



Rights Within Reach: Securing Equality and Human Rights in Nepal's New Constitution

CHRGJ Statement to Nepal's Constituent Assembly

CHRGJ STATEMENT TO NEPAL'S CONSTITUENT ASSEMBLY

I. INTRODUCTION

As it emerges from a prolonged civil war, Nepal stands poised to forge a democratic and peaceful nation grounded in social justice and human rights. The central feature of this democratic transition is the country's new Constitution, which will be drafted by elected members of the Constituent Assembly (CA). In creating the new Constitution, the CA has the opportunity to crystallize the country's peace, protect human rights, 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. Recognizing and securing the human rights of all Nepalese people is vital to fulfilling these paramount goals. In particular, the rights of Nepal's Dalit (so-called "untouchable") population—a group that has faced more than 2,000 years of systematic discrimination and exclusion on the basis of caste—must finally be realized.

Concept Papers submitted by the CA's Thematic Committees reflect significant progress towards codifying Nepal's commitment to human rights, but some critical gaps remain and must be addressed. To strengthen the protection of human rights in the new Constitution, the Center for Human Rights and Global Justice (CHRGJ) at New York University School of Law respectfully submits this report, comprised of a summary Statement and accompanying Chart, to Nepal's Constituent Assembly. The Statement and Chart draw on CHRGJ's expertise to analyze proposals for the new Constitution in light of Nepal's obligations under international human rights law, with particular emphasis on the protection of Dalit rights.¹

II. PURPOSE AND METHODOLOGY

A. PURPOSE

The Statement and Chart analyze relevant provisions of the CA Thematic Committee Concept Papers and concretely identify how to enhance the effectiveness of the proposed provisions in order to better protect Dalit rights and to further fulfill Nepal's human rights obligations.

This Statement summarizes Nepal's obligations under international human rights law and provides a general overview of some of the issues that are most critical for Dalit rights and that require the CA's attention. The Statement highlights substantive rights guarantees in a number of areas and discusses how to improve the enforcement of such rights. The Statement concludes by identifying some of the most critical human rights obligations that remain unaddressed by the language currently proposed by the Thematic Committees.

This Statement should be read together with the accompanying Chart. The Chart analyzes specific provisions proposed by the Thematic Committees. In order to provide CA members with a resource for evaluating such proposals in light of international human rights law, the Chart makes detailed recommendations informed by Nepal's obligations as a State Party to a number of international human rights treaties.

B. METHODOLOGY

In order to ensure a timely submission of this report, our analysis is based on our review of the

relevant provisions from Thematic Committee Concept Papers released as of November 6, 2009.² Our recommendations are based on a careful review of Nepal's obligations under the international human rights treaties to which Nepal is a party.³ These treaties create binding obligations that must be carried out in good faith to respect, protect, and fulfill the rights contained therein.⁴ Core among these are the obligations to ensure the right to be free from both direct and indirect discrimination and the right to both formal and substantive equality.⁵

In addition to its treaty obligations, Nepal recently reaffirmed its commitment to eradicating caste-based discrimination by expressing support for the Draft UN Principles and Guidelines for the Effective Elimination of Discrimination Based on Work and Descent, which were recently published by the UN Human Rights Council.⁶ While non-binding, this document, as recognized by the government of Nepal, is “a good reference in devising the ways and means to address the issue of caste-based discrimination” and “a useful tool” to “eliminate this scourge from [Nepalese] society.”⁷ Where relevant, our analysis therefore also makes reference to the Draft Principles and Guidelines.

In keeping with Nepal's obligation under international human rights law to ensure the active and meaningful participation of marginalized and affected communities in all national decision-making processes, the CA should consult with and actively solicit input from all marginalized groups in Nepal, including Dalits, and incorporate their input and recommendations in the new Constitution. Particular attention should be paid to the needs and voices of those marginalized within the Dalit community, such as Dalit women and “lower” Dalit castes.

Our analysis relies in part on two documents previously released by CHRGI: [*Recasting Justice: Securing Dalit Rights in Nepal's New Constitution*](#)⁸—which we released in April 2008, and which analyzes human rights protections in Nepal's Interim Constitution—and our [*Joint Statement on Securing Dalit Rights in the New Constitution*](#)—which we released in February 2009 in conjunction with the International Dalit Solidarity Network (IDSN) and the Dalit NGO Federation (DNF).⁹ Our work is also informed by constitutional analyses and recommendations put forward by Dalit rights groups.¹⁰

To date, in all our efforts on Nepal, we have worked closely with—and have been informed by—the experience and expertise of Nepalese Dalit rights advocates. We have also actively solicited input from Nepal's legal and academic community and have drawn on the expertise of international law and constitutional scholars.

III. SECURING HUMAN RIGHTS IN THE NEW CONSTITUTION

Nepal's pervasive caste system has a firm hold on Nepalese society. Caste discrimination and the practice of “untouchability” have resulted in the systematic exploitation and subordination of Dalits. Both government and private actors subject Dalits to extreme forms of exploitation, violence, and segregation. “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, some Dalit castes—such as Gaine, Badi and the Madhesi Dalits living in the Southern part of the country—are subject to additional exclusion and marginalization.

The drafting of the Constitution presents a critical opportunity for Nepal to address caste discrimination and memorialize its commitment to equality and human rights. As the most important legal document in the country, the Constitution will be a key way for Nepal to begin to meet its legal obligations to ensure Dalit rights. This section discusses the major proposals in the Concept Papers that have important implications for Dalit rights and for Nepal's general obligation to ensure human rights. It summarizes Nepal's international human rights law obligations in each of these areas and highlights some of the protections that must be included in the Constitution. A more complete provision-by-provision analysis of relevant proposed language in the Concept Papers can be found in the accompanying Chart.

CHRGJ commends Nepal on its recent ratification of the Convention on the Rights of Persons with Disabilities. While not considered for the analysis in this Report, the Center urges Nepal to implement its Convention obligations in the Constitution. CHRGJ also urges Nepal to ratify other human rights treaties, including the International Convention for the Protection of all Persons from Enforced Disappearances and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

A. ACCESS TO CITIZENSHIP

Pursuant to the requirements of the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Nepal must ensure non-discrimination in access to citizenship.¹¹ In recognition of this obligation, 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.
- Enables children to be equally eligible for citizenship, regardless of whether it is their mother or father who is Nepalese.

Nepal must also ensure that subsequent laws enacted to provide for the receipt of citizenship certificates do not have the effect of excluding Dalits from the legal citizenry. For example, requiring proof of property ownership has prevented many Dalits from obtaining citizenship certificates. International human rights law prohibits laws that have such a discriminatory effect.¹²

B. FUNDAMENTAL RIGHTS

1. The Right to Equality and Non-Discrimination

Non-discrimination and equality are fundamental principles of international human rights law.¹³ Nepal must guarantee both formal and substantive equality and prohibit both direct and indirect discrimination.¹⁴ Direct discrimination occurs when a policy or measure has the purpose of discriminating against a particular group; indirect discrimination occurs when a measure is neutral on its face but has a disparate effect on a particular group. Pursuant to the human rights treaties to which Nepal is a party, Nepal must ensure that no aspect of its policy has the purpose or effect of discriminating on the basis of grounds such as race, color, descent (including caste), birth, national, ethnic or social origin, nationality, religion, political or other opinion, language, property, economic position, sex, sexual orientation, gender identity, pregnancy, maternity, marital status, age, disability, health status, place of residence, or other status.¹⁵ The UN Committee on the Elimination of Racial Discrimination (CERD Committee) has made it clear that the prohibition of discrimination on the basis of "descent" includes a prohibition of discrimination on the basis

of caste.¹⁶ The treaties also provide that States must prohibit and take steps to prevent discrimination by both State officials and organs and by private parties.¹⁷

In light of these obligations, the new Constitution should:

- Prohibit discrimination on the basis of all of the grounds covered by international human rights law, as listed above.
- Make the list of grounds on which discrimination is prohibited non-exhaustive by adding language such as “or other status.”
- Extend the protection against discrimination to non-citizens by stating that the guarantee applies to “all persons.”

In furtherance of Nepal’s obligation to ensure substantive equality, the new Constitution should also recognize and provide for “special measures,” which, under human rights law, may be used both to address the inherent disadvantages that certain groups experience because of persistent, structural, and historical inequalities, and to ensure their full enjoyment of human rights.¹⁸ “Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary.”¹⁹ The provision of special measures must be based on accurate and disaggregated data, which includes an accurate census.²⁰ As experience in Nepal and other caste-affected countries has shown, special measures are critical for giving effect to rights guarantees. CHRJ therefore strongly urges the CA to provide for special measures throughout the Constitution as an important means of furthering Nepal’s obligation to ensure substantive equality. Special measures are particularly important for Dalits, given their history of oppression and disenfranchisement. Special measures should also address multiple forms of discrimination, such as those faced by women who belong to disadvantaged groups.

In light of these obligations, the new Constitution should:

- Provide for special measures to help secure substantive equality and the full enjoyment of human rights for members of disadvantaged groups, paying particular attention to multiple forms of discrimination.

Given the pervasive nature of caste discrimination and its deep entrenchment in Nepalese society, the inclusion of constitutional provisions to specifically address the rights of Dalits and to prohibit caste discrimination and “untouchability” are critical. Pursuant to ICERD, Nepal must: condemn caste discrimination and undertake to pursue by all appropriate means a policy of eliminating both direct and indirect caste discrimination;²¹ adopt “special measures” to ensure substantive equality for Dalits and other marginalized groups;²² prevent, prohibit, and eradicate caste-based segregation;²³ eradicate propaganda inciting caste-based discrimination;²⁴ eliminate caste-based discrimination in the enjoyment of civil, political, economic, social and cultural rights;²⁵ assure effective protection and remedies against acts of caste-based Discrimination;²⁶ and adopt educational measures to combat caste-based prejudices.²⁷

In light of these obligations, the new Constitution should:

- Explicitly prohibit the practice of “untouchability” and caste discrimination.²⁸
- Provide that violations of this prohibition are punishable by law and that victims are entitled to adequate compensation.
- Prohibit caste-based segregation and ensure equal access to public places and services, including places of worship, without discrimination.²⁹
- Include an explicit prohibition on the imposition of certain occupations on the basis of caste.

- Take measures against the dissemination of ideas of caste superiority and inferiority.³⁰

In addition, Nepal must also ensure that all of the rights protected in the Constitution are guaranteed and enforced in a non-discriminatory manner.

2. Civil and Political Rights

The human rights treaties to which Nepal is a party clearly prohibit the civil and political rights violations that Dalits have experienced. By its terms, the ICCPR requires a State Party to respect and ensure the rights protected by the Covenant “to all individuals within its territory and subject to its jurisdiction.”³¹ Thus, “the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.”³² This is of particular importance to Dalits, as many of them lack citizenship certificates.

The ICCPR forbids: the arbitrary denial of the right to life;³³ torture and cruel, inhuman or degrading (CID) treatment or punishment;³⁴ slavery, servitude, and forced or compulsory labor;³⁵ arbitrary arrest or detention;³⁶ arbitrary interferences with privacy, family, and correspondence;³⁷ and unlawful attacks on honor and reputation.³⁸ Under the ICCPR, Nepal is additionally obligated to guarantee a host of rights to all people detained.³⁹ Further, the ICCPR mandates Nepal to guarantee: freedom of opinion and expression;⁴⁰ freedom of assembly⁴¹ and association;⁴² the right of men and women of marriageable age to marry freely;⁴³ the freedom to take part in the conduct of public affairs, directly or through freely elected representatives;⁴⁴ the right to vote;⁴⁵ the right to enjoy culture and practice religion freely;⁴⁶ and the right to freedom of movement and residence within Nepal.⁴⁷

In light of these obligations, the new Constitution should protect *all* the rights and freedoms listed in the ICCPR. Problematically, several essential civil and political rights and freedoms are entirely missing from the Thematic Committee proposals reviewed by CHR/GJ. The CA must ensure that the following rights are included in the new Constitution:

- Right to freedom of conscience.⁴⁸
- Right to freedom of association.⁴⁹
- Right of citizens to participate in the conduct of public affairs.⁵⁰
- Right to an effective remedy.⁵¹

In addition, the new Constitution should:

- Guarantee civil and political rights and freedoms to “all persons,” not only to citizens.⁵²
- Limit restrictions on civil and political rights to those restrictions allowed under the ICCPR.⁵³
- Protect the rights to: freedom of religion; freedom of expression; and freedom from unlawful and arbitrary interferences with privacy and family, including attacks upon honor and reputation.⁵⁴
- Prohibit arbitrary arrest and detention and guarantee that all people deprived of their liberty have the right to promptly know the basis for their detention, to challenge their detention before a competent, impartial, and independent court with legal assistance, and to release and compensation in cases of wrongful detention.
- Reject the establishment of a system of preventive detention.
- Prohibit *incommunicado* detention.⁵⁵
- Provide that all persons charged with a crime must be afforded all of the rights contained in the ICCPR.⁵⁶
- Clarify that the definition of torture and CID treatment or punishment extends beyond those acts

occurring in traditional custodial detention.⁵⁷

- Provide that all acts of torture and CID treatment or punishment, including those acts which constitute complicity or participation in torture and CID treatment or punishment, are punishable by appropriate penalties, taking into account their grave nature, in order to help to erode the widespread practice of torture and CID treatment or punishment against the Dalit population in Nepal, including gender-based violence by private actors against Dalit women.⁵⁸
- Guarantee the right of men and women of marriageable age to marry freely a person of their choosing, which includes inter-caste marriage.

3. Economic, Social and Cultural Rights

Caste discrimination and the practice of “untouchability” have been used to justify severe violations of Dalits’ economic, social and cultural rights, causing Dalits to suffer extreme poverty and deprivation. Nepal is obligated to progressively realize the rights contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR). While the ICESCR allows for “progressive realization,” Nepal has an immediate obligation to: ensure non-discrimination in the provision of economic, social, and cultural rights; and to take immediate steps toward the realization of these rights.⁵⁹

In light of Nepal’s obligations under the ICESCR, the new Constitution should:

- Ensure the right of everyone to an adequate standard of living, including adequate food, clothing, and housing, and to the continuous improvement of living conditions.
- Guarantee the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, including access to the underlying determinants of health, such as safe and potable water and adequate health care.⁶⁰
- Provide for free and compulsory primary education for all and for the progressive introduction of free secondary and higher education.⁶¹
- Protect the right of all persons to take part in cultural life.⁶²
- Guarantee the right of all persons to the protection of the moral and material interests resulting from their artistic, literary, and scientific creations.⁶³
- Prohibit slavery and other forms of forced or compulsory labor.⁶⁴
- Protect the right of all persons to work, to freely choose or accept employment, to just and favorable work conditions, and to form and join trade unions.⁶⁵
- Guarantee the right to adequate social security including social insurance to everyone, without discrimination.⁶⁶

Nepal must ensure both non-discrimination and substantive equality with respect to economic, social and cultural rights and may take special measures to realize this obligation.⁶⁷ For example, Nepal should remove discriminatory references to Dalits in educational materials and provide for special measures to ensure access to higher education for women, Dalits, and other groups traditionally disadvantaged in their access to education. Nepal should also consider implementing employment training programs for Dalits and other groups systematically disadvantaged in access to employment.

4. Women’s Rights

Dalit women and girls in Nepal endure the intersectional burden of both caste and gender discrimination and, as a result, are even further removed from rights protections. Nepal is obligated to take all appropriate measures to eradicate discrimination against women and to take special measures to ensure substantive equality for women.⁶⁸ These obligations extend to women’s participation in politics,⁶⁹ access to

education, equality in employment, and access to health care and other economic and social benefits.⁷⁰ CEDAW affirms that women's enjoyment of their fundamental rights cannot be restricted on the basis of culture and tradition⁷¹ and requires that Nepal give special attention to the particular challenges and forms of discrimination faced by rural women.⁷²

In light of these obligations, the proposed "Women's Rights" provision in the new Constitution should:

- Prohibit discrimination and ensure equality on the basis of gender.
- Provide for the adoption of all appropriate measures to modify the social and cultural patterns of conduct of men and women in order to eliminate prejudices, practices, and stereotypes based on the idea that one sex is inferior or superior to the other.⁷³
- 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.⁷⁴
- Provide for special measures to help secure substantive equality and the full enjoyment of human rights for women, paying particular attention to women who belong to marginalized groups and endure multiple forms of discrimination.

5. Children's Rights

Dalit children in Nepal 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. Pursuant to the requirements of the CRC, the new Constitution should clearly state that children are protected from performing any work or services that place children's well-being, physical or mental health, or spiritual, moral, or social development at risk⁷⁵ and affirm that the best interests of the child is the primary consideration in all actions concerning the rights of children.⁷⁶ Nepal must also protect the right of every child to a nationality.⁷⁷ Under the Optional Protocol to the CRC on the involvement of children in armed conflict, Nepal is required to take all feasible measures to prevent children from participating in armed conflict and to promote the physical and psychological recovery and social reintegration of children affected by armed conflict.⁷⁸ As with all rights, Nepal must ensure that children's enjoyment of their rights is not limited by discrimination.⁷⁹

In light of these obligations, the proposed "Children's Rights" provision of the new Constitution should:

- Protect children from performing any work or services that place children's well-being, physical or mental health, or spiritual, moral, or social development at risk.
- Affirm that the best interests of the child is the primary consideration in all actions concerning the rights of children.
- Affirm that children have a voice in all matters affecting them in all spheres of society, particularly in the family, school, and their communities.⁸⁰

Nepal should additionally recognize and take measures to address the fact that Dalit children are particularly vulnerable to violations of their rights.

C. ISSUES OF IMPLEMENTATION AND ENFORCEABILITY

International human rights law guarantees the right to an effective remedy for human rights violations.⁸¹ This guarantee is of particular significance for Dalits in Nepal and other caste-affected countries

where past experience has shown that guaranteeing rights on paper is insufficient without strong enforcement mechanisms. Without a right to an effective remedy, the other rights enshrined in the Constitution will be hollow. The only proposal concerning the right to effective remedy—the Committee on Fundamental Rights and Directive Principles’ proposed provision on the implementation of fundamental rights—fails to comply with Nepal’s obligation under international human rights law to provide all persons with an effective remedy for violations of their rights.⁸²

In keeping with Nepal’s obligations under international human rights law, the proposed “Implementation of Fundamental Rights” provision of the new Constitution should:

- Clearly provide that all fundamental rights, including economic, social and cultural rights, are fully justiciable.
- Refrain from using language that allows the government to delay implementing the rights guaranteed in the Constitution.
- Provide a right to an effective remedy by clearly providing that all individuals have the right to petition an independent and competent tribunal to enforce their rights.
- Ensure that all levels of the judiciary are competent, independent, and impartial and capable of providing a remedy for the violations within their jurisdiction.

D. EMERGENCY POWERS

Past state of emergency declarations have dramatically escalated human rights abuses in Nepal, particularly against Dalits and other marginalized communities. International human rights law strictly limits the circumstances in which a state of emergency can be declared⁸³ and provides that a number of rights must be protected even under these circumstances.⁸⁴ The “Emergency Powers” provision proposed by the Committee for Preserving the National Interest does not fully comport to all of the requirements of the ICCPR.

In keeping with Nepal’s obligations under international human rights law, the proposed provision on “Emergency Powers” in the new Constitution should:

- Strictly define the circumstances in which the government can declare a state of emergency, so that it is only declared in response to the direst situations that threaten the life of the nation.
- Indicate that any derogation measures must be limited to the extent strictly required by the exigencies of the situation.⁸⁵
- Ensure that any measures enacted during a state of emergency do not involve discrimination on any ground.
- Guarantee that, at a minimum, the following non-derogable rights listed in ICCPR Article 4(2) are protected at all times, even in emergencies: the right to life; the right to be free from torture and CID treatment or punishment; the right to be free from slavery and forced servitude; the right to be free from imprisonment for the inability to fulfill a contractual obligation; the right not to be subjected to retroactive criminal laws and penalties; the right to recognition everywhere as a person before the law; and the right to freedom of thought, conscience and religion.⁸⁶

E. IMPLEMENTING DALIT RIGHTS IN STATE STRUCTURES

The caste system has systematically excluded Dalits from the political process in Nepal and has completely undermined their right to take part in the governance of their country. As noted above, as a State Party to a number of international human rights treaties, Nepal is obligated to ensure non-discrimination and

substantive equality for women and for members of marginalized groups, such as Dalits. To achieve substantive equality, States may adopt “special measures,” such as providing for proportionate representation in state structures—including the legislature, the judiciary, and national commissions—to ensure that women and members of marginalized groups can meaningfully participate in governance processes.⁸⁷

Such proposals should also consider multiple forms of discrimination, including for example discrimination faced by women who belong to marginalized groups, such as Dalit women, and should ensure their proportional representation. Such proposals must also be carried out on the basis of accurate and disaggregated data,⁸⁸ including an accurate census in 2011 to establish the actual number of Dalits in Nepal. This is especially critical given that, according to some unofficial estimates, Dalits may comprise some 20 to 25 percent of the population, even though official estimates put this figure at 15 percent.⁸⁹ Nepal must also ensure the right to non-discrimination in participation in elections and within political parties.⁹⁰

To comply with its obligation to respect, protect, and fulfill human rights, Nepal may establish national human rights institutions to investigate allegations of rights violations and to monitor Nepal's compliance with its human rights obligations.⁹¹ In addition to a Human Rights Commission, the Constitution should also establish a National Dalit Commission to address the systemic effects of caste discrimination. In order for these bodies to be effective, the new Constitution should:

- Establish the Human Rights Commission and the National Dalit Commission as constitutional bodies with broad investigative and enforcement powers and provide for their financial autonomy.⁹²

Much attention has focused on proposals regarding Nepal's federal structure and on the creation of individual states to protect the rights of marginalized groups. Regardless of what form of State structure is ultimately adopted, Nepal's obligation to respect, protect, and fulfill human rights extends to all levels of government—national, regional, and local.⁹³ It is critical that Nepal uphold this foundational principle of human rights. This principle is of particular relevance to Nepal's Dalit population, which is not confined to a particular geographic area or ethnic or linguistic group.

F. GENERAL RECOMMENDATIONS FOR CONSTITUTIONAL INTERPRETATION

In addition to adopting our recommendations concerning specific fundamental rights identified above and in the accompanying Chart, CHRGI urges the CA to adopt the recommendations contained in this section to guide interpretation of the Constitution so as to ensure the full protection of the rights guaranteed therein. The CA should also consider include a provision indicating that courts should consider international human rights law when interpreting the Constitution. Such a provision could perhaps be modeled on Article 39 of the Constitution of the Republic of South Africa, 1996.⁹⁴

1. Non-Interference with Other Rights

In order to ensure that the observance of a particular right cannot be relied upon to infringe on the rights of others, the Constitution should include a provision that states that nothing in the Constitution shall be interpreted as permitting any person or group to infringe upon or destroy the rights and freedoms of others. This provision could be modeled on Article 5 of the ICCPR and the ICESCR.⁹⁵ It is particularly important that the CA clarify that nothing in the Constitution may be used to justify perpetuation of “untouchability” and caste discrimination. For example, the right to freedom of religion cannot be used to restrict Dalits' rights to freely practice religion or to justify “untouchability” and other discriminatory features of the caste system.

2. The Rights of “All Persons”

A number of the Thematic Committees’ rights proposals are problematically limited to citizens. Under the ICCPR, Nepal must guarantee civil and political rights without distinction to “all individuals within its territory and subject to its jurisdiction.”⁹⁶ Nepal is also not permitted to make distinctions between citizens and non-citizens with respect to social and cultural rights.⁹⁷ While the ICESCR allows some latitude for developing countries to determine to what extent they will guarantee economic rights to non-nationals, this provision must be narrowly construed as a limited exception to the general principle that human rights apply to all persons, and Nepal must strive to ensure the broadest possible enjoyment of economic rights to all persons.⁹⁸ The need to ensure human rights for all is particularly important for Dalits who, as noted above, often lack citizenship certificates. As a general matter, therefore, constitutional rights should refer to, and be interpreted to cover, “all persons,” not merely citizens.

3. Legal Loopholes and Caveats

As a foundational principle, international human rights and the embodiment of those rights in the Constitution must inform legislation, and not the other way around. In other words, laws cannot be used to undermine the fundamental rights and protections contained in the Constitution. Many of the Thematic Committee proposals qualify rights with language such as “as provided for in the law.” This sort of language could be read to undermine the constitutional right by suggesting that the right is or can be qualified by legislation. Such qualifying language should therefore be avoided and should in no case be interpreted to undermine the underlying right.

IV. CONCLUSION

Ending centuries of caste-based discrimination and ensuring Dalit rights in both public and private spheres must be a central feature of Nepal’s long awaited social, political, and economic transformation. The new Constitution will serve as the basis for the development and enforcement of legislative, administrative, budgetary, judicial, and educational measures that are necessary to secure this transformation. The drafting of the new Constitution presents the CA with the profound opportunity to demonstrate Nepal’s commitment to human rights and to affirm the inherent dignity of all individuals. Many of the Thematic Committees’ proposals for the new Constitution take significant steps toward meeting these goals. However, as noted throughout this Statement and the accompanying Chart, in order for Nepal to meet its human rights obligations, certain revisions to the proposals are needed. In addition, rights that are not currently reflected in the proposals must be included and guaranteed. CHRJ strongly encourages members of the CA to consider these recommendations as they deliberate on and draft the new Constitution.

¹ See generally, CHRGI, Caste Discrimination Project, <http://www.chrgi.org/projects/discrimination.html> (last visited Jan. 19, 2009).

² The following Thematic Committees' Concept Papers were reviewed: National Interest Preservation Committee; Committee on the Protection of the Right of Minorities and Marginalized Communities; Committee for Determining the Base of Cultural and Social Solidarity; Committee for Determining the Structure of Constitutional Bodies; Form of Legislative Body Committee; Judicial System Committee; and the Committee on Fundamental Rights and Directive Principles of the State. Our analysis is based on English translations of the concept papers available through the Centre for Constitutional Dialogue, an initiative of the United Nations Development Programme's project on Support to Participatory Constitution Building in Nepal. Centre for Constitutional Dialogue, Concept Papers Presented at the Constituent Assembly, <http://www.ccd.org.np/en/constituent/concept.php>. An unofficial English translation of the Concept Paper of the Committee on Fundamental Rights and Directive Principles of the State was used, as an official translation was not available from the Centre for Constitutional Dialogue at the time of writing.

³ Nepal is a party to the following international human rights treaties: the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Mar. 7, 1966, 660 U.N.T.S. 195; the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Dec. 18, 1979, 1249 U.N.T.S. 13; the CEDAW Optional Protocol, Oct. 15, 1999, 2131 U.N.T.S.83; the International Covenant on Civil and Political Rights (ICCPR), Dec. 16, 1966, 999 U.N.T.S. 171; the ICCPR's First Optional Protocol, Dec. 19, 1996, 999 U.N.T.S. 302; the ICCPR's Second Optional Protocol, Dec. 15, 1989, 1642 U.N.T.S. 414; the International Covenant on Economic, Social and Cultural Rights (ICESCR), Dec. 16, 1966, 993 U.N.T.S.; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Dec. 10, 1984, 1465 U.N.T.S. 85; the Convention on the Rights of the Child (CRC), Nov. 20, 1989, 1577 U.N.T.S. 3, the Optional Protocol on the Involvement of Children in Armed Conflict, U.N. Doc. A/RES/54/263 (May 25, 2000), and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, U.N. Doc. A/54/49 (Jan. 18, 2000).; the Convention on the Rights of Persons with Disabilities and Optional Protocol (CPD), Dec. 27, 2009, G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49.

⁴ See Office of the High Commissioner for Human Rights, International Human Rights Law, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>

⁵ See Committee on the Elimination of Racial Discrimination (CERD Committee), *General Recommendation No. 14: Definition of racial discrimination*, ¶ 2, U.N. Doc A/48/18 (Mar. 22, 1993) [hereinafter CERD Committee, *General Recommendation No. 14*]; HRC, *General Comment No. 18: Non-Discrimination*, ¶ 7, U.N. Doc. HRI/GEN/1/Rev.1 (Nov. 10, 1989) [hereinafter HRC, *General Comment No. 18*]; Human Rights Council, *Draft UN Principles and Guidelines for the Effective Elimination of Discrimination Based on Work and Descent*, No. 18, 11th Sess., U.N. Doc. A/HRC/11/CRP.3 (May 18, 2009) [hereinafter Draft Principles & Guidelines].

⁶ See Human Rights Council, 11th Sess., Final Report of Mr. Yozo Yokota and Ms. Chin-Sung Chung, Special Rapporteurs on the Topic of Discrimination Based on Work and Descent, U.N. Doc. A/HRC/11/CRP.3 (May 18, 2009), Annex I.

⁷ *Nepal Backs UN Move on Caste*, HIMALAYAN TIMES, Sept. 18, 2009; Draft Principles & Guidelines, *supra* note 5.

⁸ CHRGI, RECASTING JUSTICE: SECURING DALIT RIGHTS IN NEPAL'S NEW CONSTITUTION (2008), available at <http://www.chrgi.org/projects/docs/recastingjustice.pdf>.

⁹ CHRGI, DALIT NGO FEDERATION (DNF), INTERNATIONAL DALIT SOLIDARITY NETWORK (IDSN), RECASTING JUSTICE: SECURING DALIT RIGHTS IN NEPAL'S NEW CONSTITUTION: JOINT STATEMENT (Feb. 23, 2009), available at <http://www.chrgi.org/press/docs/nepalconstitutionpressrelease.pdf>.

¹⁰ See DALIT NGO FEDERATION, REVIEW ON PRELIMINARY DRAFTS OF NEW CONSTITUTION: DALIT PERSPECTIVES (2009); FEMINIST DALIT ORGANIZATION, DALIT WOMEN'S ISSUES SHOULD BE INCLUDED IN THE NEW CONSTITUTION (2009); FEMINIST DALIT ORGANIZATION, REPORT OF INTERACTION PROGRAM ON CONCEPT PAPER OF FUNDAMENTAL RIGHTS & GUIDING PRINCIPLES (2009); FEMINIST DALIT ORGANIZATION ET AL, DALIT ISSUES OF NEPAL FOR NEW CONSTITUTION (2009); RASTRIYA DALIT NETWORK & DALIT STUDY AND DEVELOPMENT CENTRE, DALIT AGENDA IN THE NEW CONSTITUTION (2009). Documents on file with CHRGI.

¹¹ ICCPR, *supra* note 3, art. 24(3); CEDAW, *supra* note 3, art. 9; ICERD, *supra* note 3, art. 5(d)(iii); see also CERD Committee, *General Recommendation No. 30: Discrimination Against Non-Citizens*, 64th Sess., U.N. Doc. CERD/C/64/Misc.11/rev.3 (Dec. 1, 2004) [hereinafter CERD Committee, *General Recommendation No. 30*]; Human Rights Committee (HRC), *General Comment No. 17: Rights of the Child (Article 24)*, ¶ 8, 35th Sess., 1989, U.N. HRI/GEN/1/Rev.6 (Apr. 7, 1989) [hereinafter HRC, *General Comment No. 17*].

¹² See CERD Committee, *General Recommendation No. 14*, *supra* note 5; HRC, *General Comment No. 18*, *supra* note 5.

¹³ See CRC, *supra* note 3, art. 2(1) ("States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."); CAT, *supra* note 3, art. 1(1) ("For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . or any reason based on discrimination of any kind."); CEDAW, *supra* note 3, art. 2 ("States Parties condemn discrimination against women in all its forms..."); ICERD, *supra* note 3, art. 1(1) ("In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life), art. 1(4) ("Special measures taken for the sole purpose of securing adequate advancement of certain

racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.”); ICESCR, *supra* note 3, art. 2.2 (“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”); ICCPR, *supra* note 3, art. 2(1) (“Each State Party to the present Covenant undertakes to respect and to ensure to 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, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

¹⁴ See CERD Committee, *General Recommendation No. 14*, *supra* note 5; HRC, *General Comment No. 18: Non-Discrimination*, *supra* note 5, ¶ 7; Draft Principles & Guidelines, *supra* note 5, No. 18.

¹⁵ See Universal Declaration of Human Rights, G. A. Res. 217A, art. 2, U.N. GAOR, 3d Sess., 1st plen. Mtg, U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR]; ICERD, *supra* note 3, arts. 1, 2, & 5; ICESCR, *supra* note 3, arts. 2 (2) & 3; ICCPR, *supra* note 3, arts. 2 (1), 3 & 24 (1); CRC, *supra* note 3, art. 2; CEDAW, *supra* note 3, arts. 1, 2 & 11 (2); CPD, *supra* note 3, art. 5 (2); HRC, *General Comment No. 15: The Position of Aliens Under the Covenant*, ¶ 2, U.N. Doc. HRI/GEN/1/Rev.1 (Nov. 4, 1986) [hereinafter HRC, *General Comment No. 15*]; ESCR Committee, *General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)*, ¶¶ 29, 30, 32-34, U.N. Doc. E/C.12/GC/20 (May 25, 2009) [hereinafter ESCR Committee, *General Comment No. 20*]; Committee on the Rights of the Child (CRC Committee), *General Comment No. 4, Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, ¶ 6, U.N. Doc. CRC/GC/2003/4 (July 1, 2003) [hereinafter CRC Committee, *General Comment No. 4*].

¹⁶ See CERD Committee, *General Recommendation No. 29: Discrimination Based on Descent*, 61st Sess., U.N. Doc. A/57/18 (2002) [hereinafter CERD Committee, *General Recommendation No. 29*]; see also Draft Principles & Guidelines, *supra* note 5, No. 2.

¹⁷ See ICERD, *supra* note 3, art. 2 (1) (b), (d); CERD Committee, *General Recommendation No. 20: Non-discriminatory implementation of rights and freedoms*, 48th Sess., U.N. Doc. A/51/18 (1996) [hereinafter CERD Committee, *General Recommendation No. 20*]; CERD Committee, *General Recommendation No. 29*, *supra* note 16, ¶6; Draft Principles & Guidelines, *supra* note 5, No. 10; see also HRC, *General Comment No. 31: Nature of the General Legal Obligation on State Parties to the Covenant*, ¶ 8, 80th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter HRC Committee, *General Comment No. 31*].

¹⁸ ICERD, *supra* note 3, arts. 1(4) & 2(2); CEDAW, *supra* note 3, art. 3; CERD Committee, *General Recommendation No. 32: The meaning and scope of special measures*, 75th Sess., U.N. Doc. CERD/C/GC/32 (Sep. 24, 2009) [hereinafter CERD Committee, *General Recommendation No. 32*]; Committee on Economic, Social, and Cultural Rights (ESCR Committee), *General Comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights*, 34th Sess., U.N. Doc. E/C.12/2005/4 (Aug. 11, 2005) [hereinafter ESCR Committee, *General Comment No. 16*]; Draft Principles & Guidelines, *supra* note 5, Nos. 3, 13, 18, 22, 24, 33, 36, 51.

¹⁹ CERD Committee, *General Recommendation No. 32*, *supra* note 18, ¶16.

²⁰ *Id.*, ¶ 17.

²¹ ICERD, *supra* note 3, art. 2 (1); see also CERD Committee, *General Recommendation No. 29*, *supra* note 16, ¶¶1-10.

²² ICERD, *supra* note 3, art. 1(4); see also CERD Committee, *General Recommendation No. 29*, *supra* note 16, ¶6; Draft Principles & Guidelines, *supra* note 5, Nos. 7 & 18.

²³ ICERD, *supra* note 3, art. 3.

²⁴ *Id.* art. 4.

²⁵ *Id.* art. 5.

²⁶ *Id.* art. 6.

²⁷ *Id.* art. 7.

²⁸ See *Id.* art. 2 (1) (b) & (d); CERD Committee, *General Recommendation No. 20*, *supra* note 17; Draft Principles & Guidelines, *supra* note 5, No. 10.

²⁹ ICERD, *supra* note 3, art. 5(f); ICCPR, *supra* note 3, art. 18; Draft Principles & Guidelines, *supra* note 5, No. 21.

³⁰ ICERD, *supra* note 3, art. 4; ICCPR, *supra* note 3, arts. 19-20; CERD Committee, *General Recommendation No. 29*, *supra* note 16, ¶¶18-20; HRC, *General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion*, 48th Sess., U.N. Doc., A/48/40 vol. I (1993) [hereinafter HRC, *General Comment No. 22*]; HRC, *General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20)*, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1983) [hereinafter HRC, *General Comment No. 11*]; Draft Principles & Guidelines, *supra* note 5, No. 50.

³¹ ICCPR, *supra* note 3, art. 2(1).

³² HRC, *General Comment No. 15*, *supra* note 15, ¶ 2.

³³ ICCPR, *supra* note 3, art. 6.

³⁴ *Id.* art. 7.

³⁵ *Id.* art. 8. The prohibition on forced or compulsory labor does not preclude the performance of hard labor where such labor is prescribed as punishment by a competent court. See *id.* at art. 8(3)(b). Under the ICCPR, the term “forced or compulsory labor” does not include military service or national service for conscientious objectors, services during emergencies, and other work or service that is part of normal civic obligations. See *id.* at art. 8(3)(c).

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- ³⁶ *Id.* art. 9.
- ³⁷ *Id.* art. 17.
- ³⁸ *Id.* art. 17.
- ³⁹ *Id.* arts. 9, 10.
- ⁴⁰ *Id.* art. 19.
- ⁴¹ *Id.* art. 21.
- ⁴² *Id.* art. 22.
- ⁴³ *Id.* art. 23.
- ⁴⁴ *Id.* art. 25(a).
- ⁴⁵ *Id.* art. 25(b).
- ⁴⁶ *Id.* arts. 18, 27.
- ⁴⁷ *Id.* art. 12.
- ⁴⁸ ICCPR, *supra* note 3, art. 18.
- ⁴⁹ *Id.* art. 22.
- ⁵⁰ *Id.* art. 25. The right to vote, however, is included by the Committee for Preserving the National Interest, in its preliminary article on “Exercise of Sovereignty.”
- ⁵¹ *Id.* art. 2 (3).
- ⁵² *Id.* art. 2(1).
- ⁵³ *See, e.g., id.* art. 12(3).
- ⁵⁴ *Id.* arts. 17-19.
- ⁵⁵ HRC, *General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7)*, ¶ 11, U.N. Doc. HRI/GEN/1/Rev.1 (Mar. 10, 1992)[hereinafter HRC, *General Comment No. 20*]
- ⁵⁶ ICCPR, *supra* note 3, art. 14.
- ⁵⁷ *See* CAT, *supra* note 3, art. 1 (“For the purposes of this Convention, 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.”); *see also* CAT Committee, *General Comment 2, Implementation of article 2 by States parties*, ¶ 15, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008)[hereinafter CAT Committee, *General Comment 2*] (Calling on each State Party to “prohibit, prevent, and redress torture and ill-treatment in all contexts of custody or control, for example, in prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm.”).
- ⁵⁸ CAT, *supra* note 3, art. 4.
- ⁵⁹ ESCR Committee, *General Comment No. 3: The nature of States parties obligations (Art. 2, par.1)*, ¶¶ 1-2, U.N. Doc. E/1991/23, annex III (Dec. 14, 1990) [hereinafter ESCR Committee, *General Comment No. 3*]; ESCR Committee, *General Comment No. 20, supra* note 15 ¶ 7.
- ⁶⁰ ICESCR, *supra* note 3, art. 12.
- ⁶¹ *Id.* art. 13.
- ⁶² *Id.* art. 15(a).
- ⁶³ *Id.* art. 15(c).
- ⁶⁴ ICCPR, *supra* note 3, art. 8(3)(a).
- ⁶⁵ ICESCR, *supra* note 3, arts. 6-8; ICCPR, *supra* note 3, art. 22.
- ⁶⁶ ICESCR, *supra* note 3, art. 9.
- ⁶⁷ *See* HRC, Sub-Comm. on the Promotion and Protection of Human Rights, *Final Report of the Special Rapporteur, Prevention of Discrimination: the Rights of Non-Citizens*, ¶ 19, U.N. Doc. E/CN.4/Sub.2/2003/23 (May 26, 2003) [hereinafter *Final Report on the Rights of Non-Citizens*]; ESCR Committee *General Comment No. 16, supra* note 18; ESCR Committee, *General Comment No. 20, supra* note 15.
- ⁶⁸ CEDAW, *supra* note 3, arts. 1-4.
- ⁶⁹ *Id.* arts. 7-8.
- ⁷⁰ *Id.* arts. 10-13.
- ⁷¹ *See id.* art. 5.
- ⁷² *Id.* art. 14.
- ⁷³ *Id.* art. 5(a).
- ⁷⁴ *Id.* art. 16.
- ⁷⁵ CRC, *supra* note 3, art. 32.
- ⁷⁶ *Id.* art. 3(1).
- ⁷⁷ *Id.* art. 7(1),
- ⁷⁸ Optional Protocol on the Involvement of Children in Armed Conflict, *supra* note 3, arts. 1-2; *id.* art. 39.
- ⁷⁹ CRC, *supra* note 3, art. 2.
- ⁸⁰ *Id.* art. 12.

⁸¹ ICCPR, *supra* note 3, art. 2(3).

⁸² UDHR, *supra* note 15, art. 8; ICCPR, *supra* note 3, art. 2(3); ICERD, *supra* note 3, art. 6; CAT, *supra* note 3, art. 14; HRC, *General Comment No. 31*, *supra* note 17, ¶ 15; ESCR Committee, *General Comment No. 9: The domestic application of the Covenant*, ¶ 4, U.N. Doc. E/C.12/1998/24 (Dec. 3, 1998)].

⁸³ ICCPR, *supra* note 3, art. 4(1)(Nepal may only declare a state of emergency in response to a situation that “threatens the life of the nation”). This is to say, only in response to situations of the direst circumstances and not every disturbance or catastrophe. See HRC, *General Comment No. 29: States of Emergency*, ¶ 3, 1950th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

⁸⁴ ICCPR, *supra* note 3, art. 4(2).

⁸⁵ *Id.* art. 4(1).

⁸⁶ *Id.* art. 4(2)(“No derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.”).

⁸⁷ CERD Committee, *General Recommendation No. 32*, *supra* note 18, ¶ 18.

⁸⁸ *Id.* ¶ 17.

⁸⁹ See CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE (CHRGJ), *THE MISSING PIECE OF THE PUZZLE: CASTE DISCRIMINATION AND THE CONFLICT IN NEPAL* 7 (2005); KRISHNA BHATTACHAN, TEJ SUNAR & YASSO KANTI BHATTACHAN, *CASTE-BASED DISCRIMINATION IN NEPAL*, REGIONAL RESEARCH ON CASTE-BASED DISCRIMINATION IN SOUTH ASIA, INDIAN INSTITUTE OF DALIT STUDIES 1, 17 (2008); LAWYERS NATIONAL CAMPAIGN AGAINST UNTOUCHABILITY (LANCAU), *STATUS OF DISTRIBUTION OF DRINKING WATER & NUTRITIOUS FOOD, STATUS OF TEXT BOOKS & IMPLEMENTATION OF LEGAL PROVISIONS FOR ELIMINATING THE CRIME OF UNTOUCHABILITY* 11 (2006).

⁹⁰ CERD Committee, *General Recommendation No. 29*, *supra* note 16, ¶ 28; CERD Committee, *Concluding Observations: Nepal*, ¶ 132, U.N. Doc. A/59/18 (2004).

⁹¹ See HRC, *General Comment No. 31*, *supra* note 17, ¶ 15; ESCR Committee, *General Comment No. 10: The role of national human rights institutions in the protection of economic, social and cultural rights*, ¶¶ 1-2, U.N. Doc. E/C.12/1998/25 (Dec. 14, 1998) [hereinafter ESCR Committee, *General Comment No. 10*].

⁹² See ESCR Committee, *Concluding Observations: Nepal*, ¶ 12, U.N. Doc. E/C.12/NPL/CO/2 (Jan. 16, 2008) (“The Committee also notes with concern that there is no provision in the Interim Constitution dealing with the financial autonomy of the Commission.”).

⁹³ HRC, *General Comment No. 31*, *supra* note 17, ¶ 4.

⁹⁴ See S. AFR. CONST. 1996, art. 39(1) (“When interpreting the Bill of Rights, a court, tribunal or forum a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; b. must consider international law; and c. may consider foreign law.”)

⁹⁵ See ICCPR, *supra* note 3, art. 5 (“Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.”); ICESCR, *supra* note 3, art. 5 (same).

⁹⁶ ICCPR, *supra* note 3, art. 2(1).

⁹⁷ See *Final Report on the Rights of Non-Citizens*, *supra* note 67, ¶ 19.

⁹⁸ See *id.* ¶¶ 7, 19; ESCR Committee, *General Comment No. 3*, *supra* note 59, ¶11; CERD Committee, *General Recommendation No. 30*, *supra* note 11, ¶29.