Summary Comments on the Interim Constitution (IC) as passed

Introduction

The main purpose of drafting the Interim Constitution is certainly to bring the rebel political group to the mainstream politics and eventually pave the path of the peace building process through a new constitutional framework that would be acceptable to all political forces of the country. Incorporation of high democratic ideals and the main guiding principles stated in the preamble of Interim Constitution, despite its lack of clarity in defining its source and real purpose, are perhaps a remarkable part of the IC, as it fully commits to the principles of human rights, rule of law and competitive democracy as expressed by the people through political movements of the past.

The revised version of the newly promulgated IC is certainly an improvement over the originally published incomplete draft of the Committee, and makes it clear that its sole objective is to ensure that a new Constitution for Nepal has been drafted by freely and fairly elected CA. In order to reduce pressures on the CA from regular legislative business, a provision to create a special committee for legislative affairs has also been made.

'Consensus' has been accepted as a guiding principle for the governance of the country during the transitional period through interim arrangements, and the Human Rights Commission receives a constitutional status with an option open for the appointment of Chairperson from outside the Supreme Court paradigm.

The Comprehensive Peace Agreement and the Agreement on the Management of Arms and Armies has been annexed to IC as Third Schedule, hence these documents are recognized as a part of the constitutional document for reference (Article 166.3).

The IC draws very heavily on the 1990 Constitution. This is not a criticism; on the whole the place for real innovations will be in the Constituent Assembly (CA). But the nature of the changes cumulatively means that the IC is very different from the 1990 Constitution: it provides an Executive-oriented framework with very weak constitutionalism and check and balance devices.

As a quick overview:

The main differences are:

- IC is larger than 1990 Constitution in its size and contents, and it has 25 Parts, 167 Articles and three Schedules annexed to it while the 1990 Constitution contained only 23 Parts, 133 Articles, and three Schedules.
- This increase in size is due to the fact that while relatively short Parts have been removed (e.g. Royalty and National Assembly), 9 additional provisions in the fundamental rights chapter recognising new rights have been incorporated. Compared to 13 provisions on Fundamental Rights in the 1990 Constitution, 21 now define and guarantee fundamental rights (see below).
- There is, naturally, a chapter on the Constituent Assembly. In addition there are 3 additional chapters in the Human Rights Commission, Structure

of the State and Local Autonomous Government, and Provisions relating to the Army.

Apart from these additional provisions, the main differences are:

1. Some rather vague and aspirational provisions in the early chapters and preamble which may prove hard to implement or indeed give rise to some tensions. “Inclusive” (see e.g. Art. 4, is one such expression). Secular is mentioned once (also in Art. 4).
2. Inclusion of reference to caste, religion, region, Madhesi, janjati etc. at various points; but the usage is not consistent, so we find “Class, caste, regions and gender” in the Preamble (how about ethnicity?).
3. Efforts to introduce social justice measures for these various groups (wider range of possible affirmative action, economic and social rights etc.)
4. Occasional signs of what might be thought of as “Maoist” influence –e.g. reference to class, peasants and labourers, “scientific land reform”.
5. Greater executive control over various appointments – especially through the change in composition of the Constitutional Council (CC): it now comprises the PM, Chief Justice (on his independence see below), the Speaker (appointed as a matter of political party deal making), and three appointees chosen by the Prime Minister).[1] Hence the PM with the support of his three nominees can do and undo anything.
6. Giving the Prime Minister a number of roles of a ‘head of state’ type – thus increasing the reality or at least the appearance of executive control
7. Emphasis on consensus in the Interim Parliament and Government
8. IC has tried to accommodate the contents of the Citizenship Act passed by HoR just a few weeks ago, which required amendment of some provisions of the 1990 Constitution, (and depriving the Interim Legislature, with Maoists in it, of the chance to contribute to the debates on a sensitive but very important issue).

It is our view that the main focus of attention should be on the making of a new constitution now, rather than on the IC. In other words, faults in the IC (whether they derive from the 1990 Constitution or not) should be addressed in the constitution to be drafted by the CA, and it is the main purpose of the IC to provide for that process. In fact, the innovations could be considered to have gone too far already, especially in the human rights area. Many of these demand new laws to be formulated for their enforcement. This noble but very ambitious desire to secure many rights to the people during the transitional period may distract the attention of the interim legislature and political actors from the CA process. A weak judiciary can hardly be expected to safeguard the further expanded regime of the fundamental rights of the people.

Further, there is a provision that if laws inconsistent with the Constitution are still on the statute book after 3 months they become void (Article 164). To check all statutes for inconsistency at a time when new laws must be drafted for the CA and the lection to it, poses a heavy burden on someone (perhaps the Law Commission), or there is a

[1] In the 1990 Constitution it comprised: the Prime Minister; the Chief Justice; the Speaker of the House of Representatives; the Chairman of the National Assembly; and the Leader of the Opposition in the House of Representatives.

risk that laws will be declared void and vacuums created. On the other hand, Article 1 suggests inconsistent laws may become void immediately!

It is however, important to study the IC carefully, especially if there is any possibility that it might be used as the basis of discussion for the new constitution (which is not at all clear).

Below are some more detailed comments on different aspects and there are or will be separate papers on the topic marked *.

The Interim System of Government

1. The system of government during the interim period consists of the interim executive and the interim legislature, and the relationship between them. The guiding principles in both cases are said to be the aspirations of the united people's movement and political consensus. Political consensus is defined as the consensus between the SAP and the Maoists on 8 November 2006, and seems to refer to decision making as between them. Both are seen as based on the principle of coalitional government between these parties ('8 parties'). This would exclude other parties and the 46 members of the legislature who are meant to represent, broadly, civil society from any effective role in the executive or the legislature.
2. Powers of the executive are vested in the Council of Ministers, headed by the Prime Minister. These are to be constituted by political consensus, that is, by internal decisions among the 8 parties. If no consensus can be reached, the Prime Minister would be elected by the legislature by a two-thirds vote of all its members.
3. Meanwhile the existing Council of Ministers would continue to hold office and no time frame is provided for the formation of its successor which presumably would include Maoists.
4. The structure of the Council of Ministers and the allocation of responsibilities are to be left to 'mutual understanding', presumably negotiations among the 8 parties. But the Interim Constitution provides for a deputy Prime Minister and other ministers and gives the authority to appoint them. Ministers can be appointed from either the members of the legislature or from outside. The assumption is that the allocation of ministries would be negotiated among the parties; and the IC states that the Prime Minister would appoint those members of the legislature to ministries that are nominated by the relevant party leaders. However, when the Prime Minister appoints a minister from outside the legislature, there is no requirement of following party nominations or even consulting with parties.
5. There is no provision for the dismissal of the Prime Minister (and therefore of the executive which changes only when there is a change in the Prime Minister). However, the Prime Minister would lose office if he or she ceases to be a member of the legislature (which would seem to give his or her party the ability to remove him or her by expulsion from the party). Similarly there seems to be no provision for the removal of a minister or a party from the government (except that a particular minister can be removed by the Prime

Minister on the recommendation of, or after consultation with, the party leader of that minister).

6. Although neither the Prime Minister nor a minister can be removed by the legislature, the IC makes them collectively responsible to the legislature. Ministers are also individually responsible to the legislature (and to the Prime Minister). In this context responsibility would mean no more than having to explain and defend their policies or conduct.

7. In Art. 38(10) does the Deputy Prime Minister or the seniormost Minister act as Prime Minister if PM dies? And for how long? One must assume that the Deputy acts - because he is mentioned first, and presumably the alternative is in case there is no Deputy PM, but the drafting is not clear.

8. This form of the executive would continue even after the convening of the Constituent Assembly.

9. The legislature is called Legislature-Parliament ('LP') (seemingly due to different 'bourgeois' and 'Marxist' perceptions of that institution). Legislative power is not expressly vested in the LP (but this is assumed). The LP is unicameral. It consists of three types of members: (a) 209 from political parties which had representation in the House of Representatives and the National Assembly immediately before the commencement of the IC (which excludes the 11 members who were expelled by the SPA from these chambers as they were deemed to oppose the people's movement); (b) 73 members nominated by the Maoists; and 48 members from the United Left Front and civil society organizations, women, backward region, indigenous and oppressed tribes, and 'political personalities' nominated 'through understanding' (although in practice the spirit of this criteria or procedure seems not to have been followed). Those who were opposed to the people's movement are disqualified from membership.

10. The Speaker and the Deputy Speaker are to be elected from the members of the LP on political consensus (that is, by the 8 parties), failing which by a two-thirds majority of all the members. They can be removed by a resolution passed by the two-thirds vote of all members (although in the case of the Speaker, but not explicitly, the Deputy Speaker, can both take part in the deliberations and vote!).

11. Decisions of the LP are made by the majority vote of those present and voting, unless stated otherwise.

12. The LP would be dissolved on the election of the Constituent Assembly. The IC authorizes the CA to set up a special committee to deal with parliamentary-legislative business (both not to take up too much time of the entire CA and to reduce the number of members who can suitably act as the 'legislature').

13. It would seem from this description of the executive and the legislature that there could be a rather formal role for the legislature, as decisions would be made by the 8 parties outside the LP. Deal making among them could lead to a lesser of degree of democracy and accountability than should characterize even the interim period.

14. In several contexts the drafter just brought in 1990 provisions without apparently thinking that things are different under the temporary system.

15. The Interim Parliament (and other legislative bodies) retain wide protection from 1990 Constitution – e.g. Art. 56(3) – in the sense that people who criticise their "good faith" or intentionally distort what they say can be punished by the house itself. Why should they get this protection? They can't be sued for anything they say!
16. The provisions on legislative process and financial procedures are essentially the same as in the 1990 Constitution. Improvements could be made but these can wait until the CA.

"Independent Commissions"

These are the Public Service Commission, Commission for the Investigation of the Abuse of Authority and Election Commission; provisions about most of these are essentially similar to the 1990 Constitution. There are also three new Commissions: Human Rights Commission (see under Human Rights below); Truth and Reconciliation Commission, and High Level Commission on Restructuring (see below on restructuring). There is less detail on these last two and they may be rather different from other commission.

Our more specific comments include:

1. The Commission are appointed "on recommendation" of the Constitutional Council - what does it mean? Must the PM accept or can he send it back?
2. The reconstituting of that Council means that it is not independent so how can the commissions on which it recommends?
3. There is a concept of political neutrality for these bodies but it is assured only by the members not having been members of parties just before their appointment; does not really seem adequate guarantee.
4. The commissions have to report to the Prime Minister. This gives the impression that they are accountable to the executive which is undesirable. In some instances the reporting requirements have been made very complex, perhaps unreasonably so. They used to report to the King (head of state).
5. On specific commissions:
    a. the Commission for the Investigation of the Abuse of Authority – government decides on how many members – gives opportunity for patronage Art. 119.
    b. Public Service Commission now has some responsibilities with respect to public enterprise and also on advising on military promotions.
    c. Election Commission has now been expanded in size to 5 (for a while the draft restricted it to 3). Its independence remains threatened by the fact that the government supplies employees. It has been given power to decide on qualifications of candidates see Art. 129 (2).
    d. There is no provision for a Delimitation Commission [which presumably indicates an assumption that there will be no constituency delimitation during the period of the Interim Constitution].
    e. Provisions related to the Truth and Reconciliation Commission and the Peace and Rehabilitation Process are inserted under the unenforceable

chapter on Directive Principles, Policies and Duties of the State Article 133 (p)-(s).

Courts and judiciary *

The main points arising from a scrutiny of these provisions are:

1. The basic system of justice remains – with addition of Constituent Assembly Court
2. there are a good number of protections for independence of the judiciary, but:
    a. The appointment mechanism is weakened, especially as it affects the Chief Justice (see above on Constitutional Council which recommends his appointment); when the Chief Justice has to be appointed, the Minister of Justice will take the seat of the Chief Justice at the CC for the appointment purpose (Article 149.2).
    b. The protection of independence of lower courts judges not strong
    c. There appears to be no immunity from legal action for judges
    d. Judiciary has to make annual report to Prime Minister – an even more serious issue than for independent commissions (see above)
3. Important remedies before Supreme Court not available to non-citizens
4. The system is highly centralised (in hands of Supreme Court or even Chief Justice)
5. Military courts are now subject to Supreme Court

Human Rights etc*

The rights from the 1990 Constitution are preserved, and there are some additions, some minor some more significant

1. Major additions include more references to women, dalits, Madeshi etc, economic and social rights
2. Qualifications on rights in the long run would be improved if they were required to be proportionate to the purposes to be achieved and justifiable in a democratic society etc
3. Many rights are seriously qualified because they are subject to legislation (which may constitute a serious inroad unless the courts take a very tough line)
4. Many rights – especially economic and social – require legislation which makes them little better than the directive principles that they essentially replace
5. The Human Rights Commission is provided for which is welcome; but it suffers from weaknesses in terms of independence similar to those of other commissions; it now has some powers of investigation that are perhaps too wide (entry without warrant); it now (unlike in an early draft of IC) cannot itself go to court.

Attorney-General

1. This official's position is the same as under existing constitution basically, but new there are a few new powers:
    a. to monitor the interpretation of law or implementation of the legal principles propounded by the Supreme Court in the light of litigation; in one sense this would be a natural function, but some might read some worrying implications;
    b. to investigate complaints that any person in custody received inhuman treatment; it seems desirable that someone should do that – but not clear that it is appropriate for the A-G.
2. As under the 1990 Constitution, there is no provision for independent prosecutions (as a separate DPP); it is a responsibility of the AG who is the government's legal adviser and holds office at the pleasure of the PM.

Political parties

Again the provisions are modelled on the 1990 Constitution, but there are a few additions, and points worth commenting on:

1. they must include in their executives members of suppressed regions, dalits women etc,
2. They must disclose sources of funding; this is the beginning of a more accountable system
3. The party constitutions must be effective to discipline the parties; the implications of this are not clear.
4. Existing parties are favoured in terms of registration for elections – they do not have to show the strength of support that other arties must show. This may have serious implications for the CA elections.

Emergency Powers

The chapter follows the 1990 Constitution but there are improvements.

1. Previously the declaration of emergency was made by the King (presumably on the advice of the Government). Now this power is explicitly stated to be that of the Council of Ministers.
2. Previously the declaration could last for 3 months without reference to or the approval of the legislature. This period has been reduced to one month.
3. Previously the declaration, once approved by the legislature, lasted for 6 months and could be extended by a similar period on new mandate from the legislature. Now the periods are 3 months.
4. Previously the legislature had to approve by a two-thirds vote of all the members. Now it is two-thirds of those present – less demanding
5. Previously all human rights were suspended during the declaration (except for the petition of habeas corpus). Now the list of rights which cannot be suspended is impressively long.

The Army

1. Previously there were only two articles on the army (leaving other matters to legislation) – on the National Defence Council and the King as Supreme Commander. There was sufficient ambiguity so that the King could exercise significant control (as indeed was the reality).
2. The Interim Constitution has a more elaborate set of provisions (chapter 20)., emphasising the democratisation of the army, with parliamentary oversight of the Army, and inculcating in its members values of democracy and human rights.
3. Control, mobilisation and management of the Army are vested in the Council of Ministers, which also appoints the Commander-in-Chief.
4. A National Defence Council is appointed (consisting of the Prime Minister as Chair, the Defence Minister, the Home Minister, and three other ministers appointed by the Prime Minister). The function of the Council is to make recommendations to the Council of Ministers.
5. The decision of the Council of Ministers to mobilise the army must be presented to the relevant committee of the legislature (except in the case of a natural calamity) 'within a month' and its approval secured (presumably the army cannot be mobilised without that permission).
6. The Council of Ministers has to formulate and implement a scheme for the democratisation of the Army (and for its 'national and inclusive character') 'with the consent of the political parties and by seeking the advice of the relevant committee of the Legislature-Parliament'.
7. There is also the requirement to train the army in accordance with the norms and values of democracy and human rights.
8. A special committee of the Council of Ministers is to be appointed to supervise, integrate and rehabilitate the combatants of the Maoist Army, while other arrangements for the management and monitoring of the army and its arsenal shall be in accordance with the agreements of 7 November 2006 and 8 December 2006.
9. See also notes on Supreme Court and Military courts, and role of Public Service Commission (above).

Restructuring*

1. A High Level Commission is to be set up to make recommendations on the restructuring of the state (art. 138). It seems that 'restructuring' it is used in a narrower sense, referring only to the elimination of the 'centralised and unitary form of the state'.
2. The agenda is to bring to an end discrimination based on 'class, caste, language, sex, culture, religion and region' (not all of which might be compatible). It is not clear that federalism can achieve simultaneously all the specified objectives (particularly regarding sex and class).
3. Federalism or devolution is complicated and controversial. The High Level Commission, to be appointed by the Government, will provide a useful source

of ideas, analysis and options for the CA, if it is independent and expert, which is not clear.

4. It is unclear whether its recommendations would go directly to the CA or would be vetted by Government, although article 138(3) states that the final decision on the restructuring would be made by the CA.

Constituent Assembly*

This is in some ways the main focus of the IC – its *raison d'être*. There are few details about the way it will operate – which is on the whole a good thing as it means that possibilities are not precluded. On the other hand, some things may be precluded, and there are many details to be worked out in rather a short time.

1. Composition: we know the size (425) – rather large, but arguments about this fell on deaf ears: 205 constituency members, 204 list members plus 16 eminent persons appointed by the Council of Ministers. Unless a wide range of groups are able to contest the election all these people will come through parties.
2. Elections: the mixed system has been decided on. As we read the provision, the parallel system has been decided on (the distribution of list seats will not take account of seats obtained in the geographical constituencies). Other details remain to be decided. There is some unhappiness with the provisions on using the existing geographical constituencies, and indeed possibly some uncertainly, since a few were changed following the 2001 census.[2]
3. The provisions about inclusion of dalits etc are rather vague and exhortatory
4. The provision on women is a bit odd – it says (i) in order to achieve one-third women (ii) there must be one-third candidates (overall, adding the constituency and list candidates): the latter is certainly not guaranteed to achieve the former!
5. Duration – it can extend its time by 6 months if a state of emergency has delayed completion of the new constitution. Otherwise it finishes its work when the new constitution comes into force; but this does not automatically dissolve it – something that takes place on the 2nd anniversary of its first sitting (which might take place before the constitution comes into force). But it can continue to be the legislature until new elections under that constitution. These provisions do not mesh entirely well.
6. Method of operation – very little is said about this and a new law will be required: how will it take account of public views, will it prepare a draft for comment, etc. Committees must be according to 'Law' (does this mean in the Act establishing the CA? We also know they may appoint experts. It will regulate its own procedure (which in some countries has taken a good deal of time at the beginning of Constituent Assembly processes).

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[2] One member of the SPA, Nepal Sadvawana Party (A) recorded its dissenting opinion on the draft IC, and disagreed on three major issues, such as continuation of the existing 2005 constituencies, electoral provisions (relating to one or two ballots) and restructuring of the state.

7. Decision making: each element of the new Constitution (preamble and articles) must be passed ideally unanimously but ultimately by at last two-thirds. There is an elaborate provision for reaching consensus that could delay individual decisions by 3 weeks, and involves only party leaders. But if the formal debate on the new constitution as a Bill takes place only after an earlier discussion in committees etc this procedure may not be needed.
8. Role as legislature – it will be the "Legislature Parliament as well". The legislative work (does this include accountability functions?) could be carried out a committee – nothing said about how this could be constituted.