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नेपालमा दिगो विकास लक्ष्य र मानव अधिकार

डा. गिरिधारी शर्मा पौडल[१]

सारांश

दिगो विकास लक्ष्य सन् २०१५ को सेप्टेम्बर महिनामा विश्वका राष्ट्र प्रमुख तथा सरकार प्रमुखहरूले संयुक्त राष्ट्रसङ्घको ७० औ साधारण सभामा प्रतिबद्धता जनाएका विकासका महत्त्वकांक्षी साझा विषय (एजेण्डा) हुन् । यी लक्ष्य विकासको आवरणाअन्तर्गत कार्यान्वयनमा आएका मानव अधिकारका सवाल हुन् । यी लक्ष्यहरूको कार्यान्वयनले नेपालमा मानव अधिकारको प्रवर्धन गर्न के-कस्तो योगदान गरे भन्नेबारे जानकारी लिने तयारी सूचना उपलब्ध छैनन् । तसर्थ दिगो विकास लक्ष्यको सफल कार्यान्वयन हुँदा मानव अधिकारको प्रवर्धनमा के-कस्तो योगदान गरे भन्नेबारे पाठकले सजिलैसँग बुझ्न र जानकारी लिन सकुन् भन्ने उद्देश्यले यो लेख तयार गरिएको छ । दिगो विकास लक्ष्य कार्यान्वयनमा आएपछि हालसम्मको प्रगति हेर्दा स्वास्थ्य तथा प्रजनन् अधिकार प्रवर्धन गर्ने लक्ष्य ३, समानताको अधिकार प्रवर्धन गर्ने लक्ष्य १०, र प्रयाप्त तथा सुरक्षित आवासको अधिकार प्रवर्धन गर्ने लक्ष्य ११ का सूचकहरूको प्रगति उच्च देखिन्छ । दिगो विकासका ८ लक्ष्यहरू मुख्यतया: शुद्ध खानेपानी तथा सरसफाइको अधिकार प्रवर्धन गर्ने लक्ष्य ६, आधुनिक उर्जाको पहुँच र उपभोग गर्ने अधिकार प्रवर्धन गर्ने लक्ष्य ७, रोजगारी र मर्यादित कामको अधिकार प्रवर्धन गर्ने लक्ष्य ८, स्वाच्छ वातावरणमा जीउन पाउने अधिकार प्रवर्धन गर्ने लक्ष्य १३, वन, जङ्गल, सिमसार, हिमाल तथा सुख्खा भूमिको संरक्षण र दिगो उपयोग गर्ने अधिकार प्रवर्धन गर्ने लक्ष्य १५, वाक स्वतन्त्रता र सुरक्षाको आधिकार प्रवर्धन गर्ने लक्ष्य १६, र आत्मनिर्णयको अधिकार प्रवर्धन गर्ने लक्ष्य १७ का सूचकहरूमा मध्यम स्तरको प्रगति भएको छ । त्यसै गरी दिगो विकासका पाँच लक्ष्यहरू क्रमस: गरिबी निवारण गरी मानव जीवनको प्रत्याभूति गर्ने अधिकार प्रवर्धन गर्ने लक्ष्य १, भोकमरी अन्त्य गरी खाद्य तथा पोषण अधिकार प्रत्याभूति गर्ने लक्ष्य २, लैङ्गिक असमानता हटाइ लैङ्गिक समानताको अधिकार प्रवर्धन गर्ने लक्ष्य ५, नवप्रवर्तन गरी नवप्रवर्तनले ल्याएका नयाँ प्रविधि प्रयोग गर्ने अधिका प्रवर्धन गर्ने लक्ष्य ९, र आफ्ना स्रोत तथा सम्पत्तिको दिगो प्रयोग गर्ने अधिकारको प्रवर्धन गर्ने लक्ष्य १२ का सूचकहरूमा सामान्य प्रगति भएको छ ।

प्रमुख शब्दावली: दिगो विकास लक्ष्य, मानव अधिकार, सूचक, समानता, सरसफाइ, गुणस्तरीय

२.पृष्ठभूमि

दिगो विकास लक्ष्य संयुक्त राष्ट्रसङ्घको ७०औं महासभामा सहभागी १९३ राष्ट्रका राष्ट्र प्रमुख, सरकार प्रमुख तथा उच्च स्तरीय प्रतिनिधीले सन् २०१५ को सेप्टेम्बर महिनामा घोषणा गरेका विश्वका साझा विकासका

१ यस लेखमा व्यक्त भएका विचार लेखकका निजी धारणा हुन् । अत: लेखले संयुक्त राष्ट्रसङ्घीय विकास कार्यक्रम नेपालको प्रतिनिधित्व गर्दैन ।

विषय हुन । यसमा १७ लक्ष्य, १६९ परिमाणत्कम लक्ष्य, र २३४ विकास सूचकहरू छन[२] । नेपालले १६ लक्ष्य, १५९ परिमाणत्मक लक्ष्य र विश्व सूचकमा २४५ सूचक थप गरी ४७९ सूचकको कार्ययोजना बनाइ दिगो विकास लक्ष्य कार्यान्वयन गरिरहेको छ[3] । दिगो विकास लक्ष्यहरूको कार्यान्वयनले नेपालमा मानव अधिकारको प्रवर्धन गर्न के-कस्तो योगदान गरे भन्नेबारे जानकारी लिने तयारी सूचना उपलब्ध छैनन । तसर्थ दिगो विकास लक्ष्यको सफल कार्यान्वयन हुँदा ती लक्ष्यले मानव अधिकारको प्रवर्धनमा के-कस्तो योगदान गर्दछन् भन्ने सम्बन्धमा विश्लेषणात्मक बिवेचना आवश्यक देखिन्छ । यस परिवेसमा यो लेखको मुख्य उद्देश्य पाठकले यो लेख पढेपछि दिगो विकास लक्ष्यका १७ लक्ष्य (नेपालले अपनाएका लक्ष्य १४ बाहेका १६ लक्ष्य) मध्ये कुन-कुन लक्ष्यले मानव अधिकारको प्रवर्धन गर्दछन ?, तिनको कार्यान्वयनको स्थिति के छ ?, तिनले हालसम्म मानव अधिकार प्रवर्धनमा के-कस्ता योगदान गरे ? भन्नेबारेमा सजिलैसँग बुझ्न र जानाकारी लिन सकुन् भन्ने ध्येय राखी यो लेख तयार गरिएको छ ।

३.विधि पद्धति

यस लेखको लागि आवश्यक पर्ने द्वितीय सूचना संयुक्त राष्ट्रसङ्घको दिगो विकास लक्ष्यको घोषणापत्र, नेपालको सङ्घीय सरकार, प्रदेश सरकार र स्थानीय तहले तयार गरेका आवधिक विकास योजना, दिगो विकास लक्ष्यका सङ्घीय, प्रादेशिक र स्थानीय तहका आधार तथ्याङ्क प्रतिवेदन, प्रदेश र स्थानीय तहका वार्षिक प्रगति प्रतिवेदनबाट लिइएको छ । सङ्घीय सरकारका दिगो विकास लक्ष्यका प्रगति प्रतिवेदन, केन्द्रीय तथ्याङ्क विभागका जनगणना र कृषि गणनाका प्रतिवेदन, सङ्घीय सरकारका आर्थिक सर्वेक्षण, राष्ट्रिय प्राकृतिक स्रोत तथा वित्त आयोगलाई पनि आधार बनाइएको छ । त्यसै गरी संयुक्त राष्ट्रसङ्घीय विकास कार्यक्रम, राष्ट्रिय मानव अधिकार आयोग, नेपाल राष्ट्र बैङ्क, नेपालबारे विश्व बैङ्क र एसियन विकास बैङ्कका प्रतिवेदनहरूको सङ्कलन र विश्लेषण गरी द्वितीय स्रोतका सूचना प्राप्त गरिएको छ । प्राथमिक तहका सूचना मुख्य जानिफकार र सरोकारवलासँग टेलीफोन अन्तर्वार्ता गरी सङ्कलन गरिएको छ । लेखकको यस क्षेत्रमा लामो अनुभव पनि सूचनाको एक मुख्य स्रोत भएको छ । परिमाणत्मक र गुणात्मक दुवै विधि प्रयोग गरी दिगो विकास लक्ष्यको कार्यान्वयनले नेपालमा मानव अधिकारको प्रवर्धनमा गरेको योगदानबारे विश्लेषण गरिएको छ ।

४.विषय तथ्यहरू

दिगो विकासका १ देखि १७ लक्ष्यहरूले कुनै न कुनै प्रत्यक्ष वा अप्रत्यक्ष रूपमा मानव अधिकारको प्रवर्धन गर्न सहयोग गरेका छन । दिगो विकास लक्ष्यहरू मानव अधिकारको आवरणमा अगाडि बढाइएकोले कुन लक्ष्यले मानव अधिकारको कुन पक्षलाई बढी पृष्ठपोषण गर्दछ भन्ने सम्बन्धमा यसभन्दा अगाडि विश्लेषणात्मक बिवेचना नभएकोले यस लेखको आवश्यकता भएको हो । यस लेखमा लक्ष्य १ ले प्रवर्धन गरेको मानव जीवनको प्रत्याभूति गर्ने अधिकार, लक्ष्य २ ले प्रवर्धन गरेको खाद्य तथा पोषण अधिकार, लक्ष्य ३ ले प्रवर्धन गरेको स्वास्थ्य तथा प्रजनन् अधिकार, लक्ष्य ४ ले प्रवर्धन गरेको शिक्षा प्राप्त गर्ने अधिकार, लक्ष्य ५ ले प्रवर्धन

२ संयुक्त राष्ट्रसङ्घ, २०१५: विश्व रुपान्तरणको लागि सन् २०३० सम्मको लागि दिगो विकास एजेण्डा, दिगो विकास लक्ष्यको घोषणापत्र, संयुक्त राष्ट्रसङ्घ आर्थिक तथा सामाजिक विकास महाशाखा, न्यूयोर्क, अमेरिका ।

३ राष्ट्रिय योजना आयोग, २०१७: दिगो विकास लक्ष्यहरू वर्तमान अवस्था र भावी मार्गचित्र २०१६ २०३०, राष्ट्रिय योजना आयोग, काठमाडौँ, नेपाल ।

गरेको लैङ्गिक समानताको अधिकारको चर्चा छ । लक्ष्य ६ ले प्रवर्धन गरेको शुद्ध खानेपानी तथा सरसफाइको अधिकार, लक्ष्य ७ ले प्रवर्धन गरेको आधुनिक उर्जाको पहुँच र उपभोग गर्ने अधिकार, लक्ष्य ८ ले प्रवर्धन गरेको रोजगारी र मर्यादित कामको अधिकार, लक्ष्य ९ ले प्रवर्धन गरेको नवप्रर्वतनले ल्याएका प्रविधिको प्रयोग गर्ने अधिकार, लक्ष्य १० ले प्रवर्धन गरेको समानताको अधिकार, लक्ष्य ११ ले प्रवर्धन गरेको प्रयाप्त र सुरक्षित आवासको अधिकारको बारेमा उल्लेख छ । यसै गरी लक्ष्य १२ ले प्रवर्धन गरेको आंफ्ना स्रोत तथा सम्पत्तिको दिगो प्रयोग गर्ने अधिकार, लक्ष्य १३ ले प्रवर्धन गरेको स्वच्छ वातावरणमा जीउन पाउने अधिकार, लक्ष्य १५ ले प्रवर्धन गरेको वन, जङ्गल, सिमसार, हिमाल तथा सुख्खा भूमिको संरक्षण र दिगो उपयोग गर्ने अधिकार, लक्ष्य १६ ले प्रवर्धन गरेको वाक स्वतन्त्रता र सुरक्षाको आधिकार र लक्ष्य १७ ले प्रवर्धन गरेको स्रोत परिचालनमा देशको आत्मनिर्णयको अधिकारको सम्बन्धमा प्रकाश पारिएको छ । यी सबै मानव अधिकारका अभिन्न अङ्ग हुन । यस सम्बन्धमा नेपालको स्थिति र कार्यक्रमबारे सङ्क्षिप्त रूपमा लक्ष्यगत विश्लेषण गरिएको छ ।

५.विश्लेषण

५.१ विश्वमा विकास अवधारणमा आएका परिवर्तन, दिगो विकास लक्ष्य र मानव अधिकार

विकास भनेको सामाजिक, आर्थिक, प्राविधिक र वातावरणीय क्षेत्रमा परिवर्तन ल्याउनु हो । यसले जनतालाई उनीहरूको मानवीय दक्षता र क्षमता प्राप्त गर्न सघाउँछ । सामान्य बुझाइमा विकास जनताको जीवनस्तरमा सुधार गर्ने क्रमिक प्रक्रिया हो । यो सामाजिक, आर्थिक, भौतिक, वातावरणीय र जनसाङ्ख्यिक पक्षको गुणस्तर र मात्रामा हुने सकारात्मक वृद्धिको प्रक्रिया हो[४] । मानव जातिका बढ्दा आकांक्षा पूर्ति गर्न विश्वमा विकास अवधारणामा क्रमिक परिवर्तनहरू भएका छन । आजको विश्वमा आर्थिक वृद्धिलाई मात्र विकास ठान्ने परम्परागत अर्थ-राजनीतिक दृष्टिकोणमा परिवर्तन आएको छ । सन् १९५० को दशकमा विकास भनेको आर्थिक वृद्धि गरी रोजगार सिर्जना गर्नं र दोस्रो विश्वयुद्धमा क्षत-विक्षत भएका क्षेत्रको पुनर्निर्माण गर्नंको रूपमा बुझिन्थ्यो । सन् १९६० को दशकमा आर्थिक वृद्धिमात्र सबै चिज होइन भन्ने सोच विकास भयो र समानतासहितको आर्थिक वृद्धिको विकास अवधारणाले मान्यता पायो । सन् १९७० को दशकमा युरोपको उपनिवेशबाट स्वतन्त्र भएका नव-स्वतन्त्र देशहरूको विकासको लागि प्रविधि अति आवश्यक भएकोले प्रविधि हस्तान्तरणसहितको आर्थिक वृद्धिको विकास अवधारणाले मान्यता पायो । सन् १९८० को दशकमा आधारभूत आवश्यकता परिपूर्तिको लागि विकास भन्ने विकास अवधारणा प्रचलित रह्यो । यसै दशकबाट विकास र वातावरणबिचको सह-सम्बन्धको खोजी कार्य प्रारम्भ भयो । सन् १९९० को दशकमा मानव आकृतिसहितको विकास, आर्थिक वृद्धि, समन्याय र मानव अधिकारबिचको सम्बन्ध खोजियो, जसलाई मानव विकास भन्न थालियो । सन् २००० देखि २०१५ सम्मको अवधिमा सहस्राब्दी विकास लक्ष्यको प्राप्तिलाई विकास भनियो । सन् २०१६ देखि २०३० सम्मको अवधिलाई दिगो विकास लक्ष्यको प्राप्तिलाई विकास भनिंदैछ[५] । यस विकास अवधारणाले गरिबीको अन्त्य, शून्य भोकमरी, स्वास्थ्य र आरोग्य, समावेशी र गुणस्तरीय शिक्षा, स्वच्छ खानेपानी र सरसफाइ, खर्चले धान्न सक्ने आधुनिक उर्जा, पूर्ण रोजगारी र मर्यादित काम, बलिया र दिगो

४ पौडेल, गिरिधारी शर्मा, सन् २०२१: केरला र गुजरात विकास मोडेलबाट नेपालका प्रदेशहरूले के शिक्षा लिने ?, अनलाइनखबर पत्रिकामा ५ अक्टुबर २०२१ मा प्रकाशित लेख https://www.onlinekhabar.com/2021/10/1022473 हेरेको मिति १० मार्च २०२२ ।

५ पौडेल, गिरिधारी शर्मा, सन् २०२१: नेपालमा समन्यायिक विकासको आवश्यकता र यथार्थ, अनलाइनखबर पत्रिकामा २३ फेब्रुवरी सन् २०२२ मा प्रकाशित लेख https://www.onlinekhabar.com/2022/01/1069786, हेरेको मिति १० मार्च २०२२ ।

पूर्वाधार र सहरहरूको निर्माण, समावेशी र न्यायपूर्ण समाजको निर्माण र जलवायु अनुकूलन प्रविधिको प्रयोगलाई विकास मान्दछ । दिगो विकास लक्ष्यको मुख्य ध्येय विकास अभियानमा कोही पनि नछुटुन् (No one left is Behind) भन्ने हो[६] र यसले समन्यायिक विकास र मानव अधिकारको पदचाप पछ्याएको छ । यो सिद्धान्त विश्वका नेताहरूले मानिसहरूलाई पछाडि छाड्ने र समग्र मानवको क्षमतालाई कमजोर पार्ने गरिबी, भेदभाव, र बहिष्करण उन्मूलन गर्ने प्रतिबद्धता हो[७] ।

भौगोलिक विविधता तथा असमान सामाजिक आर्थिक अवस्था भएको नेपालजस्तो विपन्न मुलुकमा सबै तह र तप्काका जनतालाई अवसरको समान वितरण गरी मानव अधिकारसहितको सामाजिक न्याय स्थापना गर्न तथा विकट र पिछडिएका क्षेत्रमा पूर्वाधार तथा आर्थिक विकास गरी देशलाई समृद्धितर्फ लैजान समकालीन विकास व्यवस्थापनमा मानव अधिकार सहितको आर्थिक विकासको आवश्यकता बढ्दै गएको छ[८] । विश्वव्यापी रूपमा स्विकार गरिएका दिगो विकास लक्ष्यको सफल कार्यान्वयन हुँदा नागरिकमा समान अधिकार, अवसर र कर्तव्यको सोच विकास गर्दछ । यसले सबै लिङ्ग, वर्ग, जाति र समुदायको समान विकास गर्न मद्दत गर्दछ । यसले सार्वजनिक सेवा, वस्तु र स्रोतको समान वितरण र प्रयोग गर्न मद्दत गर्दछ । विकास प्रक्रियामा कुनै व्यक्ति वा समुदाय छुट्यो भने नेपालले संवत् २१०० मा कल्पना गरेको "समृद्ध नेपाल र सुखी नेपाली" को उद्देश्य पूरा हुन सक्दैन । यसको अतिरिक्त विश्वव्यापी रूपमा स्थापित भएका समानताका सिद्धान्त जस्तै सामाजिक समानता, नागरिक समानता, राजनीतिक समानता, आर्थिक समानता, कानुनी समानता, शिक्षा, स्वास्थ्य र रोजगारका अवसरमा समानता र विकासमा समानता पनि दिगो विकास लक्ष्यका स्रोत हुन् । त्यसै गरी सामाजिक समानताको सिद्धान्तले स्थापना गरेको मान्यता, जस्तैः वर्ण, लिङ्ग, जात, जातीयता, वर्ग, उमेर, प्रजनन स्वरूप, आम्दानी, सम्पत्ति, भाषा, धर्म, विश्वास, विचार, भूगोल, स्वास्थ्य, अपाङ्गता आदिको आधारमा कहीं-कसैले पनि विभेद नगरी सबैका अधिकारको संरक्षण गरी मानव अधिकार र दिगो विकास लक्ष्य एकैपटक सँगसँगै प्राप्ति गर्नु हो ।

२. दिगो विकास लक्ष्यहरूले प्रवर्धन गरेको मानव अधिकार

दिगो विकास लक्ष्यहरू सहश्राब्दी विकास लक्ष्यको जगमा विकास भएका हुन तथापि यी विकास लक्ष्यहरू उक्त विकास लक्ष्यका विस्तारीत रूपमात्र नभएर असमानता अन्त्य गर्ने र विश्वव्यापी रूपमा मानव अधिकार प्रवर्धन गर्नेजस्ता जटिल विषय सम्बोधन गर्न खोजेका छन । दिगो विकास लक्ष्यका मार्गदर्शक स्रोतमध्ये संयुक्त राष्ट्रसङ्घको साधारण सभाले १० डिसेम्बर सन् १९४८ मा फ्रान्सको राजधानी पेरिसमा घोषणा गरेको मानव अधिकारको विश्वव्यापी घोषणा पनि एक प्रमुख स्रोत हो । नेपालमा मानव अधिकारको प्रवर्धन र प्रत्याभूत गर्न दिगो विकास लक्ष्यहरूले गरेका योगदान बारे तलका अनुच्छेदमा विश्लेषणात्मक बिवेचना गरिएको छ ।

लक्ष्य १: मानव जीवनको प्रत्याभूतिः दिगो विकास लक्ष्य १ ले हरेक क्षेत्रमा रहेका सबै स्वरूपका गरिबीको अन्त्य र मानव जीवनको प्रत्याभूतिसहित मानव अधिकारको संरक्षण एवम प्रवर्धन गर्ने प्रयत्न गरिरहेको छ । यस लक्ष्यअन्तर्गत नेपालमा जुनसूकै अवस्थामा रहेका सबै जनताको चरम गरिबी उन्मूलन गर्ने, राष्ट्रिय

६ उही राष्ट्रिय योजना आयोग, २०१७ ।

७ उही संयुक्त राष्ट्रसङ्घ, सन् २०१५

८ पौडेल, गिरिधारी शर्मा २०२१: समृद्ध गण्डकी प्रदेशको निर्माण कसरी ? मिडिया मिसन नेपाल अनलाइन पत्रिकामा ९ अगस्त २०२१ मा प्रकाशित लेख https://mediamissionnepal.com/main-news/101582/, हेरेको मिति १० मार्च २०२२।

परिभाषाअनुसार गरिबीमा बाँचिरहेका सबै उमेरका पुरुषहरू, महिलाहरू, बालबालिकाहरूको अनुपात घटाउने, उपयुक्त सामाजिक सुरक्षा प्रणाली र उपायहरू सबैका लागि कार्यान्वयन गर्ने, आर्थिक तथा प्राकृतिक स्रोत, प्रविधि, र आधारभूत सेवाहरूमा गरिबको पहुँच बढाउने जस्ता कार्य भइरहेका छन् । नेपालले सन् २०१५ मा राष्ट्रिय गरिबीको रेखामुनि रहेको जनसङ्ख्या २१.६ प्रतिशतबाट घटाएर सन् २०३० मा २ प्रतिशतमा झार्ने लक्ष्य लिएकोमा हाल १७.१ प्रतिशतमा झरेको छ । पिपिपि मुल्यमा प्रतिदिन १.९ अमेरिकी डलर नकमाउने जनसङ्ख्या सन् २०१५ मा ३६ प्रतिशत रहेकोमा सन् २०३० मा ८ प्रतिशतमा झार्ने लक्ष्य रहेकोमा हाल २८.५ प्रतिशतमा झरेको छ । सन् २०१५ मा सामाजिक सुरक्षामा देशको कुल बजेटको ११ प्रतिशत खर्च रहेकोमा सो बढाएर सन् २०३० मा १५ प्रतिशत पुऱ्याउने लक्ष्य रहेकोमा हाल ११.७ पुगेको छ[९]। बहुआयामिक गरिबी २८.२ प्रतिशतबाट २ प्रतिशतमा झार्ने लक्ष्य लिएकोमा हाल १७.४ प्रतिशतमा झरेको छ[१०] । त्यसै गरी प्रतिव्यक्ति आय सन् २०१५ को ७६६ अमेरिकी डलरबाट बढाएर सन् २०३० मा ३,७२१ डलर पुऱ्याउने लक्ष्य रहेकोमा हाल १,१९६ डलर पुगेको छ[११]।

नेपालमा सङ्घीय, प्रादेशिक र स्थानीय सरकारले माथि उल्लेखित सूचक प्राप्त गरी मानव जीवनको प्रत्याभूति गर्न विभिन्न सामाजिक सुरक्षा कार्यक्रम सञ्चालन गरेका छन् । नेपालको संविधान २०७२ ले नेपाललाई ७ प्रदेश, ७७ जिल्ला र ७५३ स्थानीय तहमा विभाजन गरी सङ्घीय शासकीय ढाँचामार्फत केही शक्ति र स्रोत केन्द्रबाट प्रदेश र स्थानीय तहमा जाने व्यवस्था गरेको छ । सङ्घीय सरकारबाट प्राप्त अनुदान र आफ्नै स्रोतबाट प्रदेश तथा स्थानीय तहले अशक्त तथा विपन्नहरूको लागि सामाजिक सुरक्षा भत्ता, जस्तैः वृद्धभत्ता, लोपोन्मुख समुदायका परिवारहरूलाई सामाजिक सुरक्षा भत्ता, एकल महिला भत्ता, अपाङ्ग भत्ता आदिको व्यवस्था गरेका छन् । मानव जीवनको प्रत्याभूति गर्नको लागि प्रकोपमा परी विस्थापित भएका व्यक्ति तथा परिवारलाई राहत तथा पुनःस्थापना, सहीद परिवार निर्वाह भत्ता जस्ता अन्य कार्यक्रम पनि सञ्चालन गरेका छन् । सङ्घीय सरकारले गरिबी निवारणको लागि गरिबसँग विश्वेश्वर, आयआर्जन कार्यक्रम, गरिब लक्षित साना तथा लघुउद्यम प्रवर्धन कार्यक्रम, गरिब पहिचान र परिचयपत्रको वितरण र सामाजिक सुरक्षा कार्यक्रम सञ्चालन गरेको छ ।

लक्ष्य २: खाद्य तथा पोषण अधिकारको प्रवर्धनः दिगो विकास लक्ष्य २ ले नेपालमा भोकमरी अन्त्य गर्ने, खाद्य सुरक्षा र उन्नत पोषण प्राप्त गर्ने, दिगो कृषिको प्रवर्धन गर्ने र जनताको खाद्य अधिकार प्रत्याभूति गरी मानव अधिकार प्रवर्धन गर्ने प्रयास गरेको छ । नेपालले सन् २०१५ मा पाँच वर्षमुनिका ३६.१ प्रतिशत बच्चाहरूमा रहेको कुपोषण सन् २०३० सम्ममा आठ प्रतिशतमा झार्ने लक्ष्यका साथ काम गरेकोमा हाल २७.३ प्रतिशतमा झरेको छ । प्रतिव्यक्ति सरदर खाद्यान्न उत्पादन सन् २०१५ को तीन सय २० किलोग्रामबाट बढाएर सन् २०३० मा पाँच सय ३० किलोग्राम पुऱ्याउने लक्ष्य लिएकोमा हाल तीन सय ७६ किलोग्राम पुगेको छ । नेपालको विश्व खाद्य सुरक्षा सूचकाङ्क ४२.८ बाट बढाएर ९० पुऱ्याउने लक्ष्य रहेकोमा हाल ४६ पुगेको छ । बाह्रैमास सिंचाइ पुगेको खेतियोग्य जग्गा २५.२ प्रतिशतबाट बढाएर ९० प्रतिशत पुऱ्याउने लक्ष्य रहेकोमा हाल ३३ प्रतिशत पुगेको छ[१२]।

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९ राष्ट्रिय योजना आयोग, २०२०: दिगो विकास लक्ष्यको प्रगति प्रतिवेदन, राष्ट्रिय योजना आयोग, काठमाडौँ, नेपाल ।

१० राष्ट्रिय योजना आयोग, २०२१: बहुआयमिक गरिबीको राष्ट्रिय प्रतिवेदन, राष्ट्रिय योजना आयोग, काठमाडौँ, नेपाल।

११ अर्थ मन्त्रालय, २०२१: नेपालको आर्थिक बर्ष सन् २०२१ को आर्थिक शर्भेक्षण, अर्थ मन्त्रालय, काठमाडौँ नेपाल ।

१२ उही राष्ट्रिय योजना आयोग, २०२० ।

खाद्य अधिकारको प्रत्याभूति गर्न सङ्घ, प्रदेश र स्थानीय तहले खाद्य असुरक्षा भएका घरपरिवार र भूगोलको पहिचान गर्ने, खाद्य असुरक्षा भएका बस्ती र कृषि जमिनमा सिंचाइ, उन्नत मल, बिउ र प्रविधिसहितको कृषि प्याकेज लैजाने, सहुलियत दरमा कृषि कर्जा उपलब्ध गराउने, किसानलाई कृषि अनुदान वितरणगर्ने, भूमिहिन किसान, मुक्त कमैया, हलिया, बाढीपहिरो र अन्य प्राकृतिक विपत्तिबाट विस्थापित परिवार आदिलाई जग्गा वितरण गर्नेजस्ता कार्य गर्दै आएका छन । दुर्गम जिल्लाहरूमा खाद्यान्न ढुवानी तथा वितरण, आयोडिनयुक्त नुनको वितरण, मोडेल कृषि तथा पशुपन्छी फार्मको विकास, रासायनिक मलको ढुवानी अनुदान आदि कार्य गर्दै आएका छन् । विकास साझेदार संस्था, निजी क्षेत्र, सहकारी र तीन तहका सरकारको समन्वयमा कृषि तथा खाद्य सुरक्षा आयोजना, खाद्य सुरक्षा प्रवर्धन आयोजना सञ्चालनमा छन् । यसको साथै किसान दोस्रो आयोजना, कृषि प्रवर्धन, स्वास्थ्य र वैकल्पिक जीवन पद्धति विकास गर्ने पहल आयोजना, कृषि बजार प्रवर्धन आयोजना, नेपाल कृषि सेवा विस्तार कार्यक्रम, सहकारी बजार प्रवर्धन कार्यक्रम, तरकारी र फलफुलको भ्यालुचेन (Value-Chain) विकास कार्यक्रम सञ्चालन भएका छन् ।

लक्ष्य ३: स्वास्थ्य जीवन तथा प्रजनन् अधिकार: दिगो विकास लक्ष्य ३ ले नेपालमा सबै उमेर समूहका व्यक्तिका लागि स्वास्थ्य जीवन तथा महिला र किशोरीहरूको प्रजनन् अधिकार सुनिश्चित गर्दै समृद्ध जीवन प्रवर्धन गर्ने ध्ययको साथ काम गरेको छ । नेपालमा स्वास्थ्य अधिकार प्रवर्धनको लागि दिगो विकास लक्ष्यले सन् २०१५ मा पाँच वर्षमुनिका बच्चाहरूको मृत्युदर (प्रति हजार जिवित जन्ममा) ३८ बाट घटाएर सन् २०३० मा २० मा झार्ने लक्ष्य लिएकोमा हाल २८ मा झरेको छ । मातृ मृत्युदर (प्रति लाख जिवित जन्ममा) सन् २०१५ मा २५८ रहेकोमा घटाइ सन् २०३० मा ७० मा झार्ने लक्ष्य रहेकोमा हाल दुई सय ३९ मा झरेको छ । १० देखि १९ वर्षका किशोरीहरूले बच्चा जन्माउने दर (प्रतिहजार) सन् २०१५ को १७० बाट घटाएर सन् २०३० मा ३० मा झार्ने लक्ष्य रहेकोमा हाल ६३ मा झरेको छ । सन् २०१५ मा स्वास्थ्य संस्थामा बच्चा जन्माउने महिला ५५.२ प्रतिशत रहेकोमा बढाएर सन् २०३० मा ९० प्रतिशत पुऱ्याउने लक्ष्य रहेकोमा हाल ७७.५ प्रतिशत पुगेको छ । ३० मिनेको यात्रा गरेर स्वास्थ्य संस्थामा पुग्ने जनसङ्ख्या सन् २०१५ को आधार वर्षको ६१.८ प्रतिशतबाट बढाएर सन् २०३० मा ९० प्रतिशत पुऱ्याउने लक्ष्य रहेकोमा हाल ६९.३ प्रतिशत पुगेको छ[१३] ।

नेपालमा तीनै तहका सरकारका नीति तथा कार्यक्रमले देशका सबै नागरिकले स्वास्थ्य जीवन-यापन गर्न पाउने अधिकारलाई नैसर्गिक अधिकारको रूपमा ग्रहण गरेका छन । सङ्घ, प्रदेश तथा स्थानीय तहले स्वास्थ्य क्षेत्रमा स्वास्थ्य जीवन तथा आमा र शिशुको विशेष संरक्षणको अधिकार प्रत्याभूति गर्न विभिन्न कार्यक्रम सञ्चालन गरेका छन् । प्रजनन् स्वास्थ्य कार्यक्रमअन्तर्गत परिवार नियोजन, सुरक्षित मातृत्व, महिला स्वयम्सेविका, सुरक्षित गर्भपतन, किशोर-किशोरी प्रजनन् स्वास्थ्य, गाउँघर क्लिनिक आदि कार्यक्रम सञ्चालन गरेका छन् । बाल कार्यक्रमअन्तर्गत समुदायमा आधारित एकीकृत नवजात शिशु संरक्षण, खोप तथा पोषण कार्यक्रम सञ्चालन गरेका छन् । नसर्ने रोगसम्बन्धी अति आवश्यक निःशुल्क स्वास्थ्य प्याकेजअन्तर्गत मुटुरोग, मृगौलारोग, मधुमेह, अर्बुदरोग, मानसिक स्वास्थ र सिओपिडी (COPD) रोगको निःशुल्क परीक्षण, उपचार र सम्प्रेषण गर्ने व्यवस्था गरेका छन् । सरुवा रोगअन्तर्गत मलेरिया, कालाज्वर, हात्तिपाइले, डेङ्गु, कुष्ठरोग, क्षयरोग, एचआइभी, जापानिज एन्सेफलाइटिस आदिको निःशुल्क पहिचान र उपचार गर्ने व्यवस्था गरेका छन् । सुरक्षित मातृत्व कार्यक्रमअन्तर्गत स्वास्थ संस्थामा चार पटकसम्म स्वास्थ जाँच गराउने महिलालाई प्रोत्साहन भत्ता, स्वास्थ संस्थामा बच्चा जन्माउने महिलालाई यातायात खर्च, नवजात शिशुलाई

१३ उही राष्ट्रिय योजना आयोग, २०२० ।

न्यानो कपडा र सुत्केरीपश्चात् नियमित स्वास्थ जाँच गराउने महिलालाई प्रोत्साहन भत्ताजस्ता कार्यक्रम सञ्चालन गरेका छन् । असहाय तथा विपन्नलाई निःशुल्क स्वास्थ्य सेवा र आधारभूत औषधीहरूको निःशुल्क वितरणको व्यवस्था गरेका छन् ।

लक्ष्य ४: शिक्षा प्राप्त गर्ने अधिकार: दिगो विकास लक्ष्य ४ ले सबैका लागि समावेशी तथा समतामूलक गुणस्तरीय शिक्षा सुनिश्चित गर्दै जीवनपर्यन्त सिकाइका अवसरहरू प्रर्वद्धन गरी हरेक नागरिकले शिक्षा पाउने अधिकार तथा महिला र किशोरीहरूले शिक्षामा समान अवसर पाउने अधिकार प्रत्याभूति गर्ने ध्येय राखेको छ[14] । शिक्षा प्राप्त गर्ने अधिकार प्रत्याभूतिको लागि नेपालले प्राथमिक विद्यालयमा विद्यार्थीको खुद भर्नादर आधार वर्ष सन् २०१५ को ९६.६ प्रतिशतबाट बढाएर सन् २०३० सम्ममा ९९.५ प्रतिशत पुऱ्याउने लक्ष्य लिएकोमा हाल ९७.२ प्रतिशत पुगेको छ । प्राथमिक विद्यालयमा भर्ना भएका विद्यार्थीले अध्यन सम्पन्न गर्ने दर ८०.६ प्रतिशतबाट बढाएर सन् २०३० सम्ममा ९९.५ प्रतिशत पुऱ्याउने लक्ष्य लिएकोमा हाल ८५.८ प्रतिशत पुगेको छ । माध्यमिक विद्यालयमा विद्यार्थीको भर्नादर सन् २०१५ को ५६.७ प्रतिशतबाट बढाएर सन् २०३० मा ९९ प्रतिशत पुऱ्याउने लक्ष्य लिएकोमा हाल ७१.७४ प्रतिशत पुगेको छ । त्यसै गरी बालशिक्षामा विद्यार्थीको भर्नादर सन् २०१५ को ८१ प्रतिशतबाट बढाएर सन् २०३० सम्ममा ९९ प्रतिशत पुऱ्याउने लक्ष्य लिएकोमा हाल ८४.७ प्रतिशत पुगेको छ । प्राविधिक ज्ञान भएका कामगर्ने उमेरका जनसङ्ख्या सन् २०१५ मा २५ प्रतिशत रहेकोमा बढाएर सन् २०३० सम्ममा ७५ प्रतिशत पुऱ्याउने लक्ष्य लिएकोमा हाल ३१ प्रतिशत पुगेको छ । १५ देखि २४ वर्षका युवा युवतीको शाक्षरता दर ८८.६ प्रतिशतबाट बढाएर ९९ प्रतिशत पुऱ्याउने लक्ष्य लिएकोमा हाल ९२ प्रतिशत पुगेको छ । नेपालको समग्र मानव सम्पत्ति सूचकाङ्क ६६.६ बाट बढाएर ७६ पुऱ्याउने लक्ष्य रहेकोमा हाल ७२ पुगेको छ[१५] ।

नेपालमा सङ्घ, प्रदेश र स्थानीय तहले देशका सबै नागरिकको शिक्षा प्राप्त गर्ने अधिकार प्रत्याभूति गर्नको लागि आधारभूत शिक्षा (कक्षा ८ सम्म) लाई अनिवार्य र निःशुल्क तथा माध्यमिक तहको शिक्षालाई निःशुल्क गरेका छन् । अपाङ्ग तथा आर्थिक रूपले विपन्न व्यक्तिले निःशुल्क उच्च शिक्षा पाउने अधिकारको कानुनी व्यावस्था गरेका छन् । प्राथमिक तहको शिक्षा मातृ भाषामा पाउने व्यवस्था गरेका छन् । सङ्घ, प्रदेश र स्थानीय तहका शिक्षा नीतिले जीवन पर्यन्त सिकाइको लागि प्राविधिक शिक्षा तथा तालिममा जोड दिएका छन । विद्यालय शिक्षा क्षेत्र सुधार कार्यक्रमले विद्यालय शिक्षामा समानता, समता, दक्षता, प्रभावकारिता र गुणस्तरमा जोड दिएको छ । यस कार्यक्रमले विद्यालय शिक्षामा शिक्षक तालिम, शिक्षण सामग्री, भौतिक पूर्वाधार, विद्यालय शिक्षामा सूचना प्रविधिको प्रयोगलगायत सबैको लागि शिक्षा भन्ने मुल नाराका साथ काम गरेको छ । नेपालका विकास साझेदार संस्थाहरूले शिक्षालाई मानव अधिकारको अभिन्न अङ्गको रूपमा विकास गर्न सघाइरहेका छन् ।

लक्ष्य ५: लैङ्गिक समानता हासिल गर्ने अधिकार: दिगो विकास लक्ष्य ५ ले लैङ्गिक समानता हाँसिल गर्ने अधिकार प्रत्याभूति गर्ने र सबै बालिका, किशोरी र महिलालाई सशक्त बनाउने ध्येयको साथ काम गरेको छ । लैङ्गिक समानता हाँसिल गर्न नेपालले सन् २०१५ मा लैङ्गिक असमानता सूचकाङ्क ०.४९ रहेकोमा सन् २०३० सम्ममा ०.०५ मा झार्ने लक्ष्य लिएकोमा हाल ०.४७ मा झरेको छ । लैङ्गिक शशक्तिकरण सूचकाङ्क सन् २०१५ मा

१४ गण्डकी प्रदेश नीति तथा योजना आयोग, २०१९: दिगो विकासका लक्ष्यहरूस् गण्डकी प्रदेशको आधार तथ्याङ्क प्रतिवेदन, गण्डकी प्रदेश नीति तथा योजना आयोग, पोखरा नेपाल ।

१५ उही राष्ट्रिय योजना आयोग, २०२० ।

०.५७ रहेकोमा सन् २०३० सम्ममा ०.६९ पुऱ्याउने लक्ष्य रहेकोमा हाल ०.६२ पुगेको छ। महिला पुरुष श्रम सहभागिता अनुपात सन् २०१५ मा ०.९३ रहेकोमा सन् २०३० सम्ममा बढाइ १ पुऱ्याउने लक्ष्य रहेकोमा हाल ऋणात्मक भई ०.६१ मा झरेको छ। प्रतिनिधि-सभामा महिलाको सहभागिता सन् २०१५ को २९ प्रतिशतबाट बढाएर सन् २०३० सम्ममा ४० प्रतिशत पुऱ्याउने लक्ष्य रहेकोमा हाल ३३.५ प्रतिशत पुगेको छ। सम्पत्तिमाथि अधिकार भएका महिलाको सङ्ख्या सन् २०१५ को १९.६ प्रतिशतबाट बढाएर सन् २०३० सम्ममा ९८ प्रतिशत पुऱ्याउने लक्ष्य रहेकोमा हाल ३४.९७ प्रतिशत पुगेको छ[१६]।

नेपालमा लैङ्गिक समानताको अधिकार प्रत्याभूति गरी सबै बालिका, किशोरी र महिलालाई सशक्त बनाउने उद्देश्यले महिलामाथि हुने सबै प्रकारका विभेद अन्त्य गर्ने, महिलाको सम्पत्तिमाथिको अधिकार कायम गर्ने, महिलामाथि हुने सबै प्रकारका हिंसा नियन्त्रण गर्ने कार्यक्रम रहेका छन्। पीडितको व्यवस्थापन गर्ने, आमाको नामबाट पनि बच्चाहरूलाई नागरिकता दिने, सुरक्षित मातृत्व र परिवार वियोजन सेवा प्रदान गर्ने, सरकारी जागिरमा महिलाको लागि कोटा आरक्षण गर्ने, सबै तहका निर्णय गर्ने तहमा महिलाको सहभागितामा बढोत्तरी गर्ने, मुलुकका देवानी र फौजदारी संहिताको असल अभ्यास गरी महिलालाई आफ्नो अधिकारको प्रयोग गर्न सक्षम बनाउनेजस्ता कार्यक्रमहरू पनि सञ्चालनमा छन्।

लक्ष्य ६: शुद्ध खानेपानी तथा सरसफाइको अधिकार: दिगो विकास लक्ष्य ६ ले सबैको लागि स्वच्छ खानेपानी तथा सरसफाइको उपलब्धता वृद्धि गरी सबै नागरिकको शुद्ध खानेपानी तथा सरसफाइ प्राप्त गर्ने अधिकार प्रत्याभूति गर्न जोड दिएको छ। नेपालमा सन् २०१५ मा सुरक्षित खानेपानी प्राप्त जनसङ्ख्या १५ प्रतिशत रहेकोमा बढाइ सन् २०३० सम्ममा ९० प्रतिशत जनतामा पुऱ्याउने लक्ष्य रहेकोमा हाल २५ प्रतिशत जनतामा पुगेको छ। आधारभूत खानेपानी उपलब्ध भएको जनसङ्ख्या सन् २०१५ मा ८२ प्रतिशत रहेकोमा बढाइ ९९ प्रतिशत जनतामा पुऱ्याउने लक्ष्य रहेकोमा हाल ८६.५ प्रतिशत जनतामा पुगेको छ। आफ्नै घरमा शौचालय भएका घरपरिवार सन् २०१५ मा ६० प्रतिशत रहेकोमा बढाइ सन् २०३० सम्ममा ९५ प्रतिशत पुऱ्याउने लक्ष्य रहेकोमा हाल ६२ प्रतिशतमा पुगेको छ। शौचालय प्रयोग गर्ने जनसङ्ख्या सन् २०१५ मा ६७.६ प्रतिशत रहेकोमा बढाइ सन् २०३० सम्ममा ९८ प्रतिशत पुऱ्याउने लक्ष्य रहेकोमा हाल ८५ प्रतिशतमा पुगेको छ[१७]।

नेपालमा सङ्घ, प्रदेश र स्थानीय तहले जनताको शुद्ध खानेपानीको अधिकार प्रत्याभूति गर्न एक घर एक धारा कार्यक्रम र सन् २०३० सम्ममा सबैजनतालाई शुद्ध खानेपानी तथा सरसफाइ सेवा उपलब्ध गराउने क्षेत्रगत दीर्घकालीन कार्यक्रम कार्यान्वयन गरिरहेका छन्। अन्य कार्यक्रमहरूमा पानीका मुहान संरक्षण, जलाधार संरक्षण, खानेपानीमा हुने प्रदुषण नियन्त्रण, जलवायु अनुकुलन कार्यक्रम आदि सञ्चालन भएका छन्।

लक्ष्य ७: आधुनिक उर्जाको पहुँच र उपभोग गर्ने अधिकार: दिगो विकास लक्ष्य ७ ले सबैको लागि किफायती, विश्वासनीय, दिगो र आधुनिक उर्जामा पहुँच सुनिश्चित गर्ने प्रयास गरेको छ। नेपालमा विद्युतको पहुँच भएको जनसङ्ख्या सन् २०१५ मा ७४ प्रतिशत रहेकोमा बढाइ सन् २०३० सम्ममा ९९ प्रतिशतमा पुऱ्याउने लक्ष्य रहेकोमा हाल ८९.९ प्रतिशत जनतामा पुगेको छ। प्रतिव्यक्ति सरदर बार्षिक विद्युत खपतदर सन् २०१५ मा ८० किलोवाट घण्टा रहेकोमा सो बढाइ सन् २०३० सम्ममा १७०० किलोवाट घण्टा पुऱ्याउने लक्ष्य रहेकोमा हाल २६० किलोवाट घण्टा पुगेको छ। खाना पकाउन दाउरा प्रयोग गर्ने जनसङ्ख्या ७४.७

१६ उही राष्ट्रिय योजना आयोग, २०२०।

१७ उही राष्ट्रिय योजना आयोग, २०२०।

प्रतिशतबाट घटाएर सन् २०३० सम्ममा ३० प्रतिशतमा झार्ने लक्ष्य रहेकोमा हाल ६८.६ प्रतशतमा झरेको छ[१८] ।

नेपालमा आधुनिक उर्जाको उपभोग गर्ने अधिकार प्रवर्धन गर्न नेपालमा उपलब्ध जलस्रोतको बहुउद्देश्यीय प्रयोग गर्ने, सबै जनतालाई आधुनिक उर्जाको पहुँच वृद्धि गर्न जलविद्युतको उत्पादन र उपभोगको बिस्तार गर्ने, नविकरणीय उर्जाले जिवाष्मा इन्धनलाई क्रमशः प्रतिस्थापन गर्ने, निजी क्षेत्रले नविकरणीय उर्जाको उत्पादन र वितरण गर्दा सहजीकरण गर्ने र सन् २०३० सम्ममा जलविद्युतको उत्पादन ६००० मेगावाट पुऱ्याउने कार्यक्रम कार्यान्वयन भइरहेका छन् ।

लक्ष्य ८: रोजगारी र मर्यादित कामको अधिकार: दिगो विकास लक्ष्य ८ ले भरपर्दो र दिगो आर्थिक वृद्धि तथा सबैका लागि पूर्ण र उत्पादनमूलक रोजगारी र मर्यादित कामको प्रवर्धन गर्ने प्रयास गरेको छ । नेपालले सबै जनाताको लागि रोजगारीको प्रत्याभूति गर्ने प्रयास गरेको छ तथापि पर्याप्त भएका छैनन् । सन् २०१५ मा १५ देखि ५९ वर्ष उमेरका जनतामा रहेको २७.८ प्रतिशत बेरोजगारी दर घटाएर सन् २०३० सम्ममा १० प्रतिशतमा झार्ने लक्ष्य रहेकोमा हाल १९.६ प्रतिशतमा झरेको छ । युवा बेरोजगार दर सन् २०१५ मा ३५.८ प्रतिशत रहेकोमा घटाइ सन् २०३० सम्ममा १० प्रतिशतमा झार्ने लक्ष्य रहेकोमा हाल २१.४ प्रतिशतमा झरेको छ । जीवन बिमाले समेटेको जनसङ्ख्या सन् २०१५ को ५ प्रतिशतबाट बढाएर सन् २०३० सम्ममा २५ प्रतिशत जनतामा पुऱ्याउने लक्ष्य रहेकोमा हाल १९ प्रतिशत जनतामा पुगेको छ[१९] ।

रोजगारी र मर्यादित कामको अधिकार प्रत्याभूति गर्न नेपालका सङ्घीय, प्रादेशिक र स्थानीय सरकारहरूले उच्च आर्थिक वृद्धि गरी रोजगारी सिर्जना गर्ने, सघन श्रम कार्यक्रमलाइ प्राथमिकता दिने, स्वरोजगारको लागि लघुउद्यम प्रवर्धन गर्ने, विदेशमा थप रोजागार गन्तव्य पहिचान गर्ने, कृषि मोडेल कार्यक्रम प्रवर्धन गर्ने र प्रधानमन्त्री रोजगार कार्यक्रम सञ्चालन गरेका छन ।

लक्ष्य ९: नवप्रर्वतनले ल्याएका प्रविधि उपभोग गर्ने अधिकार: दिगो विकास लक्ष्य ९ ले उत्थानशील/बलियो पूर्वाधार निर्माण गर्ने, समोवशी तथा दिगो औद्योगीकरणको प्रवर्धन र नवप्रर्वतनलाई प्रेरित गरी जनतालाई नवप्रर्वतनले ल्याएका प्रविधि उपभोग गर्ने अधिकार प्रत्याभूति गर्ने प्रयास गरेको छ । नेपालले सन् २०१५ मा मोबाइल सञ्जाल (नेटवक)-मा समेटिएका जनसङ्ख्याको हिस्सा ९४.५ प्रतिशत रहेकोमा बढाइ सन् २०३० सम्ममा १०० प्रतिशतमा पुऱ्याउने लक्ष्य लिएकोमा हाल लक्ष्यभन्दा बढी प्रगति भएको छ । कुल विद्यार्थीमध्ये विज्ञान र प्रविधि विषयमा अध्ययन गर्ने विद्यार्थीको हिस्सा सन् २०१५ मा ६.८ प्रतिशत रहेकोमा सन् २०३० मा १५ प्रतिशत पुऱ्याउने लक्ष्य रहेकोमा हाल १०.६ प्रतिशत पुगेको छ । दर्ता गरिएका प्रतिलिपि (Patent) अधिकारको सङ्ख्या सन् २०१५ मा ७५ रहेकोमा वृद्धि गरी सन् २०३० सम्ममा १००० पुऱ्याउने लक्ष्य रहेकोमा हाल ७७ मात्र पुगेको छ[२०] ।

नेपाली जनतालाई नवप्रर्वतनले ल्याएका प्रविधि उपभोग गर्ने अधिकार प्रत्याभूति गर्न सङ्घ, प्रदेश र स्थानीय तहले मोबाइल र इन्टरनेट प्रविधिको विस्तार र सुदृढीकरण, शिक्षण सिकाइ र व्यवसायिक कारोबारमा

१८ उही राष्ट्रिय योजना आयोग, २०२० ।

१९ उही राष्ट्रिय योजना आयोग, २०२० ।

२० उही राष्ट्रिय योजना आयोग, २०२० ।

विद्युतीय प्रविधिको प्रयोग, विश्व विद्यालय, विज्ञान तथा प्रविधि प्रतिष्ठान र अनुसन्धान केन्मा नयां प्रविधि अन्वेषण गर्न प्रोत्साहन गर्नेजस्ता कार्यक्रम सञ्चालन गरिरहेका छन् ।

लक्ष्य १०: समानता तथा सामजिक सुरक्षाको अधिकार: दिगो विकास लक्ष्य १० ले मुलुकभित्र र मुलुकहरूबिचको असमानता घटाउने क्रममा हरेक व्यक्तिको समानता र अविभेदको अधिकार, सार्वानिक कियाकलापमा सहभागिताको अधिकार, र सामाजिक सुरक्षाको अधिकार प्रवर्धन गर्दछ । समानता तथा सामाजिक सुरक्षाको प्रत्याभूति गर्न नेपालले उपभोग तथा खपतमा असमानता (गिनी कोफिसियन्ट विधिबाट मापन गरिएको) सन् २०१५ मा ०.३३ रहेकोमा घटाइ सन् २०३० मा ०.१६ मा झार्ने लक्ष्य लिएकोमा हाल ०.३० मा झरेको छ । आयमा असमानता (गिनी कोफिसियन्ट विधिबाट मापन गरिएको) सन् २०१५ को ०.४६ बाट ०.२३ मा झार्ने लक्ष्य लिएकोमा हाल ०.३२ मा झरेको छ । कुल उपभोगमा तल्लो ४० प्रतिशत जनताको हिस्सा सन् २०१५ मा १८.७ प्रतिशत रहेकोमा सन् २०३० सम्ममा बढाइ २३.४ प्रतिशत पुऱ्याउने लक्ष्य लिएकोमा हाल २५.७ प्रतिशत पुगेको छ । कुल आयमा तल्लो ४० प्रतिशत जनसङ्ख्याको हिस्सा सन् २०१५ को ११.९ प्रतिशतबाट बढाइ सन् २०३० सम्ममा १८ प्रतिशत पुऱ्याउने लक्ष्य लिएकोमा हाल २०.४ प्रतिशत पुगेको छ । त्यसै गरी सामाजिक सशक्तिकरण सूचकाङ्क सन् २०१५ को ०.४१ बाट बढाएर सन् २०३० सम्ममा ०.७० पुऱ्याउने लक्ष्य लिएकोमा हाल ०.५० पुगेको छ । आर्थिक सशक्तिकरण सूचकाङ्क सन् २०१५ को ०.३४ बाट बढाएर सन् २०३० सम्ममा ०.७० पुऱ्याउने लक्ष्य रहेकोमा हाल ०.४५ पुगेको छ । राजनीतिक सशक्तिकरण सूचकाङ्क सन् २०१५ को ०.६५ बाट बढाएर सन् २०३० सम्ममा ०.८५ पुऱ्याउने लक्ष्य रहेकोमा हाल ०.७१ पुगेको छ । लघुवित्तबाट समेटिएका खेती गर्ने परिवारको अनुपात सन् २०१५ को २४ प्रतिशतबाट बढाएर सन् २०३० सम्ममा ४० प्रतिशत पुऱ्याउने लक्ष्य रहेकोमा हाल २९ प्रतिशत पुगेको छ । नेपालको विश्वस्तर प्रतिस्पर्धि सूचकाङ्क सन् २०१५ को ३.९ वाट बढाएर ६ मा पुऱ्याउने लक्ष्य रहेकोमा हाल ५.१ मा पुगेको छ । व्यावसाय गर्ने सूचकाङ्कमा नेपाल सन् २०१५ मा १०५ औं स्थानमा रहेकोमा सन् २०३० मा ६० औं स्थानमा उकास्ने लक्ष्य रहेकोमा हाल ९४ औं स्थानमा स्तरोन्नति भएको छ[२१] । दिगो विकास लक्ष्य कार्यान्वयनका छ वर्षमा नेपालले उपभोग र आएका तल्लो वर्गको हिस्सा उल्लेख्य रूपमा वृद्धि गरी असमानता न्यूनीकरण गरी समानताको अधिकार प्रवर्धन गर्न महत्त्वपूर्ण उपलब्धि हासिल गरेको छ ।

नेपालमा सङ्घ, प्रदेश र स्थानीय तहले हरेक नागरिकको समानता र अविभेदको अधिकार, सार्वजानिक कियाकलापमा सहभागिताको अधिकार, र सामाजिक सुरक्षाको अधिकार प्रवर्धन गर्न गरिबी निवारण मार्फत असमानतामा कमी ल्याउने, आधारभूत स्वास्थ्य र शिक्षा सुविधामा सबैको पहुँच वृद्धि गर्ने, सामाजिक सुरक्षाले समेटेको जनसङ्ख्या वृद्धि गर्ने, राज्यका नीति निर्माण गर्ने तहमा महिला, दलित, जनजाति, मधेशी, अपाङ्ग र सीमान्तकृत वर्गको सहभागिता बढाउने, रोजगारमा आरक्षण दिने, न्युनतम रोजगारको प्रत्याभूति गर्ने, साना तथा सिमान्त किसान र लघु उद्यमीलाइ प्रोत्साहन अनुदान दिने, र कृषि उपजको न्युनतम मुल्य तोक्ने जस्ता कार्यक्रम सञ्चालन गरेका छन् ।

लक्ष्य ११: पर्याप्त र सुरक्षित आवासको अधिकार: दिगो विकास लक्ष्य ११ ले सहर तथा मानव बसोबासलाई समावेशी, सुरक्षित, उत्तथानसिल र दिगो बनाउँदै नेपाली नागरिककलाई पर्याप्त र सुरक्षित आवासको अधिकार प्रत्याभूति गर्ने प्रयास गरेको छ । नेपालमा पर्याप्त र सुरक्षित आवासको अधिकार प्रवर्धन गर्न

२१ उही राष्ट्रिय योजना आयोग, २०२० ।

गरीब-बस्तीहरू/ झुपडपट्टीहरू र अवैध जमिनमा बसोबास गर्ने जनसङ्ख्या सन् २०१५ मा ५ लाख रहेकोमा घटाइ सन् २०३० मा एकलाख पच्चिस हजारमा झार्ने लक्ष्य रहेकोमा हाल दुई लाखमा झरेको छ। खर, पराल र पातले छाना छाएका परिवार सन् २०१५ मा १९ प्रतिशत रहेकोमा घटाई सन् २०३० मा पाँच प्रतिशतमा झार्ने लक्ष्य लिएकोमा हाल ९.१ प्रतिशतमा झरेको छ। एकै परिवारमा पाँच जनाभन्दा बढी बसोबास गर्ने परिवार सन् २०१५ मा ४६.७ प्रतिशत रहेकोमा घटाइ सन् २०३० सम्ममा २० प्रतिशतमा झार्ने लक्ष्य लिएकोमा हाल ४३.६ प्रतिशतमा झरेको छ[२२]।

नेपालमा सङ्घ, प्रदेश र स्थानीय तहले जनताको पर्याप्त र सुरक्षित आवासको अधिकार प्रत्याभूति गर्न नयाँ तथा व्यवस्थित सहरहरूको विकास गर्ने, सीमान्तकृत तथा विपन्न वर्गलाई जनता आवास कार्यक्रम अन्तर्गत घर बनाई सुरक्षित घरमा बसोबास गराउने, खर, पराल र पातले छाना छाएका घरका छाना जस्तापाताले छाउने, नयाँ घर निर्माण गर्न अथवा पुरानो घर मर्मत-सम्भार गर्न वित्तीय संस्थामार्फत आवास कर्जा दिने, सुरक्षित घर निर्माणको लागि राष्ट्रिय, प्रादेशिक तथा स्थानीय भवन संहिता पालन गराउने, नयाँ बस्तीहरूमा ढल,सडक, खानेपानी, बिजुली, टेलीफोनजस्ता आधारभूत सेवाहरू बिस्तार गर्नेजस्ता कार्यक्रमहरू सञ्चालन गरेका छन्।

लक्ष्य १२: आफ्ना स्रोत तथा सम्पत्तिको दिगो प्रयोग गर्ने अधिकार: दिगो विकास लक्ष्य १२ ले दिगो उत्पादन र उपभोगलाई प्रोत्साहन गरी स्वच्छ तथा दिगो वातावरणमा जीउन पाउने अधिकार, शुद्ध तथा सुरक्षित पिउने पानीको उपभोग गर्ने अधिकार, आफ्ना प्राकृतिक स्रोत तथा सम्पत्तिहरू स्वतन्त्रतापूर्वक उपभोग गर्न पाउने अधिकार प्रवर्धन गर्दछ। नेपालले देशमा उपलब्ध जलस्रोतमध्ये सन् २०१५ मा जम्मा १० प्रतिशतमात्र उपभोग गरेकोले यसको प्रयोगमा बढोत्तरी गरी सन् २०३० सम्ममा २० प्रतिशतसम्म पुऱ्याउने, जिवाष्मा इन्धनको प्रयोग घटाइ नविकरणीय उर्जाको प्रयोग बढाउने, नेपालका वन-जङ्गलमा कार्बन सञ्चय बढाउने, माटोमा जैविक पदार्थको अंश बढाउने, काठ र कृषि उपजको दिगो उपभोग गर्न प्रोत्साहन गर्नेजस्ता कार्यक्रम सञ्चालन गरेको छ।

लक्ष्य १३: स्वच्छ वातावरणमा जीउन पाउने अधिकार: दिगो विकास लक्ष्य १३ ले जलवायु परिवर्तन र यसका प्रभावहरूसँग जुध्न उपयुक्त कार्यक्रम अघि बढाइ नागरिकको स्वच्छ वातावरणमा जीउन पाउने अधिकार प्रवर्धन गरेको छ। नेपालले स्वच्छ वातावरण प्राप्त गर्नको लागि विभिन्न सूचकहरू तय गरी कार्यान्वयन गरेको छ। सन् २०१५ मा स्थानीय अनुकुलन योजना तर्जुमा गरेका स्थानीय तहको सङ्ख्या चार रहेकोमा बढाइ सन् २०३० सम्ममा १२० पुऱ्याउने लक्ष्य रहेकोमा हाल ६८ स्थानीय तहमा तर्जुमा भएका छन्। समुदाय स्तरका अनुकुलन योजना सन् २०१५ मा ३१ रहेकोमा बढाइ सन् २०३० सम्ममा ७५० पुऱ्याउने लक्ष्य रहेकोमा हाल ३४२ समुदायस्तरका योजना तर्जुमा भएका छन्। सन् २०३० सम्ममा अनुकुलन योजनाको कार्यान्वयन ६० पुऱ्याउने लक्ष्य रहेकोमा हाल लक्ष्यभन्दा बढी ६८ पुगेको छ र जलवायु स्मार्ट १७० गाउँ विकास गर्ने लक्ष्य रहेकोमा हाल ४२ गाउँको विकास भएको छ[२३]।

नेपालले जलवायु परिवर्तनसम्बन्धी सबै अन्तर्राष्ट्रिय सन्धि-सम्झौतामा हस्ताक्षर गरेको छ। यीमध्ये क्योटो अनुबन्ध (प्रोटोकल), पेरिस सम्झौता र सेन्डाइ ढाँचा (फ्रेमवर्क) प्रमुख हुन्। यिनीहरूको कार्यान्वयन गर्न

२२ उही राष्ट्रिय योजना आयोग, २०२०।

२३ उही राष्ट्रिय योजना आयोग, २०२०।

नेपालले राष्ट्रिय नीति, योजना तथा कार्यक्रम, र सङ्गठन संरचना बनाइ कार्यान्वयन गरिरहेको छ। नेपालका जलवायु परिवर्तनसम्बन्धी नीति तथा कार्यक्रमहरूले हरित गृह ग्याँस र कार्बनको उत्सर्जन घटाउने, वनको वृद्धि गरी कार्बन सञ्चय बढाउने, जलवायु अनुकूलन योजनाको तर्जुमा र कार्यान्वयन गर्ने, नविकरणीय उर्जाको प्रवर्धन गर्ने, जलवायु परिवर्तनसम्बन्धी जोखिम न्यूनीकरण गरी जनताको स्वच्छ वातावरणमा जीउन पाउने अधिकार प्रवर्धन गर्ने प्रयास गरेको छ।

लक्ष्य १५: वन-जङ्गल, सिमसार, हिमाल तथा सुख्खा भूमिको संरक्षण र दिगो उपयोग गर्ने अधिकार: दिगो विकास लक्ष्य १५ ले स्थलीय पर्यावरणको संरक्षण, पुनःस्थापना र दिगो व्यवस्थापन, मरुभूमिकरण र भूक्षयको नियन्त्रण र जैविक विविधताको संरक्षण गरी नेपाली जनताले वन-जङ्गल, सिमसार, हिमाल तथा सुख्खा भूमिको संरक्षण र दिगो उपयोग गर्ने अधिकार प्रवर्धन गरेको छ। यसको लागि देशको कुल भूभागमा वनले ढाकको क्षेत्रफल सन् २०३० सम्ममा ४५ प्रतिशत कायम राख्ने लक्ष्य राखेकोमा हाल सोहीबमोजिमको क्षेत्रफल कायम भएको छ। वार्षिक ५००० हेक्टर क्षेत्रफलमा वृक्षारोपण गर्ने लक्ष्य रहेकोमा हाल सरदर ४००० हेक्टरमा वृक्षरोपण भएको छ। वन-जङ्गलमा बोटवृक्षको घनत्व प्रतिहेक्टर ६४५ कायम राख्ने लक्ष्य रहेकोमा हाल ४३० वृक्ष भएको छ। जम्मा ५००० तालतलैया र पोखरीको संरक्षण गर्ने लक्ष्य रहेकोमा हाल १००० को संरक्षण भएको छ [२४]।

सङ्घ, प्रदेश तथा स्थानीय तहले "हरियो वन नेपालको धन" भन्ने उक्तिलाई संस्मरण गर्दै वन-जङ्गलको संरक्षण, सामुदायिक वन कार्यक्रममार्फत वनको व्यवस्थापन, राष्ट्रिय निकुञ्ज र संरक्षण क्षेत्र कार्यक्रम रहेका छन्। जसमार्फत जैविक विविधताको संरक्षण र प्रवर्धन, डढेलो नियन्त्रण, जलाधार संरक्षण एवम व्यवस्थापन, खाली जमिनमा वृक्षरोपण आदि कार्यक्रम सञ्चालन गरी नेपाली जनताको वन-जङ्गल, सिमसार, हिमाल तथा सुख्खा भूमिको संरक्षण र दिगो उपयोग गर्ने अधिकारको संरक्षण गरिएको छ।

लक्ष्य १६: वाक स्वतन्त्रता र सुरक्षाको अधिकार: दिगो विकास लक्ष्य १६ ले दिगो विकासका लागि शान्तिपूर्ण र समावेशी समाजको निर्माण गर्ने, न्यायमा सबैको पहुँच सुनिश्चित गर्ने र सबैतहमा प्रभावकारी, जवाफदेही र समावेशी संस्थाको स्थापना गर्ने कार्यलाई प्रोत्साहन गरी जनताको वाक स्वतन्त्रता र सुरक्षाको अधिकार प्रवर्धन गर्ने प्रयास गरेको छ। नेपालमा सन् २०१५ मा सशस्त्र र हिंसात्मक द्वन्द्वबाट मृत्यु हुनेको वार्षिक सङ्ख्या १६२८ रहेकोमा हाल घटेर ६५९ मा झरेको छ। त्यसै गरी विगत १२ महिनामा शारीरिक, मनोवैज्ञानिक र यौनजन्य हिंसामा परेका जनसङ्ख्याको अनुपात सन् २०१५ मा २३.६ प्रतिशत रहेकोमा हाल १३.५ प्रतिशतमा झरेको छ। हाल देशमा करिब ६० प्रतिशत जनताले आफू बसेको क्षेत्र वरिपरि एक्लै हिँडडुल गर्न सुरक्षित ठान्दछन्। विगत एक महिनामा मनोवैज्ञानिक त्रास अथवा आक्रमणको अनुभव गरेका एकदेखि १७ वर्ष उमेरका बालबालिकाहरूको अनुपात सन् २०१५ मा ८१.७ प्रतिशत रहेकोमा घटाइ सन् २०३० मा शून्य प्रतिशतमा ल्याउने लक्ष्य रहेकोमा हाल ७७.६ प्रतिशतमा झरेको छ। भारतलगायतका विदेशी मुलुकहरूमा हरेक वर्ष हुने बालबालिकाको बेचबिखन सूचनाको सङ्ख्या सन् २०१५ को ६४ बाट सन् २०३० मा शून्य बनाउने लक्ष्य रहेकोमा हाल २३ मा झरेको छ[२५]।

नेपालमा सङ्घ, प्रदेश र स्थानीय तहले आवधिक निर्वाचन सहितको बहुदलीय प्रतिस्पर्धी शासन् व्यवस्था,

२४ उही राष्ट्रिय योजना आयोग, २०२०।

२५ उही राष्ट्रिय योजना आयोग, २०२०।

प्रेस स्वतन्त्रता, नागरिकको वाक स्वतन्त्रता, मानव अधिकार, कार्यपालिका, न्यायपालिका र व्यावस्थापिकाबिच शक्ति पृथकीकरण र प्रजातान्त्रिक मूल्यमान्यताप्रति प्रतिबद्धता जनाएका छन् । नेपालले वाक स्वतन्त्रता र सुरक्षाको अधिकार प्रत्याभूति गर्न मौलिक हकसम्बन्धी कानुनको तर्जुमा गरी कार्यान्वयन गरिरहेको छ ।

लक्ष्य १७: आत्मनिर्णयको अधिकार: लक्ष्य १७ ले दिगो विकास लक्ष्य कार्यान्वयनका उपायहरू सुदृढ गर्दै राष्ट्रिय तथा अन्तर्राष्ट्रिय साझेदारीलाई जीवन्त तुल्याउदै देशको आत्मनिर्णयको अधिकार प्रत्याभूति गर्ने प्रयास गरेको छ । यसले लक्ष्यहरू प्राप्त गर्न राष्ट्रिय स्रोतहरू तथा वैदेशिक सहायता र ऋण परिचालन गर्दा देशको आत्मनिर्णयको अधिकार प्रवर्धन गरेको छ ।

६.सुझाव र निष्कर्ष

६.१ सुझाव

दिगो विकास लक्ष्य प्रभावकारी रूपमा कार्यान्वयन गरी नेपालमा मानव अधिकारको प्रवर्धन गर्न निम्नअनुसारका सुझाव कार्यान्वयन गर्न उपयुक्त देखिन्छ

१. दिगो विकास लक्ष्य कार्यान्वयन गर्दा मानव अधिकार प्रवर्धन गर्ने विषयमा मिश्रित प्रगति भएको छ । केही सूचकहरूको उच्च, केहीको मध्यम र केहीको सामान्य प्रगति भएको छ । कमजोर रहेका सूचकहरू पहिचान गरी तिनीहरूको प्रगति अपेक्षित बनाउन थप लगानी गर्नुपर्दछ ।

२. दिगो विकास लक्ष्य कार्यान्वयनको लागि सङ्घीय तहमा केही लक्ष्यहरूको लागि निर्दिष्ट मन्त्रालयलाई जिम्मेवारी तोकिएको छ । उदाहरणको लागि लक्ष्य ३, ४, ५, ६, ७, ८, ९, ११, १५ तर अन्तरसम्बन्धित लक्ष्य, जस्तै– लक्ष्य १, २, १२, १३, १६ र १७ कार्यान्वयनको लागि जिम्मेवार मन्त्रालय तोकी कार्यान्वयनको व्यवस्था नगरिँदा यी लक्ष्यका सूचकहरूको प्रगति कमजोर देखिएको छ । तसर्थ सबै लक्ष्यहरूको कार्यान्वयन प्रभावकारी रूपमा अगाडि बढाउन अन्तरसम्बन्धित लक्ष्यको लागि पनि जिम्मेवार मन्त्रालय तोकि कार्यान्वयनको व्यवस्था गर्न उपयुक्त देखिन्छ । प्रदेश तहमा दिगो विकास लक्ष्य कार्यान्वयन गर्न सङ्गठन संरचना निर्माण भएका छैनन् । हाल कायम रहेका मन्त्रालहरूमा पनि कामको प्रकृतिअनुसार जिम्मेवारी तोकी दिगो विकास लक्ष्य कार्यान्वयन गर्ने प्रष्ट व्यवस्था गरिएको छैन । प्रदेश तहमा दिगो विकास लक्ष्य प्रभावकारी रूपमा कार्यान्वयन गर्न सङ्घीय तहमा जस्तै सङ्गठन संरचना निर्माण गरी मन्त्रालयगत जिम्मेवारी तोक्न आवश्यक देखिन्छ । स्थानीय तहमा दिगो विकास लक्ष्य कार्यान्वयन गर्न कुनै सङ्गठन संरचना बनेका छैनन । आधारभूत सामाजिक सेवाहरू स्थानीय तहको कार्य जिम्मेवारीमा पर्ने हुँदा स्थानीय तहमा पनि दिगो विकास लक्ष्य कार्यान्वयन गर्ने सङ्गठन संरचना निर्माण गरी तीन तहको कार्य जिम्मेवारी प्रस्ट गरी किटानीका साथ काम गर्ने व्यवस्था गर्नुपर्दछ ।

३. दिगो विकास लक्ष्य कार्यन्यन गर्न नेपालले सन् २०१६ देखि २०३० सम्ममा वार्षिक सरदर २० खर्ब २५ अर्ब लगानी गर्नुपर्ने देखिन्छ[२६]। हालको सरकारी, निजी क्षेत्र र सहकारी क्षेत्रको लगानी प्रवृत्ति हेर्दा लक्ष्यअनुसार लगानी गर्न सक्ने देखिँदैन । दिगो विकास लक्ष्यका सूचकहरू पनि सन् २०१५ को भूकम्प, सिमामा नाकाबन्दी, र सन् २०२० र २०२१ मा कोभिड-१९ को महामारीले प्रभावित भएका हुँदा सूचकहरू पुनरावलोकन गरी यथार्थ बनाउने र सोहीअनुसार चाहिने स्रोतको पुनःअनुमान गर्नुपर्दछ ।

२६ राष्ट्रिय योजना आयोग, २०१८: दिगो विकास लक्ष्यको लागि आवश्यकता पहिचान र लगानी रणनीति, राष्ट्रिय योजना आयोग, काठमाडौँ, नेपाल ।

४. दिगो विकास लक्ष्य कार्यान्वयन गर्न चहिने स्रोतको व्यवस्था गर्न नेपालका सङ्घ, प्रदेश र स्थानीय तहले राजस्व सुधार कार्ययोजनासहितको स्रोत परिचालन कार्ययोजना बनाइ कार्यान्वयन गर्नुपर्दछ ।

५. गरिबी निवारण बहुपक्षीय कार्यक्रम भएकोले यससम्बन्धी कार्यक्रमहरू विभिन्न मन्त्रालयमा छरिएका छन । छरिएका कार्यक्रमको गरिबी निवारणमा न्युन प्रभाव देखिएको हुँदा गरिबी निवारण कार्यक्रमलाई परिमार्जन गरी एकीकृत गरिबी निवारण कार्यक्रम बनाउने र गरिब व्यक्तिलाई व्यक्तिगत तहमा आवश्यकताअनुसार आर्थिक तथा प्राविधिक सहयोग गरी गरिबीको रेखामाथि उठाउने व्यवस्था गर्नुपर्दछ ।

६. गरिबी निवारण कार्यक्रम जस्तै भोकमरी अन्त्य गर्ने कार्यक्रम पनि बहुपक्षीय कार्यक्रम हो । हालका खण्डीकृत प्रयासले उत्साहबर्धक नतिजा ल्याउन नसकेकोले अपेक्षित नतिजाको लागि एकीकृत प्याकेज बनाइ कृषि मन्त्रालयबाट दिगो तथा आधुनिक बिउ, मल र प्रविधि, सिचाइ मन्त्रालयबाट सिचाइ सुविधा, शिक्षा मन्त्रालयबाट प्रविधि र शिक्षा, र स्वास्थ्य तथा जनसङ्ख्या मन्त्रालयबाट पोषण शिक्षा र सामग्रीको वितरण गर्नेजस्ता कार्यक्रम एकीकृत रूपमा सञ्चालन गर्ने व्यवस्था गर्नुपर्दछ ।

७. स्वास्थ्य क्षेत्रमा नसर्ने रोगहरू, जस्तै– मुटुरोग, मृगौलारोग, अर्बुदरोग, मधुमेह, सिकलसेलको घनत्व बढदै गएको छ र हालका स्वास्थ्य संरचना र जनशक्ति आधारभूत स्वास्थ्य सेवा प्रदान गर्ने उद्देश्यले तयार भएका र विशिष्टिकृत सेवा प्रदान गर्न पर्याप्त स्रोत साधन नभएकोले स्वास्थ्य क्षेत्रका आवश्यकता पहिचान गरी स्वास्थ्य सेवालाई विशिष्टिकृत गर्दै दिगो विकास लक्ष्यले कल्पना गरेको नेपाली जनताको स्वास्थ्य तथा प्रजनन् अधिकारको प्रत्याभूति गर्न आवश्यक देखिन्छ ।

८. नेपालको शिक्षा प्रणाली बढी सैद्धान्तिक रहेको र नागरिकहरूमा रहेको ज्ञानलाई सिपमा, सिपलाई रोजगारमा र रोजगारलाई उत्पादनमा बदल्न नसकेकोले शिक्षा क्षेत्रमा सैद्धान्तिक कक्षाको सट्टा व्यावहारिक कक्षा, साधारण शिक्षाको सट्टा प्राविधिक र व्यवहारिक शिक्षामा जोड दिई जीवन प्रयन्त सिकाइको विकास गरी देशलाई चाहिने दक्ष जनशक्ति उत्पादन गर्ने दिशतर्फ लैजान वर्तमान शिक्षा प्रणालीमा सुधार गर्नुपर्दछ ।

९. नेपालको संविधान, कानुन, नीति, योजना तथा कार्यक्रमले लैङ्गिक समानताबारे प्रशस्त आधार तयार गरेका छन् । नेपालमा भएका कानुनी व्यवस्था र अभ्यासबिच ठुलो खाडल रहेकोले लैङ्गिक समानता हाँसिल गर्न कानुनी व्यवस्था र अभ्यासबिचको अन्तर क्रमशः कम गर्ने कार्यक्रम तर्जुमा गरी कार्यान्वयन गर्नुपर्दछ ।

१०. सङ्घ, प्रदेश र स्थानीय तहले हाल सञ्चालन गरेका एक घर एक धारा कार्यक्रम पूरा गर्न चाहिने स्रोतको आँकनल, सङ्कलन र विनियोजन गरी नेपाली जनताको स्वच्छ खानेपानी उपभोग गर्ने अधिकार प्रत्याभूति गर्नुपर्दछ ।

११. नेपाली जनताको आधुनिक उर्जामा पहुँच र उपभोग गर्ने अधिकार प्रत्याभूति गर्न हालसम्म राष्ट्रिय विद्युत वितरण प्रणालीमा नसमेटिएका गाउँहरूमा विद्युत वितरण प्रणालीको विस्तार गर्ने, निजी क्षेत्रको सहकार्यमा जलविद्युत र सौर्य उर्जाको उत्पादनमा बढोत्तरी गर्ने, जिवाष्मा इन्धनलाई नवीकरणीय उर्जाले प्रतिस्थापन गर्न हाल बत्ती बाल्नको लागि बनाएको विद्युत वितरण प्रणाली सुदृढ गरी एलपी ग्याँसलाई विद्युतीय चुल्होले, र पेट्रोल तथा डिजेलले चल्ने सवारी साधनलाई विद्युतीय सवारी साधनले प्रतिस्थापन गर्ने कार्यलाई तीब्रता दिनुपर्दछ ।

१२. नेपाली जनताको पूर्ण रोजगारी र मर्यादित कामको अधिकार प्रत्याभूति गर्न हाल अरू देशले उत्पादन गरेका सामान ल्याएर बेच्ने नाफामुखी अर्थतन्त्रलाई उत्पादनमुखी अर्थतन्त्रमा रुपान्तरण गर्न आवश्यक छ । नेपालमा उत्पादित वस्तु विदेश निकासी गर्न नसके पनि देशको आन्तरिक मागलाई आपूर्ति गर्ने औद्योगिक सामान देशभित्रै उत्पादन गर्दा गैरकृषि क्षेत्रमा रोजगारीको सिर्जना भई पूर्ण रोजगारी र मर्यादित कामको प्रत्याभूति गर्न सकिने हुनाले उत्पादनमुलक अर्थतन्त्र निर्माण गर्न प्रयत्न गर्नुपर्दछ ।

१३. नेपालले अध्यन, अनुसन्धान र नवप्रर्वतनको क्षेत्रमा नगन्य लगानी गरेको छ । नेपाली जनताको नवप्रर्वतनले ल्याएका प्रविधि उपभोग गर्ने अधिकार प्रत्याभूति गर्न नेपालले यस क्षेत्रमा लगानी बढाइ कुल बजेटको एक प्रतिशत अध्यन, अनुसन्धान र नवप्रर्वतनको क्षेत्रमा लगानी गर्नुपर्दछ ।

१४. नेपालले समानता तथा सामजिक सुरक्षाको अधिकार प्रत्याभूति गर्न वार्षिक बजेटको महत्त्वपूर्ण हिस्सा खर्च गरेको छ । ती सामाजिक सुरक्षाका कार्यक्रम भने खण्डिकृत भएर विभिन्न मन्त्रालय, निकाय र स्थानीय तहमार्फत कार्यान्वयन हुँदा अपेक्षित प्रभाव छोडन सकेका छैनन् । अतः राज्यका विभिन्न मन्त्रालय र निकायमार्फत वितरणहुँदै आएका सामाजिक सुरक्षा कार्यक्रमलाई राम्रो प्रभावको लागि एकीकृत गरी कार्यान्वयन गर्नुपर्दछ ।

१५. पर्याप्त र सुरक्षित आवासको अधिकार प्रत्याभूति गर्न गरिब तथा विपन्न वर्गले धान्न सक्ने र सुरक्षित हुने किफायती घर निर्माण प्रविधिको विकास र विस्तार गर्ने, सङ्घ प्रदेश र स्थानीय तहका भवन संहिताबिच एकरूपता ल्याउने, र आफैँ सुरक्षित घर निर्माण गर्न नसक्ने गरिब, सिमान्तकृत तथा विपन्न वर्गको लागि जनता आवास कार्यक्रममार्फत घर बनाइ वितरण गर्ने व्यवस्था सुदृढ गर्नुपर्दछ ।

१६. स्वच्छ वातावरणमा जीउने अधिकार प्रत्याभुति गर्न आर्थिक विकास र वातावरणबिच सन्तुलन कायम गर्ने, प्राकृतिक प्रकोप न्यूनीकरण गर्ने, सहर तथा बस्तीबाट उत्पादन हुने फोहोरमैलाको उपयुक्त उत्सर्जन गरी आर्थिक उपार्जनमा प्रयोग गर्ने व्यवस्था गर्नुपर्दछ ।

१७. वाक स्वातन्त्रता, सुरक्षा र आत्मनिर्णयको अधिकार प्रत्याभूति गर्न हाम्रा मौलिक हकसम्बन्धी कानुनको प्रभावकारी कार्यान्वयन, सुरक्षा निकायको सुदृढीकरण र देशका महत्त्वपूर्ण विषयमा राष्ट्रिय सहमतिको आधारमा निर्णय गर्ने पद्धतिको सुदृढीकरण गर्नुपर्दछ ।

१८. दिगो विकास लक्ष्यको मुख्य ध्येय विकास अभियानमा कोही पनि नछुटुन् भन्ने हो । यो सिद्धान्त विश्वका नेताहरूले मानिसहरूलाई पछाडि छाडने र समग्र मानवको क्षमतालाई कमजोर पार्ने गरिबी, भेदभाव, र बहिष्करण उन्मूलन गर्ने प्रतिबद्धता हो । नेपालमा अझै पनि महिला हिंसा, जातीय विभेद र सम्पत्तिको वितरणमा रहेको असमानताले यस सिद्धान्तको कार्यान्वयनमा बाधा पुऱ्याएको हुँदा सङ्घ, प्रदेश र स्थानीय तहका नीति तथा कार्यक्रमले यी महत्त्वपूर्ण पक्षमा ध्यान दिनुपर्दछ ।

६.२ निष्कर्ष

दिगो विकास लक्ष्य सन् २०१५ को सेप्टेम्बर महिनामा विश्वका राष्ट्र प्रमुख तथा सरकार प्रमुखहरूले संयुक्त राष्ट्रसङ्घको ७० औँ साधारण सभामा प्रतिबद्धाता जनाएका विकासका महत्त्वकांक्षी साझा विषय हुन् । नेपाल दिगो विकास लक्ष्यप्रति प्रतिबद्धता जनाइ कार्यन्यन गर्ने एक प्रमुख अग्रिणी राष्ट्र हो । दिगो विकास लक्ष्य विकासको आवरणामा कार्यान्वयनमा आएका भएता पनि यी लक्ष्यको प्रभावकारी कार्यान्वयन हुँदा नेपालमा मानव अधिकारको प्रवर्धन गर्न प्रत्यक्ष वा अप्रत्यक्ष रूपमा उल्लेख्य भूमिका खेलेका छन् । दिगो

विकास लक्ष्यले मानव जीवनको प्रत्याभूति गर्ने अधिकार, खाद्य तथा पोषण अधिकार, स्वास्थ्य तथा प्रजनन् अधिकार, शिक्षा प्राप्त गर्ने अधिकार, लैङ्गिक समानताको अधिकार, शुद्ध खानेपानी तथा सरसफाइको अधिकार, आधुनिक उर्जाको पहुँच र उपभोग गर्ने अधिकार, रोजगारी र मर्यादित कामको अधिकार, नवप्रर्वतनले ल्याएका प्रविधिको प्रयोग गर्ने अधिकार, समानताको अधिकार, पर्याप्त र सुरक्षित आवासको अधिकार, आफ्ना स्रोत तथा सम्पत्तिको दिगो प्रयोग गर्ने अधिकार, स्वच्छ वातावरणमा जीउन पाउने अधिकार, वन, जङ्गल, सिमसार, हिमाल तथा सुख्खा भूमिको संरक्षण र दिगो उपयोग गर्ने अधिकार, वाक स्वतन्त्रता र सुरक्षाको आधिकार र आत्मनिर्णयको अधिकार मानव अधिकारसँग प्रत्यक्ष सम्बन्ध भएका अधिकारको प्रवर्धन गरेका छन ।

दिगो विकास लक्ष्य कार्यान्वयनमा आएपछि हालसम्मको प्रगति हेर्दा स्वास्थ्य तथा प्रजनन् अधिकार प्रवर्धन गर्ने लक्ष्य ३, समानताको अधिकार प्रवर्धन गर्ने लक्ष्य १०, र पर्याप्त तथा सुरक्षित आवासको अधिकार प्रवर्धन गर्ने लक्ष्य ११ का सूचकहरूको प्रगति उच्च देखिन्छ । दिगो विकास लक्ष्यका आठ वटा लक्ष्यहरू मुख्यतया: शुद्ध खानेपानी तथा सरसफाइको अधिकार प्रवर्धन गर्ने लक्ष्य ६, आधुनिक उर्जाको पहुँच र उपभोग गर्ने अधिकार प्रवर्धन गर्ने लक्ष्य ७, रोजगारी र मर्यादित कामको अधिकार प्रवर्धन गर्ने लक्ष्य ८ मा प्रगति मध्यम छ । स्वच्छ वातावरणमा जीउन पाउने अधिकार प्रवर्धन गर्ने लक्ष्य १३, वन, जङ्गल, सिमसार, हिमाल तथा सुख्खा भूमिको संरक्षण र दिगो उपयोग गर्ने अधिकार प्रवर्धन गर्ने लक्ष्य १५, वाक स्वतन्त्रता र सुरक्षाको आधिकार प्रवर्धन गर्ने लक्ष्य १६, र आत्मनिर्णयको अधिकार प्रवर्धन गर्ने लक्ष्य १७ का सूचकहरूमा मध्यम स्तरको प्रगति देखिन्छ । त्यसै गरी दिगो विकासका पाँच लक्ष्यहरू क्रमश: गरिबी निवारण गरी मानव जीवनको प्रत्याभूति गर्ने अधिकार प्रवर्धन गर्ने लक्ष्य १, भोकमरी अन्त्यगरी खाद्य तथा पोषण अधिकार प्रत्याभूति गर्ने लक्ष्य २, लैङ्गिक असमानता हटाइ लैङ्गिक समानताको अधिकार प्रवर्धन गर्ने लक्ष्य ५, नवप्रर्वतन गरी नवप्रर्वतनले ल्याएका नयाँ प्रविधि प्रयोग गर्ने अधिकार प्रवर्धन गर्ने लक्ष्य ९ र आफ्ना स्रोत तथा सम्पत्तिको दिगो प्रयोग गर्ने अधिकारको प्रवर्धन गर्ने लक्ष्य १२ का सूचकहरूमा सामान्य प्रगति भएको छ ।

आगामी वर्षहरूमा दिगो विकास लक्ष्यको प्रभावकारी कार्यान्वयन गरी मानव अधिकारको अवस्थालाई थप मजबुत बनाउन दिगो विकास लक्ष्यको कार्ययोजना कार्यान्वयनमा आएपछि घटित घटना, जस्तै– महाभूकम्प, सिमामा नाकाबन्दी, र कोभिड १९ को प्रभावले अपेक्षित उपलब्धि हुन नसक्ने अवस्था रहेकोले सूचकहरूका लक्ष्य पुनरावलोकन गरी यथार्थपरक बनाउनुपर्दछ। सूचक पुनरावलोकनपश्चात् दिगो विकास लक्ष्य कार्यान्वयन गर्न चहिने स्रोतको पुन:अनुमान गर्नुपर्ने देखिन्छ । सङ्घ, प्रदेश र स्थानीय तहले दिगो विकास लक्ष्य कार्यान्वयन गर्न चहिने स्रोतको व्यवस्थापन गर्न स्रोत परिचालन कार्ययोजना बनाइ स्रोतको व्यवस्था गर्ने र कमजोर सूचकहरू पहिचान गरी थप लगानी गर्नुपर्ने अवस्था छ । दिगो विकास लक्ष्यको मुख्य ध्येय विकास अभियानमा कोही पनि नछुटुन् भन्ने हो । नेपालमा भने अझै पनि महिला हिंसा, जातीय विभेद र सम्पत्तिको वितरणमा रहेको असमानताले यस सिद्धान्तको कार्यान्वयनमा बाधा पुऱ्याएको हुँदा सङ्घ, प्रदेश र स्थानीय तहका नीति तथा कार्यक्रमले यी महत्त्वपूर्ण पक्षमा ध्यान दिनुपर्दछ । सङ्घ, प्रदेश र स्थानीय तहमा दिगो विकास लक्ष्यका सूचक कार्यान्वयन, अनुगमन र मूल्याङ्कन गर्न विषयगत मन्त्रालय, निकाय, महाशाखा, शाखा नतोकिएका अन्तरसम्बन्धित सूचकहरूको लागि जिम्मेवारी तोकि प्रभावकारी कार्यान्वयनको व्यवस्था गर्ने जस्ता सुधारका कार्यहरू सञ्चालन गर्न आवश्यक छ ।

रजस्वला हुँदा 'नछुने' बार्ने बराउने शिष्ट प्रथा कि महिला अधिकारको अपमानः एक विवेचना

रवीन्द्र भट्टराई

सारांश

नेपालका केही जाति र समुदायमा नारीलाई रजस्वला हुँदाका समयमा नछुने बार्ने बराउने प्रथा अद्यापि प्रचलित छ। नछुने बार्ने बराउने कुरा केकस्तो व्यवहार हो र यस व्यवहारलाई अवलम्बन गराउने धार्मिक, सांस्कारिक र सांस्कृतिक प्राधिकार केकस्ता छन् ? नछुने बार्ने बराउने वा छाउपडी राख्ने प्रथाको उद्विकास कसरी हुँदै आएको होला ? मानवअधिकार तथा कानुनको शासनको आलोकमा यस्ता कार्यलाई केकसरी परिभाषित गरिएको छ ? यस लेखमा यी प्रश्नहरूको उत्तर खोज्ने जमर्को गरिएको छ। रजस्वलाकालमा नारीलाई सुरक्षित राख्ने अभिप्रायले विकसित हुँदै आएको नारीमैत्री अवधारणामा पछिबाट विकार पैदा भएको यसका सांस्कृतिक प्राधिकारसम्बन्धी स्रोतको समीक्षाले औँल्याएको छ। मानवअधिकार र कानुनको दृष्टिमा नछुने बार्ने बराउने कार्य अपमानजनक र अमानवीय व्यवहार हुन्। कानुनले यस्ता व्यवहारलाई दण्डनीय बनाएको छ भने पीडितका लागि क्षतिको परिपूरणको अधिकारलाई पनि मान्यता दिएको छ। रजस्वला हुँदा नछुने बार्ने बराउने कार्यबाट शिष्ट प्रथा धानिने नभएर मानवअधिकार र कानुनको अवज्ञा हुने देखिएको छ। कानुनले अपराध कायम गरेका यस्ता घटना केकति भइरहेका छन् तिनको अनुगमन, लेखाजोखा र मूल्याङ्कन गर्ने काम मानवअधिकारको कार्यान्वयनको अनुगमनका रूपमा हुन आवश्यक देखिएको छ।

प्रमुख शब्दावली: रजस्वला, महिला अधिकार, छाउपडी, नछुने, प्रथा मानव अधिकार

१. परिचय

गर्भवती भएको वा सुत्केरीपछिको केही महिनाबाहेक छाडेर १३/१४ वर्षदेखि ४५/५० वर्षका नारीमा रजस्वला हुन्छ। २८/३० दिनको अन्तरमा हुने रजस्वला स्त्री जातिको एक प्राकृतिक प्रक्रिया हो र एक महिनाको अन्तरालमा हुने भएकाले यसलाई मासिक धर्मका नामले पनि चिनिन्छ। नारीको यस मासिक धर्मलाई रजस्राव, ऋतुकाल आदि नामले पनि चिनाइन्छ। नेपालका खस, मैथिलीलगायत समुदायमा रजस्वलाकाल (रजस्वला देखिएपछि चार दिनसम्म) ती महिलाले पुरुष वा अन्य महिला नै सँग पनि स्पर्श गर्नु नहुने अलग्गै बस्नुपर्ने र खानुपर्ने लगायतका बारना गर्ने कुरा प्रथागत रूपमै प्रचलित छ। पश्चिम नेपालको पहाडी भेगमा रजस्वला र सुत्केरी कालमा छाउगोठमा राख्ने चलन पनि यसैको एक स्वरूप हो।

रजस्वला हुनुलाई 'नछुने' भएको वा 'पर सरेको' भन्ने गरिन्छ। 'नछुने' बार्ने वा रजस्वला हुँदा छुनै नहुने वा छोइछिटो नै गरिने नभए पनि रजस्वला बार्नुपर्ने संस्कृतिको प्रभावबाट नेपालका नेवार तथा अन्य समुदाय पनि पूरापूर मुक्त छैनन्। 'बौद्धमार्गी नेवार समाजमा पर सर्ने चलन प्रायः नभए पनि हिन्दूमार्गी नेवार समाजमा

रजस्वला हुँदा तीन दिनसम्म बार्ने चलन छ' (कायस्थ, २०७७: ७९)। खसान क्षेत्र र नेपालका पहाडी क्षेत्रमा बाहुनक्षेत्रीको बस्तीमा मिसिएर बसेका अन्य जातिसमुदायका मानिसले पनि नछुने बार्ने कुरालाई प्रथागत रूपमा छिटपुट अवलम्बन गर्दै आएको पाइन्छ।

नारीमा नैसर्गिक रूपमा हुने यो जैविक प्रक्रिया हो जसले नारीको प्रजनन् प्रणालीको प्रतिनिधित्व गर्छ। यो हुने कुरा नारीको इच्छा र नियन्त्रणको विषय होइन। परित्याग गर्न नसकिने यस्तो प्राकृतिक जैविक गुणलाई आधार बनाएर ऋतुवती नारीलाई अलग्गै राखिने, छुवाछुत गरिने कार्य धर्म वा संस्कृतिको अभ्यास हो कि नारीमाथिको भेदभाव ? परिवारकै नारी सदस्यलाई अछुत बनाउने, भेदभाव गर्ने, त्यो बेलामा नारीले आफूलाई अरूभन्दा हीन ठान्नुपर्ने यो चलनको नालीबेली कस्तो होला ? मानवअधिकार र कानुनका दृष्टिमा यो प्रथा वा चलन ग्राह्य वा स्वीकारयोग्य छ कि यो आफैमा महिला अधिकारविरुद्ध क्रिया हो ? नेपालको कानुनले यसबारेमा के भन्छ ? यिनै प्रश्नहरूको उत्तर यस लेखमार्फत खोज्ने प्रयास गरिएको छ।

२. रजस्वला के हो र किन भनियो ?

हरेक जीवको जीवनचक्र हुन्छ र प्रजनन प्रणाली हुन्छ। मानिसको जीवनचक्र पनि क्रमशः गर्भ, जन्म, शैशव, बाल्य, किशोर/तरुण, युवा, वयस्क, प्रौढ र बृद्ध हुँदै चल्छ। बाल्यावस्था पूरा भई तरुणावस्थामा प्रवेश गरेसँगै किशोर/किशोरीमा प्रजनन प्रणालीको विकास पूर्णतातिर उन्मुख हुन्छ। यो भनेको बालबालिकाबाट वयस्कतातिरको सङ्क्रमण हो र यस अवस्थामा तिनको शरीरमा सन्तान उत्पादन गर्ने क्षमता विकसित हुन्छ। रजस्वला महिलाको किशोर अवस्थामा हुने एउटा सामान्य प्राकृतिक प्रक्रिया हो जसले तिनको शरीरमा गर्भधारण गर्ने क्षमता बनाउँछ।

यो महिलाको नियमित शारीरिक प्रक्रिया हो जसमा जीवनरस (हर्मोन) हरूको चक्र चल्छ मासिक नियमितताको त्यो चक्र टुङ्गिन्छ। रजस्वला (मेन्ट्रुएसन), मासिक धर्म (पिरियड) वा रज/रक्तश्राव (ब्लिडिङ) चिकित्साविज्ञानका हिसाबले महिलाको गर्भाशयबाट डिम्ब, रगत् र अन्य प्रचननरसहरूको निष्कासन् हो। यो गर्भवती भएमा बाहेकका अवस्थामा किशोरावस्थादेखि रजोनिवृत्ति (मेनोपज) नभएसम्म मासिक अन्तरालमा भइरहन्छ र तीनदेखि पाँच दिन रहन्छ भने कसैकसैला दुई दिनमै टुङ्गिने र कसैलाई सात-आठ दिनसम्म पनि रहने हुन सक्छ (डेभिड, २००४)।

शब्दोत्पत्तिका हिसाबले हेर्दा 'रजस्' संस्कृत भाषाको शब्द हो। यसमा वलच् प्रत्यय लागेपछि 'रजस्वल' शब्द बन्छ। रजस्वल पुंलिङ्गी शब्द हो र यसको स्त्रीलिङ्गी शब्द हो रजस्वला। किशोरीमा पहिलो पटक देखा परेको रजस्वलालाई रजस्दर्शनम् र रजस्वला स्थायी रूपमा रोकिनेलाई रजोबन्ध (रजोनिवृत्ति) भनिन्छ (आप्टे, १९६९: ८४४)। रजस् शब्दको मूल अर्थ् मानिसका त्रिगुण (सात्विक राजस र तामस) को एक, सूर्यको किरणको सर्वाधिक सानो कण, स्त्रीकेशर/पराग, कन्या विवाहयोग्य भएको अवस्था र नारीको सन्तान उत्पादकत्व हो (आप्टे, १९६९ : ८४४)।

प्राणीमा हुने तृष्णा, विलास, भोग आदिद्वारा मोहित पार्ने सकाम इच्छालाई रज भनिन्छ। वनस्पतिको स्त्रीकेशरमा उत्पन्न हुने परागलाई पनि रज नै भनिन्छ। नारीको मासिक धर्मका रूपमा निसर्जन हुने रगत भनेको रज नै हो अर्थात् सन्तानोत्पादनका लागि अत्यावश्यक हुने स्त्री-तत्त्वलाई रज भनिन्छ। पुंकेशरबाट सेचन नगरेका कारण निर्धारित काल पार गरी त्यस्तो रज निस्सर्जन हुनुलाई संस्कृत वाङ्मयमा रजस्वला भनिएको पाइन्छ।

रजको अर्थ चमक वा ज्योति पनि हो जसलाई ऋतु भनिन्छ । यसै कारण रजस्वलाको समयलाई ऋतुकाल भनिन्छ । ऋतु शब्दको मूल ऋतम् हो जसको अर्थ निश्चित प्राकृतिक नियम (रीत) हा । त्यस्तो प्राकृतिक नियम वा गुणलाई धर्म भनिन्छ । यसैले रजस्वलालाई मासिक धर्म भनिएको हो (भट्टराई, २०७७)।

अङ्ग्रेजी भाषामा महिनावारी वा रजस्वलालाई मिन्सेस्, मेन्ट्रुएसन् वा मेन्ट्रुअल साइकल भनिन्छ । यी तीनै शब्दहरूको व्युत्पत्तिलाई हेर्दा मासिक धर्मकै अर्थसङ्गति रहेको भेटिन्छ । मेन्स्ट्रुएसन् शब्दको औपचारिक प्रयोग "पिरियड अफ मेन्ट्रुएसन" का रूपमा अङ्ग्रेजी भाषामा १६८० को दशकबाट हुँदै आएको पाइन्छ । ल्याटिनका मुन, मेनस्ट्रम्, मोन्थ, मेन्सिस, मेन्स्ट्रुअस् (मोन्थ्ली) यो शब्दको सम्बन्ध संस्कृतको "मास" (महिना) र ग्रीकको मिने, मेन शब्दबाट व्यत्पन्न हुँदै आएको यो शब्दले अङ्ग्रेजीका दुवै मन्थ (महिना) र मिजर (नापो) को अर्थसंयोजन गरेको छ (इटिमोनलाइन, २०२१) । यसबाट पूर्वीय र पाश्चात्य दुवै संस्कृतिहरूमा रजस्वलालाई चन्द्रमाको समयगतिसँगै महिलामा हुने एक मासिक प्रक्रियाको रूपमा स्वीकार गरेको पाइन्छ ।

३. नछुने बार्ने प्रथाको विकास

रजस्वला हुँदा नछुने बार्ने वा बारना गर्ने चलन कहाँ, कहिले, किन र कसरी सुरु भयो? प्रत्यक्ष प्रमाणमा आधारित भएर यी प्रश्नको उत्तर दिने सामर्थ्य सम्भवतः कसैको पनि हुँदैन र कसैले दिँदैन पनि । अनुमान प्रमाणको सहारा लिएर उद्विकासको सिद्धान्त (इभोलुसन् थ्योरी) र विनिर्माणवादी चेतना सम्मिश्रण गरेर हेर्दा भने यसको सुरुआत् मानिसको जङ्गलमा जीवनयापन हुने बेलादेखि नै भएको तथ्यको लख काट्न सकिन्छ ।

मानिसले जङ्गलमा जीवनयापन गरेका समयमा बासका लागि ओडार सबैभन्दा सुरक्षित ठाउँ हुन्थ्यो । हिंस्रक वन्यजन्तुसँग सामना गरिरहेको मानववर्गालले सुरक्षा उपायका रूपमा आगोको सहारा लिन जान्यो । प्राकृतिक भएकाले स्त्री जातिमा रजस्वला हुने कुरालाई उसले अवलोकनद्वारा सजिलै बुझ्न सक्यो । रजस्वला वा सुत्केरी हुँदा योनीबाट निसर्जन हुने रगत र अन्य रसहरूको गन्ध हिंस्रक जन्तुले थाहा पाउँथे । हिंस्रक मांसभक्षी जन्तुले रजस्वला भएका महिलालाई त्यस कारणले पनि बढी आक्रमण गर्ने र लुछ्नेजस्ता जोखिम आसन्न भए । महिलालाई रजस्वला भएका अवस्थामा हिंस्रक जनावरबाट हुने र हुन सक्ने आक्रमणबाट कसरी जोगाउने ? सम्भवतः यो प्रश्नले त्यो मानववर्गाललाई समाधान सोच्न बाध्य बनायो । उनीहरूले सोचविचार गरे र तिनलाई ओडारभित्र राख्ने र अन्य सदस्य बाहिर आगो बालेर बसेर सुरक्षित बनाउने जुक्ति निकाले र अभ्यास गर्न थाले ।

नेवार समुदायमा पहिलो पटक रजोवती भएकी बालिकाको बारा तयेगु संस्कार गरिन्छ । यसलाई गुफा राख्ने भनिन्छ । प्रथम पटक रजस्वला हुने बित्तिकै कन्याकेटीलाई लुकाएर अध्याँरो कोठामा एघार दिनसम्म राखिन्छ । बाह्रौँ दिनमा सूर्यदर्शन गराएपछि बारा तयेगु संस्कार सम्पन्न हुन्छ (कायस्थ, २०७७ : ७८) ।

नेपालका खस र किरातलगायतका जातिले मनाउने उधौँली र उभौँली चाड र त्यससँग जोडिएको संस्कारले तिनले पशुपालन गर्ने र पशुपालनका लागि हिउँदमा औलमा र बर्खामा लेकमा गोठ राख्ने परम्परालाई संस्कारमा विकास गरेको देखाउँछन् । पशुपालनका लागि लेकमा गोठ बस्ने चलन हुँदा सामान्य अवस्थामा स्याउलाका गोठले काम चल्नु स्वाभाविक भयो । गोठ बस्ने महिलालाई रजस्वला भए वा गर्भवती भए तिनको रजस्रावमा हिंस्रक जन्तुको आक्रमणको जोखिम बढी हुनाले तिनीहरू रहने घर स्वभावैले हिंस्रक जन्तुले

भत्काउन नसक्ने गरी बलिया चाहिए । यसरी छाउगोठ स्याउले छहारीभन्दा बलिया गरी अलग्गै बनाइन थाले र त्यस्ता महिलालाई छाउ गोठमा राख्न थालियो ।

यसरी सुरुमा सुरक्षाको दृष्टिले राख्न थालिएका छाउगोठहरू नै समयक्रममा घरमै पशुपालन गरिन थालेपछि घरछेउमा बनाउने रजस्वला वा सुत्केरी भएका महिलालाई त्यहाँ बाध्यत्मक रूपले राख्ने परम्परा बस्यो । मानिसले ओडारको विकल्पमा विकास गरेका घरमा सर्दा पनि निरन्तरता दियो । सुत्केरीलाई बच्चाको न्वारान नभएसम्म उज्यालो नछिर्ने भँडारमा राख्ने चलन अझै कतिपय ठाउँमा होला ।

परासरस्मृतिमा रजदर्शन (पहिलो रजस्वला) भएपछि बालिकालाई कन्या भनिने कुरा छ । परासरस्मृतिले स्त्रीलाई अलग्गै राख्न नहुने, गोठमा राख्न नहुने र घरबाट टाढा राख्न हुँदैन भनेको छ (पारासरसंहिता, ९/५७; गौतम, २०६६ : २९७)। यसले माथि चर्चा गरिएको विकासक्रमको अनुमानलाई समर्थन गर्ने आधार उपलब्ध गराएको छ । भँडारमा सुत्केरी बसेर हुर्केका पुस्ताका मानिस त अद्यापि प्रशस्तै भेटिन्छन् । यसरी रजस्वला र सुत्केरी भएका महिलासँग संसर्गमा रहँदा त्यस्तो संसर्गबाट रगत लाग्न पुगेमा पुरुषलाई पनि हिंस्रक जन्तुबाट आक्रमण हुन सक्ने अवस्था हुनाले कम्तीमा त्यस्तो रगत निसर्जन अवधिभर पुरुषले महिलासँग संसर्ग नगर्ने अभ्यास नै प्रकारान्तरमा नछुने बार्नेमा रूढ भएको देखिन आउँछ (भट्टराई, २०७७)।

४. रजस्वलाबारेको वैदिक प्रावधान र निर्देश

हिन्दूमार्गी नेपालीहरूले रजस्वला वा मासिक ऋतुकालमा परिवारका महिला सदस्यलाई अछूत बनाउने कुरालाई प्रथाका रूपमा स्वाभाविक रूपले नै स्वीकार गर्छन् । यसैले यो प्रथालाई हिन्दू धार्मिक प्राधिकारद्वारा संरक्षित मानिन्छ र के भनिन्छ भने धर्मशास्त्रले नै ऋतुमती महिलालाई सर्वत्र वर्जित गरेको छ । धर्मपरम्पराका नाममा नारीमाथि गरिँदै आएको यो छुवाछूत प्रथाको सामाजिक प्राधिकार को हो ? हाम्रा पण्डित वा पुरोहितहरू हुन् ? वा अरू नै कोहीले यस त्रासदीलाई निरन्तरता दिन सबल आड दिइरहेको छ ? यी प्रश्नलाई शोधसमस्याको रूपमा लिएर कसैले अलग्गै अनुसन्धान गर्न सक्ने ठाउँ छ । यस लेखमा चाहिँ प्रमुख वाङ्मयमा उपलब्ध केही स्रोतका आधारमा प्राधिकार केलाई मानिँदै आएको छ भन्ने सीमित चर्चा गर्ने जमर्को गरिएको छ ।

वैदिक युगमै मानिसहरूले गर्भाधानदेखि मृत्युपर्यन्त गरिने मानवसंस्कारका विधि र आचरणका नियम बनाए । संस्कारयुक्त मानवसभ्यताको परिकल्पना गरिनु मानवहितकै कुरा थियो । वैदिक चिन्तकहरूले नारी रजस्वला र गर्भावस्थाको प्राकृतिक कारण र त्यस अवस्थामा गरिनुपर्ने व्यवहार र आचरणबारे विचार गरेका रहेछन् । ऋग्वेदको दसौं मण्डलको एकसय बैसट्ठिऔं सूक्तमा गर्भ र स्त्रीरोगको निवारणसम्बन्धी मन्त्रहरू छन् । तिनमा गर्भ, प्रसूति, नवजात शिशुस्याहार, स्त्रीरोग तथा यौनसम्बन्धी स्वास्थ्य समस्याको निवारणसम्बन्धी प्रार्थना छ । दसौं मण्डलकै अन्य ऋचामा अग्नि र अश्विनीकुमारहरूले मानवरोगहरूको निवारण गर्ने कुरा उल्लेख छ (भट्टराई, २०७७)। यसले ऋग्वेद कालमा प्रसूति र सुत्केरीसम्बन्धी विषयलाई चिकित्सागत विषयको रूपमा लिएको देखाउँछ ।

यजुर्वेदमा संयमले मात्र पतिपत्नीको प्रेमपूर्ण सम्बन्ध स्थापित हुन्छ भनेर नरनारी दुवैलाई समान संयमताको निर्देश गरिएको छ । रजलाई रात र चन्द्रमासँग सम्बन्धित गराउँदै नारीलाई प्रेममय र धर्मानुकूल आचरण गरेर बलवान् पुरुषसँग संयुक्त हुन निर्देश गरिएको छ । यजुर्वेदको काण्वी शाखाको बाजसनेयी ब्राह्मणअन्तर्गतको

बृहदारण्यक उपनिषद् छ । उपनिषद्को छैटौँ अध्यायमा सन्तानोत्पादन प्रक्रियाको विशद् वर्णन गरेको छ । सो उपनिषद्को चतुर्थ ब्राह्मणको नाम नै पुत्रमन्थ कर्म अर्थात् 'सन्तानोत्पत्ति-विज्ञान' छ ।

यसको थालनीमा सद्गुणयुक्त सन्तान उत्पन्न गर्ने, जथाभावी नगर्ने र संयमयुक्त जीवन निर्माणको जुक्ति बताउन ब्राह्मण आरम्भ भएको उल्लेख छ । पुरुषको यौनस्वेच्छाचारिताको निरोधका लागि गरेको भन्दै पुरुषले शुक्रको क्षय हुन नदिई पत्नीको ऋतुकालको प्रतीक्षा गर्नुपर्ने विधान दिइएको छ । चतुर्थ ब्राह्मणको छैटौँ मन्त्र भन्छ- रजस्वला भएकी पत्नीका प्रारम्भिक तीन रात ब्रह्मरात हुने हुनाले तीन दिनसम्म पत्नीलाई पतिले स्पर्श गर्नु हुँदैन । त्यसपछिका समयमा पतिले पत्नीसमक्ष गएर अब हामीले सन्तान उत्पन्न हुने काम गरौँ भनेर याचना गर्नुपर्छ (बृहदारण्यकोपनिषद्: ६/४/६)। पत्नीले मैथुन गर्न नमानेमा उनले इच्छाएअनुसारका आभूषणहरू दिनुपर्छ (बृहदारण्यकोपनिषद्: ६/४/६)। आवश्यकताअनुसार गर्भनिरोध गर्नुपरेमा 'इन्द्रियेण ते रेतसा रेत आददे' मन्त्र जप गर्न निर्देश गरेको छ (बृहदारण्यकोपनिषद्: ६/४/१०)। ऋतुकालमा पत्नीलाई दूध-चामल, तिल-चामलको खिर, मासुभात (मांसोदनमं), घिउसहितको दालचामलको खिचडी बनाएर खुवाउनुपर्ने र अझ हिमालयमा पाइने ऋषभ नामको बलवर्धक औषधि ख्वाउनुपर्छ (बृहदारण्यकोपनिषद्: ६/४/१४-२०) ।

त्यसउप्रान्तका ऋतुकालका उपयुक्त दिनमा दुवैको सुखद सम्भोगबाट गर्भधारण गर्नु-गराउनुपर्छ । सुखपूर्वक प्रसव भएपछि सुत्केरी र जातकलाई आगो ताप्ने गरी (अग्निस्थापना गरेर) राख्नुपर्छ र बाबुले दही, मह र घिउ मिलाएर जातकलाई चटाउनुपर्छ । जातकको नामकरण गराएर 'आमाबाट पोषक दूध प्राप्त होस् हे सरस्वती' भनेर प्रार्थना गर्नुपर्छ (बृहदारण्यकोपनिषद्: ६/४/२७) भनिएको छ ।

गरुड पुराणको पूर्वखण्डको पञ्चानब्बेऔं अध्यायमा याज्ञवलक्यले निर्देश गरेको गृहस्थ आचरणमा पतिपत्नीको सम्बन्धको चर्चा छ । त्यसको उन्नाइसौं श्लोकमा स्त्रीहरूलाई सोम र अग्निबाट पवित्रता प्राप्त भएकाले ती सदासर्वदा चोखा हुन्छन् भनिएको छ (गरुडपुराणम्, १/९५/१९)। लोग्नेस्वास्नीको झगडा नभएमा मात्र धर्म, अर्थ र मोक्ष सम्भव हुन्छ भनिएको छ । १६ रात स्त्रीको रतिसमय हो जुन सहवासका लागि उपयुक्त हुन्छ (गरुडपुराणम्, १/९५/२४)। पर्वकाल र रजस्वलाका चार दिनबाहेक अन्य दिनमा मात्र पतिले पत्नीसँग सहवास गर्न सक्ने (गरुडपुराणम्, १/९५/२५)विधान निर्देश रहेको पाइन्छ ।

मनुस्मृतिले पनि रजोदर्शन भएका पहिला चार दिन स्त्रीसँग पुरुषले एकै ओछ्यानमा सुत्नु नहुने र आशक्त भएर स्त्रीसम्भोग गर्न नहुने भनेको छ र यस अवस्थामा स्त्रीप्रसङ्ग गर्ने पुरुषको बुद्धि, तेज, बल, दृष्टि र आयु क्षीण हुन्छन् र त्यसो नगर्ने पुरुषको बुद्धि, तेज, बल, दृष्टि र आयु बढ्छ (लुइटेल, २०६१: ८०) भनेको छ ।

सन्तानदरसन्तानबाट लोकान्तपछि स्वर्ग पाइने हुनाले र सन्तानप्राप्ति स्त्रीबाट मात्र सम्भव हुने भएकाले पुरुषले स्त्रीसँग संसर्ग र सुरक्षा गर्ने कर्तव्य पूरा गर्नुपर्ने निर्देश यज्ञवल्क्यस्मृतिले दिएको छ । यो स्मृतिले यसका लागि सुरुका चार दिन र चतुर्दशी, अष्टमी, औँसी र पूर्णिमा तिथिबाहेक ऋतुकालका १६ रातका जोडा दिनहरूमा स्त्रीप्रसङ्ग गर्न निर्दिष्ट गरेको छ (उप्रैती, २००१: ५९)। पुरुषले आफ्नो इच्छामा होइन, स्त्रीका इच्छा वा उत्तेजना मात्र यस्तो रतिक्रिया गर्नुपर्छ किनभने स्त्रीको रक्षा अत्यावश्यक हुन्छ भन्ने कुरा पनि स्मृतिले स्पष्ट गरेको छ ।

सनातन तन्त्र परम्पराले रजस्वला भएकी नारीलाई अछूत ठान्ने मान्ने त मास बराबर ठाउँ दिँदैन । तन्त्र परम्पराको स्रोतको रूपमा रहेको शक्तिसंगमतन्त्रले रजस्वला भएकी नारीलाई शक्तिस्वरूपा ब्रह्म मान्छ र

नारीको स्वैच्छिक ऋतुमती शक्तिलाई सस्पर्श वस्त्र, अलंकार र भोजनद्वारा सम्पूज्य गर्न र निन्दा, क्रोध वा अपहेलना गर्दै नगर्न निर्देश गर्छ (काणे, १९९६ :२०)।

वेद, उपनिषद् र स्मृतिहरूमा रहेका मन्त्र र तन्त्र नै सनातन हिन्दूमार्गीका संस्कार र सांस्कृतिकताका प्राधिकारका स्रोत हुन्। उपनिषद्लाई वेदकै दार्शनिक सिद्धान्तकरण गर्ने स्रोत मानिन्छ। यी स्रोतले नारीलाई अछूत मानेका छैनन् तर पुरुषलाई चाहिँ नारीका रजस्वला भएका समयमा सहवास वा रतिरागका आशयले स्पर्श नगर्नू भनेका छन्। चार दिनको स्नानपछि सँगै रहनबस्न हुने भए पनि रजस्वला भएको सातौं दिन पूरा नभई यौन रतिराग वा सहवासका लागि पत्नीसमक्ष पुरुषलाई जान निषेध गरिएको छ। नारीले छोएको नखानू वा छोइएमा स्पर्शको दोष लाग्ने र अलग्गै रहनुपर्ने कुरा गरेको पाइँदैन।

उल्लेख गरिएको वैदिक मान्यता र निर्देशविपरीत हिन्दूमार्गी समुदायमा नारीलाई अछुत बनाउने र नछुने बार्न बाध्य गराउने धार्मिक प्राधिकारको स्रोतचाहिँ गरुड पुराणको दोस्रो खण्ड 'प्रेतकल्प' हो। प्रेतकल्प मानिस मरेपछिको स्वर्ग र नर्कको यात्राको वर्णन गरिएको खण्ड हो। खासमा नेपाली समाजमा यसैलाई गरुड पुराण भन्ने गरिन्छ। प्रेतकल्पको बाइसौँ अध्यायमा नारीका ऋतुकालका चार दिनलाई अतिरञ्जनापूर्ण तरिकाले प्रस्तुत गरिएको छ। रजस्वलाको सात दिनसम्म पत्नीलाई अछुत घोषित गरिएको छ। देह निर्णय नामको सो अध्यायका सातौं, आठौं, नवौं र दसौं श्लोकले इन्द्लाई लागेको ब्रह्महत्याको पाप चौथो अंश ऋतुकालका चार दिनमा नारीमा रहेकाले चाण्डाल्नी, ब्रह्मघातिनी र धोबिनी (गरुण पुराण, २/२२/७-९) हुने हुनाले ती अछुत हुन्छन् भन्ने मिथक जोडिएको छ। यो मात्रै नछुने बार्ने बराउने प्रथालाई टिकाइराख्ने मूल स्रोत रहेको देखिन्छ।

५. नेपालको कानुनी–न्यायिक परम्परा र रजस्वलाको प्रश्न

नेपालको कानुनी तथा न्यायप्रणालीलाई हिन्दू धार्मिक कानुनी प्रणालीबाट विकास भएको र प्रभावित रहँदै आएको भन्ने गरिएको छ। अपराधसंहिता २०७४ को परिच्छेद ११ मा रहेको विवाहसम्बन्धी कसुरका प्रावधानहरूमा उल्लिखित "परम्परामा चलिआएकोमा बाहेक" (दफा १७२) वा "परम्परामा चलिआएअनुसार" (दफा १७४) (काकिव्यस, २०७७ख: ६६) र देवानी संहिता २०७६ को भाग ३ को पारिवारिक कानुनअन्तर्गत विवाहसम्बन्धी व्यवस्थामा रहेको "आफ्नो जातीय समुदाय वा कुलमा चलिआएको चलनअनुसार" (दफा ७०.२) (काकिव्यस, 2077ग: २७) जस्ता पदावलीको प्रयोगले नेपालमा कुलपरम्पराको सनातनी प्रथाअनुसार पारिवारिक सम्बन्धसम्बन्धी कानुन अवलम्बन हुँदै आएको देखाउँछ।

विक्रम संवत् १९१० देखि सुरु विभिन्न कालमा संशोधित हुँदै आएको र २०२० साल साउन मसान्तसम्म प्रभावमा रहेको मुलुकी ऐनमा जातीय छुवाछुतलाई कानुनले नै वैध गरेको र आशौच बार्नेको (पाँचौँ भाग, गोरखापत्र, २००९: ९१-१०९) एवम् अनाचार निर्णयको भातमा बोर्नेको (पाँचौँ भाग, गोरखापत्र, २००९: १३१-१३५, र १३७-१३९) जस्ता विशुद्ध आचारगत पक्षको बारेमा कानुनी व्यवस्था गरिएको पाइन्छ। आशौच बार्नेको महलले मानिस मर्दा र जायजन्म हुँदा बन्धुवर्गादिले सूतक यी प्रावधानहरूले छाउ राख्ने वा रजस्वला हुँदा बारना गर्नुपर्ने वा छुवाछुत गर्नुपर्ने भन्ने कुरा निर्देश गरेको र नबारिए वा छुवाछुत नगरेमा दण्ड हुने प्रावधान राखेको पनि पाइँदैन।

साबिक मुलुकी ऐनलाई परिमार्जन गरी २०२० सालमा मुलुकी ऐनकै नामबाट जारी भएको र नयाँ मुलुकी ऐन भनेर चिनिएको "मुलुकी ऐन, २०२०" मा उल्लिखित आशौच बार्नेलगायतका प्रावधानलाई "कुलधर्मअनुसार"

(अदलको दफा ८, ९ र १०; काकिव्यस, २०४३: २४२) गर्नुपर्ने गरी सीमित गरिदिएको पाइन्छ । यसरी रजस्वला हुँदाका समयमा बारना गर्नुपर्ने, रजस्वला भएका महिलालाई भेदभाव गर्न हुने वा छुवाछूतको व्यवहार गर्न पाइने कुरालाई नेपालको कानुनी परम्पराले वैधानिकता प्रदान गरिआएको पाइँदैन ।

नेपालले सन् १९९० अर्थात् २०४७ सालयता आफ्नो कानुनी व्यवस्था र देवानी तथा फौजदारी कानुनलाई अन्तरराष्ट्रिय कानुनसँग सुसङ्गत रहने गरी परिमार्जन गर्दै अगाडि बढेको भए पनि नछुने बार्ने वा छाउपडी राख्ने प्रचलनलाई गैरकानुनी र दण्डनीय कार्यको रूपमा दर्ज गर्ने काम राज्यबाट लामो समय भएन । यसको अर्थ नछुने बार्नेबराउने र छाउपडीलाई छाउगोठमा राख्ने रखाउने चलनलाई स्वाभाविक प्रथाकै रूपमा राज्यले ग्रहण गर्दै आएको पाइन्छ । २०४७ साल यता सञ्चार र अन्य सामाजिक सार्वजनिक मञ्च र माध्यमहरूमा छाउपडी र नछुने बार्नेबराउने प्रथा महिलाविरुद्धको हिंसात्मक व्यवहार भएकाले यो प्रथा नभएर कुरीति र कुप्रथा हो भन्ने नागरिक आवाज चर्को रूपले उठ्दै आयो । तथापि, राज्यको कार्यपालिका र व्यवस्थापिकाले छाउपडी र नछुने बार्ने बराउने कुरालाई कुप्रथा र अपराधको रूपमा घोषित गर्ने काम गरेन । विक्रम संवत् २०६१ सालमा दलित गैरसरकारी संस्था महासङ्घका तर्फबाट अध्यक्ष डिलबहादुर विश्वकर्मा समेतले यसमा न्यायिक पहलको आवश्यकता देखे र सर्वोच्च अदालतको असाधारण क्षेत्रको शक्ति गुहार्दै निवेदन दिए । संवत् २०६१ सालको रिट नम्बर ३३०३ मा दर्ता भएको निवेदनमा उनीहरूले निम्नानुसारको माग गरे:

महिलामा नियमित हुने मासिक स्राव हुँदा नेपालका विशेष गरी सुदुर पश्चिमका सबै जिल्ला, मध्यपश्चिमका अधिकांश जिल्ला, महोत्तरी जिल्लालगायत नेपालभरै कष्ट दिने चलन यथावत् छ । अन्धविश्वास तथा रूढिमा आधारित कुसंस्कारयुक्त समाजिक परम्पराका रूपमा समाज तथा परिवारबाट अहिले सम्म पनि घरबाट टाढा गाई, भैंसी, बाखा आदि बस्ने गोठसँगै छाउपडी गोठमा राख्ने, सामाजिक तथा पारिवारिक तिरस्कार गर्ने, मानसिक यातना दिने, खाने कुराबाट वञ्चित गर्ने, अस्वस्थ वातावरणमा बस्न बाध्य पार्नेलगायत आदि यातनापूर्ण व्यवहार कायम छन् । महिलामा हुने नियमित प्राकृतिक शारीरिक नियमका रूपमा रहेको मासिक स्रावलाई अन्धविश्वास रूढिमा आधारित भई महिलालाई घर देखि अलग छाउपडी गोठमा राख्ने गरिन्छ । छाउपडीमा बस्ने महिलालाई घरमा भएका उपभोग्य बस्तुलगायत सम्पूर्ण वस्तुको उपभोग र प्रयोग गर्नबाट वञ्चित गरिन्छ । परिवार र समाजका कुनैपनि व्यक्तिसँग सम्पर्क सम्बन्धबाट टाढा राखिन्छ । पोषणयुक्त सम्पूर्ण खाने कुराबाट वञ्चित गरिन्छ । सुत्न बस्नका लागि लत्ता कपडा वञ्चित गरी पराल बोरा र मानु गुनि आदिमा सुत्नु बस्नुपर्ने हुन्छ । रोगसङ्क्रमणयुक्त, फोहोरमैला भएको, पशु राखिने गोठमा बस्न बाध्य बनाई स्वच्छताबाट वञ्चित गरिन्छ । यस्ता कुराबाट महिलाहरू अपमानित पारिँदै आएका छन् । मासिक स्राव भएको बेला गरिने यस्ता व्यवहारबाट महिलाहरूमा कुपोषण, शारीरिक कमजोरी, सामाजिक तिरस्कार, भयानक रोगहरूको सङ्क्रमणजस्ता प्रत्यक्ष असरहरू देखिएका छन् । नेपाल अधिराज्यको संविधान, २०४७ को प्रस्तावनाले नागरिकको आधारभूत मानवअधिकारको सुरक्षा गर्ने कानुनी राज्यको स्थापना गर्ने र आर्थिक सामाजिक तथा राजनीतिक न्याय प्रदान गर्ने किटान गरी धारा ११ ले समानताको अधिकार र धारा १२(१) ले व्यक्तिगत स्वतन्त्रताको अधिकारको प्रत्याभूति गरेको छ । महिलालाई छाउपडी गोठमा पठाउने कार्यले तिनको जीवनको अधिकार, वैयक्तिक स्वतन्त्रतालगायतका अधिकारहरूबाट वञ्चित भएको र सोको संरक्षण गर्ने प्रत्यक्ष दायित्व भएका विपक्षीहरूले तत्सम्बन्धमा कुनै चासो नदेखाएकाले छाउपडी प्रथाबाट महिलाहरूको संरक्षण गरी जीवनरक्षा गर्नका लागि संविधानको धारा २३ तथा ८८(२) बमोजिम विपक्षीहरूको नाउँमा उपयुक्त आज्ञाआदेश जारी गरिपाऊँ (नेकाप, २०६२ बाट सारांशित) ।

निवेदनको प्रारम्भिक सुनुवाइपछि सर्वोच्च अदालतले तत्कालीन सरकार अर्थात् कार्यपालिकालाई निवेदकले माग गरेअनुसारको आदेश किन जारी गर्नु नपर्ने हो ? जारी गर्नु नपर्ने भए लिखित जवाफ पठाउन सूचित गर्‌यो । सरकारको तर्फबाट विशेष जवाफ महिला, बालबालिका तथा समाज कल्याण मन्त्रालयले दियो । मन्त्रालय अन्तर्गतको महिला विकास विभागले सामाजिक कुरीति, अन्याय एवम् भेदभाव पूर्ण व्यवहारमा परिवर्तन गर्न ग्रामीण महिलालाई चेतनामूलक र सामाजिक जागरणमूलक कार्यक्रम सञ्चालन गर्दै आएको छ । यस्ता कार्यक्रमका माध्यमबाट महिलाको सशक्तीकरण गरी आर्थिक रूपमा सक्षम बनाउँदै सामाजिक कुप्रथाको रूपमा रहेको छाउपडी प्रथालाई हटाउँदै लान सकिने मन्त्रालयको जवाफ थियो । महिलाविरुद्धका सबै प्रकारका भेदभाव उन्मूलन गर्न स्थानीय तहदेखि नीतिनिर्माणतहसम्मै कार्यक्रमहरू सञ्चालन गरिँदै गरेको र त्यस्ता कार्यक्रमद्वारा जनचेतना जगाई छाउपडी प्रथा अन्त्य हुने जवाफ सरकारले दिएको भए पनि यो प्रथा एक कुरीति र कुप्रथा हो भन्ने कुरा लिखित जवाफमा सरकारले सकारेको कुराचाहिँ सरकार पक्षको सकारात्मक कुरा थियो ।

रिटनिवेदनमा उठाइएको विषयलाई सर्वोच्च अदालतले गम्भीरतापूर्वक लिएको थियो र अदालतले विशिष्ट किसिमले आदेश जारी गरेको थियो । अदालतले सुदूर पश्चिमलगायतका जिल्लामा महिलाहरूमा मासिक स्राव हुँदा छाउपडी गोठमा बस्नुपर्ने, दूध दहीलगायतका पौष्टिक आहार खान नपाउनेलगायतका विभेदपूर्ण व्यवहार हुने गरे नगरेको बारेमा विवेचना गर्दै सुदूर पश्चिमको पहाडी जिल्लामा महिनावारी हुँदा महिलालाई सात दिनसम्म घरदेखि टाढाको छाउपडी गोठभित्र कैदी बनाएर राख्ने गरिएको, छाउपडीभित्र जबरजस्ती पठाउन पुरुषबाट कुटपिट हुने गरेको, त्यस्ता महिलाले दूध, दही, घ्यू खान त के देख्नसमेत नपाउने र नुन, खुर्सानीसँग बासी रोटी खाएर सात दिन बिताउनुपर्ने र धारा, पँधेरामा जान प्रतिबन्धित गर्ने गरिएको र घर छाडेर असुरक्षित र फोहोर स्थानमा समय गुजार्नुपर्नाले महिलाले रोग, बलात्कार र मृत्यु समेतको सामना गर्नुपरेको तथ्यगत सूचना ‘‘राजधानी" र “कान्तिपुर“ दैनिकजस्ता समाचारमा आएको पाइएकोले छाउपडी प्रथा निस्सन्देह कायम रहेको ठहर गरेको थियो।सरकारी कार्यक्रम सञ्चालनका संयन्त्रको अस्पष्टताका कारण महिलाविरुद्धको भेदभावपूर्ण प्रथा रोक्नको लागि सरकारबाट प्रभावकारी उपाय अपनाइएको नपाइएको पनि अदालतले ठहर्‌याएको थियो । अदालतले जारी गरेको निर्देशात्मक आदेशमा भनिएको थियो:

(क) श्री ५ को सरकार, प्रधानमन्त्री तथा मन्त्रिपरिषद्को कार्यालयले यो आदेश प्राप्त भएको मितिले एक महिनाभित्र मासिक स्राव भएका महिलालाई छाउपडी गोठमा पठाउने प्रथालाई कुरीति भएको घोषणा गर्नू ।

(ख) स्वास्थ्य मन्त्रालयले चिकित्सकहरू समेत भएको एक अध्ययन समिति बनाई छाउपडी प्रथा कायम रहेका जिल्लाहरू तथा स्थानहरूमा महिला तथा बालबालिकामाथि सो प्रथाबाट पर्न जाने र परिरहेका असरको समीक्षा गरी त्यसबारे गर्नुपर्ने स्वास्थ्यसम्बन्धी कार्यहरूको पहिचान गरी यथासक्य चाँडो प्रतिवेदन स्वास्थ्य मन्त्रालय र सर्वोच्च अदालतमा पेस गर्नू ।

(ग) छाउपडी प्रथाका विरुद्ध सार्वजनिक चेतना जगाउन स्थानीय निकायहरूलाई परिचालित गर्न स्थानीय विकास मन्त्रालयले निर्देशन दिनू ।

(घ) छाउपडी प्रथाअन्तर्गत महिलामाथि हुने कुनै पनि प्रकारको विभेद रोक्न श्री ५ को सरकार, महिला बालबालिका तथा समाज कल्याण मन्त्रालयले यो आदेश प्राप्त भएको मितिले तीन महिनाभित्र

निर्देशिका बनाई लागू गर्नूगराउनू साथै त्यस्तो निर्देशिका बनेको बारेमा यस सर्वोच्च अदालतलाई समेत जानकारी गराउनू (नेकाप, २०६२)।

अदालतबाट सो आदेश जारी हुँदाका समयमा संसद्को एउटा प्रमुख हिस्सा प्रतिनिधि सभा कार्यात्मक अवस्थामा थिएन। अदालतले छाउपडीविरुद्ध बृहत् कानुनकै आवश्यकता रहेको कुरालाई ध्यानमा राखेर आवश्यक कानुन निर्माणार्थ गर्न बृहत् अध्ययन पनि आदेशमार्फत अपेक्षा गरेको थियो।

सर्वोच्च अदालतको सो आदेशपछि महिला, बालबालिका तथा समाज कल्याण मन्त्रालयले २०६४ सालमा छाउपडी प्रथा उन्मूलन निर्देशिका बनायो र नेपाल सरकारको नामबाट जारी गराउँदै तुरुन्तै लागू हुने घोषणा गर्‌यो। निर्देशिकाको उद्देश्य "सुदूरपश्चिमाञ्चल र मध्यपश्चिमाञ्चलका कतिपय जिल्लाहरूमा केटीहरूले पहिलो मासिकधर्म (रजस्वला) हुँदा ११-१५ दिनसम्म, त्यसपछिका मासिकधर्मका बेला पाँच दिनसम्म र विवाहिता महिलाले चार दिनसम्म छाउपडीमा बस्नु पर्ने, सार्वजनिक स्थान (धारो, बाटो, विद्यालय आदि) प्रयोग र प्रवेशमा बन्देज लगाउने तथा पोषणयुक्त खाने कुरा (दूध, दही, ध्यू, आदि) खान नदिने मान्यताका कारण महिला तथा बालिकाविरुद्ध हुने भेदभावपूर्ण व्यवहार, महिलाविरुद्धको हिंसा र निजहरूको स्वास्थ्यमा समेत गम्भीर असर पर्ने भएकोले यस्तो कुप्रथाको उन्मूलन गरी समतामूलक समाजको स्थापना गर्ने" (मबाज्येनाम, २०६४) राखिएको छ।

निर्देशिकाले 'छाउपडी प्रथाप्रति रहेको पुरातन विश्वास, मान्यता र प्रचलनविरुद्ध जनचेतना जगाउने उपायहरू अवलम्बन गर्ने, छाउपडी प्रथाबाट प्रत्यक्ष रूपमा प्रभावित बालिका तथा महिलाहरूलाई स्वास्थ्य सेवा तथा पोषण सम्बन्धमा जानकारी उपलब्ध गराउने, र छाउपडी प्रथाको अन्त्य गर्ने व्यक्ति, परिवार र समुदायलाई सम्मान गर्ने कुरालाई प्रथा उन्मूलनको तात्कालिक कार्यक्रमको रूपमा लागू गर्ने' (मबाज्येनाम, २०६४) भनेको छ।

दीर्घकालीन कार्यक्रमका रूपमा 'महिलाहरूलाई आर्थिक, सामाजिक र राजनैतिक रूपमा सशक्त बनाउदै सामाजिक तथा राष्ट्रिय जीवनको सबै क्षेत्रमा महिलाहरूको समानुपातिक सहभागिताको लागि कार्यक्रम सञ्चालन गर्ने, र कानुनी व्यवस्थाद्वारा महिलाको मानवअधिकारको प्रत्याभूति गर्दै समतामूलक समाज स्थापना गर्ने' (मबाज्येनाम, २०६४) कुरा निर्देशिकाले उल्लेख गरेको छ।

निर्देशिकाले छाउपडी प्रथा प्रचलनमा रहेका प्रत्येक जिल्लामा माथि लेखिएबमोजिमका कार्यक्रम सञ्चालन गर्न जिल्ला विकास समितिको संयोजकत्वमा जिल्ला प्रशासन् कार्यालय, जिल्लास्थित शिक्षा, जनस्वास्थ्य, प्रहरी कार्यालयहरू, गैरसरकारी संस्था, अगुवा महिला समूह, बाल क्लब र शिक्षकहरूको प्रतिनिधित्व रहनेगरी जिल्ला स्तरीय समिति गठन हुने व्यवस्था गरेको छ। जुन समितिको सदस्यसचिव महिला विकास कार्यालयलाई बनाइएको छ। यस्तै समिति स्थानीय रूपमा नगरपालिका वा गाउँविकास समिति (हाल गाउँपालिकालाई मान्नुपर्ने?) को संयोजकत्वमा पनि कार्यक्रम कार्यान्वयन संयन्त्रको रूपमा तोकेको पाइन्छ। यी दुवै समितिले कार्ययोजना बनाएर कार्यक्रम सञ्चालन गर्नुपर्ने र स्थानीय समितिको हकमा स्थानीय निकायले भने आफ्नो वार्षिक कार्यक्रमभित्रै यसलाई समेट्नुपर्ने निर्देशिकाले निर्दिष्ट गरेको छ (दफा ४.२ र ४.३; मबाज्येनाम, २०६४)।

विद्यालय, छाउपडी प्रथाबाट प्रभावित बालिका तथा महिला, समुदाय (धामी, झाँक्री, पण्डित, मुखिया

आदि), परिवारका वरिष्ठ सदस्यसहित अन्य सदस्य (?), राजनीतिक दलहरूलाई निर्देशिकाले कार्यक्रमको लक्षित समूह मानेको छ भने स्थानीय निकायदेखि अन्तर्राष्ट्रिय स्रोतसम्मलाई कार्यक्रममा परिचालन गरिने भनिएको छ ।

६. मानवअधिकार तथा कानुनका आलोकमा नछुने बार्ने बराउने प्रथा

रजस्वला वा प्रसूतिका समयमा नारीलाई असुरक्षित तरिकाले राख्ने, नछुने बार्ने, बराउने परिपाटीलाई मानव अधिकारको आलोकबाट पनि आँकलन गर्न सकिन्छ । यसका लागि यस्तो व्यवहार विभेदपूर्ण हुन्छ कि निर्विभेदपूर्ण हुन्छ? भन्ने प्रश्नको निरूपण हुन आवश्यक छ । छाउपडी र नछुने बार्ने दुवै कुरा नारी र पुरुषबीच प्रकृतिले नै सिर्जना गरेको अन्तरमा आधारित छ किनभने पुरुषलाई रजस्वला हुने र गर्भवती हुन सक्ने दुवै कुरा प्रकृतिले दिएको छैन र दुवै कुरा नारीका प्रकृतिप्रदत्त वा नैसर्गिक हुन् ।

सबै व्यक्ति जन्मजात स्वतन्त्र र प्रतिष्ठा तथा अधिकारमा समान हुन् भन्ने मानव अधिकारको सर्वव्यापी मान्यता छ । यसैले मानिसहरूले जाति, वर्ण, लिङ्ग, भाषा, धर्म, राजनीतिक वा अन्य विचारधारा, राष्ट्रिय वा सामाजिक उत्पत्ति, सम्पत्ति, जन्म वा अन्य कुनै हैसियतजस्ता कुनै पनि आधारमा एकआपसमा भेदभाव गर्न वा विभेदपूर्ण व्यवहार गर्न निषेधित छ । प्रत्येक व्यक्तिलाई जीवनको स्वतन्त्रता र सुरक्षाको अधिकार छ, कसैलाई पनि कुनै पनि किसिमको दासत्व, यातना तथा क्रूर, अमानवीय वा अपमानजनक व्यवहारको कसैले भागीदार बनाउन पाइँदैन । प्रत्येक नारीले सर्वत्र व्यक्तिको रूपमा मान्यता पाउने कुराको कानुनी मान्यता छ भने नारी र पुरुष दुवै कानुनको दृष्टिमा समान र भेदभावरहित रूपमा कानुनको समान संरक्षणका हकदार छन् । मानव अधिकारको विश्वव्यापी घोषणापत्र, नागरिक तथा राजनीतिक अधिकारसम्बन्धी अन्तर्राष्ट्रिय अनुबन्ध तथा आर्थिक, सामाजिक तथा सांस्कृतिक अधिकारसम्बन्धी अनुबन्धले निर्विभेदपूर्ण व्यवहार हुनुपर्ने कुरा सुनिश्चित गरेका छन् ।

महिलाविरुद्ध सबै प्रकारका भेदभावको अन्त्य गर्ने महासन्धि १९७९ ले "पुरुष र महिलाहरूको वैवाहिक स्थिति जेसुकै भए तापनि राजनीतिक, आर्थिक, सामाजिक, सांस्कृतिक, नागरिक र अन्य कुनै पनि क्षेत्रमा पुरुष र महिलाबीच समानताका आधारमा महिलाहरूद्वारा मानवअधिकार तथा मौलिक स्वतन्त्रताको मान्यता, उपभोग वा प्रयोग रद्द गर्ने वा त्यसमा आघात पार्ने प्रभाव वा उद्देश्य रहेको लिङ्गका आधारमा गरिने कुनै पनि अन्तर, निष्कासन् वा प्रतिबन्ध" लाई "महिलाविरुद्धको भेदभाव" (नेकाआ, २०११ : ०३) भनेको छ । यस हिसाबले नारीलाई नछुने बार्ने बराउने व्यवहार यसअनुसारको विभेदपूर्ण व्यहारमा पर्ने भएकाले मानव अधिकार तथा महिला अधिकारविरुद्धको अभ्यास देखिन्छ ।

नेपालको संविधानको धारा १ ले संविधानलाई नेपालको मूल कानुन घोषित गरी सोको पालना गर्न सबै व्यक्तिलाई कर्तव्यबद्ध गराएको छ (काकिव्यस, २०७७क : ०२) । धारा ३८ ले नारीलाई लैङ्गिक भेदभावरहित वंशीय हक प्रत्याभूत गर्दै सुरक्षित मातृत्व तथा प्रजननको अधिकार सुनिश्चित गरेको छ । रजस्वला र प्रसूति यही अधिकारमा अन्तर्भ"त विषयवस्तु हो । सोही धाराले धार्मिक, सामाजिक, सांस्कृतिक परम्परा, प्रचलन वा अन्य आधारमा शारीरिक, मानसिक, मनोवैज्ञानिक, यौनजन्य हिंसा वा शोषण हुनबाट नारीलाई जोगाउने प्रत्याभूति दिएको छ । नारीविरुद्ध हुन सक्ने यस्ता व्यवहारलाई दण्डनीय बनाउने कुरा सुनिश्चित गर्दै पीडितलाई क्षतिपूर्तिको समेत प्रबन्ध गरिने कुरा किटान गरेको छ *(काकिव्यस, २०७७क : १५)*।

उपर्युक्त संवैधानिक प्रावधान र माथि उपशीर्षक ५ मा वर्णन गरिएअनुसारको सर्वोच्च अदालतको निर्देशनात्मक आदेशसमेतलाई विचार गर्दै राज्यले छाउपडीमा राख्ने र रजस्वला हुँदा छुवाछूतपूर्ण व्यवहार गरी नछुने बार्ने बराउने कुरालाई नेपाल कानुनमा फौजदारी कसुर कायम गरिएको छ । मुलुकी अपराध संहिता २०७४ ले रजस्वला र सुत्केरी अवस्थामा छाउपडीमा राख्ने वा कुनै किसिमको भेदभाव, छुवाछूत वा अमानवीय व्यवहार गर्ने कार्यलाई अपमानजनक वा अमानवीय व्यवहारको कसुर भनेर किटान नै गरेको छ । संहिताको दफा १६८ र १६९ मा निम्न कानुनी प्रावधान राखिएको पाइन्छ:

१६८. अपमानजनक वा अमानवीय व्यवहार गर्न नहुने (१) कसैले कसैलाई अपमानजनक वा अमानवीय व्यवहार गर्न वा गराउनु हुँदैन ।

(२) उपदफा (१) बमोजिमको कसुर गर्ने व्यक्तिलाई पाँच वर्षसम्म कैद र पचास हजार रुपैयाँसम्म जरिमवाना हुनेछ ।

(३) महिलाको रजस्वला वा सुत्केरीको अवस्थामा छाउपडीमा राख्न वा त्यस्तै अन्य कुनै किसिमका भेदभाव, छुवाछूत वा अमानवीय व्यवहार गर्न वा गराउन हुँदैन ।

(४) उपदफा (३) बमोजिमको कसुर गर्ने व्यक्तिलाई तीन महिनासम्म कैद वा तीन हजार रुपैयाँसम्म जरिमाना वा दुवै सजाय हुनेछ ।

(५) राष्ट्रसेवकले यस दफामा लेखिएको कसुर गरेमा निजलाई थप तीन महिनासम्म कैद सजाय हुनेछ ।

१६९. क्षतिपूर्ति भराइदिनुपर्ने: यस परिच्छेदबमोजिमको कसुर गर्ने व्यक्तिबाट पीडित व्यक्तिलाई पुगेको क्षति र पीडावापत मनासिब क्षतिपूर्ति भराइदिनुपर्नेछ ।

(स्रोत: काकिव्यस, २०७७ख: ६५)

यसरी मानव अधिकार र नेपालको संविधान तथा फौजदारी कानुनले रजस्वला भएका बेला नछुने बार्ने बराउने कार्यलाई स्पष्टत: आपराधिक कार्यको कोटीमा राखेको पाइन्छ । मानव अधिकार र कानुनको आलोकमा अपराध घोषित भएको कार्यलाई संस्कृति, संस्कार, परम्परा, चलन र प्रथाको नाममा निरन्तर कायम राखिनु भनेको संविधान र कानुनको अवज्ञा हो ।

७. प्राप्तान्त (फाइन्डिङ) र निष्कर्ष

सनातन वैदिक परम्पराका मूल प्राधिकार-ग्रन्थ (वेद र उपनिषद्)हरूले रजस्वला र प्रसूतिमा महिलालाई उपेक्षा गर्ने, अपवित्र मान्ने वा स्पर्श नै गर्नु नहुने प्रावधान गरेको पाइँदैन । बृहदारण्यक उपनिषद्को चौथो ब्राह्मणले त स्पष्टै रूपमा महिला अछूत हुने नभएर पति ऋतुकालकी पत्नीप्रति आशक्त हुन सक्ने खतराबाट जोगाउन निर्देश गरेको छ । रजस्वला र प्रसूति दुवै अवस्थामा पतिले पत्नीलाई राम्ररी स्याहार गर्नुपर्ने निर्देश गरेको पाइन्छ । परासरस्मृतिले रजस्वला वा गर्भावस्थामा नारीलाई गोठ वा टाढा राख्ने कुरा निषेध नै गरेको छ । उल्लिखित ग्रन्थहरूले रजस्वला भएको अवस्थाकी नारीसँग शारीरिक संसर्ग नगर भन्नुको अर्थ त्यस समयमा पत्नीसँग पतिले सहवास वा समागम वा यौनक्रियामा सरिक हुन याचना नगर भन्ने हो । यसको तात्पर्य नारीलाई पुरुषले यौनाचारका आशय वा उद्देश्यले नछुनू भन्ने हो । नारीको रजस्वलाकालप्रति संवेदनशील हुन र तदनुरूप सो कालमा नारीसँग यौनक्रिया सहवास वा रतिरागको याचना नगर्न पुरुषलाई निषेध गरिएको व्यवस्था नारीका विरुद्धको व्यवस्था देखिँदैन ।

गरुड पुराणको प्रेतकल्पले भने रजस्वलाकालका नारीलाई ब्रह्म घातिनीजस्तो गम्भीर आरोपसमेत लगाएको र सो समयमा नारीलाई अछूत बनाउँदै नछुने बार्ने बराउने कुरा निर्देश गरेको पाइन्छ । वेदधर्मलाई पतनतिर धकेल्नेलाई सनातनीहरूले 'पाखण्ड' मान्छन् र वेदविहितबाहेकको कार्यलाई संस्कार वा संस्कृतिसम्म काम मान्दैनन् । वेद र उपनिषद्ले स्पष्ट रूपमा पुरुषलाई तोकिएको आचरणविपरीत नारीलाई अछूत बनाउँदै विपरीत व्यवहार बनाउने 'प्रेतकल्प' को निर्देश नै वेदसम्मत देखिँदैन ।

सर्वोच्च अदालतमा परेको रिटनिवेदनको सुनुवाइ गरी अदालतले कार्यपालिकालाई मासिक स्राव भएका महिलालाई छाउपडी गोठमा पठाउने प्रथालाई कुरीति भएको घोषणा गर्न, महिला, बालबालिका तथा समाज कल्याण मन्त्रालयलाई छाउपडी प्रथाअन्तर्गत महिलामाथि हुने कुनै पनि प्रकारको विभेद रोक्नका लागि निर्देशिका बनाई लागू गर्न गराउन दिएको आदेशअनुसार २०६४ सालमा निर्देशिका बनेको सम्म पाइन्छ । यस्तै अदालतद्वारा अपेक्षित छाउपडीविरुद्ध आवश्यक बृहत् कानुन निर्माणको हकमा अपराध संहिताले छाउपडी राख्ने र रजस्वला बार्ने बराउने दुवै कुप्रथालाई फौजदारी अपराध कायम गरेको पाइन्छ । अदालतको आदेशअनुरूप स्वास्थ्य मन्त्रालयबाट चिकित्सकसमेत रहेको अध्ययन समिति बन्यो बनेन र छाउपडी प्रथा कायम रहेका जिल्लाहरू तथा स्थानहरूमा महिला तथा बालबालिका माथिको सो कुप्रथाको असरको समीक्षा गरी स्वास्थ्यका कार्यक्रम सञ्चालन भयो वा भएन भन्नेबारेमा तथ्यगत जानकारी सार्वजनिक रहेको छैन । यस्तै छाउपडी प्रथाका विरुद्ध सार्वजनिक चेतना जगाउन स्थानीय निकायहरूलाई परिचालित गर्न स्थानीय विकास मन्त्रालयले निर्देशन दियो कि दिएन भन्ने कुराको पनि सार्वजनिक सूचना उपलब्ध रहेको पाइँदैन ।

छाउपडी प्रथा उन्मूलन निर्देशिका बनाइ लागू गरिएको भनिए पनि त्यो निर्देशिकाले कुन कुन जिल्लामा छाउपडी प्रथा कायम छ भन्ने कुरा उल्लेख नगरेको र २०६४ सालमा बनेको निर्देशिका संविधान आई संविधान बमोजिम सीय ढाँचामा प्रदेश र स्थानीय तहको नयाँ ढाँचा कार्यान्वयन भएको चार वर्ष बितिसक्दा पनि नयाँ ढाँचामा अद्यावधिक गरी तत्तत् तहबाट कार्यक्रम कार्यान्वयन गराएको देखिँदैन । कतिसम्म भने स्थानीय तहको नाम नै गाउँ विकास समितिबाट गाउँपालिका कायम भइसकेको सन्दर्भमा त्यतिसम्म पनि संशोधन परिमार्जन नभई रहेको सो निर्देशिका कार्यान्वयनमा नरही केवल एक अभिलेखका रूपमा रहेको स्पष्ट हुन्छ ।

यता अन्तर्राष्ट्रिय मानव अधिकार तथा राष्ट्रको कानुनले भने छाउपडीका साथसाथै रजस्वला वा सुत्केरी कालमा नारीलाई छुवाछूत र भेदभाव गर्ने कुरालाई अपराधको कोटीमा राखेका छन् । छाउगोठमा राख्ने कुरा मात्र होइन नछुने बार्ने बराउने कार्यसमेत यस हिसाबले फौजदारी अपराधको रूपमा परिभाषित छ । सँगै यो कार्य सजायद्वारा दण्डित गरिने कार्यको रूपमा किटान गरिएको छ । त्यति मात्र नभएर कानुनले राज्यलाई पीडकबाट पीडितलाई क्षतिपूर्ति भराइदिनुपर्ने थप दायित्व पनि तोकेको पाइन्छ । यसरी रजस्वला भएको समयमा नछुने बार्ने बराउने प्रचलन हिन्दूमार्गीहरूकै प्रमुख प्राधिकारबाट स्वीकृत नरहेको र खालि पौराणिक मिथकबाट निर्देशित देखिएको छ । यसबाट शिष्ट परम्परा धानिनुको सट्टा मानव अधिकार र कानुनको अवज्ञा भइरहेको अवस्था देखिन आएको छ ।

उल्लिखित आधारहरूमा हेर्दा गरुड पुराणको प्रेतकल्पलाई आधार बनाएर नछुने बार्न बाध्य गराउनेहरू संस्कृतिका संवाहक होइनन् कानुनको उल्लुन गर्ने कसुरदार हुने देखिन आउँछ । मानव अधिकार तथा कानुनको कार्यान्वयनको अनुगमन तथा सुपरीवेक्षण गर्ने राज्यका निकायहरूले नछुने बार्ने बराउने कार्य गरी हुने गरेका कसुरपूर्ण क्रियाकलापको पनि आँकलन हुने गरी अनुगमन र सुपरीवेक्षण गर्नुपर्ने देखिन्छ ।

मुलुकी अपराध संहिता २०७४ को परिच्छेद १० लाई मुलुकी फौजदारी कार्यविधि संहिता २०७४ को अनुसूची १ मा समावेश गरिएको छ। सो अनुसूचीमा समावेश भएको मुद्दा सरकार वादी भएर चल्छ। यस्तो अपराधको अनुसन्धान गर्ने दायित्व राज्यको हो भन्ने कुरा घामजतिकै छर्लङ्ग छ। "समाजमा कतै कुनै अपराध हुन गएमा अपराध गर्ने व्यक्तिउपर अनुसन्धान गरी मुद्दा चलाई अभियुक्तलाई सजाय दिलाई पीडितलाई न्याय दिलाउनुपर्ने सरकारको संवैधानिक कर्तव्य हुने हुँदा यस्तो जवाफदेहीबाट सरकार पन्छिन" (प्रकरण १८, नेकाप, २०६७) मिल्दैन र "अपराधमा अनुसन्धान र अभियोजनमा कमी अनुसन्धानकर्ता र अभियोजनकर्ताको लापरवाही, गल्ती, बद्नियत आदि कुनैको पनि स्थान हुन हुँदैन। यदि हुन्छ भने सरकारले त्यसको जिम्मा लिनपर्ने" (प्रकरण २१, नेकाप, २०६७) हुन्छ। यस्तै सामान्यतः महिला नै पीडित हुने प्रकृतिका अपराधको हकमा "राज्यले पीडित महिलाको सहयोगको लागि आवश्यक स्रोत र साधनअनुसार प्रत्येक जिल्लामा पीडित महिलाको लागि एक विमर्श केन्द्र (काउन्सिलिङ सेन्टर) को क्रमशः व्यवस्था गर्दै जानुपर्ने" (प्रकरण ३५, नेकाप, २०६७) भनेर सर्वोच्च अदालतबाट भएको आदेशको कार्यान्वयनद्वारा छाउपडी तथा रजस्वला हुँदा गरिने भेदभाव र अमानवीय व्यवहारबाट पीडित महिलालाई अपराध अनुसन्धान निकायबाट सेवा उपलब्ध गराउनुपर्ने स्पष्टै छ।

अतः छाउपडी तथा रजस्वला हुँदाको छुवाछूतमूलक अमानवीय व्यवहारको नियन्त्रणका लागि सीय, प्रदेश तथा स्थानीय सरकारहरूबाट देशभरमा केकति पहल र कामहरू भए ? मुलुकी अपराध संहिता लागू भएको २०७५ साल भदौदेखि हालसम्म देशभरमा रजस्वला वा सुत्केरी कालमा छाउपडीमा राखेको र नछुने बार्ने बराउने गरी भेदभावपूर्ण र अपमानजनक व्यवहार भएका घटनाका केकति घटनाको अनुसन्धान भयो ? केकति कसुरदारले सजाय पाए र केकति पीडितले केकति क्षतिपूर्ति पाए भन्ने कुरा पनि मानव अधिकारको कार्यान्वयनको अनुगमनको दृष्टिले समीक्षा हुनुपर्ने देखिएको छ। यसैले यस पाटोमा पनि अनुगमन र सुपरीवेक्षण हुन आवश्यक छ। यी कुराहरूको समग्र सिंहावलोकन गरी महिला मानव अधिकारको आलोकबाट कानुन कार्यान्वयनको लेखाजोखा र मूल्याङ्कन हुनु आवश्यक छ।

सन्दर्भसामग्री

आप्टे, वामन शिवराम (१९६९); संस्कृत-हिन्दी कोश; दिल्ली: मोतीलाल बनारसीदास पब्लिसर्स प्राइवेट लिमिटेड।

इटिमोनलाइन (२०२१); https//:www.etymonline.com/word/menstruation २०७८ कार्तिकमा अवलोकित।

उप्रैती, थानेशचन्द्र (२००१); याज्ञवल्क्यस्मृति (मूल, हिन्दी अनुवाद एवं 'मिताक्षरानुसारि सुधा' हिन्दी व्याख्या); दिल्ली: परिमल प्रकाशन।

ऋग्वेद संहिता (नेपालीमा अर्थ र आशयसहित) (२०७४); काठमाडौँ: विद्यार्थी पुस्तक भण्डार (भोटाहिटी/कमलपोखरी) र कुलचन्द्र गौतम स्मृति संस्था (गैहीधारा)।

काकिव्यस (२०४३); मुलुकी ऐन (नवौँ संशोधन मिलाएको रूपमा); काठमाडौँ : श्री ५ को सरकार कानुन तथा न्याय मन्त्रालय, कानुन किताब व्यवस्था समिति।

काकिव्यस (२०७७क); नेपालको संविधान; काठमाडौँ : नेपाल सरकार कानुन, न्याय तथा संसदीय मामिला मन्त्रालय, कानुन किताब व्यवस्था समिति।

काकिव्यस (२०७७ख); मुलुकी फौजदारी संहिता २०७४, मुलुकी फौजदारी कार्यविधि संहिता २०७४ र फौजदारी कसुर (सजाय निर्धारण तथा कार्यान्वयन ऐन २०७४; काठमाडौँ : नेपाल सरकार कानुन, न्याय तथा संसदीय मामिला मन्त्रालय, कानुन किताब व्यवस्था समिति।

काकिव्यस (२०७७ग); मुलुकी देवानी संहिता २०७४ र मुलुकी देवानी कार्यविधि संहिता २०७४; काठमाडौँ : नेपाल सरकार कानुन, न्याय तथा संसदीय मामिला मन्त्रालय, कानुन किताब व्यवस्था समिति।

काणे, पाण्डुरङ्ग वामन (१९९६); धर्मशास्त्रका इतिहास (५); लखनऊ: उत्तरप्रदेश हिन्दी संस्थान।

कायस्थ, बलराम (२०७७); नेवार समाजको इतिहास र संस्कृति; काठमाडौँ: रत्न पुस्तक भण्डार।

गरुडपुराणम् (नेपाली भाषानुवादसहितम्); काठमाडौँ : विद्यार्थी पुस्तक भण्डार।

गोरखापत्र (२००९); मुलुकी ऐन (पाँच भाग); काठमाडौँ: गोरखापत्र छापाखाना।

गौतम, डिल्लीराम (२०६६); पूर्वीय सोच र स्रोत; भक्तपुर: काठमाडौँ स्कुल अफ ल।

डेभिड, चार्ल्स प्याट्रिक (२००४); "मेन्स्ट्रुएसन (मेन्स्ट्रुअल साइकल, पिरियड)"https://www.medicinenet.com/menstruation/article.htm मा २०७८ साउनमा अवलोकित।

नेकाआ (२०२१); नेपाल कानुन आयोग; https://www.lawcommission.gov.np/en/wp-content/uploads/2021/03/Convention-on-the-Elimination-of-All-Forms-of-Discrimination-against-Women-1979.pdf मा २०७८ साउनमा अवलोकित।

नेकाप (२०६२); नेपाल कानुन पत्रिका; निर्णय नं. ७५३१, परमादेशसमेत; ४७, २०६२:४, फैसला मिति :२०६२/०२/१९ ७३८६, https://nkp.gov.np/full_detail/2419

नेकाप (२०६७); नेपाल कानुन पत्रिका; निर्णय नं. ८५०७; ५२, २०६७:११ २०६७/०८/१५ ६३४१, https://nkp.gov.np/full_detail/3391

बृहदारण्यकोपनिषद् (सानुवाद शाङ्करभाष्यसहित) (२०७६); गोरखपुर: गीताप्रेस।

भट्टराई, रवीन्द्र (२०७७-ङ); "नारीलाई 'नछुने' बनाउने प्राधिकार कि पाखण्ड?" नेपालसमय, काठमाडौँ, बुधबार, फागुन १२, २०७७;https://nepalsamaya.com/detail/42419.

मबाज्येनाम (२०६४); छाउपडी प्रथा उन्मूलन निर्देशिका २०६४; महिला बालबालिका तथा ज्येष्ठ नागरिक मन्त्रालय; https://mowcsc.gov.np/rules/5XJJPfzcr1qO9Wk6w1ENIEti2gfVBk2iqGZzH59e-1625473867.pdfमा २०७८ कार्तिकमा अवलोकित।

लुइटेल, तिलकप्रसाद (अनु) (२०६१); मनुस्मृति (श्लोकसहित सरल नेपाली अनुवाद); काठमाडौँ: पैरवी प्रकाशन।

बाल–न्यायः सिद्धान्त, कानुन र प्रयोग

– अधिवक्ता अजयशंकर झा "रूपेश"

सारांश

परिवर्तित सन्दर्भमा, नेपालमा बालबालिकासम्बन्धी व्यवस्थालाई संवैधानिक एवम् अन्य कानुनी हकको रूपमा उल्लेख गरिए पनि कार्यान्वयन पक्ष सन्तोषजनक छैन । बालबालिकालाई घर, विद्यालय वा अन्य जुनसुकै स्थान र अवस्थामा शारीरिक, मानसिक वा अन्य कुनै किसिमको यातना दिन नपाइने, पीडित बालबालिकाको अधिकारको सुनिश्चिततालगायतका कठोर सजाय दिन नहुने तथा कारागारमा राख्न नहुनेजस्ता कानुनी प्रावधान अझै पनि प्रभावकारी रूपमा ला गु हुन सकेको छैन । एकातिर पठनपाठनको व्यवस्था तथा वृति विकास हुने खालका दक्षता अभिवृद्धिसँग सम्बन्धित विशेष तालिम/कार्यक्रमहरू सञ्चालित सबै बालसुधार गृहहरूमा उपलब्ध हुन नसकेको अवस्था छ । अर्कोतर्फ क्षमताभन्दा बढी बालबालिका त्यसै रही रहेको अवस्थामा पनि "प्रत्येक बालबालिकालाई मुद्दाको परिस्थितिले आवश्यक नबनाएसम्म बालविज्याँईकर्तालाई पैतृक सुपरीवेक्षणबाट आंशिक वा पूर्ण कुनै रूपमा पनि अलग्याइने छैन" भनी बाल-न्यायप्रणालीको मान्यता विपरीत कानुनसँगको द्वन्द्वमा पर्न आएका बालबालिकालाई दिशान्तरण लगायतका वैकल्पिक उपचारमार्फत पुनःस्थापना नगरी औपचारिक न्यायप्रणालीमा ल्याइ अभियोजन गर्नु र बालसुधार गृहमा मुद्दा पुर्पक्ष वा सजाय भुक्तानको लागि राख्नुमात्रले राज्यको दायित्वको पूर्णता वा समाप्ति भएको मान्न मिल्दैन वा सकिँदैन । व्यक्तिको दैनिक जीवनसँग सम्बन्धित कानुनको जानकारीको स्थितिको बारेमा गरिएको अध्ययनबाट समेत अधिकांश बालबालिकाहरूलाई कानुनको बारेमा जानकारी नहुँदा उनीहरू त्यस्तो कार्यमा संलग्न भएको देखिन्छ । यस्तो अवस्थामा राज्यले उनीहरूलाई अभियोजन गरेर बालसुधार गृहमा राख्नेमात्र नभई कानुनको बारेमा पनि जानकारी गराउनुपर्ने देखिन्छ । यस पक्षलाई ध्यान नदिँदा अभियोजन र बालसुधार गृहमा राख्नेजस्ता कार्य भए पनि बाल-न्याय अनुकुलको उद्देश्य प्राप्त हुन सकिने देखिदैन ।

मुख्य शब्दावली– बाल-न्याय, मानव अधिकार, गैरकानुनी थुना, अदालतबाट नै विधायिकी मनसाय विपरीत कानुनको प्रयोग ।

पृष्ठभूमि

१. बाल–न्यायप्रणालीको सिद्धान्त र विकास

१.१ बाल–न्यायप्रणालीको अर्थः–

सामान्य अर्थमा "बाल-न्यायप्रणाली" भन्नाले बालबालिकाले गरेको बाल दुराचार/बाल बिज्याइँ (Juvenile Delinquency[१]) सम्बन्धमा कारबाही गर्न परम्परागत फौजदारी न्यायप्रणालीभन्दा विशुद्ध रूपले बालबालिकाको

१ बालबालिकाद्वारा गरिने त्यस्तो कार्य जुन फौजदारी कानुन वा समाजविरुद्ध हुन गएको हुन्छ ।

हितलाई ध्यानमा राखी छुट्टै रूपमा स्थापित न्यायप्रणाली हो । अर्को शब्दमा भन्नु पर्दा, बाल-न्याय भनेको कानुन अन्तर्गत बालबालिकाका लागि विशुद्ध उपचार हो । बाल-न्याय एउटा दर्शन हो, बालबालिकाहरू पीडित भएको अवस्थामा तिनीहरूको संरक्षणको खोजी गरेको बेला निजहरूप्रति संरक्षणसम्बन्धी कार्यविधि अख्तियार गर्नु हो । बाल-न्यायप्रणाली एउटा विशेष प्रकारको कार्यविधि हो, जसले कानुन अन्तर्गत बालबालिकाको विशुद्ध प्रशासनलाई सुनिश्चित गर्दछ । Gus Martin ले बाल-न्यायलाई "Juvenile Justice is a fair handling and treatment of youths under the law[2]" भनी परिभाषित गरेको छ ।

१.२ बाल–न्यायप्रणालीको विकास :–

बाल-न्यायप्रणाली राज्यको अभिभावकत्वको सिद्धान्त (doctrine of parents patriae) मा आधारित छ । यसको अर्थ राज्यले अभिभावकको भूमिका निर्वाह गर्नुपर्दछ भन्ने हो । राज्यले कानुन र व्यवस्था कायम गर्ने सिलसिलामा कानुन उल्लङ्घन गर्नेहरूलाई दण्डसजाय दिने कार्यमात्र नगरी बाटो बिराएकाहरूलाई सत्मार्गमा ल्याउने भूमिका पनि निर्वाह गर्नुपर्छ भन्ने मान्यतामा यो सिद्धान्त विकसित भएको हो । खास गरेर जुन अभिभावकले आफ्नो बालबच्चालाई शिक्षादीक्षाको अवसर जुटाउन तथा तिनीहरूको बानीबेहोरामा नियन्त्रण गर्न अक्षम हुन्छन् वा गर्न चाहदैनन् । त्यस्तो अवस्थामा रहेका बालबालिकाहरूका निम्ति राज्यले अभिभावकत्व ग्रहण गर्नुपर्दछ भन्ने यो सिद्धान्तको मूल मान्यता रहेको छ ।

१.३ बाल–न्यायप्रणालीको उद्देश्यः–

बालबालिकाको सर्वोत्तम हित नै बाल-न्यायप्रणालीको प्रमुख उद्देश्य हो । बाल-न्यायअन्तर्गत आरोपित, अभियुक्त वा फौजदारी कानुनको उल्लङ्घन गरेको भनी मानिएका बालबालिकालाई निजको मर्यादा र महत्त्वको भावनालाई संवर्धन गर्ने किसिमबाट, उनीहरूको मनमा अरूको मानव अधिकार र मौलिक अधिकारप्रतिको आदर जागृत हुने एवम् उनीहरूको उमेरअनुसारको व्यवहार गरिनुपर्ने भन्ने हो । यसका अतिरिक्त बाल-न्यायप्रणालीका निम्न दुई उद्देश्य रहेको पाइन्छः

१.३.१ बालबालिकाको हितको प्रवर्धन (Promotion of the wellbeing of the children)

- बाल-न्यायका सबैचरणमा बालबालिकाको उच्चतम हितलाई ध्यानमा राख्ने ।
- दण्डात्मक उपायहरू सकेसम्म कम प्रयोग गर्ने ।
- वैकल्पिक उपायहरू–सामुदायिक सेवा, स्थगित सजाय अवलम्बन गर्ने ।
- सबैभन्दा महत्त्वपूर्ण– उनीहरूको पुनःस्थापनामा जोड दिने ।

१.३.२ समानुपातिकताको सिद्धान्त (Principles of proportionality)

बालबालिकाबाट हुने गल्ती (wrong) उपर प्रतिक्रिया जनाउदा गल्तीको गम्भीर्यतामात्रलाई ध्यानमा नदिई निम्न कुराहरूलाई समेत ध्यानमा राख्नुपर्ने हुन्छः

- बालबालिकाको व्यक्तिगत परिस्थिति (सामाजिक अवस्था, पारिवारिक अवस्था),
- बालबालिकाको उच्चतम हितको संरक्षण एवम् बढी प्रतिक्रिया नजनाउनु,
- प्रतिक्रिया जनाउनु पर्दा पनि सो प्रतिक्रिया उचित (Fair) हुनुपर्ने,

2 Gus Martin (2005). Juvenile Justice: Process and System, London: Sage publication, Inc, p.4

- प्रतिक्रिया सधै दण्डात्मक नभई स्याहार (Care), सरसल्लाह (Counselling), शिक्षा (Education) आदि जस्तो हुनुपर्दछ ।

१.४ बाल–न्यायप्रणालीको आवश्यक्ता :–

बालबालिकाको मानसिकता वयस्कसरह विकास भएको हुदैन । वयस्कहरूको तुलनामा बालबालिकाहरू कम परिपक्व हुनाले सही र गलत छुट्याउन सक्दैनन् । आफूले गरेको कार्यको प्रकृति तथा परिणामबारे पनि जानकार हुदैनन् । उनीहरू जिज्ञासु स्वभावका हुने भएकाले कुनै पनि कार्य गर्दा त्यसबाट हुने लाभ/हानीभन्दा पनि आफ्नो जिज्ञासा मेटाउने उद्देश्यले गरेका हुन्छन् । त्यस्तो कार्य कानुनद्वारा निषेधित वा वर्जित भए पनि सही र गलत छुटयाउन नसक्ने, लाभ वा हानीप्रति जानकार नभई जिज्ञासा मेटाउन उद्देश्यले गरेको हुँदा कानुनसँगको द्वन्द्वमा पर्न पुगेको हुन्छ । आफ्नो जीवन निर्वाहका लागि अरूमाथि निर्भर हुने भएकाले पनि बालबालिकाहरूलाई अरू व्यक्तिले सहजै प्रयोग गर्न लगाइ कानुनद्वारा वर्जित कार्य गर्न लगाउन सक्ने अवस्था रहन्छ । वयस्कको तुलनामा बालबालिकाहरूलाई सजिलै पुनःस्थापना गर्न सकिने भएकाले परम्परागत फौजदारी न्यायप्रणालीभन्दा फरक हुने गरी "बाल मनोविज्ञान अनुकुलको न्याय" को आवश्यकता महसुस गरी कार्यान्वयनमा ल्याइएको हो ।

२. बाल–न्याय र कानुन

२.१ बालबालिकासँग सम्बन्धित अन्तर्राष्ट्रिय कानुन

बालबालिकाहरूको हक अधिकारको रक्षा तथा उनीहरूसँग सम्बन्धित न्याय-प्रशासनलाई सुचारु गर्न विभिन्न महासन्धि, नियम, निर्देशिकाहरू तर्जुमा गरिएको छ । जसको पालना पक्षराष्ट्रहरूको कानुनी दायित्वभित्र पर्दछ । प्रत्यक्ष रूपमा बालबालिकासँग सम्बन्धित अन्तर्राष्ट्रिय कानुनहरू निम्नानुसार रहेका छन्:

- नागरिक तथा राजनीतिक अधिकारसम्बन्धी अन्तर्राष्ट्रिय प्रतिज्ञापत्र (ICCPR),
- बाल अधिकार महासन्धि १९८९, (CRC)
- कैदीहरूसँग गरिने व्यवहारसम्बन्धी आधारभूत नियमहरू १९५५
- बाल-न्याय प्रशासनसम्बन्धी आधारभूत नियमहरू, १९८५ (Beijing Rules)
- बालदुराचार रोकथामसम्बन्धी संयुक्त राष्ट्रसङ्घीय निर्देशिका, १९९० (रियाद निर्देशिका)
- गैरथुनाका उपायहरूसम्बन्धी आधारभूत नियमहरू, १९९० (टोकियो नियम)
- स्वतन्त्रताबाट वञ्चित गरिएका बालबालिकाको संरक्षणसम्बन्धी आधारभूत नियमहरू १९९० (JDLS)
- फौजदारी न्यायप्रणालीमा बालबालिकाउपर कारबाहीका लागि निर्देशिका, १९९७

२.२ नेपालमा बाल–न्यायप्रणालीको अनुशरण र विकास

नेपालले १४ सेप्टेम्बर १९९० (२९ भदौ २०४७) मा बालअधिकारसम्बन्धी महासन्धि, १९८९ लाई अनुमोदन गरेपछि बाल-न्यायको अवधारणलाई आत्मसात गरेको देखिन्छ । राष्ट्रिय कानुनको रूपमा २०४९ साल जेठ ७ गते लालमोहर लागि प्रकाशनमा आएको "बालबालिकासम्बन्धी ऐन, २०४८" वि.स. २०५० साल वैशाख

१ गतेको राजपत्रमा प्रकाशित सूचनाअनुसार सोही मितिदेखि नेपाल राज्य भर लागु भएको देखिन्छ ।

कानुनसँगको द्वन्द्वमा पर्न आएका बालबालिकाहरूलाई उमेर पुगेका कैदीबन्दीहरूभन्दा भिन्न स्थानमा राख्ने प्रयोजनको लागि बालसुधार गृहहरूको स्थापना गर्ने, अपराधिक दायित्व बहन गराउन नमिल्ने उमेरको निर्धारण, बालबालिकाको उमेरका आधारमा सजायको व्यवस्था, सजाय कार्यान्वयन नै नगरी स्थगन गर्न सक्ने मुद्दा हेर्ने निकायको विशेषाधिकार, बालबालिकासँग सम्बन्धित मुद्दाहरू हेर्नका लागि विशिष्टकृत बालअदालतको कल्पना, बालअदालत गठन नभएसम्मका लागि समाजसेवी, मनोविज्ञ तथा न्यायाधीश रहने गरी बाल-इजलाशबाट मुद्दाको सुनवाइ गर्नेजस्ता नवीनतम अवधारणाहरू बालबालिकासम्बन्धी ऐन, २०४८ मा व्यवस्था गरिएको थियो ।

बालबालिकासम्बन्धी ऐन, २०४८ ले आत्मसात गरेको नवीन अवधारणाको कार्यान्वयमा नेपाल सरकार (तात्कालीन श्री ५ को सरकारसमेत) उदासीन रहेको कारण न्यायपालिकाको सक्रिय भूमिकाद्वारा बाल-न्यायप्रणालीको बिस्तारै विकास हुदै गएको देखिन्छ । उदाहरणको रूपमा कानुनसँगको द्वन्द्वमा पर्न आएका बालबालिकाको पुनःस्थापनाका लागि अलग बालसुधार गृहको स्थापना गर्ने कुरा बालबालिकासम्बन्धी ऐन, २०४८ ले गरे पनि ऐन आएको नौ वर्षसम्म कार्यान्वयनमा आउन सकेन । वि.सं. २०५७ सालमा सर्वोच्च अदालतबाट बब्लु गोडियाको मुद्दामा आदेश भएपश्चात् बालसुधार गृहको स्थापनाको कार्य सुरु भएको देखिन्छ । बालबालिकामात्र संलग्न रहेको मुद्दा अर्धन्यायिक निकायले हेर्न मिल्ने नभई बाल-इजलाशबाट मात्र हेर्नुपर्ने भनी भएका आदेशहरूबाट बाल-न्यायको अभ्यास भएको पाइन्छ ।

बालबालिकासम्बन्धी ऐन, २०४८ ले नै छुट्टै बाल-अदालतको गठनसम्बन्धी व्यवस्था गरे पनि सरकारको तर्फबाट त्यस तर्फ अग्रसरता नलिइएपछि अधिवक्ता सन्तोषकुमार महतोले २०६१ सालमा दायर गरेको रिट निवेदनमा सम्मानित सर्वोच्च अदालतको विशेष इजलाशबाट यथाशीघ्र बाल-अदालतको गठन गर्न परमादेशको आदेश जारी भए पनि हालसम्म बाल-अदालतको गठन नभई बाल-इजलाशमार्फत नै बाल-न्याय सम्पादन भइआएको छ, जुन गम्भीर एवम् विचारणीय सवाल हो ।

यसै गरी बाल-न्यायका क्षेत्रमा नेपालको सर्वोच्च अदालतबाट कैयन मुद्दामा बाल-न्यायसम्बन्धी सिद्धान्त प्रतिपादन गर्नुका साथै बालबालिकाको हकअधिकार संरक्षणका लागि समयसमयमा रिट जारी भएको छ । यस सन्दर्भमा २०७२ सालमा संविधान सभाद्वारा बनेको नेपालको संविधानले बालबालिकाको हकलाई मौलिक हकको रूपमा प्रत्याभूत गर्दै धारा ३९ को उपधारा (८) मार्फत प्रत्येक बालबालिकालाई बाल अनुकुल न्यायको हकलाई सुनिश्चितता गरेको छ । तत्पश्चात् बाल-न्यायसम्बन्धी कानुनलाई समयानुकूल बनाउने क्रममा हाल बालबालिकासम्बन्धी ऐन, २०७५ र बाल-न्याय सम्पादन (कार्यविधि) नियमावली, २०७६ समेत तर्जुमा भई प्रचलनमा रहेको छ ।

२.३ प्रगतिशील कानुन, फितलो कार्यान्वयन

परिवर्तित सन्दर्भमा, नेपालमा बालबालिकाको संवैधानिक एवम् अन्य कानुनी हकसम्बन्धी व्यवस्थालाई हेर्दा कुनै पनि बालबालिकालाई घर, विद्यालय वा अन्य जुनसुकै स्थान र अवस्थामा शारीरिक, मानसिक वा अन्य कुनै किसिमको यातना दिन नपाइने, बालबालिकाको सर्वोत्तम हितलाई प्रथामिकता दिनुपर्ने देखिन्छ । कसुरजन्य कार्यको आरोपमा नियन्त्रणमा लिइएका बालबालिकालाई अनुसन्धान अवधिभर राख्ने प्रयोजनको

लागि निगरानी कक्षको स्थापना गर्नुपर्ने, पीडित बालबालिकाको अधिकारको सुनिश्चितता, कठोर सजाय दिन नहुने तथा कारागारमा राख्न नहुनेजस्ता कानुनी प्रावधान अझै पनि प्रभावकारी रूपमा लागु हुन सके को छैन । सुधारगृहमा कसुरदार बालबालिकाहरूलाई पठाउने कार्यको निरन्तरता नै आफ्नो जिम्मेवारी हो भन्ने सोच बाल-न्यायसम्बन्धी प्रशिक्षित अनुसन्धानकर्ता, अभियोजनकर्ता र न्यायकर्ताहरूमा रहेका प्रशस्त उदाहरणहरू छन् । अझ प्रष्ट रूपमा भन्नुपर्दा कोभिड १९ को सङ्क्रमण तथा बन्दाबन्दीको असहज परिस्थितिमा बालबालिकासम्बन्धी मुद्दाहरूमा बढी सक्रिय, सुक्ष्म र गहन रूपमा अध्ययन, प्रतिनिधित्व गर्दै जाँदा कानुनको कार्यान्वयन गर्ने निकायहरूबाट नै बालबालिकासम्बन्धी कानुनको भावना विपरीत कार्य हुने गरेको प्रशस्त उदाहरणहरू छन् । केही प्रतिनिधिमूलक दृष्टान्तहरूलाई निम्नअनुसार हेर्न सकिन्छ:

२.३.१ कैदको सजाय कार्यान्वयन गर्न नमिल्नेलाई पनि सजाय

बालबालिकासम्बन्धी ऐन, २०७५ को दफा ३६ को उपदफा (७) ले "यस दफामा अन्यत्र जुनसुकै कुरा लेखिएको भए तापनि १६ वर्ष उमेर पूरा नभएका बालबालिकालाई सजाय गर्दा जघन्य कसुर, गम्भीर कसुर वा पटके कसुर गरेकोमा बाहेक कैदको सजाय गरिने छैन" भनी प्रष्ट कानुनी व्यवस्था गरेको छ । सो ही व्यवस्था मुलुकी अपराध संहिता, २०७४ को दफा ४५ (५) र फौजदारी कसुर (सजाय निर्धारण तथा कार्यान्वयन) ऐन, २०७४ को दफा १६(२) मा पनि गरिएको छ । यी कानुनी व्यवस्थाहरूबाट जघन्य तथा गम्भिर कसुरबाहेकका समान्य कसुर (अर्थात तीन वर्षसम्म कैद हुन सक्ने कसुर) मा १६ वर्षको उमेर पूरा नभएका बालबालिकाउपर लगाइएको अभियोग ठहर भए पनि सजाय कार्यान्वयन हुन नसक्ने हुँदा हुँदै जिल्ला अदालतहरूबाट कैद कार्यान्वयन गर्दै सजाय भुक्तानका लागि बालबालिकाहरूलाई बालसुधार गृहमा राखिने गरिएको छ ।

क. पारस नेपालको जाहेरीले वादी नेपाल सरकारविरुद्ध परिवर्तित नाम धादिङ २४ (११७७) भएको मुद्दा नं. ०७७-C१-०१०४ को चोरी मुद्दामा धादिङ जिल्ला अदालतबाट १२ वर्षको नाबालकलाई छ महिना सजाय भुक्तानको लागि बालसुधार गृह भक्तपुरमा पठाइएको थियो । त्यसविरुद्ध अधिवक्ता अजयशंकर झा "रुपेश" ले निज नाबालकको हकमा सर्वोच्च अदालतसमक्ष दायर गरेको रिट नं. ०७७-WH-०३२१ को बन्दीप्रत्यक्षीकरणको रिट निवेदनमा मिति २०७८/२/९ गतेमा सर्वोच्च अदालतबाट सुनुवाइ गर्दै निज उपरको बालसुधार गृहको नियन्त्रणलाई गैरकानुनी ठहर गर्दै बन्दीप्रत्यक्षीकरणको आदेशमार्फत थुनामुक्त गरिएको छ ।

ख. भविन्बहादुर बस्नेतको जाहेरीले वादी नेपाल सरकारविरुद्ध परिवर्तित नाम ०७७/०७८-४५ (A) भएको मुद्दा नं. ०७७-C१-००२१ को चोरी मुद्दामा वागलुङ जिल्ला अदालतबाट १५ वर्षको नाबालकलाई तीन महिना बालसुधार गृह कास्कीमा सजाय भुक्तानको लागि पठाउँदा त्यसविरुद्ध सर्वोच्च अदालतसमक्ष परेको रिट नं. ०७८-WH-००९२ को बन्दीप्रत्यक्षीकरणको निवेदनमा संयुक्त इजलाशबाट सुनुवाइ हुँदा गम्भीर कानुनी व्याख्याका लागि पूर्ण इजलाशसमक्ष पठाउने निर्णय भई पूर्ण इजलाशको लागि रिट नं. ०७८-WF-००२६ मार्फत दर्ता भई मिति २०७८/९/१ गतेमा सुनुवाइ हुँदा निज नाबालकलाई बालसुधार गृहमा राख्ने कार्यलाई गैरकानुनी ठहर गर्दै बन्दीप्रत्यक्षीकरणको आदेश जारी गरी निजालई थुनामुक्त गरिएको देखिन्छ ।

ग. दिवाकार गुरुङको जाहेरीले वादी नेपाल सरकारविरुद्ध परिवर्तित नाम राक्सिराङ (१) ०७८/०७९

भएको मुद्दा नं. ०७८-C१-०१२८ को नकबजनी चोरी मुद्दामा चितवन जिल्ला अदालतबाट १५ वर्षको नाबालकलाई एक वर्ष छ महिना कैद सजाय गर्दै कैद भुक्तानको लागि बालसुधार गृह मकवानपुरमा पठाइएको थियो। त्यसविरुद्ध सर्वोच्च अदालतसमक्ष रिट नं. ०७८-WH-०१२४ को बन्दीप्रत्यक्षीकरणको रिट निवेदन दायर भएको र उक्त निवेदनमा मिति २०७८/११/५ मा सुनुवाइ हुँदा निजलाई गैरकानुनी रूपमा बालसुधार गृहमा राखिएको ठहर गर्दै बन्दीप्रत्यक्षीकरणको आदेशमार्फत थुनामुक्त गरिएको अवस्था छ।

घ. प्र.स.नि. जीवनकुमार सुनारीको जाहेरीले वादी नेपाल सरकारविरुद्ध परिवर्तित नाम रेकाप (१) भएको मु.नं. ०७८-C१-०२७६ को लागु औषध गाँजा मुद्दामा चितवन जिल्ला अदालतबाट १५ वर्षको नाबालकलाई तीन महिना कैद सजाय गर्दै कैद भुक्तानको लागि बालसुधार गृह मकवानपुरमा पठाइएपश्चात् त्यसविरुद्ध सर्वोच्च अदालतसमक्ष परेको रिट नं. ०७८–WH-०१२३ को बन्दीप्रत्यक्षीकरणको रिट निवेदनमा मिति २०७८/११/११ गतेमा सुनुवाइ हुँदा निज नाबालकलाई बालसुधार गृहमा राख्ने कार्यलाई गैरकानुनी ठहर गर्दै मुक्त गर्ने आदेश जारी भएको छ।

[a]= परिवर्तित नाम गोकुलगङ्गाको जाहेरीले वादी नेपाल सरकारविरुद्ध परिवर्तित नाम गोकुलगङ्गा भएको मुद्दा नं. ०७७-C१-००५४ को मुद्दामा रामेछाप जिल्ला अदालतबाट १५ वर्षको नाबालकलाई एक वर्ष कैद सजाय गर्दै कैद भुक्तानको लागि बालसुधार गृह भक्तपुरमा पठाइएको र त्यसविरुद्ध सर्वोच्च अदालतसमक्ष रिट नं. ०७८-WH-०१४० मार्फत बन्दीप्रत्यक्षीकरणको रिट निवेदन दायर हुँदा मिति २०७८/११/११ गतेमा सुनुवाइ भएपश्चात् निजलाई बालसुधार गृहमा राख्ने कार्यलाई गैरकानुनी ठहर हुँदै बन्दीप्रत्यक्षीकरणको आदेशमार्फत थुनामुक्त गरिएको देखिन्छ।

२.३.२ कानुनी व्यवस्था विपरीत पुर्पक्षका लागि बालसुधार गृह

बालबालिकासम्बन्धी ऐन, २०७५ को दफा २४ ले मुद्दा पुर्पक्षसम्बन्धी व्यवस्था गरेको छ। जसअनुसार उपदफा (१) मा "कुनै पनि बालकलाई मुद्दाको पुर्पक्षको सिलसिलामा थुनामा राखिने छैन र निजसँग धरौटी वा जमानत माँगिने छैन" भनी व्यवस्था गर्दै अपवादजनक रूपमा "बालसुधार गृहमा राख्न सकिने विशेष अवस्था" उपदफा (२) मा गरिएको छ। जसअनुसार कम्तिमा पनि तीन वर्ष वा सोभन्दा बढी कैद सजाय गर्नुपर्ने तत्काल प्राप्त प्रमाणबाट देखिनुपर्दछ। तीन वर्ष वा सोभन्दा बढी कैदको सजाय गर्नुपर्ने अवस्थाको बालबालिकालाई पनि मुद्दा पुर्पक्षका लागि बालसुधार गृहमा नराखी अभिभावकको जिम्मा वा अन्य विकल्पहरू कार्यान्वय गर्नसक्ने व्यवस्था सोही दफाको उपदफा (३) को प्रतिबन्धात्मक वाक्याँशले गर्दागर्दै, थुनाको विकल्पको रूपमा रहेको बालसुधार गृहमा अभियोग लागेका बालबालिकाहरूलाई पुर्पक्षका लागि पठाउने गरिएको देखिन्छ:

क. शेरबहादुर पुन मगरको जाहेरीले वादी नेपाल सरकारविरुद्ध परिवर्तित नाम ५३ होलेरी झसमेत भएको ज्यानसम्बन्धी मुद्दामा रोल्पा जिल्ला अदालतबाट १० वर्षको नाबालक जसउपर लगाइएको अभियोग प्रमाणद्वारा पुष्टी हुन गएको खण्डमा बालबालिकासम्बन्धी ऐन, २०७५ को दफा ३६ (२) अनुसार अधिकतम छ महिनासम्म मात्र कैदको सजाय हुन सक्ने उक्त कसुरको आरोपमा त्यो १० वर्षे बालकलाई मुद्दा पुर्पक्षका लागि अभिभावकहरूबाट अलग्याइ बालसुधार गृह बाँकेमा राख्ने कार्य भएको थियो। निजलाई हुन सक्ने अधिकतम छ महिनाको कैद अवधिभन्दा पनि बढी आठ महिना सुधार गृहमा

बसिसक्दा पनि रोल्पा जिल्ला अदालतसमक्ष थुनामुक्तका लागि आवेदन गर्दा पनि थुनामुक्त नगरी निरन्तर बालसुधार गृहमा राख्ने आदेश भएपश्चात् निजको हकमा अधिवक्ता अजयशंकर झा "रुपेश" ले सर्वोच्च अदालतसमक्ष रिट नं. ०७७-WH-०४२३ को बन्दीप्रत्यक्षीकरणको रिट निवेदन दायर गरेको र सो रिट निवेदनमा मिति २०७८/४/८ गते सुनुवाइ हुँदा निज १० वर्षको नाबालकलाई बालसुधार गृहमा राख्ने कार्यलाई गैरकानुनी ठहर गर्दै थुनाबाट मुक्त गर्न आदेश भएपश्चात्मात्र निज थुनामुक्त हुन सकेको देखिन्छ ।

ख. प्रहरी प्रतिवेदनले वादी नेपाल सरकारविरुद्ध परिवर्तित नाम ईनर्वा (अ) ०७७/०७८ भएको मुद्दा नं. ०७७-C१-०३४७ को लागु औषध गाँजा मुद्दामा पर्सा जिल्ला अदालतबाट १३ वर्षको नाबालक जसउपर लगाइएको अभियोग प्रमाणद्वारा पुष्टी हुन गएको खण्डमा बालबालिकासम्बन्धी ऐन, २०७५ को दफा ३६(२) अनुसार अधिकतम छ महिनासम्म मात्र कैदको सजाय हुन सक्ने प्रकृतिको कसुरमा, त्यो १३ वर्षे बालकलाई मुद्दा पुर्पक्षका लागि बालसुधार गृह पर्सामा राख्ने कार्य भएको थियो । सो विरुद्ध निजको हकमा अधिवक्ता अजयशंकर झा "रुपेश" ले सर्वोच्च अदालतसमक्ष रिट नं. ०७८-WH-००३० मार्फत बन्दीप्रत्यक्षीकरणको रिट निवेदन दायर भएपश्चात् मिति २०७८/५/११ गतेमा सुनुवाइ हुँदा निज १३ वर्षे नाबालकलाई गैरकानुनी थुनाबाट मुक्त गर्न आदेश भई निज जिल्ला अदालतबाट राखिन पुगेको गैरकानुनी थुनाबाट मुक्त भएको अवस्था छ ।

ग. संकेतनाम २१ जलेश्वर ०७७ (थ-१७) को जाहेरीले वादी नेपाल सरकारविरुद्ध संकेत नाम २१ जलेश्वर ०७७ कुमार मनि भएको मुद्दा नं. ०७७-C१-०२९९ को मुद्दामा महोत्तरी जिल्ला अदालतबाट १३ वर्षको नाबालक जसउपर लगाइएको अभियोग प्रमाणद्वारा पुष्टी हुन गएको खण्डमा बालबालिकासम्बन्धी ऐन, २०७५ को दफा ३६(२) अनुसार अधिकतम छ महिनासम्म मात्र कैदको सजाय हुन सक्नेमा, त्यो १३ वर्षे बालकलाई मुद्दा पुर्पक्षका लागि बालसुधार गृह पर्सामा राख्ने कार्य भएको र सो विरुद्ध निजको हकमा अधिवक्ता अजयशंकर झा "रुपेश" ले सर्वोच्च अदालतसमक्ष रिट नं. ०७८-WH-००५६ को बन्दीप्रत्यक्षीकरणको रिट निवेदन दायर गरेपश्चात् मिति २०७८/६/१९ गते सुनुवाइ हुँदा निज १३ वर्षको नाबालकलाई गैरकानुनी थुनाबाट मुक्त गर्ने आदेश भएपश्चात् मात्र निज थुनामुक्त भएको देखिन्छ ।

घ. परिवर्तित नाम ३१ (०७८/०७९-२०) को जाहेरीले वादी नेपाल सरकारविरुद्ध परिवर्तित नाम ३१ (०७८/०७९-A13) भएको मुद्दा नं. ०७८-C१-००८६ को मुद्दामा मकवानपुर जिल्ला अदालतबाट १३ वर्षको नाबालक जसउपर लगाइएको अभियोग प्रमाणद्वारा पुष्टी हुन गएको खण्डमा बालबालिकासम्बन्धी ऐन, २०७५ को दफा ३६(२) अनुसार अधिकतम ६ महिनासम्म मात्र कैदको सजाय हुन सक्नेमा, त्यो १३ वर्षे बालकलाई मुद्दा पुर्पक्षका लागि बालसुधार गृह मकवानपुर राख्ने कार्य भएको र सो विरुद्ध सर्वोच्च अदालतसमक्ष रिट नं. ०७८-WH–००७५ मार्फत बन्दीप्रत्यक्षीकरणको रिट निवेदन दायर भएपश्चात् मिति २०७८/७/२८ गते उक्त रिट निवेदनमा सुनुवाइ हुँदा नाबालकलाई गैरकानुनी थुनाबाट मुक्त गर्न आदेश भएपश्चात मात्र निज थुनामुक्त भएका थिए ।

ङ. अर्जुन कुँवरको जाहेरीले वादी नेपाल सरकारविरुद्ध परिवर्तित नाम रुकुमकोट ५४घ २०७८/०७९ भएको मु.नं. ०७८-C१-०००५ को मुद्दामा रुकुमकोट जिल्ला अदालतबाट १० वर्षको नाबालक जसउपर

लगाइएको अभियोग प्रमाणद्वारा पुष्टी हुन गएको खण्डमा बालबालिकासम्बन्धी ऐन, २०७५ को दफा ३६ (२) अनुसार अधिकतम छ महिनासम्म मात्र कैदको सजाय हुन सक्ने प्रकृतिको कसुरमा १० वर्षे बालकलाई अभिभावकहरूबाट अलग्याइ मुद्दा पुर्पक्षका लागि बालसुधार गृह बाँकेमा राख्ने कार्य भएको थियो । यसविरुद्धमा सर्वोच्च अदालतसमक्ष रिट नं. ०७८-WH-००८० को बन्दीप्रत्यक्षीकरणको रिट निवेदन दायर भएपश्चात् मिति २०७८/७/२९ गते सुनुवाइ भई निजलाई गैरकानुनी थुनाबाट मुक्त गर्ने आदेश भएपश्चात् मात्र निज थुनामुक्त हुनसकेको देखिन्छ ।

२.३.३ कानुन विपरीत सजाय भुक्तानको लागि कारागार स्थानान्तरण

बालबालिकासम्बन्धी ऐन, २०७५ को दफा ३२ ले "मुद्दाको कारबाहीको क्रममा बालबालिकाको उमेर १८ वर्ष पूरा भए पनि त्यस्तो मुद्दा बाल-अदालतबाटै कारबाही, सुनुवाइ र किनारा गर्नुपर्नेछ" भनी भइरहेको कानुनी व्यवस्थाबाट बालबालिका सम्मलित रहेको मुद्दा कारबाही गर्दै जाँदा त्यस्तो व्यक्ति सबालक हुन गए पनि बाल-अदालतबाट नै (अर्थात उसको उमेर पुग्न गए पनि त्यस कुराले खासै महत्त्व नराखी नाबालकसरह नै मानी बाल-अदालतबाट नै) कारबाही, सुनुवाइ र किनारा गर्नुपर्ने बाध्यात्मक कानुनी व्यवस्था भइरहेको देखिन्छ । त्यस्तै सोही ऐनको दफा ४३ (४) ले "बालसुधार गृहमा रहेका बालबालिकाको सो गृहमा रहनुपर्ने अवधि बाँकी हुँदाको अवस्थामा निजको उमेर १८ वर्ष पुगेमा निजको बानीव्यहोरामा आएको सुधार, आर्जन गरिरहेको सीप तथा शिक्षाको निरन्तरता लगायतलाई ध्यान राखी बाँकी अवधिसम्मका लागि बालसुधार गृहमा अन्य बालबालिकासँग अलग हुने गरी राख्नुपर्नेछ" बाध्यात्मक उल्लेख छ। सजाय भुक्तानको क्रममा बालसुधार गृहमा रहेका बालबालिका उमेर पुगे पनि कारागारमा स्थानान्तरण गर्न मिल्ने नभई बालसुधार गृहमा नै अन्य बालबालिकासँग अलग हुने गरी राख्नुपर्ने कानुनी व्यवस्था रहेको छ ।

त्यस्तै सोही ऐनको दफा ४२ ले "प्रचलित कानुनमा जुनसुकै कुरा लेखिएको भए तापनि कानुनको विवादमा परेका कुनै बालबालिकालाई नेल वा हतकडी लगाउन वा एकान्त कारावास वा थुना वा कैदमा राख्न हुदैन" प्रष्ट कानुनी व्यवस्था छ । यसरी उमेर पूरा भए पनि बालबालिकालाई बाल्यअवस्थामा गरेको कसुरबापतको सजाय भुक्तानको लागि बालसुधार गृहबाट कारागारमा स्थानान्तरण गर्न नमिल्ने नभए पनि कानुनसँगको द्वन्द्वमा पर्न आएका बालबालिकालाई (१८ वर्ष पुगेपश्चात्) कारागारमा पठाइने कार्य भएको पाइन्छ ।

क. बालसुधार गृह बाँकेमा कैद जीवन व्यतित गरी रहेका परिवर्तित नाम कञ्चनपुर ७५ (१५) लगायतका १० जना व्यक्तिहरूलाई बालसुधार गृहबाट कारागार कार्यालयमा स्थानान्तरण गर्ने भनी कारागार व्यवस्थापन विभागबाट मिति २०७६/५/८ गतेमा निर्णय भई निर्णयानुसार गर्नका लागि मिति २०७६/५/८ गतेमा बालसुधार गृह समेतलाई पत्राचार गरी निजहरूलाई कारागार कार्यालय बाँकेमा र तदपश्चात् केही व्यक्तिहरूलाई फरक-फरक कारागारमा स्थानान्तरण गर्ने कार्य भएको थियो । त्यसविरुद्धमा अधिवक्ता अजयशंकर झा "रुपेश" ले सर्वोच्च अदालतसमक्ष रिट नं. ०७७-WH-०३९७ को बन्दीप्रत्यक्षीकरणको रिट निवेदन दायर गरेको र मिति २०७८/४/५ मा परमादेशको आदेश जारी गरी कारागारमा स्थानान्तरण गरिएका सबै व्यक्तिलाई बालसुधार गृहमा फर्काउन आदेश भएको छ ।

ख. सुर्खेत जिल्ला अदालतसमक्ष चलेको मुद्दा नं. ०७५-CR-०००८ को जबरजस्ती करणी मुद्दामा जिल्ला अदालत र उच्च अदालत सुर्खेतबाट ठहर भएको कैदको सजाय भुक्तानका लागि परिवर्तित नाम

बराहताल AB लगायतका अन्य दुई जना नाबालकहरूलाई मिति २०७८/४/३ गते कारागार कार्यालय सुर्खेतमा राखिएको थियो । जुन कार्य गैरकानुनी रहेको भनी अधिवक्ता अजय शंकर झा "रुपेश" ले सर्वोच्च अदालतसमक्ष दायर गरेको रिट नं. ०७८-WH-०११८ को बन्दीप्रत्यक्षीकरणको निवेदनमा मिति २०७८/१०/६ गते सुनुवाइ गर्दै सर्वोच्च अदालतबाट निजहरूको थुनालाई गैरकानुनी ठहर गर्दै थुनामुक्त गर्न आदेश गरिएपश्चात् निजहरू थुनामुक्त भएका थिए ।

२.३.४ कानुन विपरीत पटकेको आधारमा थप सजाय

बालबालिकासम्बन्धी ऐन, २०७५ को दफा ४१ को उपदफा (१) ले "प्रचलित कानुनमा जुनसुकै कुरा लेखिएको भए तापनि सजाय गर्ने प्रयोजनको लागि यो ऐन वा प्रचलित कानुनबमोजिम पटके कायम गर्दा नाबालग अवस्थामा गरेको कसुरजन्य कार्यको गणना गरिने छैन" भनी उल्लेख छ । उपदफा (२) ले "प्रचलित कानुनमा जुनसुकै कुरा लेखिएको भए तापनि कुनै बालबालिकाले पटक-पटक कसुरजन्य कार्य गरे पनि पटके को आधारमा निजलाई थप सजाय गरिने छैन" भनी प्रष्ट कानुनी व्यवस्था गरेको छ । सोहीअनुसारकै व्यवस्था तात्कालीन बालबालिकासम्बन्धी ऐन, २०४८ दो दफा १२ मा समेत रहेको थियो । प्रष्ट कानुनी व्यवस्थाको बावजुद पनि काठमाडौँ जिल्ला अदालतका तात्कालीन एक जना दशौँ वरियताका माननीय जिल्ला न्यायाधीशले नाबालकविरुद्धको मुद्दा हेर्ने अधिकार क्षेत्र नहुँदानहुँदै अधिकारक्षेत्र ग्रहण गरी निज नाबालक रोशन भन्ने प्रशान्त अधिकारीलाई पटकेको आधारमा कैद र जरीवाना गरी सजाय भुक्तानको लागि बालसुधार गृह बाँके को नियन्त्रणमा राख्न पठाएका थिए । त्यसविरुद्ध अधिवक्ता अजयशंकर झा "रुपेश" ले सर्वोच्च अदालतसमक्ष दायर गरेको रिट नं. ०७७-WH-०३०४ को बन्दीप्रत्यक्षीकरणको निवेदनमाथि मिति २०७८/१/२१ मा सुनुवाइ गर्दै निजउपर बालसुधार गृहको नियन्त्रणलाई गैरकानुनी ठहर गर्दै बन्दीप्रत्यक्षीकरणको आदेशमार्फत मुक्त गरिएको छ ।

२.३.५ कानुन विपरीत अधिकारक्षेत्रको ग्रहण –

बालबालिकासम्बन्धी ऐन, २०७५ को दफा ३० को उपदफा (१) ले "बालबालिकाले गरेको कसुरजन्य कार्यको सुरु कारबाही, सुनुवाइ र किनारा गर्न नेपाल सरकारले न्याय परिषद्को सिफारिसमा आवश्यक सङ्ख्यामा बाल-अदालत गठन गर्न सक्नेछ" भनी व्यवस्था गर्नुको साथै उपदफा (३) ले "**उपदफा (१) बमोजिम बाल-अदालत गठन नभएसम्मको लागि बाल-अदालतबाट हेरिने कसुरजन्य कार्यको कारबाही, सुनवाइ र किनारा गर्न प्रत्येक जिल्ला अदालतमा बाल इजलास गठन गरिनेछ**" भनी कानुनी व्यवस्था गरिनुको साथै दफा ३३ ले "**यो ऐन प्रारम्भ हुनुअघि कुनै बालबालिकाउपर कसुरजन्य कार्यको आरोप लागी प्रचलित कानुनबमोजिम जिल्ला अदालत वा अन्य निकायमा सुरु कारबाहीको क्रममा रहेका मुद्दा यो ऐन प्रारम्भ भएपछि सम्बन्धित बाल-अदालतमा सर्नेछ**" भनी कानुनी व्यवस्था विद्यमान रहेको छ ।

बालइजलाशको गठनको सम्बन्धमा बालबालिकासम्बन्धी ऐन, २०४८ को अख्तियारीअन्तर्गत रही बनेको बाल-न्याय कार्यविधि नियमावली, २०६३ को नियम ६ (२) ले "एकभन्दा बढी जिल्ला न्यायाधीश भएको अदालतमा बाल-इजलाशको लागि प्रधान न्यायाधीशले तोकेको जिल्ला न्यायाधीशले बाल-इजलाशको न्यायाधीशको रूपमा काम गर्नेछ" भन्ने व्यवस्था छ । सो व्यवस्थाको अधीनमा रही प्रत्येक जिल्ला अदालतका वरिष्ठतम जिल्ला न्यायाधीशलाई मात्र बाल-इजलाश हेर्ने गरी तोकिएकोमा बालबालिकासम्बन्धी ऐन, २०७५ मा बालबालिकाको उमेर पनि साविकको १६ बाट १८ कायम गरियो । यसको साथै मुद्दाहरूको सङ्ख्यामा समेत वृद्धि हुन सक्ने

कुरालाई मनन गर्दै सम्माननीय प्रधान न्यायाधीशबाट एक आर्थिक वर्षमा बालबालिका सम्मलित रहेको मुद्दाको सङ्ख्या दुई सयभन्दा बढी हुने जिल्लाको हकमा वरिष्ठ न्यायाधीशपछिको न्यायाधीशलाई बाल-इजलाशको मुद्दा हेर्ने गरी तोकिएको छ ।

मुलुकी देवानी कार्यविधि संहिता, २०७४ को दफा १६(१) ले **"मुद्दाको कारबाही सुनुवाइ र किनारा गर्न कुनै पनि अदालतलाई कानुनबमोजिम अधिकारक्षेत्र हुनु पर्नेछ"** भनी कानुनी प्रावधान गर्नुको साथै उपदफा २ ले **"अधिकारक्षेत्र नभएको अदालतले मुद्दाको सिलिसलामा गरेको कारवाही, सुनुवाइ आदेश वा निर्णय बदर हुनेछ"** भनी अधिकारक्षेत्र विहिन रूपमा मुद्दामा हुने काम कारवाही वा सुनुवाइलाई बदर योग्य हुने भनी गरेको कानुनी व्यवस्थाबाट कुनै पनि विषयको अधिकारक्षेत्रमा न्यायकर्ता सदैव सजग रहनु पर्ने देखिन्छ । कानुन अनुसारको कामकारवाही भयो भएन ? भनेर जाँच्ने कानुनी निकायको रूपमा रहेको अदालत र आवद्ध माननीय न्यायाधीशज्यूहरूबाट नै बालबालिकाविरुद्धको मुद्दामा बाल-इजलाशको मुद्दा हेर्ने अधिकार प्रदान नगरिदा गरिदै आत्मगत रूपमा अधिकारक्षेत्र ग्रहण गरी नाबालकहरूलाई थुनास्वरूप बालसुधार गृहमा राख्ने कार्य भएको पनि देखिन्छ:

क. साधना पाठक भन्ने मायादेवी घिमिरेको जाहेरीले वादी नेपाल सरकारविरुद्ध रोशन भन्ने प्रशान्त अधिकारी भएको मु.नं. ०७५-CR-०२३८, ०७५-CR-०२३९ र ०७५-CR-०२४० को मुद्दामा काठमाडौँ जिल्ला अदालतको दशौँ वरियता क्रममा रहनु भएका तात्कालीन एक जना माननीय जिल्ला न्यायाधीशले बालबालिकाविरुद्धको मुद्दामा अधिकारक्षेत्र ग्रहण गर्दै कानुनी व्यवस्था प्रतिकूल नाबालकलाई पटकेको आधारमा थप कैदको सजाय गर्दै निज नाबालकलाई सजाय भुक्तानको लागि बालसुधार गृह बाँकेमा राखिएपश्चात् अधिवक्ता अजयशंकर झा "रुपेश" ले सर्वोच्च अदालतसमक्ष दायर गरेको रिट नं. ०७७-WH–०३०४ को बन्दीप्रत्यक्षीकरणको निवेदनमा मिति २०७८/१/२१ गतेमा सुनुवाइ गर्दै निजको बालसुधार गृहको बसाइलाई गैरकानुनी ठहर गर्दै थुनामुक्त गर्न आदेश भएको छ ।

ख. परिवर्तित नाम मिर्चैया (Y) को जाहेरीले वादी नेपाल सरकारविरुद्ध परिवर्तित नाम फुलमाया भएकी मु.नं. ०७५-C१-०४६२ को मुद्दामा सिराहा जिल्ला अदालतसमक्ष नेपाल सरकारको तर्फबाट दायर भएको अभियोगमा बाल-इजलाशका लागि नतोकिएका एक जना माननीय जिल्ला न्यायाधीशले बालबालिका आबद्ध मुद्दाको अधिकारक्षेत्र ग्रहण गरी निज नाबालिकालाई पुर्पक्षका लागि बालसुधार गृहमा राख्ने आदेश गरी निजलाई बालसुधार गृह भक्तपुरमा राखिएको थियो । मुद्दा हेर्ने अधिकारीको आदेशबिना नै निजलाई बालसुधार गृहमा राखिएको हुँदा निजउपरको बालसुधार गृहको नियन्त्रणलाई चुनौती दिदै अधिवक्ता अजयशंकर झा "रुपेश" ले सर्वोच्च अदालतसमक्ष दायर गरेको रिट नं. ०७८-WH-०००८ को बन्दीप्रत्यक्षीकरणको निवेदनमा मिति २०७८/४/२७ गतेको सुनुवाइ हुँदा मुद्दा हेर्ने अधिकार नै नभएको अधिकारीबाट बालसुधार गृहमा राख्ने कार्य गैरकानुनी भएको ठहर गर्दै निजलाई अभिभावकको जिम्मा लगाउने आदेश भएको छ ।

ग. परिवर्तित नामथर बराहताल M को जाहेरीले वादी नेपाल सरकारविरुद्ध परिवर्तित नाम बराहताल ZA लगायतका ४ नाबालकहरू समेतको विरुद्धमा नेपाल सरकारको तर्फबाट सुर्खेत जिल्ला अदालतसमक्ष दायर भएको मु.नं. ०७५-CR-०००८ को मुद्दा दायर भएको अभियोगमा बाल-इजलाशका लागि नतोकिएका दोश्रो वरियताक्रमका माननीय जिल्ला न्यायाधीशले बालबालिकाविरुद्धको मुद्दाको अधिकारक्षेत्र

ग्रहण गरी मुद्दा हेरी कसुरदार ठहर गरिएको फैसला उच्च अदालत सुर्खेतबाट पनि सदर कायम भई कैद कार्यान्वयनको लागि परिवर्तित नाम बराहताल ZA लाई बालसुधार गृह भक्तपुर तथा परिवर्तित नाम बराहताल AB लगायतका अन्य तीन जनालाई कारागार कार्यालय सुर्खेतमा पठाइयो । अधिकार नै नभएको इजलाशबाट मुद्दामा प्रारम्भिक सुनुवाइ गरी सजाय गरिएको कैद गैरकानुनी हुने भनी बराहताल ZA को हकमा रिट नं. ०७८-WH-०१०९ र बराहताल AB लगायतका तीन जनाको हकमा रिट नं. ०७८-WH-०११८ मार्फत बन्दीप्रत्यक्षीकरणको रिट निवेदनहरू सर्वोच्च अदालतसमक्ष दायर भई ती रिट निवेदनहरूमा क्रमशः मिति २०७८/९/१६ र मिति २०७८/१०/०६ गते सुनुवाइपश्चात् मुद्दा हेर्ने अधिकार नै नभएको इजलाशबाट अधिकारक्षेत्र ग्रहण गरी सजाय निर्धारण गरी सो निर्धारीत सजाय भुक्तानको लागि बालसुधार गृह र कारागार कार्यालयमा राख्ने कार्यलाई गैरकानुनी ठहर गर्दै सबै चारै जनालाई गैरकानुनी थुनाबाट मुक्त गरिएको छ ।

घ. परिवर्तित नामथर ६४ छिन्चु ७५(म) को जाहेरीले वादी नेपाल सरकारले नाबालक परिवर्तित नाम ६४ छिन्चु ७५(इ) को विरुद्धमा सुर्खेत जिल्ला अदालतमा दायर गरेको मु.नं.०७६-C१-००३४ को मुद्दामा पनि बाल-इजलाशका लागि नतोकिएका दोस्रो वरियताक्रमका माननीय जिल्ला न्यायाधीशले मुद्दाको प्रारम्भिक कारबाही गरी मुद्दामा फैसला गर्नु भएको र सो फैसलाउपर नेपाल सरकारको तर्फबाट उच्च अदालत सुर्खेत समक्ष पुनरावेदन पर्दा उच्च अदालत सुर्खेतबाट सजाय निर्धारण गरी कैद भुक्तानको लागि कारागार कार्यालय सुर्खेतमा राखिएको थियो । अधिकार नै नभएको इजलाशबाट प्रारम्भिक कारबाही गर्नु गैरकानुनी रहेको भनी सर्वोच्च अदालतसमक्ष दायर भएको रिट नं. ०७८-WH-०१५१ को बन्दीप्रत्यक्षीकरणको रिट निवेदनमा मिति २०७८/१२/११ गतेमा सुनुवाइ गर्दै अधिकारक्षेत्र विहीन रूपमा गरिएको प्रारम्भिक कारबाही नै त्रुटीपूर्ण ठहर गर्दै निजलाई गैरकानुनी थुनाबाट मुक्त गर्ने आदेश जारी भएको देखिन्छ ।

२.३.६ कानुनी व्यवस्था विपरीत अभियोजन

बालबालिकासम्बन्धी ऐन, २०७५ को दफा ३० को उपदफा (६) ले "उपदफा (१) मा जुनसुकै कुरा लेखिएको भए तापनि कुनै कसुरजन्य कार्यमा बालबालिकासहित उमेर पुगेका व्यक्ति संलग्न भएमा बालबालिकाको हकमा बाल-अदालतबाट कारबाही, सुनुवाइ र किनारा गर्नुपर्नेछ । उमेर पुगेका व्यक्तिको हकमा छुट्टै मिसिल खडा गरी प्रचलित कानुनबमोजिम मुद्दाको कारबाही, सुनुवाइ र किनारा गर्नुपर्नेछ" भनी व्यवस्था भएको छ । यो कानुनी व्यवस्था बाध्यात्मक रहँदा-रहँदै पनि मुद्दाको अनुसन्धानकर्ता (प्रहरी), अभियोजनकर्ता (सरकारी वकिल), अदालतसमक्ष मुद्दा दर्ता हुन आउँदा रीत मिले-नमिलेको भनी जाँच्ने अख्तियारवाला (श्रेस्तेदार) र न्यायकर्ता (माननीय न्यायाधीश) यो बाध्यात्म कानुनको पालना गर्नुपर्नेमा विधायिकाबाट निर्माण गरिएको उक्त बाध्यात्मक व्यवस्थाको स्वच्छेचारी रूपमा प्रयोग गरी कानुनी व्यवस्था विपरीत उमेर पुगेका व्यक्ति र नाबालकको मुद्दा एउटै अभियोगपत्रमार्फत कारबाही, सुनुवाइ र किनारा गर्ने गरेको देखिन्छ:

क. प्र.ना.नि शोभनविक्रम राणासमेतको प्रतिवेदनले वादी नेपाल सरकारविरुद्ध परिवर्तित नाम विर्ता (श) ०७७/०७८ समेतका दुई जना नाबालकहरू र अन्य दुई जना उमेर पुगेका सह-अभियुक्तसमेत गरी चार जनाको विरुद्धमा मिति २०७८/०२/१७ गते मु.नं. ०७७-C१-०३८५ मार्फत पर्सा

जिल्ला अदालतसमक्ष नेपाल सरकारको तर्फबाट अवैध वित्तीय कारोबार (हुण्डी) मुद्दामा एउटै अभियोगपत्रबाट अभियोग दायर भयो । यसविरुद्धमा सम्मानित सर्वोच्च अदालतसमक्ष दायर भएको रिट नं ०७८-WH-००३७ को बन्दीप्रत्यक्षीकरणको रिट निवेदनमा सुनुवाइ गर्दै नाबालक र उमेर पुगेका व्यक्तिहरूको हकमा छुट्टाछुट्टै मिसिल खडा गरी मुद्दाको कारबाही गर्न मिति २०७८/५/३० गतेमा पर्सा जिल्ला अदालत र नेपालभरिका सबै जिल्ला अदालतहरूको नाउँमा परमादेशको आदेश जारी भएको छ ।

ख. दिवाकार गुरुङको जाहेरीले वादी नेपाल सरकार र प्रतिवादी नाबालक राक्सिराङ (१) ०७८/०७९ एक जना र अर्का वर्ष २२ को उमेर पुगेका सह-अभियुक्त समेत दुई जनाको विरुद्धमा चितवन जिल्ला अदालतसमक्ष मु.नं. ०७८-C१-०१२८ मार्फत दायर भएको नकबजनी चोरी मुद्दामा पनि नाबालक र उमेर पुगेका व्यक्तिको एउटै अभियोगपत्रबाट मिति २०७८/६/७ गतेमा मुद्दा दायर हुनुको साथै कानुनी व्यवस्था विपरीत दायर भएको अभियोगमा मुद्दा सुनुवाइ गरी कैद समेत गर्दै कैद कार्यान्वनको लागि निज नाबालकलाई बालसुधार गृह मकवानपुरमा राखियो । तदउपर सर्वोच्च अदालतसमक्ष परेको रिट नं. ०७८-WH-०१२४ को बन्दीप्रत्यक्षीकरणको निवेदनमा उमेर पुगेको व्यक्ति र नाबालकको हकमा एउटै अभियोगबाट मुद्दाको कारबाही गर्न नमिल्नेमा पनि कारबाही गरी सजाय निर्धारण गरिनु गैरकानुनी रहेको भन्दै मिति २०७८/११/५ गतेमा बन्दीप्रत्यक्षीकरणको आदेशमार्फत निज नाबालकलाई मुक्त गरिएको छ ।

ग. रामप्रसाद गौतमको जाहेरीले वादी नेपाल सरकार तथा प्रतिवादीहरू नाबालक वीरेन्द्र थारु र उमेर पुगेका अरूण थारुसमेत दुई जना भएको चोरी मुद्दामा पनि वादी नेपाल सरकारको तर्फबाट कपिलवस्तु जिल्ला अदालतमा मु.नं.०७५-C१-००४१ मार्फत मिति २०७५/६/२३ गते अभियोगपत्र दायर गरिएकोमा कानुन विपरीत दायर भएको अभियोगमा मुद्दा सुनुवाइ गरी प्रतिवादीहरूलाई कैद तोक्नुको साथै कार्यान्वनको लागि निज नाबालकलाई बालसुधार गृह रुपन्देहीमा राखिएको थियो । जसउपर सर्वोच्च अदालतसमक्ष दायर भएको रिट नं. ०७८-WH-०१४१ को बन्दीप्रत्यक्षीकरणको निवेदनमा मिति २०७८/१२/९ गतेको सुनुवाइ गर्दै नाबालक र उमेर पुगेको व्यक्तिको एउटै अभियोगबाट कारबाही गर्नुलाई गैरकानुनी ठहर गर्दै बन्दीप्रत्यक्षीकरणको आदेशमार्फत थुनामुक्त गरिएको छ ।

२.३.७ सर्वोच्च अदालतकै आदेशको पालनामा गम्भीर नहुनु

क. प्र.ना.नि. शोभनविक्रम राणासमेतको प्रतिवेदनले वादी नेपाल सरकारविरुद्ध परिवर्तित नाम वित्तर्ा (श) ०७७/०७८ समेतका दुई जना नाबालकहरू र अन्य दुई जना उमेर पुगेका सह-अभियुक्त समेत गरी चार जनाको विरुद्धमा मिति २०७८/०२/१७ गते मु.नं. ०७७-C१-०३८५ मार्फत पर्सा जिल्ला अदालतसमक्ष नेपाल सरकारको तर्फबाट अवैध वित्तीय कारोबार (हुण्डी) मुद्दामा एउटै अभियोगपत्रबाट अभियोग दायर भयो । जसविरुद्धमा सम्मानित सर्वोच्च अदालतसमक्ष दायर भएको रिट नं. ०७८-WH-००३७ को बन्दीप्रत्यक्षीकरणको रिट निवेदनमा सुनुवाइ गर्दै नाबालक र उमेर पुगेका व्यक्तिहरूको हकमा छुट्टाछुट्टै मिसिल खडा गरी मुद्दाको कारबाही गर्न मिति २०७८/५/३० गतेमा पर्सा जिल्ला अदालतको नाउँमा परमादेशको आदेश सर्वोच्च अदालतबाट जारी पनि भएको छ । पर्सा जिल्ला अदालतबाट उक्त मुद्दामा

उमेर पुगेको र नाबालकविरुद्ध सर्वोच्च अदालतको आदेशबमोजिम मिसिल फुटाएर कारबाही गरी मात्र फैसला गर्नुपर्नेमा सर्वोच्च अदालतको उक्त आदेशको बेवास्ता गर्दै मिति २०७८/०७/१६ गते उमेर पुगेको व्यक्ति र नाबालकको हकमा एउटै मिसिलबाट फैसला गर्दै सर्वोच्च अदालतको निर्देशनको पालना नगरेको देखिन्छ ।

ख. टेकराज पनेरुको जाहेरीले नेपाल सरकार वादी तथा परिवर्तित नाम ७१ धनगढी ३३ र परिवर्तित नाम ७१ धनगढी ३४ भएको मुद्दा नं.०७८-C१-०३११ को चोरी मुद्दामा कैलाली जिल्ला अदालतका वरियता क्रममा दोश्रो नम्बरमा रहनु भएका (वरिष्टम जिल्ला न्यायाधीशले मात्र बाल-इजलाशसँग सम्बन्धित मुद्दा हेर्न मिल्ने) माननीय न्यायाधीशज्यूले बालबालिका आवद्ध रहेको मुद्दामा अधिकारक्षेत्र ग्रहण गरी निज नाबालकहरूउपर लगाइएको कसुरमा कसुर ठहर हुँदाका अवस्थामा पनि ३ वर्ष भन्दा कम (समान्य कसुर) कैदको सजाय हुने प्रकृतिको कसुरमा बालबालिकासम्बन्धी ऐन, २०७५ को दफा २४(२)(ख) को कानुनी प्रावधान विपरीत मुद्दा पुर्पक्षका लागि बालसुधार गृहमा राखी मुद्दाको पुर्पक्ष गर्ने गरी मिति २०७८/९/२० गतेमा आदेश गर्नु भएको र सो विरुद्ध सर्वोच्च अदालतसमक्ष परेको रिट नं. ०७८-WH-०१३७ को बन्दीप्रत्यक्षीकरणको रिट निवेदनमा मिति २०७८/११/१२ गतेमा सुनुवाइ गर्दै उक्त बालबालिकासम्बन्धी ऐन, २०७५ को दफा २४ (२)(ख) अनुसार मुद्दा पुर्पक्षका लागि बालसुधार गृहमा राख्न कम्तीमा पनि ३ वर्ष वा सो भन्दा बढी कैदको सजाय हुनु नै पर्नेमा उक्त कानुनी व्यवस्था विपरीत निज नाबालकहरूलाई कैलाली जिल्ला अदालतबाट पुर्पक्षका लागि थुनामा राख्ने कार्य गैरकानुनी हुँदा अविलम्व बालसुधार गृहबा मुक्त गरी अभिभावकको जिम्मा लगाई मुद्दाको पुर्पक्ष गर्न कैलाली जिल्ला अदालतको नाउँमा निर्देशनात्मक आदेश पनि जारी भएको छ ।

सम्मानित सर्वोच्च अदालतको उक्त निर्देशनात्मक आदेशबाट कुनै पनि बालबालिकालाई मुद्दा पुर्पक्षका लागि बालसुधार गृहमा राख्दा कम्तीमा पनि त्यो बालबालिकालाई तीन वर्षको कैद सजाय हुने प्रकृतिको कसुर हुनुपर्दछ भनी अभिभावकको जिम्मा लगाइ मुद्दाको पुर्पक्ष गर्न निर्देशन दिएको थियो । उक्त आदेश भएको केही दिनपश्चात् नेपाल सरकारको तर्फबाट कैलाली जिल्ला अदालतसमक्ष दायर भएको अर्को मुद्दामा पुनः सोही दोस्रो वरियताका माननीय जिल्ला न्यायाधीशले सर्वोच्च अदालतको उक्त आदेश विपरीत मुद्दा पुर्पक्षका लागि बालसुधार गृहमा राख्न पठाएकोमा सो विरुद्ध बन्दीप्रत्यक्षीकरणको रिट निवेदन परी सर्वोच्च अदालतबाट मुक्त गर्न आदेश भएको देखिन्छ ।

प्रहरी लोकेन्द्रबहादुर चन्दको प्रतिवेदनले वादी नेपाल सरकार र प्रतिवादी परिवर्तित नाम कैलाली ७१ टिकापुर æकपिल" भएको मुद्दा नं. ०७८-C१-०४६९ को मुद्दामा कैलाली जिल्ला अदालतबाट त्यसअनुसारको आदेश भएको थियो । निज नाबालकउपर लगाइएको अभियोगको कसुरमा अभियोग प्रमाणित हुन गएको खण्डमा निज नाबालकलाई सात हजार पाँच सय रुपैयाँसम्म जरीवाना वा नौ महिनामात्र कैदको सजाय हुन सक्ने प्रकृतिको मुद्दा हुँदाहुदै निजलाई अभिभावकको जिम्मा नलगाइ माननीय जिल्ला न्यायाधीशबाट मिति २०७८/१२/१३ गतेमा आदेश गरी बालसुधार गृहमा राख्न पठाउनु भएकोमा सर्वोच्च अदालतबाट रिट नं. ०७८-WH-०१७९ को बन्दीप्रत्यक्षीकरणको रिट निवेदनमा मिति २०७८/१२/२९ गते आदेश जारी गर्दै थुनामुक्त गरिएको अवस्था छ ।

२.३.८ कानुन-व्यावसायीविना नै मुद्दाको कारबाही

नेपालको संविधानको धारा १७ (१) ले "कानुनबमोजिम बाहेक कुनै पनि व्यक्तिलाई वैयक्तिक स्वतन्त्रताबाट वञ्चित गरिने छैन" भनी मौलिक हकको प्रत्याभूत गरेको छ । त्यस्तै धारा २० को उपधारा (२) ले "पक्राउमा परेका व्यक्तिलाई पक्राउ परेको समयदेखि नै आफूले रोजेको कानुन-व्यावसायीसँग सल्लाह लिन पाउने तथा कानुन-व्यावसायीद्वारा पुर्पक्ष गर्ने हक हुनेछ । त्यस्तो व्यक्तिले आफ्नो कानुन-व्यावसायीसँग गरेको परामर्श र निजले दिएको सल्लाह गोप्य रहनेछ" भनी व्यवस्था गर्नुको साथै उपधारा (१०) लाई "असमर्थ पक्षलाई कानुनबमोजिम निःशुल्क कानुनी सहायता पाउने हक हुनेछ" भनी संविधानमा नै Right to Counsel र Right to free legal aid लाई प्रत्याभूत गरेको छ । बालबालिकासम्बन्धी ऐन, २०७५ को दफा ८० को उपदफा (१) ले "प्रचलित कानुनमा जुनसुकै कुरा लेखिएको भए तापनि कुनै बालबालिकाको विरुद्ध लगाइएको कसुरजन्य कार्यको अभियोगमा निजको प्रतिरक्षा गर्ने कानुन-व्यावसायी नियुक्त नभएसम्म बाल-अदालतले त्यस्तो मुद्दाको कारबाही र किनारा गर्ने छैन" भनी प्रष्ट र बाध्यात्मक कानुनी व्यवस्था गरी कानुन-व्यावसायीविना बालबालिका आबद्ध रहेको मुद्दामा कारबाही, सुनुवाइ वा किनारा हुन नसक्ने व्यवस्था गरेको छ । मुद्दाको कारबाहीअन्तर्गत म्याद थपको सुनुवाइ पर्ने भए पनि कानुनसँगको द्वन्द्वमा पर्न आएका बालबालिकालाई प्रहरीले नियन्त्रणमा लिई निगरानी कक्षमा राखी मुद्दाको अनुसान्धान अगाडि बढाउनका लागि अनुमतिका लागि (म्याद थपका लागि) अदालतसमक्ष हुने कारबाहीमा बालबालिकाको प्रतिनिधित्व गर्ने कानुन-व्यावसायी राखेरमात्र म्याद थपको प्रक्रिया बढाउने कार्य शून्यमात्रामा मात्र हुने गरेको छ । अझ त थुनछेक आदेश गर्दा पनि कानुनव्यवायीविना नै आदेश भएको पनि पाइएको छ ।

प्रहरीको प्रतिवेदनले उठान भएको बालबिज्याइँकर्ता परिवर्तित नामथर कैलाली ७१ टिकापुर "कपिल" का विरुद्धमा कैलाली जिल्ला अदालतसमक्ष मिति २०७८/१२/१० गते मु.नं. ०७८-C१-०४६९ मार्फत दायर भएको अभियोगसम्बन्धी कारबाही हुदा निजले अदालतसमक्षको आफ्नो वयानको स.ज. ४ मा स्पष्ट रूपमा "आफ्नो कानुन-व्यावसायी नरहेको" भनी लेखाएका थिए । निजको तर्फबाट बालबालिकासम्बन्धी ऐन, २०७५ को दफा ८० अनुसार कानुन-व्यावसायीविना मुद्दाको कारबाही अगाडि बढन नसक्ने र यस्तो अवस्थामा अदालतले व्यवस्था गरेका वैतनिक कानुन-व्यावसायी वा इच्छुक कानुन-व्यावसायीलाई निज नाबालको प्रतिनिधित्व गर्न नियुक्त गरेपश्चात् मात्र थुनछेकको प्रक्रिया अगाडि बढाउनुपर्ने हुन्छ । कैलाली जिल्ला अदालतका माननीय जिल्ला न्यायाधीशबाट कानुन-व्यावसायीविना नै थुनछेक आदेश गर्दै पुर्पक्षका लागि निज नाबालकलाई बालसुधार गृहमा राख्ने आदेश भई निजलाई बालसुधार गृह बाँकेमा राख्ने कार्य भएको देखिन्छ । कानुन-व्यावसायीविना मुद्दाको कारबाही अगाडि बढाउनु गैरकानुनी भएको भन्ने समेतका विषयमा सम्मानित सर्वोच्च अदालतमा निज नाबालकको हकमा रिट नं. ०७८-WH-०१७९ मार्फत बन्दीप्रत्यक्षीकरणको निवेदन दायर भई मिति २०७८/१२/२९ गते सुनुवाइ हुँदा कानुन-व्यावसायीविना मुद्दाको कारबाही अगाडि बढाउनुलाई गैरकानुनी ठहर गर्दै निजलाई अभिभावकको जिम्मा लगाइ मुद्दाको बाँकी प्रक्रिया अगाडि बढाउन निर्देश गरिएको छ ।

३. बाल–अनुकूलको न्याय र उञ्जेका सवाल

३.१. कसुरको बात लागेका बालबालिकाउपर अभियोजन लगाउनु र मुद्दा पुर्पक्षका लागि बालसुधार गृहमा पठाउनुमात्रले राज्यको दायित्व पुरा हुन्छ त ?

वि.स. २०५७ सालमा सर्वोच्च अदालतबाट आदेश भएपछि सुरु गरिएका बालसुधार गृहहरू हाल भक्तपुर, कास्की, मोरङ, बाँके, रुपन्देही, पर्सा, हेटौडा र डोटी गरी जम्मा आठ वटा जिल्लाहरूमा सीमित क्षमताका साथ सञ्चालन भइरहेका छन् । अहिलेको क्षमता हेर्दा भक्तपुरमा १० महिला र १०० पुरुषसहित कुल ११०, कास्की र मोरङमा, ५०/५० पुरुष, बाँके ७५ पुरुष, रुपन्देही ६० पुरुष, पर्सा र मकवानपुरमा ८०/८० पुरुष र डोटीमा २५ पुरुष रहेको देखिन्छ । सङ्ख्याको अनुपातमा हेर्दा सञ्चालित सबै बालसुधार गृहको कुल क्षमता ५३० हुन आउँछ ।

नेपालमा बालबालिकाको स्थिति प्रतिवेदन, २०७६[3] अनुसार बालसुधार गृह भक्तपुरमा २३१ जना, कास्कीमा ७४ जना, मोरङमा १३८ जना, बाँकेमा १०९ जना, रुपन्देहीमा ८५ जना, मकवानपुरमा ६६ जना, पर्सामा ७८ जना, डोटीमा ४० जना गरी कुल ८२१ जना बालबालिका बालसुधार गृहमा रहेको देखिन्छ । त्यस्तै नेपालमा बालबालिकाको स्थिति प्रतिवेदन, २०७७[4] अनुसार नेपालमा सञ्चालित आठ वटै बालसुधार गृहमा कुल १०५३ जना बालबालिका रहेको देखिन्छ । मिति २०७८/४/०३ गतेबाट मिति २०७८/५/२७ गतेसम्ममा सार्वजनिक प्रतिरक्षक समाज नेपाल (PDS–Nepal) ले सबै बालसुधार गृहमा रहेका बालबालिकासँग गरेको अन्तर्वाताका आधारमा सो मितिसम्म कुल ९१७ जना बालबालिकाहरू बालसुधार गृहहरूमा रहेको देखिन्छ ।

पठनपाठनको व्यवस्था तथा वृति विकास हुने खालका दक्षता अभिवृद्धिसँग सम्बन्धित विशेष तालिम/कार्यक्रमहरू सञ्चालित सबै बालसुधार गृहहरूमा उपलब्ध हुन नसकेको अवस्था एकातिर छ । अर्कोतर्फ क्षमताभन्दा बढी बालबालिका राखिएका छन् । "प्रत्येक बालबालिकालाई मुद्दाको परिस्थितिले आवश्यक नबनाएसम्म बालविज्याइँकर्तालाई पैतृक सुपरीवेक्षणबाट आंशिक वा पूर्ण कुनै रूपमा पनि अलग्याइने छैन[5]" भनी बाल-न्यायप्रणालीको मान्यता विपरीत कानुनसँगको द्वन्द्वमा पर्न आएका बालबालिकालाई दिशान्तरण लगायतका वैकल्पिक उपचारमार्फत पुनःस्थापना नगरी औपचारिक न्यायप्रणालीमा ल्याई अभियोजन गर्नु र बालसुधार गृहमा मुद्दा पुर्पक्ष वा सजाय भुक्तानको लागि राख्नुमात्रले राज्यको दायित्वको पूर्णता वा समाप्ती मानिन मिल्दैन र सकिँदैन ।

नेपालमा बालबालिकाको स्थिति प्रतिवेदनहरूको अध्ययनबाट र सार्वजनिक प्रतिरक्षक समाज नेपालले गरेको अन्तर्वार्ताहरूबाट ठूलो सङ्ख्यामा बालबालिकाहरू जबरजस्ती कारणी, बालविवाह, लागु औषधजस्तो कसुरमा अभियोग लागी मुद्दा पुर्पक्ष वा सजाय भुक्तानका लागि बालसुधार गृहहरूमा रहेको देखिन्छ । एउटा व्यक्तिको वृति विकास हुने उमेर समूह भनेकै युवा अवस्था हो । खास गरेर १४ देखि १८ वर्ष उमेर समूहका व्यक्तिहरू यस प्रकृतिका कसुरमा किन बढीमात्रामा संलग्न हुन पुगेका छन् भन्नेतर्फ राज्यबाट खोजी गर्नेतर्फ खासै चासो लिएको पनि देखिँदैन ।

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3 https://www.ncrc.gov.np/uploads/topics/16439519442131.pdf

4 https://www.ncrc.gov.np/uploads/topics/16439516897775.pdf

5 No juvenile shall be removed from parental supervision, whether partly or entirely, unless the circumstances of her or his case make this necessary. Rule 18.2. The Beijing Rules

कानुनसँगको åGåमा पर्न आएका बालबालिकाहरू यस प्रकृतिको कसुरमा किन संलग्न हुन लागेको हो भनेर सार्वजनिक प्रतिरक्षक समाज नेपालमार्फत सर्भेक्षण गरिएको थियो । काठमाडौँ दुई र भक्तपुर एक गरी जम्मा तीन विद्यालयहरूमा कक्षा ८ देखि १२ सम्ममा अध्ययनरत छात्रछात्राहरूमा "कानुनको जानकारीको बारेमा सर्वेक्षण" गर्दा सहभागी तीन सय २७ जना सहभागी थिए । उनीहरूमध्येमा दुई सय २० जना (६७.२८%) लाई मात्र नेपालको कानुनले १८ वर्ष उमेर पूरा नगरेको व्यक्तिलाई बालबालिका मानिएको जानकारी भएको पाइएको छ । त्यस्तै आफ्नो स्वेच्छाले भए पनि शारीरिक सम्बन्ध कायम गर्न कानुनले निश्चित उमेर पुरा गरेको हुनुपर्दछ भन्ने सम्बन्धमा दुई सय ३३ (७१.२५%) जना जानकार रहेको देखिएको छ । त्यसै गरी कानुनत: विवाह गर्नका लागि २० वर्षको उमेर पुगेको हुनुपर्दछ भन्ने सम्बन्धमा १७४ (५३.२१%) लाई मात्र थाहा भएको पाइएको छ ।

व्यक्तिको दैनिक जीवनसँग सम्बन्धित कानुनको जानकारीसम्बन्धी अवस्थाबारेमा गरिएको यो अध्ययन (हाल रिपोर्ट लेखनको क्रममा रहेको) बाट समेत बालबालिकाहरूको ठुलो हिस्सा कानुनको बारेमा अनविज्ञ हुँदा यस प्रकृतिका कार्य गर्न पुगेको देखिन्छ । यस्तो अवस्थामा राज्यले उनीहरूलाई अभियोजन गरेर बालसुधार गृहमा राख्ने नगरी कानुनको बारेमा जानकारी गराउन विविध प्रकृतिका चेतनामूलक कार्यक्रम सञ्चालन गर्न आवश्यक छ ।

४. निष्कर्ष तथा सुझाव

उल्लिखित तथ्यहरूबाट नेपालमा बालबालिकाहरू कानुनको बारेमा जानकार नहुँदा कानुनसँगको द्वन्द्वमा पर्न गइरहेको देखिएको अवस्था एकातिर छ । त्यस्तै अर्कोतिर कानुन कार्यान्वयन गर्ने निकायहरूबाट कानुनसँगको द्वन्द्वमा पर्न आएका बालबालिकाहरूले गरेको कसुरमात्र हेरी कारणमा नपुगी निर्णयमा पुगिने परिपाटी छ । कसुरमा संलग्न बालबालिकालाई औपचारिकभन्दा पनि अनौपचारिक प्रक्रिया (दिशान्तरण)-मार्फत नै पुन:स्थापना गर्न सकिने तर्फ ध्यान पुग्न सकेको छैन । अत: बाल-न्यायप्रणालीको उद्देश्यअनुसार न्याय सम्पादन हुनका लागि कम्तीमा पनि निम्न सवालमा सरोकारवालाहरूबाट कदम चाल्नुपर्ने देखिन्छ:

१. **अविलम्ब छुट्टै बाल-अदालतको गठन**

हाल बाल-इजलाशमार्फत न्याय-सम्पादन गर्ने क्रममा न्यायसम्पादनको जिम्मेवारी पाउनु भएका माननीय जिल्ला न्यायाधीशहरूबाट एकै समयमा एकसाथ परम्परागत औपचारिक फौजदारी न्यायप्रणालीअन्तर्गत रही कानुन उल्लङ्घन गर्ने बालबालिकाहरूलाई अधिकतम सजाय गर्ने गरिएको पाइन्छ । सोही समयमा बढी लचिलो भई न्याय-सम्पादन गर्नुपर्दा एकै व्यक्तिबाट एकै समयमा दोहरो भूमिका निर्वाह गर्न पूर्णत: सफल हुन असम्भव हुने हुँदा माथि सि.नं. २.३.१ देखि २.३.७ सम्ममा उल्लिखित कानुन प्रतिकूलको कार्यसमेत भएको अवस्था देखिन्छ । यी पक्षलाई समेत मनन गरी बाल-अदालतको गठन अपरिहार्य देखिन्छ

२. **दिशान्तरण लगायतका वैकल्पिक उपायहरूको प्रयोग**

सामान्यभन्दा सामान्य कसुरमा पनि बालबालिकालाई औपचारिक न्यायिक प्रक्रियामा ल्याउनुभन्दा पनि कसुरको कारणमा पुगी सुधारका लागि दिशान्तरणलगायतका वैकल्पिक उपचारमार्फत पुन:स्थापनामा

जोड दिनुपर्दछ। बालसुधार गृहमा क्षमताभन्दा बढी त्यसमा पनि शिक्षादीक्षाको पूर्ण सुनिश्चितता नहुँदा बालबालिकाको पुनःस्थापना नभई भविष्य नै अन्धकारमय हुन जानेतर्फ सरकारको सरोकारवालाहरू गम्भीर हुन आवश्यक छ।

३. **बाल–न्यायप्रणालीसँग सम्बन्धित प्रभावकारी तालिम**

प्रहरी, अभियोजनकर्ता, प्रतिरक्षी कानुन-व्यावसायी तथा न्यायकर्ताहरूलाई राष्ट्रिय न्यायिक प्रतिष्ठान, महान्यायाधिवक्ताको कार्यालय, केन्द्रीय बाल-न्याय समिति सचिवालयलगायतका निकायहरूबाट बाल बिज्याइँसम्बन्धी अनुसन्धान, अभियोजन, प्रतिरक्षा, पुर्पक्ष एवम् न्यायसम्पादनका विषयमा दक्षता अभिवृद्धि हेतुले प्रशिक्षण दिई बाल-न्यायलाई प्रभावकारी बनाउन प्रयत्न हुँदै आएका छन्। बालबालिकासम्बन्धी ऐन, २०४८ लागु भएदेखि निरन्त रूपमा तालिम कार्यक्रम चलाइए पनि बाल-न्यायको मर्म अनुसारको कार्य सम्पादन हुन सकेको पाइँदैन। अतः तालिमको स्वरूपमा अमुल परिवर्तन गरी सैद्धान्तिकभन्दा पनि बाल-न्यायको मर्म, सिद्धान्त र कानुनअनुसार समस्यालाई सम्बोधन गर्ने प्रकृतिका प्रयोगात्मक र व्यवहारिक तालिम सञ्चालन हुनु आवश्यक छ।

४. **कानुनको सचेतना कार्यक्रम सञ्चालन**

नेपाल सरकार, प्रदेश सरकार र स्थानीय तह सबैले भएसम्म व्यक्तिहरूको दैनिक व्यवहारीक पक्षसँग जोडीएको कानुनहरूको जानकारीका लागि निम्न माध्यमिक तहबाट नै शैक्षिक पाठ्यपुस्तकहरूमा नै जानकारीमूलक शिक्षा सामग्रीहरूको पठन पाठनको सुरुवात गर्नुपर्दछ। नियमित रूपमा कानुनी साक्षरता कार्यक्रमको लागि प्रत्येक विद्यालयले गैरसरकारी सङ्घसंस्थाहरूसँग समन्वयन गरी विशेष कार्यक्रमको तर्जुमा गर्दै बालबालिकालाई अभिमुखिकरणको साथै औपचारिक अनौपचारिक शिक्षासँगै र विभिन्न स्तरमा सचेतना कार्यक्रमहरू सघन रूपमा सञ्चालन गर्न नितान्त आवश्यक छ।

बुद्ध दर्शनको कसीमा महिला अधिकार

कैलाशकुमार सिवाकोटी

सारांश

मानिसको जन्मसँगै जीवनको अधिकार अर्थात बाँच्न पाउने अधिकार जोडिनु स्वाभाविक थियो । बाँच्नका लागि ऊ विभिन्न सङ्घर्षहरूबाट गुज्रदै अगाडि बढ्न थाल्यो । भोकप्यास मेट्नु, जङ्गली जनावरबाट जोगिनु, घामपानी, जाडो आदिबाट सुरक्षित रहनु मानिसका दैनिकी थिए । समयको विकासक्रमसँगसँगै विभिन्न परिवर्तनहरू हुँदै गए । मुक्ति वा स्वतन्त्रताको लागि विद्रोह, प्रतिरोध, आन्दोलन, युद्ध तथा सामाजिक न्यायका लागि प्रयासहरू कुनै न कुनै स्वरूपमा निरन्तर चली नै रहे । उद्योगधन्दामा कार्यरत श्रमिकहरू, महिला, थिचिएका वा शोषणमा परेका वर्ग, समुदाय आफ्नो हक अधिकारको लागि सङ्घर्षमा उत्रन पुगे । दमन र प्रतिरोधको चक्रमा अन्ततः अधिकारहरू क्रमशः स्थापित हुन पुगे । मानव अधिकारको वर्तमान अवधारणा कुनै एक कालखण्ड, समाज संस्कृति, धर्म, भूभाग र राजनीतिक मान्यताबाट मात्र उत्पन्न भएको होइन । समाज विकासको क्रमसँगै विभिन्न स्वरूपमा विकसित हुँदै आएको अवधारणा हो । अहिले मानव अधिकार, महिला अधिकार वा अन्य कुनै अधिकार केवल पश्चिमी उपज वा विषयजस्तो गरी प्रस्तुत गरिएको पाइन्छ । यी र यस्ता विषयमा मानव अधिकार शब्द निहित वा उल्लेख थियो कि थिएन भनी गरिने व्याख्याले सही निष्कर्ष दिँदैन । यस सन्दर्भमा आधुनिक मानव अधिकारको अवधारणाभित्रका विषय शाब्दिक रूपमा उल्लेख नभए पनि तत्कालीन अवस्थामा नै बौद्ध दर्शनभित्र समाहितमात्र थिएनन्, प्रचलनमा समेत आइसकेको पाइन्छ । अतः यस आलेखमा आधुनिक मानव अधिकारका दस्तावेजमा उल्लेख महिला अधिकारका सवालहरूलाई बौद्ध दर्शनभित्र कसरी उल्लेख गरिएको थियो, अभ्यास कस्तो थियो भनी केलाउने प्रयत्न गरिएको छ ।

प्रमुख शब्दावली : बुद्ध दर्शन, महिला अधिकार, विदुषी, शोषण, मानव अधिकार, भिक्षु, भिक्षुणी ।

विषय प्रवेश

मानव अधिकारलाई पश्चिमी अवधारणाको रूपमा बुझ्ने र सोहीअनुरूप व्याख्या गर्ने परिपाटी अहिले पनि छ । मानिसको जन्मसँगै जीवनको अधिकार अर्थात बाँच्न पाउने अधिकार जोडिनु स्वाभाविक थियो । बाँच्नका लागि ऊ विभिन्न सङ्घर्षहरूबाट गुज्रदै अगाडि बढ्न थाल्यो । भोकप्यास मेट्नु, जङ्गली जनावरबाट जोगिनु, घामपानी, जाडो आदिबाट सुरक्षित रहनु मानिसका दैनिकी थिए । समाज विकासको क्रममा आदिम युग (Primitive age) मा मानिस स्वतन्त्र थियो । त्यसपछि दास युग/सामन्ति युगमा ऊ मानिसको हैसियतमा रहन सकेन । क्रमशः मानिसको जनसङ्ख्यामा वृद्धि हुँदै जान थालेपछि सीमित स्रोतसाधनबाट जीवन धान्न समस्या पर्दै गयो । अझ त्यसमा पनि भोलिका लागि जगेर्ना गर्नुपर्ने मनोवृति मानिसमा विकसित हुन थालेपछि स्रोतसाधनमा कब्जा जमाउने परिपाटी विकसित हुन थाल्यो । स्रोतसाधनमाथि बलियाहरूको नियन्त्रण हुन थालेपछि हुने र नहुनेबिच दूरी फराकिलो बन्दै गयो । यसबाट समूह-समूहबिच मनमुटाव हुनु स्वाभाविक नै

थियो । बलवानले दुर्बलमाथि, शक्तिशालीले कमजोरमाथि दमन, थिचोमिचो र शोषण गर्न थाल्यो । समाजमा अन्याय, अत्याचार, दमन तथा उत्पीडनले जरा गाड्दै गयो । आफू शोषित, थिचोमिचो वा अन्यायमा परेको अनुभुति गर्ने वर्ग वा समूह असन्तुष्टी प्रकट गर्दै गए । अन्ततः आपसमा काटमार, लडाईं हुन थाल्यो । यस अवस्थाबाट मुक्ति पाउन मानिसले स्वतन्त्र अस्तित्वको खोजीमा लाग्यो ।

समयको विकासक्रमसँगसँगै विभिन्न परिवर्तनहरू हुँदै गए । मुक्ति वा स्वतन्त्रताको लागि विद्रोह, प्रतिरोध, आन्दोलन, युद्ध तथा सामाजिक न्यायका लागि प्रयासहरू कुनै न कुनै स्वरूपमा निरन्तर चली नै रहे । उद्योगधन्दामा कार्यरत श्रमिकहरू, महिला, थिचिएका वा शोषणमा परेका वर्ग, समुदाय आफ्नो हक अधिकारको लागि सङ्घर्षमा उत्रन पुगे । दमन र प्रतिरोधको चक्रमा अन्ततः अधिकारहरू क्रमशः स्थापित हुन पुगे । मानव अधिकारको वर्तमान अवधारणा कुनै एक कालखण्ड, समाज संस्कृति, धर्म, भूभाग र राजनीतिक मान्यताबाट मात्र उत्पन्न भएको होइन । समाज विकासको क्रमसँगै विभिन्न स्वरूपमा विकसित हुँदै आएको अवधारणा हो ।

अहिले मानव अधिकार, महिला अधिकार वा अन्य कुनै अधिकार केवल पश्चिमी उपज वा विषयजस्तो गरी प्रस्तुत गरिएको पाइन्छ । यी र यस्ता विषयमा मानव अधिकार शब्द निहित वा उल्लेख थियो कि थिएन भनी गरिने व्याख्याले सही निष्कर्ष दिँदैन । यस सन्दर्भमा आधुनिक मानव अधिकारको अवधारणाभित्रका विषय शाब्दिक रूपमा उल्लेख नभए पनि तत्कालीन अवस्थामा नै बौद्ध दर्शनभित्र समाहितमात्र थिएनन्, प्रचलनमा समेत आइसकेको पाइन्छ । अतः यस आलेखमा आधुनिक मानव अधिकारका दस्तावेजमा उल्लेख महिला अधिकारका सवालहरूलाई बौद्ध दर्शनभित्र कसरी उल्लेख गरिएको थियो, अभ्यास कस्तो थियो भनी केलाउने प्रयत्न गरिएको छ ।

बुद्ध दर्शन र महिला अधिकारको बारेमा चर्चा गरिरहँदा बुद्धकालीन समाजभन्दा पूर्वावस्थालाई पनि हेर्नुपर्ने हुन्छ । यसले कसरी महिलाहरूको अवस्था दयनीय बन्दै गएको रहेछ भन्ने सम्बन्धमा चित्रण गर्न सहयोग पुऱ्याउँदछ । सबैभन्दा प्राचीन भनिएको वेदमा पनि महिलाको स्थिति सम्बन्धमा चर्चा गरिएको पाइन्छ । तत्कालीन अवस्थामा समाजमा महिलाको स्थान विशेष थियो । प्रकृतिबिना पुरुष अपूर्ण भएजस्तै महिलाबिना मनुष्य जीवन पूर्ण सम्भव मानिन्दैनथ्यो । शारीरिक रूपमा हुने भिन्नता स्वाभाविक थियो र हुन्छ पनि । संसारको अस्तित्व "प्रकृति" अर्थात महिला र "पुरुष" मा निहित छ । प्रकृतिमा उत्पादन, पुनर्उत्पादनको क्षमता हुन्छ तर आफैँमा स्थूल, निष्क्रिय, गतिहीन हुन्छ, जो पुरुषद्वारा चलायमान गराउनुपर्दछ । पुरुष स्वयम्मा शक्ति वा सामर्थ्यवान हुन्छ तर उत्पादन वा पुनर्उत्पादन गर्न सक्दैन, महिलामाथि निर्भर रहन्छ । प्रचलित शव्दावली "दम्पति" जसको अर्थ दोयम पति अर्थात पत्नीको पति र पतिको पत्नी हुन्छ ।[१] वेदमा उल्लेख गरिएअनुसार महिलाले गृहिणी पद, मातृ पद र सहचरी पदको जिम्मेवारी बहन गर्नुपर्दथ्यो । स्त्री नै घर हो भन्ने मान्यता थियो । महासरस्वती, महालक्ष्मी र महाकालीलाई ब्रह्मा, विष्णु र महेश्वरसहर मानिन्थ्यो । विश्ववारा, आत्रेयी, अपाला आत्रेयी, घोषा काक्षिवती, वागाम्भृणी, रात्रि भारद्वाजी, श्रदा कामायनी, शची पौलोमी, आदि वैदिक युगका मन्त्रद्रष्टा विदुषीहरू थिए, जसका मन्त्रहरू ऋग्वेदमा आज पनि छन् ।[२]

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१ सिवाकोटी, कैलाशकुमार (२०७७), पूर्वीय दर्शनभित्र मानव अधिकार, संवाहक : मानव अधिकार जर्नल, वर्ष ६, अङ्क १७, राष्ट्रिय मानव अधिकार आयोग, ललितपुर, पृ.४८

२ सिंह, सुमित्रा (२०७४) (संकलन) वेदकालीन विश्वको इतिहास, डीकुरा प्रकाशन, काठमाडौँ, १६२

बुद्धकालीन समाजसम्म आइपुग्दा समाज आफैंमा शोषक र शोषितमा विभक्त थियो । महिलाहरूको अवस्था विगतमा भन्दा थप खराब हुँदै आएको देखिन्छ । यस सम्बन्धमा आचार्य बलदेव उपाध्याय भन्नुहुन्छ: महिलाहरूको अवस्था वैदिक युगमा जस्तो समान उदात्त थिएन । वेदकालमा महिलाहरूलाई जति स्वतन्त्रता तथा आध्यात्मिकता थियो, त्यसमा क्रमशः ह्रास हुँदै आयो । उनीहरूलाई धार्मिक अधिकारबाट वञ्चित राखिएको थियो । बुद्ध स्वयम् महिलाहरूलाई शिक्षा दिने पक्षमा थिएनन् तर आमाको स्नेह र शिष्यको आग्रहको कारण त्यसो गर्नुपरेको थियो । स्त्रीहरूलाई बौद्ध समाज हीनत्वको सूचक मान्थ्यो । ...पुरुष शुरवीर, पण्डित बन्न सक्छ, ज्ञान हासिल गरी आचरण गर्न र पारमिताको अभ्यास गर्न सक्छ ।[३]

यसप्रकार बुद्धकालीन समाजलाई आदर्श मान्न सकिँदैन । त्यस समयमा थोरै धनीमानी थिए, बढी गरिब थिए । धनीको जीवन भोगविलासमा बित्थ्यो । राजाहरूमा पारस्परिक कलह थियो, युद्धको कारण धेरै नरसंहार हुन्थ्यो । ठुलो मात्रामा दासदासीहरू राखिन्थे, खेतीपाती र व्यापारमा उनीहरूको विशेष सहयोगी भूमिका भए पनि अवस्था राम्रो थिएन । स्त्रीहरू समाजमा तल्लो दर्जामा थिए, यसको कारण थियोः महिला भई जन्मनु ! बुद्धले समाजको विषमतालाई नजिकबाट नियाले, बुझे । यसको अन्त्यका लागि उनले नवीन मार्ग अवलम्बन गरे, जसमा उनलाई पूर्णतः भरोसा थियो ।[४]

बौद्ध दर्शनभित्र महिला अधिकारका सवालमा चर्चा गर्दा मानव अधिकारसम्बन्धी दस्तावेजहरूमा उल्लेख गरिएका प्रावधानहरूलाई हेर्नुपर्ने हुन्छ । समग्रतामा हेर्दा महिला मानव अधिकारभित्र राजनीतिक, आर्थिक, सामाजिक, सांस्कृतिक लगायतका अधिकारहरू पर्दछन् । विचार, अभिव्यक्ति प्रकट गर्न, सङ्घसंस्था खोल्न, त्यसमा आबद्ध हुन, मतदान गर्न, उम्मेदवार हुन तथा सार्वजनिक पद प्राप्त एवम् धारण गर्न पाउने लगायतका अधिकार राजनीतिक अधिकार मानिन्छन् । त्यसै गरी शिक्षा, स्वास्थ्य, सम्पत्ति, योग्यता, क्षमताअनुसारको काम, समान कामका लागि समान पारिश्रमिक, शरीर र स्वाधीनताको अधिकार एवम् जैविक रूपमा प्राप्त अधिकारहरूलाई आर्थिक, सामाजिक अधिकारको रूपमा लिइन्छ । यी अधिकारहरूलाई विशेष गरी महिलासँग सम्बन्धित मानव अधिकारसम्बन्धी घोषणापत्र, महासन्धि, इन्छाधीन आलेख, प्रस्ताव अदिमा उल्लेख गरिएको पाइन्छ । यसमा पनि महिला अधिकारको सम्मान, संरक्षण र परिपालन सम्बन्धमा निर्माण गरिएका महासन्धिका प्रावधानहरू महत्त्वपूर्ण मानिन्छन् । विशेषतः जीउ मास्नेबेच्ने तथा अरूको वेश्यवृत्तिको शोषणको दमनका लागि व्यवस्था भएको महासन्धि १९४९, महिलाको राजनीतिक अधिकारसम्बन्धी महासन्धि १९५२, महिलाविरुद्ध हुने सबै किसिमका भेदभाव अन्त्य गर्ने महासन्धि १९७९, महासन्धिको इच्छाधीन आलेख महिला मानव अधिकारसँग प्रत्यक्ष सम्बन्धित छन् ।

माथि उल्लिखित महासन्धिमा निहित प्रावधानहरूलाई महिलाविरुद्ध हुने सबै किसिमका भेदभाव उन्मूलन गर्ने सम्बन्धी संयुक्त राष्ट्रसङ्घीय महासन्धि, १९७९ (International Convention on the Elimination of All Forms of Discrimination against Women, 1979) मा समावेश गरिएको पाइन्छ । यस महासन्धिले विशेषतः निम्न अधिकारलाई आत्मसात गरिएको पाइन्छः

धारा ७ : राजनीतिक र सार्वजनिक जीवनमा सहभागिताको अधिकार

(क) निर्वाचनहरूमा मतदान र उम्मेदवार हुन पाउने अधिकार;

३ उपाध्याय, बलदेव (२०१४), बौद्ध-दर्शन मीमांसा, वाराणसी : चौखम्बा विद्याभवन, पृ.१८–१९

४ ऐ.ऐ.

(ख) सरकारी नीतिको निर्माण र कार्यान्वयनमा भाग लिन पाउने अधिकार र

(ग) सबै गैरसरकारी सङ्गठनहरू र संस्थाहरूमा भाग लिन पाउने अधिकार ।

धारा ८ : भेदभावबिना अन्तर्राष्ट्रियस्तरमा आफ्नो सरकारको प्रतिनिधित्व गर्न पाउने अवसर

धारा ९ : (क) नागरिकता प्राप्त गर्ने, परिवर्तित गर्ने र यथावत् कायम राख्न पाउने अधिकार र

(ख) सन्तानको नागरिकताको सम्बन्धमा समान अधिकार

धारा १५ : समानताको अधिकार

धारा १६ : विवाह र पारिवार बसाउँन पाउने अधिकार

समय, परिस्थिति एवम् सन्दर्भअनुसार मुद्दाहरूमा फेरबदल, नविन मुद्दाहरूको जन्मलाई स्वाभाविक रूपमा लिनुपर्दछ । अतः महासन्धिमा आधारित यी प्रावधानहरूलाई पनि यही कोणबाट हेर्नु, व्याख्या/विश्लेषण गर्नु वान्छनीय हुन आउँछ । महिला मानव अधिकारका सवाललाई बौद्ध दर्शनको कसीमा राख्दा सापेक्ष र निरपेक्ष रूपमा हेर्नुपर्ने हुन्छ । बौद्ध दर्शनलाई सुक्ष्म रूपमा अध्ययन गर्दा महिलाहरूका विविध सवालहरूमाथि चर्चा-परिचर्चा गरिएको पाइन्छ ।

हालको अवस्था र बुद्धले आत्मसात गरेका कतिपय कदमलाई हेर्दा महिला अधिकारको दृष्टिकोणबाट तत्कालीन समयमा चालिएका कदम बढी प्रगतिशील/उदार थिए भन्न सकिने आधार पनि भेटिन्छन् । अहिले बाहच र घरेलु रूपमा व्यवस्था गरिएका कतिपय प्रावधानहरू बुद्धको पालामा व्यवहारतः लागु भएको देखिन्छ । महिलाहरूको अलग भिक्षुणी सङ्घ स्थापना हुनु र त्यसमा ठुलो सङ्ख्यामा महिला भिक्षुणीको रूपमा आवद्ध हुन पाउनु अधिकारको दृष्टिकोणबाट सामान्य कुरा थिएन । यसलाई सङ्घसङ्गठन खोल्न, त्यसमा आबद्ध हुन, विचार, अभिव्यक्ति प्रकट गर्न पाउँने अधिकारको रूपमा हेर्न सकिन्छ ।

बौद्ध दर्शन के महिलाहरूप्रति उदार थियो ? किन बुद्धले सुरुमा भिक्षुणी सङ्घ स्थापना गर्न वा प्रवज्य दिन अस्वीकार गरे ? कतै आमाको कारण भिक्षुणी सङ्घ स्थापना भएको त होइन ? किन भिक्षुका लागि कम र भिक्षुणीका लागि बढी नियम पालना बनाइयो ? सुरुमा बुद्ध महिलाहरूलाई प्रव्रजित गर्नुपर्छ भन्ने कुरामा दुविधामा थिए, निष्कर्षमा पुगेका थिएनन् भन्नेमा दुईमत देखिँदैन । यस सम्बन्धमा अलग-अलग मत रहेको पाइन्छ । धर्म-विनयमा नारी-जातिको प्रवेशबाट उनीहरूको हित हुन्छ । महिला र पुरुष समान हुन्छन् । समाजमा महिलाहरूले फड्को मारेको सन्देश प्रवाह हुन्छ । महिला पनि तीक्ष्ण बुद्धिका हुन्छन् । विनय नियम पालनामा पछाडि पर्दैनन् । यी सकरात्मक पक्षबारेमा बुद्धलाई ज्ञान नभएको होइन तर व्यवहारिक पाटोप्रति पनि त्यत्तिकै सचेत रहेको पाइन्छ ।

महिलालाई प्रवज्या दिएपछि घरपरिवार, गृहस्थी भन्न पाईँदैन । भिक्षुहरूजस्तै एकान्तमा बस्नुपर्दछ । उनीहरूको रेखदेख भिक्षुहरूले गर्नुपर्ने हुन्छ । उपदेश दिने र अनुशासनको पालना गराउने जिम्मेवारी भिक्षुहरूको जिम्मामा हुन्छ । यसको लागि भिक्षु, भिक्षुणीकोमा र भिक्षुणी भिक्षुकोमा आवतजावत, कुराकानी र सरसङ्गत गर्नुपर्ने आवश्यकता हुन्छ । स्वाभावतः मन चञ्चल, हलचल एवम् कमजोर हुन सक्छ । अन्ततः शुद्ध ब्रह्मचार्य पालन गर्नमा बाधा-अवरोध पुग्न जाने सम्भवना रहन्छ । त्यसअलावा बुद्धत्व कठोर परिश्रमको फल हो ।

यसलाई बहुजन हिताय र बहुजन सुखाय बनाउने बुद्धको भित्री चाहना देखिन्छ । कतै महिलाहरूलाई प्रवज्य गर्दा यी कुराहरूमा बाधा पर्ने त होइन ? भन्नेतर्फ बुद्ध सोचमग्न भएको अनुमान गर्न सकिन्छ ।

यसअलावा सद्धर्म आयु छोटिने चिन्ताले बुद्धलाई छोएको बुद्धले आनन्दसँग व्यक्त यस भनाइले पनि सङ्केत गर्छ । यसबारेमा दहाल रोशन लेख्नुहुन्छ: आनन्द, यदि तथागतको धर्म-विनयमा महिलाले प्रब्रज्या नपाएका हुन्थे भने यो ब्रह्मचर्य चीरस्थायी हुन्थ्यो । सद्धर्म हजारौँ वर्षसम्म चल्थ्यो तर अब महिला प्रव्रजित भए, त्यसै ले अब चीरस्थायी हुनेछैन । सद्धर्ममात्रै पाँच सय वर्ष रहनेछ ।[५]

यी र यस्ता भनाइ बुद्धका होइनन्, पछि थपिएका हुन् भनिन्छ । बुद्धको महिलाप्रतिको सम्मान र व्यवहार हेर्दा यसलाई अन्यथा भन्न सकिन्नँ । बुद्धभन्दा अगाडि महावीर जैनले भिक्षुणी सङ्घ गठन भएको पाइन्छ, जुन तत्कालीन अवस्थामा सामान्य कदम थिएन तर सो सङ्घ विकृति र विसङ्गतिको घेराबाहिर रहन सकेन । यस परिदृष्यलाई बुद्धले राम्ररी नियालेका थिए । यसैको परिणाम पनि हुन सक्छ: सुरुमा बुद्ध भिक्षुणी सङ्घको गठनप्रति अनिच्छुक हुनु !

अन्ततः महाप्रजावती गौतमी र बुद्धका शिष्य आनन्द, त्यसैगरी आनन्द र बुद्धबिचको वार्तालाप, गौतमी लगायतका महिलाहरूको कठोर तपस्यालगायतका कार्यबाट बुद्ध भिक्षुणी सङ्घ गठनप्रति सकारात्मक बन्न पुग्छन् । राहुल सांकृत्यायनले उल्लेख गरेअनुसार बुद्ध कपिलवस्तुको न्यग्रोधारममा विहार गरिरहेको अवस्थामा महाप्रजापति गौतमीले बुद्धसमक्ष उपस्थित भई प्रवज्या ग्रहणको लागि पटक-पटक आग्रह गरे पनि बुद्धले व्यावहारिक कठिनाइ देखाइ त्यसमा स्वीकृति दिनुभएन । महाप्रजापति यसमा दृढ हुनुहुन्थ्यो । ठुलो सङ्ख्यामा रहेका महिलाहरूको नेतृत्व गर्दै वैशाली पुग्नुभयो । कपाल मुण्डन गरेर, काषाय वत्र धारण गरी, धूलोमैलो शरीर, सुन्निएका खुट्टा, छरपष्ट कपाल भएका महिलाहरूको अवस्था दयनीय थियो । महाप्रजापतिले महावनको कुटगारशालामा विहार गरिरहेका बुद्धसमक्ष प्रवज्याको लागि पुनः अनुरोध गरिन् तर बुद्ध सकारात्मक भएनन् । आनन्द यस विषयसँग पूर्ण परिचित थिए । उनले बुद्धलाई 'महिलाले बुद्धको धर्ममा श्रोतापत्ति फल, सकृदागामी फल, अनागामी फल र अर्हत फलको साक्षात्कार गर्न सक्छन कि सक्दैनन् ? भनी प्रश्न गरे । बुद्धको जवाफ थियो: सक्छन् । अन्ततः यही उत्तरको आधारमा महिलाहरूलाई सङ्घ प्रवेशको ढोका खुला गरियो । यसको लागि महिलाहरूले आठ नियम पालना गर्नुपर्ने भयो ।[६]

आठ नियम पालना गर्ने सर्तमा सङ्घमा महिला प्रवेश गर्ने ढोका खुला गर्न उनी राजी भएको पाइन्छ । ती विशेष आठ नियम यस प्रकार छन्:

(१) "उपसम्पदाले सय वर्ष जेष्ठी भएकी भिक्षुणीले आजमात्रै उपसम्पदा भएको भिक्षुलाई पनि अभिवादन, प्रत्युष्पस्थान, नमस्कार तथा आदर, सत्कार गर्नुपर्छ ।

(२) भिक्षुणीले भिक्षु आश्रम नभएको आवासमा वर्षावास गर्नुहुँदैन ।

(३) प्रत्येक पक्ष (पन्ध्र दिन) मा भिक्षुणीहरू भिक्षुहरूकहाँ गई उपासेथ गराउने गर्नुपर्छ ।

(४) वर्षावास गरिसकेकेको भिक्षुणीहरूले भिक्षु र भिक्षुणी सङ्घमा गई देखेको सुनेको, शङ्का लागेको कुरा प्रकाशमा ल्याउने गर्नुपर्छ, अर्थात दृष्ट, श्रुत, परिशंकितको हिसाबले पवारणा गर्नुपर्छ ।

५ दहाल, रोशन (नभएको), बुद्ध दर्शन (बौद्ध जीवन कसरी जिउने), काठमाडौँ : पाँच पोखरी प्रकाशन गृह, पृ.१६१

६ सांकृत्यायन राहुल (१९९५), बुद्धचर्या, दिल्ली: सम्यक प्रकाशन, नई दिल्ली, पृ.११५–११८

(५) गरु-धम्म (सङ्घादिसेसादि दोष, पाप कर्मको दोष) मा परेको भिक्षुणीले दुवै सङ्घमा गई एक पक्षसम्म भूल स्वीकारी बस्नुपर्छ (मानात्मना पालन गर्नुपर्छ ।

(६) दुई वर्षसम्म शिक्षा पालन गरिसकेकेकी नारीले भिक्षु र भिक्षुणी दुवै सङ्घसभामा गई उपसम्पदा माग्नुपर्छ ।

(७) भिक्षुणीले केही गरे पनि भिक्षुलाई निन्दा, उपहास गर्नुहुँदैन ।

(८) आजैदेखि भिक्षुणीहरूले भिक्षुहरूलाई केही भन्न नपाउने तर भिक्षुहरूले भिक्षुणीहरूलाई जे पनि भन्न पाइने भयो ।"[७]

यसबाहेक भिक्षुणी विनयका लागि बुद्धले ३११ र भिक्षु विनयका लागि २२७ उपनियम निर्माण गर्नुभएको छ । भिक्षुणीका लागि बनाइएको नियममा गर्भवतीलाई प्रवज्याको लागि निषेध गरिएको पाइन्छ । यी आठ नियम र ३११ अन्य नियमलाई हेर्दा बुद्ध महिलाप्रति कठोर भएजस्तो देखिन्छन् । कपिपय नियम विभेदयुक्त देखिन्छन् भन्ने कुरामा बुद्ध अनविज्ञ थिए भन्ने होइन । यी सबै नियम जानजान बनाइएको थियो भन्न सकिन्छ । अनुशासन, इन्द्रीय संयम्, चारित्रिक शुद्धता, कायम, मानसिक शान्ति, द्वैष, क्लेषको अन्त्य आदि पक्षलाई विचार गरिएको थियो भनी अनुमान लगाउन सकिने प्रशस्त आधारहरू देखिन्छन् । आठ नियमप्रति मौद्गल्यायनले हाँस्दै प्रतिक्रिया दिएका थिए: यी आठ नियम त सर्वथा भेदभावपूर्ण छन् । जवाफमा सारिपुत्र भन्छन्: यी नियम त भिक्षुणीहरूका लागि ढोका खोल्नका लागि मात्रै हुन् । यिनको उद्देश्य भेदभाव बनाइराख्नु होइन, बरु भेदभाव समाप्त गर्नु हो । आनन्दले आठ नियम पालना गर्ने हो भने प्रवज्य दिने खबर सुनाएपछि माता गौतमीले यी आठ नियम त हामी सङ्घमा प्रवेश गर्ने द्वार हुन् भनी प्रतिक्रिया दिएको पाइन्छ । यी सबै पक्षलाई मनन् गर्दा स्पष्ट हुन्छ: यो एक किसिमले प्रवेश परीक्षा थियो भनी अनुमान गर्न सकिन्छ । महिलाहरू सङ्घमा छिरेपछि अवरोध वा व्यवधान भएको पाइँदैन ।

यसको अर्थ भिक्षुहरूलाई स्वछन्दता वा उन्मुक्ति प्रदान गरिएको थियो भन्ने होइन, उनीहरूलाई पनि नियमको दायरा तोकिएको थियो । महिलाप्रति बुद्धको दृष्टिकोण वा हेराइ कस्तो थियो भन्ने बुझ्न बुद्धले भिक्षुहरूलाई महिलाप्रति गर्नुपर्ने व्यवहारको सम्बन्धमा शिष्य आनन्द र बुद्धबिचको निम्न कुराकानीबाट पनि प्रष्ट हुन्छ:

– भन्ते ! आइमाई (स्त्री जातिहरू)-सित कसरी व्यवहार गर्ने ?

– आनन्द, नहेर्ने

– हेर्नै परेमा कसरी व्यवहार गर्ने ?

– कुराकानी नगरकन ।

– कुराकानी गर्नुपरेमा ...?

– स्मृतिमा होस राखी बस्नुपर्छ ।

– तथागतको शरीरलाई हामीले के गर्नुपर्छ ?

– शरीर पूजा गर्नेतर्फ नलाग । सारत्थ (सच्चा पदार्थ) का लागि प्रयत्न र उद्योग गर्नुपर्छ । यसका लागि अप्रमादी, उद्योगी र संयमी भएर बस्नुपर्छ ।[८]

७ मानन्धर, नानीमैयाँ (२०६३), नारीप्रति बुद्धका देन, श्री विश्वमान बज्राचार्य परिवार, तानसेन, पृ..१५–१६

८ कोण्डन्य (२०६०) (सम्पादन तथा संयोजन), परियति: द्वितीय प्रवेश शिक्षा, पाटन : नेपाल बौद्ध परियति शिक्षा परिषद्, पृ.३६१

भिक्षुणी सङ्घको ढोका कुनै जाति, धर्म, सम्प्रदाय विशेष वा आर्थिक हैसियतमा जो-कोहीका लागि पनि खुला थियो । यसभित्र महाप्रजापति गौतमी, प्रकृतिजस्ती चण्डालिनी, अम्बपालीजस्ती नर्तकी सबै अटाएका थिए । सापेक्ष रूपमा हेर्ने हो भने यो कार्य चानचुने क्रान्ति थिएन, ठुलै तर सकारात्मक विद्रोह थियो ।

माता मितं सके घरे अर्थात घरमा साच्चिको साथी आमा हुन् ।[९]

नारी पनि पुरुषभन्दा श्रेष्ठ हुन सक्छे

एक पटक बुद्धसँग श्रावस्तीको जेतवनमा विहार गर्ने क्रममा राजा प्रसेनजितलाई "मल्लिकादेवीले छोरी जन्माइन्" भनी एक पुरुषले सुटुक्क भनेको थियो । प्रसेनजित् कोशल राजाको मन खुसुक्क भएको बुझी त्यसबेला भगवान्ले निम्न गाथा सुनाउनु भयो:

(१) **"इत्थीपि हि एकच्चिया, सेय्या पोस जनाधिप ।**

मेधावी सीलवती, सस्सुदेवा पतिब्बता ॥"

(२) **"तस्सा यो जायति पोसो, सूरो होति दिसम्पति ।**

तादिसा सुभगिया (स्याम र रोमनमा : 'सुभरिया' ।) पुत्तो, रज्जं पि अनुसासती'ति ॥"

अर्थ:

१. "जनाधिप ! यहाँ कुनै कुनै स्त्री बुद्धिमानी, शीलवती, सासुससुरालाई देव समान मान्ने तथा पतिव्रता भई पुरुषभन्दा पनि श्रेष्ठ हुन सक्छे ।"

२. "त्यस्ती स्त्रीबाट जुन सन्तान जन्मिन्छ ऊ सूर-वीर तथा दिशाप्रमुख पनि हुनसक्छ । त्यस्ती सौभाग्यवतीको बालकले राज्यअनुशासन् पनि गर्न सक्छ ।"[१०]

यसको अर्थ हो: बुद्धको चिन्तन लैङ्गिक विभेदसँग मेल खाँदैनथ्यो । कुनै पनि राज्य, व्यवस्था वा शासन-प्रणाली त्यतिखेर सबल, सक्षम र समृद्ध हुन्छ, जब यहाँ महिलाहरूको उचित सम्मान र सुरक्षा हुन्छ । यस सम्बन्धमा अजात शत्रुका मन्त्रीलाई उनका विरोधी वैशालीका लिच्छविहरूको शासनतन्त्रको प्रशंसा गर्दै त्यसमा बुद्धले महिलाहरूलाई जबरजस्ती नगर्नुलाई पनि उल्लेख गर्नुभएको छ ।[११]

बुद्धकालीन समाजमा दासदासी राख्ने, दाइजो दिने प्रचलन अधिक थियो । अनाथपिण्डिक महाजनको घरमा 'पूर्णा' (पूर्णिका) भन्ने दासी थिइन् । भान्सा, सरसफाई, नदीबाट पानी ल्याउनु उनका नियमित कार्य थिए । सदाझैँ एकदिन बिहान पानी लिन जाँदा एक ब्राह्मण चिसो पानीमा थर्थर काम्दै नुहाइरहेका थिए । यो देखी पूर्णिकाले सोधिन –"मेरो काम नै पानी बोक्ने हो, सर्दीगर्मी भन्न पाइँदैन काम गरेन भने खान पनि पाइन्नँ र दण्डको सहभागी हुनुपर्छ । हे ब्राम्हण ! हेर्दा त साच्है चिसो लागेजस्तो लाग्यो । तर किन यसरी पानीमा पसेको ? यस्तो चिसो पानीमा पसेर नुहाउनु तिम्रो काम हो ? यो काम नगर्दा कसैले दण्ड दिन्छ कि के हो ?"

९ भिक्षु अश्वघोष (२०७४), (ले.) वीर्यवती गुरुमाँ (अनु.), असल शिक्षा (भाग १४), २०७४, भिक्षु अश्वघोष संघ नायक ध्यानकुटी विहार, काभ्रे, पृ.६

१० भिक्षु अमृतानन्द (२०३९), बुद्धकालीन श्रावक चरित्र, (भाग २) काठमाडौँ, पृ.१११ https://www.anandabhoomi.com/uploads/buddhakalin_files/pdf/Shrawak%20Charit%20Vol%202.pdf.

११ सांकृत्यायन राहुल महापंडित (२००९), महामानव बुद्ध, सम्यक प्रकाशन, नई दिल्ली, पृ.८५

ब्राम्हण–"म यहाँ किन नुहाइरहेको भन्ने कुरा तिमीलाई राम्रोसँग थाहा छ तर पनि सोध्यौ । पाप पखाल्न र धर्म कमाउन यसरी नुहाउनु पर्छ । सानो मान्छे होऊन् वा ठुलो, जानीजानी गरिएका पापहरू यसरी नुहाउँदा पखालिन्छ ।"[१२]

यसरी सवालजवाफ हुँदै गएपछि पूर्णिकाले भनिन–"नदीमा यसरी नुहाउँदैमा पाप पखालिने हो र ब्राम्ह्ण ? कसले भन्यो यस्तो कुरा ? नदीमा नुहाउँदैमा पापकर्म पखालिने हो भने माछा, भ्यागुता सबैको पापकर्म पखालिन्थ्यो होला, सोझै सुगति पुग्थे । यसरी नुहाउँदैमा पापकर्म पखालिने भए त हत्या, हिंसा, चोरी, ठगी आदि कर्म गर्नेहरूले गरी नै रहँदा हुन्थ्यो होला । एकपल्ट नदीमा आएर नुहाए सबै पाप पखालिन्थ्यो, होइन र ?"[१३]

ब्राम्हण नाजवाफ थिए । यो उनको लागि पहिलो र अप्रत्यासित प्रश्न थियो । यतातिर कहिल्यै सोचेका पनि थिएनन् । त्यसपछि उनले पूर्णिकालाई अब मैले के गर्नुपर्‍यो भनी सोधिसकेपछि जवाफ दिइन्–पापकर्मबाट यति साह्रो डर लाग्छ भने किन पाप गर्नु, नगरी बस्नुहोस् । शील पालना गर्नुहोस् । कसैको हानि नगर्नुहोस् । मलाई त धेरै थाहा छैन, एकपटक बुद्धलाई भेट्नुहोस् । ब्राम्हणले घत परेको यस कुरालाई व्यापक प्रचार गरे । यो कुरा अनाथपिण्डकको पनि कानमा पर्‍यो । उनी असाध्यै खुसी भए । यसअघि पनि एकदिन बुद्ध जेतवन विहारबाट निस्कन लाग्दा अनाथपिण्डिक महाजन भगवान्लाई रोक्न असमर्थ भएको अवस्थामा पूर्णा दासीले पञ्चशील पालन गर्ने कबुल गरी भगवान्लाई रोक्न सफल भएकी थिइन् । पूर्णाको तीक्ष्ण बुद्धिको कदर गर्दै महाजनले दासीबाट मुक्त गरी पुत्रीको स्थानमा राखिदिए । त्यसपछि उनले प्रवज्या लिई भिक्षुणी बनी अर्हत् बनिन् । आफूले ऋद्धि र दिव्यश्रोतमा अधिकार सम्पन्न भएको कुरा बुद्धलाई बताइन् । उता सोत्थिक ब्राम्हण पनि अर्हत् बन्न सफल भए । तत्कालीन अवस्थामा दासदासी, सैनिक, ऋणीलाई भिक्षु र भिक्षुणी बन्न निषेध थियो । यसले दासीमा पनि विशेष क्षमता हुन्छ । मालिकले पनि विस्तारै कुरा बुझ्छन् र सत्मार्गमा लाग्छन् भन्ने सन्देश प्रवाह गरेको छ ।

सुमुत्तिका सुमुत्तिका साधुमुत्तिकाम्हि मुसलस्स

अहिरिको मे छत्तक वा पि उख्खलिका मे देडडुभं वा ति ॥२३॥

ओहो म मुक्त नारी हुँ । मेरो मुक्ति कति धन्य छ, मेरो दरिद्र वा गरिबी अवस्थामा साना-साना भाँडाकुँडाहरू, जसबिच म फोहोरी भएर बस्थेँ र मेरो निर्लज्ज पति मलाई ती वस्तुहरूभन्दा पनि तुच्छ ठान्दथ्यो, जसलाई ऊ आफ्नो जीविकाको आधार बनाउथ्यो ।[१४]

त्यसैगरी महिलाको विद्धताको सम्बन्धमा बुद्धले भन्नुभएको छ:

नहि सब्बेसु ठानेसु, पुरिसो होति पण्डितो ।

इत्थिपि पण्डिता होति, तत्थ तत्थ विचक्खणा ॥

नहि सब्बेसु ठानेसु, पुरिसो होति पण्डितो ।

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१२ महर्जन, बसन्त (२०१४), बुद्ध र महिला, इन्साइट पब्लिकेशन प्रा.लि.काठमाडौँ, नेपाल, पृ.७८–७९

१३ ऐ.ऐ.७९

१४ आनन्द, श्रीकृष्ण (२०१४), भगवान् बुद्ध एवं धम्म सार : जोरबाग लेन, हिन्द पाँकेट बुक्स प्राइवेट लिमिटेड, पृ.७७

इत्थिपि पण्डिता होति, लहुं अत्थ विचितिन्का ॥

सबै ठाउँमा पुरुषमात्र पण्डित हुँदैनन्, स्त्री पनि पण्डित्नी हुन्छन् । त्यस ठाउँमा विचार शक्ति पुऱ्याउने हुन्छन् ।

सबै ठाउँमा पुरुषमात्र पण्डित हुँदैनन्, स्त्री पनि पण्डित्नी हुन्छन् । क्षणभरमै विषय परिस्थितिलाई बुझ्न सक्ने हुन्छन् ।[१५]

पारिवारिक दायित्व

अंगुत्तर निकायका अनुसार धर्मको बाटोमा लाग्नु पारिवारिक दायित्वबाट विमुख हुनु होइन । बौद्ध वाङ्मयमा परिवारलाई सुखी बनाउनु पनि महिलाहरूको अनेक दायित्वमध्ये एक हो भनी निर्देश गरिएको पाइन्छ । अंगुत्तर निकायमा एक असल गृहिणी आफ्नो पति उठ्नुभन्दा पहिले उठिसक्नुपर्ने र पति सुतेपछि मात्रै सुत्नुपर्ने, आज्ञाकारी हुनुपर्ने, पतिको अनुकूल व्यवहार गर्नुपर्ने, प्रियभाषिणी हुनुपर्ने कुराहरू उल्लेख गरिएको पाइन्छ । त्यसैगरी, मातापिता एवम् श्रमण ब्राह्मणलाई आदरसत्कार गर्ने, उनीहरूप्रति गौरव गर्ने, पतिको काम चाहे ऊनको होस् वा कपासको त्यसमा दक्ष हुनुपर्ने, आलस्यरहित हुनुपर्ने र उपायकौशलले पूर्ण हुनुपर्ने, नोकर चाकरको कामको सुपरिवेक्षण गर्ने, रोगीहरूको सेवा गर्ने, पतिले कमाएर ल्याएको धन सुरक्षित राख्ने, त्यसमा धोका नदिने, चोरी नगर्ने, मादक पदार्थको सेवन नगर्ने जस्ता कुरा पत्नीको पारिवारिक दायित्वमा राखिएको छ ।[१६]

एक पटक बुद्ध अनाथपिण्डिककोमा प्रवचन दिइरहेको समयमा उनीकी बुहारी सुजाताले सेवकहरूलाई गाली गरिरहेकी थिइन् । गालीयुक्त आवाज सुनेपछि बुद्धले प्रवचन रोकी सुजातालाई पत्नीहरूका बारेमा निम्न कुरा बताउनुभएको थियो:

- वन्धक भार्या: क्रोधी, पतिको अहित गर्ने, नोकरचाकरलाई कुट्ने,
- चौर भार्या: पतिले कमाएको धन चोर्ने वा चोर्ने इच्छा राख्ने,
- मालिकनी भार्या: काम नगर्ने, अल्छी, अधिक खाने, कठोर, दुष्ट, कटु वचन बोल्ने,
- माता भार्या: माताले झैं पतिको रक्षा गर्ने, सर्वदा पतिको हित गर्ने, पतिले कमाएर ल्याएको धनको रक्षा गर्ने,
- भगिनी भार्या: पतिप्रति गौरव गर्ने, लज्जाशील र पतिको वशमा रहने,
- सखी भार्या: पतिलाई देख्दा अति मिल्ने पुरानो साथीलाई भेटेझैं प्रशन्न रहने, कुलीन, शीलवती,
- दासी भार्या: क्रोध नगर्ने, शान्त, राम्रो चित्त भएकी ।

परिवार बनाउने र बिगार्नेमा महिलाको ठूलो भूमिका हुन्छ । त्यसैले, कुनै पनि महिलाले उपर्युक्तमध्ये पहिला तीन :बन्धक भार्या, चौर भार्या र मालिकनी भार्याका अवगुणलाई छोडेर अन्य चार प्रकारका भार्यामध्ये कुनै एकको मात्र सुगुण भए पनि गृहस्थ जीवन सुखमय तरिकाले चल्ने कुरा बुद्धले बताउनुभएको छ ।[१७]

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१५ भिक्षु अश्वघोष महास्थविर (२०६५), बौद्ध जगतमा स्वास्थ्य सेवा, धर्मकीर्ति बौद्ध अध्ययन गोष्ठी, धर्मकीर्ति विहार, काठमाडौं, पृ.५१

१६ पौडेल, शारदा (२०१९), लुम्बिनी प्रभा : बौद्धधर्मको उन्नयनमा महिलाको भूमिका र दायित्व, अङ्क ४, लुम्बिनी बौद्ध विश्वविद्यालय, केन्द्रीय विश्वविद्यालय, रुपन्देही, लुम्बिनी, पृ.१४६ (https://lbu.edu.np/lbupublications/)

१७ ऐ.ऐ.

बुद्ध दर्शनले श्रीमान र श्रीमतीले आपसमा निर्वाह गर्नुपर्ने कर्तव्यको बारेमा पनि उल्लेख गरिएको छ । विनय सुत्तमा यस सम्बन्धमा विस्तृत रूपमा चर्चा गरिएको पाइन्छ । समग्रमा दुवैले गर्नुपर्ने कर्तव्यलाई निम्नानुसार उल्लेख गर्न सकिन्छ:

स्वास्नीप्रति लोग्नेको कर्तव्य

(१) सम्मान गर्नु,

(२) अपमान नगर्नु,

(३) अतिचार नगर्नु,

(४) ऐश्वर्य प्रदान गर्नु,

(५) अलङ्कार प्रदान गर्नु ।

लोग्नेप्रति स्वास्नीको कर्तव्य

(१) कामकाज राम्ररी गर्नु,

(२) परिजन (सहयोगी) वशमा राख्नु,

(३) अतिचारिणी नहुनु,

(४) सम्पत्तिको रक्षा गर्नु,

(५) निलालसी भई काम गर्नु ।

यी माथि उल्लिखित प्रावधानहरूलाई हेर्दा बौद्ध दर्शनले महिला सवालका विविध पाटालाई केलाइएको छ । सुरुमा बुद्ध भिक्षुणी सङ्घ गठनप्रति अनिच्छुक देखिनु, भिक्षु सङ्घको अनुपातमा भिक्षुणी सङ्घप्रति बढी र विभेदमा आधारित नियम निर्माण गरिनुजस्ता कोणबाट आलोचना गरिएको पाइन्छ । यी पक्षलाई सापेक्ष रूपमा हेर्नुपर्ने हुन्छ । यस सम्बन्धमा बपटको भनाइ उल्लेख गर्दै राजेन मानन्धर लेख्नुहुन्छ: बिसौं शताब्दीको मान्यताका आधारमा उहाँको मूल्याङ्कन गर्नुहुँदैन भन्ने कुरा सम्झनु आवश्यक छ । उहाँको समयमा त्यो एउटा ठुलो अग्रगामी कदम थियो । त्यसैले नै धार्मिक जीवनमा महिलाहरूले अर्हतको जस्तो सर्वश्रेष्ठ उपाधि हासिल गर्न सके जसले महिलाहरू पनि पुरुष जत्तिकै शिक्षित र विद्वान् हुन सक्छन् भन्ने कुरा देखाउँछ ।[१८] थेरीगाथामा गरिब, अपहेलित, असहाय, मानसिक रूपमा विक्षिप्त, नि:सन्तान, वेश्या, धनी, समाजसेवी, प्रतिष्ठित, महारानीसम्मको भिक्षुणी सङ्घमा बिनाविभेद उपस्थिति देखिन्छ ।

कनिष्ट भिक्षुको मातहतमा ज्येष्ठ भिक्षुणीले रहनुपर्ने नियमलाई भिक्षु सङ्घ जेठो भनी लिनुपर्दछ । कतिपय नियम शारीरिक बनौट र त्यसको आधारमा निर्मित हुन् भन्नुमा अन्यथा नहोला । मूल कुरा भिक्षुणी सङ्घ गठनपश्चात् विभेदको अवस्था रहचो/भन्ने पक्ष महत्त्वपूर्ण हो । समग्रमा हेर्दा यस दर्शनमा महिला र पुरुषलाई रथका दुई प्राङ्ग्राको रूपमा हेरिएको छ । विशेषत: महिला पनि बौद्धिक हुन्छन्, धर्म देशना, उपदेशको भूमिकामा पनि अब्बल मानिन्छन् । पुरुषसरको काममा संलग्न हुन्छन् । परिवार सञ्चालन, सेवासुश्रुवामा पनि

१८ मानन्धर, राजेन (२०७१), रूपान्तरमा महिला, अस्मिता प्रकाशन गृह, सञ्चार तथा स्रोत संस्था, काठमाडौं, पृ.१७८–१७९

उनीहरूको भूमिका विशेष हुन्छ । त्यसैगरी यस दर्शनमा लोग्ने र स्वास्नीको कर्तव्य एकसाथ उल्लेख गरिनुले पनि महिला अधिकारको सन्दर्भमा अधिकारमा मात्र सीमित नरही कर्तव्यमा पनि आधारित रहेको स्पष्ट हुन्छ ।

निष्कर्ष

वर्तमान अवस्थामा मानव अधिकारसम्बन्धी दस्तावेजहरूमा महिला अधिकारलाई महिला मानव अधिकार उल्लेख गरिएको छ । जसमा राजनीतिक, आर्थिक, सामाजिक, सांस्कृतिक अधिकारको प्रत्याभूति गरिएको पाइन्छ । यी अधिकारअन्तर्गत राजनीतिक अधिकारमा जीवन तथा सुरक्षा, कानुनको अगाडि समान व्यवहार, विचार र अभिव्यक्ति, मर्यादा एवम् सम्मान, निर्वाचनमा उमेद्वार हुने, मतदान गर्ने, निर्वाचित हुन पाउने आदिलाई जोड दिएको छ । आर्थिक, सामाजिक तथा सांस्कृतिक अधिकारमा बासस्थान, पेसाव्यवसाय, कामबापतको पारिश्रमिक, सामाजिक सुरक्षा, स्वास्थ तथा शिक्षा, विवाहलगायतका अधिकारको उल्लेख छ । यी अधिकारको अभ्यासबाट महिलाहरूको समग्र व्यक्तित्वको विकासको परिकल्पना गरिएको छ । त्यसैगरी यी अधिकारलाई बुद्ध दर्शनमा कुनै न कुनै रूपमा समावेश गरिएको छ । अझ बौद्ध दर्शनमा श्रीमान् र श्रीमतीको कर्तव्य निर्धारण गरिनुले दुवैप्रति पारिवारिक दायित्यको बोध गराएको पाइन्छ । भिक्षुणी सङ्घको निर्माण, कुनै पनि बिनाभेदभाव सङ्घमा प्रवेश एवम् अभ्यासलाई परिवर्तनको ठुलो फड्कोको रूपमा लिनुपर्दछ । महिला पनि पुरुषसरह बुद्धिमान हुने, उत्तम कार्यहरू गर्न सक्नेमा जोड दिएको पाइन्छ । भिक्षुणी सङ्घ निर्माणमा बुद्धको अनिच्छा, भिक्षुको तुलनामा भिक्षुणीहरूप्रति बढी एवम् असमान व्यवहारलाई सापेक्ष एवम् सही रूपमा हेरिनुपर्छ । निर्माण गरिएका विनयलाई तत्कालीन समाजमा महिलाप्रति हेरिने दृष्टिकोण, व्यवहारिक रूपमा व्याख्या गरिनु उपयुक्त हुन्छ । प्रजापति गौतमी, यशोधरा, सुजाता, अम्बापाली, विशाखा, चिञ्चा, मागन्धी, चण्डालिका, पूर्णिका, कृषा, सुन्दरी, नन्दा, पटचरा, सोमवती, मल्लिकादेवीसम्मका महिलाहरू प्रवजित भएको पाइन्छ । अतः बुद्ध दर्शनले महिला अधिकारलाई सम्मान, संरक्षण एवम् प्रवर्धन गरेको छ भन्नुमा अन्यथा नहोला ।

Federalism and Human Rights

Khushee Prasad Tharu, PhD.

Abstract

Federalism is a mechanism for reconciling the diversity of states with the desire for national unity; promoting democratic participation by reserving meaningful powers to the regional level and fostering cooperation among governments and legislatures for the common good. Aim and objectives, texts and contexts of each federalism vary from country to country, however, each federal system has made a greater contribution to the maximization of civil liberties by providing double checks on government and balancing the power, as well as accommodation of diversity by a system of self-rule and shared rule. By keeping civil liberty at the heart, federalism is inherently linked with human rights and fundamental freedoms. Federalism is identity sensitive but gender-neutral. The character of a federal system, rather than the federal system itself, matters for the political empowerment of women. Since the federal system provides a system of multilevel governance, it offers an opportunity for political participation and representation for women and marginalized sections of society as well. By recognizing the principle of inclusion as a key constitutional value, that is imperative and mandatory across all levels of government, Nepalese federalism brought together a new value in a federal system. By devolving power to the local level, the federal system also offers a venue for realizing human rights locally.

Key Words: Federalism, Human Rights, Local Governments, Inclusion, Constitution, Freedom.

Background

The Constitution of Nepal establishes three levels of government: the federal level, the provinces, and the local level (villages and municipalities). The basic structure of the federal democratic republic of Nepal shall be the Federation, Province and local levels. [1] These tiers have their own legislative, executive, and fiscal powers. By establishing the local level as the third tier of government, Nepal follows the example of newer Federations, most prominently in South Africa. In addition, the Constitution maintains a limited role for the districts and envisages the possibility of creating Special, Protected, or Autonomous Regions.

Understanding federal system

Federalism is a system of government in which the same territory is governed by two or more levels of government. Generally, a national government is responsible for the governance of the whole country whereas the state governments are limited to state territory. The power of each

Government is divided but also shared, hence, living together and working together in mutual cooperation is essential. Attributed to legislative and executive power, the states are guaranteed some level of autonomy to realize self-rule in their province and the power to co-participate in the central decision-making process. This is why federalism is known as a system of unity in diversity.

Alexander Hamilton wrote, that federalism is "the constitutional principle on which the federation is based in the division of power between two levels of government: the federal government and the states. These two powers are independent but coordinated so that the federal government, which has jurisdiction over the federation's entire territory, has a minimum of powers indispensable for political and economic unity while the states, each with jurisdiction over their own territory, have the remaining powers."[2] The essence of federalism is a division of power under which federal government and state government operate.

K.C Wheare defined federalism or federal government, as "the method of dividing power so that general and regional governments are each within a sphere co-ordinate and independent".[3] The definition underscores that federalism is a method of dividing powers between national and regional governments; the power is divided in such a way that each government is coordinate and independent. According to him, *coordinacy* and independence of each government is a hallmark of federalism. Independence was later brought within the purview of political autonomy.

Daniel Elazar defined "federalism as constitutionalized power-sharing through systems that combine self-rule and shared rule."[4] Considered as self-rule and shared rule, "federalism involves some kind of contractual linkage of a presumably permanent character that (1) provides for power-sharing, (2) cuts around the issue of sovereignty, and (3) supplements but does not seek to replace or diminish prior organic ties where they exist."[5]

Nepal is defined as a federal democratic country.[6] In the Nepalese federal arrangement, state power is divided into the federation, Province, and Local level, and each government operates distinctly according to the principle of cooperation, coordination, and coexistence. The key ingredients of the federal system in Nepal are as follows:[7]

- The Source of power for all levels of the state is the Constitution of Nepal, therefore powers of all levels of the state are limited by the constitution. The center is entitled to the residuary power as well. Legislative powers of all levels of government are co-ordinate and independent. However, legislative competence on the matters of the concurrent list is based on a hierarchy of government.
- The interrelation between Federation, State, and local levels is based on the principles of cooperation, co-existence, and coordination. However, the Federation has the power to give instruction to the provinces on matters of national interest.
- The ambition of federalism is to enhance national unity by ensuring inclusiveness and equal participation.

Nepalese federalism needs a new definition that represents its structure and character. In the Nepalese context: “Federalism is a political process of dividing powers into multi-level governance who operate in the constitutional spirit of cooperation, coordination, and coexistence."[8]

Federalism received a growing conviction that it enables a country to have the best of both worlds—those of shared rule and self-rule, coordinated national government and diversity, creative experiment, and liberty. Federalism is not merely about the distribution of power between the central and regional governments. Behind such distribution is a vision of securing and ensuring the creation of a particular form of the political situation which reflects and acknowledges diversity. Federalism is not an ideology, it's a pragmatic and prudential compromise combining shared rule on some matters with self-rule on others.[9]

General Trends

In the study of federalism in the United States, Switzerland, Canada, German, India, South Africa, and Nepal, the following trends can be deducted:[10]

Each federalism is homegrown, responding to the ground political reality of the nation. In the United States, federalism was born in the course of the war of independence against British imperialism. Federalism was a means for defense as well as the unity of states. In Canada, federalism was welcomed for unity in diversity against external aggression however with approval from British Empire through British North America Act. India adopted federalism during its war against British rule however text of federalism has its root in the Government of India Act of 1935. Federalism was born in India along with the unionization of states as well as the protection of diversity. Similarly in Switzerland, a confederation was created for the unity of defense against external aggression as well as to save internal sovereignty from fear of a unitary system that was experienced by French imperialism. Germany, which has its basic root in the creation of the German Empire, adopted federalism for defense against external aggression and for democracy against totalitarianism which was experienced during Nazi rule. South Africa adopted federal promises as a problem-solving device to accommodate the different demands during the negotiation process against apartheid rule. Nepal adopted federalism for ending discrimination and for diversity in unity which was a tool for restructuring the state. Each federalism has different reasons, aims, texts, and contexts at birth.[11]

The aims and objectives, texts, and contexts of each federalism vary from country to country. However, all federalism has made a greater contribution to the maximization of civil liberties by providing double checks on government and balancing the power, as well as accommodating diversity by a system of self-rule and shared rule. Federalism is a mechanism for reconciling the diversity of states with the desire for national unity; promoting democratic participation by reserving meaningful powers to the regional level, and fostering cooperation among governments and legislatures for the common good.[12]

Federalism is a sovereign political process. Since federalism is adopted in response to particular needs of a society, the distribution of power corresponds to the needs. There are no ideal

prescriptions for the distribution of power. However, it is clear that federalism aimed to make a stronger union as well as greater devolution and combined them for national unity. Distribution of power is attached to the aims of federalism, and a strong center or strong province and strong local level is the outcome. Nepalese federalism, with recentralizing elements, has made a strong province and local level. The arrangement of a strong center or strong province has, as a principle, no relation with the process (aggregation or disaggregation) of creation of a federal system.[13]

Federalism in the US and Switzerland was dual at birth. Federalism in Canada, India, Germany, and South Africa was cooperative from birth. However, there is a growing tendency for cooperation in each federalism due to growing interdependence and cross-state problems. The United States developed the new federalism with values of cooperation, whereas Switzerland, Germany, India, and South Africa made it mandatory under the constitution. Therefore, all federalisms are cooperative, variations are only on the degree of cooperation. Dual federalism in a strict sense doesn't exist in the present world.[14]

In the United States, residuary power is located in states but also guarantees the supremacy of federal laws over state laws. In Germany, residuary power is allocated to States (Landers), however, it also guarantees federal supremacy over the Land laws. Swiss Constitution allocated residuary power to states (Cantons) but the supremacy of federal laws over cantonal laws. In these federalism, federal supremacy is somehow countered against the residuary power of states. Canadian constitution placed residuary power as well as federal supremacy to the Federation. Similarly, federal supremacy and residuary power both are allocated to the federation in India and South Africa. In these federalism, the Federation needs the power to keep national unity and combat the disintegration of states. 2015 Constitution of Nepal also allocated the residuary power to the Federal as well as guaranteed federal supremacy over provincial laws. Though, federal supremacy is a general principle of all federal systems, the location of residuary power differs from federation to federation.[15]

The scope of residuary power is limited. The center's power is increasing in the United States from the text or implied power or inherent power which means that space for the state's residuary power is decreasing. Similar principles are developed in Germany and Switzerland though not extensively. In India, Union's residuary cannot be invoked at the cost of the state's power and autonomy. Similar principles have been developed in Canada as well. Residuary power, whether it lies with the center or state, has been limited by legislative process or by judicial interpretation. There is a growing tendency to impose limits on residuary power. Residuary power can be invoked only as a last resort in all federalism.[16]

Each federalism has provided for an exclusive power of the center and states as well as concurrent power for both. In addition to concurrency in each federalism, the exclusive power of the center and states overlap with each other. It shows that overlaps are inevitable in each federalism. This is because some matters are indivisible to the center as well as states and need a common response, due to growing interdependence. Indeterminacy has become a fact in all federalism, however, the scope of indeterminacy varies due to response from the judicial interpretation or legislative

measures, or intergovernmental dialogue. Indeterminacy is rampant in Nepalese federalism.[17]

Federal supremacy on matters of the concurrent list is a general rule in all federalism, as is the case in the United States, Germany, Switzerland, and India. In a dispute between the center and states on a matter of concurrent list, federal law is supreme over state law. Nepalese federalism follows the same.[18]

National integrity and defense of the state is the responsibility of the center in the United States, Canada, Switzerland, Germany, and India. The central government in India has additional power to dissolve a state parliament in case it acts to jeopardize national integrity; that is also the case in Nepal. Internal secession or reorganization of the state is allowed but the power remains with the center. It is clear that in each federalism, notwithstanding the powerful center or powerful states, the center occupies the powers to combat disintegration.[19]

Federalism is a technique of balancing the common aspiration of people for self-rule and shared rule. Common aspiration has no limits and is not measurable. It is proved by the fact that state power in India is quite different from the United States or Switzerland and that states are dominated concerning power relations, however, Indian federalism is functional and viable. Therefore, the degree of self-rule and the shared rule are always attached to peoples' aspirations. Balancing of power is never perfect but always developing for perfection. Each federalism is for self-rule and shared rule, variation is only on the degree.[20]

The distribution of power in a federal system is a political process, without any limits, without prescription. However, there are some patterns of distribution of powers proven by experiences. It is clear that the matters relating to international relations (defense, coinage, immigration, interstate trade, etc.), economic union, and national concerns are allocated to the center whereas the matters relating to social affairs (health, education, social security, poverty alleviation) are assigned to states.[21]

Democracy is essential for the success of federalism. The countries which are included in the study: the United States, Canada, Switzerland, Germany, India, and South Africa, are practicing democracy. In fact, federalism is about deepening democracy in second tiers of government. Federalism and democracy go hand in hand. Practicing federalism against democracy results in disintegration, i.e. former Yugoslavia, USSR.[22]

Federalism is neutral to the political system of government, i.e. Presidential system or parliamentary system. We can observe that federalism is a success in the United States with a presidential system of government. It is also a success in Canada, India, and South Africa with a parliamentary system of government. It is also a success in Germany with the chancellery system and in Switzerland with consociation democracy. A political system of government is not an ingredient for federalism but democracy is.[23]

Interrelation of federalism and human rights ***(How human rights differ in the unitary model and federal model)***

Federalism was evolved either to protect liberty or to avoid tyranny or abuse of power. Swiss federalism was adopted for the accommodation of multicultural diversity and to achieve Swiss aspiration against anti-centralization. The core of American federalism was to protect individual liberty and avoid tyranny. For Canadians, the key reason to adopt federalism was 'unity in diversity' and to accommodate *bijuralism* in the land. German federalism is designed in a way to prevent abuse of power from the Federation and as a method of unity of the German Landers. Indian federalism reflects twin reasons: to unionize the provinces and princely states in India and to balance the provincial autonomy with the Union power. Nepal adopted federalism as a method of eliminating all forms of discrimination [24] by securing unity in diversity [25], and building an equitable society [26]. The motivation for the adoption of federalism in any country is either securing liberty or abuse of power which is the foundation for human rights.

Americans recognized human rights through the Declaration of Independence before they established the federal system. "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights; that among these are Life, Liberty and the pursuit of Happiness."[27] The governments were instituted to secure those rights. The Continental Congress (of thirteen colonies) adopted the Articles of Confederation, the first constitution of the United States, on November 15, 1776,[28] which together with the Declaration of Independence formed the first national compact of the United States of America. [29] The Articles of Confederation were replaced by the present United States Constitution on March 4, 1789[30] which is based on four political principles: republicanism, federalism, separation of powers, and check and balances.[31]

Federalism serves the American dreams of liberty by dividing sovereign powers among different levels of government, and by giving each level of government, state and national, substantial powers sufficient to allow each to monitor and check the abuses of the other.[32] In this scheme, Hamilton wrote, "a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself. '[33] "The accumulation of all powers... in the same hands," wrote Madison, "may justly be pronounced the very definition of tyranny."[34] To protect liberty, power must therefore be divided.[35] In the basic Madisonian model to which Americans are heirs, the purpose of federalism is clear: to protect liberty.[36] Life, liberty and pursuit of happiness was a key concern of American independence. The concept of separation of power and federalism was a means to secure the liberty of the people. Devolution protects and enhances individual liberties by diffusing and limiting government power more effectively than centralized alternatives. In the words of Justice O'Connor, in addition to the advantages of experimentation, competition, and self-government, "perhaps the principal benefit of the federalist system is a check on abuses of government power," which "ensures the protection of 'our fundamental liberties.'"[37]

There is no direct relationship between federalism and human rights as the relationship between federalism and democracy or between democracy and human rights. Human Rights cannot exist without democracy but human rights can be flourished even in unitary system. It does not necessarily need federal system to have better human rights record. The unitary system with democracy in European countries such as Denmark, Sweden, and France are such examples. Human rights record in Nepal before adoption of federalism in 2015 is not significantly less than human rights record after its adoption. The realization of human rights should not depend upon the federal or unitary form of government and equally good or bad human rights records could exist in both. However, federalism is a form of deepening democracy in multilevel government which provides more opportunity for representation and participation in potential benefit of marginalized groups.

A link between democracy and human rights stands established. But no such direct link gets established between federalism and human rights except through the medium of democracy which, is an essential condition of federalism. "The link between human rights and democracy and between democracy and federalism, however, establishes a link between human rights and federalism. We may say federalism is dependent on democracy and democracy is dependent on human rights, therefore, no federalism can exist without human rights."[38]

There is no apparent linkage between federalism and human rights, however, tyranny and federalism cannot go together. Tyrannical federalism is a self-contradiction. A federal-state must be democratic and a democratic state must respect human rights. Therefore, a federal-state must also respect human rights. To express it as a syllogism: a federal state is a democratic state; a democratic state respects human rights; therefore all federal states respect human rights.[39]

Division of power between distinct and autonomous governmental units inherently limits that power, and where the government is limited, individual liberty flourishes. Federalism purports to provide dual structural protections for liberty. On the one hand, devolution would ensure that the states "will always have the political capacity to function as alternative sources of authority and to resist incursion from without. A foundational proposition is that limits on government protect liberty—the less we are governed, the freer we are. Federalism is merely one element of a larger scheme of constitutionalism that protects individual liberty by institutionalizing a distrust of all governmental power.

A federal constitution, like the separation of power principles, reduces the risk of a concentration of power and the danger of arbitrary government. If diffusion of powers assures respect for human rights, then the division of powers between different levels of government is even greater assurance of respect for human rights than separation of powers. The totality of powers gets divided not only between different wings of the same government but also between different levels of government conscious of their identity, independence, and autonomy.

The key argument for securing human rights in a federal system lies in the diffusion of power into multilevel governance. There are good records of human rights in a unitary system as well,

however, it lacks the system of double security against an abuse of power by governments. Federalism protects liberty not by offering an opportunity for the continuous expansion of human rights protections, but by creating a system of dual agency in which the people appoint two agents, one state and one federal, to monitor and check the abuses and errors of the other.

State obligation to protect human rights

Human rights are entitlements of all human beings, irrespective of nationality, sex, age, national or ethnic origin, color, religion, language, or any other status. Human rights are held by all persons equally and universally. They are based on core principles like dignity, fairness, equality, respect, and autonomy. All human rights are universal, indivisible, interdependent, and interrelated.

International human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts, to promote and protect human rights and fundamental freedoms of individuals or groups. It makes governments accountable and foresees specific measures and sanctions that can be taken against the state that does not fulfill these obligations. Human rights issues are intimately linked to the state. Conceptually, human rights are standards about the way the state should treat society; even when the state does not directly harm individuals, human rights typically denote the state's obligation to guarantee human rights.

States, as the signatory to human rights conventions, have the obligation to respect, protect and fulfill the human rights that are included in the treaties. The obligation to respect means that States must refrain from interfering with or limiting the enjoyment of human rights. It is also described as a negative obligation, as the state has to abstain from violating human rights. The other two obligations include positive duties, which means that the state has to take action to deliver rights. The obligation to protect requires States to interfere to protect individuals and groups against human rights abuses by others, in particular private, actors. Obligation to fulfill means that States must take positive measures to facilitate the enjoyment of human rights.

Federalism and Gender Equality

Federalism in Nepal has its root in the general aspiration of ending discrimination, which is a unique value offered in a federal system. Ending discrimination seems an ever-reaching political goal in Nepal as discrimination is deep-rooted in overall society, irrespective of territorial cleavages. A key basis of discrimination is caste and gender, the remedy is not directly interlocked to state structure. Though federalism offers some space for political empowerment at all levels of government, it can hardly have the potential to cure widespread discrimination in society. Federalism is identity sensitive but gender-neutral. It is not discrimination specific but can be instrumental to ending discrimination. Ending discrimination needs socio-political transformation through a national policy. The proper cure of the problem is not federalism itself but inclusion enshrined in a federal system. As such principle of inclusion is a key constitutional value, mandatory and imperative across all levels of government and their machinery. Nepalese federalism is inclusion sensitive. This is a new value Nepal added to the federal system.

Scholars have argued over whether federal systems help or harm women in their pursuit of policies promoting gender equality. It is agreed that (1) Federal systems provide multiple access points for political activism at a minimum the two different levels, federation and state, (2) Federal systems decentralize power to more local levels, and (3) Federal systems generally involve multiple subnational entities.

A federal system provides multiple access points that can be of benefit to women to influence state policies as it allows for forum shopping: choosing the most hospitable venue for each issue. The multiple access points also facilitate multiple bites at the apple: if reform fails in its first attempt, it is often possible to try again quickly in a different forum. In a centralized system, on the other hand, only one venue may be available and that may make it difficult to try again for some time.

The devolution of power in federal systems to more local levels also has potential benefits for women for representation and participation in decision-making. As it offers more positions and therefore more opportunities for political participation. In addition, women find it easier to participate in politics at the local level, rather than at higher levels of government, for their family responsibilities and personal security. They face fewer obstacles in terms of party gatekeepers and campaign funding in local elections. To the extent that federal systems push policy-making power down to these lower levels, they increase women's access to such power. They also offer what is sometimes described as a ‘laboratory': if one state experiments with reform and it is successful, then other states are likely to follow suit. Based on these arguments, some scholars have suggested that federalism is helpful to women to expand women's representation and political participation in promoting gender equality. The fact that federal systems move policy-making down to more local levels can also be a double-edged sword for women as it federalizes the gender equality movement.

The general characteristics of federal systems create both potential opportunities and potential challenges from the perspective of gender equality. There has been little attention paid to the interaction between federalism and gender equality. Federalism, which is a method of the structure of the state, is inherently neither good nor bad for gender equality: it all depends on the merits of the federal system and the context in which they are applied. There are, nonetheless, some guiding principles about the designing elements that can make federalism more or less useful for promoting gender equality. As federalism is about managing diversity and devolution of power, there seems no direct connection between gender and federalism at the theoretical level. It requires extra measures to make it valuable for gender equality. It is, then, “the character of federal citizens, rather than the federal system itself, that could be inherently beneficial to gender equality.[40]

The Preamble of the Constitution has expressed commitment to creating an egalitarian society based on the principles of proportional inclusion and participation. The President and Vice-President of Nepal shall come from a different gender or social group.[41] Appointments in all federal Commissions and bodies shall be inclusive.[42] Inclusion is obligatory in the formation

of federal civil service.[43] Article 38(1) guarantees the rights of women including the right of participation on the basis of proportionate inclusion. Article 76(9) instructs that the Council of Ministers shall be formed on the basis of the principle of inclusion. Likewise, Article 168(9) provides for constituting the Provincial Council of Ministers on the basis of the principle of inclusion.

Table: Federal Parliament and Provincial Assembly Results (by social group)

Population group	HoR NA (2017) (2018)		Population share (2011)	Provincial Assemblies															
				Province 1		Madhes		Bagmati		Gandaki		Sudurpaschim		Lumbini		Karnali			
	%	%		%	Population share (2011)	%	Population share (2011)	%	Population share (2011)	%	Population share (2011)	%	Population share (2011)	%	Population share (2011)	%	Population share (2011)	%	Population share (2011)
Dalit	6.9	11.9	12.6	3.2	9.4	6.5	16.4	1.8	5.7	8.3	17.4	5.7	14.3	12.5	23.3	11.3	17.2		
Janajati	30.9*	22	28.6	48.4	46.7	4.7	9.6	43.6	53	36.7	42.3	13.8	19.2	7.5	13.5	3.8	3.5		
Khas Arya	42.5	55.9	31.2	35.5	27.7	3.7	4.8	53.6	37	55	37.1	52.9	28.7	77.5	62.2	69.8	59.9		
Madhesi[#]	16.4	8.5	14.8	6.5	7.7	72.9	51.9	0.9	1.8	-	0.5	9.2	15.3	2.5	0.3	-	1.7		
Muslim	3.3	-	4.4	3.2	3.6	9.3	11.6	-	0.7	-	0.7	4.6	7.0	-	0.2	-	0.2		
Tharu		1.7	6.6	3.2	4.1	2.8	5.3	-	1.6	-	1.7	13.8	15.3	-	0.4	15.1	17.3		
Women	***32.7***	***37.3***	***51.5***	***34.4***		***34.6***		***33.6***		***35.0***		***36.8***		***32.5***		***34.0***			

Source: Bipin Adhikari al. From Exclusion to Inclusion, Social Science Baha, Himal Books, at 99 (2022)

There is a total of 35924 political positions in Nepal to be filled through election in all levels of government. Among them, the Local Level occupies 35041 seats, Provincial Assembly occupies 550 (330 FPTP + 220 PR), and Federal Parliament shares 334 seats in total (275 seats of the House of Representatives and 59 seats of the National Assembly). As per the 2017 election results, Male occupied 21271 seats (59.21%) and females occupied 14653 seats (40.79%) of the total political positions. Women's representation in total positions sounds fairly good. At the local level, women's representation consists of 41%, whereas it is 34.36% in the provincial assembly. In Federal Parliament, women's representation held 32.72% (FPTP and PR) in the House of Representatives and 37.28% in the National assembly.

In Nepal, after the promulgation of the Constitution of Nepal (2015), the Head of State is Bidhya Devi Bhandari from 2017 till the date. However, no woman has become the Prime Minister yet, and neither has the chairperson of any political party. The Chief Minister in all Provinces is male and the Speaker of the House of Representatives and the Speaker of each Provincial Assembly are male. At the local level, 98 percent of chief positions – mayors and chairpersons – are filled by men and 98 percent of secondary-power positions – deputy mayors and deputy chairpersons – are filled by women.[44] It sounds that women's representation is still limited to subordinate positions.

Federalism, which is a structure of the state, is neutral to gender, however, a federal system can be made responsive to gender equality by its character. As mentioned above, it is the character of a federal system that makes it beneficial to women's equality. Nepal's federal system is inclusion sensitive basically inclusive of women which is proved by the election results of all levels of the state.

Local Government

Local government is commonly defined as the lowest tier of public administration within a given State. In unitary states, the local government usually comprises the second or third tier of government, whereas, in federal States, it is constituted as the third or sometimes fourth tier of government. Local government aims at bringing government to the grassroots and enabling citizens to participate effectively in the making of decisions affecting their daily lives. As the level closest to the citizens, local government is, in principle, in a much better position than central government to deal with matters that require local knowledge and regulation on the basis of local needs and priorities.[45]

The degree of self-government enjoyed by local authorities can be regarded as a key element of genuine democracy. In this regard, political, fiscal, and administrative decentralization is essential for localizing democracy and human rights. It should be borne in mind that democracy is not possible without respect for human rights and no human right can be achieved without democracy. Nevertheless, local self-government does not automatically lead to participatory democracy. While decentralization in general works towards the empowerment of citizens in decision-making and control over policies, certain measures and procedures must be securely in place to create the necessary environment.

With the promulgation of the 2015 Constitution in Nepal, the local level became the third tier in the Nepalese federal arrangement, which is autonomous, independent, and coordinate with the Federation and States. Local governments have been assigned huge responsibilities on social affairs, service delivery, and social security, along with legislative and executive competence. The endowment of powers and responsibilities to local governments is essential to function as an institution of self-government. Strong local government is valued for local empowerment, gender, and social inclusion, efficient and cost-effective service delivery, and good governance of local ownership, which is often supportive of the State.

In Nepal, subject matters of competence of local government are defined in the constitution. State power was divided among federal units in consideration of principles of subsidiarity, national concern doctrine as well as principles of proximity and effectiveness. The local level is endowed with exclusive power on some matters that are secured against federal or state encroachment, however, most of them are concurrent with the center and province, and shared, on which the local level also can legislate but remains inoperative in case of legislative conflict. Therefore, the local level is independent and coordinate with others, however, the sphere of its independence is limited and thin. A federal system is itself a means of empowerment on the one hand and a

limit on the other. The exercise of any power which is not enumerated under the constitution is excessive. The federation or States can cooperate with the local government but cannot dominate or subordinate it.

South African local government is a sphere of cooperative government along with national and provincial government which are distinctive, interdependent, and interrelated but Nepalese local government is a tier of federal arrangement which is independent and coordinate. South African local government has legislative competence but it is limited to by-laws, but Nepalese local government has legislative competence on equal footing with the Federation and States. Indian local governments are creatures of the constitution as aspired for self-government, however, the powers are devolved from states. They are guaranteed huge developmental powers under the 12th Schedule of the Constitution of India, however, they are not the tiers of federal arrangement, and also lack legislative authority. Swiss local governments are recognized in the constitution, but they are not allocated legislative power, they exercise the power devolved from the Cantons. American local governments are purely state creations and developmental arms. Local governments across America follow one of two types of governing authority: the Home Rule or the Dillon Rule. Whether a local government is governed by the Dillon Rule [46] or Home Rule, the ultimate decision of what powers they possess resides with the states. They exercise devolved power to serve the purpose of states.

The powers and practices of local government in South Africa, India, the USA, and Switzerland seem that Nepalese local government is substantially different. The endowment of legislative and executive power equal to the Federation and State opened the door for relationship complications and supervisory problems. At the same time, the dual correlation of local government: with the Federation on municipal affairs, and with the States on legislative procedures and inter-municipal dispute resolution, intensified the relationship complications. Local government delivers as an institution of decentralization but not of federalism, having complementary to States but not competitive. The local level as a tier of federal arrangement is unique in the globe, contrary to universal trends, excessive common aspirations, and a remedy beyond the disease in Nepal, which may reverse the virtue of federalism into a vice if not rectified.

Local government and human rights

The protection of human rights is not something that the architecture of federalism assigns exclusively to the national level; it is, on the contrary, a shared function, to be pursued simultaneously at all levels. The federal Bill of Rights in the United States is not the exclusive responsibility of the federal government but a shared responsibility of the state as well, neither is the Canadian Charter of Rights and Freedom the sole responsibility of the federal government. Fundamental Rights recognized in the Constitution shall be protected by all levels of government. In Nepal, human rights and inclusion is not just the responsibility of the federal government but of Provincial and local governments as well.[47] The protection and promotion of them is a shared responsibility of all levels of government.

In a unitary system, the protection of human rights lies with the single government. In the federal system, which is the system of multilevel governance, the responsibility is shared with all levels of government. The proper scope of protection for human rights can be a subject of disagreement and contention among the orders of government. It should by no means be assumed that all states and the national government agree on the scope of protection to be accorded to every human right receiving the dual protection of the state and national constitutions. Following the federal dynamics of intergovernmental relations, whenever any such disagreement appears, each order of government can be expected to use the resources to advance the appropriate level of protection.

States and Local Governments: Shared and Complementary Duties to Respect, Protect and Fulfill Human Rights

As a matter of international law, the State is one single entity, regardless of its unitary or federal nature and internal administrative division. In this regard, only the State as a whole is bound by obligations stemming from international treaties to which it is a party. Thus, by becoming a party to an international human rights treaty, a State assumes obligations to respect, protect and fulfill human rights.

It is the central government that has the primary responsibility for the promotion and protection of human rights, while local government has a complementary role to play. Local authorities are obliged to comply, within their local competencies, with their duties stemming from the international human rights obligations of the State. Local authorities are those who are to translate national human rights strategies and policies into practical application. To comply with their human rights responsibilities, local authorities should have the necessary powers and financial resources.

Local authorities are close to citizens' everyday needs and they deal with human rights issues on an everyday basis. Therefore, there exists a clear and strong connection between human rights and local government. When performing their functions, local authorities take decisions relating in particular to education, housing, health, the environment, and law and order, which are directly connected with the implementation of human rights and which may enforce or weaken the possibilities of its inhabitants to enjoy their human rights. Furthermore, local government is always facing the risk of discriminatory practices against perceived outsiders, such as ethnic minorities or women's rights, to the local community. Integrating a human rights dimension in all local government initiatives is vital for addressing these violations. It is difficult to imagine a situation of human rights being realized where there are no local authorities to provide the necessary services. Local officials are thus responsible for a wide range of human rights issues in their day-to-day work. However, this work is rarely perceived as human rights implementation, neither by the authorities nor by the public. Consequently, human rights remain distant as a frame of reference or analysis in most policies and practices at the local level, while they may be human rights in practice. In this regard, it should be borne in mind that the real effect of human rights is experienced locally.

Human rights duties of local government follow the classical tripartite typology of States' human rights obligations, namely, the duty to respect, the duty to protect, and the duty to fulfill. The duty to respect means that local officials must not violate human rights through their own actions. It requires local government to refrain from interfering with the enjoyment of the rights and freedoms of all persons within its jurisdiction. For example, concerning the freedom of religion, the local government may not prohibit religious communities, beyond the permissible limitations, from using public squares or municipal buildings for religious celebrations. Regarding the right to health, the local government may not deprive certain communities or groups of access to health care facilities. The **duty to protect** requires measures to ensure that third parties do not violate the rights and freedoms of the individual. For example, local authorities are required to take action to ensure that children are not prevented by others from attending school. The duty to protect can necessitate creating safer urban environments that reduce the risk of violence, for example against women. The **duty to fulfill** means that local government must take positive action to facilitate the enjoyment of the rights and freedoms. For example, local authorities are obliged to fulfill the right to education by sustaining a good educational system. To comply with the duty to fulfill the right of individuals not to be discriminated against, local human rights mechanisms such as ombudspersons or specialized anti-discrimination agencies can be established.

Further, local authorities should promote the understanding of and respect for the human rights of all individuals within their jurisdiction through education and training. In particular, local authorities should organize, on a systematic basis, human rights training for their elected representatives and administrative staff, and the dissemination of relevant information among citizens about their rights. By promoting human rights, local authorities can help to build a culture of human rights in the community. It is not only the realization of economic, social, and cultural rights indispensable for the full exercise of political rights, but at the same time, only the exercise of civil and political rights permits the participation in the decision-making mechanisms that may lead to the achievement of economic and social rights.

Drafting a **local human rights charter** or **local human rights law** setting out specific human rights responsibilities that fall upon the local government can be regarded as an important step towards localizing human rights. In this context, local authorities should have human rights offices with sufficient human and financial resources that could fully take charge of human rights issues within the respective local competencies.

Human Rights City

The local governments' role can be significant in realizing the human rights of all their inhabitants locally. The local level is a political community in which all its inhabitants should have an opportunity to realize locally the human rights and freedom. Eleanor Roosevelt said, “Human rights begin in small places, close to home, so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, and equal

dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere."[48] It was the beginning of the idea of human rights city.

The idea of a “human rights city" is one of the globally developed initiatives aimed at localizing human rights. It is based on the recognition of cities as key players in the promotion and protection of human rights and refers in general to a city whose local government and local population are morally and legally governed by human rights principles. A human rights city requires a shared human rights governance in the local context where local government, local parliament (council), civil society, the private sector, and other stakeholders cooperate to improve the quality of life for all people in the spirit of partnership based on human rights standards and norms. A human rights-based approach to local governance includes the principle of democracy, participation, responsible leadership, transparency, accountability, non-discrimination, empowerment, and rule of law.

Human Rights City contains the following principles: the right to the city; non-discrimination and affirmative action; social inclusion and cultural diversity; participatory democracy and accountable governance; social justice, solidarity, and sustainability; political leadership and institutionalization; human rights mainstreaming; effective institutions and policy coordination; human rights education and training; and right to remedy.[49]

Conclusion and Recommendation

Democracy is *sine qua non* for the safeguard of human rights. Unitarianism can withstand democracy but federalism without democracy is self-contradictory. Therefore, federalism and human rights are complementary to each other. Since a system of double security that arises in a federal system but not in a unitary system offers better security of human rights. Human rights and freedom also have a good environment to flourish in a country of unitary system where there is democracy but it has a single door of protection.

Theoretically, federalism is neutral to gender justice but fruitful for inclusion. The character of a federal system, rather than the federal system itself, matters for the political empowerment of women. Since the federal system provides a system of multilevel governance, it offers an opportunity for political participation and representation of women and marginalized sections of society as well. Therefore, it offers a favorable environment for the pursuit of gender justice. Nepal's federal system is inclusion sensitive basically inclusive of women which is proved by the election results of all levels of the state.

Local governments are the best forum for bringing human rights home. The real effect of human rights is experienced locally**.** It is the central government in a federal system that has the primary responsibility for the promotion and protection of human rights, while local government has a complementary role to play. There exists a clear and strong connection between human rights and local government. In this way, it is highly desirable that each local government enacts a local human rights charter or local human rights law setting out specific human rights responsibilities, which can be regarded as an important step towards localizing human rights. The concept of human rights city, though it looks like an ideal type, can be an aim for local governments.

References

[1] CONSTITUTION OF NEPAL (2015) art. 56(1).

[2] ALEXANDER HAMILTON, FEDERALIST NO. 15

[3] K.C. WHEARE, FEDERAL GOVERNMENT, 4TH ED. (LONDON: OXFORD UNIVERSITY PRESS, 1963) at 11.

[4] *Id*. at 12

[5]*Id.* at 12.

[6] CONSTITUTION OF NEPAL, art. 4.

[7] KHUSHEE PRASAD THARU, DISTRIBUTION OF COMPETENCE IN FEDERAL SYSTEM: A CASE STUDY OF NEPAL, PAIRAVI BOOK HOUSE, KATHMANDU, at 22 (2021)

[8] *Id.*

[9] WATTS, OP. CIT., PP. 5, 7–8, G. WALKER, *INITIATIVE AND REFERENDUM: THE PEOPLE'S LAW*, CENTRE FOR INDEPENDENT STUDIES, ST LEONARDS, NSW, 1987, ch. 1.

[10] THARU, Supra 7 at 195.

[11] *Id*. at 195, 196, 197, 198, 199

[12] *Id*. at 196.

[13] *Id*. at 196.

[14] *Id*. at 196.

[15] *Id*. at 197.

[16] *Id*. at 197.

[17] *Id*. at 198.

[18] *Id*. at 198.

[19] *Id*. at 199.

[20] *Id*. at 199.

[21] *Id*. at 199.

[22] *Id*. at 199.

[23] *Id*. at 199.

[24] CONSTITUTION OF NEPAL, Preamble.

[25] *Id.*

[26] *Id.*

[27] DECLARATION OF INDEPENDENCE, 1776 (United States of America).

[28] https://guides.loc.gov/articles-of-confederation, accessed on 25/05/2021.

[29] ELIS KARTZ, ENCYCLOPEDIA OF FEDERALISM, CENTER FOR THE STUDY OF FEDERALISM, ENCYCLOPEDIA.FEDERALISM.ORG accessed on 15/10/2019.

[30] https://guides.loc.gov/articles-of-confederation, accessed on 25/05/2021.

[31] https://guides.loc.gov/articles-of-confederation, accessed on 25/05/2021..

[32] JAMES A. GARDNER, STATE COURTS AS AGENTS OF FEDERALISM: POWER AND INTERPRETATION IN STATE CONSTITUTIONAL LAW, 44 WM. & MARY L. REv. 1725, 1728-29, 1734- 40 (2003)

[33] THE FEDERALIST No. 51, supra

[34] 8THE FEDERALIST No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

[35] THE FEDERALIST No. 51, supra

[36] THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

[37] Gregory v. Ashcroft, 501 U.S. 452 (1991), 458 (O'Connor, J.).

[38] MAHENDRA P. SINGH, FEDERALISM, DEMOCRACY AND HUMAN RIGHTS: SOME REFLECTIONS WITH SPECIAL REFERENCE TO INDIA, Universidad Nacional Autónoma de México - Instituto de Investigaciones Jurídicas (2005)

[39] *Id.*

[40] WILLIAMS, SUSAN H., "FEDERALISM AND GENDER EQUALITY" (2018). ARTICLES BY MAURER FACULTY. 2747. https://www.repository.law.indiana.edu/facpub/2747

[41] CONSTITUTION OF NEPAL, article 70.

[42] *Id.* article 283.

[43] *Id.* article 285(2)

[44] THE ASIA FOUNDATION, NEPAL'S LOCALLY ELECTED WOMEN REPRESENTATIVES: EXPLORATORY STUDY OF NEEDS AND CAPACITY, at 6 (2018).

[45] ROLE OF LOCAL GOVERNMENT IN THE PROMOTION AND PROTECTION OF HUMAN RIGHTS – FINAL REPORT OF THE HUMAN RIGHTS COUNCIL ADVISORY COMMITTEE, at 3.

[46] The Dillon Rule originated in the City of Clinton v. Cedar Rapids and the Missouri River Rail Road Company, Justice Dillon spelled out the terms of his municipal philosophy. "A municipal corporation possesses and can exercise the following powers and no others:

- First, those granted in express words (from the state);
- second, those necessarily implied or necessarily incident to the powers expressly granted;
- third, those absolutely essential to the declared objects and purposes of the corporation-not simply convenient, but indispensable; and
- Fourth, any fair doubt as to the existence of power is resolved by the courts against the corporation."

[47] CONSTITUTION OF NEPAL (2015), art. 56(6).

[48] Eleanor Roosevelt, March 27, 1958.

[49] THE GWANGJU GUIDING PRINCIPLES FOR A HUMAN RIGHTS CITY, ADOPTED AT THE 2014 WORLD HUMAN RIGHTS CITIES FORUM on 17 May 2014,

Link of Table (Election Commission, Nepal)

https://result.election.gov.np/GenderWiseElectedSummary.aspx

Urban Development, Environmental Risk and its Effect on Human Rights -An Impression

-Bishal Khanal *

Abstract

The Babylonian, Chinese, Indian and Sumerian civilization indicates that urban development began over five millennia ago. The quest of urban living was led by the idea of ideal living and protection of life and property. Usually early people lived together at the sea coast and river banks. Later the towns fortified to dispel threats of enemy, wild lives and natural causes such as storm. The advent of science and technology helped making cities apart of coastal areas as water supply, sewage, transport, communication etc network built at distant locations. The industrial revolution around 19th century opened the eyes for modern urban living in Europe and elsewhere. The advancement of academia, trade, religion etc largely contributed to develop the cities. People aspiring the city life for their prospect and job rapidly increased. Urbanization was considered major component of development. But some byproducts of city life did not prove the consideration true. Extremely polluted hundreds of cities contain air with toxic substances therefore un-breathable, and that may cause serious diseases like cancer, stroke and many others.

Air pollution is one of the top 10 human killers in the world, and sixth most dangerous killer in South Asia. The number of human killing by pollution is fifteen times more than all wars and other forms of violence. Air pollution related diseases cause 3.2 million deaths worldwide annually. A Global Burden Disease report shows the increment of 800,000 persons than estimated in 2000. This shows 300 per cent increase and about 74 million healthy life years are lost annually. It is the seventh leading cause behind loss of about 18 million healthy years of life annually in India alone.

The issue pollution is observed only with the lance of environment though its ramification goes far beyond. It derogates whole range of human rights followed by health of the earth and atmosphere as well. The state sponsored or involuntary migration to cities particularly to ageing, disabled, person with acute health problems and lacking urban skills has serious repercussion. Experience shows that many of them seriously suffer by nostalgia, limited access to movement, no use of rural skills and ways of life among others. There 'comfort may be available but happiness abandoned'. Indeed human rights call for happiness as well.

Key Words: Air Pollution, Environmental Risk, Human Rights, Urbanization, Disease

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Genesis

There is a great deal of thinking that urbanization is one of the components for development. Urban settlements have enormous benefits to its people. The policy makers and government as a whole realize that urbanization process help providing access to various socio-economic goods and services. To mention few are the access to education, healthcare, transportation, business transaction, safety/security concentration, focused economic activities, supplies, safe water, waste management, information and communication among many others. However urbanization has not only advantages as above. It may generate a lot of burden as well in economic, social and cultural terms whose consequences fall upon the rights and freedoms of people.

Urban living grossly jeopardizes various rights and liberties of its people. At times the rights relating to life, dignity, healthcare, hygiene, sanitation, environment, movement, nutrition are regularly and apparently affected. Additionally increased criminality, threat to safety and security appear rising. Different rights related issues are underscored in short of social, cultural and religious assimilation. Their effect and impact are serious and therefore the right based issues need to seriously integrate in the process of urban development.

Urban Initiatives

Urbanization has a long history. Since early times people began to live in the vicinity of each other. There might be different reasons from safety

/security to socialization, avoiding threats to enjoying peace, ensuring cooperation to cementing human strength and so on. As in other issues urban living has also merit and demerits. Prior to analyzing, an endeavor is made to briefly explore the practice of urban settlement from early times to present.

Early urban initiatives- Prehistoric urban initiative is believed to start in search of security of life, property and better living conditions. In view of a section of scholars city of *Eridu* under ancient Sumerian civilization of Mesopotamia was the oldest city of the earth. The city was developed in around 5400 BCE. The city was developed once surrounding people migrated to save from flood, water currents and sediments of Tigris and Euphrates rivers.[1] Other section of scholars claimed that Jericho a walled city of 2500 people located in present day Palestine was the oldest city. The city was developed around 6500 BCE. Other cities like *Uruk* of Mesopotamia had been in place during 4100-2900 BCE. Likewise Indian cities of *Mohenjo-Daro* and *Harappa* were in place during 2800-1900 BCE.[2]

> In order of development several Chinese, Indian, Greek and Roman cities were developed. People lived together in township for the safety from flood, wild lives, enemy aggression, and attraction towards fertile land. The early towns were fortified to save people from wild lives, enemies; wind blows etc and keep the people tight to respond jointly against any external intervention. The rulers were responsible for

1 Helen Chapin Metez- Iraq a Country Study, 2016), worldhistory.org/urbanization
2 Id

safety and security of inhabitants inside the fort. Some Chinese monarchs even fortified their nation to save from enemy's act of aggression. Thus the Great Wall of China was developed and that was considered as one of the Seven Wonders of the World.

The study of Prof Ramasamy at Bharathidasan University shows that original *Poompuhar* city was established around twenty millennia ago. The city was located about 30 kilometers east of present *Kaveripoompattinam* city. *Poompuhar* city altered its location four times due to sea level rise and changing coastline. The earlier three were submerged into Bay of Bengal one after the other. Hence city inhabitants were forced to migrate towards west around newly formed coastal areas. His research indicates that ancient city of *Poompuhar* located at the confluence of Cauvery River and Bay of Bengal was established by *Chola* dynasty of India, two millennia ago. The city had trade links with major destinations of Asia. Unfortunately, a millennium ago the city vanished from the maritime history of the world leaving several mysteries behind. Presently *Poompuhar* is known by the name of *Kaveripoompattinam* city located on Cauvery river bank.[3]

Ancient Egyptian knew benefit and cost of urbanization and made smaller and specialized settlements based on work divisions. However there was a threat of overuse of resources in the cities. Babylonian emperor Hammurabi (2285-2242 BC) issued building code as a part of his famous code entitled Code of Hammurabi with a view to ensure strength of the urban and housing structure[4].

Later the rise and fall of cities remained a common occurrence. Some cities fell in due course because of overpopulation like Maya and early Greece. Some fell because of over use of land, draught, depletion of water sources and deforestation like some Mesopotamian cities. Some fell because of lack of foresight, ill planning and management, such as some known and unknown Sumerian and Greek cities.[5] Some fell because of war and conflicts like *Kurukchetra, Nalanda, Taksila* of then *Bharatbarsha* largely known by the term India. Some cities fell because of natural causes like submerging into the sea such as ancient Indian city of *Poompuhar*.[6] Although population living in cities in prehistoric days was indeed very low, even negligible.

Factors that led to urban living in history **-** The inevitability of water for human living led people to live around river banks and coastal areas. The ancient Indian cities of Gaya, Varanasi, *Pataliputra, Sindh*, the Chinese cities of Beijing, Hong Kong, Songhai and Indonesian city of Java and Sumatra are few examples to mention

Religious faith and beliefs followed by fertile plane, valleys and basin has too historical nexus in the advancement of town and cities. The Indian cities such as Varanasi, *Ayodhya, Kurukchhetra*,

3 K.S Jayaraman, Submerged Ancient Harbor May Have Been Inspiration for Neapolis, Alexandria www. nature.com. articles/nindia.2020.133.

4 The Code of Hammurabi, a collection of 282 rules, established standards for commercial interactions and set fines and punishments to meet the requirements of justice. Hammurabi's Code was carved onto a massive, finger-shaped black stone stele (pillar) that was looted by invaders and finally rediscovered in 1901. It was the Oldest code of laws codified and promulgated by Hammurabi the king of Babylon

5 Jashua J Mark, 2014 - worldhistory.org/urbanization

6 Supra 3

Hardwar, Bodh Gaya, Ayodhya etc of north India, Nepali cities of *Kantipur, Janakpur etc*, Jerusalem of Palestine, Vatican in Rome, Mecca in Saudi Arabia are few to mention that help advance the cities.

The trade and transit on the other hand played role to establish towns in various parts of the world. Freetown of Liberia, Lhasa of Tibet-China, Suez in Egypt, Venice of Italy are few examples to mention. Additionally number towns developed along ancient Silk Road connecting Asia to Europe may fall to this group.

With the establishment of universities and academia the students and workforce of the universities and academia began to settle in nearby locations. The ancient Indian cities of *Nalanda, Bikramshila, Taksila, Somapura* among many others, that were in existence until 7th century, significantly contributed to develop those towns as well. In the due course a number University towns developed across Europe towards thirteenth century. The Universities have had significant contribution to advance cities like Bologna of Italy, Uppsala of Sweden, Prague of Czechoslovakia, Oxford and Cambridge of UK, Lima of Peru, St Marcos of Mexico among others. In the modern times as well many towns are developed along with the establishment of Universities in Europe, Americas, Asia and Africa. Universities in cities are often described as 'anchor institutions' and sometimes as civic universities. Universities should be considered as '*connective anchors'* that can work with cities to bridge the local, national and international arena. Almost all universities have in their name the city or region in which they are based. [7]

Industrial Revolution- Key to Contemporary Urban Set Up

The industrial revolution towards 18th century changed the landscape of human settlement in Europe and elsewhere. The invention of steam engine, communication devices, printing press, means of transportation and establishment of factories and so on helped human population to concentrate in certain areas. In search of work and opportunities rural people migrated to the factory located areas. In the 19th century thousands of industrial workers flooded into European cities. They lived in crowd, polluted slums with diseases and refuses. There was absence of plan and programs for urban development.[8]

The attraction to live in the cities was growing. People migrated to cities were found disinterested to return back to earlier home towns/ villages. The good taste of cities was indeed realized by the migrant population. Studies shows until 1800 estimated three percentage of world population lived in the cities of having more than 20000 people. In the 1960s estimated 25 percentage of world population lived in the cities. In early 21s century half of the word population live in the cities. The trend of migration towards cities has been rapidly increasing.[9]

In this context in 1777 Samuel Johnson said that *'when a man is tired of London he is tired of life: for there is London all the life can afford'*. The trend of urban population of United Kingdom

7 James Ransom, Future of Cities: Universities and Cities, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/477295/future-cities-universities.pdf

8 Jan de Vries, European Urbanization 1500-1800, Routledge London, (1984)

9 Ibid

was gradually increasing. In 1801 only twenty percent of people were living in cities, in 1851 that rose to forty percent and in 1901 it went up to seventy five percentage.[10] The trend of urbanization extended to the colonies and other parts of the world as well.

Messy Township and Right Abuses

Messiness denotes urban conditions and processes that do not follow institutionalized or culturally prescribed notions of order. It suggests an alternative structure, hierarchy and actions that are often subjugated by dominant hierarchy. The dominant hierarchy may include concept of spatial and visual orders, social and political institutions and cultural norms. Messiness rises with regard to the production of cities, cityscapes, and citizenship.[11] Messiness is a range of urban conditions and concept that we attempt to avoid.

Public perception indicates that urban locations are the hub of opportunities. The rural people of developing world have both need and dream to migrate to urban locations. The aims behind is to seize opportunities that could lead to success in life. The unplanned and messy flow of people into cities has created undesired by-products. The effect of those by-products results into disrespect and abuse of the right and freedoms of people. The constitutional provisions of the right to movement and residence allow every citizen to move into and reside in any location they desire in the country. The locations they desire may include the cities they prefer as well. It leaves hardly any space to the state restraining its population entering into urban life.

The rapid flow of population into the cities, particularly in the developing world, have now challenged to urban planning, management, supplies, safety, socio-cultural and economic orders among others. The overflow of population has made some cities messy and unlivable because of high pollution, slums, ill sanitation system, short of safe water and others. After all those ill conditions have relation is with the right and freedoms of people.

People usually migrate to other country or cities to improve quality of life. Environment is one of the major indicators for quality life. The clean air, clean water, good waste disposal system, water purification system etc makes the city good and livable. But in many cities inhabitants live in environmentally polluted, unhygienic and toxic areas. The tap water is unsafe and has bacteria, air is bad for breathing, open air refuses exist in multiple locations and many people with open hand collect refuses for recycling purposes. The cities have open air sewage and many people live and conduct business aside sewage. Rivers are either dry or dirty, and converted waste dumping locations. Some neighborhood is slum where millions of people live. Only water available to many of them is from polluted canal. Sewage treatment plant does not exist there.

Breathing with toxic since childhood has risk to various forms of cancer. Water drinking with bacteria and toxic substances has risk to serious illness. Those cities are believed to cut short life of its inhabitants by threatening to their right to life and livelihood. Writers identifies few of those cities as parts of Varanasi and Nagpur of India, Peshawar and Karachi of Pakistan, Jining and

10 Ibid

11 Jeffrey and Manish Chalana, Untangling the Asian 'Messy' City Understanding the 'Other' Cities of Asia, 2016 https://www.researchgate.net/publication/312638786_ Untangling_the_Messy_Asian_City_Understanding_the_Other_Cities_of_Asia?

Dezhou of China, Kampala of Uganda, Lagos of Nigeria, Doha of Qatar, Mexico City of Mexico etc.[12] Dirty and exceedingly polluted cities have been turning into major killer of human being, biological/botanical species, water sources and soil quality.

Rights - Grossly Jeopardized

The human rights and environment are intertwined. Many rights cannot be enjoyed without safe, clean and healthy environment. There is always risk for rights and freedoms relating to environment mainly in urban areas including in megacities. The rights in peril in messy urban set up includes the rights relating to *life, dignity, decency, hygiene, housing, sanitation, atmospheric environment, pollution, movement, religious/cultural disputes, criminality, safety/ security, residence, labor, food , water and nutrition and so on.* Much of those rights have linkage with economic, social and cultural rights followed by some collective rights and right to development.

Rights and Freedoms at Risk

The urban development process lacking proper environmental impact assessment may give reverse affect mainly to the rights relating to environment. A number of economic, social and cultural rights followed by some civil, collective and right to development as well deemed affected by such urban processes. Every unplanned and ill managed urban settlement has negative effect upon various rights and freedoms, though, extent may be different. The dirty and excessively polluted and messy cities have higher degree chances in abusing rights and vice versa.

The environmental rights are determined by the national law that may include the constitution, act of parliament, judicial decisions, rules and regulations and both public and corporate policies. In addition the international environmental and human rights treaties, declaration and so on provide guidelines to the government to undertaking effective measures. More than one hundred UN members have recognized the environmental rights through their constitution and law. Around two third of the countries have recognized right to safe/clean water, safe, favorable, wholesome of ecologically balanced environmental rights.[13] Right to a healthy environment is ensured by the constitutions of over one hundred countries. [14]

The United Nations Environment Program (UNEP) has put an effort to classify them by grouping into substantiate and procedural rights. UNEP classifies the right to life, freedom of association, freedom from discrimination, right to healthcare, right to food and right to a decent standard of living as substantive rights. Other substantive rights include cultural rights as access to religious sites and collective or group right affected by environment e.g. rights of disadvantaged people, rights of indigenous people and so on. UNEP categorizes procedural rights and fundamental access to rights, access to information, right to participation and access to justice/remedy.

As mentioned, many urban areas are considered unfriendly to human living because of their dirt

12 https://www.immigroup.com/topics/top-10-dirtiest-cities-world/

13 https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/what-0?_ga=2.71192272.1528084732. 1646298353-298809938.1646298353

14 https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/what

and degrading state of environment. A number of human rights and fundamental freedoms of residents have been severely at risk in those cities. Based on February 2020 study example of few dirtiest and environmentally unsafe cities that shows serious threats to various rights of people appears as below.

Lagos, the largest city of Africa with around 16 million populations is one of the most polluted cities in the world. A World Bank report estimates that illness and premature deaths due to air/water pollution caused loss of $ 2.1 billion in 2018 representing about 2.1 percentage of Lagos State's GDP. It caused an estimated 11200 premature deaths, the highest in West Africa. Children under five were the most effected, accounting for 60 percent of total deaths, while adult suffered from heart disease, lungs cancer and chronic obstructive pulmonary disease. [15] The sources of emissions are the industries, road transport and diesel generators. The study on the loss of surface or soil pollution is yet to be made.

The inadequate waste management infrastructure and pollution from two sea ports are also responsible to create situation. In lack of proper waste management system people resort to open burning of waste and illegal dumping causing emissions of toxic pollutants. Nigerian ports related statistics shows that in 2017 alone 33 million tons of cargo passed through two sea ports of Lagos namely Apapa and Tin Can. Every day, about 5000 highly polluting diesel trucks seek access to ports or park around for months, packing up or waiting for their loads making heavy congestion and pollution.[16]

According to a WHO data of 2016, four of the worst cities for air pollution in the world are in Nigeria. City of Onitsha was rated as the most polluted city in the world. Onitsha city recorded 30 times more than WHO's recommended levels of PM 10. The other three cities having above10 PM levels are Kaduna, Aba and Umuahia all the trade centers.[17]

At times the holy and historic Indian city of Varanasi was identified one among most polluted cities. Industry and vehicle emissions were largely to blame for it. There was excessive air and water borne pollution in the river Ganges. Much of the untreated sewage was seeping into the Ganges. Toxic chemicals, a by-product of industrial waste was uncontrolled. At times hygiene and sanitation were too poor where high levels of infant mortality (reportedly 70 per 1000 births) existed. Indeed very insecure in terms of respect for human rights and freedoms as well.[18]

The Pakistani city of Peshawar has created dangerously high levels of particulate matter concentrates – a PM 2.5 level of 111 to be specific. The air is considered deadly indeed making the right to life too insecure. There is fear that air quality will get worse before it gets better.[19] The air quality in the city of Kampala is considered 20 times worse than that of Sarnia (that has best environmental condition) due to vehicle emission. The city is observed as a toxic location which

15 Karin Kemper and Shubham Chaudhuri, Air Pollution a Silent Killer in Lagos , Sept 2020, https://blogs.worldbank.org/africa-can/air-pollution-silent-killer-lagos

16 Ibid

17 Phoebe Parke, Dirtied by Success? Nigeria is the Home to City with Worst 10 PM Levels, June 1, 2016 , https://edition.cnn.com/2016/05/31/africa/nigeria-cities-pollution/index.html

18 https://www.immigroup.com/topics/top-10-dirtiest-cities-world/

19 ibid

indeed is unsuitable for healthy human living. Hygiene, sanitation and water supply are also in serious question. Its extension toward Lake Victoria has been making the lake and surrounding areas toxic place to breathe and live in. [20]

The Jining a coal mining city of China is considered most polluted in terms of particulate matter concentration. During winter people use their coal heaters to keep warm. As a result blanket of foggy smog that rest over the sky like a smoke filled room and seeping into the lungs. Indeed there is greater risk to life mainly to children and people with health problem during the winter.[21]

Pollution – Major among Human Killer

Most of air pollution-related deaths are from non-communicable diseases. WHO survey shows that air pollution is the cause of over one-third deaths from stroke, lung cancer and chronic respiratory diseases. One-quarter of deaths occur due to ischemic heart disease. WHO report shows that in Nepal alone nearly 740 people died from acute lower respiratory infection, 1770 from chronic obstructive pulmonary disorder, 932 from lung cancer, 3,328 from ischemic heart disease and 3,183 from stroke in 2016.[22]

Pollution is the largest environmental cause of disease and premature deaths in the world. A global study published in The Lancet Medical Journal[23] in 2015, death caused by pollution was three times more than AIDS, tuberculosis and malaria combined. The Lancet Commission on Pollution and Health blames that estimated nine million premature deaths occurred in 2015. *That number of killing is fifteen times more than all wars and other forms of violence.* It concludes that pollution "endangers the stability of the Earth's support systems and threatens the continuing survival of human societies."[24] *The California fires produced air pollution in 2 days as the US's entire cars do in a year*.[25] China's air pollution is causing its residents to die three years earlier. [26]

Pollution disproportionately kills the poor and the vulnerable. The Lancet Commission's finding of 2017 shows that nearly 92% of pollution-related deaths occur in low and middle-income countries. India had 2.5 million pollution related deaths largest in the world. China is second with 1.8 million and Pakistan third with 311,000 deaths.

The pollution related deaths in densely populated countries shows that out of all annual deaths Bangladesh had 26.6% pollution related deaths. Such death percentage in India was 24.5%,

20 Ibid
21 Ibid
22 Basanta Pudasaini, The Air Polution an Invisible Killer, The Himilian Times, March 30, 2018, https://thehimalayantimes.com/opinion/air-pollution-the-invisible-killer
23 More than 40 researchers from governments and universities worldwide worked on the study funded by the United Nations, the European Union and the United States. The Lancet is a weekly peer-reviewed general medical journal.
24 Doug Stanglin, Global Pollution is the Globe's Biggest Killer and a Threat to Survival of Mnkind, Study Finds, USA Today, Oct 20, 2017
25 https://www.usatoday.com/story/news/nation-now/2017/10/11/air-pollution-california-fires-equals-years-worth-traffic-analyst-says/756602001/
26 https://www.usatoday.com/story/news/world/2017/09/18/chinas-air-pollution-causing-its-residents-die-early/677099001/

China 19.5%[27], Pakistan 21.9%, Nigeria 18.7%, Indonesia 13.5%, Russian Federation, 8.6% and United States of America 5.7%. [28]

The ten countries that has highest percentage of pollution related deaths (out of 100000 deaths) are Somilia, 26.5%, Chad 25.6%, India 24.5%, , Niger 24.9, South Sudan 23.2% , Burundi 20.4%, Guinea Bissau 20.1%, Central African Republic 18.9%, Afghanistan 18.7% and Lesotho 13% respectively.

The Guardian paper of UK reported that there were nine million pollution related deaths in the world in 2016. WHO therefore consider pollution is the biggest human killer leading to heart disease, stroke, lung cancer and other illnesses. Outdoor air pollution, caused by vehicles and industry, is blamed for 4.5 million deaths annually while indoor air pollution, from wood and dung stoves, is linked to 2.9 million deaths.[29]

Water pollution, mainly contaminated by sewage, is linked to 1.8 million deaths from gastrointestinal diseases and parasitic infections. Another 800,000 deaths are tied to workplace pollution, including exposure to toxins, carcinogens and secondhand tobacco smoke, coal-related diseases and bladder cancer in dye workers.

A recent report developed by Center for Science and Environment, Indian Council of Medical Research and Health Effects Institute indicates that outdoor air pollution is the fifth largest killer in India. The top four largest killers are the blood pressure, indoor air pollution, tobacco smoking and poor nutrition. Premature deaths caused by particulate air pollution have increased by six times since 2000. In 2010, about 620,000 premature deaths happened from air pollution-related diseases. CSE's national air quality analysis shows half of urban Indian population breathes air with particulate levels that exceed the permissible limit. One third of urban Indians live in critically polluted areas. Air pollution is the seventh leading cause behind the loss of about 18 million healthy years of life due to illness. The respiratory and cardiovascular diseases and air pollution-induced premature deaths are common. These diseases include stroke to 25.48 %, chronic obstructive pulmonary disease (17.32%), Ischemic heart disease (48.6%), lower respiratory infections (6.4%) and trachea, bronchus and lung cancer (2.02%).[30] Air pollution deaths in Southeast Asia may double by 2050, the report indicates.

The air pollution related deaths have increased by 300 percentages globally. The Global Burden Disease (GBD) report has ranked air pollution as one of the top 10 killers in the world, and the sixth most dangerous killer in South Asia. Air pollution related diseases cause 3.2 million deaths worldwide every year. This has increased by 800,000 from GDB estimation of 2000. This shows a huge 300 per cent increase and about 74 million healthy life years are lost annually.

27 Supra, 24
28 Supra, 26
29 Supra 25
30 https://www.cseindia.org/air-pollution-is-now-the-fifth-largest-killer-in-india-says-newly-released-findings-of-global-burden-of-disease-report--4831

In fact, particulate air pollution is now just three places behind indoor air pollution, which is the second highest killer in India. Close to half the cities are reeling under severe particulate pollution while newer pollutants like nitrogen oxides, ozone and air toxics are worsening the public health challenge. Half of the urban population breathes air laced with particulate pollution that has exceeded the standards. Estimated one third of the population is exposed to critical levels of particulate pollution. Smaller and more obscure cities are amongst the most polluted.

The PM 10 monitoring network has doubled between 2005 and 2010 from 96 to 180 cities. During this period the cities with low level of pollution have fallen from 10 to 2, while the number of critically polluted cities has increased from 49 to 89. In 2005 about 75% of the cities exceeded the standard. In 2010, 78% of the cities exceeded the standard. NO2 monitoring has expanded from 100 cities in 2005 to 177 in 2010. In 2005 only one city had exceeded the standard for NO2; in 2010, 19 cities have exceeded the standard. The tightening of the national ambient air quality standards has also changed the air quality profile of the cities. However some mega cities that have initiated some pollution control action in recent years have witnessed some decrease in the levels.

The hazards of waste dump including bio-chemical and toxic substances in the sea/lakes mainly by the powerful states appear immeasurable. The effect and impact of wastage dumped into the seas, lakes and large rivers through ships, vessels and cruise need to be correctly explored. The death and extinction of ground animals, water animals, organisms followed by deterioration of soil and earth surface quality is another part of study. The effect and loss of earth warming including melting poles/glaciers, desertification, drying drinking water sources appears inestimable. Those all perils are also responsible to invite present state of chaos.

Costly Life for Idle Residents

Urban life is obviously more costly in economic, social and even in cultural terms. It is much costly to the persons who are unable work and earn because of ageing, disability, acute health problems, lacking skills, joblessness etc. There is an increasing trend to migrate those people to urban centers to live with working family members, taking care and to seek job opportunities and skills. The lack of adequate earning forbids them the right to enjoy a descent and adequate standard of living in the cities. Additionally they would have short of adequate health care, recreation, socio-cultural relations and enjoying happy life mainly due to financial, social and cultural constraints.

The ageing rural people migrated to urban areas has serious psychic and other problems. The problems may include nostalgia, loneliness, expensive accommodation, market price, sanitary services, accustoming with new habits, food, cloth and cultural adjustment as well. A number of ageing people find them confined in rooms and realize the situation of denial for free access of movement, physical work around premises and socio-cultural connections. Consequently, a number of them have nostalgic and psychic problem of depression among others.

Especially ageing and persons with acute health problems require regular and affordable medicine/ treatment which indeed are costly in urban areas. That is a big burden to family members with

limited income. On the other hand pollution and unfriendly ecosystem of cities makes them vulnerable. Hence the situation invites them to spend undignified life. Consequently a number of them choose to return earlier rural lifestyles. Some does and some cannot, as they require physical or life support system available in the cities.

Denial to Natural Attachment

The contribution of rural areas is immense for the development of cities. Most of the 19th and 20th century cities were developed with the migration of rural people, migration of people from one to other towns, migration to fertile land mass and road sides. The trends revert from earlier concept of developing towns around the river banks and coastal areas. As the technology, transportation, water supply, waste management system etc advanced towns did not need to locate in the vicinities of the seas, river and other water sources.

Over the generations, however the rural mass that settled into the cities and towns bore nostalgia of natural attachments as well, such as flora and fauna, rivers, farming, forest/ vegetation, domestic livestock, social, cultural, religious and to some extent economic or earning practices. Indeed the rural immigrants had to give up those natural attachments enjoyed over the years and decades. The situation invited mental shock, discomfort, anxieties and so on among the migrated people.

In the 1980s the Government of Singapore adopted a policy to provide urban accommodation to the rural people with a view to commercialize and urbanize rural landmass. Many people of Chinese, Indian and Malay origin were shifted to multistoried housing allocating flats to many families. A number of those people used staircase instead of elevator for long as they feared to use the new machine/ elevator. They used kerosene lamp instead of affixed electric bulbs for long period. A number of them carried out their old business such as selling cigarettes, sweets, sundry etc from the front room of the ground floor. Some of them come with their own livestock such as pig and chicken and reared aside living room of the flat. Children used to collect ground worm to feed the chicken. At times pigs were seen from the road, croaking out of veranda and window even on the 9th floor of the house. Many people were suffered with cultural shock and problems. The writer rightly says *"success brought new problems"* [31]

China introduced similar policy. Several millions of people migrated from rural to urban areas. The rural people entering into cities had to face various problems. Firstly, rural skills as small farming, rearing livestock, rural craftsmanship, labor bartering, fishing, horticulture, animal's transport system, human carriage and so on were hardly useful in the city life. And therefore rural migrants had to develop different skills for the job. Secondly, the adult and ageing population realized nostalgia, loneliness, unfavorable accommodation, not accustoming with new habits, food, cloth and cultural adjustment as well.[32] A number of ageing people found themselves confined in rooms realizing denial of free access to movement, physical work in the premises and socio-cultural connections. A study shows that millions of Chinese rural people did not go back to work in urban areas after Covid-19 pandemic. In view of Dan

31 Lee Kuan Yew, From Third to First World, Harper and Collins Publisher, 2011 p 98-99

32 Yanfan Zang and Rui Xu, An Exploration of the Relationships between Nostalgia, Involvement, and Behavioral Intention in Diaspora Tourism, file:///C:/Users/Antic/Downloads/sustainability-13-12273-v3%20(1).pdf

Wang Shanghai based chief economist the reverse migration will pick up pace in coming years, partly because the workers cannot afford city housing and do not have access to city healthcare among others.[33]

Comfort is There but Happiness Abandoned

Urban life is relatively comfortable. The access to services such as food items, transportation, education, healthcare, communication, water supply, sewage, civility, social networking etc have made the cities center of attraction, despite being costly. The city life is haste and it has invited hazards as well. The degradation of environment, hasty life, busy at work, over dependency upon state services has made the life unfavorable to many people.

As mentioned above large number of adult, ageing and other who entered into city life in the support of state and relatives has many grievances. The costly life, nostalgia/homesickness, inconvenient accommodation and personal lifestyle, shrinking movement, eroding physical connections and declined socio-cultural relations among others finds the urban life unfavorable. Indeed *'comfort obtained but happiness abandoned'* to those people. Happiness is a globally recognized indicator of human development. Therefore, this part should also be taken into account particularly in the state supported migration initiatives. Choice of enjoying happy life rest in the people and it is also a human rights issue.

Conclusion

In the contemporary societies impact of urbanization on human rights has been rapidly increasing. Studies are carried out in line with environment pollution and its impact on human rights. Urbanization is indeed the major component of development. But the fact that parts of some mega cities are converting into gas chamber producing slow poison that gradually exterminate mainly poor and powerless people. The time is not away that cities we make may prove curse or hell than blessing. That may cause unbelievable loss for entire humanity.

The cities, historic symbol of ideal human living are turning into compression of toxic fumes. The open sewage and broken drain pipes does not produce only toxic gases and bacterial substances, at times commuter meet deadly accidents, flood push children into them and take life of innocent, among others. As discussed above, cities built and fell during long history of human civilization. Many cities fell with numerous causes and the other could be toxic gases beyond human living in the cities.

The challenge is enormous. The Zero emission programs have limited effect in the mega cities of developing world. Despite, political and policy consciousness has been increased. Hundreds of countries have developed the law and policies to this end, under international framework guidelines. This is a positive step and that may work in due course of time, if willfully enforced. But the issue is urgent, no time to long wait. That is not only for various human rights including right to life of people but for the collective defense of entire humanity.

March 14, 2022

33 Evelyn Cheng, Reverse Migration is Picking up In China as the Workers Give Up the Big Cities, https://www.cnbc.com/2021/06/28/reverse-migration-is-picking-up-in-china-as-workers-leave-big-cities.html

Criminalization of Torture in Nepal: A Critical appraisal

Karna Bahadur Thapa*

Abstract

Torture is an act inflicting physical or mental pain or suffering for the purpose of obtaining information, punishment, intimidation, discrimination with the involvement of public official. Torture absolutely is prohibited in international law and such prohibition applies even in the time of national emergency. This article explores various international instruments against torture and even surveys the provision of torture in national laws. National laws prohibits torture. Right against torture is a fundamental right provisioned in the constitution. Despite the constitutional and legal guarantee for prohibition, torture is massively practiced in Nepal. This article presents various judicial cases against torture and exposes torture as human rights violation. No justice could be ensured without fair and impartial criminal investigation. Nepal as the party to major human rights instruments, is compelled to prosecute the responsible. If torture pervasively exists and responsible are not prosecuted, Nepal as a state party to the convention not only be defamed in international forum for not fulfilling obligation in accordance with the treaties acceded, but the perpetrators certainly will face international adjudication process. Thus, state should enact measures for the effective implementation of the convention on the one hand and responsible must be brought to the justice on the other.

Keywords : Torture, International instruments, Fundamental right, Abjudication, National laws

Prologue:

Universal Declaration of Human Right (UDHR) 1948 envisions the torture free world and provides that "no one would be subjected to torture or to cruel, inhuman, or degrading treatment or punishment".[1] Prohibition on torture originated in UDHR was followed by other international human right treaties later aimed at meeting the objective to make the torture free world. Specifically, *International Covenant on Civil and Political Rights* (ICCPR) ensures that no one is subjected to torture or to cruel, inhuman or degrading treatment of punishment.[2] ICCPR further guarantees that no one shall be subjected to medical, and scientific experiments without his/her free consent. Social scientists claim that the torture is a social construction and not a pre-social, biological

1 *Associate Professor of International Human Rights and Humanitarian Law, Tribhuvan University Faculty of Law, Nepal Law Campus, Kathmandu. Universal Declaration of Human Rights 1948, Article 5.

or behavioral one and is emerged as a practice seems closely connected to the emergence of politically centralized state.[3] It has been practiced since the beginning of state system and used against those who opposed the state policy. In ancient Greek, torture was used against slaves because the testimony was not considered reliable unless they were not tortured. However, torture was prohibited against citizens in ancient Greek.[4] Greek system of prohibiting torture against citizens extended to Roman era and most of the European nations were influenced by Roman law. With the collapse of Roman Empire, Churches in Europe succeeded in abolishing torture from Europe. But in thirteenth century torture resurfaced as a means of extracting confession from suspected person during the inquisition. Various torture methods were used during this horrible period of history, and the magistrates were to observe techniques, methods, and instruments used for torture. Subsequently, European societies influenced by the Roman law treated torture as natural part of the questioning and a useful means of securing information.[5] But in common law, torture was prohibited but applied in only one case where suspect refused to offer a plea of guilt or innocence.[6]

Although prohibited, an exceptional procedure allowed the king to issue 'torture warrant' through the Star Chamber in English law. Guy Fawkes who was arrested on 4 November 1605 for the charge of preparing to blow up of parliament was a first individual subjected to such procedure.[7] He was brutally tortured to extract the name of his fellow conspirator. This form of investigation was considered abuse of power by the king and abolished by the law along with Star Chamber in 1640.[8] Although suspected, witches were still subjected to various form of torture.[9] Torture similarly became a capital offence in France after 1789 revolution. Russia and Germen abolished torture in early nineteenth century.

Torture, though claimed to be abolished legally and judicially in Europe it dramatically resurfaced in twentieth century and used as a political practice more widely. Mussolini's fascist regime in Italy instigated torture as a state policy. Same practice was followed by Franco's Spain and Hitler's Germany. Torture was routinely used to silence the opponents by the dictators in Africa and Latin America. Despite passing of various conventions, torture revived as a political tool,[10] still in practices worldwide. Torture particularly is used against political rivalries particularly, fighting against establishment. Such political rivalries upon arrest, undoubtly are tortured and ill-treated either for extracting strategic information or weakening the movement.

Torture is full of complexities and contradictions. Governments often attempt to justify torture in national security issues and sedition or treason cases. An Israeli psychiatrist and human right activist Ruchana Matron say "the declared purpose of the torture is to force the enemy, the

3 Darren J O'Byrne, Human Rights; an Introduction, Pearson 2008, p 168.
4 Ibid.
5 Ibid p 169.
6 Ibid.
7 Andrew Clapham, Human Rights: A very short Introduction, Oxford, 2007, p 82.
8 Ibid.
9 Supra note 3 p 169
10 Ibid.

outsider, to talk and reveal secret". Such revelation is supposed to anticipate the killing of insiders, members of the group. Because of this reason, torture uncritically accepted and provided validity and justification.[11] But civil society in general and human rights activists condemn torture as barbaric, evil, and outdated. Even the Vienna Declaration of Programme of Action observes act of torture as "one of the most atrocious violations against human dignity, destroying the dignity and impairs the capability of the victim to continue their lives and their dignity.[12]

Definition of torture.

Torture has been observed as a barbaric act inflicted against an individual. Scholars had and even have different opinions about the torture in terms of its purpose, use and justification. Jonathan Power says "torture has been prevalent and evolved side by side with civilization and has been used as the symbol of power.[13] Inflicting pain is an ancient practice and has continuously been used all over the world. An important purpose of torture is to extract confession and essential proof at trial. The primary factor in the torture is inflicting pain against the person tortured. But Lindsey William is of the different opinion that the torture consists of two misconceptions. *first* the primary purpose is to inflict pain; *second* the purpose of the pain is to elicit information. But pain is used to different end being the destruction of the individual as a person. Any information elicited is usually no more than a side benefit: often the victim has no information to give.[14] When torture is inflicted as the tool of power it has less to do with pain than absolute humiliation and domination.[15] Jean-Paul-Sartre also is of similar opinion that "the purpose of the torture is not only to make a person talk but make him betray others. The victim must turn himself by his screams and by his submission into a lower animal, in the eyes of all and in his own eyes. His betrayal must destroy him and take away his human dignity, consequently he is made sub-human.[16] Thus, Torture is not only an act but a process to attack against individual dignity and worth of human person. It is a denial of inherent right and dignity of human person, an international crime subjected to universal jurisdiction.

As the torture is taken as the severe attack against human dignity, sufficient attempts have been made to prohibit it. Such Prohibition has been imposed in 1948 by *Universal Declaration of Human Rights*[17] and *International Covenant on Civil and Political Rights* 1966.[18] These two seminal human rights instruments have imposed prohibition on torture with no specific definition. However, attempts have been made to define torture. Under customary international law torture is defined as "intentional infliction of severe physical or mental pain or suffering upon the victim by

11 Ibid, p 166.
12 Vienna Declaration of Programme of Action 1993, para. 55.
13 Supra note 3. p. 164.
14 Ibid p, 165.
15 Ibid.
16 Ibid.
17 UDHR provides that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" in its Article 5.
18 "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected to without his free consent to medical or scientific experiment."

an official or someone acting at the instigations of, or acquiescence of, an official or person acting in an official capacity, for the purpose of obtaining information or confession from the victim or a third person, punishing the victim or third person, intimidating or coercing the victim or third person, or for any reason based on discrimination of any kind.[19] *The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984* (CAT) adopted similar approach as to customary international law. The Convention defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[20] Another international treaty the *Rome Statute of International Criminal Court* (ICC Statute) also defines torture as the "intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanction.[21] ICC Statute specifically applicable to international crime mainly occurring during armed conflict of international and non-international in nature. Under Rome Statute, torture, inhuman treatment, including biological experiment is regarded as crime against humanity[22] or war crimes.[23]

In terms of the definition of torture, *Inter-American Convention to Prevent and Punish Torture* 1985 is of much importance. The convention extensively defines torture as "an act intentionally performed whereby physical or mental pain or suffering inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose." Torture is also understood to be the use of methods upon a person intended to destroy the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.[24]

Thus, torture is such an act inflicting physical or mental pain or suffering for the purpose of obtaining information, punishment, intimidation, discrimination with the involvement of public official. The Convention Against Torture in its Article 1, does not pronounce about cruel, inhuman, or degrading treatment or punishment. However, Article 16 of the convention requires States parties to prevent "other acts of cruel, inhuman, or degrading treatment or punishment.[25] The provisions contained in Article 1 and Article 16 constitute that torture is an aggravated form of

19 Kriangsak Kittichaisaree, International Criminal Law, Oxford, 2001, p. 110-111.

20 Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, Article 1.

21 Rome Statute of International Criminal Court 1998 Article 7(2)(e)

22 Ibid, Article 7 (1) (f).

23 Ibid, Article 8(2) (a) (ii)

24 Inter-American Convention to Prevent and Punish Torture 1985, Article 2.

25 Article 16 provides that each state parties undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or by or at investigation of or with the consent or acquiescence of public official or other person acting in an official capacity.

cruel, inhuman, or degrading treatment or punishment.[26] According to Article 1 of the Convention, pain and suffering must intentionally be inflicted to the victim to qualify as torture. The definition envisions some important aspects Such as: (a) torture has an objective, (b) it produces a certain result, (c) it is of certain categories, and (d) state officials are involved in it. Thus, any act to be torture must qualify following elements.

- infliction of severe physical or mental pain upon person
- infliction of severe pain is intentional,
- severe physical or mental pain is inflicted to obtaining information or confession form him or any third person,
- such pain or suffering is inflicted by or at instigation of or with the consent of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Categories and methods of torture:

Torture is often claimed to be violent; a process begins with the arrest and occurs at night.[27] Article 1 of the Convention clearly states that the torture is inflicted against the person either physically or mentally. So far as the methods are concerned, twentieth century witnessed the sophisticated methods of torture. Any instrument of torture is so designed that extreme physical pain may be inflicted and creates the sense of dehumanization and demoralization. Such dehumanization and demoralization create the fear and anxieties in mind and ultimately resulted in mental torture. As one of the fundamental elements in torture is pain or suffering, certainly any method used to for torture inflict severe pain or suffering. A very simple household appliance can be used as a savage tool of violence.

Torture is categorized as physical and mental. Separate methods may be used to inflict physical or mental torture. Various methods such as electric shock to sensitive part of the body, suspension of victim by an arm or a leg for hours, the immersion of victim's head into the water until the point of suffocation, burning of the victim's skin by cigarettes, and red-hot iron rods, beating aimed at the specific part of the body (beating under the feet until the soles are badly damaged), sexual abuse against women (men also harmed sometimes in their ability to function as the men), extremely poor sanitary condition in detention, depriving from visit toilets, keeping the victim alive with filthy food and drinking water, limited freedom of movement, and packing of prisoners in small cell that they are forced to sleep in turns are in practice.[28] Physical torture is complemented by the psychological torture and more severe methods are used for mental torture, such as, sleep deprivation, blind folding and isolation invoking the deep sensation of fear and helplessness, total isolation for years, coercing victim to say or to do things which violate their ideology or religious conviction with the purpose of destroying fundamental part of victim's identity related to their

26 Hemide Sadiqova, Defining threshold between torture and inhuman or degrading treatment, Baku University Law Review, 20015, Vol.1.

27 Supra note 3, p 171.

28 Ibid, p. 172

self-respect and self-esteem, Political and ethical values are attacked by the techniques such as forcing to sing a song or chant slogan which the victim is against, mock execution, replacement of name by numbers, removing of personal belongings including glasses and life-saving drugs, Providing ill-fitting uniforms etc.[29]

New methods of torture have been invented. Following 9/11incident, Central Intelligence Agency (CIA) used "coercive interrogation" to the Al Qaida suspects at Guantanamo Bay in the name of "enhanced" interrogation programme. Such method include: grabbing and shaking prisoners, slapping prisoners to cause pain and fear, forcing prisoners to stand for upwards of 40 hours, exposing prisoners to extremely cold temperatures for prolonged period and dousing them in cold water, waterboarding prisoners by binding them to a board, wrapping their faces in plastic and pouring water over them, or strapping them down, putting a washcloth over their faces and pouring water into their noses, confining prisoners in coffin-style boxes, keeping prisoners in darkness without access to light, and blaring continuous loud music at prisoners.[30]

Prohibition of torture in international Human Rights Law:

Torture absolutely is prohibited in international law and such prohibition applies even in the time of national emergency.[31] Torture in no case and no ground, legally or morally could be justified.[32] Prohibition on torture amounts to *jus cogens*[33] and states must bear international responsibility if such a crime is committed within their territory. Various international human rights treaties at international or regional level[34] prohibit torture. Under certain conditions specifically in time of armed conflict international and non-international in nature, torture if perpetrated, may constitute a war crime. It may also be a discrete crime under customary international law, whether committed in time of peace or in time of war.[35] Torture if inflicted in time of war, may be prosecuted at national or international level both. Therefore, International human rights instruments require all the state parties to adopt appropriate legislative, administrative, and judicial measures[36] to criminalize the torture under their domestic criminal jurisdiction.[37] Various International instruments prohibiting torture could be summarized as follows.

Universal Declaration of Human Rights 1948.

The Universal Declaration of Human Rights (UDHR) a normative instrument was adopted to remedy the failure of the UN members to agree on the incorporation of the catalogue of

29 Ibid,
30 Human Right First, Tortured Justice, New York, 2008, available at https://www.corteidh.or.cr/tablas/r25625.pdf.
31 International Covenant of Civil and Political Right 1967, Article 4, Robert Cryer et al. An Introduction to International Criminal Law and Procedure, Cambridge, first South Asian Edition 2011, p 352.
32 Leah Levin, Human Rights: Questions and Answers, UNESCO 1998, p 96.
33 Preemptory norms of international law.
34 European Convention of Human Rights and Fundamental Freedom, 1950 Article 3, American Convention on Human Rights 1969, Article 5(2), African Charter of Human and People's Rights 1981 Article 5.
35 Antonio Cassese, International Criminal Law, 2nd ed, Oxford 2008, p 149.
36 Supra note 20, Article 2.
37 Ibid, Article 4.

protectable human rights within the Charter itself. Unanimously adopted Declaration although a non-binding one, is considered as normative standard of human rights based on various grounds. *First*, Declaration although non-binding, is taken by the UN itself and states as normative framework in the subsequent development of human rights, *Second,* the Declaration is considered as an authoritative interpretation of the Charter by the General Assembly. *Third*, the Declaration now posited as a part of the general principle of law recognized by the civilized nations.[38] The Declaration serves as a contemporaneous interpretation of the obligations of U.N. member. States have to "take joint and separate action, to promote universal respect for, and observance of, human rights.[39] The Declaration was adopted to give effect to the obligation contained in Article 55 and 56 of the Charter,[40] and to achieve international cooperation in solving international problems of economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without any distinction.[41] UDHR further expresses fundamental provisions contained in Charter which have become the cornerstone of the human rights in the twin covenants adopted later in 1966.[42]

UDHR has set out the normative standard as "No one should be subjected to torture, or to cruel, inhuman, or degrading treatment or treatment."[43] The provision of the declaration provides the basis for recognizing torture as an international crime. The Declaration is binding to all member states to achieve this objective.[44]

Geneva Conventions of 1949.

The Geneva Conventions[45] adopted in 1949 are vital for the protection of victim of armed conflict both at international and non-international level. The Geneva Conventions applicable in non-international armed conflict, impose prohibition on violence to life and person, in particular murder of all kinds, mutilation , torture and cruel treatment.[46] Torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to the body and health, and willful killing is prohibited under Geneva Convention.[47] The Third Geneva Convention relating to the protection of prisoners of war (POW) clearly provides that, "No physical or mental torture, nor any other form of coercion, may be inflicted on POWs to obtain

38 Scott Davidson, Human Rights, Open University Press, 1997, p 65.
39 Charter of the United Nations, Article 56.
40 Preamble of the Universal Declaration of Human Rights 1948, para. 5 &6.
41 Ibid, Article 1 (3).
42 Supra note 31, and International Covenant of Economic, Social, and Cultural Rights 1966.
43 Universal Declaration of Human Rights 1948, Article 5.
44 Ibid, Preamble para 6.
45 Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, of August 12, 1949, Geneva Convention for the Amelioration of the Condition of Wounded and Sick and Shipwrecked Members of Armed Forces at the Sea, of August 12, 1949, Geneva Convention Relative to the Treatment of the Prisoners of War, of August 12, 1949, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, of August 12, 1949.
46 Geneva Convention I, II, III, and IV, Article 3.
47 Geneva Convention I, Article 50, Geneva Convention II, Article 51, Geneva Convention III, Article 130, and Geneva Convention IV, Article 147.

any kind of information from them. Upon refusing to answer POWs may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.[48] Similarly, Fourth Geneva Convention relating the protection of civilian persons, prohibits exercise of physical or moral coercion or sufferings against protected persons, for obtaining information from them or any third parties.[49] Such prohibition applies not only to murder, torture, corporal punishment, mutilation, or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality applied to civilian or military agents.[50] The prohibition against torture and ill-treatment further expanded to cover all persons, regardless of their status in international armed conflicts under Article 75 of Additional Protocol I to the Geneva Conventions. Additional Protocol I prohibits torture of all kinds whether physical or mental, at any time and in any place whatsoever, whether committed by the civilian or by military agents.[51] Besides, other acts such as murder, corporal punishment, and mutilation are also prohibited acts during international armed conflict.[52] Similar approach has been adopted in non-International armed Conflict too.[53]

International Covenant on Civil and Political Rights, 1966.

The spirit of the UDHR is further expressed in International Covenant on Civil and Political Rights (ICCPR) as a binding document to the state parties. The Covenant precisely repeated the provision of Article 5 of the UDHR and added further prohibition on medical and scientific experiment which was witnessed in Nazi Germany. The Covenant provides that, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."[54] Under the Covenant, some of the rights may be derogated in time of public emergency when it is considered the life of the nations is threatened, however, the torture, inhuman or degrading treatment in no case be derogated.[55]

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.

Despite prohibiting torture in UDHR and ICCPR, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) was adopted by the United Nations in 1984. The CAT being a thematic document, imposes specific obligations on states to prevent and enforce prohibition against torture and cruel, inhuman, or degrading treatment. CAT is widely accepted by the state parties in their domestic law. The convention lays down obligation for states to undertake effective legislative, administrative, and judicial measures to prevent torture within

48 Geneva Convention III, Article 17.
49 Ibid, Article 31.
50 Ibid, Article 32.
51 Additional Protocol I to the Geneva Convention of 1949, Article 75 (2).
52 Ibid.
53 Additional Protocol II to Geneva Conventions of 1949, Article 4(2).
54 Supra note 31, Article 7.
55 Ibid, Article 4.

their jurisdiction.[56] Torture in no circumstances such as war or a threat of war, internal political instability, or any other public emergency or any order by superior officer or public authority can be justified.[57] State parties are in obligation even not to return a person to another state where there are substantial grounds of believing that the person may be tortured.[58] Article 4 to the convention requires that all state parties ensure that the acts of torture or attempt to commit torture are offenses under its criminal law and be punishable. State parties require to establish jurisdiction over the offence of torture when the offences are committed within its jurisdiction or on board a ship or aircraft registered in that state, or when an alleged offender is the national of that state, or when the victim is a notional of that state if that state considers it appropriate.[59] Besides, state parties if any extradition treaty exists between them, must include torture as a extraditable offence.[60]

Ratified by 171[61] the Convention Against Torture is monitored by a Committee Against Torture, involving 10 independent experts.[62] The Committee considers reports on the measures taken by states parties to implement the convention and considers communications from or on behalf of individuals who claim to be victims of a violation of the Convention. Superior order even cannot be invoked as a justification of torture.[63] Each state party to the Convention has to ensure that all acts of torture are criminalized and punishable under its criminal law.[64] State parties to the Convention have to take measures to establish the jurisdiction[65] over the offences of torture if;

a) such offences are committed in the territory under its jurisdiction or on board a ship or aircraft registered in that state,

b) alleged offender is the national of that state,

c) victim is the national of that state and if that state considers it appropriate.

Further, state parties are obliged not to accept any statement extracted from torture. States must ensure that any statement which is established to have been made because of torture, shall not be invoked as evidence in any proceedings.[66] A person when is in detention or custody is often subjected to torture. So, another international instrument provides that 'No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment, and No circumstance could be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.[67]

56 Supra note 20, Article 2(1)
57 Ibid, Article 2(2).
58 Ibid, Article 3
59 Ibid, Article 5
60 Ibid, Article 5
61 https://indicators.ohchr.org/ accessed on 1/30/2021.
62 Supra note 20, Article 17.
63 ibid, Article 2(3).
64 Ibid, Article 4.
65 Ibid, Article 5(1).
66 Ibid, Article 15.
67 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988, principle 6.

Rome Statute of the International Criminal Court (ICC) 1998.

Millions of children, women and men have been the victim of unimaginable atrocities occurring during international and non-international armed conflict both. Some responsible have been punished for the atrocities they committed in the course of time, but many remained unpunished although an established principle in international law is that the perpetrator of such atrocities must not go unpunished. International community desires to ensure that serious crimes should not go unpunished. If there is less possibility of punishing criminals lacking jurisdiction and other technical rules of criminal law, international law applies the maxim "*aut punire, aut dedere"* or offenders must be punished by the state of refuge or surrendered to the state which can and will punish him.[68] If states make cooperation either in prosecuting or in extraditing, alleged criminals of a serious crime, offenders shall have no chance to escape from the punishment. But in many cases, due to their influence on the government or political mechanism, people committing atrocities usually escape of the punishment.

States are primarily responsible to prosecute and punish the responsible under national criminal law. Upon failure of the state to prosecute or to punish the offenders, any international mechanism may be attracted in this regard. Otherwise, international mechanism such as treaty committees[69] shall recommend to the member state to take appropriate action against the violator. International Criminal Court which complements to national criminal jurisdiction, is a permanent institution and has the power to exercise its jurisdiction over persons for the most serious crimes of international concern[70] such as Crime of Genocide, Crime against humanity, War crimes, and Crime of Aggression.[71] ICC Statute proscribes torture as crime against humanity[72] and incase of grave breach of Geneva Conventions, may be considered as war Crimes.[73]

Torture prohibition in Regional Instruments:

Not only universally applicable human rights instruments, but regional human rights instruments are firmly dedicated in abolishing torture. The first among all regional human rights instrument, European Convention on Human Rights and Fundamental Freedoms 1950, requires all state parties secure to everyone the rights and freedoms defined in the Convention.[74] The Convention along with other rights, imposes prohibition on torture, or inhuman or degrading treatment or punishment.[75] Similarly, American Declaration of Rights and Duties of Man 1948 provides no specific provision on the prohibition of torture, however ensures the right to protection of law against abusive attack on his honour, reputation and his private and family life.[76] The provisions concern not only with

68 I.A. Shearer, Starke's International Law, Eleventh edition, Oxford University Press, 2015, p.317.
69 Covenant on Civil and Political Rights 1966 Article 18, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, Article 17.
70 Rome Statute of International Criminal Court, Article 1.
71 Ibid, Article 5.
72 Ibid Article 7 (1) (f).
73 Ibid Article 8 (2) (a) (ii).
74 European Convention on Human Rights and Fundamental Freedoms 1950, Article 1.
75 Ibid, Article 3.
76 American Declaration of Rights and Duties of Man 1948, Article V.

physical torture directly, but it concerns with inhuman and degrading treatment too. American states have adopted American Convention on Human Rights popularly known as 'Pact of San Jose' in 1969. The convention ensures the right to human treatment[77] and provides that every person has the right to have his physical, mental, and moral integrity respected.[78] The convention clearly imposes prohibition on torture stating that no one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.[79]

Inter-American Convention Preventing and Punishing torture is another step taken in 1985 by American states. The convention separately adopted by American states covers all aspects of torture prohibition. The convention provides that torture occurs when a public servant or employ orders, instigates, or induces to use of torture, or directly commits or fails to prevent it. Torture can also be inflicted by any other person at the instigation of a public employee. The public official himself if involved in inflicting torture, or any other person who at the order or instigation of public official involved in the torture may be guilty.[80] In no case of superior order, or any circumstances such as state of war, or threat of war or state of siege, or state of emergency, domestic disturbances or strife, domestic political instability, suspension of constitutional guarantees, and public emergency or disaster, torture may be justified.[81]

Another important and most comprehensive regional human right treaty is the African Charter of Human and People's Rights ("Banjul Charter") 1981. The Charter guarantees to inviolability of human person and ensures that every human being is entitled to respect for his life and integrity of his person. The Charter further prohibits arbitrary deprivation of the right.[82] The right to respect of the dignity inherent in a human being and to the recognition of his legal status is also guaranteed by the Charter. Banjul Charter further provides that all forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman, or degrading treatment and punishment is prohibited.[83]

Torture Practices in Nepal:

All over the Nepalese political history since Rana regime to present democratic era, torture has been the common practice in criminal investigation and political arena. Torture at maximum level is often used in political cases specifically people opposing to the political system in Nepal and so happened during Panchayat regime and even in so called democratic era. Torture specifically has commonly been used against anti-establishment political activists. During anti Panchayat movement, many of the opposition political activists were arrested, tortured, and in many cases disappeared. Torture had been the general trend during Panchayat era to get information about anti panchayat political activities from detainees. Investigating officers if got failed to get intended

77 American Convention on Human Rights 1969, Article 5.
78 Ibid, Article 5(1).
79 Ibid, Article 5(2).
80 Inter-American Convention to Prevent and Punish Torture 1985, Article 3.
81 Ibid, Article 5.
82 African Charter of Human and People's Rights 1981, Article 4.
83 Ibid, Article 5.

information, the detainees were killed and disappeared.[84] Inflicting torture against political opponents continued even after the restoration of Democracy in 1990. During 1992 local election some of the anti-congress political activists were arrested, tortured, and finally disappeared. The government neither made the status of such detained public, nor prosecuted the police officers involved in the incidents. Anti-establishment activists when arrested, they were severely beaten, and made disappeared.[85]

A vicious cycle of the of the human right violation began with waging of an armed conflict by Nepal Communist Party (Maoist) in 1996. During the period, torture remained an effective tool for state security forces for extracting information about war strategies form insurgents. In the meantime, the rebellions were allegedly said to have inflicted torture against supporter of the ruling parties or sometimes common people either to make them silent or supporter. Consequently, a horrendous cycle of violence resulted in hostage taking, arbitrary arrest, torture, inhuman and degrading treatment, extra judicial killing, sexual violence, and enforced disappearance across the country. Insurgents and state security force both got involved in violence. Despite having sufficient provisions in the constitution and the law[86], government itself instigated security forces for extrajudicial killings, disappearance, and torture against the detainees. The government openly made proclamation of reward for beheading insurgent leaders which instigated security personnel towards extreme violations of human rights. The arrested and detainees were not presented to the court to prosecute them in the crime charged, instead they were barbarously tortured and treated inhumanly and most of them disappeared. State security forces used torture, inhuman, and degrading treatment as a tool against Maoist cadres either to finish them or to obtain intended information about their comrades and political programme. UN Office of the High Commissioner for Human Rights reported that some Maoist activists arrested during 2003- 2005 by the then Royal Nepal Army (RNA) were blind folded, hand cuffed, bitten by stick, belt, plastic pipes, rifle butt, and kicked. They were tortured for minimum 30 minutes to many hours. Drowning and pouring water into the nostril was commonly used as a method of torture.[87] In another incident a 15-year-old girl Maina Sunuwar was arrested by RNA officers from her house and taken to Birendra Peace Operation Training Centre. Army officers ordered to drown her head into water for one minute and the process was repeated for 6-7 times. Later, electric shock was administered against her wet body. Such a torture was continued for one and half hour. After torture she was detained in a building blind folded and hand cuffed. When she died of severe torture, RNA officials took her body outside barrack and shot at her back and buried her corps to conceal the incident.[88]

Not only the Maoist and their supporters, but other sister organizations activists such as, All Nepal Free Students Union, Dalit Liberation Front, Nepal Trade Union Federation, All Nepal

84 Dipendra Prasad Pant et. all (ed), Profile of Disappeared Persons, INSEC, 2011, pp. 3-4.
85 Ibid.
86 Interim Constitution Article 20 (3) 24, 26, and 28, Government Cases Act 2049, Sec. 14.
87 United Nations Human Rights, Office of the High Commissioners, Nepal ko Dwond Pratibedan (Nepal's Conflict Report) 2069, p 136
88 Ibid, p. 137

Women's Organization, and sympathizers to the Maoists were targeted by the security forces.[89] Security forces even treated the common people having no relation with the Maoists insurgency inhumanly. During the cordon and search operation conducted by RNA, common people were beaten, women were sexually assaulted, and some were shot dead.[90] Journalists criticizing security forces, medical doctors providing medical treatment to the Maoists, teachers, and human rights activists protesting the violations were reported to be tortured and even killed.[91] Arrested persons instead of presenting in the court with in the 24 hours in accordance with the constitutional and legal provision[92] the were tortured and disappeared. Limitless torture inflicted to the detainees at Bhairavnath Battalion of RNA. Among the detainees some were died of torture and inhuman and degrading treatment and many others were disappeared.[93]

This ferocious cycle of torture didn't stop here. Even Maoists insurgents allegedly involved in torture and Inhuman or degrading treatment basically for two purposes. *First,* they inflicted torture as coercive measure against those who defy general strike or Shutdown or provided no financial support and opposed them. *Secondly*, they used torture as a punishment. Maoists imposed punishment even against their comrades either by the decision of people's court or by the decision of local commander. Such punishment was used against those who in accordance with their code of conduct involved in an indecent activity.[94] Among others, the maximum number of the victims were the persons who allegedly were blamed for espionage against Moist.[95] A group of Maoists found involved in smashing both of the legs of a 70 year old man for his relation with District Development Board President.[96] A person who served for 11 years as a teacher and 28 years as Village Development Committee Secretary, was tortured brutally, and treated inhumanly for not providing donation to insurgents.[97] Thus entire population across the country came under the whirl of the conflict and More than thirty thousand people encountered with some sort of torture, inhuman and degrading treatment during the period of armed conflict.[98]

Despite the prohibition at national and international level, torture, mutilation, or other inhuman and degrading treatment frequently took place during the conflict era. Nepal as an acceding state to the Convention Against Torture (CAT) and having prohibition on torture as a fundamental right in the constitution, failed to undertake obligation set out in the convention. The government agents freely and intentionally defied the constitutional and legal norms and involved in torturing detainees.

89 Ibid, 138

90 Kundan Aryal, Raktapatko ek Dashak Jawafdehita kasko?(Nepali Version) A Decade of Bloodshed: Who is responsibile DFHRI Kathamandu, 2072.

91 Ibid.

92 Interim Constitution, Article 24(3).

93 Jitman Basnet, Andhyara 258 dinharu (258 Dark days) Advocacy Forum Kathamandu, 2007.

94 United Nations Human Rights, Office of the High Commissioners, Nepal ko Dwond Pratibedan (Nepal's Conflict Report) 2069, p 127.

95 Ibid.

96 Ibid, p. 139

97 Ibid, p. 140

98 Ibid.

Prohibition of torture in Nepalese Legal Regime:

Nepal with the restoration of multiparty democracy in 1990, entered to major international human rights treaties. Before 1990 Nepal entered to no international human rights treaties guaranteeing political organizations and freedom of expression due to autocratic Panchayati political philosophy. With the promulgation of Constitution of kingdom of Nepal based on liberal democratic political values opened avenues for acceding international human right treaties and Nepal acceded to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 on 14 May 1991. In pre-democratic era, Nepal acceded to Geneva Conventions in 1964 having provisions for the prohibition of torture.[99] Unfortunately Geneva Conventions never translated into domestic law.

Constitutional prohibition against torture:

Some rights of the citizens and in some cases of non-citizens, are protected as fundamental rights. As a part of the written constitution such rights are constitutionally protected not because the constitution is highest of all laws, but because other laws which contradict with constitutional provisions are void. In every written constitution, there is a fashion to include some basic human rights as fundamental rights. Such fundamental rights are highly influenced by the Universal Declaration of Human Rights 1948 and other international human rights treaties. Right against torture contained as fundamental right in the constitution, is extracted from Article 5 of the UDHR,[100] and ICCPR 1966.[101] Constitution of Kingdom of Nepal guaranteeing major human rights of the people, contained right against torture not as separate fundamental right, but it placed prohibition on torture under "Right Regarding Criminal Justice" in Article 14 (4) of the constitution.[102] Unfortunately, Nepal witnessed poor implementation of right against torture in the following days. Later, the Interim Constitution of Nepal 2007 first time included Right Against Torture as fundamental human rights separately.

Right against torture has been one of the most important human rights upholding the individual dignity. The constitution guaranteed for not to inflict physical or mental torture or to cruel, inhuman or degrading treatment, while in detention for criminal investigation or trial or any other reason. Such any act of torture or cruel, inhuman, or degrading treatment shall be punishable by law, and any person so treated shall be provided with such compensation as may be determined by law.[103] Constitution of Nepal promulgated in 2015, also provides for right against torture as a separate fundamental human right.[104] The constitution contains similar provisions as to the

99 supra note 31.

100 Article 5 states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

101 Supra note 31, Article 7.

102 Article 14(4) states that" 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. Any person so treated shall be compensated in a manner as determined by the law.

103 Supra note 92, Article 26 (1) and (2).

104 Constitution of Nepal, Article 22

Interim Constitution.[105] An act of torture is made punishable by law and the victim is entitled to compensation in accordance with law.[106]

Legal prohibition against torture:

Nepal being a party to the CAT Convention is bound to criminalize torture and cruel, inhuman, and degrading treatment or punishment through her national legislations. But even after accession to ICCPR and CAT Convention in 1991, Nepal enacted no legislation criminalizing the torture however, torture is not a new in Nepalese legal domain. It was first included in Evidence Act 1974. The Evidence Act regards any statement taken by undue influence, duress or torture or threaten to torture to him or any others, is inadmissible.[107] So, legislature intended that any confession obtained from the person while in detention, may not be admissible as evidence against him.

Nepal acceded to the Convention against Torture in 19991 just one year after the promulgation 1990 constitution. Following bad human right record during Panchayat era, Nepal was compelled to improve her human right record by acceding international human rights treaties including Torture Convention in 1991. Incorporation of right against torture as fundamental right, in 1990 constitution, further compelled the government to initiate the legislation which resulted in Torture Compensation Act 1997. But the constitutional prohibition and commitment to international instruments, newly promulgated Act met no obligation to prevent and criminalize the torture. However, the Act contained many provisions such as, not to inflict torture against person in detention during investigation or trial,[108] medical checkup while in detention, and provide compensation to the victim in case of torture inflicted.[109] The non-criminalization of torture by the Act resulted in the exemption from the civil and criminal liability for the person directly or indirectly involved in the torture remained a serious flaw in the Act. Consequently, the Act was severely criticized and demanded for appropriate legislation by the human right activists at national and international level.

Nepal has the binding obligation to comply with provisions of ICCPR and CAT regarding torture. Specifically, to fulfil the obligation under Article 2, 4 and Article 10 of the ICCPR, Nepal should have to adopt legislative or other measures necessary to give effect to the rights recognized in the covenant.[110] In case of violation of right against torture, the victim has the right to an effective remedy.[111] Even in the time of public emergency, right against torture is non-derogable in nature.[112] Human Right Committee[113] which is entrusted with supervision of the implementation of the convention, and responsible for setting out the authoritative interpretation of its provisions is also responsible to investigate allegation of violation promptly, thoroughly, and effectively

105 Ibid, Article 22 (1)
106 ibid Article 22(2)
107 Evidence Act 1974, Article 9 (2) (a) (2))
108 Torture Compensation Act 1997, Sec. 3(1).
109 ibid, Sec. 4.
110 Supra note 31, Article 2(2).
111 Ibid, Article 2(3).
112 Ibid Article 4(2).
113 Ibid Article 28.

through independent and impartial body, to criminalize such acts of torture and cruel inhuman and degrading treatment (CIDT), to ensure that those responsible are brought to the justice, and to make sure that these obligations are made effective in the domestic legal order.

Following the severe criticism by the international committee and other right activists at national and international level, government of Nepal initiated for the Torture and Cruel, Inhuman or Degrading Treatment (Control) Bill 2014. This bill was brought to make compliance with convention by criminalizing torture, and some form of cruel, inhuman, or degrading treatment or punishment. The bill for first time defined the torture in tune with CAT Convention as " physical or mental torture causing serous hurt, pain or suffering whether or not committing any act, to a person under detention or any other person by the person holding public office, or any other person under his/ her instigation or consent knowingly for any of the following purpose:[114]

a) to obtain information on any matter from victim or any other person;
b) to cause confessed the victim or any other person to any offence;
c) to punish the victim or any other person for an act suspected to have committed or preparing to commit;
d) to force or coerce or threaten or intimidate the victim or any other person to commit or not to commit any act,
e) to carry out any other act which is based on discrimination and is punishable under existing laws.

The bill however contained many provisions such as; not to inflict torture at the instigation of a public official,[115], not to impose inhuman, degrading treatment or punishment against person in detention,[116] liability of officer-in-charge for not preventing torture, cruel, inhuman, degrading treatment or punishment,[117] and non-exemption from liability for torture, cruel, inhuman, and degrading treatment, or punishment.[118] Besides, the Bill provided for filing of a complaint by the victim within 90 days of release,[119] punishment for responsible,[120] and compensation to the victim.[121]

Causing political instability, the bill languished at the parliament and attempt to make the torture as a punishable crime remained unfulfilled. But Muluki Criminal Code in 2017 in its sec. 167 criminalized torture for the first-time in Nepalese criminal law. The Code provides that an officer, pursuant to existing law having authority to investigate, prosecute or execute law, or arrest, or to take into detention, shall not inflict or cause to inflict physical or mental torture, or cruel, Inhuman,

114 The Torture, Cruel, Inhuman, and Degrading treatment or Punishment (control) Bill 2014, sec. 2 (K).
115 Ibid, sec. 3
116 Ibid sec. 4
117 Ibid sec. 6.
118 Ibid sec. 8.
119 Ibid sec. 11.
120 Ibid sec. 20.
121 Ibid sec. 22.

and degrading treatment against any person.[122] The section in the explanation provides that, for the purpose of this section, it may be considered to have inflicted torture against the person who is arrested, detained, or taken into preventive detention, or remained under own security, or because of such person to any other person, knowingly inflicted physical or mental pain, or torture, cruel, and inhuman treatment for the following purpose:

a) to obtain information on any subject,
b) to obtain confession,
c) to punish for any act,
d) to threaten or to cause threaten,
e) to carry any other act against law.

Any person giving order or accessory to carry out the committing of crime pursuant to section 167 (1) shall equally be responsible as the principal offender.[123] Neither the superior order may be claimed for the exemption, nor any exemption may be available for liability in torture.[124] Section 167(2) provides for the punishment up to five years of imprisonment and up to Rs. fifty thousand as the fine.

The Code separately provides "no inhuman and degrading treatment shall be inflicted against any person".[125] Inhuman and degrading treatment is not defined by the Code but similar punishment as to the torture has been imposed. Torture is closely related with cruel, inhuman, and degrading treatment or punishment. However, provision of discrimination made against woman during mensural period is taken as the inhuman and degrading treatment while inhuman and degrading treatment is closely related with torture. Such a practice based on the culture is covered by the CEDAW convention and may not be dealt under Torture Convention.

Judicial response to torture:

In pursuant to the provisions provided for in international and regional human rights instruments, each if the state is obliged to undertake appropriate legislative, administrative and judicial measure to prevent torture within its jurisdiction. In order to punish the responsible, the judicial setup has been established at national, regional and international level. Besides, UN Treaty bodies are responsible for monitoring the implementation of concerned treaty provisions. In the course of monitoring, Human Right Committee[126] and Committee Against Torture[127] have given the various decisions of jurisprudential importance. In a Communication submitted to Human Right Committee by *Dev Bahadur Maharjan*[128] a Nepalese national for alleged violation of Article 2(3) 7, 9, and 10 of ICCPR. the Committee concluded that keeping the author in captivity without allowing any

122 Muluki Criminal Code, 2017, Sec. 167.
123 Ibid, sec. 167(3).
124 Ibid, sec. 167(4).
125 Ibid, sec. 168 (1).
126 Supra note 31, Article 28.
127 Supra note 20, Article 17.
128 CCPR/C/105/D/1863/2009.

contact with his family and the outside world, subjecting him to acts of torture and ill-treatment on four consecutive nights and his conditions of detention amount to a violation of article 7 of the Covenant and committee observed that, State party is under an obligation to provide the author and his family with an effective remedy, by (a) ensuring a thorough and diligent investigation into the torture and ill-treatment suffered by the author; (b) the prosecution and punishment of those responsible; (c) providing the author and his family with adequate compensation for all the violations suffered; and (d) amending its legislation so as to bring it into conformity with the Covenant, including the amendment and extension of the 35-day statutory limitation from the event of torture or the date of release for bringing claims under the Compensation relating to Torture Act; the enactment of legislation defining and criminalizing torture; and the repealing of all laws granting impunity to alleged perpetrators of acts of torture and enforced disappearance. In doing so, the State party shall ensure that the author and his family are protected from acts of reprisals or intimidation. The State party is also under an obligation to prevent similar violations in the future.[129] The Committee in further paragraph wished to receive information about the measures taken to give effect to the Committee's Views from the State party, within 180 days and publish the present Views and to have them widely disseminated in the official languages of the State party.

Regarding *Himal Sharma and Devi Sharma*'s communication,[130] the Committee, concluded that, the State party is under an obligation to provide the authors with an effective remedy with full reparation. Accordingly, the State party is obligated to, inter alia: (a) conduct a thorough and effective investigation into the facts surrounding the detention of Mr. Sharma and the treatment he suffered in detention; (b) prosecute, try and punish those responsible for the violations committed and make the results of such measures public; (c) provide the authors with detailed information about the results of its investigation; (d) ensure that any necessary and adequate psychological rehabilitation and medical treatment is provided to the authors; and (e) provide effective reparation, including adequate compensation and appropriate measures of satisfaction, to the authors for the violations suffered. The State party is also under an obligation to take steps to prevent the occurrence of similar violations in the future. In particular, the State party should ensure that its legislation: (a) allows for the criminal prosecution of those responsible for serious human rights violations, such as torture, extrajudicial execution and enforced disappearance; (b) guarantees that any enforced disappearances give rise to a prompt, impartial and effective investigation; (c) defines and criminalizes acts of torture with sanctions and remedies commensurate with the gravity of the crime; and (d) is amended to bring the 35-day limit for claiming compensation for torture into line with international standards.

Committee Against Torture in *Estela Deolinda Yrusta*[131] concluded that the state party upon violation of Article 2 (1), 11 12 and 13 of the convention, categorially urged to:

(a) Conduct a prompt, impartial and independent investigation into all allegations of

129 Ibid.

130

131 CCPR/C/122/D/2265/2013. CAT/C/65/D/778/2016

torture made by Mr. Yrusta and by the authors, and file specific torture charges against perpetrators,

(b) Grant the complainants the status of victims, together with all associated rights, and allow them to act as private criminal plaintiffs in the investigative proceedings into the allegations of torture and the causes of Mr. Yrusta's death;

(c) Provide the complainants with appropriate redress, including fair compensation and access to the truth;

(d) Take the necessary steps to provide guarantees of non-repetition in connection with the facts in the present complaint.

The Committee wished the State party to amend its criminal procedural legislation and to report, on the initiatives taken to allow persons having the status of victims to participate in criminal investigative proceedings into allegations of torture or other cruel, inhuman or degrading treatment within 180 days.

Similarly, Regional Human Rights Courts have sufficiently contributed to prohibit torture, cruel or inhuman, degrading treatment or punishment. In *Velásquez Rodríguez v. Honduras*,[132] Inter American Court of Human Rights found that Mr. Velásquez Rodríguez has been disappeared for seven years and even the body was never discovered and state's failure to investigate or to take steps to prevent such forced disappearances. Thus, Honduras violated Article 4 (Right to life) of the detainee provided for in American Convention of Human Rights. Similarly, When Mr. Velásquez Rodríguez was kidnapped, imprisoned, arbitrarily detained, and tortured by the government officials, having past record of torturing detainees, the Court held that the State violated Article 5 (Right to Humane Treatment) of the Convention.

European Court of Human Rights in *Selmouni v France*[133] held that Article 3 of ECHR enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits torture or inhuman or degrading treatment or punishment in absolute terms. Article 3 makes no provision for exceptions and no derogation even in the event of public emergency threatening the life of the nation. The court therefore reiterates that, in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the European Convention of Human Rights and Fundamental Freedoms. *El-Masri v. The Former Yugoslav Republic of Macedonia* [134] is another important decision taken in this regard. The court in in the context of abduction, transfer and arbitrary and secret detention of El-Masri, held that, there has been a violation of Article 3 of the Convention for the failure of the respondent state to carry out an effective investigation into the applicant's allegations of ill treatment; and inhuman and degrading treatment to which the applicant was subjected, Article 5 for applicant's captivity

132 Velásquez Rodríguez v. Honduras, Merits, Judgment, InterAmerican Court of Human Right, No. 4, Jul. 29, 1988.
133 European Court HR 28 Jul 1999.
134 Application no. 39630/09, Judgment of Grand Chamber of 13 December 2012.

and arbitrary detention in the hotel for twenty-three days, Article 8 and Article 13 for lack of effective remedies in respect of the applicant's grievances and the Court ordered respondent state to pay EUR 60,000 as the damage for torture and inhuman treatment in the detention.

Lacking legislation criminalizing torture, Nepali judiciary had no such a milestone verdict in this regard. With the ratification of many international human rights treaties particularly Torture Convention, Nepal promulgated Torture Compensation Act 2053 in compliance with 1990 Constitution. Although insufficient, the Law certainly was an important step towards protection of individual human rights. in absence of clear and strong law neither the responsible involved in the crime could be punished nor any judicial institution can provide effective justice through its judgment. Consequently, torture remained prevalent in Nepal and excessively practiced during armed conflict. Nonetheless, Supreme Court of Nepal has given a verdict in Decision No 9051[135] which relates to abrogation of Section 13,23, 25 and 29 of Truth and Reconciliation Ordinance 2069. The Supreme Court explained that "torture and enforced disappearance are purely criminal offences subject to criminal investigation and prosecution separately. Agreeing with the principles and causes of the conflict and being involved in committing such a crime in the name of bringing changes or to suppress the conflict is another aspect. The idea to do everything in the name of bringing changes is unacceptable. Whatever the measures to be taken in the furtherance of the society and establish peace should be valid and justifiable". The court further explains that no amnesty may be granted for right against torture and violation of other fundamental human rights.

Epilogue:

Torture practices pervasively are existing in Nepal before and after armed conflict. Despite the constitutional and legal guarantee for prohibition, torture massively practiced in Nepal. National Human Rights Commission in its monitoring report described various cases of custodial death causing torture.[136] Before promulgation of Muluki Criminal Code there was no specific law criminalizing torture. But even after implementation of the Code, torture practices do not come to an end and continuously in practice. It has massively been used during criminal investigation to obtain confession. Bijaya Mahara from Rautahat district who was forced to confess the killing of Niranjan Ram, died of torture in police custody. Some others were severely tortured in the police custody to force them to confess the killing. Hakim Miya of Sunsari district, who was arrested for marrying a hindu girl, was found dead of torture in police custody. Even after promulgation of Muluki Criminal Code in 2074 21 person are found died in custody.[137] Behind such an incident of torture in police custody, some reasons could be traced. a) Investigating authorities are of ruling mind set and do not recognize the minimum human rights of the persons, b) investigating authorities are not aware of minimum standards of protection of human rights of detainees, c) Investigating authorities work under the pressure of so called powerful elites in the society, d)

135 Madhav Kumar Basnet v. Rt. Honorable Chair, Interim electoral Cabinet, Decision date: 2070/9/18.

136 National Human Right Commission, Human Right Situation in Jail and Detention Centre Monitoring Report, 2017 p.54-57

137 Kantipur, December 31, 2021, Friday.

investigating authorities are instigated to deny the human rights of detainees causing bribe or corruption, e) the government turns reluctant to bring the responsible to the justice and ensure the human rights of the detainees.

No justice could be ensured without fair and impartial criminal investigation. But in Nepal Police still uses the barbaric methods instead of using the modern technique of criminal investigation. Such an investigation certainly would derail entire criminal justice system and defy the right to justice guaranteed in the constitution on the one hand and actual criminal may not be brought to the justice and impunity shall exist pervasively. Consequently, entire criminal justice system will be unsuccessful, and anarchy will prevail instead of rule of law. Nepal as the party to major human rights instruments, is compelled to prosecute the responsible. If torture pervasively exists and responsible are not prosecuted, Nepal as a state party to the convention not only be defamed in international forum for not fulfilling obligation in accordance with the treaties acceded, but the perpetrators certainly will face international adjudication process. Thus, state should enact measures for the effective implementation of the convention on the one hand and responsible must be brought to the justice on the other.

Interfac of Full Protection and Security (FPS) and Fair Equitable Treatment (FET) Clauses of Investment Treaties with Human Rights Discourse in Nepal

Vijay Prasad Jayshwal[1]

Abstract

A human rights approach to international investment law is well endorsed concerns by the international forum as well as is duly placed in muniicpla laws of the respctive countries. The extent of physical protection of investor's life, liberty and property is an integral part of human rights discourse and mostly any forms of international investment treaties has crystalized these concerns in number of treaty clauses. The conventional model of investment treaties reflects the language of these clauses in the same provision and modern reflects under a different heading. The International investment law arises from a network of more than 3,300 treaties—generally investment treaties or free trade agreements with investment chapters—concluded between states, of which more than 2,600 were in force at the time of writing. The gensis of investment treaties has always treated the human rights discourse or subject as an part of broader jurisprudence of investment laws. The UN Special Rapporteur on the right to food, Olivier De Schutter, developed Guiding Principles on Human Rights Impact Assessments (HRIAs) of Trade and Investment Agreements, which explore how states can ensure that such agreements are consistent with their human rights obligations. The concerns of FPS and FET in investment treaites is also built around the different commentaries by UN, international arbitrationa panel and other literatry works.

This paper has analyzed the relatable relation with investor's human rights protection and due concern while dealing with the principles of FPS and FET in investment treaties. This paper has further analyzed the key legal instrument dealing with human rights and interface of FPS and FET with it. The extent of relatibility with investment law and human rights is well endorsed in the paper. This paper has alo analyzed the reflection of discourses in Nepalese investment treaties.

Keywords: Full Protection and Security, Fair and Equitable Treatment, National Treatment, Bilateral Investment Treaties, Treaty Governance.

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Human rights in investment treaties

Human rights is pervasive, interdependent, interrelated and universal in nature. The extent of cooperation and contradiction of human rights doctrine with international investment agreements are always a subject matter of jurisprudential enquiry. Governments with legal obligations under investment treaties also have binding legal obligations under international human rights law.[2] Most of the International Investment Agreements (IIAs) were concluded at the edge of the 1960s for the purpose of promotion and protection of investor in another jurisdiction and the first investment treaty arbitrations being decided in the 1990s.[3] The flow of IIAs were witnessed in a decade and most of bilateral investment treaties were also concluded in similar episode.[4] The relationship between state and investor since earlier were also based on 'cooperation and protection' considering each other investor interest and needed security in host state and mostly are represented through the hybrid theory of investment disputes.[5] The issues of protection to investor and investment in host state is concept not well entirely deep rooted in the investment governance and jurisprudence rather is seen in domain of other branch of public international law.[6] The development made in public international law is considered as reference to the issues reflected in investment treaties in modern time.[7] The historical development to the protection and treatment to alien developed in the field of public international law not for the purpose of investment notion is a supporting jurisprudence.[8]

The interest of home states in ensuring their citizens' protection abroad has been traditionally attached to broader debates on the legal status of aliens.[9] The protection of investor's human rights concern in the host state has also been a debate in the domain of public international law. The so far established jurisprudence of investment law in terms of due recognition and protection of interest of investors in other state is inherently associated with the values of human rights doctrine. This protection if further granted to the status of aliens and their properties are been protected in host states are entirely today's known as subject of full protection and security in investment laws. The protection given to properties and the security attached to investment law

2 Jesse Coleman, Kaitlin Y. Cordes & Lise Johnson, Human Rights Law and the Investment Treaty Regime, (2019). Available at: https://scholarship.law.columbia.edu/sustainable_investment_staffpubs/3

3 The first BIT was concluded between Pakistan and Germany in 1959; see: Treaty for the Promotion and Protection of Investments between Pakistan and the Federal Republic of Germany (adopted 25 November 1959, entered into force 28 April 1962). The first ICSID case based on a BIT, which remains one of the leading decisions about the FPS standard, was decided in June 1990. See: Asian Agricultural Products v Sri Lanka, Final Award, ICSID Case No ARB/87/3 (27 June 1990).

4 Bilateral Investment Treaties, EU Investment Policy and International Development, available at https://www.tni.org/files/download/iias_report_feb_2015.pdf. (Accessed on 7th July 2021).

5 Anthea Roberts, State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority. Available at https://harvardilj.org/wp-content/uploads/sites/15/2014/03/HILJ_55-1_Roberts.pdf. (Accessed on 7th July 2021).

6 Ibid.

7 Lorenzo Cotula, Public Participation and Investment Treaties: towards a New Settlement? Available at https://brill.com/view/book/edcoll/9789004397668/BP000005.xml.(Accessed on 7th July 2021).

8 Ibid.

9 Borchard, The Diplomatic Protection of Citizens Abroad or the Law of International Claims (The Banks Law Publishing Co., New York 1916) 33-6.

is a well-established norms of investment law and is equally considered as compelling norms in international human rights law. There are well developed public international law in terms of proving a justifiable reasoning to status, rights, responsibilities, liabilities, protection on the rights of aliens.[10] The rights of aliens are no more subject to customary practices of state rather has able to occupy on the broader spectrum of human rights discourse in the investment law. Whether this entire development in terms of protection to alien and their human rights were literally leading to trace the footprint of FPS of modern IIAs or BITs is a subject of historical analysis. The literature available on the inseparable relations between the human rights discourses and investment law from the perspectives of due protection and recognition of aliens or investor rights in host state is subject matter largely studied in the scope of investment law. The few references in terms of these clauses can be seen looking back to antiquity,[11] or even to the geneses of mankind. Such as, *Todd Wailer* places the origins of FPS in the Bronze Age as:

> The roots of the P&S standard lay in over two millennia of promises of examples and protection and security [...] the concept of hospitality, which encompasses the practice of according protection and security to aliens, appears to have been a recurring theme from the start of human civilization. While shared understandings of concepts such as: sovereignty, territory, property rights, economy and States may have all evolved over the millennia and between cultures, the concept of hospitality itself has remained largely immutable.[12]

In the modern IIAS, the clauses of full protection and security (FPS) standard is one of the most common substantive provisions contained and also larger disputes at arbitrational panel is seen in relation to these measures.[13] Most of the contentions are seen in the way these clauses are drafted, negotiated, legislated as part of the treaty provision of IIAS or BITs.[14] The FPS and FET standard varies from treaty to treaty and sometime reflected in same clause hence a mechanical separation is difficult to locate.[15] The investor's human rights concerns and their interest in the most of the clauses of investment treaties are seen as an integral part of modern development of investment law. The human rights of investor in terms of security to their property from unjustifiable nationalization or encroachment by host state is also well established norms by number of international arbitral forum in the investment disputes. The state must concerns the issues not entirely as reflection of human rights but its connection with investment treaties while drafting or negotiating with FET and FPS clauses of investment treaties.

10 Ibid.

11 Cf. Nartnirun Junngam, 'The Full Protection and Security Standard in International Investment Law: What and Who is Investment Fully[?] Protected and Secured From?' (2018) 7(1) AUBLR 1, 8 et seq., 85-6, 90, 94 and 99 (arguing that the origins of the FPS standard can be placed in the antiquity, particularly in Greece and Rome).

12 Todd Weiler, The Interpretation of International Investment Law: Equality, Discrimination, and Minimum Standards of Treatment in Historical Context (Brill, Leiden 2013) 61.

13 Ibid.

14 Ibid.

15 Romesh Weeramantry, Full Protection and Security and Its Overlap with Fair and Equitable Treatment, Springer Nature Singapore Pet Ltd. 2021.

The United Nations (UN) Guiding Principles on Business and Human Rights,[16] for example, recognize the tension between human rights and investment norms, and specifically call on states to 'maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts'.[17] The UN Special Rapporteur on the right to food, Olivier De Schutter, developed Guiding Principles on Human Rights Impact Assessments (HRIAs) of Trade and Investment Agreements, which explore how states can ensure that such agreements are consistent with their human rights obligations.[18] These guidining principles contain basic three rules whereby a state would be always obligated under the framework of human rights in investment paradigm.

> a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms; (b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; (c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.

In its General Comments and Concluding Observations, the UN Committee on Economic, Social and Cultural Rights has also elaborated on the human rights obligations of states in the context of international investment. In its General Comment No. 24, for example, the Committee underscored that states 'should identify any potential conflict between their obligations under the Covenant and under trade or investment treaties, and refrain from entering into such treaties where such conflicts are found to exist' and 'cannot derogate from the obligations under the Covenant in trade and investment treaties that they may conclude'.[19] The GC No.24 is for the State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities.

The interpretation of trade and investment treaties currently in force should take into account the human rights obligations of the State, consistent with Article 103 of the Charter of the United

16 The "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework", which were developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. The Special Representative annexed the Guiding Principles to his final report to the Human Rights Council (A/HRC/17/31), which also includes an introduction to the Guiding Principles and an overview of the process that led to their development. The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011.

17 United Nations, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (2011) Principle 9 (hereafter UN Guiding Principles). The commentary to Principle 9 notes that investment treaties 'may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so'. UN Guiding Principles, 11.

18 United Nations, Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements (Addendum to the Report of the Special Rapporteur on the Right to Food, Olivier De Schutter) UN Doc A/HRC/19/59/Add.5 (19 December 2011) (hereafter UN Guiding Principles HRIAs)

19 UN Committee on Economic, Social and Cultural Rights 'General Comment No 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities: restricting marketing and advertising of certain goods to protect public health' (10 August 2017) UN Doc E/C.12/GC/24 (hereafter CESCR General Comment No 24) [13].

Nations and with the specific nature of human rights obligations.[20] States parties cannot derogate from the obligations under the Covenant in trade and investment treaties that they may conclude. They are encouraged to insert, in future treaties, a provision explicitly referring to their human rights obligations, and to ensure that mechanisms for the settlement of investor-State disputes take human rights into account in the interpretation of investment treaties or of investment chapters in trade agreements. The General Comment also notes that '[t]he interpretation of trade and investment treaties currently in force should take into account the human rights obligations of the State', and that states should explicitly reference human rights obligations in future investment treaties so that investorstate dispute settlement mechanisms 'take human rights into account' when interpreting treaty standards.[21] For the most part, regional human rights tribunals have yet to address the interaction between state obligations under human rights treaties and those under investment treaties. One exception is the InterAmerican Court of Human Rights' decision in *Sawhoyamaxa Indigenous Community* v. *Paraguay*, wherein the Court specifically sought to harmonize human rights and investment treaty obligations.[22]

FPS and FET in Investment Treaties & Human Rights

The autonomy given to state at table of negotiation on provisions of IIAs or similar treaty provisions are also cited a cause for number of protection in different forms to investors. When a state is negotiating for the best of investor in another/host state, their concerns of human rights in terms of protection of life, liberty, property and security of him/her is always primary subject. The extent of protection of physicality and property of investor is intersectionality of human rights discourse in investment treaties. Even the expression of investment treaties contain the language of human rights. For example, the well expression of language in the treaty provision is seen in the arbitral tribunal in *Limier* v *Ukraine* (2010):

> It is a rule of Delphic economy of language, which manages in just three sentences to formulate a series of wide ranging principles: FET standard, protection and security standard, international minimum standard and prohibition of arbitrary or discriminatory measures.[23]

Early expressions of FPS provisions were contained in treaties of friendship, commerce, and navigation (FCN). For example, Article V(1) of the 1949 FCN treaty between the United States and Italy provides that nationals of each contracting State shall receive "the most constant protection and security for their persons and property, and shall enjoy in this respect the full protection and security required by international law."[24] The protection of person's life and property is

20 Inter-American Court of Human Rights, Sawhoyamaxa Indigenous Community v. Paraguay (judgment of 29 March 2006, Series C No. 146), para. 140.

21 CESCR General Comment No 24

22 Kaitlin Cordes, Lise Johnson and Sam Szoke-Burke, 'Land Deal Dilemmas: Grievances, Human Rights, and Investor Protections' (CCSI, March 2016) 542-544 accessed 25 June 2018.

23 Joseph Charles Limier v Ukraine, Decision on Jurisdiction and Liability, ICSID Case No. ARB/06/18 (14 January 2010) [246] (in reference to the article II (3) of the Ukraine-USA BIT and the U.S. Model BITs of 1992 and 1994).

24 Treaty of friendship, commerce and navigation between the United States of America and the Italian Republic, 2

fundamental discourse in the investment treaties. Furthermore, the notable invocations of FPS provisions in FCN treaties were made before the International Court of Justice (ICJ) in the Tehran Hostages case[25] and the ELSI case.[26] The inclusion of an FPS clause in Article 3 of the 1959 Germany-Pakistan BIT, the first ever bilateral investment treaty (BIT), was therefore not a novel development. The human rights discourse was also added in the first BIT. It was same protection asked for the property, life and liberty of investor's in host state. The multiple variations are seen in the modern treaty provisions. For example, Article 3(1) of the Bangladesh-Thailand BIT provides that "Investments of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security."[27] The two standards may also be located in different articles within a BIT.[28]

A variation in FPS language uses the qualifier "legal" to modify "security." For instance, Article 4(1) of the Germany-Argentina BIT provides that "Investments shall enjoy full protection and legal security" (emphasis added). This language difference has been relied on by some tribunals to extend FPS protection beyond physical assets to intangible property. Certain treaties offer FPS not as an independent treaty standard but package it as forming a part of international law: "Each Party shall accord to a covered investment treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security."[29] Treaty language may also specify that international law is a floor that a State's FPS obligations cannot fall below: "Investments shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less favorable than required by international law."[30] Alternatively, some treaties narrow FPS by providing that international law is a ceiling and the obligation to provide FPS does not require protection more than that required by international law: "The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by [the customary international law minimum standard of treatment of aliens], and do not create additional substantive rights."[31]

Adjectival qualifiers (or their absence) in FPS provisions may also lead to different interpretations and applications. For example, there may be an absence of the term "full."[32] In this context, the tribunal in Bowater Gaff held that when the terms "protection and security" are qualified by "full,"

February 1948, 63 Stat. 2255, T.I.A.S. No. 1965, 79 U.N.T.S. 171 (entered into force 26 July 1949). Article I, Abs-Shaw cross Convention, and Article 1, 1967 Draft OECD Convention, also provide that property is to receive the "the most constant protection and security."

25 United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 3.

26 Electronica Secular S.P.A. (ELSI), Judgment, I.C.J. Reports 1989, p. 15.

27 See also Art 2(2)(I) Czech Republic-Slovak Republic BIT, Art 2(2) UK-Egypt BIT, Art II(2)(a) UK-Sri Lanka BIT.

28 In the Bangladesh-Denmark BIT, for example, the FPS and FET provisions are located, respectively, in Arts 2 and3.

29 Art 6(1) Canada-Hong Kong BIT.

30 Art II (3) (a) Lithuania-United States BIT.

31 Chapter 9, Art 9.6(2) Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

32 See, for example, Art 2(2) Argentina-United Kingdom BIT and Art II Zaire-United States BIT.

the content of the standard may extend to matters other than physical security.[33] In contrast, the Parke rings v. Lithuania tribunal held that "it is generally accepted that the variation of language between the formulation 'protection' and 'full protection and security' does not make a difference in the level of protection a State is to provide."[34] Aside from "full," other qualifiers may also be included, such as "full legal protection and security" (emphasis added), as mentioned above, or "full and adequate protection and security"[35] or "full and complete protection and security."[36] Article 10(1) of the Energy Charter Treaty speaks of "most constant protection and security" (emphasis added). To complete this survey, it should be noted that a handful of treaties do not contain an FPS provision, as is the case with the India-Bangladesh BIT.[37] A treaty in absence of FPS or FET as integral party of treaty provision are mostly deal based on their prior assumptions or on basis of customary nature of these provision in investment law. The lack of explicit recognition of FET and FPS as part of treaty provision may have impact on protection of human rights of investor and may question on substance of investment treaties.

Perspectives of Human Rights to fps & fet

The government is always obligated to protect, promote and fulfill the human rights obligation either be it of categories of investment treaties or any other international instrument like ICCPR, ICESCR, CRC or others. The extent of human rights obligation are always comprheneisvley framed in the international legal documents. The issues of FPS and FET are also related with the legal obligation given to state towards the foreign investor's concerns and their rights in host states. It is said that the international duty of a government in respect of the property of foreigners cannot be dissevered from its international duty in relation to foreigners in other respects. The state needs to act always positive in terms of providing protection to hyman rights of investors and their properties in the invested states. The duty of a government towards individuals in respect of their property varies with each successive stage of civilization; it is not the same in the modern world as in ancient or medieval societies, nor is it the same in all countries [today].[38] A lawmaker should hesitate long before decreeing any absolute rule as a dogma exempt from the relativity which is the condition of human organizations. Foreigners, as long as they live in alien territory, ought to be safe from every injury, and the ruler of the state is bound to defend them against it,

33 Bowater Gaff Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, para 729. See also Suez, Societal General de Agues de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina, Award, 30 July 2010, ICSID Case No. ARB/03/19, para 175.

34 Parkerings-Compagniet AS v. Republic of Lithuania, Award, 11 September 2007, ICSID Case No. ARB/05/8, para 354. See also Al Warraq v. Republic of Indonesia, UNCITRAL, Final Award, 15 December 2014, para 630 ('full protection and security is not a higher standard than adequate protection and security').

35 Art 3(2) Singapore-Bangladesh BIT (emphasis added).

36 Art 5(1) France-Argentina BIT (emphasis added).

37 See also Newcombe A, Paradell L (2009) Law and practice of investment treaties: standards of treatment. Kluwer, p 309.

38 Junngam, Nartnirun "The Full Protection and Security Standard in International Investment Law: What and Who is Investment Fully[?] Protected and Secured From?," American University Business Law Review, Vol. 7, No. 1 (2018) . Available at: https://digitalcommons.wcl.american.edu/aublr/vol7/iss1/1.

that is, security is to be assured to foreigners living in alien territory.[39] There are few approaches developd by the court/arbitration while dealing with the subject matters of FPS and FET in the IIA and also relations with humn rights discourse.

1. The Equating Approach & Human Rights

There has been a tendency to place the FPS and the FET standards on equal footing, as a single substantive obligation. This trend is not of recent origin. Some of historical recorded document in the field of investment treaties has reflected it such as in 1961, in his Critical Commentary to the Abs-Shawcross Convention of 1959, *Georg Schwarzenberger* explained the content of the protection and security obligation in terms of fair and equitable treatment:

> The emphasis in Article I of the Draft Convention on protection and security of foreign property being “most constant" and being granted “at all times" does not appear to add any undue rigidity to the obligations expected to be undertaken by capital-importing States. What is promised at all times is merely the grant of equitable treatment.[40]

The so-called ‘equating approach' has found its way into investment arbitral decisions. The award rendered in Occidental v Ecuador (2004) provides the perhaps clearest example of this line of argument. In their analysis of the FPS standard, the arbitrators stated:

> The Tribunal [...] holds that the Respondent has breached its obligation to accord fair and equitable treatment under Article II (3)(a) of the Treaty. In the context of this finding the question of whether in addition there has been a breach of full protection and security under this Article becomes moot as treatment that is not fair and equitable automatically entails an absence of full protection and security of the investment.[41]

In *National Grid* v *Argentina* (2008) the claimant argued that, as enshrined in the Argentina-UK BIT, ‘the general duty to protect investments is linked to fair and equitable treatment'.[42] Based on this contention and noting that the BIT contained a broad definition of investment, which included both tangible and intangible assets, the investor concluded that the FPS clause could not be limited to the guarantee of physical protection.[43] A few tribunals have followed a more careful approach by observing that an overlap between both standards only occurs when FPS is interpreted broadly, so as to encompass the notion of legal stability. In *Plama* v *Bulgaria* (2008) the arbitrators noted that, when FPS is said to comprise the guarantee of a stable legal environment, ‘the standard becomes closely connected with the notion of fair and equitable treatment'.[44] A similar statement was made in *Achmea* v *Slovakia* (2010):

39 Christian Wolff, Jus Gentium Scientifca Pertractum (1749), in 2 CLASSICS OF INT'L L. 536 (Joseph H. Drake trans., James Brown Scott ed., 1934).

40 Georg Schwarzenberger, ‘The Abs-Shawcross Draft Convention on Investments Abroad: A Critical Commentary' (1961) 14(1) Current Legal Problems 213, 221.

41 Occidental Exploration and Production Co. v Ecuador, Final Award, LCIA Case No. UN 3467 (1 July 2004) [187].

42 National Grid P.L.C. v Argentina (UNCITRAL), Award (3 November 2008) [181].

43 National Grid P.L.C. v Argentina (UNCITRAL), Award (3 November 2008) [181-2].

44 Plama Consortium Ltd. v Bulgaria, Award, ICSID Case No. ARB/03/24 (27 August 2008) [180].

> Where, as here, the complaint is essentially that the investment was not protected against government policies, the question whether there has been a breach of the Treaty is inseparable from the question whether the policies in question were fair and equitable.[45]

In *Spyridon* v *Romania* (2011) the tribunal expressed the view that, where this broad interpretation is adopted, 'the [FPS] standard is also covered by Fair and Equitable Treatment'. [46] A good example would be *Murphy* v *Ecuador* (2016/2017). In its Partial Final Award the tribunal considered that a finding of liability under the FET standard turned further consideration of the investor's FPS claim unnecessary.[47] The tribunal's reasoning was heavily based on procedural economy.[48] Another example is the award issued in *AES* v *Kazakhstan* (2013).[49] In that case, the arbitrators observed that the claims raised under both standards were identical.[50] Having dismissed the FET claim, the arbitrators stated that '[the tribunal] sees no additional element in or aspect of Respondent's conduct that constitutes a breach of the FPS standard'. [51] In *Anglo American PLC* v *Venezuela* (2019), the investor claimed that a set of measures was contrary to both the FET and the FPS standards for similar reasons.[52] Since the Tribunal had rejected the investor's argument as regards to the FET standard, it also dismissed the FPS claim.[53] In *Rumeli Telekom* v *Kazakhstan* (2008) the claimant argued that the breach of the FET standard 'automatically entails' a failure to provide FPS.[54] The respondent state acknowledged that '[FPS] is closely related to the fair and equitable standard'. [55] In *PSEG* v *Turkey* (2007) the investor invoked the Occidental award and advanced the argument that 'the breach of fair and equitable treatment automatically entails the absence of full protection and security'.[56] In *Eurogas* v *Slovakia* (2017) the investor contended that 'acts and omissions identified as being in violation of the fair and equitable treatment standard also constitute a violation of the standard of full protection and security'. 49 The respondent rejected the

45 Achaea B.V. v Slovakia (UNCITRAL), Award on Jurisdiction, Arbitrability and Suspension, PCA Case No. 2008-13 (26 October 2010) [284] (further noting that there was 'no need' to address the FPS separately from the FET claim).

46 Spyri don Rousakis v Romania, Award, ICSID Case No. ARB/06/1 (7 December 2011) [321]

47 Murphy Exploration & Production Co. v Ecuador (UNCITRAL), Partial Final Award (6 May 2016) [294].

48 Murphy Exploration & Production Co. v Ecuador (UNCITRAL), Partial Final Award (6 May 2016) [294].

49 AES Corporation and Tau Power B.V. v Kazakhstan, Award, ICSID Case No. ARB/10/16 (1 November 2013) [337-9]

50 AES Corporation and Tau Power B.V. v Kazakhstan, Award, ICSID Case No. ARB/10/16 (1 November 2013) [339].

51 AES Corporation and Tau Power B.V. v Kazakhstan, Award, ICSID Case No. ARB/10/16 (1 November 2013) [339].

52 Anglo American PLC v Venezuela, Award, ICSID Case No. ARB (AF)/14/1 (18 January 2019) [483].

53 Anglo American PLC v Venezuela, Award, ICSID Case No. ARB (AF)/14/1 (18 January 2019) [484-5].

54 Rudely Telekom A.S. and Telis Mobil Telekomunikasyon Hizmetleri A.S. v Kazakhstan, Award, ICSID Case No. ARB/05/16 (29 July 2008) [658]

55 Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v Kazakhstan, Award, ICSID Case No. ARB/05/16 (29 July 2008) [663].

56 PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v Turkey, Award, ICSID Case No. ARB/02/5 (19 January 2007) [257].

equalization of the two standards, and argued that FPS solely refers to omissions in the protection of investors against third party violence.[57]

The award and the annulment decision rendered in the *Azurix* v *Argentina* case (2006/2009) provide an excellent introduction to the *effet utile* argument. In that case, the arbitral tribunal, giving particular weight to the use of the adjective full in the FPS clause of the Argentina-United States BIT, reached the following conclusion:

> The Tribunal is persuaded of the interrelationship of fair and equitable treatment and the obligation to afford the investor full protection and security [...] full protection and security was understood [in other cases] to go beyond protection and security ensured by the police. It is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor's point of view [...] the Tribunal, having held that the Respondent failed to provide fair and equitable treatment to the investment, finds that the Respondent also breached the standard of full protection and security under the BIT.[58]

In the annulment proceeding, Argentina argued that '[i]f the standard of full protection and security were the same as the standard of fair and equitable treatment under the Treaty, there would be no *effet utile* for the second standard'.[59] The Annulment Committee considered that the arbitral award did not 'necessarily' imply that both standards are identical, but could also be read as indicating that FPS is a 'sub-category' of FET.[60]As to the effect utile argument, the Committee made the following observation:

> Argentina's argument that the Tribunal's findings in this respect leave no *effet utile* for the full protection and security standard might, if accepted, support a conclusion that the Tribunal was wrong in law. However, mere error of law, even if this could be established, is not a ground for annulment. The Committee considers that the Tribunal's reasoning, right or wrong, is quite clear. The Committee therefore considers that there is no basis for annulling this finding under Article 52(1)(e) of the ICSID Convention ['failure to state reasons'].[61]

Arbitral tribunals have often resorted to the *effet utile* argument as the basis for the distinction between the FPS and the FET standards. Thus, in *Electrabel* v *Hungary* (2012) the arbitrators explained: In the Tribunal's view, given that there are two distinct standards [FPS and FET] under ECT, they must have, by application of the legal principle of "*effet utile*", a different scope and

57 Eurogas Inc. and Belmont Resources Inc. v Slovakia, Award, ICSID Case No. ARB/14/14 (18 August 2017) [365].

58 Azurix Corp. v Argentina, Award, ICSID Case No. ARB/01/12 (14 July 2006) [408]. See also the tribunal's reliance on Occidental v Ecuador at paras 406-7.

59 Azurix Corp. v Argentina, Decision on the Application for Annulment of the Argentina Republic, ICSID Case No. ARB/01/12 (1 September 2009) [134 and 182].

60 Azurix Corp. v Argentina, Decision on the Application for Annulment of the Argentina Republic, ICSID Case No. ARB/01/12 (1 September 2009) [183].

61 Azurix Corp. v Argentina, Decision on the Application for Annulment of the Argentina Republic, ICSID Case No. ARB/01/12 (1 September 2009) [184].

role.[62] Similarly, in *Crystallex* v *Venezuela* (2016) the tribunal considered that 'full protection and security' does not extend beyond physical security, and observed:

> [A] More extensive reading of the "full protection and security" standard would result in an overlap with other treaty standards, notably FET, which in the Tribunal's mind would not comport with the "*effet utile*" principle of interpretation.[63]

Even where the *effet utile* principle is not expressly mentioned, avoiding overlaps between FPS and FET has been a recurrent concern of arbitrators interpreting FPS clauses. Arbitral tribunals have often warned about the risk that extensive interpretations of FPS clauses could lead to a complete overlap between the FPS and FET standards.[64] This approach further tells that the concerns of human rights in the investment treaties or investment governance should be equally balanced and host state must take appropriate measures for protection of physical properties or others from unjusitifable infringement.

2. The General-Particular Approach & Human Rights

Parties in investment arbitral proceedings might seek to strengthen their case by alleging that the duty to provide protection and security does not constitute a separate head of liability, properly so-called, but a mere element of the obligation to provide fair and equitable treatment.[65] In *Vivendi* v *Argentina* (2007), the tribunal held that this treaty clause grants protection beyond physical security.[66] In this vein, it drew particular attention to the embedding of the FPS standard within the BIT:

> [T]he scope of the Article 5(1) protection should be interpreted to apply to reach any act or measure which deprives an investor's investment of protection and full security, providing, in accordance with the Treaty's specific wording, the act or measure also constitutes unfair and inequitable treatment. Such actions or measures need not threaten physical possession or the legally protected terms of operation of the investment.[67]

62 Electrabel S.A. v Hungary, Decision on Jurisdiction, Applicable Law and Liability, ICSID Case No. ARB/07/19 (30 November 2012) [7.83].

63 Crystallex International Corp. v Venezuela, Award, ICSID Case No. ARB(AF)/11/2 (4 April 2016) [634]. Cf. also Oxus Gold v Uzbekistan (UNCITRAL), Final Award (17 December 2015) [354].

64 Cf. Enron Corp. and Ponderosa Assets L.P. v Argentina, Award, ICSID Case No. ARB/01/3 (22 May 2007) [286]; Sempra Energy International v Argentina, Award, ICSID Case No. ARB/02/ 16 (28 September 2007) [323].

65 See, for example, the investor's argument in Urbaser v Argentina (2016): Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentina, Award, ICSID Case No. ARB/07/26 (8 December 2016) [560] (invoking '[t]he requirement of protection as included in the fair and equitable treatment test' and advancing the proposition that '[t]he fair and equitable treatment standard and the right to full protection and certainty must be viewed as a whole and cannot be interpreted in isolation' – emphasis added).

66 Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentina, Award, ICSID Case No. ARB/97/3 (20 August 2007) [7.4.13-7.4.17].

67 Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentina, Award, ICSID Case No. ARB/97/3 (20 August 2007) [7.4.15]. For another case concerning the interpretation of article 5(1) of the Argentina-France BIT see: EDF International S.A., Saur International S.A. and Leon Participaciones Argentinas S.A. v Argentina, Award, ICSID Case No. ARB/03/23 (11 June 2012) [405, 413 and 1108-12]. Section 15.2.1 considers this aspect of

The Total v Argentina case (2010) was also concerned with the interpretation of Article 5(1) of the France-Argentina BIT. In their Decision on Liability, the arbitrators held that the close connection between the FPS and the FET standards confirmed the interpretation of the FPS clause as encompassing the notion of 'legal security'.[68]

> [T]he obligation set forth in Article 5(1) [FPS] forms part of the fair and equitable treatment standard, so that a finding of breach of that obligation would form part of the breach of Article 3 [FET] rather than be an independent finding of breach. The Tribunal has already found such a breach in respect of the same facts so that no additional finding of breach of Article 5(1) is warranted. Moreover, no further damages would result from following a different approach.[69]

A similar approach was followed in Suez v Argentina (2010). Making particular reference to the wording of the France-Argentina BIT, the arbitrators explained:

> The present Tribunal [...] takes the view that under Article 3 [FET], quoted above, the concept of full protection and security is included within the concept of fair and equitable treatment, but that the scope of full protection and security is narrower than the fair and equitable treatment. Thus, State action that violates the full protection and security clause would of necessity constitute a violation of fair and equitable treatment under the French BIT. On the other hand, all violations of fair and equitable treatment are not automatically also violations of full protection and security. Under the French BIT, it is possible for Argentina to violate its obligation of fair and equitable treatment toward the Claimants without violating its duty of full protection and security. In short, there are actions that violate fair and equitable treatment that do not violate full protection and security.[70]

The general-particular approach also found expression, at least implicitly, in *Rusoro Mining* v *Venezuela* (2016). In that case, the investor alleged that regulatory measures adopted by Venezuela constituted a breach of both the FET and the FPS clauses of the Canada-Venezuela BIT.[71] In their assessment of one of the FPS claims, the arbitrators stated: [T]he Tribunal has already concluded that [...] [the measures] did not amount to a breach of the FET standard; consequently, such measures can never imply a breach of the FPS standard, however widely interpreted.[72] Hence, the state must develop a different forms of intruemnt while dealing with the issues of protection to investor's properties or life or others concern in investment treaties. The human rights concerns of investor by the host state must be well endored and equally significant for the promotion of investmen regime.

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the EDF award in more detail, in connection with the 'equating approach'.

68 Total S.A. v Argentina, Decision on Liability, ICSID Case No. ARB/04/1 (27 December 2010) [343]

69 Total S.A. v Argentina, Decision on Liability, ICSID Case No. ARB/04/1 (27 December 2010) [343].

70 Suez Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v Argentina, Decision on Liability, ICSID Case No. ARB/03/19 (30 July 2010) [171].

71 Rusoro Mining Ltd. v Venezuela, Award, ICSID Case No. ARB(AF)/12/5 (22 August 2016) [527 et seq. and 546].

72 Rusoro Mining Ltd. v Venezuela, Award, ICSID Case No. ARB(AF)/12/5 (22 August 2016) [548]

3. 'Full Protection and Security' and 'Fair and Equitable Treatment' as Independent Standards & Human Rights

While the equating approach and the general-particular approach have enjoyed some support in the past, the most widely accepted view is that the FPS standard is different and independent from the FET standard. This conclusion seems convincing as a matter of principle.[73] The real issue, however, lies in the determination of the precise difference between the two obligations. Some arbitral tribunals have rightly observed that, while the FET standard is not attached to any particular standard of liability, there is widespread agreement that a breach of FPS requires a failure to exercise due diligence. As explained by the arbitrators in *Jan de Nul* v *Egypt* (2008):

> The notion of continuous protection and security is to be distinguished here from the fair and equitable standard since they are placed in two different provisions of the BIT, even if the two guarantees can overlap. As put forward by the Claimants, this concept relates to the exercise of due diligence by the State.[74]

In *Gemplus* v *Mexico* (2010) the arbitral tribunal also drew a careful distinction between the FPS and the FET standards. The arbitrators considered that the difference between them is twofold. In the first place, FPS '[does] not generally impose strict liability on a host state under international law'.[75] Secondly, in its core, each standard refers to a different source of risk:

> [T]hese BIT provisions [FPS] are directed at different kinds of unlawful treatment from that proscribed by other provisions of the two BITs [i.e. the Argentina-Mexico BIT and the France-Mexico BIT], particularly those regarding FET and Expropriation. The latter involve the investor and the host state, whereas the 'protection' provisions also involve the host state protecting the investment from a third party.[76]

In *Electrabel* v *Hungary* (2012) the arbitral tribunal held that the FPS standard is not the same as the FET standard.[77] The implication is that, while the FET standard refers to direct injuries committed by state organs, the FPS standard imposes a positive obligation to protect foreign investors from harmful events that do not originate in the host state's conduct. In *Ulysseas* v *Ecuador* (2012) the investor argued that the FPS and the FET standards should be assessed jointly because 'both treatments require the State to provide stability and predictability'.[78] The arbitrators were not convinced by the investor's approach:

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73 Christoph Schreuer, 'Full Protection and Security' (2010) 1 (2) J. Int'l Disp. Settlement 353, 366; Finnur Magnússon, Full Protection and Security in International Law (University of Vienna, Vienna 2012) 207

74 Jan de Nul N.V. and Dredging International N.V. v Egypt, Award, ICSID Case No. ARB/04/13 (6 November 2008) [269].

75 Gemplus S.A., SLP S.A. and Gemplus Industrial S.A. de C.V. v Mexico, Award, ICSID Cases No. ARB(AF)/04/3 & ARB(AF)/04/4 (16 June 2010) [9.10].

76 Gemplus S.A., SLP S.A. and Gemplus Industrial S.A. de C.V. v Mexico, Award, ICSID Cases No. ARB(AF)/04/3 & ARB(AF)/04/4 (16 June 2010) [9.11].

77 Electrabel S.A. v Hungary, Decision on Jurisdiction, Applicable Law and Liability, ICSID Case No. ARB/07/19 (30 November 2012) [7.83].

78 Ulysseas Inc. v Ecuador (UNCITRAL), Final Award (12 June 2012) [271]. See also para 260.

> The Tribunal does not share this view. Full protection and security is a standard of treatment other than fair and equitable treatment, as made manifest by the separate reference made to the two standards by Article II(3)(a) of the BIT.[79]

The Ulysseas tribunal observed that, as opposed to the FET standard, FPS establishes a 'due diligence' obligation, which comprises the prevention and redress of injuries originating in the conduct of entities other than the host state.[80] In *Mobil* v *Argentina* (2013) the arbitrators limited the scope of the FPS standard to protection against acts which stem from third parties rather than state agents,[81] also acknowledging the standard's preventive and repressive functions.[82] In Oxus Gold v Uzbekistan (2015) the arbitral tribunal found that, as a rule, FPS serves the function of providing protection against third party conduct.[83] As regards the relationship between FPS and FET, the arbitrators explained:

> [U]nless otherwise expressly defined in a specific BIT, the general FPS standard complements the FET standard by providing protection towards acts of third parties, i.e. non-state parties, which are not covered by the FET standard. Thus, where an incriminated act is done by a State-organ, the applicable standard is the FET standard, whereas where such act is done by a non-state entity, the applicable standard becomes the FPS standard.[84]

In *CC/Devas* v *India* (2016) the arbitral tribunal held that FPS is applicable only in respect of acts of third parties.[85] The arbitrators added that '[i]f, on the other hand, the acts can be attributed to the Government, then the FET standard would apply'.[86] The award rendered in *Koch* v *Venezuela* (2017) follows a similar approach, as it links the FET standard to good faith and the absence of arbitrariness,[87] and FPS to protection against physical violence by third parties.[88]

Human Rights, FPS and FET in Nepal's BIT

The investment regime and its governance is comparatively wider in nature than any other system of the world. The host state must take consideration of investors interest along with the issues of human rights of people as well as investors. The human rights and investment regimes do not

79 Ulysseas Inc. v Ecuador (UNCITRAL), Final Award (12 June 2012) [272].
80 Ulysseas Inc. v Ecuador (UNCITRAL), Final Award (12 June 2012) [272].
81 Mobil Exploration and Development Argentina Inc. Suc. Argentina and Mobil Argentina S.A. v Argentina, Decision on Jurisdiction and Liability, ICSID Case No. ARB/04/16 (10 April 2013) [999].
82 Mobil Exploration and Development Argentina Inc. Suc. Argentina and Mobil Argentina S.A. v Argentina, Decision on Jurisdiction and Liability, ICSID Case No. ARB/04/16 (10 April 2013) [1002].
83 Oxus Gold v Uzbekistan (UNCITRAL), Final Award (17 December 2015) [353].
84 Oxus Gold v Uzbekistan (UNCITRAL), Final Award (17 December 2015) [353].
85 CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Ltd. and Telcom Devas Mauritius Ltd. v India (UNCITRAL), Award on Jurisdiction and Merits, PCA Case No. 2013-09 (25 July 2016) [499]
86 CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Ltd. and Telcom Devas Mauritius Ltd. v India (UNCITRAL), Award on Jurisdiction and Merits, PCA Case No. 2013-09 (25 July 2016) [499].
87 Koch Minerals SÁRL and Koch Nitrogen International SÁRL v Venezuela, Award, ICSID Case No. ARB/11/19 (30 October 2017) [8.43].
88 Koch Minerals SÁRL and Koch Nitrogen International SÁRL v Venezuela, Award, ICSID Case No. ARB/11/19 (30 October 2017) [8.46].

inherently conflict with one another to many extent but sometime a special diverget seeking of protection may come in specific circumsatnces.[89] A narrow conflict may arise when there is a direct clash or clear incompatibility between a state's obligations under human rights law and under an investment treaty applicable to an investor-state dispute.[90] The state obligation out of specific investment treaties can't be a ground for derograble. The obligation in the human rights may occur in different form. where a state must choose between protecting the rights of indigenous peoples who stand to be affected by an investment and protecting an investor's interests in the same investment.[91] Nepal has signed BIT with France to secure the investment and protection of each other investors and also agreed to make a possible dual contribution for sake of dragging more investors.[92] This treaty is in force. The treaty with France has also mentioned the dispute settlement clauses between state and state as well as state and investor of each other territories. The standards of clauses are also reflected in the BIT with France.

The bilateral treaty between the Federal Republic of Germany and the Kingdom of Nepal concerning the encouragement and reciprocal protection of investment is another remarkable achievement to promote and bring more investment in each other territories. The BIT with the Federal Republic of Germany has aimed to create favorable conditions for investments by nationals and companies, encouraging and contractual protection for investment and stimulate private sectors initiative to increase the prosperity of each other.[93] This treaty contains fourteen articles along with the protocol. The protocol has made several additions to different articles of the treaty for making more contextually applicable the treaty provision. This treaty is in force. Article 3 of the treaty has mentioned the principle of national treatment.

> Neither contracting Party shall subject investments in its territory owned or controlled by nationals or companies of the other Contracting party to treatment less favorable than it accords to investments of its own nationals or companies or to investments of nationals of any third State.[94]
>
> Neither contracting Party shall subject nationals or companies of the other Contracting party as regards their activity in connection with investments in its territory, to treatment les favorable than it accords to its own nationals or companies or to nationals or companies of any third State.[95]

The BIT with Germany has strongly projected the enforcement of principles of favorable treatment as well as national treatment to each other investors in each other territory. The principle of NT and MFN is considered as one of in separate parts of modern BIT as well as a traditional

89 Jesse Coleman, Kaitlin Y. Cordes & Lise Johnson, Human Rights Law and the Investment Treaty Regime, (2019). Available at: https://scholarship.law.columbia.edu/sustainable_investment_staffpubs/3.

90 Ibid.

91 Ibid.

92 France- Nepal Bilateral Investment Treaties, (1983).

93 Preamble of treaty between the Federal Republic of Germany and the Kingdom of Nepal concerning the encouragement and reciprocal protection of investment, (1986).

94 Article 3 (1) of BIT with Germany, 1986.

95 Article 3 (2) of BIT with Germany, 1986.

form of BIT not as under a separate chapter but as part of some other clauses. The investor and investment get better protection if the treaty provision is very clear in terms of protection awarded to properties, assets, investment, and other substances connected with the investment purpose. This gives a sense of insertion of full security and fair equitable treatment as part of investment treaties. The clause of FPS and FET is seen as an inseparable part of the treaty agreement. This treaty with Germany has also provisions about the FPS clauses.

> Investments by nationals or companies of either Contracting party shall enjoy ***full protection*** as well as ***security*** in the territory of the other Contracting party.[96] It further says that the investments by nationals or companies of either Contracting party shall be expropriated, nationalized or subjected to any other measures the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting Party except for the public benefit and against compensation. Such compensation shall be equivalent to the value of the investment expropriated immediately before date the expropriation or nationalization of the imminent expropriation or nationalization has come publicly known. The compensation shall be paid without delay, it shall be effectively reliable and freely transferable. The legality of any such expropriation, nationalization of comparable measure and the amount of compensation shall be subject to review by due process of law.[97]

Taking reference to modern BIT and their consistent trend on substantive clauses, the German-Nepal treaty has also followed very similar features. Similarly, His Majesty's Government of Nepal has made further progress to promote and secure the investment with the Government of the Republic of Mauritius. This treaty is signed but not in force. The treaty with the Republic of Mauritius is for the promotion and reciprocal protection of investment on each other territories.[98] The reciprocal is generally understood as on equal and in the mutual way of understanding with each other.[99] This BIT has also contained a similar purpose as reflected in the preamble of BIT with Germany. It recognized the necessity of creating a favorable environment for greater flow of investments and also promote and reciprocal protection of investment and lend greater stimulation to the development of business initiatives for increasing the prosperity of both Contracting Parties.[100] There are twelve articles in the Agreement with the Republic of Mauritius which contains issues like definitions,[101] the scope of the agreement,[102] promotion and protection of

96 Article 4 (1) of the Treaty.
97 Article 4 (2) of the Treaty,
98 Agreement between the Government of the Republic of Mauritius and His Majesty's Government of Nepal, (1999).
99 Jose Luis Siqueiros, Bilateral treaties on the Reciprocal Protection of Foreign Investment, (1994), California Western School of Law.
100 Preamble of Agreement Between the Government of the Republic of Mauritius and His Majesty's Government of Nepal, (1999).
101 Article 1 of the Agreement. (1999).
102 Article 2 of the Agreement (1999).

investments,[103] treatment of investments,[104] compensation for losses,[105] expropriation[106], transfer of investment capitals and returns[107], settlement of disputes between an investor and a contractual party[108], the dispute between contracting parties[109], subrogation[110], application of other rule[111] and final clauses.[112] This treaty is more progressive and also properly framed, recognizing the different contextual issues emerging in the international investment regime. Most of the issues are properly placed under a different heading to provide a more logical and realistic undertaking on it.

The agreement with Mauritius has also adhered the principle of fair and equitable treatment as part of substantive obligation along with measures of full protection and security clauses.

> Investments approved under Article 2 shall be accorded ***fair and equitable protection*** in accordance with this Agreement.[113] Investments and returns of investors of either Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable nor discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory by investors of the other Contracting Party.[114] Each Contracting Party shall in its territory accord to investors and to investments and returns of investors of the other Contracting Party treatment not less favourable than that which it accords to investments and returns of investors of any third State.[115]

The treaty provision in the Mauritius agreement has not explicitly mentioned the FPS clauses as part of the agreement but has spoken about the compensation in event of losses arising due to armed conflict, revolution, a state of national emergency, revolt, insurrection, or riot.[116] This provision also can be interpreted in the broader framework of FPS jurisprudence. The explicit absence of the FPS clause may create a cloud of suspicion for the investor as well as for the host state hence this agreement is not seen as much more progressive and reflecting of key major substantive clause of the Bilateral Investment Agreement.

Nepal made further progress by signing an agreement between the government of the United Kingdom of Great Britain and Northern Ireland and His Majesty's Government of Nepal for the promotion and protection of investments. This treaty is also in force. This agreement was also signed for creating favorable conditions for greater investment by national and companies of the one state

103 Article 3 of the Agreement (1999).
104 Article 4 of the Agreement (1999).
105 Article 5 of the Agreement (1999).
106 Article 6 of the Agreement (1999).
107 Article 7 of the Agreement (1999).
108 Article 8 of the Agreement (1999).
109 Article 9 of the Agreement (1999).
110 Article 10 of the Agreement (1999).
111 Article 11 of the Agreement (1999).
112 Article 12 of the Agreement (1999).
113 Article 3(3) of the Treaty.
114 Article 4(1) of the Treaty.
115 Article 4 (2) of the Treaty.
116 Article 5 (1) of the Treaty.

in the territory of other and vice-versa. The agreement further states to recognize and encourage and enhance reciprocal protection based on an international investment agreement.[117] There are altogether fourteen articles consisting the issues like definitions,[118] promotion and protection of investment[119], national treatment and most-favored-nation provisions[120], compensation for losses[121], expropriation[122], repatriation of investment and return[123], exceptions[124], reference to the international center for settlement of investment disputes[125], the dispute between the contracting parties[126], subrogation[127], application of other rules[128], territorial exceptions,[129] entry into force[130] and duration and termination.[131] In comparison to the previous or old generation of BIT in Nepal, the BIT with the UK is more progressive and also has incorporated the most necessary provisions of the international investment regime. The incorporation of national and MFN provisions under a separate clause has made this BIT more contextual and also has accelerated a leader in the investment sector. The issues of repatriation and investment return were not featured as the subject of BIT in the previous generation of BIT of Nepal.

The BIT with the UK is much more promising and has largely reflected the modern trend of agreement. The separate provisions are kept under different headings for the promotion and protection of investors and their investment in the host state. This BIT has provisions regarding the NT and MFN, FPS, FET for the protection of investors and their issues in host states.

> Each Contracting Party shall encourage and create favourable conditions nationals or companies of the other Contracting Party to invest capital in its territory, subject to its right to exercise powers conferred by its laws, shall admit such capital.[132]
>
> Investments of nationals or companies of each Contracting Party shall be accorded ***fair and equitable treatment*** and shall enjoy ***full protection and security*** in the territory the other Contracting Party. Neither Contracting Party shall in any way impair arbitrary or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to

117 Nepal-UK Bilateral Investment Treaty, (1993)
118 Ibid. Article 1 of the treaty
119 Ibid. Article 2 of the treaty.
120 Ibid. Article 3 of the treaty.
121 Ibid. Article 4 of the treaty.
122 Ibid. Article 5 of the treaty.
123 Ibid. Article 6 of the treaty.
124 Ibid. Article 7 of the treaty.
125 Ibid. Article 8 of the treaty.
126 Ibid. Article 9 of the treaty.
127 Ibid. Article 10 of the treaty.
128 Ibid. Article 11 of the treaty
129 Ibid. Article 12 of the treaty.
130 Ibid. Article 13 of the treaty
131 Ibid. Article 14 of the treaty.
132 Article 2(1) of the Treaty.

investments of nationals or companies of the other Contracting Party.[133]

The government of Nepal further extended the relationship with the Republic of Finland to enhance the promotion and protection of investments in each other territories for the national and companies of each other. This treaty is also in force. The BIT with the Finnish government has accelerated the growth of protection and special consideration of investors on each other territory. The Finnish BIT is a reflective piece of modern BIT concluded across multiple jurisdictions and has reflected very strong foundations like the party should treaty on a non-discriminatory basis; stimulate the flow of private capitals, effective utilization of economic resources and improving living standards; promote sustainable development and finally promotion and protection of investments.[134] This BIT 'has also foreseen the concern of 'sustainable development' as one of the purposes of the treaty and hence all other connected considerations for achieving the sustainable development in investment would be a guiding principle at the time of enforcement and this concept is also endorsed by G 20.[135] Generally, the issues of sustainable development were not seen for a very significant period of the older generation of BIT. There are seventeen articles in the Finnish BIT containing the issues like definitions,[136]promotion, and protection of investments[137], treatment of investments[138], exemptions[139], expropriation[140], compensation of losses[141], free transfer[142], subrogation[143], the dispute between an investor and a contracting party[144], the dispute between the contracting parties[145], permits[146], application of other rules[147], application of the agreement[148], general derogation[149], transparency[150], consultations[151] and entry into force, duration and termination.[152] The Finnish BIT has included very progressive and also standard clauses in the agreement for better protection and promotion of each other investment and also more considerations are given to investors.

133 Article 2 (2) of the Treaty.
134 Finland-Nepal Bilateral Investment Treaties, (2009).
135 James Zhan, G20 Guiding Principles for Global Investment Policymaking: A Facilitator's Perspective (2016), see at https://e15initiative.org/wp-content/uploads/2015/09/E15-Investment-Zhan-Final-1.pdf. (Accessed on 8th Juyl 2021)
136 Article 1 of the Finnish Treaty.(2009)
137 Ibid. Article 2 of the Treaty.
138 Ibid. Article 3 of the Treaty.
139 Ibid. Article 4 of the treaty
140 Ibid. Article 5 of the Treaty.
141 Ibid. Article 6 of the Treaty.
142 Ibid. Article 7 of the Treaty.
143 Ibid. Article 8 of the Treaty.
144 Ibid. Article 9 of the Treaty.
145 Ibid. Article 10 of the Treaty.
146 Ibid. Article 11 of the Treaty.
147 Ibid. Article 12 of the Treaty.
148 Ibid. Article 13 of the Treaty.
149 Ibid. Article 14 of the treaty.
150 Ibid. Article 15 of the treaty.
151 Ibid. Article 16 of the Treaty
152 Ibid. Article 17 of the treaty.

The Finnish BIT is also progressive in terms of adapting and accommodating the modern trend of BIT. The liability and obligation to host as well as investors are kept under a different chapter excluding as an integral part of any other clauses. The issues of FET and FPS are an inseparable part of the Finnish treaty. The provision of fair and equitable treatment along with the measures of full protection and security are mentioned in the same section and also in similar lines of the agreement.

> Each Contracting Party shall promote in its territory investments by investors of the other Contracting Party and shall, in accordance with its laws and regulations, admit such investments.[153] Each Contracting Party shall in its territory accord to investments and returns of investments of investors of the other Contracting Party ***fair and equitable treatment*** and ***full and constant protection and security***.[154]

Furthermore, Nepal has also signed the BIT with the Government of India for the promotion and protection of investments. This treaty is already terminated. This BIT has also foreseen to create favorable conditions for fostering greater investments and has also recognized and encourage the investor based on reciprocal promotion and protection and also to stimulate private sector initiative in the investment sector.[155] Nepal shares a very significant percentage of trade and commercial relations with India and mostly Nepalese trade are in deficit with India. The BIT to some extent will help each other investors to bridge the investment gap and will provide excellent protection as in form of legal instruments to each other investors. The Bit with India contains sixteen articles incorporating the issues like definitions[156], the scope of the agreement[157], promotion and protection of investments[158], national treatment and most favored nation treatment[159], expropriation[160], compensation for losses[161], repatriation of investments and returns[162], subrogation[163], settlement of disputes between an investor and a Contracting Party[164], the dispute between the contracting parties[165], entry and sojourn of personnel[166], applicable laws[167], application of other rules[168], denial of benefits[169], entry into force[170] and duration, termination and amendment.[171]

153 Article 2 (1) of the Treaty.
154 Article 2 (2) of the Treaty.
155 India- Nepal Bilateral Investment Treaties, (2011)
156 Article 1 of the treaty
157 Article 2 of treaty
158 Article 3 of treaty.
159 Article 4 of treaty.
160 Article 5 of treaty.
161 Article 6 of treaty.
162 Article 7 of treaty.
163 Article 8 of treaty.
164 Article 9 of treaty
165 Article 10 of treaty.
166 Article 11 of treaty.
167 Article 12 of treaty
168 Article 13 of treaty.
169 Article 14 of treaty.
170 Article 15 of treaty
171 Article 16 of treaty.

The Indian BIT has mentioned the issues of protection in the preamble of the treaty, not as part of the agreement under a separate clause. The investment based on reciprocal promotion and protection is a key aim of the Indian BIT in each other territories. The provision relating to fair and equitable treatment, national treatment, and most-favored-nation treatments are reflected in the treaty provisions.

> Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party.[172]Each Contracting Party shall accord to investments of investors of the other Contracting Party, treatment which shall not be less favourable than that accorded either to investments of its own investors or investments of investors of any third State. [173]In addition, each Contracting Party shall accord to investors of the other Contracting Party, including in respect of returns on their investments, treatment which shall not be less favourable than that accorded to investors of any third State.[174]

This treaty has not mentioned any explicit position about full protection and security clauses of investor's assents or investment in any form. The absence of FPS as part of treaty provision has less favored for bringing the investment. The FPS is viewed as solid ground in case of non-justifiable measures of host state leads to losses of an investor or there is a cloud of illegal measures of the host state. Furthermore, it creates a positive hope for the investments. The Indian BIT has not more reflected the established international practices in terms of protection and promotion of investment as compared to other BIT to which Nepal is a party. Hence it is terminated.

Conclusion

Human rights obligation in the investment treaties are narrowly and widely constructed for the purpose of providing greatest protection of investors property and life. The right to regulate of host state to investor is always a subject matters for the conflict between the absolute right to investor and right of host state. There are various international human rights doctrine and laws that establishes the cordial relitonship bwteen the human rights and investment treatiess. Nepal major six bilateral investment treaties and other treaties with investment provision has also protected the issues of huma rights of investor in the investment treaties. The international tribunal has also spoken more about the issuesof human rights intersecting the investment treaties.

Hence, the newer or older investment treaties has not deviated from the human rigts obligation. Nepal furthermore in way of concluding the investment agreement must observe the issues of human rights of investor and also the other third party concerning to it.

172 Article 3(2) of the treaty.
173 Article 5 (1) of the treaty.
174 Article 5 (2) of the treaty.

Role of masculinity in preventing women from the accusation of a witch: a human right issue in Tamang community in Kavrepalanchok district, Nepal

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Abstract

In many parts of the country, beliefs and practices related to witchcraft have led to serious violations of human rights, including beatings, cutting off body parts, feeding human excreta, female genital mutilation, parading naked, applying black shoot on face, applying hot spoon on the body, torture, and even murder. Tamang women also suffer a lot from this. The role of men seems to be one of the major factors in preventing the accusation of women of being a witch. The meaning of the saying is that men's masculinity is important to prevent the women from being accused of the witch in the Tamang village. This study indicates that incidents of witch accusations mostly happen with adult women, when the men in the family are not able to fulfill their expected gender roles or the males are naive and not aggressive. The aim of this study was to explore the masculine role in preventing the witch accusation in Tamang community where innocent women were often subjected to various forms of physical and mental indignities and to draw the attention of all key stakeholders to the significant scale, severity, and complexity faced by Tamang women. This study has adopted a qualitative research design based on both primary and secondary data has been used. Byways of in-depth interviews and direct observation, this study explored the masculine role in preventing the witch accusations. Respondents included a total number of fifteen accused women, shamans, and perpetrators representing different Tamang communities in the district.

Key words: Masculine, Witch, Accusation, Tamang, Kavrepalanchok

Introduction

All the Tamang communities living in the district under the study believe in a supernatural power or evil spirits. Beliefs related to witchcraft are not problematic in them but are challenging when they involve allegations of harassment, including psychological, emotional, and physical abuse, which can ultimately lead to the exclusion of the accused women from society or even death. The Himalayan Times (2016) also wrote about an incident in this district in which the victim was proved as a witch by so-called shamans and she could not bear this humiliation and committed suicide.

Witch accusations against women are a traditional and harmful practice that can be understood as the result of a crisis of multi-social factors and needs to be analyzed and understood within a broader cultural, historical, economic, and political context in which they occur (UN, 2020). Thus, it is clear that the phenomenon of witch accusations does not respect any geographical or cultural boundaries. That's why it is found to be growing in scale. Therefore, it has become one of the most challenging human rights issues of the 21st century.

Despite the witch allegation as a human rights violation, the issue has received relatively little attention in the human rights debate from the United Nations, academics, and civil society (Secker, 2012). There is no evidence so far of any intervention to stop, suppress and protect the rights of accused women against witchcraft allegations. According to the accused women, even the existing law of Nepal regarding witchcraft allegations has failed to punish the perpetrators as they expected. Such incidents are increasing in our society as most of the incidents of witchcraft accusations are settled in the community. On the one hand, there are gaps in the legal framework, and on the other hand there are challenges in the implementation process, most of the perpetrators are not brought to justice and such impunity cannot be accepted or tolerated. Incidents of witchcraft allegations settled in the community are not known to the general public as they do not appear in the media. Therefore, keeping in view the concept of human rights, it has become necessary for all concerned to take action from their respective areas in the event of such a serious incident.

Many profound social changes seem to have contributed to the emergence and rise of the phenomenon in Tamangs. Most of the Tamangs are uneducated and looking for alternative income due to poor economic condition. In this connection, some go to the city for work and some go abroad. Thus, the presence of men in the homes of most of the Tamangs seemed to be low. In this way, absence of men in the house on the one hand and the presence of naive men on the other have made it easy to accuse the women of the house of witch. Especially when the men in the family are inactive, the woman has to play a major role in the family. She has to run the entire households. In this sense, when women are more active than men, the Tamang community does not readily accept that. Such women also come under suspicion.

In general, a family man devotes his manly powers to protect his wife from anyone who would threaten her. No man can tolerate such a thing and the masculinity within him is also awakened. It seems to be an instinct among males, to protect the women in their lives; wife, mother, sister, daughters from outsiders; aggression. In this sense, the presence of a man alone does not give any meaning to the family; he should also be able to show his manhood in the family and society. There were men in all the alleged cases but they could not show their masculinity. This proves that a man's masculinity brings prestige and respect to the society of the Tamang family.

Most of the witch allegations are based on reasons like making people or animals sick, casting a spell on food or drinks and making children sick. Accused women are subjected to the worst forms of maltreatment. Different kinds of psychological harassment like humiliation, threatening and denouncing in public as a witch, expelling from houses, restriction in social gatherings, and outcast from villages are common. This series of violence against women, accusing as a witch is

deliberately in action. The deep traumatic impact of such an experience cannot only be seen in the lives of the women who are accused of being witches but also felt by their families who pay for that. Often, all the family members are tortured or compelled to leave their homes as well as the areas in which they have been residing for many years. Thus, innocent women have unknowingly lost their lives or been stigmatized in society day by day, due to witch allegations. Hence, it is natural to question here the human rights of women accused of the witch.

Wilson (1975) argued that all animal behavior, including that of humans, is the product of heredity, environmental stimuli, and past experiences, and that free will is an illusion. He has referred to the biological basis of behavior as the ‘genetic leash'. He argues that the human mind is shaped as much by genetic inheritance as it is by culture if not more. He further says that, in many animal species, including primates, males have the biological role of being guardians of the territory and of banishing the intruders or of protecting the group from predators, and these functions imply that males exhibit a higher level of aggression than females.

Fukuyama (1998) suggests that violence and coalition building are primarily the work of males. His argument such as this has been based on underlying socio-biological assumption of human nature; i.e., males are purely instrumental, calculating and political in their alliances, while females are emotionally attached. For him male are by nature always aggressive and violent, always seeking a ‘dominant' position in the status hierarchy. Unlike males, according to him, females are emotionally attached, conciliatory and cooperative.

From the above arguments, it is clear that men should be brave and aggressive in their society in order to protect their families from unfortunate events. As the Tamang society is also influenced by the patriarchal ideology, women are being controlled by men and they are also facing heinous crimes like witchcraft accusations. So it is necessary to have manliness in men and womanly in women. These gender roles make it easy to target the woman who stepped outside of their assigned roles. In Tamang community, the women who violate the boundaries of the gender roles were considered evil and looked with suspicion and accuse them of being witches when necessary.

What is amazing are the people becoming very happy to find the witch and enjoy torturing her. They closely observe the incident, take photographs and videos and clap but do not speak against the torture. And when it comes to witch allegations, most people take the support of the perpetrator because if they support the witch, they may also be accused of a witch and maybe beaten as the victim. Therefore, in the event of such a witch accusation, no one take the side of the accused and no one stop the torture. At such times when even the men of the family cannot open their mouths, it is easy for the perpetrators to bring other people of the village towards him and isolate the victim. As a result of this, in some cases, the victim dies due to severe torture. In most situations, the accused is forced to confess the charge. It is because the accused cannot do anything in front of a large crowd of people and is forced to accept whatever the situation is. In this way, even the innocent people are forced to declare themselves being a witch. This may be one of the reasons why the number of witch allegations is increasing day by day instead of decreasing and still exists in our society as a social evil and an inhumane example of human rights violation.

Legal provisions regarding witch allegations in Nepal

As per the Muluki Ain (Civil Code) provision, in miscellaneous section 10 (B), stipulated those accused of torturing women for 'practicing witchcraft' was liable to a fine ranging from Rs 5,000 to Rs 25,000 and jail time ranging from three months to two years for violence committed by accusing someone of witchcraft. But the new anti-witchcraft Act envisages stringent punishment for the perpetrators as women continue to be tortured physically and mentally on the charge of practicing witchcraft. It is expected that the new law would discourage such incidents.

The Anti-witchcraft (Crime and Punishment) Act, 2014, was specifically enacted to curb violence based on accusations of witchcraft, by introducing stringent measures. It stipulated fines not exceeding Rs 100,000 and up to 10 years in jail. In cases where the accusation was leveled based on the verdicts of *tantrics* or witch-doctors, the penalties were Rs 70,000 in fines and 7 years of jail. In addition, slandering the family members of the victim could incur fines of up to Rs 30,000 and up to three years of jail. If the perpetrator does not have the means to compensate the victim, the victim would be compensated through the Gender Violence Prevention Fund.

The Criminal Code Bill passed in 2017 stipulates penalties for inhuman treatment of an individual by accusing them of practicing witchcraft. According to section 168 of the bill, the perpetrator of such an act could face up to five years in jail and up to Rs 50,000 in fines to be granted as compensation to the victim. An additional three months of jail time is stipulated for perpetrators who happen to be a government employee at the time of the crime. In addition, the perpetrators would also be prosecuted for other charges relevant to the incident, like torture, assault, murder and so on. This provision replaced the outdated *Muluki Ain* provision mentioned above.

Even though the Criminal Bill was adopted in 2017 and is a landmark law, the practical implementation of it is still very poor. One of the challenges is that people, especially those, who live in remote areas of Nepal, do not know about such a law and what it means. Many people do not know that they can or they have to go and register a complaint, if they are accused of being a witch. They don't even know where to go. Additionally, even those, who do know about it, law enforcement and police officers, often choose to ignore and not even attempt to seek justice in such cases, due to their own deep and abundant beliefs in witchcraft and existence of *boksi*. Without effective legal measures, many perpetrators enjoy impunity and victims do not get justice. Enactment of strict laws would be necessary to prevent women being tortured and accused of witchcraft.

Objective

The aim of this study was to explore the masculine role in preventing witch accusation in Tamang community where innocent women were often subjected to various forms of physical and mental indignities and to draw the attention of all key stakeholders to the significant scale, severity, and complexity faced by Tamang women.

Method

Initially, the word ‘witch' was a kind of fear to me and I was feeling uncomfortable and having some fear meeting with my first participant. And in the second case, the victim's husband helped a lot in providing the real information on an accusation. In this way, I was gradually becoming comfortable and encouraging to meet the other victims in their original place and even the perpetrators and villagers. While talking with the victim, most of the people were sitting around her and watch our conversation. I was very careful, sensitive, and highly alert during the conversation and tried not to hurt anyone with my words. Actually, my participants; victim, perpetrator, and shamans were not feeling comfortable with me in the first meeting and I followed the next. In this way, I had visited several times with them and obtained enough data and information and developed the thick knowledge on witch accusation and male's role in preventing it.

A qualitative research based on both primary and secondary data has been used. By ways of in-depth interviews and direct observation, this study explored the masculine role in the witch accusation in Tamang community. Respondents included a total number of fifteen accused women, shamans, and perpetrators representing different Tamang communities in the district. Obtained data was processed and analyzed by means of data reduction, data display, and drawing and verifying conclusions were made. Though this study topic is considered to be sensitive as it deals with potential fear of stigmatization, the anonymity and privacy of those who participate in the research process were respected and kept confidential for the protection of an individual right.

While talking about the selection of the study area, Kavrepalanchok District; one of the districts where witch accusations are reported highest in Nepal (Nepal Police, WCSCSD). Even in this, such practices are highly prevalent in Tamang than in other people. Thus this study focused on Tamang where accused women were the primary respondent. However, there are many unreported cases but the study is only concerned with reported cases. Few cases from Terai particularly from Siraha and Kailali districts were studied in order to triangulate the finding in Tamangs with them.

Wilson's sociobiology and evolutionary principles that explain the behavior of social insects and then to understand the social behavior of other animals, including humans (1975) and Fukuyama's socio-biological theory on assumption of human nature (1998), and Freud (1915) were used to understand the masculine characteristics and their role in the witch accusations.

Findings of the study

In a patriarchal society like Tamang, men play an important role in the family. He has to perform the duty of not only the husband, the father but also the mental leader. The presence of a man in the family is not the only thing that matters, the man should also show masculinity and then treats his family like others in the society. An analysis of the incidence of witch allegations included in this study revealed that women from such families were accused of witch where the men were weak, naive, and not aggressive. Such incidents have happened even when men are not able to fulfill their expected social role. Incidents of witch allegations thus increasing day by day due to the men's inability to fulfill their roles what the society expects.

In addition to this, like others, a few men in Tamang do not take care of the family because of family disputes, stay away from the family, quarrel with their wife, do not return from their work for a long time and rarely stay at home, etc. are the main reasons for an allegation of the witch in the family. Tamang man's such activities lower the social value of the women in his household and are taken lightly by society and are more likely to be accused of the witch. In another sense, if the man in the family is inactive, then the women have to be active to run the family, which cannot be taken easily by society. Since Tamang are based on patriarchy, they do not like women to move forward in any way.

There is a clear link between manhood and witch accusations in Tamang. Incidents of witch accusations are due to the marginal manhood of men in the family, who are oppressed in one or more ways within their structure embody. This study also shows that no one has been able to point a finger at a woman in a household where the men are brave and aggressive. It is not easy for relatives, neighbors, and villagers to suspect the woman of such a house. So in the process of making accusations, the first target the house where there is a straight and non-fighting man. Or in a house where the woman is very rude and the man of the family is also oppressed, the relatives, neighbors, and villagers also suspect such a woman. Society takes such woman as a threat and tries to weaken her in any way and accusing her of a witch is the easiest and best way they can. Thus, women are more likely to be accused of witch than men in Tamang.

Socio-economic conditions in Tamang also weaken or neglect the role of men in the family. As the Tamangs are already based on traditional agricultural systems, their socio-economic status is weak. They often lack money. That is why most of the Tamangs are in debt. So the only way to earn money is to go to the city to work or go abroad to work. Due to this, most of the men of the Tamang family have gone to the city or abroad for work. They are obliged to repay the loan or do so for income. Studies have shown that most of the men in the family go out of the house for work as there is a patriarchal family in Tamang as well. Due to these reasons, only old people, women and children can be seen in the Tamang family at present. My observation is that most of women of these families were suspected and accused of being a witch.

Study revealed that, most of the Tamang men are abroad for employment. Taking advantage of this opportunity, the woman is often accused by her relatives and neighbors of being a witch. Society pays special attention to the women of the family whose husbands have gone abroad and they tell bad things to the husbands of the women through various means. As these suspicions grow, they quarrel over small things and accuse each other of a witch. Thus, the absence of a man or a husband in the house is a curse for a Tamang woman. No matter how much women's rights are debated in society, the reality is different. Women are more vulnerable than men. Hence, men's role in Tamang has always been that of protector and provider which protects women from being accusation of witch.

Every Tamang man has manhood but is not used according to the difficult situation; he will not have manhood in the sense. Therefore, if the man in the family demonstrates his masculinity, the woman is not accused of witch, but if the man is unable to do so, the woman is accused of witch.

In almost all cases, the main reason for accusation is the inactivity of the man and his inability to display his masculinity. It is found that no one tries to speak on behalf of the accused woman in case of a witch accusation. It is said that, if someone speaks in the middle of a fight, he is also beaten or an accomplice of the witch. Because of this fear, even men just watch the incident but can't resist it. If a Tamang man does not speak like this, it means that his masculinity is weak or lacking in masculinity. In this way, when society does not speak at the time of the incident, the victim has to suffer a lot. In some cases, the victim has fainted, bled, and died. Here, too, the question of human rights arises. The incident of such witchcraft allegations has been encouraged in the Tamang society as the society does not support the victims during the incident. In this way, when there is an incident of witch allegation in the Tamang society, no one will help and support the victims, there is growing excitement over such incidents and the number of witch allegations is increasing day by day. Thus, this research revealed that, no matter if the family is poor but the man of that family treats all the members of the family equally and speaks in support of the woman and respects her value then such family has good respect in the society.

Tamang women are assumed to be delicate, emotional, soft-spoken, vulnerable, weak, and talkative in the society. With this societal model, men had a progressively predominant role in everyday life while women had a subjugated position to men. Similarly to the other side, women who are confident and hold a position in society are viewed as a threat to the conventional gender order. Women have to play an active role as the men in the family are weak and not aggressive. Thus, violence is also directed towards such woman who challenges the existing social structures directly. Study revealed that the women who remained outside of male control, on the margin of their guardianship through the family, or who kept themselves outside or on the edges of the feminine roles prescribed for them, were worrying elements of the established social order. There are also cases of witch allegations that have been studied where society has taken the female as a threat to them.

We may think that Tamang men are aggressive and masculine but not all Tamang men are like that. They are also influenced by their upbringing, experience, and social environment where they grow, and this determines one's view of manhood. My observations found; in the families, if the man is strong, active, or does not tolerate any oppression from the outsiders, then the women of that family are usually safe. No one can think or speak badly about the women of such a house. Therefore, in a society dominated by a patriarchal family in Tamang, it is equally important for a man to be present as well as to be courageous. If this is not the case, society will make various allegations against the women of such houses and one of them is an accusation of witch.

There is a similar practice in the Terai of the far west where a girl is accused of being a witch (INSEC, 2019). This incident took place at Devkaliya, where a young girl of 18 years old from a marginalized chaudhary community was accused of being a witch by so-called *'bholebaba'*. The first reason she was accused of being a witch is that she was *kamlari* and the second reason is that the men in her house were naive, non-violent, and mentally retarded. Although men were present in the family, they were weak for various reasons. Taking advantage of this, *'bholebaba'* of the

same village badly looked down on her and insulted her by accusing her of being a witch. The incident against this schoolgirl and the torture and ill-treatment of her appear to be an extreme violation of human rights. Therefore, the incident of witch accusation can be considered as an incident of human rights violation with the silent approval of the patriarchal structure of society. Women thus in such traditional patriarchal system have always been regarded as the weaker, vulnerable and inferior section of the society. They indicate the sense of low esteem among women, making them vulnerable to victims of violence.

The majority of the accused women were subjected to various forms of discrimination at different stages of their life. Generally, poor, miserable, helpless, ugly-faced, and assertive women whose male partner or the males in the family are were mostly suspected of being witch allegations without any justice and proof in Tamang community. Once, they accused, it is difficult for the victims to stay in the society for the rest of their life.

Discussion

Wilson (1975) argued that all animal behavior, including that of humans, is the product of heredity, environmental stimuli, and past experiences, and that free will is an illusion. Unlike his asserting, study revealed that human nature and behavior are more affected by the society where he is born, raised, and socialized than by his heredity and environment. Despite this, gender, race and ethnicity, age, economic class, religion, and other factors that make up the individual's social location. However he further says that, in many animal species, including primates, males have the biological role of being guardians of the territory and of banishing the intruders or of protecting the group from predators, and these functions imply that males exhibit a higher level of aggression than females. Wilson's this view supports the study as the Tamang women were accused of being witches due to absence of manhood with the males in the family. As Wilson said, women are more likely to suffer because men are less aggressive.

This study supports Berger & Luckmann (1966) where they argued that society is created by humans and human interaction, which they call it habitualization. This study observed that the accusation of witches among Tamang is more than other castes; it is a product of their own society. Their religion and patriarchal society have strengthened and promoted this where women are considered the weakest member of the society. And taking advantage of this, they are often accused of the witch in society.

The original social role theory (Eagly, 1987) predicted that men should be more aggressive than women, to a moderate extent, consistent with other sex differences in social behavior. Supporting this theory, this study shows that, women are accused where their male partners or the male members in the family did not satisfy the social role as expected by society. That's why the value of women became light and easy for the other to accuse her. Concerning the accusation of witch among the Tamang, it is determined by the courage of the men and women in the family. Thus as Eagly argued, males must be masculine in order to prevent the female members in the family from accusing witches. Most accused cases were studied where males are

not assertive and aggressive. Hence, there is a close relationship between masculine and witch accusations in the Tamang community.

Fukuyama (1998) suggests that violence and coalition building are primarily the work of males. His argument such as this has been based on underlying socio-biological assumption of human nature; i.e., males are purely instrumental, calculating and political in their alliances, while females are emotionally attached, conciliatory, and cooperative. For him male are by nature always aggressive and violent, always seeking a 'dominant' position in the status hierarchy. This study also accepts this and felt the same. His statement highly supports this study that males should be violent and aggressive. But, in absence of these qualities with the men in the Tamang community, innocent women have been suspected and accused of being a witch. Victims also say that if their male partners were aggressive then no one can point the finger at them. So, the male's role in protecting and preventing the female from the accusation of a witch is an important issue dealt with in the study.

Conclusion

This article emphasizes that the presence of males with an assertive role as expected by society is important to prevent the females in the family from witch accusations. Men's masculinity in the family affects the formation, stability and overall well-being of the family in the Tamang community. Thus, incidents of witch accusations have been increasing in Tamangs, day by day even as men do not speak out against the women's violence. Mostly women of innocent, poor, illiterate, ugly, single, and aged whose male partners or the males in the family are naive are baselessly suspected as witches and treated inhumanly that avoids the human rights issues.

The perpetrators have committed serious human rights violations such as beating the woman, feeding her human excrement, female genital mutilation, parading her naked, putting black shoot on her face, wearing shoelaces, and applying hot spoon on her body, torture, and even murder. Due to such extreme torture, the victim is forced to call herself a witch in front of the villagers. In this way, an ordinary woman is transformed into a witch in the Tamang society. Once they were accused, it is difficult for them to be in the village for the rest of their lives. Therefore, it is necessary to bring this incident of witch accusation within the scope of human rights, and accordingly it is also necessary to take strict legal action against the perpetrators. Only then can such incidents be gradually reduced and the perpetrators would be discouraged.

Women without male or having male but not masculine are most at risk of witch accusations in Tamang. Women of the family whose husband or the males are rarely present at home due to various reasons are taken lightly by society and are mostly suspected and blame as a witch. Therefore, men must be present in the family and able to perform manhood or the gender role expected by society at the appropriate time, which helps in preventing the allegations at all. Even if the family is poor, the man of the family treats all the members of the family equally and speaks in support of the woman and respects her values, and then no one can abuse women of that family. Therefore, men also have a big role to play in protecting women from being accused of witch in

the Tamang community.

References

Berger, Peter L. and Luckmann, Thomas (1966). *The Social Construction of Reality: A Treatise in the Sociology of Knowledge*. Garden City, NY: Anchor/Doubleday.

Eagly, A. H. (1987). *Sex differences in social behavior: A social role interpretation*. Erlbaum.

Freud, Sigmund (1915). *Instincts and Their Vicissitudes Standard.* Vol. 14. Strachey J (ed.). London: Hogarth Press; 109–140.

Fukuyama, Francis (1998). *Women and the Evolution of World Politics.* Foreigll Affairs, 77(5): 25-40

Government of Nepal (2017). *The National Civil (Code) Act*. Ministry of Law, Justice, and Parliamentary Affairs.

INSEC (2019). *Girl beaten for hour on allegation of being witch.* Retrieved 7 July 2019.

Pandy, Y. R. (2019). *New Muluki Ain - An Era of Reformation*. Legal Info, Kathmandu Nepal.

Secker, E. (2012). Witchcraft stigmatization in Nigeria: Challenges and successes in the implementation of child rights. *International Social Work*, No 56 (1), 2012, pp. 22-36.

The Himalayan Times (2016). *Speedy justice sought for Laxmi Pariyar's family.* Retrieved 20 August 2019.

United Nations Nepal (2020). *Literature Review on Harmful Practices in Nepal.* United Nations Human Rights Office of the High Commissioner.

Wilson, Edward O. (1975). *Sociobiology: A New Synthesis.* Harvard University Press.

जर्नलको लागि लेखहरूमा अबलम्बन गर्नु पर्ने ढाँचा

विभिन्न अनुसन्धान पद्धतिहरूमध्ये हामीले पाद टिप्पणी (Foot notes) मा एक रूपताको लागि APA सैलीलाई अपनाएका छौं । आदरणीय लेखकज्यूहरूलाई यसै विधिलाई अबलम्बन गरिदिनुहुन हार्दिक अनुरोध छः

शीर्षक (Heading)

Bold or *Italicized* and Centered गरी पेजको सबैभन्दा माथि तर शीर्षकभन्दा तल राख्ने ।

सार-सङ्क्षेप (Abstract)

- The First line of the paragraph is not indented.
- पेजको चारैतिर एक/एक इन्च खाली छोड्नुपर्ने ।
- लेखको शीर्षकलाई **Bold** and Centered गर्ने ।
- First line of each paragraph is indented .5 inch
- Paragraph Format, set 'Before & After' to 0.

Font Size :

Article in English :

Times New Roman : 12 pt

नेपाली लेखको लागि :

प्रीति फन्ट

साइज : १६

Heading Level Format

Use title case for all headings. This means that the first letter of all major words should be Capitalized. The formatting from the Heading Level 1 to 5 is given below.

1. Centered, Bold, Title Case

Paragraph text begings one line below the heading (with 0 Spacing before and after)

2. Flush left, Bold, Title Case

Paragraph text begins a double - spaced line below the heading.

3. Flush Left, Bold Italicized, Title Case

Paragraph text begins a double - spaced line below the heading.

पाद टिप्पणी गर्दा लेखकको नाम, थर, कृतिको नाम, प्रकाशक, प्रकाशित मिति, पृष्ठ आदि उल्लेख पाद टप्पणीको प्रयोग गर्दा पृष्ठको अन्त्यमा गर्न अनुरोध छ । सो सिधा रेखामुनि अङ्कित गर्न पनि अनुरोध छ ।

जस्तै : डा. विजय सिंह सिजापतिको पुस्तकमा[1] बाल अधिकारको संरक्षणको विषयमा विशेष चर्चा गरिएको छ ।

क) पाद टिप्पणी गर्दा ध्यान दिनुपर्ने कुराहरू

१) एक लेखक भए

लेखकको नाम थर, शीर्षक, प्रकाशनसम्बन्धी विवरणहरू, प्रकाशन मिति, पृष्ठ

उदहारण : डा. विजय सिंह सिजापति, बाल अधिकार र न्याय, (काठमाडौं : पैरवी प्रकाशन वि.स. २०७०), पृ. १० ।

सीके प्रसाईं, आजको सरल राजनीति तथा व्यवहारिक राजनीतिको रूपरेखा, (काठमाडौं : पैरवी बुक हाउस प्रा.लि. : २०७७

कैलाशकुमार सिवाकोटी, आधारभूत मानव अधिकार (दोस्रो सं.), (काठमाडौं : पैरवी बुक हाउस प्रा.लि., २०७७)

प्रा.डा. जगदीशचन्द्र रेग्मी, नेपालको वैधानिक परम्परा (तेस्रो सं.), (काठमाडौं : पैरवी बुक हाउस प्रा.लि., २०७७)

२) दुई लेखक भए

केदारप्रसाद शर्मा र माधवप्रसाद पौडेल, नेपाली भाषा र साहित्य शिक्षण,
(काठमाडौं : एम.के. पब्लिसर्स एण्ड डिस्ट्रिव्युटर्स, २०६०), पृष्ठ १२–१५ ।

३) तीन लेखक भए

पारसमणी भण्डारी, रामनाथ ओझा र डोलराज अर्याल, भाषिक अनुसन्धान विधि, (काठमाडौं : पिनाकल पब्लिकेशन, २०६८) ।

४) तीनभन्दा बढी लेखक भए : तीन लेखकको लागि जस्तो हो, त्यस्तै गर्नु अनुरोध छ । त्यसैगरी २० जनाभन्दा बढी भए पहिले मूल लेखकको नाम थर लेख्ने र पछि अन्य लेख्ने, अरू विवरणहरू यथावत् नै रहने छन् : हरेराम काजी र अन्य, कानुनको शासन र मानव अधिकार, (भक्तपुर, पौडेल प्रकाशन, २०७०) ।

५) सम्पादित पुस्तक वा अन्य लेख : सम्पादित गरिएका रचनाहरूमा नाम थर(सम्पा., शीर्षक, प्रकाशनसम्बन्धी विवरण, वर्ष र पृष्ठ ।

जस्तै : श्रीधरप्रसाद लोहनी र रामेश्वरप्रसाद अधिकारी (सम्पा.), एकता बृहत् नेपाली–अङ्ग्रेजी कोश, (काठमाडौं : एकता बुक्स, २०६७) ।

६) कुनै सम्पादित पुस्तकभित्रको निबन्ध वा लेख :

जस्तै : जगन्नाथ अधिकारी, खाद्य सुरक्षा : विश्वव्यापीकरणको सन्दर्भमा, भित्र, मेरी डेशेन वा प्रत्यूष वन्त (सम्पा.), नेपालको सन्दर्भमा समाजशास्त्रीय चिन्तन, (ललितपुरः सोसल साइन्स बहाः, सन् २००४), पृ.२१७–२४९।

७) कुनै संस्थाले निकालेको प्रकाशन :

संस्थाको नाम, प्रकाशित डकुमेण्टको नाम, प्रकाशनसम्बन्धी विवरण, प्रकाशन वर्ष ।

जस्तै : नेपाल सरकार कानुन, न्याय, संविधानसभा तथा संसदीय मामिला मन्त्रालय, मानव अधिकारसम्बन्धी

1 डा. विजय सिंह सिजापति, बाल अधिकार र न्याय, (काठमाडौं : पैरवी प्रकाशन, वि.स. २०७०) ।

अन्तर्राष्ट्रिय महासन्धिहरूको संगालो , (काठमाडौं : नेपाल सरकार कानून, न्याय, संविधानसभा तथा संसदीय मामिला मन्त्रालय, वि.सं. २०७२) ।

८) अनुदित पुस्तक वा अन्य सामग्री :

१) यदि लेखक थाहा भए :

लेखकको नाम थर, कृतिको नाम लेखिसकेपछि अनुवादकको नाम थर लेखेर अन्य विवरण यथावत राख्नुपर्नेछ ।

जस्तै : नारायण वाग्ले, पाल्पासा क्याफे (Palpasa Cafe), अनु. विकास संग्रौला, (काठमाण्डौं : नेपालया, सन् २००५) ।

२) यदि लेखक थाहा नभए :

जस्तै :ढुण्डिराज कोइराला (अनु.), नेपाली भाषामा श्रीमद्भागवत् रहस्य (दोस्रो सं), (काठमाडौं : मञ्जरी पब्लिकेशन, वि.सं २०७३) ।

नारायण ज्ञवाली (अनु) धम्मपद: सन्दर्भ, शब्दार्थ र भावार्थसहित नेपालीमा पद्यानुवाद, (काठमाडौं जनता प्रशारण तथा प्रकाशन लिमिटेड, २०७५)

९) पत्रिकाको सम्पादकीय लेख:

माटेको स्पन्दन बुझ्ने कवि सम्पादकीय, गोरखापत्र, (१२० (१०७), २०७७ भदौ ४), पृ.५ ।

१०) पत्रिकाको लेख :

तारा वाग्ले, 'पर्यटन उकास्न 'प्याकेज", गोरखापत्र, भदौ ७ (वर्ष १२०, अङ्क ११०, २०७७), पृ. ५, काठमाडौं : गोरखापत्र संस्थान ।

११) सरकारी प्रकाशन :

सरकारी संस्थाको नाम, शीर्षक, प्रकाशकसम्बन्धी विवरण, प्रकाशन वर्ष, पृष्ठ पनि उल्लेख गर्न सकिन्छ ।

नेपाल सरकार अर्थ मन्त्रालय, आर्थिक सर्वेक्षण २०७६/०७७, (काठमाडौं : नेपाल सरकार अर्थ मन्त्रालय, २०७७) ।

राष्ट्रिय मानव अधिकार आयोग, वार्षिक प्रतिवेदन २०७५–२०७६, (ललितपुर : राष्ट्रिय मानव अधिकार आयोग, २०७६) ।

१२) पत्रपत्रिका वा जर्नलको लेख :

महेश शर्मा पौडेल, राष्ट्रिय मानव अधिकार आयोगको अनुसन्धानसम्बन्धी अधिकार, संवाहक : मानव अधिकार जर्नल, (वर्ष ५ अङ्क १३, २०७६, पुष्स) पृ.९२–१११ ।

पूर्णचन्द्र भट्टराई, वैदेशिक रोजगार र नेपाल, संवाहक : मानव अधिकार जर्नल (वर्ष ५, अंक १४, २०७६), पृ. ७९–८८, ललितपुर : राष्ट्रिय मानव अधिकार आयोग ।

१३) शोधपत्र तथा अप्राशित दस्तावेजहरू:

हरे राम आचार्य, नेपालमा लोकभाका र पप गीत बीचको तुलनात्मक अध्ययन, अप्रकाशित शोधपत्र स्नातकोत्तर तह, नेपाल : सङ्गीत विश्वविद्यालय, २०७६) ।

प्रित शुक्ला, नेपालमा चिया खेती : एक अध्ययन, अप्रकाशित, २०७४ ।

१४) इन्टरनेटवाट लिइएका लेख :

राष्ट्रिय मानव अधिकार आयोग, राष्ट्रिय मानव अधिकार आयोगबाट भएका मानव अधिकारसम्बन्धी महत्त्वपूर्ण निर्णयहरू, (वर्ष ४ अङ्क ६, २०७६) ललितपुर: राष्ट्रिय मानव अधिकार आयोग, मिति २०७७ भदौ १२ मा https://www.nhrcnepal.org/nhrc_new/doc/newsletter/Importation_Nirnayharu_NHRCNepal_2077_compressed.pdf बाट पुन:प्राप्ति

यदि कुनै लेखको Digital Object Identifier (DOI) (डिजिटल अब्जेक्ट आइडेन्टिफाएर) भए त्यसको https://doi.org/10.1080/28937/2070

१५) टेलिफोन वार्ता

कल्पना नेपाल आचार्य, टेलिफोन अन्तरवार्ता, (२०७७ भदौ १०) ।

१६) टेप रेकर्ड सामग्री

सुदूरपश्चिम लोक नृत्य, मिमिरे रेकर्डिङ, (काठमाडौं : शिव डिजिटल ल्याब, २०७०) ।

१७) दोस्रो पटक सोही लेखकको सोही कृति प्रयोग गर्नुपरेमा ऐजन/पूर्ववत् शब्दको प्रयोग गरिन्छ । (खतिवडा, २०७५) कुनै पहिले नै सन्दर्भाङ्कन भइसकेको लेखलाई लगत्तै नभइ अफ पछि पुनः सन्दर्भाङ्कन गर्नै परेमा पूर्ववत्को प्रयोग गर्न अनुरोध छ ।

उदहारण :

१) प्रा. कृष्ण पोखरेल, राजनीतिशास्त्रको सिद्धान्त, (काठमाडौं : एम.के पब्लिशर्स एण्ड डिष्ट्रीब्यूटर्स, २०७२), पृ.७३ ।

ऐ.ऐ । (लगत्तै सन्दर्भाङ्कन गर्नु परेमा)

Ibid (पूर्ववत्) वा (ऐ) प्रा. कृष्ण पोखरेल । (लगत्तै नभइ अफ पछि पुनः सन्दर्भाङ्कन गर्नु परेमा)

२) जगन्नाथ अधिकारी, खाद्य सुरक्षा : विश्वव्यापीकरणको सन्दर्भमा, मेरी डेशेन वा प्रत्यूष वन्त (सम्पा.), नेपालको सन्दर्भमा समाजशास्त्रीय चिन्तन, (ललितपुरः सोसल साइन्स बहाः, सन् २००४), पृ.२१७–२४९ ।

ऐ.ऐ. (पृ.२१२)

१८) supra note / infra note को प्रयोग : supra note पूर्वाक्त भन्नाले यदि कुनै प्रसङ्ग वा लेख वा अन्य कुनै लेखको अंशलाई पुनः सन्दर्भाङ्कन गर्नुपर्ने भएमा विशेषतः कानुनका विषयमा यसको प्रयोग गरिन्छ तर मुद्दा, ऐन र संविधानजस्ता विषयहरूको पुनः सान्र्भाङ्कन गर्दा supra note प्रयोग गर्नुहुँदैन ।

महेश शर्मा पौडेल, राष्ट्रिय मानव अधिकार आयोगको अनुसन्धानसम्बन्धी अधिकार, संवाहक : मानव अधिकार जर्नल, (वर्ष ५ अङ्क १३, २०७६, पुस) पृ.९२–१११

जस्तै : उल्लिखित पाद टिप्पणीलाई पुनः प्रयोग गर्दा *supra* note १ भनी गर्नपर्दछ ।

infra note अनुरोक्त को प्रयोग पछाडिको लेखलाई अगाडि सन्दर्भाङ्कन् गर्नु परेमा गरिन्छ । infra note को प्रयोग गर्दा पुस्तकको लागि भने प्रयोग गर्न पाइँदैन । यसको प्रयोग supra note जस्तै गरिन्छ ।

ख) सारांश लेख्दा ध्यान दिनुपर्ने कुराहरू :

लेख पूर्णरूपमा तयार भएपछि त्यसको पाठकलाई थोरै वा सारमात्र पढेर लेख सम्बन्धमा दिशानिर्देश गर्न सारांश लेख्नु आवश्यक हुन्छ । सारांश १५०–२५० शब्दको हुनुपर्दछ । सारांशमा निम्न कुराहरू समावेश गरिदिनुहुन अनुरोध छः

- परिचय वा पृष्ठभूमि (Introduction or Background)
- अनुसन्धानात्मक लेखको उद्देश्य (Research Objectives)
- विधि (Methodology)
- महत्त्वपूर्ण खोजहरू (Important Findings)
- निष्कर्ष (Conclusion)

आयोगका केही प्रकाशनहरू

१. वार्षिक प्रतिवेदन, आ. व. २०७०/७१, २०७१/७२, २०७२/७३, २०७३/७४, २०७४/७५

२. विद्यालय शिक्षकहरूका लागि मानव अधिकार स्रोत पुस्तिका, २०७१

३. रणनीतिक योजना (२०१५-२०२०), २०७१, दोस्रो संस्करण २०७३, तेस्रो संस्करण २०७४

४. राष्ट्रिय मानव अधिकार आयोगको आर्थिक प्रशासनसम्बन्धी नियमावली, २०७१

५. भूकम्प (२०७२) प्रारम्भिक अनुगमन प्रतिवेदन, २०७२

६. नेपालको संविधान घोषणाअघि र पछि भएका आन्दोलनको क्रममा मानव अधिकारको अवस्था अनुगमन प्रतिवेदन, २०७२

७. राष्ट्रिय मानव अधिकार आयोगका कर्मचारीको सेवा, शर्त र सुविधासम्बन्धी नियमावली, २०७२, दोस्रो संस्करण २०७४, तेस्रो संस्करण २०७४

८. संवाहक, अङ्क-१, २०७२, अङ्क-२, २०७३, अङ्क-३, २०७३, अङ्क-४, २०७४, अङ्क-५, २०७४, अङ्क-६, २०७४, अङ्क-७, २०७४, अङ्क-८, २०७५, अङ्क-९, २०७५ अङ्क-१०, २०७५, अङ्क-११, २०७६ अङ्क-१२, २०७६ अङ्क-१३, २०७६ अङ्क-१४, २०७६ , अङ्क-१५, अङ्क-१६, २०७७

९. भूकम्प र मानव अधिकार, २०७३

१०. Human Rights Situation during the Agitation before and after Promulgation of the Constitution of Nepal, Monitoring Report 2015

११. राष्ट्रिय मानव अधिकार आयोगबाट भएका केही महत्त्वपूर्ण निर्णयहरू, २०७३

१२. Preliminary Report on Monitoring on Earthquake Report, 2072

१३ The NHRIs Nepal Joint Submission for the second Universal Periodic Review of Nepal, 2072

१४. Trafficking in Persons National Report 2013-15

१५. Selected Decision of the NHRC, Nepal vol. 1

१६. मानव अधिकारसम्वन्धी महत्त्वपूर्ण निर्णयहरू वर्ष १ अङ्क २

१७. Annual Progress Report 2072-73

१८. भूकम्प प्रभावितहरूको मानव अधिकारको अवस्था बारेमा तेस्रो अनुगमन प्रतिवेदन २०७४

१९. Trafficking in Persons National Report 2015/16

२०. आयोगका केही सिफारिस कार्यान्वयन र पीडितको अवस्था अध्ययन प्रतिवेदन खण्ड १ (२०७३) खण्ड २ (२०७५)

२१. भूकम्प प्रभावितहरूको अनुगमन प्रतिवेदन, २०७४

२२. निर्वाचन अनुगमन भाग -१ (२०७४) भाग-२ (२०७५)

२३. मानव अधिकारपत्र अङ्क- १-५ (२०७४/०७५), अङ्क १-३, (२०७५/०७६)
२४. Trafficking in Persons Especially on Women and Children in Nepal, National Report
२५. स्वर्गीय दयाराम परियार स्मारिका
२६. कारागार अनुगमन प्रतिवेदन, २०७४
२७. मानव अधिकारसम्बन्धी जान्नुपर्ने कुरा (नेपाली भाषा, मैथिली भाषा, भोजपुरी भाषा, थारु भाषा, तामाङ्ग भाषा, नेपाल/नेवारी भाषा),
२८. मुलुक, प्रदेश र जिल्लाका मानव अधिकारका पाँच प्रमुख विषयः अध्ययन, प्रतिवेदन, २०७५
२९. छाउपडी प्रथाले महिलाको जीवनमा पारेको प्रभाव एक अध्ययनः २०७५
३०. नेपालमा अपाङ्गहरूका मानव अधिकारका अवस्था प्रादेशिक तथा राष्ट्रिय सम्मेलन प्रतिवेदनसहित
३१. प्रतिनिधि सभा र प्रदेश सभा सदस्य निर्वाचन, २०७४ अनुगमन प्रतिवेदन
३२. Monitoring Report of the House of Representative and State Assembly Election, 2017
३३. सप्तरी जिल्लाको मलेठमा २०७३ साल फागुन २३ गते भएको घटनाको छानबिन प्रतिवेदन
३४. मानव अधिकार रक्षाकहरूको दोस्रो राष्ट्रिय सम्मेलनको प्रतिवेदन, २०७४
३५. किसानको अधिकार कानुन पुनरावलोकन, अध्ययन प्रतिवेदन, असार २०७५
३६. Report of International Confernce on Identifying Challenges, Assessing Progress, Moving Forward: Addressing Impunity & Realizing Human Rights in South Asia
३७. Trafficking in Persons in Nepal, National Report, September 2018
३८. विवाद समाधानमा स्थानीय तह (मानव अधिकार अभ्यास पुस्तिका)
३९. नेपालका वृद्धाश्रम/जेष्ठ नागरिक हेरचाह केन्द्रको अध्ययन प्रतिवेदन (संवाहक अङ्क- १०)
४०. राष्ट्रिय मानव अधिकार आयोगसँग सम्बन्धित संवैधानिक व्यवस्था र कानुन
४१. मानव अधिकारसम्बन्धी महत्त्वपूर्ण निर्णयहरू
४२. महासन्धि नं १६९ कार्यान्वयन अवस्था
४३. Monitoring Synopsis of the Senior Citizen's Care Centers-2019
४४. NHRC Nepal's Recommmendations on Right to Environment
४५. An Introduction to the National Human Rights Commission, Nepal
४६. The Rights of the Persons with Disability
४७. Reinforcing Peasants Rights: NHRCN Recommendations
४८. Migrant Workers Rights and NHRC Nepal's Initiatives
४९. वातावरण प्रदूषण र मानव अधिकार एक अध्ययन प्रतिवेदन

५०. जातीय भेदभाव तथा छुवाछुतविरुद्धको अधिकारको अवस्था अनुगमन प्रतिवेदन

५१. अनौपचारिक क्षेत्र विशेषगरी मनोरञ्जन तथा सत्कार सेवाका कार्यरत महिला तथा बालबालिकाहरूको अवस्था र वैदेशिक रोजगारीमा गएका पुरुषहरूको श्रीमतीहरूले भोग्नुपरेको सामाजिक मुल्य (आर्थिक हिंसा, पारिवारिक हिंसा, सामाजिक लान्छना, घरायसी कार्यबोझ) सम्बन्धमा अध्ययन अनुसन्धान प्रारम्भिक प्रतिवेदन ।

५२. मानव बेचबिखनसम्बन्धी राष्ट्रिय प्रतिवेदन, २०७६

५३. जवरजस्ती करणीमा परेका महिलाको मानव अधिकार एवम् न्यायमा पहुचमा नेपाल प्रहरीको जवाफदेहिता

५४. मौलिक हक कार्यान्वयनमा विधायिका र कार्यपालिकाको भूमिका

५५. Reserch report on the situation of the Rights of migrant workers २०७६

५६. मानव बेचबिखनसम्बन्धी राष्ट्रिय प्रतिवेदन २०७६ साउन

५७. नेपालमा बालबालिकाको अवस्था २०७६

५८. Monitoring synopsis of the senior citizens care centers 2019

५९. Sustainable Development Goals and Human Rights in Nepali Context, February, 2020

६०. नेपालको सन्दर्भमा दिगो विकास लक्ष्यहरू र मानव अधिकार २०७७ बैशाख

६१. सीमाक्षेत्रमा बसोबास गर्ने नेपाली नागरिकहरूको मानव अधिकार अवस्था २०७७ वैशाख

६२. कोभिड १९ र बन्दाबन्दीको अवधिमा मानव अधिकारको अवस्था, २०७७

६३. यौनिक तथा लैङ्गिक अल्पसङ्ख्यकहरूको मानव अधिकार अवस्थासम्बन्धी अध्ययन प्रतिवेदन, २०७७

६४. जेष्ठ नागरिकसँग सम्बन्धित कानुनसमेतको सङ्कलन, २०७७

६५. दलितको मानव अधिकार अवस्था, २०७७

६६. जेष्ठ नागरिकहरूको मानव अधिकार अवस्था, २०७७

६७. अपाङ्गता भएका व्यक्तिहरूको अवस्था, २०७७

६८. कोभिड १९ र महामारीमा नेपाली अप्रावासी श्रमिकहरूको अधिकार प्रतिवेदन, २०७७

६९. वार्षिक प्रतिवेदन, २०७६/०७७

७०. आयोगका २० वर्ष : आयोगका सिफारिस र कार्यान्वयन अवस्था, २०७७

७१. GANHRI-SCA Accrediation of NHRC Nepal and the Recommendations (2001 to 2020)

७२. नेपालको सन्दर्भमा दिगो विकास लक्ष्य र मानव अधिकार, २०७७

७३. महत्वपूर्ण प्रेस विज्ञप्तिहरु, भाग-३ (२०७१-२०७७)

७४. राष्ट्रिय मानव अधिकार आयोगबाट भएका मानव अधिकारसम्बन्धी महत्वपूर्ण निर्णयहरु

७५. वार्षिक प्रतिवेदन, आ.व. २०७७-२०७८)

७६. Annual Report synopsis, 2020-2021 AD

७७. राष्ट्रिय मानव अधिकार आयोग बागमती प्रदेश कार्यालयको वार्षिक गतिविधि पुस्तिका, २०७७/७८

७८. मानव अधिकार र जान्नैपर्ने कुरा, २०७८

मानव अधिकार चिन्तक तथा लेखक समूहमा अहिलेसम्म आवद्ध संवाहकका लेखकहरू

अङ्क-१

(१) राजुप्रसाद चापागाई (+अङ्क ४)
(२) विष्णुप्रसाद तिमिल्सेना (+अङ्क ५)
(३) बिनोदकुमार वि.क. (+अङ्क ४)
(४) डा.शङ्करकुमार श्रेष्ठ
(५) ओमप्रकाश अर्याल (+अङ्क ७)
(६) डा. हरिहर वस्ती
(७) डा. रंजीतभक्त प्रधानाङ्ग
(८) डा. श्रीप्रकाश उप्रेती (+अङ्क ७)
(९) डा. लोकनाथ भुषाल
(१०) विशाल खनाल (+अङ्क १३)
(११) माधव रेग्मी (+अङ्क ३)
(१२) पुष्पा पोखरेल (+अङ्क ४)
(१३) जायश्वर चापागाईं
(१४) मोहना अन्सारी

अङ्क-२

(१५) ललितबहादुर बस्नेत
(१६) तेजमान श्रेष्ठ (+अङ्क ६)
(१७) माधवकुमार बस्नेत
(१८) सूर्यबहादुर देउजा (+अङ्क १३)
(१९) महेश शर्मा पौडेल (+अङ्क ३, ५, ८, १२, १३, १५, १७)
(२०) डा. गोविन्द सुवेदी
(२१) टेकनारायण कुंवर (+अङ्क ५)
(२२) सलिना काफ्ले (+अङ्क ६)
(२३) उदयन रेग्मी
(२४) डा. चन्द्रकान्त ज्ञवाली (+अङ्क ४)
(२५) सोम लुईटेल (+अङ्क ७, १४)
(२६) लोकेन्द्र पनेरु (+ अङ्क ८)

अङ्क-३

(२७) मोहन बन्जाडे
(२८) संजीवराज रेग्मी (+ अङ्क ८)
(२९) गोविन्द शर्मा वन्दी
(३०) कृष्णजीवी घिमिरे (+अङ्क ७, १२)
(३१) श्रीराम अधिकारी
(३२) डा. टीकाराम पोखरेल (+अङ्क ११)
(३३) डा. अश्वस्थामा खरेल (+अङ्क ६, १२, १५)
(३४) शोभाकर बुढाथोकी (+अङ्क ११)
(३५) रेवतीराज त्रिपाठी (+अङ्क ९)
(३६) नवराज थपलिया
(३७) करुणा पराजुली
(३८) रामकान्त तिवारी (+अङ्क ६)

अङ्क-४

(३९) सुदर्शन रेग्मी
(४०) मनिष प्रसाइ
(४१) कैलाशकुमार सिवाकोटी (+अङ्क ८, १७)
(४२) डा. महेन्द्रजंग शाह
(४३) शारदा तिमिल्सेना
(४४) शिवप्रसाद पौडेल
(४५) नीतु पोखरेल
(४६) सोम निरौला

अङ्क-५

(४७) राष्ट्रिय जेष्ठ नागरिक महासङ्घ
(४८) लिप्तबहादुर थापा
(४९) भक्त विश्वकर्मा
(५०) ऋषिकेश वाग्ले (+अङ्क ९)
(५१) डा. हरिवंश त्रिपाठी

अङ्क-६

(५२) डा. नारायणप्रसाद घिमिरे
(५३) कोषराज न्यौपाने
(५४) वीरबहादुर बुढा मगर
(५५) श्यामबाबु काफ्ले (+अङ्क ७, १३)
(५६) बुद्धिनारायण श्रेष्ठ
(५७) घनश्याम खड्का (+अङ्क ११)
(५८) सूर्यप्रसाद पराजुली (+अङ्क ९)

अङ्क-७

(५९) बेद भट्टराई (+अङ्क १३, १४)

अङ्क-८

(६०) प्रा.डा. श्रीरामप्रसाद उपाध्याय

(६१) नवराज सापकोटा (+अङ्क ११, १३, १४)

अङ्क-९

(६२) वसन्त अधिकारी

(६३) इन्दु तुलाधर

(६४) शिवप्रसाद पौडेल

(६५) टेक ताम्राकार (अङ्क १२)

अङ्क-१०

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अङ्क-११

(६५) बलराम राउत

(६६) केशवप्रसाद चौलागाईं

(६७) अर्जुन विश्वकर्मा

अङ्क-१२

(६८) मीना गुरुङ

(६९) विनोदकुमार विश्वकर्मा

(७०) डा. हरिवंश त्रिपाठी

(७१) डा. हरिहर वस्ती

(७२) प्रेमबहादुर थापा

अङ्क-१३

(७३) विदुशी अधिकारी

(७४) श्यामकुमार भट्टराई

(७५) इन्दिरा दाहाल

अङ्क-१४ (आप्रवासी कामदार विशेषाङ्क)

(७६) दिनेश रेग्मी

(७७) होम कार्की

(७८) रामेश्वर नेपाल

(७९) शरु जोशी

(८०) मन्जु गरुङ

(८१) नेहा चौधरी

(८२) अनुराग देवकोटा

(८३) आरती श्रेष्ठ

अङ्क-१५

(८४) यज्ञप्रसाद अधिकारी

(८५) रविन्द्र आचार्य

(८९) केदार कोइराला

(९०) कल्पना नेपाल आचार्य

(९१) नितु पोखरेल

(९२) Akhila Kolisetty

(९३) अनिशकुमार पौडेल

(९४) दिनेशप्रसाद जोशी रतला

अङ्क-१६

(९५) केशवप्रसाद बास्तोला

(९६) बासुदेव बजगाईं

(९७) डा. टिकाराम पोखरेल

(९८) डा. दिव्य दवाडी

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(१०३) डा. लेखनाथ पौडेल

(१०४) डा. हेमन्तराज दाहाल

अङ्क-१७

(१०५) किरण बराम

(१०६) समिक्षा पौडेल

(१०७) अच्युतमणि न्यौपाने

अङ्क-१८

(१०८) डा. कृष्ण चन्द्र शर्मा

(१०९) विजय प्रसाद मिश्र

(११०) यज्ञ प्रसाद अधिकारी

(१११) वासुदेव बजगाईं

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(११४) मोहन काफ्ले

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(११६) राजेन्द्र बहादुर सिंह

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(११८) अक्षेया दुवाडी

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(११९) डा. समीरकुमार अधिकारी

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(१२१) डा. घनश्याम गुरुङ्ग

(१२२) आरती खड्गी

(१२३) डा. गोविन्द सुवेदी

(१२४) डा. धरमराज उप्रेती

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(१२७) टेक ताम्राकार

(१२८) दिनेशप्रसाद घिमिरे

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राष्ट्रिय मानव अधिकार आयोग

पुल्चोक, ललितपुर, नेपाल

पो.ब.नं.: ९१८२, काठमाडौं, नेपाल

फोन : ०१-५०१००१५, हटलाइन : ५०१००००

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