

International Covenant on Civil and Political Rights (ICCPR)



Shadow Report 2021

NEPAL

International Covenant on Civil and Political Rights
(ICCPR)

SHADOW REPORT

*Fifth and Sixth periodic reports of the government of Nepal
on measures taken to give effect to
The International Covenant on Civil and Political Rights
(ICCPR)
January 2021*

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Printed at : Open Printing Service

Reporting Format

The Report is 36 pages in length: Part 1 refers to forward, table of content, introduction and technical components related to the structure of the report itself. Part 2 consists constitutional, legal & institutional provisions and principle concerns of civil and political rights and recommendations for necessary measures to be taken.

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A. TECHNICAL COMPONENTS

Foreword

Nepal acceded to the International Covenant on Civil and Political Rights (ICCPR), the Optional Protocol to the ICCPR on 14 May 1991, and the Second Optional Protocol to the ICCPR, Aiming at the Abolition of the Death Penalty on 4 March 1998, without any reservation. Nepal submitted the Initial Report under the ICCPR in 1994. Nepal has submitted a combined report consisting of the second, third and fourth periodic reports, covering the period from 1995 to 2010.

The Human Rights Committee of the International Covenant on Civil and Political Rights (hereinafter referred as Committee) adopted at its 108th session held 8-26 July 2013 and forwarded 26 issues in the list of issues to the Government of Nepal (GoN) in relation to the Second Periodic Report (CCPR/C/NPL/2) The GoN submitted written replies. The committee considered the Second Periodic Report (CCPR/C/NPL/2) at its 3050th and 3051st meetings (CCPR/C/SR.3061) held on 26th March 2014. The committee has made recommendations in the concluding observations on 10 different matters contained in the report. The deadline to submit its fifth and sixth periodic report was due on March 2018, which has been missed.

Human Rights Treaty Monitoring Coordination Centre (HRTMCC) is the network of 78 Nepali Civil Society Organizations established in 2003. Writing alternative/shadow reports is one of the primaries of HRTMCC and a vital source of information for the United Nations Treaty Bodies including the Human Rights Committee (HRC). HRTMCC believes that this shadow report will serve as a valuable source for the Independent Experts who analyses the implementation of the ICCPR in Nepal's context. With this report, we believe that it is possible to see the situation as objectively as possible and to take a critical look at the government's action to prevent the violation of civil and political rights in the country.

Preparation of the Report

INHURED international led in coordinating and preparing the report with enormous feedback of leading specialized human rights organizations who are member of HRTMCC along with other individual experts. The shadow report on ICCPR was submitted by the same committee in the year 2014, since then no other formal reports have been submitted. The report is based on the UN Human Rights Committee' Guidelines and other available formats. The report provides a review of Nepal's implementation of the ICCPR and focuses on the issues of critical importance namely the right to life, freedom of expression, freedom from torture and enforced disappearance.

Cooperation with Stakeholders

This report is prepared in consultation with the members of the committee on ICCPR under the banner of HRTMCC. Several rounds of formal and informal interactions/dialogues have been held among experts of the human rights and legal community across the country. Similarly, series of provincial and federal level consultations have been held to seek input from different stakeholders.

Credit goes to all the members of the HRTMCC Committees, Secretariat team, Informal Sector Service Centre (INSEC) provincial staffs, organizational and individual experts, civil society institutions, human rights community, media and legal professionals without whose active involvement, the report would not have taken such a comprehensive shape. The seasoned insightful guidance from Dr. Indira Shrestha, Chairperson of INSEC, Dr. Gopal Krishna Siwakoti of INHURED INTERNATIONAL and Mr. Bijay Raj Gautam from HRTMCC secretariat to enrich the quality of the report is highly appreciated. Thanks goes to INSEC's Shreeram Bajgain and Aarya Adhikari for their editorial input, Samjah Shrestha for overall coordination for the publication and Govinda Tripathi for the design and the layout. Special thanks go to the FHI 360 and DAN Church Aid (DCA) and Civil Society in Development (CISU) for publication of this report and other technical support.

B. CONSTITUTIONAL SAFEGUARD

With the promulgation of the Constitution, the Government of Nepal (hereinafter GoN) has guaranteed to end all forms of discrimination to protect and promote social and cultural solidarity, tolerance and harmony. It is committed for unity in diversity by recognizing the multi-ethnic, multi-lingual, multi-religious, multi-cultural and diverse regional characteristics, resolving to build an egalitarian society founded on the proportional inclusive and participatory principles in order to ensure economic equality, prosperity and social justice, by eliminating discrimination based on class, caste, geographic region, language, religion and gender and all forms of caste-based untouchability.¹

In addition to this, the State has also demonstrated its commitment to ensure democratic norms and values including the people's competitive multiparty democratic system of governance, civil liberties, fundamental rights, human rights, adult franchise, periodic elections, freedom of expression, and independent, impartial and competent judiciary and rule of law in an attempt to build a prosperous nation.²

C. GENERAL FRAMEWORK FOR THE PROTECTION AND PROMOTION OF HUMAN RIGHTS

ACCEPTANCE OF INTERNATIONAL HUMAN RIGHTS NORMS

Nepal has fully accepted international human rights norms. Nepal has become the party to 22 international and 2 regional human rights treaties and instruments, which effectively reflect the commitment of the government towards human rights.³ Following the accession to the ICCPR by Nepal, the covenant has been a part of its legal system as per Section 9 of Nepal Treaty Act. Nepal's commitment to the acceptability of international human rights norms and principles are evident from the Preamble, Part-3, and Part-4 of the constitution.

(i) Natural Jurisprudence

The State has made commitment through the Preamble of the Constitution to establish socialism based on democratic norms and values including people's competitive multi-party democratic system of governance, civil liberties, fundamental rights, human rights, adult franchise, and periodic election, full freedom of the press, independent impartial and competent judiciary and concept of the rule of law as the basic features of the Constitution. Part-3 guarantees 31 fundamental rights and Part-4 makes strong commitment to protect human rights through principles, policies and obligations of the State. Article 279 of the Constitution is a specific provision to regulate the process of becoming a party to treaties. The Nepal Treaty Act, specifies the provision to regulate the process of becoming a party to treaties. The Nepal Treaty Act, 1990 provides that any provision of law that is inconsistent with a treaty ratified by Parliament is for the purpose of that treaty, invalid to the extent of inconsistency, and the treaty applies as if it were the law of Nepal.

(ii) Principles Laid Down by Judiciary

The Constitution recognizes the judiciary as one of the three pillars of the State, specifies its powers, lays down a framework for its independence, and determines its basic features. The judiciary has played a predominant role in promoting and protecting human rights through its landmark judgments. The principles and ruling laid down in such judgments, made in relation to a wide array of human rights including economic, social and cultural rights, including the rights of the child and women, portray the human rights jurisprudence developed by the Supreme Court (SC). By exercising the judicial power, the SC declared ultra-vires in many legal provisions relating to facilities in prisons, equality and non-discrimination. In a range of areas where there was legal vacuum, such as women's rights over parental property, rights against sexual harassment and marital rape, it issued directives orders to the GoN for making necessary enabling

1. Constitution of Nepal, preamble para
2. Ibid.
3. Ibid.

laws or streamlining laws to corroborate them with the guaranteed rights. These orders have brought ample changes on the elimination of various discriminatory traditions or practice. Moreover, it also contributed to the enforcement of rights including personal liberty by quashing, in several cases, decisions of public authorities affecting personal liberty by putting persons in preventive detention, infringing the right to privacy and denying access to information held by public authorities.

The Supreme Court (SC) has also developed advanced public interest Litigation (PIL) regime for the protection and promotion of public interest to seek redress in situations of violations of human rights, a wealth of jurisprudence has evolved on issues such as prisoner's rights, bonded labour, right to clean and healthy environment, and custodial violence, among others. This establishment has also become a mechanism to forge public participation in the dispensation of justice.

D. THE GENERAL LEGAL FRAMEWORK FOR THE PROTECTION AND PROMOTION OF HUMAN RIGHTS

The general legal framework for the protection and promotion of human rights in Nepal are set out in the constitution, relevant laws, policies and judicial decisions.

E. GENERAL FRAMEWORK WITHIN WHICH HUMAN RIGHTS ARE PROTECTED

Nepal has several human rights institutions and assemblies responsible for the protection of human rights at national, state and local levels.

They are:

1. Federal, state and local level assemblies,
2. National HR Institutions which includes:
 - a. National Human Rights Commission,⁴
 - b. National women's commission,⁵
 - c. National Dalits commission,⁶
 - d. National inclusion commission,⁷
 - e. Indigenous Nationalities commission,⁸
 - f. Madhesi commission,⁹
 - g. Tharu commission,¹⁰
 - h. Muslim commission¹¹ and
 - i. Language commissions.¹²

4. Ibid.

5. Ibid. Art. 252

6. Ibid. Art. 255

7. Ibid. Art. 258

8. Ibid. Art. 261

9. Ibid. Art. 262

10. Ibid. Art. 263

11. Ibid. Art. 264

12. Ibid. Art. 287

PART II

DEVELOPMENT IN THE AREAS OF PRINCIPAL MATTERS OF CONCERN AND RECOMMENDATIONS

1. Impunity for Gross Violations Committed During the Conflict

(Paragraph 5 of the Concluding observation covering Article 2,3,6,7,9,10 and 16)

Informal Sector Service Centre (INSEC) documented 13,248 Nepali killed and 932 were subjected to enforced disappearance during a 10-year internal armed conflict which lasted from 1996 to 2006. The Comprehensive Peace Accord, with which the conflict ended in 2006, contained a commitment to transitional justice. Pledges to ensure justice and reparations for victims of conflict-era human rights violation cases have been repeated over the years. Without accountability and institutional reform, status quo of impunity continued.

There has been lack of investigation and prosecution of perpetrators, aggravated by political interference in the criminal justice system, such as refusal by the police to register First Information Reports, pressure exerted on law enforcement officials not to investigate or prosecute certain cases, and extensive withdrawal of charges against persons accused of human rights violations.

National Human Rights Commission (NHRC), in a report has stated that, out of 286 individuals the commission said should face legal action, only 30 had been held accountable. The list includes 16 civil servants, 98 policemen, 85 Nepal Army personnel, and 65 Maoist. Out Of 1,195 recommendations made by the commission over the last 20 years, the government failed to act on half, and only 163 recommendations were fully implemented. The NHRC's list includes several alleged perpetrators of the 62 cases tracked in this report.¹³

Likewise, there has been the denial of effective remedies and reparation to victims and their families. The state has provided limited *ex- gratia*¹⁴ compensation, to some victims or their relatives under the Interim Relief Programme, while others have been excluded, including victims of torture, rape and other forms of sexual violence.

Similarly, instead of excluding persons accused of serious human rights violations from holding public office, there has been practice of promoting such individuals that puts serious question on the vetting system. The Truth and Reconciliation Commission (TRC) and the Commission of Investigation on Enforced Disappeared Persons (CIEDP), which have collected over 63,000 complaints of human rights violations and abuses committed by state security forces and the then Maoist Party, failed to carry out effective and independent investigations¹⁵.

Despite a commitment made at treaty and charter based bodies, the government has resisted amending the Commission of the Investigation on Enforced Disappearance, Truth and Reconciliation Act 2014, as ordered by the Supreme Court in 2014, 2015 and 2020 to bring it in line with international human rights law and standards.¹⁶ The law in its current form allows amnesties for serious crimes. Also, no effective investigations have taken place into the hundreds of killings of demonstrators by security forces since 1990.¹⁷

13. Human Rights Watch, 'The Culture of Impunity in Post-Conflict Nepal', 20 Nov 2020.

14. Without accountability, only monetary compensation

15. Amnesty International, *South Asia: End appalling use of torture and other ill-treatment*, 26 June 2018, <https://www.amnesty.org/download/Documents/ASA0486672018ENGLISH.pdf>

16. Amnesty International, *Nepal: Draft bill on transitional justice falls short of international law and standards*, 20 July 2018, <https://www.amnesty.org/en/latest/news/2018/07/nepal-draft-bill-on-transitional-justice-falls-short-of-international-law-and-standards/>.

17. Amnesty International, *Amnesty International Report 2017/2018, State of the World's Human Rights*, 22 February 2018, <https://www.amnesty.org/download/Documents/ASA0113542020ENGLISH.PDF>, pp. 275-276.

2. Views Adopted Under the First Optional Protocol to the Covenant

(Paragraph 6 of the concluding observation covering article 2)

Nepal has failed in taking concrete steps to give full effect to all views on individual communications adopted by the committee, in particular by conducting prompt, thorough and independent investigation. Prosecuting those responsible and providing effective remedies and reparation to victim without any further delay. The reparation that needs to be prompt, adequate and effective. Furthermore, the cases of gross violation of human rights that deserves the immediate responses from the competent court through regular justice mechanism has been on hold waiting for TJ mechanism to deal with it.

The TRC and CIEDP which were constituted on 5th February 2015 with a term of two years couldn't accomplish its task even with additional extension for one year.

Additionally, the government has also ignored the UN Human Rights Committee (HRC) when it called on Nepal to thoroughly investigate alleged enforced disappearances, rape, torture, and other human rights violations, and to prosecute and punish those responsible for crimes identified in individual complaints against Nepal brought to the HRC under the Optional Protocol to the International Covenant on Civil and Political Rights. The government argued that complainants had not exhausted domestic remedies and that the cases would be investigated by transitional justice mechanisms.

3. National Human Rights Commission (NHRC)

(Paragraph 7 of the concluding observation covering article 2)

National Human Rights Commission of Nepal has been upgraded as constitutional body. In principal, NHRC is independent and autonomous body. However, there has been the imposition on restriction to the independent and effective functioning of the NHRC despite Supreme Court's decision of 6th March 2013 which declared various provision of the act null and void. There has been lack of progress in bringing the Act in-line with the Paris Principles. In addition to this, there has been inadequate implementation of the recommendations issued by NHRC despite the fact that it's binding under domestic law.

During the second Universal Periodic Review (UPR), Nepal committed¹⁸ to ensure the effective functioning of the NHRC in accordance with the Paris Principles, in particular by providing the Commission with adequate levels of funding and guarantee the independence and financial autonomy of the commission. However, there has been negligible action on the commission's recommendations for prosecution of causes related to crimes under international law and human rights violations¹⁹. Lack of effective functioning of NHRC has been enunciated in International Covenant on Economic, Social and Cultural Rights (ICESCR) report as well.

Additionally, "political appointment" of Chairperson of NHRC²⁰ and its members has also added hurdles in making NHRC an independent body ensuring effective functioning.

In April 2019, the government proposed amendments to the National Human Rights Commission Act, 2012, with measures that would undermine the independence and autonomy of the NHRC and limit its jurisdiction²¹. Proposals included provisions which would allow the Attorney General's discretion to bypass the Commission's recommendations for prosecutions in cases concerned with human rights violations, and limit the presence of the NHRC to the capital²².

18. UN Human Rights Council, Report of the Working Group on the Universal Periodic Review – Nepal UN Doc. A/HRC/31/9, 23 December 2015, para. 112.

19. National Human Rights Commission of Nepal, *Annual Report Synopsis 2018/19*, January 2020, https://www.nhrcnepal.org/nhrc_new/doc/newsletter/Annual_Report_2076_English_min.pdf, pp. 4-7.

20. Constitution of Nepal, Art. 248(2)

21. Amnesty International, *Human Rights in Asia Pacific, Review of 2019, 29 January 2019*, <https://www.amnesty.org/download/Documents/ASA0113542020ENGLISH.PDF>, pp. 43-45

22. National Human Rights Commission of Nepal, *Annual Report Synopsis 2018/19*, January 2020, https://www.nhrcnepal.org/nhrc_new/doc/newsletter/Annual_Report_2076_English_min.pdf, pp. 4-7.

Since the establishment of NHRC in 2000, it has registered 12,825 complaints, reached conclusions in 6,617 cases, and made 1,195 recommendations to the government. The commission's recommendations have been fully implemented only in 13 percent of the cases, partially implemented in 37 percent of the cases, and not implemented at all in almost 50 percent of the cases. The government has often implemented the recommendation for pecuniary compensation, but very rarely in relation to investigation and prosecuting abuses.

4. Gender Equality

(Paragraph 8 of the concluding observation covering article 2,3 and 26)

Nepal's Constitution guarantees that no citizens shall be discriminated on the ground of race, sex and economic condition and similar other grounds. Article 38 safeguards a wide range of rights of women. However, gender inequality prevails, and women are discriminated in both public and political fronts. Women from *Dalit*, minority and *Muslim* community and women with disabilities continue to face gender and identity-based discrimination which is deeply rooted as the structural concern.

Despite legal safeguards, discrimination and violence against women in families and communities continue. The patriarchal social structure has made it hard to deal with the issues of domestic violence because victims generally do not file complaints; instead seek social settlement. The interim protection measure envisioned by the Domestic Violence (Offence and Punishment) Act, 2009 has not been effective due to lack of physical, resources shortage along with lack of willingness of the respective stakeholders.

Likewise, even though, the Constitution has prohibited discrimination on any ground and has amended gender discriminatory legal provisions. There is absence of definition of discrimination against women in line with the definition of discrimination.

The indirect forms of discrimination have not been addressed by the law. Equally, no viable steps have been taken so far to address intersectional and multiple forms of discrimination of women especially multiple discrimination faced by *Dalit* women, women with disabilities, displaced women, women from religious and sexual minorities, indigenous women and *Madhesi* women.

Discriminatory laws against women on the basis of sex are still in existence including the discriminatory words in various legislations. There is no clear provision of conducting gender auditing during law enactment process in order to ensure equal and non-discriminatory laws. Gender Equality has only been considered equality among male and female and not for the Lesbian, Gay, Bisexual, Transgender and Intersex' (LGBTI) group. Legal Aid is only provided to economically vulnerable people whose income is less than NRs. 40,000 annually and not to the socially vulnerable people. There is a lack of Universal design and reasonable accommodation structure and gender friendly structure to women with disability resulting in being dependent upon others. On the similar note, Nepal being a state party to the widely ratified convention has ensured that all instances of *de-jure* discriminations have been eliminated in most of the areas. However, the same cannot be said about elimination of *de-facto* discrimination.

Nepal has a Gender equality Index (GII) value of 0.480, ranking it 118 out of 160 countries in the 2017 which also resulted due to inadequate special provisions to address the needs of women. The government has failed to enact law to implement the special opportunity provision under fundamental rights of women as per Article 47 of the Constitution. The Constitution has further limited the special provision by adding the condition of 'lagging behind socially and culturally' which indicates that the positive discrimination may not extend to all women but only those who are proven to fulfil the condition.

Women from marginalized group such as Dalit, Madhesi, and indigenous communities, religious minorities, gender and sexual minorities (LGBTI), women from geographically disadvantaged locations, women with disabilities and displaced women have lesser representations in all sectors. Intersection and vulnerability within the marginalized women have not been taken into consideration in special measures e.g. lack of reservation and quota for LGBTI. Sexual Minority group were deprived from opportunities as they were not categorized under the Minority group in the definition released by Ministry of Home Affairs.

The electoral quota of Nepal has ensured 33% women's representation in the federal and provincial parliaments and 40% in local governments. However, women were given seats by political parties mostly under Proportional

Representation not with the First past-the post category. Out of 753 local bodies, only 18 are headed by women (Chairperson/Mayor); only 16 female judges (4%) out of 400 judges are serving in judicial service; only 23.54% are in civil service sector. Existing legal loopholes has allowed party leaders have upper-hand in nominating male candidates in senior executive positions despite reserved quotas for women, reflecting patriarchal mind-set. All chief ministers in seven provinces are male; there are only 4 women ministers out of 25 members of Federal Cabinet. There is no woman Secretary in the federal government or women Chief Secretary in the provincial governments.

Likewise, there is inadequate data and non-identification of the areas to reflect women participation in International Forums and the level of effort initiated to promote women's participation. Similarly, there is absence of information among women on available opportunities and mechanisms for these positions that they are entitled to. Despite the constitutional provision, the principle of inclusion is not followed during the appointment of ambassadors.

Women are still not considered as an independent coparcener to the ancestral property in practice. Women with disabilities are not considered eligible to have insurance policy, to open bank accounts, and are compelled to be accompanied by a guardian to hold legal ownership of any properties. The eligibility criteria for right to vote and right to get elected for women with disabilities, especially challenging psychological/psychosocial conditions are put together without any specific categorization. Women are forced to be made the least capacitated in responding to disasters, and its aftermath. Women are not recognized as an active change agent, and therefore, their role in disaster management and reconstruction is found to be very limited. Women headed household, women with disabilities, pregnant women, lactating mother LGBTI had the least access to relief materials, as well as to relevant disaster related information.

The Constitution provides that no person shall be exploited on the basis of religion, custom, tradition, culture, practices or any other bases²³ as a fundamental right. Similar provision is also enshrined in the Directive Principles²⁴ and the State Policy²⁵ of the Constitution. This right is extended whereby any physical, mental, sexual or psychological or any other kind of violence against women, or any kind of oppression based on religious, social and cultural tradition, and other practices is forbidden by the Constitution.²⁶ The punishment for the perpetrator and the compensation to the victim is also ensured by the same article.

Yet, Gender wage gap still persists. Central Bureau of Statistics report has revealed that, on an average; women earn 30% (approx.) less than their male co-workers despite the level of education amongst both being same.²⁷ Also, Women representation in executive and judiciary is minimal and those in the position aren't really capable of representing entire women of the Nation. Nepal has blatantly failed to adapt Capability building approach for the empowerment of women.

Wiping out of the social ill practices for the protection of girls and women had been ensured long time back through Local Self Governance Act, 1999.²⁸ According to the Act, the District Development Committee (DDC) was provided with the duty to carry acts to wipe out the social ill practices and protect women and girls.²⁹ These provisions were later realized in various Acts of the country.

In Nepal, women, generally elderly women or widows of lower social status have been branded as witches and have been victims of unabated violence.³⁰ Women, particularly so called 'low castes' are the hardest-

23. Constitution of Nepal, Art. 29 (2).

24. Ibid. Art. 50 (2)

25. Ibid. Art. 51 (c) (5)

26. Ibid. Art. 38 (3)

27. The Himalayan Times, 'CBS report brings to fore huge gender pay gap', 20 June 2019, available at: <https://thehimalayantimes.com/nepal/central-bureau-of-statistics-report-brings-to-fore-huge-gender-pay-gap/>

28. Local Self-Governance Act, 1999, Sec. 28 (k)

29. Ibid. Sec. 189 (f)

30. Economic and Social Commission for Asia and the Pacific, *Gender and Development Discussion Paper Series No. 21: Harmful Traditional Practices in Three Countries of South Asia: culture, human rights and violence against women*, UN Economic and Social Commission for Asia and Pacific, p. 38.

hit sufferers as they are considered to be morally weak and needed to be controlled by men.³¹ Especially widows and women from marginalized communities are subjected to discrimination and physical, sexual and psychological abuse in the name of witchcraft.³² Generally, public health hazards are blamed as the doings by witches.³³ To combat the crime of witchcraft in the country, the parliament enacted an Act ‘Witchcraft Act (Offense and Punishment) 2072 (2015)’. The Act enumerates a list of acts falling under witchcraft³⁴ and provides for the treatment of the victim. Police officials are obliged to ensure that doctors prepare a treatment report of the victims.³⁵ The officials also have a duty to make an arrangement for the psychological counselling from an expert, but this support is only supposed to be provided immediately in the case of necessity.³⁶ An assessment of which of the situation to be considered as ‘an immediate necessary’ situation is still nowhere mentioned.

A relief package to the victim is provided in the forms of an interim protective order³⁷, compensation³⁸ and money for treatment³⁹ in the Act. The victim is provided with food and accommodation in the shelter he/she has been living in along with the protection from beating and to have gentle behaviour. The assessment of the compensation is carried out in the nature of the crime, quantity, the pain inflicted on the victim and the economic status of the perpetrator. In case of inability of the perpetrator to pay the victim, the court will bear the cost of the compensation. Furthermore, the perpetrator should pay all the cost of the treatment of the victim and the person accompanying the victim in the hospital. The money for such cause can be drawn from the ‘Gender Violence Prevention Fund’ in case the court finds it necessary on the basis of economic status of the perpetrator. The victim in case requires security and separate treatment, such should be arranged by the police station.⁴⁰ Since the law itself is new and there is no regulation to implement these provisions, the impact is yet to be witnessed.

Traditional harmful practices like *chhaupadi*⁴¹ perpetuate the inferior status of women.⁴² Despite their harmful nature and their violation of international human rights laws, such practices persist because they are not questioned.⁴³ Following the Supreme Court’s order⁴⁴, a directive has been issued to eradicate *chhaupadi*. The directive aims at eradicating ill tradition and establishing equity based society.⁴⁵ The GoN aims at eradicating *chhaupadi* in two prongs: with immediate program and long-term programs.⁴⁶ The long-term program includes adhering to the ideas to create awareness against traditional belief, understanding and practice towards *chhaupadi*, providing information about health service and nutrition to the women and girls who are directly affected by *chhaupadi* and respecting the person, family and community ending *chhaupadi* tradition. The long-term program includes conducting programs for inclusive participation of women by strengthening her economically, socially and politically and establishing equitable society by guaranteeing women human rights through legal mechanisms. It will be meaningless if monitoring mechanisms and follow up programs go inactive or be discontinued.

31. David N. Gellner, ‘Priests, Healers, Mediums and Witches: The Context of Possession in the Kathmandu Valley’, Nepal. Man, New Series Vol. 29, No.1 Mar. 1994, p. 36.

32. Ibid. p1

33. The Witchcraft and Human Rights Information Centre, PPR Nepal & Bar Human Rights Committee England and Wales, *Women Witchcraft Accusations and Persecution in Nepal*, 2014 Country Report

34. *Witchcraft Act (On Offense and Punishment)*, Sec. 3

35. Ibid. Sec. 5 (2)

36. Ibid. Sec. 5 (3)

37. Ibid. Sec. 10

38. Ibid. Sec. 12

39. Ibid. Sec. 13

40. Ibid. Sec. 14

41. Chhaupadi is a practice where a Female are forced to stay in the shed for thirteen days during their first and second menstrual cycle, seven days in their third cycle and four days of every other menstrual cycle. The practice of *Chhaupadi* is also followed by woman during child birth and for up to eleven days after the delivery.

42. Human Rights Matrix, ‘Harmful Traditional Practices’, available at <http://www.policyproject.com/matrix/harmfultradpractices.cfm>, accessed on 11 April 2016.

43. UNHCHR, Fact Sheet No.23, *Harmful Traditional Practices Affecting the Health of Women and Children*, available at <http://www.unhchr.ch/html/menu6/2/fs23.htm>, accessed on 16 April 2016.

44. *Dalits NGO Federation v HMG*, Writ No. 3303/061, 2 May 2005

45. Directives to Eradicate *Chhaupadi*, 2064, No. 2.

46. Ibid. No. 3

Despite the positive steps taken by Nepal to promote gender equality, there is extremely low representation of women, particularly *Dalit* and indigenous women, in high-level decision-making positions. There is lack of meaningful representation which doesn't reach to operation level. The persistence of patriarchal attitudes and deep-rooted stereotypes has perpetrated discrimination against women in all spheres of life. Despite the abolishment of harmful practices such as *kamlari*, *chaupadi*, *Deuki*, *jhuma*, it's still in practice with inadequate monitoring and supervision from the state.

5. Caste-based Discrimination

(Paragraph 9 of the concluding observation covering Art 2 and 26)

Despite the adoption of the Caste-based Discrimination and Untouchability (Offence and Punishment) Act in 2011, there is still the lack of its effective implementation resulting as the persistence of *de facto* discrimination against the *Dalit* community. In addition to this, people have echoed that National *Dalit* Commission lacks the sufficient resources along with the non-implementation of its recommendations. A petition was filed in Supreme Court of Nepal⁴⁷ whereby court ordered the government to promptly formulate the rules and ensure effective implementation of the Act against untouchability. In response to the Supreme Court's order, the Government recently formulated and adopted a regulation to receive complaints. Yet, it falls short in providing protection for victims and witnesses, full implementation of the court decisions and promotion of laws dealing with Caste Based Discrimination and untouchability practice.

Discrimination towards *Dalit* still exists but in different forms. For instance, the camouflaged equality is practiced in public sphere and functions however, in the day to day life, untouchability is profoundly practiced. Practices like purifying through pure water after touching *Dalit*, avoiding eating with *Dalit* are still practiced in many parts of the country. Facing all the odds and challenges while lodging the complaint against the case of discrimination against *Dalit*, police officers have been found reluctant to lodge it and often initiated for the mediation. Approximately 42% of *Dalit* fall below the poverty line in Nepal, which is 17% point higher than that of the national average (25.2%).⁴⁸ The implementation of law found to be very weak as the FIRs (First Information Reports) are not registered easily and huge efforts have to be made in the police stations in the cases of caste discrimination. Such incidence is dealt in an improper gravity.

Nepal being a multi-ethnic, multi-lingual, multi-religious, multi-cultural society with aspirations of people living in diverse geographical regions has prevalence of latent caste-based conflicts. The underlying caste-based hierarchy has also been a cause of many violent outbursts impacting lives and livelihoods. Political instability, weak public security, history of violent conflict has heavily strained the social fabric and resulted in lack of trust in civil institutions. To address this dilemma, Nepal has taken multiple approaches through domestic, regional and international normative frameworks. Nepal is state party to a large number of treaties and has subsequently introduced number of legislations to eliminate caste-based discrimination. However, their implementation status is still not satisfactory. It is believed that the primary reason for such a situation is largely due to non-allocation of needed funding, diversion of such funding into fulfilment of different needs, ignorance of general public regarding exiting mechanisms, and provisions that they are entitled to and finally the inadequate capacity of State's apparatus. A more serious inhibition to such discrimination comes from social and political resistance by dominant groups across multiple state institutions, such as political parties, the bureaucracy, the courts, public officials and law enforcement agencies. As public service delivery occurs primarily at the local level, the attitudes and behaviours of local actors and institutions is central to effectively address the problems with due diligence.

While looking at the constitutional provisions, the Constitution of Nepal-2015 contains provisions for institutional mechanisms. Inclusion is also ensured through other provisions such as Article 283 which states that appointment to the constitutional bodies and agencies shall be made based on the principles of inclusion. Article 269 makes it mandatory for all the political parties to abide by the policy of inclusion. The Constitution promotes proportional representation for the appointment in GoN services.

47. Shyam Bishwokarma for JuRI-Nepal v. Government of Nepal, OPMC, and decision dated 2073/3/26 (10 July 2016).

48. Nepal Living Standard Survey 2010.

There has been constitutional safeguard in ensuring inclusivity as fundamental rights and directive principles. Moreover, the scrutiny of other Nepalese statutes reveals legal safeguards on special provisions for the rights of *Dalit* in equality and inclusion agenda. With various provisions intact, Nepal still fails to bring application of those provisions.

In addition to these legislations, the GoN has set up multiple structures that deliver inclusion related services. While *Dalit* are considered equal before the laws and untouchability as punishable offence; in the cases of violation, the parties were subjected to go for forced mediation. On the economic sector, *Dalit* and women earned less in both organized and unorganized sectors. In addition to these, *Dalit* had minimal representation in other public and private positions. On the whole, the practice of meaningful public and political participation of *Dalit* was found to be cursory and based on welfare approach rather than rights-based approach.

6. Extrajudicial Killings, Torture and Ill-Treatment

(Paragraph 10 of the concluding observation covering Arts. 2, 6, 7, 9, 10 And 14).

(i) Extrajudicial Killings

It has been 14 years since the armed conflict between the then Maoist insurgents and government forces ended in Nepal. During the decade, long armed conflict from 1996-2006, tens of thousands became victims of enforced disappearances, torture, rape, and unlawful killings and are still waiting for truth and justice.

There have been hardly any successful prosecutions since the end of the conflict for gross violations of human rights. There has been the ordered of investigations by the competent authority, but the security forces, Maoists, and others have mostly failed to comply with directives. Nor have the TJ mechanisms, which were purportedly established in 2015 to expedite the legal system to deliver justice, been able to uphold that responsibility. This failure of justice has instigated anguish among victims and their families.

Resistance to address past abuses has deep-rooted impunity in the present and, combined with a failure to ensure security sector reform, has led to repeated lack of punishment in cases of serious human rights violations which still occur in Nepal. In a mounting number of alleged extrajudicial killings by the police, custodial deaths allegedly resulting from torture, and shootings of unarmed protesters in recent years, the authorities refused to take action despite strong evidence.

Subsequent to the peace agreement in 2006, several complaints were filed with the police against all parties to the conflict however there has been continuing refusal of the Nepali justice system to respond to allegations of human rights abuses. In addition to this, Human rights watch in its report mentions that “Nepali criminal justice system has not just failed to protect the rights of victims, but conceding under political pressure has cautiously blocked accountability”.

Over the last decade, families of conflict-era victims have repeatedly approached the authorities through the courts or the police. In some of these cases, the courts ordered the police to register FIRs and carry out investigations. In others, there were interventions by the NHRC.

But, with successive governments displaying what can only be described as a more robust commitment to impunity than to accountability, there has been hardly any progress toward prosecution. The conflict era cases have been diverted to Transitional Justice (TJ) mechanism that was set up in 2015. It should be noted that the existence of a TJ process does not absolve the government’s obligation to prosecute serious human rights violations.

Article 22 of the Constitution of Nepal 2015 has ensured the rights against torture as fundamental rights. Physical and mental torture along with cruel inhumane and degrading treatment are punishable. Likewise, National penal codes 2017 criminalize and penalize torture, inhumane and degrading treatment. Despite having legal and normative framework, extrajudicial killings, torture and ill treatment is prevalent in Nepal.

The unlawful killings in the *Terai* region, deaths in custody, and the official confirmation of the widespread use of torture and ill-treatment in places of police custody that happened during the year 2015...before and after the promulgation of the constitution has not been addressed yet. The state has not been able to investigate, prosecute, convict, and impose sanctions on those responsible, hence institutionalized impunity of law enforcement officials involved in such human rights violations. The state has also grossly ignored

the victim's right to effective remedy. In most of the cases, there has been limited pecuniary compensation for the irreparable loss and harm.

(ii) Torture and Ill-Treatment

Torture and other ill-treatment continue despite Nepal's commitments to end torture and related impunity. Torture and other ill-treatment are widespread in pre-trial detention to extract "confessions" and intimidate people, with an ancient and harsh criminal investigation system. The authorities did not carry out any independent and credible investigation into several deaths in custody suspected to have resulted from torture.

The new Criminal Code passed by Parliament in August 2017, contained provisions criminalizing torture and other ill-treatment, with a maximum of five years in prison. However, punishments are not proportionated to the gravity of a crime under international law. A separate anti-torture bill, pending in Parliament since 2014, fell short of defining and prohibiting torture with sanctions and remedies commensurate with the gravity of the crime, in accordance with international standards⁴⁹.

International law explicitly prohibits torture. Nepal is state party to at least four treaties that prohibit torture in loud and clear manner: The Geneva Conventions, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Rights of the Child (CRC). Particularly, under CAT, the Government of Nepal is obliged to promptly and impartially investigate credible allegations of torture and ill-treatment, and to punish the perpetrators. The constitution of Nepal 2015, Torture Compensation Act 1996 prohibited torture. However, torture *per se* is not a criminal offence under Nepali domestic law, in the absence of law that gives effect to the criminalization of torture and other cruel, inhumane and degrading treatment.

The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has made several recommendations to Nepal on issues within his mandate. In March 2012, the Special Rapporteur stressed that several of his recommendations made in 2005 had not been implemented. In particular, he emphasized the need to include a definition of torture in the penal code, and ensure that no persons convicted of torture be given amnesty or benefit from impunity. He also stated that the National Human Rights Commission (NHRC) has not been able to carry out investigations of torture, and encouraged the Government to strengthen its capacity in this area.

The Constitution and criminal law prohibit torture; however, the police often use torture and beatings to punish suspects or to extract confessions. The Government has failed to conduct thorough and independent investigations of reports of police brutality and has refused to take significant disciplinary action against officers involved. Police often are unwilling to investigate and to discipline fellow officers, and persons are afraid to bring cases against police with fear of reprisals. The Constitution ensures compensation for victims of torture, and the Torture Compensation Act, provides compensation, passed by Parliament in 1996.

Nepal acceded to the UNCAT in 1991 thereby committing itself to criminalizing torture, preventing its occurrence and redressing victims. Until today, the country has failed to fulfill its obligation. Torture has been and still is committed on alarming scale in the country. Since 2000, almost 1000 complaints have been registered by the National Human Rights Commission of Nepal. Given the procedural hurdles to the file, a case odd is the real figure is much higher. Now, finally and anti-torture draft bill is being discussed in the Legislature –parliament since November 2014.

While the Bill is definitely a positive step in the progressing direction, its standard falls well short of those recommended by UN committee against torture. The Torture and Cruel, Inhumane or Degrading Treatment (Control) Bill 2014 has been welcome proposal, necessary to bring Nepal's laws in line with its international legal obligations. However, the Bill as presently drafted fails to comply with Nepal's international human rights treaty obligations in a number of important respects. Categorically, the definition of torture and other ill treatment has been narrowly defined. There is limited responsibility of the charge of office. Likewise,

49. Amnesty International, *South Asia: End appalling use of torture and other ill-treatment*, 26 June 2018, <https://www.amnesty.org/download/Documents/ASA0486672018ENGLISH.pdf>

insufficient sanctions and penalties together with scope for *refoulement*. Similarly, there is inadequate reparation provision along with improper penalties for fake complaints.

(iii) Extra Judicial Executions

There were several allegations of extrajudicial executions, which the authorities failed to adequately investigate. Police officers reportedly shot dead Tirtha Raj Ghimire in the Bhojpur district, and Kumar Poudel in the Sarlahi district, in May and June 2019, respectively. Witnesses have testified that both men were killed during arrest. The report of the Inquiry Commission known as the *Lal* Commission, established to investigate the killings, has not been published yet.

In this regard, it can be said that government has failed to take practical steps to prevent the excessive use of force by law enforcement official by ensuring that they comply with the Code of Conduct for Law Enforcement Officials (General Assembly resolution 34/169) and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990).

7. Arbitrary Detention

(Paragraph 11 of the concluding observation covering Article covering 9, 10 and 14)

National Criminal Procedure Act, 2017⁵⁰ and Constitution of Nepal, 2015⁵¹ have ensured right against arbitrary detention, right to be promptly informed about the charges⁵² including duty of state to swiftly bring detainees before a judge respectively.⁵³ However, implementation of the same is still questionable since arresting the person without timely warrant⁵⁴ and depriving detainees from standing before a judge within 24 hours are rampantly practiced in Nepal.⁵⁵

Article 9(5) of ICCPR requires state to compensate the victims of unlawful arrest or detention. Nonetheless, Nepal being state party to the covenant has failed to ensure this right of an accused.

Despite the constitutional and legal guarantees to persons deprived of their liberty, such as the right to be informed of the grounds of their arrest and access to a court within 24 hours, the exercise of such rights in practice is in question. Likewise, there is lack of effective guarantees, in law and in practice, of the rights of detainees to notify their immediate family members about their detention and to have access to a lawyer from the moment of arrest. Similarly, there has also been the practice of maintaining false or inadequate custody records and keeping detainees in unofficial places of detention.

Nepal has failed to take effective measures to ensure that no one under its jurisdiction is subject to arbitrary arrest or detention and that detained persons enjoy all legal guarantees, in compliance with articles 9 and 14 of the covenant.

8. Conditions of Detention

(Paragraph 12 of the concluding observation covering Article 9 and 10)

Nepal has introduced the concept of open prisons and a community prison system, which has been welcomed by the treaty bodies however, overcrowding in prisons and jails, unsanitary conditions of detention, and inadequate provision of basic services and facilities, including medical care and adequate facilities for confidential meetings with lawyers fell short of the basic requirement.

Overcrowding of the Prison in Nepal and is manifested from the fact that currently (in 2018) 74 prisons in Nepal have been accommodating 20,925 inmates⁵⁶ against the collective capacity of holding 10,433 of them.⁵⁷ To address the situation, Department of Prison Management is building 17 new prisons.⁵⁸

50. Criminal Procedural Act, 2017, Sec. 13(1 and 2) and 14(1), National

51. Constitution of Nepal, Art. 20(3)

52. ICCPR, Art. 9(1, 2)

53. ICCPR, Art. 9(3)

54. Bureau of democracy, Human Rights and Labour, 'Country Reports on Human Rights Practices: Nepal', 2019.

55. Advocacy Forum Nepal & Redress, 'Making the law work to fight impunity in Nepal', 2011, p.36.

56. <https://prisonstudies.org/country/nepal>

57. Department of Prison Management, 'Report on Capacity of Prison', 2017. Available at: https://www.dopm.gov.np/downloadfile/Prisons%20capacity_1487741052.pdf

58. Available at: <https://thehimalayantimes.com/kathmandu/departement-of-prison-management-building-17-prisons-support-adb/>

The office of Attorney General and Human Right Organization in Nepal has reported that prisoners in 31 detention centres were found to be deprived from regular medical check-up. Contrary to Article 10 of the ICCPR, most of the prisons lacked separate facilities for women, children and persons with disabilities.⁵⁹ Due to lack of beds, many detainees sleeps on the floor and are constantly deprived from access to fresh water and proper living environment.⁶⁰

Besides, contrary to Article 10(2) (b) of the covenant, Authorities sometimes incarcerate pre-trial detainee juvenile with adults.⁶¹

Very recently, The Office of the Attorney General has painted a bleak picture of police cells, prisons, juvenile detention centers in 24 districts, emphasizing the urgent need to improve the living conditions to ensure “human dignity” of those living there. The findings revealed overcrowding in prisons and the lack of basic care of prisoners especially in the several prisons in the Terai districts, like Banke and Parsa. Inmates there were found living under “inhumane conditions” struggling for clean water and food inside crammed, dilapidated structures. Prisoners in these districts are struggling for decent living space and timely health care.

Despite the repeated recommendation sent by The Office of the Attorney General, NHRC and other Human Rights organizations in Nepal, to improve the prison condition, there has been hardly any progress made so far.

The government is currently building three large prisons with better physical infrastructure in Nuwakot, Banke and Dhangadi, but has not yet made efforts to deal with other issues like mistreatment and abuse in prisons.

SOME LANDMARK JUDGMENTS

i. Advocate Ajay Sankaret.al vs. Nepal Government⁶²

In this case, Supreme Court of Nepal laid down the principle that “Every Inmate holds the right to live in clean and healthy environment” and State is obliged to create favourable environment inside the prison so that the inmates could duly exercise their rights.

Facts and figure illustrate the insufficient attempt from government to ensure basic standard of living inside the prison.

ii. Charles Gurumukh Sovraj vs. Nepal Government⁶³

In this case, Supreme Court of Nepal laid down the principle that “State shall take the responsibility of inmate’s life and health notwithstanding the inmates are national of foreign state and shall not employ “Unavailability of resources” as a reason for failing to ensure basic human rights (such as right to live and adequate standard of health) of inmates inside the prison.”

Likewise, there is lack of measures to establish a system of regular and independent monitoring of places of detention and to reduce overcrowding and improve conditions of detention, in line with the Standard Minimum Rules for the Treatment of Prisoners.

Similarly, there is also lack of the application of alternative measures to pre-trial detention, such as bail and home arrest, and non-custodial sentences, such as suspended sentences, parole and community service. Equally there is also absence of confidential mechanism for receiving and processing complaints lodged by detainees.

59. FWLD, ‘Stakeholder report for the Universal Periodic Review of Nepal’, p.3.

60. Ibid.

61. Ibid.

62. Advocate Ajay Sankaret.al vs. Nepal Government⁶²NKP2074BS (Nepali Calendar) (2018), Decision Number: 9845, 2018.

63. Charles Gurumukh Sovraj vs. Nepal Government.NKP2073BS (2016), Decision Number: 9722, 2017.

9. Violence Against Women

(Paragraph 13 of the concluding observation covering article 2,3 and 7)

Nepal appointed women as President, Chief Justice and Speaker of House of Representatives in 2015-2016 ensuring active political participation of women⁶⁴. However, violence against women is yet extensively dominant and patriarchal social norms, persistent discriminatory harmful practices, normalization of violence and the social stigma attached to reporting violence is still prevalent in Nepali society.⁶⁵ On a brighter note, recent substantial legal reform in Nepal includes; adoption of new constitution 2015, act preventing sexual harassment at workplace 2015, National Penal Code 2017 including Criminal Procedure Code and Criminal offences (Sentencing and Execution) Act, National Civil Code 2017.

Constitution of Nepal, 2015 guarantees rights of Woman as a fundamental right and Article 38(3) specifically prohibits infliction of physical, mental, sexual, psychological or other forms of violence or exploitation on the ground of religion or social or cultural tradition or practice or on any other grounds against women.⁶⁶ It has further added “Right to participate in all bodies of the States on the basis of the principle of proportional inclusion”⁶⁷ which was absent in “Interim constitution of Nepal 2007”.

National Penal Code 2017 has extended the time limitation from 35 days to 1 year in sexual offences and has completely eliminated the time limitation in the cases of incest rape.⁶⁸ However, what still remains problematic is the fact that this extension is too short and this couldn’t cover the sexual offences that were committed during the time of conflict.⁶⁹ Nepal isn’t party to Rome Statute of International Criminal Court and hence doesn’t codify war crime and crime against humanity and because of this very reason; cases of rape during the conflict can only be prosecuted as ordinary criminal offence.⁷⁰ This is the inconsistency between the Nepal’s international legal obligation and its effective corroboration in domestic law.

For the first time, National Penal Code 2017 has criminalized marital rape⁷¹ however, implementation of the same is still challenging since societal pressure latent upon women resists them from reporting the cases of marital rape.⁷²

Nepal has further criminalized harmful practices such as Witchcraft accusation under “Anti witchcraft act 2015”, *Chaupadi*⁷³ under Penal code 2017, child marriage under “National strategy to end child marriage, 2016” as well as National Penal Code 2017.⁷⁴ However, it is noted that, 37 percent of girls in Nepal are married by the age of 18, with 10 percent married before the age of 15 years. Many young girls are forced into marriage owing to poverty, lack of access to education, child labour, social pressure and harmful practices.⁷⁵

Penal Code of Nepal has also criminalized Acid Attack⁷⁶ and adopted Sexual Harassment at Workplace Prevention Act in 2015 prohibiting explicit and implicit sexual harassment at workplace however, regulation for the proper implementation of the same it yet to be formulated.

64. HRC, ‘ Report of the Special Rapporteur on violence against women, its causes and consequences’, 2019, para 7

65. Ibid. para 8.

66. Constitution of Nepal, Art. 38(3)

67. Ibid. Art. 38(4)

68. National Penal Code, 2017, Sec. 229

69. HRC, ‘Report of the Special Rapporteur on violence against women, its causes and consequences’, 2019, para 35.

70. Ibid.

71. National Penal Code, 2017, Sec. 219(4)

72. HRC, Report of the Special Rapporteur on violence against women, its causes and consequences’, 2019, para 36.

73. National Penal Code, 2017, Sec. 168(3)

74. National Penal Code, 2017, Sec. 173

75. Human Rights Watch, “*Our Time to Sing and Play*”: *Child Marriage in Nepal* (2016), available at www.hrw.org/sites/default/files/report_pdf/nepal0816_web.pdf.

76. Section 194, National Penal Code, 2017.

Despite the adoption of various laws and policies aimed at eliminating violence against women, the weak implementation, lack of a comprehensive system to collect data on cases of different types of violence against women, and continuing reports of widespread sexual and domestic violence against women and girls are the outstanding concern. These legal and policy provisions are not backed by effective enforcement and compliance. Likewise, the on-going failure by the police to register complaints, investigate and prosecute rape cases, and the trend of such cases being diverted to settlement through informal justice mechanisms has raised serious question on the trust in states apparatus.

Even though Nepal is party to seven out of nine principal International treaties, it is yet to ratify Protocol to prevent, Suppress and Punish Trafficking in Person, Especially Women and Children.⁷⁷

Similarly, there is lack of accountability of law enforcement agencies which can be illustrated by the rape together with murder case of a young student Ms. Nirmala Pant from Kanchanpur in the middle of 2018 which remains unresolved. Most Nepali women and girls cannot even confide in their spouses or close relatives' due to various stigma attached with Violence Against Women. Hence, the incidences of VAW remain grossly underreported.

Low conviction rate remains as one of the main challenges in combating violence against women. Lack of implementation of court decision. Strong patriarchy-based norms dictated by structural cum ideological substructures; patriarchal mind-set and behaviours; Dysfunctionality of Gender Based Violence funds have halted the relief fund package to the victims and survivors.

The complaint process is complex, which makes it difficult for the victims to receive compensations in practice even though there is a provision of compensation written in law. The current legal regime does not ensure compensation even if technical faults are occurred such as if the defendant is not arrested, or his or her address is erroneous, or he or she is acquitted. It is against the spirit of the right to compensation to deprive victims from compensation in such technicalities. Lack of adequate shelter and rehabilitation homes for the victims of violence against women adds insults to the injury, makes them helpless and eventually are forced to live with their perpetrator.

Likewise, there is lack of free legal aid to the survivors of violence. The Supreme Court of Nepal has issued the Guidelines for Prevention of Abuse and Harassment in the Entertainment sector and also ordered to enact law to regulate the sector however, no separate law has been enacted by the State till date.

10. Domestic Violence

Article 38 of the Constitution and Domestic Violence Act (2009) make the act of domestic violence punishable by law, and the victim shall have the right to compensation. The Constitution enshrines some fundamental rights to women including that there shall not be any physical, mental, sexual or psychological or any other kind of violence against women, or any kind of oppression based on religious, social and cultural tradition, and other practices.⁷⁸

A person who commits the crime of domestic violence is penalized with different set of punishment dependings on who commits the crime⁷⁹.The Domestic Violence (Crime and Punishment) Act, 2009 provides that no one shall commit aid or incite domestic violence,⁸⁰ in order to improve victim's access to justice it has provision on the procedure of filing a complaint including different complaint receiving

77. HRC, 'Report of the Special Rapporteur on violence against women, its causes and consequences', 2019, para 11.

78. Constitution of Nepal (n. 1) Art.38.

79. Domestic Violence (Offence and Punishment) Act, 2009). Section 13, Maximum of NPR twenty-five thousand rupees or six months of imprisonment or both. A person who attempts to commit the crime or abets the crime or incite others to commit the crime shall be liable to half of the punishment given to the perpetrator. A person who repeats domestic violence will be given double the punishment each time the crime is repeated. A person holding a public post commits the crime will receive additional ten percent of the punishment given. A person who disobeys the Court orders made in relation to interim protection order shall be punished with a fine of two thousand rupees up to fifteen thousand rupees or four months of imprisonment or both

80. Ibid. 3

mechanisms categorically speaking: the police, the national women's commission and any local governmental body.⁸¹

Article 9 of the Domestic Violence (Crime and Punishment) Act, 2009 provides that the total costs of treatment of the victim of the domestic violence, will be charged on the perpetrator. If the perpetrator is not able to pay for the treatment due to economic condition, the court can order to the Service Centre to provide treatment expenses to the victim.⁸²

The court can order the perpetrator to pay compensation to the victim depending on the nature of the act of domestic violence and the degree of pain suffered by the victim and also taking into account the economic and social status of the perpetrator and victim.

The Domestic Violence (Crime and Punishment) Act, 2009 requires government/other organizations to establish a Service Centre with the purpose of immediate protection of the victim to provide separate accommodation during the course of treatment. The centre is also expected to provide psychological counseling services to the victims of domestic violence. Also, the centre is required to provide legal aid and economic aid to the victims.

The Article 7 of the Domestic Violence (Crime and Punishment) Act, 2009 provides for the proceedings to be held in-camera if requested by the Victim, and only those among the claimant, defendant, and their legal practitioners would be allowed to enter the court room as permitted by the court.⁸³

The victim of crime shall have the right to be informed about the investigation and proceedings of the case regarding his/her victimization. The victim of the crime shall have the right to social rehabilitation and justice with compensation as provided for by law.⁸⁴

Despite of having standalone act dealing with domestic violence, it lacks the legal measures providing for specialized courts and mobile courts which has been ensured by international instruments. Likewise, there is no legal provision that provides for rehabilitation to victim, or support mechanism to the families where incest might have been committed.

Similarly, there is no provision for a rehabilitation program for victim of crime in the Domestic Violence (Crime and Punishment) Act, 2009 which has been ensured by Article 21(2) of the Constitution of Nepal which guarantees for the social rehabilitation and justice with compensation as provided by law. Women and children cells are operating in the police stations where women police officers hear the complaints. In most of the cases that required investigation and appropriate punishment, mediation is practiced in domestic violence cases which negate Nepal's international commitments.

On the similar note, the scope for mediation under Domestic Violence Act negates the provision ensured by the international covenant⁸⁵ as it recommends that alternative dispute resolution should not be allowed in the case of domestic violence.

There is no provision to promote research, collect and compile statistics and dissemination of finding of the research and studies. Similarly, there is also absence of legal provision to ensure that victim is informed of the in-camera hearing. The provision about in-camera hearing in the Domestic Violence (Crime and Punishment) Act, 2009 provides that the victim may ask for in-camera procedure, however, the legal provision does not ensure that the victim is informed about this option.

SOME LANDMARK JUDGMENTS

i. Nepal Government vs. Radhika Shrestha⁸⁶

In this case, Supreme Court of Nepal has laid down the principle that "Violence perpetrated by victim woman and provocation-based homicide holds considerable difference. In many cases of Battered Women

81. Ibid. 4

82. Domestic Violence (Offence and Punishment) Act, 2009

83. Ibid. 7(1), (2)

84. Ibid. 21

85. CEDAW General Recommendation No. 33 on women's access to justice, (2015)

86. Nepal Government vs. Radhika Shrestha, NKP 2071, (2014), Decision Number: 9242

Syndrome, the women are constantly inflicted to domestic violence, mistreatment, trauma, physical and mental violence and death threats for years from the husband hence, the crime perpetrated by women with Battered Women Syndrome (BWS) should be subjected to less punishment than other cases.”

ii. Nepal Government vs. LaxmiMahatoet.al⁸⁷

In this case, Supreme Court of Nepal laid down the principle that “Accusing, mistreating or boycotting someone by considering them a “witch”, assaulting and socially defaming them or killing them in the charge of same is a heinous crime. Least of all, even accusing someone as being a “Witch” in itself is violation of “Right to live with dignity”, “Freedom of movement and profession” of that person. Hence, this is the grave breach of Human Right.”

iii. Nepal Government vs. Shankar Biswokarma⁸⁸

In this case, Supreme Court elucidated the concept of “Consent” in sexual intercourse and states that “Consent is irrelevant in rape if the victim is less than 16 years old, Sexual intercourse with girls below 16 years is statutory rape”

iv. Ramhari Lamichaney vs. Nepal Government⁸⁹

In this case, Supreme Court strongly clarified that the act of rape cannot be denied only on the ground that the FIR was not lodged immediately.

Even though the state has prohibited violence against women under its domestic law, it has failed to ensure sanctions commensurate with the gravity of the offence, in accordance with international standards.

It also lacks a comprehensive national data collection system on cases of different types of violence against women to enable the government to adopt targeted strategies and evaluate their effectiveness.

Nepal has failed to further ensure that cases of violence against women are thoroughly investigated, perpetrators are prosecuted and, if convicted, punished with appropriate sanctions, and that victims have access to effective remedies and means of protection.

11. Refugees

(Paragraph 14 of the concluding observation covering articles 2,7,9,13,19,26 and 27)

Nepal is not a party to the Refugee Convention & its Additional Protocol. There is absence of laws/comprehensive policy on refugees/asylum-seekers. Nepal treats asylum seekers as illegal immigrants. Section 9 of Immigration Act, 1992 and Immigration Rule of 1994 empowers immigration officers to investigate infractions of immigration regulations & to detain, fine, & deport person charged with violation. New Immigration Bill-2020 entirely restricts Refugee Status Determination procedure and violates the principle of *non-refoulement* (This bill on immigration tabled in the Nepal’s parliament is also restrictive to recognize asylum-seekers and refugees.)

Refugees are residing in Nepal without their formal identity. The Tibetan and Bhutanese refugees are residing in Nepal since long time. The refugee population in Nepal are facing challenges in fulfilment of their fundamental requirement.

On the issues of Bhutanese refugees, third country resettlement commenced in 2007 and over 1, 15,000 already resettled in 8 core countries which is regarded as the most successful case of this millennium. Residue population around 6500 plus are facing uncertain future in the absence of any tangible durable solution

On the issues of Tibetan refugees, Tibetans arrived prior to ‘1989 are issued refugee RCs- technically entitle them to “refugee status”.

87. Nepal Government vs. LaxmiMahatoet.al, NKP 2073, (2016), Decision Number: 9861.

88. Nepal Government vs, Sankar Biswokarma, NKP 2069, (2012), p. 940.

89. Ramhari Lamichaney vs. Nepal Government, NKP 2068 (2011), p. 1657.

On the issues of Mandate refugees under UNHCR protection, around 700 urban refugees from more than 10 countries are living in in Nepal. But the government of Nepal has not recognized them as refugee. There have been two major Supreme Court orders in favour of urban refugees. UNHCR carries out Refugee Status Determination under its Mandate for urban asylum-seekers. UNHCR provides legal advice/protection/assistance to individuals found to be of concern from various countries approaching its office for seeking asylum. The issue has led to the government accusing UNHCR of giving refugee status to people without its consent. Government imposes immigration penalty even for recognized asylum-seekers (exist permit restriction)—with few exceptions of penalty waiver. Nepal does not have any specific legislation and policy on dealing with refugees and asylum and these issues are being dealt under the immigration laws. As the preamble of Nepal Immigration Act 1992 states that the main objectives of this legislation are to regulate and control the entry of the foreigners into Nepal, their stay and their departure and to manage the arrival and departure of the citizens of Nepal'.

Section 14 of this Act provides power to Nepal Government for exempting the foreigner of any class, tribe or caste or nationality from the application of all or any of the provisions of this Act or the Rules framed hereunder, or for the application of only the prescribed terms to such foreigner. The section further provides that if the Government of Nepal considers so appropriate that any foreigner's entry into, stay in or departure from Nepal may be detrimental to the national interest, may prohibit the entry, stay, or departure of such foreigner.

There is no any rules, regulation, and guidelines on how to use this section consequently government uses its discretion. It is clear that within the national legal framework there is no room for asylum what has done till date is a decision of government of Nepal on the humanitarian ground. Due to the lack of clear and specific legal framework Nepal government's treatment to the refugees and asylum seekers is always based on its discretion. For example; Tibetan and Bhutanese who entered into Nepal in certain times considered as refugees but others who came individually are considered as 'illegal immigrants'.

There is no any national system of Refugee Status Determination (RSD) in Nepal by the Nepal government but it is done by UNHCR as per the agreement between Nepal Government and its global mandate. Nepal is yet to enact a national law for protection and regulating refugee situation. The protection of refugees is based on the traditional hospitality and the deeply ingrained culture of tolerance in the host community. Nepal is operating refugee's response on *ad-hoc* basis thus there is no any legally binding instrument to guarantee the refugee protection. Thus, whenever there is any change in the governments or power equation, the refugee community undergoes a tremendous psychological pressure about their safety, security, human rights, and the possibility for safe and dignified return.

12. Corporal Punishment

(Paragraph 15 of the concluding observation covering articles 7 and 24)

Article 39 on child rights in the Constitution of Nepal 2015 has strict provisions banning all forms of abuse and violence against children, from family to community levels. It states that “no child shall be subjected to physical, mental or any other form of torture at home, school or other place and situation whatsoever”. The sixth amendment to the Education Rules 2002 in 2011 added a code of conduct for the teachers specifying that the teachers should not commit physical or mental torture on students. Most recently, in August 2018, the Bill to Amend and Codify Laws Relating to Children, which will supersede Children's Act of 1992, was registered in the parliament resulting in enactment of Children's Act 2018 which specifies that "physical or mental punishment or undignified behavior at home, school or any other place in the name of protection, education or discipline shall be regarded as ‘violence against children’. This Act fully replaces the Children Act 1992, which had previously defended the use of “scolding and minor beating” in its article 7. Corporal punishment is prohibited in alternative care settings under sections 7(5) and 66(2) (d) of the Act relating to Children 2018. Under section 67(1) of the Act, a person who works in public or private institutions and commits such an offence may “be dismissed as per the prevailing law and based on the severity and nature of the offence will be barred from engaging in any work which has a direct contact with children and not eligible to be recruited, appointed or elected in such private institutions for up to 10 years.”⁹⁰

90. Global Initiative to End All Corporal Punishment of Children, ‘Corporal Punishment of Children in Nepal’, 2018, p.2.

With this, Nepal has emerged as the first South Asian country to enact the law criminalizing corporal punishment. However, The Penal Code of Nepal has failed to prohibit corporal punishment explicitly.

Further, lack of awareness amongst the parents and teachers about the corporal punishment and the harm that can be inflicted upon child's brain is yet another cause of persistent practice of corporal punishment in Nepal.

Despite having legal, normative framework, the practice of corporal punishment remains a daily practice. Especially at home, where it traditionally continues to be practiced as a form of discipline by parents and guardians.

13. Fair Trial

(Paragraph 16 of the concluding observation covering article 14)

Right to Justice (incorporating fair trial procedurals) has been enshrined as a fundamental right under Constitution of Nepal, 2015.⁹¹ It has ensured basic rights such as Presumption of innocence, right against self-incrimination, legal aid, right to acquire information about the charges, right against torture, right to privacy, right to rehabilitation and compensation for the victim of crime⁹² and so on however, rights thereto aren't all in conformity with Article 14 of ICCPR.

Article 14(1) of ICCPR enshrines that "All person shall be equal before the courts and tribunals." However, Provision to Article 20(2) of the Constitution of Nepal restricts citizen of an "enemy state" to exercise "right to consult legal practitioner".⁹³ This defies the whole purpose of fair trial.

Similarly, Article 14(3) (a) and 14(3) (b) of the ICCPR which envisions "right to be promptly informed about the charge in Understandable Language" and "right to have adequate time for the preparation of defence" haven't yet been ensured by Nepali law explicitly.

Further, National Penal Code, 2017 has also ensured "right to fair trial" of a person.⁹⁴ Nepal also enacted Administration of Justice Act in 2016 with the aim of ensuring impartial, effective and accountable justice system to the people.⁹⁵

Effective implementation of these acts is still questionable since arbitrary arrest⁹⁶ and depriving detainees from standing before a judge within 24 hours are rampantly practiced in Nepal.⁹⁷ A research done by Advocacy Forum has revealed that Nepali courts routinely accept confession as evidence, providing incentives for the police to torture and coerce confession from suspects under a criminal charge.⁹⁸ Against the notion of Fair Trial, this practice has led to normalization of torture and other ill-treatment during the investigation process.⁹⁹

Additionally, Article 152 of the constitution of Nepal permits the formation of specialized courts which is allowed to hear even criminal offence (involving less than 1 year of imprisonment).¹⁰⁰ Contrary to Article 14 of ICCPR, this provision allows quasi-judicial authorities like CDO having the capacity of both, judiciary as well executive to hear such cases.

91. Constitution of Nepal, Art. 20

92. Constitution of Nepal, Art. 21

93. Constitution of Nepal, Art. 20(2) proviso

94. National Penal Code, 2017, Sec. 10

95. Administration of Justice Act, 2016, Preamble

96. Bureau of democracy, Human Rights and Labor, 'Country Reports on Human Rights Practices: Nepal', 2019.

97. Advocacy Forum Nepal & Redress, 'Making the law work to fight impunity in Nepal', 2011, p.36.

98. Advocacy Forum Nepal, 'Advocating against Torture in 2016: The Challenges of Achieving Justice', 2017, p.3.

99. Ibid.

100. Constitution of Nepal, Art. 152

SOME LANDMARK JUDGMENTS

i. Advocate AmbarBahadurRaut vs. Nepal Government¹⁰¹

In this case, Supreme Court of Nepal laid down the principle that “Independence, competence and Fairness are the backbone of judicial process. Easy accessibility to justice including fair and speedy hearing increases the faith of citizens in justice system. Every Institution and Authority shall be allowed to work independently in justice rendering process and to ensure effective judicial proceeding, Institutions and Authorities involved shall duly made aware about the existing laws and fair judicial procedures.”

ii. Advocate JyotiLamsalPaudel vs. Nepal Government¹⁰²

In this case, Supreme Court of Nepal laid down the principle that “the Investigating Authority shall not be Negligent, hold ill-intention or commit mistakes during any phase of Investigation. State shall take responsibility of such actions committed by Investigating Authority. “

iii. Pushkar Raj Pandeyet.al. vs. Sabina Pandey¹⁰³

In this case, Supreme Court of Nepal laid down the principle that “Proceeding that are too expensive, holds unknown procedures and puts victim in a position of not being able to present before the court or present his/her witness before the court cannot be considered as a fair trial and such judgment cannot be recognized by the court.”

14. Juvenile Justice

(Paragraph 17 of the concluding observation covering article 14)

Article 39 of the Constitution of Nepal 2015 guarantees the rights relating to children and 39(8) in specific envisions “juvenile friendly justice system” for the children.¹⁰⁴ Following this, Nepal enacted “The Act Relating to Children” in 2018, Chapter-4 of which incorporates the provision relating to “Juvenile Justice.”¹⁰⁵ Progressively, Section 30 of the act envisions the formation of “Juvenile Court”¹⁰⁶ for hearing the cases of juvenile delinquencies. Act further ensures the notion of “camera hearing” to uphold juvenile friendly justice system.¹⁰⁷

Section 36(2) of the act has failed to properly demarcate “rehabilitation centre and jail”. It enshrines that “if a juvenile between 10-14 years old is found guilty of a crime carrying jail term, then s/he can be imprisoned for up to six months depending upon the seriousness of the crime and or be sent to a rehabilitation centre for up to one year.”¹⁰⁸ This is not in compliance with the International Standard.¹⁰⁹ Further, the act also allows police authorities to keep juvenile under virtual custody.¹¹⁰ Additionally, due to the lack of adequate juvenile detention facilities, authorities sometimes incarcerated pre-trial detainee children with adults or allowed children to remain in jails with their imprisoned parents.¹¹¹ These yet again defy the purpose of “Juvenile friendly justice system.”

101. Advocate Ambar Bahadur Raut vs. Nepal Government, NKP 2068 (2012), Decision Number: 8642.

102. Advocate Jyoti Mamsal Paudel vs. Nepal Government, NKP 2067 (2011), Decision Number: 8507

103. Pushkar Raj Pandeyet.al. vs. Sabina Pandey, NKP 2067 (2011), Decision Number: 8572

104. Constitution of Nepal, Art. 39(8)

105. The Act Relating to Children, 2018, Chapter-4

106. Ibid. Sec. 30

107. Ibid. Sec. 35

108. Ibid. Sec. 36(2)

109. ICCPR, Art. 14(5)

110. The Act Relating to Children, 2018, Sec. 21, n(58)

111. <http://fwld.org/wp-content/uploads/2020/07/Torture-UPR.pdf>, p.3

On the other side, acts relating to Children has defined Children as “ persons who have not completed the age of 18 years”¹¹² complying with the International Standards. Prior to this, only the person below 16 are considered as Children in Nepal.

RECENT JUDGMENT

Nepal Government vs. Kumar Prasad.¹¹³

In this case, Supreme Court of Nepal laid down the principle that “Juvenile Justice System holds diverse principles than that of traditional Criminal Justice System hence, if the principles of juvenile justice system are evaluated and implemented in the line of criminal justice system that would deny the whole purpose of juvenile justice system. This shall also be taken into account while rendering punishment.”

15. Trafficking and Bonded Labour

(Paragraph 18 of the concluding observations covering articles

Despite having legal and normative framework, there is lack of effective implementation of the Human Trafficking and Transportation (Control) Act of 2007, and the persistence of trafficking for purposes of sexual exploitation, forced labour, bonded labour, domestic servitude and marriage, as well as trafficking of human for organs trade. The alleged involvement of State officials in trafficking-related crimes and absence of taking action in lieu of such crime has become the state practice. Also, Nepal has ratified Palermo Protocol.

The Constitution in Articles 18, 38, 29 guarantees the equality principle and prohibits any form of exploitation. Article 18 ensures equality of all citizens and equal protection of law. Likewise, Article 38 provides the equal right to lineage without any discrimination to women and ensures special opportunity to women on the basis of positive discrimination. Article 29 restricts exploitation on the basis of religion, custom, tradition, culture, practices or any other bases. The article is further aided by the provision that guarantees no subjection to human trafficking or bonded labour and ensures punishment for such. The article also disallows any subjection to forced labour. In case of human trafficking, bonded labour and forced labour, the Constitution also guarantees for the compensation to the victim by the offender. The provisions in the Directives of the State¹¹⁴ and Policies of the State¹¹⁵ too call for provision to end all forms of discrimination. The establishment of the Women Commission as a constitutional body additionally strengthens the attention to the issues of women.

However, the practical implications of this provision has complexities. There is no authentic and adequate data that reflects the investigations and prosecutions in cross borders of extra territorial effect. Secondly, the offenders caught in cross border are handed over to the police officers of the country where the offender are caught. For instance, offender caught by Nepal Police in India is handed over to the Indian Police. Hence, the investigation of the case, prosecution and punishing the offenders cannot be guaranteed. And at last, the victims in most of the cases are forced to choose compensation rather than initiating the case for legal remedy.

Section 4 of Human Trafficking and Transportation (Control), Act, 2007 states that if anyone commits acts for selling or purchasing a person for any purpose or use someone into prostitution, with or without any benefit, extract human organ except otherwise determined by law, shall be deemed of committing human

112. Act Relating to Children, 2018, Sec. 2(j)

113. Nepal Government vs. Kumar Prasad, NKP 2074 (2018), Decision Number: 10127

114. Constitution of Nepal, Art. 50 (2)

115. Ibid. Art. 51.

trafficking.¹¹⁶ The State Cases Act defines the crime of trafficking in women and girls as an offence against the state of Nepal.¹¹⁷

The new Act provides a number of legal safeguards, including the provision of rehabilitation and integration of victims of trafficking, protection of victims and witnesses, compensation and others. The scope of the Act is wide as it establishes extra-territorial jurisdiction, to reach offenses that are committed outside Nepal.¹¹⁸ Human trafficking is an offence under this act.¹¹⁹ Similarly, section 15 of the Act gives the provision of punishment. Trafficking of women for the sexual exploitation is punishable as per section 15 of the act.¹²⁰

There exist certain challenges in relation to law enforcement and judicial response. The effective functioning of the laws demand to increase the effective implementation of the Act; increase efforts to enforce the laws; develop the functional capacity and professional efficiency of prosecutors and judges; increase efforts to maintain the privacy of the special type of cases; increase budget allocation; increase the conceptual clarity about the differences between the crime of human trafficking and offences envisioned under the Foreign Employment Act 2007.

The massive earthquake of 2015 has greatly increased the vulnerability of trafficking especially of women and children. Evidences confirm that there has been the nexus of foreign labour migration and Trafficking in Person, and protection and promotion of the migrant workers should be the lexicon priority of the GoN¹²¹. Law enforcement status is still not satisfactory. Surveillance and monitoring in the formal and informal institutions have been ineffective. The GoN compliance on rescue, rehabilitation and reintegration of trafficked survivors appears to be grossly inadequate mainly because of low budget allocated. Recent judicial responses are encouraging but much effort is needed to reorient the whole judicial system as human rights friendly and victim centric. The GoN of Nepal has the responsibility to establish necessary rehabilitation centres for physical and mental treatment, social rehabilitation and family reconciliation of the victims¹²² and conduct regular monitoring.¹²³

Nepal enacted “Human Trafficking and Transportation (Control) Act in 2007AD. Apart from the specific law, Nepal has also promulgated Constitution of Nepal 2015¹²⁴ and National Penal Code 2017¹²⁵ prohibiting and criminalizing trafficking in human being and also ensuring proper compensation to the victim.

However, one of the major loopholes in Human Trafficking and Transportation (Control) Act of Nepal is that, it vests burden of proof of proving oneself innocent in the defence defying the whole principle of “Presumption of innocence”.¹²⁶

116. Human Trafficking and Transportation (Control) Act, Nepal, 2064(2007), Sec. 4.

117. State cases Act, Nepal, 2049(1992), Schedule 1

118. Human Trafficking and Transportation (Control) Act, 2064 (2007), Nepal, Sec. 1

119. Ibid. Sec. 3

120. Ibid. Sec. 15(1)(e).

For a person who is involved in transportation of human being for the purpose of buying, selling and engaging someone in prostitution:

10 years to 15 years imprisonment and a fine of Rs 50,000 to Rs 100,000 for taking a person out of the country.

15 years to 20 years imprisonment and a fine of Rs 100,000 to Rs 200,000 for taking a child out of the country.

10 years of prison and a fine of Rs 50,000 to Rs.100,000 for taking a person from one place to another place within the country. 10 years to 12 years imprisonment and a fine of Rs 100,000 for taking a child from one place to another place within the country.

121. The Rising Nepal, June, 19, 2015

122. Human Trafficking and Transportation (Control) Act, 2064 (2007) Sec. 13 (1).

123. Ibid. Sec. 13 (2)

124. Constitution of Nepal, Art. 29(3) and 29(4),

125. National Penal Code, 2017, Sec. 213

126. Human Trafficking and Transportation Control Act, 2007. Sec. 9,

These laws do oblige the state to punish the crimes of human trafficking however, implementation of proper “prevention mechanisms” such as adopting to “Capability building approach” by studying causes behind the increasing trend of human trafficking (poverty, weak economic condition, lack of awareness amongst citizens) is utterly lacking in Nepal.¹²⁷

In regard with traditional practices of bonded labour like *Haliya*, *Kamaiya* and *Kamalari*, Government of Nepal abolished *Haliya* and *Kamaiya* in 2058 BS (2001), GoN also abolished *Kamlari*.¹²⁸ Hence, evidently; bonded labour is not institutionalized in Nepal. Government even signed five point’s agreement with *Rastriya Haliya Mukti Samaj Mahasangh*¹²⁹

Nepal is a country of transit, source and destination for offence of trafficking in person, the decade-long internal armed conflict and the recent devastating earthquake of 2015 has contributed to uproot many more women, children, and youths from their place of origin and expose them to threats of trafficking¹³⁰ and the *modus operandi* of trafficking has been changing constantly. However, Nepali laws have failed to incorporate and institutionalize this aspect of Trafficking and come up with proactive measures to minimize threats during natural calamities along with human made disasters.

SOME LANDMARK JUDGMENT

i. Dambar B.K. et.al vs. Nepal Government¹³¹

In this case, Supreme Court of Nepal has laid down the principle that “Constitution of Nepal prohibits Slavery, Servitude and bonded labour. Such practices are against Human Rights and every institution of the State is obliged to end such practices. State shall constitutionally implement the agreement that has been concluded between Government of Nepal and *Rastriya Haliya Mukti Samaj Mahasangh*.”

Keeping *Haliyas* is still prevalent in 21st century in the name of traditional practices. They don’t get to eat properly, their children are often deprived of right to education, right to health, and such practices are not suitable for Nepal and Nepali Society. Accepting the existence of these practices in itself is a disgrace for the State and such practices are against constitutionally guaranteed rights...”

ii. Lok B. Sarki vs. Nepal Government¹³²

In this case of Human Trafficking, Supreme Court very progressively explored the notion of providing compensation to the victim and noted that: “Victim shall be compensated based on the severity of pain suffered by the victim and not based on the financial capacity of the offender. “

16. Freedom of Expression

(Paragraph 19 of the concluding observation covering article 19)

Constitution of Nepal 2015 has enshrined freedom of opinion and expression of every citizen as their fundamental right.¹³³ However, Constitution’s provision holds that the same can be subjected to reasonable restrictions if “any act undermines the sovereignty, territorial integrity, nationality and independence of Nepal or the harmonious relations between the Federal Units or the people of various castes, tribes, religions or communities or incite caste-based discrimination or untouchability or on any act of disrespect of labour,

127. INHURED International et.al, ‘Study on De Jure Compliance of Nepalese Anti-Trafficking Legal Measures with International Laws and Standards’, Ganga Jamuna press, 2016, p.14.

128. Human Right Committee, ‘List of issues in relation to the second periodic report of Nepal’, 2014, para.37.

129. 5-point Agreement between the Government of Nepal and *Rastriya Haliya Mukti Samaj Mahasangh*, 2008.

130. INHURED International et.al, ‘Study on De Jure Compliance of Nepalese Anti-Trafficking Legal Measures with International Laws and Standards’, Ganga Jamuna press, 2016, p.31& 32.

131. Dambar B.K. et.al vs. Nepal Government, NKP 2074(2018), Decision Number: 9999.

132. Lok B. Sarki vs. Nepal Government, NKP 2072 (2015), Decision Number: 9346.

133. Constitution of Nepal, Art. 17(2)(a)

defamation, contempt of court, incitement to an offence or on any act which may be contrary to public decency or morality.”¹³⁴ Similarly, Article 19(1) prohibits the censorship of “Any news item, editorial, feature article or other reading, audio and audio-visual material through any means whatsoever including electronic publication, broadcasting and printing.”¹³⁵

Since the constitution permits certain restrictions on this right, several other legislations like the National Penal Code Act, 2017¹³⁶, the Electronic Transactions Act, 2063 (2008)¹³⁷, the Press and Publication Act 1991¹³⁸, and the National Broadcasting Act 1993¹³⁹ constitute of provisions restricting the exercise of this right to a certain extent. Restrictions include prohibition of (i) publishing anything that creates enmity among people of various castes, tribes, religions, classes, regions, communities and spreading communal disharmony¹⁴⁰, (ii) broadcasting of advertisements or materials: adversely affecting political parties; of vulgar type; against foreign policy; misinterpreting, disregarding, insulting and devaluing any tribe, language, religion and culture,¹⁴¹ (iii) publishing or displaying of any material in the electronic media including computer, internet that is prohibited by the prevailing law or which may be contrary to the public morality or decent behaviour or any types of materials which may spread hate or jealousy against anyone or which may jeopardize the harmonious relations subsisting among the peoples of various castes, tribes and communities¹⁴², (iv) slander and defamation committed by writing/conduct/signs/by visual representation/by publicity or any other means.¹⁴³ These restrictions imposed are way too ambiguous. General Comment 34 provides that “restrictions may be imposed as prescribed by law and must conform to the strict tests of “Necessity and Proportionality”¹⁴⁴, however the restrictions imposed in Nepal are characterized by vague terminologies and are subject to numerous conflicting interpretations.¹⁴⁵

Further, it is unclear what kind of activities are protected under the current constitutional provisions regarding freedom of expression. ICCPR clearly define freedom of expression as the freedom to seek, receive, and impart ideas of all kinds. Nepal’s constitution simply states that, “Every citizen shall have freedom of opinion and expression.” Hence, the scope of freedom of expression still remains unclear in the law.¹⁴⁶

During the Universal Periodic Review (UPR) in the year 2015, Nepal committed to ensure the rights to freedom of expression and peaceful assembly. However, the government has cracked down on freedom of expression by arbitrarily arresting people for expressing their views online and through the media, and demonstrators continue to be arrested and assaulted by the police.

By virtue of being State party, Nepal should guarantee, in law and in practice, the right to freedom of expression to all individuals, including non-citizens, and ensure that any restriction to the right is in compliance with the restrictions as set out in article 19, paragraph 3 of the Covenant and the Committee’s general comment No. 34 (2011) on freedoms of opinion and expression. It should also investigate all cases of threats and attacks against journalists and human rights defenders, hold the perpetrators accountable, and provide effective remedies to victims.

134. Ibid. proviso to Art. 17(2). Also see proviso to Art. 19(1)

135. Ibid. Art. 19(1).

136. National Penal Code Act 2017, Sec. 49(4), 305 and 306

137. Electronic Transactions Act, 2063 (2008), Sec. 47

138. Press and Publication Act, 2048 (1991), Sec. 14(d)

139. The National Broadcasting Act, 2050 (1993), Sec. 15

140. Ibid. Sec. 14(d)

141. The National Broadcasting Act, 1993, Sec. 15

142. Electronic Transactions Act, 2008), Sec. 47(1),

143. National Penal Code Act, 2017 Sec. 305, 306 and 307

144. General Comment number 34 on Art. 16 of ICCPR, 2011, para 22.

145. Narayan Datta Kandel, ‘Standard Review of Freedom of Expression and Censorship in Nepal’, International Journal of Culture and History, Vol. 3, No.1, March 2017, p.61.

146. Ibid.

Human rights activists, lawyers, and civil society groups have played a key role in pursuing justice for conflict-era violations, and in seeking reform. However, they have come under increasing pressure to end any criticism.

Currently, government is even proposing new laws that threaten to undermine the right to freedom of expression, including the Media Council Bill, Information Technology Bill, and the Mass Communications Bill, which contain numerous loosely defined but potentially draconian measures. These include offenses such as harming the nation's "self-pride" or damaging an individual's "image or prestige." Provisions to control online and social media activity are especially far-reaching. Many of the new offenses carry fines and lengthy prison sentences. The Special Service Bill contains provisions that would give Nepal's intelligence agency unlimited search and surveillance powers.

LANDMARK JUDGMENT

i. **Kalpiti Parajuli vs. Nepal Government**¹⁴⁷

In this case, the Supreme Court of Nepal laid down the principle that "The freedom of expression guaranteed in the law is not an absolute. It comes with a responsibility attached with it. While exercising this right, one must make sure that it does not affect any individual or group or anyone's reputation. In a multi-lingual, multi-cultural, multi-religious society like ours, the exercise of this right must be done cautiously. The values of pluralism, tolerance, peace and non-discrimination cannot be compromised for the exercise of freedom of expression. Restriction on this right can be imposed by the law if its exercise would induce hatred on the grounds of caste, religion, language, sex, identity and place. While imposing restriction on the exercise of freedom of expression, the restriction must have a direct link with the aimed objective."

17. Birth Registration and Nationality

(Paragraph 20 of the concluding observation covering articles 3, 16, 24, 25 and 26)

There is low number of birth registrations, particularly in rural areas. The difficulties faced by women in the birth registration process is enormous. The current legislation does not provide for the granting of nationality to children born in the territory who would otherwise be stateless.

Nepal follows the principle of *jus sanguinis* (right of blood), transferring citizenship through parents as opposed to *jus soli* (right of birthplace), and transferring citizenship to anyone born on the territory of a state. Citizenship creates a legal relationship between the state and its citizens. It is of paramount significance because it provides person with a sense of identity, enables them to exercise a wide range of basic social, economic, and political rights and gives them the protection of their country of nationality.

The Constitution provides for the acquisition of citizenship as a right of every citizen in the country and that no Nepali citizen is to be deprived of this right.¹⁴⁸ The Constitution provides citizenship by descent to all children living in Nepal and born to parents one of who is a Nepali citizen.¹⁴⁹ This provision ensures that the person does not have to be born in Nepal to be eligible for Nepali citizenship if either of the parents was a Nepali citizen at the birth of such a person. Citizenship creates a legal covenant between the state and citizens; therefore, the accountability is to make sure that statelessness is avoided and non-discrimination on the basis of sex is guaranteed.

147. Kalpiti Parajuli vs. Nepal Government. NKP 2074 (2017), Decision Number: 9878

148. Constitution of Nepal, Art. 11(3)

149. Ibid. Art. 11 (2) (b)

Citizenship act 2006 and Constitution of Nepal 2015¹⁵⁰ ensures citizenship rights of Nepali citizens whereby, Article 10 of the constitution in specific enshrines that “No citizen of Nepal may be deprived of the right to obtain citizenship.” Article 39(1) of the constitution (under fundamental rights) has further ensured “right to name and birth registration along with his/her identity” of every child.¹⁵¹

Article 11(4) of the constitution¹⁵² ensures right of a minor found within Nepal whose father and mother are unknown to acquire citizenship by descent. This is to some extent in conformity with Article 16 of ICCPR and for the first time, Article 11(5) of the constitution¹⁵³ has ensured right of women to pass the citizenship to her children even if father’s identity is missing. These two provisions have attempted to protect Children from being stateless.

However, Article 11(3) of the constitution provides that “a child of a citizen having obtained the citizenship of Nepal by birth prior to the commencement of this Constitution shall, upon attaining majority acquire the citizenship of Nepal by descent if the child's father and mother both are citizens of Nepal.”¹⁵⁴ This provision is challenging and gender discriminatory since it requires both the parents to be Nepali citizen to acquire citizenship by descent. Constitution further restricts women from conferring citizenship to their children independently in the same capacity as men since the child born from Nepali women and foreigner father can only acquire naturalised citizenship¹⁵⁵ and is hardly distributed in Nepal.¹⁵⁶

Additionally, citizenship certificate is one of the most prized possessions in Nepali society since it allows citizens to purchase or transfer land, register births, marriage and deaths, open bank accounts, acquire travel documents, register business, and acquire higher education and so on.¹⁵⁷ However, denial of providing citizenship documents to marginalized groups is still rampant in Nepal and 4.5 million population of Nepal is still estimated to be Stateless.¹⁵⁸

On a positive note, Nepal joined Asia Pacific Ministerial Conference with 43 other states and committed to the target of achieving universal civil registration by 2024¹⁵⁹ and endorsed a Regional Action Framework to facilitate the achievement of this goal. Birth registration and related documentation is required for the prevention of statelessness by helping children to avoid problems in proving their link to a State¹⁶⁰

However, a child born to parents, who obtained citizenship before the commencement of the Constitution, will require both mother and father to be the citizens of Nepal to be eligible for Nepali citizenship.¹⁶¹ A child who is found in Nepal and whose parents’ identity is unknown will be a citizen of Nepal by descent until the father or mother of the child is traced.¹⁶² However, for a mother to confer citizenship by descent to her child, the mother has to prove that her husband is not a foreigner since women married to a foreigner can only confer naturalized citizenship to her children. A person born to a Nepali mother living in Nepal whose father is not identified shall be granted citizenship of Nepal by descent; however, if a father is

150. Constitution of Nepal, Art. 10-15

151. Ibid. Art. 39 (1)

152. Ibid. Art. 11(4)

153. Ibid. Art. 11(5)

154. Ibid. Art. 11(3)

155. Ibid. Proviso to Art. 11(5)

156. Sara Shneiderman and Subin Mulmi, ‘Citizenship, Gender and Stateless in Nepal: Before and After the 2015 Constitution’, 2017, available at: <https://discoversociety.org/2017/09/05/citizenship-gender-and-statelessness-in-nepal-before-and-after-the-2015-constitution/>

157. https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/NPL/INT_CCPR_NGO_NPL_14748_E.pdf

158. The Himalayan Times News, available at: <https://thehimalayantimes.com/kathmandu/5-4-million-people-stateless-in-nepal/>, 22 April 2018.

159. Nepal’s delegation informed participant “Nepal has initiated national level representative sample survey to establish a baseline for 2015 and set the yearly target to achieve the universal registration for all by 2024”, cited on: <https://www.refworld.org/pdfid/56385fc44.pdf>.

160. UNHCR, Child protection Issue Brief : Birth Registration, August 2013, available at: <http://www.refworld.org/docid/523fe9214.html>.

161. Constitution of Nepal, Art.11 (3)

162. Ibid. Art.11(4)

identified as a foreign citizen the person's citizenship will be converted to the naturalized citizenship. Thus, the burden of proof lies onto women whereas men who are married to a foreign wife do not have to provide such proof and are able to confer citizenship to their child based on descent.

In addition, the child whose father is identified as a foreign citizen will only be able to obtain naturalized citizenship whereas this does not apply to children from fathers married to a foreign wife.¹⁶³ As naturalization is not a matter of right in Nepal, citizenship will only be conferred upon the discretion of the state thereby creating great legal uncertainty. Furthermore, to make it restrictive only for women, the Constitution also requires that for women their children need to be born in Nepal to obtain citizenship by descent. With this requirement, a different standard is clearly and egregiously applied to the children of Nepali women, whereas this is not applied to the children of Nepali men. This will clearly bring out problems to the children of trafficked women, women labour migrants and other transient women whose offspring is born outside Nepal.

Inequality is also perpetuated on citizenship by naturalization in other entitlements under the constitution. Article 11 (6) prevents Nepali women to transfer citizenship based on marital naturalization to their foreign national husbands, while on the other hand, Nepali men may transfer naturalized citizenship to their foreign national wives without any complication.

Apart from the new Constitution, citizenship in Nepal is governed by the Nepal Citizenship Act (2006). Several of the provisions in the Act are contradictory to the Constitution, hence needs to be amended.¹⁶⁴ Similarly, the Nepal Citizenship Rules of 2006, which provide for procedures in order to obtain Nepali citizenship and naturalized citizenship, needs to be amended to be aligned to the Constitutional provision.

Although through the Constitutional measures the law in relation to citizenship has improved, there are still discriminatory provisions against women in the Constitution, the Citizenship Act and Rules that contradicts with the international instruments that Nepal is state party to.

The Citizenship Rules 2006 confer power to the Chief District Officer (CDO) to issue the certificate of citizenship.¹⁶⁵ However, in majority of the situations, insensitivity or ineffectiveness of the government officials are one of the major causes of not issuing citizenship certificate to the eligible national. The responsible governmental officers were found making excuses that they would require procedural guidelines from the central level to confer citizenship in the name of mother.

Another struggle in accessing citizenship lies in cases of children born out of rape. Although the present constitution guarantees citizenship by descent in the name of father or mother,¹⁶⁶ such has not been found in practice in the districts. The discriminations towards women exist in various forms with many hassles attached.

The procedure relating to provide citizenship of Nepal is explicitly written in the Citizenship Rules 2006. However, women of rural areas have no idea or are little known about details such as the institution, processes and documents attached with gaining citizenship certificate.

SOME LANDMARK JUDGMENTS

i. Sabina Damai vs. Government of Nepal¹⁶⁷

In this case, Supreme court of Nepal progressively ordered the District Administration Office Dolakha to issue citizenship and also ordered Ministry of Home Affairs to issue a circular to all the District

163. Ibid. Art.11 (5)

164. Ibid. Sec. 18 (2)

165. Citizenship Act Rules, Rule 8

166. Constitution of Nepal, Art. 11 (2) (b)

167. Sabina Damai vs. Government of Nepal, NKP 2068 (2011), Decision Number: 8557.

Administration Offices of Nepal to provide citizenship to the person whose mother is a Nepali citizen and Father is not traced, by fulfilling the procedures laid down in Nepal Citizenship Act 2009 and Rules 2006.

ii. **Deepti Gurung vs. Government of Nepal**¹⁶⁸

In this case, Supreme Court of Nepal relying on the principle that “registering the birth of a child is the duty of the state” and “this applies equally to the foreigners” held that Children of Nepali mothers whose father cannot be traced, must not be prohibited from birth registration in concerned authorities.

18. Population that Requires Special Protection

(i) **Sexual Minorities**

Article 306(1)(a) of Constitution of Nepal¹⁶⁹ defines minorities as “linguistic, ethnic and religious groups whose population is less than the percentage specified by the Federal law and includes groups that have their distinct ethnic, religious or linguistic characteristics, aspirations to protect such features and subjected to discrimination and oppression.”

Similarly, 306(1)(m)¹⁷⁰ defines marginalized as “communities that are made politically, economically and socially backward, are unable to enjoy services and facilities because of discrimination and oppression and of geographical remoteness or deprived thereof and are in lower status than the human development standards mentioned in Federal Law”

These two definitions have efficiently failed to address ‘Sexual minorities’ thereby leaving legal vacuum and creating unfavorable environment for LGBTI people to enjoy their “Special protection” rights and “positive actions”.

Affirmative action ensured by Article 86(a) of the constitution (place in National Assembly) has out rightly been rejected for LGBTI groups. The political participation of the sexual minorities is quite dismal.¹⁷¹ It is reported that due to lack of access to education and employment opportunities, there is risk of overall being more vulnerable to social exclusion¹⁷², many transgender ends up in forced sex works.¹⁷³ Besides, they also face high rates of harassment. Additionally, due to lack of knowledge amongst people and indifferent behavior coming from bureaucrats, transgenders are highly facing difficulty in obtaining legal status.¹⁷⁴

Problems are more evident in rural part of the country. LGBTI community in rural parts are particularly struggling to exercise their basic fundamental rights. Demands of medical care, education, fair employment are still denied to them.¹⁷⁵ Chairperson of Blue Diamond society has said that “Our friends, who have obtained citizenship with gender identity of ‘others’ are denied employment opportunities following which few of them are even planning to change their gender on certificate.”¹⁷⁶

In regard with protection ensured by Article 2, 6, 7, 14, 17 and 26 of ICCPR.

168. Deepti Gurung vs. Government of Nepal, NKP 2072 (2015).

169. Constitution of Nepal, Art. 306(1)(a)

170. Constitution of Nepal, Art. 306(1)(m)

171. Pinky Gurung (chairperson of blue diamond society), ‘Rights of LGBTI people should be protected’, available at: <https://therisingnepal.org.np/news/23500>

172. Gyanu Chhetri, ‘Perceptions About The ‘Third Gender’ In Nepal’, Dhaulagiri Journal of Sociology and Anthropology, vol.11, 2017, p.7,

173. Pinky Gurung (chairperson of blue diamond society), ‘Rights of LGBTI people should be protected’, available at: <https://therisingnepal.org.np/news/23500>.

174. Ibid.

175. Ibid.

176. Ibid.

Article 2 of ICCPR requires State party to respect and ensure all individuals within its territory and the rights recognized in the covenant without distinction of any kind such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 6 of the ICCPR ensures Right to life of every individuals including abolition of death penalty. Complying with this, Constitution of Nepal 2015 has enshrined “Right to live with dignity”¹⁷⁷ as a fundamental right and has further prohibited death penalty under every circumstance.¹⁷⁸

Further, elaborating Article 6 of ICCPR, General Comment no. 36 of the same enunciates LGBT persons as a group requiring “special protection”.¹⁷⁹ This requires state parties to take special measures of protection towards person in situation of vulnerability.

Nevertheless, this wasn’t ensured by Nepal till 2015. A report published by Human Rights watch in 2013 highlighted the increase in attacks on Nepal’s LGBT activists and threat of physical violence and abduction amongst them. It has also revealed that LGBT rights activists have reportedly been harassed by threatening text messages and being followed by people wearing masks who attempted to extort money or sex and being arbitrarily arrested.¹⁸⁰

However, Nepal enacted new constitution in 2015. Constitution has duly ensured “special protection” of sexual minorities under fundamental right for the “protection, empowerment and development” of sexual minorities.¹⁸¹

Article 7 of ICCPR ensures right against torture and cruel inhumane or degrading treatment. This has been ensured by Article 22 of the constitution of Nepal 2015¹⁸² as well as Section 167 and 168 of National Penal Code 2017.¹⁸³

Article 14 of the ICCPR related to Fair trial rights which have duly been recognized by Article 20 of Constitution of Nepal as a fundamental right of “every citizen.”

Article 17 of ICCPR ensures Right against arbitrary or unlawful interference with his/her privacy, family, home or correspondence or to unlawful attacks on his/her honour and reputation. Explicit recognition of this provision is yet to be done by Nepal. Besides. Even though Nepal has managed to make progressive changes in terms of LGBTI rights legally, the same is yet to be accepted by highly conservative Nepali Society¹⁸⁴ and government is showing little to no interest in organizing awareness campaigns as such.

POSITIVE CHANGES

On a brighter note, Nepal has been pronounced as a “beacon for LGBT rights progress in Asia” in Human Right Watch report.¹⁸⁵ Sunil Babu Panta’s case¹⁸⁶ is considered as one of the landmark case in Nepal which helped in the recognition of LGBTI rights. In this case, Supreme Court of Nepal ordered government to

177. Constitution of Nepal, Art. 16

178. Ibid.

179. General Comment No.36 on article 6 of the International Covenant on Civil and Political Rights on the right to life, 2018, para 23.

180. Nepal: Climate of Fear Imperils LGBT People, available at: <https://www.hrw.org/news/2013/04/01/nepal-climate-fear-imperils-lgbt-people>

181. Constitution of Nepal, Art. 18(3)

182. Constitution of Nepal, Art. 22

183. National Penal Code 201, Sec. 167 & 168,

184. <https://kathmandupost.com/national/2020/05/17/nepal-might-have-made-progress-when-it-comes-to-queer-rights-but-it-still-has-a-long-way-to-go>

185. Available at: <https://www.hrw.org/news/2017/08/11/how-did-nepal-become-global-lgbt-rights-beacon>

186. Sunil Babu Panta vs. Nepal Government, 2065, Decision Number. 7958

legally recognize a third gender category, audit all laws and identify discriminatory laws against LGBTI people and form a committee to study legal recognition of same-sex relationship.

Following this judgment, Nepal Government identified more than 100 laws that needed to be amended/changed to eliminate the discrimination against people belonging to LGBTI community.¹⁸⁷ Further, by 2010, Election Commission of Nepal added third option to voter rules and in 2011, Nepal became first country in the world to include third gender on its federal census.¹⁸⁸

In 2015, Nepal Government started issuing passports recognizing three genders.¹⁸⁹ And more specifically, new constitution of Nepal enacted on 2015 specifically ensured rights of people belonging to LGBT community and became 10th country in the world to do so. Article 12 of the Constitution¹⁹⁰ allows the obtainment of citizenship with gender identity.

Additionally, Article 18 of the constitution ensures the “Right to equality” of citizens and 18(3) specifically allows state to enact special provisions for the “protection, empowerment and development” of sexual minorities.

Article 42 of the Constitution has further ensured “Right to Social justice” of sexual minorities and enshrined that “they shall have right to participate in the State bodies on the basis of inclusive principle.” However, proper implementations of all these laws are still in the limbo

The definition of rape is still limited to the commission or attempt of rape by man to a woman. It has failed to incorporate rape committed within same sex or by woman to a man.¹⁹¹ Civil code of Nepal still recognizes marriage as a marriage between “a man and a woman”¹⁹². Further, in 2015, a committee formed to study same sex marriage recommended Nepal government to form a legislation legalizing same sex marriage in Nepal¹⁹³ however; this hasn’t yet been done by Nepal government.

SOME LANDMARK CASES

i. Lakpa Sherpa vs. Nepal Government¹⁹⁴

This is one of the most progressive judgments rendered by Supreme Court of Nepal. In this case, a woman had sexual intercourse with another woman deceptively by using sex toys and distinguishing herself as a man. Next morning, it was revealed that the perpetrator (woman) gained consent from another woman by portraying herself as a man. This is a first sexual offences’ case whereby a female had engaged in sexual conduct with another female acquiring her consent by deception. In this case, Supreme Court held that: Consent for sexual intercourse obtained under a false identity or deception cannot be considered as a lawful consent

Even a female can be an offender in a sexual offence.

ii. Dilu Budujaa vs. Nepal Government¹⁹⁵

In this case, Supreme Court of Nepal ordered to make arrangement for providing passport with giving third gender identity.

187. Available at: <https://www.hrw.org/news/2017/08/11/how-did-nepal-become-global-lgbt-rights-beacon>

188. Ibid.

189. Kyle Knight, ‘Nepal’s Third Gender Passport Blazes Trails’, Human Rights Watch, 2015; Nepal Introduces transgender passport, available at: <https://www.dw.com/en/nepal-introduces-transgender-passport/a-18638698>

190. Constitution of Nepal, Art. 12

191. National Penal Code 2017, Sec. 219,

192. National Civil Code 2017 Sec. 67

193. Committee recommends Nepal legalize same-sex marriage, available at: <https://www.washingtonblade.com/2015/02/10/committee-recommends-nepal-legalize-sex-marriage/>

194. Lakpa Sherpa vs. Nepal Government, 2073 (2016), Decision Number. 9684

195. Dilu Budujaa vs. Nepal Government, 2070 (2013), Decision Number. 9048

iii. Sunil Babu Panta vs. Nepal Government¹⁹⁶

In this case, Supreme Court held that: Third gender and other cannot be discriminated based on their sexual orientation.

This case has also emphasized on the norms that a group with special sexual orientation and gender identity in the society should be able to enjoy a political, social, cultural and economic right. Further Court ordered government to legally recognize a third gender category, audit all laws and identify discriminatory laws against LGBTI people and form a committee to study legal recognition of same-sex relationship.

Article 18 of the Constitution has the provision of right to equality under which all citizens shall be equal before law and shall not be discriminated on the basis of origin, religion, race, caste, tribe, sex, physical conditions, disability, health condition, matrimonial status, pregnancy, economic condition, language or geographical region, or ideology or any other such grounds as a fundamental right. Despite the constitutional guarantee, de facto equality is a challenge.

A bill has been passed by legislative parliament of Nepal to combat sexual harassment in working place.

Likewise, In the case of Sunil Babu Panta and others/v. Nepal Government and others, Supreme Court of Nepal (21 December 2007) ordered the GoN to make the necessary arrangements, including making new laws or amending existing laws to ensure that people of different gender identities and sexual orientations could enjoy their rights without discrimination. However, there have not been any specific laws for the rights of the LGBTI.

Despite Constitutional guarantee of non-discrimination, people of different gender identity continue to face discrimination. Recently, a transgender woman was denied enrollment in one of the pronounced University, due to lack of provisions to enroll transgender students. The government needs to assure the implementation of existing laws and policies. There has been no reprimand by the government, this will continue to put transgender community in vulnerable position without being able to exercise their fundamental right to equality.

Article 12 of the Constitution guarantees that one can obtain citizenship with the gender identity of choice. Only new applicant LGBTI can have gender "O" but the persons who already got their citizenship with the gender identity as male or female cannot amend the citizenship with the gender identity of their choice. There is no provision to change name or gender identity in other legal documents and educational certificates. This violates essence of the constitutional provision to have citizenship with gender identity.

Sexual and Gender Minorities are not incorporated with in the definition of "minorities" that the Constitution has defined. Because of this definition, LGBTI are facing the following problems:

Election Commission of Nepal did not make it compulsory to nominate any candidate from LGBTI from political parties in elections whereas there are quotas allocated for minorities to participate in structure of the state. This violates Article 42 of the Constitutions that provides "right to social justice" which says all sexual and gender minorities can participate in every structure of the state.

Because of having citizenship with "O" identity, there are increasing cases of being denied for jobs.

There is no specific mechanism established for the investigation and punishment for discrimination against LGBTI person.

Recently enacted Criminal Code in section 226 prohibits unnatural sexual intercourse and prescribes to a sentence of imprisonment for a term not exceeding three years and a fine not exceeding thirty thousand rupees.

196. Sunil Babu Panta vs. Nepal Government, 2065, Decision Number. 7958

Same sex marriage is denied and not recognized by Nepalese laws. Ministry of Women, Children and Social Welfare prepared a draft note on the same sex marriage but this document has not taken any shape and things have not moved any forward. Because of non-recognition of same-sex marriage, many LGBTI people are forced to marry the person whom they do not like. Many LGBTI people are living together without legal recognition of their relationship. There is uncertainty of future of this same-sex living together relationship in Nepal.

(ii) Person with disabilities

Issues of disabilities used to be viewed on “Charity based approach” formerly but progressively, now it is addressed on “Right based approach”. Nepal being party to Convention on the Rights of Person with Disabilities and its Optional Protocol is obliged to form plan and policy for their protection.

Article 31(3) of Constitution of Nepal has ensured “Free Education” to the citizens with disabilities under the Fundamental rights.¹⁹⁷ It further alludes the provision of providing free education through “Brail Script” to the visually impaired citizens and through “Sign Language” to hearing or speaking impaired citizens.¹⁹⁸

Additionally, Special protection facilities¹⁹⁹ as well as equal access to public services and facilities²⁰⁰ have also been ensured for the Child with disabilities.

Constitution of Nepal 2015 has vested the responsibility of management of people living with disabilities upon the local government.²⁰¹ Furthermore, GoN has also enacted “Act relating to rights of persons with disabilities” in 2017 classifying the disabilities based on the problem and difficulty in organs or system of the body and severity of disability.²⁰²

Constitution of Nepal however doesn’t explicitly incorporate people with disabilities as Minorities²⁰³ or Marginalized²⁰⁴ under its definition. This contributes to the exclusion of people with disabilities from proportionate political and public participations in one way or the other.

Also, despite all the legal provisions of ensuring accessibility and proper facilities to people with disabilities, GoN is vehemently lagging behind in the part of implementation.

Putting it into perspective, in terms of access to justice; GoN has ensured fast track court system for the people with disabilities. However, still in the cases of violence against the people with disabilities, on the foundational part; they do not have access to proper way via which they could file a complaint. The “Sign language” interpreters are not yet provided by the GoN which makes it difficult for people with speaking or hearing disabilities even to register a complaint.

Additionally, Lack of “Easy readable version of documents” and dissemination of information in “understandable manner” makes it hard for the persons with disabilities to exercise their “right to information”²⁰⁵ ensured by the constitution itself.

The statute promulgated for people with disabilities have explicitly talked about “Accessibility” and GoN has also formulated implementation and communication guidelines²⁰⁶. However implementation of the same is negligible. There are no proper toilet seats made to facilitate persons with disabilities (not even in

197. Constitution of Nepal, Art. 31(3)

198. Ibid. Art. 31(4)

199. Ibid. Art.39(9)

200. Ibid. Art. 42(3)

201. Ibid. Schedule 8

202. The act relating to rights of persons with disabilities 2017, Schedule 1

203. Constitution of Nepal, Art. 306(a)

204. Constitution of Nepal, Art. 306(m)

205. Constitution of Nepal, Art. 27

206. Available at: <https://nta.gov.np/wp-content/uploads/2012/11/MoWCSW.pdf>

the hospitals), proper walking lane is also absent. The interpreters are also absent in the hospitals which more often makes it hard for the patient with disabilities to communicate their issues to the medical staffs.

In the same note, Condition of Women with disabilities (WWD) is even vulnerable since they are multiply disadvantaged, first as a status of woman and then as a woman with disabilities.²⁰⁷

In addition, since a few years back, the GoN has started providing social security allowance to the people with disability but it is very much biased and insufficient.²⁰⁸

Government statistics reveals that there are 600,000 people living with disability throughout the country but only around 200,000 of them have received the disability identity card. Among them 3700 have received red card (complete disability) and 49000 have received blue card (severe disability). Those persons with disability having red card receive Rs. 2000 (\$20) every month and those with blue receive Rs. 600 (\$6) as social security allowance.²⁰⁹ But among the blue-card-holders, 60% are either not provided with the allowance or have not taken it because they feel ashamed of receiving the grant as it is very minimal; even not sufficient for medicines. Therefore, most of the people with severe disability have announced to relegate this allowance.²¹⁰

On a positive side, the thirteen Five-Year plans (2013-2014) revealed that there was an increase in the net primary-school enrolment rate amongst people with disabilities.²¹¹ Nevertheless, achieving 2015's goal of "National primary education for all" seemed impossible due to poor classroom structures, widespread poverty, class repetition rates and difficulty in accessing remote communities and the prevalence of negative social attitude towards disabled children.²¹²

207. Binod Khanda Timalana, 'Women with Disabilities in Nepal', The saptagandki journal, vol. ix, 2018,p.18.

208. Available at: <https://www.sarokar.com.np/?tag=status-of-disability-in-nepal>

209. Mukti Prakash Thapaliya et.al., 'A report on Disability in Nepal', 2016.

210. Available at: <https://www.sarokar.com.np/?tag=status-of-disability-in-nepal>.

211. Mukti Prakash Thapaliya et.al., 'A report on Disability in Nepal', 2016, p.10-11.

212. Ibid.



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