



RECASTING JUSTICE: SECURING DALIT RIGHTS IN NEPAL'S NEW CONSTITUTION

Joint Statement by New York University School of Law Center for Human Rights and Global Justice (CHRGJ), Dalit NGO Federation (DNF); and International Dalit Solidarity Network (IDSN)

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I. INTRODUCTION

In creating the new constitution for Nepal, the Constituent Assembly has the opportunity to crystallize the country's peace 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. In order to fulfill these paramount goals, the rights of all of Nepal's Dalit population—including those marginalized within the Dalit community, such as Dalit women and "lower" Dalit castes—must finally be realized.¹

This Joint Statement draws on Nepal's international human rights obligations to identify how to best achieve the rights of Dalits—a group that has faced more than 2,000 years of systematic discrimination on the basis of caste.² This Joint Statement takes the Interim Constitution as a starting point and predictor of constitutional arrangements in Nepal, and concretely identifies how to enhance the effectiveness of its provisions in order to ensure human rights, consistent with Nepal's obligations. It assumes that the essential articles in Nepal's Interim Constitution—such as the political inclusion of Dalits, provisions for special measures, the expansive repudiation of "untouchability" and racial discrimination in a separate article, the abolition of bonded labor, and the justiciability of economic, social and cultural rights—will be carried over into the new constitution and makes only the most important recommendations to improve these protections.

These recommendations address both the substantive rights guarantees in areas such as equality and non-discrimination and economic, social and cultural rights, as well as how to improve the enforcement of such rights. Experience in Nepal and other caste-affected countries such as India has shown that guaranteeing rights on paper is not enough, and that strong implementation and

¹ This statement focuses on Dalits because of the authors' collective expertise on Dalit history and treatment in Nepal, along with expertise on the human rights implications of caste-based discrimination wherever it exists. The authors also strongly urge the Constituent Assembly to observe the input and recommendations of other organizations regarding all marginalized groups in Nepal.

² This Joint Statement is based on the following sources which should be consulted for a more comprehensive treatment of these issues and recommendations, *see* Center for Human Rights and Global Justice, *Recasting Justice: Securing Dalit Rights in Nepal's New Constitution* (2008) (<http://www.chrgj.org/projects/docs/recastingjustice.pdf>); Dalit NGO Federation, *Dalit Agenda Paper to be Addressed in the New Constitution of Nepal: An Executive Summary* (2008) (http://www.idsn.org/fileadmin/user_folder/pdf/New_files/Publications_from_network/Executive_Summary_of_DNF_Dalit_Agenda_Paper__English_.pdf); International Dalit Solidarity Network, *The Dalits of Nepal: Acting for Change* (2008) (www.idsn.org/fileadmin/user_folder/pdf/Old_files/asia/pdf/FACTSHEET_NEPAL.pdf).

enforcement is critical to closing the gap between a constitutional vision and the social reality which has characterized Nepal's human rights record to date.

II. THE CONSTITUTIONAL MOMENT IN CONTEXT: FACTUAL AND LEGAL STARTING POINTS

A. The Dalit Experience in Nepal

Nepal's pervasive caste system has a firm hold on Nepalese society. Stripped of its historical underpinnings and religious justifications, it is a social hierarchy that is nothing other than a *discrimination* system in which certain groups of people, based exclusively on their birth into a particular social group, are forever branded as inferior. This distinction defines every conceivable aspect of a Dalit's existence. Her citizenship, her access to land, her education, her livelihood, her choice of spouse, her place of worship, her security, her health, and her bodily integrity are all principally limited by caste. The grossest manifestation of this discrimination system is the practice of "untouchability"—the complete repudiation and segregation of Dalits from members of other castes, including a prohibition on touching non-Dalits and their possessions based on the belief that Dalits are "polluted."

Caste discrimination and the practice of "untouchability" have ensured the complete subordination of Dalits who, based on some unofficial estimates, may comprise up to 25 percent of Nepal's population. Both government and private actors subject Dalits to extreme forms of exploitation. "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, Madhesi Dalits living in the Southern part of the country and marginalized Dalit castes like GAINI and BADI, are more marginalized and more excluded in society and thereby face further barriers to their enjoyment of human rights.

B. Nepal's International Human Rights Obligations

Nepal's implicit and explicit endorsement of caste discrimination is illegal under international law. Nepal is a party to the following international human rights treaties that reject the inherently discriminatory features of the caste system: the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the Convention on the Rights of the Child (CRC).

These treaties create binding obligations that must be carried out in good faith to respect, protect and fulfill rights. Core among these obligations are non-discrimination (in both intent and effect) and equality, which means both formal or *de jure* equality and substantive or *de facto* equality. The obligation of substantive equality requires Nepal to look at all of the factors that impact on a person's real enjoyment of equality, including those who face multiple forms of discrimination, such as Dalit women and those subject to inter-Dalit discrimination.

These treaties unequivocally obligate Nepal to undertake the following with respect to caste discrimination by both government and private actors:

- Pursuant to ICERD, Nepal is obligated to eliminate all forms and manifestations of direct and indirect descent-based discrimination, which, according to General Recommendation No. 29, includes caste discrimination; to ensure non-discrimination in the fulfillment of civil, political, social, economic, and cultural rights; and to take positive measures to ensure equality for Dalits and other marginalized groups.
- Pursuant to CEDAW, Nepal is obligated to pursue policies to eliminate discrimination against women and to take positive measures to ensure equality for women in relation to all substantive rights guarantees to which women are entitled. These include the enjoyment of economic, social, and cultural rights, as well as civil and political rights.
- Pursuant to the CRC, Nepal is obligated to protect the rights of children, including protection from all forms of sexual exploitation and sexual abuse, prostitution and other unlawful sexual practices, and child labor.
- Pursuant to the ICCPR, Nepal is obligated to guarantee civil and political rights to all individuals within its territory or subject to its jurisdiction. Among other things, the ICCPR forbids the arbitrary denial of the right to life; torture or cruel, inhuman, or degrading treatment or punishment; slavery, servitude, and certain instances of forced or compulsory labor; arbitrary arrest or detention; arbitrary interferences with privacy, family, and correspondence; and unlawful attacks on honor and reputation. Further, the ICCPR mandates that Nepal allow for freedom of opinion and expression; freedom of assembly and association; the right to marry freely; freedom to take part in the conduct of public affairs, directly or through freely elected representatives; the right to vote; and the right to enjoy culture and practice religion freely. Moreover, Nepal is obligated to treat as equal all persons before the law and to provide, without discrimination, equal protection of the law.
- Pursuant to the ICESCR, Nepal is obligated to guarantee certain economic, social, and cultural rights. These rights include, but are not limited to, the right to work in a field freely chosen; fair and equal remuneration for work; pay that provides a decent living for workers and their families; safe and healthy working conditions; reasonable limitations on working hours and days; the right to organize with regard to labor and employment issues; social security and social insurance programs; the right of everyone to an adequate standard of living (including adequate food, clothing, and housing and the continuous improvement of living conditions); the right of everyone to the highest attainable standard of physical and mental health; the right to an education; and the right of everyone to take part in cultural life, enjoy the benefits of scientific progress, and benefit from the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which they are the author. The ICESCR also guarantees that the rights enunciated therein will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.
- Pursuant to its accession to CAT, Nepal is obligated to prevent, prohibit, and punish acts of torture and other forms of cruel, inhuman, or degrading treatment or

punishment and to ensure that victims of torture can obtain redress in the State's legal system.

Nepal's human rights record has been examined by each of the treaty bodies that monitor the implementation of these treaties. These bodies have found that Nepal has not fulfilled many of its obligations under ICERD, CEDAW, CRC, ICCPR, ICESCR, or CAT. These obligations continue to apply to Nepal, irrespective of the political mechanisms that are envisaged in the transition to democracy and should therefore be embodied in Nepal's new constitution.

III. SECURING DALIT RIGHTS IN THE NEW CONSTITUTION

A. Access to Citizenship

Through Articles 8 (*Citizenship at the commencement of the Constitution*) and 11 (*Citizenship team to be assigned*), the Interim Constitution seeks to address barriers to citizenship. However, the Interim Constitution (and the Nepal Citizenship Act 2063 (2006)), continues to discriminate against women and Dalits. To remedy this, 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, and include language that enables children to be equally eligible for citizenship whether it is their mother or father who is foreign. To give full effect to the promise of citizenship, Nepal must also remove barriers to Dalits' receipt of citizenship certificates, including the requirement of certain documentation (e.g. property ownership), that create particular obstacles for Terai Dalit community members and others who have historically lacked access to land rights. Without citizenship, Dalits are also unlawfully prevented from the enjoyment of a host of other rights under the Interim Constitution.

B. The Right to Equality and Non-Discrimination

The Interim Constitution seeks to protect the right of individuals to equality and non-discrimination primarily by virtue of The Preamble, Article 13 (*Right to equality*) and Article 14 (*Right against untouchability and racial discrimination*). However, Nepal has routinely failed to effectively address caste-based discrimination both in law and in practice. In order to remedy this, the new constitution should, as a starting point, explicitly include a commitment to human rights as a central concern in the Preamble. In addition, building upon Article 13, the new constitution should make the list of grounds on which discrimination is prohibited non-exhaustive, fully include all grounds covered by international human rights law to illustrate the breadth of proscribed discrimination, and extend this protection against discrimination to non-citizens by stating that the guarantee applies to "all persons." The new constitution should also make clear that the list of groups eligible for "special provisions" is non-exhaustive, as failure to create such measures when necessary to achieve substantive equality risks placing Nepal in violation of its international obligations. Finally, to augment Article 14's repudiation of "untouchability" and racial discrimination, the new constitution could additionally include an explicit prohibition on the imposition of certain occupations on the basis of caste. Drafting the new constitution in this manner will ensure substantive equality by realizing the prohibition on caste-based discrimination and thereby moving to eradicate many of the serious violations of human rights committed against Dalits in Nepal.

C. Civil and Political Rights

Through Articles 21 (*Right to social justice*) and 33(d1) (*Responsibilities of the State*), the Interim Constitution secures the right of Dalits to participate in State structures on the basis of proportional inclusion. This requires an accurate census to establish the correct number of Dalits and the enforcement of special measures, such that Dalits can meaningfully participate in all decision-making

processes—from drafting the new constitution to national development activities. An inclusive political system also requires that political parties do not discriminate in membership, leadership or nomination for political positions and thus registration should be prohibited on all these grounds in the new constitution's equivalent of Article 142 (*Registration required for securing recognition for the purpose of contesting elections as a political party*). To ensure the *Right to freedom* (Article 12) and the *Right to religion* (Article 23), the new constitution should avoid unlawful or undue restrictions on these freedoms, which may be misapplied to prevent Dalits from asserting their human rights. Finally, to fully square Nepal with its international obligations, the new constitution should guarantee the right to marry freely a person of one's choosing, which includes inter-caste marriage. Through these changes, the new constitution can ensure that civil and political rights are protected, including during states of emergency when they are often most under threat.

D. Economic, Social & Cultural Rights

While the Interim Constitution makes considerable effort to constitutionalize economic, social and cultural rights, it fails to provide adequate assurances that Dalits will access and enjoy these rights. To overcome the significant historical barriers which Dalits face, the new constitution needs to ensure that these rights guarantees are not hollow or contingent. For example, many of the relevant provisions (e.g. Article 18 (*Right regarding employment and social security*)) only guarantee the right to the extent that it is "...provided for in the law." Removing such caveats and ensuring that Nepal's core obligations are not mistakenly included in non-judicially enforceable provisions in the new constitution will ensure that economic, social and cultural rights are justiciable in practice.

The new constitution must also include a series of more concrete provisions on economic, social and cultural rights in order to comply with Nepal's international obligations. Whereas Article 16 (*Right regarding environment and health*) provides rights to a clean environment and free basic health care, the new constitution must in addition include a provision that guarantees every person's right to enjoy the highest attainable standard of physical and mental health, including access to the underlying determinates of the right to health, such as clean water and adequate health care. Whereas Article 18 (*Right regarding employment and social security*) provides for the right to food sovereignty, to enhance enforceability, the new constitution should clarify that the right to food sovereignty includes the right to the minimum essential, nutritionally adequate and safe food. Whereas Article 17 (*Education and cultural rights*) provides a right to free education, to ensure meaningful access to education, it should expand the right to education to include progressive introduction of free higher education for all. Consistent with Nepal's obligations of equality and non-discrimination, access to all education must be non-discriminatory, which includes removing discriminatory references to Dalits in educational materials.

Whereas Article 29 (*Right against exploitation*) and Article 30 (*Right regarding labour*) prohibit traffic, slavery, and serfdom, the new constitution must take additional steps to end the segregation and exploitation of Dalits in employment. This can be achieved if the new constitution also includes as a component of the right to work the right to freely choose or accept employment and specifies that workers are entitled to just and favorable work conditions, including reasonable wages. Alongside these changes, Nepal should also implement employment training programs for Dalits and other groups systematically disadvantaged in access to employment. In view of the living conditions that many Dalits face, the new constitution should explicitly guarantee a right to safe and adequate housing, thereby improving the living conditions and overall personal security of Dalits. Further, because a general provision of rights is inadequate to end the pervasive discrimination faced by Dalits (e.g. Article 19 (*Right to Property*)), the new constitution should add Dalits to the groups that would benefit from a progressive policy of ensuring socio-economic security and the provision of land. Specifically, given Dalits' lack of land tenure, the new constitution should also add language which

secures an entitlement to tenure or comparable redress in cases where land tenure has been compromised by previous discrimination.

E. Women's Rights

Article 20 (*Rights of women*) of the Interim Constitution prohibits discrimination and violence against women and bestows certain property rights and reproductive rights. The devotion of a specific article to women's rights is welcome; however, more is required to remedy the intersectional burden of caste, gender and class discrimination against Dalit women. First, consistent with international law, the new constitution should add a provision requiring all appropriate measures to modify the social and cultural patterns of conduct of men and women. Moreover, it should 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. Adopting this approach would ensure that the substantive equality of women is promoted, enabling Nepal to take action against the continued and serious violations of human rights committed against Dalit women which have excluded Dalit women from participation in Nepal's governance; undermined access to education, healthcare and an adequate standard of living; and made women susceptible to sexual coercion and exploitation.

F. Children's Rights

Through Article 22 (*Rights of children*), the Interim Constitution seeks to protect the rights of children, including Dalit children who 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. In light of these violations, the new constitution should build upon the Interim Constitution's protections, including by clearly stating that children are prohibited from performing any work or services that place children's well-being, physical or mental health, or spiritual, moral or social development at risk and affirming that the best interests of the child is the primary consideration in all actions concerning the rights of children.

G. The Right to be Free from Torture and other Cruel, Inhuman or Degrading (CID) Treatment or Punishment

Article 26 (*Right against torture*) of the Interim Constitution prohibits physical and mental torture and CID treatment in detention, stating that any such act will be punishable by law complete with the provision of compensation. Despite its merits, Article 26 does not effectively target torture and CID treatment against the Dalit community. In order to ensure that Nepal adheres to its international legal obligations, the new constitution should make clear that the definition of torture and CID treatment extends beyond those acts occurring in traditional custodial detention. Moreover, the new constitution should provide that all acts of torture and CID treatment, including those acts which constitute complicity or participation in torture and CID treatment, are punishable. Finally, it should ensure that all such acts will be punishable by law and by appropriate penalties, taking into account their grave nature. Such changes would address torture and CID acts in State custody or control other than detention as well as acts carried out by non-State actors, ensuring that these rights are practically enforceable. This would help to erode the widespread practice of torture and CID treatment against the Dalit population in Nepal, including gender-based violence by private actors against Dalit women.

H. Realizing Constitutional Rights & Protections in Nepal: Issues of Implementation and Enforceability

The Interim Constitution, particularly through Articles 32 (*Right to constitutional remedy*), 33 (*Responsibilities of the State*) and 107 (*Jurisdiction of the Supreme Court*), recognizes that rights must be enforced to be meaningful and that enforcement is not optional. To ensure that law enforcement, the judiciary, and government commissions promote rather than undermine rights and consequently treat untouchability as a serious crime, the new constitution should remove unlawful restrictions on rights guarantees (see above) and give both citizens and non-citizens the constitutional right to petition the Supreme Court to have a law declared unconstitutional. The new constitution should also strengthen the national commissions, by providing for the financial autonomy of the National Human Rights Commission and establishing the National Dalit Commission as a constitutional body. These changes will help end impunity for caste-based discrimination and ensure Dalits' real enjoyment of equality, including for those who face multiple forms of discrimination, such as Dalit women and those facing inter-Dalit discrimination.

IV. CONCLUSION

In drafting the new constitution, the Constituent Assembly is tasked with the paramount responsibility of crystallizing the peace after Nepal's prolonged civil war and with the challenge of fulfilling Nepal's international legal obligations to secure fundamental rights. These two responsibilities will only be met if the rights of Nepal's Dalit population are fully realized. That all human beings share the same worth is a fundamental principle enshrined in the various human rights treaties to which Nepal is a State Party. Nepal is therefore legally obligated to respect, protect, and fulfill the human rights of Dalits. Meeting this obligation will greatly increase Nepal's ability to maintain a sustainable peace and to achieve effective political, economic, and social development; for too long Nepal has been deprived of Dalit contributions and voices. A new constitution that affirms Nepal's international human rights obligations can and must serve as the foundation for this crucial endeavor if that constitution is drafted to:

- **Ensure access to citizenship, including through ensuring that Dalits receive citizenship certificates.**
- **Protect the right to equality and non-discrimination for all persons by requiring formal and substantive equality, prohibiting discrimination on any ground, repudiating "untouchability" and racial discrimination, and providing for "special provisions" to ensure real equality in the enjoyment of all rights, including employment and education.**
- **Secure the right of Dalits to meaningfully participate in State structures and decision-making, including the drafting of the new constitution and national development activities, on the basis of proportional inclusion.**
- **Prohibit registration of political parties that exclude Dalits in membership, leadership or nomination for political positions.**
- **Guarantee fully all freedoms to Dalits, including freedom of religion and the right to marry freely a person of one's choosing, and ensure that there are no unlawful or undue restrictions on these civil and political rights which prevent their implementation in practice.**

- Ensure Dalits' economic, social and cultural rights, by guaranteeing their justiciability and by specifically ensuring education and cultural rights; the right to a clean environment; the right to the highest attainable standard of physical and mental health and free basic health services, along with the underlying determinants of health, such as water and safe and adequate housing;; rights regarding employment, labor and social security, that *inter alia* ensure the right to food, prohibit bonded and forced labor, and guarantee the right to freely choose or accept employment, just and favorable work conditions, and reasonable wages; and the right to property, including through ensuring entitlement to tenure or comparable redress in cases where Dalits' land tenure has been compromised by previous discrimination.
- Guarantee Dalits' children's rights by guaranteeing the right to his or her identity and name, as well as the right to be nurtured, to basic health and social security; prohibiting all exploitation of children, including work or services that endanger their well-being, physical or mental health, or development; and affirming that the best interests of the child is the primary consideration in all actions concerning the rights of children.
- Ensure the rights of Dalit women by prohibiting discrimination and violence against women; requiring all appropriate measures to modify the social and cultural patterns of conduct of men and women; and guaranteeing property rights, reproductive rights and rights concerning family relations.
- Ensure Dalits' right to be free from torture and other cruel, inhuman or degrading (CID) treatment or punishment by prohibiting all acts of physical and mental torture and CID treatment irrespective of the perpetrator and ensuring that all such acts will be punishable by law and by appropriate penalties which take into account their grave nature.
- Realize constitutional rights and protections by ensuring that Dalits' rights are implemented and enforced and that law enforcement, the judiciary and government commissions treat untouchability as a serious crime.

CHRGJ, DNF and IDSN wish to point out that once the Constituent Assembly has made constitutional protections and guarantees in line with the recommendations above, the State must take further legislative, administrative, budgetary, judicial and educational measures to eliminate and prevent caste-based discrimination in both the public and private spheres and to respect, promote, implement and monitor the human rights of those facing caste discrimination.³

³ In addition to its treaty obligations, the State should take guidance from the general and special measures stipulated in the draft UN Principles and Guidelines for the Effective Elimination on Discrimination based on Work and Descent as specified in the final report of Mr. Yozo Yokota and Ms. Chin-Sung Chung, Special Rapporteurs on the topic of discrimination based on work and descent. (http://www.idsn.org/fileadmin/user_folder/pdf/New_files/final_report_discrimination_on_work_and_dece nt.pdf)

ABOUT THE AUTHORS

CHRGJ: The New York University (NYU) School of Law Center for Human Rights and Global Justice (www.chrgj.org) 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. In its work on discrimination, the CHRGJ and its International Human Rights Clinic have focused on caste discrimination in South Asia, collaborating extensively with IDSN and with Dalit NGO partners throughout South Asia.

DNF: The Dalit NGO Federation, Nepal, (www.dfnepal.org/) is an umbrella organization of 300 Dalit NGOs in the country. The main aim of DNF is to coordinate the efforts of Nepalese NGOs in the fight against caste-based discrimination. The organization provides a common forum for raising the collective voice of the Dalit community in order to petition for rights, dignity and opportunity through policy influencing, networking and alliance building.

IDSN: The International Dalit Solidarity Network (www.idsn.org) is a network of international organizations, Dalit solidarity networks in European countries, and national Dalit coalitions in caste-affected countries concerned with caste discrimination and other forms of discrimination based on employment and descent. IDSN is an advocacy and lobbying body committed to eradicating caste discrimination by influencing policy makers, including at the United Nations, the European Union, and other multilateral bodies.