

Chapter - 11

Recommendations

The following recommendations were developed through a participatory and consultative process that included extensive research on nine issues and direct consultation with over 500 individuals including legal professionals, civil society organizations, political parties, community leaders and international experts from Canada, Kenya and the United Kingdom. The NBA's consultations included representatives from 72 of Nepal's 75 districts, women, Dalits, disabled, Madhesees, Muslim women, indigenous nationalities, youth and all major political parties. At its National Council meeting in Baglung on February 8 and 9 2008, 450 NBA members from across the country reviewed and amended the first draft of these recommendations. This final set of recommendations incorporates the Baglung amendments as well as subsequent feedback from NBA Bar Units and international experts. The NBA will forward these recommendations to the future Constituent Assembly.

The recommendations prepared on the nine subjects selected by the Nepal Bar Association are as follows:

On Federal Structure:

Recommendations:

Many multi-caste, multi-cultural, multi-lingual and multi-religious countries in the world have adopted federal systems of governance. A situation has arisen in Nepal to select a federal system in order to end the consequences created by caste-based, lingual and regional problems and find a lasting solution to them. As the Interim Constitution has made a provision to adopt a federal structure, the nation is constitutionally already heading towards a federal system. Thus, the following recommendations have been proposed to be included in the new constitution:

1. It appears appropriate to divide state power between the Central Government and Provincial Governments. Inter-state relationship, co-existence and harmony should be recognized as the basis of the relationship between provincial governments.
2. It appears appropriate to adopt a coordinated model for economic growth by developing a self-reliant national economy at the center and establishing industries based on local raw materials and natural resources in the Provinces. It appears appropriate to allocate taxes and tariffs based on the type and availability of resources in each province.
3. Given that Nepal has ratified the ILO Convention 169 and thereby bears the obligation to respect the rights and freedoms of indigenous and tribal peoples under the Convention, it seems appropriate to provide the Provinces with jurisdiction related to their internal or local affairs.
4. It seems appropriate for the Constitutional Assembly to create an inclusive High Level Commission for the purpose of discussing and determining the basis upon which federalism will be created in Nepal (i.e. on the basis of ethnicity, language and culture or geography or socio-economic factors and historical background). Such Commission should adopt a process of maximum consensus to enter into a federal system of governance.
5. In cases of disputes between the national and provincial governments and between or among provincial governments it seems appropriate to delegate jurisdiction to the Federal Supreme Court to settle such disputes.
6. It seems appropriate to develop and regulate penal policy and law at the national level. In case of any specificity at the local level, on issues which are not listed under central jurisdiction, provincial governments should be left independent to formulate and implement other penal and civil law policies according to their needs.
7. It seems appropriate to have a provision for a four-tier system of judiciary, including *Lok Adalat*, District Court and Provincial High Court under the provincial level and Supreme Court under the federal level. It would be appropriate to make a constitutional provision that the judiciary be inclusive in nature.
8. It seems appropriate to provide authority to the majority language or ethnic group and to guarantee the access of other marginalized linguistic and ethnic community's access to the state power and to guarantee proportional leadership and representation in the provincial governments.
9. It seems appropriate to constitute two levels of parliament, including a House of Representatives at the central level and a single House of Representatives at the provincial level.

10. It seems appropriate to have a Presidential system at the center and Chief Ministers at the provincial level both to be elected.
11. It seems appropriate to have a separate bureaucracy, service commission, planning commission, development council, police, etc. at the provincial level.
12. It seems appropriate to adopt a policy of single citizenship. Nepalese Citizenship, and matters related to same, should be under the jurisdiction of the Central Government.
13. It would be appropriate to include a constitutional provision regarding the principles of non- discrimination and proportionate inclusion in the provincial government structures equivalent to that of the central government.

On Independent, Impartial and Accountable Judiciary:

Recommendations:

1. The new constitution should include the basic principles of the Interim Constitution of Nepal 2007, particularly on the judiciary.
2. The new constitution should set out the basic requirements for the appointment of judges such as professional skills, reputation and experience. It is the responsibility of the nation to build up the pool of qualified human resources for an inclusive and competent judiciary and hence there should be adequate constitutional provision on this. There should not be a provision for the temporary appointment of judges.
3. There should be basic elements of the codes of conduct for judges in the new constitution. In order to make the Judicial Council professional, a full time chairperson and a member from the general public seems appropriate to be appointed. It seems appropriate to remove the provision for an ex-officio member in the Judicial Council.
4. In order to ensure functional independence of the judiciary, there should be constitutional provisions relating to: 1) the budget of the judiciary; 2) the authority of the Supreme Court to frame regulation in respect to the courts; 3) delegation of power to the Supreme Court regarding judicial staff and their accountability as well as control over the administration of justice; and 5) the authority of the Supreme Court to recommend law reforms.
5. Along with the term “independence of the judiciary”, the constitution should include the terms “competent, impartial and accountable judiciary”.
6. With the exception of courts that specialize in certain areas of the law, such as family or tax courts, special courts, are obstacles to the independence of the judiciary. Hence, there should not be any provision in the constitution to establish special courts.
7. A long term of service protects judges’ independence. Therefore, there should be provision to amend the existing age limit of 63 and 65 years for Appellate and Supreme Court judges and to consider raising the age of retirement.
8. The post of a judge is a professional one. Therefore, there should not be a provision to second the Chief Justice for the conduct of any inquiry.
9. There should be a provision to make the report of the Supreme Court public through the Federal Parliament. As the Judicial Council is an independent constitutional body, it is appropriate to make its report public through the Federal Parliament.
10. Provision should be made to appoint practicing lawyers to the bench of all levels of courts. Such opportunity for lawyers should also be provided with respect to the legal and judicial services.

On Corruption in Judiciary:

Recommendations:

1. The terms “impartiality, transparency, competency and accountability of the judiciary” should be included along with the term “independence” in the preamble of the constitution.
2. The nature and definition of the judiciary should be clearly stated under the chapter related to the judiciary in the new constitution.

3. There should be clear constitutional provision regarding the function, duty, jurisdiction and nature of the Judicial Council.
4. The Commission for Investigation of Abuse of Authority (CIAA) should be granted the effective power to control corruption in judicial sectors such as the police, government attorneys and prisons. There should be effective provision to control corruption at the local level, including at the provincial level, under the federal structure.
5. For the functional independence of the judiciary, the provisions on appointment, transfer, promotion, disciplinary action and provisions regarding the codes of conduct of court officials should be under the judiciary.
6. There should be a provision in the constitution on the financial independence of the judiciary.
7. There should be clear criteria for the appointment of judges set out in the constitution.
8. There should be provision in the new constitution on the appointment of judges by the Judicial Council through a competitive process by examination up to the District Court level and through the advertisement of vacancies at the High Courts and Federal Supreme Court levels.
9. There should be a provision in the constitution requiring judges to disclose details of their assets.
10. There should be a provision to establish the Judicial Council as a judicial information center to keep personal records of all judges.
11. There should be a provision to encourage alternative dispute resolution in the constitution in order to decrease case loads of courts and ensure the people's access to justice.

On Fundamental Rights in the New Constitution:

Recommendations:

1. Most of the fundamental rights which were enshrined in the Constitution of the Kingdom of Nepal 1990 and included in the Interim Constitution of Nepal, 2007, should be continued in the new constitution. Article 14 of the Interim Constitution has guaranteed the right against untouchability and racial discrimination. It comes under the right to equality and should be maintained in the new constitution. However, prohibition to practice untouchability in public places should be replaced by the complete prohibition of untouchability by any person at any place under the new constitution.
2. Article 15 of the Interim Constitution has made a provision for the right to freedom of the press and publication and broadcasting rights. These rights seem to have been included due to the development of information technology in Nepal and are appropriate to include in the new constitution.
3. The new constitution must include provisions on inclusiveness extending to a requirement that appointments to all constitutional bodies are inclusive, and there must be a policy of positive discrimination for women and other sections of society that are economically, socially and culturally marginalized.
4. The term "as per a provision in law" has been mentioned at the end of the provisions on some of the fundamental rights of the Interim Constitution. Such provisions have made the fundamental rights a directive principle of the state and have created obstacles to effective legal remedy. Hence, such types of terms should be removed from the new constitution.
5. For the effective remedy against the violation of fundamental rights, all courts must be independent to plan the structure of courts in the new constitution. Human rights enforcement mechanisms should be formed in such a manner that the people's faith in the judiciary is maintained.
6. Since Nepal is almost certain to adopt a federal democratic republican structure, rights related to writ petitions should be decentralized to the lower courts at the provincial level so that writ petitions can be filed for the protection of fundamental rights. The High Court at the provincial level must be provided jurisdiction equivalent to the Federal Supreme Court in respect to issuing the writ petitions. For the protection of fundamental rights, the district courts should also be authorized to handle *habeas corpus* and *mandamus* cases.
7. Most of the rights mentioned in the chapter on fundamental rights are provided to individuals. Such rights should not be limited to citizens. A thorough study of international laws and practices should be conducted and such rights should be provided to every individual.

8. Restrictions on certain fundamental rights in the existing provisions of the Interim Constitution, such as the right to freedom of expression, the right to assembly and association and rights regarding publication, broadcasting and press are not compatible with international laws and practices. Such restrictions should be limited to what is reasonable in a free and democratic society with such restrictions being balanced against their potential harm. The new constitution must embrace this principle of reasonable restriction in the relevant provisions of the chapter on fundamental rights.
9. The right to juvenile justice should be included under the rights of children in the Interim Constitution.
10. The right to justice, access of lawyers during the investigation period, the right to obtain compensation against illegal detention, criminal penalties for forceful disappearance and the right to a fair trial should be broadened in the new constitution.
11. The right against preventive detention should be made subject to judicial review to protect personal freedom. The right of a person under preventive detention to be brought before the authority must be clearly mentioned in the constitution.
12. The new constitution should include a provision on the right to vote and the right to participate in all state structures.
13. Rights of the minorities should be included as fundamental rights.
14. Right to access over natural resources should be defined and included as a fundamental right in the constitution.
15. The right to a minimum standard of living, right to clean drinking water and other economic, social and cultural rights should be included as fundamental rights in addition to similar rights already included in the Interim Constitution.

On Indigenous Nationalities and Marginalized Sections of Society:

Although Nepal has already ratified over 16 international conventions, discrimination of all kinds are still prevalent in Nepalese society. The power of the state is vested in the people of the high castes and classes.

Indigenous nationalities, Madhesees and marginalized sections of society are lagging behind in economic, social, cultural and political fronts. Obstacles have been created to their right to means and resources. Janajatis, Dalits, women, Madhesees and other marginalized sections of the society have not been proportionally represented in state structures. The people of these groups seem to be the most disadvantaged citizens according to economic growth indicators, their participation in health, education and economic activities. The policy makers have overlooked these discriminations. Despite their commitment to a unified Nepal, there appears to be rampant discrimination against them in development and political fronts.

The new constitution to be made for the purpose of restructuring the state should be serious about the rights and inclusion of the marginalized, Dalits, indigenous nationalities and Madhesees. Everyone should have the right to a dignified life with due respect and identity for co-existence. The following are the recommendations in this regard:

Recommendations:

The new constitution should state that ‘discriminatory laws shall be amended and nullified by the new constitution, and a policy of positive discrimination shall be adopted to uplift Dalits, indigenous nationalities, Madhesees and other marginalized sections of the society’.

It seems appropriate to state that while making policies regarding marginalized, indigenous people and Madhesees, that such groups must be consulted prior to passing such policies.

It seems appropriate that the new constitution provide for the formulation of a Janajiti and Indigenous Nationalities Commission.

It seems appropriate that the new constitution include the following provision: “The right of indigenous nationalities, Janajitis and marginalized people over their ancestral land, their access to natural resources and indigenous knowledge, shall be protected”.

It seems appropriate that the new constitution should include the following provision: “damages incurred to indigenous nationalities, Janajatis and marginalized people due to encroachment of their land and their displacement caused by development plans should be compensated”.

It seems appropriate that the new constitution state, “policies and plans to protect, develop and uplift caste, tribe, indigenous people, Madhesees and their languages which are on the verge of extinction shall be formulated and implemented”.

It seems appropriate to include a provision to ensure proportional and inclusive representation of marginalized people, Dalits, Madhesees and indigenous nationalities in the national and provincial civil service, judiciary and other government services.

It seems appropriate to include in the new constitution a provision stating “Nepal shall be a federal state and the provincial governments be guaranteed jurisdiction over issues such as language, culture and the representation of indigenous nationalities, Madhesees, Janajatis and other marginalized groups of the country.”

On Nepal’s Language Policy:

Recommendations:

1. It seems appropriate to make provision for the establishment of a mother languages commission. It seems appropriate for such a commission to give directives to formulate and implement policies for all languages and carry out various research projects and programs.
2. It seems appropriate that while holding discussions on language policies, the attention of the Constituent Assembly be drawn towards renaming the natural heritage, historical and cultural places named by previous governments.
3. It seems appropriate that the new constitution include a provision that it is the duty of the state to provide primary and secondary level education in the mother tongues of the people, knowledge of the national language to all communities and to take steps towards providing higher education in the mother tongues of the people.
4. It seems appropriate to delegate authority to the national and provincial governments to prepare their own language policies based on the number of speakers.
5. It seems appropriate to include a provision in the new constitution that English and Nepali be the official languages of the national government and that Nepali or English or local languages be used by local bodies.
6. It seems appropriate to make provision in the new constitution that the Nepali language be the language of the nation and that all languages spoken as mother tongues in Nepal be national languages of Nepal. And it seems appropriate to make provision for national languages as the official languages based on the number of local speakers.
7. It seems appropriate that the examination of the Public Service Commission and other public service bodies be conducted in the Nepali language for national government bodies and in local languages in provincial government bodies.
8. It shall be the national government’s obligation to protect and promote the national language whereas the provincial governments shall have the obligation to promote their respective national languages.

On Attorney General and Legal Practitioners:

Recommendations:

1. The new constitution should clearly mention the rights of the Attorney General and the professional independence of government attorneys. Although government attorneys are subordinate to the Attorney General, the Attorney General should not be permitted to interfere in the exercise of their duties and jurisdiction.
2. The delegation of the Attorney General’s authority to government attorneys in the existing constitution should be removed. Government attorneys should be independent to carry out investigations and prosecutions. However, there should be a strict provision regarding the personal accountability of government attorneys.

3. The provision regarding the appointment of government attorneys should be amended to provide private lawyers with the right to compete for such positions.
4. Provision should be made in the Directive Principles of the constitution for the independence and self-regulation of the legal profession.
5. The Nepal Bar Association should be designated as the center for legal aid and a free legal service provision should be included in the constitution.
6. There should be a constitutional requirement that 50 per cent of all judicial appointments in all levels of court will be filled by legal practitioners through open and inclusive competitions.
7. There should be a technical committee appointed for Parliamentary Hearings to appoint judges and there should be a constitutional requirement to include a representative of the Nepal Bar Association on such committee.
8. The constitutional requirement to include a representative of the Nepal Bar Association on the Judicial Council should be retained.

On Access to Justice:

The issues to be addressed by the new constitution in order to ensure people's access to justice are as follows:

Recommendations:

1. It seems appropriate to have a provision for a four-tier system of judiciary, including *Lok Adalat*, District Court, Provincial High Court and Federal Supreme Court. The local and district courts should be authorized to handle minor cases.
2. There should be a guaranteed right to justice provision in the constitution to ensure easy, equal and meaningful access to justice by the people. The Judiciary should be kept independent of the Executive and the Legislative branches of government to maintain the independence of the Judiciary.
3. A constitutional provision should be made to change the existing structure of the Commission for the Investigation of Abuse of Authority (CIAA) to ensure good governance and effectiveness. There should be a constitutional provision for the control of corruption at the local level.
4. The provision of legal aid in both criminal and civil cases should be incorporated as fundamental rights in the new constitution.
5. The district courts should be authorized to hear *habeas corpus* and mandamus writs in order to protect human rights violation cases at the local level.
6. Traditional justice delivery methods, people's courts and other methods of dispute resolution at the local level should be mentioned in the directive principles and policies of the state. In this regard, it seems appropriate to establish a local body or any other legal mechanism to provide justice at the local level. It seems appropriate to increase people's access to justice through means of alternative dispute resolution mechanisms such as mediation.
7. Provisions for the formation of a National Criminal Court, Peace and Reconciliation Commission, and commitment to legal reforms should be mentioned in the constitution in order to address serious human rights violation cases caused during the insurgency.
8. Socio-economic and cultural rights are important to ensure access to justice, accordingly, it seems appropriate to recognize such rights as fundamental rights in constitution.

On Constituent Assembly Process:

Recommendations:

1. It seems appropriate to include a provision to establish a Constitution Drafting Commission or Committee to assist the Constituent Assembly to develop the process and working procedure for drafting the constitution.

2. A high level, inclusive State Re-structuring Commission should be an integral part of the Constituent Assembly.
3. For the effective management of the work to be conducted by the Constituent Assembly, it seems appropriate that it form sub-committees to conduct in depth studies on different issues.
4. It seems appropriate for the Constitution Drafting Committee to hold public hearings in the national languages at the local level and mini-referendum processes to collect the suggestions from politically, economically, culturally, geographically and educationally disadvantaged people, caste, indigenous and minority groups, including the Madhese community.
5. A process should be determined and it seems appropriate that a professional committee be constituted to study the suggestions received from various quarters. It seems appropriate to involve both government and private attorneys in such a committee.
6. It seems appropriate that the working procedures of committees, the methods of holding meetings of the full Constituent Assembly and the constitutional drafting process be clearly stated.
7. As the Constituent Assembly will have representatives from different levels, it seems appropriate to hold programs immediately after the formation of the Constituent Assembly to enhance capacity in order to ensure everyone can enjoy equal status and levels of understanding.
8. A clear provision should be made on the process to promulgate and implement the proposed constitution.
9. A Constituent Assembly (working procedure) Regulation should be made in order to make the procedure of the Constituent Assembly systematic and legal.
10. The Constituent Assembly should be broadcast live and recorded for the future.
11. The Constituent Assembly decision process should be by consensus based on the basic principles of constitutionalism.
12. The basic principles of constitutionalism should be identified and discussed before drafting the new constitution.
13. The Constituent Assembly should make the draft constitution and its work plan to approve and adopt the new constitution publicly available. Maximum efforts should be made for the collection of all kinds of suggestions.

On Gender Equality

Recommendations:

1. The proportionate participation of women in political parties and electoral selections and processes should be guaranteed in the constitution.
2. The new constitution must include provisions on inclusiveness extending to a requirement that appointments to all constitutional bodies are inclusive, and there must be a policy of positive discrimination for women.
3. The fundamental rights under the Interim Constitution relating to women's rights must be further elaborated to meet Nepal's international obligations and decisions of the Supreme Court of Nepal.
4. Protection against domestic violence must be effectively incorporated under the Directive Principles of the State Policies.
5. The Constituent Assembly should involve gender experts and have discussions on the issue of gender equality during the constitution drafting process.