The Making of the New Constitution: The Interim Constitution's Road Map

The Interim Constitution

When a country emerges from a state of conflict and state institutions have either collapsed, been discredited, or are unacceptable to one or more groups, an interim constitution is usually adopted to provide for the governance of the country until a new government under a new constitution is established, and to set out the road map (goals, institutions and procedures) for the making of the new constitution. Sometimes an interim constitution is short (especially when the previous constitution has been modified) and sometimes long and comprehensive (when the previous constitution is completely rejected). Sometimes interim arrangements take the form of a political agreement among the key actors.

In Nepal, the seven parliamentary parties that had negotiated a political alliance with the Maoists in 2005 were in favour of using the 1990 Constitution, with its unsuitable provisions modified or deleted, as an interim constitution, on the restoration of the House of Representatives (in a proclamation in May 2006, the seven parties attempted to do precisely this). Thus the modified older constitution became the Interim Constitution (although doubts had been raised by some about the legality of this procedure) for the period leading up to the inclusion of the Maoists in the legislature (and ultimately the government). The Maoists were not enamoured of the 1990 Constitution and had insisted on its replacement by a specially tailored constitution.

On 15 January 2007, that Interim Constitution was adopted by the former House of Representatives and ratified by the (new) Interim Legislature-Parliament. The Interim Constitution is a lengthy document and covers most topics that one would ordinarily find in a permanent constitution. But this chapter concerns itself with the process for a new constitution, the central feature of which is the Constituent Assembly.

The Constitution-making Process

In the last three years or so, there has been extensive discussion on how an inclusive and effective constitutional system of government could be established in Nepal. These discussions became all the more important as the institutions of the state came under severe attack from the Maoist insurgency, the House of Representatives was abolished, and the authoritarian rule of the monarchy replaced the parliamentary system of government. Negotiations between an alliance of seven parliamentary parties and the Maoists on 22 November 2005 led to an agreement that on the cessation of hostilities, a constituent assembly would be elected to frame a new constitution. One of the main demands of the 2006 *Jana Andolan* was that the new constitution should be made by a broadly representative constituent assembly, and thus in this agreement made between the chief political actors, considerable emphasis was placed on the sovereignty of the people and their participation in the constitution-making process. This defining characteristic of the process that would be adopted was emphasized in the second understanding among the parties, and the parties and their civic organizations promised that they would actively work 'to establish full democracy with the sovereignty and the state power of the country completely in people through the election of a constituent assembly on the basis of the determined process.'

The Interim Constitution gives effect to this agreement, guaranteeing a constituent assembly 'to formulate a new constitution by the people themselves' (Art. 63). Thus considerable public attention has focused on the composition and role of the Constituent Assembly, but it is doubtful if the provisions meet the test of an inclusive assembly or if the process will be particularly participatory.

Constituent Assembly: Membership and Representation

Originally, the Constituent Assembly was to have 425 members, consisting of three categories of members (Art. 63(3)): 205 members were to be elected in single-member constituencies in the 'first past the post' system; that is, the winner would be the person who won the largest number of votes, even if the winner could not garner an overall majority ('the first category'); 204 members were to be chosen on the basis of party lists, by a system under which voters would vote for a party ('the second category'); a party would be given seats in proportion to its share of the votes, and the party would draw its members from its list; the third category would consist of 16 persons prominent in national life, to be nominated by the Council of Ministers.

These provisions have been changed three times, as the result of agreements with various groups. The provisions now call for 240 single-member-constituency seats (designed to increase the number of seats in the Tarai) and 335 proportional-representation seats (the second category). The Interim Constitution provides that when parties are nominating

candidates for constituency seats, they must take inclusiveness into consideration. And when composing party lists, the parties have to ensure 'proportional representation of women, Dalits, oppressed tribes and indigenous tribes, backward regions, and *Madhesis* and other groups,' as provided in the law. The provision is more specific in the case of women: at least one-third of the total number of candidates from the two categories must be women. And there are now to be 26 members nominated by the Council of Ministers. These nominees will be selected from among distinguished persons and from ethnic and indigenous groups who fail to be represented as a result of the elections.

The terms 'proportional' or 'proportionality' as used in the directives regarding the Constituent Assembly connote two meanings: one meaning refers to proportionality between the parties, the other to proportionality among categories of communities and between the two genders. Achieving proportionality in the first sense does not necessarily mean that the second type of proportionality will also be achieved, but the Interim Constitution aims to achieve both types of proportionality at least among the second category of seats. The Constituent Assembly Election Law goes into more detail about this issue: The law requires that each party must have a certain percentage of candidates from specified groups in its list (*Janajatis*, *Madhesis*, Dalits, representatives of backward regions, and others [meaning hill Brahmins and Chhetris]). Within each group, half of the candidates must be women. After the elections, when the number of second-category seats that each party is entitled to has been determined, the parties will make their final selections from their lists, again respecting the same proportions outlined for inclusive representation. The parties are then entitled to deviate from the proportions to a limited extent.

There are various problems with these provisions that cannot be explored in this paper, but it must be said here that many groups fear that their hopes of being represented will not be completely fulfilled. In the first category of seats, there is no guarantee that even if the parties do respect the directive to take inclusiveness into consideration when nominating candidates, this will produce proportionality of members from the marginalized communities. In fact, there is widespread speculation that parties could place candidates from marginalized communities in those constituencies where the parties have the least prospects of success.

There is to be a two-vote system: voters will cast a separate vote for their constituency member and another for a party list. Voters will have the opportunity to calculate the impact of their votes, and to vote, if they so wish, for a geographical candidate on the basis of that individual's merit or party affiliation, and to vote for a list on the basis of the make-up of the party lists. But this system will only work if voters understand the system—if they have been educated about it. And it will only work if voters actually care enough about inclusiveness for the issue to affect their voting choices—if the issue of inclusiveness is more important than, say, their traditional choice of party.

Furthermore, even if members of marginalized communities were to be represented in significant numbers, the extent to which they would be able to present and lobby for the interests of their communities would be affected by the fact that virtually all their representation would be through the parties. Consequently, they would be subject to the party whip, which could inhibit their ability or willingness to lobby for their interests. This possibility of representatives from marginalized communities being subject to the parties' wishes, which has worried many sections of the marginalized communities, has been reinforced by the rule that a member may be removed if the party of which the member was a member at the time of the election gives notice that the member has left the party or no longer holds membership (presumably meaning that the party can effectively expel such a member) (Art. 67)).

There is also the fear that the 26 nominated persons will be distributed among the eight political parties for patronage purposes rather than to secure expertise and relevant experience. So they too could be subject to party discipline, a factor that could reduce the value of such membership (although the Interim Constitution prescribes, as one criterion for the registration of a party that its own constitution should provide for an effective system of discipline for its members (Art. 142(3 (d)).

In the Interim Constitution, the provisions regarding the Constituent Assembly election are biased in favour of political parties, rather than ethnic, community, or professional groups. This bias is particularly evident in certain provisions; for example, Article 142(5) says that while parties that are represented in the interim legislature are entitled to registration without showing significant support, other parties have to present signatures of at least 10,000 supporters. The second category of members will be elected on the basis of one national constituency, rather than on the basis of regional or zonal constituencies. This provision allows the central committees of the parties to increase their control over candidacies in the second category. Moreover, only political parties will be eligible for party-proportionality seats. There is a danger that such exclusive membership through the mechanism of existing parliamentary parties will exclude scholars, professionals, social workers, and special groups, like the disabled and linguistic minorities, all of whose participation is essential to ensure a balanced and professional constitution.

And attempts to set up new parties more closely related to the marginalized groups that discriminate in granting membership on ethnic or gender grounds or with objectives that 'would disturb the religious or communal harmony or divide the country' (Art. 142(4)) may run afoul of the rules in the Interim Constitution regarding rules about party formation. In fact, some sectional parties, especially pro-*Madhesi* parties, were registered, but they won exemption from the rule in the law which was mentioned in the Interim Constitution to ensure that only a certain percentage of members in an ethnic party could be members of the ethnic group the party was created to represent.

It has now been agreed that the Constituent Assembly will consist of 601 members. Such an assembly is undoubtedly very large and may not prove conducive for holding detailed discussions or for building consensus. To ensure proper participation in this large assembly, careful thought needs to be given to the procedures that must be followed in the Constituent Assembly: the procedures should not unduly prolong the proceedings, and yet they must offer proper opportunities for debate.

Free and Fair Elections to the Constituent Assembly

Whatever the system of voting adopted, there is general acceptance that the actual elections must be free and fair. The very first responsibility of the state is to ensure the conducting of a free and impartial election for the Constituent Assembly. This principle is stated in the agreements between the SPA and the Maoists and now constitutes the mandate of the United Nations Mission in Nepal (UNMIN). An independent electoral commission is to 'conduct, supervise, direct, and control the elections' to the Constituent Assembly (Art. 129). As a pre-condition to embarking on a free and fair electoral process, it has also been widely accepted that the weapons held by the Maoists (and a similar number of weapons belonging to the army) must be stored away, and all intimidation of citizens will have to be stopped. It is the responsibility of the Electoral Commission and UNMIN to ensure that these and other necessary conditions are met before elections are held.

But although the prime minister and other party leaders made several public statements of their commitment to the Constituent Assembly, and to the original June 2007 deadline for the Constituent Assembly election, progress on finalizing the details of the electoral laws was slow. As the parties had not consulted other groups, it became necessary, as shown above, to have consultations with the *Madhesis*, *Janajatis*, and Dalits. Thus the June deadline could not be met, and the Interim Constitution was amended to extend the deadline to mid-November 2007. But even though a new scheme for representation was successfully negotiated, elections could not be held in November either because the Maoists threatened to boycott the elections unless certain demands were met. By the time the demands were settled, it was too late to hold the elections in November, and the constitution was amended yet again, this time specifying that elections would be held by the middle of April 2008.

Procedures for Dealing with Election Disputes

A special court known as the Constituent Assembly Court is to be established to resolve complaints regarding elections to the Constituent Assembly (Art. 118). Petitions regarding electoral disputes can only be submitted in this court. Only this court, and not even the Supreme Court, can interpret the law on electoral issues (Art. 102(4)).

Fundamental Binding Constitutional Principles that Underlie the Mandate of the Constituent Assembly

As discussed in chapter 5, there are considerable advantages in adopting fundamental constitutional principles in order to bind or guide the constitution-making process, in terms of the contents of the new constitution. That chapter shows the kinds of fundamental principles that emerged from the 2006 *Jana Andolan*, the Comprehensive Peace Agreement, and the Interim Constitution. The Interim Constitution does not clearly specify that the Constituent Assembly is bound by any fundamental principles, except decentralization of state power in the form of federalism. But the Interim Constitution does contain many fundamental principles of state policy and directive principles, and it could be argued that these principles are intended to be the guidelines for the Constituent Assembly.

The most important of these principles pertains to the restructuring of the state, which appears in several places in the Interim Constitution (the issue is discussed in detail in the chapter on restructuring and federalism). For example, the chapter on the form of state and local self-governance calls for the 'inclusive, democratic, and progressive restructuring of the state' to bring about 'an end to the discrimination based on class, caste, language, sex, culture, religion, and region by eliminating the centralized and unitary form of the state' (Art. 138).

We find that Articles 33 and 34 contain many broad principles (set out in more detail in chapter 5), just as the preamble of the Interim Constitution does. Many of these articles are concerned with democracy, inclusiveness, participation, human rights, and self-governance. None of these articles is binding, in the sense that persons could not go to court claiming that these principles had been breached. Instead, these principles are meant to be guidelines for the state. These goals are indeed the inspiration for and the aspirations of the *Jana Andolan*, and since the Constituent Assembly is the child of the *Jana Andolan*, it is not unreasonable to argue that these goals have the status of fundamental constitutional principles and that they bind the Constituent Assembly.

However, despite the emphasis on, and the frequent reiteration of these goals, the Interim Constitution does not provide for any method for adopting these principles in the new constitution, to verify or certify that the new constitution has successfully and effectively incorporated them.

High Level Commission on Restructuring

A High Level Commission is to be set up by the government to make recommendations on the restructuring of the state (Art. 138). The term 'restructuring' is used in Nepal to mean changes that will need to be made in the structure and institutions of government, measures that will need to be taken to advance historically disadvantaged communities,

methods of governance that will need to be adopted to ensure a greater degree of public participation, and so on. In the Interim Constitution, however, it seems that the term 'restructuring' is used in a narrower sense, referring only to the elimination of the 'centralized and unitary form of the state,' and the term is used to respond to the demand for a federal or devolved system. But this concept of restructuring ('inclusive, democratic, and progressive') actually refers to a broad and ambitious agenda: to bring to an end discrimination based on 'class, caste, language, sex, culture, religion, and region' (not all of which might be compatible). There is considerable controversy on whether the basis of federalism should be ethnicity ('cultural') or geography ('developmental'), and Article 138 does not resolve this controversy, as it refers to both 'caste, language, and religion' and 'region.' A detailed discussion of federalism and restructuring is contained in chapter 14.

Federalism or devolution is a complicated and controversial issue and will require careful thought. The High Level Commission (yet to be appointed 19 months after the enactment of the Interim Constitution, as this book goes to press), can provide a useful source of ideas, analyses, and options for the Constituent Assembly if the commission is independent and is run by experts. It is unclear whether the commission's recommendations are to be made directly to the Constituent Assembly or if the recommendations are to be vetted by the government, although Article 138(3) does state that the final decision on the restructuring would be made by the Constituent Assembly.

Time Lines

The general principle is that the Constituent Assembly shall function for two years from the time of its first meeting (Art. 64) (the first meeting must be held within 21 days after the election results are announced (Art. 69). However, the Constituent Assembly may dissolve itself earlier by a resolution (Art. 64). No explanation is provided as to the reasons for which an earlier dissolution may be made. The only justifiable reason would be if the constitution were to be adopted before the two-year tenure of the Constituent Assembly comes to an end. But that possibility is already provided for in Article 82, which says that save for a temporary extension to enable elections to the legislature under the new constitution to be held, the Constituent Assembly would automatically be dissolved on the adoption of the new constitution. There may indeed be a case for the dissolution of the Constituent Assembly if it fails to meet the deadline (or the extended deadline under Article 64, as was stipulated in the Iraqi Interim Constitution). But might there be any justification for a premature dissolution of the Constituent Assembly by its members (given that the members will be elected to enact the new constitution)? Could this power of dissolution be used to disrupt—indeed permanently sabotage—the Constituent Assembly if the nature of constitutional changes to be made were not to suit the political party with the majority of members? And what majority

would be required to pass the resolution? (Normally resolutions can be passed by a simple majority of members present and voting, unless expressly provided otherwise (Art. 68), as would be the case for the adoption of the new constitution.)

It is also possible to extend the life of the Constituent Assembly for another six months, by a resolution of the Constituent Assembly, if the constitution is not ready due to 'an emergency situation in the country' (Art. 64). As defined in Article 143, 'war, external invasion, armed rebellion, or extreme economic disarray' could lead the government to formally declare an emergency. Article 64 could, therefore, be read as requiring the Constituent Assembly to finish its task within the two years, but for any exceptional situation, and even in that situation, it has to complete the work within the period of extension (which presumably cannot be extended further—in Iraq, the word 'one off' was used to specify that no further extension would be possible, and in the case of failure, the Constituent Assembly would automatically be dissolved). The extension would require a resolution passed by a simple majority of members present and voting.

Presumably, to justify the extension, it would be necessary for the Constituent Assembly to establish that the delay was caused by the proclamation of an emergency. But what if the proclamation takes place a week before the end of the stipulated two-year tenure of the Constituent Assembly? And there has been no provision made for a scenario in which an emergency has not been declared but the Constituent Assembly's task still has not been finished. Should such a situation result in the automatic dissolution of the Constituent Assembly?

On the question of the duration of the Constituent Assembly or the length of time allowed for the conclusion of the process, there are generally two opposing views. One says that constitution making is so critical to the future of the country that it should not be rushed; that people must be given ample opportunities to participate in the process; and that there must be enough time provided for educating the people and to consult with them. Others argue that if too much time is allowed, the members of the Constituent Assembly, not wanting to let go of the prestige and financial benefits of membership, will drag out the process as long as possible. If the process is unduly stretched for this or other reasons (e.g., if the ruling clique opposes reform), the opportunity for change may be lost. Constitution reform is a highly political process, with great but also narrow interests at stake, and there are always people who are willing to sabotage the process. A drawn-out process gives such people ample opportunities to do so. On the other hand, given the kinds of purposes served by the process (for example, the people and the representatives will have to educate themselves on the purpose and structure of the state and on questions of public policy), the presumption must be against a rushed process. What constitutes a happy medium between too long and too short a process depends on the context, and on whether the people are knowledgeable

enough to engage in the process. But because the elections have been delayed, people have had some opportunities to learn about the process, through the efforts of local and international organizations (including International IDEA and UNDP), and the prolonged interim period has given the people the time to discuss the substantive issues, like federalism and the rights of marginalized groups. A number of books and pamphlets regarding these central issues have been published, and there have also been some negotiations between the government and representatives of marginalized groups (including *Madhesis*) that have clarified the kinds of issues that must be negotiated in the Constituent Assembly. Since this process of education and consultation has, to an extent, been carried out, it should be possible for the Constituent Assembly to make relatively speedy progress.

The Rules and Procedures of the Constituent Assembly

The Constituent Assembly will perform a dual role—as a constitution-making body and as a legislature. To some extent, the two tasks are different and may require different procedures. Parliamentary procedures are quite technical, and those members of the assembly not familiar with them may find themselves at a disadvantage. The rules for the Constituent Assembly's constitution-making function should be made simpler and more facilitative of exchanges and should not have too many points of order. If the Constituent Assembly utilizes the provision in the Interim Constitution for it to set up a legislative affairs committee, it would be easier to have two different sets of procedural rules (Art. 83(1)). In any case, the Constituent Assembly in its role as a legislature will be bound by the normal rules of financial procedures (Art. 83(4)).

In general, it is left up to the Constituent Assembly to determine the rules of its procedures, subject to the provisions of the Interim Constitution (Art. 78). The most important of these rules concerns the system of voting (which is discussed separately in this paper). The first meeting is to be convened by the prime minister within 21 days of the elections; subsequent meetings will be convened by the presiding officer, or on the request, for good reason, of one-fourth of the members (Art. 69). The Constituent Assembly will elect its chairperson and vice-chairperson from among its members, subject to the proviso that both should not come from the same party (Art. 71). For most purposes, the quorum will be one-fourth of the total membership, but when decisions regarding the new constitution are to be made, then at least two-thirds of the entire membership will need to be present to constitute a quorum (Art. 70(2)). Decisions other than those about the new constitution are to be made by a simple majority of members present and voting (Art. 75).

According to Article 74, a vote cast by a non-member cannot be invalidated. This rule may need to be reconsidered, at least for occasions when issues such as the inclusion of provisions in the new constitution are being determined, for a vote by a non-member may prove to be decisive.

Privileges of the Constituent Assembly

In order to ensure complete freedom of speech in the Constituent Assembly, no member of the Constituent Assembly can be 'arrested, detained or prosecuted in any court for anything said or for any vote cast in the Constituent Assembly' (Art. 77). Persons who publish any documents or reports regarding the votes taken or proceedings made under the authority of the Constituent Assembly are immune from any legal proceedings. Members cannot be arrested during the period of constitution drafting, except on a criminal charge.

The Constituent Assembly has been given considerable authority to protect its proceedings from external control as well as to discipline outsiders who criticize it. The Constituent Assembly and its committees have been given the 'exclusive power to decide whether or not any proceeding is regular' (Art. 77(6)). Courts are excluded from making any enquiry into these matters.

The Interim Constitution prohibits anyone from making any comments 'about good faith concerning any proceeding of the Constituent Assembly' as well as any 'publication of any kind' about 'anything said by any member which intentionally misinterprets or distorts the meaning of the expression' (Art. 77(3)).

The violation of any of these privileges constitutes contempt of the Constituent Assembly. The Constituent Assembly is the sole judge of whether a violation has been committed. If the Constituent Assembly decides that a person has committed contempt, the chairperson, in consultation with the Assembly, may issue a reprimand or impose a fine or order the imprisonment of the person. Presumably, there is no appeal from this decision to the courts or other authority.

But while it is true that the issues that the Constituent Assembly will consider and decide on are so fundamental to the future of Nepal that there should be the least restrictions on free speech and debate in the Constituent Assembly, some of the privileges that the Constituent Assembly has been endowed with seem excessive: the Constituent Assembly should not be protected from judicial review if its members commit legal irregularities; the chair should not be able to punish those who are critical of the Constituent Assembly ('judge in their own cause'); and the Constituent Assembly should be accountable.

System to Be Used for Voting on the New Constitution

The Constituent Assembly will vote separately on the preamble and on each article of the bill for the constitution (Art. 70). At the first voting, the proposed provision will be passed only by unanimity (that is, only if no member votes against the provision; so presumably, an abstention from voting is not counted as a negative vote). If unanimity cannot be achieved, the political leaders of the parliamentary (legislative) parties 'shall

carry out mutual consultation to develop consensus' (Art. 70 (3)). A maximum period of 15 days is allowed for consultation. Within seven days after the consultation is concluded, a vote may be taken again. If there is still no unanimity, a further vote may be taken during which, if a two-thirds majority votes in favour of the provision, the provision is passed.

But the rules regarding unanimity may cause problems too. For one, while it is good to have a rule that encourages consensus, unanimity is almost impossible to achieve; also, if the rules state that in the absence of unanimity, a two-thirds majority suffices, the majority may have little incentive to compromise.

It is also undesirable that only party leaders should be involved in consensus-building exercises—perhaps the drafting committee assumed that only parties will be able to contest elections.

Public Consultation and Participation

As stated in the preamble, a primary goal of the Interim Constitution is to guarantee 'the rights of the Nepali people to frame a constitution for themselves.' The preamble also guarantees persons qualified to vote the right to participate in a 'free and impartial election of the Constituent Assembly in a fear-free environment.'

The Interim Constitution does not give the people the right to participate in the processes that lead up to the formation of the Constituent Assembly and during the Constituent Assembly's tenure. The original version of the Interim Constitution had provided for an awareness-raising committee to inform the public about the process and to collect their views and recommendations to assist in the drafting of the constitution. The present version of the Constituent Assembly does not contain any such provision, although it does provide for a commission to make recommendations on the restructuring of the state (Art. 138, discussed above).

Since the Constituent Assembly is free to establish rules for its procedure, it would be possible for the Constituent Assembly to provide for a greater degree of participation (for example, by setting up a committee of its members to consult with the people, or by inviting views and recommendations from the public). But might the Constituent Assembly also be able to require that the new constitution be put up for approval in a referendum to the public? Article 157 authorizes the Constituent Assembly, through a vote of two-thirds of members present, to refer to a referendum matters of 'national importance' on which it is necessary to make a decision ('except as otherwise provided elsewhere in the constitution'). The purpose and scope of this article is not immediately clear, but some clues regarding its function may be gleaned by noting where the article has been placed in the Interim Constitution and by parsing the definition of what constitutes conditions under which the article can be used: the article is located in the chapter titled 'Miscellaneous,' just before the article dealing with the 'power to remove

difficulties'; and the referendum is to deal with a matter not 'otherwise provided elsewhere in the constitution.' This treatment accorded the article suggests that a referendum may be used for deciding the outcome of something unexpected, something sufficiently critical that it must be decided by the people, regardless of the cost or complexity of a referendum. As the procedures for the adoption of provisions of the new constitution are set out at some length in Part 7 of the Interim Constitution, it is unlikely that the referendum can be used to resolve an issue relating to the new constitution.

How and When the New Constitution Will Come into Force

There are no express provisions in the Interim Constitution about when the new constitution would come into force. Perhaps it is assumed that it would come into force on the day specified in the new constitution. That day could be the date of its adoption by the Constituent Assembly, but it would be possible for the Constituent Assembly to postpone the time of its coming into force. Could the Constituent Assembly specify that the constitution would become effective only if it were to be approved in a referendum? The answer, as indicated in the preceding paragraph, is a likely 'no.' It is relevant to note here that Article 64 envisages that the maximum duration of the Constituent Assembly will be two years (with the possibility of an extension for another six months). Presumably, if the Constituent Assembly were to continue after its two-year tenure, it would then be necessary to move to new constitutional arrangements. But Article 82 envisages the possibility of the Constituent Assembly's continuing until elections for the first legislature under the new constitution are held. It is unclear for how long the new elections can be postponed. It is also unclear whether the coming into force of the entirety of the new constitution can be postponed, or merely the parts dealing with the legislature. It would be important for the Constituent Assembly to specify these matters clearly in the transitional provisions of the new constitution.

Amending the Interim Constitution

There is only one method for amending the contents of the Interim Constitution. An amendment can be passed if it is voted for by at least two-thirds of all the existing members. Since members of parties are subject to party discipline, and because all important decisions are being taken by party leaders, the leaders of the three main parties have been able to change the Interim Constitution at will. As of now, there is no real entrenchment of the provisions of the Interim Constitution; indeed, we have seen how easily they have been changed on five occasions. This flaw in the procedures for amendment has somewhat devalued the Interim Constitution and its image as a supreme, constitutional document.

Normally, an important function of an interim constitution is to entrench decisions in the road map, and in this way to give to the people a sense of security and predictability

about the process. While there is an advantage to having a flexible interim constitution, that flexibility is only desirable for provisions that pertain to the interim arrangements, rather than for the roadmap to the new constitution. A culture of changing the Interim Constitution at will may allow more groups who are unhappy about the original provisions, or the changed provisions, to advance their own claims for amendment. It is unlikely that this 'flexibility' is good for the overall process.

Nor is the procedure whereby these changes are negotiated good for the process. These negotiations take place between the seven parties on the one hand and the 'agitating' community on the other. These sorts of bilateral negotiations are inconsistent with the notion of a constituent assembly, where all interest groups get together to examine all claims and to settle differences. Neither the eight parties nor the interim government has any electoral mandate or legitimacy to negotiate these claims. This mode of negotiations also gives the impression that it is within the authority and grace of the seven parties (for the most part representing the old elite) to make concessions to the marginalized communities—thus reinforcing forms of relations that are to be eliminated.

Conclusion

A Constituent Assembly of over six hundred members is perhaps not ideally suited to frame a constitution. There will be complex problems of logistics, funding, accommodation, and most of all, with devising appropriate forums and venues for meaningful negotiations (in committees that may have as many as 80 members).

It is clear that the constitution-making process will be dominated by political parties. And among the political parties, the most influential members will probably be drawn from the same circle that dominated the constitution-making process in 1990. Such a setup may not be fully compatible with Nepal's new credo of inclusiveness. After all, it is from the widely held perception of lack of inclusiveness that many of the challenges to the Interim Constitution have come. Even if excluded groups are now admitted to the Constituent Assembly, they will have to be included as members of, mostly, established parties, and thus their influence will be marginal.

It is also essential that adequate preparations be made to assist the Constituent Assembly. An independent commission could still make a big difference. If an independent commission is not set up, then civil society organizations, such as universities and think tanks and NGOs, must make up the deficit. They must undertake research on the complex issues that the Constituent Assembly will face, and they must mobilize the people to participate in the process.

Finally, there is a lack of space for the people, in general, and civil society, in particular, contrary to the earlier commitments made by the seven parties now in government.

The Interim Constitution has no provisions for the involvement of the people, other than in their capacities as voters. The participation of the people would depend on their own efforts or on the efforts of the private sector and civil society. Since full and active participation is essential for the transition to a new Nepal, civil society must now take the matter in its own hands.