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SUBMISSION FROM AMNESTY INTERNATIONAL ON NEPAL'S DRAFT CONSTITUTION AS PART OF THE CONSULTATION PROCESS

Amnesty International¹ is concerned that the draft constitution, adopted by the country's Constituent Assembly on July 7, 2015 and put forward for a two-week public consultation period, has a number of major human rights shortcomings which need to be urgently addressed. In particular, the rights of women and marginalized communities, such as dalits, are not clearly and sufficiently protected in the draft.

Of further concern is that the Constituent Assembly allowed for only two weeks of public consultation on the constitution and exacerbated that short deadline by imposing confusing deadlines through comments communicated nationally or internationally.

Amnesty International outlines below specific concerns on the draft constitution and recommends changes to address them.

CITIZENSHIP ISSUES

Article 12 (1) as currently drafted requires that in order for a child to acquire citizenship by descent, the child must prove that both father and mother are Nepali citizens. This imposes a burden on children of single parents and refugee parents who might be unable to prove citizenship of both parents. Nepal at present has an estimated 4.2 million stateless people who are unable to prove their citizenship which in turn leaves them unable to access basic state services such as higher education, health care and government employment.

Amnesty International strongly urge that the requirement for both parents to prove citizenship be removed. A child should be able to acquire citizenship through descent through proof of citizenship of one of the parents. Furthermore, this article as it stands is discriminatory towards same sex couples and their children. The article should be phrased in gender neutral language using 'parent/s' as opposed to 'mother and father.'

Article 12(2) should be amended to grant citizenship to children at birth, not merely on attainment of majority.

Article 12 (4) grants citizenship by descent to a child of a Nepali mother whose father is unidentified, but then immediately, through a proviso, 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.

¹ We are a global movement of more than seven million people campaigning for the protection and promotion of human rights, but are also registered as a non-governmental organisation in Nepal.

Article 13 places a discriminatory burden on foreign men married to Nepali women. As drafted, foreign husbands must wait 15 years before being eligible for citizenship, while foreign wives are eligible for citizenship as soon as they are married provided they are willing to give up their own citizenship. The same requirements for acquiring Nepali citizenship should apply to both foreign women and men married to Nepali citizens.

Article 15, as currently drafted, is unclear on its face. The article should be repealed. Article 12 should be amended in a way that doesn't discriminate against children of single parents, refugees, transgender parents or same sex couples, and allows a child to acquire citizenship by descent from one parent only (regardless of their gender).

Article 19 provides for 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, and is particularly aimed at discriminating against Nepalis living in the South Asia region, who are the great majority of those living abroad.

The term "backward" when applied to "class" or "women" is discriminatory and derogatory, and should be replaced by a term such as "marginalised," which recognises that the groups identified are subject to discrimination by the state or other actors (see Articles 23(3), 47(1), 55(f)(1), 55 (j)(10), 254(1)(a), 262(2)).

RIGHT TO FREEDOM

Article 22(2) (1-6): These sub-clauses place undue restrictions on freedom rights by imposing vague and arbitrary limits on the exercise of freedom by allowing the government essentially to decide what undermines nationality, harmonious relations, disrespect to labour, public health, good behaviour, public morality, business, trade or other listed offences. Any restrictions on liberty must be strictly limited to those necessary to protect public order and security and as permitted by law.

RIGHT TO JUSTICE

Article 25 (4) of the draft constitution should be amended to exclude the non-retroactivity rule to such crimes so as to pave the way for accountability in the context of conflict-era violations, including enforced disappearances.

Article 15 of the International Covenant on Civil and Political Rights (ICCPR), to which Nepal is a party, makes it clear that the prohibition against non-retroactivity of laws does not apply to crimes under international law at the time of commission.

Also under Article 25, 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 preventive 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 the ICCPR.

RIGHTS AGAINST PREVENTIVE DETENTION

Article 28 as drafted is overly broad, and as such gives the government huge discretion in deciding who can be held in preventive detention. The draft allows the government to hold anyone who they believe may be an "immediate threat to the sovereignty and integrity of, or the law and order situation, in Nepal."

WOMEN'S RIGHTS

Article 43 (6) spells out that each spouse in a married couple shall be entitled to equality in financial and family matters. This clause should borrow from the language in article 16 of the CEDAW convention and include other elements of equality in marriage such as custody over children, personal rights and reproductive rights as well as the right to enter freely into marriage.

SEXUAL AND REPRODUCTIVE RIGHTS

The replacement of the Interim Constitution's "right to reproductive health" guarantee under article 20 (2) with the "right to safe motherhood" and the "right relating to reproduction" under Article 43 (2) of the Draft Constitution has been a matter of serious concern for women's rights groups. The reasons behind distorting the language in the draft constitution is by no means clear. The article should reflect not only women's reproductive rights (including the right to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health but also their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.

Article 43 (2) contains a provision criminalising sex selective abortion. A 2011 UN Interagency Statement on Sex Selection from the UN Office of the High Commissioner for Human Rights, UNICEF, UNFPA, UN Women and the World Health Organization stated that banning sex selection was not necessarily effective in reducing disparities in the sex ratio. The agencies found that laws banning sex selection, including sex-selective abortion, tended to threaten a broader range of reproductive rights including, prenatal testing (which could be vital to assess any risks to the health of a woman's pregnancy and to the life or health of the woman) and access to abortion, generally. Instead the states should tackle the underlying causes of sex selection, such as discrimination against women and girls and discriminatory gender stereotypes.

CHILD RIGHTS

Article 44 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, to which Nepal is a state party.

RIGHTS OF DALITS

The constitution should explicitly call for proportional representation of Dalits and Indigenous Peoples in all forms of government service, including the security services, through all ranks. The constitution should also call for proportional representation of Dalits and Indigenous Peoples in both houses of parliament through the appointments process.

Section 45(4) should be amended to ensure Dalits the right to exercise their traditional profession only if through free will and without societal or other coercion.

PARDONS AND CLEMENCY

Article 271 and 164 entrust the President and the Chief Executive of the Province respectively with sweeping authority on pardoning and clemency without any provision that bars de facto and de jure amnesties including pardon in the context of serious crimes including enforced disappearance, torture and rape. As amnesties for gross violations of human rights are not permissible under the international law, the proposed provision should be amended to ensure compatibility with Nepal's international human rights obligations and the jurisprudence developed by the Nepalese Supreme Court of Nepal.

STATE OF EMERGENCY

The proposed provision (article 268) 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 article 4 of the ICCPR, although certain rights can be suspended in the time of emergency, the suspension should be based on the tests of proportionality and necessity and the possibility of judicial review should always be available to assess whether the suspension of particular right is necessary to meet the exigencies.