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The Equal Rights Trust

Parallel report submitted to the 49th session of the Committee on the Elimination of All
Forms of Discrimination against Women (CEDAW) in relation to the combined fourth
and fifth periodic reports submitted by:

The Federal Democratic Republic of Nepal

July 2011

Statement of Interest

1. The Equal Rights Trust (ERT) submits this parallel report to the United Nations Committee on the Elimination of Discrimination Against Women (the Committee) commenting on the combined fourth and fifth periodic reports by the Federal Democratic Republic of Nepal (Nepal) under Article 18 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (the Convention).
2. ERT is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. Established as an advocacy organisation, resource centre and think tank, it focuses on the complex relationship between different types of discrimination and inequality, developing strategies for translating the principles of equality into practice.
3. In the course of its mission, ERT undertakes research on the patterns of discrimination – including gender based discrimination – which prevail in different states, and of the adequacy of domestic legislation and policy to address these forms of discrimination. In respect of Nepal, ERT has followed with interest the ongoing process of Constitutional reform, and the extent to which these reform attempts will lead to the creation of the basic legal framework required to address issues of discrimination and inequality in the country.

Executive Summary

4. ERT notes the extensive, informative and authoritative report submitted by the Federation of Women, Law and Development and the 44 members of the CEDAW sub-committee on the patterns and incidences of discrimination which affect women in Nepal,¹ and the detailed report submitted by the state party.² The present shadow report does not seek to replicate the efforts of domestic civil society actors, but to complement them by focusing in particular on the adequacy of Nepal's interim Constitution and its legislation to meet the state party's obligations under Articles 1 and 2 of the Convention. In so doing, we note the importance placed on Article 2 by the Committee in its recent General Recommendation, and in particular that "the obligations enshrined in Article 2 are inextricably linked with all other substantive provisions of the Convention".³
5. The present parallel report finds that the interim Constitution – which prohibits discrimination on grounds of sex in both Articles 13 and 20 – is inadequate to meet Nepal's obligations to respect, protect and fulfil the right to non-discrimination under Article 2 of the Convention. Furthermore, we find that the absence of comprehensive anti-discrimination legislation is in breach of its specific obligation under Article 2 (b) and means that Nepal is ill-equipped to meet its obligations under Article 2 (c) and (e). The report goes on to make recommendations for how these inadequacies could be addressed through the Constitutional reform process and subsequent legislative reform efforts.
6. ERT submits this report in the context of the ongoing debates in Nepal about the adoption of a new Constitution to replace the interim Constitution. ERT believes that the Constitutional reform process offers far-reaching opportunities to enhance respect for and protection of the right to non-discrimination, and to make progress towards greater substantive equality for vulnerable groups. Indeed, the recently-adopted Constitution of Kenya illustrates what can be achieved in this area through constitutional reform.⁴ Furthermore, we believe that the period immediately after the adoption of a new Constitution provides an excellent opportunity for states to develop and enact comprehensive equality legislation.
7. This report's recommendations focus on the opportunities available to the state party at this time of constitutional reform. The report highlights areas in which the state party needs to ensure that a new Constitution is adequate to meet its obligations under Article 2, and to draw attention to the need to enact comprehensive equality legislation following the adoption of a new Constitution, in order to comply with its obligations under Article 2.

¹ CEDAW sub-committee, coordinated by Forum for Women, Law and Development, Shadow Report on the 4th & 5th Periodic Report by The Government of Nepal on CEDAW, 2011, available at: http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/FWLD_NepalCEDAW49.pdf.

² Government of Nepal, *The Combined 4th and 5th Periodic Report of the Government of the Republic of Nepal on Implementation of the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, 2011, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/466/11/PDF/G1046611.pdf?OpenElement>.

³ Committee on the Elimination of Discrimination Against Women, *General Recommendation 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women*, CEDAW/C/GC/28, 2010, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/472/60/PDF/G1047260.pdf?OpenElement>.

⁴ For detailed discussion, see Fitzgerald, J., "The Road to Equality? The Right to Equality in Kenya's New Constitution", *Equal Rights Review*, Vol. 5, 2010, pp. 55-69, available at: <http://www.equalrightstrust.org/ertdocumentbank/jim%20Fitzgerald%20article.pdf>.

Article 1 – Discrimination

8. ERT welcomes the introduction of improved equality and non-discrimination provisions in the interim Constitution of Nepal. In particular, we welcome the inclusion of a specific provision which prohibits discrimination “of any kind” by virtue of sex. However, we have a number of concerns about the definition of discrimination under the interim Constitution, and about the scope of its protection.
9. ERT is concerned that there is no definition of discrimination against women in Nepalese law or the interim Constitution which complies with the definition set out in Article 1 of the Convention. Article 13(2) and 13(3) of the interim Constitution prohibit discrimination in the “application of general laws” and by the state, but do not define this prohibited discrimination by reference to “distinction, exclusion or restriction”, nor by reference to the equal enjoyment of human rights and fundamental freedoms.⁵ Similarly, Article 20(1), which prohibits all forms of discrimination against women, provides no definition of what constitutes such discrimination.⁶ ERT is concerned that without such a definition, the Constitution will be interpreted narrowly, as guaranteeing only formal equality, and that the Constitution will thus be insufficient to address all forms of discrimination and instances of de facto inequality.
10. ERT is further concerned that, in the absence of either comprehensive or specific anti-discrimination law regulating discrimination against women, the State will fail to protect women against all the forms of discrimination referred to in Article 1 of the Convention, which can occur in both the public and private spheres, an issue discussed in respect of Article 2 below.

Article 2 – Policy Measures

11. ERT applauds the steps taken by the state party to amend and repeal laws which discriminate against women in line with its obligations under Article 2(d), (f) and (g). We note that – in response to the Committee’s recommendations – the state formed a commission to review discriminatory laws and that it introduced Act 2063 “Act to Amend Some Nepalese Acts to Maintain Gender Equality”⁷ and intends to introduce further legislation to amend remaining discriminatory laws in 2011.⁸ We further note that the interim Constitution creates an obligation on the state to repeal discriminatory laws.⁹
12. However, we are concerned that the state party’s focus on repealing and amending discriminatory laws has led it to interpret its obligations under Article 2 too narrowly, in contravention of the Committee’s explicit recommendations in its General Recommendation on Article 2.¹⁰ In ERT’s view, the provisions of the interim Constitution are insufficient to ensure that Nepal’s obligations to *respect* women’s right to non-discrimination are met. Furthermore, the absence of either comprehensive or specific anti-discrimination law means that the state party falls short of its obligation to *protect* the rights of women and is inadequately served in its attempts to *fulfil* the rights of women to non-discrimination.

⁵ The Interim Constitution of Nepal, 2063 (2007), Article 13. Translation available at: http://www.lawcommission.gov.np/index.php?option=com_remository&Itemid=52&func=fileinfo&id=163&lang=en

⁶ *Ibid.*, Article 20.

⁷ See above, note 2, Para. 8.

⁸ Government of Nepal, *Response to the list of issues and questions with regard to the consideration of the combined fourth and fifth periodic report, Nepal*, 2011, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/290/43/PDF/N1129043.pdf?OpenElement>, Para. 4.

⁹ See above, note 2, Article 33 (n).

¹⁰ See above, note 3.

Constitutional Provisions

13. Articles 13(2) and 13(3) of the interim Constitution relate to the state's obligations to respect the right to non-discrimination, in that they regulate the content of laws and the conduct of the state respectively. In addition Article 20 prohibits "discrimination of any kind" against women "by virtue of sex". However, these clauses fall short of the standards required by Article 2 of the Convention in a number of ways.
14. Neither Article 13 nor Article 20 of the Constitution explicitly prohibits the different forms of discrimination which are accepted as essential elements of a modern equality guarantee. Thus, neither article makes reference to direct and indirect discrimination, as required by the Committee in its General Recommendation 28.¹¹ In addition, the Constitution does not explicitly prohibit multiple discrimination, discrimination by association, segregation or harassment. In the view of ERT, the fact that neither Article 13 nor Article 20 explicitly covers these forms of discrimination represents a failure of the state party to ensure that its Constitution effectively prohibits all forms of discrimination and provides for substantive, rather than solely formal equality, in accordance with current best practice. The Declaration of Principles on Equality, a document which was drafted and adopted in 2008 by 128 prominent human rights and equality advocates and experts, includes these forms of discrimination in its definition of discrimination.¹² The Declaration has been referred to as the "current international understanding of Principles on Equality".¹³
15. There are also a number of problems posed by the list of prohibited grounds of discrimination provided by Articles 13 and 20 of the Constitution. Neither Article 13 nor 20 explicitly prohibits discrimination on grounds of gender in addition to sex. The Committee has stated that gender-based discrimination is prohibited by the Convention, through a reading of Article 1 together with Articles 2(f) and 5(a).¹⁴ However, ERT is concerned that the omission of a specific reference to gender in the Nepalese Constitution gives rise to the risk of restrictive interpretations of sex discrimination. ERT believes that in order to avoid this risk, the Constitution should make explicit reference to both gender and sex, as has been done elsewhere.¹⁵
16. In addition to the non-inclusion of gender in either Article 13 or 20, ERT is concerned by the restrictive list of grounds in Article 13. In particular, we note that the inclusion of "pregnancy or maternity" and "civil, family and carer status" as protected grounds would substantially increase the protection which women enjoy. The Committee has stressed the obligation for state parties to adequately prohibit discrimination on other grounds which may affect women as an inherent element of state obligations under Article 2.¹⁶ Thus, the absence of "age", "disability", "sexual orientation" and "gender identity" from Articles 13 and 20 – all of which are acknowledged grounds in a range of jurisdictions and international instruments – represents a cause for concern.
17. Further to these concerns, ERT notes the use of a "closed list" of grounds in Article 13, limiting the protection from discrimination to only the grounds of "religion, race, caste, tribe, sex, origin, language or ideological conviction". This restrictive approach denies the Nepalese courts the opportunity to add new grounds – including those referred to in paragraph 16, but also emerging grounds, such as

¹¹ See above, note 3, Para. 16.

¹² *Declaration of Principles on Equality*, published by The Equal Rights Trust, London 2008, Principle 5.

¹³ *Naz Foundation v. Government of NCT of Delhi and Others* WP(C) No.7455/2001, Para. 93.

¹⁴ See above, note 3, Para. 5.

¹⁵ See for example: Constitution of the Republic of South Africa, Art 9(3).

¹⁶ See above, note 3, Para. 18.

fertility status – which are analogous to those explicitly listed. The effect is that women who face discrimination on any ground other than those listed in the Constitution will not be protected. The drafters of the Declaration of Principles on Equality regarded the use of a “conditionally open” list of grounds – which provides a three-part test to establish the admission of new grounds as the best approach to determine whether new grounds should be incorporated; ERT would commend this as a best-practice approach to this question.¹⁷

18. The impact of the lack of protection from discrimination on a broader list of grounds is further exacerbated by the lack of provision for multiple, including intersectional discrimination, as mentioned above. In its General Recommendation 28 on Article 2, the Committee has explicitly stated that “[i]ntersectionality is a basic concept for understanding the scope of the general obligations of states parties contained in article 3” and as such, both the restricted and restrictive list of grounds and the absence of multiple discrimination provisions in the Constitution are a cause for concern.¹⁸
19. We further note that Article 13 prohibits discrimination against citizens only, rather than against all persons within the jurisdiction of the state, as required by the Convention,¹⁹ though no such restriction applies in respect of Article 20. ERT is concerned by this inappropriate restriction on the rights contained in the interim Constitution.
20. Finally, ERT is further concerned by the limited scope of Article 13, which applies only to acts of the state, either in the form of legislation or activities undertaken by state actors. The duty to protect requires the state to prohibit discrimination by private actors, a point which is addressed in more detail in paragraphs 22-28.
21. ERT welcomes the ongoing debates in Nepal about the adoption of a new constitution to replace the interim Constitution. ERT believes that the constitutional reform process offers far-reaching opportunities to enhance respect for and protection of the right to non-discrimination, and to make progress towards greater substantive equality for vulnerable groups. We therefore call on the Committee to urge the government of Nepal to take this opportunity to ensure that any new constitution remedies the defects in the interim Constitution, in particular by ensuring that the constitutional provision(s) on the right to equality:
 - a. Defines the right to non-discrimination in such a way as to meet the requirements of Article 1 of the Convention;
 - b. Explicitly prohibits direct and indirect discrimination, multiple discrimination, discrimination by association, segregation and harassment and makes provision for the achievement of substantive equality;
 - c. Explicitly prohibits discrimination on grounds of sex, gender, pregnancy or maternity, civil, family or carer status, age, disability, sexual orientation and gender identity;
 - d. Provides a test for the incorporation of new grounds of discrimination in line with that recommended in the Declaration of Principles on Equality;
 - e. Prohibits discrimination against all persons within the jurisdiction of Nepal, rather than solely citizens;

¹⁷ See above, note 13.

¹⁸ See above, note 3, Para. 18.

¹⁹ See above, note 3, Para. 12.

f. Prohibits discrimination by state and non-state actors, in all areas of life governed by law.

Legislative Provisions

22. As discussed above, Nepal does not have specific legislation prohibiting discrimination against women or comprehensive equality and anti-discrimination legislation covering the full range of protected grounds. Indeed, the only legislation dealing with discrimination against women - Act 2063 “Act to Amend Some Nepalese Acts to Maintain Gender Equality” – focuses on the repeal or amendment of discriminatory laws, rather than the prohibition of discrimination. ERT is concerned that – in addition to the limited scope of protection of the right to non-discrimination provided by the Constitution – the absence of either gender-specific or comprehensive equality legislation means that Nepal’s domestic legislation does not ensure effective protection of women’s right to non-discrimination. In the view of ERT, without substantive equality legislation articulating the protected grounds, scope of application, prohibited conduct, the operation of positive action measures, as well as sanctions and remedies for discrimination and procedures to ensure access to justice, Nepal is failing to meet its obligations to effectively protect and fulfil the right enshrined in Article 2(a), (b), (c) and (e).
23. Beyond the general protection offered by Article 20, women in Nepal have no protection from discrimination by non-state actors. There is no anti-discrimination legislation prohibiting discrimination against women in different areas of life, such as employment, education or land rights, and legislation governing such areas does not contain basic non-discrimination provisions. The published versions of the Education Act, the Labour Act, the Lands Act and the Political Parties Act available from the National Law Commission contain no protections from discrimination.²⁰ Further, neither the Human Rights Commission Act nor the National Women’s Commission Act – acts which would reasonably be expected to prohibit discrimination and contain provisions for enforcement – contain non-discrimination provisions.²¹ The absence of non-discrimination provisions in the aforementioned areas represents a failure by the state party to meet its obligation under Article 2 (a) to “enact legislation that prohibits discrimination in all fields of women’s lives under the Convention and throughout their lifespan”.²²
24. To make the right to non-discrimination effective in practice, specific, detailed legislation is necessary to define and prohibit all of the different forms of discrimination experienced by women, which fall within Article 1.²³ Such anti-discrimination legislation must apply to both state and non-state actors, and define direct and indirect discrimination, harassment and multiple discrimination.
25. ERT is also concerned that without a comprehensive equality law, provisions to ensure access to justice, such as provisions for the transfer of the burden of proof in civil cases and measures to ensure standing by associations or other interested parties, which are necessary for the effective protection

²⁰ Education Act, 2028 (1971); Labour Act, 2048 (1992); Lands Act, 2021(1964); Political Parties Act, 2058 (2002).

Translations available at:

http://www.lawcommission.gov.np/index.php?option=com_remository&Itemid=52&func=fileinfo&id=163&lang=en

²¹ Human Rights Commission Act, 2053 (1997); National Women’s Commission Act, 2063 (2006). Translations available at:

http://www.lawcommission.gov.np/index.php?option=com_remository&Itemid=52&func=fileinfo&id=163&lang=en

²² See above, note 3, Para. 31.

²³ The Declaration of Principles in Equality contains a principle on specificity of equality legislation, according to which “The realisation of the right to equality requires the adoption of equality laws and policies that are comprehensive and sufficiently detailed and specific to encompass the different forms and manifestations of discrimination and disadvantage.” (See above, note 13, Principle 15.)

of the right to equality, are absent from Nepal's legislative framework. Again, the Declaration of Principles on Equality provides a clear guide to best practice in this area.²⁴ ERT is concerned that the absence of anti-discrimination legislation containing these provisions means that Nepal is ill-equipped to meet its obligations under Article 2(c) which requires it to ensure "through competent national tribunals and other public institutions the effective protection of women against any act of discrimination". Without law establishing these critical principles regarding effective access to justice, Nepalese courts will lack the necessary legal tools to ensure women have effective protection from discrimination.

26. Furthermore, ERT is concerned that the absence of anti-discrimination legislation means that Nepal is unable to ensure that there are in place sanctions which are effective, proportionate and dissuasive and which provide appropriate remedies for those whose right to equality has been breached.²⁵ The absence of such provisions represents a violation of the Nepal's obligations under Article 2(b) to provide reparation to women whose rights have been violated and to ensure that the right is effective in practice.²⁶
27. Finally, ERT would argue that the absence of such legislation means that other, non-legislative, measures taken by the state to eliminate discrimination, in compliance with obligations under Article 2(e) may be inconsistent, inadequate or inefficient. As the Committee has recommended, such measures might include the establishment of national human rights institutions, measures to ensure women's participation in policy formulation, and measures to promote education on the Convention and its goals.²⁷ Similarly, we submit that the absence of anti-discrimination legislation means that there is inadequate legal provision for the institution and regulation of positive action measures. As the Committee has noted, the obligation to fulfil the right under Article 2 "encompasses the [...] promotion of [...] substantive equality through all appropriate means, including through concrete and effective policies and programmes [and] where appropriate, through the adoption of temporary special measures in accordance with article 4."²⁸ ERT submits that while the state party may be making some progress in these areas, the absence of a legislative framework governing these activities is likely to limit their effectiveness, reducing these measures to policy aspirations rather than substantive legal obligations.
28. ERT is firm in its opinion that the Constitution alone is insufficient to meet Nepal's obligations to protect and fulfil the right to non-discrimination arising under Article 2 (a), (b), (c) and (e), and believes that these obligations can only be properly met by the enactment of equality legislation. Further, given the importance of protecting women from discrimination on all grounds, and the Committee's emphasis on the obligation to protect from inter-sectional discrimination, we believe such legislation should be comprehensive, covering an open and extensive list of protected grounds.²⁹

²⁴ See above, note 13, Principle 18 (Access to Justice), Principle 21 (Evidence and Proof), Principle 20 (Standing), and Principle 22 (Remedies and Sanctions).

²⁵ *Ibid.*, Principle 22 (Remedies and Sanctions).

²⁶ See above, note 3, Para. 32.

²⁷ See above, note 3, Para. 35.

²⁸ See above, note 3, Para. 20.

²⁹ In the view of ERT, in order to provide basic protection for women, such legislation should cover, as a minimum, all those grounds in the interim Constitution of Nepal, together with the additional grounds listed in paragraph 16 above. However, in order to ensure genuinely comprehensive protection, such legislation should cover all grounds specified in Principle 5, *Declaration of Principles on Equality*: race, colour, ethnicity, descent, sex, pregnancy, maternity, civil, family or carer status, language, religion or belief, political or other opinion, birth, national or social

We therefore call on the Committee to urge the government of Nepal to enact comprehensive equality legislation, ensuring that it:

- a. Prohibits discrimination in all areas of life governed by law, including but not limited to: education, employment, social security (including pensions and housing), provision of goods and services (including public services), clubs and associations;
- b. Prohibits direct and indirect discrimination, multiple discrimination, discrimination by association, segregation and harassment;
- c. Provides measures for legal aid provision, the transfer of the burden of proof, the standing of interested parties in cases related to discrimination and other measures necessary to ensure adequate access to justice for victims of discrimination;
- d. Provides sanctions which are effective, proportionate and dissuasive and which provide appropriate remedies for those whose right has been breached; and
- e. Requires the state to take all necessary measures to eliminate discrimination and promote equality, including through the adoption of special measures, and sets out conditions for the appropriate implementation of such measures.

Conclusion

29. As stated above, ERT believes that the current process of constitutional reform offers the state party an unprecedented opportunity to ensure that any new constitution provides the right to non-discrimination, and to bring forward comprehensive equality legislation thereafter in order to meet its obligation to protect the right to non-discrimination under Article 2. ERT urges the state party to seize this opportunity and ensure that it places the right to non-discrimination at the heart of both its constitutional reform process and its subsequent legislative agenda. As such, these recommendations are offered in order to assist the state party in ensuring that in that process it complies with its obligations.