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**Date:** 1 July 2009

**Your ref.:**

**Our ref.:**

## **Fundamental Rights in Nepal's new Constitution**

Dear President

We refer to our letter of 24 June 2009 and the four questions posed publicly by the Fundamental Rights Committee in the process of preparing its report for the Constituent Assembly. We provide below some comments on the four questions.

### **1. What is the relation between fundamental rights and directive principles (directive principles are chief objectives of the state on socio-economic, political and foreign relations)?**

Directive principles or objectives are common in many constitutions as a means of providing direction to a state's policies in a range of fields. In some countries, particularly in South Asia, they have been used to interpret the content of fundamental rights. In particular, the right to life has been interpreted to include various socio-economic as well as civil and political rights. However, not all socio-economic rights have been recognised equally in practice in the jurisprudence of these courts,<sup>1</sup> while judgments from countries with directly justiciable ESC rights tend to have more consistent jurisprudence (e.g., see South Africa, Colombia and Argentina).<sup>2</sup>

### **2. Should economic, social and cultural rights (ESCR) be incorporated under the directive principles or in the fundamental rights chapter?**

Since the 1980s, there has been an increasing trend away from the use of directive principles for ESC rights in constitutions towards the direct recognition of these rights as fundamental and justiciable rights. This has included many Asian countries (e.g. East Timor, Indonesia and Afghanistan and Cambodia) and Latin American countries (e.g. Brazil, Argentina, Colombia,

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<sup>1</sup> See S. Muralidhar, 'India: The Expectations and Challenges of Judicial Enforcement of Social Rights' (pp. 102-124) and I. Byrne and S. Hossain, 'South Asia: Economic and Social Rights Case Law of Bangladesh, Nepal, Pakistan and Sri Lanka', (pp. 125-143), in M. Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2008).

<sup>2</sup> See relevant chapters in F. Coomans (ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Antwerpen: Intersentia and Maastricht Centre for Human Rights, 2006) and Langford, *Social Rights Jurisprudence*, *ibid.*

Bolivia, Peru, Costa Rica, Nicaragua, Venezuela).<sup>3</sup> In Africa, Benin, Cape Verde, Sao Tome and Principe, Burkina Faso, Gabon, Madagascar, Mali, Niger, Togo and Seychelles and South Africa all included ESC rights in their bills of rights in this period while only Nigeria and Sierra Leone included directive principles.<sup>4</sup> In Eastern Europe, of the twenty countries that reformed their countries since 1990, eleven have fully-fledged catalogues of ESC rights, seven have a limited number of ESC rights and two have none.<sup>5</sup> This trend is also evident in the recent adoption of new complaint procedures under the International Covenant on Economic, Social and Cultural Rights and the International Convention on the Rights of Persons with Disabilities, which make ESC rights internationally justiciable.<sup>6</sup>

Beyond the contemporary dominant practice of inclusion of ESC rights as fundamental rights, there are a number of reasons why this is important.

- 1) It provides effective recognition of the indivisibility and interdependence of all human rights. Such indivisibility was recognised in the Universal Declaration of Human Rights 1948 and affirmed in the Vienna Declaration of 1993. This has important practical consequences. A review of case law shows that judges are often highly influenced by the level of recognition of the rights in the constitution; it thus impacts on how they deal with cases before them.<sup>7</sup>
- 2) Ensuring the rights are justiciable provides an important accountability mechanism for Governments on their laws, policies and practices. Jurisprudence from many countries shows that courts have been able to constructively contribute to policy-making for instance by highlighting the lack of attention to the most marginalised groups in housing policy<sup>8</sup> or that seemingly neutral systems of financing schools favour high-income groups.<sup>9</sup> Judgments have also had an impact on poverty. An empirical review by Gauri and Brinks, they concluded that ‘legalizing demand for SE [socioeconomic] rights might well have averted thousands of deaths’ and ‘enriched the lives of millions of others’.<sup>10</sup> This is not to advocate that courts should be making policy. Rather, the growing

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<sup>3</sup> See B. Simmons, ‘Should States Ratify – Process and Consequences of the Optional Protocol to the ICESCR’, *Nordic Journal of Human Rights*, Vol. 27, No.1 (2009), pp. 648-1.

<sup>4</sup> See C. Heyns, and M. van der Linde, *Human Rights Law in Africa, Volume 5 International Human Rights Law in Africa & Domestic Human Rights Law in Africa* (2-volume set) (Martinus Nijhoff, 2004).

<sup>5</sup> W. Sadurski, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Dordrecht: Springer, 2005), p. 177.

<sup>6</sup> See *Perspectives on a New Complaint and Inquiry Procedure: The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, Special Issue of the *Nordic Journal of Human Rights*, Vol. 27, No.1 (2009); and R. Kayess and P. French, ‘Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities’, *Human Rights Law Review*, Advance Access published on January 24, 2008, available at <http://hrlr.oxfordjournals.org/cgi/content/full/ngm044v1>

<sup>7</sup> See M. Langford: ‘The Justiciability of Social Rights: From Practice to Theory’, in Langford, *Social Rights Jurisprudence* (n. 1 above), pp. 3-45.

<sup>8</sup> See the South African case of *Government of the Republic of South Africa v Grootboom and Others* 2000 (11) BCLR 1169 (CC) and Canadian case of *Eldridge v British Columbia (Attorney General)* [1997] 3 S.C.R..

<sup>9</sup> See the following three cases in the United States: *Edgewood Independent School District v Kirby* 777 S.W.2d 391 (Tex. 1989); *Rose v Council for Better Education* 790 S.W.2d 186 (Ky. 1989); and *Campaign for Fiscal Equity v. State of New York*, 100 N.Y.2d 893, 914 (2003).

<sup>10</sup> V. Gauri and D. Brinks. (ed.). *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (New York: Cambridge University Press, 2008).

jurisprudence shows that courts have been able to set minimum legal standards for government which has the discretion in choosing appropriate policies within its available resources.

- 3) Since 14 August 1991, Nepal has been a party to the International Covenant on Economic, Social and Cultural Rights. In General Comment No. 9, the Committee overseeing this treaty has encouraged States parties to make ESC rights directly justiciable:

*While the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions. It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.<sup>11</sup>*

- 4) Moreover, if Nepal was to include ESC rights as constitutional and justiciable rights, it could ensure that its domestic courts first review any cases before they were submitted to any UN treaty body complaint procedure. For example, Nepal has signed the Optional Protocol to the International Convention on the Rights of Persons with Disabilities while the Optional Protocol to the International Covenant on Economic Social and Cultural Rights (ICESCR) will be open for signature on 24 September 2009. Both protocols require a complainant to first exhaust domestic remedies before the petition can be submitted to the relevant international committee. Thus, including ESC rights in Nepal's constitution should ensure that cases would have to be first commenced in Nepal's domestic courts.
- 5) Lastly, including ESC rights as fundamental rights avoids the uncertainty judges face when applying directive principles. Instead of having to consider whether to be 'judicially active', courts can apply the rights directly. But they should have additional guidance in the constitution on how this should be done. For example, the Constitution could stipulate, like the ICESCR and many other constitutions in the world, that the rights must only be *progressively achieved* within *maximum available resources*. Nonetheless, the state must immediately take steps towards that end and such steps should be reasonable. Moreover, additional requirements could be added that some rights require immediate implementation (e.g. Constitution of South Africa) while a minimum level of other rights must be achieved immediately (as consistent with the jurisprudence under the ICESCR) and Colombian, Hungarian and Swiss courts.

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<sup>11</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment 9, The domestic application of the Covenant* (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 (1998).

In addition to including ESC rights as fundamental rights, Nepal could also consider including the international covenants in the constitution as directly self-executing, as Argentina has done for example and as recommended by in General Comment No. 9 cited above.

### **3. Should there be monitoring mechanisms to enforce these rights, in particular the rights of specific groups?**

A variety of formal monitoring mechanisms are needed to enforce ESC rights in addition to judicial and administrative review. The UN Committee on Economic, Social and Cultural Rights has commented on the need for national human rights institutions to address ESC rights:<sup>12</sup>

*1. Article 2, paragraph 1, of the Covenant [ICESCR] obligates each State party "to take steps ... with a view to achieving progressively the full realization of the [Covenant] rights ... by all appropriate means". The Committee notes that one such means, through which important steps can be taken, is the work of national institutions for the promotion and protection of human rights....*

*2. These institutions range from national human rights commissions through Ombudsman offices, public interest or other human rights "advocates", to "defensores del pueblo". In many cases, the institution has been established by the Government, enjoys an important degree of autonomy from the executive and the legislature, takes full account of international human rights standards which are applicable to the country concerned, and is mandated to perform various activities designed to promote and protect human rights. Such institutions have been established in States with widely differing legal cultures and regardless of their economic situation.*

*3. The Committee notes that national institutions have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights..... It is therefore essential that full attention be given to economic, social and cultural rights in all of the relevant activities of these institutions. The following list is indicative of the types of activities that can be, and in some instances already have been, undertaken by national institutions in relation to these rights:*

*(a) The promotion of educational and information programmes designed to enhance awareness and understanding of economic, social and cultural rights, both within the population at large and among particular groups such as the public service, the judiciary, the private sector and the labour movement;*

*(b) The scrutinizing of existing laws and administrative acts, as well as draft bills and other proposals, to ensure that they are consistent with the requirements of the International Covenant on Economic, Social and Cultural Rights;*

*(c) Providing technical advice, or undertaking surveys in relation to economic, social and cultural rights, including at the request of the public authorities or other appropriate agencies;*

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<sup>12</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment 10, The role of national human rights institutions in the protection of economic, social and cultural rights* (Nineteenth session, 1998), U.N. Doc. E/1999/22 at 18 (1998).

*(d) The identification of national-level benchmarks against which the realization of Covenant obligations can be measured;*

*(e) Conducting research and inquiries designed to ascertain the extent to which particular economic, social and cultural rights are being realized, either within the State as a whole or in areas or in relation to communities of particular vulnerability;*

*(f) Monitoring compliance with specific rights recognized under the Covenant and providing reports thereon to the public authorities and civil society; and*

*(g) Examining complaints alleging infringements of applicable economic, social and cultural rights standards within the State.*

Experience has shown that it is important that some institutions that can pro-actively take up individual complaints with authorities. For example, it was the official public defenders in Argentina that took the first cases to court on the right to water on behalf of various communities, challenging pollution of groundwater sources and the need for basic water access.<sup>13</sup> This is particularly important for rural communities and informal settlements who often have poor access to legal services. Thus, if national human rights institutions only play a limited role, other bodies should be given the power to take up cases of groups.

Moreover, consideration should be given to ensuring the availability of mechanisms to enable the enforcement of all human rights judgments. Lack of enforcement has been a particular problem in South Asia and some other countries.<sup>14</sup>

#### **4. Should the human rights chapter include a specific provision for a right to affirmative action for the historically marginalized?**

A right to equality and non-discrimination should be included in the Constitution. The Indian, Canadian and South African constitutions provide different examples of this. What is most important is that the Constitution is clear that this right can require positive action,<sup>15</sup> which could also include temporary affirmative action measures such as quotas, to redress socio-economic disadvantages of historically marginalised groups. For example, this is captured in Section 9 of the South African bill of rights, particularly subsection 2:

*(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.*

*(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or*

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<sup>13</sup> See . Fairstein, 'Legal Strategies and the Right to Water in Argentina' in E. Riedel and P. Rothen (eds.) *The Human Right to Water* (Berlin: Berliner WissenschaftsVerlag, 2006). pp. 93-112

<sup>14</sup> See Byrne and Hossain , 'South Asia: Economic and Social Rights Case Law of Bangladesh, Nepal, Pakistan and Sri Lanka' (n. 1 above).

<sup>15</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)*, (Forty-second session, 2009) U.N. Doc E/C.12/GC/20 (2009).

*advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*

*(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*

*(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*

*(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.*

However, some groups may require separate mention and recognition. This would particularly include indigenous peoples given the UN General Assembly's Declaration of Indigenous Peoples and ILO Convention 169.

We hope the above information is useful and we would be happy to provide more information or copies of the references not included in our previous letter.

Yours sincerely

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Annexures:

1. UN Committee on Economic, Social and Cultural Rights, *General Comment 9, The domestic application of the Covenant* (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 (1998).

2. Committee on Economic, Social and Cultural Rights, *General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)*, (Forty-second session, 2009) U.N. Doc E/C.12/GC/20 (2009).