

# Human Rights in the Constitution

Nepal Participatory Constitution Building  
Booklet Series  
NO. 4



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# Human Rights in the Constitution

## Human rights belong to everyone

Human rights are rights inherent to all human beings, whatever their nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. All human beings are equally entitled to human rights without discrimination. Article 1 of the Universal Declaration of Human Rights states that “All human beings are born free and equal in dignity and rights.” These rights are all **interrelated, interdependent and indivisible**. Universal human rights are often expressed and guaranteed by international law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.<sup>1</sup> Many countries include a section on human rights or fundamental and freedoms in their Constitutions.

Human rights are inalienable. Human rights are not a gift from the state, and the Government can neither violate them nor take them away arbitrarily. They should not be infringed upon, except in specific exceptional situations and according to due process, and within strict parameters of necessity and proportionality. For example, the right to liberty may be restricted if a person is found guilty of a crime by a court of law.

Human rights include **civil** (individual freedom), **political** (the right to hold meetings, establish organizations, hold and participate in elections), **economic** (right to food and residency), **social** (education, health) and **cultural** (language, culture, traditional practices) rights along with rights relating to development (access to natural resources, equal distribution and use of the benefits of development and scientific inventions), environment (clean atmosphere and environment) and peace (free from violence and conflict). The designation as

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1 For more, see <http://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx>

‘fundamental rights’ often signifies that a Constitution affords certain rights only to citizens of the country. However, this does not mean that internationally recognized and binding Human Rights are limited thereby.

Some Human Rights are formulated as individual rights against the state. They have to be accompanied by effective remedial provisions to deal with the violations of such rights. This claim includes rights such as the right to life and physical integrity, equality before law, and individual freedom of speech and expression. In normal circumstances, if the state does not interfere these rights could be fully enjoyed. The state cannot have arbitrary interference on individual matters. It also has a responsibility to protect people under its jurisdiction from Human Rights violations by non-state actors. Other rights imply that the state it also means that the state has the responsibility to work for the all round development of its citizens. Such responsibilities include right to social security and the right to education, health and employment. Only by ensuring these rights in a pro-active, organized and consistent manner individuals would be able to exercise their rights against the state independently.

In addition to listing substantive human rights and freedoms, constitutions also often include **procedural and institutional provisions** which help to give effect to the substantive rights provisions. Thus, constitutions may foresee systems for **judicial remedy**, lay down **state responsibility** for Human Rights protection and promotion, and establish **independent national human rights institutions**. Other provisions may relate to the incorporation of international human rights treaties in the national legislation and their applicability and direct effect for individuals.

## International legal context

The Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly on December 10, 1948 and two international covenants – the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) – are today considered to be the “international constitution” on human rights. In the

course of more than 60 years several Human Rights related treaties, agreements and declaration have been developed, which include child's rights, women's rights, rights against torture, rights against racial and caste based discrimination, rights of indigenous, ethnic and minority groups, right to education and health, rights of refugees and internally displaced persons or groups of people, etc.

Among these treaties, Nepal has signed and ratified more than 20 important treaties. International human rights law lays down obligations which States are bound to respect. By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfill Human Rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of Human Rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfill means that States must take positive action to facilitate the enjoyment of basic Human Rights.<sup>2</sup>

Nepal is one of 20 countries that have ratified the Indigenous and Tribal Peoples Convention, (No. 169) of 1989. It covers a wide range of issues, including land rights, access to natural resources, health, education, vocational training, conditions of employment and contacts across borders. The fundamental principles of the Convention are that indigenous and tribal peoples should be consulted and fully participate at all levels of decision-making processes that concern them. The ILO, as the UN agency responsible for the only legally binding international instrument on the rights of indigenous and tribal peoples, has an important role to play in this context.

In Nepal, according to the Section 9 of the Treaty Act, 2047 BS (1991), **all ratified treaties become the laws of Nepal**. Additionally, after signing treaties, the Government of Nepal has to enact laws, according to the provisions in those treaties; change the provisions that are different or incompatible; comply with them; provide remedies in case of violation; and allocate the budget for related education and training for their full compliance. In this regard, Nepal has a sufficient legal basis to proceed on the basis of human rights.

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## Human rights in Nepal

Human rights are laid down as fundamental rights in Nepal's law. Nepal has acceded to many international Human Rights instruments, and has laid down a comprehensive catalogue of human rights in the existing and previous Constitutions. The **Interim Constitution, 2063 BS (2007)** is considered the most progressive among all the constitutions promulgated in Nepal to date in terms of the provisions related to Human Rights.

Throughout history, the concepts of human rights have progressed in Nepal along with various political events. Generally, the norms and values of Hindu state and royal institutions prior to the year 2007 BS (1951) were **discriminatory** to a large segment of the population of the state. There was a formalized Hindu caste system in the Nepali society, the impact of which still continues to be felt. Even today, the legacies of that system remain a barrier in the social system in Nepal in relation to human rights and equality for many indigenous, ethnic and Dalit people. Also the situation of women is a legacy of that tradition which often puts them in a position of disempowerment, marginalization and exclusion. Although the Civil Code (*Muluki Ain*) of 1910 BS (1854) made some improvements in the caste-based penal system it entrenched the caste and hierarchy system by legally formalizing the practice. Thus, the Nepali people were deprived from the exercise of human rights including the right to equality for a long time.

Following a number of earlier legal and constitutional provisions which include some references to fundamental rights, the Constitution of the Kingdom of Nepal 2015 BS (1959) expanded the provisions of fundamental rights and provided constitutional remedies such as a petition at the Supreme Court in case of violations of such rights. The Constitution of 2019 BS (1962) also maintained the provisions related to individuals' rights but it prevented any action against the then partyless political system. Most of the individual's right to freedom remained passive due to restrictions on any act of protest against the Panchayat system and for political freedom. The amendment to the **Civil Code** (*Muluki Ain*) in 2020 BS (1963) is considered a very important step from the human rights perspective. This law **repealed the traditional caste system** and also attempted to end discrimination on the basis of caste by eliminating untouchability, caste hierarchy and prohibiting all inhuman penal systems.

The Constitution of Nepal 2047 BS (1990) broadened the scope of individual freedoms with the provision of putting the sovereign authority inherently in the people of Nepal. Similarly, provisions such as the end of the death penalty, the right to information, education and cultural rights, provision of petition at the Supreme Court against violations of fundamental rights along with public interest litigation, etc. are considered to be of special importance. The **Interim Constitution**, 2063 BS (2007) is considered the **most progressive** among all the constitutions promulgated in Nepal till date in terms of the provisions related to human rights mentioned in **Part 3 “Fundamental rights”**.

In this constitution, articles 12, 13, 16, 24, 25, 26, 29 and 31 relate to various individual freedoms including the provisions of civil rights (*right to life, dignity, equality and freedom, etc.*); political rights (*rights to association, expression and exchange of ideas, participation in state system, etc.*) mentioned in articles 12, 15, 27, 28; economic rights (*rights relating to opportunity of proper employment, emancipation from hunger, right to work for livelihood, right to select one's own occupation, etc.*) mentioned in articles 12, 13, 18, 19, 29 and 30; social rights (*right to education, health and safety, medical facilities, maternal and infant health care, safety and security of children, etc.*), mentioned in articles 12, 14, 16, 17 and 18; and cultural rights (*right to participate in religious, cultural and traditional practices without hurting the sentiment and dignity of others*) mentioned in article 23.

Laws inconsistent with the Interim Constitution, including its human rights provisions, are declared “void”, and therefore without force or effect (IC, art. 164(2)).

The Interim Constitution also includes an important guarantee for the right to appeal to the **Supreme Court** for the enforcement of the rights conferred in this part of the Constitution (Art. 32 and 107).

The **National Human Rights Commission (NHRC)** of Nepal is an independent and autonomous constitutional body. It was established in the year 2000 as a statutory body under the Human Rights Commission Act 1997 (2053 BS). The Interim Constitution of Nepal 2007 (2063 BS) made the NHRC a constitutional body (Part 15). It has a separate sphere of responsibilities in the constitutional legal system of the country. These responsibilities complement the responsibilities of the normal machinery of the administration of Justice,

the Supreme Court, the Office of the Attorney General, the Commission for the Investigation of Abuse of Authority, and other existing executive, quasi-judicial or judicial bodies performing in the legal system of Nepal.<sup>3</sup>

Many norms, institutions and procedures have been established to ensure basic human rights in Nepal. The practical implementation and the effective enjoyment of these rights by the people of Nepal have however been a persistent challenge. Newly emerging challenges may also include the need to broaden the scope of human rights and creating bases for the institutionalization of such rights to guarantee all forms of human rights.

Human rights can also be affected by other legislation or administrative regulations, some of which continue to be in conflict with the existing human rights provisions in the Constitution.

## Some possible issues to consider for Constituent Assembly

As stated above, the body of human rights law in Nepal is largely in line with international standards. Provisions for effective protection and remedy exist in the Constitution and other legal sources. That is not to say that the legal/constitutional protection of Human Rights cannot be further improved. Moreover, the state of human rights leaves a lot to be desired in practice in Nepal. It should therefore be noted that in order to increase effective human rights protection, refining and extending constitutional provisions may represent only an inadequate way to achieve better human rights standards in practice.

While a comprehensive list of human rights and freedoms, as well as procedural aspects, have already been laid down in the existing constitutional and legal framework of Nepal, the drafting of a new Constitution through a participatory process represents another opportunity to review these provisions, possibly fill gaps which may have emerged, and equip the bodies and institutions responsible for human rights protection with adequate powers. Moreover, the expected transformation of the state structure of Nepal into a federal state will raise a

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3 National Human Rights Commission, Nepal

number of questions relating to the supremacy of federal human rights law over future legislation enacted by constituent units.

- » It has been suggested that the CA may consider incorporating social and economic human rights under the **“Fundamental Rights”** Part of the constitution, thus giving them the same effect and protection including judicial enforceability as those currently listed under Part 3. Part 4 of the Interim Constitution currently relates to **“Responsibilities, Directive Principles and Policies of the State”**. It deals with many demands of the Nepali people (many of which are of social and economic nature) and there is a possibility that the Constituent Assembly will also be confronted with this challenge.
- » Consider further consolidating fundamental rights by, for example, setting a **timeframe** in the constitution with regard to the formulation of laws to implement the Constitution’s Human Rights provisions, such as those that relate to compensation under such rights as the Rights against Untouchability, as guaranteed by the Interim Constitution 2007.
- » Hold discussions on the clear specifications of rights and providing judicial remedies if the rights of **economically, socially or educationally backward communities** such as Dalits, poor farmers and labourers, and women, are violated and denied participation in the State structures on the basis of principles of proportional inclusion.
- » Consider a provision to enable people to have **easy access** to an affordable, quick and effective justice delivery system for the effective enjoyment of human rights. Identification of the fundamental rights for which effective remedy can be provided at the local level. For example, District courts could be allowed to look into writ petition as the Appellate courts by expanding its rights (e.g. right against untouchability and maltreatment, right to information, right to secrecy).
- » Consider provisions for **local quasi-legal bodies** for the use of human rights in addition to the police administration and law courts. For example, the ward police offices or popularly-elected institutions could be the first bodies to address cases regarding untouchability and maltreatment, domestic violence, dowry, and alleged witchcraft. This could be an effective initiation towards providing immediate remedy. However, the right to a fair trial would

have to be guaranteed in such a case. This would include the right to a public hearing before an independent and impartial tribunal within reasonable time, the presumption of innocence, and other minimum rights for those charged in a criminal case (adequate time and facilities to prepare their defense, access to legal representation, right to examine witnesses against them or have them examined, right to the free assistance of an interpreter).

- » Consider provisions to ensure **accountability for serious human rights violations** in the past, including during the 10-year-long armed conflict. Such a discussion may include aspects relating to compensation and rehabilitation for victims. Questions relating to the rights of internally displaced people may also be addressed in this context.
- » The Interim Constitution has already made arrangements for an independent National Human Rights Commission to protect and promote human rights through effective monitoring and supervision. Some countries have created a number of **different independent human rights institutions** (e.g. Ombudsman), which may be responsible for addressing the situation of particular sections of the population (children, handicapped, ethnic or indigenous minorities, etc.). The CA may want to investigate such options.

## About this booklet series

This series of papers is intended to provide a basic background for Constituent Assembly members and the interested public on issues related to the constitution building process. They are not position papers, proposals or intend to preempt any constitutional outcome in any other way. They are the result of a cooperative effort of Nepali and international constitutional experts, coordinated by UNDP's Support to Participatory Constitution Building in Nepal project.

These papers are living documents, and feedback and comments are strongly encouraged. The more they will lead to informed, engaged and constructive discussion and exchanges, the more will their objective be attained. As comments are received further versions of this document or additional issues may be prepared.

In translating them into some of Nepal's major national languages, all effort has been made to achieve a high level of quality standards and the correct terminology, which will be understood by a majority of the speakers of those languages. However, future debates within the various linguistic communities on the proper and correct use of terms can be expected. CCD did not want to preempt that discussion in any way, but rather sought to maximize the reach and inclusiveness of this effort by including those languages.

This booklet is part of a series of documents to be developed by the Centre for Constitutional Dialogue (CCD) on themes relevant to the constitution building process in Nepal.

The objective of this series is to engage Constituent Assembly members as well as the interested public with key constitutional concepts and issues. Each document is available in the major languages used in Nepal – Nepali, Maithili, Bhojpuri, Tharu, Magar, Tamang, Newar and English. Each document is also available in audio format as well as online.

In the first phase it is envisaged that the publication series will include the following themes: State and Religion, Federal System, Human Rights in the Constitution, Rights of Indigenous Peoples, Minority Rights, Systems of Government, Independent Judiciary, Local Self-Governance, Diversity and Social Inclusion, and Participatory Constitution Making Process.

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