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30 June 2011

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Honourable Nilambar Acharya
Constitutional Committee
Constituent Assembly
Singha Durbar, Kathmandu

Re: Comments on the proposed Fundamental Rights Provisions of the Constitution of Nepal

Honourable Chairperson,

The International Commission of Jurists (ICJ) congratulates the Constitutional Committee on the progress that it has made in the Constitution-drafting process, and in settling contentious issues. In the past, the ICJ has shared comments on the draft provisions prepared by the Fundamental Rights Committee, and made recommendations for how those provisions could be brought in line with Nepal's international human rights obligations. Those detailed comments can be found in the attachments to this letter.

This letter is also meant to follow-up our discussions on 18 March 2011, at the ICJ-sponsored event at the Hotel Everest at which you were kind enough to attend as a guest of honour. Below we have highlighted some concerns that were discussed during that program, and that the Committee may want to address.

1 - Right to Life. The protection of the right to life in Article 1 lacks clarity. It is advisable that the text includes "the right to life, including the right to be free from the arbitrary deprivation of life".

2 - Right to Liberty and Prohibition on Preventive Detention. It is advisable that the text of Article 2(1) provide for "the right to liberty and security of the person" and explicitly prohibit arbitrary arrest and detention. Article 5(2) and 8(2) should be removed or its provisions on the use of preventive detention be limited to exceptional threats to public security, limited in time, and subject to judicial review and all procedural guarantees. Article 8(2)'s restriction on access by family members to a detainee and Article 5's limitation on access to legal counsel and review by a judicial authority are also impermissible under international law.

3 - Right Against Torture. Article 7(1) fails to prohibit punishment that amounts to "torture or any other cruel, inhuman or degrading treatment or punishment". Article 7(2) should also be revised to include the right of the victim under Article 14 of the *UN Convention against Torture* to "fair and adequate compensation, including the means for as full rehabilitation as possible". The concept of "adequate compensation" should also be extended to victims of other types of rights violations.

4 - Enforced Disappearances. There is no provision to address enforced disappearances, which constitutes a crime under international law. We suggest that a provision include (a) the fundamental right of everyone not to be subjected to enforced disappearance, (b) that no exceptional circumstances may be invoked to justify an enforced disappearance and (c) that an enforced disappearance shall be punishable as a criminal offence without the possibility of amnesty or the imposition of a statute of limitations.

5 - Freedom of Expression, Assembly and Association. Articles 2(1) (2), 2(1) (3) and 2(1) (4) allow the Government to impose restrictions on fundamental rights on the grounds of threats to "harmony", "relations", "decent public behaviour", "the interest of the general public", or the "social dignity of the individual". Under international law, it is only legitimate to restrict freedom of expression, assembly and association if restrictions are (1) specifically provided by law, (2) use the least restrictive means necessary in a democratic society, and (3) protect a legitimate interest (ICCPR Articles 19, 21 and 22).

6 - Rights of Non-Citizens. Articles 2, 5, 16, 18, 20, 21 and 22 deny rights to non-citizens. Under the ICCPR (Article 2.1), a state must protect the rights of "all individuals within its territory and subject to its jurisdiction... 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". The only rights that can be restricted to citizens under the ICCPR are the rights to elect and be elected and to take part in public affairs (ICCPR Article 25).

7 - Compulsory Service. Article 14(4)'s provision allowing "compulsory service for public purposes" should be removed, or narrowed to compulsory service permitted under international law: military service (with the option of exemption on basis of being a conscientious objector), emergencies, and civic obligations that citizens would engage in voluntarily (ICCPR, Article 8; ICESCR, Article 6; ILO 29 - *Forced Labour Convention*, Article 2(2)).

8 - Right to Employment and Unemployment Allowances. Article 18 provides that terms and conditions of employment and the provision of allowances to the unemployed shall be "as determined by law". It is advisable the term "reasonable" should be inserted before both "terms and conditions of employment" and "unemployment allowances" to ensure that legislation meets the constitutional standard of reasonableness.

9 - Right to Health Care. The right to health should not be restricted to "basic" health services (which is undefined). It could be worded as the "right to the highest attainable standard of physical and mental health services free of cost." (CESCR General Comment 14). Nor should this guarantee be limited to citizens.

10 - Right to Adequate Housing. The right of "access" to housing in Article 22 should be reformulated to express "the right to adequate housing" (ICESCR Article 11(1)).

The right against arbitrary eviction can be better protected by including language such as "No person shall be removed from his or her place of residence except as is necessary to serve a reasonable and legitimate public purpose."

11 - Right to Social Security. The right to social security in Article 28 is limited to members of certain groups rather than being made available to people on the basis of need. The provision could be revised as "Every person has the right to adequate and accessible social security when in need."

12 - Deportation. Article 30 prohibits the government from "exiling" citizens. In order to respect the principles of non-refoulement, a recognized principle of international law, this article should also provide that "no person shall be arbitrarily extradited and deported to another country".

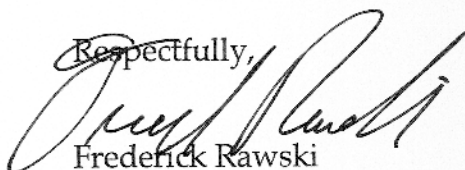
13 - Substantive Equality. Many provisions appear only to guarantee "identical treatment" rather than substantive equality. It is advisable to revise the current provisions (including Articles 3(2), 3(3), 9, 23, 25, and 27) to ensure that every individual is entitled to substantive equality under the law and without discrimination. This would facilitate judicial review regarding the substance and effects of legislation and government action. Courts should be permitted to look at the historical causes of discrimination against disadvantaged groups, including the poor and disabled.

14 - Restrictions on Fundamental Rights - "As Prescribed By Law". A number of articles (including Articles 7, 8, 13, 16, 18 and others include "as prescribed by law". This language should be removed, or clarified. Fundamental rights guaranteed in the Constitution are inviolable. Any limitations imposed on such rights or the Government's obligation to ensure their fulfillment must be "reasonable", limited to a case-by-case basis, and carried out in a manner that is consistent with fundamental rights and Nepal's international obligations. For the same reasons, Article 31(1) and (2) should be removed or revised to ensure that constitutional rights are not subordinated in any way to subsequent legislation.

15 - Justiciability of Fundamental Rights. Article 31(1) and (2) should be removed or revised to provide clearer wording regarding the justiciability of fundamental rights, such as: "These rights are binding on all levels of government and are fully justiciable in court. The state shall take all appropriate measures to implement these rights."

We hope that you will find these comments of use in your work. The ICJ is at your disposal should you seek further clarification of these comments, and those in the attached documents.

Respectfully,



Frederick Rawski
Country Representative
International Commission of Jurists, Kathmandu

cc:

*Rt. Honourable Subash Chandra Nembang
Chairperson, Constituent Assembly*

*Honourable Purna Kumari Subedi
Vice- Chair, Constituent Assembly*

*Mr. Monahar Bhattarai
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