

Re-writing Fundamental Rights and Gender Issues in the New Constitution of Nepal

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Evolution of Fundamental Rights in Nepal

In Nepal, Fundamental Rights first found place in 1947's Constitution, inspired by discussion over the Universal Declaration of Human Rights and the Indian experience of constitution drafting. However, the subsequent constitution of 1950 only incorporated the Directive Principles of State Policies retrograding on the chapter of Fundamental Rights. The next constitution of 1958 retained the chapter on fundamental rights and was hugely inspired by the British experience. The fourth constitution of 1960 adopted both Fundamental Rights and Directive Principles of State Policies in two different chapters. The sixth constitution which came in democratic framework expanded the theme and content of rights along with the constitutional frame work on remedy to remedy. The existing Interim Constitution 2007 improves the content of rights-to some extent-and expands it scope on economic, social and cultural rights, but lacks the remedial part on it. In gender perspective, the Interim Constitution retains the affirmative provision on women in equality right and adds a new article on women's rights².

In the meantime, along with the evolution of the constitutional framework, the Fundamental Rights Act, 1948 and the Individual Liberty Act, 1948 were promulgated and repealed by the Civil Liberties Act, 1955. The current Civil Liberty Act is far behind the constitutional framework in ensuring individual rights. In a federal system, a comprehensive legislation on protection of fundamental rights may be instrumental in bringing uniformity in implementation

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² See Article 20 of the Interim Constitution 2007.

and interpretation of rights enumerated in the chapter of fundamental rights.

The analysis of the evolution of fundamental rights demonstrates that the chapters on Fundamental Rights and Directive Principles of the State Policies developed in the subsequent development of constitutional history, but maintain a format with additional content. Hence, it would be pertinent to discuss the format and sequencing of rights in the new chapter of the new constitution.

Context and Comments on Existing Fundamental Rights

Nepal has ratified a number of international human rights instruments and is recognized as a serious member of the international community. Ratifying international obligation bounds to meet minimum common standards affixed in the international treaties in the content of the Fundamental Rights. The Supreme Court of Nepal has also repeatedly stated this position in various judgments. Hence, while re-writing the new chapter on Fundamental Rights, one must think of Nepal's international obligation, decisions of the Supreme Court, and some comparative provisions of some democratic countries in order to standardize the content.

Based on the above references there may be some general comments on the existing chapter of Fundamental Rights:

- ◆ Many rights are provided only to the citizens where as they are supposed to be for all persons³ (for example see article 12.2 and 13.3).
- ◆ Many rights are 'as provided by law' and such laws are not defined and promulgated yet (for example see article 16.1, 17.1 and 2, 18.2 , 23.2, and 24, 10).

³ See article 25 of the International Covenant of the Civil and Political Rights, 1966. Only rights mentioned in article 25 are subject to citizens and rest others are for all persons irrespective of their nationality.

- ◆ The right to receive compensation as a part of the right to remedy has not been clearly spelled out.

The following are some of the article-wise comments on the existing chapter of Fundamental Rights:

- ◆ The right to dignified life under article 12 can be supported by the right to life to give its broader scope.
- ◆ Rights to equality under article 13 does not cover all grounds of non-discrimination, such as age, pregnancy, disability, sexual orientation, gender identity and so on and has a close ended provision.
- ◆ Article 14 only prohibits untouchability in public places where as one cannot discriminate to other even in private places,
- ◆ Women rights, children's rights and labor rights in article 20, 22 and 30 needs to be improved to meet their international standards and in reference to the women rights the judgment of the Supreme Court.
- ◆ Article 24 and 26 covers fair trial rights and rights against torture and cruel, inhuman and degrading treatment, but humane treatment to a person during the detention is not guaranteed as a fundamental right.
- ◆ Article 24 which has fair trial rights still need to be improved with some new rights such as right to arrest and detention letter, access to lawyer during the investigation, right to be produced before the authority even in case of preventive detention, right to access over documents, right against enforced disappearance, right to interpreter, fair trial rights in quasi-judicial bodies, victims right and so on.
- ◆ Given the jurisprudence developed by the Supreme Court and with reference to the international standards, a right against preventive detention in article 25 can be discussed to be removed as a right, and the grounds of preventive detention can be referred to be defined as crimes.

- ◆ The right to social justice in article 21 can be made more concrete with its new dimension as the right to access over all state structures in light with the provision of article 25 of the ICCPR.
- ◆ 'Public purpose' and 'public service' in article 29, in the right against exploitation, need to be defined as it can be misused by any repressive government.
- ◆ The language, content and list of the ESC rights is confusing in the Interim Constitution. Further right to remedy on ESC rights is unclear. They can be made justiciable through invoking writ jurisdiction: in case if the right to life and dignity is in stake due to the violation of such rights (rights with immediate effect), in case of discrimination to use such rights, and to test the laws, policy and any measures if the government fails to progressively realize such rights, given to the available resources, through such measures (rights with long term effect). Such remedial provision may be mentioned in the right to remedy at one place or may be referred in the respective rights in specific articles.
- ◆ The directive principles of the state policies must be refined in language and content so as they can be referred as minimum common standards of the state by the courts while determining the progressive realization. Hence, the existing article 36 which prohibits to test the directive principles and state policies must also be removed.
- ◆ The right to remedy under article 32 can be expanded with the right to receive reparation or compensation. Some reference can be taken from *Rajendra Dhakal vs. the Government Nepa*⁴ case where Supreme Court has said right to remedy includes right to relief.

⁴ See *Rajendra Dhakal and Others vs. the Government of Nepal, Special Bulletin 2007, Supreme Court of Nepal*. This case is widely known as a disappearance case.

Inserting New Rights and Obligations in the Fundamental Rights

There may be the following new rights in the chapter of Fundamental Rights. However, possibilities are not limited to these and are subject to discussion over nature and content:

- ◆ right to food (to support expand the scope of the right to food security)
- ◆ right to adequate housing
- ◆ minority rights
- ◆ consumer rights
- ◆ right to participate in democratic process and right to vote,
- ◆ right to access over the natural resources

While discussing the new rights and obligations, the issue of obligation of non-state actors such as violation of rights at private sphere, i.e., at home, companies and by armed groups, can be considered for addition to the chapter of fundamental rights.

So far, the place of international law, along with the provision of customary international law, in constitution, is not widely discussed in Nepal. The Nepal Treaty Act provides the superior position of international law, but still does not meet the spirit of the Vienna Convention of the Law of Treaties. Therefore, the constitution can have a reference to international law in the chapter of fundamental right or elsewhere, to bring about uniformity in interpretation by Supreme, High, or District Courts.

Implementing Fundamental Rights

Claiming or implementing fundamental rights in Nepal is heavily centralized. The constitution only authorized the Supreme Court⁵ to use the extraordinary jurisdiction, but the Judicial Administration

⁵ See Article 107 of the Interim Constitution, 2007.

Act adds to the Court of Appeal to issue some writs. The scope of High Courts and trial courts in issuing writs of habeas corpus and other writs or injunction may be further discussed. Distribution of jurisdiction does not only meet the federalization of justice, but also establish access to justice and effective protection of rights enumerated in the chapter of Fundamental Rights or treaties that Nepal has acceded to.

One of the pertinent issues on protection of fundamental rights is during the state of emergency. The new constitution should have a clear provision, in line with the international standards⁶, on the proclamation of state of emergency and provision of suspension of fundamental rights during such emergency. Certain rights which cannot be suspended further need to be discussed and right to challenge the legality of state of emergency and rights violated during such emergency must be mentioned in the constitution itself.

Gender Issues in New Constitution

The Interim Constitution has liberalized women's right to claim citizenship for her and grant the citizen to her children, but still a women married to a foreign citizen is unprivileged and unequal⁷. The women rights in article 20 (1) protect women from discrimination, but does not recognize a woman as equal to a man. The same article further guarantee reproductive rights, prohibition of violence against women, and rights over the parental property. However, women's political rights, the right to have equal access over the structures of the state are not guaranteed, and exploitation against women or girls in the name of rituals, tradition and religion are not eliminated. Further, a new scheme in the constitution may put some obligation on the state to bring women into equal status through positive discrimination and by adding some obligation to states.

⁶ See Article 4 of the International Covenant on Civil and Political Rights, 1966.

⁷ Article 8 (7) of the Interim Constitution 2007.