

Hon'ble Members of the Interim Constitution Drafting Committee
Singh Durbar
Katmandu, Nepal

July 28, 2006

Dear Hon'ble Members of the Interim Constitution Drafting Committee:

First of all, I would like to congratulate you for drafting an interim constitution that reflects the evolving aspirations of the people of Nepal and international human rights principles. This phase marks an important step forward in our nation's attempt to re-construct our society based on the principles of equality and social justice. The purpose of this letter is to draw your attention to a set of norms and principles that lie at the heart of social justice for women, which have gained global legal recognition since the drafting of our last constitution. They pertain to the ability of women to control their fertility and their reproductive lives and may collectively be described as women's "reproductive rights."

Reproductive rights are human rights that have very unique implications for women's health and lives. Broadly speaking they comprise of two important principles: access to reproductive health care and services and reproductive self-determination. [*Please refer to Annex I for the definition*]. They encompass several important civil, political, social and economic rights that have been guaranteed by international treaties that have been signed and ratified by our government. Furthermore, the centrality of reproductive rights to women's empowerment and equality has been established through several policy documents including the Millennium Declaration, 2000. [*Please refer to Annex I for the list of relevant international policy documents.*]

Global trends reveal that reproductive rights violations disproportionately impact women. This is starkly evident in Nepal, which has one of the highest maternal mortality ratios in the world. According to the government, over 4000 women die each year due to pregnancy and childbirth; this translates into an average of around 11 deaths per day. Maternal mortality is not merely a health issue but a compelling example of the impact that poverty, discrimination, lack of access to health care and government neglect can have on women's lives. According to international law, a high maternal mortality rate indicates a breach of obligations by a government to respect, protect and fulfill the human rights of women. Furthermore, based this estimate, one may conclude that over the last 13 years, more women have died due to pregnancy than men and women in the armed conflict. [*Please refer to Annex II for select indicators relating to women's reproductive health in Nepal*]

The first step toward creating a just and prosperous nation requires an honest inquiry into how men and women experience the impact of poverty, inequality and violence in different ways. At least two immediate ways to elicit different perspectives are, first, to

ensure women's participation in the constitutional drafting process and, second, to look to other jurisdictions to see how they have handled some of the complex challenges posed by gender inequality. The government has already taken the first step recommended above by including, albeit belatedly, four women on the interim drafting committee. More needs to be done in this regard by soliciting input from women outside the formal drafting process in discussions around the constitution. Regarding trends in other parts of the world, there have been major constitutional legal developments that are worthy of note. The most outstanding example is provided by the South Africa Constitution, which was introduced in 1996. It explicitly recognizes the right to make decisions concerning reproduction as a fundamental right.

The South African Constitution has been hailed as the best and most admirable in the world, for its recognition of socio-economic rights as being justiciable. This happened based on the realization that traditional civil and political rights would not be of concern to individuals who did not have food to eat, a home to live in or the means to send their children to school, a sentiment with which the majority of Nepalese can identify. It was decided that in order to make the new constitution 'relevant' to the people, third generation rights which include the rights to health and education would have to be included as fundamental rights. Key features of the South African Constitution that are relevant to ongoing discussion in Nepal include the following:

- the recognition of the right to make decisions concerning reproduction as a fundamental right;
- the recognition of the right to access to health care services, including reproductive health care, as a fundamental right; and,
- the prohibition on both "direct" and "indirect" discrimination on the grounds of sex, gender, pregnancy, marital status, age and culture.

It is important to note that this has been done notwithstanding the challenge of balancing the judiciary's role in interpreting and securing the enforcement of these rights with the legislature's and executive's authority to determine how to manage and allocate public funds. [*Please refer to Annex III for a summary of key provisions*]

A noteworthy aspect of the interim draft constitution (version 6.1) is that it contains stronger language on the right to health than the former constitution through the inclusion of "access to primary health care" as fundamental right [Article 21(2)]. However, this provision is not sufficient in scope to address the basic health needs of women and female adolescents in Nepal, most of which pertain specifically to their reproductive and sexual health. Furthermore, the current draft is silent on discrimination based on pregnancy, marital status, gender and age which are common sources of reproductive rights violations in the public and private spheres. The draft constitution also fails to explicitly condemn sexual violence, which is the single greatest and most pervasive threat to women's life, reproductive health, bodily integrity, privacy and dignity whether during conflict or peace.

Women's ability to make choices about reproduction free from discrimination, to access a full range of reproductive health services and information, and to protect themselves against gender-based violence are critical to their ability to survive and live with dignity and to recognize their full potential as citizens. It is important to note that the Nepal government is legally obligated to respect, protect and fulfill women's reproductive rights by virtue of the fact that it has signed and ratified the CEDAW Convention. Article 12 obliges the government "[t]o take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning." In addition, Article 2 (f) of the Convention obliges the government "[t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women." In order to be true to the goal of establishing a just and peaceful society, the constitution must explicitly guarantee women's reproductive rights as fundamental rights and condemn gender violence and sexual stereotyping in all forms as inherently discriminatory and detrimental to women's health and dignity.

We have reached a critical juncture in our history and while the future remains fraught with challenges, one thing is clear: women do not want to go back to the dark ages or to preserve the status quo. The message of the women's movement in Nepal which campaigned for a decade to amend the *Muluki Ain* is loud and clear: they want an end to sex and gender discrimination and violence and the removal of all legal, social, economic and cultural barriers to full citizenship. This view is perfectly aligned with that of the female combatants who have struggled over the last decade for the establishment of a republic on the Maoist platform of equality and social justice. The views of women on both sides of the political aisle support the creation of a non-sexist society as an aspiration that must find explicit expression in our new constitution.

Delivering democracy and social justice for women will require taking new and bold steps. In this vein, I would like to request the Committee to begin to take concrete steps towards broadening the scope of fundamental rights in the interim constitution and recognize women's reproductive rights as fundamental rights in accordance with Nepal's obligations under international human rights law and the realities of women's lives in Nepal. I would be happy to furnish the Committee with further information and mobilize the necessary technical and financial assistance to support research and drafting initiatives towards this endeavor.

Sincerely,

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Annex I

Definitions of Reproductive Health and Rights [as originally adopted by WHO and further expanded at the International Conference on Population and Development (ICPD) in Cairo, 1994, and at the Fourth World Conference on Women (FWCW) in Beijing, 1995]

***Reproductive health** is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant. In line with the above definition of reproductive health, reproductive health care is defined as the constellation of methods, techniques and services that contribute to reproductive health and well-being through preventing and solving reproductive health problems. It also includes sexual health, the purpose of which is the enhancement of life and personal relations, and not merely counseling and care related to reproduction and sexually transmitted diseases.*

ICPD Programme of Action, para. 7.2

*Bearing in mind the above definition, **reproductive rights** embrace certain human rights that are already recognized in national laws, international human rights documents and other relevant United Nations consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes the right of all to make decisions concerning reproduction free of discrimination, coercion and violence as expressed in human rights documents.*

ICPD Programme of Action, para. 7.3

Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe,

effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant.

Beijing Platform for Action, para. 94

The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.

Beijing Platform for Action, para. 96

Key components of Reproductive Rights: (Center for Reproductive Rights, New York)

- The Right to Life, Liberty and Security
- The Right to Health, Reproductive Health and Family Planning
- The Right to Decide the Number and Spacing of Children
- The Right to Consent to Marriage and to Equality in Marriage
- The Right to Privacy
- The Right to be Free from Discrimination of Specified Grounds
- The Right to be Free from Practices Harmful to Women and Girls
- The Right Not to be Subjected to Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment
- The Right to be Free from Sexual Violence
- The Right to Enjoy the Benefits of Scientific Progress and to Consent to Experimentation

International treaties that guarantee many of the rights that together comprise women's reproductive rights include the following:

- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- Convention on the Rights of Children (CRC)

The Nepal government is legally obligated to respect, protect and fulfill women's reproductive rights by virtue of the fact that it has signed and ratified all of these treaties.

Furthermore, key principles of reproductive rights have been elaborated and endorsed in the Millennium Development Goals, 2000

Annex II

Select indicators relating to women's reproductive health in Nepal

Contraceptive prevalence rate for modern methods: 35%
(Sri Lanka 44%; US 71%; Sweden 72%)

Pregnant women who receive ante-natal care (more than 4 visits): 15%
(Sri Lanka 98%; US and Sweden, information unavailable)

Births attended by skilled health personnel: 11%
(Sri Lanka 97%; US 99%; Sweden 100%)

Maternal mortality ratio per 100,000 live births: 740
(Sri Lanka 92; US 14; Sweden 8)

Still birth rate per 1000 total births: 23
(Sri Lanka 11; US 4; Sweden 3)

Source: The World Health Report 2005, WHO

Among adolescent females aged 15-19, 43.3% are already married.

Source: Implementation Status of Outcome Document of the Beijing Platform for Action, Forum for Women, Law and Development and The Asia Foundation, 2003.

21% of women aged 15-19 are already mothers or are pregnant with their first child

Source: Demographic Health Survey, 2001.

Nepal's ranking on the Mother's index: 107/125 countries
(Sri Lanka 37; US 10; Sweden 1)

Nepal's ranking on the Women's index: 120/131 countries
(Sri Lanka 34; US 13; Sweden 1)

Source: State of the World's Mothers, 2006, Save the Children US
(These rankings are determined on the basis of select socio-economic indicators for women including access to reproductive health care, level of education and political participation.)

Annex III

Relevant sections of the South Africa Constitution:

Chapter one of the South Africa Constitution proclaims the country's founding values which include non-sexism as well as the advancement of human rights.

Section 9(3) of the Bill of Rights explicitly prohibits both "direct" and "indirect" discrimination on the grounds of sex, gender, pregnancy, marital status, age and culture.

Section 12(2) of the Bill of Rights declares that "[e]veryone has the right to bodily and psychological integrity, which includes the right: a) to make decisions concerning reproduction; and b) to security in and control over their body."

Section 27(1) (a) of the Bill of rights explicitly states that that "[e]veryone has the right to have access to health care services, including reproductive health care.

Section 27(2) instructs that the state "must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights."

Section 27(3) states that "[n]o one may be refused emergency medical treatment."

These provisions draw extensively upon the ICESCR and the prohibition on both direct and indirect forms of discrimination is an important aspect of the definition of discrimination offered by CEDAW.