

Non Resident Nepali Association



Suggestions submitted to the Constituent Assembly of Nepal on **The Framework of the Future Constitution of Nepal**

I. Introduction

Nepal has gone through a process of huge political transformation in the recent past and the Non-Resident Nepalese (NRN) community has been following closely the developments within the country and has made its own contribution in various ways to this process. The country is now in the process of writing a new constitution and the NRN community wanted to submit its own suggestions to the Constituent Assembly (CA). Accordingly, the International Coordination Council (ICC) of the Non-Resident Nepali Association (NRNA) established a Constitution Recommendation Committee (CRC) under the convenorship of Prof. Surya Prasad Subedi, internationally known constitutional expert to collect suggestions from the NRN community residing in different parts of world and collate and crystallize them in a concrete set of suggestions. The Committee was composed as follows:

The full list of all members of the Committee is provided in Appendix I of this report. Similarly, the full list of office bearers and member of the International Co-ordination Committee of the NRN is provided in Appendix II.

II. Suggestion Collection and Collation Methodology

The Constitution Recommendation Committee sent out a questionnaire to all National Coordination Committees (NCCs) in 48 different countries to solicit their suggestions. The Questionnaire together with a letter from the Coordinator of the Committee has been reproduced in Appendix III of this report. The NRNs residing in different parts of the world participated enthusiastically in this process. Various interaction programmes were organised by many NCCs to respond to the questionnaire. Often such programmes were organized in coordination with the Nepalese embassies or consulates in the countries concerned. Many prominent figures of the Nepalese community and people from various Nepalese organisations representing women Dalits, Janjatis, Adibasi, Madhesis, professionals, intellectuals, businessmen and women, and representatives of sister organisations of all major Nepalese political parties participated in the interaction programmes.

The list of the National Coordination Councils (NCCs) who sent their suggestions to the Constitution Recommendation Committee of the NRN is provided in Appendix IV of the report. Similarly, the suggestions that were received from them and the accompanying documents are appended to this report in Appendix V.

It is understandable that on critical matters such as structure of governance of the country, the views of all NCCs were not congruent. Where the recommendations received by CRC were

incongruent or contradictory, the recommendations presented in this report are, in the opinion of the CRC, close to the views of the majority of the NRNs.

III. The Main Suggestions of the NRN Community

The main suggestions of the NRN community to the Constituent Assembly of Nepal are as follows:

- The NRN community strongly believes that the new Constitution should stand for such core values and principles as - people's sovereignty, nation's territorial integrity, pluralistic democracy, respect for universally-recognized human rights, unity in diversity and commitment to peaceful resolution of all disputes nationally and internationally.
- The NRN community believes that Nepal's development prospects are immense and Nepal should take full advantage of its proximity to the two rising economic super powers of tomorrow –India and China. For this, Nepal needs political stability. Therefore, the NRN community urges all the stakeholders in Nepal, especially the political parties, to give the constitutional framing task their highest priority.
- The executive head of Nepal should be the president directly elected for a five year term by the people with more than 50% of the popular support. The president should be answerable to the federal (central) parliament of the country, which should have the powers to impeach him.
- The president's term in office should be limited to two terms of five years each.
- Nepal should adopt a federal structure which will take account of the geographical, economic (resource endowment), ecological and ethnic diversity of the country. The federal structure should be such which would strengthen the territorial integrity of the nation; promote equitable economic development of the various regions within the federation, ensure fair and equitable social justice to all citizens of the country regardless of their gender, religion, ethnic origin and enhance social, cultural and ethnic harmony within the country. It should be emphasised here that none of the NCCs supported a federal structure based entirely on ethnicity.
- The parliament should be bi-cameral. The election of members to parliament should be on the basis of a mixed system under both the "first-past-the-post" and the proportional representation system (50/50). However, in the case of the upper house there should be a provision for nomination of certain members by the president of the country.
- Political parties which secure less than three percent of the total votes cast in any federal election should not qualify to send representatives in the parliament under the proportional representation system.
- Internal democracy in party political structure is essential for democracy to work. Therefore, there should be a provision in the constitution to require all recognised political parties to have elections in every five years to elect their leaders at all levels.

Similarly, all parliamentary candidates of individual parties should be elected by the democratically elected local committees of the political parties in the constituencies concerned or through their local voting.

- Two new institutions should be created- a constitutional court to adjudicate upon matters relating to constitutional disputes and electoral disputes relating to presidential and parliamentary elections and a supreme advisory council to advise the president on matters relating to the declaration of a state of emergency or the exercise of residual powers under the constitution.
- There should be provisions for affirmative action in favour of women, Madhesi, Tharu, Janjati, Adibasi, Dalit, and other traditionally marginalised and disadvantaged groups. Such measures should be time-bound or the laws to this effect should have sun-set clauses, and thus such provisions should be handled through the legislative laws.
- The residual powers should be vested in the president, but the exercise of such powers should be subject to the prior approval of the proposed supreme advisory council. Likewise, any unspecified power sharing provisions between the central government and the federal units should be vested in the central government.
- The power to declare the state of emergency should be vested in the president, but its exercise should be subject to the prior approval of the supreme advisory council.
- There should be an all powerful Independent Commission against Corruption (ICAC) answerable to the federal parliament. The ICAC should be vested with authority to establish rules and regulations to control corruption and enforce them in an effective manner.
- There should be a more inclusive national security advisory board to enhance communication between the civilian government and the armed forces of the country and to advise the president on matters relating to the regulation, control and use of the armed forces.
- The future constitution should guarantee that all people of Nepali origin and their spouses and children who hold a second country citizenship which recognizes dual citizenship do not have to forego their rights as a citizen of Nepal by virtue of being a citizen of the second country

IV. The Detailed Suggestions of the NRN Community

A. The Preamble to the Constitution

The preamble of the constitution should define core national values, send out a positive message to the outside world as to the values that the people of Nepal uphold, guide the future generation on the basis of the aspirations of the present generation and act as a guiding principle for all organs of the state and people holding public positions at all levels of governance. It should avoid emphasis on what has happened just in the recent past and principles and concepts that are liable to change in time. Accordingly, the preamble should reflect the following principles:

- A pledge to defend the sovereignty and independence of Nepal and the indivisibility and inviolability of the territorial integrity of the country
- A commitment to the promotion of tolerance, peaceful co-existence, respect for cultural diversity and ethnic harmony
- A commitment to respect plurality of ideas and to protect multiparty democracy
- Reaffirmation of republicanism
- Affirmation of sovereignty of the people
- Guarantee of adult franchise and periodic elections
- Respect for the rule of law, democracy, human rights, independence of the judiciary, freedom of the press, inclusiveness, and unity in diversity
- Affirmation of economic and political freedom
- Affirmation of social justice
- Affirmation of secularism
- Respect for international law
- Commitment to sustainable development
- Freedom to travel and reside anywhere in Nepal

These principles should be regarded as sacrosanct. The preamble should only be amended by holding a referendum.

B. Fundamental Freedoms and Individual Responsibilities

We recommend that the constitution provide for the fundamental rights and freedoms of the people including all the rights guaranteed under the Interim Constitution, the Universal Declaration of Human Rights of 1948 and the 1966 UN Covenants on Civil and Political Rights and on the Economic, Social and Cultural Rights and other rights flowing from other international treaties. The constitution should outlaw capital punishment. NRNA is of the view that the constitution should also outline certain responsibilities of individuals and they should include the duty to:

- Obey Nepal's constitution;
- Have regard for the rights of others when exercising their own rights and freedoms;
- Help others in the community;
- Care for and protect Nepal's heritage and environment;
- Defend, protect and promote the sovereignty, territorial integrity, indivisibility and inviolability of Nepal.

C. The System of Governance (the Executive Branch)

The NRNA believes that Nepal needs a stable and strong central government which governs under internationally accepted norms of modern democracy to usher the country towards rapid economic development. One of the major factors that foreign investors take into account when making investment decisions is political stability in the country. A majority of NCCs believed that in a country at Nepal's socio-political development stage, only an elected presidential system offers the probability of a stable government. However, significant checks and balances will have to be built in the constitution to control potential abuse of the constitutional authority by the president. Therefore, the NRNA recommends as follows:

- The president should be elected directly by the people for a term of five years;

- The president should have executive powers
- The president should have the right to appoint his/her cabinet including individuals who are not the members of the parliament. To minimize the conflict of interest, a cabinet member should not be allowed to hold the membership of parliament.
- The president will be the commander-in-chief of the armed forces of the country.

In order to ensure a wider appeal, a presidential candidate must secure more than 50 percent of the votes cast. If a candidate does not get at least 50 percent of the vote, the two candidates who have secured the highest number of votes should go through a second round to elect the president. The following should be the limitations imposed on the powers of the president:

- The president should not be allowed to hold office for more than two terms of five years each
- The judiciary should have the powers to review decisions of the president which allegedly contravene the Constitution of Nepal.
- The federal parliament should have the powers to impeach the president for misconduct or abuse of authority. Upon passage of the vote of no-confidence by a two-third majority, the president should be required to hand over the presidency to his/her successor within 48 hours of the passage of the no-confidence motion.
- The president's appointment of cabinet members must be ratified by the federal (central) parliament.
- The Independent Commission against Corruption (ICAC) should have powers to monitor the exercise of the executive powers by the president, investigate allegations of abuse of powers by the president and initiate appropriate actions against the president when necessary.
- Only a person who is a Nepali citizen by descent should be allowed to become the president of the country. In other words, no naturalised person should be allowed to become president or vice president of the country.
- The president should not be able to dissolve parliament if it is hearing an impeachment case against the president.

D. The Legislative Body

The NRNA believes that the development of democracy in Nepal will require a federal parliament which truly represents the aspirations of its population and is diverse ethnically. This will require a parliament which will not only be able to protect and promote the interests of the historically oppressed minority without diminishing the role and importance of the majority, but also be, by the composition of its membership, able to enhance stability. We believe this can be achieved through a bicameral legislative body which includes a mix of members directly elected under the "first-past-the-post" system (DE); members elected under the proportional representation (PR) system and certain independent members appointed by the president from those who have served the society with distinction and can rise above short term partisan political interests.

Similar bicameral systems have been adopted in a number of modern democracies. Nepal's bicameral system could be modelled on these systems with modifications to suit our unique conditions. An observation of the performance of parliaments elected under the mixed system in countries around the world, and in Nepal in the last few months, suggest that the parliament will be too fractious and unlikely to be effective to address the matters of the state if the ratio of DE to PR members is not well balanced and a certain threshold is not

prescribed to send members to parliament under the PR system. Germany, Israel, Russia and many other countries use a threshold of popular vote as a basis to qualify parties to send members to their parliaments and Nepal should have a similar system.

There is some difficulty in deciding the correct proportion of the DE and PR members and the threshold of popular vote a party should garner to send members to the parliament. After serious deliberations, NRNA has concluded that a proportion of 50 percent by DE and 50 percent by PR would be the most appropriate ratio between DE and PR for Nepal. Based on the above observations, the NRNA recommends the following:

(a) Lower House of Parliament

- Nepal should have a bicameral legislative body.
- The members of the lower house should be elected for a period of five years on the basis of a mixed electoral system, which will consist of both members from direct first-past-the-post election (DE) and from proportional representation (PR).
- The allocation of the number of constituencies to each federal province should be based on the size of population derived from the national census. The constituency boundaries may be adjusted in every fifteen years to match the change in population.
- There should be no more than 200 total members (100 DE and 100 PR) in the lower house.

(b) Upper House of Parliament

- The Upper house should include four members from each provinces directly elected under the first-past-the-post system and ten members nominated by the president in consultation with the three largest opposition parties in parliament. The nominated members will be distinguished members of the society with high integrity and an impressive record of service to the country.
- The terms of office of the members should be six years, with one third of the members elected/appointed in every two years for a term of six years.

(c) Stability of the House

The NRN recommends three mechanisms to stabilize parliament:

- Firstly, numerous countries around the world have adopted some form of the proportional system, and Nepal's move towards this form of electoral system is a right move. But, the PR system by itself is not a magic bullet, and there is a real chance that the country will begin to see coalition governments as a rule rather than an exception. This generally leads to instability. Our post-1990 period was also marred with frequent changes in government. However, there are some safety valves that can be installed to prevent such political volatilities.
- Secondly, any system (presidential or prime ministerial) without certain checks and balances is going to be detrimental to the stability and economic development in the nation. If a parliamentary system were to be adopted, one such mechanism that could be adopted is as follows. In order to avoid frequent changes in governments that are more likely under the PR system, the parliament may adopt a "constructive vote of no-confidence" system. Under this system, as in Germany, the opposition party

should be required to present a slate of the incoming government before filing for a vote of no-confidence motion. This system discourages the opposition from attempting to table frivolous no-confidence proposals. This German system is also under consideration in India for adoption to stop frequent changes in the government.

- Thirdly, if a member of parliament is appointed as a minister that person should be required to resign from her/his parliamentary seat.
- Fourthly, political parties which secure less than three percent of the total votes cast in any federal election should not qualify to send representatives in the parliament under the proportional representation system. This threshold should not be too high since it would be detrimental to smaller political parties and the functioning of democracy in a country such as Nepal with so much ethnic diversity. But as in many other countries which have adopted a PR system some sort of threshold would be highly desirable for parliamentary stability and the NRN believes that 3% requirement would be about right!

E. The Judiciary

The chief justice should be appointed by the president on the recommendation of the constitutional council and other judges should be appointed by the chief justice on the recommendation of the judicial council. The existing Constitutional Council should be expanded to include parliamentary leaders of three largest parties in Parliament and a former Chief Justice. The existing Judicial Council should also be expanded to include the Attorney-General and head of the National Human Rights Commission. The current system of parliamentary hearing for the appointment of the Chief Justice and other Supreme Court Justices should be scrapped altogether. The Judicial Council should be made more effective and required to perform the tasks of a judicial ombudsman. The current unitary structure of the judiciary should be maintained with the creation of provincial high courts as appellate courts.

There should be a separate constitutional court to adjudicate on disputes between the central organs of the state and their provincial counterparts as well as to entertain appeals against vote rigging and electoral malpractices in elections for both central and provincial elected bodies. In addition, it should also be the court to settle disputes between various organs of the central or provincial governments.

F. The Federal Structure

(a) The fundamental elements of federalism in Nepal

A unique perspective of NRNA is that while in Nepal we may be very conscious of our local, regional, caste, ethnic and linguistic identities, when far away from home, our common, shared identify is as Nepali. Both in Nepal and abroad, we are keen to preserve our rich and diverse cultural heritage, but as global Nepali we NRNs believe strongly in unity in diversity. We believe that in this rapidly globalizing and inter-dependent world, the future prosperity of Nepal as a whole is best assured through a federal structure that accentuates commonalities rather than create differences among our children - with full recognition and respect for our rich and diverse cultures and traditions.

It should be emphasized that there was not much support amongst the global Nepalese diaspora for a federal structure based on ethnicity, race, creed or colour alone. The NRNA is of the view that restructuring the state on any of these bases alone goes against the very idea of democracy, inclusiveness, and cohesiveness in a country such as Nepal with a very diverse population which criss-crosses the entire country. Any proposed restructuring model should strengthen the long-term territorial integrity of the nation and ethnic harmony. A pure ethnically based federation is less likely to be economically viable either. On this basis NRNA believes that the composition of provinces in the our federation should be based on geography, the equitable distribution of natural resources, public convenience, road transport and other modes of connectivity, ethnicity, culture, history, and economic viability

(b) Division of Provinces

Given the geographical structure of Nepal, the diversity of its population and disparity in economic conditions and opportunity in different parts of the country and the variation in the available developmental resources from the north of the country to the south, NRNA considers Nepal's long term stability, ethnic harmony and equitable economic development amongst the Provinces will be enhanced if the general boundary between provinces run north to south. This will ensure each province includes various ethnic groups who will share the ownership of economic resources within the province which vary from energy sources (e.g. hydro-power, wind power), natural resources (water, forest, and mining) to agricultural farm land (Terai) to tourism, urban-rural economic linkages, and cash crops. Likewise, the entire state can also collectively deal with the natural disasters such as climate change, flooding, soil erosion, glacial meltdown, and drought.

NRNA recognizes that there can be a number of variations to this fundamental model, but believes that more than six provinces could create serious economy of scale issue and fragmentation of the state.

(c) Allocation of Power between the Central and Provincial Governments

It is evident from the observation of the division of power between federal and provincial governments in nations where federalism as envisaged for Nepal are practiced, that central government has authority over matters relating to defence, foreign affairs, monetary matters, central bank, science and technology, civil aviation, telecommunications and postal, immigration, customs, tariffs, and boarder guard of the country.

The provincial government should has powers to frame policies in harmony with federal policies in matters of economic and social development, education, protection of culture, languages, and health, promotion of local and traditional knowledge and heritage, police force, irrigation, and drinking water supply. The two governments have concurrent powers on the following matters: national highways, national railways, development of natural resources, law and order, protection of the environment, promotion of tourism, control of corruption, and flood control etc.

Based on the above observation, NRNA recommends that the central government should be responsible for national defence; foreign affairs; central banking; national health care standards, national standards of primary and secondary education; science and technology, civil aviation, telecommunications and postal, immigration, customs, tariffs, and boarder guard, common criminal and civil codes. The provincial government should have powers

concerning education, health care, transportation, law and order and protection of environment. The federal government should have powers to dissolve the provincial government should an extra ordinary law and order situation develop in the province.

(d) Internal Organization of Provinces

NRNA believes that the model of provincial government similar to that of India will suit Nepal best. Accordingly, we suggest a unicameral provincial legislative body where the legislatures are elected by the people on the basis of a mixed system of both direct and proportional representation system. We suggest a 45 member legislative assembly which may be revised at a future date based on the change in population within the electoral boundary. There should be a high court in each of the provinces which should function as an appellate court within the existing structure of the judiciary.

The provincial government may be dissolved by the president with the approval of the federal parliament should the internal situation in the Province present a threat to national integrity and cause extra ordinary disruption to law and order situation in the Province.

G. National Security Advisory Board

We would also like to suggest that a more inclusive National Security Advisory Board be formed to bridge the communication gap between the civilian government and the army. In such an advisory body we recommend that the army Chief of Staff (COS) be included as a voting member along with the other members from the civilian side such as the Speaker of parliament, parliamentary leader of the largest opposition party in the lower house of parliament, the head of the executive branch (prime minister or president), and the defence minister. The head of the State, in the role of the commander-in-chief, should be the chair of this Advisory Board. Such a broad body with a shared responsibility will strengthen our decision making process and create a cooperative environment between the armed forces and the civilian government.

H. Political Parties

Lack of internal democracy in political parties is of major concern to NRNA. We believe that internal democracy is absolutely essential for democratic development of Nepal. The constitution should embody clear provisions to promote internal democracy. The leader (president or party head) of a political party should be elected by an electoral college composed of a minimum of ten representatives from every electoral district for federal parliamentary election in the country. Each member of the electoral college should be elected by the relevant party's district committees on the basis of transparent elections or consensus.

Every political party should hold periodic elections to elect its party leader. The term of office of the party leader should be five years unless he /she is removed by a vote of no confidence by the members of the electoral college. Every political party should make its annual financial statement public and have it audited annually by a recognised auditor. No political party should be allowed to operate if its objectives are driven by communal or secessionist objectives or those which spread hatred against people belonging to other ethnic, religious, cultural or racial groups. Similarly, political parties that do not renounce violence as a method of political change should not be allowed to operate.

I. Inclusiveness in Governance

NRNA believes that while meritocracy and competition should be the main criteria for appointing people in various levels of government, there should be provisions for affirmative action in favour of women, Madhesi, Tharu, Janjati, Adibasi, Dalit, and other traditionally marginalised and disadvantaged groups. Such measures should be time-bound or the laws to this effect should have sun-set clauses. All national and regional political parties should be required to field at least one third of women from their slate of candidates. Similarly all national political parties should have at least one of third of their candidates from Madhesi, Tharu, Janjati, Adibasi, Dalit, and other traditionally marginalised and disadvantaged groups.

J. Control of Corruption and Abuses of Power

NRNA shares the concern of all Nepali with the prevailing rampant corruption in the private and public sectors of the country and believes that unless corruption is controlled Nepal will not be able to realize its potential as a free and prosperous nation. NRNA also notes that previous attempts to control corruption have not been successful. NRNA believes that there should be a constitutional provision to establish an all powerful Independent Commission against Corruption (ICAC).

The ICAC should have authority to establish regulations to control corruption and investigate individuals in public and private sectors against whom there is ground of suspicion of corruption or against whom complaints of corruption has been received from the members of public, and based on evidence gathered, initiate criminal proceedings. The president should nominate the chairperson and other members of the ICAC. The appointments should be ratified by the federal (central) parliament.

K. Amendment of the Constitution

In keeping with the practice in other countries with a federal democratic set up and with a view to keeping the constitution flexible enough to meet the demands of changing times, NRNA believes that the constitution should include provisions for its amendment by two-thirds of the total membership of the national parliament. There should be a provision in the constitution stating that no amendments could be made to alter the multiparty democratic system of governance or to restrict the fundamental rights and freedoms embodied in the Constitution. Other amendments to the constitution can be made by a two-thirds majority in parliament which should be ratified by a two third majority of provinces.

L. Ratification of Treaties

With regard to the ratification of treaties, the provisions contained in the current Interim Constitution should be included in the new constitution too.

M. Declaration of a State of Emergency

NRNA believes that the powers to declare a state of emergency should be vested in the president of the country. This view accords with the practice in democratic countries elsewhere in the world. Such a declaration should be issued only to address the situation created by a natural disaster, invasion of the country by a foreign power, civil war, communal riots, epidemic of a life threatening disease, extremely serious financial disorder, and other grave situations which endanger the very existence, integrity, sovereignty and independence

of Nepal. The president should declare such a state of emergency only after consulting a supreme advisory council consisting of the speaker of parliament, the head of the national human rights commission and a former chief justice appointed for this purpose.

No declaration of the state of emergency should suspend the rights as guaranteed under the International Covenant on Civil and Political Rights of 1966. The president should table such a declaration within a month before parliament for ratification. If such a declaration has to be issued when there is no parliament the previous parliament should automatically be revived and reconvened.

N. The Exercise of Residual Powers

There can be two types of residual powers in a federal state. First, those ones not allocated to any organ of the state or not covered in the constitution and second, those which are allocated neither to the central government nor to the provincial government. Similar to the powers to declare a state of emergency, the right to exercise residual powers should also be vested in the president of the country. Such a power should be exercised only after consulting a supreme advisory council consisting of the speaker of parliament, the head of the national human rights commission and a former chief justice appointed for this purpose. The president should table a measure adopted under this provision within a month before parliament for ratification.

O. Provisions Relating to the NRN

NRNA believes that people of Nepali origin, their spouses and children should have the right to continue to be recognized as Nepali and they should not be deprived of this right even in the event they acquire foreign citizenship. On this basis, we recommend that the constitution should state that those who are Nepalese nationals by descent will not have to give up their Nepalese nationality if they acquire a foreign nationality. The children and grand-children of Nepali nationals who become foreign nationals will have the right to acquire Nepali nationality while keeping their foreign nationality. The Election Commission should make provisions for NRNs to cast their votes in the presidential election of the country and in major referendums by registering with the Nepalese embassies and consulates in the country of their residence. There should be a provision for a multi-year, multi-entry long-term visa for the people of Nepali origin.