were imposed or drafted by authorities that were ignorant of our actual requirements. Secondly, they did not reflect the fundamental aspirations of the people of Nepal.

The 1990 Constitution of Nepal was different in the sense that it was an outcome of thorough consultations and discussions between experts and politicians. It was a democratic constitution based on modern parameters. It had incorporated substantial elements to make it a democratic instrument. Despite these positive features, this document also had an inherent weakness. It had, in a sense, outlived its utility since it rested on the indispensability of an institution that no longer complied with the aspirations of the people in the context of the changing political dynamics.

The political movement of 2006 in Nepal was a climax in the glorious saga of the people’s struggle for democracy, fundamental rights, civil liberties, rule of law and human rights. It was a major event in the annals of the country’s social and political history. This movement led the country towards a fundamental transformation in its system of political governance. Many path-breaking achievements like the Comprehensive Peace Accord, Interim Constitution, successful conclusion of the Constituent Assembly elections, abolition of the 240-year-old monarchy and declaration of the country as a Federal Democratic Republic have been defining moments in our recent political history. These developments have changed the country’s decade long status of violence and conflict into a post-conflict era of great political transformation.

The Government of Nepal is committed in taking the ongoing peace process to a positive and meaningful conclusion and drafting a new constitution within the specified timeframe. Accomplishing this objective is a tremendous challenge. It involves the incredible task of restructuring the unitary framework that has been the basis of our political order for centuries. This restructuring is aimed at promoting harmony, fraternity and unity in the country and can be achieved by greater inclusion and mainstreaming of the marginalized sections of society. We are confident of achieving these goals through utmost flexibility and accommodation. We will do it on the basis of
broad understanding, consensus, dialogue and unity of purpose. We will do it with the representation of all major political parties in the Constituent Assembly.

The formation of the Constituent Assembly through the historic elections held in 2008 was a crucial step forward in the constitution making task. This was the defining moment when representatives of the people, for the first time in history, had been directly entrusted with the task of determining the destiny of a new Nepal. This step is of immense political significance as it has empowered the people to outline the vision of a new society, define the fundamental principles of state and redistribute the powers and resources of the country. The Interim Constitution has served as a good starting point. It has at least established a framework for constitutional and political changes. It has also enshrined some basic guiding values in the forms of a preamble and directive principles that were agreed upon by all the major political forces in the country through prior negotiations between them.

Restructuring of the state is needed to resolve social and regional inequalities. While it is fundamental to promote democracy, peace, prosperity, and progressive economic and social changes, it is imperative to protect territorial integrity, sovereignty and independence of the country as these are vital concerns to us. We are determined to ensure that these ideals and goals are materialized through the adoption of a new constitution.

The people of Nepal truly expect that promulgation of the new constitution would permanently end conflict and address the widespread grievances afflicting the population. Thus, the drafting process has to address the twin objectives of peace-building and long-term political, social and economic reforms. The broad objectives of our home-driven peace process include, among others, the integration and rehabilitation of the Maoists into mainstream democratic politics and resolution of long-standing ethnic, regional and caste fissures in our society.

The experience of other countries amply indicates that successful constitutional processes require a delicate act of striking a judicious balance and accommodation between competing interests and broad public participation. I have been encouraged by recent developments wherein the legislature has once again started working smoothly and started taking some tangible measures to addressing the problem of combatants in the cantonments. I am also pleased to note that key political parties and players have shown willingness to realize and learn from past errors and devote themselves to broad national interests, setting aside their party lines.
Additionally, I would also like to mention that it is imperative on the part of political parties to strengthen their internal democratic processes and accountability systems. This would directly benefit the constitution-making process.

We can’t live in isolation in the modern world, especially in the context of liberalization and globalization of the world economy. As one of the least developed countries with serious resource constraints, our quest for peace, stability and progress would be futile without international cooperation, goodwill and support.

While it is very important to institutionalise peace and democracy in the country, our priority should be on rapid social and economic transformation to improve the quality of life of our people. I appeal to our friends to duly appreciate the dynamics of Nepal’s post-conflict situation and special areas that need to be addressed within the constitutional framework. At the same time, I am confident of receiving tangible support from the international community in areas concerning our social and economic development. The Government is committed to mobilizing both internal resources and external assistance towards this end. The investment-friendly policy pursued by the Government and establishment of peace and stability in the country have created a congenial atmosphere for increased direct foreign investments in hydropower, infrastructure-building, tourism, agriculture, industry and other areas.

To conclude, I once again thank the organizers for hosting this timely programme that has focused on the current issues of the constitution making process. I also take this opportunity to thank all the international delegates who have come to Kathmandu to attend such an important conference. I appreciate their hard work and sincere endeavours to support our constitution making process through valuable feedback, inputs and suggestions, and in making this seminar a success.

I can assure you that the Government will give due consideration to your expert recommendations by taking into account our special needs and priorities in this direction. At the same time, I seek your constant support and solidarity at a time when our topmost priority is to finish drafting a new constitution that will steer the nation forward.

Thank you all!

*****
Annex I

List of Constituent Assembly Participants

<table>
<thead>
<tr>
<th>S.N.</th>
<th>NAME</th>
<th>PARTY</th>
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<tr>
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<td>Abhishekh Pratap Shah</td>
<td>Madhesi Janadhikar Forum</td>
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<td>2</td>
<td>Agni Prasad Kharel</td>
<td>Communist Party of Nepal (UML)</td>
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<td>Subhash C. Nemwang</td>
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<td>29</td>
<td>Yadhu Bansh Jha</td>
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## Annex II

### List of International Participants

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<tr>
<td>57</td>
<td>Dr. Yash Ghai</td>
<td>Kenya</td>
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</table>
## Annex III

**List of National Participants**

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<th>S.N.</th>
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<td>1</td>
<td>Abhishekh Adhikari</td>
<td>Nepal Constitution Foundation</td>
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<td>2</td>
<td>Abijit Sharma</td>
<td>New Spotlight Magazine</td>
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<td>3</td>
<td>Aditya Bastola</td>
<td>Women In Environment</td>
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<td>4</td>
<td>Dr. Amber Prasad Pant</td>
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<td>5</td>
<td>Ananta Raj Luitel</td>
<td>The Himalayan Times</td>
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<td>8</td>
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<td>Barbara Adams</td>
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<td>46</td>
<td>Dal Bahadur Adhikari</td>
<td>Ministry of Federal Affairs, Constituent Assembly, Parliamentary Affairs and Culture (MOFACAPAC)</td>
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<td>47</td>
<td>Daman Nath Dhungana</td>
<td>Senior Advocate &amp; Former Speaker, House of Representatives</td>
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<td>Ganesh Adhikari</td>
<td>Kathmandu District Court Bar Association</td>
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<td>Society for Constitutional and Parliamentary Exercises (SCOPE)</td>
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<td>Ganesh Datta Bhatta</td>
<td>Associate Professor, Faculty of Law, Tribhuvan University</td>
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<td>Gaurab Pudasaini</td>
<td>Media Initiative for Rights, Equity and Social Transformation (MIREST)</td>
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<td>Geja Sharma Wagle</td>
<td>Nepal Institute for Policy Studies</td>
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<td>Dr. Gopal Siwakoti</td>
<td>International Institute for Human Rights, Environment and Development (INHURED International)</td>
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<td>66</td>
<td>Govinda Gautam</td>
<td>Faculty of Law, Tribhuvan University</td>
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<td>Dr. Hari Bansh Jha</td>
<td>Professor/Center for Economic and Technical Studies</td>
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<td>68</td>
<td>Hari Krishna Karki</td>
<td>Nepal Bar Association</td>
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<td>Hari Sharma</td>
<td>Advisor, Office of the President of Nepal</td>
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<td>Hari Upreti</td>
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<td>Harka Bhattarai</td>
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<td>Hemlata Shrestha</td>
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<td>73</td>
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<td>76</td>
<td>Indra Kharel</td>
<td>President, Supreme Court Bar Association</td>
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<td>Ishori Prasad Bhattarai</td>
<td>Supreme Court Bar Association</td>
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<td>78</td>
<td>Jalan Kumar Shrestha</td>
<td>Supreme Court Bar Association</td>
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<td>Jay Nishant</td>
<td>National Democratic Institute</td>
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<td>Jeetendra Dev</td>
<td>Madeshi Janadhikar Forum (Democratic)</td>
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<td>Juju Kaji Maharjan</td>
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<td>82</td>
<td>Kaji Shrestha</td>
<td>Member, Hotel Association of Nepal (HAN)</td>
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<td>83</td>
<td>Kalyan Kumar Shrestha</td>
<td>Justice, Supreme Court of Nepal</td>
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<td>84</td>
<td>Kamala Dhungel</td>
<td>Women in Evironement</td>
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<td>85</td>
<td>Karna Thapa</td>
<td>Lecturer, Faculty of Law, Tribhuvan University</td>
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<td>86</td>
<td>Karuna Shrestha</td>
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<td>Kashi Raj Adhikari</td>
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<td>Kavita Shrestha</td>
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<td>90</td>
<td>K.B. Pandey</td>
<td>Save The Nation</td>
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<td>91</td>
<td>Kedar Acharya</td>
<td>Lawyer, Janakpur</td>
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<td>92</td>
<td>Keshab Paudel</td>
<td>Senior journalist</td>
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<td>93</td>
<td>Keshav Raj Pande</td>
<td>Public Administration Campus, Tribhuvan University</td>
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<td>94</td>
<td>Khushee Tharu</td>
<td>Lawyer / Institute for Democracy and Electoral Assistance (IDEA International)</td>
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<td>Komal Pokhrel</td>
<td>National Peace Campaign</td>
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<td>Constituent Assembly Secretariat</td>
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<td>Kumar Fudung</td>
<td>Maj.Gen. (Ret) &amp; Former MP</td>
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<td>Women in Environment</td>
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<td>Kumar Regmi</td>
<td>Constitutional Lawyers’ Forum (CLAF)</td>
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<td>101</td>
<td>Kushal Chemjong</td>
<td>TJM Campus, Udayapur</td>
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<td>102</td>
<td>Kusum Saakha</td>
<td>Associate Professor, Faculty of Law, Tribhuvan University</td>
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<td>Laba Parasad Gautam</td>
<td>Constituent Assembly Secretariat</td>
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<td>104</td>
<td>Lalbubu Yadav</td>
<td>Professor, Patan Multiple Campus, Tribhuvan University</td>
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<td>105</td>
<td>Lalit Basnet’</td>
<td>Constitutional lawyer</td>
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<td>106</td>
<td>Laxman Kumar</td>
<td>Professor, Faculty of Law, Tribhuvan University</td>
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<td>Mani Ram Ojha</td>
<td>Office of the President of Nepal</td>
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<td>108</td>
<td>Manohar Bhattarai</td>
<td>Secretary General, Constituent Assembly and Legislative Parliament Secretariat</td>
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<td>109</td>
<td>Mukunda Sharma</td>
<td>Secretary, Committee on the Determination of Form of Government, Constituent Assembly</td>
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<td>Dr. Narayan Manandhar</td>
<td>Transparency International</td>
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<td>Neeru Sherstha</td>
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<td>112</td>
<td>Dr. OM Gurung</td>
<td>Professor, Department of Sociology, Tribhuvan University</td>
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<td>Pabitra Raut</td>
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<td>Parshuram Tamang</td>
<td>Leader of Indigenous People</td>
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<td>Prabindra Joshi</td>
<td>Kathmandu School Of Law</td>
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<td>Ram Chandra Pokharel</td>
<td>Chief Secretary, Nepali Congress Headquaters</td>
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<td>Ramesh Upreti</td>
<td>President, Lalitpur Bar Association</td>
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<td>Dr. Ram Krishna</td>
<td>Registrar, Supreme Court</td>
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<td>123</td>
<td>Rina Rai</td>
<td>United Nations Development Program</td>
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125  Rukamanee Maharjan   Lawyer
126  Sadip Shah            Lt Gen (ret) Nepal Army
127  Sakuntala Kalyan     Centre for Nepal and Asian Studies
128  Sanjeev Pokhrel      German Technical Cooperation (GTZ)
129  Sanju Shah           President, Woman Peace Research and
                          Development Center
130  Shambhu Thapa        Former President, Nepal Bar Association
131  Shanti Kumari Rai    Lecturer, Faculty of Law, Tribhuvan University
132  Sharada Dongol       Lawyer
133  Sher Bahadur K.C.    Lawyer, Nepal Bar Association
134  Shiva Bisanghe       Alliance for Social Dialogue
135  Shreehari Aryal      Senior Advocate
136  Surendra Thapa       Secretary, Supreme Court Bar Association
137  Suresh Acharya       Media Initiative for Rights, Equity and Social
                          Transformation (MIREST)
138  Dr. Surya Dhungel    Constitutional expert
139  Surya Subedi         Professor, University of Leeds
140  Tahal Thami          Federation of Nepalese Indigenous Nationalities
                          (FONIN)
141  Tek Prasad Dhungana  Constitutional Committee, Constituent Assembly
                          Secretariat
142  Tek Tamrakar         Lawyer/United Nations Development Programme
143  Tirthaman Shakya     Lawyer/Former Chairman of Civil Service
                          Commission
144  Toya Nath Bhattarai  Secretary, Committee on Fundamental Rights and
                          Directive Principles, Constituent Assembly
145  Vickal Deep Khadka   Forum of Federations
146  Vijay Prasad Mishra  Mahendra Morang Adarsha Campus, Tribhuvan
                          University, Biratnagar
147  Yogita Rai           Lawyer

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Annex IV

Contributors' Profile

Amber Prasad Pant (Nepal), PhD, is a former Post-doctoral Fulbright Fellow who has been involved in teaching, research, consulting, and law practice since 1978. He started his law profession as a remunerated Supreme Court lawyer in 1978 and has served as a legal advisor and consultant to a number of national and international organizations. He had contributed to the drafting process of the 1990 Constitution of Nepal, as well as several Acts and Regulations of the country. In the past, he has served as President of Nepal Teachers Association - Nepal Law Campus branch, member of Nepal Bar Council Examination Committee, executive committee member of Supreme Court Bar Association, coordinator of Nepal Bar Association Environmental Law Committee, and Campus Chief of Nepal Law Campus. He is presently the Dean of Faculty of Law, Tribhuvan University and also member of its Executive Committee, Vice Chairperson of SAARC Law Nepal and member of Nepal Bar Council Executive Committee.

Bipin Adhikari (Nepal) is a lawyer. He is the principal of Nepal Consulting Lawyers, Inc. Adhikari has expertise in the areas of constitutional law, human rights, legal reforms and democratization process. He is a lead analyst of constitutional issues in Nepal. Adhikari is the co-author of Commentary on the Nepalese Constitution - a major treatise in the field. He continues to strongly support liberal political causes. Adhikari also heads the Nepal Constitution Foundation (NCF).

Bob Rae (Canada) is a politician with experience and significant expertise through years of public service. He has been elected ten times to federal and provincial parliaments, winning every election he contested. Mr. Rae was Ontario's 21st Premier, from 1990 to 1995. He has experience at the highest levels of government in Canada and was an active participant in some of the most important constitutional talks of the day. Most recently, Mr. Rae ran for the leadership of the Liberal Party of Canada in 2006 and in 2008. Mr. Rae currently serves as the foreign affairs critic for the Liberal Party of Canada. Mr. Rae has a B.A. and an LL.B. from the University of Toronto and was a Rhodes Scholar in 1969. He obtained a B.Phil. degree from Oxford University in 1971 and was named a Queen's Counsel in 1984. He has also received numerous honorary degrees and awards from Canadian and foreign universities, colleges, and organizations.

Cheryl Saunders (Australia) is a laureate professor at the University of Melbourne and founding Director of the Centre for Comparative Constitutional Studies. She
works in the areas of constitution-making and design, federalism, intergovernmental relations and comparative constitutional law. She is a Fellow of the Australian Academy of Social Sciences in Australia. From 1991-2000 she was deputy chair of the Australian Constitutional Centenary Foundation, established to assist broad public understanding of the Australian constitutional system and to encourage public involvement in constitutional debate. She is a President Emeritus of the International Association of Constitutional Law and is currently President of the International Association of Centres for Federal Studies. In 1994 she was appointed an officer in the Order of Australia, for services to the law and to public administration. She is a chevalier de la Légion d’Honneur of France.

George R.M. Anderson (Canada) has been President and CEO of the Forum of Federations since 2005. He served over thirty years in Canada’s federal public service, where his positions included Deputy Minister of Natural Resources (2002-2005) and Deputy Minister for Intergovernmental Affairs in the Cabinet office (1996-2002). He held assistant deputy minister level positions in the energy, finance and foreign ministries. He has degrees in political science from Queen’s University and Oxford University, and a diploma from the École nationale d'administration in Paris. He was a fellow at Harvard University's Center for International Affairs in 1992-93. He is the author of Federalism: An Introduction (Oxford University Press: 2008) and is a trustee of Queen’s University in Kingston, Ontario.

Hashim Mohammed Tewfik (Ethiopia) is Assistant Professor of Addis Ababa University Institute of Federalism since 2008. He is an expert on the issue of ethnic federalism. He was Ethiopia's State Minister for Justice during 2005-2008. Earlier, he led the Ethiopian Federal Police College as its Director and also served as Assistant Professor of Law at the Ethiopian Civil Service College. Mr. Mohammed is a PhD of Melbourne University Australia and LL. M from K. U. Leuven, Belgium.

Horst Matthaeus (Germany) holds a PhD in Public Policy. He specialized on decentralization, local government and political participation. He worked in Brazil, Ethiopia and Nepal on long term assignments for German Technical Cooperation in Urban Development Policies and Programmes. Additionally, he has assisted Governments, NGOs and Community Organizations in strengthening federal state structures, capacity building, institutional reforms and conflict resolution. Presently, he heads the Federalism Support Programme, financed by the German Federal Foreign Office and acts as coordinator for German Development Cooperation in the focal area of Local Governance and Civil Society in Nepal.

Indra Kharel (Nepal) is a general legal practitioner practicing at the Supreme Court, Court of Appeal, and other courts and tribunals. His specializes in civil law, real estate and properties. Currently, Advocate Kharel is President of the Supreme Court Bar Association. He is based in Kathmandu.
Jie Cheng (China) is an Associate Professor of Law at Tsinghua University Law School. She teaches constitutional and administrative law, Hong Kong Basic Law and comparative constitutional law at Tsinghua. She has also been visiting lecturer and visiting associate professor in Hong Kong University and Hong Kong Chinese University respectively. From 2003-4, she was a Fulbright Senior Visiting Scholar at Yale Law School. Her specialty include Chinese constitutional history, Hong Kong and Macau Basic Laws, land issues in China, and access to information laws. Since 2000, she has been involved in the drafting and implementation of the Regulations on Access to Information of the PRC commissioned by the State Council 'Informationization' Office. From 2006-7, she was seconded to the National People’s Congress Standing Committee (NPCSC) to work on Hong Kong and Macau Basic Law issues. She has also advised the Taiwan Office of the State Council from time to time on Taiwan issues.

Jill Cottrell (United Kingdom) is currently living in Kenya. She recently retired from the University of Hong Kong after having been a university law teacher for 40 years, teaching especially economic social and cultural rights. In recent years she has been a consultant on constitution making in various countries, including East Timor and Iraq. From 2006 to 2008 she was a consultant with UNDP Nepal, working with the Nepalese experts and institutions involved in constitution making. During that time she also worked with International IDEA, for which she remains an adviser especially on issues of women in the constitution building process in Nepal.

John Pace (Australia) is a visiting fellow at University of New South Wales. He has been involved in a wide range of experience in human rights and related institutional structures and procedures. He was Secretary to the Commission on Human Rights (1978 to 1994) and Coordinator of the Vienna World Conference on Human Rights (1991 to 1993). He was also Secretary to various Committees and other bodies. He has been involved in the establishment and management of most departments that currently make up the Office of the High Commissioner for Human Rights, and as the senior official at the time, played a leading role in the design and restructuring of the Secretariat upon the creation of the Office of the High Commissioner. Over the years he was entrusted by the Secretary General of the UN to undertake a number of missions, including ‘good offices’, missions, such as to Nigeria in 1996, Cambodia in 1995 to Kuwait in 1991 etc. He has taught in various universities in a number of countries.

Kumar Suresh (India) is Associate Professor at the Centre for Federal Studies, Hamdard University, New Delhi. He has been deeply involved in studies and research on multiculturalism and federalism; discourse on rights and social justice; human rights including the rights of minorities, excluded, deprived and marginal groups; public policy and multicultural governance in plural societies. Besides over twenty research papers published in Journals and edited volumes, he has co-authored and co-edited two books and published three monographs on the theme of identity, inclusion and empowerment.
of minorities and disadvantaged groups. His publications are widely reviewed in international and national journals and periodicals. He has also been associated as a resource person with a number of national and international programmes and projects including the Forum of Federations, Canada, the Bergoff Foundation, Germany, and with a collective project on Citizenship initially initiated at McGill University, Canada.

**Larry Taman (Canada)** is a senior specialist in international legal reform. He has over 30 years experience in teaching (law), legal practice, legal policy, institutional reform and capacity building. He has worked in developing, transitioning and post-conflict countries. His legal speciality is constitutional law. He is currently working as International Project Manager for Support to Participatory Constitution Building in Nepal – a UNDP project designed to support Nepal’s Constituent Assembly, civil society and international development partners in the building of Nepal’s new constitution.

**Madhav Kumar Nepal (Nepal)** is the Prime Minister of Nepal. He took office on May 25, 2009. A commerce graduate of Tribhuvan University, Nepal joined the communist movement in 1969, and has been with it ever since as a political moderate. In 1978 he became a founding politburo member of the Communist party of Nepal (ML), which later became CPN (UML). Nepal was one of the members of the Commission which drafted the Nepalese Constitution of 1990. He was the Deputy Prime Minister in the government during the CPN (UML) minority government in 1994-1995 as well as the leader of the opposition in the National Assembly almost from 1991-1999. In 2009 Mr. Nepal became a member of the Constituent Assembly and was elected chairman of Constitutional Committee of the Constituent Assembly that is entrusted to draft Nepal’s new constitution. He was previously the General Secretary of the CPN (UML) for 15 years.

**Mario Gomez (Sri Lanka)** is a Human Rights Lawyer and a Member of the Law Commission of Sri Lanka. He serves occasionally as a Visiting Lecturer in the University of Colombo. He was previously a full time Faculty member at the University of Colombo where he taught administrative law, constitutional law, jurisprudence, and women's rights at undergraduate and post-graduate levels. He has published in the areas of public law, economic and social rights, women's rights, human rights commissions, and internally displaced persons. His latest publication is the 2008 book *Power Sharing in Sri Lanka: Constitutional and Political Documents 1926 – 2008* (Co-author) published by Berghof Foundation and Centre for Policy Alternatives. He has designed and conducted training programmes for judges, human rights activists, and staff of human rights commissions. He was a Post-Doctoral Fellow at Harvard University in 2001/2002.

**Markus Böckenförde (Germany)**, PhD, is a Program Officer for the Constitution Building Programme at International IDEA, Stockholm, Sweden. Before joining IDEA, he was the Head of the Africa Projects and a Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law (MPIL) in
Heidelberg (2001-2008). In 2006-2007, he was seconded by the German Foreign Office to the Assessment and Evaluation Commission (AEC) in Sudan as its legal expert. The AEC has been mandated to support and supervise the implementation of the Sudanese Comprehensive Peace Agreement. From 1995-1997 he was research assistant to Justice Professor Steinberger, the German delegate to the Venice Commission. He has published widely in the area of constitution building and is the co-author on several Max Planck Manuals used as training materials for Max Planck projects.

Markus Heiniger (Switzerland), Lic. Phil. I, Historian, is Special Adviser for Peacebuilding / Nepal of the Federal Department of Foreign Affairs, Switzerland. He was the Deputy Head of Peace Policy within the Political Division IV, Human Security, of the Political Directorate, Federal Department of Foreign Affairs until September 2007. He also worked on the Swiss Government's accompaniment of several peace processes, e.g., in Sri Lanka, Aceh/Indonesia, Guatemala. Heiniger studied history and sociology from University of Zurich. He is also trained and experienced in peace process mediation and facilitation, systematic conflict transformation, conflict management, human rights, transitional justice, federalism, and security sector reform.

Menaka Guruswamy (India) practices law at the Supreme Court of India. Guruswamy’s area of academic interest is in the interface between constitutional law and national security. She was a Rhodes Scholar at Oxford University, and a Gammon Fellow at Harvard Law School, and a gold medalist from the National Law School of India. She worked at the Office of the Attorney General of India. She has also practiced law in New York, as an associate at Davis Polk & Wardwell. In 2006-2007, she taught at New York University's School of Law. Her most recent publications, include a piece on the constitutional process in Nepal (Mint-Wall Street Journal), on Constitutional values and the Supreme Court in India (to be published by Hart Publishing, UK), on How to Combat Financing of Terrorism (chapter to be published by Oxford University Press), on Financing the Lashkar-e-Toiba (the Hindu) and on the amendments to the law since the Mumbai attacks and the new National Investigation Agency Act (Seminar – National Security issue, July 2009).

Minendra Rijal (Nepal) is Minister for Federal Affairs, Parliamentary Affairs, Constituent Assembly and Culture. He has a PhD in business administration from New York University, where he taught for three years as a faculty member. He also taught at Kathmandu University and Tribhuvan University, and lectured at Lancaster University (UK) in the area of his specialization. Rijal has more than 25 years of experience in research, teaching and consulting in the fields of quantitative analysis, optimization, operations management, business management, transport economics, financial analysis and planning, economic analysis, public policy formulation and development economics. He has been elected to the Constituent Assembly as a candidate of the Nepali Congress Party, where he occupies the position of Central
Working Committee member. Rijal was also a member of Nepal's legislature in 2008. He also served as a member of the National Planning Commission of Nepal.

Nicole Töpperwien (Switzerland), Dr. Jur., works as an expert and consultant on federalism, decentralisation, inclusion of non-majority groups in state institutions and democratic processes, and conflict transformation. Her particular focus is on constitutional reform and state organisation in conflict and post conflict situations. After having graduated in law, she obtained a master’s degree (ll.m.) from the Benjamin N. Cardozo School of Law, NYC, USA and a PhD from the University of Fribourg, Switzerland. Until 2003, she worked as a senior research fellow at the Institute of Federalism in Switzerland. From 2003 to 2006 she was attached to the Swiss Expert Pool for Civilian Peace-building of the Political Division IV (Swiss Federal Department of Foreign Affairs). Since 2006 she works as an independent expert and consultant. She has given inputs for the political reform processes in a number of countries including Nepal.

Paul Flodman (United Kingdom) was a police officer for 31 years working in London, Leeds and finishing off in Liverpool. Upon retiring he took up academic life lecturing at Lancaster University. Paul specialises in European and International Law but has a particular interest in Human Rights. He has also lectured at Liverpool and Edge Hill University in these areas of law but in more recent times he has been on the law programme with the Open University. He is a Visiting Lecturer to the Institute of International Trade and Law in Moscow in contract law and to the International Police Association in Cologne, Germany on matters relating to Police and Judicial Cooperation, particularly the Schengen Agreement. He has been a legal advisor to his Member of Parliament and was instrumental in assisting the FACT organization, which deals with false allegations, to be set up and to have an all party committee within the House of Parliament through his MP.

Pekka Hallberg (Finland), LL.D. and D. Soc. Sc. is the president of the Supreme Administrative Court since 1993. Prior to this present function, he has performed law drafting duties at the Ministry of Justice, has worked as a researcher and judge, and as a university professor in administrative law. Hallberg has directed the preparation of several constitutional reforms and other extensive legislative projects. He is the author of numerous titles in the fields of constitutional law, legal remedies, municipal law and environmental law, and other subjects. Hallberg has actively participated in the international judicial cooperation. He has been a board member of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, and in 2000 - 2002 also its president, as well as a board member of the International Association of Supreme Administrative Jurisdictions since its establishment in 1983.

Purna Kumari Subedi (Nepal) is a politician, belonging to the Unified Communist Party of Nepal (Maoist). She is currently serving as the vice chairperson of the
Constituent Assembly. She was elected to the Constituent Assembly during the 2008 Constituent Assembly elections.

**Purushottam S. Kulkarni (India)** is a Maharashtra based legal practitioner. He is a practicing lawyer since 1979. He taught law between 1979 to 2008 at ILS Law College and Symbiosis Law College in Pune, and at Pune University Law Department where he taught post-graduate courses.

**Ram Baran Yadav (Nepal)** is the President of Nepal. Elected in July 2008, he is the country's first elected head of state. Trained as a postgraduate physician and a medical professional for many years, Yadav gradually joined the mainstream democratic movement in the country under the eminent leader, and the first elected Prime Minister of Nepal, Mr. B. P. Koirala. Yadav was the Minister of State for Health in the 1991-1994 Nepali Congress government. He was elected to the House of Representatives in 1999 again as a candidate of the Nepali Congress and subsequently sworn in as the Minister of Health. He also served as the General Secretary of the Nepali Congress party. Yadav got elected to the Constituent Assembly in the April 2008 Constituent Assembly elections. He has a profound interest in the medical sector in particular, and nation building issues in general. He also emphasizes the importance of national sovereignty and integrity above all party or partisan interests.

**Robert Piper (Australia)** is UN Resident and Humanitarian Coordinator and UNDP Resident Representative in Nepal.

**Rohan Edrisinha (Sri Lanka)**, LL.B.(Hons.) Colombo, LL.M (University of California, Berkeley), is Director & Head, Legal Unit, Centre for Policy Alternatives, (CPA). He has been teaching at the University of Colombo Faculty Of Law since 1986. He also taught at the Faculty of Law, University of Witwatersrand, South Africa in 1995 and was a Visiting Fellow at the Center for the Study of World Religions, Harvard University, 2004/2005. In July 2008 he was a faculty member of the Asia-America Institute of Transnational Law of Duke University and the University of Hong Kong at the University of Hong Kong. He was a Saul Rae Visiting Fellow at Massey College, University of Toronto in 2009. His latest publications include *Essays on Federalism in Sri Lanka* (co-ed_with A. Welikala, 2008) and *Power Sharing in Sri Lanka: Constitutional and Political Documents 1926-2008*, co-ed with M. Gomez, V.Tamilmaran and A. Welikala, (2009).

**Satya Arinanto (Indonesia)** is a Professor of Constitutional Law and Director of the Center for the Study of Constitutional Law at the Faculty of Law University of Indonesia. He is also the Chairman of the State Law Program at the Postgraduate Law Program, University of Indonesia. He recently held the position of a Visiting Scholar at the Queen's University of Belfast, Northern Ireland, UK (May, August, and September 2008); Visiting Research Scholar at the Institute of Social Studies,
Shambhu Ram Simkhada (Nepal), PhD, is currently a member of the Technical Committee, a high level expert panel created to advise and assist the Special Committee of the Government of Nepal for the Supervision, Integration and Rehabilitation of the Maoist army combatants. He has served as former Permanent Representative of Nepal to the United Nations and the World Trade Organization in Geneva and Ambassador to Switzerland. He was Chairman of the UN Human Rights Commission, Visiting Fellow of the Graduate Institute of International Studies, Geneva, Visiting Scholar of the Geneva Center for Security Policy and Visiting Professor of the Geneva School of Diplomacy.

Steven Greer (United Kingdom) is Professor of Human Rights at the University of Bristol. He studied Law at the University of Oxford, Sociology at the London School of Economics, and has a PhD in Law from the Queen's University of Belfast. In addition to Bristol, he has also taught at Queen's Belfast, and at the Universities of Sussex, Hannover (West Germany), and Wollongong (Australia), and has acted as consultant to various organisations including the Council of Europe and Amnesty International. He is consultant editor (Human Rights) for Amicus Curiae and has published widely, particularly in the fields of criminal justice, human rights, and law and terrorism. His work has been translated into French, Spanish, Turkish, Macedonian and Arabic, and two of his books, 'Supergrass' (Oxford University Press, 1995) and 'The European Convention on Human Rights' (Cambridge University Press, 2006), were short-listed for book prizes.

Subhash C. Nemwang (Nepal) is the Chairperson of the Constituent Assembly of Nepal which is drafting a new constitution for the country. A former law teacher and legal practitioner, based in Kathmandu, Nemwang specialized on criminal laws and institutions. He was unanimously elected the chairperson of the Constituent Assembly in July 2008. His candidacy was proposed by the Communist Party of Nepal (UML). Earlier, he was appointed Speaker after the reinstatement of the House of Representatives following the people's movement in April 2006. He was reappointed as Speaker of the Interim Legislature after the Maoists joined the government on April 1, 2007.

Surya Dhungel (Nepal) is a constitutional lawyer of Nepal. He is former Professor of Law at Tribhuvan University Law Faculty, where he served for twenty-two years until his voluntary retirement. He then worked as a human rights and rule of
law expert in United Nations in Cambodia, Liberia and Thailand. He was the Chief of Legal Assistance Unit at the UN Office of the High Commissioner for Human Rights in Cambodia for more than four years after June 1999. Dhungel contributed to the constitution building efforts as senior manager of the Constitutional Assistance Support Unit of UNDP between 2006 and 2008. He took up the initiative of convening a Consortium of Constitutional Experts, CONCOE, in Nepal after leaving the UN to assist the constitution building process. Dhungel is a senior partner at Nepal Consulting Lawyers, Inc.

Thio Li-ann (Singapore) teaches and researches public international law, international human rights law and public law at the Faculty of Law, National University of Singapore. She holds a BA (Hons) from the University of Oxford, a LL.M from Harvard Law School and a Ph.D. from the University of Cambridge. Her publications include Managing Babel: The International Legal Protection of Minorities in the Twentieth Century (Brill, 2005); Constitutional Law in Malaysia & Singapore (Lexis-Nexis, 2010) and The Evolution of a Revolution: 40 Years of the Singapore Constitution (Routledge-Cavendish, 2009), (co-edited with Kevin YL Tan). She is a barrister (Gray’s Inn UK) and was a Nominated Member of the Singapore Parliament (Eleventh Session, Jan 2007-June 2009). She is currently the General Editor of the Asian Yearbook of International Law and editor of various journals, including the International Journal of Constitutional Law.

Vincent Calderhead (Canada) is the Nepal Country Director for the International Commission of Jurists. His expertise is in the area of economic, social and cultural rights–especially in a federal context. Prior to working in Nepal, he worked as a senior staff counsel at Nova Scotia Legal Aid in Halifax, Nova Scotia, Canada. He was admitted to the Nova Scotia Bar in 1986 and the British Columbia Bar in 1995. Vincent obtained his undergraduate degree in History from the New University of Ulster in Coleraine, Northern Ireland in 1978 and Master of Articles degrees from Concordia University (Montréal) (History, 1979) and Queen’s University (Kingston) (Political Studies, 1981). He earned a Bachelor of Law degree from Dalhousie University Law School (Halifax, Nova Scotia, Canada) in 1985. Vincent Calderhead is also a member of the part-time faculty at Dalhousie University Law School where he teaches a course entitled Poverty Law and Human Rights.

Wiktor Osiatynski (Poland) is Professor of Law at Central European University in Budapest. He also teaches human rights to the post-graduate students at the University of Siena, Italy. Since 1989, Osiatynski has been an advisor to constitutional committees in Poland and a number of other countries. Between 1991 and 1997, he was co-director of the Center for the Study of Constitutionalism in Eastern Europe at the Chicago Law School where he was a recurrent visiting professor between 1991 and 2001. Since 2000, Osiatynski has been involved in the development of a multi-disciplinary center for Human Rights at the University of Connecticut. He is also associated with the Open Society Institute. The main subject of Osiatynski’s scholarly interests has been the comparative study of individual rights.
and constitutionalism. Osiatynski’s latest academic contribution to this area is his 2009 book Human Rights and Their Limits published by the Cambridge University Press.

**Yash Pal Ghai (Kenya)** is a scholar in constitutional law. Between 2006 and 2008 he headed the Constitution Advisory Support Unit of the United Nations Development Programme in Nepal. He was the Chairman of the Constitution of Kenya Review Commission, and the National Constitutional Conference from 2000 to 2004, and has advised many countries on constitution making from Papua New Guinea in the mid-1970s to Iraq in 2005. Ghai was the Sir YK Pao Professor of Public Law at the University of Hong Kong from 1989, and is now Professor Emeritus there, since his retirement in 1995. Prior to that, Ghai taught and did research in law at the University of Warwick Uppsala University in Sweden, the International Legal Centre in New York, and Yale Law School. Ghai has also advised and assisted NGOs in human rights law related work. He drafted the Asian Human Rights Charter - A People's Charter, a project of the Asian Human Rights Commission. He was Special Representative of the UN Secretary General in Cambodia on human rights from 2005-8. He has been a Fellow of the British Academy since 2005.

**Zhenmin Wang (China)** is the Dean of the Tsinghua University Law School, the People's Republic of China. He specializes in Chinese constitutional and administrative law, Hong Kong and Macao Basic Laws, comparative constitutional law, constitutionalism and political science. He was appointed a member of the Committee for the Basic Law of the Hong Kong Special Administrative Region and a member of the Committee for the Basic Law of the Macau Special Administrative Region under the Standing Committee of the National People's Congress, respectively in 2006 and 2004. He has published widely in Chinese and overseas journals. His books include Constitutional Review in China (2004).

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Annex V

Abbreviations / Acronyms

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>APLA</td>
<td>Azanian People’s Liberation Army</td>
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<tr>
<td>CDLFB</td>
<td>Committee on Determination of the Form of the Legislative Body</td>
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<tr>
<td>CEDAW</td>
<td>Convention for the Elimination of All Forms of Discrimination against Women (1979)</td>
</tr>
<tr>
<td>CFA</td>
<td>Court of Final Appeals</td>
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<tr>
<td>CFRDP</td>
<td>Committee on Fundamental Rights and Directive Principles</td>
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<tr>
<td>CIAA</td>
<td>Commission on the Investigation of Abuse of Authority</td>
</tr>
<tr>
<td>CRMMC</td>
<td>Committee on Rights of Minorities and Marginalised Communities</td>
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<tr>
<td>DDC</td>
<td>District Development Committee</td>
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<tr>
<td>DDR</td>
<td>Disarmament, Demobilization and Reintegration</td>
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<tr>
<td>DP</td>
<td>Directive Principles</td>
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<tr>
<td>EDORM</td>
<td>Ethiopian Democratic Officers Revolutionary Movement</td>
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<tr>
<td>EPDM</td>
<td>Ethiopian Peoples' Democratic Movement</td>
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<tr>
<td>EPRDF</td>
<td>Ethiopian Peoples' Revolutionary Democratic Forces</td>
</tr>
<tr>
<td>ESCR</td>
<td>Economic Social and Cultural Rights</td>
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<tr>
<td>FPP</td>
<td>First Past the Post</td>
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<tr>
<td>GRC</td>
<td>Group Representation Constituency</td>
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<tr>
<td>ILO</td>
<td>International Labour Organization</td>
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<tr>
<td>LBFR</td>
<td>Local Bodies Financial Regulations</td>
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<tr>
<td>MJF</td>
<td>Madheshi Janadhikar Forum</td>
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<tr>
<td>MMPR</td>
<td>Mixed Member Proportional Representation</td>
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<tr>
<td>NSC</td>
<td>National Security Council</td>
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<tr>
<td>NC</td>
<td>Nepali Congress</td>
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<tr>
<td>NCF</td>
<td>Nepal Constitution Foundation</td>
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<tr>
<td>NCMP</td>
<td>Non-Constituency Member of Parliament</td>
</tr>
<tr>
<td>Acronym</td>
<td>Full Name</td>
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<tr>
<td>NHRC</td>
<td>National Human Rights Commission</td>
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<tr>
<td>NHRI</td>
<td>National Human Rights Institution</td>
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<tr>
<td>OHCHR</td>
<td>Office of the High Commissioner for Human Rights</td>
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<tr>
<td>OPDO</td>
<td>Oromo People’s Democratic Organization</td>
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<tr>
<td>PLA</td>
<td>People’s Liberation Army</td>
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<tr>
<td>PRI</td>
<td>Panchayati Raj Institutions</td>
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<td>TPLF</td>
<td>Tigray Peoples Liberation Front</td>
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<tr>
<td>SSR</td>
<td>Security Sector Reform</td>
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<tr>
<td>UCPN (Maoist)</td>
<td>Unified Communist Party of Nepal (Maoist)</td>
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<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights (1948)</td>
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<tr>
<td>UML</td>
<td>United Marxist Leninists</td>
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<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNDP</td>
<td>United Nations Development Program</td>
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<td>UNFPA</td>
<td>United Nations Population Fund</td>
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<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
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<tr>
<td>UNIFEM</td>
<td>United Nations Development Fund for Women</td>
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<tr>
<td>UNMIN</td>
<td>United Nations Mission in Nepal</td>
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<tr>
<td>VDC</td>
<td>Village Development Committee</td>
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<tr>
<td>YCL</td>
<td>Young Communist League</td>
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</tbody>
</table>
Annex VI

Bibliography of International Scholarly Work Related to Constitutional Drafting


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Nepal Constitution Foundation

Profile

Nepal Constitution Foundation is a newly registered, independent and non-partisan civil society organization. It was registered in September 2009 (Asoj, 2066 BS) under the Society Registration Act, 2034 B.S. (1977) as a collaborative effort of some constitutional experts, management professionals and development practitioners. It is a non-profit making membership-based organization.

The Foundation was founded as a civil society 'think tank' on constitutional matters, which encourages and facilitates the study and research of constitutional issues. It is dedicated to increasing public understanding of, and appreciation for, the Constitution of Nepal. It intends to examine and evaluate the constitutional system of the country and contribute actively to debates on its reforms and democratization. As a 'think tank', the Foundation works through various interactive and interpretive facilities. There are three important areas of NCF interventions:

1. Support for constitution building and its institutionalization process
2. Public policy analysis
3. Development of constitution sensitive socio-economic and political leadership in the country.

Objectives

The major objectives of the Nepal Constitutional Foundation are as follows:

- To conduct studies and research on constitutional subjects including free and fair elections, accountable government, the rule of law, independence of judiciary, fundamental rights and freedoms, and
self-governing and impartial constitutional bodies in order to help institutionalize these pillars of constitutionalism in Nepal, and monitor the operation of constitutional democracy in the country.

- To help resolve complicated constitutional issues by pursuing studies and research on various aspects of constitution and constitutionalism and by bringing forward the views of relevant parties and civil society in the process of their resolution.

- To support the democratization process of political parties and public institutions as a non-governmental organization by conducting programmes, providing research assistance on issues concerning them and by making laws for their democratic management and reforms.

- To disseminate information and conduct advocacy on equality, pluralism and social justice in order to institutionalize the values of constitutionalism in Nepal.

- To evaluate national achievements in the implementation of state obligations as specified by the constitution, the directive principles and policies in cooperation with governmental and nongovernmental bodies.

- To analyze relevant developmental issues and public policies in light of their relationship with the constitution and publish the finding.

- To assist ongoing law making efforts, their implementation and review process in different areas of public concern in order to secure the rule of law.

- To act as a "think tank" in the area of constitutional law, human rights, judicial reform, legal development and process of democratization.

- To work for the development of leadership – political, economic, social or cultural in order to achieve all the above objectives, and to ensure consolidation and stability of the constitutional system.

**Activities**

The Foundation pursues these objectives through its activities that include constitutional seminars/workshops, thematic research, training programmes,
information exchange, research collaborations and resource center services. It also hosts a variety of symposia and panel discussions on constitutional topics of national importance. These events involve scholars from a variety of disciplines, government officials, lawyers and the general public. In the long run, the Foundation intends to serve as a forum that would play an instrumental role in introducing comparative constitutional practices into the Nepalese constitutional debate. It plans to achieve this goal by developing a strong network of constitutional experts, scholars, students, judges, policy makers and other relevant resource persons. In this regard, the Foundation would also endeavor to promote a sound understanding of the underlying issues and practical operative aspects of the constitutional systems of neighbouring countries in the region.

The Foundation raises awareness of constitutional violations and how those conflicts might be resolved through its publications, the media, meetings, and dialogue among its members.

All persons who are sincerely committed to defending the constitution as originally understood are encouraged to associate themselves with the Foundation and actively engage in its program and events. The Foundation organizes local meetings in many places within the country. Local groups offer speakers, educational courses, seminars, and other opportunities for regional members to meet and collaborate. Local meetings give members a chance to interact with activists and experts on how constitutional compliance can be achieved and maintained.

The Foundation also operates a constitutional advisory group of Nepalese lawyers committed to the constitution building process in Nepal.

Current Priorities

The Foundation's priority at this stage is to help the Constituent Assembly of Nepal to draft a new constitution for the country through technical assistance and policy recommendations. It will focus on providing assistance in writing the new constitution and complementing the process by interventions consisting of public lectures, conferences and publications. It will also serve as a clearing house for information and materials relevant to the Constituent Assembly for the thematic jobs before it. The Foundation will help stimulate thinking on subjects of constitutional concern under the proposed constitution from a variety of perspectives and disciplines.
Nepal Constitution Foundation considers it very important to archive or document all types of resources produced in Nepal after April 2008 elections to the Constituent Assembly regarding the ongoing constitution making exercise. This is necessary not just to preserve the constitutional debate for posterity, but also to make sure that the new constitution is understood with all its background materials and political discourses. This activity will promote the vitality of the new constitution, once it is promulgated.

Current Executive Board

Dr. Bipin Adhikari, Chairperson
Mr. Bishweswar P. Bhandari, Vice-chairperson
Mr. Ganesh Datta Bhatta, General Secretary
Mr. Bhagwat Das Chaudhary, Secretary
Ms. Sabita Nakarmi, Treasurer
Dr. Bidya Kishore Roy 'Bimal', Member
Ms. Pragya Basyal, Member

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