

A Simple Guide to the Interim Constitution of Nepal 2007

What is a Constitution? It is a set of rules about how government is formed and how it works and what the rights of the people are. In most countries these rules are found in one large document. In Nepal now the document is “The Interim Constitution of Nepal” and it became a law on January 15 2007.

It is the “Interim” Constitution because it is intended to exist only until a new Constitution has been made by the people of Nepal through the Constituent Assembly. An agreement to have a Constituent Assembly and a new Constitution was one of the results of the jana andolan II in 2006.

When the Constituent Assembly prepares a new Constitution it does not have to use any of the rules in the Interim Constitution. But it may decide that some of those rules are still useful. The purpose of this Simple Guide is to give readers some idea of what a Constitution can include. As you read, you can think about whether you would like to see the same rule in the new, final Constitution, of whether you would want to see something different. And some topics that might be in a Constitution are not included in the Interim Constitution at all.

At the beginning is the “Preamble” – this explains why the Constitution has been prepared, mentioning the people’s movement, and the need for democracy and for a new Constitution.

The Interim Constitution is then divided into chapters on different topics. The first chapter states some basic things about the Constitution and about Nepal. It says that the Constitution is such an important law that no other laws must contradict it, and everyone, including the government, must obey it. It says that Nepal is a “secular” state – which means that the state is not attached to one particular religion – unlike the 1990 Constitution which said that Nepal was a Hindu Kingdom. This does not mean that it is against religion – just that religion is a personal not a government matter. It says that Nepali is the official language, but all other languages spoken in Nepal are national languages and they can be used in local offices. Exactly what it means to say a language is an “official language” varies from country to country. Chapter I also says what the national flag is, as well as the national animal, flower and bird.

Chapter 2 is about Citizenship. A citizen is a person who can say “I am a Nepalese”. Such a person can get a passport of the country. In many countries citizens are the only people who can vote in elections. They have special rights as citizens, and also special responsibilities. Chapter 2 says that any person whose father or mother is Nepalese is Nepalese, and that other people can become Nepalese (including the wife of a Nepalese man). No person who is a Nepalese citizen can at the same time be a citizen of another country (not all countries have a rule like this).

Chapter 3 is a very important chapter. It is about human rights. These are the rights which we all have because we are human. But some of the rights in the Interim constitution apply only to citizens; this is all right for some rights, but in many constitutions most rights are for all people within the country – because they are all human. Human rights in a constitution are political – they indicate to the government what would be the right behaviour – but they are also legal rights. A person who has

suffered because the government has violated the rights should have a legal claim for compensation. Sometimes it is more effective to complain to a body like the Human Rights Commission though.

So what are the rights recognised in the Interim Constitution? They are the right to a dignified life, to liberty, freedom of speech, freedom to join with others in gatherings or associations. Everyone is equal, and there must be no discrimination just because a person is of a certain sex, or ethnic group or caste, or speaks a certain language or believes in a certain religion. Discriminating against someone because of their race or because they are “untouchable” must be something for which they can be punished under the law. There is a right to a clean environment and a right to basic health care. There is a right to free primary and secondary education. Certain rights are guaranteed for children and for women. There are rights to property, and rights to social security in some situations. And there is a right to practise one’s religion – but this right only applies to the religion into which a person was born. There are rights to a fair trial for people accused of a crime, and a right not to be tortured. There is a right to information, a right to privacy, and right not to be exploited and a right to fair labour conditions. Some of these rights need law to be passed before they will actually be useful. This is not a complete list of the rights. And some of the rights are limited – because this may be necessary for the benefit of all in some circumstances.

An important point is how does one actually protect one’s rights? Later in the Constitution it says that the Supreme Court can make orders to enforce human rights. The Human Rights Commission also has the responsibility to protect human rights.

Chapter 4 is called Responsibilities, Directive Principles and Policies of The State. Here we find first article 44 which is about the state’s responsibilities to move to the Constituent Assembly, with elections by mid-June, and to various other things that would carry out the demands of the jana andolan. So the government must repeal all discriminatory laws, it must restructure the state to do way with injustice, it must set up a Truth and Reconciliation Commission, and in various ways improve society. This is a big agenda for an interim period!

This is followed by some Directive Principles and State Policies. These are rather similar but not so clearly related to the transitional period. In fact many of them were in the 1990 Constitution. For example there must be special provision for women’s health and education to improve their involvement in national life (this was in the 1990 Constitution, too). And there must be reservations for a certain time for marginalised and poor communities in connection with education, health, housing, food sovereignty and employment. Reservations means that special arrangements must be made. Although lots of hopeful ideas are included here, it is important to realise that no-one could take the government to court claiming that it had not done anything about these things. This is expressly stated – and makes these principles and policies different from the rights.

Chapter 5 is about the Executive – the Government. It says the Prime Minister – the heads of government – must be chosen by consensus between the 8 parties. If this cannot be achieved the Prime Minister must have the support of two-thirds of the members of the House of Representatives. Then there must be a Deputy Prime Minister and other Ministers. These must also be chosen by agreement between the

parties. It goes on to say how a Minister resigns. It also says that a person who is not a member of the House of Representatives could become a Minister.

Chapter 6 is about the Legislature Parliament. This used to be called just “Parliament”. It is the body that makes law. The constitution says who are the members – it is unusual because it says that the existing members (elected in 1999) remain members, and that the parties were to choose some extra members, from civil society and the grassroots. Also the Maoist party members were not to be elected but chosen by the party. It says that business of the house must be conducted on the basis of “political consensus” – but also says that in case a decision has to be made this must usually be by a simple majority of the members who vote. There are rules about quorum – how many members must be present for the house to carry on its business: the answer is one quarter. There are rules about qualifications to be a members, about choosing the person who presides (the Speaker), about freedom of speech for members. It also says that no-one else can accuse the members of bad faith – something that is taken from the 1990 Constitution. It says the House can adopt its own rules of procedure. In order to protect the independence of the courts no case that is being heard in court can be discussed in the legislature. The Interim Constitution is not very clear about what the Legislature Parliament actually does (except for making laws as we shall see). But the other roles of a legislature include keeping a watch over the government, including questioning Ministers, and investigating matters through its committees.

Once the CA comes into existence it will do the work of parliament and the current parliament will cease to exist.

Chapter 7 is about the Constituent Assembly, which has the task of making a new constitution for Nepal. It says members will be elected – some from constituencies with one member each and some in party lists. The parties must be “inclusive” in choosing candidates for the constituencies, and ensure proportionate representation of women, Dalits, indigenous tribes, people from backward regions, Madhesi and other groups in their lists for the second election. And overall at least one-third candidates must be women. It says the CA will be in existence for 2 years. It says members must have certain qualifications – same as for the Members of the House. It has similar rules for everyday business as for the Parliament. But for passing the constitution the aim is for consensus. But if someone votes against any proposed article of the constitution, this must be referred to a meeting of party leaders to try to reach agreement. If this can’t be done, an article in the new constitution has to have two-thirds support to be passed.

Chapter 8 is called “legislative procedure” and is about how laws (except for the new Constitution) must be passed. Laws must be signed by the Speaker (laws used to be signed by the King). If the legislature is not sitting and there is need for a law, the Government may pass it as an “Ordinance” – but it must later be approved by the legislature.

Chapter 9 is about money – about financial procedure. No taxes can be raised, and no money borrowed by the Government without a law. All government money must be paid into a central account – called the “Consolidated fund” and nothing must be paid out of it without authority under a law. Most expenditure will be made after

discussion in the annual budget. But certain expenses are automatically paid without such discussion – this is to prevent interference with certain offices, including the judges of the Supreme Court. The chapter sets out the normal procedure for presenting an annual budget and having it approved by parliament. There are also special situations – like unexpected expenditure, which are given special procedures.

Chapter 10 is about the courts: it is called “The Judiciary”. It creates the Supreme Court, the Appellate Courts and the District Courts and says what their basic powers are. It says who is qualified to become a judge. It says that The Chief Justice is appointed by the Prime Minister, but this must be on the recommendation of the Constitutional Council. (You will find the Constitutional Council is now made up of the Prime Minister, the Chief Justice (or the Minister of Justice when the Chief Justice is to be appointed) the Speaker and three other Ministers, chosen by the Prime Minister– see Article 149). The other judges are appointed on the recommendation of the Judicial Council – which consists of the Chief Justice, the Minister of Justice, another Supreme Court Judge, an advocate and a scholar of law. It says that Supreme Court Judges can only be removed if there is a resolution passed by two-thirds of the Legislature. Other judges can be removed by the Judicial Council for misbehaviour and other reasons. It says that with a few exceptions judges must not do any other sort of work except that of a judge.

A very important provision is that about using the Supreme Court to protect rights. A citizen can apply to the court for any law to be declared contrary to the Constitution. The Court can actually say that the law has no force in the future – but anything that has been done under the law before the court decision can stand. The court also can issue orders to enforce fundamental rights – and this is not restricted to citizens.

There is also a Judicial Services Commission to deal with the appointments etc. of members of the judicial service who are not judges. This body has similar membership to the Judicial Council: Chief Justice, the Minister of Justice, another Supreme Court Judge but also the Chair of the Public Service Commission and the Attorney-General.

Every year the Supreme Court must make a report to the Prime Minister – and this must include various facts and figures, and whether any remarks have been made about judges when cases have gone to higher courts on appeal.

A special court is set up to deal with complaints about the elections to the CA.

Chapter 11 is about the Commission for the Investigation of Abuse of Authority. This important body is designed to investigate people who have been accused of having done something wrong or being corrupt, when they are holding some public office. The Prime Minister appoints the members of the Commission – but the recommendation must come from the Constitutional Council. Members must be at least 45 years old and experienced in some area of life like engineering or law or accounting. And they must not be members of a political party, but must have a good character – they must not be known to have done wrong things. So that the members can be fearless in their investigations they cannot be easily dismissed – in this they are like Supreme Court Justices. They only hold the job for 6 years. What could the Commission do if it thought that someone had done wrong? It can report the person to

their department, or other body like the Public Service Commission for disciplinary action. And they can take a case to court. Every year they must report on their activities to the Prime Minister.

Chapter 12 is about the Auditor General, whose responsibility, like that of the Commission in Chapter 11, is to ensure accountability of government and public officials. He is appointed rather in the same way as Commission members, and it is hard to dismiss him or her. The work of the office is to check on the way money has been spent – was it spent on the purposes that had been approved by the law and by the relevant ministry? He or she must look at the expenditure by the government, the legislature, the military, the courts and many other public bodies. As well as seeing whether the law has been obeyed, and proper accounting standards applied, the Auditor-General must decide whether the use of the money has been effective and efficient. So the idea is to see not only whether there has been corruption or inefficiency but also whether the public are getting value for their money.

Chapter 13 is on the Public Service Commission, which has some important functions in connection with the civil service. It conducts the exams for entry into the civil service, and it gives advice about appointments generally and about individuals. Half of its members must have worked in the public service for over 20 years and the rest must be people from other walks of life. Like other commissions its members serve for 6 years, and the Commission must make an annual report.

Chapter 14 is about the Election Commission, which runs elections – and will be in charge of the election for the Constituent Assembly. Their responsibilities include registering voters, and political parties, and preparing laws about the elections, to be passed by the Legislature Parliament. Like other commissions, the members are appointed by the Prime Minister but the names come from the Constitutional Council. There must be a Chief Commissioner and could be as many as four other commissioners.

Chapter 15 is about the National Human Rights Commission. The Commission has existed for some time but this is the first time it has been mentioned in the Constitution. There must be a chairman (who must be a retired Chief Justice or Supreme Court Judges) and 4 other members. The other members must have experience in human rights work or social work. Members must come from a wide range of backgrounds – including women. They are appointed by the Prime Minister – on the recommendation of the Constitutional Council. The work of the Human Rights Commission is to investigate accusations of human rights violations, to make recommendations to authorities to take action, including punishment of people who have violated human rights, to suggest taking action in court for human rights violations, and to publicise human rights – working with civil society. It is also supposed to study the laws of Nepal to see whether they meet human rights standards. They are to give advice to the country on becoming a party to human rights treaties. And they are to monitor how the government complies with human rights treaties and make proposal for improving the country's human rights performance. The Commission is given some special powers to do its work. It can call people to give it information. It can enter premises to find evidence. It can order compensation to people who have suffered because of human rights violations. It is supposed not to inquire into anything that is dealt with the Army Act – which deals with the

administration and discipline of the Army. But on the other hand, this does not apply if there is a violation of human rights (or humanitarian law). It must report annually to the Prime Minister.

Chapter 16 is about the Attorney-General who is the legal advisor of the Government. He or she gives advice to the Government itself and to other public bodies and can appear in court as the government's lawyer. There are other functions including investigating a complaint that a person who was in prison or somehow in custody was treated in a way that violated human rights. And the A-G is supposed to watch the work of the Supreme Court and how it interprets and applies the law (but it does not say what the A-G is to do with this information). The A-G can go to the Legislature Parliament and express any views before it. The A-G is appointed by the Prime Minister and can be dismissed by the Prime Minister. He or she must have qualifications that are good enough that he or she could be appointed as a judge of the Supreme Court.

Chapter 17 is called "Form of State and Local Self governance". One Article of this is about Nepal becoming a federal state. At first it said that the Constituent Assembly would decide this, but the Interim Constitution was amended so that it now says Nepal will be a federal state. But it does not give any details. It does say that the state must be re-structured to remove discrimination. A High Level Commission is to be appointed to make proposals on the details of the restructuring. The Chapter also deals with local government. It says that the political parties must agree on a system of local self-government at the District, Municipality and Village levels. This is to be an interim arrangement – which must mean until the Constituent Assembly has made final recommendations. Responsibilities – and the resources needed to carry them out – must be shared between the national government and the other levels. The whole system must ensure fair development, and especially it must take care of the backward groups. A new law is needed about this local government system.

Chapter 18 is about political parties. It says people have a right to form political parties. And no law must interfere with this. Also no law must permit a one-party system in Nepal. In order to be able to register a political party must support the spirit of the preamble – we looked at this earlier. The parties must show that they are democratic –including having elections for their officers at least once in 5 years. And they must supply information about their sources of finance, and about their manifesto – that is their appeal to the voters. There are some other restrictions on registering a party; these include a rule that there must be no discrimination about party membership on the basis of religion, caste, tribe, language or sex. This means that there cannot be a women-only party or a party for dalits only. And the party cannot be registered if its purposes or its symbols are likely to disturb the religious or communal harmony or might divide the country, or if it formed to push for a no-party state or a one-party state. If they want to contest election parties must register with the Election Commission. For the Constituent Assembly elections a new party must produce the signatures of 10,000 people in support – but this does not apply to the parties that have members in the Legislature Parliament now.

Chapter 19 is about arrangements for dealing with situations of emergency. This may be by war, invasion, armed rebellion or "extreme economic disarray" – it does not mention natural disaster like earthquake or floods. In such a situation the Council of

Ministers can declare a “state of emergency” which will give them extra powers to cope with the situation and also enable them to ignore some of the human rights in chapter 4. The state of emergency must be approved by the Legislature Parliament within one month and can’t last for more than 3 months without further approval from the Legislature. Two-thirds of the Legislature Parliament must vote for the state of emergency if it is to be valid. If any official causes damage, like damaging property to prepare defences against invasion, the person whose property was damaged can claim compensation.

Chapter 20 is about the army. It says that the commander in chief is appointed by the Council of Ministers, and the Council of Ministers manages the Army. The Council of Ministers must prepare, and carry out, a plan for the democratization of the Army; the plan must have the consent of the political parties and the Council of Ministers must consult the relevant committee of the Legislature-Parliament about it. This plan must include training for the army in democracy and human rights. There must be a National Defence Council which makes recommendations to the Council of Ministers about the Army. The Defence Council consists of 6 Ministers (the Prime Minister, the Defence and Home Ministers and 3 others). If the Army is brought into action (except to deal with a natural disaster) this must be approved by a special committee of the Legislature Parliament within one month. The Council of Minister must form a special committee to deal with the question of integrating and rehabilitating the Maoist Army. Other matters about the Maoist Army must be done as agreed in the peace agreements.

Chapter 21 says that the Interim Constitution can be changed by a vote of at least two-thirds of those members of the Legislature Parliament who are present at the time of the vote. This procedure was used to change the Constitution twice in 2007.

Chapter 22 is called “Miscellaneous”, and it does various things. It creates the Constitutional Council. This is made up of the Prime Minister, the Chief Justice, the Speaker of the Legislature Parliament and three Ministers chosen by the Prime Minister. The Chapter says that the Council of Minister appoints Nepalese Ambassadors. The Council of Ministers also has the power to pardon people convicted of criminal offences, and if anyone is convicted they can suspend the sentence, or change the sentence to something less serious or even say that the person will not serve the sentence at all. Any honours and titles to be given by the state are given by the Prime Minister. It is not clear if he also decides on the honours. No Nepal citizen can accept any honour from a foreign country without Nepal government approval. The Government can create the civil service and any other services needed to run the country. There must be a law to deal with this. The Government may set up special commissions to protect the rights of women, Dalits, indigenous ethnic groups, Madhesis, disabled, labourers or farmers and others. When any person is appointed to be a member of any Commission there must be a hearing before the legislature parliament. A law must deal with this. There is also a rule about qualifications for people appointed to positions under the constitution: they must be citizens and must, if they are naturalised citizens, have lived in Nepal for 10 years.

There is also a rule about approval of treaties entered into by Nepal. If they deal with certain important topics, including peace, security, the boundaries of Nepal or natural resources, they must be approved by two-thirds of all the members of the Legislature

Parliament. But if it is a less serious treaty it can be approved by an ordinary majority of the members. There is also a provision for a referendum (a vote of all the people) if some matter of national importance is to be decided. The Constituent Assembly can refer such a matter to the people in this way – unless the Constitution says that the matter must be decided in some other way. There has been some discussion about a referendum to decide on future of the monarchy. But this is said in the Constitution to be decided by the Constituent Assembly itself, so the Constitution would have to be amended in order for this to be referred to a referendum. There is a final provision which says that if there is any difficulty in connection with implementation of the Constitution, the Council of Ministers could issue any orders to remove the difficulties – but this must be approved by the Legislature-Parliament or the Constituent Assembly within a month.

Chapter 23 deals with what are called “Transitional Issues” This means things that must be done because there is a new constitution and a new situation in the country. These are: the king has no powers in connection with government; and the Prime Minister is the person responsible for the governance of the country. The Constituent Assembly must decide, at its first meeting, about the future of the monarchy. All property of late King Birendra, late Queen Aishwarya and other members of their family must be put in a Trust so that the property can be used for the benefit of the nation. All property acquired by King Gyanendra as King must be nationalized. The existing Council of Ministers is to continue until a new one was created under this Constitution. As soon as the Constitution was adopted by the House of Representatives the existing Parliament was to be dissolved and the new Legislature-Parliament was to sit on the same day. Any Bills for new laws being considered by the old parliament would be transferred to the new. Existing judges remained in office and continued to hear cases but had to take a new path of office under the Interim Constitution. Any judge who refused would lose his or her job. There must be gradual reforms in courts to make the system, “independent, clean, impartial and competent”. Existing constitutional bodies would continue. The Human Rights Commission would continue until a new one was set up under the Constitution. All existing laws would continue. But any laws that are not consistent with the Constitution cease to be valid after three months – but if only part of a law is inconsistent then only that part is invalid.

Chapter 24 defines a few words that are used in the Constitution. Chapter 25 says that the Interim Constitution must be passed by the House of Representatives and approved by the new Legislature Parliament (which happened on January 15 2007). And the 1990 Constitution ceases to exist.

The Constitution also has some Schedules. The first give details of the national flag. The second concerns the relationship between the Constitution and the Comprehensive Peace Agreement.