

Human Rights and Directive Principles under the Interim Constitution

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Fundamental rights

Main Points

- The rights from the 1990 Constitution are preserved, and there are some additions, some minor some more significant
- Major additions include more references to women, dalits, Madeshi etc, economic and social rights
- Qualifications on rights in the long run would be improved if they were required to be proportionate to the purposes to be achieved and justifiable in a democratic society etc
- Many rights are seriously qualified because they are subject to legislation (which may constitute a serious inroad unless the courts take a very tough line)
- Many rights - especially economic and social ~ require legislation which makes them little better than the non-justiciable directive principles that they essentially replace
- The Human Rights Commission is provided for which is welcome; but it suffers from weaknesses in terms of independence similar to those of other commissions; it now has some powers of investigation that are perhaps too wide (entry without warrant); it now (unlike early draft of the IC) cannot itself go to court

Part III on Fundamental Rights shows perhaps most clearly the impact of the demands of the jana adolan. But in many respects it has not been fully thought through. There are drafting problems and some provisions may prove difficult to enforce in court.

Many of the rights are qualified. Qualifications are of three types:

- (1) specific qualifications for specified national purposes or rather general national purposes. Typical is the limitation on the right to freedom of opinion and expression: "nothing in sub-clause (a) shall be deemed to prevent the making of laws to impose reasonable restrictions on any act which may undermine the sovereignty and integrity of Nepal, or which ,may jeopardize the harmonious relations subsisting among the peoples of various castes, tribes, religion or communities, or on any act of defamation, contempt of court or incitement to an offence; or on any act which may be contrary to decent public behaviour or morality." These remain as in the 1990 Constitution, but we note that now jeopardizing harmonious relations between tribes and religions is added (good for social harmony but further restricting the right); on the other hand, in the case of freedom of expression seditious law is no longer on the

"protected list". Defamation remains there (for many years this was used in India to protect all defamation law against freedom of expression scrutiny, though recently the courts have changed).

Oddly enough, when it comes to the censorship article, tribe but not religion is added to the harmonious relationship exception, and sedition remains on the "protected list". This is probably attributable to oversight.

A preferable approach would have been to include requirements such as "being justifiable in a democratic society" or being necessary and proportionate to the need.

- (2) Some say "unless qualified by law" - which on the face of it means that the right can be taken away by law (unless the courts are particularly determined and resourceful). So one cannot be deprived of personal liberty save in accordance with law (art 12 (2); communications including telephone cannot be "obstructed" except in accordance with law).
- (3) Some rights require legislation in order to come into force "as provided by law" which is even weaker. This is particularly true of economic and social rights.

Under the 1990 there was no clear "right to life" though some have argued that it could be read into the other provisions (including the ban on capital punishment). The IC still does not give a clear right to life, but does say there is a right to live with dignity.

A number of provisions have been changed by the addition of references to marginalised groups (more groups or more specific references than in 1990). Equality is largely the same, but tribe, origin and language are added as prohibited grounds of discrimination. Dalits, indigenous ethnic tribes, Madhesi, peasants and labourers may now legitimately be the beneficiaries of "special measures" or positive discrimination.

The right against untouchability is more fully spelled out and extended from access to public places and public utilities to places of worship (which would possibly not be public) and access to goods and services. The requirement that propagating ideas of caste superiority etc. should be punishable also seems to be new.

Three new Articles relate to the rights of certain classes of people: women, children, and one headed misleadingly "social justice" which relates to "participation in the state institutions on the basis of principles of proportional inclusion". The women's rights include reproductive health and rights, equal rights to family property and require violence against women to be punishable by law. The participation rights are for "women, dalits indigenous tribes, Madhesi community, oppressed group, the poor peasant and labourers, who are economically, socially or educationally backward". Making this a right (rather than an aspiration) is interesting - enforcing it would require a class action rather than an individual claim to participate.

The rights of the child show the influence of the Convention on the Rights of the Child, that on women the influence of the Convention on the Elimination of All Forms of Discrimination Against Women. There is also a right against torture which is new - reflecting the Convention.

There are more economic and social rights than in the 1990 Constitution (where these things were largely dealt with as a matter of Directive Principles of State Policy - that are not

legally enforceable. So, there is a right to a clean environment (previously merely a State Policy). There is also a right to health - but this requires a law, so is ineffective as a right.

"Each community shall have the right to receive basic education in their mother tongue as provided for in the law." But this is a weak right as firstly it requires law, and secondly does not say that anyone must provide that education. A stronger education right is that to free education up to secondary level. Is this practical in Nepal, at present?

There are rights to work, to social security, and "food security".

Among the rights, many were in the 1990 Constitution. Some changes just reflect changing times; the censorship provision has been extended to modern forms of communication.

The right to property remains largely as before (with the addition that it does not apply to property acquired through illegal means". Right to religion remains - including the absence of right to convert. There is a new provision that says "no person shall act or behave in a manner which may jeopardize/cause disturbance to¹ the religion of others". Rights in connection with a fair trial are basically the same, though with the addition of a clearer statement of the presumption of innocence, right that advice given by a lawyer to a person under arrest is confidential, free legal aid for the "indigent" (but this is "in accordance with law, which makes it little different from the social policy under the 1990 Constitution). Right against preventive detention remains as before, with the same crippling exception: "sufficient grounds to believe in the existence of an immediate threat to the sovereignty and integrity of, or the law and order situation in, Nepal". Right to information remains, with the addition that the right extends to information "relating to himself or herself" and not just to public interest. The right to privacy is largely the same. The right against exploitation is expanded to cover "Exploitation on the basis of custom, tradition and convention or in any manner". The right not to be exiled and the right to the constitutional remedy for violation of rights also remain as before.

In the area of labour rights, the equal pay provision remains the same (and thus does not include the concept of equal pay for work of equal value). The rights to proper work practices, to organise and bargain collectively, are new.

Directive Principles and State Policies

There is now a chapter with three different types of state responsibilities: described as "responsibilities", "Directive Principles" and "state policies". There is a great deal of overlap between them. Some of the 1990 corresponding provisions have gone because they have been "elevated" to rights - such as the environment. Nonetheless, there is some overlap with the "operational rights" such as freedom of expression. This chapter is non-justiciable so these provisions remain essentially aspirational - at least as far as litigation is concerned, though some of them are central to the political programme of the post *jana andolan* II period.

Human Rights Commission

For the first time there is provision for a Human Rights Commission in the constitution. The Commission is to be appointed by the PM on the advice of the Constitutional Commission - a body of which he is a member, and of which 3 of the other 5 members he also appointed. The qualifications for membership of the HRC are to be a graduate and of high moral standards; and now that they must have made an outstanding contribution and have been

¹ Depending on the translation

involved in human rights (perhaps too narrow now!). They must be drawn from "all fields" which is perhaps inconsistent; and it goes on to state "including the woman" - does this mean women are a field or there must be one woman member? The Chair must be a retired Supreme Court judge. Once appointed a member of the HRC can be removed only with difficulty, and cannot be penalised by having their remuneration etc reduced.

The powers of the HRC in connection with investigation are considerable; indeed perhaps too great because it seems they may enter premises without a warrant which presumably the police could not do. But it does not have the powers to go to court, though there is a rather obscure provision about recommending to go to court; in an earlier draft (September 2006) the Commission could itself go to court if necessary. There is an obscure provision about how far the Commission may investigate matters under the Army Act.