



INTERNATIONAL COMMISSION OF JURISTS

Commission internationale de juristes - Comisión Internacional de Juristas

" dedicated since 1952 to the primacy, coherence and implementation of international law and principles that advance human rights "

President
Mrs. Mary ROBINSON, Ireland

Vice-Presidents
Dr. Rajeev DHAVAN, India
Justice John DOWD, Australia

Executive Committee
Prof. Vojin DIMITRIJEVIC, Serbia
Justice Unity DOW, Botswana
Dr. Gustavo GALLÓN GIRALDO, Colombia
Mr Stellan GÄRDE, Sweden
Prof. Robert GOLDMAN, United States
Dr. Pedro NIKKEN, Venezuela
Justice Michèle RIVET, Canada
Mr Raji SOURANI, Palestine
Prof. Leila ZERROUGUI, Algeria

Other Commission Members
Mr. Muhand AL-HASSANI, Syria
Mr. Ghanim ALNAJJAR, Kuwait
Mr Raja AZIZ ADDRUSE, Malaysia
Prof. Abdullahi AN-NA'IM, Sudan
Justice Solomy BALUNGI BOSSA, Uganda
Mr. Abdelaziz BENZAKOUR, Morocco
Justice Ian BINNIE, Canada
Prof. Alexander BRÖSTL, Slovakia
Justice Arthur CHASKALSON, South Africa
Prof. Santiago CORCUERA, Mexico
Ms Vera DUARTE, Cape-Verde
Prof. Louise DOSWALD-BECK, Switzerland
Justice Hisham EL BASTAWISSI, Egypt
Prof. Paula ESCARAMEIA, Portugal
Justice Elisabeth EVATT, Australia
Prof. Jochen FROWEIN, Germany
Mr. Roberto GARRETÓN, Chile
Prof. Jenny E. GOLDSCHMIDT, Netherlands
Ms Asma JAHANGIR, Pakistan
Ms Imrana JALAL, Fiji
Prof. David KRETZMER, Israel
Prof. Kazimierz Maria LANKOSZ, Poland
Justice José Antonio MARTÍN PALLÍN, Spain
Mr Kathurima M'INOTI, Kenya
Justice Sanji MONAGENG, Botswana
Ms Karinna MOSKALENKO, Russia
Prof. Iulia MOTOC, Romania
Prof. Vitit MUNTABHORN, Thailand
Prof. Manfred NOWAK, Austria
Dr. Jorge Eduardo PAN CRUZ, Uruguay
Prof. Andrei RICHTER, Russia
Sir Nigel RODLEY, United Kingdom
Mr Claes SANDGREN, Sweden
Mr. Belisario dos SANTOS JUNIOR, Brazil
Justice Philippe TEXIER, France
Prof. Daniel THÜRER, Switzerland
Prof. U. Oji UMOZURIKE, Nigeria
Prof. Vilenas VADAPALAS, Lithuania
Prof. Yozo YOKOTA, Japan
Justice E. Raúl ZAFFARONI, Argentina

18 November 2009

Rt. Honourable Subas Nembang

Chairperson

Constituent Assembly

Singadurbar, Kathmandu

Nepal

Rt. Honorable Chairperson,

Re: Comments by ICJ on the Fundamental Rights Committee's Report

The International Commission of Jurists (ICJ) congratulates the Fundamental Rights Committee on the completion of draft provisions submitted to you on 13 November 2009. It is our understanding that the honourable CA members will now consider these provisions in plenary. The intention of this letter is to support the honourable CA members in this important and historic deliberation.

The ICJ has carried out a preliminary and non-exhaustive analysis of the draft provisions related to the Part on Fundamental Rights, as well as one provision in the Part on Duties (Article 1). We have not yet reviewed all of the provisions contained in this detailed submission.

The ICJ notes positively the Fundamental Rights Committee's efforts to guarantee fundamental civil, political, economic, social and cultural rights. However, there are also serious weaknesses related to:

- A. The definition of fundamental rights;
- B. Limitations on fundamental rights; and
- C. Measures provided for the enforcement of fundamental rights.

A. Definition of fundamental rights

1. "Right to live with dignity" (Article 1(1)). The protection of the

right to life, itself, is not clearly defined. A specific provision on the right to life is indispensable for any human rights instrument of general scope. The prohibition against violations of the right to life is peremptory norm of international law and such violations may constitute a crime under international law. It is advisable that the text include 'the right to life, including the right to be free from the arbitrary deprivation of life'.

2. **Liberty** (Article 2(1), 14(4)).

2.1. Article 2(1). This provision fails to guarantee the right to “**security of person**” and other related fundamental rights. It is advisable that the text provide for “the right to liberty and security of the person” and guarantee explicitly against arbitrary arrest and detention, while also guaranteeing procedural safeguards, the right to challenge the lawfulness of detention before an independent court in *habeas corpus* or similar proceedings, and provide for compensation when these rights are violated (ICCPR, Article 9).

2.2. Article 14(4). This Article allows the State in overly broad and vague terms to require “**compulsory service for public purposes.**” It is advisable that the text avoid the danger of compulsory service amounting to forced or coercive labour by narrowing this provision to the more narrow grounds of compulsory service that are allowed under international law: military service (with the option of exemption on basis of being a conscientious objector), emergencies, and "normal civic obligations" that citizens normally would engage in voluntarily (ICCPR, Article 8; ICESCR, Article 6; ILO 29 - *Forced Labour Convention*, Article 2(2)).

3. **Enforced disappearances.** There is no provision to address Nepal’s history of enforced disappearances, which constitutes a crime under international law. It is advisable that this provision be expanded to include:

- the fundamental right of everyone not to be subjected to enforced disappearance,
- that no exceptional circumstances may be invoked to justify an enforced disappearance and
- that an enforced disappearance shall be punishable as a criminal offence without the possibility of amnesty or the imposition of a statute of limitations on this continuing violation.

4. **Right against torture** (Article 7).

4.1. **Punishment.** Article 7(1) fails to prohibit ‘punishment’ that amounts to torture or any other cruel, inhuman or degrading treatment or punishment. This would amount to a serious omission given Nepal’s obligations under the *UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. It is advisable that this provision explicitly prohibit “torture or any other cruel, inhuman or degrading treatment or punishment”.

4.2. **Compensation.** Article 7(2) uses the concept of “appropriate compensation”. However, compensation is only one part of the broader rights of victims under the concept of “reparations”. It is advisable that this provision include the right of the victim under Article 14 of the CAT (*UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*) to “an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible”, and that dependants of victims that have died are also entitled to compensation.

5. **Substantive Equality, Right Against Untouchability, Rights of Women and Dalits** (Articles 3, 9, 23 & 25). Despite the fact that the most prevalent grounds of discrimination such as *sex*, *religion* or *caste* have been prohibited bases of discrimination since at least 1951, discrimination continues to characterise Nepali society. The current text is unlikely to address this lack of significant progress because it appears only to guarantee ‘identical treatment’ (or what is often called ‘formal equality’) rather than substantive equality. It is advisable, therefore, to revise the current provisions (Articles 3(2), 3(3), 9, 23, 25) to ensure that every individual is entitled to substantive equality under the law and to substantive equality in the protection and benefit of the law without discrimination.

Such a provision would allow judicial review regarding the substance and effects of legislation and government actions. Courts should be permitted to look at the historical causes of discrimination against disadvantaged groups. In its current form, courts would instead be restricted to looking only at formal distinctions on the surface of challenged legislation.

6. **No discrimination for work of equal value** (Article 3(4)). The current provision provides for non-discrimination for men and women doing the same work. However, it does not address different work that is of equal value. Under the concept of employment equity, it is important to properly value this work. This is especially important in Nepal, where women often perform low-valued work that is not performed by men, but that is equal in value to other kinds of work. It is advisable that the provision be reviewed with the goal of ensuring that different work that is of equal value, whether performed by men or women, is paid equally.
7. **Prohibited grounds of discrimination: Financial status.** It is advisable that Article 3(3) include "financial status" as a prohibited ground of discrimination, mirroring article 3(2).
8. **Right to legal counsel** (Article 5(2)). This provision establishes the right to legal counsel “from the time of arrest”. It is advisable, however, to ensure that this right apply ‘throughout all stages of the legal process’, in order to comply with Nepal’s international obligations (see the *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Principles 17 and 18, and Article 14 (3) (b), ICCPR).
9. **Legal Aid** (article 5(10)). The current provision creates a right to legal aid for indigent people. In order to make certain that legal aid will be available whenever a poor person’s constitutionally protected interests are jeopardized or violated, it is advisable to convert article 5(10) into a separate article that ensures the right of any indigent person shall have the right to free legal aid in cases where their Fundamental Rights are threatened or have been violated.
10. **Rights of those under preventive detention** (Article 5). This provision denies those under preventive detention the right to legal counsel and the right to be produced before a judicial authority within 24 hours. This exclusion fails to ensure that anyone detained, whether under preventive detention or as a criminal suspect or as a convicted person, has swift access to the outside world, especially a lawyer and a judge. This guarantee is an essential safeguard against serious human rights violations, including enforced disappearances, extrajudicial execution and torture and other ill-treatment. It is advisable that this provision incorporate a guarantee that all detained persons, regardless of the reason why they are arrested and detained, must be brought “promptly” before a judicial authority and be able to access to a lawyer “without delay” (*UN Body of Principles*

for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 11 (1), 17, 18).

11. **Civil and political rights.** The current provisions do not include important civil, political, indeed, democratic rights contained in international human rights instruments ratified by Nepal. Among these, it is essential and advisable to include the right of citizens to take part in public affairs, to elect and be elected.

12. **“As prescribed by law” or “provided by law”.**

12.1. **Regarding compensation.** The phrase, “as prescribed by law”, refers to future implementing legislation related to compensation for the consequences of violations of the right against torture (Article 7) or the right against preventive detention (Article 8). It is advisable to explicitly create in this provision a right to the broader category of “reparations”, including an enforceable right to fair and adequate compensation and to rehabilitation (see also paragraph 4, above, regarding the norms under the Convention against Torture).

12.2. **Regarding right to privacy** (Article 13). The right to privacy is provided in Article 13 as “inviolable” “except in circumstances provided by law”. Those circumstances are not described nor is any standard created to ensure that such future laws do not violate this fundamental right. It is advisable to add a provision to ensure that any exceptions provided by law are “reasonable”, limited to a case-by-case basis, and carried out in a manner that is also reasonable and consistent with fundamental rights.

13. **Future Implementation of Economic, Social and Cultural Rights** (31(1), 31(2)).

13.1. Article 31(1) creates a separate legal regime for economic, social and cultural rights. It provides that all of the rights, which, on their face, are stated in very positive and comprehensive terms (e.g., rights to education, health, employment, housing, food, social justice and social security) are all subject to being ‘provided for by law’. This means that the ‘rights’, considered fundamental under international human rights law binding on Nepal, would actually have no constitutional status at all. Instead, their only status would be statutory—if and when the legislature chooses to enact relevant legislation. It is advisable to simply remove article 31(1).

13.2. Article 31(2) calls upon the Government to enact implementing legislation regarding rights “in this Part” within two years. This provision undermines the constitutional recognition and guarantee of rights that already exist. In other words, it is advisable that the rights in this part unambiguously take effect immediately. This can be achieved simply by deleting article 31(2).

B. Limitations on fundamental rights

14. **“Reasonable restrictions”** (Articles 2, 3, 4). The current provisions allow the Government to impose “reasonable restrictions” on fundamental rights on the overly broad and vague grounds of threats to “harmony”, “relations”, “decent public behaviour”, “the interest of the general public”, or the “social dignity of the individual”. The use of this kind of “reasonableness” test is contrary to that established under international law. Specifically, under international human rights law (and good practice around the world), it is legitimate for a government to restrict the rights to freedom of expression, assembly and association only if the restrictions are:

- specifically provided by law,

- the least restrictive means necessary in a democratic society,
- intended to protect a legitimate interest, including respect of the rights and reputations (or freedoms) of others, the protection of national security or public order, or public health or morals. Such language is found in Articles 19, 21 and 22 of the ICCPR, which has been ratified by Nepal and which therefore applies directly in Nepali law.

It is advisable to redraft this provision in order to comply with these international norms.

15. Duties of Citizens (Duty Part 1(b), 1(d); Fundamental Rights Part, Article 14(4)).

15.1. **Secrecy.** Article 1(b) requires that citizens maintain secrecy of information on the grounds of national security. This overly broad and vague language creates conditions for arbitrary restrictions on fundamental rights, particularly freedom of expression. There is a general presumption under Nepal's international human rights obligations that information can be exchanged freely (ICCPR, Article 19(2)). Under Nepal's international legal obligations, the state can adopt legislation or similar measures requiring that individuals do not disclose particular pieces of information, provided these limitations fall within the narrow scope of limitations already permitted to freedom of expression, but. It is advisable on this basis to remove this provision.

15.2. **Compulsory Labour.** Both Article 1(d) of the Part on Duties and the exception in the Part on Fundamental Rights (Article 14(4)) allow the State to describe certain kinds of work as "compulsory" on the overly broad and vague basis that it serves a "public purpose". It is advisable that the text avoid the danger of compulsory service amounting to "forced or coercive labour" by narrowing this provision to the more narrow grounds that are allowed under international law: military service (with the option of exemption on basis of being a conscientious objector), emergencies, and "normal civic obligations" that citizens normally would engage in voluntarily, (ICCPR, Article 8; ICESCR, Article 6; ILO 29 - Forced Labour Convention, Article 2(2)).

16. Preventive Detention (Article 5(2), 5(3), 8(2)). Article 8 permits detention without charge or trial on the broad and vague grounds of threats to "law and order". Article 8(2) allows restrictions on access to information by family members regarding the condition of persons under preventive detention in certain situations. Articles 5(2) and 5(3) restrict the access to justice by those under preventive detention, denying access to legal counsel and to review by the judiciary within 24 hours. These measures violate Nepal's international human rights obligations.

16.1. Article 8. The use of preventive (or 'administrative') detention is limited to exceptional threats to public security (see UN Human Rights Committee regarding Article 9, ICCPR). Except in narrow circumstances that are legally prescribed, limited in time, and subject to judicial review and all procedural guarantees, preventive detention must be considered arbitrary. It is advisable to narrow the grounds for preventive detention in this provision to these more specific and limited criteria.

16.2. Article 8(2), 5(2), 5(3). No restriction on access by family members to a detained person is permissible under Nepal's international human rights obligations. Similarly, especially in situations of preventive detention, access to legal counsel and to review by an independent, impartial and competent judicial authority is essential and required under international law. It is advisable to remove these limitations on fundamental rights.

17. **Non-citizens** (Article 2(2), 5(2), 5(3), 16, 18, 20, 21 and 22). The current provisions deny arbitrarily many fundamental rights to non-citizens. Under the *International Covenant on Civil and Political Rights*, Nepal must guarantee “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, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (ICCPR, article 2.1). The only rights specifically enjoyed only by citizens under the ICCPR are the rights to elect and be elected and to take part in public affairs (ICCPR, Article 25). Permissible restrictions on the rights of non-citizens are same as those that apply to citizens: a threat to national security, public safety, public order, public health or morals or the rights and freedoms of others. As long as non-citizens observe the country’s laws and respect the customs and traditions of the people, they are also allowed the same rights as citizens to join trade unions and to have access to social services, health care, education, and social security. It is therefore advisable to conduct a careful review of the provisions that limit rights to citizens, ensuring compliance with these international obligations.
18. **Right to justice denied to a “Citizen of an enemy state”** (Article 5(2), 5(3)). It is contrary to international human rights law to deny the right to justice on any grounds. Even in the context of armed conflict, enemy combatants enjoy the right to justice. It is advisable to remove this restriction.
19. **Right to Housing only to be Terminated Pursuant to Reasonable Law** (Article 22(2)). It is advisable to explicitly require that the termination laws applied by the courts be just and reasonable.

C. Weak enforcement of rights, including the right to a remedy

20. **Retroactivity** (5(4)). This provision contradicts Nepal’s obligation to prosecute those acts that were crimes under international law even if, at the time of the criminal act, no domestic provisions existed (Article 15, ICCPR). It is advisable to clarify that this provision does not apply to acts that were crimes under international law at the time of their commission.
21. **Jurisdiction of District Courts**. The current draft does not address the critical problem of access to adequate judicial remedies where fundamental constitutional rights are violated. It is advisable to conduct a thorough review of this issue and to consider extending full and complete jurisdiction to District Courts.
22. **Constitutional Remedy and Reparations** (Article 6(2), 7(2), 31). The current draft does not make reference to the right of victims to reparations, an essential part of the victim’s right to a remedy. “Social rehabilitation and compensation” (Article 6(2), 7(2)) are both contained in the concept of “reparations”, which also extends to other kinds of reparation under international human rights norms, including rehabilitation and restitution. It is advisable to state in this provision that victims shall be “entitled to full reparation, including fair and adequate compensation” (UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law).

More generally, fundamental rights require a specific remedial provision that is tailored to address the myriad of ways in which rights may be violated. Existing provisions in the judiciary chapter may well be inadequate for this constitutional purpose. It is advisable that a provision that addresses the question of remedies be created. It ought to be drafted

in broad and open-ended terms, so as to ensure that any court with jurisdiction to address rights violations claims would have full and complete jurisdiction to grant an appropriate range of remedies.

23. **Obligation to investigate.** The current text does not address the historic problem in Nepal of a lack of effective and independent investigations when fundamental rights are violated. It is advisable that the obligation to investigate be included as part of the remedy provisions provided in the existing draft article 31.

24. **Giving Nepal's international human rights obligations an interpretive role.** The current text fails to acknowledge Nepal's international human rights obligations as a basis for interpreting the fundamental rights provisions. The provision in the Nepal Treaty Act to provide superiority to international law is weak and can be repealed at any time. It is therefore important to establish in the Chapter on Fundamental Rights a consolidated ground of interpretation of fundamental rights from the District Courts to the Supreme Court. It is advisable create such a provision to ensure that the rights, freedoms and duties in this Part will be implemented and interpreted in a manner which is consistent with international human rights agreements that Nepal has ratified.

These are the ICJ's preliminary views and are in no sense intended to be exhaustive. The ICJ will continue to offer more detailed submissions and remain available for further discussion of these issues. We take this opportunity again to congratulate the Fundamental Rights Committee and to offer the ICJ's expression of full support to the upcoming work of the honorable CA members.

Sincerely yours,

Vincent Calderhead

Director, ICJ-Nepal

cc: Deputy Chairperson, CA
All Members of the Constituent Assembly
Secretary-General, CA
Secretary, CA