



RIGHTS WITHIN REACH

SECURING EQUALITY AND HUMAN RIGHTS IN
NEPAL'S NEW CONSTITUTION



ABOUT THE CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE AND THE INTERNATIONAL HUMAN RIGHTS CLINIC

The Center for Human Rights and Global Justice (CHRGJ) at New York University (NYU) School of Law brings together and expands the rich array of teaching, research, clinical, internship, and publishing activities undertaken within NYU School of Law on international human rights issues. Philip Alston and Ryan Goodman are the Center's Faculty Directors and Co-Chairs; Smita Narula and Margaret Satterthwaite are Faculty Directors; Jayne Huckerby is Research Director; and Veerle Opgenhaffen is Senior Program Director.

The International Human Rights Clinic at NYU School of Law (a program of the Center) provides high-quality, professional human rights lawyering services to individual clients and nongovernmental and intergovernmental human rights organizations, partnering with groups based in the United States and abroad. Working as legal advisers, counsel, co-counsel, or advocacy partners, Clinic students work side-by-side with human rights activists from around the world. The Clinic is co-directed by Professor Smita Narula and Professor Margaret Satterthwaite of the NYU faculty and co-taught by Adjunct Assistant Professor Jayne Huckerby; Amna Akbar is Clinical Fellow and Michelle Williams is Clinic Administrator.

In its work on discrimination, the CHRGJ and its International Human Rights Clinic have focused extensively on caste discrimination in South Asia and have published several widely cited reports on India and Nepal. In all its work on caste discrimination, the Center collaborates extensively with Dalit advocates.

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GLOSSARY

CA:	Constituent Assembly
CAT:	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CAT Committee:	UN Committee on the Convention Against Torture
CEDAW:	Convention on the Elimination of All Forms of Discrimination Against Women
CEDAW Committee:	UN Committee on the Elimination of Discrimination Against Women
CERD Committee:	UN Committee on the Elimination of Racial Discrimination
CHRGJ:	Center for Human Rights and Global Justice, NYU School of Law
CID:	“Cruel, inhuman, or degrading” treatment or punishment
CPD:	Convention on the Rights of Persons with Disabilities
CRC:	Convention on the Rights of the Child
CRC Committee:	UN Committee on the Rights of the Child
Draft Principles and Guidelines:	Draft UN Principles and Guidelines for the Effective Elimination of Discrimination Based on Work and Descent
ESCR Committee:	UN Committee on Economic, Social and Cultural Rights
HRC:	UN Human Rights Committee
ICCPR:	International Covenant on Civil and Political Rights
ICERD:	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR:	International Covenant on Economic, Social and Cultural Rights
UDHR:	Universal Declaration of Human Rights
UN:	United Nations

CHRGJ STATEMENT TO NEPAL'S CONSTITUENT ASSEMBLY

I. INTRODUCTION

As it emerges from a prolonged civil war, Nepal stands poised to forge a democratic and peaceful nation grounded in social justice and human rights. The central feature of this democratic transition is the country's new Constitution, which will be drafted by elected members of the Constituent Assembly (CA). In creating the new Constitution, the CA has the opportunity to crystallize the country's peace, protect human rights, and advance Nepal's political, economic, and social development. It also has the opportunity to demonstrate Nepal's commitment to the inherent dignity of all individuals. Recognizing and securing the human rights of all Nepalese people is vital to fulfilling these paramount goals. In particular, the rights of Nepal's Dalit (so-called "untouchable") population—a group that has faced more than 2,000 years of systematic discrimination and exclusion on the basis of caste—must finally be realized.

Concept Papers submitted by the CA's Thematic Committees reflect significant progress towards codifying Nepal's commitment to human rights, but some critical gaps remain and must be addressed. To strengthen the protection of human rights in the new Constitution, the Center for Human Rights and Global Justice (CHRGJ) at New York University School of Law respectfully submits this report, comprised of a summary Statement and accompanying Chart, to Nepal's Constituent Assembly. The Statement and Chart draw on CHRGJ's expertise to analyze proposals for the new Constitution in light of Nepal's obligations under international human rights law, with particular emphasis on the protection of Dalit rights.¹

II. PURPOSE AND METHODOLOGY

A. PURPOSE

The Statement and Chart analyze relevant provisions of the CA Thematic Committee Concept Papers and concretely identify how to enhance the effectiveness of the proposed provisions in order to better protect Dalit rights and to further fulfill Nepal's human rights obligations.

This Statement summarizes Nepal's obligations under international human rights law and provides a general overview of some of the issues that are most critical for Dalit rights and that require the CA's attention. The Statement highlights substantive rights guarantees in a number of areas and discusses how to improve the enforcement of such rights. The Statement concludes by identifying some of the most critical human rights obligations that remain unaddressed by the language currently proposed by the Thematic Committees.

This Statement should be read together with the accompanying Chart. The Chart analyzes specific provisions proposed by the Thematic Committees. In order to provide CA members with a resource for evaluating such proposals in light of international human rights law, the Chart makes detailed recommendations informed by Nepal's obligations as a State Party to a number of international human rights treaties.

B. METHODOLOGY

In order to ensure a timely submission of this report, our analysis is based on our review of the relevant provisions from Thematic Committee Concept Papers released as of November 6, 2009.² Our recommendations are based on a careful review of Nepal's obligations under the international human rights

treaties to which Nepal is a party.³ These treaties create binding obligations³ that must be carried out in good faith to respect, protect, and fulfill the rights contained therein.⁴ Core among these are the obligations to ensure the right to be free from both direct and indirect discrimination and the right to both formal and substantive equality.⁵

In addition to its treaty obligations, Nepal recently reaffirmed its commitment to eradicating caste-based discrimination by expressing support for the Draft UN Principles and Guidelines for the Effective Elimination of Discrimination Based on Work and Descent, which were recently published by the UN Human Rights Council.⁶ While non-binding, this document, as recognized by the government of Nepal, is “a good reference in devising the ways and means to address the issue of caste-based discrimination” and “a useful tool” to “eliminate this scourge from [Nepalese] society.”⁷ Where relevant, our analysis therefore also makes reference to the Draft Principles and Guidelines.

In keeping with Nepal’s obligation under international human rights law to ensure the active and meaningful participation of marginalized and affected communities in all national decision-making processes, the CA should consult with and actively solicit input from all marginalized groups in Nepal, including Dalits, and incorporate their input and recommendations in the new Constitution. Particular attention should be paid to the needs and voices of those marginalized within the Dalit community, such as Dalit women and “lower” Dalit castes.

Our analysis relies in part on two documents previously released by CHRGI: [*Recasting Justice: Securing Dalit Rights in Nepal's New Constitution*](#)⁸—which we released in April 2008, and which analyzes human rights protections in Nepal’s Interim Constitution—and our [*Joint Statement on Securing Dalit Rights in the New Constitution*](#)—which we released in February 2009 in conjunction with the International Dalit Solidarity Network (IDSN) and the Dalit NGO Federation (DNF).⁹ Our work is also informed by constitutional analyses and recommendations put forward by Dalit rights groups.¹⁰

To date, in all our efforts on Nepal, we have worked closely with—and have been informed by—the experience and expertise of Nepalese Dalit rights advocates. We have also actively solicited input from Nepal’s legal and academic community and have drawn on the expertise of international law and constitutional scholars.

III. SECURING HUMAN RIGHTS IN THE NEW CONSTITUTION

Nepal’s pervasive caste system has a firm hold on Nepalese society. Caste discrimination and the practice of “untouchability” have resulted in the systematic exploitation and subordination of Dalits. Both government and private actors subject Dalits to extreme forms of exploitation, violence, and segregation. “Upper-caste” community members typically force Dalits to live in segregated communities; forbid them from entering public spaces; deny them access to food, water, and land; and coerce them into caste-based occupations considered too “ritually impure” for “higher castes.” Attempts by Dalits to defy this prescribed social order are met with punitive violence and social ostracism and the State frequently fails to step in to prevent or punish such acts. In addition, as Dalit women and girls in Nepal endure the intersectional burden of both caste and gender discrimination, they bear the brunt of exploitation and violence and are consistently denied the ability to fulfill their basic daily needs. Along with Dalit women, some Dalit castes—such as Gaine, Badi and the Madhesi Dalits living in the Southern part of the country—are subject to additional exclusion and marginalization.

The drafting of the Constitution presents a critical opportunity for Nepal to address caste discrimination and memorialize its commitment to equality and human rights. As the most important legal

document in the country, the Constitution will be a key way for Nepal to begin to meet its legal obligations to ensure Dalit rights. This section discusses the major proposals in the Concept Papers that have important implications for Dalit rights and for Nepal's general obligation to ensure human rights. It summarizes Nepal's international human rights law obligations in each of these areas and highlights some of the protections that must be included in the Constitution. A more complete provision-by-provision analysis of relevant proposed language in the Concept Papers can be found in the accompanying Chart.

CHRGJ commends Nepal on its recent ratification of the Convention on the Rights of Persons with Disabilities. While not considered for the analysis in this Report, the Center urges Nepal to implement its Convention obligations in the Constitution. CHRGJ also urges Nepal to ratify other human rights treaties, including the International Convention for the Protection of all Persons from Enforced Disappearances and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

A. ACCESS TO CITIZENSHIP

Pursuant to the requirements of the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Nepal must ensure non-discrimination in access to citizenship.¹¹ In recognition of this obligation, the new Constitution should include language that:

- Allows foreign spouses of Nepalese women to acquire citizenship in the same way as foreign spouses of Nepalese men.
- Enables children to be equally eligible for citizenship, regardless of whether it is their mother or father who is Nepalese.

Nepal must also ensure that subsequent laws enacted to provide for the receipt of citizenship certificates do not have the effect of excluding Dalits from the legal citizenry. For example, requiring proof of property ownership has prevented many Dalits from obtaining citizenship certificates. International human rights law prohibits laws that have such a discriminatory effect.¹²

B. FUNDAMENTAL RIGHTS

1. The Right to Equality and Non-Discrimination

Non-discrimination and equality are fundamental principles of international human rights law.¹³ Nepal must guarantee both formal and substantive equality and prohibit both direct and indirect discrimination.¹⁴ Direct discrimination occurs when a policy or measure has the purpose of discriminating against a particular group; indirect discrimination occurs when a measure is neutral on its face but has a disparate effect on a particular group. Pursuant to the human rights treaties to which Nepal is a party, Nepal must ensure that no aspect of its policy has the purpose or effect of discriminating on the basis of grounds such as race, color, descent (including caste), birth, national, ethnic or social origin, nationality, religion, political or other opinion, language, property, economic position, sex, sexual orientation, gender identity, pregnancy, maternity, marital status, age, disability, health status, place of residence, or other status.¹⁵ The UN Committee on the Elimination of Racial Discrimination (CERD Committee) has made it clear that the prohibition of discrimination on the basis of "descent" includes a prohibition of discrimination on the basis of caste.¹⁶ The treaties also provide that States must prohibit and take steps to prevent discrimination by both State officials and organs and by private parties.¹⁷

In light of these obligations, the new Constitution should:

- Prohibit discrimination on the basis of all of the grounds covered by international human rights law, as listed above.
- Make the list of grounds on which discrimination is prohibited non-exhaustive by adding language such as “or other status.”
- Extend the protection against discrimination to non-citizens by stating that the guarantee applies to “all persons.”

In furtherance of Nepal’s obligation to ensure substantive equality, the new Constitution should also recognize and provide for “special measures,” which, under human rights law, may be used both to address the inherent disadvantages that certain groups experience because of persistent, structural, and historical inequalities, and to ensure their full enjoyment of human rights.¹⁸ “Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary.”¹⁹ The provision of special measures must be based on accurate and disaggregated data, which includes an accurate census.²⁰ As experience in Nepal and other caste-affected countries has shown, special measures are critical for giving effect to rights guarantees. CHRGI therefore strongly urges the CA to provide for special measures throughout the Constitution as an important means of furthering Nepal’s obligation to ensure substantive equality. Special measures are particularly important for Dalits, given their history of oppression and disenfranchisement. Special measures should also address multiple forms of discrimination, such as those faced by women who belong to disadvantaged groups.

In light of these obligations, the new Constitution should:

- Provide for special measures to help secure substantive equality and the full enjoyment of human rights for members of disadvantaged groups, paying particular attention to multiple forms of discrimination.

Given the pervasive nature of caste discrimination and its deep entrenchment in Nepalese society, the inclusion of constitutional provisions to specifically address the rights of Dalits and to prohibit caste discrimination and “untouchability” are critical. Pursuant to ICERD, Nepal must: condemn caste discrimination and undertake to pursue by all appropriate means a policy of eliminating both direct and indirect caste discrimination;²¹ adopt “special measures” to ensure substantive equality for Dalits and other marginalized groups;²² prevent, prohibit, and eradicate caste-based segregation;²³ eradicate propaganda inciting caste-based discrimination;²⁴ eliminate caste-based discrimination in the enjoyment of civil, political, economic, social and cultural rights;²⁵ assure effective protection and remedies against acts of caste-based Discrimination;²⁶ and adopt educational measures to combat caste-based prejudices.²⁷

In light of these obligations, the new Constitution should:

- Explicitly prohibit the practice of “untouchability” and caste discrimination.²⁸
- Provide that violations of this prohibition are punishable by law and that victims are entitled to adequate compensation.
- Prohibit caste-based segregation and ensure equal access to public places and services, including places of worship, without discrimination.²⁹
- Include an explicit prohibition on the imposition of certain occupations on the basis of caste.
- Take measures against the dissemination of ideas of caste superiority and inferiority.³⁰

In addition, Nepal must also ensure that all of the rights protected in the Constitution are guaranteed and enforced in a non-discriminatory manner.

2. Civil and Political Rights

The human rights treaties to which Nepal is a party clearly prohibit the civil and political rights violations that Dalits have experienced. By its terms, the ICCPR requires a State Party to respect and ensure the rights protected by the Covenant “to all individuals within its territory and subject to its jurisdiction.”³¹ Thus, “the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.”³² This is of particular importance to Dalits, as many of them lack citizenship certificates.

The ICCPR forbids: the arbitrary denial of the right to life;³³ torture and cruel, inhuman or degrading (CID) treatment or punishment;³⁴ slavery, servitude, and forced or compulsory labor;³⁵ arbitrary arrest or detention;³⁶ arbitrary interferences with privacy, family, and correspondence;³⁷ and unlawful attacks on honor and reputation.³⁸ Under the ICCPR, Nepal is additionally obligated to guarantee a host of rights to all people detained.³⁹ Further, the ICCPR mandates Nepal to guarantee: freedom of opinion and expression;⁴⁰ freedom of assembly⁴¹ and association;⁴² the right of men and women of marriageable age to marry freely;⁴³ the freedom to take part in the conduct of public affairs, directly or through freely elected representatives;⁴⁴ the right to vote;⁴⁵ the right to enjoy culture and practice religion freely;⁴⁶ and the right to freedom of movement and residence within Nepal.⁴⁷

In light of these obligations, the new Constitution should protect *all* the rights and freedoms listed in the ICCPR. Problematically, several essential civil and political rights and freedoms are entirely missing from the Thematic Committee proposals reviewed by CHRJ. The CA must ensure that the following rights are included in the new Constitution:

- Right to freedom of conscience.⁴⁸
- Right to freedom of association.⁴⁹
- Right of citizens to participate in the conduct of public affairs.⁵⁰
- Right to an effective remedy.⁵¹

In addition, the new Constitution should:

- Guarantee civil and political rights and freedoms to “all persons,” not only to citizens.⁵²
- Limit restrictions on civil and political rights to those restrictions allowed under the ICCPR.⁵³
- Protect the rights to: freedom of religion; freedom of expression; and freedom from unlawful and arbitrary interferences with privacy and family, including attacks upon honor and reputation.⁵⁴
- Prohibit arbitrary arrest and detention and guarantee that all people deprived of their liberty have the right to promptly know the basis for their detention, to challenge their detention before a competent, impartial, and independent court with legal assistance, and to release and compensation in cases of wrongful detention.
- Reject the establishment of a system of preventive detention.
- Prohibit *incommunicado* detention.⁵⁵
- Provide that all persons charged with a crime must be afforded all of the rights contained in the ICCPR.⁵⁶
- Clarify that the definition of torture and CID treatment or punishment extends beyond those acts occurring in traditional custodial detention.⁵⁷
- Provide that all acts of torture and CID treatment or punishment, including those acts which

constitute complicity or participation in torture and CID treatment or punishment, are punishable by appropriate penalties, taking into account their grave nature, in order to help to erode the widespread practice of torture and CID treatment or punishment against the Dalit population in Nepal, including gender-based violence by private actors against Dalit women.⁵⁸

- Guarantee the right of men and women of marriageable age to marry freely a person of their choosing, which includes inter-caste marriage.

3. Economic, Social and Cultural Rights

Caste discrimination and the practice of “untouchability” have been used to justify severe violations of Dalits’ economic, social and cultural rights, causing Dalits to suffer extreme poverty and deprivation. Nepal is obligated to progressively realize the rights contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR). While the ICESCR allows for “progressive realization,” Nepal has an immediate obligation to: ensure non-discrimination in the provision of economic, social, and cultural rights; and to take immediate steps toward the realization of these rights.⁵⁹

In light of Nepal’s obligations under the ICESCR, the new Constitution should:

- Ensure the right of everyone to an adequate standard of living, including adequate food, clothing, and housing, and to the continuous improvement of living conditions.
- Guarantee the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, including access to the underlying determinants of health, such as safe and potable water and adequate health care.⁶⁰
- Provide for free and compulsory primary education for all and for the progressive introduction of free secondary and higher education.⁶¹
- Protect the right of all persons to take part in cultural life.⁶²
- Guarantee the right of all persons to the protection of the moral and material interests resulting from their artistic, literary, and scientific creations.⁶³
- Prohibit slavery and other forms of forced or compulsory labor.⁶⁴
- Protect the right of all persons to work, to freely choose or accept employment, to just and favorable work conditions, and to form and join trade unions.⁶⁵
- Guarantee the right to adequate social security including social insurance to everyone, without discrimination.⁶⁶

Nepal must ensure both non-discrimination and substantive equality with respect to economic, social and cultural rights and may take special measures to realize this obligation.⁶⁷ For example, Nepal should remove discriminatory references to Dalits in educational materials and provide for special measures to ensure access to higher education for women, Dalits, and other groups traditionally disadvantaged in their access to education. Nepal should also consider implementing employment training programs for Dalits and other groups systematically disadvantaged in access to employment.

4. Women’s Rights

Dalit women and girls in Nepal endure the intersectional burden of both caste and gender discrimination and, as a result, are even further removed from rights protections. Nepal is obligated to take all appropriate measures to eradicate discrimination against women and to take special measures to ensure substantive equality for women.⁶⁸ These obligations extend to women’s participation in politics,⁶⁹ access to education, equality in employment, and access to health care and other economic and social benefits.⁷⁰ CEDAW affirms that women’s enjoyment of their fundamental rights cannot be restricted on the basis of

culture and tradition⁷¹ and requires that Nepal give special attention to the particular challenges and forms of discrimination faced by rural women.⁷²

In light of these obligations, the proposed “Women’s Rights” provision in the new Constitution should:

- Prohibit discrimination and ensure equality on the basis of gender.
- Provide for the adoption of all appropriate measures to modify the social and cultural patterns of conduct of men and women in order to eliminate prejudices, practices, and stereotypes based on the idea that one sex is inferior or superior to the other.⁷³
- Include specific rights concerning family relations, including the equal rights of men and women with respect to entry into marriage, dissolution of marriage, parental rights and responsibilities, family planning, relations with children, and property and financial assets.⁷⁴
- Provide for special measures to help secure substantive equality and the full enjoyment of human rights for women, paying particular attention to women who belong to marginalized groups and endure multiple forms of discrimination.

5. Children’s Rights

Dalit children in Nepal are vulnerable to intolerable work conditions, recruited into armed conflict, and suffer inadequate access to economic, social and cultural rights, such as education and health. Pursuant to the requirements of the CRC, the new Constitution should clearly state that children are protected from performing any work or services that place children’s well-being, physical or mental health, or spiritual, moral, or social development at risk⁷⁵ and affirm that the best interests of the child is the primary consideration in all actions concerning the rights of children.⁷⁶ Nepal must also protect the right of every child to a nationality.⁷⁷ Under the Optional Protocol to the CRC on the involvement of children in armed conflict, Nepal is required to take all feasible measures to prevent children from participating in armed conflict and to promote the physical and psychological recovery and social reintegration of children affected by armed conflict.⁷⁸ As with all rights, Nepal must ensure that children’s enjoyment of their rights is not limited by discrimination.⁷⁹

In light of these obligations, the proposed “Children’s Rights” provision of the new Constitution should:

- Protect children from performing any work or services that place children’s well-being, physical or mental health, or spiritual, moral, or social development at risk.
- Affirm that the best interests of the child is the primary consideration in all actions concerning the rights of children.
- Affirm that children have a voice in all matters affecting them in all spheres of society, particularly in the family, school, and their communities.⁸⁰

Nepal should additionally recognize and take measures to address the fact that Dalit children are particularly vulnerable to violations of their rights.

C. ISSUES OF IMPLEMENTATION AND ENFORCEABILITY

International human rights law guarantees the right to an effective remedy for human rights violations.⁸¹ This guarantee is of particular significance for Dalits in Nepal and other caste-affected countries where past experience has shown that guaranteeing rights on paper is insufficient without strong enforcement mechanisms. Without a right to an effective remedy, the other rights enshrined in the Constitution will be

hollow. The only proposal concerning the right to effective remedy—the Committee on Fundamental Rights and Directive Principles’ proposed provision on the implementation of fundamental rights—fails to comply with Nepal’s obligation under international human rights law to provide all persons with an effective remedy for violations of their rights.⁸²

In keeping with Nepal’s obligations under international human rights law, the proposed “Implementation of Fundamental Rights” provision of the new Constitution should:

- Clearly provide that all fundamental rights, including economic, social and cultural rights, are fully justiciable.
- Refrain from using language that allows the government to delay implementing the rights guaranteed in the Constitution.
- Provide a right to an effective remedy by clearly providing that all individuals have the right to petition an independent and competent tribunal to enforce their rights.
- Ensure that all levels of the judiciary are competent, independent, and impartial and capable of providing a remedy for the violations within their jurisdiction.

D. EMERGENCY POWERS

Past state of emergency declarations have dramatically escalated human rights abuses in Nepal, particularly against Dalits and other marginalized communities. International human rights law strictly limits the circumstances in which a state of emergency can be declared⁸³ and provides that a number of rights must be protected even under these circumstances.⁸⁴ The “Emergency Powers” provision proposed by the Committee for Preserving the National Interest does not fully comport to all of the requirements of the ICCPR.

In keeping with Nepal’s obligations under international human rights law, the proposed provision on “Emergency Powers” in the new Constitution should:

- Strictly define the circumstances in which the government can declare a state of emergency, so that it is only declared in response to the direst situations that threaten the life of the nation.
- Indicate that any derogation measures must be limited to the extent strictly required by the exigencies of the situation.⁸⁵
- Ensure that any measures enacted during a state of emergency do not involve discrimination on any ground.
- Guarantee that, at a minimum, the following non-derogable rights listed in ICCPR Article 4(2) are protected at all times, even in emergencies: the right to life; the right to be free from torture and CID treatment or punishment; the right to be free from slavery and forced servitude; the right to be free from imprisonment for the inability to fulfill a contractual obligation; the right not to be subjected to retroactive criminal laws and penalties; the right to recognition everywhere as a person before the law; and the right to freedom of thought, conscience and religion.⁸⁶

E. IMPLEMENTING DALIT RIGHTS IN STATE STRUCTURES

The caste system has systematically excluded Dalits from the political process in Nepal and has completely undermined their right to take part in the governance of their country. As noted above, as a State Party to a number of international human rights treaties, Nepal is obligated to ensure non-discrimination and substantive equality for women and for members of marginalized groups, such as Dalits. To achieve substantive equality, States may adopt “special measures,” such as providing for proportionate representation

in state structures—including the legislature, the judiciary, and national commissions—to ensure that women and members of marginalized groups can meaningfully participate in governance processes.⁸⁷

Such proposals should also consider multiple forms of discrimination, including for example discrimination faced by women who belong to marginalized groups, such as Dalit women, and should ensure their proportional representation. Such proposals must also be carried out on the basis of accurate and disaggregated data,⁸⁸ including an accurate census in 2011 to establish the actual number of Dalits in Nepal. This is especially critical given that, according to some unofficial estimates, Dalits may comprise some 20 to 25 percent of the population, even though official estimates put this figure at 15 percent.⁸⁹ Nepal must also ensure the right to non-discrimination in participation in elections and within political parties.⁹⁰

To comply with its obligation to respect, protect, and fulfill human rights, Nepal may establish national human rights institutions to investigate allegations of rights violations and to monitor Nepal's compliance with its human rights obligations.⁹¹ In addition to a Human Rights Commission, the Constitution should also establish a National Dalit Commission to address the systemic effects of caste discrimination. In order for these bodies to be effective, the new Constitution should:

- Establish the Human Rights Commission and the National Dalit Commission as constitutional bodies with broad investigative and enforcement powers and provide for their financial autonomy.⁹²

Much attention has focused on proposals regarding Nepal's federal structure and on the creation of individual states to protect the rights of marginalized groups. Regardless of what form of State structure is ultimately adopted, Nepal's obligation to respect, protect, and fulfill human rights extends to all levels of government—national, regional, and local.⁹³ It is critical that Nepal uphold this foundational principle of human rights. This principle is of particular relevance to Nepal's Dalit population, which is not confined to a particular geographic area or ethnic or linguistic group.

F. GENERAL RECOMMENDATIONS FOR CONSTITUTIONAL INTERPRETATION

In addition to adopting our recommendations concerning specific fundamental rights identified above and in the accompanying Chart, CHRGIJ urges the CA to adopt the recommendations contained in this section to guide interpretation of the Constitution so as to ensure the full protection of the rights guaranteed therein. The CA should also consider include a provision indicating that courts should consider international human rights law when interpreting the Constitution. Such a provision could perhaps be modeled on Article 39 of the Constitution of the Republic of South Africa, 1996.⁹⁴

1. Non-Interference with Other Rights

In order to ensure that the observance of a particular right cannot be relied upon to infringe on the rights of others, the Constitution should include a provision that states that nothing in the Constitution shall be interpreted as permitting any person or group to infringe upon or destroy the rights and freedoms of others. This provision could be modeled on Article 5 of the ICCPR and the ICESCR.⁹⁵ It is particularly important that the CA clarify that nothing in the Constitution may be used to justify perpetuation of “untouchability” and caste discrimination. For example, the right to freedom of religion cannot be used to restrict Dalits' rights to freely practice religion or to justify “untouchability” and other discriminatory features of the caste system.

2. The Rights of “All Persons”

A number of the Thematic Committees’ rights proposals are problematically limited to citizens. Under the ICCPR, Nepal must guarantee civil and political rights without distinction to “all individuals within its territory and subject to its jurisdiction.”⁹⁶ Nepal is also not permitted to make distinctions between citizens and non-citizens with respect to social and cultural rights.⁹⁷ While the ICESCR allows some latitude for developing countries to determine to what extent they will guarantee economic rights to non-nationals, this provision must be narrowly construed as a limited exception to the general principle that human rights apply to all persons, and Nepal must strive to ensure the broadest possible enjoyment of economic rights to all persons.⁹⁸ The need to ensure human rights for all is particularly important for Dalits who, as noted above, often lack citizenship certificates. As a general matter, therefore, constitutional rights should refer to, and be interpreted to cover, “all persons,” not merely citizens.

3. Legal Loopholes and Caveats

As a foundational principle, international human rights and the embodiment of those rights in the Constitution must inform legislation, and not the other way around. In other words, laws cannot be used to undermine the fundamental rights and protections contained in the Constitution. Many of the Thematic Committee proposals qualify rights with language such as “as provided for in the law.” This sort of language could be read to undermine the constitutional right by suggesting that the right is or can be qualified by legislation. Such qualifying language should therefore be avoided and should in no case be interpreted to undermine the underlying right.

IV. CONCLUSION

Ending centuries of caste-based discrimination and ensuring Dalit rights in both public and private spheres must be a central feature of Nepal’s long awaited social, political, and economic transformation. The new Constitution will serve as the basis for the development and enforcement of legislative, administrative, budgetary, judicial, and educational measures that are necessary to secure this transformation. The drafting of the new Constitution presents the CA with the profound opportunity to demonstrate Nepal’s commitment to human rights and to affirm the inherent dignity of all individuals. Many of the Thematic Committees’ proposals for the new Constitution take significant steps toward meeting these goals. However, as noted throughout this Statement and the accompanying Chart, in order for Nepal to meet its human rights obligations, certain revisions to the proposals are needed. In addition, rights that are not currently reflected in the proposals must be included and guaranteed. CHRGI strongly encourages members of the CA to consider these recommendations as they deliberate on and draft the new Constitution.

CHRGJ RECOMMENDATIONS ON PROPOSALS FOR NEPAL'S NEW CONSTITUTION

The Chart below, prepared by the Center for Human Rights and Global Justice (CHRGJ) at New York University School of Law, examines specific provisions proposed by the Thematic Committees of the Constituent Assembly (CA) of Nepal, and makes detailed recommendations in light of Nepal's obligations under international human rights law, with particular emphasis on the protection of Dalit rights.

The Chart analyzes provisions in the following categories: Preamble; Preliminary Section; Access to Citizenship; Right to Equality and Non-Discrimination; Civil and Political Rights; Economic, Social and Cultural Rights; Women's Rights; Children's Rights; Implementation of Fundamental Rights; Directive Principles; Emergency Powers; and State Structures. Each Chart section includes a brief summary of Nepal's relevant obligations under international human rights law, as well as the primary recommendations compelled by those obligations. Where individual provisions proposed by the Thematic Committees have implications under international human rights law, the Chart includes more targeted comments on those provisions. In these sections, the Chart is divided into three columns. The first column contains the name of the relevant Thematic Committee; the second column contains the specific language of their proposal; and the third column contains CHRGJ's analysis of the proposal. In this third column, we note where the proposal complies, or fails to comply, with Nepal's human rights obligations and we include CHRGJ's recommendations on how the proposal can be strengthened to better comply with Nepal's obligations.

In order to ensure a timely submission of this document, the analysis contained in this Chart is based on our review of the relevant provisions from Concept Papers released as of November 6, 2009. While the Concept Papers analyzed in this Chart cover many of the areas thought to be key under international human rights law, it is important to note that each provision of the Constitution has potential international human rights law implications, and the CA should be mindful of the general considerations highlighted in this Chart and the accompanying Statement throughout the constitutional drafting process.

PREAMBLE

Nepal has obligations under a number of international human rights treaties to take legislative and other measures to respect, protect, and fulfill human rights without discrimination.⁹⁹ The language of the Preamble to the Constitution is an important place to reflect Nepal’s strong commitment to human rights.

In keeping with Nepal’s obligations under international human rights law, the Preamble to the new Constitution should:

- Include a stand-alone provision that clearly frames the Constitution as a document rooted in a commitment to equality, human dignity, and human rights.
- Explicitly condemn caste discrimination and highlight Nepal’s commitment to ending caste discrimination and the practice of “untouchability.”

PRELIMINARY

As noted above, the international human rights treaties to which Nepal is a party require that the Constitution reflect a commitment to human rights, and to non-discrimination, which is a fundamental precept of human rights.¹⁰⁰ Like the Preamble, the “Preliminary” section of the Constitution is an important place to begin to frame the Constitution in human rights terms.

In keeping with Nepal’s obligations under international human rights law, the Preliminary provisions in the Constitution should:

- Contain a firm commitment to non-discrimination on all prohibited grounds, including caste.
- Avoid caveats such as “as provided for in law,” as they run the risk of being used as loopholes to deny the rights contained in the Constitution.
- Establish that all government organs, at all levels, are obligated to respect, protect, and fulfill human rights.

CITIZENSHIP

International human rights law provides that every child has the right to a nationality¹⁰¹ and prohibits “discrimination with regard to the acquisition of nationality . . . as between legitimate children and children born out of wedlock or of stateless parents or based on the nationality status of one or

both of the parents.”¹⁰² Under the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), Nepal is required to ensure access to citizenship without discrimination, including on the basis of gender and caste.¹⁰³ In the past, restrictions on citizenship have been used to limit Dalits’ access to fundamental rights by excluding Dalits from the legal citizenry. This provision is therefore particularly important for the protection of Dalit rights.

In keeping with Nepal’s obligations under international human rights law, the proposed citizenship provisions in the new Constitution should:

- Allow foreign spouses of Nepalese women to acquire citizenship in the same way as foreign spouses of Nepalese men.
- Ensure that children are equally eligible for citizenship regardless of whether it is their mother or father who is Nepalese.

Committee	Proposed Provision	CHRGJ Recommendations
Committee on the Protection of the Rights of Minorities and Marginalized Communities	<p>“(1) All Nepali citizens shall have the right to receive citizenships in the name of their father or mother or both.</p> <p>(2) Any child who is born within the territory of Nepal but the whereabouts of whose parents are not known shall have the right to obtain citizenship as provided for in the laws.</p> <p>(3) All Nepali citizens shall have the right to obtain citizenship by descent, caste or by providing details.</p> <p>(4) The State shall not subject any citizen to discrimination of any kind on the grounds of being indigenous peoples, dalits, Tarai people, Madheshis, Muslims or of castes, tribes, religion, color, language, sex, sexual and gender identity, political or other thoughts, national or social origin, property, birth or region or physical or mental incapacity or the state of disability or any other status in the acquisition, application and termination of citizenship.</p> <p>(5) Transgenders shall have the right to acquire citizenships describing them as transgenders along with their gender identity.</p> <p>(6) The acquisition and termination of citizenship and other arrangements regarding naturalized and honorary citizenship shall be as prescribed in the law.”</p>	<p>In keeping with Nepal’s international human rights obligations, this provision:</p> <ul style="list-style-type: none"> ▪ Allows citizenship to come from the mother or the father. ▪ Bars discrimination on the basis of caste and other forbidden grounds in the granting of citizenship. <p>To further fulfill Nepal’s human rights obligations, this provision should be amended to:</p> <ul style="list-style-type: none"> ▪ Include a provision that provides that the spouses of both Nepalese men and women can apply for citizenship in the same way.
Committee on Fundamental Rights and Directive Principles	<p>“Citizenship by Descent or Heredity:</p> <p>1. The following individuals that live permanently in Nepal will be provided Nepalese citizenship:</p> <p>a. An individual whose parents were Nepalese citizens during his/her birth,</p> <p>b. An individual who was born in Nepal of a Nepali citizen, married to a foreign national, and living permanently in Nepal and both of whose parents have obtained Nepalese citizenship</p>	<p>To further fulfill Nepal’s human rights obligations, this provision should be amended to:</p> <ul style="list-style-type: none"> ▪ Provide that children are equally eligible for citizenship regardless of whether it is their mother or father who is Nepalese, rather than requiring that both parents be Nepalese citizens.

	<p>before he/she obtains the certificate of Nepalese citizenship.</p> <p>2. Every minor who is found within the Nepalese territory but whose parents are not identified will be recognized as a Nepali citizen on the basis of heredity till his/her parents are identified.”</p>	
Committee on Fundamental Rights and Directive Principles	<p>“Provision Regarding Naturalized Citizenship:</p> <p>1. After the commencement of this Constitution, a foreign national married to a Nepalese citizen can obtain naturalized Nepalese citizenship in accordance with the existing laws if he/she wishes so on the condition that he/she has lived legally in Nepal for fifteen years and denounces the citizenship of the foreign country.</p> <p>However, if a foreign lady married, prior to the commencement of the Constitution, to a Nepalese male, wishes to obtain the certificate of Nepalese citizenship, she can obtain naturalized Nepalese citizenship after applying for denouncement of her citizenship of the foreign country.</p> <p>2. An individual born in Nepal of a Nepali citizen as a mother and living in Nepal but whose father is not identified can obtain naturalized Nepalese citizenship in accordance with the existing laws of Nepal.</p> <p>3. An individual born in Nepal of a Nepali citizen married to a foreign national, and living permanently in Nepal and who has not obtained citizenship of a foreign country can obtain naturalized Nepalese citizenship in accordance with the existing laws of Nepal.”</p>	<p>This provision fails to comply with Nepal’s obligations under international human rights law because it:</p> <ul style="list-style-type: none"> ▪ Discriminates on the basis of gender with respect to couples married prior to the commencement of the new Constitution by making it harder for foreign spouses of Nepalese women to naturalize than foreign spouses of Nepali men. ▪ Requires children born of one foreign parent or of an unidentified father to obtain citizenship through naturalization rather than by descent. <p>To further fulfill Nepal’s human rights obligations, this provision should be amended to:</p> <ul style="list-style-type: none"> ▪ Provide the same naturalization requirements for foreign spouses of Nepalese men and women regardless of whether they were married before or after the commencement of the new Constitution. ▪ Provide that all children born of one Nepali citizen parent are eligible for citizenship by descent, rather than through naturalization, regardless of whether it is their mother or father who is a Nepali citizen.
Committee on Fundamental Rights and Directive Principles	<p>“Citizenship Showing Descent and Gender Identity: Every citizen will be provided with Nepalese citizenship on the basis of his/her mother’s or father’s heredity and showing his/her gender identity.”</p>	<p>In keeping with Nepal’s international human rights obligations, this provision:</p> <ul style="list-style-type: none"> ▪ Allows citizenship to come from the mother or the father.

FUNDAMENTAL RIGHTS

Under international human rights law, the obligation to ensure fundamental rights must be guided by the following principles.

No right may be relied upon to justify infringing upon the rights of others.

- The CA should ensure that the “Fundamental Rights” section of the new Constitution contains a provision that states that nothing in the Constitution shall be interpreted as permitting any person or group to infringe upon or destroy the rights and freedoms of others. This provision could be modeled on Article 5 of the ICCPR and the ICESCR.¹⁰⁴ It is particularly important that the CA clarify that nothing in the Constitution may be used to justify perpetuation of “untouchability” and caste discrimination.

The rights to equality and non-discrimination inform all other rights.

- While the inclusion of a separate provision on equality and non-discrimination in the Constitution is critical, Nepal must also ensure that all constitutional provisions comply with these fundamental principles.

International human rights and the embodiment of those rights in the Constitution must inform legislation, and not the other way around. In other words, laws cannot be used to undermine the fundamental rights and protections contained in the Constitution. Some of the proposals reviewed for the rights concerning education, employment, labor, and social security include language that the rights shall be implemented “as prescribed by law.” This sort of language could be read to undermine the constitutional right by suggesting that the right is or can be qualified by legislation.

- Such qualifying language should therefore be avoided and should in no case be interpreted to undermine the underlying right.

RIGHT TO EQUALITY AND NON-DISCRIMINATION

Right to Equality

Non-discrimination and equality are fundamental principles of international human rights law.¹⁰⁵ Nepal must guarantee both formal and substantive equality and prohibit both direct and indirect discrimination.¹⁰⁶ Direct discrimination occurs when a policy or measure has the purpose of discriminating against a particular group; indirect discrimination occurs when a measure is neutral on its face but has a disparate effect on a particular group. Pursuant to the human rights treaties to which Nepal is a party, Nepal must ensure that no aspect of its policy has the purpose or effect of discriminating on the basis of grounds such as race, color, descent (including caste), birth, national, ethnic or social origin, nationality, religion, political or other opinion, language, property, economic position, sex, sexual orientation, gender identity, pregnancy, maternity, marital status, age, disability, health status, place of residence, or other status.¹⁰⁷ The UN Committee on the Elimination of Racial Discrimination (CERD Committee) has made it clear that the prohibition of discrimination on the basis of “descent” includes a prohibition of discrimination on the basis of caste.¹⁰⁸

The treaties also provide that States must prohibit and take steps to prevent discrimination by both State officials and organs and by private parties.¹⁰⁹

To achieve substantive equality, international human rights law provides that States may adopt “special measures” to address the inherent disadvantage that certain groups experience because of persistent, structural, and historical inequalities, and to ensure their full enjoyment of human rights.¹¹⁰ “Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary.”¹¹¹ Provided that they comply with these requirements, special measures do not violate the prohibition on discrimination.¹¹² In all cases, special measures should be carried out on the basis of “accurate data, disaggregated by race, colour, descent and ethnic or national origin and incorporating a gender perspective, on the socio-economic and cultural status and conditions of the various groups in the population and their participation in the social and economic development of the country.”¹¹³ Special measures should not be limited to specific groups, as other groups may need similar provisions now or in the future, but instead should be broadly available to disadvantaged groups.¹¹⁴ As experience in Nepal and other caste-affected countries has shown, guaranteeing rights in the absence of taking special measures is insufficient to achieve substantive equality. CHRGI therefore strongly urges the CA to provide for special measures throughout the Constitution as an important means of furthering Nepal’s obligation to ensure substantive equality.

As a general matter, human rights must be enjoyed by all persons within a State’s territory or jurisdiction, regardless of their citizenship status.¹¹⁵ While States may differentiate between citizens and non-citizens with respect to a narrow subset of rights, such as the right to vote and certain economic rights, States must always ensure that non-citizens are equally protected from discrimination and are guaranteed equal protection and recognition before the law.¹¹⁶

The rights to equality and non-discrimination inform all other rights; while the inclusion of a separate provision on equality and non-discrimination in the Constitution is critical, Nepal must also ensure that all constitutional provisions comply with these fundamental principles.

In keeping with Nepal’s obligations under international human rights law, the proposed provision on the “Right to Equality” in the new Constitution should:

- Prohibit discrimination on the basis of all of the grounds covered by international human rights law.
- Make the list of grounds on which discrimination is prohibited non-exhaustive by adding language such as “or other status.”
- Provide for special measures to help secure substantive equality and the full enjoyment of human rights for members of disadvantaged groups, paying particular attention to those who suffer multiple forms of discrimination.
- Extend the protection against discrimination to non-citizens by stating that the guarantee applies to “all persons.”

Committee	Proposed Provision	CHRGJ Recommendations
Committee on the Protection of the Rights of Minorities and the Marginalized Communities	<p>“Right to Equality:</p> <p>(1) All citizens shall be equal before the law.</p> <p>(2) There shall be no discrimination of any kind against any citizen in the application of general laws on grounds of being indigenous peoples, dalits, Tarai people, Madheshis, Muslims or</p>	<p>In keeping with Nepal’s international human rights obligations, this provision:</p> <ul style="list-style-type: none"> ▪ Makes the list of grounds on which discrimination is prohibited non-exhaustive. ▪ Provides for special measures to secure

	<p>of religion, color, caste, tribe, sexual and gender identity, language, political or other thoughts or social origin, property, birth or region or physical or mental incapacity or the state of disability or in any other state.</p> <p>(3) There shall be no discrimination by the State against any citizens on grounds of anything such as indigenous peoples, dalits, Tarai people, Madheshis, Muslims, religion, color, caste, tribe, sexual, sex, sexual and gender identity, language, political or other thoughts or social origin or ethnic discrimination and untouchability, property, birth or region or physical or mental incapacity or the state of disability or in any other status. Provided that the State shall make special arrangements, along with a provision for compensation for victimization in the past, on the basis of positive discrimination for the protection, development and empowerment of those who are economically, socially, politically and educationally backward and those who are poor in health condition by identifying such communities or classes.</p> <p>(4) There shall be no discrimination of any kind against anyone on grounds of being indigenous peoples, Dalits, Tarai people, Madheshis, Muslims, religion, color, caste, tribe, sex, sexual or gender identity, language, political or other thoughts or social origin, property, birth or physical or mental incapacity or the state of disability or any other status with regard to providing any facility including remuneration for the same work.”</p>	<p>substantive equality and the full enjoyment of human rights for members of disadvantaged groups.</p> <p>In order to strengthen Nepal’s commitment to international human rights law, this provision should:</p> <ul style="list-style-type: none"> ▪ Extend the protection against discrimination to non-citizens by stating that the guarantee applies to “all persons.” ▪ Explicitly prohibit discrimination on all of the grounds covered by international human rights law.
<p>Committee on Fundamental Rights and Directive Principles</p>	<p>“ Right to Equality:</p> <p>1. All citizens shall be equal before the law. No person shall be denied the equal protection of the laws.</p> <p>2. The State shall not discriminate against any citizen in the application of general laws on grounds of religion, colour, caste, tribe, gender, sexual orientation, biological condition ,disability, health condition, marital condition, pregnancy, economic condition, origin, language or region, ideological conviction or other similar grounds.</p> <p>Provided that, nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or advancement of women, <i>dalits</i>, indigenous ethnic tribes (<i>adimasis</i></p>	<p>In keeping with Nepal’s international human rights obligations, this provision:</p> <ul style="list-style-type: none"> ▪ Provides for special measures to help ensure substantive equality and the full enjoyment of human rights for members of disadvantaged groups, including women. ▪ Makes the list of grounds on which discrimination is prohibited non-exhaustive. <p>In order to strengthen its commitment to international human rights law, this provision should:</p> <ul style="list-style-type: none"> ▪ Explicitly prohibit discrimination on all of the

	<p><i>janjatis</i>), Madhesis or farmers, workers, oppressed region, Muslims, backward class, minority, marginalized and endangered communities or destitute people, youths, children, senior citizens, gender or sexual minorities, disabled or those who are physically or mentally incapacitated and helpless people, who are economically, socially or culturally backward.</p> <p>3. The State shall not discriminate among citizens on grounds of religion, color, race, caste, tribe, gender, sexual orientation, biological condition, disability, health condition, marital condition, pregnancy, economic condition, origin, language or region, ideological conviction or other similar grounds.</p> <p>4. There shall be no discrimination with regard to remuneration and social security on the basis of gender for the same work.</p> <p>5. All the children shall have equal right to ancestral property without any gender discrimination.”</p>	<p>grounds covered by international human rights law, as listed above</p> <ul style="list-style-type: none"> ▪ Make clear that the list of groups eligible for special measures is non-exhaustive. ▪ Extend the protection against discrimination to non-citizens by stating that the guarantee applies to “all persons.” ▪ Provide for equal remuneration for work of equal value and equal access to social security without discrimination on any basis, not simply on the basis of gender. ▪ Provide that all children shall have an equal right to ancestral property without discrimination on any basis, not simply on the basis of gender.
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Right Against “Untouchability” and Discrimination

All of the human rights treaties to which Nepal is a party reject the inherently discriminatory features of the caste system. The grossest manifestation of this system of pervasive discrimination is the practice of “untouchability” which has ensured the complete subordination and segregation of Dalits in Nepal. In October 2009, the United Nations High Commissioner for Human Rights called on States to join together “to eradicate the shameful concept of caste.”¹¹⁷ Nepal’s recent endorsement of the Draft UN Principles and Guidelines on the Effective Elimination of Discrimination Based on Work and Descent reflects the government’s commitment to fulfilling its international human rights obligations in this area, a commitment that should also be reflected in the Constitution.

Pursuant to ICERD, Nepal must: condemn caste discrimination and undertake to pursue by all appropriate means a policy of eliminating both direct and indirect caste discrimination;¹¹⁸ adopt “special measures” to ensure substantive equality for Dalits and other marginalized groups;¹¹⁹ prevent, prohibit, and eradicate caste-based segregation;¹²⁰ eradicate propaganda inciting caste-based discrimination;¹²¹ eliminate caste-based discrimination in the enjoyment of civil, political, economic, social and cultural rights;¹²² assure effective protection and remedies against acts of caste-based discrimination;¹²³ and adopt educational measures to combat caste-based prejudices.¹²⁴

In light of the pervasive nature of caste discrimination and its deep entrenchment in Nepalese society, the inclusion of constitutional provisions to specifically address the rights of Dalits and to prohibit caste discrimination and “untouchability” are critical. In addition, Nepal must also ensure that all of the rights protected in the Constitution are guaranteed and enforced in a non-discriminatory manner.

In keeping with Nepal’s obligations under international human rights law, the proposed provision on “untouchability” and discrimination in the new Constitution should:

- Explicitly prohibit the practice of “untouchability” and caste discrimination.¹²⁵

- Provide that violations of this prohibition are punishable by law and that victims are entitled to adequate compensation.
- Prohibit caste-based segregation and ensure equal access to public places and services, including places of worship, without discrimination.¹²⁶
- Include an explicit prohibition on the imposition of certain occupations on the basis of caste.
- Take measures against the dissemination of ideas of caste superiority and inferiority.¹²⁷

In keeping with Nepal’s obligations under international human rights law, the proposed provision on “Rights Regarding Dalit Community” should additionally:

- Provide for special measures to ensure substantive equality for Dalits.
- Pay particular attention to the need to ensure substantive equality for Dalit women who endure the intersectional burden of both caste and gender discrimination.

As noted above, the provision of special measures must be based on accurate and disaggregated data, which includes an accurate census.¹²⁸

Committee	Proposed Provision	CHRGJ Recommendations
Committee to Decide the Basis of Cultural and Social Solidarity	<p>“Right against untouchability and caste discrimination:</p> <p>(1) No person shall be discriminated against or made subject to untouchability on the basis of caste, descent, community (s/he belongs to) or profession (s/he has). Such discriminatory behaviour shall be considered a serious crime and made punishable by law. The victim shall get compensation as determined by law.</p> <p>(2) No individual shall be discriminated against in any place, or in the use of services, facilities and other usable matters on basis of one's caste and ancestry.</p> <p>(3) No discrimination shall be made on the basis of caste, ancestry, or community (to which one belongs to) while producing, distributing, selling, buying or receiving objects, services or facilities.</p> <p>(4) No expression shall be made which is based on hatred, or justifies social discrimination on the basis of caste system, or ideas disseminated, or encourage things that may encourage caste discrimination, or use the kind of expression that will put individuals who belong to a particular caste, descent, or profession, or a religious group – to a higher or lowly status.</p> <p>(5) Any action which is contrary to clause (2), (3), and (4) shall be punishable by law.”</p>	<p>In keeping with Nepal’s obligations under international human rights law, this provision:</p> <ul style="list-style-type: none"> ▪ Expansively repudiates “untouchability” and caste discrimination. ▪ Provides that discrimination on these grounds shall be punishable by law and that victims shall receive compensation. ▪ Prohibits caste-based discrimination in access to public places and services. ▪ Prohibits the dissemination of ideas of caste superiority and inferiority. <p>In order to strengthen Nepal’s commitment to international human rights law, this provision should:</p> <ul style="list-style-type: none"> ▪ Specifically prohibit the imposition of certain occupations on the basis of caste. ▪ Prohibit caste-based segregation. ▪ Provide that victims shall receive “adequate” compensation.¹²⁹
Committee on the	“Right Against Discrimination and Untouchability:	In keeping with Nepal’s obligations under

<p>Protection of the Rights of Minorities and Marginalized Communities</p>	<p>(1) No person shall, on grounds of indigenous peoples, dalits, Tarai people, Madheshis, Muslims, the disabled, religion, color, sex, region, caste, tribe, descent, community or occupation, be subject to discrimination and untouchability in any form.</p> <p>(2) No person shall, on grounds of indigenous peoples, dalits, Tarai people, Madheshis, Muslims, the disabled, religion, color, sex, region, caste, tribe, community or occupation, be deprived of the use of services, conveniences or utilities available to the public, or be denied access to any public place.</p> <p>(3) No indigenous peoples, dalits, Tarai people, Madheshis, Muslims, the disabled, or no person of any particular religion, color, sex, region, caste, tribe, descent, community, occupation shall, in relation to the production or making available any goods, services or conveniences, be prevented from purchasing or acquiring such goods, services or conveniences or no such goods or conveniences shall be sold or distributed only to members of a particular religion, color, region, caste, tribe, descent, community or state.</p> <p>(4) The State shall discourage discrimination or a feeling of superiority or ethnic intolerance, indignity or hatred to be taking place on ethnic, linguistic, religious, cultural, economic, social, educational, political, physical, health, sex, sexual and gender identity, origin or regional or any other grounds among citizens.</p> <p>(5) Acts contrary to Sub-Articles (1), (2), (3) and (4) shall be punished as heinous social crimes against humanity and the victim shall get due compensation as per the law.”</p>	<p>international human rights law, this provision:</p> <ul style="list-style-type: none"> ▪ Expansively repudiates “untouchability” and discrimination on a number of grounds. ▪ Provides that discrimination on these grounds shall be punishable by law and that victims shall receive compensation. ▪ Provides that the State will discourage the dissemination of ideas of caste superiority and inferiority. <p>In order to strengthen Nepal’s commitment to international human rights law, this provision should:</p> <ul style="list-style-type: none"> ▪ Prohibit caste-based segregation and ensure equal access to public places and services, including places of worship, without discrimination.¹³⁰ ▪ Specifically prohibit the imposition of certain occupations on the basis of caste. ▪ Provide that victims shall receive “adequate” compensation.¹³¹
<p>Committee on Fundamental Rights and Directive Principles</p>	<p>“Right Against Untouchability and Racial Discrimination:</p> <p>1. No person shall, on the ground of caste, tribe, descent (origin), community, occupation or physical condition, be subject to discrimination and untouchability in any form.</p> <p>2. No person belonging to any particular caste or tribe shall, in relation to the production or making available of any goods, services or conveniences, be prevented from purchasing or acquiring such goods, services or conveniences; and no such goods, services or conveniences shall be sold or distributed only to members of a particular caste or tribe.</p> <p>3. No one shall be allowed to purport to demonstrate superiority</p>	<p>In keeping with Nepal’s obligations under international human rights law, this provision:</p> <ul style="list-style-type: none"> ▪ Prohibits discrimination based on caste and “untouchability.” ▪ Provides that discrimination on these grounds shall be punishable by law and that victims shall receive compensation. ▪ Prohibits the dissemination of ideas of caste superiority and inferiority. ▪ Explicitly prohibits the imposition of certain occupations based on caste.

	<p>or inferiority of any person or a group of persons belonging to any caste, tribe or origin; or to justify social discrimination on the basis of caste and tribe or untouchability; or to disseminate ideas based on untouchability or caste superiority or hatred justifying social discrimination; or to encourage caste discrimination in any form.</p> <p>4. No person shall be subjected to any form of discrimination by engaging him or her in an act or work contrary to his or her will, by practicing or not practicing untouchability on the basis of caste or tribe.</p> <p>5. All forms of untouchability and discriminatory acts shall be punishable in accordance with law and an individual victimized by such act shall have a right to proper compensation.”</p>	<p>In order to strengthen Nepal’s commitment to international human rights law, this provision should:</p> <ul style="list-style-type: none"> ▪ Prohibit caste-based segregation and ensure equal access to public places and services, including places of worship, without discrimination.¹³² ▪ Clarify that victims shall receive “adequate” compensation.¹³³
<p>Committee on Fundamental Rights and Directive Principles</p>	<p>“Rights Regarding <i>Dalit</i> Community:</p> <p>1. No discrimination, humiliation, intolerant behaviour or discrimination shall be inflicted against the <i>dalit</i> community on the ground of caste and tribe and untouchability. Such an act shall be regarded as a social crime and punishable in accordance with law. The person who is victim of such act shall have a right to receive proper compensation.</p> <p>2. The <i>dalit</i> community shall have the right to participation in all the organs, agencies and sectors of the state mechanism on the basis of inclusive proportionate system, along with compensation. The provision for compensation shall be as prescribed by law.</p> <p>3. The <i>dalit</i> community shall have the right to special privileges in education, health, employment and social security on the basis of positive discrimination.</p> <p>4. The destitute <i>dalits</i> shall be given priority while provisioning in accordance with Clause (3).</p> <p>5. The <i>dalit</i> community shall have the right to get special privileges for the use, protection and development of their traditional occupation, knowledge, skill and technology, and for reaping professional gains thereof in accordance with law.”</p>	<p>In keeping with Nepal’s obligations under international human rights law, this provision:</p> <ul style="list-style-type: none"> ▪ Prohibits discrimination based on caste and “untouchability.” ▪ Provides that perpetrators of discrimination shall be punished and the victims compensated. ▪ Provides for special measures, including proportionate representation, to help ensure substantive equality for Dalits. <p>In order to strengthen Nepal’s commitment to international human rights law, this provision should:</p> <ul style="list-style-type: none"> ▪ Include an explicit prohibition on the imposition of certain occupations on the basis of caste and otherwise ensure that Clause (5) cannot be interpreted as a justification for forcing Dalits to remain in “traditional occupations.” ▪ Provide that special measures should pay particular attention to the multiple forms of discrimination faced by Dalit women. ▪ Clarify that victims shall receive “adequate”

CIVIL AND POLITICAL RIGHTS

The human rights treaties to which Nepal is a party clearly prohibit the civil and political rights violations that Dalits and others experience in Nepal. The International Covenant on Civil and Political Rights (ICCPR) forbids: the arbitrary denial of the right to life;¹³⁵ torture and cruel, inhuman or degrading treatment or punishment;¹³⁶ slavery, servitude, and certain instances of forced or compulsory labor;¹³⁷ arbitrary arrest or detention;¹³⁸ arbitrary interferences with privacy, family, and correspondence;¹³⁹ and unlawful attacks on honor and reputation.¹⁴⁰ The ICCPR also mandates that Nepal allow for freedom of opinion and expression;¹⁴¹ freedom of assembly¹⁴² and association;¹⁴³ the right of men and women of marriageable age to marry freely;¹⁴⁴ the freedom to take part in the conduct of public affairs, directly or through freely elected representatives;¹⁴⁵ the right to vote;¹⁴⁶ the right to enjoy culture and practice religion freely;¹⁴⁷ and the right to freedom of movement and residence within Nepal.¹⁴⁸ In addition, the ICCPR protects a host of specific rights for individuals who are within the criminal justice system.¹⁴⁹

By its terms, the ICCPR requires a State Party to respect and ensure the rights protected by the Covenant “to all individuals within its territory and subject to its jurisdiction.”¹⁵⁰ Thus, “the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.”¹⁵¹ This is of particular importance to Dalits, as many of them lack citizenship certificates.

Problematically, several essential civil and political rights and freedoms are entirely missing from the proposals for the new Constitution reviewed for this Chart, including: the right of freedom of conscience;¹⁵² the right of freedom of association;¹⁵³ the right of citizens to participate in the conduct of public affairs;¹⁵⁴ and the right to an effective remedy.¹⁵⁵ Without ensuring the protection of these rights, the new Constitution will fail to comply with Nepal’s international human rights obligations.

The new Constitution should also explicitly prohibit enforced disappearance and secret detention—violations that were widespread in Nepal during the civil war—as they have been held to violate both the ICCPR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).¹⁵⁶

Right to Freedom

The “Right to Freedom” provision proposed by the Committee on Fundamental Rights and Directive Principles protects a number of important freedoms guaranteed by international human rights law, including: freedom of opinion and expression;¹⁵⁷ freedom of assembly;¹⁵⁸ freedom to form and join trade unions;¹⁵⁹ freedom of movement and of residence;¹⁶⁰ and freedom to choose one’s work.¹⁶¹ As discussed above, these freedoms must be provided to all persons and should not be limited to citizens.¹⁶²

Problematically, this provision is framed as an exhaustive one, yet it fails to reference many important civil and political rights and freedoms which are addressed in other proposals for the new Constitution, including: the right to life;¹⁶³ the right to freedom from slavery, servitude, and certain

instances of forced labor;¹⁶⁴ the right to freedom from torture and cruel, inhuman or degrading treatment or punishment;¹⁶⁵ the right to liberty and security of the person;¹⁶⁶ the right to freedom from arbitrary arrest and detention;¹⁶⁷ the right to seek, receive, and impart information;¹⁶⁸ right to freedom from advocacy of discriminatory hatred, hostility, or violence;¹⁶⁹ the right of men and women of a marriageable age to freely marry a person of their choosing;¹⁷⁰ the right to a fair legal process;¹⁷¹ and the right equality before the law and equal protection of the law.¹⁷²

Moreover, as noted above, several essential civil and political rights and freedoms are not protected in this provision, or in the other proposals for the new Constitution reviewed for this Chart. In particular, the “Right to Freedom” section should specifically include the right to freedom of thought and conscience¹⁷³ and the right to freedom of association.¹⁷⁴ At this writing, neither of these rights is explicitly provided for in the Concept Papers.

These rights and freedoms may only be limited under very narrow circumstances through restrictions “imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.”¹⁷⁵

In keeping with Nepal’s obligations under international human rights law, the proposed “Right to Freedom” provision in the new Constitution should:

- Clarify that it is not an exhaustive listing of all of the civil and political rights and freedoms guaranteed under the Constitution.
- Refrain from imposing restrictions on these freedoms beyond those allowed by the ICCPR (as noted above).
- Extend these rights and freedoms to all persons, not merely to citizens.

Committee	Proposed Provision	CHRGJ Recommendations
Committee on Fundamental Rights and Directive Principles	<p>“Right to Freedom (Independence):</p> <p>1. Except as provided by the law, no person shall be deprived of his/her personal liberty.</p> <p>2. Every citizen shall have the following freedoms:</p> <p>a. Freedom of opinion and expression,</p> <p>b. Freedom to assemble peacefully and without any arms,</p> <p>c. Freedom to form unions and organizations,</p> <p>d. Freedom to form political parties,</p> <p>e. Freedom to move and reside in any part of Nepal,</p> <p>f. Freedom to engage in any occupation or be engaged in employment, industry and trade.</p> <p>Provided that,</p> <p>1. 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 nationality, sovereignty, independence and integrity of Nepal, or the harmonious</p>	<p>In keeping with Nepal’s international human rights obligations, this provision:</p> <ul style="list-style-type: none"> ▪ Protects a number of important rights enumerated in the ICCPR. ▪ Of particular relevance for Dalits, the provision provides for the freedom to move and reside in any part of Nepal and the freedom to engage in any profession. <p>To further fulfill Nepal’s human rights obligations, this provision should be amended to:</p> <ul style="list-style-type: none"> ▪ Clarify that it is not an exhaustive listing of all of the civil and political rights and freedoms guaranteed under the Constitution. ▪ Avoid broad language that allows these rights to be restricted to maintain “the harmonious relations

<p>relations subsisting among the federal units, or which may jeopardize the harmonious relations subsisting among the people of various castes, tribes, religions 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.</p> <p>2. Nothing in sub-clause (b) shall be deemed to prevent the making of laws to impose reasonable restrictions on any act which may undermine the sovereignty, integrity or law and order situation in Nepal.</p> <p>3. Nothing in sub-clause (c) 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 people of various castes, tribes, religions or communities, or which may instigate violence, or which may be contrary to decent public behaviour or morality.</p> <p>4. Nothing in sub-clause (d) shall be deemed to prevent the making of laws which are in the interest of the general public, or which are made to impose reasonable restrictions on any act which may undermine nationality, sovereignty and integrity of Nepal, or discourage any act of spying against the country, or revealing national secrecy, or assisting a foreign country or organization or representative (committing treason) in a way that affects the external security of Nepal in case of war or peace, or undermine harmonious relations among the federal units, or act towards spreading racial or communal hatred, or undermine harmonious relations among different castes, tribes, religions and ethnic communities, or in order to discourage an act of restricting citizens of certain caste, language, religion, community or gender to take the membership of any political party only on racial, linguistic, religious, communal or gender grounds, or to discourage an act of forming political parties in a way that makes discrimination among the citizens or engaging in any violent activity or any activity which may be contrary to decent public behaviour or morality.</p> <p>5. Nothing in sub-clause (e) shall be deemed to prevent the</p>	<p>subsisting among the people of various castes.”</p> <ul style="list-style-type: none"> ▪ Limit restrictions on these rights to those allowed under international human rights law.
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	<p>making of laws to impose reasonable restrictions on any act which may undermine the interest of general public or harmonious relations subsisting among federal units or undermine harmonious relations subsisting among different castes, tribes, religions or communities, or on any violent act or crime in order to discourage it.</p> <p>6. Nothing in sub-clause (f) shall be deemed to prevent the making of laws to impose reasonable restrictions on any act which may undermine harmonious relations subsisting among federal units or be contrary to public health, decent behaviour, or morality or to confer on the State the exclusive right to undertake specific industries, businesses or services, or impose any condition or qualification for engaging in any industry, trade, profession or occupation.”</p>	
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Right to Religion

Under Article 18 of the ICCPR, Nepal must ensure the right to freedom of religion, including the “freedom to have or to adopt a religion or belief . . . [and] to manifest his religion or belief in worship, observance, practice and teaching.”¹⁷⁶

As with all other rights, the freedom of religion cannot be used to justify encroaching upon the fundamental rights and freedoms of others, including Dalits’ right to equality and non-discrimination and to practice religion.¹⁷⁷ Some restrictions on the right to freedom of religion are permissible, but only when they “are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.”¹⁷⁸

In keeping with Nepal’s obligations under international human rights law, the proposed “Right to Religion” provision in the new Constitution should:

- Protect the right to freedom of religion.
- Limit restrictions on the right to freedom of religion to those provided for under international human rights law.

Committee	Proposed Provision	CHRGJ Recommendations
Committee to Decide the Basis of Cultural and Social Solidarity	<p>“Right to Religion:</p> <p>(1) All persons shall have the freedom of religion as given below:</p> <p>a. To accept or not to accept a religion,</p> <p>b. To profess and practise [sic] religion according to one's own faith,</p> <p>c. To disseminate the religion of one's own faith and religious</p>	<p>In keeping with Nepal’s international human rights obligations, this provision:</p> <ul style="list-style-type: none"> ▪ Protects the right to freedom of religion. <p>To further fulfill Nepal’s human rights obligations, this provision should:</p> <ul style="list-style-type: none"> ▪ Ensure that the right of religious groups to manage

	<p>belief,</p> <p>d. To renounce or convert to another religion out of one's own accord,</p> <p>e. To open and run religious associations or organizations.</p> <p>(2) While exercising the freedom of religion mentioned in Sub-Article (1) (a), (b), (c), (d) and (e), it shall have to be done in a manner which shall not affect other religions or religious faith,</p> <p>(3) No one shall be allowed to convert another person from one religion to another against his or her desire.</p> <p>(4) Acts contrary to Sub-Articles (2) and (3) shall be punishable by laws.</p> <p>(5) Every religious denomination shall have the right to manage and protect religious places and religious trusts in accordance with the law by maintaining its independent existence and religious tolerance.”</p>	<p>and protect religious places does not include a right to discriminate based on caste or other status.</p>
<p>Committee on the Protection of the Rights of Minorities and Marginalized Communities</p>	<p>“Right to Religion:</p> <p>(1) All persons shall have the freedom of religion as given below:</p> <p>a. To accept or not to accept a religion,</p> <p>b. To profess and practise religion according to one's own faith,</p> <p>c. To disseminate the religion of one's own faith and religious belief,</p> <p>d. To renounce or convert to another religion out of one's own accord,</p> <p>e. To open and run religious associations or organizations.</p> <p>(2) While exercising the freedom of religion mentioned in Sub-Article (1) (a), (b), (c), (d) and (e), it shall have to be done in a manner which shall not affect other religions or religious faith,</p> <p>(3) No one shall be allowed to convert another person from one religion to another against his or her desire.a</p> <p>(4) Acts contrary to Sub-Articles (2) and (3) shall be punishable.”</p>	<p>In keeping with Nepal’s international human rights obligations, this provision:</p> <ul style="list-style-type: none"> ▪ Protects the right to freedom of religion. <p>To further fulfill Nepal’s human rights obligations, this provision should:</p> <ul style="list-style-type: none"> ▪ Ensure that the right of religious groups to manage and protect religious places does not include a right to discriminate based on caste or other status.
<p>Committee on Fundamental Rights and Directive</p>	<p>“Right to Religious Freedom:</p> <p>1. Every person shall have the freedom to profess, practice and preserve his or her own religion in accordance with his or her faith, or to refrain from any religion.</p>	<p>In keeping with Nepal’s international human rights obligations, this provision:</p> <ul style="list-style-type: none"> ▪ Protects the right to freedom of religion.

Principles	<p>Provided that no person shall be entitled to act contrary to public health, decent behaviour and morality, to indulge in activities of jeopardizing public peace or to convert a person from one religion to another, and no person shall act or behave in a manner which may infringe upon religion of others.</p> <p>2. Every religious denomination shall have the right to maintain its independent existence, and for this purpose to manage and protect its religious places and religious trusts, in accordance with law.”</p>	<p>To further fulfill Nepal’s human rights obligations, this provision should:</p> <ul style="list-style-type: none"> ▪ Ensure that the right of religious groups to manage and protect religious places does not include a right to discriminate based on caste or other status. ▪ Limit restrictions on the right to freedom of religion to the grounds provided for in international human rights law.
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Rights to Justice

Pursuant to the ICCPR, “[e]veryone shall have the right to recognition everywhere as a person before the law.”¹⁷⁹ Nepal must ensure equal protection of the law and equality before the courts and tribunals for all persons.¹⁸⁰ In all legal proceedings, everyone is entitled to “a fair and public hearing by a competent, independent and impartial tribunal established by law.”¹⁸¹ Nepal must also protect all persons’ right to liberty and security of person and must ensure that no one is arbitrarily arrested or detained.¹⁸²

Nepal must guarantee certain rights to all detained persons.¹⁸³ Nepal must ensure that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”¹⁸⁴ All detentions must be based on grounds and procedures established by law and all detainees must be promptly informed of the legal basis for their detention. All detainees must also have access to an independent and impartial court to challenge their detention and to release and compensation if their detention is deemed unlawful.¹⁸⁵ All persons deprived of their liberty have the right to defend themselves and to be assisted by legal counsel¹⁸⁶ and an interpreter, at no cost if necessary.¹⁸⁷ All detained persons have the right to be informed of their rights, including the right to free legal assistance.¹⁸⁸

Nepal must guarantee additional rights to all persons who have been charged with a crime, including: the right to be brought promptly before a judge;¹⁸⁹ the right to be presumed innocent until proven guilty;¹⁹⁰ the right to be promptly informed of the charges in a language he or she understands¹⁹¹ and use of an interpreter at no cost during court proceedings;¹⁹² the right to be tried in one’s presence and to defend oneself, including the right to free legal assistance and the right to be informed of the right to free legal counsel;¹⁹³ the right to examine and produce witnesses;¹⁹⁴ the right not to be compelled to testify against oneself;¹⁹⁵ the right to a fair and public trial, by a competent, independent, and impartial tribunal established by law, without undue delay and within a reasonable time;¹⁹⁶ the right to “adequate time and facilities” to prepare a defense;¹⁹⁷ a presumption in favor of release while awaiting trial;¹⁹⁸ the right to appeal a criminal conviction to a higher tribunal;¹⁹⁹ the right to compensation for a wrongful conviction;²⁰⁰ and the right not to be tried or punished again for an offense of which one has already been acquitted or convicted.²⁰¹ In addition, everyone has the right not to be subjected to retroactive criminal laws or punishments, and to benefit from subsequent reductions in punishment.²⁰² Special procedures must be developed for juvenile persons accused of a crime, to take into account their age and to emphasize their rehabilitation.²⁰³

In keeping with Nepal’s international human rights obligations, the proposed provision on the “Rights to Justice” in the new Constitution should:

- Prohibit all forms of arbitrary arrest and detention and require that all forms of detention be justified by grounds and procedures established by law and be subject to effective judicial review.
- Guarantee that all persons deprived of their liberty have the right to promptly know the basis for their detention; to challenge their detention before a competent, impartial, and independent court with legal assistance; and to release and compensation in cases of wrongful detention.
- Prohibit imprisonment for the failure to fulfill a contractual obligation under all circumstances.²⁰⁴
- Provide that all persons charged with a crime be afforded all of the rights contained in the ICCPR, as listed above.

Committee	Proposed Provision	CHRGJ Recommendation
Committee on Fundamental Rights and Directive Principles	<p>“Rights Regarding Justice:</p> <p>(1) No person shall be detained without being informed of the ground for such an arrest.</p> <p>(2) The person who is arrested shall have the right to consult a legal practitioner of his/her choice at the time of the arrest. The consultation made by such a person with the legal practitioner and the advice given thereon shall remain confidential, and such a person shall not be denied the right to be defended by his/her legal practitioner. Provided that, this Clause shall not be applicable to the nonresident Nepalese (NRN) under preventive detention or to the citizen of an enemy country.</p> <p>Explanation: For the purpose of this Clause, the term “legal practitioner” means any person who is authorized by law to represent any person in any court.</p> <p>(3) Every person who is arrested shall be produced before a judicial authority within a period of twenty-four hours after such arrest, excluding the time necessary from journey from the place of arrest to such authority, and the arrested person shall not be detained in custody beyond the said period except on the order of such authority. Provided that nothing in this Clause shall apply to preventive detention of an individual or to a citizen of an enemy state.</p> <p>(4) No person shall be punished for an act which was not punishable by law when the act was committed, and no person shall be subjected to a punishment greater than that prescribed by the law in force at the time of the offence.</p> <p>(5) No person accused of any offence shall be assumed to be</p>	<p>In keeping with Nepal’s international human rights obligations, this provision protects some of the key rights listed in the ICCPR.</p> <p>Ultimately, however, this provision fails to comply with Nepal’s international human rights obligations by failing to protect several essential rights.</p> <p>To further fulfill Nepal’s human rights obligation, this provision must:</p> <ul style="list-style-type: none"> ▪ Extend these rights to all persons deprived of their liberty, and not exclude nonresident Nepalis under preventive detention or “citizen[s] of an enemy country.” (Clause 2) ▪ Prohibit arbitrary arrest and detention and require that all deprivations of liberty be based on grounds and procedures established by law. ▪ Guarantee that all persons deprived of their liberty have the right to promptly know the basis for their detention; to challenge their detention before a competent, impartial, and independent court with legal assistance; and to release and compensation in cases of wrongful detention. ▪ Provide that all persons charged with a crime be afforded all of the rights contained in the ICCPR, as listed above. ▪ Clarify that the right not to be subjected to retroactive criminal laws or punishments does not

	<p>an offender until proven guilty.</p> <p>(6) No person shall be prosecuted or punished for the same offence in a court of law more than once.</p> <p>(7) No person accused of any offence shall be compelled to be a witness against himself or herself.</p> <p>(8) Every person undergoing trial shall have the right to be informed about the proceedings of the trial.</p> <p>(9) Every person shall be entitled to a fair trial by a fair, free (independent) and competent court or judicial authority.</p> <p>(10) Any indigent person shall have the right to free legal aid in accordance with law.”</p>	<p>apply to international crimes.²⁰⁵</p>
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Right Against Preventive Detention

Preventive detention regimes in Nepal and elsewhere are rampant with human rights abuses, including high risks of arbitrary detention, prolonged or indefinite detention, *incommunicado* detention, and torture and cruel, inhuman and degrading treatment and punishment.²⁰⁶ Preventive detention has also been used for political reasons and to suppress freedom of expression and assembly.²⁰⁷ Under international human rights law, preventive detention may only be used where necessary for reasons of public security and proportionate to the ends sought, and must always be accompanied by a number of procedural safeguards.²⁰⁸ Preventive detention systems cannot be used to eviscerate the rights of detained persons. The ICCPR provides that no one shall be subject to arbitrary detention,²⁰⁹ which means that all systems of detention must be premised on grounds and procedures established by law.²¹⁰ In particular, international human rights law is clear that all detained persons have the right to effective judicial review,²¹¹ including the right to be promptly informed of the basis for their detention,²¹² the right to challenge the legality of their detention before an independent and effective court with the assistance of legal counsel²¹³ and the right to release and compensation for unlawful detention.²¹⁴ Prolonged preventive detention, without charge and without judicial review, amounts to arbitrary detention, in violation of the ICCPR.²¹⁵

All detained persons must “be treated with humanity and with respect for the inherent dignity of the human person.”²¹⁶ This means that persons detained under preventive detention cannot be “subjected to any hardship or constraint other than that resulting from the deprivation of liberty.”²¹⁷ In particular, *incommunicado* detention, including denying a detainee access to his family, violates the right of all detainees to be treated with humanity and dignity and prolonged *incommunicado* detention may violate the ICCPR’s prohibition on torture and cruel, inhuman and degrading treatment.²¹⁸ All detained persons must have the right to communicate with their family and with their legal counsel.²¹⁹

The proposed “Right Against Preventive Detention” provision in the new Constitution includes a number of exceptions to this right that in effect would establish a system of preventive detention that could be liberally used and that is devoid of the necessary procedural safeguards. Establishing such a system jeopardizes Nepal’s commitment to democracy and human rights as reflected elsewhere in proposals for the new Constitution. CHRJJ strongly urges the CA to reject the inclusion of such a provision in the new Constitution and calls on Nepal to instead forge a strong criminal justice system that can guarantee both the security of the Nepalese people and their rights.

Should the CA decide to retain this provision, then in keeping with Nepal’s international human rights obligations, the proposed provision on the

“Rights Against Preventive Detention” in the new Constitution should:

- Prohibit arbitrary arrest and detention and require that all detentions be premised on grounds and procedures established by law.
- Limit the use of preventive detention to situations where it is necessary for reasons of public security and proportionate to the ends sought.
- Ensure that all detained persons have the right to be promptly informed of the reasons for their detention.
- Ensure that all persons detained have access to the courts to challenge the legality of their detention with legal assistance and to release and compensation for wrongful detention. Require that all persons detained be treated with humanity and with respect for their dignity.
- Prohibit *incommunicado* preventive detention in which detainees are denied the right to communicate with their family.

Committee	Proposed Provision	CHRGJ Recommendation
Committee on Fundamental Rights and Directive Principles	<p>Right Against Preventive Detention:</p> <p>“(1) No person shall be held under preventive detention unless there is sufficient ground to believe in the existence of an immediate threat to the sovereignty and integrity of, or the law and order situation in, Nepal.</p> <p>(2) Except in case of the individual that undermines sovereignty or integrity of the State of Nepal, seriously jeopardizes the public peace and law and order by spreading communal riots, and in case of the citizens of an enemy state, the family members of other individuals held under preventive detention shall be informed of their conditions.</p> <p>(3) If an authority detains a person under preventive detention contrary to law or in bad faith, the person detained is entitled to compensation under the law.”</p>	<p>This provision fails to comply with Nepal’s international human rights obligations because it permits the establishment of a preventive detention system that is not limited to situations where preventive detention is necessary and proportionate to achieving public security and because it does not guarantee protection of:</p> <ul style="list-style-type: none"> ▪ The right against arbitrary arrest and detention, allowing preventive detention under broad circumstances. ▪ The right of all detained persons to challenge the legality of their detention. ▪ The right of all detained persons to be treated with humanity and dignity. ▪ The right of all detained persons to communicate with their family and their legal counsel.

Right Against Torture

Dalits are particularly vulnerable to torture and other forms of cruel, inhuman, or degrading (CID) treatment or punishment in both custodial and non-custodial settings. As a State Party to the ICCPR and pursuant to its accession to CAT, Nepal is obligated to prevent, prohibit, and punish acts of torture and CID treatment or punishment and to ensure that victims of torture and CID treatment or punishment can obtain redress.²²⁰ The prohibition against torture has been universally recognized as a customary international law norm and as a *jus cogens* norm applicable in times of war and peace, from which no derogation is permitted.²²¹ All people, without discrimination, have a right to be free from torture and CID treatment or punishment, regardless of whether it is committed by State or private actors.²²² Importantly for Dalits, CAT defines torture and CID treatment or punishment to include severe pain and suffering that is inflicted for a discriminatory reason.²²³ CAT also provides that statements given as a result of torture cannot be used in courts of law.²²⁴

In keeping with Nepal’s obligations under international human rights law, the proposed “Right Against Torture” provision in the new Constitution should:

- Prohibit torture and CID treatment or punishment in all situations, not only those of detention or law enforcement.²²⁵
- Provide that complicity with, or participation in, torture or CID treatment or punishment are also punishable.
- Clarify that every victim of torture or CID treatment or punishment is entitled to: file a complaint; have his or her case promptly and impartially examined by a competent authority; be protected from intimidation and ill-treatment; and “has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible.”²²⁶

Committee	Proposed Provision	CHRGJ Recommendations
Committee on Fundamental Rights and Directive Principles	<p>Right Against Torture:</p> <p>1. No person who is detained during investigation, probe or enquiry or for trial or for any other reason, shall be subjected to physical or mental torture, or be treated in a cruel, inhuman or degrading manner.</p> <p>2. Any such an act pursuant to clause (1) shall be punishable by law, and any person victimized by such a treatment shall have a right to proper compensation.</p>	<p>In order to strengthen Nepal’s commitment to international human rights law, this provision should:</p> <ul style="list-style-type: none"> ▪ Define torture and CID treatment or punishment as they are defined in international human rights law, to include acts occurring outside custodial detention. ▪ Explicitly provide that complicity or participation in torture or CID treatment or punishment are also punishable by law. ▪ Protect the rights of victims of torture and CID treatment or punishment to complain, have their cases dealt with promptly, be protected from intimidation and ill-treatment, and receive fair and adequate compensation.

Right to Communication

The ICCPR guarantees the right to freedom of expression, which includes the “freedom to seek, receive and impart information and ideas” in written or oral form and in the media of one’s choosing.²²⁷ The ICCPR also recognizes that this right carries with it “special duties and responsibilities.”²²⁸ This right may therefore be limited when such restrictions are provided by law and are necessary to ensure the rights or reputations of others or the protection of national security, public order, health, or morals²²⁹ – although no such restriction can “put in jeopardy the right itself.”²³⁰ International human rights law also requires that “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” be prohibited by law; this includes incitements to discrimination, hostility, or violence on the basis of caste.²³¹

In keeping with Nepal’s obligations under international human rights law, the new Constitution should:

- Protect the right to freedom of expression.
- Require that any restrictions on the right to freedom of expression must be provided in law and necessary for the respect of the rights or reputations of others or for the protection of national security or of public order (ordre public), or of public health or morals.²³²

Committee	Proposed Provision	CHRGJ Recommendations
Committee on Fundamental	<p>“Rights Regarding Mass Communications:</p> <p>1. There shall be no prior censorship of publication,</p>	To further fulfill Nepal’s commitment to international human rights law, this provision should:

<p>Rights and Directive Principles</p>	<p>transmission (broadcasting) or information flow or printing of any news item, editorial, article, feature or any other reading, audio, audiovisual materials by any means including electronic publication, transmission (broadcasting) and the press. Provided that, nothing shall be deemed to prevent the making of laws to impose reasonable restrictions on any act which may undermine nationality, sovereignty or integrity or which may jeopardize the harmonious relations subsisting among federal units or the harmonious relations subsisting among the peoples of different castes, tribes or communities, an act of treason, any act that may harm the social prestige of an individual through publication or transmission of false (fake) materials, or that leads to a contempt of court, or to discourage crimes or an act that may be contrary to public health, decent behaviour, or morality and to discourage untouchability and racial and gender discrimination.2. There shall be no closure, seizure or cancellation of registration of radio, television, online or any other types of digital or electronic, print or other media or equipment of communications on account of publication and transmission (broadcasting) or printing of any materials through the medium of audio, audiovisual or electronic equipment.3. There shall be no closure, seizure or cancellation of registration of any newspaper, periodical (magazine) or press on account of printing or publishing any news item, article, editorial, feature, information or any other materials. Such act will be culpable in accordance with law and the victim of such act shall have a right to receive proper compensation.4. Except in accordance with law, no press, electronic transmission and telephone and other means of communications shall be obstructed.”</p>	<ul style="list-style-type: none"> Clearly require that any restrictions on the right to freedom of expression must be provided by law and are necessary to ensure the respect of the rights or reputations of others or the protection of national security, public order, health, or morals.
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Right to Privacy

The ICCPR provides that “No one shall be subjected to arbitrary or unlawful interferences with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation.”²³³ The prohibition on “arbitrary” interferences with privacy extends to interferences provided for under the law—but which are inconsistent with the aims and objectives of the ICCPR or are otherwise unreasonable.²³⁴ The ICCPR further requires that “Everyone has the right to the protection of the law against such interference or attacks.”²³⁵ Thus, Nepal must guarantee the right to privacy *both* with respect to unlawful interferences and with respect to arbitrary interferences and must protect against interferences and attacks on

personal honor by State authorities as well as private actors.

In light of Nepal’s international human rights obligations, the proposed provision on the “Right to Privacy” in the new Constitution should:

- Prohibit arbitrary and unlawful interferences with a person’s privacy, family or correspondence and attacks upon a person’s honor and reputation.

Committee	Proposed Provision	CHRGJ Recommendations
Committee on Fundamental Rights and Directive Principles	“Right to Privacy: Except in circumstances provided by law, privacy in relation to the person, and to his or her residence, documents, records, statistics and correspondence, and his or her reputation are inviolable.”	To further fulfill Nepal’s international human rights obligations, this provision should: <ul style="list-style-type: none"> ▪ Include a protection against “arbitrary” interferences with privacy, to clarify that even interferences provided for by law will be prohibited if they are arbitrary.

Right Regarding Family

The right of men and women of marriageable age to freely marry a person of one’s choosing is protected under a number of international human rights treaties.²³⁶ Included in this right is a prohibition against marriage without free and full consent of each spouse.²³⁷ As a State Party to ICERD, Nepal must also guarantee without discrimination, the right to marriage and choice of spouse.²³⁸ This right is of particular significance to Dalits, as inter-caste marriages have been traditionally forbidden and inter-caste couples have faced severe punishment. Under the ICCPR, States Parties also have an obligation to take appropriate steps to ensure equality between men and women regarding their rights and responsibilities as to marriage, during marriage, and at its dissolution.²³⁹

In keeping with Nepal’s obligations under international human rights law, the proposed provision on the “Right Regarding Family” in the new Constitution should:

- Protect the right of men and women of marriageable age to freely marry a person of their choosing, without discrimination.
- Ensure equality of rights and responsibilities of spouses as to marriage, during marriage, and at its dissolution.

Committee	Proposed Provision	CHRGJ Recommendations
Committee on Fundamental Rights and Directive Principles	“Rights Regarding Family: 1. No one shall be allowed to have more than one spouse. 2. Every person shall have the freedom to marry and divorce in accordance with law. 3. No marriage shall be held against the wishes of the wedding parties or their full and independent consent. 4. The couple shall have the right to property and in family affairs. 5. It shall be the common right and responsibility of the	In keeping with Nepal’s international human rights obligations, this provision: <ul style="list-style-type: none"> ▪ Protects the right of all persons to freely marry. ▪ Prohibits marriage without the full and independent consent of the intending spouses. <p>To further fulfill Nepal’s human rights obligations, this provision should:</p> <ul style="list-style-type: none"> ▪ Clarify that the right to freely marry a person of one’s

	<p>parents for the nurturing, care and all round development of the children whereas it shall be the common right and responsibility of every child to respect and nurture their parents and guardians.</p> <p>6. The acts contrary to Clause (1) and Clause (3) shall be punishable in accordance with law.”</p>	<p>choosing applies to men and women of marriageable age.</p> <ul style="list-style-type: none"> ▪ Ensure equality of both spouses at the time of marriage, during the marriage, and at a marriage’s dissolution.
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ECONOMIC, SOCIAL AND CULTURAL RIGHTS

As a State Party, Nepal is obligated to progressively realize the rights contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR).²⁴⁰ In particular, the ICESCR requires Nepal to guarantee “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”²⁴¹ The proposals for the new Constitution that were reviewed for this Chart protect many of the important economic, social and cultural rights provided for in the ICESCR. To better comply with Nepal’s international human rights obligations, however, the Constitution should also include the right to an adequate standard of living, the right to clothing, and the right to the continuous improvement of living conditions—which are lacking from the current proposals.

While the ICESCR allows for “progressive realization” of the rights contained therein, there are two obligations that apply fully and immediately to all economic, social and cultural rights irrespective of the availability of resources: the obligation to ensure non-discrimination and the obligation “to take steps” toward the realization of these rights.²⁴² With respect to non-citizens, the CERD Committee has called upon States to “[r]emove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment, and health.”²⁴³ In addition, Nepal cannot distinguish between citizens and non-citizens with respect to social and cultural rights.²⁴⁴ While the ICESCR allows some latitude for developing countries to determine to what extent they will guarantee economic rights to non-nationals, this provision must be narrowly construed as a limited exception to the general principle that human rights apply to all persons, and Nepal must strive to ensure the broadest possible enjoyment of economic rights to all persons.²⁴⁵

To achieve substantive equality and eliminate discrimination with respect to economic, social and cultural rights, Nepal may use “special measures.”²⁴⁶ Nepal’s Constitution should also recognize that many economic, social and cultural rights are interdependent and indivisible; for example, the UN Committee on Economic, Social and Cultural Rights (ESCR Committee) has explained that the right to water is a prerequisite to the fulfillment of many other rights and is inextricably intertwined with several other rights, such as the right to health.²⁴⁷

Right Regarding Environment and Health

As a State Party to the ICESCR, Nepal recognizes the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”²⁴⁸ This right includes the right of everyone, without discrimination, to the equal enjoyment of the right to public health and medical care, including access without discrimination to health facilities.²⁴⁹ Nepal must also ensure access without discrimination to the “underlying determinants of health, such as...safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and

environmental conditions, and access to health-related education and information.”²⁵⁰ Under the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), Nepal is further obligated to ensure women “appropriate services in connection with pregnancy, confinement, and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.”²⁵¹

The ICESCR additionally directs Nepal to take steps to improve all aspects of environmental and industrial hygiene.²⁵² Specifically, Nepal must provide for “preventative measures in respect of occupational accidents and diseases”; ensure “an adequate supply of safe and potable water and basic sanitation”; prevent and reduce exposure to harmful substances, such as harmful chemicals; and minimize, “so far as is reasonably practicable, the causes of health hazards inherent in the working environment.”²⁵³

Protection of the right to health and a healthy environment are especially significant for Dalits who are often forced to work in unhealthy environments and are denied access to health services and to the underlying determinants of health.

In keeping with Nepal’s obligations under international human rights law, the proposed provision on the “Right Regarding Environment and Health” in the new Constitution should:

- Guarantee the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
- Protect the underlying determinants of health, such as safe and potable water, adequate health care, and healthy occupational and environmental conditions.
- Ensure the right of women to appropriate health services during and after pregnancy.

Committee	Proposed Provision	CHRGJ Recommendations
Committee on Fundamental Rights and Directive Principles	<p>“Right Regarding Environment:</p> <p>1. Every person shall have the right to live in a healthy, clean and sustainable environment.</p> <p>2. Every person shall have the right to conditioning to safeguard himself or herself from the ill effects of climate change.</p> <p>3. The victim of environmental pollution or degradation shall have the right to compensation in accordance to law.”</p>	<p>This provision takes appropriate steps to support the right to health by:</p> <ul style="list-style-type: none"> ▪ Protecting the right of all persons to live in a healthy, clean, and sustainable environment.
Committee on Fundamental Rights and Directive Principles	<p>“Rights Regarding Health:</p> <p>1. Every citizen shall have the right to free basic health services and no person shall be deprived of emergency health services.</p> <p>2. Every person shall have the right to reproductive health.</p> <p>3. Every person shall have the right to informed health services.</p> <p>4. Every citizen shall have the right to equal access to health services.</p> <p>5. Every citizen shall have the right to an access to clean (pure)</p>	<p>This provision takes appropriate steps to support the right to health by:</p> <ul style="list-style-type: none"> ▪ Providing for equal access to health services. ▪ Protecting the right to water. ▪ Protecting some of underlying determinants of the right to health, such as access to clean water and sanitation. <p>To further fulfill Nepal’s commitment to human rights, this</p>

	drinking water and sanitation (cleanliness).”	provision should: <ul style="list-style-type: none"> ▪ Guarantee the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. ▪ Clarify that women are entitled to appropriate health services during and after pregnancy.
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Education and Cultural Rights

As a State Party to the ICESCR, Nepal must take concrete steps to ensure that everyone has the right to education.²⁵⁴ Nepal has an obligation to ensure free primary education and to progressively introduce free higher education for all.²⁵⁵ Nepal must also ensure that fundamental education is “encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education.”²⁵⁶ Consistent with Nepal’s obligations to ensure equality and non-discrimination, access to all education must be non-discriminatory.²⁵⁷ To ensure equal access to education in fact, and not merely in law, Nepal should introduce special measures to ensure educational equality for Dalits, women, and other marginalized groups.²⁵⁸ The right to education is particularly important to Dalits, women, and other marginalized groups who have historically faced significant obstacles to attaining an education. Education is also an essential tool for these groups to assert, safeguard, and further other human rights.

Under the ICESCR, everyone has the right to take part in cultural life.²⁵⁹ In addition, every individual has the right to “benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”²⁶⁰ Under the ICCPR, persons belonging to ethnic, religious, or linguistic minorities have the right to enjoy their own culture, profess and practice their own religion, and use their own language.²⁶¹ As with all other human rights, the right to take part in cultural life cannot be interpreted so as to infringe on the individual rights and freedoms of others.²⁶²

In keeping with Nepal’s obligations under international human rights law, the proposed provision on “Education and Cultural Rights” in the new Constitution should:

- Provide for free and compulsory primary education for all.
- Provide for the progressive introduction of free secondary and higher education available and accessible for all.
- Protect the right of all persons to take part in cultural life.
- Guarantee the right of all persons to the protection of the moral and material interests resulting from their artistic, literary, and scientific creations.

Committee	Proposed Provision	CHRGJ Recommendations
Committee on the Protection of the Rights of Minorities and Marginalized Communities	“Cultural and Educational Rights: (1) Every person, family or community residing in Nepal shall have the right to protect, promote and use his or her language, script and culture, customs, traditions, rituals and practices that are inconsistent with universal norms and	In keeping with Nepal’s obligations under international human rights law, this provision: <ul style="list-style-type: none"> ▪ Protects the right of all persons to take part in cultural life, while ensuring that this right is not used to justify encroachments on the rights of others.

	<p>values of human rights. Provided that this shall not be deemed to have prevented from making laws for imposing reasonable restrictions on acts which are likely to disrupt public law and order or incite people to commit crimes or violent acts or undermine morality or jeopardize harmonious relations subsisting between communities or groups including different castes, tribes, religions, language, region, etc.</p> <p>(2) Every citizen shall have the right to receive education up to high level free of cost.</p> <p>(3) It shall be the duty of the State to ensure the right of all religious, cultural and linguistic communities to open and run educational institutions as desired by them. Provided that this shall not be deemed to have prevented from making laws for imposing reasonable restrictions on acts that are likely to disrupt public law and order or incite to commit crimes or violent acts or undermine morality or jeopardize harmonious relations subsisting between communities or groups including different castes, tribes, religions, language, region, etc.</p> <p>(4) No educational institutions opened and run by a particular religious, cultural or linguistic community shall be deprived of receiving assistance due to be received from the State.</p> <p>(5) No person shall be deprived of the opportunity to get enrolled in or receive higher education from a public educational institution just by reason of having received education from an educational institution opened or run by a particular religious, cultural or linguistic community.</p> <p>(6) No person shall, on grounds of being, indigenous peoples, Tarai people, Muslims, Madheshi, religion or of sex, color, language, region or culture, be deprived of the opportunity to get enrolled in or receive education from educational institutions run by or receiving assistance from the State.”</p>	<ul style="list-style-type: none"> ▪ Provides for free education for all, up to the higher level. ▪ Prohibits discrimination in access to education. <p>In order to strengthen Nepal’s commitment to international human rights law, this provision should:</p> <ul style="list-style-type: none"> ▪ Include caste in the list of grounds for which limits on access to education is prohibited (Clause 6) and make the list non-exhaustive. ▪ Replace broad language such as “harmonious relations,” which could be interpreted to allow the perpetuation of caste discrimination, with a provision emphasizing that cultural rights, like all other rights, may not be invoked to justify infringing upon the rights of others.
Committee on Fundamental Rights	<p>“Rights Regarding Education:</p> <p>1. Every citizen shall have the right to access over basic</p>	<p>In keeping with Nepal’s obligations under international human rights law, this provision:</p>

<p>and Directive Principles</p>	<p>education. 2. Primary education shall be compulsory and free of cost. Every citizen shall have the right to obtain free education up to secondary level. 3. The citizens of destitute class shall have the right to free higher education as prescribed in the law. 4. Every Nepalese community inhabiting Nepal shall have the right to run and operate schools and academic institutions in order to provide education in mother tongue.”</p>	<ul style="list-style-type: none"> ▪ Provides for free and compulsory primary education and free secondary education. <p>In keeping with Nepal’s international human rights obligations, this provision should:</p> <ul style="list-style-type: none"> ▪ Refrain from using qualifying language such as “as prescribed in the law” (Clause 3). ▪ Provide for the progressive introduction of free higher education for all.
<p>Committee on Fundamental Rights and Directive Principles</p>	<p>“Rights Regarding Language and Culture: 1. Every person and community shall have the right to use their own language 2. Every person and community shall have the right to participate in the cultural life of their community. 3. Every Nepalese community inhabiting Nepal shall have the right to protect and promote their language, script, culture, cultural civilization and heritage. 4. Every individual shall have the right to create arts and literature, develop them, and protect, in accordance to law, their intellectual heritage, and reap gains thereof.”</p>	<p>In keeping with Nepal’s obligations under international human rights law, this provision:</p> <ul style="list-style-type: none"> ▪ Protects the right of all persons to take part in cultural life ▪ Ensures the right of all individuals to the protection of the moral and material interests resulting from their artistic and literary creations.

Employment and Exploitation

Systemic work-related abuses are a core feature of caste-based discrimination. The new Constitution must take steps to end the segregation and exploitation of Dalits in employment.

As a State Party to the ICESCR, Nepal is obligated to protect the right to work, which includes the freedom to choose one’s work.²⁶³ Nepal must also protect the enjoyment of just and favorable work conditions, which includes fair wages and equal remuneration for equal work without distinction of any kind, a decent living, and safe and healthy working conditions.²⁶⁴ Both the ICCPR and ICESCR also provide for the right of everyone to form and join trade unions and the ICESCR further provides for the right of trade unions to function freely.²⁶⁵ No restrictions may be placed on this right, except those which are prescribed by law and necessary in a democratic society to protect the rights and freedoms of others or in the interests of national security or public order.²⁶⁶

The ICCPR also prohibits slavery in all its forms and prohibits other forms of forced or compulsory labor.²⁶⁷ The prohibition on forced or compulsory labor does not preclude the performance of hard labor where such labor is prescribed as punishment by a competent court.²⁶⁸ Under the ICCPR, the term “forced or compulsory labor” does not include military service or national service for conscientious objectors, services during

emergencies, and other work or service that is part of normal civic obligations.²⁶⁹

In keeping with Nepal’s obligations under international human rights law, the proposed provision on the “Right Against Exploitation” in the new Constitution should:

- Prohibit slavery in all its forms.
- Prohibit other forms of forced or compulsory labor.

In keeping with Nepal’s obligations under international human rights law the proposed provisions on rights regarding labor and employment in the new Constitution should:

- Protect the right of all persons to work.
- Explicitly include the right to freely choose or accept employment.
- Specify that workers are entitled to just and favorable work conditions, including fair wages, equal remuneration for equal work, and safe and healthy working conditions.
- Protect the right of all persons to form and join trade unions.

Committee	Proposed Provision	CHRGJ Recommendations
Committee on Fundamental Rights and Directive Principles	<p>“Right Against Exploitation:</p> <ol style="list-style-type: none"> 1. Every person shall have the right against exploitation. 2. No person shall be exploited in the name of religion, custom, tradition and practice, or in any other way 3. No person shall be subjected to human trafficking, slavery or bonded labour. Such an act shall be punishable in accordance with the law and the victim shall have the right to receive proper compensation from the victimizer. 4. No person shall be subjected to forced labour. Provided that nothing in this Clause shall prevent the enactment of a law requiring citizens to be engaged in compulsory service for public purposes.” 	<p>In keeping with Nepal’s obligations under international human rights law, this provision:</p> <ul style="list-style-type: none"> ▪ Explicitly prohibits exploitation in the name of religion, custom, tradition and practice, and makes this list non-exhaustive. ▪ Prohibits slavery, bonded and forced labor, and human trafficking.
Committee on Fundamental Rights and Directive Principles	<p>“Rights Regarding Employment:</p> <ol style="list-style-type: none"> 1. Every citizen shall have the right to employment. The terms and conditions of the employment shall be as prescribed by the law. Every person shall have the right to conditioning to safeguard himself or herself from the ill effects of climate change. 2. Every citizen shall have the right to select / choose employment. 3. Every unemployed citizen shall have the right to receive 	<p>While this provision recognizes the right to work and the right to choose one’s work, in keeping with Nepal’s international human rights obligation, this provision should:</p> <ul style="list-style-type: none"> ▪ Refrain from using qualifying language such as “as prescribed by the law.”

	allowance in accordance to law.”	
Committee on Fundamental Rights and Directive Principles	<p>“Rights Regarding Labour:</p> <ol style="list-style-type: none"> 1. Every worker shall have the right to proper work practices. 2. Every worker shall have the right to proper wages, conveniences and social security. 3. Every worker shall have the right to form trade unions, participate in them and engage in collective bargaining and strikes in accordance with law.” 	<p>This provision recognizes the right to form and participate in trade unions and the right to proper work practice and proper wages—which is interpreted to mean just and favorable work conditions, including fair wages, equal remuneration for equal work, and safe and healthy working conditions. In keeping with Nepal’s human rights obligations, this provision should also:</p> <ul style="list-style-type: none"> ▪ Refrain from using qualifying language such as “in accordance with law.”
Right to Social Security		
<p>As a State Party to the ICESCR, Nepal is obligated to recognize the right of everyone to adequate social security, including social insurance.²⁷⁰ The ESCR Committee has clarified that, to ensure non-discrimination, State Parties must take effective measures, “within their maximum available resources, to fully realize the right of all persons without any discrimination to social security, including social insurance.”²⁷¹</p> <p>In keeping with Nepal’s obligations under international human rights law, the proposed provision on the “Right to Social Security” in the new Constitution should:</p> <ul style="list-style-type: none"> ▪ Guarantee the right to adequate social security, including social insurance to everyone, without discrimination, while paying particular attention to marginalized groups such as women and Dalits. 		
Committee	Proposed Provision	CHRGJ Recommendations
Committee to Decide the Basis of Cultural and Social Solidarity	<p>“Right to social security:</p> <p>Single women, the elderly, people with disabilities, physically impaired, helpless citizens and the tribes that face the threat of extinction shall have the right to social security according to the provisions made in law.”</p>	<p>In keeping with Nepal’s human rights obligations, this provision should:</p> <ul style="list-style-type: none"> ▪ Guarantee the right to adequate social security including social insurance to everyone, without discrimination, while paying particular attention to marginalized groups such as women and Dalits. ▪ Avoid caveats such as “according to the provisions made in law,” which could be used to limit or weaken the right.
Committee on Fundamental Rights and Directive Principles	<p>“Right Regarding Social Security:</p> <p>Destitute class, incapacitated and helpless people, single and helpless women, disabled people, children, senior citizens, people who cannot take care of themselves, and citizens of endangered tribes shall have the right to social security as prescribed by the law.”</p>	<p>In keeping with Nepal’s human rights obligations, this provision should:</p> <ul style="list-style-type: none"> ▪ Guarantee the right to adequate social security including social insurance to everyone, without discrimination, while paying particular attention to marginalized groups such as women and Dalits.

		<ul style="list-style-type: none"> Refrain from using qualifying language such as “as prescribed by the law.”
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Right to Social Justice

As discussed above, international human rights law requires that Nepal take special measures to ensure substantive equality for women and for members of marginalized groups.²⁷² Special measures may be used to address “persistent or structural disparities and *de facto* inequalities resulting from the circumstances of history that continue to deny to vulnerable groups and individuals the advantages essential for the full development of the human personality”²⁷³ and to accelerate the achievement of *de facto* equality between women and men.²⁷⁴

Special measures “can reach into all fields of human rights deprivation”²⁷⁵ and “should include measures to achieve appropriate representation in educational institutions, housing, political parties, parliaments and employment, especially in the judiciary, police, army and other civil services, which in some cases might involve electoral reforms, land reforms and campaigns for equal participation.”²⁷⁶

As discussed above, special measures must in all cases be carried out on the basis of accurate and disaggregated data.²⁷⁷ Proposals for proportional representation must additionally be based on an accurate and disaggregated census.

In keeping with Nepal’s obligations under international human rights law, the proposed provision on the “Right to Social Justice” in the new Constitution should:

- Provide for special measures that are designed to secure to women and to disadvantaged groups the full and equal enjoyment of human rights and freedoms.
- Secure an entitlement to land tenure or comparable redress in cases where land tenure has been compromised for particular groups by previous discrimination.²⁷⁸

Committee	Proposed Provision	CHRGJ Recommendations
Committee on Fundamental Rights and Directive Principles	<p>“Rights Regarding Social Justice:</p> <p>1. Women, <i>dalits</i>, Madhesis, indigenous tribes (<i>adivasis janjatis</i>), minorities and marginalized, Muslims, gender and sexual minority community, disabled people, youths, backward class, farmers and workers and oppressed groups, who are socially backward, shall have the right to participate in state structures on the basis of the principles of proportionate inclusion.</p> <p>2. The economically destitute citizens shall be given priority while making provisions pursuant to Clause (1).</p> <p>3. Destitute class, disabled people and citizens of endangered communities shall have the right to get special privileges in education, health, accommodation,</p>	<p>In keeping with Nepal’s obligations under international human rights law, this provision:</p> <ul style="list-style-type: none"> Provides for special measures in a number of key areas, including state structures, education, and employment, in order to help secure substantive equality for women and for members of historically marginalized groups. <p>In order to strengthen its commitment to international human rights law, this provision should:</p> <ul style="list-style-type: none"> Provide for an entitlement to land tenure or comparable redress in cases where land tenure has been compromised for particular groups by previous

	<p>employment, food and social security for their protection, uplifting, empowerment and development, and for reaping professional gains thereof in accordance with law.</p> <p>4. Every farmer shall have the right to land for farming activity, to selection and protection of local seeds and saplings and agricultural species which are used and adopted in a traditional manner, to access to proper cost and market of agricultural output and agricultural production, and to special privileges for their empowerment and development, and to benefits thereof.”</p>	discrimination.
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Right to Food

The ICESCR provides that everyone has the right to “adequate food,”²⁷⁹ including the fundamental right to be free from hunger and to have sustainable access to food in a quantity and quality sufficient to satisfy one’s dietary and cultural needs.²⁸⁰ The ESCR Committee has recommended that Nepal take urgent steps to ensure food security, particularly for those who belong to the most disadvantaged and marginalized groups.²⁸¹ Nepal must remove obstacles that prevent non-citizens’ enjoyment of the right to food.²⁸²

In keeping with Nepal’s obligations under international human rights law, the proposed “Right to Food” provision of the new Constitution should:

- Include the right to “adequate food” for all.

Committee	Proposed Provision	CHRGJ Recommendations
Committee on Fundamental Rights and Directive Principles	<p>“Right to food:</p> <p>(1) Every person shall have the right to food.</p> <p>(2) Every citizen shall have the right to protect himself or herself from the vulnerable condition of life owing to the scarcity of food (provisions).</p> <p>(3) Every citizen shall have the right to food sovereignty in accordance with law.”</p>	<p>In keeping with Nepal’s obligations under international human rights law, this provision:</p> <ul style="list-style-type: none"> ▪ Recognizes the right to food as fundamental. <p>To further fulfill Nepal’s international human rights obligations, this provision should:</p> <ul style="list-style-type: none"> ▪ Clarify that the right to food is a right to “adequate” food.

Right to Housing

As a State Party to the ICESCR, Nepal is obligated to take steps to ensure the right to adequate housing.²⁸³ This right includes “adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost.”²⁸⁴ This right also includes access to “safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.”²⁸⁵ Like all rights, this right must be provided in a manner that is non-discriminatory. In addition, the ICERD specifically prohibits housing discrimination and residential segregation based on caste.²⁸⁶

In recognition of Nepal’s obligations under international human rights law, the proposed “Right to Housing” provision of the new Constitution should:

- Ensure the right to adequate housing.

Committee	Proposed Provision	CHRGJ Recommendations
Committee on Fundamental Rights and Directive Principles	<p>“Rights Regarding Accommodation:</p> <p>(1) Every citizen shall have the right to an access to proper accommodation.</p> <p>(2) Except in accordance with law or ordered by the court, no person shall be evacuated from his or her habitation,”</p>	<p>In keeping with Nepal’s obligations under international human right law, this provision:</p> <ul style="list-style-type: none"> ▪ Ensures the right to adequate housing.

WOMEN’S RIGHTS

Nepal is obligated to take all appropriate measures to eradicate discrimination against women and to take special measures to ensure substantive equality for women.²⁸⁷ These obligations extend to women’s participation in politics,²⁸⁸ access to education,²⁸⁹ equality in employment,²⁹⁰ and access to health care²⁹¹ and economic and social benefits.²⁹² CEDAW affirms that women’s enjoyment of their fundamental rights cannot be restricted on the basis of culture and tradition²⁹³ and requires that Nepal give special attention to the particular challenges and forms of discrimination faced by rural women.²⁹⁴ In addition, Nepal should consider and take measures to address the multiple forms of discrimination endured by women who are members of marginalized groups, such as Dalits.²⁹⁵

In keeping with Nepal’s obligations under international human rights law, the proposed “Women’s Rights” provision in the new Constitution should:

- Prohibit discrimination and ensure equality on the basis of gender.
- Provide for special measures to help secure substantive equality and the full enjoyment of human rights for women, paying particular attention to women who belong to marginalized groups and endure multiple forms of discrimination.
- Provide for the adoption of all appropriate measures to modify the social and cultural patterns of conduct of men and women in order to eliminate prejudices, practices, and stereotypes based on the idea that one sex is inferior or superior to the other.²⁹⁶
- Include specific rights concerning family relations, including the equal rights of men and women with respect to entry into marriage, dissolution of marriage, parental rights and responsibilities, family planning, relations with children, and property and financial assets.

Committee	Proposed Provision	CHRGJ Recommendations
Committee on Fundamental Rights and Directive Principles	<p>“Rights Regarding Women:</p> <p>(1) Every woman shall have equal ancestral right without any gender discrimination.</p> <p>(2) There shall be no gender discrimination against women, in any form.</p> <p>(3) Every woman shall have the right regarding reproduction.</p>	<p>In keeping with Nepal’s human rights obligations, this provision:</p> <ul style="list-style-type: none"> ▪ Prohibits discrimination on the basis of gender. ▪ Provides for special measures to help secure substantive equality and the full enjoyment of human rights for women.

	<p>4) No physical, mental, sexual, psychological or other form of violence or exploitation shall be inflicted on any woman on the basis of religious, social, cultural tradition, custom or any other grounds, and such an act shall be punishable by law and the victim woman shall have the right to receive proper compensation.</p> <p>(5) Every woman shall have the right to proportionate participation in all agencies of the state mechanism on the basis of inclusiveness.</p> <p>(6) Every woman shall have the right to special opportunity in education, health, employment and social security on the basis of positive discrimination.”</p>	<p>To further fulfill Nepal’s commitment to human rights, this provision should:</p> <ul style="list-style-type: none"> ▪ Provide for women’s right to equality (in addition to their right to non-discrimination). ▪ Include specific rights concerning family relations, including the equal rights of men and women with respect to entry into marriage, dissolution of marriage, parental rights and responsibilities, family planning, relations with children, and property and financial assets. ▪ Ensure that special measures pay particular attention to women who are members of marginalized communities, such as Dalits, and that all special measures are enacted on the basis of accurate and disaggregated data.²⁹⁷ • Add a provision requiring adoption of all appropriate measures to modify the social and cultural patterns of conduct of men and women in order to eliminate prejudices, practices, and stereotypes based on the idea that one sex is inferior or superior to the other.
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CHILDREN’S RIGHTS

As a State Party to the Convention on the Rights of the Child (CRC), Nepal is obligated to protect the rights of children, without discrimination, and to protect children from discrimination based on the status of their parents.²⁹⁸ The CRC requires that States use the best interests of the child as the primary consideration in all State actions concerning children.²⁹⁹ The CRC further requires that children “be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development.”³⁰⁰ The CRC also protects children’s rights to a name and a nationality, an adequate standard of living, health, and freedom from sexual exploitation.³⁰¹ Under the Optional Protocol to the CRC on the involvement of children in armed conflict, which Nepal has ratified, Nepal is required to take all feasible measures to prevent children from participating in armed conflict³⁰² and to promote the physical and psychological recovery and social reintegration of children affected by armed conflict.³⁰³ Nepal should recognize and take measures to address the fact that Dalit children are particularly vulnerable to violations of their rights.

In keeping with Nepal’s obligations under international human rights law, the proposed “Children’s Rights” provision of the new Constitution should:

- Protect children from performing any work or services that place children’s well-being, physical or mental health, or spiritual, moral or social

development at risk.

- Affirm that the best interests of the child is the primary consideration in all actions concerning the rights of children.
- Affirm that children have a voice in all matters affecting them in all spheres of society, particularly in the family, in school, and in their communities.³⁰⁴

Committee	Proposed Provision	CHRGJ Recommendations
<p>Committee on Fundamental Rights and Directive Principles</p>	<p>“Rights Regarding Children:</p> <p>(1) Every child shall have the right to his or her name along with his or her identity and registration of his or her birth.</p> <p>(2) Every child shall have the right to education, health, be nurtured, to proper care, sports, entertainment and personality development from his or her family and state.</p> <p>(3) Every child shall have the right to Preliminary child development along with proper care.</p> <p>(4) Every child shall have the right to receive education in his or her mother tongue.</p> <p>(5) No child shall be employed in factories, mines or in any other hazardous work.</p> <p>(6) No child shall be subjected to child marriage, illegal trafficking and abduction or hostage.</p> <p>(7) No child shall be recruited or used in army, police or armed conflict or group, or be subjected to maltreatment, negligence through any medium or in any form in the name of cultural or religious practice, or to physical, mental, sexual or other types of exploitation or inappropriate use.</p> <p>(8) No child shall be tortured at home, school or any other place and in any condition, either physically, mentally or in any other forms.</p> <p>(9) Every child shall have the right to child-friendly justice.</p> <p>(10) Helpless, orphaned or mentally retarded, disable children, children who are victims of conflict or displaced and children at risk shall have the right to receive special protection and privileges from the State to ensure their secure future.</p> <p>(11) The acts pursuant to Clauses (5), (6), (7) and (8) shall be punishable in accordance with law and children who are victims of such acts shall have the right to receive proper compensation from the victimizer.”</p>	<p>In keeping with Nepal’s international human rights obligations, this provision broadly protects the rights of children in many fundamental ways.</p> <p>To further fulfill Nepal’s commitment to human rights, this provision should also:</p> <ul style="list-style-type: none"> ▪ Protect children from performing any work or services that place children’s well-being, physical or mental health, or spiritual, moral, or social development at risk. ▪ Affirm that the best interests of the child is the primary consideration in all actions concerning the rights of children. ▪ Affirm that children have a voice in all matters affecting them in all spheres of society, particularly in the family, in school, and in their communities.

IMPLEMENTATION OF FUNDAMENTAL RIGHTS

International human rights law requires that Nepal respect, protect, and fulfill international human rights both in law and in practice. Without strong enforcement mechanisms, constitutional rights will exist only on paper. In recognition of the fact that a right without a remedy is meaningless, the international human rights treaties to which Nepal is a party provide that there must be adequate State mechanisms by which individuals can seek redress for violations of their rights.³⁰⁵

In keeping with Nepal’s obligations under international human rights law, the proposed “Implementation of Fundamental Rights” provision of the new Constitution should:

- Clearly state that the Government has an obligation to respect, protect, and fulfill fundamental rights.
- Provide that this obligation is binding on “[a]ll branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local.”³⁰⁶
- Provide that all individuals have the right to petition competent and impartial tribunals to have a law declared unconstitutional and to seek redress and compensation if their fundamental rights have been violated.

Committee	Proposed Provision	CHRGJ Recommendations
Committee on Fundamental Rights and Directive Principles	<p>“Rights Regarding Implementation of Fundamental Rights and Constitutional Treatment:</p> <p>(1) The State shall make appropriate provisions for the implementation of the rights provisioned in this Part, such as rights regarding education, rights regarding health, rights regarding employment, rights regarding accommodation, rights regarding food, rights regarding social justice and rights regarding social security.</p> <p>(2) The State shall make legal provisions, within two years as deemed necessary, for the implementation of the rights provided in this Part.</p> <p>(3) The right to take measures in accordance with the documentation in Article ... (Article related with the jurisdiction of federal supreme court) and Article ... (Article related with the jurisdiction of regional/state level supreme/high court) for the exercise of the rights provided by this Part is reserved.”</p>	<p>This provision fails to comply with Nepal’s human rights obligations. In keeping with Nepal’s human rights obligations, the new Constitution must:</p> <ul style="list-style-type: none"> ▪ Clarify that all fundamental rights, including economic, social and cultural rights, are fully justiciable. ▪ Refrain from using language that allows the government to delay implementing rights guaranteed in the Constitution (as in clause 2). ▪ Provide a right to an effective remedy by clearly providing that all individuals have the right to petition an independent and competent tribunal to enforce their rights.

DIRECTIVE PRINCIPLES, POLICIES AND RESPONSIBILITIES OF THE STATE

In keeping with Nepal's obligations under international human rights law, the proposed "Directive Principles, Policies, and Responsibilities of the State" section of the new Constitution should:

- Make it clear that any fundamental rights mentioned in this section are obligatory human rights and fully justiciable.
- Ensure that all state responsibilities and policies are created and administered without discrimination of any kind.

EMERGENCY POWERS

International human rights law strictly limits the circumstances in which a state of emergency can be declared and provides that a number of rights must be protected even in these times. Past state of emergency declarations have dramatically escalated human rights abuses in Nepal, particularly against Dalits and other marginalized communities.

Pursuant to its obligations under the ICCPR, Nepal may only declare a state of emergency in response to a situation that "threatens the life of the nation,"³⁰⁷ which is to say, only in response to situations of the direst circumstances and not every disturbance or catastrophe.³⁰⁸ Both the declaration of the state of emergency and any actions taken as a result thereof must reflect the principle of proportionality and must be carefully justified by the State.³⁰⁹ Nepal may only derogate from its international human rights obligations during public emergencies to the extent strictly required by the exigencies of the situation and so long as measures taken do not involve discrimination.³¹⁰

Even in a state of emergency, Nepal must at a minimum guarantee a number of non-derogable rights, as listed below.

In keeping with Nepal's obligations under international human rights law, the proposed provision on "Emergency Powers" in the new Constitution should:

- Strictly define the circumstances in which the government can declare a state of emergency.
- Indicate that any derogation measures must be limited to the extent strictly required by the exigencies of the situation.
- Ensure that any measures enacted during a state of emergency do not involve discrimination on any ground.
- Guarantee that, at a minimum, the following non-derogable rights listed in ICCPR Article 4(2) are protected at all times, even in emergencies: the right to life; the right to be free from torture and CID treatment or punishment; the right to be free from slavery and forced servitude; the right to be free from imprisonment for the inability to fulfill a contractual obligation; the right not to be subjected to retroactive criminal laws and penalties; the right to recognition everywhere as a person before the law; and the right to freedom of thought, conscience and religion.³¹¹

Committee	Proposed Provision	CHRGJ Recommendations
Committee For Preserving the National Interests	<p>“(1) If a grave emergency arises in regard to the sovereignty or integrity of Nepal or the security of any part thereof, whether by war, external aggression, armed rebellion or extreme economic disarray, the Head of the State on the recommendation of the Head of the State/Council of Ministers of the Government of Nepal may, by proclamation or order, declare a state of emergency to be enforced in Nepal or any specified part thereof.</p> <p>(2) If grave emergency arises in a province as a result of severe natural disaster or extreme economic disarray, the government of the province with consent of the Central/Union government may, by proclamation or order, declare a state of emergency in the areas falling under its provincial jurisdiction.”</p>	<p>This provision fails to comply with Nepal’s international human rights obligations. In keeping with Nepal’s international human rights obligations, this provision should:</p> <ul style="list-style-type: none"> ▪ Strictly limit the circumstances in which the Government can declare a state of emergency to situations that threaten the life of the nation. ▪ Limit derogation measures to the extent strictly required by the exigencies of the situation. ▪ Prohibit discrimination on any forbidden grounds. ▪ Protect certain rights as non-derogable even in a state of emergency, as listed above.

STATE STRUCTURES

LEGISLATURE

As noted throughout this Chart, as a State Party to a number of international human rights treaties, Nepal is obligated to ensure non-discrimination and substantive equality for women and for members of marginalized groups, such as Dalits.³¹² To achieve substantive equality, States may adopt “special measures,” such as providing for proportionate representation in state structures to ensure to women and members of marginalized groups meaningful participation in all decision-making processes.³¹³ Such proposals should be carried out on the basis of accurate and disaggregated data, including an accurate census.³¹⁴ Such proposals should also consider the multiple forms of discrimination faced by women who belong to marginalized groups, such as Dalit women, and should ensure their proportional representation. Finally, Nepal must also ensure the right to non-discrimination in participation in elections and within political parties.³¹⁵

In keeping with Nepal’s obligations under international human rights law, the proposed provision on the legislature in the new Constitution should:

- Provide for and enforce special measures for women, Dalits, and other marginalized groups to ensure their proportionate participation in legislative bodies.
- Prohibit or revoke registration of political parties that unlawfully discriminate in either their membership, leadership, or nomination of individuals for political positions.

JUDICIARY

Pursuant to international human rights law, Nepal is obligated to ensure the right to an effective remedy to all persons whose human rights are

violated.³¹⁶ To comply with this obligation, the new Constitution must establish independent and impartial bodies to address claims of rights violations.³¹⁷ In keeping with its obligation to eliminate discrimination and ensure substantive equality, Nepal should additionally adopt special measures to ensure that women, Dalits, and other marginalized groups are proportionately represented in the judiciary.³¹⁸ As with all special measures, this requires accurate and disaggregated data, including an accurate census.³¹⁹

In keeping with Nepal's obligations under international human rights law, the proposed provision on the judiciary in the new Constitution should:

- Ensure that all levels of the judiciary are competent, independent, and impartial and capable of providing a remedy for the violations within their jurisdiction.
- Ensure that all people, including non-citizens, have the right to petition an independent and impartial court when their constitutional rights are violated.
- Provide for and enforce special measures for women, Dalits, and other marginalized groups to ensure their proportionate participation in the judiciary.

NATIONAL CONSTITUTIONAL BODIES AND COMMISSIONS

To comply with its obligation to respect, protect, and fulfill human rights, Nepal may establish national human rights institutions to investigate allegations of rights violations and to monitor Nepal's compliance with its human rights obligations.³²⁰ In addition to a Human Rights Commission, the Constitution should also establish a National Dalit Commission as a constitutional body to address the systemic effects of caste discrimination. In order to be effective, such institutions must be independent and impartial and must enjoy "an important degree of autonomy from the executive and the legislature,"³²¹ including financial autonomy.³²² To further ensure the right to an effective remedy, these commissions should be given broad investigative and enforcement powers. Furthermore, in order to comply with its obligation to ensure substantive equality and non-discrimination, Nepal should adopt special measures to ensure that Dalits, women, and other marginalized groups are proportionately represented in national human rights institutions.³²³ As with all special measures, this requires a comprehensive and accurate census.³²⁴

In keeping with Nepal's obligations under international human rights law, the proposed provision on "National Constitutional Bodies or Commissions" in the new Constitution should:

- Establish the Human Rights Commission and the National Dalit Commission as constitutional bodies with broad investigative and enforcement powers.
- Provide for the financial autonomy of these commissions.
- Provide for and enforce special measures for Dalits and other marginalized groups, including women, to ensure their proportionate participation in these commissions.

¹ See generally, CHRGI, Caste Discrimination Project, <http://www.chrgi.org/projects/discrimination.html> (last visited Jan. 19, 2009).

² The following Thematic Committees' Concept Papers were reviewed: National Interest Preservation Committee; Committee on the Protection of the Right of Minorities and Marginalized Communities; Committee for Determining the Base of Cultural and Social Solidarity; Committee for Determining the Structure of Constitutional Bodies; Form of Legislative Body Committee; Judicial System Committee; and the Committee on Fundamental Rights and Directive Principles of the State. Our analysis is based on English translations of the concept papers available through the Centre for Constitutional Dialogue, an initiative of the United Nations Development Programme's project on Support to Participatory Constitution Building in Nepal. Centre for Constitutional Dialogue, Concept Papers Presented at the Constituent Assembly, <http://www.ccd.org.np/en/constituent/concept.php>. An unofficial English translation of the Concept Paper of the Committee on Fundamental Rights and Directive Principles of the State was used, as an official translation was not available from the Centre for Constitutional Dialogue at the time of writing.

³ Nepal is a party to the following international human rights treaties: the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Mar. 7, 1966, 660 U.N.T.S. 195; the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Dec. 18, 1979, 1249 U.N.T.S. 13; the CEDAW Optional Protocol, Oct. 15, 1999, 2131 U.N.T.S.83; the International Covenant on Civil and Political Rights (ICCPR), Dec. 16, 1966, 999 U.N.T.S. 171; the ICCPR's First Optional Protocol, Dec. 19, 1996, 999 U.N.T.S. 302; the ICCPR's Second Optional Protocol, Dec. 15, 1989, 1642 U.N.T.S. 414; the International Covenant on Economic, Social and Cultural Rights (ICESCR), Dec. 16, 1966, 993 U.N.T.S.; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Dec. 10, 1984, 1465 U.N.T.S. 85; the Convention on the Rights of the Child (CRC), Nov. 20, 1989, 1577 U.N.T.S. 3, the Optional Protocol on the Involvement of Children in Armed Conflict, U.N. Doc. A/RES/54/263 (May 25, 2000), and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, U.N. Doc. A/54/49 (Jan. 18, 2000).; the Convention on the Rights of Persons with Disabilities and Optional Protocol (CPD), Dec. 27, 2009, G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49.

⁴ See Office of the High Commissioner for Human Rights, International Human Rights Law, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>

⁵ See Committee on the Elimination of Racial Discrimination (CERD Committee), *General Recommendation No. 14: Definition of racial discrimination*, ¶ 2, U.N. Doc A/48/18 (Mar. 22, 1993) [hereinafter CERD Committee, *General Recommendation No. 14*]; HRC, *General Comment No. 18: Non-Discrimination*, ¶ 7, U.N. Doc. HRI\GEN\1\Rev.1 (Nov. 10, 1989) [hereinafter HRC, *General Comment No. 18*]; Human Rights Council, *Draft UN Principles and Guidelines for the Effective Elimination of Discrimination Based on Work and Descent*, No. 18, 11th Sess., U.N. Doc. A/HRC/11/CRP.3 (May 18, 2009) [hereinafter Draft Principles & Guidelines].

⁶ See Human Rights Council, 11th Sess., Final Report of Mr. Yozo Yokota and Ms. Chin-Sung Chung, Special Rapporteurs on the Topic of Discrimination Based on Work and Descent, U.N. Doc. A/HRC/11/CRP.3 (May 18, 2009), Annex I.

⁷ *Nepal Backs UN Move on Caste*, HIMALAYAN TIMES, Sept. 18, 2009; Draft Principles & Guidelines, *supra* note 5.

⁸ CHRGI, RECASTING JUSTICE: SECURING DALIT RIGHTS IN NEPAL'S NEW CONSTITUTION (2008), available at <http://www.chrgi.org/projects/docs/recastingjustice.pdf>.

⁹ CHRGI, DALIT NGO FEDERATION (DNF), INTERNATIONAL DALIT SOLIDARITY NETWORK (IDSN), RECASTING JUSTICE: SECURING DALIT RIGHTS IN NEPAL'S NEW CONSTITUTION: JOINT STATEMENT (Feb. 23, 2009), available at <http://www.chrgi.org/press/docs/nepalconstitutionpressrelease.pdf>.

¹⁰ See DALIT NGO FEDERATION, REVIEW ON PRELIMINARY DRAFTS OF NEW CONSTITUTION: DALIT PERSPECTIVES (2009); FEMINIST DALIT ORGANIZATION, DALIT WOMEN'S ISSUES SHOULD BE INCLUDED IN THE NEW CONSTITUTION (2009); FEMINIST DALIT ORGANIZATION, REPORT OF INTERACTION PROGRAM ON CONCEPT PAPER OF FUNDAMENTAL RIGHTS & GUIDING PRINCIPLES (2009); FEMINIST DALIT ORGANIZATION ET AL, DALIT ISSUES OF NEPAL FOR NEW CONSTITUTION (2009); RASTRIYA DALIT NETWORK & DALIT STUDY AND DEVELOPMENT CENTRE, DALIT AGENDA IN THE NEW CONSTITUTION (2009). Documents on file with CHRGI.

¹¹ ICCPR, *supra* note 3, art. 24(3); CEDAW, *supra* note 3, art. 9; ICERD, *supra* note 3, art. 5(d)(iii); see also CERD Committee, *General Recommendation No. 30: Discrimination Against Non-Citizens*, 64th Sess., U.N. Doc. CERD/C/64/Misc.11/rev.3 (Dec. 1, 2004) [hereinafter CERD Committee, *General Recommendation No. 30*]; Human Rights Committee (HRC), *General Comment No. 17: Rights of the Child (Article 24)*, ¶ 8, 35th Sess., 1989, U.N. HRI/GEN/1/Rev.6 (Apr. 7, 1989) [hereinafter HRC, *General Comment No. 17*].

¹² See CERD Committee, *General Recommendation No. 14*, *supra* note 5; HRC, *General Comment No. 18*, *supra* note 5.

¹³ See CRC, *supra* note 3, art. 2(1) ("States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."); CAT, *supra* note 3, art. 1(1) ("For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . or any reason based on discrimination of any kind."); CEDAW, *supra* note 3, art. 2 ("States Parties condemn discrimination against women in all its forms..."); ICERD, *supra* note 3, art. 1(1) ("In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life), art. 1(4) ("Special measures taken for the sole purpose of securing adequate advancement of certain

racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.”); ICESCR, *supra* note 3, art. 2.2 (“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”); ICCPR, *supra* note 3, art. 2(1) (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

¹⁴ See CERD Committee, *General Recommendation No. 14*, *supra* note 5; HRC, *General Comment No. 18: Non-Discrimination*, *supra* note 5, ¶ 7; Draft Principles & Guidelines, *supra* note 5, No. 18.

¹⁵ See Universal Declaration of Human Rights, G. A. Res. 217A, art. 2, U.N. GAOR, 3d Sess., 1st plen. Mtg, U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR]; ICERD, *supra* note 3, arts. 1, 2, & 5; ICESCR, *supra* note 3, arts. 2 (2) & 3; ICCPR, *supra* note 3, arts. 2 (1), 3 & 24 (1); CRC, *supra* note 3, art. 2; CEDAW, *supra* note 3, arts. 1, 2 & 11 (2); CPD, *supra* note 3, art. 5 (2); HRC, *General Comment No. 15: The Position of Aliens Under the Covenant*, ¶ 2, U.N. Doc. HRI/GEN/1/Rev.1 (Nov. 4, 1986) [hereinafter HRC, *General Comment No. 15*]; ESCR Committee, *General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)*, ¶¶ 29, 30, 32-34, U.N. Doc. E/C.12/GC/20 (May 25, 2009) [hereinafter ESCR Committee, *General Comment No. 20*]; Committee on the Rights of the Child (CRC Committee), *General Comment No. 4, Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, ¶ 6, U.N. Doc. CRC/GC/2003/4 (July 1, 2003) [hereinafter CRC Committee, *General Comment No. 4*].

¹⁶ See CERD Committee, *General Recommendation No. 29: Discrimination Based on Descent*, 61st Sess., U.N. Doc. A/57/18 (2002) [hereinafter CERD Committee, *General Recommendation No. 29*]; see also Draft Principles & Guidelines, *supra* note 5, No. 2.

¹⁷ See ICERD, *supra* note 3, art. 2 (1) (b), (d); CERD Committee, *General Recommendation No. 20: Non-discriminatory implementation of rights and freedoms*, 48th Sess., U.N. Doc. A/51/18 (1996) [hereinafter CERD Committee, *General Recommendation No. 20*]; CERD Committee, *General Recommendation No. 29*, *supra* note 16, ¶6; Draft Principles & Guidelines, *supra* note 5, No. 10; see also HRC, *General Comment No. 31: Nature of the General Legal Obligation on State Parties to the Covenant*, ¶ 8, 80th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter HRC Committee, *General Comment No. 31*].

¹⁸ ICERD, *supra* note 3, arts. 1(4) & 2(2); CEDAW, *supra* note 3, art. 3; CERD Committee, *General Recommendation No. 32: The meaning and scope of special measures*, 75th Sess., U.N. Doc. CERD/C/GC/32 (Sep. 24, 2009) [hereinafter CERD Committee, *General Recommendation No. 32*]; Committee on Economic, Social, and Cultural Rights (ESCR Committee), *General Comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights*, 34th Sess., U.N. Doc. E/C.12/2005/4 (Aug. 11, 2005) [hereinafter ESCR Committee, *General Comment No. 16*]; Draft Principles & Guidelines, *supra* note 5, Nos. 3, 13, 18, 22, 24, 33, 36, 51.

¹⁹ CERD Committee, *General Recommendation No. 32*, *supra* note 18, ¶16.

²⁰ *Id.*, ¶ 17.

²¹ ICERD, *supra* note 3, art. 2 (1); see also CERD Committee, *General Recommendation No. 29*, *supra* note 16, ¶¶1-10.

²² ICERD, *supra* note 3, art. 1(4); see also CERD Committee, *General Recommendation No. 29*, *supra* note 16, ¶6; Draft Principles & Guidelines, *supra* note 5, Nos. 7 & 18.

²³ ICERD, *supra* note 3, art. 3.

²⁴ *Id.* art. 4.

²⁵ *Id.* art. 5.

²⁶ *Id.* art. 6.

²⁷ *Id.* art. 7.

²⁸ See *Id.* art. 2 (1) (b) & (d); CERD Committee, *General Recommendation No. 20*, *supra* note 17; Draft Principles & Guidelines, *supra* note 5, No. 10.

²⁹ ICERD, *supra* note 3, art. 5(f); ICCPR, *supra* note 3, art. 18; Draft Principles & Guidelines, *supra* note 5, No. 21.

³⁰ ICERD, *supra* note 3, art. 4; ICCPR, *supra* note 3, arts. 19-20; CERD Committee, *General Recommendation No. 29*, *supra* note 16, ¶¶18-20; HRC, *General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion*, 48th Sess., U.N. Doc., A/48/40 vol. I (1993) [hereinafter HRC, *General Comment No. 22*]; HRC, *General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20)*, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1983) [hereinafter HRC, *General Comment No. 11*]; Draft Principles & Guidelines, *supra* note 5, No. 50.

³¹ ICCPR, *supra* note 3, art. 2(1).

³² HRC, *General Comment No. 15*, *supra* note 15, ¶ 2.

³³ ICCPR, *supra* note 3, art. 6.

³⁴ *Id.* art. 7.

³⁵ *Id.* art. 8. The prohibition on forced or compulsory labor does not preclude the performance of hard labor where such labor is prescribed as punishment by a competent court. See *id.* at art. 8(3)(b). Under the ICCPR, the term “forced or compulsory labor” does not include military service or national service for conscientious objectors, services during emergencies, and other work or service that is part of normal civic obligations. See *id.* at art. 8(3)(c).

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- ³⁶ *Id.* art. 9.
- ³⁷ *Id.* art. 17.
- ³⁸ *Id.* art. 17.
- ³⁹ *Id.* arts. 9, 10.
- ⁴⁰ *Id.* art. 19.
- ⁴¹ *Id.* art. 21.
- ⁴² *Id.* art. 22.
- ⁴³ *Id.* art. 23.
- ⁴⁴ *Id.* art. 25(a).
- ⁴⁵ *Id.* art. 25(b).
- ⁴⁶ *Id.* arts. 18, 27.
- ⁴⁷ *Id.* art. 12.
- ⁴⁸ ICCPR, *supra* note 3, art. 18.
- ⁴⁹ *Id.* art. 22.
- ⁵⁰ *Id.* art. 25. The right to vote, however, is included by the Committee for Preserving the National Interest, in its preliminary article on “Exercise of Sovereignty.”
- ⁵¹ *Id.* art. 2 (3).
- ⁵² *Id.* art. 2(1).
- ⁵³ *See, e.g., id.* art. 12(3).
- ⁵⁴ *Id.* arts. 17-19.
- ⁵⁵ HRC, *General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7)*, ¶ 11, U.N. Doc. HRI/GEN/1/Rev.1 (Mar. 10, 1992)[hereinafter HRC, *General Comment No. 20*]
- ⁵⁶ ICCPR, *supra* note 3, art. 14.
- ⁵⁷ *See* CAT, *supra* note 3, art. 1 (“For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”); *see also* CAT Committee, *General Comment 2, Implementation of article 2 by States parties*, ¶ 15, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008)[hereinafter CAT Committee, *General Comment 2*] (Calling on each State Party to “prohibit, prevent, and redress torture and ill-treatment in all contexts of custody or control, for example, in prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm.”).
- ⁵⁸ CAT, *supra* note 3, art. 4.
- ⁵⁹ ESCR Committee, *General Comment No. 3: The nature of States parties obligations* (Art. 2, par.1), ¶¶ 1-2, U.N. Doc. E/1991/23, annex III (Dec. 14, 1990) [hereinafter ESCR Committee, *General Comment No. 3*]; ESCR Committee, *General Comment No. 20, supra* note 15 ¶ 7.
- ⁶⁰ ICESCR, *supra* note 3, art. 12.
- ⁶¹ *Id.* art. 13.
- ⁶² *Id.* art. 15(a).
- ⁶³ *Id.* art. 15(c).
- ⁶⁴ ICCPR, *supra* note 3, art. 8(3)(a).
- ⁶⁵ ICESCR, *supra* note 3, arts. 6-8; ICCPR, *supra* note 3, art. 22.
- ⁶⁶ ICESCR, *supra* note 3, art. 9.
- ⁶⁷ *See* HRC, Sub-Comm. on the Promotion and Protection of Human Rights, *Final Report of the Special Rapporteur, Prevention of Discrimination: the Rights of Non-Citizens*, ¶ 19, U.N. Doc. E/CN.4/Sub.2/2003/23 (May 26, 2003) [hereinafter *Final Report on the Rights of Non-Citizens*]; ESCR Committee *General Comment No. 16, supra* note 18; ESCR Committee, *General Comment No. 20, supra* note 15.
- ⁶⁸ CEDAW, *supra* note 3, arts. 1-4.
- ⁶⁹ *Id.* arts. 7-8.
- ⁷⁰ *Id.* arts. 10-13.
- ⁷¹ *See id.* art. 5.
- ⁷² *Id.* art. 14.
- ⁷³ *Id.* art. 5(a).
- ⁷⁴ *Id.* art. 16.
- ⁷⁵ CRC, *supra* note 3, art. 32.
- ⁷⁶ *Id.* art. 3(1).
- ⁷⁷ *Id.* art. 7(1),
- ⁷⁸ Optional Protocol on the Involvement of Children in Armed Conflict, *supra* note 3, arts. 1-2; *id.* art. 39.
- ⁷⁹ CRC, *supra* note 3, art. 2.
- ⁸⁰ *Id.* art. 12.

⁸¹ ICCPR, *supra* note 3, art. 2(3).

⁸² UDHR, *supra* note 15, art. 8; ICCPR, *supra* note 3, art. 2(3); ICERD, *supra* note 3, art. 6; CAT, *supra* note 3, art. 14; HRC, *General Comment No. 31*, *supra* note 17, ¶ 15; ESCR Committee, *General Comment No. 9: The domestic application of the Covenant*, ¶ 4, U.N. Doc. E/C.12/1998/24 (Dec. 3, 1998).

⁸³ ICCPR, *supra* note 3, art. 4(1) (Nepal may only declare a state of emergency in response to a situation that “threatens the life of the nation”). This is to say, only in response to situations of the direst circumstances and not every disturbance or catastrophe. See HRC, *General Comment No. 29: States of Emergency*, ¶ 3, 1950th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

⁸⁴ ICCPR, *supra* note 3, art. 4(2).

⁸⁵ *Id.* art. 4(1).

⁸⁶ *Id.* art. 4(2) (“No derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.”).

⁸⁷ CERD Committee, *General Recommendation No. 32*, *supra* note 18, ¶ 18.

⁸⁸ *Id.* ¶ 17.

⁸⁹ See CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE (CHRGJ), *THE MISSING PIECE OF THE PUZZLE: CASTE DISCRIMINATION AND THE CONFLICT IN NEPAL* 7 (2005); KRISHNA BHATTACHAN, TEJ SUNAR & YASSO KANTI BHATTACHAN, *CASTE-BASED DISCRIMINATION IN NEPAL, REGIONAL RESEARCH ON CASTE-BASED DISCRIMINATION IN SOUTH ASIA*, INDIAN INSTITUTE OF DALIT STUDIES 1, 17 (2008); LAWYERS NATIONAL CAMPAIGN AGAINST UNTOUCHABILITY (LANCAU), *STATUS OF DISTRIBUTION OF DRINKING WATER & NUTRITIOUS FOOD, STATUS OF TEXT BOOKS & IMPLEMENTATION OF LEGAL PROVISIONS FOR ELIMINATING THE CRIME OF UNTOUCHABILITY* 11 (2006).

⁹⁰ CERD Committee, *General Recommendation No. 29*, *supra* note 16, ¶ 28; CERD Committee, *Concluding Observations: Nepal*, ¶ 132, U.N. Doc. A/59/18 (2004).

⁹¹ See HRC, *General Comment No. 31*, *supra* note 17, ¶ 15; ESCR Committee, *General Comment No. 10: The role of national human rights institutions in the protection of economic, social and cultural rights*, ¶¶ 1-2, U.N. Doc. E/C.12/1998/25 (Dec. 14, 1998) [hereinafter ESCR Committee, *General Comment No. 10*].

⁹² See ESCR Committee, *Concluding Observations: Nepal*, ¶ 12, U.N. Doc. E/C.12/NPL/CO/2 (Jan. 16, 2008) (“The Committee also notes with concern that there is no provision in the Interim Constitution dealing with the financial autonomy of the Commission.”).

⁹³ HRC, *General Comment No. 31*, *supra* note 17, ¶ 4.

⁹⁴ See S. AFR. CONST. 1996, art. 39(1) (“When interpreting the Bill of Rights, a court, tribunal or forum a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; b. must consider international law; and c. may consider foreign law.”)

⁹⁵ See ICCPR, *supra* note 3, art. 5 (“Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.”); ICESCR, *supra* note 3, art. 5 (same).

⁹⁶ ICCPR, *supra* note 3, art. 2(1).

⁹⁷ See *Final Report on the Rights of Non-Citizens*, *supra* note 67, ¶ 19.

⁹⁸ See *id.* ¶¶ 7, 19; ESCR Committee, *General Comment No. 3*, *supra* note 59, ¶ 11; CERD Committee, *General Recommendation No. 30*, *supra* note 11, ¶ 29.

⁹⁹ See generally CRC, *supra* note 3 art. 2, 3(2); CAT, *supra* note 3, art. 2(1); CEDAW, *supra* note 3, art. 2; ICERD, *supra* note 3, art. 2; ICCPR, *supra* note 3 art. 2; ICESCR, *supra* note 3, art. 2.

¹⁰⁰ ICERD, *supra* note 3, art. 1(1) (“In this Convention, the term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life), art. 1(4) (Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.”); CRC, *supra* note 3, art. 2(1) (“States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”); CAT, *supra* note 3, art. 1(1) (“For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . or any reason based on discrimination of any kind.”); CEDAW, *supra* note 3, art. 2 (“States Parties condemn discrimination against women in all its forms. . .”); ICESCR, *supra* note 3, art. 2(2) (“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”); ICCPR, *supra* note 3, art. 2(1) (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

¹⁰¹ CRC, *supra* note 3, art. 7(1); ICCPR, *supra* note 3, art. 24(3).

¹⁰² Human Rights Committee (HRC), *General Comment No. 17*, *supra* note 11, ¶ 8; see also CEDAW, *supra* note 3, art. 9(2).

¹⁰³ ICERD, *supra* note 3, art. 5(d)(iii); CEDAW, *supra* note 3, art. 9. *See also* Committee on the Elimination of Racial Discrimination (CERD Committee), *General Recommendation No. 30*, *supra* note 11 (stating that ICERD requires that State Parties: “13. Ensure that particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalization, and to pay due attention to possible barriers to naturalization that may exist for long-term or permanent residents; [and] 14. Recognize that deprivation of citizenship on the basis of race, colour, descent, or national or ethnic origin is a breach of States parties’ obligations to ensure non-discriminatory enjoyment of the right to nationality,” and that States must “refrain from applying different standards of treatment to female non-citizen spouses of citizens and male non-citizen spouses of citizens” and that States must allow “both parents to transmit their citizenship to their children.”).

¹⁰⁴ *See* ICCPR, *supra* note 3, art. 5 (“Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.”); ICESCR, *supra* note 3, art. 5 (same).

¹⁰⁵ *See* CRC, *supra* note 3, art. 2(1) (“States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”); CAT, *supra* note 3, art. 1(1) (“For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . or any reason based on discrimination of any kind.”); CEDAW, *supra* note 3, art. 2 (“States Parties condemn discrimination against women in all its forms. . .”); ICERD, *supra* note 3, art. 1(1) (“In this Convention, the term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life), art. 1(4) (“Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.”); ICESCR, *supra* note 3, art. 2.2 (“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”); ICCPR, *supra* note 3, art. 2(1) (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

¹⁰⁶ *See* CERD Committee, *General Recommendation No. 14*, *supra* note 5, ¶ 2; HRC, *General Comment No. 18*, *supra* note 5, ¶ 7; Draft Principles and Guidelines, *supra* note 5, No. 18.

¹⁰⁷ *See* UDHR, *supra* note 15, art. 2; ICERD, *supra* note 3, arts. 1, 2, & 5; ICESCR, *supra* note 3, arts. 2 (2) & 3; ICCPR, *supra* note 3, arts. 2 (1), 3 & 24 (1); CRC, *supra* note 3, art. 2; CEDAW, *supra* note 3, arts. 1, 2 & 11 (2); CPD, *supra* note 3, art. 5 (2); HRC, *General Comment No. 15*, *supra* note 15, ¶ 2; ESCR Committee, *General Comment No. 20*, *supra* note 15, ¶¶ 29, 30, 32-34; CRC Committee, *General Comment No. 4*, *supra* note 15, ¶ 6.

¹⁰⁸ *See* CERD Committee, *General Recommendation No. 29*, *supra* note 16; *see also* Draft Principles & Guidelines, *supra* note 5, No. 2.

¹⁰⁹ *See* ICERD, *supra* note 3, art. 2 (1)(b), (d); CERD Committee, *General Recommendation No. 20* *supra* note 17; CERD Committee, *General Recommendation No. 29*, *supra* note 16, ¶6; Draft Principles and Guidelines, *supra* note 5, No. 10.

¹¹⁰ ICERD, *supra* note 3, arts. 1(4) & 2(2); CEDAW, *supra* note 3, art. 3; CERD Committee, *General Recommendation No. 32*, *supra* note 18; ESCR Committee, *General Comment No. 16*, *supra* note 18; Draft Principles and Guidelines, *supra* note 5, Nos. 3, 13, 18, 22, 24, 33, 36, 51.

¹¹¹ CERD Committee, *General Recommendation No. 32*, *supra* note 18, ¶16.

¹¹² ICERD, *supra* note 3, art. 1(4).

¹¹³ CERD Committee, *General Recommendation No. 32*, *supra* note 18, ¶17; *see also* CERD Committee, *General Recommendation No. 29*, *supra* note 16; Draft Principles and Guidelines, *supra* note 5, Nos. 3, 20, and 53.

¹¹⁴ *See* CERD Committee, *General Recommendation No. 32*, *supra* note 18, ¶ 25.

¹¹⁵ *See* CERD Committee, *General Recommendation No. 30*, *supra* note 11; HRC, *General Comment No. 31*, *supra* note 17.

¹¹⁶ *See* CERD Committee, *General Recommendation No. 30*, *supra* note 11, ¶¶1-4, 7, 18.

¹¹⁷ Navi Pillay, *Tearing Down the Wall of Caste*, Oct. 8, 2009, available at <http://idsn.org/international-advocacy/un/un-principles-guidelines/unhchr-opinion-piece/>.

¹¹⁸ ICERD, *supra* note 3, art. 2 (1); *see also* CERD Committee, *General Recommendation No. 29*, *supra* note 16, ¶¶1-10.

¹¹⁹ ICERD, *supra* note 3, art. 1(4); *see also* CERD Committee, *General Recommendation No. 29*, *supra* note 16, ¶6; Draft Principles and Guidelines, *supra* note 5 Nos. 7 & 18.

¹²⁰ ICERD, *supra* note 3, art. 3.

¹²¹ *Id.* art. 4.

¹²² *Id.* art. 5.

¹²³ *Id.* art. 6.

¹²⁴ *Id.* art. 7.

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- ¹²⁵ See *Id.* art. 2(1)(b) & (d); CERD Committee, *General Recommendation No. 20*, *supra* note 17; Draft Principles and Guidelines, *supra* note 5, No. 10.
- ¹²⁶ ICERD, *supra* note 3, art. 5(f); ICCPR, *supra* note 3, art. 18; Draft Principles and Guidelines, *supra* note 5, No. 21.
- ¹²⁷ ICERD, *supra* note 3, art. 4; ICCPR, *supra* note 3, arts. 19-20; CERD Committee, *General Recommendation No. 29*, *supra* note 16, ¶¶18-20; HRC, *General Comment No. 22*, *supra* note 30; HRC, *General Comment No. 11*, *supra* note 30; Draft Principles and Guidelines, *supra* note 5, No. 50.
- ¹²⁸ CERD Committee, *General Recommendation No. 32*, *supra* note 18, ¶ 17.
- ¹²⁹ CERD Committee, *General Recommendation No. 29*, *supra* note 16, ¶23.
- ¹³⁰ ICERD, *supra* note 3, art. 5(f); ICCPR, *supra* note 3, art. 18; Draft Principles & Guidelines, *supra* note 5, No. 21.
- ¹³¹ CERD Committee, *General Recommendation No. 29*, *supra* note 16, ¶23.
- ¹³² ICERD, *supra* note 3, art. 5(f); ICCPR, *supra* note 3, art. 18; Draft Principles and Guidelines, *supra* note 5, No. 21.
- ¹³³ CERD Committee, *General Recommendation No. 29*, *supra* note 16, ¶23.
- ¹³⁴ *Id.*
- ¹³⁵ ICCPR, *supra* note 3, art. 6.
- ¹³⁶ *Id.* art. 7.
- ¹³⁷ *Id.* art. 8.
- ¹³⁸ *Id.* art. 9.
- ¹³⁹ *Id.* art. 17.
- ¹⁴⁰ *Id.* art. 17.
- ¹⁴¹ *Id.* art. 19.
- ¹⁴² *Id.* art. 21.
- ¹⁴³ *Id.* art. 22.
- ¹⁴⁴ *Id.* art. 23.
- ¹⁴⁵ *Id.* art. 25(a).
- ¹⁴⁶ *Id.* art. 25(b).
- ¹⁴⁷ *Id.* arts. 18, 27.
- ¹⁴⁸ *Id.* art. 12.
- ¹⁴⁹ *Id.* arts. 14, 15.
- ¹⁵⁰ *Id.* art. 2(1).
- ¹⁵¹ HRC, *General Comment No. 15*, *supra* note 15, ¶ 2.
- ¹⁵² ICCPR, *supra* note 3, art. 18.
- ¹⁵³ *Id.* art. 22.
- ¹⁵⁴ *Id.* art. 25. The right to vote, however, is included by the Committee for Preserving the National Interest, in its preliminary article on “Exercise of Sovereignty.”
- ¹⁵⁵ *Id.* art. 2(3).
- ¹⁵⁶ See, e.g., *Laureano v. Peru*, Hum. Rts. Comm.540/1993, ¶8.5, U.N. Doc.CCPR/C/56/D/540/1993 (1996); Committee on the Convention Against Torture (CAT Committee), *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee against Torture*, United States of America, ¶¶ 17-18, U.N. Doc. CAT/C/USA/CO/2 (May 18, 2006); HRC, *General Comment No. 7: Torture or cruel, inhuman or degrading treatment or punishment*, 16th Sess. (May 30, 1982).
- ¹⁵⁷ ICCPR, *supra* note 3, art. 19.
- ¹⁵⁸ *Id.* art. 21.
- ¹⁵⁹ *Id.* art. 22.
- ¹⁶⁰ *Id.* art. 12.
- ¹⁶¹ ICESCR, *supra* note 3, art. 6(1).
- ¹⁶² See ICCPR, *supra* note 3, art. 2(1); ICESCR, *supra* note 3, art. 6(1); HRC, *General Comment No. 15*, *supra* note 15, ¶2.
- ¹⁶³ ICCPR, *supra* note 3, art. 6(1).
- ¹⁶⁴ *Id.* art. 8.
- ¹⁶⁵ *Id.* art. 7.
- ¹⁶⁶ *Id.* art. 9.
- ¹⁶⁷ *Id.* art. 9.
- ¹⁶⁸ *Id.* art. 19.
- ¹⁶⁹ *Id.* art. 20(2).
- ¹⁷⁰ *Id.* art. 23(2).
- ¹⁷¹ *Id.* arts. 9, 14.
- ¹⁷² *Id.* art. 26.
- ¹⁷³ *Id.* art. 18(1).
- ¹⁷⁴ *Id.* art. 22(1).
- ¹⁷⁵ See, e.g., *id.* art. 12(3).
- ¹⁷⁶ *Id.* art. 18.
- ¹⁷⁷ See *id.* arts. 5 & 18(3); HRC, *General Comment No. 22*, *supra* note 30.

¹⁷⁸ *Id.* art. 18(3).

¹⁷⁹ *Id.* art. 16.

¹⁸⁰ *Id.* art. 14(1).

¹⁸¹ *Id.* art. 14(1).

¹⁸² *Id.* art. 9.

¹⁸³ See HRC, *General Comment No. 8 Right to Liberty and Security of Persons*, ¶1, 16th Sess., U.N. Doc. A/37/40 (1982) [hereinafter HRC, *General Comment No. 8*]; HRC, *General Comment No. 21, Replaces general comment 9 concerning humane treatment of persons deprived of liberty*, ¶2, 44th Sess. (Oct. 4, 1992)[hereinafter HRC, *General Comment No. 21*].

¹⁸⁴ ICCPR, *supra* note 3, art. 10(1).

¹⁸⁵ *Id.* art 9(1), (2), (4), (5); HRC, *General Comment No. 8, supra* note 183, ¶4; UN Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment, Nos. 10, 11, 32, G.A. Res. 43/173 (Dec. 9 1988) [hereinafter UN Principles on Detention and Imprisonment]

¹⁸⁶ *Id.* No.11; UN Basic Principles on the Role of Lawyers, U.N. Doc. A/CONF.144/28/Rev.1, Nos. 6-8 (1990) [hereinafter UN Principles on Lawyers].

¹⁸⁷ UN Principles on Detention and Imprisonment, *supra* note 185, Nos. 14, 17.

¹⁸⁸ *Id.* Nos. 13, 17; UN Principles on Lawyers, *supra* note 186, No. 5.

¹⁸⁹ ICCPR, *supra* note 3, art. 9(3).

¹⁹⁰ *Id.* art. 14(2).

¹⁹¹ *Id.* art. 14(3)(a).

¹⁹² *Id.* art. 14(3)(f).

¹⁹³ *Id.* art. 14(3)(d).

¹⁹⁴ *Id.* art. 14(3)(e).

¹⁹⁵ *Id.* art. 14(3)(g).

¹⁹⁶ *Id.* arts (3)(c), 9(3), 14(1).

¹⁹⁷ *Id.* art. 14(3)(b).

¹⁹⁸ *Id.* art. 9(3).

¹⁹⁹ *Id.* art. 14(5).

²⁰⁰ *Id.* art. 14(6).

²⁰¹ *Id.* art. 14(7).

²⁰² *Id.* art. 15.

²⁰³ *Id.* art. 14(4).

²⁰⁴ *Id.* art. 11.

²⁰⁵ *Id.* art. 15(2).

²⁰⁶ See, e.g., CAT Committee, *Conclusions and Recommendations of the Committee against Torture: Nepal*, ¶14, U.N. Doc. CAT/C/NPL/CO/2 (Apr. 13, 2007); see also HRC, *Concluding Observations of the Human Rights Committee: Israel*, ¶¶12-13, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003)[hereinafter HRC, *Concluding Observations: Israel 2003*]; HRC, *Concluding Observations of the Human Rights Committee: Ireland*, ¶¶15-18, U.N. Doc. A/55/40 (July 24, 2000).

²⁰⁷ UN High Commissioner for Human Rights, *Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights and the Activities of her Office, Including Technical Cooperation, in Nepal*, ¶ 26, U.N. Doc. E/CN.4/2006/107 (Feb. 16 2006) (“Arbitrary arrest and detention of suspected members of or sympathizers of [the Maoist insurgents] continued to be a major source of complaints. . . Detainees were often arrested by security officials in plainclothes, without being informed of the reasons, and held in detention without notification to their families or a lawyer. An analysis of cases where habeas corpus writ petitions were filed showed frequent denial of detention (giving rise to cases of disappearances), false or misleading information provided to the court by authorities or security forces, and rearrest after a court ordered release.”).

²⁰⁸ See HRC, *General Comment No. 8, supra* note 183, ¶¶1, 4; see also HRC, Communication No. 1324/2004: Australia, ¶ 7.2, *Safiq v. Australia*, U.N. Doc. CCPR/C/88/D/1324/2004 (Nov. 13, 2006).

²⁰⁹ ICCPR, *supra* note 3, art. 9(1); see also UN Principles on Detention or Imprisonment, *supra* note 185, No. 9.

²¹⁰ ICCPR, *supra* note 3, art. 9(1); HRC, *General Comment No. 8, supra* note 183, ¶ 4.

²¹¹ UN Principles on Detention or Imprisonment, *supra* footnote 185, Nos. 11, 32; HRC, *Concluding observations: United States of America*, ¶ 18, CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006); HRC, *Concluding Observations: Israel 2003, supra* note 206, ¶¶ 12-13; HRC, *Concluding Observations: Israel*, ¶ 21, CCPR/C/79/Add.93 (Aug. 18, 1998); HRC, *Concluding Observations: India*, ¶ 24, CCPR/C/79/Add.81 (Aug. 4, 1997)[hereinafter HRC, *Concluding Observations: India*].

²¹² ICCPR, *supra* note 3, art. 9(2); HRC, *General Comment No. 8, supra* note 183, ¶ 4; see also UN Principles on Detention or Imprisonment, *supra* footnote 185, No. 10; HRC, *Concluding Observations: India, supra* note 211, ¶ 24.

²¹³ ICCPR, *supra* note 3, art. 9(4); HRC, *General Comment No. 8, supra* note 183, ¶ 4; UN Principles on Detention or Imprisonment, *supra* footnote 185, No. 11.

²¹⁴ ICCPR, *supra* note 3, art. 9(5); HRC, *General Comment No. 8, supra* note 183, ¶ 4.

²¹⁵ See UN Commission on Human Rights, Working Group on Arbitrary Detention, *Report on Civil and Political Rights, Including the Question of Torture and Detention*, ¶ 64, U.N. Doc. E/CN.4/2003/8 (Dec. 12, 2005).

²¹⁶ ICCPR, *supra* note 3, art. 10(1).

- ²¹⁷ HRC, *General Comment No. 21*, *supra* note 183, ¶ 3.
- ²¹⁸ HRC, *General Comment No. 20*, *supra* footnote 55, ¶ 11.
- ²¹⁹ UN Principles on Detention or Imprisonment, *supra* note 185, Nos. 15, 16, 19; HRC, *Concluding Observation: Spain*, ¶¶ 12, 18, U.N. Doc. CCPR/C/79/Add.61 (Apr. 3, 1996); HRC, *Concluding Observations: Egypt*, ¶ 16, U.N. Doc. CCPR/CO/76/EGY (Nov. 28, 2002).
- ²²⁰ CAT, *supra* note 3, arts. 2(1), 4, 12, 14(1), 16(1); HRC, *General Comment No. 20*, *supra* note 55.
- ²²¹ See ICCPR, *supra* note 3, arts. 4, 7; CAT, *supra* note 3, art. 2; Prosecutor v. Furundzija, Case No. IT-95-17/1, ICTY Trial Chamber, Judgment, ¶ 153-57 (Dec. 10, 1998); HRC, *General Comment No. 24, Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 2, 1994).
- ²²² See ICERD, *supra* note 3, art. 5(b); HRC, *General Comment No. 20*, *supra* note 55, ¶ 2 (“The aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State Party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.”).
- ²²³ CAT, *supra* note 3, art. 1(1).
- ²²⁴ *Id.* art. 15.
- ²²⁵ See *id.*, art. 1 (“For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”); See also CAT Committee, *General Comment 2*, *supra* note 57, ¶ 15 (calling on each State Party to “prohibit, prevent, and redress torture and ill-treatment in all contexts of custody or control, for example, in prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm.”).
- ²²⁶ See CAT, *supra* note 3, arts. 13-14(1); HRC, *General Comment No. 20*, *supra* footnote 55.
- ²²⁷ ICCPR, *supra* note 3, art. 19(2).
- ²²⁸ *Id.* art. 19(3).
- ²²⁹ *Id.* art. 19(2).
- ²³⁰ HRC, *General Comment No. 10: Freedom of Expression (Art. 19)*, U.N. Doc. HRI/GEN/1/Rev.6 (June 29, 1983).
- ²³¹ ICCPR, *supra* note 3, art. 20(2); see also ICERD, *supra* note 3, at art. 4; CERD Committee, *General Recommendation No. 29*, *supra* note 16, ¶¶ 18-20; HRC, *General Comment No. 22*, *supra* note 30; HRC, *General Comment No. 11*, *supra* note 30; Draft Principles and Guidelines, *supra* note 5, No. 50.
- ²³² ICCPR, *supra* note 3, art. 19(3).
- ²³³ *Id.* art. 17 (1).
- ²³⁴ HRC, *General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17)*, ¶ 4, U.N. Doc. HRI/GEN/1/Rev.6 (Apr. 8, 1988).
- ²³⁵ ICCPR, *supra* note 3, art. 17 (2).
- ²³⁶ *Id.* art. 23; ICESCR, *supra* note 3, art. 10.
- ²³⁷ ICCPR, *supra* note 3, art. 23(3); ICESCR, *supra* note 3, art. 10(1).
- ²³⁸ ICERD, *supra* note 3, art. 5(d)(iv).
- ²³⁹ ICCPR, *supra* note 3, art. 23(4).
- ²⁴⁰ ICESCR, *supra* note 3, art. 2(1).
- ²⁴¹ *Id.* art. 11(1).
- ²⁴² ESCR Committee, *General Comment No. 3*, *supra* note 59, ¶¶ 1-2; ESCR Committee, *General Comment No. 20*, *supra* note 15, ¶ 7.
- ²⁴³ CERD Committee, *General Recommendation No. 30* *supra* note 11, ¶ 29.
- ²⁴⁴ See HRC, Sub-Comm. on the Promotion and Protection of Human Rights, *Final Report of the Special Rapporteur, Prevention of Discrimination: the Rights of Non-Citizens*, ¶ 19, U.N. Doc. E/CN.4/Sub.2/2003/23 (May 26, 2003).
- ²⁴⁵ See *id.*, at ¶¶ 7, 19; ESCR Committee, *General Comment No. 3*, *supra* note 59, ¶ 11; CERD Committee, *General Recommendation No. 30*, *supra* note 11, ¶ 29.
- ²⁴⁶ ESCR Committee, *General Comment No. 20*, *supra* note 15, ¶ 9.
- ²⁴⁷ ESCR Committee, *General Comment No. 15: The Right to Water*, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003).
- ²⁴⁸ ICESCR, *supra* note 3, art. 12(1).
- ²⁴⁹ ICERD, *supra* note 3, art. 5(e)(iv); ICESCR, *supra* note 3, arts. 2(2), 3; CERD Committee, *General Recommendation No. 29*, *supra* note 16, ¶ 40.
- ²⁵⁰ ESCR Committee, *General Comment No. 14: The right to the highest attainable standard of health*, ¶ 11, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter ESCR Committee, *General Comment No 14*].
- ²⁵¹ CEDAW, *supra* note 3, art. 12(2).
- ²⁵² ICESCR, *supra* note 3, art. 12(2)(b).

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- ²⁵³ ESCR Committee, *General Comment No. 14*, *supra* note 250, ¶ 15.
- ²⁵⁴ ICESCR, *supra* note 3, art. 13(1).
- ²⁵⁵ *Id.* arts. 13, 14.
- ²⁵⁶ *Id.* art. 13(2)(d).
- ²⁵⁷ *Id.* art. 13; ICERD, *supra* note 3, art. 5(e)(v).
- ²⁵⁸ Draft Principles and Guidelines, *supra* note 5, No. 46; ESCR Committee, *General Comment No. 13: The Right to Education*, ¶ 32, U.N. Doc. E/C.12/1999/10 (Dec. 10, 1999); *see generally* CERD Committee, *General Recommendation No. 32*, *supra* note 18.
- ²⁵⁹ ICESCR, *supra* note 3, art. 15.
- ²⁶⁰ *Id.* art. 15(1)(a).
- ²⁶¹ ICCPR, *supra* note 3, art. 27.
- ²⁶² *See id.*, art. 5; HRC, *General Comment No. 23: The rights of minorities (Art. 27)*, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 8, 1994).
- ²⁶³ ICESCR, *supra* note 3, art. 6(1).
- ²⁶⁴ *Id.* art. 7.
- ²⁶⁵ *Id.* art. 8 (1); ICCPR, *supra* note 3, art. 22.
- ²⁶⁶ ICESCR, *supra* note 3, art. 8(1)(a).
- ²⁶⁷ ICCPR, *supra* note 3, art. 8(3)(a).
- ²⁶⁸ *Id.* art. 8(3)(b).
- ²⁶⁹ *Id.* art. 8(3)(c).
- ²⁷⁰ ICESCR, *supra* note 3, art. 9; *see also* ESCR Committee, *General Comment No. 19, The Right to Social Security*, ¶ 22, U.N. Doc. E/C.12/GC/19 (Feb. 4, 2008).
- ²⁷¹ ESCR Committee, *General Comment No. 19: The right to social security (art. 9)*, ¶ 4, U.N. Doc. E/C.12/GC/19 (Feb. 4, 2008).
- ²⁷² *See* CEDAW, *supra* note 3, art. 4; CERD, *supra* note 3, art. 2(2); CERD Committee, *General Recommendation No. 14*, *supra* note 5, ¶ 2; HRC, *General Comment No. 18*, *supra* note 5, ¶ 7; Draft Principles & Guidelines, *supra* note 5, No. 18.
- ²⁷³ CERD Committee, *General Recommendation No. 32*, *supra* note 18, ¶ 22.
- ²⁷⁴ *See* CEDAW, *supra* note 3, art. 4(1).
- ²⁷⁵ CERD Committee, *General Recommendation No. 32*, *supra* note 18, ¶ 33.
- ²⁷⁶ World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Declaration*, ¶ 108, U.N. Doc. A/CONF.189/12 (2001); *see, e.g.*, S. AFR. CONST. 1996, art. 25(5) (“The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.”).
- ²⁷⁷ CERD Committee, *General Recommendation No. 32*, *supra* note 18, ¶¶ 16-17; *see also* CERD Committee, *General Recommendation No. 29*, *supra* note 16; Draft Principles & Guidelines, *supra* note 5, Nos. 3, 20, 53.
- ²⁷⁸ *See* S. AFR. CONST. 1996, art. 25.
- ²⁷⁹ ICESCR, *supra* note 3, art. 11.
- ²⁸⁰ ESCR Committee, *General Comment No. 12: The right to adequate food (Art. 11)*, ¶¶ 8, 14, U.N. Doc. E/C.12/1999/5 (May 12, 1999).
- ²⁸¹ ESCR Committee, *Nepal Concluding Observations 2008*, ¶ 4, U.N. Doc. E/C.12/NPL/CO/2 (Jan. 16, 2008).
- ²⁸² *See* CERD Committee, *General Recommendation No. 30*, *supra* note 11, ¶ 29 (“Remove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health.”).
- ²⁸³ ICESCR, *supra* note 3, art. 11(1) (“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing, and to continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right.”).
- ²⁸⁴ ESCR Committee, *General Comment No. 4: The right to adequate housing (Art.11 (1))*, ¶ 7, U.N. Doc. E/1992/23 (Dec. 13, 1991).
- ²⁸⁵ *Id.* ¶ 8(a).
- ²⁸⁶ ICERD, *supra* note 3, arts. 3, 5(e)(iii).
- ²⁸⁷ CEDAW, *supra* note 3, arts. 1-4.
- ²⁸⁸ *Id.* arts. 7-8.
- ²⁸⁹ *Id.* art. 10.
- ²⁹⁰ *Id.* art. 11.
- ²⁹¹ *Id.* art. 12.
- ²⁹² *Id.* art. 13.
- ²⁹³ *See id.* art. 5.
- ²⁹⁴ *Id.* art. 14.
- ²⁹⁵ *See* CERD Committee, *General Recommendation No. 29*, *supra* note 16, ¶¶ 11-13; Draft Principles & Guidelines, *supra* note 5, Nos. 53 & 54.
- ²⁹⁶ CEDAW, *supra* note 3, art. 5(a).
- ²⁹⁷ *See* Draft Principles & Guidelines, *supra* note 5, No. 53; CERD Committee, *General Recommendation No. 29*, *supra* note 16, ¶¶ 11-13; CERD Committee, *General Recommendation No. 32*, *supra* note 18, ¶ 17.
- ²⁹⁸ CRC, *supra* note 3, art. 2.
- ²⁹⁹ *Id.* art. 3(1).
- ³⁰⁰ *Id.* art. 32.

³⁰¹ *Id.* arts. 7(1), 6(2), 27(1), 24(1), 34.

³⁰² CRC, Optional Protocol on the involvement of children in armed conflict, *supra* note 3, arts. 1-2.

³⁰³ CRC, *supra* note 3,, art. 39.

³⁰⁴ *Id.* art. 12.

³⁰⁵ UDHR, *supra* note 15, art. 8; ICCPR, *supra* note 3, art. 2(3); ICERD, *supra* note 3, art. 6; CAT, *supra* note 3, art. 14; HRC, *General Comment No. 31*, *supra* note 17, ¶ 15; ESCR Committee, *General Comment No. 9*, *supra* note 82, ¶ 4.

³⁰⁶ HRC, *General Comment No. 31*, *supra* note 17, ¶ 4.

³⁰⁷ ICCPR, *supra* note 3, art. 4(1).

³⁰⁸ HRC, *General Comment No. 29: States of Emergency*, ¶ 3, 1950th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

³⁰⁹ *Id.* ¶4.

³¹⁰ ICCPR, *supra* note 3, art. 4(1).

³¹¹ *Id.* art. 4(2) (“No derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.”).

³¹² ICERD, *supra* note 3, art. 1(1) (“In this Convention, the term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life), art. 1(4) (“Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.”); CRC, *supra* note 3, art. 2(1) (“States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”); CAT, *supra* note 3, art. 1(1) (“For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . or any reason based on discrimination of any kind.”); CEDAW, *supra* note 3, art. 2 (“States Parties condemn discrimination against women in all its forms. . .”); ICESCR, *supra* note 3, art. 2(2) (“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”); ICCPR, *supra* note 3, art. 2(1) (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

³¹³ CERD Committee, *General Recommendation No. 32*, *supra* note 18, ¶ 18.

³¹⁴ *Id.* ¶ 17.

³¹⁵ CERD Committee, *General Recommendation No. 29*, *supra* note 16, ¶ 28; CERD Committee, *Concluding Observations: Nepal*, ¶ 132, U.N. Doc. A/59/18 (2004).

³¹⁶ See UDHR, *supra* note 15, art. 8; ICCPR, *supra* note 3, art. 2(3); *supra* note 3, art. 6; CAT, *supra* note 3, art. 14; HRC, *General Comment No. 31*, *supra* note 17, ¶ 15; ESCR Committee, *General Comment No. 9*, *supra* note 82, ¶ 4.

³¹⁷ See HRC, *General Comment No. 31*, *supra* note 17, ¶ 15.

³¹⁸ See Draft Principles and Guidelines, *supra* note 5, No. 33.

³¹⁹ See CERD Committee, *General Recommendation No. 32*, *supra* note 18, ¶ 17.

³²⁰ See HRC, *General Comment No. 31*, *supra* note 17, ¶ 15; ESCR Committee, *General Comment No. 10*, *supra* note 91, ¶¶ 1-2 .

³²¹ ESCR Committee, *General Comment No. 10*, *supra* note 91, ¶ 2.

³²² ESCR Committee, *Nepal Concluding Observations 2008*, *supra* note 281, ¶ 12 (“The Committee also notes with concern that there is no provision in the Interim Constitution dealing with the financial autonomy of the Commission.”).

³²³ See Draft Principles and Guidelines, *supra* note 5, No. 33.

³²⁴ See CERD Committee, *General Recommendation No. 32*, *supra* note 18, ¶ 17.

RIGHTS WITHIN REACH

Securing Equality and Human Rights in Nepal's New Constitution

Ending centuries of caste-based discrimination and ensuring Dalit rights must be a central feature of Nepal's long awaited social, political, and economic transformation. The drafting of the new Constitution presents the Constituent Assembly of Nepal with the profound opportunity to demonstrate Nepal's commitment to human rights and to the inherent dignity of all individuals. Many of the proposals for the new Constitution take significant steps toward meeting these goals. However, critical gaps in rights protections remain that must be addressed.

Rights Within Reach analyzes proposals for the new Constitution in light of Nepal's obligations under international human rights law and provides Nepalese lawmakers with a clear roadmap for ensuring that the country lives up to its commitment to ending caste-based discrimination and ensuring human rights for all. The report includes a Statement that summarizes our main recommendations, and an accompanying Chart that provides a provision-by-provision analysis of many of the proposals under review.

The report draws on the Center's expertise on caste discrimination and international human rights law, and builds on its 2008 report *Recasting Justice: Securing Dalit Rights in Nepal's New Constitution*. The report was produced in close consultation with Dalit advocates, members of Nepal's legal and academic community, and experts in constitutional and international human rights law.

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Dalits work on the road from Rolpa to Thabang in western Nepal. In the country's democratic transition, Dalits are demanding their meaningful participation in Nepal's governance and constitutional affirmation of their fundamental human rights.

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