



## **OPEN LETTER TO THE NEW PRIME MINISTER OF NEPAL: AMEND REGRESSIVE ASPECTS OF THE CONSTITUTION**

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**3 November 2015**

Dear Prime Minister Oli,

Amnesty International congratulates you on your appointment as Prime Minister and is seeking your urgent attention to a number of concerns regarding the new Constitution, adopted on 20 September 2015.

Having long called for constitutional grounding of human rights protection, we are pleased to see a Charter that has a strong articulation of key civil and political as well as economic, social and cultural rights and norms. A notable example is that for the first time in Nepal and in South Asia, the rights of gender and/or sexual minorities have been afforded constitutional protection.

We are also encouraged to see that a few of the recommendations Amnesty International made to the Constitutional Assembly as part of the two-week public consultation on the draft Constitution in July 2015 have been incorporated into the final text of the Constitution. We for instance note that our recommendation to remove the provision criminalising sex-selective abortion was accepted.

Amnesty International regrets, however, that the new Constitution still has some major human rights shortcomings despite recommendations to the Constitutional Assembly from the National Human Rights Commission, civil society and the public to align the text of the draft Constitution with international human rights standards. In particular, the rights of women, ethnic groups and marginalised communities, such as Dalits, have not been clearly and sufficiently protected.


Furthermore, the proposed federalist structure in the Constitution, rejected by ethnic groups who see the new federal boundaries as denying them political representation, resulted in peaceful and sometimes violent protests in the Terai. Nepali security forces resorted to excessive, disproportionate or unnecessary force in several clashes with protestors. As of early October, while protests continue, scores have been injured and at least 33 protestors

and 10 police were killed in violation of the right to life, which we deeply regret is not protected in the Constitution.

Since the Constituent Assembly adopted the new Constitution, your government has stated that it would be willing to make amend it to address the demands of protesting groups. We attach a non-exhaustive list of concerns based on an analysis of a non-official English translation.<sup>1</sup> We urge you to bring about a number of important amendments to ensure the human rights of all people of Nepal are guaranteed in the Constitution. Furthermore, we urge you to push for amendments to existing laws and the adoption of news laws to give full effect to the rights protected in the Constitution.

We are also bringing these concerns to the attention of the member states of the Human Rights Council participating in Nepal's Universal Periodic Review on 4 November, and we urge your government delegation to the meeting to confirm its commitment to bringing about these important amendments to ensure the fullest protection of human rights in Nepal at the earliest opportunity.

Yours sincerely,



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<sup>1</sup> Constitution of Nepal 2015, Unofficial Translation by Nepal Law Society, IDEA and UNDP, available at [https://drive.google.com/file/d/0B6I\\_XwWisUUdNEM5QV83LXI2N2s/view](https://drive.google.com/file/d/0B6I_XwWisUUdNEM5QV83LXI2N2s/view), accessed 28 October 2015.



## AMNESTY INTERNATIONAL CONCERNS REGARDING KEY HUMAN RIGHTS PROVISIONS IN THE 2015 NEPAL CONSTITUTION

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### CITIZENSHIP ISSUES

**Article 10 (1)** states that, “No Nepali citizen shall be denied the right to acquire citizenship.” This provision is unclear and should be amended to prescribe that no one shall be arbitrarily denied access to Nepali citizenship, such as denying access to citizenship on prohibited discriminatory grounds.

**Article 11 (3)** should be amended to grant citizenship to children at birth, not merely on attainment of majority. International standards require states to introduce safeguards to prevent statelessness. There is a risk that children in this case will be stateless until they become adults. This provision should therefore be amended to ensure that if these persons would otherwise be stateless they be granted citizenship at birth, not merely on attainment of majority.

**Article 11 (3)** requires that in order for a child to acquire citizenship by descent, it must be proved that both father and mother are Nepali citizens. This provision is exclusive and discriminatory towards children of single parents, Nepali women married to foreigners, refugee parents who might be unable to prove citizenship of both parents, as well as LGBTI parents (parents belonging to sexual and/or gender minorities). Amnesty International strongly urges that the requirement for both parents to prove citizenship be removed. Including as a way to avoid statelessness, a child should be able to acquire citizenship through descent, through proof of citizenship of one of the parents (regardless of their gender).

**Article 11 (5)** grants citizenship by descent to a child of a Nepali mother (who resides permanently in Nepal) whose father is unidentified, but then converts that citizenship into one by naturalization if the child’s father is later proven to be a foreigner. This provision discriminates against Nepali women with regard to passing citizenship to their children and

is contrary to article 9 of the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), to which Nepal is a state party.<sup>2</sup> The article further discriminates against Nepali women who do not reside permanently in Nepal (such as, for example, trafficked women, migrant women, and others), and who are single or whose husbands are not Nepali.

Although the wording of **article 12** on citizenship and gender identity has been changed from the draft Constitution, the provision is unclear. Acquisition of citizenship of a child based on descent should be independent of the sexual orientation and gender identity of the parents. The article should be amended to state this explicitly.

**Article 14** provides for non-resident citizenship and economic, cultural and social rights to people of Nepali origin living abroad but only if they are domiciled beyond the South Asian Association Regional Cooperation (SAARC) group. This article is discriminatory on its face, particularly against people of Nepali origin living in the South Asia region, who constitute the great majority of those living abroad.

Furthermore, all references to “mother and/or father” in **articles 11 (1), 11 (2) (b), 11 (3), 12 and 14** should be replaced with gender-neutral language using “parent/s” instead.

## **RIGHT TO LIFE**

The Constitution fails to guarantee the right to life, which is a serious omission in itself, and also because of ongoing concerns around extra-judicial killings and the indiscriminate killing of protestors by security forces in Nepal. While we welcome the abolition of the death penalty in 1990, the Constitution should be amended as a matter of urgency line with article 6 of the International Covenant on Civil and Political Rights (ICCPR), to which Nepal is a state party, to specify that no one shall be arbitrarily deprived of his or her life.<sup>3</sup>

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<sup>2</sup> Article 9 reads, “1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband” and “2. States Parties shall grant women equal rights with men with respect to the nationality of their children.” *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>.

<sup>3</sup> “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life,” article 6(1), International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

## RIGHT TO FREEDOM

Many of the restrictions to the exercise of the rights in **article 17 (2)**, outlined in subparagraphs 1-6, are vague and open the door to excessive and unjustified restrictions on these rights (for example “Nothing in section (a) shall be deemed to prevent the making of an Act to impose reasonable restrictions on any act which ... is contrary to decent public behavior or morality”). These provisions should be harmonised with the relevant provisions of ICCPR.

## EQUALITY AND DISCRIMINATION

**Article 18 (3)**, which names the marginalised groups which qualify for “special provisions by law” for their “protection, empowerment or advancement,” includes “financially deprived” Khas Arya, a historically advantaged group with strong political power. The special provisions envisaged by this article are targeted at ethnic and religious groups which have been historically marginalised, and are in line with obligations under international human rights treaties.<sup>4</sup> The inclusion of the Khas Arya is a misinterpretation of those obligations and essentially renders their adoption for the acceleration of *de facto* equality between advantaged and disadvantaged groups irrelevant.<sup>5</sup> The situation of financial deprivation of poorer members of the Khas Arya is not linked to their membership of that community, and should be addressed under poverty alleviation measures aimed at the general population. The identification of groups requiring special measures should be carried out on a case by case basis drawing on the context reigning at the time, and such programmes should end when effective equality has been achieved; therefore, a list of groups fixed in the constitution should be avoided.

**Article 24** and the relevant sub-clauses do not take into consideration discrimination faced

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<sup>4</sup> The UN Committee on the Elimination of all forms of Racial Discrimination states that “The concept of special measures is based on the principle that laws, policies and practices adopted and implemented in order to fulfil obligations under the Convention require supplementing, when circumstances warrant, by the adoption of temporary special measures designed to secure to disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms,” Paragraph 11, General Recommendation 32, UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation no. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination, 24 September 2009, CERD/C/GC/32. Nepal is a state party to the UN Convention on all forms of Racial Discrimination.

<sup>5</sup> Article 4 of CEDAW, for example, allows for state parties to adopt temporary special measures advantaging women, who have historically had a more disadvantaged position in comparison to men, in order to accelerate *de facto* equality between men and women.

by individuals and communities based on their sexual orientation and gender identity (sexual and gender minorities). The article should therefore be amended to incorporate sexual orientation and gender identity as protected grounds against discrimination. In a similar manner, **article 18 (2)** should be amended to include sexual orientation and gender identity as grounds for non-discrimination in the application of general laws.

**Article 24 (4)** which reads, “there shall not be any racial discrimination in the workplace by indulging or not indulging in untouchability” is unclear on its face and could be interpreted to mean that the state has no obligation to combat behaviour in the workplace that reinforces norms of untouchability, in contradiction to earlier provisions. The provision should be amended to prohibit discrimination on any grounds in the workplace.

The Constitution should also require the state to take all reasonable measures by means of awareness-raising and education, to combat the social prejudices that are at the root of the continuing practice of untouchability. While such initiatives are dealt with as part of the responsibilities of the National Dalit Commission (**article 256**), there is no constitutional duty on the state.

**Article 40 (1)** emphasises Dalits’ right to engage in their traditional occupation. These occupations, and the way they are perceived by the rest of society, are at the root of the entrenched discrimination experienced by Dalits. This article should emphasise the state’s duty to prohibit any social pressure or obligation on Dalits to engage in any particular profession.

The Constitution should also require the state to undertake all reasonable efforts to combat discrimination exercised by private citizens, organisations and companies.

## **TORTURE**

**Article 22 (1)** states that no person in detention shall be subjected to physical or mental torture, or be treated in a cruel, inhuman or degrading manner. This provision is not in line with the definition of torture as provided in article 1 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT),<sup>6</sup>

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<sup>6</sup> “For the purposes of this Convention, the term ‘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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”. Article 1, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol.

to which Nepal is a state party, as well as with article 16 of UNCAT, including as it restricts the prohibition of these acts to situations of detention only.

**Article 22 (2)** provides that torture and ill-treatment shall be punishable by law and a victim shall have the right to compensation provided for by law. Currently the only law on torture in Nepal, the Torture Compensation Act, does not criminalise torture as required by UNCAT. Furthermore, a new torture bill, registered with Parliament earlier this year, proposes to criminalise torture but falls below international standards. It recognises torture and ill-treatment as taking place in police custody only; limits punishment for perpetrators to a maximum of five years or a fine of 50,000 Rupees; stipulates that compensation for a victim cannot exceed 500,000 Rupees; and imposes a 90 day limit for registering complaints against perpetrators.

## **RIGHT TO FREEDOM OF RELIGION OR BELIEF**

**Article 26 (3)** of the Constitution is problematic for several reasons. First of all, the clause that makes it punishable by law for a person to act or make others act “in a manner which is contrary to public health, decency and morality or behave or act or make others act to disturb public law and order situation” is overly broad and inconsistent with ICCPR articles 18 (3)<sup>7</sup> and 22 (2). The wording should be amended in line with article 18 (3) to read, “Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others,” taking into consideration the Human Rights Committee's interpretation of article 18(3) in its General Comment 22.<sup>8</sup>

Secondly, the clause making it punishable by law for a person to act or make others act “to convert a person of one religion to another religion, or disturb the religion of other people”

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1465, p. 85, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>.

<sup>7</sup> The Human Rights Committee in its General Comment 22 says of article 18(3) of the ICCPR that “it permits restrictions on the freedom to manifest religion or belief only if limitations are *prescribed by law* and are *necessary* to protect public safety, order, health or morals, or the fundamental rights and freedoms of others... In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26. Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. The Committee observes that paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security”. General Comment 22, article 18 (Forty-eighth session, 1993). Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994).

<sup>8</sup> Ibid.

is incompatible with the right to freedom of religion as enshrined in ICCPR article 18 including as it severely curtails an individual's choice to be converted, to change one's faith or to adopt a faith or religion of his/her choosing, or to choose not to have a religion or faith. It could also be interpreted to mean that anyone who wishes to discuss their faith peacefully with a person of another religion could be accused of conversion, thereby violating an individual's rights to freedom of expression and religion. Furthermore, the prohibition on disturbing the religion of other people is unduly vague and could be interpreted to repress public expressions of religious beliefs by persons belonging to religious minorities, which are deemed to be unacceptable by sectors of the majority. This clause should be amended in line with article 18 of ICCPR.

## **RIGHT TO JUSTICE**

**Article 20 (4)** states that 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 law at the time of the offence. While this provision goes some way in reflecting Nepal's obligations under article 15 of ICCPR, it only partially complies with that provision. For instance, it fails to make clear that when referring to an act punishable by law, this should also include acts that are crimes under international law, in accordance with what is set out in article 15 (1) and 15 (2) of ICCPR. This provision should therefore be amended to be fully in line with article 15 of ICCPR. Among others it is important to ensure that nothing in the Constitution could be used to prevent accountability for crimes under international law committed during the past conflict.

Also under **article 20 (2) and (3)**, the right of arrested persons' access to a legal practitioner of their choice from the time of arrest and the right of persons arrested to be produced before a judicial authority within 24 hours of the arrest are specifically excluded with respect to persons subject to preventative detention or to a citizen of an enemy state. This is a major restriction on the rights of all arrested persons, contrary to the guarantees under articles 9 (3), 10 and 14 of ICCPR.

## **RIGHTS AGAINST PREVENTATIVE DETENTION**

**Article 23** allows the government to detain anyone who they believe may be an "immediate threat to the sovereignty and territorial integrity of Nepal or public peace and order." This provision is overly broad, giving the government huge discretion in deciding who can be held in preventative detention and on undefined grounds, and for how long. Such form of administrative detention, which bypasses the guarantees offered by the ordinary criminal justice system, must be prohibited.



## ECONOMIC, SOCIAL AND CULTURAL RIGHTS

While the inclusion of economic, social and cultural rights in the new Constitution reflecting many of the guarantees enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>9</sup> to which Nepal is a state party, is positive, the provisions do not adequately reflect the content of some of the rights as elaborated in international law and standards, leaving significant protection gaps.

The right to housing must not be curtailed by processes of acquisition of land or housing in public interest as stated in **article 25** on the right to property. Given the serious and long-term impacts of displacement due to acquisition of land and housing for infrastructure development projects, Amnesty International is calling for an explicit statement under article 25 to clarify that the acquisition process of land and/or housing will ensure that the process does not lead to forced evictions as defined by international human rights standards. It is also important that there is a requirement on the state to demonstrate “public interest” prior to acquiring land and/or housing or other forms of property.

It would have been valuable for the right to education provision in **article 31** to make some reference to the aims of education as reflected in international law and standards, such as the CRC and ICESCR. Reference to higher education should also be included in line with ICESCR article 13 (2) (c).<sup>10</sup>

The right to employment elaborated in **article 33** should be amended to refer to the right to freely choose or not to be deprived of work unfairly.

The right regarding labour provision in **article 34** should be amended to reference the right of everyone to the enjoyment of just and favourable conditions of work, in particular the right to safe working conditions.

The right to healthcare provision in **article 35** contains both some vague terms and gaps. The article only refers to the right to “seek basic health care services” which is a weaker formulation than that recognised under international law. There is no reference to the rights to essential medicine nor to sexual and reproductive health services and information, both

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<sup>9</sup> *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx>.

<sup>10</sup> “Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education,” ICESCR Article 13 (2) (c).

of which are core obligations under international law. This provision should be amended in line with international standards.

It would be preferable to have a separate provision on the right to water and to make reference to the right to sanitation. **Article 35 (4)** is very limited and would be strengthened by adopting the international definition of the right to water, which entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. A reference to the right to maintain access to existing water supplies to be free from interference, including arbitrary disconnections or contamination of water supplies, would further clarify the state's obligations in this area.

The right to food as laid out in **article 36** would benefit from explicit references to the quality of food, nutrition and food security, as per international standards.

**Article 37** on the right to housing should be framed in terms of adequacy as opposed to appropriateness. A failure to prohibit forced evictions explicitly is a missed opportunity and should be included.

Whilst the right to social security in **article 43** covers a number of vulnerable groups who should be entitled to receive support, it omits to include a range of benefits such as maternity and paternity, employment injury and unemployment and non-contributory schemes. The provision should be amended to incorporate the schemes that are available to these groups and an explicit reference to disability should be inserted.

## **WOMEN'S RIGHTS AND SEXUAL AND REPRODUCTIVE RIGHTS**

**Article 38 (6)** provides that each spouse in a married couple shall be entitled to equality in financial and family matters. The scope of this provision should be broadened to include all other elements related to equality in marriage as per article 16 of CEDAW such as custody over children, personal rights and reproductive rights as well as the right to enter freely into marriage.

**Article 38 (2)** refers to every woman's right related to "safe motherhood and reproductive health" as opposed to "reproductive rights" as per the draft Constitution – something that has been a matter of serious concern for women's rights groups in Nepal who argue that the vague wording of the provision does not allow for the protection of the full range of reproductive rights. The article should fully reflect women's reproductive rights, including their right to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so; the right to attain the highest standard of sexual and reproductive health and the right to have control over and decide freely and responsibly on matters related to sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.

## CHILD RIGHTS

**Article 39** fails to provide a definition of a child. The Constitution should define a child as someone under age eighteen, in line with article 1 of the UN Convention on the Rights of the Child (CRC),<sup>11</sup> to which Nepal is a state party. The article should also include the principle that the best interest of the child shall be the primary consideration in all actions, laws and policies concerning children.

## PARDONS AND CLEMENCY

**Article 276** entrusts the President with sweeping authority on pardoning and clemency without any provision that bars *de facto* and *de jure* amnesties for crimes under international law such as enforced disappearance, torture, extra-judicial executions, war crimes and crimes against humanity. Amnesties for crimes under international law are not permissible and the proposed provision should be amended to ensure compatibility with Nepal's international human rights obligations and the jurisprudence developed by the Supreme Court.

## STATE OF EMERGENCY

**Article 273 (11)** does not allow for an individual or group to approach the courts to raise the question about whether the suspension of a particular right is constitutional or not. According to the ICCPR, although certain rights can be suspended in the time of emergency, the suspension should be justified by strict criteria laid out in article 4 (1) of ICCPR and detailed by the UN Human Rights Committee in its General Comment 29.<sup>12</sup> The possibility to challenge in court the establishment and scope of the state of emergency should always be available, including to assess whether the suspension of a particular right is strictly necessary to meet the legitimate exigencies of the situation.

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<sup>11</sup> *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

<sup>12</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11