

# **Nepal**

## **Domestication of Treaties**

**What about Implementation ?**

# **Review Report**



**Human Rights Alliance**  
**2012**

**Nepal**  
**Domestication of Treaties**  
**What about Implementation?**

**Review Report**

**National Alliance for Human Rights and Social  
Justice Nepal (Human Rights Alliance)**  
**2012**

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Padma Prasad Khatiwada, PhD

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## **A Review Report for the RDIF Project**

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What about Implementation?

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(Human Right Alliance)  
New Baneshwor, Kathmandu Nepal  
P.O. Box 9993  
Phone: 977-01-4464192  
E-mail: [alliance.humanrights@gmail.com](mailto:alliance.humanrights@gmail.com)

**Researcher:** Padma Prasad Khatiwada, PhD

**Coordinator :** Yadab Bastola

**Cover and layout :** Manoj Raj Regmi

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# Preface

The main objective of this study is to examine critically what progress Nepal has done in the major human rights conventions and how they are being domesticated. This study has tried to highlight what is the status of Human Rights Commitment of Nepal before and after 1990. Because before 1990, Nepal has ratified only seven human rights related instruments which were mainly related to slavery and CERD.

The decade of 90s is popularly known as the ratification of human rights. The state had an opportunity of the success of the Popular Movement and thus ratified almost all human rights instruments, namely, ICCPR, ICESCR, CEDAW, CAT, and CRC.

Although the State has shown commitment for the domestication of major provisions enshrined in the international human rights instruments by ratifying them, it has been found very weak and reluctant to implement. Unless and until these ratified instruments are implemented by understanding the practical problems of Nepali people, Human Rights becomes the slogan only. Our attempt to bring out this Research Report has indicated the same issue.

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Ganesh B.K.  
Chairperson  
August 20, 2012

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# Executive Summary

The main objective of this study is to examine critically what progress Nepal has done in the major human rights conventions and how they are being domesticated. Literatures related to the conventions in the light of Nepal were collected and compiled. Main instruments in this context are the major six treaties (ICCPR, ICESCR, CERD, CEDAW, CAT and CRC). Furthermore, two major instruments CRMW and ICC which are in the list top front discussions among the civil society, academic, and practitioners in Nepal have also been reviewed focusing mainly on why Nepal government to ratify these conventions.

## **Status of Human Rights Commitment before 1990**

Nepal's human rights movement is still young in the sense that before 1990, the country was ruled through an Autocratic Panchayat system and thus there was not any commitment shown towards protection and promotion of human rights by the rulers. The available records show that Nepal had shown commitment or ratified only on seven human rights related instruments before 1990. They were mainly related to slavery and one against racial discrimination (CERD).

The Convention of the Rights of the Child (CRC) was in plan to ratify by the Panchayat Government which had shown commitment towards it by signing on it but this was also ratified by the government formed after the Popular Movement of 1990. Before 1990, Nepal also ratified all four Geneva Conventions in 1964. These conventions are popularly known as humanitarian conventions or the law of armed conflict, that is, the law that regulates the conduct of armed conflicts. Nepal however has not ratified any of the additional protocols to the Geneva Conventions.

Although some laws have been found enacted during this period there was no state obligation to abide by them as Nepal did not ratify major international treaties before 90s.

## **Status of Human Rights Commitment after 1990**

The decade of 90s is popularly known as the ratification of human rights. The state had an opportunity of the success of the Popular

Movement and thus ratified almost all human rights instruments, namely, ICCPR, ICESCR, CEDAW, CAT, and CRC.

Nepal has also ratified all of the optional protocols to the ICCPR, but not the optional protocol to the ICESCR which establishes an individual complaints mechanism for the Covenant similar to those of the First Optional Protocol to the ICCPR, and Optional Protocol to the Convention on the Rights of Persons with Disabilities. Nepal has also ratified the optional protocol to the CEDAW which contains two procedures, the first being a communication procedure that allows individual women, or groups of women, to submit claims of violations of rights protected under the Convention to the Committee and the second that it creates an inquiry procedure enabling the Committee to initiate inquiries into situations of grave or systematic violations of women's rights.

Nepal has however not ratified the Optional Protocol to the CAT which establishes a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

In order to domesticate the provisions related to international instruments ratified by Nepal, a separate Treaty Act has been framed, which is the only act of the kind in the South Asia; none of the South Asian Countries have their treaty acts. The article 9 of the Treaty Act stipulates that once ratified treaty by Nepal is treated as equal to the national law. Special laws for press and publication, prevention of corruption and food rights are some of the examples of domestication with high priority.

## **Status of Domestication**

Domestication of human rights laws have been seen in Nepal in the light of establishing them as the fundamental rights that are the rights and the freedoms guaranteed by constitutions to their citizens. Once established as the fundamental rights, they have a legal sanction and can be challenged by affected individuals in a court of law. Among these rights are the right to life, liberty, pursuit of happiness, and so on.



## **Civil and Political Rights**

The Constitution of the 1990 is the main Nepal's legal document which domesticated 10 provisions as the fundamental rights, mainly enshrined in the ICCPR. They are Right to Life, Right to Freedom, Right to Equality, Press and Publication Right, Right Regarding Criminal Justice, Right against Preventive Detention, Right to Information, Right against Exile and Right to Privacy. In this constitution, some provisions related to ICESCR were established in the directive principles. Similarly some provisions related to CEDAW, that is in the sector of fulfilling equal rights to women were also mentioned in the 1990 constitution.

Among these rights, freedom to form unions and) freedom to move and reside in any part of Nepal were added in 2007. The 2011 draft furthermore linked right to freedom with Right to Independence as well. Freedom to engage in any occupation or be engaged in employment, industry and trade is added in 2011 draft.

Right to equality ensured in 1990 constitution was further explained in 2007, that is, the State shall not discriminate against any citizen in the application of general laws on grounds of religion, colour, caste, tribe, gender, sexual orientation, biological condition ,disability, health condition, marital condition, pregnancy, economic condition, origin, language or region, ideological conviction or other similar grounds.

Press and publication right was modified as the Right Regarding Publication, Broadcasting and Press in 2007 and now proposed as the Rights Regarding Mass Communications (2011). Similarly, the right regarding criminal justice has been redefined as the Rights Regarding Justice only. Rights against torture has been included from the 2007 constitution.

Two more fundamental rights related to civil and political rights have been added in the proposed draft of the new constitution. They are such as the victims of the crime shall have the right to information about the investigation, probe and action taken in the case in which he/she is victimized.

## **Economic, Social and Cultural Rights**

Very few economic, social and cultural rights were enshrined in the constitution of the 1990 as the fundamental rights. They were right to property, cultural and educational rights, right to religion and right against exploitation. The 2007 constitution has provisioned for the compensation in case of requisitioned, acquired or encumbered by the State in implementing scientific land reform programme or in public interest in accordance with law. The compensation and basis thereof and operation procedure shall be as prescribed by law. 2011 draft has also provisioned it.

The 2011 draft constitution has proposed to segregate the cultural rights from educational rights and included in the right to language. It has further proposed that every person and community shall have the right to use their own language.

The 2011 draft constitution has also added that no person shall be exploited in the name of religion, custom, tradition and practice, or in any other way. Right to Environment, Right to Health, Right to Employment, Right to Social Security, and Right Regarding Labour have been enshrined in the interim constitution of 2007 and they also got continuity in the 2011 draft constitution.

Labour rights and food rights are other two major achievements that the interim constitution 2007 has enshrined them as the fundamental rights. The 2007 constitution mentioned that every citizen shall have the right to food sovereignty as provided for in the law under right to employment and social security. The 2011 draft constitution added that every person shall have the right to food. They shall have the right to protect him or herself or herself from the vulnerable condition of life owing to the scarcity of food (provisions).

Right to accommodation is the only right the new draft constitution has established as the fundamental rights. According to the proposed provision, every citizen shall have the right to an access to proper accommodation. Finally, Rights regarding consumers is another important milestone that Nepali people have got as another fundamental right.

## **Domestication of Community Rights**

The 1990 constitution had not directly included the community people entitled to fundamental rights although the directive principles had something to address. Women, Dalit, and indigenous people are the main communities addressed by the 2007 and the new draft constitutions. Regarding right of women, the 2007 interim constitution has enshrined that no one shall be discriminated in any form merely for being a woman.

Right to social justice is another fundamental right which directly addresses the community people. It says women, Dalit, indigenous people, Madheshi community, oppressed group, the poor peasant and labourers, who are economically, socially or educationally backward, shall have the right to participate in the state mechanism on the basis of proportional inclusive principles. The 2011 draft added the economically destitute citizens shall be given priority. This has also included destitute class, disabled people and citizens of endangered communities.

Right against untouchability and racial discrimination is another major endorsement in the constitution in the spirit of the CERD. The 2007 constitution clearly stresses that no person shall, on the ground of caste, tribe, descent (origin), community, occupation or physical condition, be subject to discrimination and untouchability in any form.

Right of the child is another fundamental right established by the new constitution as the fundamental right. Although several rights related to children were enshrined in the laws before 2007 as an address to the CRC, the child right provision was not framed as a separate fundamental right. According to the 2007 constitution every child shall have the right to his/her own identity and name. A child has also the right to get nurtured, basic health and social security. Right of Dalit community is another separate right enshrined by the 2011 draft constitution. The 2007 constitution had included Dalit rights as integrated approach.

Rights regarding family is another major breakthrough proposed by the 2011 draft constitution. It has clearly indicated that no one

shall be allowed to have more than one spouse. Every person shall have the freedom to marry and divorce in accordance with law. No marriage shall be held against the wishes of the wedding parties or their full and independent consent.

## **Separate Article for the Implementation of the Fundamental Rights**

A separate article has been proposed by the draft of the new constitution regarding implementation of Fundamental Rights and Constitutional Treatment. It says that the State shall make appropriate provisions for the implementation of the rights provisioned as Fundamental, such as rights to education, health, employment, accommodation, food, social justice and social security.

## **Fundamental Duties (Responsibilities)**

The draft of the new constitution of Nepal has for the first time proposed nine fundamental duties of the Nepali people. They include as to show loyalty and allegiance towards the nation and safeguard the nationality, sovereignty and integrity of Nepal, to maintain national secrecy, to abide by the Constitution and law, to enroll for mandatory service when required by the nation, to protect and promote public and national property, to pay tax in accordance with law, to use one's freedom (independence) and right without encroaching upon national, social and other individuals' rights, to respect labour, to show honour and respect towards parents, children, elderly people (senior citizens), women, incapacitated and helpless people, disabled (differently challenged) people and humanity, and to protect and promote environment, natural, historical and cultural heritage.

Including these duties in the constitution, a message has been given to the people that when there are rights guaranteed by the state, there are also the duties to be strictly obeyed by the people. Despite these good attempts made, it is not clear what type of action is taken against violating these duties.

# **Domestication through Directive Principles and Polices**

A number of legal provisions addressed by the international instruments have been included in the directive principles of the constitution. Though not binding, the proposed new draft constitution has provisioned some of them as political objectives, social and cultural objectives, and economic objectives. Such as one of the state political objectives is to establish a public welfare state administration by establishing a just system in all fields of national life through a rule of law, fundamental rights and norms and values of human rights, inclusiveness, participation and social justice. Similarly, one of the is to end all kinds of discrimination, exploitation and injustice meted out on the basis of religion, culture, manner, system, tradition, custom or any other ground. Finally, one of the economic objectives is to develop an economy oriented towards socialism by making the national economy self-reliant, independent and progressive through creating a society free of exploitation while making a just distribution of means and resources, ending all kinds of economic exploitation and inequality and making sustainable economic development.

## **Criticism**

Despite these good progresses, there are many shortcomings. Fore and foremost, fundamental rights are inherent, universal and indivisible. The constitutional provisions have not fully adhered to the principles of Human Rights. The repeated words like 'but', as per the laws', as 'indicated by the law' prove this fact.

Secondly, fundamental rights are the not issues of bargain. The Constitution of a country where peoples are sovereign, there should not be any authority to 'give and take' the fundamental rights.

The main concern of the civil society is that the domestication effort in the constitutions and laws has not still fully respected the spirits of the Aadibasi Janjatis , Dalits, Women, Persons with Disability, Madhesis, Tharus, Youths, and Marginalised people like Karnali region. For example the draft constitution is still silent or somewhere vaguely mentioned about guaranteeing the group rights of these peoples.

The Concept Paper is also unclear about the need of both individual rights and group rights. It needs to clearly mention that individual rights prevail for every citizen of Nepal and since all the Nepali are not equal, peoples like Aadibasi Janjatis , Dalits, Women, Persons with Disability, Madhesis, Tharus, Youths, and Marginalised people like Karnali region will have group rights. domestication effort has not mentioned in detail about both the rights and the responsibilities of a Nepali citizen.

Finally, in the written form, many rights can be seen as domesticated but most important is to be seen their status of implementation. Furthermore, the long and confusing sentences with jargons, conjunctions, clauses and unnecessary phrases have made the text more and more ambiguous.

## **International Criminal Court**

The International Criminal Court (ICC) is the first ever permanent, treaty based, international court established to promote the rule of law and ensure that the gravest international crimes do not go unpunished which is located in The Hague in the Netherlands. The court acts only in cases where states are unwilling or unable to do so - known as the principle of complementarity.

The International Criminal Court brings the most serious international criminals to justice and challenges the impunity that they have so often enjoyed in the past. Until now, those who commit atrocities have gotten away with it and their victims left with nothing. The ICC provides redress and reparations for the victims and survivors of these atrocities, which is a vital step towards accountability and lasting justice.

Nepal needs to ratify the Rome Statute as soon as possible because it mainly assesses the cases of grave human rights violation. During armed conflict and some other violent movements so many such incidents of violations have occurred in Nepal. The court investigates and tries individuals for the most serious international crimes: genocide, crimes against humanity, war crimes and aggression. The ICC has jurisdiction over crimes committed in the territories of ratifying states and over crimes committed anywhere by nationals

of ratifying states. States that do not ratify the treaty can choose to accept the court's jurisdiction in particular cases. These states, and all states parties, must cooperate with the court's investigations and prosecutions.

## **Rights of the Migrant Workers**

This UN Convention on the Protection of the Rights of the All Migrant Workers and Their Families (CRMW), 1990 is the main instrument that relates all the rights of the migrant workers. Nepal has not ratified the Migrant Workers Rights yet.

Migration for Foreign Employment has long been an important livelihood strategy for a large part of the rural population in Nepal. In the 19th Century, Nepali (Gurkhas) were recruited to serve in the British Army and British India, while recently, during the latter part of the 1990s. In order to make the scope of the labour migration to abroad more dignified, safe and secure, Nepal needs to ratify the Convention.

# Acronyms and Abbreviations

CA	: Constituent Assembly
CAT	: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CC	: Central Committee
CCO	: Canadian Cooperation Office
CEDR	: Committee on the Elimination of Racial Discrimination
CEDAW	: Convention on Elimination of All Forms of Discrimination against Women
CRC	: Convention on the Rights of the Child
CRMW	: Convention on the Protection of the Rights of All Migrant Workers and Their Families
DDN	: Developing Democracy Nepal
HMG	: His Majesty's Government
HRTMCC	: Human Rights Treaty Monitoring Coordination Committee
ICC	: International Criminal Court
ICCPR	: International Covenant on Civil and Political Rights
ICERD	: International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	: International Covenant on Economic, Social and Cultural Rights
INSEC	: Informal Sector Service Centre
NGO	: Non-government Organisation
NHRAP	: National Human Rights Actoin Plan
NHRC	: National Human Rights Commission
RDIF	: Rights, Democracy and Inclusion Fund
UN	: United Nations
UDHR	: Universal Declaratoin of Human Rights



# **Chapter One**

## **Introduction**

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## 1.1 Background

Nepal is an ancient and always independent State of the world. Its recognition as an independent nation began only in 1769, as the King Prithvinarayan Shah expanded his ideas to annex a set of small feudal and scattered States and principalities and declared the Kathmandu valley as its capital. In 1846, after the gruesome Kot massacre, the Shah Kings, successors to Prithvinarayan Shah, lost their power to the Rana Prime Ministers which ruled the country for 104 years, the period popularly known as "darkest period" of history.

Even up to the middle of the 20<sup>th</sup> century, Nepal was very little known outside of South Asia. The conservative Rana regime, which virtually ruled over the country in a very crucial period of world history, did try everything possible to keep Nepal outside the influence of political and industrial transformation that was taking place in other parts of the globe. Nepal had no written Constitution or basic rights and fundamental freedoms of the people. The concept of an independent judiciary, the rule of law and human rights did not exist.

The year 1951 marked the turning-point in the history of Nepal when possibly the first people's revolution liberated the country from the Rana regime. In 1958 the late King Mahendra Bir Bikram Shah Dev introduced a new Constitution providing a parliamentary form of government and, in the beginning of 1959 under that Constitution, the first ever popular election on the basis of adult franchise was held. The Nepali Congress Party headed by late B.P. Koirala obtained an absolute majority of seats (74 out of 109) in the House of Representatives -the lower house - and B.P. Koirala became the first elected Prime Minister of the country. Thus, the elected Government took power for the first time in the history of Nepal, but this experiment did not last long. On 15 December 1960, King Mahendra declared a state of emergency and took the State power, dismissing the 19-month-old democratically elected Cabinet. The Parliament was dissolved, political parties were banned, and the partyless Panchayat system was introduced. A new Constitution was promulgated in 1961. Under this Constitution, the sovereignty of the State was vested on the Crown and all the legislative, administrative and judicial powers emanated from it. Hence, the King was in the centre and at the apex of the government machinery. Despite the

fact that only a few limited rights were given to the people and were protected by the Supreme Court, basic human rights and fundamental freedoms were not part of the Constitution in a true sense (United Nations, 1994).

Human Rights became Nepal's commitment and practice only after the restoration of democracy in 1990 although the previous ruling systems, mainly the Panchayat regime used to claim it in its own way, that is, without recognition of the practice being held by the international community. Human Rights, mainly the political freedom, was major agenda during the Popular Movement in the same year. Before 1990, Nepal had ratified only one convention - The International Convention on the Elimination of All Forms of Racial Discrimination (*ICERD*). *Although the then governments had shown commitments for the Universal Declaration of Human Rights (UDHR), in formality which was easy for them because the UDHR itself was non-binding in nature and thus had no virtual obligation of the state. Some other commitments shown in the international instruments were related to only slavery convention, slave trade, political rights for women and crime.*

## **1.2 Rationale of Review**

Human beings are born with certain inalienable fundamental rights. Right to equality and peaceful existence are the basic and inseparable rights of the human beings. The United Nations Convention held on 10 December 1948 to formalize the Universal Declaration on Human Rights (UDHR) identified human rights as fundamental to the achievement of peace and progress. This declaration has been taken as a primary document to define the birthright of human beings to certain innate and inalienable rights. Based on the United Nations Charter and the UDHR, various international covenants on human rights have been declared that incorporate various aspects of human rights. Nepal, as an active member of the United Nations (UN), has signed and ratified such international agreements and is working to assimilate them into the mainstream development effort and implement them effectively. Nepal is a party to more than two dozens of such conventions.

In 1993, the UN Human Rights Convention took place in Vienna, Austria. The Convention called on member states to help develop

a human rights culture in the world. It urged the member states to formulate national plans that protect and promote human rights implement them effectively. A UN workshop on human rights was held in Bangkok in 1999 involving nations in Asia Pacific. The UN members in the Asia Pacific agreed to respect, promote, and protect human rights and fulfil their commitments to the UN in a systematic manner. Nepal at that time proposed to formulate and implement a coordinated National Human Rights Action Plan (NHRAP) involving the government of Nepal, civil society, and the private sector. As a result, an National Human Rights Action Plan (NHRAP) was prepared in 2004 and being implemented (HMG, 2004).

### **1.3 Objectives**

Countries that have ratified or acceded to the Conventions are legally bound to put their provisions into practice. They are also committed to submit national reports on policies, programmes and measures they have taken to comply with their treaty obligations (UN, 2011). Since Nepal has also ratified these conventions, it is necessary to see what progress Nepal has done in the major human rights conventions and where the gap is. This review exercise also concentrates mainly on the domestication status of the major conventions of Nepal.

### **1.4 Methodology**

Desk review is the main process adopted for the preparation of this report. Literatures related to the conventions in the light of Nepal were collected and compiled. Main highlights in this context were the major six treaties (ICCPR, ICESCR, CERD, CEDAW, CAT and CRC). Furthermore, two major instruments CRMW and ICC which are in the list top front discussions among the civil society, academic, and practitioners in Nepal have also been reviewed focusing mainly on why Nepal government has not ratified these conventions. Review of these two major instruments is made here to find out the cause why Nepal has still shown reluctant to ratify these two major documents.



# **Chapter Two**

## **Status of Nepal's Commitment towards International Instruments**

## **2.1 Introduction**

Human Rights movement in Nepal has evolved through the principle of equality. Part three of the Constitution of Nepal 1990 for the first time addressed fundamental human rights. Despite those constitutional provisions, both de jure and de facto discrimination still existed in Nepal. Statutes based on traditional practices and customs that were discriminatory and inconsistent with the present Constitution still existed, including the Muluki Ain, which restricted women from independent use of their property and inheritance of parental property.

Nepal's status towards commitment of international human rights instruments can be observed by dividing the historical context in two broad eras. The first is the period remained during the autocratic Panchayat System in Nepal, that is, before 1990 and the second is the period after 1990, the context that the underground political parties launched People's Movement and as a result the onset of multi party system resumed after 30 years.

## **2.2 Status of Human Rights Commitment before 1990**

The available records show that Nepal had shown commitment or ratified only on seven human rights related instruments before 1990. They were Slavery Convention of 1926, 25 September 1926 as amended (23 October 1953); Amendments to the Slavery Convention (1926), 1953; Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 7 September 1956; Convention on the Political Rights of Women, 20 December 1952; Convention on the Prevention and Punishment of the Crime of the Genocide, New York, 9 December 1948; International Convention on the Elimination of All Forms of Racial Discrimination, New York, 7 March 1966; and International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973 (Table 2.1).

**Table 2.1: Status of Nepal's Commitment Towards International Human Rights Instruments before 1990**

SN	Conventions	Commitment date
1.	Slavery Convention of 1926, 25 September 1926 as amended (23 October 1953)	7 Jan 1963
2.	Amendments to the Slavery Convention (1926), 1953	7 Jan 1963
3.	Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 7 September 1956	7 Jan 1963
4.	Convention on the Political Rights of Women, 20 December 1952	26 Apr 1966
5.	Convention on the Prevention and Punishment of the Crime of the Genocide, New York, 9 December 1948	17 Jan. 1969
6.	International Convention on the Elimination of All Forms of Racial Discrimination, New York, 7 March 1966	30 Jan. 1971
7.	International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973.	12 July 1977

Source: HRTMCC, 2008.

Ratification to the Convention on the Rights of the Child (CRC) was the first historic task of the then government formed after the success of the Popular Movement, that is, 14 September 1990. Although this Convention was signed during the time the Popular Movement was in plan, that is, 26 January 1990, it was the plan of the then government under Panchayat era that Nepal is committed for Human Rights and it wants to start with the children. None of the human rights instruments has been recognised by Nepal before 1990 except these two.

Nepal also ratified all four Geneva Conventions before in 1964 (Table 2.2) which is quite earlier than the political change of 1990. These conventions are popularly known as humanitarian conventions.<sup>1</sup>

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1 International humanitarian law (IHL), or the law of armed conflict, is the law that regulates the conduct of armed conflicts (*jus in bello*). It comprises "the Geneva Conventions and the Hague Conventions, as well as subsequent

**Table 2.2: Status of Nepal's Commitment towards International Humanitarian Laws**

SN	Humanitarian Conventions	Formulation date	No. of countries ratifying	Date on which Nepal ratified
1.	<b>Geneva Convention (I)</b> for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field	12 August 1949	<b>167</b>	7 Feb 1964
2.	<b>Geneva Convention (II)</b> for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea	12 August 1949	163	7 Feb 1964
3.	<b>Geneva Convention (III)</b> relative to the Treatment of Prisoners of War	12 August 1949	17	7 Feb 1964
4.	<b>Geneva Convention (IV)</b> relative to the Protection of Civilian Persons in Time of War	12 August 1949		7 Feb 1964
5.	<b>Protocol Additional</b> to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts	8 June 1977		Not ratified
6.	<b>Protocol Additional</b> to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts.	8 June 1977		Not ratified
7.	<b>Protocol Additional</b> to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem.	2005		Not ratified

Nepal however has not ratified any of the protocols additional to the Geneva Conventions.

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treaties, case law, and customary international law." [1] It defines the conduct and responsibilities of belligerent nations, neutral nations and individuals engaged in warfare, in relation to each other and to protected persons, usually meaning civilians.



## 2.3 Human Rights Laws Provisioned before 1990

Possibly the first of its kind in the legal provision history of Nepal, the Fundamental Rights Act of 2005 (1947) is the one which stresses the following as the fundamental rights of the Nepali citizens:

By not violating the principles of public morality, in accordingly to the existing and new Act and rules to be made hereunder, is given fundamental rights to the citizens of Nepal that of Personal Liberty, Freedom of Speech, Freedom of Publication, Freedom of Assembly or Organization, Freedom of Religion, Equality before the laws, Cheap and Speedy Justice, Free and Compulsory Primary Education through out the country, adult franchise, Right to Protection of Private Property.<sup>2</sup>

Right to Personal Liberty Act 2006 [1949] can be taken another example of human rights law in Nepal. As there were no major instruments ratified by Nepal, its reflection over the laws can also be seen almost similar. Despite this, some laws like Nagarik Adhikar Ain 2012 [Citizen Rights Act, 1955] can be taken as a milestone which for the first time stressed that "all people are equal before the law" (Article 3). This Act also defined that any person won't be discriminated while appointing in the civil service in terms of religion, caste, sex and others (Article 4). This act furthermore provisioned some human rights such as right to press, and freedom of speech, right to peaceful assembly, right to mobility throughout country and so on. It banned children under 14 years of age to work in a factory. Despite these good initiatives in the sector of human rights, the main clause was that these all rights can be exercised as per the law. This means the government could cancel any of these laws at any moment. Some more acts/laws can be found as:

- ◆ Nepal Press and Registration of Publication Act, 2009 [1952];
- ◆ Public Service Commission Procedures Act, 2009 [1952];
- ◆ Nepal Citizenship Act, 2009 [1952];
- ◆ Press and Publication Act, 2009 [1952];
- ◆ Press and Publication (Amendment) Act, 2011 [1954];
- ◆ Prevention of Corruption (First Amendment) Act, 2012 [1955];
- ◆ Land Act, 2014 (1956).

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2 Government of Nepal Act, 2004, [http://himalaya.socanth.cam.ac.uk/collections/rarebooks/downloads/Nepal\\_1948\\_Government\\_Act\\_English.pdf](http://himalaya.socanth.cam.ac.uk/collections/rarebooks/downloads/Nepal_1948_Government_Act_English.pdf)

The Muluki Ain 2019 (General Code of 1962) which has got 19<sup>th</sup> amendment so far has more issues related to social, economic and others. Before 1990 although some laws were framed, they were not being reflected as a domestication of the international human rights instruments.

## **2.4 Status of Human Rights Commitment after 1990**

After the decade of 90s, the term *Human Rights* became a catchword for the human rights activists, politicians, policy makers, academics, lawyers and others. Hundreds of civil society organisations were established and worked for the protection and promotion of human rights of the Nepalese people. The environment suited them to do so because the period is known in Nepal as the decade Human Rights, The then Constitution for the first time guaranteed basic human rights to every citizen of Nepal. There were bases for enshrining these rights into the constitution. In the international level, different human rights related covenants and conventions had been made by the coordination of the United Nations decades back (since 1948). The major such Human Rights conventions among others are the International Covenant on Civil and political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on Elimination of All Forms of Discrimination against Women (CEDAW), Convention against Torture (CAT), Convention on the Rights of the Child (CRC) and Convention on Elimination of All Forms of Racial Discrimination (CERD). Prior to these six major conventions, two important principles have also been made – The Universal Declaration of Human Rights (UDHR) and four Geneva Conventions. Nepal ratified all of these conventions after promulgating the 1990 constitution. Many of them (ICCPR, ICESCR, CAT and CEDAW) were ratified by Nepal in 1991, that is the context of the new democratic constitution after the success of the People's Movement 1990.

Nepal has also ratified all of the optional protocols to the ICCPR, but not the optional protocol to the ICESCR which establishes an

individual complaints mechanism for the Covenant similar to those of the First Optional Protocol to the ICCPR and Optional Protocol to the Convention on the Rights of Persons with Disabilities.

Nepal has also ratified the optional protocol to the CEDAW which contains two procedures: (1) A communications procedure allows individual women, or groups of women, to submit claims of violations of rights protected under the Convention to the Committee. The Protocol establishes that in order for individual communications to be admitted for consideration by the Committee, a number of criteria must be met, including those domestic remedies must have been exhausted. (2) The Protocol also creates an inquiry procedure enabling the Committee to initiate inquiries into situations of grave or systematic violations of women's rights. In either case, States must be party to the Convention and the Protocol. The Protocol includes an "opt-out clause", allowing States upon ratification or accession to declare that they do not accept the inquiry procedure. Article 17 of the Protocol explicitly provides that no reservations may be entered to its terms UN, 2012).

Nepal has however not ratified the Optional Protocol to the CAT which establishes a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment (UN 2012).

Thus Nepal became a state party to a total of 16 international human rights conventions including in following table and many of them were made after 1990s.

Furthermore, once ratified by any country the above six major conventions (treaties), that is ICCPR, ICESCR, CAT, CEDAW, CRC and CERD, the State has the responsibility to submit report from time to time. Since the government of Nepal is a state party to all of these conventions, it is bound to implement all the provisions by way of enactment or amendment of legislation, creation of mechanisms, administrative arrangement, proper allocations of budgets and proper monitoring for effective implementation and enjoyment of rights enshrined in these international human rights documents.

**Table 2.2: Distribution of Major Human Rights Instruments by Date of Formulation and Ratification Status by Nepal**

SN	Conventions	Formulation date	No. of countries ratifying	Nepal's Status	
				Signature	Ratification
1.	ICCPR	16 Dec. 1966	167	*	14 May 1991
2.	First Optional Protocol to ICCPR	16 Dec. 1966	114		14 May 1991
3.	Second Optional Protocol to ICCPR	15 Dec. 1989	73		4 Mar. 1998
4.	ICESCR	16 Dec. 1966	160	*	14 May 1991
5.	Optional Protocol to ICESCR	10 Dec. 2008	8**	Not signed	Not ratified
6.	ICERD	7 March 1966	174	*	30 Jan. 1971
7.	CEDAW	18 December 1979	186***	5 Feb 1991	22 April 1991
8.	Optional Protocol to CEDAW	6 Oct 1999		18 Dec. 2001	15 June 2007
9.	CAT	10 Dec. 1984	149	*	14 May 1991
10.	Optional Protocol to CAT	18 Dec. 2002	61	Not signed	Not ratified
11.	CRC	20 Nov. 1989	193	26 Jan. 1990	14 Sept. 1990
12.	First Optional Protocol to CRC	25 May 2000		8 Sept. 2000	3 Jan. 2007
13.	Second Optional Protocol to CRC	25 May 2000		8 Sept. 2000	6 Jan. 2006
14.	Convention on the Rights of Persons with Disabilities	13 Dec. 2006	112	3 Jan. 2008	7 May 2010
15.	Optional Protocol to the Convention on the Rights of Persons with Disabilities	13 Dec. 2006	64	3 Jan. 2008	7 May 2010
16.	International Convention for the Protection of All Persons from Enforced Disappearance (ICCPED)	20 December 2006	34 (s: 91)		
17.	CRMW	18 Dec 1990	46	Not signed	Not ratified
18.	ICC	17 July 1998	120	Not signed	Not ratified

Source: INSEC, 2008; UN 2012

\* Ratified without signature.

\*\* It will enter into force when ratified by 10 parties (so far ratified by: Argentina, Bolivia (Plurinational State of), Bosnia and Herzegovina (2012), Ecuador, El Salvador, Mongolia, Slovakia (March 2012) and Spain .

\*\*\*Iran, Sudan, Somalia, Nauru, Palau, Tonga, and USA.<sup>3</sup>

3 President Jimmy Carter signed the treaty guaranteeing gender equity

## 2.5 Major Laws /Acts Related to Human Rights after 1990

The Treaty Act 1992 can be taken as the landmark in the process of domestication of human rights instruments in Nepal. Some other examples of domestication of human rights laws can be found in:

- ◆ Press and Publication (First Amendment) Act, 2046 [1990];
- ◆ Press and Publication Act, 2048 [1991];
- ◆ Prevention of Corruption (Fourth Amendment) Act, 2048 [1991];
- ◆ Foods (Second Amendment) Act, 2048 [1991].

The Right to Information Act 2007 and the Right to Information Rule 2009 are other recent examples of the domestication of right to information in Nepal. This Act stresses that "every citizen shall have access to the information held in the public bodies" (Article 3).



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within its first year. But the Senate has never ratified CEDAW, and without ratification the U.S. is not bound by its provisions. In addition to Carter, two other presidents have attempted to push forward CEDAW. Urged by the Clinton administration in 1994, the Senate Foreign Relations Committee held hearings on CEDAW and recommended it be ratified. Yet Senator Jesse Helms, a leading conservative and longtime CEDAW opponent.

# **Chapter Three**

## **Status of Domestication**

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## **3.1 Introduction**

Reflection of the provisions established in the different international instruments discussed on the Chapter II is the focus of this chapter. Any country once they have ratified the international instruments has three obligation in the process of their domestication: obligation to respect, obligation to protect and obligation to fulfil. Since Nepal has ratified a number of international instruments, their status of the domestication is the priority of this small scale desk review. Such a review responds to the big six treaties, namely, ICCPR, ICESCR, CERD, CEDAW, CAT and CRC and two major instruments CRMW and ICC.

## **3.2 Domestication of Fundamental Rights**

There is a typical difference between fundamental rights and human rights. Fundamental rights are the rights and freedoms guaranteed by constitutions to their citizens. These rights have a legal sanction and can be challenged by affected individuals in a court of law. Among these rights are the right to life, liberty, pursuit of happiness, and so on. These rights are considered to be the most basic rights and are provided to all citizens of the country without any discrimination. There are other fundamental rights such as the right to profess faith, right to movement across the country, right to freedom of speech and belief, and so on.

Fundamental rights are similar to human rights but are different in the sense that they have legal sanction and are enforceable in a court of law whereas human rights do not have such sanctity and are not enforceable in courts. Then there is difference of universal appeal because fundamental rights are country specific that have been made keeping in mind the history and culture of a country whereas human rights are designed in such a way that they are of even more basic nature and apply to all human beings across the world without any discrimination. The right to a dignified human life is one such human rights which cannot be questioned whether you are in US or in our country Nepal.

Nature of fundamental rights is based on equality, non-discrimination, freedom and justice. There are two separate schools of thought:

first that fundamental rights have generations and second that they have no generations. Usually, rights related to civil and political are treated as the first generation rights, rights related to economic, social and cultural are the second generation and the rights related to development and environment are treated as the third generation rights. However there are counter arguments that rights should not be distributed as generation because such segregation brings out itself a feeling of discrimination. For a person, all types of rights need to be ensured at the same time and not as step by step.

The trend of plasticising fundamental rights though the constitution of a country shows that they first guarantee the civil and political rights, then economic, social and cultural rights and finally the rights of the specific communities as well as related to development. Nepal's constitutional provisions have also a similar history. Before the decades of 90s no fundamental rights were enshrined in the constitution because it was the era of party less autocratic Panchayat system.

The Constitution of the 1990 is the main Nepal's legal document which domesticated so many provisions, basically the fundamental rights, enshrined in ICCPR. The provisions related to ICESCR were established in the directive principles of the then constitution. Similarly some provisions related to CEDAW, that is in the sector of fulfilling equal rights to women were also mentioned in the 1990 constitution.

### **3.3 Domestication of Civil and Political Rights**

Many of the civil and political rights related to the ICCPR were domesticated in Nepal through the Constitution of the 1990. This Constitution guaranteed a total of 10 civil and political rights as the fundamental rights. They include Right to Life, Right to Freedom, Right to Equality, Press and Publication Right, Right Regarding Criminal Justice, Right against Preventive Detention, Right to Information, Right against Exile and Right to Privacy.

The 2011 draft constitution has added to the right to life as the right to dignified life. The 1990 constitution had categorically identified the following as the right freedom:



- (a) freedom of opinion and expression;
- (b) freedom to assemble peaceably and without arms;
- (c) freedom to form political party or organisations;
- (d) freedom to form unions and associations;
- (e) freedom to move and reside in any part of Nepal; and
- (f) freedom to practice any profession, or to carry on any occupation, industry, or trade.

**Table 3.1: Civil and Political Rights Related to ICCPR**

SN	Fundamental rights	Constitution of 1990	Interim Constitution 2007	Draft Constitution 2011
1.	Right to Life	Y	Y	Y
2.	Right to Freedom (liberty)	Y	Y	Y
3.	Right to Equality	Y	Y	Y
4.	Press and Publication Right	Y	Y	Y
5.	Right Regarding Criminal Justice	Y	Y	Y
6.	Right of the Victims of the Crime	-	-	Y
7.	Right against torture	-	Y	Y
8.	Right against Preventive Detention	Y	Y	Y
9.	Right to Information	Y	Y	Y
10.	Right against Exile	Y	Y	Y
11.	Right to Privacy	Y	Y	Y
12.	Right to Constitutional Remedy	Y	Y	Y

Freedom to form unions and) freedom to move and reside in any part of Nepal were added in 2007. The 2011 draft furthermore linked right to freedom with Right to Independence as well. Freedom to engage in any occupation or be engaged in employment, industry and trade is added in 2011 draft.

Right to equality ensured in 1990 constitution has got some addition in its explanation in 2007 constitution such as The State shall not discriminate against any citizen in the application of general laws on grounds of religion, colour, caste, tribe, gender, sexual orientation, biological condition ,disability, health condition, marital condition, pregnancy, economic condition, origin, language or region, ideological conviction or other similar grounds.

Press and publication right was modified as the Right Regarding Publication, Broadcasting and Press in 2007 and now proposed as the Rights Regarding Mass Communications (2011). The right regarding criminal justice has been redefined as the Rights Regarding Justice only. Rights against torture has been included from the 2007 constitution which has the explanation that (1) No person who is detained during investigation, or for trial or for any other reason shall be subjected to physical or mental torture, nor shall be given any cruel, inhuman or degrading treatment. (2) Any such an action pursuant to clause (1) shall be punishable by law, and any person so treated shall be compensated in a manner as determined by law.

Two more fundamental rights related to civil and political rights have been added in the proposed draft of the new constitution. They are the victims of the crime shall have the right to information about the investigation, probe and action taken in the case in which he/she is victimized.

### **3.4 Domestication of Economic, Social and Cultural Rights**

Very few economic, social and cultural rights were enshrined in the constitution of the 1990 as the fundamental rights. They were right to property, cultural and educational rights, right to religion and right against exploitation. The 2007 constitution has provisioned for the compensation in case of requisitioned, acquired or encumbered

by the State in implementing scientific land reform programme or in public interest in accordance with law. The compensation and basis thereof and operation procedure shall be as prescribed by law. 2011 draft has also provisioned it.

Educational and cultural rights were established in the constitutions of 1990 and 2007 respectively. From 2011 census, the cultural right has been segregated from the education and included in the right to language. The 2011 draft constitution has provisioned that every person and community shall have the right to use their own language. They shall have the right to participate in the cultural life of their community. Furthermore, Nepalese community inhabiting Nepal shall have the right to protect and promote their language, script, culture, cultural civilization and heritage.

The 2011 draft constitution has indicated that no person shall be exploited in the name of religion, custom, tradition and practice, or in any other way. This right has also guaranteed that no person shall be subjected to human trafficking, slavery or bonded labour. Such an act shall be punishable in accordance with the law and the victim shall have the right to receive proper compensation from the victimizer.

The 2011 draft has defined the right to religion as the Right to Religious Freedom. This right has been enshrined again in the context that Nepal has been now a secular country and not the Hindu Kingdom as defined by the 1990 constitution. Now the discourse is going on as a state has no religion but the individual or the community. Right against exploitation was also enshrined from the 1990 constitution.

Right to Environment, Right to Health, Right to Employment, Right to Social Security, and Right Regarding Labour have been enshrined in the interim constitution of 2007 and they also got continuity in the 2011 draft constitution. The 2007 constitution had merged the right to health and environment in one place but the 2011 draft has segregated them as separate rights. The draft has also segregated the right to employment and security as the separate rights.

Labour rights and food rights are other two major achievements that the interim constitution 2007 has enshrined them as the fundamental rights. Regarding right to labour, the constitution has

the explanation that every employee and worker shall have the right to proper work practice. They will have also the right to form trade unions, to organise themselves and to perform collective bargaining for the protection of their interest in accordance with law.

**Table 3.2: Economic, Social and Cultural Rights (Related to ICESCR)**

SN	Fundamental rights	Constitution of 1990	Interim Constitution 2007	Draft Constitution 2011
1.	Right to Property	Y	Y	Y
2.	Cultural and Educational Right	Y	Y	Y
3.	Rights Regarding Language and Culture		Y	Y
4.	Right to Religion	Y	Y	Y
5.	Right against Exploitation	Y	Y	Y
6.	Right to Environment	-	Y	Y
7.	Right to Health	-	Y	Y
8.	Right to Employment	-	Y	Y
9.	Right to Social Security	-	Y	Y
10.	Right Regarding Labour	-	Y	Y
11.	Right to Food	-	Y	Y
12.	Right to Accommodation	-	-	Y
13.	Rights Regarding Consumers	-	-	Y

Regarding right to food, the 2007 constitution mentioned that every citizen shall have the right to food sovereignty as provided for in the law under right to employment and social security. The 2011 draft constitution added that every person shall have the right to food. They shall have the right to protect him or herself or herself from the vulnerable condition of life owing to the scarcity of food (provisions). Right to accommodation is the only right the new draft constitution has established as the fundamental rights. According to the proposed provision, every citizen shall have the right to an access to proper accommodation. Finally, Rights regarding consumers is another important milestone that Nepali people have got as another fundamental right. According to this provision, every consumer shall have the right to quality goods and services. It also adds that the person who incurs loss from substandard goods and services shall have the right to receive proper compensation.

### **3.5 Domestication of Community Rights**

The 1990 constitution had not directly included the community people entitled to fundamental rights although the directive principles had something to address. Women, Dalit, and indigenous people are the main communities addressed by the 2007 and the new draft constitutions. Regarding right of women, the 2007 interim constitution has enshrined that no one shall be discriminated in any form merely for being a woman. Every woman shall have the right to reproductive health and other reproductive matters. It further says no physical, mental or any other form of violence shall be inflicted to any woman, and such an act shall be punishable by law. (4) Son and daughter shall have equal rights to their ancestral property. The 2011 draft added that -no gender discrimination against women. Every woman shall have the right to proportionate participation in all agencies of the state mechanism on the basis of inclusiveness. Similarly, every woman shall have the right to special opportunity in education, health, employment and social security on the basis of positive discrimination.

Right to social justice is another fundamental right which directly addresses the community people. It says women, Dalit, indigenous people, Madheshi community, oppressed group, the poor peasant and labourers, who are economically, socially or educationally backward,

shall have the right to participate in the state mechanism on the basis of proportional inclusive principles. The 2011 draft added the economically destitute citizens shall be given priority. This has also included destitute class, disabled people and citizens of endangered communities. This right has further explanation that every farmer shall have the right to land for farming activity. The adiwasi, janjatis minority communities and Madhesi shall have the right to their identity, to protection, promotion and development of their language and culture, and to special privileges. This fundamental right also speaks about youth and says that every youth shall have the right to special privileges in sectors like education, health, employment, to personality development, and to proper opportunities for contributing towards the all round development of the State.

**Table 3.3: Rights of women, Dalit, Indigenous people (Related to CEDAW, ICERD, and others)**

SN	Fundamental rights	Constitution of 1990	Interim Constitution 2007	Draft Constitution 2011
1.	Right of woman	-	Y	Y
2.	Right to social justice	-	Y	Y
3.	Right against Untouchability and Racial Discrimination	-	Y	Y
4.	Right of Child	-	Y	Y
5.	Rights of Dalit community	-	Y	Y
6.	Rights Regarding Family	-	-	Y

Right against untouchability and racial discrimination is another major endorsement in the constitution in the spirit of the CERD. The 2007 constitution clearly stresses that no person shall, on the ground of caste, tribe, descent (origin), community, occupation or physical condition, be subject to discrimination and untouchability in any form.

Right of the child is another fundamental right established by the new constitution as the fundamental right. Although several rights related to children were enshrined in the laws before 2007 as an address to the CRC, the child right provision was not framed as a separate fundamental right. According to the 2007 constitution every child shall have the right to his/her own identity and name. A child has also the right to get nurtured, basic health and social security. They shall have the right against physical, mental or any other form of exploitation. Any such an act of exploitation shall be punishable by law and the child so treated shall be compensated in a manner as determined by law. The constitution has further explanation that helpless, orphan, mentally retarded, conflict victims, displaced, vulnerable and street children shall have the right to get special privileges from the State to their secured future. It further says no minor shall be employed in factories, mines or in any other such hazardous work or shall be used in army, police or in conflicts.

Right of Dalit community is another separate right enshrined by the 2011 draft constitution. The 2007 constitution had included Dalit rights as integrated approach.

Rights regarding family is another major breakthrough proposed by the 2011 draft constitution. It has clearly indicated that no one shall be allowed to have more than one spouse. Every person shall have the freedom to marry and divorce in accordance with law. No marriage shall be held against the wishes of the wedding parties or their full and independent consent. According to this right, the couple shall have the right to property and in family affairs. It shall be the common right and responsibility of the parents for the nurturing, care and all round development of the children whereas it shall be the common right and responsibility of every child to respect and nurture their parents and guardians.

### **3.6 Separate Article for the Implementation of the Fundamental Rights**

A separate article has been proposed by the draft of the new constitution regarding implementation of Fundamental Rights and Constitutional Treatment. It says that the State shall make appropriate provisions for the implementation of the rights

provisioned as Fundamental, such as rights to education, health, employment, accommodation, food, social justice and social security. Furthermore, the State shall make legal provisions, within two years as deemed necessary, for the implementation of the rights provided in this Part. Another provision of special measures to be taken by both the federal and provincial governments have also been established here. This right though brought as the positive manner has been much criticised by the civil society, academics and human rights activists.

### **3.7 Treaty Act**

In order to domesticate the provisions related to international instruments ratified by Nepal, a separate Treaty Act has been framed, which is the only act of the kind in the South Asia; none of the South Asian Countries have their treaty acts. The article 9 of the Treaty Act stipulates that once ratified treaty by Nepal is treated as equal to the national law.

### **3.8 Fundamental Duties (Responsibilities)**

The draft of the new constitution of Nepal has for the first time proposed ten fundamental duties of the Nepali people. These duties are listed as follows:

- Duty 1:** To show loyalty and allegiance towards the nation and safeguard the nationality, sovereignty and integrity of Nepal;
- Duty 2:** To maintain national secrecy (privacy);
- Duty 3:** To abide by the Constitution and law;
- Duty 4:** To enroll for mandatory service when required by the nation;
- Duty 5:** To protect and promote public and national property;
- Duty 6:** To pay tax in accordance with law;
- Duty 7:** To use one's freedom (independence) and right without encroaching upon national, social and other individuals' rights;
- Duty 8:** To respect labour,
- Duty 9:** To show honour and respect towards parents, children, elderly people (senior citizens), women, incapacitated and helpless people, disabled (differently challenged) people and humanity; and
- Duty 10:** To protect and promote environment, natural, historical and cultural heritage.



Including these duties in the constitution, a message has been given to the people that when there are rights guaranteed by the state, there are also the duties to be strictly obeyed by the people. Despite these good attempts made, it is not clear what type of action is taken against violating these duties.

### **3.9 Domestication through Directive Principles and Polices**

Though not binding, the proposed new draft constitution has provisioned the following as its directive principles as political objectives, social and cultural objectives, and economic objectives:

#### **Political objectives**

- ◆ To establish a public welfare state administration by establishing a just system in all fields of national life through a rule of law, fundamental rights and norms and values of human rights, inclusiveness, participation and social justice;
- ◆ To manipulate the relations subsisting among the federal units on the basis of federalism based on mutual cooperation;
- ◆ To ensure the condition of reaping the benefits of democracy by adopting the people's inclusive, proportionate system in the governance on the basis of local autonomy and decentralization; and
- ◆ To establish a federal democratic republic system while at the same time hoisting high the sovereignty, independence and integrity of the nation and protecting the lives, property, equality and liberty of the people

#### **Social and cultural objectives**

- ◆ To end all kinds of discrimination, exploitation and injustice meted out on the basis of religion, culture, manner, system, tradition, custom or any other ground;
- ◆ To create a civilized and equitable society;
- ◆ To develop social and cultural values based on respect for national pride, democracy;
- ◆ To respect for labour, enterprise, discipline, and tolerance,
- ◆ To respect cultural diversity;

- ◆ To end all kinds of discrimination, exploitation and injustice meted out on the basis of religion, culture, manner, system, tradition, custom or any other ground and create a civilized and equitable society and develop social and cultural values based on respect for national pride, democracy, and people orientedness; and
- ◆ To maintain communal goodwill, solidarity and harmony while consolidating national unity.

## **Economic objectives**

- ◆ To develop an economy oriented towards socialism by making the national economy self-reliant, independent and progressive through creating a society free of exploitation while making a just distribution of means and resources, ending all kinds of economic exploitation and inequality and making sustainable economic development and just distribution of the achievements resulting thereof through optimum use of the available means and resources through public, cooperative and private sectors.

## **3.10 International relations**

The international relations of the State shall be directed towards enhancing the national respect in the global community by protecting the sovereignty, integrity, independence and national interest of the country and establishing international relations, on the basis of sovereign equality.

## **3.11 Overall Comments on the Domestication of Fundamental Rights**

Despite these good attempts made during the early 90s, the Constitution of 1990 slowly got much criticism by the parties and agitating forces mainly demanding group/community rights. It could not address some crucial socio-cultural and political fault lines. Hinduism was made the state religion and the Nepali language an only national language. The King, who remained Supreme Commander of the national army, was kept beyond the scrutiny of parliament and was empowered through some articles in the Constitution to control the whole political process if he wished.

The Constitution also failed to provide the socially discriminated, politically excluded, and economically deprived with a platform to meaningfully engage in relevant processes. As such, the Constitution became a factor to fuel discontent amongst various groups of people. The Maoists tapped into this discontent to launch their 'People's War', which they did in 1996. Now, following the Janaandolan of April 2006, Nepal is in a process of transition from the traditional form of polity to a new one. The current debate in Nepal is around the new form of polity. The debate has yet to reach a logical end. But a tentative understating at the political establishment suggests that the new form would be around decentralised federalism firmly protected by constitutionalism.

The states, being the parties to the ICCPR are mainly obliged to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy and for this competent authorities shall enforce such remedies when granted and take necessary steps, in accordance with its Constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the Covenant (NHRC, 2007).

All the rights enshrined in the previous two constitutions have been included in this draft constitution as the fundamental rights. However, there are critical thoughts emerged among the civil society fronts.<sup>4</sup> Fore and foremost, fundamental rights are inherent, universal and indivisible. This Concept Paper has not fully adhered to the principles of Human Rights. The repeated words like 'but', as per the laws', as 'indicated by the law' prove this fact.

Secondly, fundamental rights are the not issues of bargain. The Constitution of a country where peoples are sovereign, there should not be any authority to 'give and take' the fundamental rights.

The main concern of the civil society is that the Concept Paper for the new constitution has not still fully respected the spirits of the

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4 Human Rights Alliance has coordinated Developing Democracy in Nepal (DDN), the coalition of the civil society organisations funded by the Canadian Cooperation Office (CCO) for the review of the thematic paper prepared by the Committee of the Fundamental Rights and Directive Principles. This Author himself was the coordinator for this review.

Aadibasi Janjatis , Dalits, Women, Persons with Disability, Madhesis, Tharus, Youths, and Marginalised people like Karnali region. The Concept Paper is silent or somewhere vaguely mentioned about guaranteeing the group rights of these peoples.

The Concept Paper is unclear about the need of both individual rights and group rights. It needs to clearly mention that individual rights prevail for every citizen of Nepal and since all the Nepali are not equal, peoples like Aadibasi Janjatis , Dalits, Women, Persons with Disability, Madhesis, Tharus, Youths, and Marginalised people like Karnali region will have group rights.

The Concept Paper has not mentioned in detail about both the rights and the responsibilities of a Nepali citizen. A Nepali citizen's duty does not lie only within the family, but also for the country. After every right, there is also a responsibility of a citizen.

The Concept Paper has written many things, may be to clarify everything regarding fundamental rights and directive principles of the State. However, the long and confusing sentences with jargons, conjunctions, clauses and unnecessary phrases have made the text more and more ambiguous. Definition of the jargons like "Rastra Ghati", "Dalal", "Adalat ko Abahelana", "Nationality" need to be clearly defined.

### **3.12 Some Specific Comments**

- a) Right to property is fine as mentioned in the Concept Paper. But what about the growing gap between rich and poor in Nepal which is the result of not mentioning anything about a rich person's responsibility to the poor people. The property should not be seized but the rich person should have the responsibility to invest his/her property directly for the social security of the poor people such as by making a public trust.
- b) The concept of equal wage for equal work is not well reflected. Discrimination on wage is not the matter of gender only but mainly women, Dalit, and poor Nepali which is creating vulnerability.
- c) A right against arbitrary detention is not included clearly.
- d) Freedom of people cannot be restricted by law but duty of people to maintain freedom can be specified on behalf the State.
- e) The word 'Khalal' is like a rhetoric being reflected in every constitution of Nepal which needs to be clearly defined.



# **Chapter Four**

## **International Criminal Court**

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## 4.1 Introduction

In November 2001, National Coalition for the International Criminal Court (NCICC) was formed as an outcome of a two-day national consultation programme on ICC in Nepal. The network comprises human rights NGOs, media, lawyers, academicians and individuals. The coalition has been coordinated by Informal Sector Service Centre (INSEC), one of the founder members of the Human Rights Alliance. The overall writings on ICC in this chapter is from the same campaign.

The purpose of the formation of the coalition is to act on different platforms:

- ◆ To campaign in support of ICC;
- ◆ To advocate /lobby in favor of the court in Nepal;
- ◆ To sensitize and aware the concerned authorities of Nepal to accede the Rome Statute of the ICC;
- ◆ To bring the attention of the members of the society on the need of the court; and
- ◆ To bring NGOs, academicians, lawyers, Bar Association and other individuals in the coalition network.

The NCICC, since its establishment in 2001, has initiated campaign to make the government ratify the Statute. It has been organizing different interactions, discussions and pressure programmes in the course of conducting the campaign. It has now been more than one decade, however, the political parties have still shown reluctance to ratify the Rome Statute.

## 4.2 About the ICC

The International Criminal Court (ICC) is the first ever permanent, treaty based, international court established to promote the rule of law and ensure that the gravest international crimes do not go unpunished which is located in The Hague in the Netherlands. The court acts only in cases where states are unwilling or unable to do so - known as the principle of complementarity.

The International Criminal Court brings the most serious international criminals to justice and challenges the impunity that they have so often enjoyed in the past. Until now, those who commit atrocities have gotten away with it and their victims left with nothing. The ICC provides redress and reparations for the victims and survivors of these atrocities, which is a vital step towards accountability and lasting justice.

The Court prosecutes individuals - not states. The court consists of eighteen elected judges and an elected prosecutor, who leads investigations and tries cases. Only those states that have ratified the treaty are able to nominate and elect judges and prosecutors.

On 17 July 1998, one hundred and twenty countries voted to adopt the treaty outlining the establishment and structure of an International Criminal Court. Since then, 139 countries have signed the treaty and as of August 2006, 100 countries have ratified it. The treaty entered into force on 1 July 2002. The court takes cases that occur after its entry into force. This means that crimes committed before this moment in time cannot be brought to the court - this is known as non-retroactivity.

The court investigates and tries individuals for the most serious international crimes: genocide, crimes against humanity, war crimes and aggression. The ICC has jurisdiction over crimes committed in the territories of ratifying states and over crimes committed anywhere by nationals of ratifying states. States that do not ratify the treaty can choose to accept the court's jurisdiction in particular cases. These states, and all states parties, must cooperate with the court's investigations and prosecutions.

There are three ways that cases can be brought to the International Criminal Court. Both a state that has joined the treaty and the Security Council of the United Nations can refer a situation to the court for investigation. In addition, the ICC prosecutor can start an investigation based on information that she or he receives from victims, non-governmental organizations, or any other reliable source. The ICC relies on state cooperation in its investigation and prosecution of cases.

### **4.3 Structure of the Court**

The Court is an independent institution. The Court is not part of the United Nations, but it maintains a cooperative relationship with the U.N. The Court is based in The Hague, the Netherlands, although it may also sit elsewhere. The Court is composed of four organs. These are the Presidency, the judicial Divisions, the Office of the Prosecutor and the Registry.

The Presidency is responsible for the overall administration of the Court, with the exception of the Office of the Prosecutor, and for specific functions assigned to the Presidency in accordance with the Statute. The Presidency is composed of three judges of the Court, elected to the Presidency by their fellow judges, for a term of three years.

The Judicial Divisions consist of eighteen judges organized into the Pre-Trial Division, the Trial Division and the Appeals Division. The judges of each Division sit in Chambers which are responsible for conducting the proceedings of the Court at different stages. Assignment of judges to Divisions is made on the basis of the nature of the functions each Division performs and the qualifications and experience of the judge. This is done in a manner ensuring that each Division benefits from an appropriate combination of expertise in criminal law and procedure and international law.

The Office of the Prosecutor is responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court.

The Registry is responsible for the non-judicial aspects of the administration and servicing of the Court. The Registry is headed by the Registrar who is the principal administrative officer of the Court. The Registrar exercises his or her functions under the authority of the President of the Court.

The Court also includes a number of semi-autonomous offices such as the Office of Public Counsel for victims and the Office of Public Counsel for Defence. These Offices fall under the Registry for administrative purposes but otherwise function as wholly independent offices. The Assembly of States Parties has also established a Trust Fund for the benefit of victims of crimes within the jurisdiction of the Court and the families of these victims



## 4.4 Ratification Process

On 25 July House of Representatives has given a directive order to the Government to become a party of the Rome Statute of ICC. This has offered an opportunity to Nepal for formally being Member of the ICC through exhausting the process of ratification or accession as per the prescription of the domestic law. Today, the issue of Rome Statute accession has emerged as one of the imperative next to the political conflict and insurgency in Nepal.

The domestic law relating to ratification or accession of a Treaty, Agreement, Convention or Protocol is "Treaty Act of Nepal 1990". The Treaty Act prescribes two steps to become a Party to any Treaty, both bilateral and multilateral. In the first step, under section 3 of the Treaty Act, a Treaty is concluded and signed, by which Nepal becomes signatory to the Treaty. A signatory is not a Party but it is an expression of willingness to become a Party or Member.

The second step is a step of ratification, accession, approval or acceptance. Under Vienna Convention on Law of Treaties 1969, these different words mean in each case the international act so named whereby a state establishes on the international plane its consent to be bound by a treaty. For this reason, ratification of Rome Statute requires to undergo through the processes laid down by section 4 of the Treaty Act. Section 4 of the treaty Act has prescribed the following:

- ◆ Treaties required to be ratified, accessed, approved or accepted, except prescribed by Article 126 of the Constitution of the Kingdom of Nepal 1990, Nepal Government should present a proposal before the House of Representatives for ratification, accession, approval or acceptance;
- ◆ The majority of the House of Representatives, present, should approve the proposal therein;
- ◆ After approval from the House of Representatives, Government should deposit the instrument of ratification to the concerned authority, and
- ◆ Despite the non-requirement by international treaty for ratification, accession, approval or acceptance, the Nepal Government cannot be a Party of a treaty establishing an international organisation or becoming a Member to an international organisation unless the House of Representatives approve it.



# **Chapter Five**

## **Rights of the Migrant Workers**

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## 5.1 Introduction

This UN Convention on the Protection of the Rights of the All Migrant Workers and Their Families (CRMW), 1990 was adopted and opened for signature, ratification and accession by the General Assembly in its resolution 45/158 of 18 December 1990. It entered into force on 1 July 2003, following the deposit of the twentieth instrument of ratification on 14 March 2004. At present, 40 States are parties to the Convention including Sri Lanka, Uganda, Morocco, Egypt and Mexico with reservation. Similarly, several countries have signed the Convention (Wikipedia, 2011).

## 5.2 General Features

This Convention has nine parts and 93 articles. The preamble of the Convention highlights the principles embodied in the basic instruments of the United Nations concerning human rights, in particular the UDHR, and other big six treaties (ICESCR, ICCPR, ICERD, CEDAW, and CRC). It emphasizes the importance of the work done in connection with migrant workers and members of their families in various organs of the United Nations. The preamble also stresses that the situation of vulnerability in which migrant workers and members of their families frequently-find themselves owing, among other things, to their absence from their State of origin and to the difficulties they may encounter arising from their presence in the State of employment. The preamble finally links the migration phenomena as the rights of migrant workers and members of their families who have not been sufficiently recognized everywhere and therefore require appropriate international protection.

## 5.3 Contents of the CRMW

- Part I Scope and Definitions (articles 1-6);
- Part II Non-discrimination with Respect to Rights (article 7);
- Part III Human Rights of All Migrant Workers and Members of Their Families (articles 8-35);
- Part IV Other Rights of Migrant Workers and Members of Their Families Who Are Documented or in a Regular Situation (articles 36-56);

- Part V Provisions Applicable to Particular Categories of Migrant Workers and of Their Families (articles 57-63);
- Part VI Promotion of Sound, Equitable, Humane and Lawful Conditions Connection with International Migration of Workers and Members of Their Families (articles 64-71);
- Part VII Application of the Convention (articles 72-78);
- Part VIII General Provisions (articles 79-83); and
- Part IX Final Provisions (articles 84-93).

## **Part I: Scope and Definitions (articles 1-6)**

The Article 1 of the Convention shows the applicability of it as all migrant workers and members of their families without distinction of any kind. It gives the reference period as during the entire migration process of migrant workers and members of their families. The Article 2 defines "migrant worker" as a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national. It also defines terms like "frontier worker", "seasonal worker" "seafarer", "worker on an offshore installation", "itinerant worker", "project-tied worker", "specified-employment worker", and "self-employed worker". The Article 3 indicates that this Convention does not apply to:

- ◆ Persons sent or employed by international organizations and agencies or persons sent or employed by a State outside its territory to perform official functions, whose admission and status are regulated by general international law or by specific international agreements or conventions;
- ◆ Persons sent or employed by a State or on its behalf outside its territory who participate in development programmes and other co-operation programmes, whose admission and status are regulated by agreement with the State of employment and who, in accordance with that agreement, are not considered migrant workers;
- ◆ Persons taking up residence in a State different from their State of origin as investors;
- ◆ Refugees and stateless persons, unless such application is provided for in the relevant national legislation of, or international instruments in force for, the State Party concerned;

- ◆ Students and trainees; and
- ◆ Seafarers and workers on an offshore installation who have not been admitted to take up residence and engage in a remunerated activity in the State of employment.

The Article 4 defines "Members of the family" as persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned. The Article 5 elaborates migrant workers and members of their families are considered as:

- ◆ Documented or in a regular situation if they are authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party; and
- ◆ Non-documented or in an irregular situation if they do not comply with the conditions provided for in subparagraph (a) of the present article.

Finally, Article 6 defines some more terminologies related to migration such as "State of origin" means the State of which the person concerned is a national; "State of employment" means a State where the migrant worker is to be engaged, is engaged or has been engaged in a remunerated activity, as the case may be; and "State of transit," means any State through which the person concerned passes on any journey to the State of employment or from the State of employment to the State of origin or the State of habitual residence.

## **Part II : Non-Discrimination with Respect to Rights**

The Article 7 highlights the principle of non-discrimination as the States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind.

### **Part III: Human Rights of All Migrant Workers and Members of Their Families**

The Article 8 elaborates the fights of the migrant workers as human rights and says that migrant workers and members of their families shall be free to leave any State, including their State of origin. It further stresses that migrant workers and members of their families shall have the right at any time to enter and remain in their State of origin. The Article 9 defines the right to life of the migrant workers. The Article 10 deals with the right against torture or cruel, inhuman or degrading treatment or punishment. The Article 11 highlights rights against slavery or servitude and rights against forced or compulsory labour. The Article 12 presents right to freedom of thought, conscience and religion, rights against coercion, freedom to manifest one's religion or belief and establishes the obligation of the states Parties to undertake to have respect for the liberty of parents, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions. The Article 13 presents right to hold opinions without interference, and right to freedom of expression. The Article 14 presents right against arbitrary or unlawful interference with his or her privacy, family, home, correspondence or other communications, or to unlawful attacks on his or her honour and reputation. Each migrant worker and member of his or her family shall have the right to the protection of the law against such interference or attacks. The Article 15 includes right against arbitrarily deprived of property, whether owned individually or in association with others. The Article 16 deals with the right to liberty and security of person and stresses on:

- ◆ Effective protection by the State against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions;
- ◆ Any verification by law enforcement officials of the identity of migrant workers or members of their families shall be carried out in accordance with procedure established by law;
- ◆ Rights against arbitrary arrest or detention;
- ◆ Those arrested shall be informed at the time of arrest as far as possible in a language they understand of the reasons for their arrest and they shall be promptly informed in a language they understand of any charges against them;

- ◆ Migrant workers and members of their families who are arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release;
- ◆ Rights after arrest or intimidation;
- ◆ Right to take proceedings before a court; and
- ◆ Right to compensation.

The Article 17 presents right to humanity and for the inherent dignity of the human person and for their cultural identity; right to be separated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons for accused ones; and right to be held separately from convicted persons or persons detained pending trial.

The Article 18 highlights the right to equality with nationals of the State concerned before the courts and tribunals; right to be presumed innocent until proven guilty according to law and the rights to be informed promptly and in detail in a language they understand of the nature and cause of the charge against them. The Article 19 says that no migrant worker or member of his or her family shall be held guilty of any criminal offence on account of any act or omission that did not constitute a criminal offence under national or international law at the time when the criminal offence was committed, nor shall a heavier penalty be imposed than the one that was applicable at the time when it was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, he or she shall benefit thereby. It also indicates that humanitarian considerations related to the status of a migrant worker, in particular with respect to his or her right of residence or work, should be taken into account in imposing a sentence for a criminal offence committed by a migrant worker or a member of his or her family.

The Article 20 clarifies that no migrant worker or member of his or her family shall be imprisoned merely on the ground of failure to fulfill a contractual obligation. The Article 21 bans any unlawful activities such as to confiscate, destroy or attempt to destroy identity documents, documents authorizing entry to or stay, residence

or establishment in the national territory or work permits. No authorized confiscation of such documents shall take place without delivery of a detailed receipt. In no case shall it be permitted to destroy the passport or equivalent document of a migrant worker or a member of his or her family. The Article 22 protects the migrant workers from expulsion of any kind puts condition that migrant workers and members of their families may be expelled from the territory of a State Party only in pursuance of a decision taken by the competent authority in accordance with law.

The Article 23 stresses that the migrant workers and members of their families shall have the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin or of a State representing the interests of that State whenever the rights recognized in the present Convention are impaired. In particular, in case of expulsion, the person concerned shall be informed of this right without delay and the authorities of the expelling State shall facilitate the exercise of such right. The Article 24 highlights that every migrant worker and every member of his or her family shall have the right to recognition everywhere as a person before the law. The Article 25 reaffirms that migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and Other conditions and terms of work. The Article 26 specifies that the migrant workers and members of their families have the rights to take part in meetings and activities of trade unions and of any other associations established in accordance with law, with a view to protecting their economic, social, cultural and other interests, subject only to the rules of the organization concerned.

The Article 27 and 28 have guaranteed the same treatment including medical care granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. The Article 29 and 30 ensure the rights of the child of a migrant worker to a name, to registration of birth and to a nationality. The Article 31 ensures respect for the cultural identity of migrant workers and members of their families and shall not prevent them from maintaining their cultural links with their State of origin. 2. States Parties may take appropriate measures to assist and encourage efforts in this respect.



The Article 32 says that upon the termination of their stay in the State of employment, migrant workers and members of their families shall have the right to transfer their earnings and savings and, in accordance with the applicable legislation of the States concerned, their personal effects and belongings. The Article 33 deals with the rights of the migrant workers and members of their families to be informed by the State of origin, the State of employment or the State of transit as the case may be concerning. The Article 34 and 35 put conditions for the applicability of these rights as nothing in the present part of the Convention shall have the effect of relieving migrant workers and the members of their families from either the obligation to comply with the laws and regulations of any State of transit and the State of employment or the obligation to respect the cultural identity of the inhabitants of such States.

#### **Part IV: Other Rights of Migrant Workers and Members of Their Families Who Are Documented or in a Regular Situation**

The Article 36 says that migrant workers and members of their families who are documented or in a regular situation in the State of employment shall enjoy the rights set forth in the present part of the Convention in addition to those set forth in part III. The Article 37 has provisions before their departure, or at the latest at the time of their admission to the State of employment, migrant workers and members of their families shall have the right to be fully informed by the State of origin or the State of employment, as appropriate, of all conditions applicable to their admission and particularly those concerning their stay and the remunerated activities in which they may engage as well as of the requirements they must satisfy in the State of employment and the authority to which they must address themselves for any modification of those conditions.

The Article 38 sets some more provisions as states of employment shall make every effort to authorize migrant workers and members of the families to be temporarily absent without effect upon their authorization to stay or to work, as the case may be. In doing so, States of employment shall take into account the special needs and obligations of migrant workers and members of their families, in particular in their States of origin.

The Article 39, 40, 41, 42 and 43 highlight that migrant workers and members of their families shall have the right to liberty of movement and equality of treatment in the territory of the State of employment and freedom to choose their residence there. The Article 44 presents obligation of States Parties to take appropriate measures to ensure the protection of the unity of the families of migrant workers. The Article 45 indicates the members of the families of migrant workers the rights of access to education, training, health services, and the right to participate in cultural life. The Article 46 sets provisions for state legislation to ensure their participation in customs unions, enjoy exemption from import and export duties and taxes in respect of their personal and household effects as well as the equipment necessary to engage in the remunerated activity for which they were admitted to the State of employment.

The Article 47 ensures that migrant workers shall have the right to transfer their earnings and savings, in particular those funds necessary for the support of their families, from the State of employment to their State of origin or any other State. Such transfers shall be made in conformity with procedures established by applicable legislation of the State concerned and in conformity with applicable international agreements. The Article 48 has the provision of without prejudice to applicable double taxation agreements, migrant workers and members of their families shall, in the matter of earnings in the State of employment. The Article 49 also deals with some more issues related to remuneration.

The Article 50 highlights that in the case of death of a migrant worker or dissolution of marriage, the State of employment shall favourably consider granting family members of that migrant worker residing in that State on the basis of family reunion an authorization to stay; the State of employment shall take into account the length of time they have already resided in that State. The Article 51 has provisions of migrant workers who in the State of employment are not permitted freely to choose their remunerated activity shall neither be regarded as in an irregular situation nor shall they lose their authorization of residence by the mere fact of the termination of their remunerated activity prior to the expiration of their work permit, except where the authorization of residence is expressly dependent upon the specific remunerated activity for which they were admitted.

The Article 52 adds that the migrant workers in the State of employment shall have the right freely to choose their remunerated activity, subject to the following restrictions or conditions. The Article 53 says that members of a migrant worker's family who have themselves an authorization of residence or admission that is without limit of time or is automatically renewable shall be permitted freely to choose their remunerated activity under the same conditions as are applicable to the said migrant worker in accordance with article 52 of the present Convention. The Article 54 has another provision that without prejudice to the terms of their authorization of residence or their permission to work and the rights provided for in articles 25 and 27 of the present Convention, migrant workers shall enjoy equality of treatment with nationals of the State of employment in respect of:

- ◆ Protection against dismissal;
- ◆ Unemployment benefits;
- ◆ Access to public work schemes intended to combat unemployment; and
- ◆ Access to alternative employment in the event of loss of work or termination of other remunerated activity, subject to article 52 of the present Convention.

The Article 55 stresses that migrant workers who have been granted permission to engage in a remunerated activity, subject to the conditions attached to such permission, shall be entitled to equality of treatment with nationals of the State of employment in the exercise of that remunerated activity. The Article 56 clarifies that the migrant workers and members of their families referred to in the present part of the Convention may not be expelled from a State of employment, except for reasons defined in the national legislation of that State, and subject to the safeguards established in part III.

## **Part V: Provisions Applicable to Particular Categories of Migrant Workers and of Their Families**

The Article 57 deals with the particular categories of migrant workers and members of their families specified in the present part of the Convention who are documented or in a regular situation shall enjoy the rights set forth in part m and, except as modified below, the

rights set forth in part IV. Similarly, the Article 58 indicates frontier workers, as defined in article 2, paragraph 2 (a), of the present Convention, shall be entitled to the rights provided for in part IV that can be applied to them by reason of their presence and work in the territory of the State of employment, taking into account that they do not have their habitual residence in that State.

The Article 59 talks about seasonal workers, as defined in article 2, paragraph 2 (b), of the present Convention, shall be entitled to the rights provided for in part IV that can be applied to them by reason of their presence and work in the territory of the State of employment and that are compatible with their status in that State as seasonal workers, taking into account the fact that they are present in that State for only part of the year. The Article 60 in indicates that itinerant workers, as defined in article 2, paragraph 2 (A), of the present Convention, shall be entitled to the rights provided for in part IV that can be granted to them by reason of their presence and work in the territory of the State of employment and that are compatible with their status as itinerant workers in that State.

The Article 61 refers to the project-tied workers, as defined in article 2, paragraph 2 (of the present Convention, and members of their families shall be entitled to the rights provided for in part IV except the provisions of article 43, paragraphs I (b) and (c), article 43, paragraph I (d), as it pertains to social housing schemes, article 45, paragraph I (b), and articles 52 to 55.

The Article 62 highlights the specified-employment workers as defined in article 2, paragraph 2 (g), of the present Convention and says that it shall be entitled to the rights provided for in part IV, except the provisions of article 43, paragraphs I (b) and (c), article 43, paragraph I (d), as it pertains to social housing schemes, article 52, and article 54, paragraph 1 (d).

The Article 63 has provisions of self-employed workers, as defined in article 2, paragraph 2 (h), of the present Convention, shall be entitled to the rights provided for in part IV with the exception of those rights which are exclusively applicable to workers having a contract of employment.

## **Part VI: Promotion of Sound, Equitable, Humane and Lawful Conditions Connection With International Migration of Workers and Members of Their Families**

All the Articles 64 – 71 deal with the different measures the State Parties have to abide by while provisioning this convention in their countries. These include:

- ◆ Promoting sound, equitable and humane conditions in connection with international migration of workers and members of their families;
- ◆ formulation and implementation of policies regarding migration;
- ◆ adoption of measures regarding the orderly return of migrant workers and members of their families to the State of origin when they decide to return or their authorization of residence or employment expires or when they are in the State of employment in an irregular situation (Article 67);
- ◆ Collaboration with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation (Article 68).

## **Part VII: Application of the Convention**

The Articles 72 – 78 highlight different conditions to apply this convention such as:

- ◆ Establishment of a Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (Article 72);
- ◆ Report preparation, submission and the examination (Article 73 and Article 74) ;
- ◆ Rules of procedure of the committee (Article 75);
- ◆ Communication mechanisms (Article 76 and 77); and
- ◆ Others.

## **Part VIII: General Provisions**

They include establishment of criteria for governing admission of migrant workers (Article 79), no authority to interpret this convention against the spirit of the other conventions of the UN (Article 80), and others.

## **Part IX: Final Provisions**

The Articles 85 – 93 highlight that Secretary-General of the United Nations is designated as the depositary of the present Convention (Article 85). It also puts condition that instruments of ratification or accession shall be deposited with the Secretary-General of the United Nations (Article 86) and applicability of the Convention (Article 87). A State ratifying or acceding to the present Convention may not exclude the application of any Part of it, or, without prejudice to article 3, exclude any particular category of migrant workers from its application (Article 88 ). Any State Party may denounce the present Convention, not earlier than five years after the Convention has entered into force for the State concerned, by means of a notification writing addressed to the Secretary-General of the United Nations (Article 89).

After five years from the entry into force of the Convention a request for the revision of the Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations (Article 90). The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of signature, ratification or accession (Article 91). Any dispute between two or more States Parties concerning the interpretation or application of the present Convention that is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court (Article 92).

And finally, the Article 93 stresses that the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

### **5.4 Nepal's Context**

Nepal has not ratified this convention. Only two countries in South Asia, Bangladesh and Bhutan have signed this (Table 5.1). This table further shows the overall status of South Asian countries ratifying

the human rights six big treaties, namely: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); International Convention on Civil and Political Rights (ICCPR); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); International Convention on Economic, Social and Cultural Rights (ICESCR); Convention on Elimination of All Forms of Discrimination against Women (CEDAW) and Convention on the Rights of the Child (CRC) (Table 5.1).

**Table 5.1: Status of South Asia in Ratifying UN Human Rights Instruments**

State	Conventions/Treaties/Standards						
	ICESCR	ICCPR	ICERD	CEDAW	CAT	CRC	CRMW
Bangladesh	-	-	1979	1984	-	1990	2011
Bhutan	-	-	S	1981	-	1990	-
India	1979	1979	1969	1993	S	1993	-
Maldives	-	-	1984	1993	-	1991	-
Nepal	1991	1991	1971	1991	1991	1990	-
Pakistan	1980	1980	1982	1991	1994	1991	1996
Sri Lanka	1980	1980	1982	1981	1994	1991	1996

'S' = signed only

Source: United Nations, 2011

Migration for Foreign Employment has long been an important livelihood strategy for a large part of the rural population in Nepal. In the 19th Century, Nepali (Gurkhas) were recruited to serve in the British Army and British India, while recently, during the latter part of the 1990s, Nepali people began to migrate increasingly to the Gulf countries for work (Seddon et al 2002). Even though there is no statistics about how many migrants currently work outside the country, with various information sources, it can be estimated that not less than three million Nepalese are in foreign employment. Of which roughly around 40 percent of migrants leave for India, while the other 60 percent leave for the third countries, primarily to the Gulf countries, Malaysia, Lebanon and the Republic of Korea. Women account for around 10 percent of international migrants (and around 9% of overseas migrants) (NIDS, 2009).

Migration and development are closely interlinked. The Human Development Report 2009 rightly points out, "Migration can

contribute to human development, especially if the rights of the movers are improved” (UNDP, 2009). Whether women and men’s migration to India or overseas can contribute to the reduction in poverty largely depends on the benefits they (and their families) can draw from migration and the costs they have to bear. The remittance from labour migration contributed at least 20 percent of the decline in poverty in Nepal between 1995 and 2004 (Lokshin et al., 2007). Currently, around one third of the population benefits from remittances, which contribute about 25 percent to the Nepal’s Gross Domestic Product (GDP). However, migrant workers also face many obstacles during the migration process or in the destination countries. Some of the most important obstacles that decrease migrants’ potential benefits and increase their costs include : low level of skills and, hence, lower salaries and poor professional development opportunities in the destination countries; high interests rates on loans from local moneylenders or relatives; little or no awareness and/or misinformation about the migration-related procedures to be followed and observed, about the country of destination and the benefit package available; cheating all along the migration cycle including by recruiting agents and sub-agents in Nepal; and, finally, other forms of exploitation including gender-based violence (GBV), which is mainly a problem for female migrant workers.





# **Chapter Six**

## **Conclusions and Recommendations**

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## 6.1 Conclusions

Nepal's human rights movement is still young as for long the country was ruled by oligarchic Rana system and the partyless Panchayat. Nepal had ratified only seven human rights related instruments before 1990 and those were mainly related to slavery and discrimination.

The Popular Movement of 1990 is the landmark to open up a favourable environment for the protection and promotion of human rights. During the early decade of 90s, Nepal ratified almost all human rights instruments, namely, ICCPR, ICESCR, CEDAW, CAT, and CRC. Nepal has also ratified all of the optional protocols to the ICCPR, but not the optional protocol to the ICESCR which establishes an individual complaints mechanism for the Covenant similar to those of the First Optional Protocol to the ICCPR.

Nepal has also not ratified the Optional Protocol to the CAT which establishes a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment. Nepal has also not ratified the Rome Statute which mandates to complain the ICC for the grave human rights violation cases. Despite growing scope of the migrant workers in abroad, Nepal has not ratified the CRMW.

Nepal has domesticated the human rights provisions in three ways: by establishing them as the fundamental rights, by indicating them in the state directive principles/policies and by making laws, acts and policies. The Constitution of the 1990 had domesticated 10 provisions as the fundamental rights, mainly enshrined in the ICCPR. This constitution also enshrined a few provisions like cultural and educational rights, right to property, right to religion and right against exploitation related to ICESCR as the fundamental rights and some more as the directive principles. Similarly some provisions related to CEDAW, that is in the sector of fulfilling equal rights to women were also mentioned in the 1990 constitution.

The 2007 Interim Constitution has provisioned for the compensation in case of requisitioned, acquired or encumbered by the State in implementing scientific land reform programme or in public interest in accordance with law. The compensation and basis thereof and operation procedure shall be as prescribed by law. 2011 draft has also provisioned it.

The 2011 draft constitution has proposed to segregate the cultural rights from educational rights and included in the right to language. The draft constitution has also added that no person shall be exploited in the name of religion, custom, tradition and practice, or in any other way. Right to Environment, Right to Health, Right to Employment, Right to Social Security, and Right Regarding Labour have been enshrined in the interim constitution of 2007 and they also got continuity in the 2011 draft constitution.

Labour rights and food rights are other two major achievements that the interim constitution 2007 has enshrined them as the fundamental rights. Right to accommodation is the only right the new draft constitution has established as the fundamental rights. According to the proposed provision, every citizen shall have the right to an access to proper accommodation. Finally, Rights regarding consumers is another important milestone that Nepali people have got as another fundamental right.

The 1990 constitution had not directly included the community people entitled to fundamental rights although the directive principles had something to address. Women, Dalit, and indigenous people are the main communities addressed by the 2007 and the new draft constitutions. Regarding right of women, the 2007 interim constitution has enshrined that no one shall be discriminated in any form merely for being a woman.

Right to social justice is another fundamental right which directly addresses the community people. It says women, Dalit, indigenous people, Madheshi community, oppressed group, the poor peasant

and labourers. Right against untouchability and racial discrimination is another major endorsement in the constitution in the spirit of the CERD.

Right of the child is another fundamental right established by the new constitution as the fundamental right. Rights regarding family is another major breakthrough proposed by the 2011 draft constitution. A separate article has been proposed by the draft of the new constitution regarding implementation of Fundamental Rights and Constitutional Treatment. It says that the State shall make appropriate provisions for the implementation of the rights provisioned as Fundamental, such as rights to education, health, employment, accommodation, food, social justice and social security.

In order to domesticate the provisions related to international instruments ratified by Nepal, a separate Treaty Act has been framed, which is the only act of the kind in the South Asia; none of the South Asian Countries have their treaty acts. The article 9 of the Treaty Act stipulates that once ratified treaty by Nepal is treated as equal to the national law.

The draft of the new constitution of Nepal has for the first time proposed nine fundamental duties of the Nepali people. They include as to show loyalty and allegiance towards the nation and safeguard the nationality, sovereignty and integrity of Nepal, to maintain national secrecy, to abide by the Constitution and law, to enroll for mandatory service when required by the nation, to protect and promote public and national property, to pay tax in accordance with law, to use one's freedom (independence) and right without encroaching upon national, social and other individuals' rights, to respect labour, to show honour and respect towards parents, children, elderly people (senior citizens), women, incapacitated and helpless people, disabled (differently challenged) people and humanity, and to protect and promote environment, natural, historical and cultural heritage.

Including these duties in the constitution, a message has been given to the people that when there are rights guaranteed by the state, there are also the duties to be strictly obeyed by the people. Despite these good attempts made, it is not clear what type of action is taken against violating these duties.

A number of legal provisions addressed by the international instruments have been included in the directive principles of the constitution. Though not binding, the proposed new draft constitution has provisioned some of them as political objectives, social and cultural objectives, and economic objectives.

Despite these good progresses, there are many shortcomings. Fore and foremost, fundamental rights are inherent, universal and indivisible. The constitutional provisions have not fully adhered to the principles of Human Rights. The repeated words like 'but', as per the laws', as 'indicated by the law' prove this fact. Secondly, fundamental rights are the not issues of bargain. The Constitution of a country where peoples are sovereign, there should not be any authority to 'give and take' the fundamental rights.

The main concern of the civil society is that the Concept Paper developed for the new constitution has not still fully respected the spirits of the Aadibasi Janjatis , Dalits, Women, Persons with Disability, Madhesis, Tharus, Youths, and Marginalised people like Karnali region. The Concept Paper is also unclear about the need of both individual rights and group rights.

Finally, the Concept Paper has written many things, may be to clarify everything regarding fundamental rights and directive principles of the State.

Nepal needs to ratify the Rome Statute as soon as possible because it mainly sees the cases of grave human rights violation. During armed conflict and some other violent movements so many such incidents of violations have occurred in Nepal. The court investigates and tries individuals for the most serious international crimes: genocide, crimes against humanity, war crimes and aggression. The ICC has jurisdiction over crimes committed in the territories of ratifying states and over crimes committed anywhere by nationals of ratifying states.

The CRMW 1990 is the main instrument that relates all the rights of the migrant workers. Nepal has not ratified the Migrant Workers Rights yet. Mass movement led by civil society is essential for the pressure to the authorities to ratify it.

## **6.2 Recommendations**

### **To the State**

#### **1. Implementation of Domesticated Rights**

Although Nepal has ratified most of the UN Human Rights Conventions, the implementation aspect of the domesticated rights is very weak. For example right to health and right to employment have now been the fundamental rights of the Nepali people. However, many people are still dying of health related problems. The state needs to give serious attention to this and make a strategic planning for the strict implementation of these rights.

#### **2. Ratification of Important Conventions/Instruments**

Ratification of important instrument by the state with the two third majority of the parliament is the first and foremost step in implementing them into the local context. Nepal still has not ratified so many conventions/instruments such as:

- ◆ Optional protocol to the ICESCR which establishes an individual complaints mechanism for the Covenant similar to those of the First Optional Protocol to the ICCPR,
- ◆ Optional Protocol to the Convention on the Rights of Persons with Disabilities which mandates to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention,
- ◆ Optional Protocol to the CAT which establishes a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

#### **3. Ratification of Rome Statute**

Despite so many words, commitments and assurance by the governments formed in between, Nepal has not ratified the Rome Statute which established ICC. The Court brings the most serious

international criminals to justice and challenges the impunity that they have so often enjoyed in the past. Until now, those who commit atrocities have gotten away with it and their victims left with nothing. The ICC provides redress and reparations for the victims and survivors of these atrocities, which is a vital step towards accountability and lasting justice.

#### **4. Ratification of CRMW**

Every year more than 400 thousand people go to foreign countries for the labour work. It is said that more than three million people are in abroad except India where more than three million are believed to be in labour works. Despite this bitter reality, Nepal has not ratified the CRMW. Nepal needs to ratify it without any further delay.

#### **To the Civil Society**

#### **5. Related to Ratification**

Special strategic campaign is necessary for the giving pressure to the government for ratifying the instruments mentioned above such as:

**Lobbying the Government:** Lobbying shows the government that there is support for these instruments and that they give opportunity for Nepali people. Normally, the first step to lobbying is a letter sent to relevant government authorities.

**Meetings:** Holding a meeting is one of the central activities of all types of lobbying. To make these meeting effective, we need to prepare thoroughly, make sure your goals are clear throughout the meeting and not raise too many issues. We need to focus on the one or two most important messages that we want to convey, especially if we have a short meeting. Before the meeting better conducting some research and know facts and as much background information as possible.

**Expert Seminars:** After initial lobbying has been carried out, it may be useful to organise an expert seminar with the involvement of decision-makers to discuss the importance of ratifying the instrument. Discussion seminars would allow the government to fully consider the implications of ratifying the convention/instrument.

**Building a National Coalition:** Such as for the CRMW. A treaty ratification campaign is well suited for the formation of a wide coalition involving a broad range of actors since the campaign objective is quite clear and does not require extensive negotiations. In establishing a national NGO coalition, our first step would ideally be to partner with organisations and individuals in our context that have already joined the international NGO Coalition for similar activities.

**Public Campaigning and Media Work:** Public campaigns and media work may be required in order to complement lobbying if the government appears to be resisting signature or ratification. It may even be necessary to get the issue on the agenda depending on how responsive the government is to public campaigning.

**Day celebrations:** Such as Migrant Workers Day (18 December), International Day in Support of Victims of Torture (26 June), World Day for International Justice (17 July). We can carry on these campaigns in other day celebrations too such as UN Human Rights Day (10 December), Women's Day (8 March) and so on.

## **6. Related to Domestication and implementation**

Review of the periodic reports is necessary to identify what progress has been done in the domestication of the specific instrument. This exercise needs to compare the reports prepared by the civil society and identify what issues are essential to raise as the strategy for campaign and lobby.





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## About Human Rights Alliance

National Alliance for Human Rights and Social Justice – Nepal (Human Rights Alliance), a coalition of Nepali nongovernmental human rights organisations dedicated to the cause of freedom, human rights, social justice and peace in Nepal, was established in 1996 at the initiative of some leading human rights NGOs in order to bring together like-minded human rights organisations and build a nationwide human rights movement conducive to the realization of basic rights by all. HR Alliance envisages a world where people would be able to assert and enjoy all their human rights, and thereby experience peace and prosperity. It has made it a point to see to the inclusion of a wide variety of ethnic, caste, linguistic, religious and other marginalised communities in its organisational structure from the centre to the districts, and follows democratic processes for the selection of committee members. This mechanism promotes greater collaboration between the excluded and others rather than just creating exclusionary groups.

As an umbrella organisation, the Alliance is the largest network of human rights NGOs throughout the country and now has more than 1500 member organisations. It has its central office in Kathmandu, five regional offices and 75 district chapters. The number of organisational members at the centre and in the regions and district depends on the democratic practice of conventions to be organised at all levels as per the constitution of the organisation.

Within one decade of its journey, Human Rights Alliance has become established as one of the federations of human rights organisations in Nepal. Lately, observing country's degrading and appalling human rights situation, it has brought with some programs to ensure at least 'One HRD One VDC' so that various grassroots level issues can be addressed from local level. Likewise, HR Alliance is trying to bring the issue of dealing with past to support for truth seeking mechanism and discuss about possible process of the commission's formation which can provide valuable guidance regarding a commission's mandate and the key elements for necessary action. Through the nationwide dialogues, we are helping to enhance victim's rights, challenge to the impunity, credibility in the human rights movement and wide democratic legitimacy in Nepal. With good cooperation and collaboration among national and international human rights and civil societies, HR Alliance is working to bring peace and justice in Nepal.



**Human Rights Alliance**  
P.O.Box: 9993  
New Baneshwor, Kathmandu  
Phone /Fax: 4464192  
E-mail: [alliance.humanrights@gmail.com](mailto:alliance.humanrights@gmail.com),  
[info@hralliance.org.np](mailto:info@hralliance.org.np)  
Website: [www.hralliance.org.np](http://www.hralliance.org.np)

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