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आयोगको पूर्वस्वीकृतिविना यस प्रकाशनका लेख र सामग्रीलाई बौद्धिक वा शैक्षिक प्रयोजनबाहेक व्यापारिक वा अन्य प्रयोजनका लागि पुनः उत्पादन एवम् मुद्रण तथा कुनै पनि माध्यमबाट प्रयोगमा ल्याउन पाइने छैन । बौद्धिक तथा शैक्षिक प्रयोजनार्थ स्रोत खुलाइ आवश्यक अंशहरू साभार गरी प्रयोग गर्न सकिनेछ ।

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यस पत्रिकामा प्रकाशित लेखहरूमा व्यक्त विचार लेखकका निजी हुन् । ती विचारले लेखकको पदीय हैसियत तथा राष्ट्रिय मानव अधिकार आयोग, नेपालको प्रतिनिधित्व गर्दैनन् ।

The views expressed in the articles of this publication are solely those of the authors. The views do not represent the status of author and the views of NHRC.

# मानव अधिकारसम्बन्धी वैदिक विधिशास्त्र र नेपालको संविधान तथा अन्तर्राष्ट्रिय कानूनमा प्रयुक्त व्यवस्थाबारेको समीक्षात्मक अध्ययन

रोशनकुमार भा

## सार-सङ्क्षेप

वैदिक दृष्टिकोणमा विधिशास्त्र भनेको मानव समुदायमा एकले अर्कोसँग गर्ने व्यवहार पद्धति साथै समाज, राज्य र सम्पूर्ण जगतमा हुने व्यवहारसम्बन्धी दर्शन हो। संविधानवादको सिद्धान्तअनुसार, मानव अधिकारको प्रकृति समानता, अविभेद, स्वतन्त्रता र न्यायमा आधारित रहेको मानिन्छ। यस प्रकारको हकको जग पूर्वीय दर्शन साहित्यमा विकास भए पनि यसको समकालीन व्यवहारिक प्रयोगको श्रेय भने पश्चिमा कानुनी शिक्षालाई जान्छ। संविधानको जननी मानिने अमेरिकाको संविधानले सुरुमा यस्ता अधिकारहरूलाई समाविष्ट गरेको थिएन, तर प्रकारान्तरमा भएका संशोधनहरूमा यसलाई महत्त्वपूर्ण स्थान दिएको पाइन्छ। ग्रीक दार्शनिकहरूले मानव अधिकारलाई सर्वमान्य, अविभाजित, प्राकृतिक, र अपरिहार्य, प्रकृतिका हुन्छन् भनेका छन्। मानव अधिकारको विश्वव्यापी घोषणापत्रको प्रस्तावनामा “मानव परिवारका सबै सदस्यहरूमा अन्तरनिहित प्रतिष्ठा तथा सम्मान र अविच्छिन्न अधिकारहरूको मान्यता नै विश्वमा स्वतन्त्रता, न्याय र शान्तिको आधार भएको” भनी उल्लेख भएको पाइन्छ। नेपालको सन्दर्भमा आधुनिक मानव अधिकारको विषय अपेक्षाकृत नवीन विषय हो, तथापि यो मानवको जन्मसँगै प्रारम्भ हुने गर्दछ। वैदिक विधिशास्त्रमा मानव अधिकारबारे यथोचित अध्ययन नभए पनि मानव अधिकारसम्बन्धी अवधारणाको सूत्रपात नेपालको वैदिक कानून प्रणालीमा भएको हो। प्राचीन वैदिक शास्त्रहरू वेद, रामायण, महाभारत, श्रीमद् भागवत गीता<sup>१</sup> तथा बौद्ध धर्म ग्रन्थमा मानव अधिकारको अवधारणा विद्यमान रहेको पाइन्छ।<sup>२</sup> प्राचीनकालको सबैभन्दा पुरानो ग्रन्थ ‘ऋग्वेद’ र त्यस पश्चात ‘अथर्ववेद’ तथा कौटिल्यको अर्थशास्त्र<sup>३</sup> तथा जयस्थिति मल्लको मानव न्याय शास्त्रलगायत विभिन्न ग्रन्थमा मानवाधिकार र स्वतन्त्रतासम्बन्धी व्यवस्थाहरू उल्लेख भएको पाइन्छ। प्रस्तुत लेखमा वैदिक विधिशास्त्रमा मानव अधिकारको विषयबारे चर्चा गरिएको छ। प्रस्तुत लेख विवरणात्मक विधि (Descriptive method) मा आधारित रहेको छ।

**प्रमुख शब्दावली :** मानव अधिकार, संविधानवाद, वैदिक विधिशास्त्र, न्याय, समानता, अविभेद, स्वतन्त्रता, धर्म ग्रन्थ,

१ S. Radhakrishnan, (trans.), *The Bhagavadgita*, London, 1958, p.276.

२ Dhananjay Vasudeo Dwivedi, *The Indian Journal of Political Science* Vol. 70, No. 4 (OCT. - DEC., 2009), pp. 1021-1034 (14 pages), Published By: Indian Political Science Association

३ Yogesh K. Tyagi, *Third World Response to Human Rights*, *Indian Journal of International Law*, Vo.21, No.1 (January -March 1981): 120-121.

## विषय प्रवेश

मानव अधिकार भन्नाले आधारभूत प्राकृतिक अहरणीय अधिकारहरू हुन्, जुन नागरिकलाई सरकारका स्वेच्छाचारिताविरुद्धमा प्राप्त हुन्छ। प्रकृतिदेखि नै प्राप्त प्राकृतिक अधिकारको रूपमा रहेको यो अधिकार मानव जीवनका लागि आवश्यक पर्ने हावा, अन्न पानी जत्तिकै महत्त्वपूर्ण छ, भन्दा अतियुक्ति नहोला।

प्राकृतिक कानून र प्राकृतिक अधिकारका सिद्धान्तहरूमा परापूर्वकालदेखि नै मानव अधिकारको अवधारणा पाइने भए पनि व्यवहारिक दृष्टिकोणले हेर्दा दोस्रो विश्वयुद्धमा नाजीहरूले विश्वव्यापी रूपमा मानव अधिकारको खुलेआम उल्लंघन गर्दा मानव अधिकारको अन्तर्राष्ट्रिय पक्षको उत्पत्ति भएको हो।<sup>४</sup> जसका कारण अन्तर्राष्ट्रिय शान्ति ठुलो खतरामा परेको थियो। यस युद्धको प्रभावमा विश्व शान्तिको स्थापनाका लागि मानव अधिकारको उपलब्धि नितान्त आवश्यक छ भन्ने महसुस भएको थियो, त्यसैले १० डिसेम्बर १९४८ मा संयुक्त राष्ट्रसङ्घको महासभाले “मानव अधिकारको विश्वव्यापी घोषणापत्र” पारित गर्‍यो र फलस्वरूप मानव अधिकार आन्दोलन विश्वभर फैलियो। आजको मितिसम्म मानव अधिकार सार्वजनिक अन्तर्राष्ट्रिय कानूनको हिस्सामात्र नभई आन्तरिक कानूनको पनि हिस्सा बनेको छ।

दोस्रो विश्वयुद्धको अन्त्यपछि सन् १९४५ मा संयुक्त राष्ट्रसङ्घको स्थापना हुँदा मानव अधिकारको प्रवर्द्धन र संरक्षणलाई मुख्य उद्देश्यका रूपमा राखिएको तथ्यबाट मानव अधिकारको महत्त्वबारे अनुमान लगाउन सकिन्छ। “मानव अधिकार” शब्द पहिलो पटक अमेरिकी राष्ट्रपति रुजभेल्टले १५ जनवरी, १९४९ मा कङ्ग्रेसलाई सम्बोधन गरेको प्रसिद्ध सन्देशमा प्रयोग गरेका थिए। जसमा उनले अभिव्यक्ति स्वतन्त्रता, धर्मको स्वतन्त्रता, गरिबीबाट मुक्ति र भयबाट मुक्ति गरी जम्मा चार वटा मौलिक स्वतन्त्रतामा आधारित विश्व घोषणापत्र जारी गरेका थिए। मानव अधिकारसम्बन्धी अवधारणा विश्वव्यापी रूपमा स्थापित मान्यता हो। यसलाई विश्वका सबैजसो न्याय प्रणालीहरूले आत्मसात गरेका हुन्छन्। खास गरी द्वितीय विश्वयुद्धको समाप्तिपश्चात् विकसित भएका अन्तर्राष्ट्रिय दस्तावेजहरूमा यो सिद्धान्तले मान्यता पाएको देखिन्छ। अन्तर्राष्ट्रिय मानव अधिकार कानूनको रूपमा विकसित गरिएका ती विभिन्न दस्तावेजहरूमा मानव अधिकारको प्रत्याभूतिका साथै तिनको संरक्षणका लागि आवश्यक प्रबन्ध गर्नुपर्ने व्यवस्थासमेत गरेको पाइन्छ। वैदिक विधिशास्त्रमा न्यूनतम मानव अधिकार संरक्षण र स्वच्छ सुनुवाइसम्बन्धी आधारभूत तत्वबारे वर्णन भएको पाइन्छ।<sup>५</sup> नेपाली समाजमा मानव अधिकारको अवधारणा प्राचीनकालदेखि नै रहेको छ।<sup>६</sup>

## फौजदारी न्याय

फौजदारी विधिशास्त्रको आधारभूत सिद्धान्तहरूमध्ये व्यक्तिको जीवन र स्वतन्त्रतासँग सम्बन्धित रहेको फौजदारी न्यायसम्बन्धी सिद्धान्त महत्त्वपूर्ण सिद्धान्त हो। यसलाई मुलत : सरकारको गैरन्यायिक र स्वेच्छारी कारवाहीको विरुद्धमा व्यक्तिको जीवन र स्वतन्त्रताको अधिकारको रूपमा चिनिन्छ।<sup>७</sup> यस प्रकारको हक आधुनिक फौजदारी

४ S. Radhakrishnan (trans.), *The Bhagavadgita* (London: George Allen and Unwin, 1958) 276.

५ V.R. Krishna Iyer, *The Dialectics and Dynamics of Human Rights in India: Yesterday Today and Tomorrow*, Tagore Law Lectures (New Delhi: Eastern Law House, 1999) 115.

६ P.B. Mukherji, *The Hindu Judicial System-The Cultural Heritage of India*, (Vol.II), 434-435. Cited by V.R. Krishna Iyer, op.cit., p.115.

७ S.N. Dhyani, *Fundamentals of Jurisprudence: The Indian Approach*, Allahabad, 1992, p. 79

न्याय प्रणालीको प्रादुर्भाव हुनुभन्दा निकै अगाडिदेखि नै पूर्वीय वैदिक शास्त्रद्वारा विवेचना भएको पाइन्छ ।

वात्स्यायन नामको प्राचीन विद्वानले फौजदारी न्यायलाई,

प्रमाणै वस्तुपरीक्षण न्याय : वात्स्यायन १/१/१

अर्थात् वस्तुहरूको परीक्षण गर्ने काम नै न्याय भनी परिभाषा गर्नुभएको छ ।

त्यस्तै

नियमेन नियते इति न्याय :

नियमपूर्वक प्रमाणद्वारा सिद्ध गरिएको निष्कर्ष नै न्याय हो<sup>८</sup> ।

महाभारतमा पनि प्रष्ट रूपमा फौजदारी न्यायको बारे विवेचना गरिएको पाइन्छ ।

न्यायतो दुष्कृते घात : सुकृतेन कथचन ।

नेहयतु : स्थिर स्थातुं जवेनेवा ब्रजेत्वध : ॥ ८२ । ४४ शान्तिपर्व

अर्थात् न्याय भनेको दुष्टलाई नियमसङ्गत दण्ड र राम्रो गर्नेलाई कष्ट आउन नदिने काम हो<sup>९</sup> ।

वि.स १४३६ मा राजा जयस्थिति मल्लद्वारा किर्तिनाथ उपाध्यायको अध्यक्षतामा रामनाथ भ्वा, रघुनाथ भ्वा, श्रीनाथ भट्ट र महिनाथ भट्ट गठित सदस्यद्वारा निर्मित मानव न्याय शास्त्र नामक कानून सम्भवतः विश्वकै पहिलो संहिताबद्ध कानून जारी गरिएको थियो । सो कानूनले प्रथम पटक नेपालमा फौजदारी न्याय प्रणालीको जग खडा गरेको हो ।

सतामनुग्रहो नित्यं समतान्नीग्रहस्तथा ।

एष धर्म स्मृतो राज्ञामर्थास्चामित्रपातनात् ।

अर्थात् सज्जनहरूमा निगाह गर्नु, दुर्जनहरूलाई दण्ड दिनु...भन्ने मान्यता त्यतिबेलै विकास भएको पाइन्छ<sup>१०</sup> ।

नेपालको संविधानको धारा २० का न्यायसम्बन्धी हकहरू वैदिककालदेखि नै मानव समाजले उपभोग गरी आएका प्राकृतिक अधिकारहरू हुन् । कालान्तरमा फौजदारी न्यायसम्बन्धी हकलाई संविधानमा समावेश गरी संवैधानिक र मौलिक हकका रूपमा मान्यता प्रदान गर्न थालिएको हो ।

नेपालको संविधानको धारा २० द्वारा प्रदत्त न्यायसम्बन्धी हकको हक धारा १३३ (२) अन्तर्गत Enforce हुने हक हो<sup>११</sup> । धारा २० मा उल्लेख भएका न्यायसम्बन्धी हकहरू मौलिक हक, मानव अधिकारको पूर्ण प्रत्याभूतिसहित कानुनी राज्यको आधारमा राज्य सञ्चालन हुने प्रत्येक राष्ट्रले आफ्ना नागरिकहरूलाई प्रदान गरिने न्युनतम अधिकारहरू हुन् ।

८ डिल्लीराम गौतम, पूर्वीय सोंच र श्रोत, काठमाडौं स्कूल अफ ल, भक्तपुर, २०६६, पृष्ठ ८५ ।

९ डिल्लीराम गौतम, पूर्वीय सोंच र श्रोत, काठमाडौं स्कूल अफ ल, भक्तपुर, २०६६, पृष्ठ ८८ ।

१० न्यायविकसिनी (मानव न्याय शास्त्र), कानून सहप्रकाशन, (२०६५), पृष्ठ २५६ ।

११ नेपालको संविधान, धारा १३३(२): यस संविधानद्वारा प्रदत्त मौलिक हकको प्रचलनका लागि वा अर्को उपचारको व्यवस्था नभएको वा अर्को उपचारको व्यवस्था भए पनि त्यस्तो उपचार अपर्याप्त वा प्रभावहीन देखिएको अन्य कुनै कानुनी हक प्रचलनका लागि वा सार्वजनिक हक वा सरोकारको कुनै विवादमा समावेश भएको कुनै संवैधानिक वा कानुनी प्रश्नको निरूपणका लागि आवश्यक उपयुक्त आदेश जारी गर्ने, उचित उपचार प्रदान गर्ने, त्यस्तो हकको प्रचलन गराउने वा विवाद टुंगो लगाउने असाधारण अधिकार सर्वोच्च अदालतलाई हुनेछ ।



नेपालको संविधानको प्रस्तावनामा समेत नागरिक स्वतन्त्रता, मौलिक अधिकार, मानव अधिकार, स्वतन्त्र न्यायपालिका तथा कानुनी राज्यको अवधारणा लगायत लोकतान्त्रिक मूल्य र मान्यताप्रति पूर्ण प्रतिवद्ध रहने उल्लेख भएवाट संविधानको लक्ष्य र उद्देश्य फौजदारी न्याय पनि हो भन्ने स्पष्ट हुन्छ। प्रस्तावनाबाट नेपालको शासन व्यवस्था स्वतन्त्र न्यायपालिकाबाट प्रत्येक नागरिकको मौलिक अधिकार र मानव अधिकार संरक्षित र सुरक्षित हुने प्रत्याभूति भएको देखिन्छ।

### न्यायसम्बन्धी हक<sup>१२</sup> :

*नियमेन नियते इति न्याय :* नियमपूर्वक प्रमाणद्वारा सिद्ध गरिएको निष्कर्ष नै न्याय हो त्यसैले न्याय दिने काम त्यति सजिलो हुँदैन। जोसुकैले न्यायसम्पादन गर्न सक्ने कुरा पनि होइन। न्याय दिने काम न्यायिक क्षेत्रका व्यक्तिले मात्र गर्नुपर्छ। कानून फौजदारी न्यायसम्बन्धी हकको नामबाट समेत चिनिने यस हकको सम्बन्ध जीवनको अधिकार र वैयक्तिक स्वतन्त्रताको संरक्षणसँग रहेको हुन्छ। व्यक्तिका वैयक्तिक स्वतन्त्रताहरू सरकारविरुद्ध लक्षित हुन्छन् र ती स्वतन्त्रताहरूलाई सरकारको अन्यायिक कारवाहीबाट जोगिनको लागि यो हकको आवश्यकता पर्दछ। अमेरिकी संविधानको पाँचौं, छैठौं र चौधौं संशोधन र भारतीय संविधान, १९५० को धारा २२ ले न्यायसम्बन्धी हकको ग्यारेन्टी गरेको छ<sup>१३</sup>।

देशको शासन व्यवस्थाको मेरुदण्ड नै न्याय हो भन्ने सिद्धान्त लिएका शास्त्रहरू देशलाई न्याययुक्त बनाउनुपर्छ भन्छन्। महाभारतले स्पष्ट उल्लेख गरेको छ : न्याय भनेको दुष्टलाई नियम सङ्गत दण्ड र राम्रो गर्नेलाई कष्ट आउन नदिने काम हो।

*न्यायतो दुष्क्रीते घात : सुकृतेन कथचन ।*

*नेहयत्तु : स्थिर स्थान्तु जवेनैवा ब्रजत्वध : ॥८२।४४ शान्तिपर्व<sup>१४</sup>*

न्यायको मूल श्रोत सत्य र धर्म भएकोले दण्डलाई धर्मरूप मानिएको छ। यही सत्य वा धर्मको सुरक्षामा समाजले न्यायलाई प्रभावकारी बनाउनुपर्छ। न्यायलाई प्रभावकारी बनाएर प्रजा रक्षा गर्न ब्रह्मशक्तिस्वरूप दण्ड उत्पन्न गरी राजालाई दिएका हुन्।

*तस्याथे सर्भभुताना गोप्तार धर्ममात्मजम् ।*

*ब्रह्मतेजोमय दण्डमसृजत् पूर्वमीस्वर : ७।४ मनु<sup>१५</sup>*

शास्त्रमा न्यायपीडितले क्षतिपूर्ति पाउनुपर्ने नियमको व्यवस्था समेत गरेका छन्। गलत न्याय दिने कोही पनि दण्डित हुनुपर्छ। अनि मात्र न्यायप्रक्रिया व्यवस्थित बन्दछ, भन्ने शास्त्रीय नियम हो।

*दुर्दषतान्तु पुनदुषटवा व्यवहारान्त्रपेण तु ।*

*सभ्यास्सजयीनो दण्डया विवादाद्विगुण दमम् ॥*

*राजा न्याययेन यो दण्डो गृहीतो वरुणाय तम् ।*

१२ नेपालको संविधान, धारा २०।

१३ विनोद बस्याल, दीपकराज कडेल, मनिषकुमार श्रेष्ठ, अधिवक्ता दिग्दर्शन, लुम्बिनी प्रकाशन, काठमाडौं, २०७०, पृष्ठ ८५।

१४ डिल्लीराम गौतम, पूर्वीय सोच र श्रोत, काठमाण्डौ स्कूल अफ ल, दधिकोट ९, भक्तपुर, २०६६, पृष्ठ, ८८।

१५ डिल्लीराम गौतम, पूर्वीय सोच र श्रोत, काठमाण्डौ स्कूल अफ ल, दधिकोट ९, भक्तपुर, २०६६, पृष्ठ, ९२।

निवेद दधाद्विप्रेभ्यो : स्वयम् त्रिशदुगुणी कृतम् ॥ व्य.अ. ३०५(३०७) या.<sup>१६</sup>

न्याय स्थापित गर्नका लागि दण्ड प्रक्रियामा वेदले तत्कालीन अवस्थामा नै आजको जस्तो कारागारको को व्यवस्था मिलाउन राजालाई निर्देशन दिने क्रममा : दुष्ट अधर्मी, अर्कालाई दुख दिने लुटेराहरूलाई एकान्तघरमा लगेर राख्नु ।

अग्निना तुवर्स यदु परावत् उग्रादेव हवामहे ।

अग्निर्यन्नवास्तव बृहद्रथ तच्छतुर्वीति दस्यवे सह<sup>१७</sup> : । ऋ. १।३६।१८

न्याय दिन बस्नेका लागि शास्त्रले न्यायिक पद्धतिको निर्धारण गरेको छ। पूर्वीय धर्मशास्त्रहरूमा प्राचीनकालदेखि नै न्यायिक पद्धतिको विकास भइसकेको थियो । वादी र प्रतिवादी दुवैका कुराहरूलाई व्यवहारिक ढङ्गले हेरी निर्णयमा पुग्नु अघि चारवटा विधि अपनाएर मुद्दा छिन्नु पर्छ भनेर यज्ञवल्क्यले प्रस्तुत गरेका छन् ।

१. भाषापाद (प्रतिज्ञा)
२. उत्तरपाद (प्रतियुत्तर)
३. क्रियापाद (साक्षी प्रमाणको उपस्थिति)
४. साध्यसिद्धि (निर्णय)<sup>१८</sup>

## स्वच्छ सुनुवाइसम्बन्धी हक

मनुस्मृतिमा दोषीलाई अनिवार्य रूपमा सजाय गर्नुपर्ने कुरा उल्लेख गरिएको छ ।

पिता आचार्य सुहन्माता भार्या पुत्राः पुरोहितः।

नादंअयो नाम राज्ञोऽस्ति यः स्वधर्मे नतिष्ठति ॥'

कौटिल्यको अर्थशास्त्रमा कैदीहरूको आधारभूत अधिकारको संरक्षण गरिएको छ । कुनै अधिकारीले बन्दीहरूको दैनिक सुत्ने, बस्ने, खानपिन गर्ने काममा हस्तक्षेप गरेमा तिनलाई तीन पण वा सोभन्दा बढी जरिवाना हुने व्यवस्था गरिएको थियो ।<sup>१९</sup> स्वच्छ सुनुवाइसम्बन्धी हकलाई नेपालको संविधानको धारा २० मौलिक हकको रूपमा व्यवस्था गरिएको छ ।<sup>२०</sup> यसलाई नेपालको संविधानका अतिरिक्त अन्तर्राष्ट्रिय कानून तथा न्यायसम्बन्धी मान्यताहरूले समेत यसलाई समेटेको पाइन्छ ।

मानव अधिकारको विश्वव्यापी घोषणापत्र १९४८ ले प्रत्येक व्यक्तिलाई जीवनको स्वतन्त्रताको अधिकार हुने, सबै नागरिक कानूनको दृष्टिमा समान हुने र भेदभाव बिना समान संरक्षणको हकदार हुने प्रत्याभूति गरेको छ । यसै गरी कसैलाई पनि स्वेच्छाचारी रूपमा गिरफ्तार नगरिने यातना वा अपमानजनक व्यवहार नगरिने कुनै व्यक्ति उपर लगाईएको फौजदारी अभियोगको निरोपण गर्दा र अन्य कुनै विषयमा कुनै व्यक्तिको अधिकार

१६ डिल्लीराम गौतम, पूर्वीय सोच र श्रोत, काठमाण्डौ स्कूल अफ ल, दधिकोट ९, भक्तपुर, २०६६, पृष्ठ, १०९ ।

१७ डिल्लीराम गौतम, पूर्वीय सोच र श्रोत, काठमाण्डौ स्कूल अफ ल, दधिकोट ९, भक्तपुर, २०६६, पृष्ठ, ४६ ।

१८ डिल्लीराम गौतम, पूर्वीय सोच र श्रोत, काठमाण्डौ स्कूल अफ ल, दधिकोट ९, भक्तपुर, २०६६, पृष्ठ, ७६ ।

१९ P.B. Gajendra Gadkar, *The Historical Background and Theoretic Basis of Hindu Law - The Cultural Heritage of India*, Vol.11 (Bombay: Asia Publishing House, 1965) 421.

२० नेपालको संविधान, धारा २० ।

र दायित्वको निरोपण स्वतन्त्र र निष्पक्ष न्यायाधिकरणबाट गरिने र यसरी निरोपण गर्दा स्वच्छ र सार्वजनिक सुनुवाइ गरिने व्यवस्था रहेको छ । दण्डनीय कसूरको अभियोग लागेको प्रत्येक व्यक्तिलाई प्रतिरक्षाका लागि आवश्यक सबै प्रत्याभूतिहरू प्राप्त हुने, सार्वजनिक सुनुवाइमा कानुनबमोजिम दोषी प्रमाणित नभएसम्म निर्दोष भएको अनुमान गरिने, कुनै कार्य गर्दा वा नगर्दाका बखत कानुनअन्तर्गत दण्डनीय कसूर नमानिएको कार्यमा दोषी नठहराइने र कसूर गर्दाका बखतको कानुनले तोकेभन्दा बढी सजाय नगरिने लगायतका व्यवस्थाहरू गरिएको छ ।<sup>२१</sup> राजनीतिक तथा नागरिक अधिकारसम्बन्धी अन्तर्राष्ट्रिय प्रतिज्ञापत्र, १९६६ ले मानव अधिकारको मान्यता नै स्वतन्त्रता, न्याय र शान्तिको आधारशीला हो भन्ने स्वीकार गर्दै नागरिक तथा राजनीतिक अधिकारको उपभोग गर्न पाउने अवस्थाको सिर्जना मानव जातिको आदर्श हो भन्ने कुरालाई मान्यता दिएको छ ।

कसैलाई पनि स्वेच्छाचारी रूपले पक्राउ नगरिने, कानुनबमोजिम बाहेक कसैको वैयक्तिक स्वतन्त्रता अपहरण नगरिने, पक्राउ परेको व्यक्तिलाई पक्राउको कारणसहितको सूचना र लगाइएको आरोपको जानकारी नदिई थुनामा नराखिने, पक्राउ गरिएको व्यक्तिलाई मुद्दा हेर्ने अधिकारीसमक्ष उपस्थित गराइने, त्यस्तो व्यक्तिलाई मनासिव समयभित्र सुनुवाइ गरी पाउने वा छुटकारा पाउने हक हुने, न्यायिक कारबाहीको कुनै पनि चरणको सुनुवाइमा उपस्थित हुने, आरोपित व्यक्तिलाई सक्षम, स्वतन्त्र र निष्पक्ष अदालत वा न्यायाधिकरणबाट निष्पक्ष र सार्वजनिक सुनुवाइ गराइ पाउने हक हुने, आरोपित व्यक्तिलाई निजको प्रतिरक्षाको तयारीका लागि पर्याप्त समय पाउने, रोजेको कानुन व्यवसायीसँग कुराकानी गर्न पाउने हक हुने, आफू विरुद्धका साक्षी प्रमाण परीक्षण गर्न पाउने र आफ्ना प्रमाण र साक्षी प्रस्तुत गर्न पाउने, आफ्नाविरुद्ध प्रमाण दिन बाध्य नपारिने, अदालतबाट भएको सजायउपर पुनरावलोकन गराइ पाउने हक हुने जस्ता स्वच्छ सुनुवाइसँग सम्बन्धित अधिकारको व्यवस्था यस प्रतिज्ञापत्रले गरेको छ ।<sup>२२</sup>

यसैगरी अन्तर्राष्ट्रिय फौजदारी अदालतको विधान, १९९८ ले अन्तर्राष्ट्रिय फौजदारी अपराधको अनुसन्धानको सिलसिलामा कुनै पनि प्रकारको करकाप जबरजस्ती वा त्रास, यातना वा अन्य कुनै स्वरूपको अमानवीय वा अपमानजनक व्यवहार वा सजायको भागीदार बनाउन नहुने व्यवस्था गरेको छ । यसै गरी अनुसन्धानको क्रममा कसूर स्वीकार गर्न बाध्य नपारिने, कसूरको सम्बन्धमा चुप लाग्न पाउने, कसूर स्वीकार गरेको वा चूप लागेको कारणले माव कसूरदार नठहराइने व्यवस्था गरिएको छ ।<sup>२३</sup>

### सम्मानपूर्वक बाँच्न पाउने हक<sup>२४</sup> :

जीवन र स्वतन्त्रताको अधिकारले मानव जीवनको भौतिक अस्तित्व हुनु र बाँच्नुलाई मात्र जनाउदैन बरु विभिन्न साधन-स्रोतले सज्जित र सम्मानित बाँच्न पाउने अधिकारलाई बुझिन्छ<sup>२५</sup> ।

नेपालको संविधानको धारा १६ को उपधारा-(१)मा 'प्रत्येक व्यक्तिलाई सम्मानपूर्वक बाँच्न पाउने हक हुने' र उपधारा (२) मा 'कसैलाई पनि मृत्युदण्डको सजाय दिने गरी कानुन नबनाइने' कुराको प्रत्याभूत दिइएको छ ।

२१ मानव अधिकारको विश्वव्यापी घोषणापत्र, १९४८, धारा ९, १०, ११ ।

२२ राजनीतिक तथा नागरिक अधिकारसम्बन्धी प्रतिज्ञापत्र, १९६६ को धारा ७, ९, १३ र १४

२३ अन्तर्राष्ट्रिय फौजदारी अदालतको विधान, १९९८ को धारा धारा ५५ (२) (ख)।

२४ नेपालको संविधान, धारा १६ ।

२५ विनोद बस्न्याल, दीपकराज कडेल, मनिषकुमार श्रेष्ठ, अधिवक्ता दिग्दर्शन, लुम्बिनी प्रकाशन, काठमाडौं, २०७०, पृष्ठ २१ ।

यो व्यवस्था आर्थिक, सामाजिक तथा सांस्कृतिक अधिकारको संरक्षणका सन्दर्भमा 'बाँच पाउने अधिकार'ले 'मर्यादापूर्वक बाँच पाउने अधिकार'लाई पनि समेट्छ, भनी भारतको सर्वोच्च अदालतले गरेको व्याख्याबाट प्रभावित देखिन्छ ।

यो व्यवस्था नागरिक, राजनैतिक, आर्थिक, तथा सामाजिक सबै मानव अधिकारको सन्दर्भमा अभै प्रभावकारी बनाउन परिमार्जनको खाँचो देखिन्छ<sup>२६</sup>; जस्तो- मानव अधिकारको विश्वव्यापी घोषणापत्रको धारा ३ तथा राजनैतिक अधिकारसम्बन्धी अभिसन्धिको धारा ६ (१) अन्तर्गत 'प्रत्येक व्यक्तिलाई बाँच पाउने जन्मसिद्ध अधिकार हुने' तथा धारा ६ (१) मा 'कुनै पनि व्यक्तिको जीवनको स्वेच्छाचारी हरण' निषेधित हुने प्रत्याभूतिलाई समेत प्रतिबिम्बित हुने गरी राख्नु पर्दथ्यो<sup>२७</sup>।

हजारौं वर्ष पहिले सृष्टि भएको हाम्रो वेदले सबैले सम्मानपूर्वक बाँच पाउने हकको प्रत्याभूति गरेको छ । त्यहाँ भनिएको छ, यथार्थमा सबै प्राणीको आत्मा एउटै हो अर्थात् हामी सबै एउटै हौ ।

*एकोदेव बहुधा सन्निविष्ट एक सन् बहुधा विचचार त्वमेकोसि वहननुप्रविष्ट :*

*एको देव : सर्व भुतेशु गुढ सर्वव्यापी सर्वभुतान्तरात्मा ६।११*

पहिला एउटै ब्रह्म (सत्य) थियो उसले विभक्तियुक्त कर्म गर्न क्षत्रीयको सिर्जना गर्‍यो, जसमा इन्द्र, वरुण, सोम, रुद्र, मेघ, यम, मृत्यु र इशान थिए ।

*ब्रह्म वा इदमग्र आसीदेकमेव तदेक सन्न व्यभवत् ।*

*तच्चछेयो रूपमत्य सृजित क्षत्र यान्तेतानि देवत्रा सत्राणीन्द्रो वरुण :*

*सोमो रुद्र पर्यन्यो यमो मृत्यु रिशान इति १ :४ :११ वृ :*

## समानताको हक<sup>२८</sup>

सामान्य अर्थमा समानता भन्नाले व्यक्ति व्यक्ति बीच जातजाती, धर्म, वर्ण, लिङ्ग, सम्प्रदाय आदिको आधारमा विभेद नहुनु हो । विश्वका प्रजातान्त्रिक मुलुकका संविधानहरूले प्रदान गर्ने यस किसिमको अधिकारसम्बन्धी धारणा युनानकालबाट नै सुरु भएको मानिन्छ । बेलायतमा Magnacarta 1215, Petition of Right 1628, Bill of Rights 1689, Human Right Act, 1998 आदि दस्तावेजहरूले समानताको अधिकारलाई समाविष्ट गर्दै आएको देखिन्छ भने अमेरिकाको इतिहासमा American Declaration of Independence 1776 र तत्पश्चात बनेको अमेरिकी संविधानको १४ औं संशोधनले समानताको अधिकारलाई अग्रपङ्क्तिमा राखेको देखिन्छ<sup>२९</sup> ।

समानता र अविभेदको हकका सम्बन्धमा अन्तरिम संविधानको तुलनामा नेपालको संविधान २०७२ मा केही प्रगति देखिन्छ । उदाहरणार्थ, अपाङ्गता, वैवाहिक स्थिति, यौन अभिमुखिकरण तथा आर्थिक हैसियतसमेत समावेश हुने गरी विभेदका विषेधित आधारहरूलाई फराकिलो बनाइएको छ । निषेधित आधारहरूको सूचीलाई खुला छोडिएको छ, ता कि न्यायिक व्याख्याको माध्यमद्वारा भविष्यमा आइपर्न सक्ने नयाँ प्रकृतिका भेदभावलाई

२६ प्रारम्भिक मस्यौदा संविधान (२०७२ मा टिप्पणी तथा सुझाव (२०७२ श्रावण ५ गते संविधानसभा नागरिक सम्बन्ध तथा संवैधानिक सुझाव समिति समक्ष प्रस्तुत), जुरी नेपाल, न्याय तथा अधिकार संस्था, ललितपुर, पृष्ठ ३ ।

२७ मानवअधिकारको विश्वव्यापी घोषणापत्रको धारा ३, राजनैतिक अधिकारसम्बन्धी अभिसन्धिको धारा ६ (१) ।

२८ नेपालको संविधान, धारा १८ ।

२९ विनोद बस्याल, दीपकराज कडेल, मनिषकुमार श्रेष्ठ, अधिवक्ता दिग्दर्शन, लुम्बिनी प्रकाशन, काठमाडौं, २०७०, पृष्ठ २१

पनि संवैधानिक दायरामा ल्याउन सकियोस । समान संरक्षणसँगसँगै कानूनको समान “लाभ” लाई पनि प्रत्याभूति गरिएको छ<sup>३०</sup> ।

समानताको दृष्टिकोणमा हाम्रो धर्मशास्त्र कति उदार थियो भन्ने तथ्य यहाँबाट प्रस्ट हुन्छ ।

जन्मना जायते शुद्र :

कर्मणा द्विज उच्चयते जन्मदा :

अर्थात् जन्मदा त सबै शुद्रकै रूपमा जन्मिएका हुन्छन्, ब्रह्ममन्त्र र क्षेत्रित्वका प्रतिभा र व्यवहार लिएर कोही आउदैन बिस्तारै उसले निर्वाह गर्ने आचरण व्यवहार र कर्मले यस कुरालाई निर्धारण गर्छ<sup>३१</sup> ।

सबै व्यक्तिलाई आफूजस्तै सम्झिएर समान भावले मानिसले व्यवहार गर्नुपर्छ भन्ने वेदको यो चिन्तन मानवतावादी दृष्टिकोणबाट अगाडि बढेको छ । जसलाई आज मानव अधिकारको नामकरण गरिएको छ । एकले अर्कोलाई हेर्ने दृष्टिकोण निर्मल र पवित्र हुनु नै उच्च मानवताको मर्म हो ।

सर्वे भवन्तु सुखिनः सर्वे सन्तु निरामया ।

सर्वे भद्राणी पस्यन्तु मा कशीचत् दुखः भाग्भवेत् ।

अर्थात् एक होइन सबै सुखी हुनुपर्छ । सबै निरोगी हुनुपर्छ । सबै ठाउँमा कुशल र मंगल भएको देख्ने अवसर सबैमा रहनुपर्छ । एक आपसमा कोही पनि दुखी हुनुहुदैन भन्ने सामाजिक चिन्तन मानिसमा रहनुपर्छ भन्ने सन्देश वेदमा रहेकोले एकता र समानता जस्ता उच्चतम विचारहरू आजका लागि पनि त्यतिकै महत्त्वपूर्ण रहेका छन् ।

### ऋग्वेद

अज्ये ठासोअकनि ठास एते।

सं भ्रातरो वावृधुः सौभगाय ॥

अर्थात् कोही पनि उच्च वा नीच हुँदैन । सबै भाइ-भाइ हुन्, सबैले सबैको हितमा काम गर्नुपर्छ र सबै मिलेर अधि बढ्नुपर्छ । यसरी सबै मानवलाई समान र भातृत्व मानिन्छ, <sup>३२</sup>भनी उल्लेख भएको पाइन्छ ।

### ऋग्वेदमै

संगच्छध्वं सं वदध्वं सं वो मानांसि जानताम् ।

अर्थात् हे मानव प्राणी ! सबैले आपसी सहयोगका साथ बाँचौं, एकअर्कासँग मैत्रीपूर्ण ढङ्गले कुरा गरौं र जीवनको साझा आदर्शसहितको ज्ञान आर्जन गरौं भनी उल्लेख भएको पाइन्छ ।

ॐ संगच्छध्वं सं वदध्वं, सं वो मनांसि जानताम् ।

समानो मन्त्रः समितिः समानी, समानं मनः सहचित्तमेषाम् ।

३० प्रारम्भिक मस्यौदा संविधान (२०७२ मा टिप्पणी तथा सुझाव (२०७२ श्रावण ५ गते संविधानसभा नागरिक सम्बन्ध तथा संवैधानिक सुझाव समिति समक्ष प्रस्तुत), जुरी नेपाल, न्याय तथा अधिकार संस्था, ललितपुर, पृष्ठ ५, ६ ।

३१ डिल्लीराम गौतम, पूर्वीय सोच र श्रोत, काठमाण्डौ स्कूल अफ ल, दधिकोट ९, भक्तपुर, २०६६, पृष्ठ १६७ ।

३२ चमन लाल, बाल श्रम, मानवाधिकार: नई दिशाएँ, अंक १, (२००४ ई.) ।

समानी व आकृतिः समाना हृदयानि वः ।

समानमस्तु वो मनो यथा वः सुसहासति<sup>३३</sup>

अर्थात् सँगै हिँडौं, सँगै बोलौं, सबै एक मन हुन सकौं । हाम्रो उद्देश्य साभा होस् भन्ने हो ।

### अथर्ववेद

अथर्ववेदमा समानताको अधिकारलाई निम्न अनुसार वर्णन गरिएको छ ।

समानो प्रपा सह वोत्रभागः

समानो योक्ते सह वो युनज्मि

आरा; नाभिमिवाभिताः।

अर्थात् खाना र पानीमा सबैको समान अधिकार छ। जीवनको रथको जुवा सबैको काँधमा बराबर हुन्छ। जसरी रथको पाङ्गाले एकअर्कालाई रिम र धुरी जोडेर सहयोग गर्छ, त्यसै गरी सबै मानव जातिले एकअर्कालाई सद्भावपूर्वक सहयोग गर्नुपर्दछ ।

संयुक्त राष्ट्रसङ्घको बडापत्रले प्रस्तावनामा नै मौलिक मानव अधिकार, मानवीय रूपमा व्यक्तिको मर्यादा र मूल्यमा तथा महिला र पुरुषको समान हकमा विश्वास गर्ने कुरा उल्लेख गरिएको छ भने बडा-पत्रको धारा ५५ को ३ मा लिङ्गका आधारमा भेदभाव नगरी सबैका निमित्त मानव अधिकार र मौलिक स्वतन्त्रताका लागि विश्वव्यापी सम्मान र तिनको पालना गर्ने कुरा उल्लेख गरिएको छ।<sup>३४</sup> त्यस्तै मानव अधिकारको विश्वव्यापी घोषणा-पत्र, १९४८ को धारा १ मा, सबै व्यक्तिहरू जन्मजात स्वतन्त्र र प्रतिष्ठा तथा अधिकारमा समान हुन्छन् । उनीहरू विवेक र अन्तस्करणले युक्त भएका हुन्छन् । उनीहरूले भातृत्वको भावना लिएर एक अर्काप्रति व्यवहार गर्नुपर्ने कुरा उल्लेख गरिएको छ।<sup>३५</sup>

धारा २ मा, जाति, वर्ण, लिङ्ग, भाषा, धर्म, राजनीति वा अरु विचार र राष्ट्रिय वा सामाजिक उत्पत्ति, सम्पत्ति वा अरु कुनै मर्यादाको आधारमा भेदभाव नगरी प्रत्येक व्यक्तिलाई घोषणापत्रमा उल्लेख भएबमोजिमको अधिकार र स्वतन्त्रताको अधिकार हुने प्रत्याभूति गरिएको छ।<sup>३६</sup>

त्यस्तै धारा ३ मा, प्रत्येक व्यक्तिलाई वैचारिक र आत्मसुरक्षाको अधिकार हुने<sup>३७</sup>, धारा ७ मा, कानूनको दृष्टिमा सबै समान छन् र बिनाभेदभाव सबै कानूनको समान संरक्षणको अधिकारी हुने कुराको सुनिश्चितता गरिएको छ।<sup>३८</sup>

आर्थिक, सामाजिक तथा सांस्कृतिक अधिकारसम्बन्धी अन्तर्राष्ट्रिय प्रतिज्ञा पत्र, १९६६ को धारा १० (२) मा, जाति, राष्ट्रिय वा सामाजिक उत्पत्ति, सम्पत्ति जन्म वा अन्य हैसियतका आधारमा कुनै भेदभाव गरिनुहुँदैन

३३ ऋग्वेद, १०/१९१/२-३ ।

३४ संयुक्त राष्ट्रसंघको बडापत्र, धारा ५५ (३) ।

३५ मानव अधिकारको विश्वव्यापी घोषणा पत्र, १९४८, धारा १ ।

३६ मानव अधिकारको विश्वव्यापी घोषणा पत्र, १९४८, धारा २ ।

३७ मानव अधिकारको विश्वव्यापी घोषणा पत्र, १९४८, धारा ३ ।

३८ मानव अधिकारको विश्वव्यापी घोषणा पत्र, १९४८, धारा ७ ।

भनी उल्लेख गरिएको छ।<sup>३९</sup> त्यस्तै धारा ७ (क) मा, कुनै प्रकारको भेदभावबिना समान कामका लागि समान तलबको व्यवस्था गर्नुपर्ने कुरा उल्लेख गरिएको छ।<sup>४०</sup>

नागरिक तथा राजनीतिक अधिकारसम्बन्धी अन्तर्राष्ट्रिय प्रतिज्ञापत्र, १९६६ को धारा २ (१) मा, कसैलाई पनि जाति, वर्ग, लिङ्ग, भाषा, धर्म राजनीतिक वा अन्य विचार, राष्ट्रिय वा सामाजिक उत्पत्ति, सम्पत्ति, जन्म वा अन्य हैसियतका आधारमा कुनै पनि प्रकारको भेदभाव गरिने छैन भन्ने कुरा उल्लेख गरिएको छ।<sup>४१</sup>

## नागरिक अधिकार

कौटिल्यका अनुसार प्रजा सुखी हुँदा राजा सुखी हुने र प्रजाको सुखलाई मात्र आफ्नो सुख मान्दा राजधर्मको स्थापना हुन्छ।<sup>४२</sup>

प्रजा सुखे सुखं राज्ञः प्रजानां च हतिं हतिम् ।

नात्मप्रियं हतिं राज्ञः प्रजानां तु प्रियं हतिम् ॥

अर्थात् प्रजाको सुखमा राजाको सुख र प्रजाको कल्याणमा राजाको कल्याण हुन्छ। आफूलाई जे प्रिय लाग्छ, त्यसमा राजाको हित हुँदैन, जनतालाई जे प्रिय लाग्छ, राजालाई त्यही प्रिय लाग्नुपर्दछ। निम्न श्लोकमा सबैको सुख, स्वस्थ, मंगल र दुखरहति होस् भन्ने कामना गरिएको छ।<sup>४३</sup>

सर्वे भवन्तु सुखिनः

सर्वे सन्तु निरामाया,

सर्वे भद्राणि पश्यन्तु,

मा कश्चिद् दुख भाग्यवेत् ।

ऋग्वेदको “सर्वे भवन्तु सुखिनः” श्लोकले यही कुरालाई पुष्टि गर्छ।<sup>४४</sup>

महात्मा तुलसीदासले आफ्नो श्री रामचरितमानसमा “हित अनहित पशु पक्षिहूँ जाना, मानुष तन गुण ग्यान निधाना” भनी उल्लेख गर्नुभएको छ।

## मानवीय कानून

मनुका अनुसार राजाले लुकेर आक्रमण गर्नुहुँदैन, न त काँडे, विषाक्त वा आगो निभाउने हतियारले आक्रमण गर्न उचित हुन्छ। आफु रथमा हुँदा भुइँमा उभिएका निशस्त्र व्यक्तिलाई कहिल्यै आक्रमण गर्नु हुँदैन। जसको हतियार भौँचिएको छ, जो कष्टमा छ, वा अशक्त र भयभित छ त्यस्तो व्यक्तिलाई पनि आक्रमण गर्नुहुँदैन। यस सन्दर्भमा सन् १९४९ का चारवटा जेनेभा महासन्धिहरू तथा तिनका अतिरिक्त सन्धिपत्रहरूले सङ्घर्षमा भाग नलिएका अथवा प्रत्यक्ष रूपमा भाग लिन छोडेका व्यक्तिहरूको व्यापक सुरक्षाको व्यवस्था

३९ आर्थिक, सामाजिक तथा सांस्कृतिक अधिकारसम्बन्धी अन्तर्राष्ट्रिय प्रतिज्ञा पत्र, १९६६, धारा १०(२)।

४० आर्थिक, सामाजिक तथा सांस्कृतिक अधिकारसम्बन्धी अन्तर्राष्ट्रिय प्रतिज्ञा पत्र, १९६६, धारा ७ (क)।

४१ नागरिक तथा राजनीतिक अधिकार सम्बन्धी अन्तर्राष्ट्रिय प्रतिज्ञा पत्र, १९६६, धारा २ (१)।

४२ सन्तोष कुमार, मानवाधिकार: नई दिशाएँ, अंक १, (२००४ ई)।

४३ प्रभाकर सिन्हा, द्यूमन राइट्स, पी.यू.सी.एल., पटना।

४४ S.N. Dhyani, *Fundamentals of Jurisprudence: The Indian Approach* (Allahabad: Central Law Agency, 1992) 79.

गरेको छ।<sup>४५</sup> युद्धमा प्रयोग हुने साधन र तौरतरीकालाई नियमित तुल्याउने व्यवस्था सन् १८६८ को सेन्ट पिटर्सबर्ग घोषणा (St. Petersburg Declaration), १८९९ तथा १९०७ का हेग नियमहरू (The Hague Regulations), १९२५ को जेनेभा ग्यास सन्धि (Geneva Gas Protocol) यस विषयलाई सन् १९७२ को जैविक हतियारसम्बन्धी महासन्धिले (Biological Weapons Convention) पनि समेटेको छ, १९७७ को अतिरिक्त सन्धिपत्र (Additional Protocols), १९८० का केही परम्परागत हतियारसम्बन्धी महासन्धि (Convention on Certain Conventional Weapons) तथा यसका पाँच सन्धिपत्रहरू (Protocols), १९९३ को रासायनिक हतियारसम्बन्धी महासन्धि (Chemical Weapons Convention) तथा १९९७ को बारुदी सुरुङलाई निषेध गर्ने ओटावा महासन्धि (Ottawa Convention on the Prohibition of Anti-personnel Mines)<sup>४६</sup> सशस्त्र संघर्षको बेलामा सांस्कृतिक सम्पदाको सुरक्षासम्बन्धी विस्तृत व्यवस्था १९५४ को हेग महासन्धि (The Hague Convention for the Protection of Cultural Property) तथा यसका दुई वटा सन्धिपत्रहरू (Protocols) मा गरिएको छ। त्यस्तै सन् १९९८ को अन्तर्राष्ट्रिय फौजदारी अदालतको विधानमा (Statute of the International Criminal Court) को कार्य क्षेत्रभित्र पर्न आउने युद्ध अपराधको सूची पनि राखिएको छ। यस प्रकार मानवीय कानूनसम्बन्धी अवधारणाको विकास वैदिक विधिशास्त्रमा भई कालान्तरमा सो अवधारणा अन्तर्राष्ट्रिय मानवीय कानूनको स्वरूप ग्रहण गरेको हो।

## शिक्षाको अधिकार

‘महाभारत’ ग्रन्थअनुसार भगवानप्रति, अभिभावक प्रति, शिक्षकप्रति र मानवप्रति चार प्रकारका कर्तव्यहरू हुन्छन्।<sup>४७</sup> वैदिककालमा ब्राह्मण, क्षेत्री र वैश्यलाई वैदिक शिक्षा प्राप्त गर्ने अधिकार थियो। यहाँसम्म कि मनुस्मृतिमा ज्ञानहीन ब्राह्मणलाई निष्फल मानिएको थियो।

*विप्रोऽन्तचोऽफलं*<sup>४८</sup>

शूद्रलाई वेदाध्ययन निषेध भए पनि पारम्परिक व्यवसायको शिक्षा विधिवत प्राप्त गर्ने अवसरको सुनिश्चितता गरिएको थियो। वेद व्यासले स्त्री, शूद्र तथा अन्य जातिहरूको लागि पुराणको रचना गरेका थिए।

*“स्त्री शूद्र द्विजवधूनाम् न वेद श्रवण मतम्।*

*तेषामेवः हितार्थाय पुराणानि कृतानि च ॥”<sup>४९</sup>*

महिलाहरूलाई गृह-विज्ञानको शिक्षा, व्यावसायिक ज्ञानको शिक्षा अनिवार्य रूपमा प्रदान गर्ने प्रचलन थियो। यसको साथ साथै धार्मिक आध्यात्मिक, राजनैतिक, व्यावसायिक सबै प्रकारको शिक्षा लिन महिलालाई छुट थियो। नैषधचरितम् को छैठौं अध्यायमा गन्धर्व स्त्रीहरू नारदको शिष्यको रूपमा रहेका थिए, जो सङ्गीतका

४५ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3-7 December 1995, Resolution

I, International humanitarian Law : From law to action : Report on the follow up to the International Review of the Red Cross, No. 310 1996, p. 58

४६ Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law*, 2 Volumes, Volume I. Rules, Volume II Practice (2 Parts), Cambridge University Press. 2005.

४७ सुभाष शर्मा, भारतीय महिलाओं की दशा, आधार प्रकाशन प्रा.लि., पंचकूला हरियाणा (२००६ ई.)।

४८ नैषधमहाकाव्यम्, श्री हर्षचरित, चौखम्बा संस्कृत सीरीज, बनारस (१९५४ ई.)।

४९ डा रामबहादुर शुक्ल, नैषधीयचरितम् की शास्त्रीय मीमासा, ईस्टर्न बुक लिंकर्स (२००५ ई.)।



प्रकाण्ड विद्वान महर्षि थिए।<sup>१०</sup> तत्कालीन वैदिक परिवेशमा महिलाहरू ललित कलामा अत्यन्त अब्बल मानिन्थे। महिलाहरूलाई मूलतः कला क्षेत्र, गृहकार्य, पाककलाको शिक्षा दिने गरिए पनि योग्य महिलाहरूलाई लोपामुद्रा, घोषा, द्रौपदीजस्ता आदि विधिशास्त्रको ज्ञानको प्रबन्ध गरिएको हुन्थ्यो। वात्स्यायनका अनुसार महिलाहरू टद्ध कलामा निपूण हुने गर्दछन्।<sup>११</sup> किरातार्जुनीयम् को प्रथम अध्यायमा ग्रन्थकारले द्रौपदीको मुखारविन्दुबाट राजनैतिक ज्ञानको प्रवाह भएको भनिएको छ।<sup>१२</sup> अतः द्रौपदीलाई राजनैतिक शिक्षाको ज्ञान भएको प्रतित हुन्छ। द्रौपदीद्वारा युधिष्ठिरलाई सम्झाइ-बुझाइ गर्नुले उनको व्यवहारिक बुद्धिमत्तालाई दर्शाउँछ। उनको पाण्डित्यपूर्ण एवम् राजनीतिक विचारबाट भीम पनि सहमत भएका थिए। महाभारत काव्यको मुख्य नायिका द्रौपदी राजनैतिक ज्ञानको साथ साथै दार्शनिक तत्वबाट पनि अनविज्ञ नरहेको पुष्टी हुन्छ।<sup>१३</sup> रामायण काव्यमा कैकयी देव-दानव युद्धमा राजा दशरथको साथ जानुले पनि नारी शक्तिलाई पुष्टी गर्दछ।<sup>१४</sup>

त्यस्तै मानव अधिकारको विश्वव्यापी घोषणा-पत्र, १९४८ को धारा २५ (१) ले, प्रत्येक व्यक्तिलाई आफ्नो र आफ्नो परिवारको स्वास्थ्य र कल्याणको लागि खाद्यान्न, कपडा, आवास र औषधोपचारको सुविधा र आवश्यक सामाजिक सेवाहरू लगायत पर्याप्त जीवनस्तरको अधिकार तथा बेरोजगारी, विरामी, अशक्तता, विधवा, बृद्धसकाल वा आफ्नो काबुबाहिरका परिस्थितहरूमा जीविकोपार्जनका उपायका अभावमा सुरक्षा पाउने अधिकारबारे बन्दोबस्त गरिएको छ।<sup>१५</sup> आर्थिक, सामाजिक तथा सांस्कृतिक अधिकारसम्बन्धी अन्तर्राष्ट्रिय प्रतिज्ञा-पत्र, १९६६ को धारा १३ (२) मा, सबैका लागि क्षमताको आधारमा प्रत्येक उचित उपायद्वारा खासगरी निःशुल्क शिक्षाको प्रगतिशील अवलम्बनद्वारा उच्च शिक्षालाई समान पहुँचयुक्त बनाइने कुरा उल्लेख गरिएको छ।<sup>१६</sup>

## धार्मिक स्वतन्त्रता

धर्मकोशमा धार्मिक स्वतन्त्रता बारे उल्लेख गरिएको छ।

पाषाणनैगम श्रेणी पूगब्रात गणादिषु ।

संरक्षेत् समयं राजा दुर्गे जनपदे तथा ॥

अर्थात् राजाले वेदमा विश्वास गर्ने र नमान्ने र अरूलाई पनि समान रूपमा रक्षा गर्नुपर्ने उल्लेख छ। यसरी वैदिक धर्म मान्ने, गैर-वैदिक धर्म मान्ने र नास्तिकहरूलाई संरक्षण दिनेलाई राजधर्म भनिन्छ। धर्मनिरपेक्षता वा सर्वधर्मसमभावको बीज निहित रहेको छ। त्यस्तै मनुस्मृतिमा पनि यस प्रकार उल्लेख गरिएको छ:

क्षत्रियस्य परो धर्मः प्रजानामेव पालनम् ।

निर्दिष्ट फल भोक्ता हि राजा धर्मेण युज्यते ॥

अर्थात् राजाको परम् कर्तव्य प्रजाको रक्षा गर्नु हो, राजाले प्रजाबाट कर लिने र रक्षा गर्नु, धर्मअनुसार काम

१० डा. गायत्री द्विवेदी, नैषध कालीन भारत, रचना प्रकाशन, जयपुर (२००७ ई.)।

११ डा. मथुरादत्त जोशी, नैषध का काव्य शास्त्रीय अध्यन, बाके विहारी प्रकाशन, आगरा (१९९९ ई.)।

१२ डा चण्डिका प्रसाद शुक्ल, नैषध परिशीलन, हिन्दुस्तानी एकेडमी, उत्तरप्रदेश, इलाहाबाद, द्वितीय संस्करण (१९९२ ई.)।

१३ डा. सुषमा कुल श्रेष्ठ, बृहत्तयी-एकतुलनात्मक ईस्टर्न बुक लिंकर्स, दिल्ली (१९८३ ई.)।

१४ डा रामजी उपाध्याय, प्राचीन भारतीय साहित्य

१५ मानव अधिकारको विश्वव्यापी घोषणा-पत्र, १९४८, धारा २५ (१)।

१६ आर्थिक, सामाजिक तथा सांस्कृतिक अधिकारसम्बन्धी अन्तर्राष्ट्रिय प्रतिज्ञा-पत्र, १९६६, धारा १३ (२)।

गर्नु हो । महाभारतको शान्तिपर्वमा सबै वर्गका लागि नौ धार्मिक नियमहरू उल्लेख गरिएको छ ।<sup>५७</sup>

*अक्रोधः सत्यवचन संविभाग क्षमा तथा ।*

*प्रजनः स्वेषु दारेषु शौचमद्रोह एवं च ।*

*आर्जवं भश्यभरणं नवैते सार्वर्णिका ॥'*

अर्थात् क्रोध नगर्नु, सही कुरा गर्नु, सम्पत्ति बाँड्नु, क्षमा गर्नु, यौन नैतिकता, पवित्रता, शत्रुता नहुनु, स्पष्टता र आफूमा आश्रित व्यक्तिलाई भरण पोषण गर्नु कर्तव्य हो । यसको साथै कुनै पनि पुरुषले आफ्नी आमा, पत्नी, बाबु र बच्चाहरूलाई त्याग्नु हुँदैन । यदि कसैले त्यसलाई छोड्छ भने, उसलाई सजाय हुनेछ ।

नागरिक तथा राजनीतिक अधिकारसम्बन्धी अन्तर्राष्ट्रिय प्रतिज्ञापत्र, १९६६ को धारा २६ मा सबै व्यक्तिहरू कानूनको दृष्टिमा समान छन् र कुनै भेदभावविना कानूनको समान संरक्षणका हकदार छन् । यस सम्बन्धमा कानूनले कुनै पनि भेदभावलाई निषेध गर्नेछ र सबै व्यक्तिलाई जाति, वर्ण, लिङ्ग, भाषा, धर्म, राजनीति वा अन्य विचार, राष्ट्रिय वा सामाजिक उत्पत्ति, जन्म वा अन्य हैसियतका आधारमा कुनै पनि भेदभावविरुद्ध समान तथा प्रभावकारी संरक्षणको प्रत्याभूति दिने कुराको उल्लेख गरिएको छ ।<sup>५८</sup>

### महिलाको हक<sup>५९</sup>:

महिलाउपर हुने भेदभाव, हिंसा शोषणबाट संरक्षण गरी समाजको हरेकक्षेत्र सहभागिता सुनिश्चित गर्ने विशिष्ट अधिकारलाई महिलाको हकको रूपमा बुझ्न सकिन्छ । धारा ३८(१) मा गरिएका व्यवस्थाअनुसार “प्रत्येक महिलालाई लैङ्गिक भेदभावविना समान वंशीय हक हुनेछ भनी ग्यारेन्टी गरिएको भए पनि यससम्बन्धी व्यवस्था मानव सृष्टिको सुरु-सुरुमै राज्य गर्ने प्रथम राज्यकर्ता मनुकी पतनीले पुत्री कामनाको गराएको यज्ञबाट समेत पुष्टी हुन्छ । स्वयम् मनुकी पत्नी पनि छोरीको कामना गरी यज्ञमा ऋषीहरूलाई यस प्रकारको मन्त्रोच्चारण गर्न अनुरोध ज्यादै महत्त्वपूर्ण छ”<sup>६०</sup> ।

*तत्रश्रद्धा मनोपत्नी होतार समयाचत ।*

*दुहित्वयर्थभूपागम्य प्रणीपत्य पर्यावृत्ता ११/११४ भागवत*

११/७१/४ ऋग्वेदको मन्त्रमा विद्याप्राप्त नगरेकी नारीले सुख प्राप्त गर्न सक्दैनन् । नारी र पुरुष पतिपत्नी हुँदा समान शिक्षा लिएका हुनुपर्छ किनभने नपढेको पुरुषले शिक्षित नारीसँग विवाह गर्नु भन्ने त्यसले पत्नीलाई दुख दिन्छ । त्यस्तै अशिक्षित नारी शिक्षित पुरुषले विवाह गर्नु भन्ने पुरुषले पनि दुख पाउछ<sup>६१</sup> भनी व्यवस्था रहेबाट पनि महिला शिक्षाको ऐतिहासिक सन्दर्भ पुष्टी हुन्छ ।

वैदिककालमा महिलाहरूलाई अत्यन्तै महत्त्वपूर्ण एवम् गौरवशाली स्थान प्राप्त हुने गर्दथ्यो । महिलाहरूलाई नित्य नवीना, यौवन सम्पन्ना, शुभ्रवसना, सत्यभाषिणी आदि विशेषणहरूबाट सम्बोधन गरिन्थ्यो । महिलाहरूलाई कन्या, भगिनी, पत्नी, मातृ आदि रूपमा आदर प्रकट गर्ने प्रचलन आजसम्म कायम रहेको छ । पत्नीरहित

५७ अर्जुन देव, मानव अधिकार, राष्ट्रिय शैक्षिक अनुसंधान और प्रशिक्षण परिषद, नई दिल्ली (१९९८ ई.) ।

५८ नागरिक तथा राजनीतिक अधिकार सम्बन्धी अन्तर्राष्ट्रिय प्रतिज्ञा- पत्र, १९६६, धारा २६ ।

५९ नेपालको संविधान, धारा ३८ ।

६० डिल्लीराम गौतम, पूर्वीय सोच र श्रोत, काठमाण्डौ स्कूल अफ ल, दधिकोट ९, भक्तपुर, २०६६, पृष्ठ २०९ ।

६१ डिल्लीराम गौतम, पूर्वीय सोच र श्रोत, काठमाण्डौ स्कूल अफ ल, दधिकोट ९, भक्तपुर, २०६६, पृष्ठ २०८ ।

गृहलाई जङ्गल बराबर मानिन्छ । पत्नीलाई गृहिणी, एकलोपनको साथी, योग्य सचिव आदि विशेषणबाट अलङ्कृत गर्नु तथा अर्धाङ्गिनी भन्नु पनि श्रीमान श्रीमती दुवैलाई समान अधिकार एवम् समभावको परिचायक मानिएको बोध हुन्छ ।<sup>६२</sup> धार्मिक कार्यमा पनि स्त्रीलाई सहधर्मिणी मानिन्छ । स्त्रीबिना कुनै पनि धार्मिक कृत्य पूर्णरूपबाट सफल भएको मान्न सकिँदैन । शतपथ ब्राह्मण नामक ग्रन्थमा, अपत्नीक पतिलाई यज्ञको अधिकार नभएको उल्लेख गरिएको छ ।<sup>६३</sup> अतः श्रीरामले पनि सीताको अनुपस्थितिमा सीताको सुवर्ण मुर्ति बनाउन लगाई अश्वमेघ यज्ञ पूर्ण गरेका थिए ।<sup>६४</sup> महिलालाई मातृरूपमा आदरणीय स्थान प्राप्त छ । महिला सन्तानोत्तपति शक्तिको कारण सम्मानित मानिन्छ । आज पनि हाम्रो समाजमा आमाको स्थान गुरु र पिता दुवैभन्दा उच्च मानिन्छ ।

दशाचार्यानुपाध्याय उपाध्यायान्पिता दश।  
दश चैव पितृन्माता सर्वा वा पृथिवीमपि ॥  
गौरवेणायिभवति नास्ति मातृ-समो गुरुः ।  
माता गरीयसी यच्च तेनैता मन्यते जनः।<sup>६५</sup>

वैदिककालमा महिलालाई घरमा सम्मानजनक पद प्राप्त हुने गर्दथ्यो । मनुका अनुसार, जहाँ नारीको पूजा हुन्छ, त्यहाँ देवताको निवास हुन्छ ।

“यत्र नार्यस्तु पूज्यन्ते रमन्ते तत्र देवता।”

पत्नीलाई सम्बन्ध विच्छेदसम्म गर्ने अधिकार थियो । पति नीच, प्रवासी, राजद्रोही भएको खण्डमा महिलाले सम्बन्ध विच्छेद गर्न पाउने व्यवस्था गरिएको थियो ।

नीचत्वं परदेश वा प्रस्पितो राजकित्विशी ।

प्राणाभिहन्ता पतितस्त्याज्यः क्लीषोऽपित वा पतिः ।<sup>६६</sup>

मनुस्मृतिमा महिला र पुरुषको लागि विवाह संस्कारको नियम वेदमा जस्तै समान रूपमा भएको पाइन्छ ।<sup>६७</sup> महिलामा विनय सन्तोष, धैर्यता, गम्भीरता, सहनशीलता, श्रमशीलता, मितव्ययता आदि गुणका कारण परिवारको पवित्रता अक्षयुण राखी परिवारलाई एक सूत्रमा बाँधी राख्ने अपूर्व शक्ति निहित रहेको हुन्छ । अतः नारीलाई धर्म, अर्थ, काम, मोक्षरूपी पुरुषार्थको खजाना मान्न सकिन्छ ।

अथर्ववेद संहितामा नारीको गौरवलाई गौरान्वित तुल्याउने गरी नारीलाई शक्तिशाली सागर नदीसरह तुलना गरिएको छ, जो पतिको घरमा गई महारानीको दर्जा हासिल गर्न सफल हुन्छिन् ।<sup>६८</sup> स्त्रीलाई साम्राज्ञी एवम् महिषी आदि सम्मानजनक शब्दबाट पुकार गरिन्छ । ऋक्संहितामा सीतालाई सुख-समृद्धिको सूचकको रूपमा

६२ प्रो. राधावल्लभ त्रिपाठी, बृहत्तयी परिशीलन काव्य, शास्त्रीय खण्ड (२०१३ ई.) ।

६३ प्रो. सुखदेव भोइ श्रीलालवहादुर शास्त्री, बृहत्तयी परिशीलनम् (परिचय खण्ड), राष्ट्रिय संस्कृत विधा पीठम् नईदिल्ली (२०१३ ई.) ।

६४ डा श्रीमति सुषमा स्नातिका, बृहत्तयी और लघुत्रयी पर वैदिक प्रभाव।

६५ डा नरेन्द्र, भारतीय काव्यशास्त्र की भूमिका

६६ डा हजारी प्रसाद द्विवेदी, भारतीय नाट्य शास्त्र की परंपरा और दशरूपक (१९६३ ई.)

६७ भारतीय प्रज्ञा मोनियर विलियम्स ।

६८ पं. बलदेव उपाध्याय, भारतीय साहित्यशास्त्र (१९४९ ई.) ।

व्याख्या गरिएको पाइन्छ। आज पनि रामको नामपूर्व सीता र कृष्णको नामपूर्व राधाको स्मरण गरिन्छ।<sup>६९</sup>

अतः नारीको लागि प्रयुक्त 'श्री' जस्तो सम्मानजनक शब्दलाई यसको परिचायक मान्न सकिन्छ। प्राचीन युगबाट नै पवित्रता, पातिव्रत्य, वात्सल्य-भाव, सेवापरायणता तथा अगाध श्रद्धा आदि गुणको कारण नारीलाई नेपाली समाजमा बडो आदरका साथ हेरिन्छ।

संयुक्त राष्ट्रसङ्घको बडापत्रले प्रस्तावनामा नै महिला र पुरुषको समान हकमा विश्वास गर्ने कुरा उल्लेख गरिएको छ भने बडा-पत्रको धारा ५५ को ३ मा लिङ्गका आधारमा भेदभाव नगरी सबैका निमित्त मानव अधिकार र मौलिक स्वतन्त्रताका लागि विश्वव्यापी सम्मान र तिनको पालना गर्ने कुरा उल्लेख गरिएको छ।

मानव अधिकारको विश्वव्यापी घोषणा-पत्र, १९४८ को धारा २ मा, जाति, वर्ण, लिङ्ग, भाषा, धर्म, राजनीति वा अरु विचार र राष्ट्रिय वा सामाजिक उत्पत्ति, सम्पत्ति वा अरू कुनै मर्यादाको आधारमा भेदभाव नगरी प्रत्येक व्यक्तिलाई यस घोषणामा उल्लिखित अधिकार र स्वतन्त्रताको अधिकार कुरा उल्लेख गरिएको छ।<sup>७०</sup> त्यस्तै धारा २५ (२) मा मातृकाल वा बाल्यावस्थामा रहेका प्रत्येक व्यक्तिलाई विशेष हरेचाह वा सहायता प्राप्त हुनेछ। विवाहित वा अविवाहित आमाबाट जन्मेका दुवै बालकले समान सामाजिक संरक्षण उपभोग गर्न पाउने व्यवस्था गरिने बारे उल्लेख गरिएको छ।<sup>७१</sup>

## स्त्रीधन र महिलाको स्थान

वैदिक विधिशास्त्रमा श्रीमतीको स्थान पनि उच्च कोटीमा दरिएको पाइन्छ। ऋग्वेदको मतानुसार, श्रीमती नै घर हो।<sup>७२</sup> श्रीमती गृहस्थाश्रमको मूल व्यवस्थापक भएको कारण श्रीमतीलाई घरको आत्मा पनि भनिन्छ। वैदिक विधिशास्त्रमा उल्लेख भएअनुसार प्रारम्भकालदेखि नै महिलाको साम्प्रतिसम्बन्धी अधिकार सुनिश्चित भएको पाइन्छ।

तैत्तिरीय संहितामा श्रीमतीको पारिणाद्वा अर्थात् घरमा रहेको मालवस्तुको स्वामी मानिएको छ।<sup>७३</sup> पत्नीलाई पतिको सम्पत्तिउपर अधिकार भए पनि विभाजन गर्ने अधिकार भने छैन। पुत्रले पितासँग सम्पत्ति विभाजन माग गरेको खण्डमा पत्नीलाई पुत्रसरह समान सम्पत्तिको भाग लाग्ने उल्लेख गरिएको छ। त्यस्तो सम्पत्ति धने जसमा पत्नीको मात्र अधिकार हुन्छ, र उनको शेषपछि त्यो सम्पत्तिको उत्तराधिकारी छोरी हुन्छे भने त्यस्तो सम्पत्तिलाई स्त्रीधन भनिन्छ, जुन विवाहको समयमा बेहुलीका बाबुआमा र बेहुला पक्षले नवविवाहिता कन्यालाई दिने गर्दछन् अर्थात् विवाहको समयमा बेहुलीलाई दिइने लत्ता कपडा, गरगहना आदिलाई स्त्रीधन भनिन्छ।

तसर्थ सृष्टिको प्रारम्भिक कालमा विवाह नामक संस्था सुरु हुँदा बेहुलीलाई दिइने दाइजो, लत्ताकपडा, गरगहना र अन्य आवश्यक वस्तुहरूबाट स्त्रीधनको अवधारणाको सुत्रपात भएको देखिन्छ। धर्मसूत्रकारहरूले विवाहका बेला बेहुलीलाई दिइने लत्ता कपडा, गरगहना र आभूषणजन्य चिजवस्तु आदिलाई स्त्रीधनअन्तर्गत

६९ डा अरूण चतुर्वेदी, भारत में मानवाधिकार ।

७० मानव अधिकारको विश्वव्यापी घोषणा-पत्र, १९४८, धारा २ ।

७१ मानव अधिकारको विश्वव्यापी घोषणा-पत्र, १९४८, धारा २५ (२) ।

७२ डा अरूण चतुर्वेदी, भारत में मानवाधिकार ।

७३ डा संजय लोढा, भारत में मानवाधिकार ।

राखेको पाइन्छ । मनुले छ वटा प्रकारका स्त्रीधनहरू वर्णन गरेका छन् ।<sup>१४</sup> त्यसै गरी मौर्य साम्राज्यका निर्माता, अर्थशास्त्रका लेखक तथा कुशल राजनीतिज्ञ चाणक्यले पनि स्त्रीधनको सम्बन्धमा अनेक व्यवस्था गर्नुको साथै स्त्रीधनलाई दुई भागमा वर्णन गरेका छन्, प्रथम वृत्ति र दोश्रो आबन्ध्य ।<sup>१५</sup> वृत्तिले निर्वाहको साधनलाई जनाउँछ भने आबन्ध्यले महिलाले लगाउने आभूषणजन्य चिजलाई जनाउँछ । स्त्रीधनको उत्तराधिकारी महिला नै हुन्छन् ।<sup>१६</sup> महिला उत्तराधिकारी नभएको खण्डमा मात्र स्त्रीधनउपर पुरुषको हक लाग्छ । आचार्य मनुले छोराको अधिकारको समर्थन गर्दै आमाको सम्पत्ति दाजुभाइ दिदीबहिनीले मिलेर बाँडफाँड गर्नेपर्ने धारणा व्यक्त गरेका छन् । याज्ञवल्क्यका भने स्त्रीधनको उत्तराधिकारीका रूपमा महिला हुनुपर्ने तर्क गरेका छन् । वैदिककालमा पतिको मृत्युपश्चात् विधवा स्त्रीलाई सम्पत्तिको अधिकार दिँएको थिएन । कौटिल्यको अर्थशास्त्रका अनुसार भने त्यसबेला राजाले मृतकको श्रीमतीको जीवनयापन र और्ध्वदैहिक<sup>१७</sup> कार्यको लागि केही रकम प्रदान गर्ने प्रवन्ध गरेका हुन्थे तर याज्ञवल्क्यले विधवालाई पनि आफ्नो पतिको सम्पत्तिको उत्तराधिकारीको रूपमा मानेका थिए ।

कतिपय स्मृतिकारहरूले विधवाको अधिकारको समर्थन गर्दै क्रमशः उनीहरूको अधिकार बढ्दै गएको उल्लेख गरे पनि विधिशास्त्रमा विधवाको सम्पत्तिको हकबारे यथोचित रूपमा उल्लेख भएको पाइँदैन । रामायण र महाभारतजस्ता ग्रन्थमा चित्रण गरिएका विधवा महिला कौशल्या, कैकेयी, सुमित्रा कुन्ती आदिको सम्पत्तिबारे उल्लेख नभए पनि सारा साम्राज्यका मालिक भएका छोराहरूले आमालाई नै सर्वस्व मानेर उहाँको आज्ञा पालन गर्नु आफ्नो कर्तव्यका रूपमा मानेका छन् । उपर्युक्त विवेचनाबाट वैदिककाल देखि महाकाव्यकालसम्म महिलाको स्थान र स्त्री धनलाई प्रधानका साथ उठाइएको पाइन्छ ।

नेपालको संविधानले महिलाको स्थितिमा सुधार ल्याउन विभिन्न प्रवन्ध गरेको छ । धारा ३८, ४२, ५०(१), ७६(९), ८४(२), ८४(८), ८६(२)(ख), १६८(९), १७६, २२२, २२३ मा महिलासम्बन्धी व्यवस्था छन् । तापनि तिनको कार्यान्वयन पक्ष कमजोर भएकाले उपलब्धिहरू उपभोग गर्न कठिन भएको अवस्था छ । राज्यका हरेक तहमा महिला प्रतिनिधित्व ३३ प्रतिशत पुऱ्याउन पनि सकस परिरहेको देखिन्छ । संयुक्त राष्ट्रसङ्घीय महासभाद्वारा सन् १९७९ मा पारित भई सन् १९८१ देखि लागू भएको महिलाविरुद्ध हुने सबै प्रकारका भेदभाव अन्त्य गर्ने महासन्धि (सीईडीएडब्लू) को केन्द्रीय विषयमध्ये एक सार्वजनिक जीवनमा महिला तथा पुरुषको समान सहभागिता हो ।

## नागरिक अधिकार

राजा मुख्यतया: राज्यको शासन व्यवस्था, प्रशासन, शान्ति सुरक्षा, सामाजिक काम गर्ने, आफ्नो कर्तव्य निष्ठापूर्वक निर्वाह गर्ने, दण्ड नीतिको ज्ञान र त्यसको उचित पालना महत्त्वपूर्ण पदमा उत्कृष्ट र योग्य व्यक्ति नियुक्त गर्ने, ढुकुटीको रक्षा गर्ने जस्ता जिम्मेवारी बहन गर्दथे ।<sup>१८</sup>

७४ डा भोला शंकर व्यास, भारतीय साहित्यशास्त्र काव्यालकार ।

७५ डा मधुमंजरी दुवे, मानवाधिकार ।

७६ डा तपन विसवाल, मानवाधिकार जेन्डर एवम् पर्यावरण विवा बुक्स प्राइवेट लिमिटेड (२००९) ।

७७ मृत्युपछि शरीरको शान्तिको लागि गरिने कर्मलाई और्ध्वदैहिक भनिन्छ । जसमा पिण्ड दान, श्राद्ध, तर्पण आदि पर्दछन् । निःसन्तान भएका वा मृत्युपछि आफ्ना सन्तानले मरणोपरान्त अनुष्ठान गर्ने अपेक्षा नगर्ने कतिपय व्यक्तिहरू जीवित रहँदा यी अनुष्ठानहरू गर्छन् । हाम्रा शास्त्रहरूमा यस्ता मानिसहरूका लागि कडा व्यवस्था छ ।

७८ S.Subramanian, *Human Rights. International Challenge*. Vol.1 (New Delhi: Manas Publication. 1997) 56

अश्वघोषानुसार -

भारैरशीशमच्छत्रून गुणैर्बन्धूनरीरमत् ।

रन्धैनायूयुदद् भृत्यान् करैर्नापीपिडत् प्रजाः<sup>७९</sup>

शत्रु, मध्यस्थ र मित्रको निर्धारण गर्नु राजाको अधिकार हो ।

यथा- मध्यस्थतां तस्य

पक्षावपरस्तु नास ।<sup>८०</sup>

राजालाई जमानी (प्रतिभू)<sup>८१</sup> दिने अधिकार प्राप्त थियो ।

### सक्षम अदालतबाट सुनुवाइ

कौटिल्य अर्थशास्त्रानुसार राजालाई आन्वीक्षकी, त्रयी, वार्ता, दण्डनीति चारै विद्याको ज्ञाता हुनुपर्ने उल्लेख गरेका छन् । आन्तीक्षकी (नास्तिक दर्शन), त्रयी (ऋग्वेद, यजुर्वेद, सामवेद), वार्ता (कृषि, पशुपालन, व्यापार आदि) र दण्डनीति

आन्वीक्षकीत्रयी वार्तानां योगक्षेमसाधनों दण्डः।<sup>८२</sup>

### दण्डसजाय

आचार्य कौटिल्यका अनुसार राजा अत्याधिक कठोर तथा अत्याधिक विनम्र नभई विधिको शासन अनुसार न्यायोचित दण्ड दिनुपर्दछ । आचार्य मनुका अनुसार कुनै व्यक्तिले अज्ञानताका कारण अपराध गरेमा त्यसले गरेको अपराधको मात्रा र क्षतिअनुसार सजाय दिनुपर्दछ । अकर्मण्यताका कारण कसैलाई हानीनोक्सानी पुऱ्याएमा भने दोब्बर सजाय दिने अधिकार राजामा निहित थियो । लापरवाहीपूर्वक भए गरेको कसूरमा तीन गुणा बढी सजाय दिने बन्दोबस्त गरिएको थियो । प्रजाको रक्षा गर्ने राजालाई सबैले सदैव आदर गर्ने गर्दथे ।

अभयस्य हि यो याता सा पूज्यः सततं नृपः।

संत्रहि वर्धते तस्य सदैवाभयदक्षिणम् ।।<sup>८३</sup>

धार्मिक हिसाबले, प्रजाको रक्षा गर्ने राजाको स्थान छैटौं हुन्छ भने प्रजाको रक्षा नगर्ने राजाको स्थान अधर्ममा छैटौं हुन्छ ।

सर्वतो धर्म षड्भागो राज्ञो भवति रक्षतः।

अधर्मादपि षड्भागो भवत्यस्य ह्यारक्षतः।।<sup>८४</sup>

७९ मेघदूत कालिदास, चौखम्बा प्रकाशन वाराणसी, (१९६२ई)

८० योग दर्शन, हरिकृष्ण, दास गोकुण्डका, गीता प्रेस गोरखपुर, सम्बत् (२०६९ वि.स) ।

८१ व्यवहार शास्त्रमा ऋणी (उत्तमर्ण) को सामु उधारो (अधमर्ण) व्यक्तिलाई जमानी दिने व्यक्ति ।

८२ रघुवंश कालीदास, चौखम्बा संस्कृत सीरीज, वाराणसी (१९६९.ई)।

८३ विष्णु पुराण श्री मुनिलाल गुप्त, गीता प्रेस गोरखपुर (२००९ वि.सं.)।

८४ शिशुपालवधम्, आचार्य माघ, चौखम्बा संस्कृत सीरीज, वाराणसी (१९५५.ई) ।

जुन राजा धर्मद्वारा प्रजाको रक्षा गर्दछन् र नागरिकलाई दुख दिनेलाई परास्त गर्दछन्, त्यो राजालाई प्रतिदिन एक लाख गाईको दक्षिणा दान दिने यज्ञसरह समान फलको प्राप्ति हुन्छ । नागरिकको रक्षा गर्नु राजाको दायित्व हो ।

*अरक्षितारं राजानं बलिषड्भागहारिणम् ।*

*तमाहुः सर्वलोकस्य समग्रमलहारकम् ॥<sup>५५</sup>*

सामान्य व्यक्तिले अपराध गरेमा राजाले त्यस व्यक्तिबाट एक पण लिने अधिकार थियो, तर राजा स्वयम अपराध गरेमा हजार पणसम्म सजाय दिने शास्त्रमा उल्लेख गरिएको छ ।

*कार्षापणं भवेद्वण्डयो यत्रान्यः प्राकृतोजनः ।*

*तत्र राजा भवेद्वण्डयः सहस्त्रमिति धारणा ॥<sup>५६</sup>*

प्रजाले अपराध गरेमा सजाय दिने अधिकार राजालाई हुन्छ तर जुन राजाले साहसी व्यक्तिलाई सजाय दिने र माफी दिँदैन भने त्यो राजा शीघ्र पतन हुन्छन् । अतः उपरोक्त वर्णनानुसार राजालाई दोषीउपर कारवाही चलाउने पूर्ण अधिकारको साथै शान्ति/सुव्यवस्थाको मुख्य रक्षक थिए भन्ने कुरा पुष्टी हुन्छ ।

अर्थात् दोषीसँग अनुचित सम्बन्ध हुँदा पनि कारवाहीको भागीदार बनाउन सकिने प्रबन्ध थियो । माता, पिता, आचार्य, मित्र, पुत्र या पुरोहित आदिमध्ये जोकोहीले अपराध गरे पनि कानूनबमोजिम सजाय गरिन्थ्यो । नागरिक तथा राजनीतिक अधिकारसम्बन्धी अन्तर्राष्ट्रिय प्रतिज्ञापत्र, १९६६ को धारा १६ मा प्रत्येक व्यक्तिलाई सबै ठाउँमा कानूनको अगाडि व्यक्तिको रूपमा मान्यता पाउने अधिकार हुनेछ भनी उल्लेख गरिएको छ ।

## सम्पत्ति सम्बन्धी अधिकार

कौटिल्यका अनुसार पैतृक सम्पत्तिमा बाबु वा बाबु जीवित रहँदासम्म छोराहरूबीच सम्पत्ति बाँडफाँड गर्न सकिँदैन तर छोराहरूको स्वअर्जित सम्पत्तिमा अरू दाजुभाइहरूको हक लाग्दैन । अंशउपरको नैसर्गिक अधिकार युगौंदेखि प्रचलनमा रहेको पाइन्छ । कुलपति सत्तात्मक परिवारको प्रचलन हुने गर्दथ्यो । छोराभाति पिताको पूर्ण अधिकार थियो । पिताको आज्ञा पालन गर्नु छोराको परम् कर्तव्य थियो । सम्पत्ति बाँडफाँड सम्बन्धमा स्पष्ट नियम थिएन । परिवारको हरेकजनले आर्जन गरेको सम्पत्तिको स्वामी पितालाई मानिन्थ्यो । महिलालाई सम्पत्तिको अधिकारमा सिमितता थियो । ऋग्वेदमा, बुबा बुढेसकालमा जीवित हुँदा पनि छोराहरूलाई सबै सम्पत्ति बाँडन सकिने व्यवस्था थियो । नाबालिगको हकमा दाजुभाइहरू जेठा छन् भने, यस्तो अवस्थामा नाबालिग बच्चा पनि सम्पत्तिको हकदार हुन्थ्यो । बालिग नहुँदासम्म भ्राता, पितामह, मातामह आदि द्वारा सुरक्षाको प्रबन्ध गरिएको थियो । बालिग भएपश्चात् सम्पत्तिको स्वामित्व ग्रहण गर्ने पूर्ण अधिकार रहेको थियो ।

महिलाहरूलाई सामान्य रूपमा उत्तराधिकारी मानिँदैन थियो तर कौटिल्य वयष्क, अविवाहिता र अभ्रातृमती महिलालाई उत्तराधिकारी बनाउने पक्षमा रहेका थिए । आचार्य मनु<sup>५७</sup> तथा याज्ञवल्क्य<sup>५८</sup> ले सम्पत्ति उपर

५५ डा. भोला शंकर, व्यासस्कृतक विदर्शन, स (१९६८ई.) ।

५६ डा. हरिदत्त शास्त्री, संस्कृत काव्यकार, (१९६२ ई.) ।

५७ डा. रामजी उपाध्याय, संस्कृत के महाकवि और काव्य, (१९६५ ई.) ।

५८ डा हजारीप्रसाद द्विवेदी, संस्कृत साहित्य का आलोचनात्मक इतिहास (१९६३ ई.) ।

महिलाको भाईको भागको चौथो हिस्सा दिनुपर्ने व्यवस्था थियो । ऋग्वेदमा भनिएको छ - अभ्रातृका विवाहिता हुँदा पनि धन प्राप्तिको लागि पितृकुल धारण गर्न सक्ने व्यवस्था गरिएको थियो ।<sup>९९</sup>

महाभारतमा पुत्रलाई आत्माको समान मानिएको छ । पुत्रीलाई पनि पुत्र सरहको दर्जा दिईएको छ । यस कारण आत्मस्वरूपी पुत्री हुँदा हुँदै अर्को व्यक्ति धनको हकवाला हुन सक्दैन ।<sup>१०</sup> भाई नहुने अविवाहित छोरीलाई पनि पिताको सम्पत्तिको उत्तराधिकारी मानिन्थ्यो । वैदिक युगमा छोरीहरू उच्च शिक्षा ग्रहण गर्दथे र कतिपय अवस्थामा अविवाहित समेत रहने गर्दथे । उनीहरूको स्थिति विवाहिता कन्या भन्दा विपरीत हुने गर्दथ्यो किन भने विवाहित कन्या पाणिग्रहणको समय पिताबाट पर्याप्त सम्पत्ति प्राप्त गर्ने गर्दथे ।<sup>११</sup> विवाहपश्चात् पतिगृहमा गएपश्चात् पनि स्त्रीधनको अधिकारी हुने प्रचलन रहेको थियो । अतः छोरीहरूलाई पनि पिताको सम्पत्ति उपर अंश पाउने व्यवस्था थियो तर आजीवन अविवाहित रहने छोरी दहेज तथा पतिबाट प्राप्त हुने धनबाट विमुख रहने गर्दथे । अतः पिताको सम्पत्तिउपर छोरीहरूको अंश (सम्पत्ति भाग) लाई स्वाभाविक मानिन्थ्यो । महाभारतमा कुमारी कन्याको साम्पत्तिक अधिकारलाई पुरुषसरह समान रूपमा लिईएको छ ।<sup>१२</sup> सृष्टिको आरम्भमा स्वयंभूको पुत्र मनुले स्त्री र पुरुष दुवैलाई कुनै भेदबेगर धर्मानुसार सम्पत्तिउपरको अधिकारलाई समान रूपमा व्याख्या गरेका थिए ।<sup>१३</sup>

## विवाहको अधिकार

विवाहको प्रथा देवताहरूबाट लिइएको हो । शिव-पार्वतीको विवाहदेखि आमनागरिकको जीवनमा विवाहको विशेष महत्त्वपूर्ण स्थान छ । वैदिककालदेखि नै विवाहलाई पवित्र संस्कार मानिन्छ । विवाहको आधारशीला सत्य एवम् सतित्वको जगमा अडेको थियो । वैवाहिक आधारशिलालाई सुदृढ बनाउन हेतु वाग्दान, कन्यादान, अग्निसाख्य पाणिग्रहण, अग्नि प्रदक्षिणा, लाजाहोम एवम् सप्तपदीजस्ता प्रमुख अनुष्ठानहरू गरिन्थ्यो।विवाह सामान्यतया ब्रह्मचर्य आश्रम पूरा भएपछि मात्र हुने प्रचलन रहेको थियो ।

ऋग्वेद संहितामा विवाह संस्कारलाई सत्य र कर्तव्यको रूपमा चित्रण गरिएको पाइन्छ ।<sup>१४</sup> विवाह दम्पतिको आत्मा, मन, प्राण र शरीरलाई आध्यात्मिक सम्बन्धद्वारा सुदृढ गरिने एक चिरस्थायी प्रयत्नको रूपमा व्याख्या गरिएको पाइन्छ ।

वैदिककालदेखि आजको आधुनिक समाज सम्म विवाह संस्कारको महिमा अक्षुण्ण रहेको छ । गृहस्थाश्रममा प्रवेशको लागि विवाह संस्कार अनिवार्य थियो । स्त्री र पुरुष दुवैलाई समान महत्त्व दिईन्थ्यो । मनुस्मृतिमा विवाहको ब्रह्म, दैव, आर्ष, प्रजापत्य, असुर, गन्धर्व, राक्षस र पिशाच आठ भेद बनाइएकोमा, प्रथम चार भेद समाजद्वारा प्रशंसनीय रहेको थियो र बाँकी चार प्रकार समाजद्वारा तिरस्कृत थियो ।<sup>१५</sup>

- ब्रह्म विवाहमा वस्त्रालंकारादिबाट विभूषित कन्याको विवाह वैदिक रीतिअनुसार सुयोग्य वरको साथ गर्ने प्रचलन रहेको छ ।

८९ डा. कपिल देव द्विवेदी आचार्य, संस्कृत साहित्य का समीक्षात्मक इतिहास, कटरा रोड, इलाहबाद (२००९ ई.) ।

९० डा. मैकडानल, संस्कृत साहित्य का इतिहास (१९६२ ई.) ।

९१ डा. जगन्नारायण पाण्डेय, संस्कृत साहित्य का इतिहास जगदीश संस्कृत पुस्तकालय जयपुर (२००६ ई.) ।

९२ डा. कीथ, संस्कृत साहित्यका इतिहास (१९६० ई.) ।

९३ डा. बलदेव उपाध्याय, संस्कृत साहित्यका इतिहास (१९६८ ई.) ।

९४ डा. बलदेव उपाध्याय, संस्कृत सुकवि समीक्षा (१९६३ ई.) ।

९५ डा. पुष्करदत्त शर्मा, संस्कृत साहित्य का इतिहास, अजमेरा बुक डिपो जयपुर (१९९२ ई.) ।



- दैव विवाहमा कन्या ऋत्विक्कलाई उपहारस्वरूप प्रदान गरिन्थ्यो ।
- आर्ष विवाहमा वर पक्षलाई दूई गाई सहित कन्याको पिताले कन्यादान गर्ने प्रचलन रहेको थियो ।
- प्रजापत्य विवाहमा वर-वधु लाई, 'दुवै मिली गृहस्थाश्रमको पालना गर' यसरी सम्बोधन साथ कन्या वरलाई सुम्पने प्रचलन रहेको थियो ।
- गन्धर्व विवाहमा स्त्री-पुरुषको सहमतिको विधि विधान रहेको थियो । यस प्रकारको विवाह महाभारतमा दुष्यन्त र शकुन्तलाको विवाह भएको थियो ।
- राक्षस विवाहमा कन्याग्रहणको लागि युद्ध, हत्या, आघात, प्रतिघात गर्ने प्रचलन रहेको थियो ।
- पैशाच विवाहमा बलात्कार गरी गरिने विवाह हो ।
- आसुर विवाहमा कन्यापक्ष, वर पक्षबाट धन लिएर कन्यादान गर्ने प्रचलन कायम थियो ।

शिक्षा पूरा गरेपछि ब्रह्मचारीलाई विवाहको माध्यमबाट गृहस्थ जीवनको उत्तरदायित्व निर्वाह गर्ने अधिकार थियो। राजालाई राजकाजको लागि धेरै श्रीमती राख्न छुट भए पनि समाजका अन्य व्यक्तिलाई एक विवाह मात्र गर्ने अधिकार थियो । यदि पहिलो श्रीमतीको दुर्भाग्यवश मृत्यु भएमा, पतिलाई दोस्रो पटक विवाह गर्ने अधिकार थियो र सन्तान नभएको अवस्थामा, छोराको भन्दा छोरी सन्तानको सङ्ख्या धेरै भए पनि पुरुषलाई दोस्रो विवाह गर्ने अधिकार थियो ।

महाकाव्यकालमा महिलाहरूलाई आफ्नो दुलाहा छनौट गर्न र विवाह गर्ने पूर्ण अधिकार थियो । महिलाहरू आफूले चाहेको उपयुक्त दुलाहा छनौट गर्दथे । त्यस अनुरूप केटीका बुवाले बेहुला छनौट गर्नको लागि एउटा कार्यक्रम आयोजना गर्थे, जसको नाम स्वयंवर थियो ।<sup>९६</sup> रामायणमा सीता स्वयंवर<sup>९७</sup>, महाभारतमा कुन्ती स्वयंवर<sup>९८</sup>, द्रौपदी स्वयंवर आदि । यस परम्परा अनुसार राजकुमारीसँग विवाह गर्न चाहने राजकुमारहरू सहभागी हुने गर्दथे । राजकुमारीले मन परेको बेहुलाको घाँटीमा माला लगाइ विवाह गर्ने प्रचलन रहेको थियो । यस प्रकार रघुवंशम्मा इन्दुमती स्वयंवरको वर्णन<sup>९९</sup>, कुमारसंभवम्मा इच्छित वर पाउन हेतु पार्वतीद्वारा पिता हिमालयको आज्ञाबाट तपस्या गरेको उल्लेख भेटिन्छ ।<sup>१००</sup> अतः स्त्रीलाई स्वेच्छाले विवाह गर्ने अधिकार थियो ।

मानव अधिकारको विश्वव्यापी घोषणा-पत्र, १९४८ को धारा १६(१) मा जाति, राष्ट्रियता वा धर्मको भेदभावविना वयस्क महिला-पुरुषलाई आपसमा विवाह गर्ने र परिवार स्थापना गर्ने अधिकार छ ।<sup>१०१</sup> विवाहको विषयमा वैवाहिक जीवनमा तथा विवाह-विच्छेदमा उनीहरूको समान अधिकार हुनेछ भन्ने व्यवस्था गरिएको छ । धारा १६ (२) मा विवाहको इच्छा राख्ने महिला-पुरुषको पूर्ण र स्वतन्त्र सहमतिबाट मात्र विवाह हुनेछ भन्ने व्यवस्था गरिएको छ ।<sup>१०२</sup> आर्थिक, सामाजिक तथा सांस्कृतिक अधिकारसम्बन्धी अन्तर्राष्ट्रिय प्रतिज्ञा-पत्र, १९६६ को धारा

९६ डा. निरूपण विद्यालङ्कार, साहित्य दर्पण, साहित्य भण्डार मेरठ (२००१.ई) ।

९७ डा. कीथ, वैदिक धर्म एवं दर्शन ।

९८ वाचस्पति गैरोला, वैदिक साहित्य और संस्कृति (१९६९ ई.) ।

९९ डा मालती शर्मा, वैदिक संहिता ओम्मेनारी, सम्पूर्णा नन्द संस्कृत विश्वविद्यालय ।

१०० पण्डित परमेश्वर दीन पाण्डेय एवं श्री अरवि कुमार पाण्डेय, वेणीसंहार-नाटकम्, चौखम्बा सुरभारती प्रकाशन, वाराणसी (२०१२ ई.) ।

१०१ मानव अधिकारको विश्वव्यापी घोषणा-पत्र, १९४८, धारा १६(१) ।

१०२ मानव अधिकारको विश्वव्यापी घोषणा-पत्र, १९४८, धारा १६(२) ।

धारा १० (१) मा महिला-पुरुषको स्वतन्त्र सहमतिबाट मात्र विवाह गरिनुपर्दछ भनी व्यवस्था गरिएको छ।<sup>१०३</sup> नागरिक तथा राजनीतिक अधिकारसम्बन्धी अन्तर्राष्ट्रिय प्रतिज्ञा- पत्र, १९६६ को धारा २३ (२) मा विवाहयोग्य उमेरका पुरुष तथा महिलाहरूको विवाह गर्ने तथा परिवार आरम्भ गर्ने अधिकारलाई स्वीकार गरिनुको साथै महिला र पुरुषको स्वतन्त्र तथा पूर्ण मञ्जुरीबिना कुनै पनि विवाह सम्पन्न नगरिने कुरा उल्लेख गरिएको छ।<sup>१०४</sup>

त्यस्तै धारा २३ (४) मा विवाह सम्बन्धमा विवाह अवधिमा वा विवाहको विच्छेदका समयमा महिला र पुरुषको अधिकार वा उत्तरदायित्व समान हुने कुराको समेत सुनिश्चितता गरिएको छ।<sup>१०५</sup>

महिलाविरुद्ध हुने सबै प्रकारका भेदभाव उन्मूलन गर्ने महासन्धि, १९७९ ले महिलाविरुद्ध हिंसाको परिभाषा गरी महिलाहरूका निम्नअनुसारका अधिकारको व्यवस्था गरेको छ।

धारा १ मा महिला विरुद्धको भेदभाव भन्नाले राजनीतिक, आर्थिक, सामाजिक, सांस्कृतिक, नागरिक वा अन्य कुनै पनि विषयमा लिइएको आधारमा हुने कुनै पनि भेदभाव, बहिष्करण वा प्रतिबन्ध।<sup>१०६</sup> बेचबिखन तथा वेश्यावृत्तिका लागि गरिने यौन शोषणविरुद्धको अधिकार।<sup>१०७</sup> महासन्धिको धारा-७ ले महिलालाई सार्वजनिक र राजनैतिक जीवनमा पुरुषसह समान सहभागिताको अधिकार प्रदान गरेको छ, जसअन्तर्गत निम्न अधिकारहरू पर्दछन्:<sup>१०८</sup>

- गैरसरकारी संस्था, राजनैतिक सङ्गठन तथा अन्तर्राष्ट्रिय तहमा सहभागी हुने अधिकार।
- महिलाहरूलाई पुरुषहरूसँग समानताको आधारमा र कुनै पनि सरकारको प्रतिनिधित्व गर्ने र अन्तर्राष्ट्रिय सङ्गठनहरूको कार्यमा सहभागी हुने अधिकार छ।<sup>१०९</sup>
- महासन्धिको धारा ९ अनुसार महिलाको राष्ट्रियता (नागरिकता) का सम्बन्धमा निम्न व्यवस्था गरेको छ:<sup>११०</sup>
- महिलालाई पुरुषसह राष्ट्रियता (नागरिकता) प्राप्त गर्ने, परिवर्तन गर्ने वा धारण गर्ने समान अधिकार।
- विदेशीसँग विवाह भएको कारणबाट वा पतिले राष्ट्रियता परिवर्तन गरेको कारणबाट पत्नीको राष्ट्रियता स्वतः परिवर्तन नहुने अधिकार, पतिको राष्ट्रियत जे-जस्तो भए पनि महिलालाई आफ्नो इच्छानुसारको राष्ट्रियता धारण गर्न पाइने अधिकार।

१०३ आर्थिक, सामाजिक तथा सांस्कृतिक अधिकारसम्बन्धी अन्तर्राष्ट्रिय प्रतिज्ञा-पत्र, १९६६, धारा १० (१)।

१०४ नागरिक तथा राजनीतिक अधिकारसम्बन्धी अन्तर्राष्ट्रिय प्रतिज्ञा- पत्र, १९६६ को धारा २३ (२)।

१०५ नागरिक तथा राजनीतिक अधिकारसम्बन्धी अन्तर्राष्ट्रिय प्रतिज्ञा- पत्र, १९६६ को धारा २३ (४)।

१०६ महिलाविरुद्ध हुने सबै प्रकारका भेदभाव उन्मूलन गर्ने महासन्धि, १९७९, धारा १।

१०७ महिलाविरुद्ध हुने सबै प्रकारका भेदभाव उन्मूलन गर्ने महासन्धि, १९७९, धारा ६।

१०८ महिलाविरुद्ध हुने सबै प्रकारका भेदभाव उन्मूलन गर्ने महासन्धि, १९७९, धारा ७।

१०९ महिलाविरुद्ध हुने सबै प्रकारका भेदभाव उन्मूलन गर्ने महासन्धि, १९७९, धारा ८।

११० महिलाविरुद्ध हुने सबै प्रकारका भेदभाव उन्मूलन गर्ने महासन्धि, १९७९, धारा ९।

## निष्कर्ष

पश्चिमी कानुनी विधिशास्त्रमा, कानुनलाई केवल शक्तिशाली व्यक्तिको वा शक्तिशाली समुदायको आदेश मान्ने गरिएकोमा वैदिक विधिशास्त्रमा, विधि (कानुन) लाई राजा (राज्यको सर्वोच्च शासक) वा अन्य कुनै शक्तिशाली तत्वले पनि परिवर्तन गर्न नपाउने शाश्वत धर्मका आधारमा चलाइने नियमका रूपमा व्याख्या भएको देखिन्छ।

बृहदारण्यकोनिषद्मा भनिएको छ।

तच् छयोरूपमत्यसृजत धर्मं तदेतत् क्षत्रस्य क्षत्रं यद् धर्मस् तस्माद् धर्मात् परं नास्त्यथो अबलीयान् बलीयांसमाशंसते धर्मेण ।

अर्थात् ब्रह्मले कल्याण स्वरूप धर्म राम्ररी सृष्टि गरे, त्यो धर्म क्षत्रिय (राजा)को पनि राजा हो, त्यसैले धर्मभन्दा उत्तम वस्तु अर्को छैन, अतः दुर्बलले पनि बलियालाई धर्मद्वारा जित्न खोज्दछ। यस भनाइबाट राजादेखि रङ्गसम्म सबैलाई वैदिक विधिले शासन गर्ने कुरा स्पष्ट हुन्छ। वैदिक विधि संहिताअनुसार विधि (कानुन), नैतिकता र धर्म फरकफरक तत्व होइनन्। धर्मअन्तर्गत नै विधि (कानुन) र नैतिकता पनि पर्दछन्।

वैदिक विधिशास्त्रमा ज्ञानका हरेक क्षेत्र र विषयमा प्रकाश पारिएको भेटिन्छ। नेपालमा मानव अधिकारको मौलिक जग स्थापनाका निमित्त वशिष्ठ, आपस्तम्ब, गौतम, मनु, याज्ञवल्क्य, नारद, बृहस्पति, कात्यायन इत्यादि धर्मशास्त्रकारहरू अत्यन्तै महत्त्वपूर्ण भूमिका रहेको छ।

मानव अधिकारको परिप्रेक्ष्यमा वैदिक विधिशास्त्र र नेपालको संविधान तथा अन्तर्राष्ट्रिय कानुनमा प्रयुक्त मानव अधिकारसम्बन्धी व्यवस्थाबारेको समीक्षात्मक अध्ययन गर्दा संविधानवादका आधारभूत तत्वको रूपमा जनिएको “मानव अधिकार” को अवधारणा र उत्पत्ति ग्रीस, बेलायत र अमेरिकामा नभई पूर्वीय दर्शनमा भएको हो भन्ने प्रस्ट आधार मिल्दछ। यस तथ्यलाई अब विश्व स्तरसम्म पुऱ्याउन थप अध्ययन अनुसन्धानको आवश्यक पर्दछ, र राज्यका सरोकारवाला निकायहरूको ध्यान आकृष्ट हुन जरुरी देखिन्छ।



# किसान, भूमि र अधिकार

इन्द्रजीत सहनी

## सार-सङ्क्षेप

किसानलाई मानसिको बाँच्न पाउने अधिकारलाई जीवित राख्ने अन्नदाता मानिन्छ। किसानको अधिकारलाई संरक्षण र संवर्धन गर्न विभिन्न कालखण्डमा भएका किसान आन्दोलन, भूमि अधिकार आन्दोलनस्वरूप संयुक्त राष्ट्रसङ्घमार्फत आएको घोषणापत्र र राष्ट्रिय कानूनले लिपिबद्ध गरेको छ। कानूनमा भएको व्यवस्था बमोजिम भूमिमा पहुँचको असमानताको अवस्था विद्यमान छ। श्रमजीवी किसान अहिले पनि विभिन्न किसिमका भेदभावको कारण सम्मानित र मर्यादित जीवन व्यतित गर्न पाइरहेको छैन। नेपालमा किसानको श्रमको सम्मान, उचित ज्याला, उत्पादनको न्यूनतम मूल्य नपाउदा बेलाबेलामा उखु किसान, दुग्ध व्यवसायी, धान व्यवसायीहरू आन्दोलित हुँदै आएका छन्। महंगो लगानी, तरकारी खेतमै कृहिने जस्ता समस्या अहिले पनि विद्यमान छन्। किसानको समस्या समाधानका लागि भूमिको वैज्ञानिक व्यवस्थापन, किसान आयोगको संस्थागत सबलीकरण, कृषिमा आधुनिकीकरण, यान्त्रिकीकरण र किसानको पहुँचमा बजारीकरण आवश्यक रहेको छ। किसानको भुपडीलाई हेरेर योजना बनाउने, आर्थिक विकास तथा भूमि संरक्षणमा गरेको किसानको योगदानलाई सम्मान साथै मौलिक अधिकारलाई सुनिश्चित गर्दै उत्पादन र उत्पादकत्व वृद्धि गर्न किसानलाई अभिप्रेरित गर्नुपर्ने अवस्था छ। किसान र भूमिको सम्बन्ध अन्तरसम्बन्धित भएकोले भूमिमा समतामूलक पहुँच वृद्धि गरी कृषि क्रान्तिको माध्यमबाट समाजवाद उन्मुख आर्थिक समृद्धि कायम गर्न किसानको अधिकारलाई सुनिश्चित गर्नु अपरिहार्य रहेको छ।

**प्रमुख शब्दावली :** किसान आन्दोलन, भूमि अधिकार, श्रमको सम्मान, कृषिमा आधुनिकीकरण, खाद्य सम्प्रभुता

## पृष्ठभूमि

“किसान अधिकार” भन्नाले परम्परागत तथा आर्जित किसानको सिप, ज्ञान, प्रविधि, रैथानेबवालीको जात, बीउ, किसानले विकास गरेको जात र बीउ, कृषिमा प्रयोग हुने प्राकृतिक स्रोत र आधारभूत कृषि सामाग्रीमा किसानको पहुँच र अधिकारलाई सम्झनुपर्छ।<sup>१</sup> किसान अधिकारका लागि विश्वभर नै किसान आन्दोलनहरू वरियतापूर्ण सामाजिक संरचना (hierarchical social structure) को उपल्लो वर्गविरुद्ध लक्षित हुँदै आएका छन्। शासक र जनताबीच सम्बन्ध स्थापित गर्न नेपालमा पनि भूमिले सदैव महत्त्वपूर्ण भूमिका खेलेको छ। वि.सं. १८५६ देखि नै नेपालमा भूमि अधिकारको लागि छिटफुट रूपमा आन्दोलनहरू हुँदै आएका छन्।<sup>२</sup>

नेपाल सरकारले २००७ मङ्सिरमा बटैया (बाली विभाजन) र हुन्डा (करार) प्रथा अन्त्य गरी त्यस्ता जग्गा किसानहरूलाई वितरण गर्‍यो। नेपालको ग्रामीण कृषि इतिहासमा त्यो वास्तवमै क्रान्तिकारी कदम थियो तर

१ राष्ट्रिय किसान आयोग, नेपाल

२ Regmi, M.C. (1999a). A Study in Nepali Economic History. Delhi: Adroit Publishers.

विडम्बना दिल्लीमा भएको त्रिपक्षीय सम्झौतापछि गठित सरकारले त्यस्ता सबै जग्गा जमिन्दारलाई नै फिर्ता दिन लगायो<sup>३</sup>। कठोर श्रम विभाजन पुनः लाद्न जातीय व्यवस्थाको विस्तार, राजनीतिक उथुलपुथुलको कारण प्रजातान्त्रीक व्यवस्था संस्थागत हुननसकेको कारण दरवारका नजिकमा रहेका कुलीन, जहानियाँ वर्गका सदस्य, शाही पुजारी, वरिष्ठ सैनिक तथा निजामती अधिकारीहरूद्वारा ठुलो मात्राको उत्पादनशील जमिनमाथि गरिएको निजीकरणको कारण किसान, नेपाली जनता सुकुम्वासी हुँदै गए। १०४ वर्षको राणाशासनको अन्त्यको भए पनि राज्य संयन्त्र तथा राजनीतिक शक्तिमात्र हालिमुहाली रहेकोले यस्तो परिस्थितिमाथिको कुनै पनि परिवर्तनलाई कुलीन वर्गले ठाडै अस्वीकार गर्थे<sup>४</sup>।

भूमिहीन र मोही किसानहरू शोषित भई भूमि अधीनत्वबाट पाखा पारिएपछि बाध्यतावश एकजुट भई भूमि अधिकारको निम्ति लड्न पुगे। यस्तो खालको शोषण र निरिहताले नेपालका भूमिहीन र मोहीको आक्रोश भिन्न समय तथा स्थानहरूमा भिन्न स्वरूप र नमुनामा देखियो। भूमि अधिकारबाट सुरु भएको आन्दोलन पछि समानता, मर्यादा, जीवनको अधिकार, लोकतन्त्र, मानव अधिकारसँग पनि जोडिन पुग्यो। यो लेख द्वितीय श्रोतहरूको प्रयोग गरी गुणात्मक अनुसन्धान पद्धतिबाट तयार पारिएको छ।

## अन्तर्राष्ट्रिय किसान आन्दोलन

किसानहरूको हकहित र आफ्नो अधिकारको लागि विभिन्न रूपमा अन्तर्राष्ट्रिय आन्दोलन भएका छन्। विशेष गरी सन् १९०० को दशकमा यस्ता आन्दोलनले विशेष उचाइ लिएको अवस्था छ। यस अवधिमा धेरै मुलुकहरू उपनिवेशबाट स्वतन्त्र भए र भूमि अधिकार आन्दोलनको लागि अन्तर्राष्ट्रिय वातावरण पनि अनुकूल बन्न पुग्यो। औपनिवेशिक कालमा धेरै ग्रामीण किसानहरू भूमि अधिकारबाट वञ्चित थिए। आफ्नै देशका नेता साथै केही वैदेशिक निकायहरूले तिनमाथि नियन्त्रण कायम गरेका थिए। गरिबी, असमानता र सामाजिक अस्थिरतालाई जन्म दिन यस्ता मुलुकका फितलो नीति पनि धेरै हदसम्म जिम्मेवार रहेको पाइन्छ। बहुसङ्ख्यक जनता ग्रामीण भेगमा बस्थे र आफ्नो जीविकाको निम्ति कृषिमा निर्भर थिए। भूमि अधिकारबाट वञ्चित हुनाले तिनमध्ये धेरैजसो सजिलै अरूको प्रभावमा पर्ने खालका थिए र धेरैजना सामाजिक पूर्वाग्रहको सिकार पनि बन्न पुगे। फलतः भूमि अधिकार आन्दोलन यस्तै पूर्वाग्रहविरुद्धको आन्दोलनसमेत बन्न पुग्यो। क्रमशः यस आन्दोलनले बढीभन्दा बढी किसानहरूको साथ पनि पायो।

**मेक्सिकोमा किसान आन्दोलन:** मेक्सिकन क्रान्तिकारी नेता एमिलियानो जापटाले नेतृत्व गरेको किसान आन्दोलनलाई संसारकै एक महत्त्वपूर्ण भूमि अधिकार आन्दोलन मानिन्छ। जापटाले जमिन्दारका पक्षपाती तत्कालीन राष्ट्राध्यक्ष पर्फिरियो डायजको निरङ्कुश शासनविरुद्ध सन् १९१० र १९१९ बीचमा सशस्त्र किसान आन्दोलनको नेतृत्व गरेका थिए। मोरेलस राज्यको ट्यालाहुइकन नामको एउटा ल्याटिन अमेरिकी गाउँबाट आन्दोलन सुरु गरेका जापटाले यसलाई क्रान्तिकारी स्वरूप दिएका थिए। यस आन्दोलनमा महिलाहरूको पनि प्रमुख योगदान रहेको थियो<sup>५</sup>।

३ Thapa, S. (2001). Peasant Insurgence in Nepal 1951-1960. Bhaktapur: Nirmala KC. Page 119

४ Ghimire, K.B. (2001). Land Reform and Peasant Livelihoods. London: ITDG Publishing.

५ Barraclough, S. L. (2001). The Role of State and other Actors in Land Reform. Ghimire, K.B. (Ed.). Land Reform and Peasant Livelihoods. London: ITDG Publishing. Pp. 26-64.

**सोभियत युनियनमा भूमि अधिकार आन्दोलन:** सन् १९१७ मा सोभियत युनियन आन्दोलनका सहभागीमध्ये करिब ८०% किसानहरू थिए।<sup>६</sup> तर पनि बहुसङ्ख्यक उनीहरू खेतीको अधिकारबाट वञ्चित थिए। त्यसैले लेनिनले 'जोत्नेलाई जमिनको अधिनत्व' भन्ने नारा दिएका थिए। बोल्सेभिक आन्दोलनमा किसानहरूको भूमिका निकै महत्त्वपूर्ण हुनाले भूमि अधिकारको सवालले विशेष महत्त्व पाएको थियो।

**चीनमा भूमि अधिकार आन्दोलन:** सन् १९२० को दशकमा चीनमा करिब आधाजति किसानहरू भूमिहीन थिए<sup>७</sup>। क्षेत्रीय शक्ति सम्बन्ध र चौतर्फी व्याप्त भ्रष्टाचारका कारण किसानहरू जमिन्दारको हातबाट अत्याधिक शोषण बेहोर्न बाध्य थिए। यसर्थ तिनीहरू आफ्नो हक-अधिकारको लागि लड्न विवश बने र परिणामस्वरूप चीनमा किसान आन्दोलनको उदय भयो।

**फिलिपिन्समा भूमि अधिकार आन्दोलन:** बीसौं शताब्दीको आरम्भमा फिलिपिन्समा अमेरिकी साम्राज्यवादी सरकारद्वारा व्यावसायिक खेती थालनी गरियो। यसले धेरै फिलिपिनो किसानको अवस्थामा नराम्रो असर पायो। धेरैभन्दा धेरै जमिन विशेष गरी सुर्ती र उखु खेतीको व्यावसायिक प्रयोजनार्थ दिन थालियो। आयकर तिरेपछि यी उत्पादनहरू मुख्यतया: अमेरिका निर्यात गरिन्थ्यो। व्यावसायिक खेतीका अतिरिक्त सरकारले नयाँ व्यापारमा समेत जोड दियो। अमेरिकी साम्राज्यवादबाट त्रसित भएर जमिन्दारहरूले बिस्तारै आफ्नो जमिन किसानबाट कब्जा गर्न थाले। यस कारणले किसानहरू थप निराश बन्न थाले। मोहियानी दर ३८% बाट ६०% मा वृद्धि भयो<sup>८</sup>। सन् १९३८ देखि १९४६ सम्म जमिन्दारले न्यायाधीशलाई समेत हात लिएर निर्णय आफ्नो पक्षमा पार्न सफल रहे। मोहियानी दर वृद्धि र जमिन्दारहरूको बोलवालाका कारण हजारौं किसानहरू क्रमैसँग भूमिहीन बन्दै गए। शोषण र दमनका घटनाहरू घट्ने कुनै सङ्केत नदेखेपछि, किसानहरूको ठुलो हिस्साले स्थानीय स्तरबाटै आन्दोलन सुरुवात गर्‍यो।

**बोलिभियामा भूमि अधिकार आन्दोलन:** सन् १९५२ मा बोलिभियाको भूमि संरचना क्रान्तिपूर्वको मेक्सिकोको जस्तै भए पनि क्वेचुवा र एडमाराभाषी किसान (बहुसङ्ख्यक जनसङ्ख्या) हरूको दमन स्पेनीभाषी श्वेत जनसङ्ख्याको भन्दा कम थियो। भारतीय दासहरूलाई जीविकाको लागि केही उर्वर भूमि दिइएको थियो तर तिनीले सहरवासी आफ्ना जमिन्दारलाई प्रतिहप्ता तीनदेखि चार दिनका दरले विनाज्याला श्रम उपलब्ध गराउनुपर्थ्यो।<sup>९</sup> यसले किसानहरूलाई अझ सङ्गठित भई दमनकारीविरुद्ध विद्रोहमा उत्रनुको विकल्प नरहेको आभास दिएको थियो।

भारत सरकारले सन् २०२० सेप्टेम्बरमा ल्याएको कृषिसम्बन्धी कृषि उपजको मूल्य निर्धारण, बिक्री र भण्डारणसम्बन्धी तीन वटै कानून विरोध भएको थियो। विशेषतः पन्जाब, हरियाणा, उत्तरप्रदेश, राजस्थान,

६ Huizer, G. (2001). Peasant Mobilization for Land Reform: Historical Case Studies and Theoretical Consideration. In Ghimire, K.B. (Ed.). Land Reform and Peasant Livelihoods. London: ITDG Publishing. Pp. 164 -198.

७ Huizer, G. (2001). Peasant Mobilization for Land Reform: Historical Case Studies and Theoretical Consideration. In Ghimire, K.B. (Ed.). Land Reform and Peasant Livelihoods. London: ITDG Publishing. Pp. 164 -198.

८ Huizer, G. (2001). Peasant Mobilization for Land Reform: Historical Case Studies and Theoretical Consideration. In Ghimire, K.B. (Ed.). Land Reform and Peasant Livelihoods. London: ITDG Publishing. Pp. 164 -198.

९ Huizer, G. (2001). Peasant Mobilization for Land Reform: Historical Case Studies and Theoretical Consideration. In Ghimire, K.B. (Ed.). Land Reform and Peasant Livelihoods. London: ITDG Publishing. Pp. 164 -198.

महाराष्ट्र, पश्चिम बङ्गाल राज्यका किसानहरू आन्दोलनमा उत्रिएका थिए।<sup>१०</sup> तीनवटै कानून सरकारले फिर्ता लिएपछि, आन्दोलन तत्कालीन अवस्थामा फिर्ता भए पनि बेलाबेलामा किसानहरू आन्दोलन गरि नै रहने गर्दछ।

## नेपालमा किसान आन्दोलन

लोकतन्त्र र आफ्नो अधिकारको लागि भूमिहीन र किसानले गरेको सङ्घर्ष र पुर्‍याएको विशेष योगदान स्मरणीय छ। यस प्रकृतिका किसान आन्दोलनहरू विभिन्न समयमा विभिन्न उद्देश्यले देशभरि नै भएको पाइन्छ। पाल्पा, प्यूठान, चितवन, काठमाडौं, दाङ, बर्दिया, धनकुटा, सिन्धुपाल्चोकलगायत जिल्लाहरूमा साना र ठुला किसान आन्दोलन भएको भनी इतिहास पढ्न पाइन्छ। वि.सं. १८६२ मा बासठ्ठी हरण भनी चिनिएको जमिन जफत प्रक्रियामा अपनाइएको व्यवस्थाविरुद्ध सम्पत्ति हरण गरिएका विर्ता धनीहरूको विरोध चली नै रहेको थियो। यस किसिमको व्यवस्था लागु गर्न खाटाइएका कर्मचारीहरू र उनीहरूबीच तनहुँ र पश्चिमी पहाडी भेगका केही क्षेत्रहरूमा हिंसात्मक भिडन्तहरू भए। सरकारले यस्ता विरोधप्रति जानिबुझी खरो कार्यनीति अपनायो। पछि ती क्षेत्रका नेतृत्वकर्ताहरूलाई पक्राउ गरी हत्कडीसहित काठमाडौं ल्याइयो<sup>११</sup>। पश्चिमी पहाडी भेगमा ब्राह्मण विर्ताधनीहरूले आयोजना गरेको विरोधले १८६२ सालमा अत्याधिक उग्ररूप लियो। सोही कारण सरकारले उनीहरूलाई राहदानीबिना काठमाडौं छिर्नसमेत निषेध गर्‍यो<sup>१२</sup>। त्यसपछि वि.सं. १९७७ मा काठमाडौंका कृषक सुब्बा कृष्णलाल मकैको खेती नामक पुस्तक लेखे। यसले तत्कालीन शासकहरूबीच हल्लिखल्ली नै मच्चायो। उक्त पुस्तकमा नेपालमा कृषि व्यवस्था र कृषकको अवस्थाबारे चित्रण गरिएको थियो। पुस्तक प्रकाशनले तत्कालीन राणा शासनलाई यतिसम्म भयभित पायो कि तिनले सो पुस्तकका लेखकलाई जेल नै हाले। पछि कारागारमै उनको देहान्त भयो। मकैको खेतीको प्राक्कथनमा सुब्बा कृष्णलालले नेपाली र बेलायती कुकुरलाई मकै खाने राता र काला कीराहरूसँग तुलना गरेका छन्। उनले 'कीरा' र 'कुकुर' शब्दहरूमार्फत नेपाली किसानको अवस्था र राणा शासकहरूको शोषणलाई चित्रण गरेका छन्। यस घटनाले नेपालमा २००७ सालपूर्व नै असङ्गठित कृषि आन्दोलन सुरु भएको देखाउँछ<sup>१३</sup>।

वि.सं. २००७ देखि २०१४ सालसम्म रौतहटमा<sup>१४</sup> सुरु भएर पर्सादेखि सप्तरीसम्म फैलिएको किसान आन्दोलन एउटा इतिहासका रूपमा अङ्कित छ। राजनीतिक स्वतन्त्रताको साँघुरो घेरामा पनि त्यसबखत किसानले गरेका सङ्घर्ष उदाहरणीय मान्नुपर्छ। जाली तमसुक च्यात्ने, जमिनदारको भकारी फोर्नेजस्ता सङ्घर्षमात्र हैन, 'रे नै जी कहो' जस्ता समानताको आन्दोलन पनि किसानले गरेका थिए। आन्दोलनको समयमा भएको सरकारी क्रूर दमनका अगाडि पनि उनीहरू आन्दोलनको झण्डा उचो राख्न सफल भएका थिए। यो आन्दोलन किसान र कम्युनिस्ट पार्टीको नेतृत्वमा भएको थियो। किसान नेता केशव बडालका अनुसार त्यसबेला आन्दोलनमा सामेल हुनेमा बढी गरिब र खेतीकिसान परिवारबाट आएकाहरू थिए। उनीहरू आर्थिक र सामाजिकरूपले कमजोर थिए। जमिनदार र सामन्तबाट पीडित थिए।<sup>१५</sup>

१० <https://www.bbc.com/nepali/news-55667787>

११ Regmi, M.C. (1999a). A Study in Nepali Economic History. Delhi: Adroit Publishers. Page 77

१२ Regmi, M.C. (1999a). A Study in Nepali Economic History. Delhi: Adroit Publishers. Page 77

१३ (इन्सेक, १९९५) मानव अधिकार वर्ष पुस्तक।

१४ रौतहटको किसान नेता राजदेव चौधरी

१५ किसान नेता केशव बडालका अनुसार



आन्दोलनको मागमा त्यतिखेरको २५ प्रतिशत व्याजदरमा आधा घटाएर १२.५ प्रतिशत गर्नुपर्ने, मजदूरी दर ५ सेरबाट ६ सेर बनाउनुपर्ने, मोहियानी हक रक्षा आदि थियो। यो आन्दोलनले बेठबेगारी बन्द गराएको थियो। किसानहरूमाभ ठुलो ऐक्यबद्धता थियो। आन्दोलनको राप र तापले सरकार नाजायज तमसुक जाँच कमिसन गठन गर्न बाध्य भएको थियो।

यसरी पूर्वमा किसान आन्दोलन भइरहेकै बखत सुदूरपश्चिममा किसान नेता भीमदत्त पन्त शोषक र सामन्तहरूको ज्यादतीविरुद्ध बोल्न थालेका थिए। 'कि जोत हलो कि त छोड थलो, यदि हैन भने अब छैन भलो'<sup>१६</sup> भन्ने नारा दिएर भीमदत्तले गरिब किसानहरूमा जागरणको भावना सिञ्चित गरिरहेका थिए। उनी काला बजारिया व्यापारीहरूसँग नुन, चामल र कपडा खोसेर गरिबहरूलाई सित्तैमा बाँड्थे। उनले जीवनमा गरेका सङ्घर्ष र भेल्लुपरेका कष्ट वर्तमान पुस्ताका निम्ति अकल्पनीय लाग्न सक्छन्। सुदूरपश्चिमका जिल्लाहरूमा सामन्ती उत्पीडन र भेदभाव व्याप्त थियो। जाली तमसुक बनाएर किसानलाई उठीबास गराउने, पुस्तौं हलो जोताएर किसानको पसिना चुस्ने जस्ता अत्याचारविरुद्ध सशस्त्र विद्रोह उठाउन आवश्यक भएको ठहर उनको थियो।

वि.स. २०४६ सालको राजनीतिक आन्दोलनबाट प्राप्त उपलब्धि पछि पनि आर्थिक र सामाजिक मुद्दामा केन्द्रित भएर किसान आन्दोलन तपसिलका किसान आन्दोलनहरू भए। वि.सं. २०४९ मा बर्दियामा कनारा आन्दोलन (थारू समुदायले भूमि अधिकार र जीविकाको लागि) आन्दोलन चलाइएको थियो तर सरकारी दमनको कारण आन्दोलनले गति लिन सकेन। वि.सं. २०५१ र सुवामा अन्न नतिर्ने आन्दोलन: विर्ता भूमिको उन्मूलन भएता पनि विर्ताका मोहीहरू भने जग्गाको नक्कली धनीहरूलाई अन्न दिन बाध्य थिए। अन्ततः मोहीहरू एकजुट भई शासकलाई पहिले विर्ताको रूपमा रहेको गुठी जग्गाको अन्न भुक्तानी गर्न बन्द गरेका थिए।

वि.सं. २०५३ मा बाँके र बर्दियाका भूमि वञ्चित जनताहरूले बर्दियामा बागदारी र बाँकेमा भूमि अधिकारको लागि पित्तमरी आन्दोलन भएको थियो। वि.सं. २०५६ मा कमैया मुक्ति आन्दोलन भयो। पाँच जिल्लामा बिस्तारित यस आन्दोलनको कारण उनीहरू मुक्त भएका थिए। वि.सं. २०५६ मा सिन्धुपाल्चोकमा किसानहरूले भूमिसम्बन्धी सबै कार्यालयहरू घेराउ गरेका थिए सिन्धुपाल्चोकका गुठी जग्गाको समस्या समाधानको लागि गरिएको यस घेराबन्दीले सरकार समिति निर्माण गरी काम गर्न बाध्य भएको थियो। सिन्धुपाल्चोकमा गरेको यो सङ्घर्ष इतिहासमै विशेष एवम् महत्त्वपूर्ण मानिन्छ।

वि.सं. २०६० मा विभिन्न जिल्ला मालपोत कार्यालयहरूमा ७३,००० भन्दा बढी मुद्दा दर्ता भएको थियो। भूमिहीन जनताले विभिन्न जिल्ला प्रशासन कार्यालय तथा जिल्ला भूमि सुधार कार्यालयहरूमा दर्ता गरिएका मुद्दाहरूको कारवाही प्रक्रिया अगाडि बढाउन ध्यानाकर्षण गराउन घेराबन्दी कार्यक्रम आयोजना गरियो।<sup>१७</sup> वि.सं. २०६२ मा सुनसरीमा भूमि अधिकारको माग गर्दै भूमि सुधार कार्यालयअघि रिले भोक हडताल आयोजना गरेको थियो। (सिएसआरसी, २००६)। सोही वर्ष दाङ, बाँके, बर्दिया, सुनसरी, सिन्धुपाल्चोक, सप्तरी, सिराहा, महोत्तरीलगायत जिल्लाका मालपोत कार्यालयहरूमा तालाबन्दी गरिएको थियो।<sup>१८</sup>

सप्तरी र सिरहाका दलितमध्येको चमार समुदाय सिनो बहिष्कार आन्दोलन गर्न बाध्य भयो। यसको अगुवाइ सप्तरीका बलदेव रामले गरेका थिए। आन्दोलनको उद्देश्य थियो—वास्तविक किसानलाई जग्गा, सबै जातिकालाई

१६ किसान नेता भिमदेव पन्तका अनुसार

१७ Community Self Reliance Center सिएसआरसी, २००४), पेज न. २७ देखी ३० सम्म

१८ Community Self Reliance Center (CSRC) सिएसआरसी, २००६



मर्यादा !<sup>१९</sup> रौतहटको चन्द्रपुर नगरपालिका ३ गैँडाटारमा स्थानीय किसानले करिब तीन सय बिगाहा खेतमा उन्नत जात भनिएको हाइब्रिड मकै लगाएका थिए । मकैमा घोगा लागे पनि दाना नलाग्दा सरकार तथा अन्य निकायबाट क्षतिपूर्ति नपाएपछि वि.स. २०७४ फागुन १६ गते उनीहरू आन्दोलनमा उत्रिएका थिए ।<sup>२०</sup> त्यस्तै गरेर सर्लाही, बारा, पर्सा, रौतहट, मोरङका किसानहरूले आफूले चिनी मिललाई दिएको उखुवापतको रकम वर्षौंसम्म नपाएपछि काठमाडौँ केन्द्रित आन्दोलनमा उत्रिएका थिए ॥<sup>२१</sup>

## किसानको अधिकारसम्बन्धी अन्तर्राष्ट्रिय र राष्ट्रिय प्रावधानहरू

### अन्तर्राष्ट्रिय प्रावधान

किसानहरू अधिकारसम्बन्धी प्रत्यक्ष र परोक्ष रूपमा विविध व्यवस्थाहरू गरिएको पाइन्छ । मानव अधिकारको विश्वव्यापी घोषणापत्र सन् १९४८ को धारा २५ मा आफू र आफ्नो परिवारले खाद्यान्नसहित स्वस्थ एवम् पर्याप्त जीवनस्तरको अधिकारसहित प्रत्येक व्यक्तिको जीवन धान्न पाउने हक प्रत्याभूत गरिएको छ । आर्थिक सामाजिक अधिकारसम्बन्धी अनुबन्ध १९६६ ले<sup>२२</sup> सबैको पहुँच पुग्ने गरी खाद्य आपूर्ति तथा वितरण सुनिश्चित गर्न उत्पादनलाई सुदृढ गर्नेलगायत भोकबाट मुक्ति दिलाउन विभिन्न कदम चाल्ने दायित्व पक्षराष्ट्रलाई सुम्पिएको छ ।<sup>२३</sup> खास गरी आर्थिक, सामाजिक तथा सांस्कृतिक अधिकार समितिको सन् १९९९ मा जारी सामान्य टिप्पणी नं. १२ ले विश्वमा भोक र कुपोषणको निराकरणका लागि खाद्यको उपलब्धता र उपलब्ध खाद्यमा पहुँच सुनिश्चित गर्नुपर्नेमा जोड दिएको छ । जल, जमिन र कर्जालगायतका उत्पादनमूलक स्रोतहरूमा पहुँच अभिवृद्धिको आवश्यकतामा जोड दिँदै खाद्य-अधिकारसम्बन्धी संयुक्त राष्ट्रसङ्घका विशेष समाधिकक्षकले “ग्रामीण क्षेत्रमा भोकमरीको समस्या मुख्यतः भूमि, भोगचलनको अधिकारको अभाव, जग्गाधनी र जग्गा कमाउने किसानबीच अन्नको बाँडफाँडमा रहेको असमानताजस्ता साधन-स्रोतमा पहुँचमा कमी तथा खान पुग्ने खाद्यान्न आफैँ उत्पादन गर्न पुग्ने जग्गाजमिनको अभावजस्ता कुराहरूसँग जोडिएको छ” भनी उल्लेख गरिएको छ ।<sup>२४</sup> यस सम्बन्धमा किसानको अधिकारलाई संरक्षण र संवर्धन सम्बन्धमा डिसेम्बर १७, २०१८ मा संयुक्त राष्ट्रसङ्घको महासभाबाट किसानको अधिकार घोषणापत्र पारित भएको हो । संयुक्त राष्ट्रसङ्घको महासभाको ७३ औँ सत्रबाट १२१ देशको मुलुकले अनुमोदन गरेको यो घोषणापत्र ग्रामीण भेगहरूमा कार्यरत किसान र अन्य जनताहरूका विशेष दस्तावेज बन्न पुगेको छ ।<sup>२५</sup>

### राष्ट्रिय प्रावधान

नेपालको संविधान २०७२ को भाग ३ मौलिक हक र कर्तव्य कृषक र कृषिसम्बन्धी मौलिक हकहरूको व्यवस्था गरिएको छ । उल्लिखित प्रावधानअनुसार प्रत्येक नागरिकलाई खाद्यसम्बन्धी एवम् कानूनबमोजिम खाद्य सम्पन्नताको हक हुनेछ । यसको साथै दलितको हकमा राज्यले भूमिहीन दलितलाई कानूनबमोजिम एक पटक

१९ दलित नेता बलदेव रामका अनुसार

२० <https://nagariknews.nagariknetwork.com/economy/141434-1519821720.html>

२१ <https://www.onlinekhabar.com/2020/12/916063>

२२ International convention on Economic, social and cultural rights Article 11(1)

२३ नागरिक तथा राजनीतिक अधिकार विषयक अनुबन्ध, १९६६ को धारा ११ (२)

२४ खाद्य-अधिकारसम्बन्धी विशेष समाधिकक्षक जिन जिगलरले संयुक्त राष्ट्रसङ्घीय मानव अधिकार परिषद्को ५९औँ सत्रमा प्रस्तुत गरेको प्रतिवेदन, UN Doc. E/CN. 4/2003/54/Add.1.

२५ संयुक्त राष्ट्रसङ्घको महासभाबाट किसान अधिकार घोषणापत्र पारित, डिसेम्बर १७, २०१८

जमिन उपलब्ध गराउनुपर्नेछ।<sup>१६</sup> संविधानको भाग ३ अन्तर्गत रहेको सामाजिक न्यायको हकमा सामाजिक रूपले पछाडि परेका महिला, दलित, आदिवासी, जनजाति, मधेशी, थारू, अल्पसङ्ख्यक, अपाङ्गता भएका व्यक्ति, सीमान्तीकृत, मुस्लिम, पिछडा वर्ग, लैङ्गिक तथा यौनिक अल्पसङ्ख्यक, युवा, किसान, श्रमिक, उत्पीडित वा पिछडिएको क्षेत्रका नागरिक तथा आर्थिक रूपले विपन्न खस आर्यलाई समावेशी सिद्धान्तका आधारमा राज्यको निकायमा सहभागिताको हक हुनेछ भनी उल्लेख छ।<sup>१७</sup> आर्थिक रूपले विपन्न तथा लोपोन्मुख समुदायका नागरिकको संरक्षण, उत्थान, सशक्तीकरण र विकासका लागि शिक्षा, स्वास्थ्य, आवास, रोजगारी, खाद्यान्न र सामाजिक सुरक्षामा विशेष अवसर तथा लाभ पाउने हक हुनेछ। प्रत्येक किसानलाई कानूनबमोजिम कृषि कार्यका लागि भूमिमा पहुँच, परम्परागत रूपमा प्रयोग र अवलम्बन गरिएको स्थानीय बीउ विजन र कृषि प्रजातिको छनौट र संरक्षणको हक हुने भनिएको छ।

### राज्यका नीतिहरू :

नेपालको संविधान २०७२ मा कृषि र भूमि सुधारसम्बन्धी नीतिहरूको व्यवस्था गरिएको छ। यस नीतिमा भूमिमा रहेको दोहोरो स्वामित्व अन्त्य गर्दै किसानको हितलाई ध्यानमा राखी वैज्ञानिक भूमि सुधार गर्नेमा जोड दिइएको छ। ऐलानी तथा भूस्वामित्व नभएको जग्गाको चक्काबन्दी गरी उत्पादन र उत्पादकत्व वृद्धि गर्ने उल्लेख छ। यसको साथै किसानको हकहित संरक्षण र संवर्धन गर्दै कृषिको उत्पादन र उत्पादकत्व बढाउन भूउपयोग नीतिको अवलम्बन गरी भूमिको व्यवस्थापन र कृषिको व्यवसायीकरण, औद्योगिकीकरण, विविधीकरण र आधुनिकीकरण गर्ने भनिएको छ। भूमिको उत्पादनशीलता, प्रकृति तथा वातावरणीय सन्तुलन समुन्नतका आधारमा नियमन र व्यवस्थापन गर्दै त्यसको समुचित उपयोग गर्ने उल्लेख छ। कृषकका लागि कृषि सामग्री, कृषि उपजको उचित मूल्य र बजारमा पहुँचको व्यवस्था गर्नेमा जोड छ।<sup>१८</sup> नागरिकका आधारभूत आवश्यकतासम्बन्धी नीतिमा कृषि क्षेत्रमा लगानी अभिवृद्धि गर्दै खाद्य सम्प्रभुताको मान्यता अनुरूप जलवायु र माटो अनकूलको खाद्यान्न उत्पादनलाई प्रोत्साहन गरी खाद्यान्नको दिगो उत्पादन, आपूर्ति, सञ्चय, सुरक्षा र सलुभ तथा प्रभावकारी वितरणको व्यवस्था गर्ने उल्लेख छ।<sup>१९</sup> सामाजिक न्याय र समावेशीकरणसम्बन्धी नीतिमा मुक्त कर्मैया, कम्हलरी, हरूवा, चरुवा, हलिया, भूमिहीन, सकुम्बासीहरूको पहिचान गरी बसोबासका लागि घर घडेरी तथा जीविकोपार्जनका लागि कृषियोग्य जमीन वा रोजगारीको व्यवस्था गर्दै पुनःस्थापना गर्ने सुनिश्चित गरेको छ।<sup>२०</sup>

### पेसागत रूपमा किसानका विशेष अधिकारहरू

सदियौँदेखि कृषिलाई आफ्नो मुख्य पेसा र माटोलाई जिविकोपार्जन र आयआर्जनको मुख्य माध्यम बनाउदै आएका नेपाली किसानहरू पेसागत विशेषाधिकारबाट प्रायः वञ्चित अवस्थामा छन्। जीवनभर माटोमा पसिना

२६ नेपालको संविधान २०७२ को धारा ४० उपधारा १, २, ३, ४, ५

२७ नेपालको संविधान २०७२ भाग ३ को धारा २१ (ग) सामाजिक न्यायको हक

२८ नेपालको संविधान २०७२ भाग ४ को धारा ५१ ) कृषि तथा भूमिसुधार नीति

२९ नेपालको संविधान २०७२ भाग ४ को धारा ५१ ) नागरिकका आधारभूत आवश्यकतासम्बन्धी नीति

३० नेपालको संविधान २०७२ भाग ४ को धारा ५१ ) सामाजिक न्याय तथा समावेशीकरणसम्बन्धी नीति

काठेर पनि भरपेट खान र बालबच्चाको लालनपालन गर्न नसकी कष्टकर जीवन बिताउन बाध्य छन् । यस पाटोलाई सम्बोधन गर्न तपसीलमा उल्लिखित अधिकारलाई कार्यान्वयन गर्न जोड दिनुपर्ने देखिन्छ:

### १. भूमि र प्राकृतिक स्रोतहरूमाथि किसानको अग्राधिकार

भूमि उत्पादनको प्रमुख साधन हो । भूमिबिना कृषि र कृषिविना किसानको परिकल्पना गर्न सकिँदैन । व्यवहारतः हाम्रो विद्यमान भूमि प्रशासन र भूमिमा पहुँचका हिसाबले विश्लेषण गर्दा वास्तविक श्रमजीवी किसानको पहुँचमा भूमि छैन । यसले राष्ट्रिय उत्पादकत्वमा नै प्रतिकूल असर पारेको छ । उत्पादकत्व वृद्धि गर्न भूमि र श्रमको उचित संयोजन आवश्यक छ । नेपालको संविधान २०७२ मा वैज्ञानिक भूमि सुधारमार्फत किसानको पहुँचमा भूमिको सम्बन्ध विस्तार गर्ने कुरा उल्लेख भए<sup>३१</sup> पनि हालसम्म व्यवहारमा आउन सकेको छैन । यसलाई यथासक्य चाँडो कार्यान्वयन गरी भूमिमा श्रमजीवी किसानको अधिकार स्थापित गर्न वाञ्छनीय देखिन्छ । त्यस्तै उत्पादकत्व वृद्धिमा जमिन, जल, जडुगल, जैविक विविधता र चरीचरनको बीचमा अन्योन्याश्रित सम्बन्ध रहन्छ । अतः यी सवालमा किसानको अग्राधिकार स्थापित हुनुपर्दछ ।

### २. कृषिका पूर्वाधारहरूमाथि किसानको अधिकार

कुनै पनि उद्योग व्यवसाय फस्टाउन र सफल हुनका लागि त्यसको निश्चित पूर्वाधार पहिलो सर्त हुन्छ । कृषि व्यवसाय पनि यसभन्दा पृथक छैन । सिचाई, उन्नत जातका बिउ, मलको उपलब्धता, कृषि सडक, बजारको उचित व्यवस्थापन, वस्तुको उचित भण्डारण कृषि यन्त्र, सुलभ कृषि ऋण, कृषि प्रविधि, सूचना र सञ्चार आदि कृषि विकासका प्रमुख पूर्वाधारहरू हुन । राज्यले यसको परिपूर्ति वा व्यवस्थापन गरिदिनुपर्दछ ।

### ३. बिउबिजन, नश्ल र अनवंशिक स्रोतहरू माथिको अधिकार

शताब्दियौँदेखि किसानहरूको एकल र सामूहिक प्रयासबाट विकास गरिएका बाली तथा पशुपुन्डीका जाति, प्रजाति तथा नश्लहरूको आफ्नै महत्त्व तथा विशेषता छ । आज विभिन्न वंश र पद्धतिबाट भित्रिएका बिउबिजन र नश्ल आदिले त्यो आनुवंशीय स्रोत र मौलिक खेतीपातीको परम्परामा नै ठुलो चुनौती देखिएको छ । कृषियोग्य भूमिमा, बिउबिजन र प्रविधिको छनौट गर्ने अधिकार किसानको हुनुपर्दछ ।<sup>३२</sup> यो आनुवंशीय स्रोत र कृषि पतिलाई निरन्तरता दिदै यसलाई किसानको मौलिक बौद्धिक सम्पत्तिका रूपमा संरक्षित गरिनुपर्दछ ।

### ४. कृषिउपजको मूल्य निर्धारण गर्न पाउने अधिकार

कुनै पनि उद्योग व्यवसायीले आफ्नो उत्पादित वस्तुको मूल्य निर्धारण लागत लाभको आधारमा आफूले गर्ने गर्दछ तर किसानले आफ्नो उपजको मूल्य निर्धारण आफैँ गर्न सक्ने हैसियतमा छैन । यस परिस्थितिको अन्त्य गर्दै अन्य उद्योगीहरूसरह किसानले पनि आफ्नो कृषिउपजको मूल्य निर्धारण लागत लाभको आधारमा गर्न पाउनुपर्दछ । सरकारले पनि कृषि वस्तुको न्यूनतम समर्थन मूल्य निर्धारण गर्दा उत्पादक किसानको सहभागितामा तय गर्नुपर्दछ ।

३१ नेपालको संविधान २०७२

३२ खाद्य अधिकार तथा खाद्य सम्प्रभुतासम्बन्धी ऐन, २०७५

## ५. शिक्षा र रोजगारको अधिकार

कृषि उत्पादनमा संलग्न किसान र युवाहरूलाई कृषिसम्बन्धी व्यवसायिक तालिम र प्रशिक्षणको उचित व्यवस्था गरी व्यवहारिक र सैद्धान्तिक शिक्षाको व्यवस्था गरिनुपर्दछ। कृषि योग्य भूमिमा, बिउ-बिजन छनौट गर्ने अधिकार किसानमा रहेको हुन्छ। उनीहरूका सन्तानलाई रोजगारीको सुनिश्चितता साथै कृषि उत्पादनमा संलग्न साथै भविष्यमा पनि यस पेसालाई आत्मसात गर्ने जोकोहीलाई रोजगारीको व्यवस्था प्रत्याभूत गराउनु राज्यको दायित्व हो।

## ६. सूचनाको हक

कृषिसँग सम्बन्धित नयाँ प्रविधि, बजार विस्तार र बजार मूल्यलगायतका विभिन्न सूचना र जानकारी पाउनु हरेक किसानको अधिकार हो। विभिन्न पत्रपत्रिका, रेडियो टेलिभिजन, अनलाइन, तालिम, प्रशिक्षण, गोष्ठी, भ्रमण, सेमिनार, प्रचार-प्रसारजस्ता माध्यमबाट यसलाई कार्यान्वयनमा ल्याउन सकिन्छ।

## ७. संरक्षणको अधिकार

नेपाल २३ अप्रिल, २००४ मा नेपाल विश्व व्यापार सङ्गठनको सदस्य भएपछि नेपाली किसानहरूले अतिविकसित देशहरूसँग खुला प्रतिस्पर्धा गर्नुपर्ने अवस्था आएको छ<sup>३३</sup>। उनीहरूको विकसित प्रविधि, यान्त्रिकरण र राज्यबाट संरक्षित किसानहरूद्वारा उत्पादित कृषि वस्तुको लागत मूल्य अत्यन्त न्यून छ। त्यसको तुलनामा नेपाली किसानहरूको उत्पादनको लागत मूल्य बढी छ। देशको दुई तिहाई जनसङ्ख्या ओगटने किसानलाई संरक्षण गर्न कृषि उत्पादन, उत्पादनका साधन र कृषि सामग्रीमा अनुदान र अन्य सेवा सुविधा विस्तार गर्नुपर्दछ। यसरी संरक्षित हुन पाउनु किसानको अधिकार हो।

## ८. राहत, क्षतिपूर्ति, बिमा र वित्तीय अधिकार

कृषि विशुद्ध रूपमा प्रकृतिसँग जोडिएको पेसा भएकाले वातावरणीय प्रभाव र प्राकृतिक हिसावले कृषि जोखिमयुक्त पेसा हो। यदि वातावरणीय र प्राकृतिक प्रकोपका कारणले कृषि बाली-वस्तुमा क्षति पुगेमा नोक्सानीको आधारमा राहत र क्षतिपूर्ति पाउनु किसानको अधिकार हो। राज्यले राहत र क्षतिपूर्ति कोष खडा गरी तत्काल क्षतिपूर्ति दिने व्यवस्था गर्नुका साथै बाली तथा पशुपुच्छी बीमालाई प्रभावकारी बनाइ ग्रामीण स्तरसम्म सेवा विस्तारको माध्यमबाट स्थायी समाधानको गर्न उपयुक्त हुन्छ।

## ९. जलवायु र वातावरणीय प्रभावमा न्यायिक अधिकार

जलवायु परिवर्तनका कारणले अतिवृष्टि, अनावृष्टि, बाढीपहिरो आदिको प्रकोपबाट किसानहरू बढी मारमा पर्ने गरेका छन्। ती किसानलाई राज्यले उचित क्षतिपूर्ति उपलब्ध गराउनुपर्दछ। उनीहरूकै कृषि कर्मले वातावरणीय सन्तुलनमा योगदान पनि पुगिराखेको यथार्थता हाम्रो सामु छ। यसरी वातावरणीय सन्तुलनमा योगदान पुऱ्याउने किसानलाई न्यायसङ्गत थप सेवासुविधा र अनुदानको व्यवस्था राज्यले मिलाउनुपर्दछ। कृषिलाई वातावरणीय अनुकूलनका आधारमा थप कार्यक्रमहरू सञ्चालनमा ल्याउनु पर्दछ।

## १०. स्वास्थ्य सेवाको अधिकार

किसानलाई निशुल्क स्वास्थ्य सेवाको व्यवस्था राज्यले मिलाउनु पर्दछ। किसान स्वास्थ्य नहुनुको अर्थ कृषि क्षेत्र तथा कृषि उपज उत्पादनमा योगदान कमी हुनु हो। सुस्वास्थ्य जीवन बाँच्न पाउने किसानको अधिकार हो।<sup>३४</sup>

३३ World Trade Organization, 23 April 2004

३४ नेपालको संविधान २०७२ भाग ३ को धारा १६

### ११. खाद्य सम्प्रभुताको अधिकार

पोषणयुक्त, सांस्कृतिक परम्परा र वैयक्तिक रुचिअनुसारको भरपेट खान पाउने खाद्य अधिकार सबै नागरिकको नैसर्गिक अधिकार हो। संविधानमा खाद्य सम्प्रभुता सुनिश्चित गर्न खाद्य अधिकार तथा खाद्य सम्प्रभुतासम्बन्धी ऐन, २०७५ लाई व्यवहारिक रूप दिन आवश्यक छ।<sup>३५</sup>

### १२. सम्मान र परिचयको अधिकार

समग्र नागरिकको खाद्य तथा पोषणको जिम्मेवारी बोकेको किसान वर्ग आफैँमा मर्यादित वर्ग हो तर हाम्रो विद्यमान परम्पराले उनीहरू अपहेलित अवस्थामा छन्। अड्डाअदालत, सरकारी कार्यालयलगायतमा उनीहरूले आफ्नो मर्यादा स्वाभिमानको महसुस गर्न सकेको पाइँदैन, जो उनीहरूको अधिकार हो।

### १३. सहभागिताको अधिकार

२० वर्षे दीर्घकालीन कृषि रणनीतिले कृषिको हरेक नीति निर्माण तहमा किसानको सहभागितालाई अनिवार्य गरेको छ। सङ्घीय संरचनाअनुसार मुलुकमा अहिले केन्द्र, प्रदेश र स्थानीय तह गरी तीन तहका सरकार छन्। यी तिनै तहको कृषि विकास र खाद्य पोषण नीति निर्माण, कार्यान्वयन र अनुगमन तहमा किसान प्रतिनिधिको सहभागिता अनिवार्य अनिवार्य मानिन्छ। यसरी आफ्ना लागि तयार तथा तर्जुमा हुने नीति तथा कार्यक्रमहरूमा किसानको सहभागी हुन पाउने अधिकार किसान अधिकारको महत्त्वपूर्ण पाटो हो।<sup>३६</sup>

### १४. सामाजिक सुरक्षा र निवृत्तिभरणको अधिकार

जीवनभर कृषि पेसामा लागेर पनि सेवा निवृत्त हुने अवस्थामा श्रम गर्न नसक्ने, आयस्रोतको कुनै विकल्प नभएका असङ्ख्यक किसानहरू छन्। राज्यले ती किसानहरूको बारेमा विचार गरी सामाजिक सुरक्षाको अवधारणा बनाउन जरुरी छ। राज्यबाट सामाजिक रूपमा सुरक्षा पाउनु किसानहरूको अधिकार हो। कार्यान्वयनको दृष्टिले किसान अधिकारको वर्तमान अवस्थामाथि किसान अधिकारका बारेमा व्यापक चर्चा गरिए पनि कार्यान्वयन अवस्था सन्तोषजनक छैन। नेपालको संविधान २०७२ ले वैज्ञानिक भूमि सुधारका माध्यमले सामन्ती भूस्वामित्व अन्त्य गरी सबै किसानमा भूमिको पहुँच पुऱ्याउन र खाद्य सम्प्रभुताको अधिकारमाथि जोड दिएको छ।<sup>३७</sup>

खाद्य अधिकार तथा खाद्य सम्प्रभुता र भूमि सुधारसम्बन्धी कानून जारी भइसकेको छ र यसले करार खेती, चक्लाबन्दी, भूमि बैङ्कको माध्यमबाट जमिन व्यवस्थित गर्ने प्रयास भएको देखिन्छ।

### किसानको अधिकार संरक्षण र संवर्धनका लागि सुझाव

#### समृद्ध नेपालको पहिचान, अधिकार सम्पन्न किसान

किसानलाई सबल र सक्षम बनाएर उत्पादन बढाउन भूमिका निर्वाह गर्नु राज्यको दायित्व हो। यसबाट राज्य पन्छिन मिल्दैन। संविधानले सुनिश्चितता गरेको कृषकको हक, खाद्य सम्प्रभुताको हकसमेत र किसानहरूको

३५ खाद्य अधिकार तथा खाद्य सम्प्रभुतासम्बन्धी ऐन २०७५

३६ विस वर्षे दीर्घकालीन कृषि रणनीति

३७ खाद्य अधिकार तथा खाद्य सम्प्रभुतासम्बन्धी ऐन २०७५

अधिकार सुनिश्चितताको लागि नेपाली किसानलाई परिचयपत्रको व्यवस्था गरी गुणस्तरीय उत्पादनको लागि आवश्यक पर्ने सीप क्षमता विकासमा सरकारले सहयोग गर्नुपर्छ।<sup>३८</sup> उत्पादन र उत्पादकत्व बढाई उचित मूल्यमा किसानका उत्पादनहरू राज्यद्वारा किन्ने व्यवस्था वा राष्ट्रिय तथा अन्तर्राष्ट्रिय बजारसम्मको पहुँच अभिवृद्धि गरी समृद्ध नेपाल बनाउन सकिन्छ।

## स्वदेशी उत्पादनलाई ग्राह्यता

विगत केही वर्षदेखि चिनी मिलहरूले उखु किसानको भुक्तानी नदिँदा आन्दोलन चलिरहेको छ। नेपालमा उत्पादित चिनी मिल मालिकहरूले महँगोमा बेच्ने तर उखु किसानले समयमा भुक्तानी नपाउदा जीविकोपार्जन गर्नसमेत समस्या भएको छ। उनीहरूको आन्दोलन उधारोमा सम्झौतामा टुङ्गिने गरेको छ। एकातिर नेपाली चिनी मुलुकभित्र उपभोग गर्न नपाइने अर्कोतिर विदेशी चिनी भित्रिँदा कतिपय चिनी मिल नै बन्द अवस्थामा पुगेका। चामल, प्याज, गोलभेंडा, अण्डा, केरा, लसुन दुधजस्ता दैनिक उपभोग्य चिजहरूको स्वदेशमा प्रशस्त उत्पादन गरी आत्मनिर्भर बन्न सक्ने अवस्था हुँदाहुँदै पनि निर्यातभन्दा आयातको अनुपात अत्याधिकमात्रामा बढी रहेको छ। अधिक विषादी प्रयोग गरिएका आयातित उपभोग्य सामग्रीको नियन्त्रण गर्न जनस्तरबाट समेत अभियान नै चाल्नुपर्ने अवस्था छ।

## युवालाई स्वदेशमा रोजगार, बाँझो जग्गामा व्यापार

मुलुक अहिले ज्येष्ठ नागरिक र बालबालिकामय बनिरहेको छ। नेपालबाट प्रतिदिन १५०० देखि २००० सम्म युवाहरू विदेशिने गरेका छन्। स्वदेशमा रोजगार तथा आर्थिक सुरक्षा नभएको भनी ४८ डिग्री तापक्रम भएका मुलुकमा पनि काम गर्न बाध्यताले विदेश जाने गरेको पाइन्छ। नेपालबाट अर्धदक्ष, सीप नसिकी विदेशिँदा राम्रो आय नहुने साथै घाइते, अपाङ्ग हुनुको साथै ज्यानसमेत जाने गरेका घटनाहरू सार्वजनिक भइरहेका छन्। यही कारण यता जग्गा बाँझो अवस्थामा छन्। मुलुकभित्रै कृषि कार्यमा संलग्न किसानहरूलाई सिचाईको सुविधा, उन्नत जातको बिउको उपलब्धता र कृषि ज्ञानमा पहुँच आदि नहुँदा लगानीअनुसारको उत्पादन हुन सकेको छैन। सरकारले विदेशबाट फर्किएका युवाहरूको सीप, क्षमता, दक्षताको प्रयोग गरी कृषिमा आधुनिकीकरण र यान्त्रिकीकरण गरी बाँझो जग्गालाई वैज्ञानिक रूपमा व्यवस्थापन गरी उन्नत जातको बिउ, मल तथा जैविक मलको प्रयोग गरी कृषि उत्पादनमा वृद्धि गरी आत्मनिर्भर बनाउने नेपालको नीति तथा आवधिक योजनामा रहेको छ।<sup>३९</sup> यसको कार्यान्वयन हुन सकेमा पनि पारिवारिक मिलन, अर्थतन्त्रमा योगदान पुग्ने देखिन्छ।

## कृषि श्रमिकको सम्मान र ज्यालामा समानता

अझ पनि तराईमा जमिनदारी प्रथा कायम छ। कमैया प्रथा त अन्त गरियो तर उनीहरूको उचित व्यवस्थापन हुन सकिरहेको छैन। चक्रवृद्धि व्याज लिने कार्य जारी छ। थुप्रै मोहीहरूले आफ्नो हक प्राप्त गर्न सकिरहेका छैनन्। बारम्बार भूमिसुधारको कुरा उठ्ने गर्दछ तर त्यसलाई न्यायोचित प्रकारले सम्बोधन गर्न सकिएको छैन। तराईमा कृषिमा कार्यरत महिलाको ज्याला कम र पुरुषको बढी छ। यसले संविधान/कानून र

३८ किसान सुचिकरण कार्यक्रम कार्यान्वयन विधि, २०७७

३९ नेपाल सरकारको पन्ध्रौँ आवधिक योजना र नीति तथा कार्यक्रम

व्यवहारबीचको खाडललाई भत्काउदछ । अन्तर्राष्ट्रिय श्रम सङ्गठनले समान काममा समान ज्याला साथै आठ घण्टा काम, आठ घण्टा आराम र आठ घण्टा मनोरञ्जन हुनुपर्ने कुरामा जोड दिएको छ ।<sup>४०</sup> कृषि आश्रित श्रमिकको अधिकारलाई सम्मान, संरक्षण र संवर्धन गर्दै ज्यालामा समानता ल्याउन स्थानीय सरकारको भूमिका अपरिहार्य रहेको छ ।

## कृषिमा अध्ययन र अनुसन्धान

उत्पादनको वृद्धिका लागि कृषि विषयको व्यवस्थित अध्ययन र अनुसन्धानको विशेष महत्त्व हुन्छ । नेपालको भौगोलिक विविधता तथा नेपाली र अन्तर्राष्ट्रिय बजारलाई लक्षित गरी कुन प्रकारको कृषि प्रणाली आवश्यकता हो ? भन्ने विषयमा गहिरो अनुसन्धानको आवश्यकता छ । कृषिको अध्ययन र अनुसन्धानका लागि उचित वातावरण तयार गर्नु राज्यको दायित्व हो । राज्य यो विषयप्रति गम्भीर नभएको अवस्था छ । अतः त्यस प्रकारको व्यावहारिक शिक्षाका लागि तीन तहका सरकारलाई जनस्तरबाट व्यापक जनदबाव सिर्जन गर्नपर्ने देखिन्छ ।

इजरायलमा कृषिको क्षेत्रमा पूरै गहिराइमा अध्ययन र अनुसन्धान हुन्छ कि नेपालजस्तो कृषिको लागि अनुकूल भूगोल नभए पनि त्यहाँ प्रशस्त मात्रामा कृषि उत्पादन हुन्छ । करिब ७० लाख जनसङ्ख्या भएको त्यो देशमा प्रतिव्यक्ति जीडीपी २५ हजार अमेरिकी डलर छ । यति प्रगति हुनुको कारण पनि कृषिको औद्योगीकरण नै हो । सम्पूर्ण इजरायली भूमिको आधा भूमि, मरुभूमि छ, २० प्रतिशत जमिनमात्र खेतीयोग्य छ । त्यहाँ पानीको अभाव छ, तर पनि कृषिका विभिन्न प्रविधिको खोज, पानीलाई राष्ट्रिय धरोहर मान्दै कानूनद्वारा त्यसको संरक्षणमा जोड दिइएको छ । विभिन्न सिँचाइसम्बन्धी उपकरणको खोज, कृषि, दुध, मासुजन्य पदार्थको उत्पादनमा बायो प्रविधिको प्रयोग, गमी देशमा उपयोगी हुने ग्रीनहाउस प्रविधिको विकास, माटोमा छिट्टै घुलनशील हुने पोटासियम नाइट्रेटको उत्पादन प्रयोग र निर्यातले त्यहाँको कृषिले गुणात्मक फड्को मारेको छ । पानी, भूमि र मानव शक्तिको सही प्रयोग गर्दै सहकारितामा आधारित त्यहाँको कृषि उत्पादनले प्रारम्भमा कागतीबाट आफ्नो निर्यातलाई अगाडि बढाएको थियो । अहिले भने विश्व बजारमा कृषिका विभिन्न उत्पादन, डोरीका सामान तथा मासुजन्य सामग्री निर्यात गर्ने प्रमुख देशको रूपमा इजरायल देखिएको छ । इजरायल कृषिमा आत्मनिर्भर भई कृषि व्यापारको माध्यमबाट अर्थतन्त्र बलियो हुनुको कारण किसानको अधिकारलाई सुरक्षित, मर्यादित साथै श्रमिकको ज्यालामा समानता र एकरूपताको व्यवस्थापन हो ।

## कृषिमा सहकारिता

नेपालमा खेतीयोग्य जमिनलाई प्लाटिड गर्ने कार्यमा वृद्धि भई व्यापारीकरणको क्रम निरन्तर चलिरहेको छ । भूमाफियाको त्यस प्रकारका गतिविधि रोक्न जनस्तरबाट नै सशक्त अभियान थालनी गरी खेतीयोग्य जमिन सहकारी पद्धतिबाट गुणस्तरीय उत्पादन प्रक्रियाबाट अगाडि बढ्न ढिलाइ भइसकेको छ । 'सामूहिक उत्पादन तथा सामूहिक उपभोग' जस्तो सहकारी पद्धतिलाई आत्मसात गर्दा ठुलो मात्रामा उत्पादन सम्भव हुनुको साथै सहजै बजार पहुँच सम्भव हुन्छ । नेपालको संविधानमा आर्थिक विकासका लागि सहकारी, सरकारी र नीजि क्षेत्र तीन खम्बे नीति अवलम्बन गर्ने कुरा कृषि क्षेत्रमा समेत प्रयोग गर्न सकिन्छ ।<sup>४१</sup>

४० International Labour Organization (ILO)

४१ नेपालको संविधान २०७२



विश्वस्तरमा कृषि सहकारिताका माध्यमबाट अगाडि बढ्दा प्रशस्त उत्पादन सम्भव भएको र त्यसले किसानको जीवनस्तरमा व्यापक सुधार ल्याएका थुप्रै उदाहारण पाउन सकिन्छ । कृषि सहकारिताकै कारण चीनका किसानको मासिक आय लाखौंमा रहेको छ । कृषिको औद्योगीकरण, सहकारिता, त्यसका साथै घरको कौसी, सडकको छेउ ट्राफिक सिग्नलमा समेत उत्पादन गर्नाले त्यहाँ धान, गहुँ, आलु, गोलभेंडा, चिया, कपास, तोरीलगायत कृषि सामग्री विश्वकै तुलनामा अत्याधिक मात्रामा उत्पादन हुन्छ । विश्व बजारमा ५० प्रतिशत स्याउ चीनबाट नै निर्यात हुन्छ, जबकि दोस्रो स्थानमा रहेको अमेरिकाले स्याउ निर्यातमा विश्व बजारको मात्र छ प्रतिशत स्थान ओगटेको छ ।

भारतमा कृषि सहकारिताको आन्दोलन, ब्रिटिस उपनिवेश तथा उसको पोल्सन कम्पनीको विरुद्ध चलेको थियो । विशेष गरी अमेरिकामा अध्यन गरी फर्किएका डा. वर्गिस कुरियन तथा त्यहाँका नेताहरू बल्लभभाइ पटेल, मोरारजी देसाईको पहलमा यस प्रकारको आन्दोलन अगाडि बढेको थियो । सन १९४७ मा गुजरातका किसानको ३०० लिटर दुध सङ्कलन गरेर यस प्रकारको आन्दोलनको सुरुवात गरिएको थियो । अमूलको नामबाट सुरु गरिएको त्यस प्रकारको कृषि सहकारिताले अहिले ठुला ठुला बहुराष्ट्रिय कम्पनीलाई समेत टक्कर दिइरहेको छ । सहकारिता सिद्धान्तलाई पूर्णतः कार्यान्वयन गर्दै यसले २० प्रतिशत आम्दानी व्यवस्थापनमा खर्च गर्दछ भने बाँकी ८० प्रतिशत आम्दानी किसानमा नै वितरण गर्दछ । भारतमा सहकारी व्यवस्थापन गर्न सन १९५८ मा National Agricultural Cooperative Marketing Federation of India / NAFED स्थापना गरी कृषि उत्पादन, वितरण तथा भण्डारण गर्ने गरेको छ ।<sup>४२</sup> यी सबै तथ्यबाट पनि प्रष्ट हुन्छ कि नेपालमा पनि सहकारी तथा सामुहिक खेतीको माध्यमबाट किसानको जीवनस्तर सुधार गर्न वैज्ञानिक पद्धतिको रूपमा कृषिमा सहकारिता आवश्यक रहेको छ ।

## कृषि पर्यटन

नेपाल पर्यटकीय रूपमा प्रशस्त सम्भावना बोकेको देश हो । यहाँको भौगोलिक बनावट नै यति सुन्दर छ कि पर्यटकीय दृष्टिले केही अभियान थाल्ने हो भने प्रशस्त उपलब्धि प्राप्त हुन सक्दछ । अझ यसलाई कृषिसित जोड्ने हो भने नेपालमा कृषि पर्यटनले किसानको जीवनस्तरमा उल्लेखनीय सुधार ल्याउन सकिन्छ । कैलालीको टिकापुरमा केराखेती बढ्दै गइरहेको छ । केराखेतीको बिचैमा बनाना रिसोर्ट, कर्णाली नदीमा च्याफ्टड तथा टिकापुर पार्क भ्रमण सबैलाई जोडिदिँदा त्यो ठाउँ एउटा सुन्दर कृषि पर्यटन क्षेत्रको रूपमा विकास भइरहेको छ । अर्घाखाँचीको नरपानीमा सुन्दर रिसोर्ट खोल्दिँदा त्यसको वरिपरिका किसानको जीवनस्तरमा प्रशस्त सुधार आएको छ । सर्लाहीको वाग्मती नगरपालिकामा रहेको मानव निर्मित भरत तालमा समेत माछापालन गरी कृषि पर्यटनको रूपमा विकास गर्न सकिन्छ । इलामको चिया बगानले त्यहाँका चिया बगानका किसानको जीवनस्तरमा प्रशस्त सुधार ल्याएको छ । यसबाट प्रष्ट हुन्छ—कृषि, पर्यटन उत्पादनको मात्रालाई बढाउने दिशामा महत्त्वपूर्ण आधार हो । राज्यस्तरबाट पनि त्यो वातावरण सिर्जना गर्न किसानको अधिकारलाई सम्मान संरक्षण र संवर्धनको लागि थप पहल गर्न आवश्यक छ ।



## निष्कर्ष

अन्तर्राष्ट्रिय किसान नेता एमिलियानो जापटाले मेक्सिकोमा गरेका विद्रोहलाई आजसम्मको सबैभन्दा ठुलो र विशेष महत्त्वपूर्ण भूमि आन्दोलन मान्न सकिन्छ। यसको लागि उनी आफ्नो जीवन दिन तयार भए पनि घुसपैठमा फस्न वा आत्मसमर्पण गर्न भने राजी भएनन्। परिणामतः सन् १९१९ अप्रिल १० का दिन उनको हत्या भयो। त्यसपश्चात् पनि विश्वमा किसानको आन्दोलनको लहर क्रमशः चल्दै आएको छ। सोभियत सङ्घ, फिलिपिन्स, चीन, भारत र नेपालमा किसानको अधिकारको लागि आन्दोलनहरू चल्दै आएका छन्।

नेपालमा भएको किसानको अधिकारका लागि वि.सं. १८५६ पछिको दशकवाटै सूत्रपात भएको नेपालको भूमि अधिकार अभै पनि जारी नै छ। प्रायः यस्ता आन्दोलन वा सङ्घर्षहरू भूमिबाट वञ्चित जनता आफैले स्वतन्त्र रूपमा सञ्चालन गर्दै आएको पाइन्छ। भूमिबाट वञ्चितहरू नागरिक समाजलगायतका तहतपकाहरूको साथ र समर्थनमा २०५१ सालमा थालनी भएको मोही अधिकारको लागि भूमि सङ्घर्ष देशव्यापी रूपमा फैलियो। गरिब जनताहरूको जिविकाको सुनिश्चितता, सामाजिक न्याय र गरिबी निवारणलगायतका भूमि अधिकारका सवालहरूलाई सम्बोधन गर्न यो आन्दोलन सफल भयो।

प्रजातन्त्र स्थापनापश्चात् पनि जमिन्दारले किसानहरूप्रति गरेको विभेद, श्रमशोषण आदिका कारण नेपाली किसानहरूले बेलाबेलामा आफ्नो हकअधिकार, सम्मान र मर्यादाको लागि आन्दोलनरत रहँदै आएका हुन्। राष्ट्रिय तथा अन्तर्राष्ट्रिय कानूनको बावजुद पनि नेपालमा देखिएको विभेद, भेदभाव, हत्या, बलात्कारजस्ता घटनाहरूमा बढीभन्दा बढी किसान/परिवारका सदस्यहरू पर्ने गरेका छन्। त्यसमा पनि दलित किसान, दलित महिला तथा बालबालिकाहरू प्रत्यक्ष रूपमा प्रभावित हुँदै आएका छन्। यसमा प्रमुख कारणको रूपमा किसानहरूले नेपाल सरकारबाट समयमा अनुदानको वीउ नपाउनु, मलखादको सहज उपलब्धता र सिचाईको पर्याप्त व्यवस्था, बजार व्यवस्थापन आदि नहुनु हो। त्यसमा पनि सक्कलीभन्दा नक्कली किसानहरू राज्यबाट प्राप्त कृषि सेवा, सुविधा, अनुदान आदिबाट लाभान्वित हुन पुग्नु हो। ठाउँ, परिवेश, समय आदि अनुसार कृषिको आधुनिकीकरण आदि विषय पनि समस्या र चुनौतीको रूपमा देखिएका छन्। उत्पादन भएको कच्चा पदार्थको भण्डार क्षमताको अभाव, उत्पादनलाई सहज बजार पहुँच नहुनुको कारण कम मूल्यमा नै आफ्नो उत्पादन बेच्नुपर्ने बाध्यात्मक अवस्था छ। व्यवस्था परिवर्तन भए पनि किसानको अवस्था थप दयनीय बन्दै गएको छ। नगदी बालीमा उखु किसानले समयमा चिनी मिलबाट पैसा पाउदैनन्। दुग्ध किसान र तरकारी खेती गर्ने किसानको सामानको उचित मूल्य छैन। धान, मकै आदिमा दाना नलाग्ने समयमा सामान्य बन्न पुगेका छन्। परिणामतः कृषि-प्रधान देशमा किसानहरू आन्दोलित हुनुको साथै आत्महत्या र आत्महत्यासम्मको प्रयास गर्न बाध्य छन्।

अतः किसानको अधिकार राज्यबाट संरक्षण र संवर्धनका लागि सैद्धान्तिक र व्यवहारिक दुवै पाटोबाट सम्बोधन गर्न आवश्यक छ। कानूनको निर्माण, समायनुकूल कानूनको संशोधन र त्यसको प्रभावकारी कार्यान्वयनले मात्र समाधानको निकास सम्भव देखिन्छ। यसको लागि सबल, भरपर्दो एवम् विश्वासिलो राज्य संरचनाहरू निर्माण भई क्रियाशील हुनुपर्दछ। समयमै वीउबिजन, मल, अनुदान, तालिम, बीमा आदिको व्यवस्था साथै उत्पादनको दीर्घकालीन बजार व्यवस्थापन गर्न सकेको खण्डमा कृषिले गति लिन सक्छ। किसानको आर्थिक स्थिति मजबुत भनेको राज्य समृद्ध हुँदै जानु हो। यी पक्षलाई मध्यनजर गरी किसानको अधिकारलाई तीनै तहका सरकारबाट विशेष सम्बोधन गर्न ढिलाइ भइसकेको हुँदा यसतर्फ ध्यान दिई कृषिमा आधुनिकीकरण र यान्त्रिकीकरणमार्फत मुलुकलाई समृद्धितर्फ लैजानुपर्ने वर्तमान आवश्यकता हो।



# The Right to be forgotten: A Fundamental Human Right for the Digital Age

Dr. Newal Chaudhary

## Abstract

*The proliferation of digital technologies and online data has challenged traditional privacy norms, giving rise to the “right to be forgotten” - a critical issue balancing individual privacy, data protection, and freedom of expression. This in-depth article holistically examines the complexities surrounding this fundamental right, analyzing its legal foundations, implementation challenges, and the delicate balance between safeguarding personal autonomy and preserving free information flow. Tracing the right's evolution from conception to global recognition, the article deeply explores the European Union's groundbreaking General Data Protection Regulation (GDPR) and its robust framework for the right to be forgotten. It critically assesses the inherent tensions between privacy and free speech principles, weighing individual, business, government and societal interests through case studies and scholarly analysis. Moreover, the article investigates the technological, operational and jurisdictional hurdles faced by online platforms and data controllers in complying with data removal requests. Emphasizing transparency and fair procedures, it examines identifying legitimate claims amidst data volumes, storage systems and potential impacts on historical records. Drawing from a comprehensive range of real-world precedents and best practices, this article provides unparalleled insights into the right's global ramifications across sectors and discourses on harmonizing data protection with free speech principles. Ultimately, as an authoritative resource, it underscores the right to be forgotten's profound significance as a fundamental human right, while acknowledging the nuanced complexities inherent in realizing it in our evolving digital landscape.*

**Keywords:** Right to be forgotten, Data privacy, online data protection, General Data Protection Regulation, Freedom of expression.

## I. Introduction to the Right to be Forgotten :

Imagine a world where a youthful mistake, a minor transgression from years ago, follows you relentlessly. With a single click, it resurfaces, casting a long shadow over your present and future. This is the chilling reality for many in the digital age, where information persists indefinitely, accessible to anyone with an internet connection. The internet, once celebrated as a liberator of information, has become a double-edged sword. While it empowers us with unprecedented knowledge and connection, it also creates a vast, unforgiving digital archive of our lives. This ever-

present past is where the concept of the “right to be forgotten” emerges as a powerful and potentially transformative idea. It grants individuals the ability to reclaim control of their online narratives, to push back against the relentless tide of information that can unfairly define them. At its core, the right to be forgotten is a fundamental human right for the digital age, a necessary safeguard for our privacy, dignity, and the possibility of personal growth. The digital age has unlocked the ability to archive, interconnect and transmit data globally. As of 2022, billion people worldwide have internet access, while global internet traffic exceeds 100 GB/s. Platforms like search engines and social media thrive on maximizing user engagement through personalized profiling based on an ever-expanding trove of personal data. Once online, such data attains near-permanence and visibility irrespective of individual wishes, with privacy implications unforeseeable during initial disclosure<sup>1</sup>. The “Right to be forgotten” lets people ask search engines and others to remove outdated or irrelevant personal information, especially if it hurts their reputation or job chances<sup>2</sup>.

### The “right to be forgotten” can be understood by dissecting its three key components:

- a. **The Right:** In this context, “right” refers to a legal entitlement or a justified claim. The right to be forgotten suggests that individuals have a legitimate power to influence how their personal information is handled online.
- b. **To be forgotten:** Here, “forgotten” doesn't mean complete erasure from existence. Instead, it implies a limitation on the accessibility of certain personal information in online searches and directories.
  - **Not total deletion:** Information might still exist with the original source (e.g., a news outlet) but wouldn't be easily discoverable through search engines.
  - **Accuracy matters:** Inaccurate or outdated information is a prime candidate for removal under the right to be forgotten.
  - **Context is key:** Information deemed irrelevant or no longer in the public interest could be delisted from search results.
- c. **The Scope:** This refers to the specific types of information or situations where the right to be forgotten might apply. It's not a blanket right to erase everything online about you.

In general terms the right to be forgotten empowers individuals to request the removal of certain personal information from search engine results and potentially other online platforms<sup>3</sup>. The digital revolution has fundamentally altered the landscape of personal privacy. The ubiquity of the internet, social media platforms, and online services has created a vast digital footprint for individuals, often without their explicit consent or control. Personal data, once shared or published online, can persist indefinitely, leaving a trail that can be difficult, if not impossible, to erase or

1 Rijal, S. (2024, March 4). Ensuring the right to be forgotten. The Kathmandu Post. Retrieved from <https://kathmandupost.com/columns/2024/03/04/ensuring-the-right-to-be-forgotten>

2 Chaudhary, B. (2024, March 4). The right to be forgotten: What does it mean for search engines and the public?. Retrieved from <https://english.deshsanchar.com/the-right-to-be-forgotten-what-does-it-mean-for-search-engines-and-the-public/>

3 Chaudhary, *Supra* Note 3

contain. This persistent digital trail poses significant risks to individual privacy and autonomy. Information that may have been relevant or appropriate in a specific context can take on new meanings and implications when viewed through a different lens or at a different point in time. Outdated or irrelevant personal data can be used to make judgments, decisions, or assumptions about an individual, potentially leading to adverse consequences in various aspects of their lives, such as employment, relationships, or social standing. The right to be forgotten, also known as the right to erasure, is a concept that grants individuals the ability to request the removal or delinking of personal information from online platforms and search engines under certain circumstances. It recognizes that individuals should have control over their personal data and the power to limit the dissemination of information that is inaccurate, irrelevant, or no longer serves a legitimate purpose. This right aims to strike a balance between an individual's right to privacy and the public's right to access information. It acknowledges that while the free flow of information is essential in a democratic society, there are instances where the preservation of personal autonomy and dignity should take precedence over the perpetual availability of certain types of personal data.

## **II. Methodology:**

This comprehensive research article on “The Right to be Forgotten: A Fundamental Human Right for the Digital Age” is based primarily on doctrinal research, employing a multidisciplinary approach to examine the subject matter. The methodology involved an extensive review of various sources beyond solely relying on legal doctrines and jurisprudence. The research process commenced with a thorough analysis of relevant websites and online resources that provide in-depth discussions and analyses on the right to be forgotten. These included authoritative websites of legal experts, privacy advocates, civil society organizations, and technology platforms, offering diverse perspectives on the topic. Furthermore, government official documents, reports, and policy papers from various jurisdictions were carefully reviewed and incorporated into the research. Particular emphasis was placed on examining the European Union's General Data Protection Regulation (GDPR) and its robust framework for implementing the right to be forgotten within the EU. In addition to online resources and official documents, the research drew upon a wide range of academic literature, scholarly articles, and expert analyses from multiple disciplines, including law, technology, data privacy, and digital ethics. This interdisciplinary approach was crucial in gaining a comprehensive understanding of the theoretical foundations, historical context, and various philosophical and ethical considerations surrounding this emerging concept. To complement the doctrinal sources, relevant case studies, judicial rulings, and legal precedents were analyzed, with a particular focus on the landmark case of *Google Spain v AEPD*, which played a pivotal role in the recognition of the right to be forgotten within the European Union. Moreover, the research process involved a comparative analysis of the global landscape, exploring the varying approaches and legal frameworks adopted by different jurisdictions regarding the right to be forgotten. This cross-border examination highlighted the need for international cooperation, harmonization of standards, and the development of best practices to ensure consistent and

effective implementation of this fundamental right. Throughout the research process, a critical and analytical approach was maintained, allowing for the identification of key challenges, debates, and controversies surrounding the right to be forgotten. This enabled the development of a nuanced and balanced perspective, acknowledging the complexities and trade-offs involved in reconciling individual privacy rights with other fundamental principles, such as freedom of expression and access to information. The author has followed the American Psychological Association (APA) citation style for all references and sources used in this article, ensuring proper attribution and adherence to academic standards.

### III. Origins and Legal Foundations:

The concept of the right to be forgotten has its roots in the broader principles of privacy and data protection, which have been recognized as fundamental human rights in various international legal instruments and national legislations. However, the specific articulation and legal recognition of this right arose from the challenges posed by the digital age and the need to address the potential misuse and abuse of personal data in the online realm. The origins of the right to be forgotten can be traced back to the early 2000s when legal scholars and privacy advocates began to raise concerns about the permanence of online data and its implications for individual privacy. This concept evolved through various legal developments, particularly in Europe, where it gained recognition. Initially discussed by Spanish legal scholars, the right to be forgotten was seen as an “atypical assumption” that gradually emerged through Spanish courts and legislation, drawing from EU Privacy Directive and domestic data protection laws<sup>4</sup>. While this right is recognized in Europe, it is not acknowledged in the United States, where courts have emphasized the importance of free expression over the right to be forgotten<sup>5</sup>. Various legal cases and judgments laid the groundwork for the recognition of this right. For instance, in 2006, the Spanish Data Protection Agency (AEPD) received a complaint from a Spanish citizen against Google, requesting the removal of links to outdated information about a debt he had long since paid off<sup>6</sup>. This case eventually made its way to the European Court of Justice (ECJ), leading to a landmark ruling in 2014 that established the right to be forgotten within the European Union. The case of **Google Spain v AEPD (Agencia Española de Protección de Datos)** was a pivotal moment in the evolution of the right to be forgotten<sup>7</sup>. In this case, the ECJ ruled that individuals have the right to request search engines to remove links to personal information that is “inadequate, irrelevant or no longer relevant, or excessive” in relation to the purpose of data processing. The court's decision recognized that an individual's right to privacy and data protection could, in certain circumstances, override the public's right to access information. It established that search engines, as data controllers, have a responsibility to

4 Abirl, Sanchez, P, Lipton, D., Jaxqueline, The Right to be Forgotten: Who decides what the world forgets. Retrieved from : <https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1074&context=klj>

5 Hudson Jr., D. L. (n.d.). Right to be forgotten. The First Amendment Encyclopedia. Retrieved from <https://firstamendment.mtsu.edu/article/right-to-be-forgotten/>

6 Google. (n.d.). Right to Be Forgotten request form. Retrieved from <https://reportcontent.google.com/forms/rtbf>

7 Electronic Privacy Information Center. (n.d.). Right to be Forgotten. Retrieved from <https://archive.epic.org/privacy/right-to-be-forgotten>

evaluate requests for delinking personal data and to strike a fair balance between individual privacy rights and the public interest. This ruling had far-reaching implications, not only within the European Union but also globally, as it set a precedent for other jurisdictions to consider and adopt similar principles regarding the right to be forgotten. While the European Union has been a trailblazer in data protection and the right to be forgotten, other jurisdictions have also recognized and implemented similar principles, albeit with varying interpretations and approaches. In 2015, the Russian Federation adopted the "Right to be forgotten" law, granting individuals the right to request the removal of search engine links to inaccurate or irrelevant personal information<sup>8</sup>. Similarly, in India in the case of *Puttaswamy v. Union of India*<sup>16</sup>, the Supreme Court recognized the 'Right to be forgotten' as part of the Right to life under Article 21<sup>9</sup>. However, the interpretation and implementation of this right have not been uniform across different jurisdictions. The global landscape of the right to be forgotten remains a patchwork of varying legal frameworks and interpretations, reflecting the complex interplay between individual privacy rights, freedom of expression, and the preservation of public interest information.

#### **IV. The EU's General Data Protection Regulation (GDPR):**

The European Union's General Data Protection Regulation (GDPR) stands as a landmark legal framework that has firmly established the right to be forgotten as a fundamental principle within the EU's jurisdiction. Adopted in 2016 and enforceable since 2018, the GDPR has set a new standard for data protection and privacy rights, with far-reaching implications for individuals, businesses, and online platforms operating within the EU or handling the personal data of EU citizens. The right to privacy is part of the 1950 European Convention on Human Rights, which states, "Everyone has the right to respect for his private and family life, his home and his correspondence." From this basis, the European Union has sought to ensure the protection of this right through legislation. As technology progressed and the Internet was invented, the EU recognized the need for modern protections. So in 1995 it passed the European Data Protection Directive, establishing minimum data privacy and security standards, upon which each member state based its own implementing law. But already the Internet was morphing into the data Hoover it is today. In 1994, the first banner ad appeared online. In 2000, a majority of financial institutions offered online banking. In 2006, Facebook opened to the public. In 2011, a Google user sued the company for scanning her emails. Two months after that, Europe's data protection authority declared the EU needed "a comprehensive approach on personal data protection" and work began to update the 1995 directive. The GDPR entered into force in 2016 after passing European Parliament, and as of May 25, 2018, all organizations were required to be compliant<sup>10</sup>. The GDPR is a comprehensive regulation that governs the collection, processing, and storage of personal data within the European Union. It aims to strengthen individuals' control over

8 Russia signs controversial "Right to Be Forgotten" bill into law. Data Protection Report. Retrieved from <https://www.dataprotectionreport.com/2015/07/russia-signs-controversial-right-to-be-forgotten-bill-into-law/>

9 Manupatra. (n.d.). Right to be forgotten. Retrieved from <https://articles.manupatra.com/article-details/Right-to-be-forgotten>

10 GDPR.EU. (n.d.). What is GDPR? Retrieved from <https://gdpr.eu/what-is-gdpr/>



their personal information and ensure that organizations handle data in a transparent, secure, and accountable manner. One of the core principles of the GDPR is the recognition of data protection as a fundamental human right. The regulation emphasizes the importance of individual consent, purpose limitation, data minimization, and accountability when processing personal data.

### ***Provisions on the Right to be forgotten:***

The GDPR enshrines the right to be forgotten, also known as the right to erasure, as a key element of its data protection framework. Article 17 of the regulation grants individuals the right to request the erasure of their personal data from data controllers under certain circumstances, including:

- When the personal data is no longer necessary for the purposes for which it was collected or processed.
- When the individual withdraws their consent for the processing of their personal data.
- When the personal data has been unlawfully processed.
- When the personal data must be erased to comply with a legal obligation under EU law or the law of a Member State.

The GDPR also obliges data controllers to take reasonable steps to inform other controllers or processors processing the personal data about the erasure request, ensuring that the individual's right to be forgotten is respected across multiple platforms and systems. The GDPR establishes strict rules and mechanisms for the implementation and enforcement of the right to be forgotten. Data controllers are required to have clear and transparent procedures in place to handle erasure requests from individuals. They must also ensure that personal data is securely deleted or anonymized when requested, taking into account the available technology and the cost of implementation. Moreover, the GDPR empowers data protection authorities in each Member State to monitor compliance and impose significant fines and penalties for violations. These fines can reach up to €20 million or 4% of a company's global annual revenue, whichever is higher, emphasizing the EU's commitment to ensuring the effective implementation of the right to be forgotten and other data protection principles<sup>11</sup>. The GDPR has set a global benchmark for data protection and privacy regulations, influencing and shaping legislation in other jurisdictions. Its comprehensive provisions on the right to be forgotten have provided a robust legal foundation for individuals to assert control over their personal data and demand accountability from organizations handling their information.

## **V. Reconciling Privacy and Free Expression:**

While the right to be forgotten aims to protect individual privacy and data protection, its implementation has raised concerns about potential conflicts with the fundamental principles of freedom of expression and the public's right to access information. Striking the appropriate

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11 GDPR-info.eu. (n.d.). Article 17 GDPR – Right to erasure ('right to be forgotten'). Retrieved from <https://gdpr-info.eu/art-17-gdpr/>

balance between these competing rights and interests has been a subject of intense debate and scrutiny, requiring careful consideration and nuanced approaches.

#### **a. Balancing Individual Privacy and Free Speech:**

The inherent tension between individual privacy and freedom of expression lies at the heart of the debate surrounding the right to be forgotten. On one hand, individuals have a legitimate expectation of privacy and control over their personal data, particularly when it comes to information that is no longer relevant, accurate, or serves a legitimate purpose. On the other hand, the free flow of information and the ability to access and disseminate information are essential pillars of a democratic society and the freedom of expression enshrined in various human rights instruments. This tension raises complex questions about where to draw the line and how to balance these competing rights. While the right to be forgotten aims to protect individuals from the perpetual availability of personal data that may harm their reputation or privacy, there is a risk that overly broad or unchecked applications of this right could lead to censorship, the erasure of historical records, and the suppression of information that may be in the public interest.

#### **b. Public Interest Considerations and Exceptions:**

To address these concerns, legal frameworks and judicial interpretations have recognized the need for exceptions and limitations to the right to be forgotten when there is a legitimate public interest at stake. These exceptions often revolve around the following considerations:

- **Freedom of expression and information:** The right to be forgotten may be limited when it conflicts with the fundamental rights of freedom of expression and the dissemination of information in the public interest, such as news reporting, academic research, or artistic expression.
- **Public figures and public interests:** Individuals who hold positions of public trust or prominence, such as politicians, celebrities, or public figures, may face higher thresholds for the removal of personal information due to the heightened public interest in their activities and conduct.
- **Historical significance:** Information that has significant historical value or contributes to the preservation of collective memory may be exempt from erasure requests to protect the integrity of historical records and ensure access to information for research and educational purposes.
- **Legal obligations:** In some cases, the retention of personal data may be necessary to comply with legal obligations, such as law enforcement investigations, legal proceedings, or regulatory requirements.

These public interest considerations and exceptions aim to strike a balance between individual privacy rights and the broader societal interests in preserving freedom of expression, access to information, and the preservation of historical records.



### c. Legal Analysis:

Various legal **cases** and judicial rulings have grappled with the intricate task of reconciling privacy and freedom of expression in the context of the right to be forgotten. These cases offer valuable insights into the nuanced considerations and legal analyses involved in striking the appropriate balance. For example, in the landmark case of *Google Spain v AEPD*, the European Court of Justice recognized that the right to be forgotten is not absolute and must be balanced against other fundamental rights, such as freedom of expression and information<sup>12</sup>. The court emphasized that a fair balance should be struck between the legitimate interests of the individual and the public's interest in accessing information, particularly when the information relates to public figures or matters of public concern. These and other legal precedents highlight the complex interplay between individual privacy rights and freedom of expression, emphasizing the need for a nuanced and contextual approach that weighs the specific circumstances and societal implications of each case.

## VI. Implementation Obstacles and Challenges:

While the legal frameworks and principles surrounding the right to be forgotten have been established, the practical implementation of this right has faced numerous obstacles and challenges. These challenges stem from the complexities of the digital landscape, the sheer volume of data involved, and the intricate balancing act required to reconcile competing interests and rights.

### a. Technological and Operational Hurdles:

One of the most significant challenges in implementing the right to be forgotten lies in the technological and operational hurdles faced by online platforms, search engines, and data controllers. The sheer volume of data involved and the intricacies of data storage, retrieval, and processing systems pose formidable obstacles. Online platforms and search engines must develop robust mechanisms to identify, verify, and act upon legitimate requests for data removal or delinking. This process involves complex algorithms, data indexing techniques, and the ability to distinguish between different types of personal data and contexts. Furthermore, the effective implementation of the right to be forgotten may require the development of new technologies and systems for securely and permanently deleting or anonymizing personal data across multiple platforms, databases, and caching systems. This can be a resource-intensive endeavor, especially for smaller organizations or those with legacy data systems.

### b. Territorial and Jurisdictional Issues:

Another significant challenge arises from the territorial and jurisdictional limitations of the right to be forgotten. While legal frameworks like the GDPR apply within the European Union, their extraterritorial reach is limited, creating potential inconsistencies and conflicts across different jurisdictions. Online platforms and search engines may comply with data erasure requests within the EU but continue to display the same information in other jurisdictions where different legal frameworks or interpretations apply. This inconsistency raises questions about the effectiveness

<sup>12</sup> Carter-Ruck. (n.d.). *Google v Spain: EU backs right to be forgotten*. Retrieved from <https://www.carter-ruck.com/blog/google-v-spain-eu-backs-right-to-be-forgotten/>

and enforcement of the right to be forgotten on a global scale, as personal data can still be accessed and disseminated elsewhere. Additionally, the cross-border flow of data and the decentralized nature of the internet add further complexities, making it difficult to ensure the complete removal or delinking of personal information from all potential sources and platforms worldwide.

### **c. Assessing Data Relevance for Removal:**

A crucial aspect of implementing the right to be forgotten is determining what constitutes “irrelevant<sup>13</sup>,” “outdated<sup>14</sup>,” or “excessive<sup>15</sup>” personal data that should be subject to removal or delinking. This assessment often involves subjective and contextual considerations, making it challenging to establish clear and consistent criteria. Data controllers must carefully evaluate the specific circumstances of each request, weighing factors such as the nature and sensitivity of the personal data, the purpose for which it was collected, the potential impact on the individual's privacy and reputation, and the public interest considerations outlined in legal frameworks and judicial interpretations. This evaluation process can be complex and resource-intensive, requiring specialized expertise and careful consideration of the nuances and implications of each case. Inconsistencies or oversights in this assessment process could lead to either an overreach in data removal, potentially infringing on freedom of expression and access to information, or an underreach, failing to adequately protect individuals' privacy rights.

## **VII. Responsibilities of Online Platforms:**

### **a. Compliance with Removal Requests:**

A fundamental responsibility of online platforms and search engines is to establish and maintain robust mechanisms for handling and processing requests for data removal or delinking in accordance with the legal frameworks and principles governing the right to be forgotten. These mechanisms should include clear and transparent procedures for individuals to submit requests, as well as dedicated teams or personnel responsible for evaluating the legitimacy and merits of each request. Platforms must ensure that these processes are efficient, responsive, and adhere to the prescribed timelines for data erasure or delinking outlined in applicable regulations. Furthermore, online platforms and search engines must implement technical measures to effectively remove or delist personal data from their systems, databases, and search indexes when a legitimate request is approved. This may involve deploying advanced algorithms, data scrubbing techniques, and robust caching and indexing protocols to ensure the comprehensive removal of targeted personal data across all relevant platforms and services.

13 Irrelevant refers to personal information that has no connection to someone's current life or situation. Think of it as details that are not useful for understanding who they are today. Examples include outdated contact information, past hobbies you no longer pursue, or irrelevant details collected during online interactions.

14 Outdated means personal information that was once accurate but is no longer current. It reflects a past situation and doesn't accurately portray the present. This could be expunged criminal records, financial information about settled debts, or old news articles.

15 Excessive refers to an unnecessary amount of personal data collected or stored. It's information that goes beyond what's truly needed for a specific purpose. Examples include extensive location tracking data, detailed information collected that's not required for transactions, or large data sets with minimal user control over collection.

### **b. Transparent and Fair Procedures:**

Transparency and fairness are essential principles that must guide the processes and procedures adopted by online platforms and data controllers in handling requests related to the right to be forgotten. These entities have a responsibility to provide clear and accessible information to individuals regarding their data protection rights, the processes for submitting requests, and the criteria used for evaluating and deciding upon such requests. Online platforms should establish well-defined and publicly available policies outlining their approach to data removal requests, including the specific circumstances under which personal data may be eligible for erasure or delinking. These policies should be regularly reviewed and updated to reflect evolving legal interpretations, technological advancements, and best practices in the field of data protection. Additionally, online platforms must ensure that their decision-making processes are fair, impartial, and free from bias or undue influence. Individuals should have the right to appeal decisions and seek recourse through established mechanisms, such as independent review boards or regulatory authorities, in cases where they believe their requests have been improperly denied or handled.

### **c. Debates and Controversies:**

The responsibilities and actions of online platforms concerning the right to be forgotten have been the subject of ongoing debates and controversies. Critics have raised concerns about the potential for censorship, the suppression of information, and the erosion of freedom of expression if online platforms wield excessive power in determining what information should be removed or delisted. There have been instances where online platforms have faced criticism for either being too restrictive in their interpretation of the right to be forgotten, leading to the removal of information deemed to be in the public interest, or conversely, for being too lenient and failing to adequately protect individuals' privacy rights. These debates highlight the need for ongoing dialogue, transparency, and accountability mechanisms to ensure that online platforms strike the appropriate balance between respecting individual privacy rights and upholding the principles of freedom of expression and access to information.

## **VIII. Global Landscape and Cross-Border Considerations:**

The implementation and enforcement of the right to be forgotten have been shaped by a diverse and evolving global landscape, with varying approaches and interpretations across different jurisdictions. As personal data transcends geographical borders in the digital age, cross-border considerations and the need for international cooperation have become increasingly critical in addressing the complexities surrounding this fundamental right.

### **a. Varying Approaches Across Countries:**

While the European Union has been a pioneer in establishing the right to be forgotten through the GDPR, other regions and countries have adopted different stances and legal frameworks regarding this issue. The United States, for instance, has been more cautious in embracing the right to be forgotten, citing concerns over potential conflicts with the First Amendment and the principles

of free speech and freedom of expression<sup>16</sup>. In contrast, countries like Russia, Brazil, and several Asian nations like India have implemented varying degrees of data protection regulations that incorporate elements of the right to be forgotten, though their interpretations and enforcement mechanisms may differ from the EU's approach. This patchwork of varying legal frameworks and interpretations has created challenges for multinational organizations and online platforms that operate across multiple jurisdictions. They must navigate a complex web of compliance requirements, potentially leading to inconsistencies in the application of the right to be forgotten and the treatment of personal data across different regions.

#### **b. Need for International Cooperation:**

The cross-border nature of personal data flows and the global reach of online platforms and services highlight the need for greater international cooperation and harmonization of legal frameworks related to the right to be forgotten. As individuals' personal data can be accessed, processed, and stored across multiple jurisdictions, a fragmented and inconsistent approach to data protection and privacy rights can undermine the effectiveness of these rights and create legal uncertainties for both individuals and businesses. International cooperation efforts should focus on developing common principles, standards, and best practices for the implementation of the right to be forgotten. This could involve the establishment of multilateral agreements, treaties, or frameworks that facilitate cross-border data protection and enable the consistent application of privacy rights across different jurisdictions. Furthermore, international cooperation can foster the sharing of best practices, technological solutions, and regulatory approaches among nations, enabling a more coordinated and effective response to the challenges posed by the digital age and the protection of personal data.

#### **c. Impact on Businesses and Data Flows:**

The global landscape of the right to be forgotten and the varying legal frameworks across different jurisdictions have significant implications for businesses and the flow of data across borders. Multinational organizations must navigate a complex web of compliance requirements, potentially leading to increased operational costs, legal risks, and barriers to cross-border data transfers. Companies operating in multiple jurisdictions may face situations where they are required to comply with conflicting legal obligations or interpretations of the right to be forgotten. For instance, a company may be required to remove personal data from its systems in one jurisdiction while being obligated to retain the same data in another jurisdiction due to different legal requirements or interpretations. These challenges can create significant uncertainties and risks for businesses, potentially hindering innovation, limiting access to global markets, and disrupting the free flow of data across borders. To mitigate these risks, businesses must implement robust data governance frameworks, seek legal counsel, and stay informed about the evolving legal landscapes in the jurisdictions where they operate. Moreover, the impact on cross-border data flows and the potential for fragmentation of the digital ecosystem highlight the need for international cooperation and the

16 University of Washington. (n.d.). The right to be forgotten: coming to america? Retrieved from <https://digitalcommons.law.uw.edu/wlr/vol93/iss1/5/>

development of harmonized legal frameworks that strike a balance between protecting individual privacy rights and enabling the responsible and secure flow of data across borders.

### IX. Case Studies<sup>17</sup>:

There have been several notable cases related to the right to be forgotten in different countries, each with its own outcomes and implications:

- a) **Google Spain SL and Google Inc. v. Spanish Data Protection Agency and Mario Costeja González (2014)**: This case involved a Spanish citizen who requested that Google remove links to an old newspaper article that contained information about a debt he had settled years ago. The Spanish Data Protection Agency rejected the request, but the European Court of Justice ruled in favor of Costeja González, stating that individuals have the right to request the removal of search engine links that are “inadequate, irrelevant or no longer relevant, or excessive.” The court also held that search engines are responsible for the processing of personal data and must remove links when requested, unless there are overriding reasons for them not to do so. The outcome of this case had significant implications for individuals' right to privacy and the responsibilities of search engines. It established that individuals have the right to request the removal of search engine links that contain outdated or irrelevant personal information, and that search engines have a duty to process personal data responsibly and respect individuals' privacy rights.
- b) **Max Mosley v. Google LLC (2018)**: Max Mosley, the former president of the Fédération Internationale de l'Automobile (FIA), requested that Google remove links to news articles that contained allegations about his private life. Mosley argued that the articles contained inaccurate information and were no longer relevant. However, the UK High Court ruled against Mosley, stating that the articles were of public interest and that the right to freedom of expression outweighed Mosley's right to privacy. The outcome of this case highlighted the challenges of balancing privacy and freedom of expression. While individuals have the right to request the removal of links that contain outdated or inaccurate information, this right may be limited by the public interest in the information.
- c) **Google LLC v. CNIL (2019)**: In this case, the French data protection authority, the Commission Nationale de l'Informatique et des Libertés (CNIL), fined Google for failing to comply with the right to be forgotten. The CNIL argued that Google had not applied the right to be forgotten globally, but had only removed links from search engine results in the EU. Google argued that applying the right to be forgotten globally would violate the principle of freedom of expression. The outcome of this case demonstrated the challenges of applying the right to be forgotten globally. While individuals have the right to request the removal of links from search engine results, this right may conflict with the right to freedom

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17 Chaudhary, N. (2022). The right to be forgotten in Nepal: Balancing the individuals' right to privacy and freedom of expression. In Nepal Bar Council Journal, p. 123.

of expression, and may be difficult to enforce globally. Overall, these cases demonstrate the complexities and challenges of balancing privacy and freedom of expression, and the need for a comprehensive legal framework that addresses these challenges in a fair and effective manner. In Nepal there is no any notable cases which can relate which right to be forgotten, as there is no any draft bill of right to be forgotten.

## **X. Forging a Balanced Approach:**

Navigating the complexities surrounding the right to be forgotten requires a nuanced and balanced approach that thoughtfully weighs the legitimate interests and rights of all stakeholders involved. This includes individuals seeking to protect their privacy, online platforms and businesses responsible for data processing, governments and regulatory bodies, and society as a whole.

### **a) Principles for Effective Implementation:**

To effectively implement the right to be forgotten and strike the appropriate balance between competing interests, several key principles should be adhered to:

- **Proportionality:** The application of the right to be forgotten should be proportionate to the legitimate aims and purposes it seeks to achieve. Decisions regarding data removal or delinking should be based on a careful weighing of the individual's privacy rights against other fundamental rights and public interests.
- **Transparency and Accountability:** Online platforms, data controllers, and regulatory bodies should operate with transparency and accountability, providing clear and accessible information about their processes, criteria, and decision-making mechanisms related to the right to be forgotten.
- **Due Process and Appeals:** Individuals should have access to fair and impartial procedures for submitting and appealing requests related to the right to be forgotten. Robust mechanisms for independent review and redress should be established to ensure the protection of individual rights and the resolution of disputes.
- **Context and Relevance:** The assessment of personal data relevance and the determination of what constitutes "excessive" or "outdated" information should be based on a contextual analysis that considers the specific circumstances, purposes, and potential impacts of the data in question.
- **International Cooperation:** Given the global nature of the digital ecosystem and cross-border data flows, international cooperation and the harmonization of legal frameworks are crucial for ensuring the consistent and effective implementation of the right to be forgotten across jurisdictions.

### **b) Safeguarding Free Speech and Public Interest:**

While upholding the right to be forgotten, it is imperative to safeguard the fundamental principles of freedom of expression and the dissemination of information that serves the public interest.



This can be achieved through carefully crafted exceptions and limitations that strike a balance between individual privacy rights and the broader societal interests in accessing and preserving information.

Such exceptions may include, but are not limited to:

- **Freedom of expression and journalism:** Exemptions for news reporting, academic research, and artistic expression that serve the public interest and contribute to the free flow of information and ideas.
- **Public figures and matters of public concern:** Higher thresholds for the removal of personal data related to public figures or matters of significant public interest, ensuring that information vital to public discourse and accountability is preserved.
- **Historical and archival records:** Protections for data and information that hold significant historical or cultural value, enabling the preservation of collective memory and ensuring access to historical records for research and educational purposes.
- **Legal and regulatory requirements:** Provisions that allow for the retention of personal data when necessary for compliance with legal obligations, law enforcement investigations, or regulatory requirements in the public interest.

### c) Promoting Transparency and Accountability:

Fostering transparency and accountability mechanisms is crucial for ensuring the fair and balanced implementation of the right to be forgotten. This can be achieved through:

- **Public Reporting and Audits:** Online platforms, data controllers, and regulatory bodies should regularly publish reports and undergo independent audits to provide insights into their processes, decisions, and the overall impact of the right to be forgotten on individual privacy and public interests.
- **Multi-stakeholder Engagement:** Ongoing dialogue and engagement with various stakeholders, including civil society organizations, privacy advocates, industry representatives, legal experts, and government agencies, can help shape policies and best practices that balance competing rights and interests.
- **Independent Oversight:** The establishment of independent oversight bodies or review boards can help ensure impartial and objective decision-making processes, providing a check on potential abuses or overreaches in the application of the right to be forgotten.
- **Public Awareness and Education:** Efforts should be made to raise public awareness and promote education about the right to be forgotten, its implications, and the processes for exercising and protecting individual privacy rights in the digital age.

By adhering to these principles and promoting transparency and accountability, stakeholders can work towards a balanced and effective implementation of the right to be forgotten, one that

respects individual privacy while upholding fundamental rights and serving the broader public interest.

## **XI. Fundamental Human right for Digital Age:**

The advent of the digital age has brought about unprecedented transformations in the way we live, work, and interact with the world around us. The ubiquity of the internet, social media platforms, and online services has revolutionized global connectivity, information sharing, and access to knowledge. However, this unprecedented technological progress has also given rise to new challenges and risks, particularly in the realm of individual privacy and data protection. In this digital landscape, where personal data is constantly generated, shared, and stored online, the right to be forgotten has emerged as a fundamental human right – a vital safeguard against the potential misuse and abuse of personal information, and a bulwark against the erosion of individual autonomy and dignity.

### ***The Erosion of Privacy in the Digital Age:***

The digital age has ushered in an era of unparalleled data collection and dissemination. Every online interaction, social media post, and digital footprint contributes to the vast repository of personal information that exists on the internet. This data trail, once created, can persist indefinitely, leaving individuals vulnerable to potential privacy violations, reputational harm, and the misuse of their personal information. The persistence of online data poses significant risks to individual autonomy and self-determination. Outdated or irrelevant personal information can be used to make judgments, decisions, or assumptions about an individual, potentially leading to adverse consequences in various aspects of their lives, such as employment, relationships, or social standing.

### ***Reclaiming Control and Autonomy:***

The right to be forgotten empowers individuals to reclaim control over their personal narratives and digital identities. By providing a legal framework for individuals to request the removal or delinking of personal information from online platforms and search engines, this right acknowledges the importance of personal autonomy and the need to protect individuals from the perpetual exposure of their personal data. This fundamental right recognizes that individuals should have the ability to shape their digital identities and narratives without being indefinitely tethered to information that may be inaccurate, irrelevant, or no longer serves a legitimate purpose. It represents a bulwark against the potential harms of perpetual online exposure and a affirmation of an individual's right to privacy and self-determination in the digital age.

### **Balancing Competing Rights and Interests:**

While the right to be forgotten is a vital component of individual privacy and data protection, its implementation requires a careful balancing of competing rights and interests. It must coexist alongside the fundamental principles of freedom of expression, access to information, and the preservation of information that serves the public interest. This delicate balance necessitates



a nuanced and contextual approach, where the legitimate interests of individuals, businesses, governments, and society as a whole are thoughtfully weighed and reconciled. It requires ongoing dialogue, legal interpretation, and the development of transparent and accountable processes to ensure that the right to be forgotten is enforced in a manner that respects the broader societal interests and democratic values.

### ***Fostering Trust and Confidence in the Digital Ecosystem:***

By enshrining the right to be forgotten as a fundamental human right and implementing robust data protection measures, societies can foster trust and confidence in the digital ecosystem. Individuals will be empowered to engage with online platforms and services without the fear of perpetual exposure or the misuse of their personal information. This trust and confidence are essential for promoting responsible digital citizenship, fostering innovation, and unlocking the full potential of digital technologies. When individuals feel secure in the knowledge that their privacy rights are protected, they are more likely to embrace new technologies and participate in the digital economy, driving economic growth and societal progress. As we navigate the complexities of the digital age, the recognition and enforcement of the right to be forgotten as a fundamental human right is not merely a legal obligation but a moral imperative. It represents a commitment to upholding the core values of human dignity, autonomy, and self-determination in an era defined by the proliferation of personal data and the erosion of traditional boundaries of privacy. By enshrining this right and implementing it in a balanced and responsible manner, societies can nurture a digital ecosystem that respects individual privacy while fostering innovation, economic growth, and the free flow of information. It is a testament to our collective commitment to protecting the fundamental rights and freedoms that define our shared humanity, even as we embrace the transformative potential of technological progress.

## **XII. Importance of Right to be Forgotten in the context of Nepal:**

While the right to be forgotten has gained significant traction and legal recognition in various parts of the world, its implementation and enforcement in the context of Nepal present unique challenges and opportunities. Nepal, as a developing nation with a rapidly growing digital landscape, faces the dual challenge of protecting individual privacy rights while also fostering technological advancements and economic growth. The proliferation of internet access, social media platforms, and online services has increased the potential for personal data misuse and privacy violations, underscoring the need for robust data protection measures. One of the key challenges in implementing the right to be forgotten in Nepal is the lack of a comprehensive legal framework specifically addressing this issue. While the Constitution of Nepal recognizes the right to privacy as a fundamental right, there are no specific provisions or regulations dedicated to the protection of personal data in the digital realm or the right to be forgotten. This legal vacuum creates uncertainties for individuals seeking to exercise their right to privacy and control over their personal information online. It also poses challenges for businesses and organizations operating in Nepal, as they lack clear guidelines and compliance requirements regarding data

protection and the handling of personal data. To address this gap, Nepal should consider adopting a comprehensive data protection law that enshrines the right to be forgotten and aligns with international best practices and standards. Such a law should balance the protection of individual privacy rights with the need to promote innovation, foster economic growth, and ensure the free flow of information in the public interest. In addition to legal reforms, the implementation of the right to be forgotten in Nepal requires capacity building and awareness-raising efforts. This includes educating individuals about their digital rights and the importance of responsible data management, as well as providing training and resources to businesses, government agencies, and other stakeholders to ensure compliance with data protection principles. Furthermore, Nepal should actively engage in international cooperation and knowledge-sharing initiatives to learn from the experiences and best practices of other countries that have implemented the right to be forgotten. This could involve participating in regional or global forums, collaborating with international organizations, and leveraging resources and expertise from more advanced jurisdictions. By proactively addressing the challenges and embracing the right to be forgotten, Nepal can position itself as a leader in data protection and individual privacy rights within the South Asian region. This not only strengthens the fundamental rights of its citizens but also fosters trust and confidence in the country's digital ecosystem, facilitating economic growth and technological advancement while upholding core human rights principles.

### **XIII. Conclusion:**

The right to be forgotten represents a fundamental human right in the digital age, a cornerstone of individual privacy and autonomy in an era defined by the ubiquity of personal data and the persistence of digital footprints. As technology continues to reshape the boundaries of personal privacy, this right has emerged as a critical safeguard, granting individuals the power to reclaim control over their personal narratives and shield themselves from the potential harms of perpetual online exposure. Throughout this comprehensive article, we have explored the intricate complexities surrounding the implementation and enforcement of the right to be forgotten. From its origins and legal foundations to the landmark frameworks like the EU's GDPR, we have witnessed the evolution of this principle and its ascent to global recognition as a vital component of data protection and privacy rights. However, the path towards realizing this fundamental right is not without its challenges. We have delved into the inherent tensions between individual privacy and the principles of free speech and public interest, underscoring the need for a nuanced and contextual approach that carefully weighs competing rights and societal implications. The article has highlighted the technological, operational, and jurisdictional hurdles that online platforms, data controllers, and regulatory bodies must navigate to ensure effective and consistent implementation of the right to be forgotten. Furthermore, we have examined the global landscape and cross-border considerations, recognizing the need for international cooperation, regulatory harmonization, and the development of common standards and best practices. Only through concerted efforts and a shared commitment to upholding individual privacy rights can we truly realize the full potential of the right to be forgotten in an interconnected digital world. As we

look towards the future, emerging technologies, evolving legal frameworks, and shifting societal attitudes will undoubtedly shape the trajectory of this fundamental right. It is imperative that we remain vigilant, adaptive, and proactive in addressing the challenges that lie ahead. This includes fostering transparency, accountability, and ongoing dialogue among all stakeholders, as well as promoting public awareness and education about the significance of the right to be forgotten and its implications for individual autonomy and digital citizenship. Ultimately, the realization of the right to be forgotten is not merely a legal or technological endeavor; it is a profound affirmation of human dignity in the digital age. By upholding this right, we acknowledge the inherent value of individual privacy, personal narratives, and the ability to shape one's digital identity free from the constraints of perpetual exposure and potential misuse of personal data. As we navigate the ever-evolving digital landscape, let us remain steadfast in our commitment to protecting this fundamental human right, striking the delicate balance between individual privacy, freedom of expression, and the preservation of information that serves the greater public interest. Only through a thoughtful and inclusive approach can we truly harness the transformative potential of digital technologies while safeguarding the core values that define our humanity.



# The Human Rights Challenges of Migrant Workers from the Karnali Region, Nepal in India's Informal Unskilled Sector

Man Bahadur Karki

## Abstract

*There is an open border between the two countries which allows for both nationals to travel freely to the other country and to live and work. A significant number of Nepali migrant workers from Karnali region joins India's informal unskilled work sector every year, which includes domestic work, agriculture, security guard, and small-scale hotels and manufacturing. The legal and policy frameworks in India and Nepal related to the human rights of migrant workers in this sector are inadequate to protect their rights. In such context, this research aims to investigate the human rights challenges faced by Nepali migrant workers from the Karnali region in India's informal unskilled sector and identify potential solutions to address these challenges. The study is based on in-depth interviews with returnee migrant workers from India and other local key informants, such as community leaders, government officials, and civil society representatives, to gain insight into the human rights challenges faced by Nepali migrant workers in the sector. The Nepali migrant workers in India's informal unskilled sector often face a range of human rights challenges in their work, including low wages, poor working conditions, discriminations, and exploitation.*

**Keywords:** Nepali Migrant Workers, Karnali Region, Human Rights Challenges, Informal Unskilled Sector

## 1. Background

There is an open border between the two countries which allows for both nationals to travel freely to the other country and to live and work. Significant numbers of Nepali migrant workers go to work in India's informal unskilled sector every year, which includes domestic work, agriculture, and small-scale manufacturing<sup>1</sup>. Migration from Nepal to India has been a historical reality. Nepalese people started migrating to India after the Treaty of Sugauli in 1816<sup>2</sup>. Traditionally, Nepali have worked for the Indian state, both as part of its famed Gorkha regiments and the civil service; in the private sector as security guards; as domestic workers; and as manual labourers in mines, tea estates and dairy farms<sup>3</sup>. Recently, there have also been the twin phenomena of many student migrants from Nepal to India and of second-generation Nepali migrants in India taking up various white-collar professions there<sup>4</sup>. The International Organization for Migration (IOM) conducted a study on the socio-economic and financial profile of migrants to India. The

findings stressed issues of seasonal and long-term migrants to India particularly relating to lack of data, vulnerability of workers employed in the informal sector, and problems relating to remittance transfers and lack of social security coverage<sup>5</sup>. Nepali workers in India have been contributing substantially to the subsistence of their families back home. But it is not only because of remittances that Nepali migration to India is of significance. Various studies have shown that men practise unsafe sex while working in Indian cities and often become infected with sexually transmitted diseases which they pass on to their partners back home. Similarly, Nepali women and children are trafficked to Indian brothels, circuses, and mines. Prospective migrant workers to third countries also use India as a transit to reach their destinations, in breach of Nepal's laws regulating foreign employment<sup>6</sup>.

The Karnali region in Nepal, originally comprising five districts in the western part of the country and now 10 districts as part of Karnali province after the state reconstruction through new constitution in 2017, has long been one of the poorest and most underdeveloped areas of Nepal<sup>7</sup>. The region has traditionally relied on agriculture as the primary source of income, but with limited arable land, the agricultural sector has been unable to support the growing population<sup>8</sup>. As a result, many people from the Karnali region have migrated to other parts of Nepal and India in search of work. The migration of workers from Karnali to Indian cities, particularly to cities in the states of Punjab, Haryana, and Delhi, has been a major phenomenon for several decades. According to a study conducted by the International Labour Organization (ILO) in 2012 which was published in 2014, an estimated 50, 000 to 100, 000 people from the Karnali region were working in the informal sectors of Indian cities<sup>9</sup>. These workers are mostly engaged in construction, domestic work, and manual labour jobs, and are often employed through informal channels, without any formal contracts or social security benefits. According to a report by the Nepali Ministry of Labour, Employment, and Social Security, an estimated 700, 000 Nepali citizens go to India for work every year<sup>10</sup>. However, specific data for the number of people from Karnali region who go to India for work every year is not readily available. A study conducted by the Centre for the Study of Labour and Mobility (CESLAM) in 2016 found that out of the total migrant workers from Nepal to India, around 38% were from the western region of Nepal, which includes Karnali<sup>11</sup>. It is important to note that the actual number of Nepali migrant workers in India is likely higher than official estimates, as many workers migrate through informal channels without going through government registration processes. The formal government registration process is available for migrant workers in Nepal through the Department of Labour. The workers travelling to Middle East and other countries go through the government registration process. In case of Nepal-India, there is no such process at the border to register people moving across on either side. So, we only have estimates, no one really knows the exact number of Nepalis in India and vice versa. As per recent evidence, the nearly 8 million Nepalese citizens live and work in India<sup>12</sup>.

In such background context, this research focuses to assess the human rights challenges faced by Nepali migrant workers from the Karnali region in India's informal unskilled sector. The specific research question of this study is: "What are the human rights challenges faced by Nepali migrant workers from the Karnali region in India's informal unskilled sector?"

## 2. Methodology

The study used an exploratory research design and qualitative data collection and analysis techniques. The researcher conducted field work in Jajarkot, Dailekh, Kalikot and Surkhet districts in Karnali Province between 5 February 2023 and 24 March 2023.

At first, the researcher analysed legal and policy frameworks in India and Nepal related to the human rights of migrant workers in the sector in the months of December (2022) and January (2023). In the first week of the February (2023), the researcher visited government agencies based in Surkhet, province headquarter of Karnali province. The researcher also contacted local stakeholders via telephones for the preparation of the primary data collection. From 5 to 19 February 2023, the researcher conducted in-depth interviews with returnee migrant workers and other local stakeholders in Surkhet. The researcher visited Kalikot on 20 February – 5 March and Jajarkot on 6-18 March 2023. The last week of fieldwork was spent again in Surkhet (19-24 March 2023). The empirical data for this study was generated mostly from the qualitative research which involved in-depth interviews with 15 Nepali migrant workers from the Karnali region and 10 key informants, such as community leaders, government officials, and civil society representatives to gather data on their socio-economic characteristics and experiences of human rights challenges. The researcher spent most of the time in identifying the returnee-migrant workers from Indian cities, establishing relationship with them, taking their consent, having informal conversation at first, and conducting in-depth interviews. The process was very time consuming and only altogether 25 people were interviewed during the 42 days long field work.

The data collected from interviews were first compiled together and transcribed along with translation into English from Nepali. As a qualitative data analysis standard, emergent codes were applied. The data are analysed through domain analysis and narrative analysis methods. A high ethical standard and safeguarding norm are applied to protect the respondents. The identities of the respondents are kept confidential in this publication to safeguard them.

## 3. Literature Review

The issues of cross border workers between Nepal and India are under studied. Most of the literatures discuss challenges faced by Nepali migrant workers in India, including low wages, poor working conditions, and exploitation. Some literatures also touch upon the legal and policy frameworks in India and Nepal related to the human rights of migrant workers. Labour migration from Nepal to India has a long history that dates back more than two centuries. Despite this, many Nepali migrants in India remain outside the scope of foreign labour policies and state coverage, leaving them vulnerable to exploitation and abuse. According to the Chandan K. Mandal, it is estimated that between 1 to 3 million Nepali work in various parts of India, with many employed in informal sectors such as agriculture, construction, hospitality, and security<sup>13</sup>. The study conducted by Basyal (2019) also highlights the lack of adequate data on remittances and the impact of remittances on the Nepalese economy<sup>14</sup>. According to Sharma and Thapa (2013), Nepali have traditionally been employed by the Indian government in roles such as the Gorkha regiments and



civil service, as well as in the private sector as security guards, domestic workers, and manual labourers in industries such as mining, tea estates, and dairy farms<sup>15</sup>. More recently, there has been an increase in Nepali students migrating to India for education and second-generation Nepali migrants pursuing white-collar professions in India. These Nepali workers in India have played a significant role in supporting their families back home through remittances. However, the impact of Nepali migration to India extends beyond financial contributions. Studies have shown that Nepali men working in Indian cities often engage in unsafe sexual practices and contract sexually transmitted diseases, which they then transmit to their partners back home. Additionally, Nepali women and children are vulnerable to trafficking into Indian brothels, circuses, and mines. Some Nepali migrant workers also use India as a transit point to reach other countries for employment, in violation of Nepal's foreign employment regulations. Pradhan (2017) notes that Nepali migrant workers in Delhi are primarily employed in the informal sector, with many working as unskilled and semi-skilled labourers<sup>16</sup>. He also observes that these workers face a range of challenges, including low wages, poor working conditions, and discrimination, with women being particularly vulnerable to gender-based violence and harassment.

The lack of legal protection and redress mechanisms for Nepali migrants in India has been a long-standing issue, with many advocates calling for stronger policies and measures to protect the rights of these workers<sup>17,18</sup>. The case study on Nepali migrants in Delhi, India discusses the remittance and livelihood of Nepali migrants in India by Basyal (2019) was an important literature for the researcher. The literature argues that job scarcity in Nepal due to low levels of industrialization and stagnancy in the agriculture sector has led to out-migration to India as an inevitable consequence<sup>19</sup>.

At a National Conference on Migration in Nepal, International Organisations for Migrations (IOM) (2016) presented findings from its study on the socio-economic and financial profile of migrants to India. The study highlighted issues such as lack of data, vulnerability of workers in the informal sector, problems with remittance transfers, and lack of social security coverage for seasonal and long-term migrants to India<sup>20</sup>. IOM also showcased best practices on migration and rural development through its Homestay Initiative by Migrants and Families project and presented findings on climate change and migration. An article by Pratik Adhikary et al. explores the experiences of Nepali migrant workers in India with regard to accessing healthcare. The study found that most migrants had difficulty accessing healthcare services in India due to barriers such as lack of insurance, low wages, and not having an Indian identification card<sup>21</sup>. Other barriers included unsupportive employers, discrimination at healthcare facilities, and limited information about the locations of healthcare services and the authors suggest that partnerships between the Nepali and Indian governments, migrant support organisations, and relevant stakeholders should be strengthened to improve access to healthcare for Nepali migrant workers in India<sup>22</sup>.

Based on the available information, it appears that these literatures cover a range of topics related to migrant workers from Nepal to India. Some sources discuss the challenges faced by Nepali workers in India, such as discrimination and lack of protection from the government.

For example, Kumar and Chaudhary discuss the impact of India's COVID-19 lockdown policy on migrant workers, including those from Nepal<sup>23</sup>. Examples from news media are, "Nepalese Migrant Workers Rush to India" by SpotlightNepal and "Nepali migrant workers start returning to work in India" by New Indian Express both report on the return of Nepali workers to India after the Covid-19 lockdown<sup>24,25</sup>. According to Kumar and Choudhary (2021), migration is a significant aspect of social science and the oldest action against poverty, however, there has been a significant difference in the migration process of developed and developing countries<sup>26</sup>. These authors further argue that, in India the migration is more induced by push factors like unemployment, regional disparities, family movement, marriage, natural calamities, etc., those in developed nations are more pull factors like prosperity, safety, freedom, etc. Furthermore, the literature by Kumar and Chaudhari argues that the fundamental and economic rights bestowed upon the domestic migrant workers and other labourers under labour laws and the Indian constitution were breached extensively during the lockdown and that the state's policies during the lockdown worsened the condition of the domestic migrant workers. The Human Rights Watch World Report 2021 discusses events in India during 2020 and mentions that the Covid-19 lockdown disproportionately hurt marginalised communities due to loss of livelihoods and lack of food, shelter, health care, and other basic needs<sup>27</sup>. It appears that there are several key issues and challenges faced by Nepali migrant workers in India. These include discrimination, lack of protection from the government, and difficulties in sending remittances back to their families in Nepal.

#### **4. Mixed Experiences of Returnee Migrant Workers**

As part of this research, the researcher interviewed 15 returnee migrant workers to understand their experiences from Karnali region who had been to India and worked in unskilled informal sector work. There is a long history of people from Karnali going to work in India. The researcher talked to people going for seasonal or long-term migration and who are staying back home during the time of data collection in Surkhet, Jajarkot and Kalikot district. The respondents consist of 10 males and 5 females. In general trend also, the male Nepali migrant workers make up a larger proportion than females. The age of the respondents ranges from 22 to 67 years, with an average age of approximately 38 years. The majority of the respondents (9 out of 15) are between the ages of 30 and 50, with only one respondent over the age of 60. In terms of the implications of the findings, it is worth noting that the gender and age of the migrant workers may have an impact on their experiences and challenges in the informal unskilled sector in India. For example, there were some responses from younger workers who shared they were more vulnerable to exploitation, while older workers did not share about the vulnerabilities as such, but they shared about additional health and safety risks because of their age. Similarly, female workers shared concerns about the discrimination and gender-based violence compared to male workers.

It is worth noting that the Nepali migrant workers went to a variety of cities in India, indicating that the issue of human rights challenges for Nepali migrant workers in India's informal unskilled sector is widespread. Among the 15 respondents whose experiences are used in these findings, 3 respondents reported going to Gujarat. 3 respondents reported going to Dharchula Uttarakhand.



4 respondents reported going to Simla. 1 respondent reported going to Gadwal. 3 respondents reported going to Mumbai. 2 respondents reported going to Chandigarh.

The respondents were minimum 6 months to 17 years stayed in cities of India. The length of the stay as migrant workers among the respondents is extremely diverse. The information is reported separately as per their experiences separately based on their lengths of stay wherever it is necessary. Otherwise, the researcher has lumped all of their experiences together based on similarities of the responses despite of their duration of the stay in host city as migrant workers. It is important to note that the length of stay in India has a significant impact on the experiences and challenges faced by Nepali migrant workers. To understand the experiences, we have to keep in mind that workers who have been in India for longer periods may have established stronger social and economic ties. On the other hand, workers who have been in India for shorter periods may be less familiar with the local culture and legal system. 4 respondents reported going back home once during their stay in India. 1 respondent reported going back home 7-8 times during their stay of 5 years in India. The majority of the respondents visit their home once in one to three years. They said it is not possible for them to frequently travel back because of the financial burden and workload. As per the interviews, it was evident that the frequency of visits back home is also affecting the social and economic wellbeing of Nepali migrant workers. Those who visit home more frequently shared that they have stronger ties to their family and community, which has provided them with more social support and a sense of belonging. However, they also reported that frequent travel was costly and time-consuming and has reduced the amount of time that workers have available for rest and leisure. Furthermore, workers who are unable to visit home frequently shared that they had experiences of isolation and loneliness, which could exacerbate mental health issues.

The type of work performed by Nepali migrant workers in India's informal unskilled sector can have significant implications for their human rights. The general types of unskilled works that 15 respondents were involved were kitchen help, waiter, sweeper, domestic household work, driver, security guard/ watchman, wage labourers in road construction, wage labourer as porter, and other informal wage labourers to support in farming or industries. For instance, workers who are engaged in physically demanding jobs, such as carrying heavy loads or working in road construction reported that they were more vulnerable to injury and health problems. Similarly, workers who are employed in low-paying jobs, such as daily wage labourers or sweepers, shared that they experienced economic insecurity and have difficulty meeting their basic needs. Additionally, workers who were engaged in jobs with long working hours or limited breaks had experienced mental stress and fatigue. The long working hours reported by some of the respondents are a human rights challenge for Nepali migrant workers. Few respondents shared the experience that the long working hours resulted in physical and mental exhaustion, leading to an increased risk of workplace accidents and health issues. It was evident that the long working hours affected the workers' quality of life by leaving them with little time to rest, spend with family, or engage in leisure activities.

Many of the respondents also reported differences in pay between themselves and local workers, with local workers receiving higher wages for the same type of work. Majority of the workers were paid less than INR 500 for their work. The average pay scale reported by the respondents is low compared to the minimum wage standards in India. The low pay scale indicates that Nepali migrant workers are exploited and underpaid in the informal unskilled sector, leading to an income gap and poverty. The low income can also be a barrier to accessing basic necessities such as food, shelter, and healthcare. Therefore, policymakers should ensure that Nepali migrant workers receive fair wages, which would enhance their standard of living and contribute to their well-being. Many respondents reported receiving low wages and facing human rights challenges, such as exploitation, not receiving pay on time, unequal pay for the same work, physical and sexual abuse, and lack of access to healthcare. It is essential to promote policies that create formal employment opportunities for Nepali migrant workers, which can improve their working conditions and lead to higher wages.

Based on the responses, it appears that the living conditions at the workplace were not very satisfactory for some of the respondents. The most common response was that they worked in an open space, which was not ideal. A few respondents mentioned that it was fine, while one said that it was good but not the best. Two respondents specifically mentioned that the conditions were not good, with one stating that there were issues with heat, toilets, and drinking water. Based on the responses provided, it seems that the respondents have worked in a variety of settings, including inside houses, open fields, and offices. Most of the respondents have worked in open fields, while a few have worked solely inside houses or office spaces. Some respondents have worked in both inside and open field settings. The living conditions at the workplace appear to have been a challenge for some of the migrant workers from the Karnali region who worked in India's informal unskilled sector. Based on the responses of the migrant workers, the conditions for residence varied widely. Some had to live in cramped quarters, with 6 or 7 people in one room or in temporary shelters made of tarpaulin. Others lived in small old houses or makeshift rooms, while some were given tin shelters that were hot and lacked facilities. Some workers reported having to put up their own tents or pay cheap rent, while others had better live conditions. It is important to note that many of the workers had to make do with whatever they could find or afford, and the quality of their living conditions was often tied to their economic situation. These living conditions indicate the lack of proper infrastructure and support for migrant workers in India's informal unskilled sector.

These responses suggest that Nepali migrant workers in India face a range of human rights challenges, including: (i) Exploitation by brokers and contractors who take the commission and don't pay fair wages or pay on time; (ii) Difficulty finding good jobs and being paid according to the work done; (iii) Unsafe and inadequate living conditions; (iv) Language barriers and discrimination by police and employers; (v) Violence, theft, and sexual exploitation; (vi) Lack of access to healthcare and justice; and (vii) Risky work and dangerous working conditions. These challenges highlight the need for better protections and support for Nepali migrant workers in India to ensure that their human rights are respected and upheld.

Out of the 15 respondents, only 2 reported experiencing abuse or physical violence. One respondent mentioned that the contractor beat them up and made accusations, while another reported having a bad experience with a boss. The other 13 respondents said that they did not face any physical abuse, although some of them mentioned that it is a common problem for Nepali migrant workers in general. Based on the responses of the 15 participants, it can be concluded that verbal bullying or violence is a common experience among foreign workers in Malaysia. 6 out of 15 respondents reported experiencing verbal bullying, while 2 others reported that it happens in their workplace. Some respondents mentioned that verbal bullying is used when mistakes are made or when contractors make various accusations. Overall, the responses suggest that verbal bullying is a prevalent issue that foreign workers face in Malaysia.

Nepali migrant workers reportedly experienced various forms of discrimination while working in India. The respondents of this research listed out some issues which included not getting proper wages for labour, not receiving work according to their skills, being discriminated against and abused by locals, facing non-payment of wages on time, labour exploitation, dismissal without reason, overworking, problems with sitting and eating, abuse of women, and not being allowed to rest. Additionally, many workers reported being robbed or beaten by the police without reason, and not receiving necessities for living. There were also instances of contractors not paying for work done, cheating workers, and not providing treatment when sick. These experiences highlight the urgent need for policies and interventions that protect the rights of migrant workers and ensure their fair treatment and wellbeing.

The researcher asked stakeholders what should be done, and they have given a wish list of things which is not really viable. The respondent answered irrelevant responses which are not solutions to address the challenges. But looking at the broad perspectives on all those suggestions provided, the Nepali migrant workers are looking for government interventions from both Nepal and India to improve their situation. During the interview, some of the returnee workers have called for an improved legal process that ensures workers receive proper compensation for their work and protection from discrimination and abuse. But majority of the returnee workers are still not sure about what kind of suggestions they make. Looking at the findings and responses from all the respondents, the research supports the fact that migrant rights and rights of informal workers are weak in India, but they are also weak in Nepal. The literature reviews already suggested those major points which are re-verified by the interviewees in this study too. While going through literatures and responses from the interviewee, it was also evident that migrant rights and rights of informal workers are just as weak for Indian informal workers too. Thus, it might be felt a general argument if the simple statements are made like "it is essential to promote policies that create formal employment opportunities for Nepali migrant workers in India" or that there should be employment opportunities in Nepal itself, or "to send only qualified and skilled workers to India". But it is important to note that, comparatively, the migrant workers from Karnali than any other provinces in Nepal are going to India because they cannot find jobs in their region which has lowest number of job opportunities inside country, and because it's easy to cross the border at a relatively low cost. It is also important to note, these migrant workers are using their agency to

decide to do this to get some income despite the many challenges and problems they face during their stay in host locations. The empirical findings verified the secondary literatures that many Nepali workers from western part of Nepal returning to India after the Covid-19 lockdown due to a lack of job opportunities in Nepal, and there is a need for greater attention to the rights and well-being of Nepali migrant workers in India, and for better policies and support from both the Nepali and Indian governments.

## 5. Voices from Nepali Civil Society and Stakeholders

The researcher interviewed 10 stakeholders representing civil society, government officers and journalists who have closely observed or worked on the issues related to Nepali migrant workers to India. From the responses of the interviewees, the migration of workers from the Karnali region to India for labour is a common and well-known phenomenon. Some of the interviewees mentioned that they have seen or heard about it since childhood, indicating that it has been happening for a long time. One interviewee even mentioned that they have lived in India for many years and have extensive knowledge about the matter. This suggests that the issue of migrant workers from the Karnali region is not a new one and has been a part of the social and economic landscape of the region for a long time. The situations also very common for the workers from India in the host areas.

These civil society members and stakeholders reported that they were often reported about the basic human rights situations such as the poor living conditions of migrant workers from Nepal in India. Some respondents mentioned that the working conditions and living spaces are "deplorable", "worse", and "not good." The local civil society members were concerned with the widespread issues with labour exploitation, discrimination, violence, and inadequate access to basic needs such as food, shelter, and healthcare. The lack of legal protections and accountability for abuses also exacerbates these challenges, leaving workers vulnerable to mistreatment and exploitation. In the opinions of respondents, it is important for governments, organisations, and individuals to work together to address these issues and ensure that the rights and dignity of all workers are respected and protected.

Civil society organisations emphasised to raise awareness about the human rights abuses and minimise discrimination faced by Nepali migrant workers in India and to work towards creating a safer and more just working environment for them. All the local stakeholders thought it is the responsibility of the central government and the employers to ensure that these workers are treated fairly and with dignity, and that their basic human rights are respected. Still, these respondents could not suggest concrete suggestions. The suggestions were very vague such as Stakeholders recommend that the government of Nepal and India should make legal provisions to ensure the safety of migrant workers. One of the important suggestions came from the local stakeholders was to arrange to listen to the complaints of migrant workers. Few respondents highlighted on the need of allowing to work in India for skilled individuals. But they were silent about the issues such as the open border, easy access to market and job opportunities and the push factors of the Karnali

regions. There was one suggestion which was mentioned by 3 respondents: “the open borders should be closed, and workers should be allowed to go to India only after a labour agreement between the two countries has been made”. This suggestion is very controversial because the current border and free travel arrangement between Nepal-India do not allow favourable condition to impose such strict policies as well as such strict policy might curtail human rights of people to have choice even worse than what option are currently available for them.

The common voice among the respondents from government stakeholders was focused on raising awareness among stakeholders about the human rights of migrant workers. Most of the representatives of civil society organisations highlighted the need for workers

being informed about the possible difficulties and obstacles faced by both the Indian and Nepalese people while working in the informal sector in India.

## 6. Discussions

We all know that the type of work that the Nepali migrant workers perform can have significant implications for their human rights. For instance, workers who are engaged in physically demanding jobs, such as carrying heavy loads or working in road construction reported that they were more vulnerable to injury and health problems. Similarly, workers who are employed in low-paying jobs, such as daily wage labourers or sweepers, shared that they experienced economic insecurity and have difficulty meeting their basic needs. Additionally, workers who were engaged in jobs with long working hours or limited breaks had experienced mental stress and fatigue. The long working hours reported by some of the respondents are a human rights challenge for Nepali migrant workers which were also common for counterpart from India. The low pay scale also indicates that Nepali migrant workers and overall, all workers from informal sectors in India are exploited and underpaid, leading to an income gap and poverty. It is evident from various studies that the low income can also be a barrier to accessing necessities such as food, shelter, and healthcare. Therefore, policymakers should ensure that Nepali migrant workers receive fair wages, which would enhance their standard of living and contribute to their well-being.

It is encouraging to see that both countries have enacted laws aimed at protecting workers from exploitation, ensuring fair wages, and regulating recruitment agencies. Additionally, both countries have ratified international conventions related to labour migration. However, the research findings suggest that there are still gaps in the implementation and enforcement of these laws, and many migrant workers continue to face exploitation and abuse. From the legal reviews conducted, there are several legal provisions in place to protect the rights of migrant workers in both countries. These laws aim to ensure that workers receive fair wages, are not exploited or bonded, and are protected from discrimination. Similarly, the Nepali government has enacted several laws to protect the rights of its migrant workers, including the Foreign Employment Act, the Foreign Employment Rules, and the Labour Act. These laws aim to regulate and facilitate foreign employment and ensure that Nepali migrant workers are not exploited or mistreated in the destination countries. The Minimum Wages Act of India (1948)<sup>28</sup> mandates a minimum wage for all workers in India,

including migrant workers. The law sets minimum wage rates for different occupations and provides for the enforcement of wage payments. The Bonded Labour System (Abolition) Act of India (1976) prohibits the practice of bonded labour in India, including the exploitation of migrant workers. The law provides for the identification, release, and rehabilitation of bonded labourers and sets penalties for employers who violate the law. The Child Labour (Prohibition and Regulation) Act of India (1986)<sup>29</sup> prohibits the employment of children less than 14 years of age in hazardous occupations, including those in which migrant workers may be employed. In Nepal, the Foreign Employment Act of 2007<sup>30</sup> regulates the recruitment and conditions of employment of Nepali migrant workers. The Act requires recruitment agencies to be licensed by the government and to provide workers with a contract that includes details such as wages, working conditions, and duration of employment. The Act also prohibits recruitment agencies from charging workers excessive fees and from engaging in fraudulent practices. The law also mandates pre-departure orientation and training for migrant workers, as well as the establishment of a welfare fund to provide compensation for injured workers and families of deceased workers. The law is clearly set for the all types of foreign labour migration, but it remains silent about the special condition about Nepal-India migration pattern. Almost all migrant workers from Nepal to India in informal sector do not need to have paperwork/documentation and such formalities.

In addition to these laws, both India and Nepal have signed and ratified various international conventions related to labour migration, including the International Labour Organization's Migration for Employment Convention (Revised) and the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Despite these laws and conventions, however, the findings from this research suggest that many Nepali migrant workers continue to face exploitation, abuse, and discrimination in India. This is not specifically targeted for Nepali workers only, but in general all workers in informal sectors in India face such challenging situation. This suggests that there may be gaps in implementation and enforcement of existing laws, as well as the need for additional measures to protect the rights and well-being of migrant workers.

In general, governments, recruitment agencies, employers, and civil society organisations all have important roles to play in protecting the rights of migrant workers. The Nepal-India informal sector most of the time does not require to pass through such official channel, which makes very difficult to translate the human rights ensured by Nepali laws for Nepali's foreign migrant workers. Even though, weaker, the Indian legal framework provide safety in its own standards through the employers. Ensuring the protection of the rights of migrant workers is a complex and ongoing process that requires sustained efforts and collaboration across multiple stakeholders. However, all the research respondents and reviewed literatures suggest that it is essential to ensure that migrant workers can work in safe and dignified conditions, with access to fair wages, social protections, and the right to be free from exploitation and abuse.



## 7. Conclusion

The reasons for migration from Karnali to India are multiple and complex. Factors such as poverty, unemployment, lack of access to education and healthcare, political instability, and environmental degradation have all contributed to the migration trend. Additionally, the open border between India and Nepal has made it relatively easy for Nepali workers to enter and work in India, without the need for visas or work permits. While migration has provided an important source of income for many families in Karnali, it has also brought several challenges and risks. Nepali workers in India often face exploitation, abuse, and discrimination, due to their informal status and lack of legal protections. Many workers are not paid fairly, work in hazardous conditions, and are vulnerable to physical and sexual violence. Furthermore, the lack of access to social security benefits, including health care and pension, leaves workers and their families in a precarious situation in case of accidents, illness, or old age.

Overall, the findings suggest that Nepali migrant workers in India face significant challenges, including poor working conditions, low wages, and human rights abuses. Of course, the workers from India also face the similar challenges in general. But these challenges may be compounded in case of Nepali workers by discrimination based on their status as migrant workers. The responses suggest that the Nepali migrant workers are looking for government support to improve their situation and ensure that they are treated fairly and with dignity while working abroad. The specific challenges faced by Nepali migrant workers may vary depending on the city they are working in, due to factors such as local labour laws, cultural norms, and economic conditions. It can be concluded that while there are several legal provisions in place to protect the rights of migrant workers, there is still a need for stronger enforcement of these laws and greater awareness among workers regarding their rights. The main pillar of human rights law enforcement for Nepali migrant workers in India is awareness among workers due to the absence of any formal migration and record keeping process. Most of the time, these workers are invisible, and their rights either can be secured by themselves or through the employers in India abiding to the existing legal frameworks in India. There is also a need for greater collaboration between the governments of Nepal and India to ensure that migrant workers are treated fairly and provided with adequate protections and benefits.

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# An Overview of Judicial Review in Women Rights in Nepal

Pampha Devi Mainali

## Abstract

*Judicial review is the review by a court of a decision made by a public authority, to ensure the decision is legal, reasonable and fair. Marbury v. Madison case is landmark decision of judicial review in which US Supreme Court declared an act of Congress is unconstitutional. Judicial review is a type of court proceeding in which a judge reviews the lawfulness of a decision or action made by a public body. It is a power of the courts of a country to examine the actions of the legislative, executive, and administrative arms of the government and to determine whether such actions are consistent with the constitution. The main functions of Judicial Review are: legitimizing the governmental action and to protect the Constitution against any undue encroachments by the government. The doctrine of Judicial Review was based on right, reason and justice. The judicial powers are exercised by Judiciary. The Supreme Court is elevated as highest judicial forum in hierarchy followed by High Courts and subordinate courts.*

**Keywords:** Judicial Review, Legitimacy, Judicial Invention, Administrative Arm, Unconstitutional Decision, Encroachment, Consistent, Biased Hearing

## 1. Concept of Judicial Review

Judicial review is the doctrine that the courts have the power to invalidate governmental action which is unacceptable to the Constitution. It is emphatically the province and duty of the judicial department to say what the law is.<sup>1</sup> Moreover, judicial review also serves another purpose that of standing for the protection of basic Human Rights of the people.<sup>2</sup> The interpretative function of the Constitution is discharged by the courts through direct as well as indirect judicial review. In direct judicial review, the court overrides an enactment on the ground that it is inconsistent with the Constitution. In indirect judicial review, while considering constitutionality of a statute, the Court so interprets the statutory language as to steer clear of the alleged element of unconstitutionality.<sup>3</sup> Judicial review is a great weapon in the hands of the judges: but the judges must observe the constitutional limits set by our parliamentary system upon their exercise of this beneficent power. It is the process whereby courts exercise control over the findings of fact and interpretations of law by governmental agencies.

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2 Apurb. Khatiwada, (2006). *Judicial Review in Nepal*, (p.v) ssrn electronic journal. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=893803](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=893803)

3 Jain, M.P. (1994). Indian Constitutional Law, (p.830) Wadhwa and Company Nagpur.

It is an example of separation of powers in modern governmental system. Where the judiciary is the one of the branches of government. Separation of power and check and balance judiciary exerts checks on other organs of the government by reviewing the Constitutionality of the laws and administrative decisions. In course of Constitutional development Judicial Review has developed not only into a means of checking executive or legislature but has also developed into an ultimate watchdog of the people's fundamental rights.<sup>4</sup> Main issues of judicial review are: Unconstitutional decision and procedural error, illegal decision and biased hearing, Irrational and unreasonable decision, breach of legitimate expectations, improper procedures etc.

Judicial review is a way of challenging the decisions, acts of a public body, because it has not acted lawfully. Under the judicial review procedure, judges examine or review the decision being challenged in the claim, and consider whether the law has been correctly followed by the public body.<sup>5</sup> Constitutionally, the Supreme Court has power of Judicial Review. The Supreme Court is empowered to have any law or any part there of declared void on the ground of inconsistency with the Constitution, because it imposed an unreasonable restriction on the enjoyment of the fundamental rights conferred by the Constitution. Judicial review is an audit of the legality of decision-making by public bodies. It is not a matter of re-making the decision but assess the process of decision to decide the flaw and revoke it. All bodies exercising functions of a public law nature are liable to challenge. Public body's decisions can be subject to judicial review. Judicial review is to be distinguished from appeal, which is sometimes available as a means of contesting and administrative decision. It is the exercise of an ancient and inherent supervisory jurisdiction of the court, by which excess or abuse of public power may be restrained. The decision of a minister, local authority, and public body may be challenged in court by recourse to the machinery of judicial review.<sup>6</sup> The Supreme Court has well performed its task of protecting the rights of the individual against the Executive, Legislation and even against legislature itself, when it becomes over-zealous in asserting its privilege not only against the individual but even against the judges. At the same time, it should be observed that neither the guarantee of Fundamental Rights nor its adjunct judicial review could have full play during the first quarter of a century of the working of our Constitution owing to their erosion by Proclamations of Emergency over a substantial period of time.<sup>7</sup>

While exercising the power of judicial review of administrative action, the Court is not the appellate authority and the Constitution doesn't permit the Court to direct the executive in matter of policy. In matter of policy decisions by the government so long as the infringement of fundamental right is not shown courts will have no occasion to interfere and the Court will not and should not substitute its own judgement for the judgement of the executive in such matters.<sup>8</sup> The most remarkable achievement in post-constitution India is the exercise of the power of judicial review by the superior courts. So long as this power is wielded by the Courts effectively and

4 Supra note 2 at vi.

5 *An Introduction to Judicial Review*, 2 (Public Law Project, UK).

6 Turpin Colin & Tomkins Adam, (2009). *British Government and The Constitutions* (p. 654), Cambridge University Press.

7 Basu, Dr. Durga Das (2013). *Introduction to the Constitution of India* (p. 443) LexisNexis, India.

8 Awasthi, Dr. S.K. (2008). *The Constitution of India* (p. 691) Dwivedi Law Agency Allahabad.

fearlessly, democracy will remain ensured in India and with all its shortcomings, the Constitution will survive.<sup>9</sup>

By relating judicial review to political uncertainty, this account provides a new perspective on the spread of judicial review around the globe in the latest "wave" of democratic Constitution writing. The spread of judicial review does not merely reflect a norm among Constitution drafters, but a response to the particular problems of electoral uncertainty that they face. As judicial review spreads to new environments and appears to function successfully, it becomes easier for new democracies to adopt it as they engage in constitutional reform and drafting. The spread of judicial review is self-reinforcing as its institutional reputation grows.<sup>10</sup> Judicial review may also be attractive to minorities even in the face of majority dominance because political pressures on judges are costly.<sup>11</sup>

The Constitution of Nepal, 2072 has embodied the concept of limited government and independent of judiciary. In the case of operation of decision of the Supreme Court nullifying the law Article 133(1) states explicitly and empowers the court to declare any law void from the date of declaration. Locus standi to challenge the law is also widened. The doctrine of advisory litigation as limitation up as judicial review has been completely undone by the Constitution.<sup>12</sup> The judicial review of legislation shall be incorporated in those constitutions where a Constitution is the fundamental law of the land, supreme law or Constitution's status is superior to other laws.<sup>13</sup> Judicial review is only available to test the lawfulness of decision made by public bodies.<sup>14</sup>

Judiciary is the key organ of modern state. One of the chief functions of the Judiciary is playing a law-creative function.<sup>15</sup> The Judiciary is the third organ of the government. It has the responsibility to apply the laws to specific cases and settle all disputes. Role of Judiciary as the guardian-protector of the Constitution and the fundamental rights of the people makes it more respectable than other two organs. The Supreme Court is the highest judicial forum and final court of appeal under the Constitution of Nepal. The main purpose of judicial review is to establish the supremacy of the Constitution and the law, it controls the arbitrariness of government and protects civil liberties by maintaining the rule of law. The judicial review is exercised to make state organs and bodies as well as government and public officials disciplined and accountable.<sup>16</sup> Judicial review has two important functions: Legitimizing the governmental action and to protect the Constitution against any undue encroachments by the government.

9 Basu, Dr. Durga Das (1997). Introduction to The Constitution of India (p.405) LexisNexis, India.

10 Ginburg, Tom (2003). Judicial Review in New Democracy (p. 31) Cambridge University Press, USA.

11 Ibid at 32.

12 Kharel, Laxmi Prasad (2016). Constitutional Law and Comparative Nepalese Constitutions (p.89) Pairavi Prakashan, Kathmandu.

13 Ibid at 87.

14 Ibid at 88.

15 Mohana Rao Dr. P. (2019). *Judicial Review as an Inviolable Part of Basic Structure of Constitution* (p. 1). International Journal of Law, Management and Humanities.

16 Bhattarai, Shyam Kumar (2023). *Conceptual Framework of Judicial Review with Reference to Nepal, Advances in Sciences and Humanities* (p. 53).

## 2. Research Methodology

The methodology of study will be doctrinal. Both primary and secondary sources of information will be collected, studied and analyzed. Materials will be obtained from various sources. Among them Constitution, Conventions, Acts, Rules, decisions of the Supreme Court are the primary sources of information. Similarly, books, articles, journals are secondary sources of information for this study. Data so obtained will be analyzed through analytical, historical, descriptive and comparative method of analysis.

This research paper has based on doctrinal method of research. It has been prepared by researcher applying descriptive, comparative approaches. The study is based on the primary and secondary information. The sources of primary information are cited from the Constitution of Nepal, 2072 (2015) and other domestic legislation. Secondary sources of data have been analyzed from previous academic writings, relevant books. Articles, reports, different websites etc.

## 3. Practice of Judicial Review

England has no written constitution and therefore, there is no direct judicial review. But courts do resort to indirect judicial review at times.<sup>17</sup> The Constitution of Canada or Australia does not contain any provision for judicial review, yet the process goes on. The historical origin of judicial review in these countries is traceable to the colonial era.<sup>18</sup> The doctrine of judicial review was thus ingrained into the legal fabric of Canada and Australia and therefore, no need was felt to include a specific constitutional provision in the basic laws of these countries.<sup>19</sup> Judicial review is an integral part of the constitutional process, it is a part of the living constitution in the USA and India.

The doctrine of judicial review is an integral part of the American judicial and constitutional process although the Constitution does not explicitly mention the same in any provision. The Constitution merely says that it would be the supreme law of the land. Before the Constitution the legislation of the American colonies was subject to judicial review. But after the Constitution in 1803, in *Marbury v. Madison* is one of its most creative opinions, the U.S. Supreme Court very clearly and specifically claimed that it had the power of judicial review.<sup>20</sup> *Marbury v. Madison* case is the first case or landmark decision of judicial review in which US Supreme Court declared an act of Congress is unconstitutional. In the U.S.A., in the area of constitutional interpretation, judges have always accepted a law-creative role and from time to time have made statements putting emphasis on judicial activism in constitutional matters.<sup>21</sup> Judicial review of administrative action and legislation stand on a different footing.<sup>22</sup>

17 Jain, M.P. Indian Constitutional Law, supra note 3 at 830.

18 Ibid at 831.

19 McWhinney, Edward (1964). *Judicial Review* (p.65), (University of Toronto Press).

20 Jain M.P. Indian Constitutional Law, supra note 3 at 831.

21 Ibid at 834.

22 Basu, D.D. *Constitutional Law of India* (2011). (p. 422), (LexisNexis Butterworths Wadhwa, India).

## 4. Grounds for Judicial Review

Judicial Review is the power of the Supreme Court or High Court to examine an act of public authorities and to overturn that act if it is contrary to constitutional principles. This power has been incorporated in the Constitution itself and cannot be done away with since it is a basic feature. There are several grounds the judiciary can exercise its power. Compliance with the Constitution and protection of civilian rights are the fundamental basis of judicial review.<sup>23</sup> Jurisdictional errors are subject to review in cases when there is a lack of jurisdiction, excess of jurisdiction or an abuse of jurisdiction. Generally, grounds of judicial review are illegality of law, irrationality, violation of natural justice, unreasonableness, ultra vires, abuse of power, jurisdictional error, misuse of discretionary power, failure to comply with the mandatory procedural requirement and apparent error of law on the face of the record.<sup>24</sup> Lord Diplock has classified the ground of judicial review using the three broad classes of illegality, irrationality, and procedural irregularities.<sup>25</sup>

Another ground of the judicial review is if a statute or executive or administrative action action violates the fundamental rights that are guaranteed in the Constitution. If there is a legal question involved in any disputes of the public interest shall become one of the grounds of the judicial review.<sup>26</sup> Its concern is whether a decision-making authority has exceeded its power, committed an error of law, committed a breach of rules of natural justice, and reached a decision without reasonable ground or by abusing its power. It is an established fundamental fact that on an application for judicial review, the court will not review the merits of the decision but will confine themselves to ensuring, in brief, that the authority did not act illegally, unreasonably, or unfairly.<sup>27</sup> It also defines the role and responsibility of the legal and political branches of the state organ. The great argument of judicial review is that state organs along with the legislature and executive have not a right to violate the constitution, if they do so, the only remedy is judicial review.<sup>28</sup>

## 5. Judicial Review and Women Rights in Nepal

### 5.1 Women Rights History in Nepal

Nepal is patriarchal society. Women and men are always called the two wheels of the chariot, yet patriarchal society believes women as second-class citizens, always behind their male counterparts. Females face gender-based violence and this greatly limits their ability to attend school education. Also, religion restricts the opportunities for women to receive education. The low rate of literacy for women can be attributed to the discrimination they face at home. The major issues faced by women were Gender Based Violence, Child marriage, trafficking of women, transitional justice, unequal representation and participation of women in decision making. In Nepal, discrimination against women began with the practice of horrible widow-burning custom (Sati pratha), which

23 Supra note 16 at 55.

24 Supra note 16 at 55.

25 Council of Civil Service Union et al., Vs Minister for the Civil Service, 1984, 935.

26 Ibid at 105.

27 Gordon QC. Richard & Ward Tim (2000). Judicial Review (p.175), Cavendish Publishing Limited London.

28 Supra note 16 at 56.



was abolished at Rana dynasty by Prime Minister Chandra Shamsheer in 1920 A.D. This custom is no longer in practice today, but it was one of the cruel practices of traditional society that kept women devoid of their willingness to live. Abolishment of this custom is a milestone of women's rights movement in Nepal.

In this way, Menstrual Exile (Chhapupadi) has been discriminatory against women. It is a social practice where menstruating women are displaced from their own house during their menstruation time. The practice is still can be seen in far-western regions of Nepal, but its abolishment was an encouraging step for menstruating women. Supreme Court of Nepal banned all forms of Menstrual Exile in (2062) 2005. In 2074 (2017), Nepal passed a law punishing people who force women into exile during menstruating and imposed a fine of 3000 rupees or a term of three month's imprisonment or both on those who continued to behave in this way. Due to the growing inequality and violence against women, free legal aid was made available by the government of Nepal through the enactment of Legal Aid Act, 2054 (1997). In this way, Public Interest Litigation (PIL) was one of the key tools used by women to voice their opinions and enactment of women's rights. The newly elected democratic government ratified numerous laws and international treaties specific to women.

Nepali citizens could acquire citizenship only based on the father's citizenship but, the Citizenship Act, 2063 (2006), said that a child can acquire Nepali citizenship if either of her/his parents has Nepali citizenship too. In this way, The Interim Constitution of 2063, a 33 percent quota was reserved for women in the political system. According to the Domestic Violence (Offence and Punishment) Act, 2066 (2009) the domestic violence survivors got the platform to report the abuse. Domestic Violence (Offence and Punishment) Rules, 2067 (2010), further directs the need for prompt health checkups and protection of survivors. Currently, Nepal has introduced a new law defined marital rape as a crime and also set a punishment for marital rape. In Section 219(4) of Muluki Criminal Code 2074 states "if the husband commits rape to the wife, except in any of the following circumstances, he shall be liable to punishment with imprisonment not exceeding five years". This allowed women suffering in an abusive relationship to get out of it and even get compensation. These are some milestones of the women rights movement in Nepal's history.

### 5.2 Judicial Review in Women Rights

In Constitutional jurisprudence, the term judicial review has been employed differently. Judicial review is an armor to check lawlessness of legislative as well as the executive. The previous Constitution of Kingdom of Nepal, 2047 had fully internalized the full-fledged concept of judicial review in the Constitution. The judicial review of legislation shall be incorporated in those Constitutions where a Constitution is fundamental law of the land supreme law or Constitution's status is superior to other laws.<sup>29</sup> If a public body as defined in law makes an error of law, the courts-through the process of judicial review-will intervene to ensure that the body in question reconsiders a matter and acts in a procedurally correct manner. If judicial review is applied for and

<sup>29</sup> Supra note 12 at 103.



the court rules that the body whose decision is being challenged is a private body, then the remedy of the aggrieved individuals will lie in private law, not public law proceedings.<sup>30</sup>

Women's rights can be defined, integrated, and implemented in many ways. Every right that exists to be guaranteed, a woman needs sometimes. So in any nation, including Nepal, it is helpful to have a treaty framework encompassing the basic international treaties, which Nepal essentially has. Women's rights aren't just rights to women as women only; they have to include all rights if she is to be part of the mainstream. All economic rights, social rights, cultural rights, political rights, civil rights, and on the criminal side rights from torture, rights against genocide, rights in war as civilians—all of those rights have to be there.<sup>31</sup> All human rights need to be guaranteed for women to have human rights and to be available to be implemented in a domestic legal setting. Often when people think about women's rights they think about CEDAW, and yes one needs that, but one also needs everything else. That treaty framework which has existed for some time in Nepal.<sup>32</sup> The Interim Constitution of Nepal, 2063 has embodied the concept of limited government and independent Judiciary. There are some landmark decision of women rights in Nepal:

*a. Rina Bajracharya vs Cabinet Secretariat and others*

In this case the Supreme Court of Nepal, held that "the provision of article 11(3) of the Constitution which provides special provision for the protection and advancement of the downtrodden including women is not a negative obligation but is positive obligation to make law for the protection and advancement of women". Hence Court made it clear that the unequal treatment for unequal does not mean that one should be discriminated in the name of unequal treatment.<sup>33</sup>

*b. Sapana Pradhan Malla vs Ministry of Law, Justice and Parliamentary affairs and others.*

In this way, the Supreme Court made it even clearer that classification of any nature for the purpose of Article 11 should be just and reasonable. And the impugned provision, number 7 of the chapter of Rape of Muluki Ain, which made distinction between a prostitute and a non-prostitute women was declared unreasonable and then unconstitutional.<sup>34</sup> In the case of *Sapana Pradhan Malla vs. the Government of Nepal*, the Supreme Court of Nepal has issued directives order for the privacy and protection of the victim in certain cases, including sexual and gender based violence.<sup>35</sup>

*c. Mira kumara Dhungana vs Ministry of Law, Justice and Parliamentary affairs and others*

In this case, Court issuing directive order to the government to revise the impugned provision, Number 16 of the chapter of Partition of Muluki Ain, which entitled daughters to their ancestral property only if they are unmarried and have passed the age of 35 contrary to sons who could establish his right over such property immediately after his birth.<sup>36</sup>

30 Ibid at 104.

31 Mackinnon Catharine, (2008). Mainstreaming Women's Rights Issues in the Justice System, (p.227) NJA Law Journal.

32 Ibid at 227.

33 NKP 373, 2057.

34 Writ n. 56, 2058.

35 NKP2063, Writ No.: 3561.

36 Writ no. 55, 2058.

### *d. Sharmila Parajuli vs. Government of Nepal*

In the case of, the Supreme Court of Nepal has ordered to make appropriate laws by making a study on sexual harassment by taking a special reference to Article 2 of CEDAW which states that state has the obligation to adopt measures in order to prevent sexual harassment and any kind of discrimination against women.<sup>37</sup>

### **5.3 Relevant Laws of Women Rights in Nepal**

The Constitution of Nepal, 2072 Article 38 guarantees the Rights of Women as one of its fundamental rights of women. Article<sup>38</sup> has also made a determined effort to combat Sexual and Gender Based Violence by passing specific legislation on different aspects of Sexual and Gender Based Violence, including: the Domestic Violence (Offense and Punishment) Act 2066 (2009); the Human Trafficking and Transportation (Control) Act (2064) 2007; The Sexual Harassment at the Workplace (Elimination) Act, 2071 (2015); the Witchcraft Allegation (Offense and Punishment) Act, 2072 (2016); the Gender Based Violence Relief Fund Regulation; and the different chapters of the Country Criminal (Code) Act, 2074 (2017) that set out the laws on rape, sexual abuses, marriage, menstrual violence, discrimination, acid attack, dowry and cyber-crime.

The Chapter on Rape in Country Criminal (Code) Act, 2017<sup>39</sup> defines the crime of rape as non-consensual intercourse with an adult woman or any intercourse with a girl under 18 thereby defining rape as committed by men against women and girls. The chapter stipulates the punishment for the offender, ranging from 10 to 20 years imprisonment.<sup>40</sup> Section 220 states about the rape not be committed within incest. Similarly, it prohibits sexual abuse against child.<sup>41</sup> Section 228 mentions about the appropriate compensation to the victim. The limitation to file the case is 1 year from the date of occurrence of offence except in the incest rape.<sup>42</sup>

The Domestic Violence (Offense and Punishment) Act, 2009 gives the right to file claims with the Police Office, National Women's Commission or local bodies (such as municipalities and village executive), by any person who has reason to believe that an act of domestic violence has been, is being, or is likely to be, committed.<sup>43</sup> A person who commits an act of domestic violence shall be punished with a fine of three thousand rupees up to twenty five thousand rupees or six months of imprisonment, or both.<sup>44</sup> The Act provides that the proceedings of such cases shall be in-camera.<sup>45</sup> It also provides for compensation to be granted to the victim of domestic violence, depending on

37 Writ no. 55, 2058.

38 The Constitution of Nepal 2072, Article 38 (1), (2), (3), (4), (5), (6).

39 Country Criminal Code 2074 (2017), Section 219.

40 Country Criminal Code 2074, Section 219 (3).

41 Country Criminal Code 2074, Section 225.

42 Country Criminal Code 2074, Section 229.

43 Domestic Violence (Offense and Punishment) Act 2066 (2009), Section 4

44 Domestic Violence (Offense and Punishment) Act 2066, Section 13 (1).

45 Domestic Violence (Offense and Punishment) Act 2066, Section 7.

the nature of the act of domestic violence and degree of pain suffered by the victim.<sup>46</sup> The offense of domestic violence must be reported within 90 days of the commission of the crime.<sup>47</sup>

The Human Trafficking and Transportation (Control) Act 2007 states that any person who commits an offence of buying or selling a human being, shall be punished with twenty years imprisonment and fined two hundred thousand rupees.<sup>48</sup> The Act also provides for a translator and interpreter, if the working language used by the concerned court is not understandable by the victim.<sup>49</sup> Sexual Harassment at the Workplace (Elimination) Act, 2015 defines sexual harassment at the workplace as physical touch with sexual intent, demonstrating sexual objects, audiovisual objects or other seductive materials at the workplace. Country Criminal (Code) Act, 2017 prohibits sexual harassment at any places.<sup>50</sup> In this way, The Witchcraft Allegation (Offense and Punishment) Act, 2016 defines an offence of making a witchcraft allegation as the act of alleging any person practices witchcraft. It provides for victim protection and compensation.<sup>51</sup> Similarly, Country Criminal (Code) Act, 2017 prohibits inhumane treatment to any person.<sup>52</sup>

Country Criminal (Code) Act, 2017, chapter on Sexual Violence defined marital rape is a sexual intercourse by a husband with his wife without her consent. According to this clause, any husband who commits marital rape shall be punished with imprisonment up to 5 years.<sup>53</sup> The Country Civil (Code) Act, 2017 also provides that marital rape can be one of the grounds for divorce.<sup>54</sup> The Country Criminal (Code) Act, 2017 further provides that, a wife who has filed a claim of marital rape shall be provided with special security until the case is decided by the court. Country Criminal (Code) Act, 2017, prohibits bridegroom and his family to transact expensive gifts and property from a bride's family. The Act prohibits the Bridegroom's side or vice versa from compelling the bride's side or the groom's side to give cash, goods, Dowry, donation, gift, or farewell gift for the bride or bride groom.<sup>55</sup> The Country Criminal (Code) Act, 2017 states that any act of discrimination, untouchability or inhumane act towards women by keeping her in "menstrual exile " in her menstrual period is prohibited.<sup>56</sup> The punishment imposed on such act is up to 3 months of imprisonment or fine up to Rs. 3, 000 or both.<sup>57</sup>

## 6. Finding

Judicial review in Nepal likely focuses on protecting fundamental rights guaranteed by the Constitution. I already included some major cases where the courts have intervened to safeguard

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- 46 Domestic Violence (Offense and Punishment) Act 2066, Section 10.
  - 47 Domestic Violence (Offense and Punishment) Act 2066, Section 14.
  - 48 Human Trafficking and Transportation (Control) Act 2064 (2007), Section 15.
  - 49 Human Trafficking and Transportation (Control) Act 2064, Section 11.
  - 50 Country Criminal Code 2017, Section 224
  - 51 Witchcraft Allegation (Offense and Punishment) Act 2016, Sec 6, 7, 12, and 17.
  - 52 Country Criminal Code 2074, Section 168 (1).
  - 53 Country Criminal Code 2074, Section 219 (4)
  - 54 Country Civil Code 2074 (2017), Section 95.
  - 55 Country Criminal Code 2017, Section 174 (1).
  - 56 Country Criminal Code 2017, Section 168 (3).
  - 57 Country Criminal Code 2017 Section 168 (4) (5).

citizens' rights and liberties. The judiciary may review government actions, decisions, and policies to ensure they arrange with constitutional principles. Nepal has included PIL in some cases brought by citizens or organizations in the public interest. This could include the issues related to environmental protection, social justice, and other matters affecting the public. Findings judicial review may reflect the balance between judicial activism and judicial restraint. The courts may involve in activism to protect rights and promote justice, but findings may also address concerns about potential overreach. This could include cases where international standards are considered in judicial review decisions. The major findings of JR in Nepal are given below:

- a. Nepal has experienced significant constitutional changes over the years, particularly with the promulgation of the new Constitution in 2072. The Supreme Court of Nepal has the authority to review laws, policies, and actions of the government to ensure they arrange with constitutional principles.
- b. Judicial review in Nepal serves as a mechanism to protect fundamental rights guaranteed by the Constitution.
- c. Judiciary of Nepal acts as a check on the powers of the executive and legislative branches of government. Through judicial review, the court can strike down laws or executive actions that are unconstitutional.
- d. The several landmark judicial review cases that have had significant implications for good governance, human rights, and democracy.
- e. Judicial review promotes transparency and accountability in governance by subjecting governmental decisions to scrutiny.

## 7. Conclusion

Judicial review is an essential component of modern constitutional democracies because it ensures that the government respects the rights and liberties of its citizens. It serves to stop government abuse of power and advance democratic principles like the rule of law and the preservation of individual rights by giving the judiciary a way to review and invalidate unconstitutional laws. Judicial review is a process under which executive and legislative actions are subject to review by the judiciary. A court with judicial review power may invalidate laws and decisions that are incompatible with a higher authority.

Definitely to declare any law ultra vires to the Constitution is a very demanding task for any judiciary. Especially when such declaration is for the law made by people's representative themselves, which may at times invoke counter majoritarian arguments against judicial review. Hence, it must always balance between rule of law and democratic values, keeping in view wider objective of securing constitutional rights of the citizens.

If judicial review effectively active it can play a significant role in safeguarding and promoting women's rights. Courts can interpret existing laws and provisions to ensure they are consistent

with constitutional guarantees of gender equality. It provides a mechanism for challenging and striking down laws or policies that discriminate against women. Through judicial review, women may have improved access to justice. Courts can address issues such as gender-based violence, discrimination, and unequal treatment, providing a forum for women to seek remedies for violations of their rights. Judicial decisions can empower women's rights activists and organizations, providing legal backing to their advocacy efforts. It can also encourage a broader societal discussion on gender equality issues. It's important to note that the effectiveness of judicial review depends on various factors, including the independence of the judiciary, the legal culture of the country, and societal attitudes. For the most current and specific information on judicial review and women's rights in Nepal, it is recommended to refer to recent legal developments and cases in the country.

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# Bridging Rights and Realities: Human Rights Challenges for Refugees in Nepal

Mandira Shrestha

## Abstract

*Nepal has hosted refugees from various neighboring countries like Tibet, Bhutan, Afghanistan, Pakistan, Myanmar including some African countries, as they flee persecution, armed conflict, violence, disaster that lead them to the deprivation of dignified life and liberty. There have been various challenges for refugee protection in Nepal in terms of legal, social, and humanitarian dimensions. The presence of refugee populations emphasizes on the importance of enhancing the capacity of government agencies, promoting community awareness, advocacy for the exploration of durable solutions such as voluntary repatriation, resettlement, and local integration. However, a large population residing in Nepal without proper fulfillment of basic needs is continuously suffering because of legal uncertainties and gaps in specific legislative frameworks and formal recognition mechanisms in Nepal. Similarly, lack of national strategies for monitoring and reporting mechanisms, collaborating with national and international communities for the effective advocacy, policy reforms and developing legislation aligned with international standards causes even more challenges. However, there has been potential to improve refugee protection mechanisms, to address vulnerabilities, and to uphold the rights and well-being of refugees, contributing to a more inclusive and humane society.*

**Keywords:** threat to persecution, asylum, refugee protection, displacement, Bhutanese refugee, Tibetan refugee, refugee rights, domestic legislation, international human rights standards, voluntary repatriation

## Introduction:

Refugee is someone who has been forced to flee their home countries due to well-founded fears of persecution based on race, religion, nationality, political opinion, or memberships in a particular social group, who is unable or unwilling to return to their country of origin.<sup>1</sup> Additionally, displaced persons are categorized into asylum seekers, refugees, economic migrants and internally displaced person.<sup>2</sup> Legal status of refugee refers to the formal recognition of a person's rights and responsibilities under national and international laws, including the right to seek asylum and access to essential services. Refugees have the right to safe asylum and not to be returned to possible persecution in their country of origin.<sup>3</sup> In ordinary sense, refugee refers to the person in

1 Convention relating to the Status of Refugee, 1951

2 United Nations High Commissioner for Refugees (UNHCR), A Pocket Guide to Refugees 2008 page 11-32

3 United Nations High Commissioner for Refugees (UNHCR) <https://www.worldvision.org/refugees-news-stories/what-is-a-refugee-facts>



flight who seeks to escape social conditions or personal circumstances found to be intolerable for the survival of live. The reasons of flight may be from oppression, threat to persecution, violence, deprivation, grinding poverty, conflict, and natural calamities.

There has been a strong linkage between refugee protection and human rights. People forced to flee are often deprived of their fundamental rights to live without distinction in order to get basic facilities to live as human.<sup>4</sup> Seeking asylum is a human rights and anyone fleeing persecution, conflict or human rights abuses has a right to seek protection in another country.<sup>5</sup> Nevertheless, such individuals are subjected to fulfill rights and duties enshrined in international human rights standards and the domestic legislation of concerned state.<sup>6</sup> When individuals are compelled to leave their homes due to circumstances beyond their control, they deserve the opportunity to establish a life with dignity and security in a new environment, with the hope of returning home once conditions allow for it.<sup>7</sup>

Nepal has significant presence of refugees from different part of world, who may have suffered from various human rights violations as they are vulnerable to enjoy basic necessities in terms of food, shelter, healthcare and security, and are to be protected by host country. Tibetan, Bhutanese and other refugees residing in various camps in Nepal are to be protected with the assurance of human rights as Nepal is a party state to various international human rights instruments. The protection and legal status of refugees in Nepal is a critical issue with profound humanitarian and legal implications. Based on the contemporary presence of refugees from various nations and existing legal complications for addressing them in Nepal, this study on 'Bridging Rights and Realities: Human Rights Challenges for Refugees in Nepal' adopted a comprehensive methodology, aiming to contribute significantly in advancing discourse, policies and practices related to refugee protection and their legal status. Additionally, the study seeks for positive outcomes and improved conditions of refugees in Nepal that can inform recommendations, interventions, and advocacy strategies aimed at enhancing refugee rights and protections within unique socio-economic and political landscape of Nepal by maintaining social harmony and peace.

### **Historical Context of Refugee Movements in Nepal:**

Throughout history, the trend of displacement of people from place of origin, seeking sanctuary, finding safety, and protecting them from danger has been a global phenomenon.<sup>8</sup> People are forced for transference because of well-founded fear of persecution, deprivation of rights and safety. The protection of refugees has been considered as customary international law. International arrangements for refugee began after World War I during the period of League of Nations, with the establishment of the High Commission for Refugees in 1921, followed by various initiatives

4 United Nations High Commissioner for Refugees (UNHCR) <https://www.unhcr.org/what-we-do/protect-human-rights> [accessed 27 April 2024]

5 United Nations High Commissioner for Refugees (UNHCR) <https://www.unhcr.org/us/about-unhcr/who-we-protect> [accessed 3 May 3, 2024]

6 Article 2 General obligations, The Refugee Convention, 1951

7 United Nations High Commissioner for Refugees (UNHCR) Global Appeal 2024, The UN Refugee Agency

8 Joshi Sarat C., PROTECTING HUMAN RIGHTS OF REFUGEES Issues and International Intervention, 2011

such as the Nansen International Office for refugees, the inter-governmental Committee for Refugees, and eventually the International Refugee Organization in 1947.<sup>9</sup> Later the broad issues of refugee are coined in the Convention Relating to the Status of Refugee in 1951. The legal status of refugees has historical roots in modern Western history, where in the 19th century, rulers of European powers readily accepted individuals seeking to migrate even though there have been traces of flight in other parts of the world.<sup>10</sup> Guy Goodwin Gill argues that customary international law now recognizes a new class of refugees, extending the principle of non-refoulement to individuals outside the conventional refugee definition who lack government protection against imminent danger, such as civil disorder or human rights violations, and should be granted refuge unless the state can prove the absence of continued risk.<sup>11</sup> There are 59.5 million refugees and internally displaced people and 10 million stateless people living in limbo without citizenship, who are forced from their homes due to the conflict and are forced to live in deprivation of minimum standard of living.<sup>12</sup> United Nation High Commission for Refugees (UNHCR) states that there are 35.3 million refugees globally and 29.4 million among them needs protection. Providing shelter and aid was originally a religious obligation to many religions to help people in need before the integrated form of international instruments relating to refugee protection. The transition from granting asylum or refugee status based on religious charity to a state-mandated responsibility grounded in the concept of national sovereignty marks a pivotal evolution. This shift, acknowledged as a fundamental human right within international legal frameworks, reached its apex with the ratification of the Universal Declaration of Human Rights in 1948. Like many countries around the globe, Nepal is also a destination or transit for seeking asylum or refugee. Nepal has witnessed a notable influx of diverse refugee populations as of its renowned tranquility amidst neighboring strife. However, tracing the historical footprint of refugee presence in Nepal is a challenging task due to the lack of proper mechanisms of documentation. In addition to the refugees from Tibet and Bhutan, Nepal has hosted refugees from other countries such as Myanmar, Afghanistan, Pakistan and some African countries, among which are staying without adequate standard of living.

Tibetans have a significant presence among refugee populations of Nepal, with their displacement following Chinese occupation of Tibet in 1950.<sup>13</sup> Fleeing political persecution and cultural repression, Tibetan refugees sought refuge in neighboring countries, including Nepal. Nepal initially provided sanctuary to Tibetan refugees, allowed them to settle in designed areas, primarily in the Kathmandu Valley and other parts of the country by providing de facto asylum. They are living in a somewhat precarious legal situation, as their status has not been formally recognized under Nepali legal grounds. Some Tibetan refugees have been able to integrate into Nepali society and establish businesses or pursue education, but many continue to face challenges in terms of

9 K.C Yadav Kumar 2016. Refugee Law Theory and Praxis: A Nepalese Perspective page 4

10 B.S. Chimni (ed.), International Refugee Law, (1st Ed.), New Delhi, Sage Publications, Reprint 2007 page 19

11 ibid 8 page 20-21

12 Refugee International, [www.endslaverynow.org/refugee-international](http://www.endslaverynow.org/refugee-international) [accessed 25 April 2024]

13 KMC Journal. Livelihood Patterns of the Tibetan Refugees in Kathmandu. page 75

legal status, access to education, employment opportunities, and social integration.<sup>14</sup> As of present day, there are still Tibetan refugees residing in Nepal, including individuals and families who have been living in exile for decades.

The presence of another largest group of refugees is from Bhutan. The Bhutanese refugee community in Nepal stems from the lineage of Lhotshampa community, Nepalese migrants who arrived in Southern Bhutan during the late 1890s.<sup>15</sup> They are initially invited by the government of Bhutan to assist in the clearance and cultivation of the southern jungles of Bhutan. These settlers eventually found themselves displaced when Bhutan government implemented discriminatory policies, excluding them. As tensions escalated, protests erupted, prompting the government to clamp down on what they perceived as distinct voices, drive them to surface of arrests, torture, sexual violence, extortion, and arbitrary detention. In 1991, a wave of Lhotshampa from Southern Bhutan, numbering in the thousands, embarked on a hazardous journey to Nepal via India.<sup>16</sup> Nepal accommodated them in various refugee camps and settlement in the eastern part of the country, notably in the areas of Jhapa and Morang districts of Terai region. Such camps became home to thousands of Bhutanese refugees for many years, with limited prospects for return or resettlement. Similarly, facing systemic discrimination, violence, and denial of citizenship rights, Rohingya Muslims have been forced to flee their homes, leading to one of the largest refugee crises in the world,<sup>17</sup> whereas Nepal has not been a primary destination for Rohingya refugees due to the geographical and cultural factors, there have been significant traces of their presence in Nepal. The plight of Rohingya refugees underscores the global challenge of protecting vulnerable populations and ensuring their rights to asylum and safety. The presence of various refugee communities continues to be an important aspect of Nepal's refugee landscape and raise ongoing discussions about legal status, protections, rights and integration challenges faced by refugees in the country. Resettlement to third countries, facilitated by the United Nations High Commissioner for Refugees (UNHCR) and other agencies, has been a better option for some refugees seeking permanent resettlement and opportunities. But such initiatives seem not enough to address all the refugee populations residing in Nepal for the protection of their rights and to mark their obligations to follow the legal standards of the country in order to maintain social harmony and public acceptance.

### **Legal Framework on the Protection of Refugee:**

The legal framework of the host country governing the protection of refugees plays a vital role in safeguarding the rights and well-being of individuals forced to flee their homeland due to persecution, conflict, or violence. Similarly, international instruments relating to refugee protection create obligations for their state parties to respect and protect the people in need. International

14 Ibid 8 page 74

15 Peace and Democracy in South Asia, THE BHUTANESE REFUGEES: BETWEEN VERIFICATION, REPATRIATION AND ROYAL REALPOLITIK. Vol. 1. 2005.

16 ibid 11

17 Nepal and the Rohingya Refugees. 2017 <https://thediplomat.com/2017/12/nepal-and-the-rohingya-refugees/#:~:text=While%20the%20overwhelming%20majority%20of, repressed%20people%20in%20the%20world>

convention and its protocol relating to refugee establish international legal framework for defining refugees, their rights, and the obligations of states towards refugees and provide guidance on key principles such as non-refoulement, the right to seek asylum, access to protection, non-discrimination, and the right to food, shelter, health and well-being. Nepal is the habitation of refugees from various countries, but lacks comprehensive domestic legislation specifically focused on the protection of refugee rights and procedures for asylum or status determination. Furthermore, Nepal is not state party to the Convention relating to the Status of Refugee 1951 and its 1967 Protocol. As a result, matters related to the protection and status of refugee are primarily addressed within the framework of customary international law, human rights treaties, ad hoc measures of administrative practices, and constitutional provisions related to human rights that guarantee fundamental rights including right to life, freedom from torture, access to justice, are relevant to the issues of refugee and their protection.

Nepal, unless being the signatory to the international instruments relating to the protection of refugee, has to respect and fulfill an obligation of the provisions of customary international law enshrined in various international human rights instruments, to which Nepal is a party state, create obligations to protect the rights and well-being of refugees. Universal Declaration of Human Rights, (UDHR) 1948 provides a framework for the protection of refugees' rights in Article 9 that emphasizes the right of individuals to be protected from arbitrary arrest, detention, or exile which is particularly important for refugees who may be vulnerable to detention based on their immigration status. Article 13 (2) recognizes the right to leave any country, including his own, and to return to his country; including refugees' right to move freely within the host country and should not be arbitrarily restricted in their movements. Article 14 recognizes the right of individuals to seek asylum from persecution. Moreover, Nepal welcomed treaty obligations<sup>18</sup> under various international human rights instruments such as International Covenant on Civil and Political Rights (ICCPR) 1966 to ensure the right to movement and right to fair trial; the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966 ensures the economic, social, and cultural rights of individuals, does not explicitly mention refugees, but apply to all individuals within a state's jurisdiction, including refugees. These rights are crucial for ensuring the well-being and dignity of refugees and are integral part to their protection under international law. The principle of non-refoulement, explicitly included in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or punishment (CAT) 1984 in Article 3 that prohibits the extradition, expulsion, or return of individuals to another state where there are substantial grounds for believing that they would be in danger of being subjected to torture or inhumane treatment. It aimed at preventing torture and other forms of cruel, inhuman, or degrading treatment or punishment to all individuals, including refugees, within the jurisdiction of state parties. Article 22 of the Convention on the Rights of Child (CRC) 1989 protects the rights of a refugee child, who may or may not accompany with his or her parents or by anyone, including providing the necessary assistance for family reunification. Similarly, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979 and the

18 Nepal Treaty Act 1990 (9): Treaty provisions enforceable as good as Laws

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1965 protect various rights of refugees without discrimination.

The principles enshrined in international human rights instruments and conventions such as ICCPR, ICESCR, ICERD, CEDAW, CRC and CAT do not specifically address refugees as a distinct category; these provisions are applicable to all individuals, including refugees, within the jurisdiction of state parties as a customary international law. Apart from such instruments, there have been some other instruments that govern the protection of refugees. The Guiding Principles on Internal Displacement 1998, provide non-binding guidance, emphasizes for preventing arbitrary displacement, safeguarding asylum rights, and protecting vulnerable groups. It basically supports' voluntary return, resettlement, and reintegration of internally displaced person, indirectly reinforcing refugees' rights and the need for their safe, dignified return. Similarly, the Cartagena Declaration on Refugees, 1984, sets the principle of non-refoulement and calls for international cooperation to address the needs of refugees. These international instruments with the norms of customary international law provide insights in the absence of domestic legislations and adaptation of international instruments on refugee protection to respect and protect the refugees in Nepal

### **The Contemporary Context of Refugees in Nepal:**

Nepal has hosted around 20, 000 refugees from various neighboring countries such as Tibet, Bhutan, Afghanistan, Myanmar and other states, and this practice continued since 1959<sup>19</sup>, have sought asylum in Nepal due to various reasons, including political persecution, armed conflict, ethnic discrimination and human rights violations. Those refugees are settled in various camps in different parts of Nepal. Refugee camps and settlements in Nepal fluctuate in terms of sizes, facilities, and conditions. Bhutanese refugee camps in eastern Nepal, such as Beldangi, Sanischare, and Khudunabari, and Tibetan refugee camps in different places of Kathmandu and Pokhara have housed significant populations for decades. Rohingya refugees are settled in the camps in Kathmandu and other Terai regions. Those camps have basic infrastructure for housing, education, and healthcare, but facing challenges such as overcrowding and limited livelihood opportunities. Refugees in Nepal have access to essential services such as healthcare and education, largely supported by government agencies, NGOs, and international organizations. However, access can be limited, especially in remote areas or for vulnerable groups within the refugee population. The processes of taking various measures and efforts are ongoing to improve access the condition of refugees such as to provide education through schools in refugee camps and scholarships for higher education, and healthcare services include primary care clinics and partnerships with local hospitals for specialized treatment.

Social integration is another option to address the refugee protection, which plays a crucial role in the well-being and resilience of refugees in Nepal. Integration efforts aim to foster meaningful interaction and collaboration between refugees and host communities, promoting mutual understanding and cooperation, which ultimately help to maintain social harmony and

19 United Nations High Commissioner for Refugees (UNHCR) <https://www.unhcr.org/countries/nepal> [accessed on 28 April 2024]

peace. Positive impacts of social integration include cultural exchange and enrichment, economic opportunities through entrepreneurship and collaboration with local businesses, community support networks that provide social and emotional assistance to refugees, advocacy and awareness initiatives that promote refugee rights and inclusion contributing to diverse social fabric of Nepal. However, social integration also faces potential threats, such as language and communication barriers leading to misunderstandings or isolation, cultural tensions or conflicts. Social integration program should implant the feeling of ownness in refugee populations that can contribute to the overall development of the country.

Many refugees in Nepal seek resettlement to third countries, such as the United States, Canada, Australia, or European countries, through resettlement programs facilitated by UNHCR and partner organizations. Third-country settlement offers refugees the opportunity for permanent residency and a fresh start in a new environment. About 25, 000 Bhutanese refugees have been resettled in the United States and other receiving countries from camps in eastern Nepal, among which 22, 060 refugees has been accepted by United States, 1, 006 by Australia, 892 by Canada, 316 by Norway, 305 by Denmark, 299 by New Zealand and 122 by Netherlands since 2007 with the cooperation of the government of Nepal and the International Organization for Migration (IOM).<sup>20</sup> It is claimed that more than 113, 500 refugees from Nepal have been resettled to eight different countries with the help of UNHCR. There have been some challenges for refugees in third-country settlement such as cultural adjustment and adaptation to new societal norms and systems, language barriers, integration support, employment and economic stability in the new country, and psychological and emotional challenges related to leaving familiar surroundings and starting a new.

Despite of some progress, refugees in Nepal are facing various challenges such as legal uncertainties and restrictions on employment and mobility, limited access to higher education and professional opportunities, mental health and psychosocial disparities due to displacement and trauma, and additional vulnerabilities among specific groups such as women, children, and persons with disabilities. Refugee children and youth face significant barriers to accessing quality education and professional opportunities because of the limited availability of educational resources and facilities in refugee camps, coupled with restrictions on enrollment in public schools, hinders their educational development. Additionally, challenges in obtaining recognition of qualifications and certifications acquired in refugee camps further limit their access to higher education and vocational training programs. The experience of displacement, trauma, and uncertainty can have profound impacts on the mental health and psychosocial well-being of refugees. Stigma, discrimination, and lack of access to mental health services worsen these challenges, leading to increased vulnerability among refugee populations. Addressing for mental health and psychosocial support needs is essential for promoting resilience and recovery among refugees in Nepal. Women, children, and persons with disabilities within refugee populations are particularly vulnerable to various forms of exploitation, discrimination, and violence. Gender-based violence,

20 United Nations High Commissioner for Refugees (UNHCR) <https://www.unhcr.org/news/number-refugees-resettled-nepal-passes-25-000-mark> [accessed in 28 April 2024]



child labor, and lack of access to inclusive services pose significant challenges to their well-being and protection. Limited job opportunities, economic activities, and access to financial services in refugee camps contribute to economic instability and dependency on humanitarian assistance among refugees. Enhancing livelihood opportunities, promoting entrepreneurship, and facilitating access to financial resources are crucial for empowering refugees economically and promoting self-reliance. While refugees in Nepal have access to basic healthcare services, challenges such as limited availability of specialized care, barriers to accessing healthcare facilities outside of camps, and health disparities persist. Strengthening healthcare infrastructure, expanding access to specialized services, and addressing health inequalities are essential for ensuring the health and well-being of refugee populations residing in various camps in Nepal.

### **Addressing Refugee Protection in Nepal:**

Nepal, as a developing country, is actively striving for social, political, and economic advancement. However, amidst these efforts, the task of hosting refugees or providing sanctuary poses significant challenges that require careful consideration to implement successfully for the assurance to respect and protect existing refugees. However, Nepal is fulfilling its international obligations to protect and respect human rights of all individuals including refugees despite of various challenges.

#### **a. Legal Existence on Refugee Protection:**

The absence of a specific domestic legislation has led to legal uncertainties and challenges for refugees residing in the country, regarding their legal status, residency rights, and access to basic services to live dignified life. Such legal ambiguity has resulted in difficulties for refugees in obtaining essential documentation, including identity cards and work permits, impacting their ability to access employment, education, and healthcare services. Advocacy efforts by NGOs, civil society organizations, legal experts and judicial responses aim to promote legal reformation that enhance refugee rights and address gaps in the existing legal framework are the ultimate initiatives to contribute to resolve the problems.

#### **b. Judicial Intervention:**

There have been instances of judicial interventions through court cases aimed at protecting and upholding the rights of refugees in response to the challenges on refugee protection. The nine cases covered in the latest publication of the Supreme Court, sets examples to address the issues of refugees in Nepal such as the principle of non-refoulement, unlawful detention and protection of identity, such as:

- Abdi Fahad Yusuf v. Department of Immigration et al. (2020). The fundamental principle that detaining individuals arbitrarily, post-completion of their criminal sentence, stands in direct contradiction to both the Constitution and the human rights treaties endorsed by Nepal.<sup>21</sup>

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21 Abdi Fahad Yusuf v. Department of Immigration et al. Writ No. 076-WH-0233 Decision No. 10503 (2020)



- *Sonam Khampa v. Ministry of Home Affairs* (2011). An interim order was issued to prevent the refoulement of Tibetan refugees for the protection of their life.<sup>22</sup>
- *Hadi Jaber Habib v. Government of Nepal* (2009). The court protected the right to fair trial of an asylum seeker stating that the decision of imprisonment without following the due process of law is unlawful. Further, the Court drew the attention of the Government of Nepal for the development of domestic law on refugees.<sup>23</sup>

These judicial interventions have played a crucial role in clarifying legal rights, challenging restrictive policies, and advocating for the protection of refugee rights under international law. Despite the positive impact of judicial interventions, challenges persist due to the lack of a comprehensive legal framework specifically addressing the protection of refugee. The need for legislative reformation and policy developments to address the legal gaps and ensure adequate protection for refugees remains a priority. The judiciary in Nepal serves as a cornerstone for nurturing a fair and inclusive society, dedicated to upholding the inherent dignity and rights of all individuals including refugee residing in Nepal.

#### **c. Integration and Social Acceptance:**

Integration and acceptance of refugees from various countries is another burning concern in Nepal. Integrating them into local communities is a complex process that requires addressing socio-economic, cultural, and legal barriers. Such challenges may include limited access to formal employment, education, healthcare services, and social inclusion, leading to potential marginalization and vulnerability. There have been various ways to address such emerging challenges through constant collaboration, advocacy, and policy reformation. While some refugee communities have established ties and networks within Nepalese communities, others may face social stigma, discrimination, vulnerability and deprivation of enjoying human rights. Apart from that, cultural exchange programs, community events, and awareness campaigns can foster understanding, tolerance, and mutual respect, contributing to peaceful coexistence that can impact on the balancing of social harmony and peace.

#### **d. Humanitarian Assistance:**

Nepal has a longstanding tradition of providing asylum and humanitarian support to refugees to uphold humanitarian values with limited resources and uncertain legal grounds. The availability of resources and funding for humanitarian assistance programs for refugees is often limited, which can result in gaps in providing essential services such as shelter, food, healthcare, and psychosocial support, impacting the overall well-being of refugees. On the other hand, refugees in Nepal may encounter difficulties in accessing essential services such as healthcare, education, housing, and employment. The conditions in refugee camps, particularly those hosting a large number of refugees, pose significant challenges such as overcrowding, limited access to basic necessities such as food, clean water, hygiene and sanitation as well as healthcare, and education

<sup>22</sup> *Sonam Khampa v. Ministry of Home Affairs* Writ No 068-WH-0021 (2011)

<sup>23</sup> *Hadi Jaber Habib v. Government of Nepal* Writ No 065-WH-0019 Decision No. 8055 (2009)

services. To overcome such difficulties, various programs organized in different span of time focused on the livelihood support and economic empowerment aim to enhance the self-reliance and resilience of refugees in Nepal. Additionally, vocational training, skill development initiatives, and income-generating activities can help to provide opportunities for refugees to improve their economic well-being to contribute positively to their communities.

### **e. Government Initiatives:**

While Nepal has shown humanitarian support for refugees, there is a need for comprehensive refugee policies and frameworks to address various challenges of Nepal for refugee protection. Nepal generally follows a non-refoulement policy that forbids forcibly return to the countries where they could face persecution. Nevertheless, Nepal has a gentlemen agreement with the United Nations High Commissioner for Refugees (UNHCR) to manage refugee issues.<sup>24</sup> This partnership involves providing support for refugee camps, facilitating refugee registration, and coordinating humanitarian assistance. Women, children, senior citizens, disable people within refugees are considered as vulnerable group are likely to be special protection and aids. To address the rights and dignified life, government agencies need to implement gender-sensitive policies and programs to address gender-based violence, promote women's empowerment, and ensure the protection of children, senior citizens and persons with disabilities. It is highly important to establish child protection mechanisms, including safe spaces and education initiatives, to prevent exploitation and abuse among refugee children specially focusing on girl child.

### **f. Advocacy and Awareness:**

Advocacy and awareness programs are considered to an effective measure for ensuring human rights of refugees. Non-governmental Organizations (NGOs) and civil society groups play vital roles through various programs focusing on education; vocational training, livelihood support, and community empowerment contribute to enhancing refugee resilience and self-sufficiency, includes by providing humanitarian assistance, advocacy, legal support, and community services to refugees. Advocacy for legal reforms, inclusive policies, and coordination among government agencies, NGOs, and international partners is essential for improving the protection of refugees in Nepal. Along with such agencies, National Human Rights Commission, a constitutional body, plays a pivotal role to ensure and respect the rights of refugees in Nepal, through monitoring and reporting of various human rights violations. The Commission conducts investigations, documentation of various cases, publish reports, and make recommendations to government and relevant stakeholders highlighting issues of refugees such as access to justice, right to education, healthcare, and protection from discrimination. Advocacy for policy reforms, legal protections, and implementation of international human rights standards to safeguard refugee rights and promote inclusive practices for ensuring human rights are also the major tasks of the Commission. NHRC Nepal also performs capacity-building initiatives for government officials, law enforcement agencies, and civil society organizations to enhance their understanding on the rights of all individuals, including refugee. The Commission collaborates with national and

24 <https://www.tibetjustice.org/reports/nepal.pdf>

international partners, including UN bodies, NGOs, and civil society organizations, to strengthen refugee protection mechanisms, exchange best practices, and advocate for collective actions in addressing refugee challenges.

#### **g. Community Support:**

Community based initiatives promote social cohesion and integration between refugee populations and host communities. Cultural exchange programs, awareness campaigns, and community events foster understanding, tolerance, and mutual respect to each other. Community support includes initiatives to create livelihood opportunities, vocational training, skill development programs, and income-generating activities to empower refugees economically and facilitate their integration into local economies. Schools, clinics, and community centers may provide services tailored to the needs of refugee populations, ensuring access to essential facilities. Such support extends to education and healthcare services for refugees. Community support also involves advocacy efforts to raise awareness about refugee issues, advocate for refugee rights, and mobilize support for policy reforms. Community members, local leaders, and volunteers contribute for creating welcoming and inclusive environments for refugees. Community support plays an effective role on maintain peace and harmony for all. Beside all these programs, strengthen mental health services and psychosocial support programs tailored to the needs of refugee populations, including trauma-informed care and counseling services as they are more prone to psychological stigma. Community supporters can conduct awareness campaigns and stigma reduction initiatives to promote mental health literacy and support-seeking behaviors.

#### **h. International Cooperation:**

People flee from persecution, disaster, violence and conflict has been a global issue that needs to address through international cooperation and partnership. Apart from that, strengthening cooperation and partnerships with international organizations, NGOs, and donor agencies to manage and mobilize resources and support for refugee protection and assistance programs within any state territory becomes an emerging need of contemporary world. Strong and effective advocacy for increased global solidarity and responsibility, sharing in addressing refugee crises and promoting durable solutions can be effective to resolve the issues of refugee protection. The United Nations High Commissioner for Refugees (UNHCR) plays a pivotal role in providing technical expertise, advocacy support, and financial assistance to strengthen refugee protection mechanisms in Nepal. They collaborate with government agencies, NGOs, and civil society organizations to address legal, humanitarian, and socio-economic challenges faced by refugees. Similarly, International Organization for Migration (IOM) involves in refugee protection through various activities aimed at supporting refugees, strengthening protection mechanisms, building capacity, advocating for refugee rights, and fostering collaboration among stakeholders. Local NGOs and community-based organizations are working vivaciously to advocate for refugee rights, provide humanitarian aid, and conduct research and advocacy initiatives on refugee issues. Nepal collaborates with regional bodies such as the South Asian Association for Regional Cooperation (SAARC) and the Asia Pacific Refugee Rights Network (APRRN) to address cross-

border refugee issues, promote regional cooperation, and share best practices in refugee protection and assistance. The APRRN aims to foster a collaborative spirit among regional stakeholders, emphasizing the importance of unified efforts to effectively address the educational challenges faced by refugee and stateless children and for addressing mental health issues among refugees and asylum seekers through collaborative, culturally sensitive, and holistic approaches.<sup>25</sup> Nepal seeks to strengthen coordination, resource mobilization, and information exchange on refugee-related matters, including setting international standards of legal frameworks, durable solutions, and refugee integration through regional partnerships.

Resource allocation and mobilization is another important matter to resolve the challenges of refugee protection. The actions taken by Nepal to collaborate with various international donor agencies such as United States Agency for International Development (USAID), the European Union (EU), and the World Bank, provides crucial financial support and funding for refugee protection programs, humanitarian assistance, and infrastructure development in refugee camps and settlements to resolve the problems of generating resources. To enhance sustainable fundraising mechanisms, multi-stakeholder partnerships are essential for ensuring adequate resources for refugee populations, including education, healthcare, livelihood support, and social integration initiatives. Similarly, international organizations and partners facilitate capacity-building initiatives, including training programs and workshops, for government officials, law enforcement agencies, legal practitioners, and civil society actors on refugee rights, protection mechanisms, humanitarian principles, and international legal frameworks. Development of technical support and knowledge sharing initiatives focusing on areas such as legal aid, psychosocial support, refugee registration systems, child protection, gender equality, and anti-discrimination measures can help to enhance the effectiveness of refugee protection efforts.

### **Conclusion:**

Human rights violations, conflict, disaster, and fear of persecution are significant affecting factors driving people in a state of statelessness, which force them to seek refuge or asylum. It is the worst outcome of any country, where people are consequently stripped of fundamental rights and access to basic services, thereby extending a cycle of marginalization and vulnerability that further intensifies their plight. Refugee protection has evolved into a global imperative, governed by international instruments, regional agreements, and national mechanisms in host countries. Resolving various human rights challenges is the contemporary agenda around the globe that is considered as ongoing process. There have been several key international instruments such as the 1951 Refugee Convention and 1967 Protocol along with the Cartagena Declaration 1984, and the Guiding Principles on Internal Displacement 1998 outlined the legal framework and responsibilities for refugee protection, which set out the customary international law that apply even for non-signatory states.

No country can remain in isolation without connection to the global events and developments in the

25 [summary-report-regional-strategic-dialogue-refugee-and-stateless-children-education 2024](https://reliefweb.int/report/world/summary-report-regional-strategic-dialogue-refugee-and-stateless-children-education) <https://reliefweb.int/report/world/summary-report-regional-strategic-dialogue-refugee-and-stateless-children-education>

contemporary growing world. Likewise, Nepal has an identity in international platform even for the hosting the refugees from various neighboring countries, despite of having specific domestic legislation as well as without adopting international instruments relating to refugee protection. It is undeniable truth that the presence of refugee population can have impact on demographic change of the country even with the hardship of finding official records. The country upholds refugee rights based on the principles of customary international law embedded in international instruments. Beside all these factual grounds, refugees in Nepal have to face various challenges accessing basic necessity, education, and healthcare especially by the vulnerable groups such as women, children, and persons with disabilities. Similarly, economic empowerment, social integration, resettlement and voluntary repatriation processes remain as ongoing challenges for refugees in Nepal.

### **Recommendations:**

Nepal can significantly improve its refugee protection mechanisms, to address vulnerabilities, and to promote the rights and well-being of refugees through various ways, such as:

- Develop comprehensive national law on refugee protection aligned with international standards to enhance refugee protection effectively which includes defining refugee status, establishing asylum procedures and ensuring mechanisms for protecting the rights as well as determining the obligation of refugees.
- Establish a specific governmental agency for maintaining all the essential records for the purpose of documentation such as their status and activities.
- It is essential to enhance the capacity of human rights organizations such as National Human Rights Commission, NGOs, media and civil society as they are the important organs to robust monitoring and reporting mechanisms for refugee protection.
- Enhance, effective and continuous collaboration and cooperation with national and international partners for technical expertise and financial support to promote community awareness, cultural exchange programs, and advocacy campaigns to reduce discrimination against refugees and improve access to essential services.





# Human rights diplomacy, its different dimensions and nexus with economic diplomacy

Daya Ram Pathak

## Abstract

*Human rights diplomacy, in general, refers to the diplomatic efforts of governments, international organizations, and civil society actors to promote and protect human rights both domestically and internationally. It involves advocating for the advancement of human rights principles, norms, and standards through dialogue, negotiation, cooperation, and sometimes pressure tactics with other states and non-state actors. In the realm of international relations, economic diplomacy traditionally focuses on promoting a country's economic interests through negotiation, trade agreements, and investment partnerships. However, an often overlooked but critical dimension of economic diplomacy is human rights diplomacy. Human rights diplomacy entails advocating for and promoting human rights principles in all aspects of foreign policy, including economic engagements. Human rights diplomacy is an indispensable dimension of economic diplomacy with far-reaching implications for global prosperity and stability. By promoting responsible business practices, mitigating risks, and creating enabling environments for development, diplomatic efforts that prioritize human rights contribute to fostering sustainable economic growth and advancing shared prosperity. Therefore, integrating human rights considerations into economic diplomacy is not only a moral imperative but also a pragmatic strategy for achieving long-term economic success in an interconnected world.*

**Keywords:** Human rights diplomacy, Digital diplomacy, Economic diplomacy, Cultural diplomacy, Legal diplomacy, Non-state actors, Accountability, Globalization, Inclusivity, Technology, Economic, Cultural exchanges

## Background

Human rights diplomacy is a term that describes the interactions among states on human rights. It has existed in various forms for over 75 years – since human rights were inscribed in the 1945 UN Charter and articulated in the Universal Declaration of Human Rights in 1948. The dominant feature of human rights diplomacy today is the polarized context in which it takes place. The US and China overtly champion rival paradigms of human rights: the former and its allies tend to portray human rights almost as a subset of democracy; while the latter has sought to position itself as a leader of the Global South by laying claim to the old concept of the 'right to development'. These opposing paradigms represent neither a holistic view of human rights nor a sustainable way forward.



As above mentioned Human rights diplomacy has existed in various forms for over 75 years, since human rights were inscribed in the 1945 UN Charter and then articulated

in the Universal Declaration of Human Rights (UDHR) in 1948. It was diplomacy that enabled a series of treaties to be drafted and adopted during the second half of the 20th century and the early years of the 21st – in particular, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted in 1966. Together with the UDHR, these treaties form the International Bill of Rights.

However, human rights diplomacy is a unique concept. Diplomatic engagement on human rights is inevitably secondary to broader considerations of national interest, and subject to shifting calculations of whether it is worth the political cost. It is also a paradox: while human rights are grounded in agreed norms that are not (in theory) open to renegotiation, diplomacy is pragmatic, fluid and responsive to the demands of realpolitik. The two are not easy companions. In a 2011 book, the human rights scholar and practitioner Michael O'Flaherty defined human rights diplomacy as 'the utilization of diplomatic negotiation and persuasion for the specific purpose of promoting and protecting human rights' while George Ulrich characterized it as a set of activities aiming 'to enlarge the sphere in which human rights functions as the operative norms'. Both definitions quite reasonably assume a good-faith engagement by states and other actors seeking to advance human rights.

### **What is Human Rights Diplomacy?**

Human rights diplomacy, in general, refers to the diplomatic efforts of governments, international organizations, and civil society actors to promote and protect human rights both domestically and internationally. It involves advocating for the advancement of human rights principles, norms, and standards through dialogue, negotiation, cooperation, and sometimes pressure tactics with other states and non-state actors.

Human rights diplomacy has the following **key characteristics**.

#### **1. Promotions of Human rights standards:**

Human rights diplomacy aims to promote universal adherence to human rights standards as enshrined in international treaties, conventions, and declarations such as the Universal Declaration of Human Rights. This involves advocating for the ratification and implementation of human rights instruments by states and encouraging the development of national laws and institutions that protect and promote human rights.

#### **2. Engagements with Governments :**

Diplomatic efforts are often directed towards engaging with governments to address human rights concerns within their jurisdictions. This may involve raising specific cases of human rights abuses, urging governments to uphold their human rights obligations, and providing technical assistance and capacity-building support to strengthen national human rights mechanisms.

### 3. **Multilateral co-operations :**

Human rights diplomacy frequently takes place within multilateral forums such as the United Nations Human Rights Council, regional organizations, and bilateral partnerships. Diplomatic efforts in these forums focus on fostering consensus, sharing best practices, and coordinating actions to address global human rights challenges collectively.

### 4. **Support for Civil Society:**

Diplomacy in support of human rights often involves engaging with civil society organizations, human rights defenders, and grassroots movements. Governments and international actors provide support and protection to civil society actors working on human rights issues, amplifying their voices in diplomatic discussions and advocating for their rights to freedom of expression, association, and peaceful assembly.

### 5. **Accountability and Justice :**

Human rights diplomacy includes efforts to promote accountability for human rights violations and ensure access to justice for victims. This may involve supporting international criminal tribunals, truth and reconciliation commissions, and domestic judicial processes aimed at holding perpetrators accountable and providing reparations to victims.

### 6. **Prevention of Human Rights Violations:**

Diplomatic efforts also focus on preventing human rights violations before they occur. This includes early warning mechanisms, conflict prevention strategies, and addressing root causes of human rights abuses such as poverty, discrimination, and social exclusion.

### 7. **Prevention of vulnerable group:**

Human rights diplomacy addresses the specific rights and needs of vulnerable and marginalized groups, including women, children, ethnic and religious minorities, persons with disabilities, and refugees and migrants. Diplomatic efforts aim to ensure that their rights are protected, and their voices are heard in decision-making processes.

### 8. **Integration with Other Policies Areas:**

Human rights diplomacy is often integrated with other areas of foreign policy, including development cooperation, trade policy, peace building, and security. This holistic approach recognizes the interconnectedness of human rights with broader global challenges and seeks to mainstream human rights considerations into all aspects of international relations.

Thus, human rights diplomacy plays a vital role in advancing the global human rights agenda, promoting accountability, preventing violations, and protecting the rights and dignity of all individuals worldwide. It is an essential component of international relations aimed at building a more just, peaceful, and equitable world.

## **Human Rights Diplomacy and global scenario**

The complexity of devising a foreign policy revolves around balancing and prioritizing among different agendas—security, trade and health issues being the primary ones, which often feature in

the bilateral and multilateral forums. Although a number of United Nations (UN) resolutions have been passed on the agenda of basic human rights, bilateral diplomatic ties are rarely built on the basis of human rights issues alone. When it comes to precise formulation of a country's foreign policy in bilateral or multilateral forums, the issues of trade and national security find priority over pressing human rights issues occurring within the countries engaged in the diplomatic dialogue. An often-employed reason behind such an approach is the need to respect sovereignty and non-interference of a country in diplomacy. It would be unfair to give a blanket statement that human rights issues are ignored altogether in foreign policies, but the fact remains that when it comes to pressurizing recalcitrant regimes to respect human rights, diplomatic ties have not been terminated based solely on the grounds of human rights violations in the other state. Human rights activists have often accused developed nations of hypocrisy for ignoring human rights violation for political convenience, even on issues that these nations are otherwise very vocal about (Amnesty International, 2015). These developed countries are accused of not only ignoring grave human rights abuses but also of actively forming bilateral alliances with abusive governments for various trade-centric aspects (The Economist, 2011).

However, narrowly focusing on the so-called hypocrisy in formulation of diplomatic relations would lose sight of the big picture at hand—the potential that diplomacy holds for raising the standards of human lives. In the field of international relations, it should be realized that distancing foreign policy agendas away from politics is a futile exercise, and it is an unwarranted one as well. Diplomacy is about politics, and so is the issue of Human Rights. As noted, international law scholar Louis Henkin states, the concept of human rights is a political one based on interpersonal morality and should express a prevailing relationship between society and the individual (Henkin, 2000). An understanding of human rights must focus on politics, for politics and morality are not ideologically disjunctive. Moreover, advancing important agendas through the tool of diplomacy warrants importance to the fact that diplomacy functions around the fulcrum of reciprocity (Posner, 2013).

### Exploring the scope of Human Rights Diplomacy

In today's interconnected world, the traditional landscape of human rights diplomacy has undergone significant transformation. Beyond the conventional realm of state-to-state negotiations, human rights diplomacy now encompasses a broad spectrum of actors, strategies, and platforms. This evolution reflects the growing recognition that safeguarding human rights requires a multifaceted and inclusive approach. Here are some key factors which define the expanding scope of human rights diplomacy:

1. **Multistakeholder Engagement:** Non-state actors such as civil society organizations, grassroots movements, and international NGOs are vital contributors to human rights diplomacy. Their involvement enhances accountability, amplifies voices often marginalized, and fosters participatory approaches to addressing human rights issues.
2. **Digital Diplomacy:** Digital technologies have revolutionized advocacy efforts, offering unprecedented avenues for raising awareness, mobilizing support, and holding authorities

accountable. Social media campaigns, online petitions, and digital activism empower individuals and organizations to mobilize on a global scale, transcending geographical barriers.

3. **Economic Diplomacy:** Economic instruments, including trade agreements, sanctions, and investment policies, are increasingly employed to advance human rights objectives. By linking economic incentives with human rights compliance, states and international organizations exert pressure on entities violating human rights norms.
4. **Cultural Diplomacy:** Cultural exchanges and educational initiatives serve as powerful tools for promoting understanding, tolerance, and respect for human rights. By fostering dialogue and mutual appreciation across diverse cultural contexts, cultural diplomacy contributes to the cultivation of a rights-respecting global community.
5. **Legal Diplomacy:** International legal frameworks provide a foundation for human rights diplomacy, offering mechanisms for accountability and redress. States engage in legal diplomacy through ratification of treaties, participation in international tribunals, and adherence to human rights norms, thereby reinforcing the rule of law at the global level.
6. **Transnational Advocacy Networks:** Transnational coalitions of activists, NGOs, and advocacy groups form dynamic networks that transcend national borders. Through collaborative efforts, these networks leverage collective resources and expertise to address systemic human rights challenges and hold duty bearers to account.

In nutshell, the scope of human rights diplomacy is no longer confined to traditional diplomatic channels but extends to a diverse array of actors and strategies. By embracing this multifaceted approach, stakeholders can forge effective partnerships, leverage innovative technologies, and mobilize global solidarity to advance the universal realization of human rights.

## The Politics of Human Rights Diplomacy

The issue of Human Rights features as a prominent agenda of the United Nations and its related international organizations. However, when it comes to precise formulation of a country's foreign policy in bilateral or multilateral forums, the issues of trade and national security find priority over pressing human rights violations occurring within the countries engaged in the diplomatic dialogue. An often-employed reason behind such an approach is the need to respect sovereignty and noninterference of a country in diplomacy.

As scholar Bertrand G. Ramcharan, President of the Guyana Institute of Public Policy observes, the heart of the matter is the "...the perennial struggle between realism and idealism in human rights protection" (Ramcharan, 2011). This observation was made in light of the effectiveness of the international organs of the UN in promotion and protection of human rights, whereas it was found that with the exception of the Security Council, the organs have mostly engaged in promotional work, instead, of taking on the challenging tasks of actively providing protection against human rights violations. The General Assembly of the UN has played a significant role in the adoption of human rights standards, while the Security Council has made limited contributions

to protection in situations involving threats to, or breaches of, international peace and security. The United Nations Human Rights Council (UNHRC) is one of the principal organs of the UN, which deal with human rights, but its political nature leads one to question whether the representative Ambassadors in the Council are on a mission to protect human rights universally or only those in furtherance of their governments' interests (Piccone, 2016). Impartiality for the UN is to be more than its procedural dimension, referring not only to the position of UN officials as unbiased and informed but also the value the institution seeks to project and that which UN officials are supposed to represent and further in the absence of particular interests. (Rhoads 2019). This organ of the UN has been criticized for its lack of consistent and transparent criteria when deciding which countries should be the target of resolutions and which topics should be prioritized.

The Deputy Minister of International Relations and Cooperation, Ebrahim, at the High-Level Segment of the 22nd Session of the United Nations Human Rights Council (2013) had said that, "In serving as an agency for the promotion and protection of human rights globally, the Human Rights Council must not be compromised...In discharging its mandate, the Council should remain a credible arbiter and deal with all global human rights concerns in a balanced manner. There should be no hierarchy. Economic, social and cultural rights should be on an equal footing and be treated with the same emphasis as civil and political rights." (Department of International Relations and Cooperation, Republic of South Africa, 2013). In 2006, the UN General Assembly had voted to replace the controversial 60-year-old UN Commission on Human Rights, which was hampered for years by the politics of intransigence, geopolitical rivalries, and inadequate concern for the victims of human rights violations around the world, as the then Secretary General of the UN Kofi Annan claimed. The 47-seat membership of the UNHRC is on an equitable geographical distribution, with the largest number of seats being given to the African as well as the Asia Pacific states with 13 seats each, followed by the significant drop in the number of seats being given to the Latin American and Caribbean states with 8 seats, Western European states with 7 seats, and, lastly, Eastern European states with 6 seats. The members of the Council can serve for the period of 3 years and are ineligible for reelection after serving for two consecutive terms in office (United Nations Human Rights Council Elections).

There is no denying the fact that foreign policy formulation cannot be dissociated from world politics, and, therefore, expecting countries to ensure highest forms of human rights protections before advocating for the same elsewhere is a futile exercise. It is important to realize that in this globalized world, violation of human rights is increasingly an issue of global concern, even if the instances of violation in question do not seem to affect the other countries directly. Therefore, hypothetically speaking, where Country A is condemning Country B for Reason X, say political freedom to women, but Country A has been accused of Human Rights Violation Y, say child rights, both the claim and counterclaim should attract attention from world leaders. Country A in such a case should not be criticized for bringing a human rights issue to the forefront without being able to deal with all human rights challenges in its own country. However, this should not allow a country to take a stance that is outright hypocrisy, where a country is calling for international

action against a country on the same grounds where that country itself has a continuing track record of violation. This approach will ensure that when a country uses its foreign policy to highlight an issue of human rights violation, the focus is on country B's action rather than on country A's action. Otherwise, even where a genuine human rights issue has been highlighted, country B would be able to shift the world community's attention away from its actions, to that of other instances of human rights violation in country A—for no country can claim to be perfect in protecting human rights. However, the fact that no country has attained the highest standard of human rights does not mean that all countries are placed equally in being imperfect. Thus, diplomacy must lead the way forward for the development of all rather than holding those back who try to bring about the change.

### **Human Rights Diplomacy and reference to Nepal:**

Human rights diplomacy in Nepal is a complex and evolving field, shaped by the country's political history, social dynamics, and interactions with international organizations. Nepal experienced a decade-long civil war (1996-2006) between the government and Maoist insurgents, which had severe human rights implications, including extrajudicial killings, disappearances, and torture. The Comprehensive Peace Agreement (CPA) signed in 2006 ended the conflict and laid the foundation for addressing human rights abuse. Nepal transitioned from a monarchy to a federal democratic republic in 2008. This political change brought new opportunities and challenges for human rights, including the need for constitutional guarantees and the establishment of institutions to protect this right. The NHRC of Nepal is an independent body established to investigate human rights violations and make recommendations to the government. It plays a crucial role in monitoring and promoting human rights within the country. The new constitution enshrines a wide range of human rights, including civil, political, economic, social, and cultural rights. It also establishes various commissions to protect the rights of marginalized groups, such as the National Women Commission, National Dalit Commission, and National Inclusion commission.

Nepal is a member of the United Nations and has ratified numerous international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The country regularly engages with UN bodies, such as the Universal Periodic Review (UPR) Process.

International and local NGOs play a significant role in advocating for human rights in Nepal. Organizations like Amnesty International, Human Rights Watch, and local NGOs work to document human rights abuses and push for accountability and reform.

Nepal engages in human rights diplomacy through bilateral relations with other countries and participation in multilateral forums. Diplomatic efforts often focus on issues like migrant workers' rights, disaster response, and post-conflict reconstruction.

Civil society organizations in Nepal are active in human rights advocacy, both domestically and internationally. They often work in coalition to pressure the government to fulfill its human rights obligations and to bring international attention to human rights issues in Nepal.



Human rights diplomacy in Nepal is thus characterized by a dynamic interplay between domestic initiatives and international engagement. While significant progress has been made, particularly with the establishment of a new constitutional framework, ongoing challenges related to accountability, discrimination, and political instability require continued attention and effort. Effective human rights diplomacy will depend on the commitment of both the Nepalese government and the international community to uphold and promote human rights for all Nepalese citizens.

### **The nexus of Human Rights Diplomacy with Economic Diplomacy**

**Human Rights Diplomacy as a dimension of economic Diplomacy:** In the realm of international relations, economic diplomacy traditionally focuses on promoting a country's economic interests through negotiation, trade agreements, and investment partnerships. However, an often overlooked but critical dimension of economic diplomacy is human rights diplomacy. Human rights diplomacy entails advocating for and promoting human rights principles in all aspects of foreign policy, including economic engagements. Here is presented the significance of human rights diplomacy as a dimension of economic diplomacy and its implications for fostering sustainable economic development and global prosperity.

**The Interconnectedness of Human Rights and Economic Diplomacy:** Human rights and economic diplomacy are deeply interconnected. Respect for human rights is not only a moral imperative but also a prerequisite for sustainable economic development. Violations of human rights, such as forced labor, discrimination, and lack of access to education and healthcare, can hinder economic growth, exacerbate social inequalities, and undermine political stability. Therefore, integrating human rights considerations into economic diplomacy is essential for promoting inclusive and sustainable development outcomes.

**Promoting Responsible Business Practices:** One way in which human rights diplomacy contributes to economic diplomacy is by promoting responsible business practices. Diplomatic efforts can encourage businesses to uphold human rights standards in their operations, supply chains, and interactions with local communities. This not only mitigates risks for investors but also enhances the reputation and credibility of countries engaging in economic partnerships. By fostering an environment conducive to ethical and sustainable business conduct, human rights diplomacy contributes to the long-term success of economic endeavors.

**Mitigating Risks and Enhancing Stability:** Human rights diplomacy also plays a crucial role in mitigating risks and enhancing stability in the economic sphere. By addressing underlying human rights grievances, promoting social inclusion, and fostering dialogue between governments, businesses, and communities, diplomatic efforts contribute to reducing the likelihood of social unrest, conflicts, and disruptions to economic activities. Moreover, countries that prioritize human rights in their economic engagements are perceived as more stable and reliable partners, thereby attracting investment and trade opportunities.

**Creating Enabling Environments for Development:** Human rights diplomacy as a dimension of economic diplomacy helps create enabling environments for sustainable development. By



advocating for policies and initiatives that prioritize human rights, such as access to education, healthcare, and decent work, diplomatic efforts contribute to building resilient and prosperous societies. Moreover, integrating human rights considerations into development strategies ensures that economic growth is inclusive and benefits all segments of the population, thereby reducing inequalities and promoting social cohesion.

In this way, human rights diplomacy is an indispensable dimension of economic diplomacy with far-reaching implications for global prosperity and stability. By promoting responsible business practices, mitigating risks, and creating enabling environments for development, diplomatic efforts that prioritize human rights contribute to fostering sustainable economic growth and advancing shared prosperity. Therefore, integrating human rights considerations into economic diplomacy is not only a moral imperative but also a pragmatic strategy for achieving long-term economic success in an interconnected world.

### **How Human Rights Diplomacy can contribute to Economic Diplomacy?**

Human rights diplomacy can contribute to the success of economic diplomacy in several ways as follows:

#### **1. Enhanced reputation and credibility:**

Countries that prioritize human rights in their diplomatic efforts are often perceived as more trustworthy and credible partners in economic negotiations. Demonstrating a commitment to upholding human rights standards can enhance a country's reputation and credibility in the international community, making it more attractive for economic partnerships and investment.

#### **2. Stable and inclusive Society:**

Respect for human rights is essential for fostering stable, inclusive, and prosperous societies. Human rights diplomacy can help address underlying grievances, social inequalities, and exclusionary practices that can undermine economic development and stability. By promoting human rights, diplomatic efforts contribute to creating a conducive environment for sustainable economic growth and investment.

#### **3. Risk Mitigation:**

Human rights violations, such as labor abuses, environmental degradation, and social unrest, can pose significant risks to businesses and investors. Human rights diplomacy can help identify and mitigate these risks by promoting responsible business practices, improving governance standards, and addressing underlying human rights concerns. This, in turn, enhances the stability and predictability of the investment environment, making economic diplomacy more successful.

#### **4. Legal and Regulatory Framework:**

Human rights diplomacy can support the development and enforcement of legal and regulatory frameworks that provide clarity and certainty for economic activities. By

advocating for laws and regulations that protect human rights, diplomatic efforts contribute to creating a transparent and accountable business environment. Clear and enforceable rules help reduce uncertainty for investors and facilitate economic exchanges, making economic diplomacy more effective.

### 5. **Social License to Operate:**

In many cases, the success of economic projects depends on obtaining the social license to operate from local communities and stakeholders. Human rights diplomacy can help build trust and facilitate dialogue between governments, businesses, and affected communities, ensuring that economic projects respect human rights and address local concerns. By securing the social license to operate, diplomatic efforts contribute to the long-term success and sustainability of economic initiatives.

### 6. **Market Access and Trade Opportunities:**

Respect for human rights can be a factor in market access and trade opportunities. Many countries and consumers prioritize products and services that are produced ethically and sustainably. Human rights diplomacy can help open doors to new markets by promoting products and services that meet human rights standards, fostering trade relationships based on mutual respect and shared values.

### 7. **Conflict Prevention and Resolution:**

Human rights diplomacy contributes to conflict prevention and resolution, which are essential for creating a conducive environment for economic diplomacy. By addressing underlying grievances, promoting reconciliation, and supporting inclusive governance structures, diplomatic efforts help reduce the risk of conflict and instability, creating opportunities for economic cooperation and development.

In this way, human rights diplomacy can help make economic diplomacy successful by promoting stability, inclusivity, responsible business practices, and respect for human rights, thereby creating an enabling environment for sustainable economic growth and development.

### **The role of human rights commission in this context:**

Human rights commissions play a crucial role in promoting human rights diplomacy and economic diplomacy. These commissions, typically independent bodies established by governments or international organizations, are tasked with protecting and promoting human rights within a given jurisdiction. Here's how they contribute to both human rights and economic diplomacy.

### **Human rights diplomacy**

1. **Advocacy and awareness:** Human rights commissions actively advocate for the protection and promotion of human rights through public awareness campaigns, educational programs, and by engaging with media. By highlighting human rights issues, they keep these topics on the national and international agenda, influencing diplomatic discourse.

2. **Monitoring and reporting:** These commissions monitor human rights conditions and report on violations. Their reports are often used by international bodies, such as the United Nations, to assess a country's human rights record. Accurate and credible reporting can lead to diplomatic pressure on governments to improve their human rights practices.
3. **International co-operations:** Human rights commissions often collaborate with international human rights organizations and other countries' human rights institutions. This cooperation can lead to a unified approach to addressing human rights violations and can strengthen diplomatic relations based on shared human rights values.
4. **Advisory roles:** They provide expert advice to governments on human rights issues, helping to shape policies and legislation that comply with international human rights standards. This advice can facilitate a government's compliance with international treaties and agreements, enhancing its diplomatic standing.

### Economic Diplomacy

1. **Promoting Fair Labor Practices:** Human rights commissions advocate for fair labor practices and the rights of workers, which are integral to sustainable economic development. By promoting decent work conditions, they help create a stable and productive labor market that attracts foreign investment.
2. **Enhancing Corporate Responsibility:** They encourage businesses to adopt corporate social responsibility (CSR) practices, which include respecting human rights. Companies that adhere to CSR are often viewed more favorably in the global market, boosting a country's economic diplomacy efforts.
3. **Conflict Resolution:** By addressing human rights grievances and working to resolve conflicts peacefully, human rights commissions contribute to a stable and predictable business environment. Stability is a key factor for attracting and maintaining foreign investments.
4. **Compliance with International Standards:** Ensuring that domestic laws and practices comply with international human rights standards can improve a country's image and credibility. This compliance can lead to better trade relationships and economic agreements with other countries and international organizations.
5. **Social cohesion and economic stability:**  
Human rights commissions promote social cohesion by advocating for the rights of marginalized groups and reducing social inequalities. A more inclusive society tends to be more stable and prosperous, which in turn fosters a favorable environment for economic diplomacy.

### Some case Examples

1. **South African Commission of Human Rights (SAHRC):** The SAHRC plays a pivotal role in promoting human rights domestically and internationally. Its efforts in addressing issues such as apartheid legacy, racial discrimination, and social justice have positioned South Africa as a leader in human rights diplomacy in Africa and globally.

- 2. National Human Rights Commission of India (NHRCI):** The NHRCI has been active in reporting human rights conditions and advising the Indian government on international human rights obligations. Its work supports India's diplomatic engagements, particularly in aligning its economic growth with human rights standards.

## Conclusions

Human rights diplomacy is an indispensable dimension of economic diplomacy with far-reaching implications for global prosperity and stability. By promoting responsible business practices, mitigating risks, and creating enabling environments for development, diplomatic efforts that prioritize human rights contribute to fostering sustainable economic growth and advancing shared prosperity. Therefore, integrating human rights considerations into economic diplomacy is not only a moral imperative but also a pragmatic strategy for achieving long-term economic success in an interconnected world. So, our country also needs to realize the role of human rights diplomacy and can use this diplomacy to promote economic diplomacy thinking that human rights can be the silver thread of all our different foreign policy.

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# Legal Frameworks for the Rights of Persons with Disabilities primarily Accessibility Rights

Runa Maharjan

## Abstract

*The rights of persons with disabilities (PWDs) are fundamental and essential for their survival and full development as human beings. Despite international human rights frameworks, PWDs often remain marginalized, facing deep-seated stereotypes and prejudices globally. There are numerous national standards promoting the accessibility rights of the PWDs. Rights of Persons with Disabilities Act represents progress, aligning with the UN Convention on the Rights of Persons with Disabilities (CRPD). The prevalent situation of accessibility for PWDs in Nepal reveals significant barriers across various sectors, including justice, transportation, healthcare, education, and recreation. Studies by organizations like the National Human Rights Commission and the National Federation of Disability Nepal highlight physical infrastructure shortcomings, inadequate assistive technology, and negative societal attitudes. Accessibility audits underscore widespread inaccessibility in public infrastructure, exacerbating PWDs' exclusion. Implementation challenges persist despite legal frameworks. Intersectionality issues, especially regarding women and girls with disabilities, necessitate tailored interventions. Efforts to improve accessibility, such as urban street standards and accessibility audits, are crucial, requiring government commitment and community involvement. Initiatives like disabled-friendly transportation demonstrate progress but more comprehensive action is needed to shift societal perceptions and ensure equitable access for all individuals, recognizing disability as a social responsibility rather than a personal deficit.*

**Keywords:** Rights of Persons with Disability, Accessibility, National and International Legal Standards, Intersectionality, Inclusive infrastructure

## Background

Every person becomes entitled to some basic right from the time of birth simply by the virtue of being born as a human being. Every human being needs some minimum rights for survival namely food, cloth and residence. Besides these minimum requirements, everybody needs proper opportunities for the full development of his/her personality in accordance to their capabilities (Gardner, 2008).

However, Persons with disabilities (PWDs) remain amongst the most marginalized in every society. While the international human rights framework has changed lives everywhere, PWDs have not reaped the same benefits. Regardless of a country's human rights or economic situation, they are generally the last in line to have their human rights respected (Byrnes et al., 2007).

In most parts of the world, there are deep and persistent negative stereotypes and prejudices against persons with certain conditions and differences. These attitudes determine who is considered to be a person with a disability and perpetuate the negative image of PWDs (Byrnes et al., 2007). In the context of Nepal, Rights of Persons with Disabilities Act 2017 can be considered as a progressive act. Rights of Persons with Disabilities Act 2017 defines PWDs as those persons who have long-term physical, mental, intellectual or sensory impairments, functional impairment or which in interaction with various barriers may hinder their full and effective participation in social life, on an equal basis with others. The definition is in line with the definition incorporated under CRPD (Prasai & Pant, 2018).

Notably, the definition under CRPD and the Rights of Persons with Disabilities Act, 2017 recognize various forms of barriers that hinder the effective participation of PWDs in social life. For example, barriers such as lack of transportation not only limits access to job opportunities, but can also escalate the difficulty finding employment based on limited access to employment center and interview locations (Coleman, Cady, & Rider, n.d.). Likewise, healthcare and education are rarely equally distributed in a community, making access difficult for individuals living far from where these services are available (Bascom, 2017).

### **National and International Standards related to Accessibility Rights**

International Standards related to Accessibility Rights

#### **a. Convention on the Rights of the Persons with Disabilities (CRPD)**

CRPD highlights accessibility as the general principle of the convention. The principle of accessibility envisaged in the article 9 of the CRPD enables the PWDs to live independently and participate fully in the physical environment, transportation, information and communication, including information and communications technologies and systems, and other facilities and services open or provided to the public. The measures include identification and elimination of obstacles and barriers to accessibility in buildings, roads, transportation and other indoor and outdoor facilities including schools, housing, medical facilities. Article 20 of CRPD ensures that the state parties take effective measures to ensure personal mobility with greatest possible independence for PWDs (United Nations, 2007).

#### **b. Sustainable Development Goals (SDGs)**

Disability-inclusion is increasingly recognized as key to ensuring that no one is left behind in the sustainable development process. Goal 11 of SDGs envisions of sustainable cities and communities specifically dealing with universal access. SDG target 11.2 aims at providing access to safe, affordable, accessible and sustainable transport systems for all, improving road safety, notably by expanding public transport, with special attention to the needs of persons in vulnerable situations including PWDs by 2030 and SDG target 11.7 aims at providing universal access to safe, inclusive and accessible green public spaces, especially for women, children, older persons, and PWDs (Tuladhar, 2018).



### **c. New Urban Agenda**

The New Urban Agenda aims at providing the global framework for urbanization. It presents an opportunity for the international community to consider the place of accessibility and disability inclusion in economic and social urban development, by including and engaging all persons in society. In this regard, it encourages the elimination of legal, institutional, socioeconomic and physical barriers (United Nations, 2016).

### **d. The Sendai Framework for Disaster Risk Reduction, 2015-2030**

The Sendai Framework for Disaster Risk Reduction, 2015-2030 recognizes the need to engage PWDs in developing more inclusive and accessible disaster risk reduction practices (United Nations, 2015).

## **National Standards related to Accessibility Rights**

Several laws, policies and guidelines have been introduced by Nepal securing the rights of PWDs, including their right to accessibility which is stated below:

### **a. Constitution of Nepal**

The constitution of Nepal of 2015 provisions the right to equality as a fundamental right in Article 18 and also ensures the affirmative action for the protection, empowerment or development of PWDs in 18 (3). Constitution also ensures the right relating to education of the citizens with disabilities to get free higher education as stated in Article 31 (3). Article 39 (9) also ensures the right to special protection and facilities from the State to the children with disabilities. Article 42(1) also states the right of PWDs to participate in the state bodies on the basis of principle of proportional inclusion.

Furthermore, the Article 42 (3) also provisions the right to live with dignity and honor, with the identity of their diversity, and have equal access to public services and facilities to the citizens with disabilities. PWDs are also given the prioritized opportunity in education, health, employment, housing and social security as stated in article 42 (5). PWDs also have the right to social security as mentioned in the article 43. State has the policy to enhance investment in the transportation sector, to make the transportation sector safe, systematic and PWDs friendly by encouraging public transportation and regulating private transportation, while according priority to the environment friendly technologies as stated in the Article 50 (h) (14).

### **b. National Policy for Persons with Disability, 2021**

National Policy for PWDs was introduced for the purpose of establishing a disability-friendly governance system in all tiers of state, empowerment of PWDs, enhancing the competence of disabled persons and for development of disability-friendly physical infrastructures in all structures of the state. Strategy no. 9 states that PWDs will have access to public services by making physical infrastructure, transportation, service facilities, resources, information and communication technology accessible. Working policy under the strategy includes making public



infrastructure and means of transportation accessible, ensuring easy access for PWDs to physical structures, service facilities, resources, and information and communication technology, ensuring accessibility to public workplaces such as toilets, restaurants, libraries, parking, meeting rooms, conference rooms, etc.

### **c. The Act Relating to Rights of Persons with Disabilities, 2074 (2017)**

Section 15 provisions that the PWDs shall have an access to the educational institutions, housing, work place, buildings, road, transportation, etc. that are open to other people. Likewise, the issue of accessibility can be traced in several provisions like 28(3) which ensure accessibility of Person with Disability to the hospital. Similarly, Section 11 (2) provisions about the necessity of appropriate provisions ensuring the accessibility of PWDs to the voting so that they can cast votes voluntarily, with or without assistance of others. Accessibility is also a concern in terms of right to information and right to education of PWDs including many aspects of rights of PWDs. Also, Section 39(j) which states that necessary policies shall be made to ensure that physical infrastructures that are accessible to the Person with Disability are to be made (Government of Nepal, 2017).

### **d. Rules relating to the Rights of Persons with Disabilities, 2020**

The rules brought for the implementation of the Act relating to the Rights of PWDs also prioritizes the aspect of accessibility of PWDs. Rule 17 obliges the government to arrange education with accessible housing facilities for underprivileged and helpless children with disabilities who are completely disabled and severely disabled and find it difficult to go to school on their own. Similarly, rule 18 obliges the government to arrange for the education of the visually impaired, deaf, hard of hearing, and hearing-impaired persons by adopting the means, systems or methods of information technology. Furthermore, Rule 27 (a) specifies the criteria that there shall be a physical structure such as rehabilitation centers with minimum basic facilities for the rehabilitation of PWDs.

### **e. Ten-year National Policy and Action Plan for Persons with Disabilities (2016-2025)**

This plan highlights the priority of ensuring accessibility and removing barriers for individuals with disabilities. The purpose is to provide equal access to public infrastructure, transportation and services, facilitating their participation and mobility. This includes making public transportation accessible to everyone, including PWDs.

### **f. Accessible Physical Structure and Communication Service Directive for PWDs, 2013**

This directive was enacted with an aim to increase access by removing barriers to PWDs to establish uniformity in constructing services and facilities by fixing required standards for enabling persons with disability to utilize their civil, political, economic, social, cultural rights and entitlements. This directive explicitly defines criteria to ensure accessibility of public road, sidewalk, recreational parks, playground, public toilet, public building, Bus Park, passenger

loading zone, public transportation, hotels and information and communication along with setting standards to make infrastructures accessible.

**g. Nepal National Building Code, 2003**

Code has envisioned some essential requirement for the physically disabled persons. For instance, at least one primary entrance to a building should be useable by the physically disabled and be on the level that would provide access to elevators where provided (Government of Nepal, 2003). The minimum widths of wheelchair accessible ramps shall be 900 mm for apartments and residential use and 1000mm for all other building types. Handrails are required when the total rise exceeds 600mm. Furthermore; the areas accessible by wheelchair shall have a flush threshold and openings with minimum clear width of 775 mm (Government of Nepal, 2003).

**h. Inclusive Education Policy for PWDs, 2016**

The Inclusive Education Policy has accepted the need of accessible environment at school/college premises including every facility within the premises that meets the approved standards (Government of Nepal, 2016).

**i. Standard Operating Procedure for Operation of Disability-Related Information and Help Desk, 2014**

This operating procedure outlines the protocol for setting up and managing an information and assistance desk aimed at offering essential support services to PWDs. The desk should be accessible to PWDs and furnished with relevant information and resources to cater to their informational requirements. Furthermore, it should offer counseling services at zero cost to assist PWDs.

**j. Standards to operate and establish the Province Level Villages for disabled citizens, 2020**

The objective of this standard is to address the fundamental requirements of PWDs and offer them structured, suitable and high-quality services to enable them to live with dignity. Emphasis is placed on ensuring accessibility by delivering safe and accessible services, including rehabilitation, healthcare and livelihood support, to meet the needs of PWDs.

**k. The ‘Disability Village (Apangata Gram) Construction and Operation Procedure, 2021**

This procedure has been introduced to arrange services for PWDs, including rehabilitation centers, skill development programs, healthcare services and recreational activities. The procedure states about the establishment and operation of disability villages, in the cost sharing of the federal and province government which would be designed to be friendly with PWD, with buildings and road networks adapted accordingly along with essential amenities. Furthermore, the village will feature separate blocks catering to individuals with different types of disabilities.

### **l. Procedures related to providing grants to orphanages established for the protection of children with disabilities, 2020**

This procedure stipulates that child care homes established for the protection of disabled children must meet certain basic criteria, including having accessible physical infrastructure, in order to be eligible for grant and support.

### **m. Exemption or Concessions in Air-craft Travel to Persons with Disabilities Procedure, 2006**

The civil aviation company should design check-in facilities to be accessible for passengers using wheelchairs and those who are ambulant. Regarding terminal management and monitoring, it has been mentioned that the authority should mandatorily arrange appropriate arrangement of handicapped accessible chairs, seats and trans-light board with handicapped entrances in check-in area and departure hall of the airport terminal building.

## **Supreme Court of Nepal on Rights of Persons with Disability**

### **i. Pro Public v Ministry of Women, and Social Welfare, NKP 2064, D.N 7897**

The court using the term "differently able" issued an order of mandamus to the defendants to form a Committee with the representation of member from various organizations, specialists to make plans and policies to protect the rights and provide services to the differently able.

### **ii. National Deaf Association v Office of Prime Minister and Council of Ministers, D.N 8939, NKP 2070**

The petitioner challenged the section 47(e) of Vehicle and Transportation Management Act, 2049 with the provision of excluding deaf from acquiring driving license. Court concluded that deafness solely cannot be a scientific basis to deny any individual from acquiring driving license so the provision is inconsistent with right to equality and employment. However, court mentioned about the state responsibility to develop the infrastructures and technology in such a way that the deaf could drive safely but Nepal has not yet acquired such technological infrastructures. Hence, the court found it to cause harmful repercussions on public safety to declare it void instantly so the court urged the government to develop the required infrastructures as soon as possible.

### **iii. Pro Public and Nepal Disabled Human Rights Centre v Office of Prime minister and Council of Ministers, D.N 7931, NKP 2065**

In a legal context where the state under its directive principles and policies of constitution provides for special measures to protect physically and mentally disabled, it is both arbitrary and contrary to the fundamental rights of citizen to accept the legal provision of Number 6 of Chapter on Treatment (Country Code 2020) which mentions that putting in jail or shed being nailed is permissible under certain circumstances, in case of persons with disability. Such provisions are contrary to the principles of human dignity so it was declared null and void.

**iv. Visually Impaired Help Centre, Nepal v Nepal Government, Office of Prime minister and Council of Ministers, D.N 9320, NKP 2072**

The petitioners claimed that section 7 of Civil Service Act, 2049 mentioning about 5% quota in civil service to the disabled is not justifiable for persons with visual impairment as they are more vulnerable. The court decided that all disabled cannot be kept on same level and they should be differentiated on the basis of their disability and hence court urged the government to amend the legal provision to distinguish between several forms of disability.

**v. Sudarshan Subedi v Office of Prime Minister and Council of Ministers, D.N 8053, NKP 2066**

Court issued an order in the name of the government that the persons with disability shall be provided with free education in public schools, universities and training centers, and shall not be charged with any fee during that period.

**vi. Raju Prasad Chapagain v Office of Prime Minister and Council of Ministers, D.N 7987, NKP 2065**

27 prisoners who were having mental disability were kept in Kavrepalanchowk Jail. So, court held that such an act was against the provision of Constitution and they should be kept in a cure center, if any, otherwise should be treated within the Jail by a medical expert.

### **Prevalent situation of Accessibility**

Persons with disabilities might face numerous barriers, eliminating such barriers will ensure accessible environment for all and help promote, protect and ensure full and equal enjoyment of all human rights and fundamental freedoms by PWDs. That is why it is essential to comprehend that accessibility is a right as well as prerequisite for PWDs. Ensuring accessibility is an integral part of various development initiatives we undertake to address peoples' needs. Broadly speaking, barriers can be categorized as: physical environment that is not accessible; lack of relevant assistive technology; negative attitudes of people towards disability and services, systems and policies that are either nonexistent or that hinder the involvement of all people with a health condition in all areas of life (United Nations, 2007).

- a. A Study on Identifying Barriers to Accessing Justice for Persons with Disabilities (National Human Rights Commission of Nepal, 2022).

The National Human Rights Commission of Nepal, in collaboration with National Federation of Disabled-Nepal (NFDN), carried out a study titled "A Study on Identifying Barriers to Accessing Justice for Persons with Disabilities". The study was conducted with the objective of identification of barrier to access to formal justice for PWDs and analyzing accessibility of PWDs to the district courts and district police offices and the local levels in Nepal. A total of 15 districts including 4 districts from the Himalayan region, 6 districts from the mountainous region and 5 districts from the Terai region were selected as sample for the study.

Regarding the access to physical infrastructure, the study highlighted the presence of general perception that the mere construction of ramp is defined as accessibility. Furthermore, even when ramps were made, those ramps did not fulfill the basic standards as they were too steep and had no railings. Most of the offices studied were built either on hills above the road or well below the road, making it difficult for wheelchair and crutch users and the visually impaired to reach. In situations when the office building was built on the plain land, wheelchairs could not pass due to pits or mud piles in the main gate. In many instances, the main gate would be closed, and wheelchairs and tricycles couldn't pass through the small side gate. Moreover, the toilets were also inaccessible.

Regarding the barriers related to the registration of complaints, no separate facilities were set up in any offices for PWDs, complaint desk or help desk were kept in a higher place in most of the offices and forms were also inaccessible.

- b. The National Federation of Disability Nepal (NFDN) conducted an accessibility audit in 2018 on 150 public infrastructures in Kathmandu Valley, including government buildings. The audit revealed that 132 samples were inaccessible, 18 were partially accessible, and none fully met government accessibility standards.

Detailed findings include:

Kathmandu: 74 samples audited; 66 not accessible and 8 partially accessible.

Lalitpur: 42 samples audited; 37 not accessible and 5 partially accessible.

Bhaktapur: 34 samples audited; 29 not accessible and 5 partially accessible.

The audit assessed various external services such as infrastructure access, parking ramps, staircases, entrances, lifts, drinking water, sanitary facilities, signage and emergency exits.

Sector-specific findings:

- Transportation: All 13 samples inaccessible.
- Health: 16 out of 17 samples inaccessible and 1 partially accessible.
- Public Service: 25 out of 27 samples inaccessible and 2 partially accessible.
- Education: 17 out of 22 samples inaccessible and 5 partially accessible.
- Recreation and Entertainment: 13 out of 15 samples inaccessible and 2 partially accessible.
- Sports and Fitness: All 9 samples inaccessible.
- Hotels, Resorts and Restaurants: 10 out of 11 samples inaccessible and 1 partially accessible.
- Public Toilets: 11 out of 14 samples inaccessible and 3 partially accessible.

## Challenges faced by PWDs regarding accessibility

The data of the report from NHRC and the 2018 report of NFDN shows the prevalence of the challenges faced by the PWDs in relation to right to accessibility. The report from NFDN highlights the lack of substantial arrangements for footpaths on the roads for access to the infrastructure; absence of curbs and tactile on the footpath, inaccessible curb ramp, absence of proper signage on the pathways and those present do not meet the standard. Furthermore, there is absence of Braille facilities in most of the lifts and the control buttons of the lift are not accessible (NFDN, 2018).

Similarly, the survey conducted by Clean Energy Nepal among 84 people with disabilities in Kathmandu about mobility needs and problems faced regarding transportation in Kathmandu showed that 60% of the respondents faced difficulties related to access to transportation on a daily basis. This clearly demonstrates the need for disabled-friendly transport facilities and services in Kathmandu. Respondents repeatedly identified lack of infrastructure as a problem (NFDN, 2018).

In current scenario, at least one separate accessible toilet facility should be provided for PWDs if other toilets do not have the minimum accessibility features (Tuladhar, 2018). Therefore, it is very important that the infrastructures are developed and maintained based on the principle of Universal Design which ensures equitable use, flexibility in use, simple and intuitive, perception information, tolerance for error, low physical effort, size and space for approach and use for all.

## Challenges in Implementation of Law in Nepal

CRPD recognizes that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law (article 5). The state party, which includes Nepal, shall prohibit all discrimination on the basis of disability and guarantee equal and effective legal protection against discrimination on all grounds by providing reasonable accommodation.

In such context, it cannot be denied that Nepal government is principally committed to making all public infrastructures and services accessible, inclusive and resilient for all, including PWDs, by complying with the CRPD and the United Nations' Agenda for Sustainable Development Goals 2030. The Nepal Government has also addressed the issue of the PWDs in the Constitution of Nepal 2015 and has formulated the Disability Rights Act in 2017, including other relevant legal frameworks (McIntyre, 2018).

For instance, The Five-Year Strategic Plan for Road, Rail, and Transport Sector (2073-2078) recently prepared by the Ministry of Physical Infrastructure and Transport was supposed to make all urban roads pedestrian and disable friendly but the implementation is still questionable.

Nepal has the Nepal Road Standards, 2027 (NRS) revised in 2070 but Nepal is yet to have any standards or guidelines which can or should be used in designing urban and local roads. For instance, in the case of footpaths in cities, NRS says, "Width of the footpath depends on the volume of anticipated pedestrian traffic. But a minimum width of 1.5 m is required." However, it



should be noted that the pavement width of 1.5 m is not sufficient for two wheelchairs to pass one another. For this, a minimum of 1.8 m would be required (McIntyre, 2018).

In similar milieu, the National Road Standards as well as The Guidelines for Access to Physical Facilities and Information for People with Disabilities, 2069 have the detail specifications for wheelchair ramps, parking spaces and other facilities. Unfortunately, these standards are not mandatory and hence have not been effectively implemented. These standards along with other international standards can be used to secure and promote the accessibility right of PWDs.

Different countries have introduced legislations and standards to secure and foster the accessibility right of PWDs. In the US, The Department of Justice revised the Americans with Disabilities Act, 1990 (ADA) in 2010 and published Standards for Accessible Design. Many cities have prepared manuals based on these standards. For example, the Street Design Manual of New York City states that "Sidewalks must conform to ADA requirements for minimum clear path width and provision of spaces where wheelchair users can pass one another or turn around; beyond the ADA minimum, provide an unobstructed clear path of 8 feet or one-half the sidewalk width, whichever is greater." (NFDN, 2018)

The experiences from other countries indicate that accessibility ought to be built as a culture by increasing the awareness amongst the people at all stages. When the notion of accessibility is indoctrinated and institutionalized it can contribute towards securing the accessibility rights of persons with disability. In context of Nepal, despite international declarations and commitments there has been a limited attention regarding ensuring the right to accessibility of PWDs.

### Issues of Intersectionality

Women and girls with disabilities are subject to multiple discriminations so measures should be taken to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms. In context of Nepal, *Rights of Persons with Disabilities Act, 2074* has provisioned that the specific rights of the women with disabilities and holds that the Government of Nepal shall provide an environment for the maximum utilization of the knowledge, skill and ability of women with disability so as to protect their rights (Government of Nepal, 2017). Similarly, sec 19(2) recognizes the duty of Nepal government, to secure the protection of health and reproductive right of women with disabilities.

Furthermore, section 28 of *The Right to Safe Motherhood and Reproductive Health Act, 2075 (2018)* recognizes various rights relating to right to safe motherhood and reproductive health. In doing so, services related to safe motherhood and reproductive health has to be disability friendly. Section 29 of the Act states that no one shall discriminate on the right to get monthly services including family planning, reproductive health, safe motherhood, safe abortion, emergency obstetric and newborn care, morbidity on the ground of one's physical or health condition, disability or any similar grounds. Additionally, section 30 holds that for the protection of the reproductive health of a woman who is mentally disabled the Federal, Provincial and Local Levels shall have to make arrangement with reciprocal coordination for keeping such a woman in a protection home.



Similarly, section 12 of *The Act Relating to Children, 2075 (2018)* has made specific provisions regarding the special rights of children with disabilities including special arrangements for such children, right to determine his or her own honor and prestige, to promote his or her own independency, to participate actively in the society and to live a life with dignity, obtain special care and to be assimilated in the society and to obtain the opportunity to education, training, health care, rehabilitation service, preparation for employment and entertainment for the development of his or her personality and have the right to equal access and utilize the public services and facilities. Thus, the laws of Nepal also address the intersectionality within the category of PWDs.

## Conclusion

The 2021 census of Nepal shows that 2.2% of the total population has one or the other type of disability which is an increment from 1.94% from the 2011 Census. Furthermore, among the total persons with disability, 54.2% are males and 45.8% are females (Office of the Prime Minister and Council of Ministers, National Statistics Office, 2021). Regarding the state responsibility, Nepal is a party to the CRPD and its optional protocol and therefore it is important to make sure that the obligations of the state stipulated under CRPD are fulfilled by Nepal. From the study it is clear that the PWDs necessitate an access to quality mobility aids, devices, assistive technologies and forms of live assistance and intermediaries, including by making them available at affordable cost. It is the right of every individual to be able to participate in their family or community activities on an equal basis with others, irrespective of their physical, mental and sensory conditions. Such rights provide citizens with autonomy to pursue an active social and economic life.

Additionally, secured accessibility right enables people to live with equity and dignity; as good accessibility improves safety of the building, which also has a direct impact on the number of accidents taking place and during natural disasters (Lamichhane, 2015). Therefore, it is important to understand the idea of Disability Inclusion, which is increasingly recognized as key to ensuring that no one is left behind in the sustainable development process.

Nepal is a rapidly urbanizing country, the government's Ministry of Physical Infrastructure and transport needs to immediately formulate and enforce Urban Street Standards with universal designs which are applicable to all citizens. Proper initiatives on Accessibility Audit must be taken across the nation to propose prospective improvements in order to strengthen the accessibility standards.

Nepal being a signatory member state to CRPD has to take necessary measures to prohibit discrimination on the basis of disability with regard to all matters concerning all forms of accessibility. It has to have proper mechanism to monitor the rights of the PWDs and develop an effective mechanism to protect and develop such rights in line with CRPD which requires the government to establish a mechanism to monitor the implementation of the convention, and urges state parties to involve people with disabilities in this process.

When the notion of accessibility is indoctrinated and institutionalized in the society, it can contribute towards securing the accessibility rights of persons with disability. A candid example

of it would be the disabled friendly buses introduced by Sajha Yatayat and City Metro Yatayat Pvt Ltd in Kathmandu which are equipped with ramps, wheelchair-accessible door and can accommodate wheelchair-bound passengers, which have at least realized and recognized the accessibility rights of persons with disability (Ojha, 2018).

Thus, by not considering disability a personal deficit or shortcoming, and instead thinking of it as a social responsibility in which all people can be supported to live independent and full lives, it becomes easier to recognize and address challenges that all people—including those with disabilities—experience.

### **Recommendations**

#### ***To the Ministry of Women, Children and Senior Citizen***

- i. Programs like accessibility audit must be regularly performed across the nation to recommend potential improvements in line with the approved accessibility standards through a joint monitoring mechanism and engage all stakeholders in raising awareness on accessibility and universal design.
- ii. The government should strengthen and implement legislation and provide for accessible monitoring and reporting mechanisms to detect, prevent and combat all forms of violence, including sexual violence, against women and girls with disabilities by consulting with the representative organizations of women and girls with disabilities. Additionally, the government should pay particular attention to children with disabilities with intellectual or psychosocial disabilities belonging to marginalized groups in rural and mountainous areas.
- iii. Government in collaboration with the representative organizations of PWDs, should develop and implement public awareness-raising and education programmes on the rights and situation of PWDs, aimed at the media, public officials, judges and lawyers, the police, social workers and the general public, in order to foster a positive image of PWDs as autonomous holders of human rights.

#### ***To the Local Level Government Authorities***

- i. Authorities should take appropriate measures to remove all barriers to ensure that persons with disabilities from rural areas and indigenous backgrounds have an easy access to disability identity cards.
- ii. Legal mandates promote both disability specific and disability mainstreamed government action with an aim of achieving disability inclusive societies. That is why the training in mobility skills to PWDs and to specialist staff working with PWDs should be ensured to ascertain that the personal mobility of the PWD is upheld.

#### ***To other Concerned Stakeholders***

- i. Lack of awareness about accessibility has been a major issue for accessible infrastructure or environment. Even the basic bylaws and standards for accessible infrastructure are not

considered during the designing and construction processes. Thus, raising awareness from the root level has to be initiated by the concerned management and public sectors to ensure the use of existing criteria related to accessibility.

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# Labor and Employment Rights of Women in Nepal

Bipana Chapagain

## Abstract

*International Women's Day is celebrated every year on March 8. According to the norms and values of basic human rights, every person has right to dignified work and decent pay. It is evident that the participation of women has a significant role in the economic development of Nepal. Although the Constitution of Nepal has provided labor related rights as a fundamental right, but there is no creation of adequate and decent employment opportunities in the country. The women worker working in the informal sector in Nepal are facing physical, mental, financial and sexual violence from their families, society, managers and the customers. Nepal has ratified 11 Conventions related to labor rights, including 7 Conventions related to basic principles and rights. The Conventions ratified by Nepal are Convention on the Right to Organize and Collective Bargaining (1959), Convention on Forced Labor (1930) and Convention on Equal Remuneration (1951). Similarly, Nepal is signatory to other Conventions regarding the labor rights such as Convention on the Abolition of Forced Labor (1957), Convention on Discrimination in Employment and Occupation (1958), Convention on Minimum Age (1973) and Convention on the Elimination of Child Labor (1999). Likewise, Nepal has signed the Priority Convention on Tripartite Consultation (1976). In addition, Nepal has signed the Convention on Weekly Leave (1921), the Convention on Wage Determination (1970) and the Convention on Indigenous and Tribal People (1989). Although Nepal is a party to labor rights Conventions under the International Labor Organization, labor rights are not implemented effectively. Nepal has drafted and revised the various laws, regulations and procedures related to labor and social security. The responsible authorities for the implementation of labor rights such as Labor Office, Labor Court, Social Security Fund are working to ensure the labor rights at the national level. Through this article, the author has reviewed and analyzed the Constitutional and legal provisions along with the international labor rights originated from International Treaties and Conventions etc., as well as the principles propounded by the Supreme Court related to the labor and employment rights of women in Nepal.*

**Keywords:** Labor Rights, Sexual Abuse, Ministry of Labor and Employment, Labor Court, Right of Women.

## 1. History of International Women's Day

Around the eighteenth century, there were development of the Industries in England. Along with the development of factories, women started working outside the home. In earlier days, women were employed for long hours with low wages.<sup>1</sup> At that time dissatisfaction increased among the women workers because of their menstrual problems as well as the issues related to their reproductive health. Similarly sick leave and maternity leave facilities were not ensured for them.<sup>2</sup> Mary Wollstonecraft from Britain has advocated about the equal rights for women on 1779.<sup>3</sup> On 1832, the workers of Dutch Textile Factory protested against the slavery and they have raised their voices against the unequal wages. On 1848, Marx published the 'Communist Manifesto'. Likewise, American women has advocated for the eradication of exploitation and guarantee of equal rights in education, employment, and suffrage of women. The women workers in the American Cotton Textile Industry protested on March 8, 1857, for the reduction of working hours in the industry.<sup>4</sup> The International Labor Union was established on 1864. On 1866, women were not represented in the International Labor Union. Hariyatal was the first female member of the International Labor Union. On 1868, Karl Marx has raised the agenda of infant care of the child of the women worker working in the industry.<sup>5</sup>

The agenda relating to the equal payment for the work of equal rank was discussed at the International Conference of workers held in Paris on 1889 A.D. The women of New Zealand were the first women in the world to get the voting rights on 1893 A.D. The working women of New York has talked about the minimum wages and fixed working hours on March 8, 1897 A.D. The Second International Conference of Women was held with the participation of the representatives from 17 countries as well as women parliamentarians from Finland on 1910 A.D.<sup>6</sup> The decade of women was declared by the United Nations from 1975 A.D. to 1985 A.D. Later on, they started celebrating March 8 as the International Women's Day.<sup>7</sup> Likewise on 1979 A.D., the Convention on the Elimination of All Forms of Discrimination against Women was passed.<sup>8</sup>

### 1.1 Facts About Working Women in Nepal:

According to the statistics of National Census 2078 of Nepal, the population of women is 51.02%. Out of the total population of Nepal, the population of women worker working in undefined professions is the population with the age of 10 years or more is recorded to be 0.1%. The participation and leadership of women have the significant role in the economic development

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of Nepal.<sup>9</sup> Regarding the protection of the rights of women worker, there are specific provisions in the Nepal such as The Act Relating to Factory Workers 2016, Bonus Act, 2030 and Bonus Regulations, 2039 etc.<sup>10</sup> Although the Constitution of Nepal 2072 has established the rights regarding labor and employment as the fundamental rights, adequate and decent employment opportunities are not created in the country. According to the study of the Ministry of Finance, there is addition of labor force to the labor market every year but most of the skilled youth are migrating abroad. The significant number of workers working in the country are working in the informal sector, while only a few percent are working in the formal sector. There are significant number of women who are working as the laborers in the informal sector as they can work in the informal sector without educational certificates.<sup>11</sup>

There is no proper recognition, respect and protection of the labor rights of the women worker working in the informal sector. The women workers in this sector are not able to get their minimum wages. The women workers are facing mental, financial and sexual violence from their family and society. Although the labor rights of the employees of the formal sector are guaranteed in the laws of Nepal but the workers of the informal sector are exploited by the employers.<sup>12</sup> The Government of Nepal has passed the Social Security Scheme Operation Procedure 2079 for workers working in the informal sector and self-employed persons.<sup>13</sup>

## 2. Methodology:

Basically, the author has written this article by the review of the several non-doctrinal resources. The various government documents related to the rights of women workers are evaluated in this article. The periodical articles and reports published by the various national and international bodies are examined. The author has reviewed the constitution and other legal documents regarding the rights of women workers in Nepal. The precedents established by the Supreme Court of Nepal regarding the rights of women workers are analyzed critically. The author has followed the American Psychological Association (APA) citation rules in this article.

## 3. Legal Analysis of Labor Rights of Women Worker in Nepal:

### 3.1. Right Regarding Labor and Employment Incorporated in Constitution of Nepal 2072:

In the constitution of Nepal, every citizen has the right to live with dignity.<sup>14</sup> Every citizen is not deprived of personal freedom except in accordance with the law. They are entitled to freedom of

9 Summary of National Census, (2078) Kathmandu, Office of National Statistics, pp 82-85.

10 Legal provision regarding women worker in Nepal (2018), *Madhyanna National Daily Newspaper*. p.3 <https://www.ceslam.org/news/10987>. Accessed on 31<sup>st</sup> October, 2023.

11 Life of Women Worker Working in Entertainment Sector, Right to Decent Work and Living Wage Report (Asia Pacific Forum on Women Law and Development, (2012-2013) \_ p.2.

12 Every worker must understand their rights regarding decent labor (2019), *Amnesty International*, Accessed on 4<sup>th</sup> October, 2023.

13 Declaration made by Prime Minister to include the worker from Informal Sector in Social Security Fund (2023), *Gorkhapatra Online* <https://gorkhapatraonline.com/news/75044>, Accessed on 28<sup>th</sup> September 2023.

14 The Constitution of Nepal 2072, Article 16



doing any profession, employment, establish and run industries, trades and businesses in any part of Nepal unless it is contrary to the public health, decency or morals of the people.<sup>15</sup>

Since every citizen is equal in the eyes of the law, no one is deprived of the equal protection of the law. The Constitution of Nepal has made special arrangements for the backward women and workers. Regardless of whether men or women is doing the same work, equal pay and social security will be provided without any kind of discrimination on the basis of gender.<sup>16</sup> Every worker has right to choose the job he wants.<sup>17</sup> The workers are entitled to the employment terms, conditions and unemployment benefits in accordance with the labor law. Generally, the workers perform physical or intellectual work for the employer and they receive salary and social security in return.

The state must entitle the women with the equal inheritance rights. The rights of women related to the pregnancy protection and reproductive health should be ensured with sensitivity in the government and private sectors. No one is allowed to commit the physical, mental, sexual, psychological violence and exploitation against any woman. The compensation is provided to the women who are the victims of violence. In order to ensure the participation of women, the state must effectively implement the principle of proportional inclusion in all agencies of the state. The special opportunities in education, health, employment and social security must be provided to the women. The couple are entitled to equal rights in the property.<sup>18</sup>

The constitution itself has ensured 33 percent representation of women in the parliament. The labor policy aims to make the labor force skilled and professional, as well as create employment opportunities in the country and provide decent labor practices along with the social security. It aims to make foreign employment free from the exploitation and it encourages the capital, skills and technology acquired from abroad must be used in the productive sector.<sup>19</sup>

### **3.2 Sectoral Laws regarding Labor and Employment in Nepal:**

#### **A. Right to Employment Act 2075:**

This Act has guaranteed the right of every person to choose the employment of their wish. Every unemployed person can get the unemployment benefits. The workers cannot be removed from the employment without reason.<sup>20</sup> If the employer dismisses the worker without reason, the local level can order the employer to continue the employment of workers.<sup>21</sup> From the government level, the government of Nepal, the state government and the local level should conduct employment programs to provide jobs opportunities to the unemployed people.<sup>22</sup> The employment service centers shall be established at every local level. The unemployed must apply to the employment

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15 The Constitution of Nepal 2072, Article 17(cha)

16 The Constitution of Nepal 2072, Article 18

17 The Constitution of Nepal 2072, Article 33

18 The Constitution of Nepal 2072, Article 38

19 The Constitution of Nepal 2072, Article 51(jha)

20 The Right to Employment Act, Section 6.

21 The Right to Employment Act, Section 7.

22 The Right to Employment Act, Section 8.

service center by mentioning their knowledge, skills and abilities. The employers in the government, public and private sectors should hire applicants based on their qualifications. Under the unemployment assistance program from the government level, providing training to workers, providing loans, and self-employment related programs should be conducted.<sup>23</sup> There is a provision of the Nepal government to provide subsistence allowance equal to 50% of the amount for 100 days to the unemployed people.<sup>24</sup>

### **B. The Social Security Act 2075:**

The Government of Nepal provides social security allowance to senior citizens, economically disadvantaged, disabled and helpless, single women, disabled, children and endangered species. The employees of any government or public organization will not get social security allowance as they receive regular salary and pension from the government fund.<sup>25</sup>

### **C. The Labor Act 2074:**

The basic wages, services, conditions and facilities of the workers are mentioned in the employment contract.<sup>26</sup> In order to guarantee labor rights, every employer must provide workers with the minimum wages prescribed by labor laws and regulations. If the employment contract is against the labor law, it is automatically void.<sup>27</sup> According to the principles of human rights, no one can be forced to do labor against their will by showing fear and terror.<sup>28</sup> The Labor Act prohibits child labor and advocates for the rights of children.<sup>29</sup> The employers must ensure the wages and benefits of pregnant workers under the right to pregnancy protection and reproductive health. The equal remuneration should be provided for work of equal value without discrimination on the basis of gender.<sup>30</sup> Every worker has right to get legal remedies.<sup>31</sup>

### **Mandatory Implementation of Employment Contract:**

The wages, services, conditions and facilities to be received by the worker are mentioned clearly in the contract or appointment letter between the employer and the worker. After the implementation of the Labor Act 2074, the employer cannot employ anyone without a contract.<sup>32</sup> The employment contract establishes the employment relationship but if there is a dispute, the labor office resolves the dispute.<sup>33</sup> There is a provision that the employer can terminate the employment contract if the performance is not satisfactory after employing the worker for the probation period of six months. After the completion of the probation period, the employment relationship is automatically confirmed.

23 The Right to Employment Act, Section 20.

24 The Right to Employment Act, Section 22.

25 The Social Security Act 2075, Section 15.

26 The Labor Act 2074, Section 2(dha)

27 The Labor Act 2074, Section 3

28 The Labor Act 2074, Section 4

29 The Labor Act 2074, Section 5

30 The Labor Act 2074, Section 7

31 The Labor Act 2074, Section 9

32 The Labor Act 2074, Section 11

33 The Labor Act 2074, Section 12

### **Fixation of Time Duration of Working Hours:**

In the context of Nepal, the workers can work 8 hours per day and 48 hours per week. After working for 5 consecutive hours, the workers are allowed to rest for half an hour. If the workers are employed for more hours, they can only be employed for four hours a day and 24 hours a week. If the employer does not provide the workers with the substitute leave, it will be considered that they have worked for additional hours and the employee should be paid for such work. The working hours of the workers should be mentioned in the employment contract clearly. The employers should provide transportation facilities to the women workers working at night.<sup>34</sup>

### **Facilities of Remuneration:**

Every worker receives wages and benefits from the date of work. According to the Labor Act, the wages and benefits of the workers are mentioned in the employment contract.<sup>35</sup> The workers who work for less than a month should be provided with wages within three days. The remuneration must be provided to the workers who perform the casual work as soon as the work is completed. The salary must be paid every month. After the completion of the employment period, the workers will get an annual salary increment. Every worker receives an amount equal to one month's basic salary as the festival expenses.<sup>36</sup> The employer has to pay the salary through the bank.<sup>37</sup>

### **Leave as a Matter of Privilege Rather Than Rights:**

In accordance with Labor Act 2074, there is a provision for one day leave in a week.<sup>38</sup> Generally there is a provision of 13 days of public leave but there is 14 days of public leave for women workers.<sup>39</sup> There is a provision that workers are entitled to leave within 21 days if they work on weekly leave or public holiday. The workers are entitled to home leave at the rate of 1 day out of 20 working days.

The workers will get 12 days sick leave. Fourteen weeks maternity leave is provided to female workers. There will be 60 days of paid maternity leave and if the male worker's wife gives birth, the father will get 15 days of paid maternity leave.<sup>40</sup> In case of the death of a family member to whom the worker has to do the funeral rites, there is a provision of 13 days funeral leave.<sup>41</sup> Other leaves are considered as privilege except sick leave, maternity leave and funeral leave.<sup>42</sup>

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34 The Labor Act 2074, Section 28, 29, 30, 31, 32, 33.

35 The Labor Act 2074, Section 34

36 The Labor Act 2074, Section 35, 36, 37

37 The Labor Rules 2075, Rule 21

38 The Labor Act 2074, Section 40

39 The Labor Act 2074, Section 41

40 The Labor Act 2074, Section 45

41 The Labor Act 2074, Section 48

42 The Labor Act 2074, Section 51

### **Social Security Schemes:**

The employer is required to contribute 10% of the worker's basic salary as a provident fund and an additional 10% must be contributed by the employer.<sup>43</sup> The employer has to contribute 8.33% amount from the worker's basic salary as gratuity.<sup>44</sup> The workers will receive an insurance amount equal to one lakh rupees for medical treatment from the employer.<sup>45</sup> Likewise, the workers will receive insurance amount equal to seven lakh rupees for accident insurance.<sup>46</sup>

### **Zero Tolerance to Sexual Harassment:**

No one should abuse the women workers in the workplace by showing the greed and influence, otherwise the workers will be removed from the service. If the employer is the perpetrator, the union, the victim or the family member can file a complaint.<sup>47</sup>

### **Conditions of Termination of Employment:**

The employer must give the worker an opportunity to submit the clarification by clearly stating the fact of misconduct and the probable punishment within seven days. If the workers have committed the misconduct, the executive head can punish them. If the worker is punished for misconduct, the employment can be terminated immediately. The employer must give a reasonable and sufficient reason while terminating the employment. If the employee voluntarily submits a written resignation, the employer must approve it within 15 days.<sup>48</sup>

### **D. Sexual Harassment at Workplace (Prevention) Act 2071:**

It has guaranteed the zero tolerance of sexual harassment at workplace. It has ensured the right to work in a safe, fair and dignified environment. It has prohibited to commit sexual harassment in workspace.<sup>49</sup> The person in position, power and authority are not allowed to create pressure, influence, enticement for the sexual favor from the employee or customer. No one is allowed to touch the body of other person with the sexual intent. One should not display the picture, audio, visual related to obscene and sexual activity. No one is allowed to annoy the other person with sexual intent and making unnecessary offer for the sexual activity.<sup>50</sup> The manager should declare the office as sexual harassment free workspace. There must be prohibition of sexual harassment in the Bylaws of the office. The manager must make the reformative measures for the non-repetition of sexual harassment. There must be arrangement of psychological counselling of the victim. Every enterprise must have grievance box in the workplace. The manager has responsibility to inform the victim about the time-limitation for filing the complaint in the responsible authority.<sup>51</sup> The victim must file written or oral complaint to the manager within

43 The Labor Act 2074, Section 52

44 The Labor Act 2074, Section 53

45 The Labor Act 2074, Section 54

46 The Labor Act 2074, Section 55

47 The Labor Act 2074, Section 132

48 The Labor Act 2074, Section 139, 140, 141, 142, 143, 144

49 The Sexual Harassment at Workplace Prevention Act 2071, Section 3.

50 The Sexual Harassment at Workplace Prevention Act 2071, Section 4.

51 The Sexual Harassment at Workplace Prevention Act 2071, Section 5.

15 days. The manager is responsible to take the departmental action against the accused and order for the reasonable compensation to the victim.<sup>52</sup> The victim or anyone on their behalf must file the complaint in Chief District Office (CDO) within ninety days. If the manager of the office does not comply with the responsibilities, the victim may file the complaint with CDO.<sup>53</sup> The victim may request for the security to the local security agency. The manager has right to order for the transfer of the accused employee. The offender of the sexual harassment is awarded with the imprisonment of six months and fine of fifty thousand rupees. The manager is liable to imposition of the fine of twenty-five thousand rupees for the non-fulfillment of his responsibility. The person who has filed the false complaint is liable to imposition of fine of ten thousand rupees. The CDO may order to recover the compensation to the victim for their physical and mental damage as well as the expenses incurred while filing or defending the complaint.<sup>54</sup> The Chief District Officer have right to adjudicate the complaint. In addition to that principal secretary of the concerned Province have power to adjudicate the complaint filed against the Chief District Officer.<sup>55</sup> The victim may file appeal to the concerned district court within thirty-five days in case of the dissatisfaction of the decision made by the CDO.<sup>56</sup> It is the duty of manager to enforce the decision. The CDO is obliged to enforce the decision as per the prevailing law. The CDO must enforce the decision or conciliation within 60 days, if the accused is the manager.<sup>57</sup> Every office or enterprises must incorporate the subject matters relating to prevention of sexual harassment in the syllabus of the training.<sup>58</sup> The Government of Nepal must introduce necessary Code of Conduct with regard to the prevention of sexual harassment. Each manager is obliged to introduce separate Code of Conduct in accordance with the nature of the workplace within the framework of the Code of Conduct introduced by Government of Nepal.<sup>59</sup>

### **E. Contribution-Based Social Security Act 2074:**

In order to get social security, one should contribute to the social security fund. The employers who are listed must contribute from the income of the workers and add the amount to the fund every month from the date of listing of the workers to the last day. The contribution amount should be deposited in the fund within fifteen days of the end of every month. The contribution of the person receiving salary from the government fund should be deducted and deposited in the fund. In order to encourage the informal sector workers and self-employed people in the social security scheme, the government of Nepal should deposit money in the fund. The Social Security Fund can cooperate with cooperatives or commercial organizations to make them participate in

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52 The Sexual Harassment at Workplace Prevention Act 2071, Section 6.

53 The Sexual Harassment at Workplace Prevention Act 2071, Section 7.

54 The Sexual Harassment at Workplace Prevention Act 2071, Section 13.

55 The Sexual Harassment at Workplace Prevention Act 2071, Section 14.

56 The Sexual Harassment at Workplace Prevention Act 2071, Section 16.

57 The Sexual Harassment at Workplace Prevention Act 2071, Section 17.

58 The Sexual Harassment at Workplace Prevention Act 2071, Section 18.

59 The Sexual Harassment at Workplace Prevention Act 2071, Section 21.

the scheme.<sup>60</sup> They have the right to choose one or more social security schemes. It is not possible to choose any one social security scheme operated by the fund.<sup>61</sup>

If the committee recommends the rate of contribution to be made by the listed employers and contributors, the ministry will publish a notice in the National Gazette. There are social security schemes like health security scheme, maternity security scheme, accident security scheme, disability security scheme, old age security scheme, dependent family security scheme, unemployment assistance scheme.<sup>62</sup> The fund should pay the benefits mentioned in the social security scheme to the contributor. After the death of the contributor, the beneficiary gets the amount collected in the fund. The board of directors is in place to manage the operations of the fund.<sup>63</sup> The Social security funds can be invested in Nepal government bonds, bank term accounts or long-term deposit schemes, shares, debentures and mutual funds. The people receiving the social security can get an identity card with a social security number.<sup>64</sup> If the amount in the fund is insufficient, the government of Nepal should continue to provide for the social security.<sup>65</sup>

#### **F. Contribution-Based Social Security Regulations 2075:**

The workers of the informal sector can participate in the social security scheme after taking the recommendation of Committee's. In order to encourage the workers, Nepal government, provincial government or local level should deposit the amount in the name of the fund through the budget of the contribution amount as determined by the fund.<sup>66</sup> The fund should make an agreement with the bank and collect the amount under the social security scheme. The fund must provide the details of the contribution amount if requested by the contributor and the employer.<sup>67</sup>

#### **G. Social Security Plan Operation Procedures for Informal Sector Workers and Self-employed Persons 2079:**

From the date mentioned by the Ministry of Labor, Employment and Social Security the informal sector must be listed by giving online application to the Social Security Fund.<sup>68</sup> The workers working in the informal sector must disclose a copy of Nepali citizenship, labor sector such as agriculture, transport, construction or domestic workers and a letter of recommendation issued by the ward office as a worker in the informal sector. The fund should list the workers and provide them with the identity cards. The fund should operate drug treatment plan, health and maternity protection plan, accident and disability protection plan, dependent family protection plan and old age protection plan etc. under the Social Security Scheme.<sup>69</sup>

60 Contribution based Social Security Act 2074, Section 5.

61 Contribution based Social Security Act 2074, Section 6.

62 Contribution based Social Security Act 2074, Section 10, 11.

63 Contribution based Social Security Act 2074, Section 29

64 Contribution based Social Security Act 2074, Section 39, 40, 41

65 Contribution based Social Security Act 2074, Section 62

66 Contribution based Social Security Rules 2075, Rule 4.

67 Contribution based Social Security Rules 2074, Rule 5.

68 Informal Sector Workers and Self-Employed Persons Social Security Scheme Operating Procedure 2079, Procedure No. 3

69 Informal Sector Workers and Self-Employed Persons Social Security Scheme Operating Procedure 2079, Procedure No. 4



The employer has to deposit 20.37% of the basic remuneration of informal sector workers and the government must deposit 9.37% of the basic remuneration in the Social Security Fund. The fund will disburse 10.37% of the amount contributed by informal sector workers to Health and Maternity Protection Scheme, Accident and Disability Scheme, Dependent Family Protection Scheme. The fund will spend 10% of the amount on the Old Age Security scheme.<sup>70</sup> A Self-Employed Person has to contribute at least 31% of the basic salary within the maximum of three installment. In order to receive the amount from the Social Security Fund, the worker must have deposited at least 9 months of contribution in the fund within the 12 months prior to the date of the incident.<sup>71</sup> Similarly, the age of the worker should be 60 years old and have worked for at least 180 months. The contributors or beneficiaries can receive the payment of the Social Security Scheme through the Bank Account.

### **4. Regulatory Authorities for the Implementation of Labor Rights:**

#### **4.1 International Labor Organization:**

The International Labor Organization was established in 1919 as a special organization of the United Nations. The number of member countries of this organization is 187. Nepal became a 116<sup>th</sup> member of the International Labor Organization on 1966. Nepal has ratified 11 conventions, including 7 conventions related to the fundamental principles and rights. The Conventions regarding the labor rights ratified by Nepal are Convention on Right to Organize and Collective Bargaining (1959), Convention against Forced Labor (1930), Convention on Equal Remuneration (1951), Convention on Abolition of Forced Labor (1957), Convention on Discrimination in Employment and Occupation (1958), Convention on Minimum Age (1973), Convention on Elimination of Child Labor (1999). Likewise, Nepal has signed the Convention on Tripartite Consultations (1976). In addition, Nepal has signed Convention on Weekly Leave (1921), Convention on Wage Determination (1970) and Convention on Indigenous and Tribal People (1989).

#### **4.2 Ministry of Labor Employment and Social Security:**

The Ministry of Labor, Employment and Social Security can decide on the petitions submitted to the Labor Office or the Department of Labor except for cases pending in the Labor Court in accordance with the Labor Act. The parties who are not satisfied with the decision can appeal to the Labor Court.<sup>72</sup> In addition to this, the Ministry works on decent labor practices, management of occupational safety, prevention of child labor, creation of jobs in the country, skill development training and implementation of Social Security Schemes.

According to the Annual Progress Report of the Financial Year 2078-79, the number of labor audited institutions in Nepal is 2, 919 and the number of beneficiaries in the social security fund is 3, 46, 744. The number of employers included in the social security scheme is 17, 192 and the number of workers affiliated to the contribution-based social security establishment is 70.03%.

70 Informal Sector Workers and Self-Employed Persons Social Security Scheme Operating Procedure 2079, Procedure No. 5

71 Informal Sector Workers and Self-Employed Persons Social Security Scheme Operating Procedure 2079, Procedure No. 6

72 The Labor Act 2074, Section 176.



The Ministry has stated that 19, 553 workers were benefited by conducting professional and skill training in the financial year 2078/79. Under the Prime Minister's Employment Program, the target of providing employment to 5, 50, 000 workers are succeeded in providing the employment to 1, 56, 731 workers in FY 2078/79. The Ministry has succeeded in monitoring 2, 699 enterprises whether the labor law and the minimum wages are implemented or not. Although the Ministry has set an annual goal of providing workplace-based skill training to 300 workers in the financial year 2078-79 in collaboration with the private sector, it is unable to conduct the training. In FY 2078/79, The Ministry of Labor, Employment and Social Security has submitted 6 reports under the International Labor Organization Statute. The Ministry has succeeded in interacting with 11 local levels to eradicate the child labor. Similarly, grants have been provided to 39 local levels to eradicate child labor.<sup>73</sup>

The Fifteenth Plan aims to create the productive employment opportunities in Nepal, develop the industrial labor relations, end all forms of labor exploitation and make the foreign employment safe. The Ministry of Labor and Employment has a major role in achieving the goal of "Prosperous Nepal, Happy Nepali" by strengthening the economy of Nepal through the skilled human resources.<sup>74</sup>

#### **4.3 Authorities of Labor Office:**

The Labor Office monitors the implementation of the minimum wages, services and facilities of the workers. In addition, child laborers are rescued and child labor exploiters are prosecuted in the labor office. The Labor Office provides training on the implementation of labor standards and codes of conduct. The office implements the collective agreement between the employer and the worker and the decision of the arbitrator. The office oversees occupational safety and equipment related to the workplace.

#### **4.4 Central Labor Advisory Council and Other Committees:**

The Council provides suggestions to the Government of Nepal to ratify and implement labor-related laws, policies and international labor conventions to which Nepal is a party. The council prepares a code to implement occupational safety, health standards and fair labor practices and recommends it to the government of Nepal.<sup>75</sup> The Ministry of Labor, Employment and Social Security determines the minimum wage of workers every two years on the recommendation of the Minimum Wage Determination Committee.<sup>76</sup> The Ministry forms a Minimum Wage Determination Committee to represent the Government of Nepal, Trade Unions and Employers. The Labor Relations Committee improves the work system and work environment.<sup>77</sup> The said committee solves the grievances of the workers by discussing with the employers.<sup>78</sup>

73 Ibid, Executive Summary, p. 3.

74 Ibid, Chapter One, p. 2.

75 The Labor Act 2074, Section 102.

76 The Labor Act 2074, Section 106.

77 The Labor Act 2074, Section 107.

78 The Labor Act 2074, Section 111.

### 4.5 Jurisdiction of Labor Court:

The Labor Court is constituted with the chairman and two members. The person who is qualified to be a judge of the High Court is eligible to be the chairman or member of the Labor Court.<sup>79</sup> This court inspect the workplace related to the dispute and issue an interim order in the name of any party to the case. The Labor Court have rights to confirm or annul the decision made by the Labor Office. The Labor Court have the same powers as that of District Court in the matters relating to decision of the case. The Labor Court may demand a bank guarantee from the party. The labor court can order to pay the compensation within two months, otherwise one must pay fifteen percent interest on the compensation. The Labor Court may allow the party either to settle the case, suspend or withdraw the case. An appeal can be made to the Supreme Court within thirty-five days against the decision of the Labor Court.<sup>80</sup>

The labor court have power to impose the imprisonment up to two years or a fine up to five lakh rupees or double the amount of compensation from such person if he has forced someone to do the bonded labor. The labor court can also cover the cost of bringing the laborer to Nepal if someone has made a bonded labor outside the Nepal. If one is not satisfied with the decision made by the labor office or the department, one can appeal to the labor court within thirty-five days.<sup>81</sup>

### 4.6 Establishment of Social Security Fund:

A social security fund is established to run the social security scheme. This fund functions as a recurring fund. In the fund, the amount received from contributors and employers under the social security scheme, ten percent of the amount received from the basic salary of the worker and the amount given by the employer towards the provident fund, amount received for gratuity and pension, bonus amount, amount for social security tax, grant received from the government of Nepal, grant received from foreign government and international organizations, amount for assistance or loan, amount of interest and profit received from investment of funds, amount received as loan from the government of Nepal etc. will be collected in the social security fund. The money collected in the fund can be used only by the concerned workers.<sup>82</sup> A board of directors has been arranged to manage the work of the fund. The committee formulates policies related to the social security schemes, provides suggestions to the Government of Nepal, updates the personal details of workers listed in the fund and conducts the employment programs for the unemployed people. The said committee distributes the social security identity card to every contributor.<sup>83</sup>

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79 The Labor Act 2074, Section 151.

80 The Labor Act 2074, Section 152.

81 The Labor Act 2074, Section 165.

82 Contribution based Social Security Act 2074, Section 26.

83 Contribution based Social Security Act 2074, Section 31.

## 5. Judicial Response on Right Regarding Labor and Employment of Women Worker in Nepal:

In the case of Prem Bahadur Khadka vs. Government of Nepal, Office of the Prime Minister and Council of Ministers, it has been stated that any individual is free to pursue his profession and employment according to his own free will. It has been mentioned that no one can interfere with this employment right and insist that only certain occupations and jobs can be done. The freedom of this profession and employment cannot be interfered with by the state for the sake of public interest and well-being, except by prohibiting it in accordance with the restrictive phrase.

In this case, the Supreme Court has expressed the principle that the state should play a special role in empowering women to get employment by providing opportunities for employment equal to men in order to protect women's rights and rights, as well as taking initiatives to make the working environment women-friendly. In addition to this, the state has emphasized that policies and programs related to employment should be introduced to increase the participation of citizens from backward classes, regions or gender. Since the right to employment is an important right among economic and social rights, the state should put it in a category that can be managed according to its resources and means. Every country has the discretion to adopt legal and other measures to regulate employment rights. But in the name of discretionary power, it does not mean that the right to employment is not ensured. The state should be careful to guarantee employment security to every person.<sup>84</sup>

In the case of Advocate Prakashmani Sharma vs. The Ministry of Women, Children and Social Welfare, states that the Constitution of Nepal has provided every citizen with the right to employment, social security as well as the right to social justice and right against the exploitation as a fundamental right. In this situation, the Supreme Court has laid down the principle that the women working in Dance Bar and Cabin restaurants must not be exploited.

According to the Supreme Court, the government should enact the special law to regulate the dance bars, cabin restaurants and massage parlors. If the citizens, people of any group, caste or class are deprived of human rights due to inactiveness of the executive, the court can enforce those rights. If there is a lack of law in the country, the business cannot be operated decently due to which the fundamental rights and human rights of the women workers are not protected properly.<sup>85</sup>

In the case of advocate Sharmila Parajuli vs. His Majesty the Government, the Cabinet Secretariat, Kathmandu, states that every woman has the right to be free from serious violence such as sexual harassment and right to live with dignity. In reality, sexual abuse is considered to be an act against the will of the concerned woman. These acts range from sexual exploitation, teasing, touching the body, swearing, showing or drawing pictures, eye blinking etc. Such activities affect the work, health and professional life of the victim.

84 Prem Bahadur Khadka vs. Government of Nepal, Prime Minister and Council of Minister et.al D.N. 8203, N.K.P. 2066

85 Advocate Prakashmani Sharma et.al vs. Government of Nepal, Ministry of Women Children and Social Welfare, D.N 7995, N.K.P 2065.

Sexual harassment in the workplace means sexual harassment by seniors or colleagues, friends or customers in an office or an enterprise. There is a situation in which sexual harassment can occur in the workplace by the office boss or higher staff threatening to put their job at risk if the female worker denied to give sexual benefits, and by showing unfair temptation of rewards or high evaluation of performance or promotion etc. It is the responsibility of the State of to enact laws by the implementation of the provisions of the treaties, agreements and the general conferences to which Nepal is a party. The Supreme Court has issued a directive order in the name of the opposition for the enactment of the suitable law relating to the sexual harassment.<sup>86</sup>

In the case of Upendra Prasad Dhakal vs. The Ministry of Physical Planning and Transport, it is mentioned that if the conditions and facilities of the workers are not regulated by a certain law, it will be according to the agreement between the employer and the workers. It is the principle that the obligations created by the employment contract are applicable to the parties to the agreement in the same way as the law. In case of violation of the agreement which is in accordance with the law, the legal obligation must be fulfilled.<sup>87</sup>

### **6. Problems and Challenges related to Labor Rights of Women Worker in Nepal:**

Nepal has scored the high rank among the South Asian nations in terms of the productivity of the female labor force. Nepalese women have to struggle a lot to establish themselves as a worker. Generally Nepali women are engaged in household work, which is not recognized as the labor. Inequality in wages, uncertain working hours, mistreatment and labor exploitation are major challenges for the women workers working in the informal and entertainment sectors in Nepal.

The family and society are not able to accept the informal sector as a respectable and prestigious job. The women workers are victims of discrimination and mistreatment at the workplace. The workplace is not safe for the women workers. The employers often deduct the wages from the women workers if they arrive late at work. The women workers are not able to get any kind of sick leave, public leave, home leave, maternity leave and substitute leave.<sup>88</sup>

It is not possible for working women to provide the citizenship to their children without the support of their husbands. Since the participation of women in the final decision-making positions of the state system is less instead the decisions of men are followed. In Nepalese context economic rights of women are not implemented. The provision of equal rights of sons and daughters in the property of the mother and father as well as the equal remuneration for both men and women are not implemented properly.<sup>89</sup>

In the informal sector, there is a trend of giving employment opportunities at very low cost by the employers and terminating the employment without reasons. There is no implementation of

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86 Advocate Sharmila Parajuli vs. His majesty the Government, Cabinet Secretariat, D.N. 7449, N.K.P 2061.

87 Upendra Prasad Dhakal vs. Ministry of Physical Planning and Transportation Management D.N. 10428, N.K.P 2076.

88 The Labor Act 2074.

89 The Constitution of Nepal 2072.

employment contracts between employers and women workers in the informal sector. The women workers are not able to get their minimum wage and social security prescribed by the Labor Act 2074. The women workers are suffering from verbal, physical, psychological and sexual violence from the clients, employers, colleagues, community members, husbands, lovers and friends etc. In the present context, incidents of violence against women must be considered as a national and political issue rather than it is just the issue of the women.

## **7. Conclusion:**

Although the Constitution of Nepal has provided labor related rights as a fundamental right, adequate and decent employment opportunities are not created in the country. The women workers are victims of harassment, domestic violence and sexual violence both within the family and at the workplace. In Nepal, although there are laws such as the Constitution, Employment Rights Act, Labor Act, Contribution-Based Social Security Act, Regulations, Social Security Scheme Operation Procedures for Informal Sector Workers and Self-Employed People, but they are not implemented effectively. The women workers are deprived of their labor and employment rights. They are struggling for the guarantee of their rights. The women workers of the informal and entertainment sectors are not in a position to be listed in the social security fund as per the arrangement made by the government of Nepal. The employers are making profit by employing women labor force in very low wages. There is a requirement to take the steps from the national level for the establishment of the work of women workers as the labor.

## **8. Suggestions:**

### **8.1 Suggestions Related to the Ministry of Labor, Employment and Social Security:**

Since the rights of women workers are not right against the men but it is related to human rights of women. It is noted that Nepal is a party to several human rights conventions and the International Labor Organization. In the present context labor exploitation should be eradicated and decent labor practices must be adopted.

It is evident that all the political parties, Ministry of Labor Employment and Social Security and The National Women's Commission must take initiatives in order to ensure the rights of women workers. The employers must be encouraged to provide the equal wages for the work of equal rank without discrimination on the basis of gender. The reasonable wages must be provided to the domestic workers. The employer must be encouraged to hire the female workers in order to improve the living standards of women worker.

### **8.2 Suggestions Related to Social Security Fund:**

There is a requirement for the Board of Directors of the Social Security Fund to formulate the appropriate policies related to the Social Security Scheme. They must provide proper advice to the Government of Nepal in order to conduct the employment programs for the unemployed people.

### 8.4 Suggestions Related to the Court:

**Reformation in Labor Court:** The Labor Court should inspect the workplace effectively and it is obliged to issue an appropriate interim order. The labor court should introduce the trend of bank guarantee from the parties and issue order for the payment of the compensation to the victims of labor exploitation. It is the obligation of the Labor Court to grant the permission for the settlement, suspension or withdrawal of the case effectively.

### **Mandatory Enforcement of Supreme Court Judgment:**

The parties who are not satisfied with the decision of the Labor Court have the right to appeal to the Supreme Court within thirty-five days. The precedents established by the Supreme Court of Nepal must be obliged by the all-other government bodies and inferior courts. Once the decision is made by the Supreme Court, it is final and there must be execution of the judgment through the District Court. The Supreme Court is obliged to establish the landmark precedents in favor of the victims of labor exploitation and administers the justice on behalf of the people from the marginalized and vulnerable community who are in the verge of economic exploitation.

Since Nepal is a party to the International Labor Organization, Nepal has ratified 11 Conventions related to the labor rights. It is evident that the Supreme Court has international obligations to examine whether or not the rights of the workers mentioned in the International Convention are implemented by the employers and the official bodies of the Government of Nepal.

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# Cyberbullying: Human Rights Violations in this Digital Age

Sunu Rijal

## Abstract

*Cyberbullying, the act of using digital technologies to harass, threaten, or humiliate individuals, has emerged as a pervasive and insidious form of human rights violation in the digital age. As the world becomes increasingly interconnected through the internet and social media, the potential for online harassment and abuse has escalated, transcending geographical boundaries and posing serious threats to individuals' psychological well-being, dignity, and personal safety. This article explores the multifaceted nature of cyberbullying, its profound impact on victims, and the urgent need for comprehensive legal and societal measures to address this modern-day human rights challenge. By examining the intersection of technology, human behavior, and legal frameworks, this research aims to shed light on the complexities surrounding cyberbullying and propose strategies to safeguard fundamental human rights in the digital realm.*

**Keywords:** Cyberbullying, Human Rights, Digital Age, Online Harassment, Psychological Impact, Legal Frameworks, Societal Measures.

## I. Introduction

The digital age, also called the information age, is the period since the mid-20th century<sup>1</sup> characterized by a rapid shift from traditional industries to an information technology-based economy. The advent of the digital age has revolutionized human communication and interactions, bridging geographical divides and facilitating unprecedented levels of connectivity. The rise of the internet, social media platforms, and mobile technologies has transformed the way individuals connect, share information, and engage with one another. This technological advancement has brought about numerous benefits, enabling global collaboration, access to knowledge, and the facilitation of social movements. However, this digital revolution has also given rise to new forms of abuse and human rights violations, with cyberbullying emerging as a formidable challenge. Cyberbullying, the intentional and repeated harassment, intimidation, or humiliation of individuals through digital means, has become a widespread phenomenon that transcends age, gender, and social boundaries. The pervasive nature of cyberbullying lies in its ability to reach victims anywhere, at any time, through various online platforms and devices. Unlike traditional forms of bullying, which were often confined to physical spaces such as schools or workplaces,

<sup>1</sup> IGI Global. (n.d.). Resource sharing. In IGI Global (Ed.), IGI Global dictionary of information science and technology (4th ed.). Retrieved from <https://www.igi-global.com/dictionary/resource-sharing/756>

cyberbullying can follow individuals into their most private spaces, creating a persistent and inescapable environment of fear and distress. This article delves into the multifaceted aspects of cyberbullying, examining its impact on victims, the legal and societal frameworks surrounding it, and the urgent need for comprehensive measures to address this modern-day human rights violation.

## II. The Impact of Cyberbullying on Victims:

Cyberbullying is defined as "willful and repeated" harm inflicted through the use of computers, cell phones, and other electronic devices.<sup>2</sup> Cyberbullying is a form of bullying or harassment that takes place through digital devices and online platforms. It involves the use of electronic technology, such as the internet, social media, instant messaging, email, or mobile devices, to intentionally harm, intimidate, or humiliate another person or group. In ancient times, bullying was more likely to manifest as physical intimidation, verbal abuse, or social exclusion within the community or among individuals. The dynamics of bullying in the Mahabharata period were influenced by the societal norms, power structures, and interpersonal relationships prevalent during that time. In contrast, cyberbullying, a modern form of bullying, involves the use of digital communication tools like computers, cell phones, and other electronic devices to harm others willfully and repeatedly. This type of bullying occurs online through various platforms and can have serious psychological and emotional consequences for the victims. The anonymity and reach provided by the internet make cyberbullying particularly insidious, as perpetrators can target individuals without face-to-face interactions, leading to increased risks of depression, anxiety, and other negative outcomes for the victims.<sup>3</sup>

Cyberbullying can take various forms, including:

- **Sending Harmful or Threatening Messages:** This can involve sending offensive, abusive, or threatening messages, emails, or instant messages directly to the victim or about the victim to others. Sending harmful or threatening messages encompasses a range of behaviors that can have significant consequences for both the sender and the recipient. This form of communication involves the transmission of content that is offensive, abusive, or menacing in nature, whether through messages, emails, or instant messages. Such messages can be directed at the victim directly, aiming to intimidate, instill fear, or cause emotional harm. Alternatively, they may be disseminated about the victim to others, potentially leading to reputational damage, social isolation, or further harassment. When individuals engage in sending harmful or threatening messages, they not only violate social norms and ethical standards but also risk legal repercussions. Depending on the severity and impact of the messages, they may constitute harassment, cyberbullying, or even criminal offenses in some jurisdictions. The intent behind these messages, whether to exert control, cause distress, or incite fear, plays a crucial role in determining the seriousness of the offense.

2 EndCyberBullying.net. (n.d.). What is cyberbullying? Retrieved from <https://www.endcyberbullying.net/what-is-cyberbullying> Accessed on : March 20, 2024

3 Connections Academy. (n.d.). How bullying has changed. Retrieved from <https://www.connectionsacademy.com/support/resources/article/how-bullying-has-changed/> Accessed on : March 20, 2024

- **Spreading Rumors or False Information:** Cyberbullies may intentionally spread rumors, lies, or false information about the victim online, with the intent to damage their reputation or relationships.
- **Sharing Embarrassing or Intimate Content:** Cyberbullying can involve sharing embarrassing or intimate photos, videos, or personal information about the victim without their consent.
- **Impersonation or Identity Theft:** Cyberbullies may create fake online profiles or accounts impersonating the victim and posting harmful or defamatory content under their identity.
- **Exclusion or Ostracism:** Cyberbullying can involve intentionally excluding or ostracizing the victim from online groups, activities, or social circles.
- **Cyberstalking:** In some cases, cyberbullying can escalate to cyberstalking, where the perpetrator continuously harasses, intimidates, or threatens the victim online, often with the intent to cause fear or distress.

Cyberbullying can occur across various online platforms and digital environments, including:

- Social Media Sites (e.g., Facebook, Twitter, Instagram, and TikTok):** Social media platforms have become breeding grounds for cyberbullying due to their widespread use and the ease with which users can interact, share content, and communicate with others. Cyberbullies may target individuals on these platforms through direct messages, comments, or by creating dedicated pages or groups to harass and humiliate their victims. Examples include posting hurtful or embarrassing comments on someone's photos or posts, spreading rumors or false information, or excluding individuals from online social circles.
- Online Gaming Communities:** Online gaming communities, particularly those involving multiplayer games, can be hotbeds for cyberbullying. Perpetrators may use in-game chat functions, voice channels, or messaging systems to verbally harass, threaten, or intimidate other players. Cyberbullying in gaming can also take the form of **intentional sabotage**<sup>4</sup>, **griefing**<sup>5</sup> (deliberate harassment within the game environment), or exclusion from gaming groups or communities.
- Messaging Apps (e.g., WhatsApp, Snapchat, Discord):** Messaging apps have become ubiquitous in modern communication, and they can also serve as platforms for cyberbullying. Cyberbullies may use these apps to send harmful, threatening, or abusive messages directly to their victims, share embarrassing or intimate content without consent, or create group chats dedicated to harassing or ostracizing individuals.
- Email and Instant Messaging:** Email and instant messaging services have long been used for cyberbullying activities. Perpetrators may send harassing or threatening emails

4 Intentional sabotage in the context of gaming refers to the deliberate actions taken by one player to undermine or disrupt the gameplay experience of another player or group of players.

5 "Griefing" in the context of gaming refers to the intentional disruption or harassment of other players within a multiplayer game environment.

or instant messages to their victims, forwarding or sharing private or sensitive information without consent, or bombarding individuals with unwanted and abusive messages.

- e. **Online Forums and Discussion Boards:** Online forums and discussion boards centered on specific topics or interests can become breeding grounds for cyberbullying. Cyberbullies may target individuals on these platforms by posting derogatory or hurtful comments, spreading rumors or false information, or coordinating group attacks against specific users.
- f. **Website Comments Sections:** The comments sections of websites, blogs, or online news articles can also be exploited by cyberbullies. Perpetrators may leave abusive, threatening, or defamatory comments directed at individuals or groups, often leveraging the anonymity provided by these platforms to engage in harassment without consequence.

Unlike traditional forms of bullying, which are often confined to physical locations, cyberbullying can follow victims wherever they go, as long as they have access to digital devices and the internet. This pervasive nature of cyberbullying can lead to a persistent and inescapable environment of harassment and victimization.

### Examples of Cyberbullying:

- a) A group of classmates creating a social media page dedicated to mocking and ridiculing a fellow student based on their appearance or personal traits.
- b) An ex-partner sharing intimate photos or videos of their former partner online without consent, in an act of revenge or humiliation.
- c) A group of online gamers repeatedly targeting and harassing another player with verbal abuse, threats, and exclusion from the gaming community.
- d) An individual impersonating a classmate or colleague online, creating fake accounts or profiles, and posting defamatory or harmful content under their identity.
- e) A group of individuals coordinating a campaign of harassment and cyberbullying against a public figure, celebrity, or online influencer, flooding them with abusive messages and threats.

The consequences of cyberbullying on victims can be severe and far-reaching, affecting their mental health, emotional well-being, and overall quality of life. Victims often experience a range of psychological and emotional distress, including anxiety, depression, low self-esteem, and social isolation. In extreme cases, cyberbullying has been linked to self-harm and suicidal ideation, underscoring the gravity of this issue. Furthermore, cyberbullying can have a profound impact on victims' academic or professional performance, as the constant harassment and stress can impede their ability to concentrate and engage in productive activities. The fear and anxiety associated with cyberbullying can also lead to avoidance behaviors, where victims withdraw from social interactions and online activities, further exacerbating their isolation and limiting their personal and professional growth.

***Impact of cyberbullying on victims, covering psychological, emotional, academic/professional, and social dimensions:***

**1. Psychological and Emotional Impact:**

Cyberbullying can have a profound psychological and emotional toll on victims, leaving them vulnerable and distressed. The following are some of the most common effects observed:

- a. **Anxiety and Depression:** Victims of cyberbullying often experience heightened levels of anxiety and depression. The constant harassment, threats, and humiliation can trigger feelings of fear, helplessness, and hopelessness, leading to a persistent state of emotional turmoil. Research has shown that individuals who experience cyberbullying are at a higher risk of developing clinical anxiety and depressive disorders.
- b. **Low Self-Esteem and Confidence:** Cyberbullying attacks can directly target an individual's appearance, personality, or personal characteristics, eroding their self-esteem and confidence. Victims may internalize the negative comments and criticism, leading to a diminished sense of self-worth and a distorted self-perception. This can have long-lasting effects on their overall well-being and ability to form healthy relationships.<sup>6</sup>
- c. **Trauma and Post-Traumatic Stress Disorder (PTSD):** In severe cases, cyberbullying can result in trauma and the development of PTSD. The persistent harassment and fear can trigger symptoms such as flashbacks, nightmares, **hypervigilance**<sup>7</sup>, and a persistent state of anxiety or emotional distress. Studies have found that victims of cyberbullying exhibit similar symptoms to those experienced by victims of traditional bullying and other forms of trauma.<sup>8</sup>
- d. **Self-Harm and Suicidal Ideation:** Alarmingly, cyberbullying has been linked to self-harm and suicidal ideation among victims. The intense emotional pain and hopelessness caused by cyberbullying can lead some individuals to contemplate or attempt self-harm or suicide as a means of escape. Several high-profile cases have brought attention to the tragic consequences of cyberbullying and the need for effective interventions.

**2. Academic and Professional Impact:**

Cyberbullying can significantly hinder a victim's ability to perform academically or professionally, leading to potential long-term consequences:

- a. **Concentration and Productivity:** The constant stress and anxiety associated with cyberbullying can make it challenging for victims to concentrate on their studies or work. The mental preoccupation with the harassment can impair their productivity, leading to poor academic or professional performance. This can result in lower grades, missed deadlines, or subpar work quality.

6 Escortell, R., Aparisi, D., Martínez-Monteaquedo, M. C., & Delgado, B. (2020). Personality Traits and Aggression as Explanatory Variables of Cyberbullying in Spanish Preadolescents. *International Journal of Environmental Research and Public Health*, 17(16), 5705. <https://doi.org/10.3390/ijerph17165705> Accessed on : March 20, 2024

7 Hypervigilance is an intense state of alertness where you're constantly scanning for threats.

8 TeenTrauma.com. (n.d.). The link between cyberbullying and PTSD. Retrieved from <https://teentrauma.com/the-link-between-cyberbullying-and-ptsd/> Accessed on : March 20, 2024

- b. **Absenteeism and Avoidance:** To escape the harassment, some victims may resort to avoiding school, college, or work environments. This absenteeism can further exacerbate their academic or professional struggles and contribute to social isolation. In some cases, victims may even consider dropping out of school or quitting their jobs to escape the cyberbullying.
- c. **Career Prospects:** In some cases, cyberbullying can have lasting effects on a victim's career prospects. Damaged self-confidence, gaps in education or employment history, and potential reputational harm can hinder their ability to secure desired job opportunities or advance in their chosen fields. Employers may also be hesitant to hire individuals who have been the target of cyberbullying, fearing potential conflicts or liability issues.

### 3. Social Impact:

Cyberbullying can have a profound impact on victims' social lives and relationships, leading to isolation and withdrawal:

- a. **Social Anxiety and Avoidance:** Victims of cyberbullying may develop social anxiety and a tendency to avoid social situations or online interactions out of fear of further harassment or ridicule. This avoidance can lead to social isolation and a diminished support system, exacerbating the emotional distress caused by the cyberbullying.
- b. **Strained Relationships:** Cyberbullying can strain victims' relationships with friends, family, and peers. The emotional distress and mistrust engendered by the harassment can make it challenging to maintain healthy connections, leading to further isolation and loneliness. In some cases, victims may withdraw from their social circles or experience conflicts within their relationships.
- c. **Reputational Harm:** In some cases, cyberbullying can involve the spreading of rumors, false information, or compromising content about the victim. This can damage the victim's reputation and social standing, making it difficult to form new relationships or participate in social activities. The potential for reputational harm can also have long-term consequences, affecting future opportunities and relationships.

### 4. Intersectionality and Compounding Factors:

It is important to recognize that the impact of cyberbullying can be compounded by intersecting factors such as gender, race, sexual orientation, disability, or socioeconomic status. Individuals belonging to marginalized or vulnerable groups may face heightened risks and more severe consequences due to discrimination, prejudice, and lack of support systems.

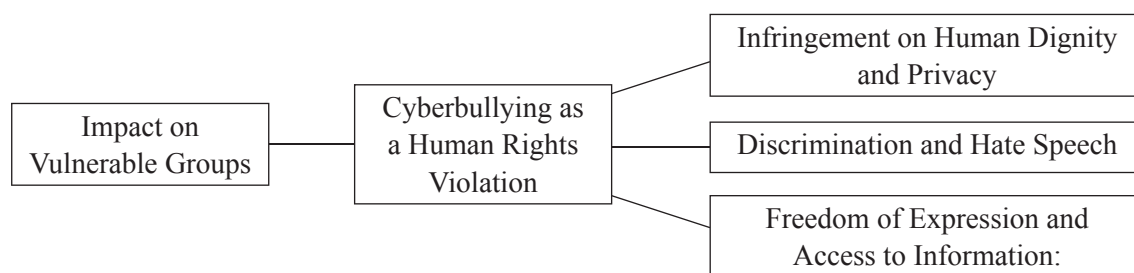
For example, individuals from minority ethnic or racial groups may experience cyberbullying that is motivated by hate or bias, exacerbating the emotional and psychological harm. Similarly, individuals with disabilities or from low-income backgrounds may have limited access to resources or support networks, making it more challenging to cope with the effects of cyberbullying. It is crucial to adopt an intersectional approach when addressing cyberbullying, acknowledging



the unique challenges faced by different groups and tailoring interventions and support systems accordingly.

### III. Cyberbullying as a Human Rights Violation:

Cyberbullying constitutes a human rights violation as it infringes upon fundamental rights and freedoms enshrined in various international human rights instruments and conventions. The United Nations Human Rights Council has recognized cyberbullying as a serious issue affecting children globally, with 130 million students, or one in three students aged 13 to 15<sup>9</sup>, experiencing it. Cyberbullying violates various human rights, including the right to be free from violence, the right to health, education, freedom of expression, privacy, and the right to be free from discrimination. At its core, cyberbullying undermines the inherent dignity and worth of individuals, violating their right to be treated with respect and without discrimination.<sup>10</sup> It represents a form of psychological and emotional violence that can inflict severe harm on victims, compromising their mental health, well-being, and overall quality of life. Cyberbullying often targets individuals based on personal characteristics such as race, gender, sexual orientation, or disability, perpetuating discrimination and hate speech, which are explicitly prohibited under international human rights laws. Furthermore, the persistent harassment and intimidation associated with cyberbullying can violate victims' right to privacy and create an environment of fear, inhibiting their freedom of expression and ability to participate fully in online spaces. Ultimately, cyberbullying deprives individuals of their fundamental rights to education, personal development, and equal opportunities, particularly when it leads to social isolation, academic or professional setbacks, or long-term psychological trauma. Recognizing cyberbullying as a human rights violation is crucial in mobilizing legal, educational, and societal efforts to combat this issue and uphold the principles of human dignity, non-discrimination, and respect for human rights in the digital age.



The pervasive and harmful nature of cyberbullying has led to growing recognition of its status as a human rights violation. The right to dignity, privacy, and freedom from discrimination are fundamental human rights enshrined in various international treaties and conventions. Cyberbullying directly infringes upon these rights by subjecting individuals to harassment, humiliation, and psychological harm, often based on personal characteristics such as race, gender,

9 United Nations Office of the High Commissioner for Human Rights. (2023, September). Cyberbullying and Children [Press release]. Retrieved from <https://www.ohchr.org/en/statements/2023/09/cyberbullying-children> Accessed on : March 20, 2024

10 Australian Human Rights Commission. (n.d.). Cyberbullying, human rights and bystanders. Retrieved from <https://humanrights.gov.au/our-work/commission-general/cyberbullying-human-rights-and-bystanders-0> Accessed on : March 20, 2024

or sexual orientation. Moreover, cyberbullying can also violate the right to freedom of expression and access to information, as victims may self-censor or withdraw from online spaces out of fear of further harassment or retaliation. This denial of digital participation not only impedes individuals' personal growth but also undermines the principles of an open and inclusive digital society.

### **Human right Laws and the Instruments:**

#### **The Universal Declaration of Human Rights (UDHR):**

- Article 1: Recognizes the inherent dignity and equal rights of all human beings.
- Article 3: Affirms the right to life, liberty, and security of person.
- Article 12: Protects against arbitrary interference with privacy.

#### **The International Covenant on Civil and Political Rights (ICCPR):**

- Article 17: Prohibits arbitrary or unlawful interference with privacy, family, home, or correspondence.
- Article 19: Enshrines the right to freedom of expression and access to information.
- Article 26: Guarantees equal protection against discrimination.

#### **The Convention on the Rights of the Child (CRC):**

- Article 16: Protects children's right to privacy and prohibits attacks on their honor and reputation.
- Article 19: Requires measures to protect children from all forms of physical or mental violence, including cyberbullying.

#### **The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW):**

- Article 5: Calls for the elimination of prejudices and practices based on stereotyped roles for men and women, which can contribute to cyberbullying.

#### **Regional human rights instruments:**

- The European Convention on Human Rights (ECHR) protects the right to privacy (Article 8) and freedom of expression (Article 10).
- The American Convention on Human Rights (ACHR) enshrines the rights to privacy (Article 11), freedom of thought and expression (Article 13), and equal protection (Article 24).
- The African Charter on Human and Peoples' Rights (ACHPR) recognizes the right to dignity (Article 5) and prohibits discrimination (Article 2).

These international and regional human rights laws and instruments provide a comprehensive framework for addressing the human rights violations associated with cyberbullying, emphasizing the need to protect the dignity, privacy, and equality of all individuals in the digital age.

Likewise:

### **1. Infringement on Human Dignity and Privacy:**

Cyberbullying directly infringes upon the right to human dignity by subjecting individuals to harassment, humiliation, and psychological harm. The perpetrators often exploit the anonymity and reach of digital platforms to inflict emotional distress and undermine the victims' sense of self-worth. This violation of human dignity can have long-lasting consequences on victims' mental health and overall well-being. Furthermore, cyberbullying can be a violation of an individual's right to privacy. The non-consensual sharing of private information, images, or personal details can result in a breach of privacy and expose victims to further harassment and reputational harm.

### **2. Discrimination and Hate Speech:**

Cyberbullying often targets individuals based on personal characteristics such as race, gender, sexual orientation, or disability. This form of discrimination and hate speech not only violates the victim's rights but also perpetuates societal prejudices and marginalization. International human rights laws and conventions, such as the **International Convention on the Elimination of All Forms of Racial Discrimination** and the **Convention on the Elimination of All Forms of Discrimination against Women**, explicitly prohibit discrimination and hate speech based on protected characteristics.<sup>11</sup>

### **3. Freedom of Expression and Access to Information:**

Cyberbullying can also violate the right to freedom of expression and access to information, as victims may self-censor or withdraw from online spaces out of fear of further harassment or retaliation. This denial of digital participation not only impedes individuals' personal growth but also undermines the principles of an open and inclusive digital society. The right to freedom of expression and access to information is enshrined in various human rights instruments, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

### **4. Impact on Vulnerable Groups:**

Cyberbullying can disproportionately affect vulnerable groups, such as children, youth, and marginalized communities. These groups may have limited access to resources or support systems, exacerbating the impact of cyberbullying and further entrenching existing inequalities. The Convention on the Rights of the Child and other international instruments emphasize the need

<sup>11</sup> ICERD: Article 1: Defines racial discrimination as any distinction based on race, color, descent, or national or ethnic origin that hinders the enjoyment of human rights, Article 4: Requires states to criminalize hate speech and racist organizations. & CEDAW: Article 1: Guarantees women equal rights with men before the law. Various Articles: Address specific areas where discrimination against women can occur, like political participation and education. (These articles indirectly prohibit discrimination based on gender, a protected characteristic under CEDAW).

to protect children and vulnerable groups from all forms of violence, including cyberbullying, and ensure their rights to education, freedom of expression, and personal development. By recognizing cyberbullying as a human rights violation, the global community can leverage existing human rights frameworks and mechanisms to address this issue and hold perpetrators accountable.

### **IV. Legal and Societal Frameworks:**

Addressing cyberbullying requires a multifaceted approach that involves legal, educational, and societal efforts. While some countries have implemented specific laws or regulations targeting cyberbullying, others rely on existing laws related to harassment, defamation, or hate speech. However, the cross-border nature of cyberbullying poses challenges for legal enforcement, as perpetrators may operate from different jurisdictions, complicating the pursuit of justice. Educational initiatives play a crucial role in raising awareness about the consequences of cyberbullying and promoting digital citizenship and online etiquette. Schools, universities, and workplaces can implement comprehensive policies and programs to educate individuals about responsible online behavior, cyberbullying prevention, and the importance of respect and empathy in digital spaces. Additionally, societal efforts are essential in fostering a culture of accountability and support for victims. Social media platforms and online communities can implement robust reporting and moderation systems to address instances of cyberbullying promptly. Furthermore, encouraging bystander intervention and promoting positive online interactions can contribute to a safer and more inclusive digital environment.

#### **1. Legal Frameworks:**

The legal landscape surrounding cyberbullying is complex and varies across jurisdictions. While some countries have implemented specific laws or regulations targeting cyberbullying, others rely on existing laws related to harassment, defamation, or hate speech.

**A. Cyberbullying-Specific Laws:** Several countries, including the United States, Canada, and Australia, have enacted laws specifically addressing cyberbullying. These laws often define cyberbullying, outline penalties for perpetrators, and provide guidelines for schools and organizations to address cyberbullying incidents.

**B. Harassment and Defamation Laws:** In the absence of cyberbullying-specific laws, many countries rely on existing laws related to harassment, defamation, or hate speech to address cyberbullying cases. These laws may cover online harassment, the dissemination of false or harmful information, and hate speech based on protected characteristics.

**C. Cross-Border Challenges:** The cross-border nature of cyberbullying poses challenges for legal enforcement, as perpetrators may operate from different jurisdictions, complicating the pursuit of justice. International cooperation and harmonization of cyberbullying laws are crucial to addressing this issue effectively.

## 2. Educational Initiatives:

Educational initiatives play a crucial role in raising awareness about the consequences of cyberbullying and promoting digital citizenship and online etiquette. These initiatives can be implemented at various levels, including:

**A. Schools and Universities:** Many educational institutions have implemented comprehensive policies and programs to educate students about responsible online behavior, cyberbullying prevention, and the importance of respect and empathy in digital spaces. These initiatives often involve curriculum-based lessons, workshops, and campaigns to promote positive online interactions.

**B. Workplace Training:** Employers and organizations can provide training and resources to employees on cyberbullying prevention, online etiquette, and professional conduct in digital environments. These efforts aim to create a safe and respectful online workplace and address cyberbullying incidents effectively.

**C. Community Outreach:** Non-profit organizations, government agencies, and community groups can play a vital role in raising public awareness about cyberbullying through public education campaigns, workshops, and support services for victims and their families.

## 3. Societal Efforts:

Addressing cyberbullying requires a collective societal effort to foster a culture of accountability, empathy, and support for victims. Various stakeholders, including social media platforms, online communities, and individuals, can contribute to creating a safer and more inclusive digital environment.

**a. Social Media Platform Policies:** Social media platforms and online communities can implement robust reporting and moderation systems to address instances of cyberbullying promptly. These platforms can also establish clear community guidelines and enforce consequences for users who engage in cyberbullying or online harassment.

**b. Bystander Intervention:** Encouraging bystander intervention can be a powerful tool in combating cyberbullying. By empowering individuals to report or intervene in cyberbullying incidents, a culture of collective responsibility and support can be fostered.

**c. Positive Online Interactions:** Promoting positive online interactions and digital citizenship can contribute to creating a safer and more inclusive digital environment. This can involve encouraging respectful communication, celebrating diversity, and fostering empathy and understanding among online communities.

## V. Cyberbullying in context of Nepal:

Cyberbullying is a growing concern in Nepal, as the country witnesses an increasing number of internet users and the widespread use of social media platforms. While Nepal has laws in place to address traditional forms of harassment and bullying, the legal framework to tackle

cyberbullying specifically is still lacking, leaving victims vulnerable and perpetrators largely unpunished. According to a report by the INSEC (Informal Sector Service Centre), a significant number of cyberbullying cases have been reported in Nepal, particularly targeting women, girls, and members of the LGBTQ+ community. Cyberbullying often takes the form of online harassment, spreading rumors, sharing private information without consent, and making threats or intimidating remarks.

Nepal's existing legal framework does not directly address the issue of cyberbullying. The following laws may be relevant, but they are not specific to cyberbullying:

- **Electronic Transaction Act, 2008:** This act covers offenses related to the misuse of electronic media, such as hacking and unauthorized access to computer systems.<sup>12</sup> However, it does not explicitly address cyberbullying or online harassment.
- **Criminal Code 2074 of Nepal (National Criminal Code 2074):** This code contains provisions related to defamation and libel, which could potentially be applied to cyberbullying cases involving the spread of false or harmful information.

To effectively tackle cyberbullying in Nepal, it is necessary to amend existing laws or introduce new legislation specifically addressing this issue. Some potential amendments or new laws could include:

- **Cyberbullying Act:** A dedicated act that defines cyberbullying, outlines the types of behavior considered cyberbullying, and establishes appropriate penalties for perpetrators.
- **Amendments to the Electronic Transaction Act, 2008:** Introducing provisions that specifically address cyberbullying, online harassment, and the dissemination of non-consensual private information.
- **Amendments to the Criminal Code:** Expanding the provisions related to defamation and libel to explicitly cover online forms of harassment and cyberbullying.
- **Mandatory Reporting and Monitoring:** Establishing mechanisms for mandatory reporting of cyberbullying incidents by educational institutions, social media platforms, and internet service providers, as well as mechanisms for monitoring and tracking such incidents.
- **Victim Support and Awareness Programs:** Implementing support systems for victims of cyberbullying, including counseling and legal assistance, as well as launching awareness campaigns to educate the public, particularly youth, about the dangers of cyberbullying and the importance of responsible online behavior.

It is crucial for Nepal to recognize the growing threat of cyberbullying and take proactive steps to address this issue through comprehensive legal reforms, awareness campaigns, and support

<sup>12</sup> Corporate Lawyer Nepal. (n.d.). Cyber-related crimes in Nepal. Retrieved from <https://corporatelawyernepal.com/cyber-related-crimes-in-nepal/> Accessed on : March 22, 2024

systems for victims. By doing so, the country can better protect its citizens, especially the most vulnerable groups, from the harmful effects of cyberbullying and promote a safer and more responsible online environment.

## **VI. Conclusion:**

Cyberbullying represents a profound human rights violation in the digital age, undermining the fundamental principles of dignity, privacy, and freedom from discrimination. Its pervasive and harmful impact on victims' mental health, emotional well-being, and overall quality of life demands urgent action from various stakeholders, including policymakers, educational institutions, and society at large. Addressing this modern-day challenge requires a comprehensive approach that encompasses legal frameworks, educational initiatives, and societal efforts. Legal frameworks must be strengthened and harmonized across jurisdictions to address the cross-border nature of cyberbullying. Robust laws and enforcement mechanisms are essential to hold perpetrators accountable and deter future instances of online harassment. However, legal measures alone are insufficient; a multi-pronged approach that involves educational initiatives and societal efforts is crucial. Educational programs and awareness campaigns should be implemented at various levels, including schools, universities, workplaces, and communities. These initiatives should focus on promoting digital literacy, online etiquette, and respect for human rights in the digital age. By equipping individuals with the knowledge and skills to navigate the digital world responsibly and empathetically, we can foster a culture of respect and accountability. Combating cyberbullying as a human rights violation necessitates a strong legal foundation rooted in international human rights laws and instruments. The Universal Declaration of Human Rights (UDHR), a cornerstone of modern human rights law, affirms the inherent dignity and equal rights of all individuals, principles that are directly violated by cyberbullying. Furthermore, the International Covenant on Civil and Political Rights (ICCPR) protects against arbitrary interference with privacy and guarantees freedom of expression, both of which are compromised by online harassment and the self-censorship it induces. Regionally, instruments like the European Convention on Human Rights (ECHR) and the American Convention on Human Rights (ACHR) enshrine similar protections, underscoring the global recognition of these fundamental rights. By aligning legal frameworks with these established human rights standards, nations can create a robust legal infrastructure to hold perpetrators accountable and safeguard the rights of individuals in the digital sphere. Concerted international cooperation and harmonization of laws will be essential in addressing the cross-border challenges posed by cyberbullying in an interconnected digital world.

Moreover, societal efforts must involve a collective commitment from all stakeholders, including social media platforms, online communities, and individuals. Robust reporting and



moderation systems, bystander intervention, and the promotion of positive online interactions can create a safer and more inclusive digital environment. Additionally, providing support and resources for victims of cyberbullying is crucial to mitigating the harmful effects and promoting healing. Ultimately, the fight against cyberbullying is not merely a technological or legal battle but a moral and ethical imperative that calls for collective action and a steadfast commitment to upholding the inherent dignity and rights of every individual in the digital age. By recognizing cyberbullying as a human rights violation and taking proactive measures to address it, we can create a more just and equitable digital society that upholds the principles of human dignity, privacy, and freedom from discrimination.



# The Protection of the Culture and Identity of Human Right of Indigenous Peoples in this Digital Age

Sujit Kumar Bhujel

## Abstract

*The digital age has brought unprecedented opportunities for indigenous communities to preserve and promote their cultural heritage and identities. However, it has also introduced new challenges in safeguarding their rights and protecting their online presence from misrepresentation, appropriation, and exploitation. This article explores the human rights of indigenous peoples in the 21<sup>st</sup> century, with a particular focus on protecting their culture and identity online in the context of Nepal. It examines the international legal frameworks and national policies aimed at recognizing and upholding the rights of indigenous communities, including their right to self-determination, cultural preservation, and participation in decision-making processes that affect their lives. The article delves into the unique challenges faced by indigenous communities in Nepal, such as language barriers, digital divides, and the risk of cultural erosion, and discusses strategies and best practices for empowering these communities to navigate the online world while maintaining their cultural integrity. Through case studies and expert insights, the article highlights successful initiatives and innovative approaches that have enabled indigenous communities to leverage digital technologies to preserve, promote, and transmit their cultural heritage to future generations.*

**Keywords:** Indigenous peoples, human rights, cultural preservation, online identity, digital inclusion, Nepal, self-determination, traditional knowledge, intellectual property rights, digital empowerment.

## I. Introduction

In the digital age, technology has permeated almost every aspect of our lives, transforming the way we communicate, access information, and interact with the world around us. The internet, in particular, has become an indispensable tool, enabling instantaneous global connectivity and the free flow of information across borders. The importance of the digital age cannot be overstated. It has revolutionized various sectors, including education, healthcare, business, and entertainment, making them more accessible, efficient, and convenient. The rapid exchange of ideas and knowledge has fostered innovation, collaboration, and creativity, driving progress and development across multiple domains. While these advancements have opened up new avenues for cultural preservation and promotion, they have also introduced unique challenges for indigenous communities around the world. As the global village becomes increasingly interconnected, the need to protect and uphold the rights of indigenous peoples, including their cultural identities and traditional ways of

life, has become a pressing concern. The online realm has the potential to amplify the voices of indigenous communities, enabling them to share their stories, traditions, and perspectives with a wider audience. However, it also poses risks of misrepresentation, appropriation, and exploitation of their cultural heritage and intellectual property. Ensuring that indigenous peoples have control over their online narratives and digital footprints is crucial for safeguarding their rights, promoting self-determination, and preserving their rich cultural legacies. The term "indigenous" refers to the ethnic groups and communities that have ancestral ties to a particular geographical region, often predating the arrival of colonizers or modern nation-states. Indigenous Peoples are inheritors and practitioners of unique cultures and ways of relating to people and the environment. They have retained social, cultural, economic and political characteristics that are distinct from those of the dominant societies in which they live. Despite their cultural differences, Indigenous Peoples from around the world share common problems related to the protection of their rights as distinct peoples<sup>1</sup>. These communities have rich cultural traditions, languages, and ways of life that have been passed down through generations. In today's digital age, indigenous communities face the risk of having their cultural identities diluted, misrepresented, or exploited. The online realm, while offering opportunities for cultural preservation and promotion, can also be a double-edged sword. The widespread dissemination of information can lead to the appropriation and misuse of indigenous cultural elements, such as traditional designs, artwork, or sacred symbols, without proper consent or attribution. One powerful example of the challenges faced by indigenous communities in the digital age is the ongoing struggle to protect their traditional knowledge and intellectual property rights. Many indigenous communities hold a wealth of knowledge about medicinal plants, sustainable farming practices, and environmental conservation techniques, which have been developed and preserved over centuries. However, in the digital age, this knowledge can be easily accessed, commercialized, or even patented by outside entities without the consent or compensation of the indigenous communities who originated it.

Another significant concern is the representation and portrayal of indigenous cultures online. The internet has the potential to amplify and perpetuate stereotypes, misrepresentations, and cultural appropriation, further marginalizing and diminishing the voices and experiences of indigenous peoples. Ensuring that indigenous communities have control over their own narratives and digital footprints is crucial for preserving their cultural integrity and promoting self-determination. The digital age also presents opportunities for indigenous communities to reclaim their narratives, preserve their traditions, and connect with a global audience. Many indigenous groups have embraced digital platforms to share their stories, promote their languages, and document their cultural practices, ensuring their survival and transmission to future generations. The digital age presents both opportunities and challenges for indigenous communities around the world. While technology has the potential to preserve and promote their cultural heritage, it also carries risks of misrepresentation, appropriation, and exploitation. Ensuring that indigenous peoples have control over their digital narratives and protecting their intellectual property rights are crucial steps towards safeguarding their cultural identities and promoting self-determination in the digital age.

<sup>1</sup> United Nations Department of Economic and Social Affairs. (n.d.). About Indigenous Peoples. Retrieved from <https://www.un.org/development/desa/indigenouspeoples/about-us.html> Accessed on 21 march 2024

## II. Methodology:

This article primarily utilizes a doctrinal research approach, drawing upon authoritative online resources, government acts, and policies relevant to the protection of indigenous peoples' cultural and identity rights in the digital sphere within the context of Nepal. The research extensively consulted official websites of governmental and non-governmental organizations, as well as reputable online databases, to analyze existing legal frameworks, guidelines, and initiatives concerning the human rights of indigenous communities in the online environment. Particular emphasis was placed on reviewing and interpreting the applicable sections of Nepalese legislation and policies that address the safeguarding of indigenous cultures and identities in the digital age. The doctrinal analysis of these web-based and governmental sources facilitated a comprehensive understanding of the current challenges and opportunities in upholding the rights of indigenous peoples in the online realm within the Nepalese context.

## III. Overview of Indigenous Communities in Nepal:

Nepal is a culturally diverse nation, home to numerous indigenous communities, each with its own distinct language, traditions, and ways of life. These communities, often referred to as **Adivasi Janajati**, have played a vital role in shaping Nepal's cultural landscape and contributing to its rich tapestry of diversity. Despite their significant contributions, many indigenous communities in Nepal have faced marginalization, discrimination, and challenges in preserving their cultural identities and traditional practices. The rapid pace of modernization and globalization has further exacerbated these challenges, making it imperative to address the protection of their rights, including their right to maintain and transmit their cultural heritage to future generations. The international community has recognized the importance of protecting and promoting the rights of indigenous peoples, leading to the development of various legal instruments and frameworks. These frameworks serve as guiding principles for nations to uphold the rights of indigenous communities and ensure their participation in decision-making processes that affect their lives. Adopted by the United Nations General Assembly in 2007, the United Nations Declaration on the **Rights of Indigenous Peoples (UNDRIP)** is a comprehensive instrument that outlines the individual and collective rights of indigenous peoples. It recognizes their right to self-determination, their right to practice and revitalize their cultural traditions and customs, and their right to maintain and protect their traditional knowledge and cultural expressions<sup>2</sup>. The **International Labor Organization (ILO) Convention No. 169**, also known as the Indigenous and Tribal Peoples Convention, was adopted in 1989. It is a legally binding international treaty that aims to protect the rights of indigenous and tribal peoples, including their right to maintain and develop their cultural identities, languages, and social and economic institutions<sup>3</sup>. In addition to the UNDRIP and ILO Convention No. 169, other international instruments, such as the

2 United Nations Department of Economic and Social Affairs. (n.d.). Declaration on the Rights of Indigenous Peoples. Retrieved from <https://www.un.org/development/desa/indigenouseoples/declaration-on-the-rights-of-indigenous-peoples.html> Accessed on 21 march 2024

3 University of British Columbia. (n.d.). ILO Convention 169. Indigenous Foundations. Retrieved from [https://indigenousfoundations.arts.ubc.ca/ilo\\_convention\\_169/](https://indigenousfoundations.arts.ubc.ca/ilo_convention_169/) Accessed on 21 march 2024

Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, also enshrine principles and provisions relevant to the protection of indigenous peoples' rights. Indigenous Peoples of Nepal are officially described as Indigenous Nationalities. They make up for 35.81 per cent of the country's total population (approximately 8.5 million out of the 26 million Nepalese). But, Indigenous People's Organizations claim that their population could be as high as 50 percent of the country's population<sup>4</sup>. Despite constituting such a significant portion of the population, indigenous peoples have been marginalized in terms of language, culture and political as well economic opportunities throughout the history.

As per the 2011 census, Nepal has 126 castes and ethnic groups speaking as many as 123 languages. And 90 percent of these languages are spoken by Indigenous Peoples. Indigenous Peoples in Nepal have distinct cultures, languages and belief systems. They live across the country – the mountains, the hills and the plains. They are in majority in as many as 27 of the total 75 districts. Most of indigenous people live in remote and rural areas and make a living out of subsistence farming. Nepal is a rich country in terms of language, culture, religion, biodiversity and socio-cultural diversity. As many as 59 (previously 61) indigenous communities have been officially and legally recognized by the Nepal government under the National Foundation for Development of Indigenous Nationalities (NFDIN) Act-2002<sup>5</sup>. However, in 2010, a high-level taskforce recommended an additional 22 ethnic and caste groups to be recognized as Indigenous Nationalities under the purview of the NFDIN Act<sup>6</sup>. But, the government did not make any decision about that taskforce's recommendations. Instead, it recently formed a new taskforce for the same purpose. Some of Nepal's indigenous peoples like **Rautes**<sup>7</sup> are nomads while some are forest dwellers like **Chepang**<sup>8</sup> and **Bankariya**<sup>9</sup>. Most of them rely on agriculture. Only a few indigenous peoples are advanced and better off. However, in terms of ethnic identity, language, religion and culture, all advanced, not-so-advanced and backward indigenous peoples have fallen victims to discrimination at the hands of the dominant groups. The 2007 Interim Constitution of Nepal promotes cultural diversity and talks about enhancing skills, knowledge and rights of indigenous peoples. But, the indigenous peoples in Nepal are waiting to see how these visions will be realized by the new constitution, which is still in the process of being promulgated through the second Constituent Assembly<sup>10</sup>.

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4 Amnesty International. (n.d.). Indigenous Peoples. Retrieved from <https://www.amnesty.org/en/what-we-do/indigenous-peoples/> Accessed on 21 march 2024

5 Minority Rights Group International. (n.d.). Nepal. Retrieved from <https://minorityrights.org/country/nepal/>

6 Indigenous Television. (n.d.). Episode 30. Indigenous Voice. Retrieved from <https://www.indigenoustelevision.com/indigenous-voice/episode/30> Accessed on 21 march 2024

7 The Raute people are a nomadic tribe in Nepal known for their unique way of life as hunter-gatherers. They describe themselves as "kings of the forest" and live a traditional lifestyle that involves hunting monkeys, manufacturing hand-carved tools, and exchanging these products for food with surrounding villages.

8 The Chepang people are a Tibeto-Burman ethnic group from the rugged ridges of the Mahabharat mountain range in Nepal

9 The Bankariya people are a small indigenous group living in an isolated region of the Makwanpur District in central Nepal

10 Indigenous Voice. (n.d.). Indigenous Peoples of Nepal. Retrieved from <https://english.indigenoustelevision.com/indigenous-peoples-of-nepal> Accessed on 21 march 2024

#### **IV. History of Discrimination :**

The indigenous peoples of Nepal have endured centuries of political oppression, economic exploitation, and cultural and social discrimination. Since the latter part of the 18th century, with the establishment of modern Nepal by Prithvi Narayan Shah, the king of Gorkha, indigenous communities have suffered under discriminatory policies and actions imposed by the state. In the pursuit of consolidating small states and principalities, indigenous peoples not only lost their ancestral lands and territories but also their traditional systems of self-governance, which were characterized by participation, consensus, fairness, and inclusivity. These communities were subjected to inhumane treatment, with their political and social institutions systematically dismantled and replaced by a highly centralized governance structure dominated by the ruling elite from the hill high castes. Indigenous peoples were systematically disempowered and coerced into adopting the customs and cultural norms of the dominant Hindu caste, which were foreign to their own traditions. In 1854, Janga Bahadur Rana enacted the "Muluki Ain" or country code, which enshrined the principles of the Hindu religion and reinforced caste hierarchy. This code institutionalized the political supremacy of Hindu castes such as Brahmin, Chhetri, and Thakuri over the indigenous majority, relegating them to inferior status. Indigenous peoples were categorized as either non-enslavable or enslavable alcohol-drinkers, further marginalizing them and compelling them to serve the ruling class. Despite not adhering to the Hindu caste system, Christians and Muslims were also relegated to the lowest rungs of the social hierarchy under the Muluki Ain, exacerbating their social exclusion. The implementation of this code for over a century has fundamentally altered the social and cultural fabric of Nepal, perpetuating the ongoing deprivation and marginalization experienced by indigenous peoples. Nepal remained a theocratic Hindu state until May 2006, further entrenching the systemic discrimination and historical injustices endured by its indigenous communities.

#### **V. National Policies and Initiatives in Nepal:**

Nepal has taken steps to recognize and uphold the rights of its indigenous communities, both through its constitutional framework and various government initiatives and programs. Nepal voted Yes to the UN Declaration on the rights of Indigenous Peoples (UNDRIP) at the UN General Assembly on September 13, 2007. Also, Nepal ratified the primary international legal instrument the Convention on Indigenous and Tribal Peoples of the International Labour Organization (ILO, Convention no 169) on August 22, 2006 and deposited it at the ILO, Geneva on September 14, 2007 and it came into effect since September 14, 2008. Nepal is one of the 20 countries (and the only one in Asia) to have ratified the Convention. However, the provisions laid down in the Convention and Declaration are yet to be internalized into Nepal's national laws, plans and policies with regards to asserting the Indigenous Peoples' rights. Currently, Nepal has a law related to indigenous nationalities since 2002. And, in recent years, there has been increased recognition of the multi-ethnic, multi-religious, multi-lingual and multi-cultural character of Nepali society and the need for respecting this diversity for political stability and social progress. Similarly, there also have been revisions in Civil Service Act of 2007 which include the provision to reserve 45 percent



of vacant posts to IPs (27 percent), women (33 percent), Madhesis (22 percent), Dalits (9 percent), disabled people (5 percent) and those from 'backward' regions (4 percent). It is regarded to be a remarkable step to making state-employment opportunities open to historically excluded groups, including Indigenous Peoples and making governance more inclusive. Likewise, in line with the provision of 1990 Constitution and to the later Interim Constitution 2007, the National Planning Commission, especially from its ninth five-year plan initiated the socio-economic development program targeting IPs. In the Ninth five-year Plan (1992- 1997), the Nepal government fully recognized the presence of indigenous nationalities. Subsequent plans the government included increasing commitments for their development and uplift<sup>11</sup>. In 1999, Local Self-Government Act made special quota provisions for indigenous people in elected local bodies. Representation of indigenous peoples in local bodies was significantly higher (29 percent) in comparison to other sectors (but local bodies were suspended in 2002). In 2002, the National Foundation for the Development of Indigenous Nationalities (NFDIN) was established. NFDIN is an autonomous, a sole governmental body whose aim is to develop and empower the Indigenous Nationalities, in close co-operation with District Development Committees (DDCs), but has been defunct since 2002<sup>12</sup>. The Constitution of Nepal, promulgated in 2015, recognizes the multi-ethnic, multi-lingual, and multi-cultural nature of the nation. It enshrines the right of indigenous communities to participate in state structures and decision-making processes, as well as their right to preserve and promote their languages, scripts, cultures, and social practices. Additionally, Nepal has adopted various laws and policies aimed at protecting the rights of indigenous communities, such as the National Foundation for Development of Indigenous Nationalities Act, the Local Self-Governance Act, and the National Trust for Nature Conservation Act.

## **VI. International Human Rights Instruments for the Protection of Indigenous Peoples' Identity and Culture:**

The International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169) is a crucial instrument that recognizes the rights of indigenous and tribal peoples to exercise control over their institutions, ways of life, and economic development. This convention acknowledges the aspirations of these communities to maintain and develop their distinct identities, languages, and religious practices within the framework of the states where they reside.

The ILO Convention No. 169 aims to promote the rights of indigenous and tribal peoples to preserve and perpetuate their cultural traditions, customs, and institutions. It emphasizes the importance of respecting their social and cultural values, traditional practices, and customary laws. The convention also recognizes the right of these communities to participate in the formulation and implementation of policies and programs that may affect them.

Furthermore, the convention calls upon governments to take measures to protect the rights of indigenous and tribal peoples to their lands and natural resources, which are often inextricably linked to their cultural identities and traditional ways of life. It encourages the adoption of

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11 Ibid

12 Ibid



measures to facilitate the development of these communities' economic activities, including their traditional and related activities, while respecting their cultural and spiritual values.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted in 2007, is a comprehensive instrument that addresses a wide range of rights for indigenous peoples worldwide. This declaration emphasizes the right of indigenous peoples to self-determination, which includes their right to freely determine their political status and pursue their economic, social, and cultural development.

Regarding the protection of cultural identity and traditions, UNDRIP affirms the right of indigenous peoples to maintain, control, protect, and develop their cultural heritage, traditional knowledge, and traditional cultural expressions. It recognizes their right to practice and revitalize their cultural traditions and customs, including the right to maintain, protect, and develop their indigenous languages.

The declaration acknowledges the right of indigenous peoples to establish and control their educational systems and media, ensuring that their histories, languages, and cultures are reflected and promoted. It also affirms their right to maintain, protect, and develop their distinctive spiritual and religious traditions, customs, and ceremonies.

UNDRIP emphasizes the importance of protecting the rights of indigenous peoples over their lands, territories, and resources, which are essential for their cultural survival and the continuation of their traditional practices. It calls for effective measures to prevent and redress actions that deprive indigenous peoples of their integrity as distinct peoples or their cultural values and ethnic identities.

Both the ILO Convention No. 169 and UNDRIP recognize the rights of indigenous peoples to maintain, protect, and develop their distinct cultural identities, languages, traditions, and ways of life. These instruments aim to promote and safeguard the rich cultural diversity of indigenous communities worldwide while ensuring their active participation and self-determination in matters that concern them.

## **VII. Indigenous Peoples movement for International solidarity:**

In 1993, the United Nations declared it the International Year for the World's Indigenous Peoples. In response, the government set up a committee chaired by the Prime Minister, but it didn't do anything to recognize Indigenous Peoples during that year. This happened again when they declared a Decade for Indigenous Peoples. Another committee was formed, this time chaired by the Minister for Education and Culture, but it also didn't take any action. However, the Indigenous Peoples themselves formed their own committee and organized various events across the country during the Indigenous People's Year and Decade, as well as afterward. They also celebrate Indigenous People's Day every year on August 9th with programs and rallies. Groups like the Nepal Federation of Indigenous Nationalities (NEFIN), National Indigenous Women Federation

(NIWF), NGO-Federation of Nepalese Indigenous Nationalities (NGO-FoNIN), Federation of Nepalese Indigenous Journalists (FoNIJ), and others have been instrumental in organizing these activities. In 2008, the UN Special Rapporteur on indigenous peoples' rights visited Nepal to assess the situation. His report in 2009 highlighted issues such as forced displacement, lack of access to justice, political exclusion, economic and educational disparities, and threats to their cultures and languages. He urged the government to protect their rights within a multicultural framework. Similarly, in 2015, the Chairperson of the UN Committee on the Elimination of Racial Discrimination (CERD), Francisco Cali Tzay, visited Nepal to address ongoing issues. Some facts about Nepalese Indigenous Peoples include that they make up about 35.81% of the population (possibly even more), a significant portion of their ancestral land is occupied by protected areas, and they face challenges like trafficking, school dropout rates, migration for work, and being disproportionately affected by conflict and imprisonment.

### **VIII. Challenges Faced by Indigenous Communities in Nepal:**

Despite the legal frameworks and initiatives in place, indigenous communities in Nepal continue to face various challenges in preserving their cultures, identities, and traditional ways of life, particularly in the digital realm.

#### **a. Language Barriers and Digital Divides:**

One of the significant challenges faced by indigenous communities in Nepal is the language barrier. Many indigenous languages lack written scripts or standardized orthographies, making it difficult to create digital content and resources in these languages. This lack of written representation hampers the development of educational materials, online resources, and digital tools that could benefit these communities. Without adequate representation in digital spaces, indigenous languages risk being marginalized and facing extinction. Moreover, the digital divide exacerbates these challenges. Limited access to technology and the internet, especially in remote and rural areas where many indigenous communities reside, further isolates these groups from the benefits of digital connectivity. The lack of infrastructure, such as reliable internet connections and access to devices, restricts their ability to engage with online platforms, educational resources, and communication tools. For instance, the Chepang community, residing in the rugged terrains of the Mahabharata mountain range in Nepal, faces language barriers and digital divides. The Chepang language, which lacks a standardized script, struggles to be represented in digital content and educational materials. This limitation hinders the community's access to online resources and digital tools that could enhance their education, preserve their cultural heritage, and facilitate communication within and outside their community. Additionally, the remote location of many Chepang villages contributes to the digital divide they experience. Limited infrastructure and access to technology impede their ability to benefit from online learning platforms, telemedicine services, and e-commerce

opportunities. Addressing these language barriers and digital divides is crucial to ensuring the inclusion and empowerment of indigenous communities like the Chepang in the digital age, promoting cultural preservation, knowledge sharing, and socio-economic development.

#### **b. Threats to Cultural Preservation and Transmission:**

The rapid pace of globalization and the influence of mainstream cultures pose a significant threat to the preservation and transmission of indigenous cultures and traditional knowledge. Many indigenous communities worldwide face challenges in maintaining their cultural practices, languages, and oral traditions, which are fundamental components of their identities and ways of life. The encroachment of dominant cultures, economic pressures, environmental changes, and social transformations contribute to the erosion of indigenous heritage and knowledge systems. For instance, the Chepang people in Nepal encounter threats to their cultural preservation and transmission due to external influences and modernization. The Chepang community's traditional practices, languages, and oral traditions are at risk of being diluted or lost as globalization impacts their way of life. The introduction of mainstream cultures, changes in land use patterns, and limited access to resources pose challenges to the continuity of Chepang heritage. Moreover, economic pressures and social transformations further exacerbate these threats by altering traditional livelihoods and community structures. The struggle to maintain cultural practices, languages, and oral traditions among the Chepang people reflects a broader issue faced by many indigenous communities globally as they navigate the complexities of preserving their heritage in a rapidly changing world. Addressing these threats requires concerted efforts to safeguard indigenous cultures, promote linguistic diversity, and support the transmission of traditional knowledge across generations

#### **c. Intellectual Property Rights and Traditional Knowledge Protection:**

The protection of traditional knowledge and intellectual property rights associated with indigenous cultures is a critical issue that indigenous communities face globally. There is a significant risk of misappropriation and exploitation of indigenous cultural expressions, traditional designs, and traditional knowledge by third parties, often without proper acknowledgment or fair compensation for the indigenous communities. This poses a threat to the cultural integrity, economic interests, and self-determination of indigenous peoples. For example, the Chepang community in Nepal, known for their unique cultural heritage and traditional knowledge, faces challenges in safeguarding their intellectual property rights. The rich traditional practices, medicinal knowledge, and craftsmanship of the Chepang people are vulnerable to exploitation by external entities seeking to commercialize or profit from their heritage without due recognition or benefit-sharing agreements with the community. In instances where bioprospecting occurs, such as the search for valuable products derived from natural resources like medicinal plants used by indigenous communities, there is a risk of unauthorized patenting and commercialization that excludes the rightful custodians of this

knowledge. Without adequate legal frameworks and mechanisms to protect traditional knowledge and ensure that indigenous communities benefit from its use, there is a real danger of exploitation and cultural appropriation

### **IX. Protecting Indigenous Cultures and Identities Online**

Addressing the challenges faced by indigenous communities in Nepal requires a multifaceted approach that empowers these communities to navigate the digital realm while preserving their cultural integrity and identities.

#### **a. Empowering Indigenous Communities through Digital Literacy:**

Bridging the digital divide and enhancing digital literacy among indigenous communities is crucial for their effective participation in the online world. Initiatives that provide access to technology, training, and capacity-building programs can equip indigenous peoples with the skills and knowledge necessary to leverage digital tools for cultural preservation, expression, and advocacy. An exemplary initiative empowering indigenous communities through digital literacy is the "Digital Natives" program implemented in partnership with the Chepang community in Nepal. This program focuses on providing digital literacy training, access to computers, and internet connectivity to Chepang youth and elders. By offering workshops on basic computer skills, internet usage, and content creation, the program enables community members to document their cultural heritage, share traditional knowledge, and engage with online platforms. Through the "Digital Natives" program, Chepang individuals learn how to create digital content in their native language, develop websites showcasing their cultural practices, and participate in online forums discussing indigenous rights and environmental conservation. This initiative not only enhances the digital literacy of the Chepang community but also empowers them to amplify their voices, preserve their heritage, and connect with a global audience interested in indigenous cultures. By fostering digital literacy among indigenous communities like the Chepang through targeted programs and resources, it becomes possible to bridge the gap between traditional knowledge systems and modern technologies, enabling indigenous peoples to navigate the digital landscape with confidence, assert their cultural identities, and advocate for their rights in the digital age.

#### **b. Promoting Online Representation and Self-Expression:**

Encouraging and supporting indigenous communities to create and curate their own online content and platforms is vital for ensuring accurate representation and self-expression. This includes developing websites, social media channels, and digital repositories where indigenous peoples can share their stories, traditions, and perspectives in their own voices. An alternative approach to promoting online representation and self-expression among indigenous communities involves the establishment of a digital storytelling project known as "Voices of the Ancestors" in collaboration

with the Bankariya people in Nepal. This initiative focuses on empowering Bankariya elders and youth to use digital tools such as video recording equipment, editing software, and online platforms to document their oral histories, cultural practices, and traditional knowledge. Through the "Voices of the Ancestors" project, Bankariya community members have the opportunity to create multimedia content that reflects their unique heritage, rituals, and worldview. By sharing these narratives on dedicated websites, social media platforms, and virtual archives, the Bankariya people can reclaim their narratives, challenge stereotypes, and foster intergenerational dialogue within their community. This approach not only promotes online representation but also serves as a means of cultural preservation, intercultural exchange, and empowerment for the Bankariya people. By providing them with the tools and platforms to share their stories on their terms, the "Voices of the Ancestors" project enables the Bankariya community to assert their identities, amplify their voices, and engage with a broader audience interested in learning about their rich cultural heritage.

### **c. Safeguarding Traditional Knowledge and Intellectual Property:**

Protecting the intellectual property rights and traditional knowledge of indigenous communities is essential for preventing misappropriation and exploitation. This can be achieved through legal frameworks, protocols, and guidelines that govern the use, access, and sharing of indigenous cultural expressions and traditional knowledge in the digital realm. Safeguarding traditional knowledge and intellectual property of indigenous communities requires a multi-faceted approach that combines legal protections with community empowerment and awareness. Establishing legal frameworks that recognize and respect indigenous intellectual property rights is crucial in preventing unauthorized use and exploitation of traditional knowledge. These frameworks should include provisions for prior informed consent, benefit-sharing agreements, and mechanisms for resolving disputes related to intellectual property. Protocols and guidelines play a vital role in outlining best practices for the documentation, protection, and transmission of traditional knowledge within indigenous communities. By establishing clear protocols for accessing and sharing cultural expressions and traditional knowledge, indigenous peoples can maintain control over their heritage and ensure that their intellectual property rights are respected in the digital domain. In the digital realm, where information can be easily disseminated and appropriated, it is imperative to implement measures that protect indigenous cultural expressions from misuse and distortion. By promoting awareness about the value of traditional knowledge and the importance of preserving indigenous intellectual property rights, communities can assert their sovereignty over their heritage and contribute to the sustainable management of their cultural resources. Overall, safeguarding traditional knowledge and intellectual property requires a collaborative effort involving indigenous communities, governments, legal experts, and stakeholders to develop inclusive and effective mechanisms that uphold the rights and interests of indigenous peoples in the

digital age. Through proactive measures and respectful engagement, it is possible to create a more equitable and culturally sensitive framework for protecting indigenous intellectual property and traditional knowledge.

### **X. Conclusion and Recommendations:**

Protecting the human rights of indigenous peoples in the digital age requires a multifaceted approach that addresses the unique challenges they face while empowering them to leverage the opportunities presented by digital technologies. Governments and international organizations should continue to strengthen legal and policy frameworks that recognize and uphold the rights of indigenous peoples, including their right to self-determination, cultural preservation, and participation in decision-making processes related to their lives and territories. Creating inclusive digital ecosystems that cater to the needs and perspectives of indigenous communities is crucial. This includes addressing language barriers, bridging digital divides, and promoting digital literacy and skills development among indigenous peoples. Fostering cross-cultural dialogue and understanding between indigenous and non-indigenous communities is essential for promoting respect, appreciation, and cooperation. Educational initiatives, cultural exchange programs, and inclusive online platforms can facilitate this process, contributing to the preservation and celebration of diverse cultural identities. By addressing these recommendations and embracing a collaborative and inclusive approach, we can ensure that the human rights of indigenous peoples are upheld in the digital age, safeguarding their cultural heritage, identities, and traditional ways of life for generations to come.

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# Navigating Legal Realms: Justiciability of Economic, Social and Cultural Rights (ESCR) in Nepal

Hrithik Yadav

## Abstract

*This research paper examines the quest of justiciability of Economic, Social, and Cultural Rights (ESCRs) emphasizing that these are justiciable and enforceable rights as good as the civil and political rights. The author makes critical appraisal of the Karel Vasak's generation theory, which places ESCRs as second-generation rights, contending that this classification undermines their importance and enforceability. Drawing on international human rights instruments and Nepal's constitutional provisions, the paper demonstrates that ESCRs are not only justiciable but also fundamental rights that are integral to the realization of human dignity. In order to assess the Nepal's; position in regard to ESCR, it examines Nepal's progressive constitutional framework, which incorporates ESCRs as enforceable rights, contrasting this with the approach in neighboring countries where such rights are often relegated to directive principles. Furthermore, the paper analyzes judicial trends in Nepal, showcasing the Supreme Court's proactive approach in adjudicating ESCR-related cases and enforcing these rights. Despite these advancements, the paper identifies potential challenges in the implementation of ESCRs in Nepal, including the lack of increased budgetary resources, non-implementation of court judgments, and the government's slow progress in establishing implementation mechanisms. It conclusively argues that while Nepal's legal framework provides a strong foundation for ESCRs, there is a need for greater action and implementation to ensure the effective realization of these rights.*

**Keywords:** Human Rights, Justiciability, Generations, ESCR, Nepal, Constitution

## Introduction of Human Rights

Human rights are those rights which belong to an individual as a consequence of being human<sup>1</sup>. Human Rights are natural rights that nature has given to all human beings and are inseparable, undividable and inalienable from human beings. They are vital, necessary and indispensable to a modern society, which without them would be unable to function and cannot be developed. In another term, human rights are the claims of the individuals for such conditions as are essential for the fullest realization of the innate characteristics which nature has bestowed him/her being a human being.<sup>2</sup> Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, color, religion, language, or any other status.

Human rights are not granted by anyone but inherited by nature and thus are not the choice of rulers.

1 Dr. H.O. Agrawal, ' Human Rights', Central Law Publication, Prayagraj, 2020, p.2

2 C. Naseema, ' Human Rights Education: Conceptual and Pedagogical Aspects', Kanishka Publishers Naya Delhi, 2002, p.2

Justice P.N. Bhagawati has rightly pointed out that ‘human rights are as old as human society, for they derive from person's need to realize his/her essential humanity. They are not ephemeral, not alterable with time, place and circumstances.’<sup>3</sup> Human rights are direct progenitor of doctrine of nature law.<sup>4</sup> Hence, they are not the products of the philosophical whim or political fashion.

Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.

In context of Nepal, human rights means rights related to life, liberty, equality and dignity of a person provided by the Constitution and other prevailing laws and this term also includes the rights contained in the international treaties regarding human rights to which Nepal is a party.<sup>5</sup> Thus, in our country, human rights refers to the collective whole of national and international human rights instruments establishing a wide theoretical horizon of human rights in the country.

### **Karl Vasek's Generation theory and Dichotomy of Human Rights**

In November 1977, Karel Vasak, a Czech Jurist, UNESCO's legal advisor and distinguished human rights scholar, wrote an article for the UNESCO Courier, introducing the idea of three generations of human rights. The theory gained traction among researchers and practitioners and became part of the standard vocabulary describing the history and contents of the human rights framework.<sup>6</sup> The tripartite typology of generation theory of human rights created dichotomy of human rights by categorically presenting:-

#### **a. Civil and Political rights as first generation<sup>7</sup>**

These consists of the human rights provided from Article 3 to Article 21 of the UN Declaration and the International Covenant on Civil and Political Rights of 1966.

#### **b. Economic, Social and Cultural rights(hereafter, ESCR) as second generation<sup>8</sup>**

The second generation rights consist of Article 22 to Article 27 of the UN Declaration and the International Covenant of Economic, Social and Cultural Rights of 1966.

3 ‘Justice P.N. Bhagwati Lectures on India's Human Rights Law’, Columbia Law School, Story Archive, available at <https://www.law.columbia.edu/news/archive/justice-pn-bhagwati-lectures-indias-human-rights-law>, assessed on 20 April 2024

4 Sushil Deshta & Kiran Deshta, ‘Fundamental Human Rights’, Deep and Deep Publications, New Delhi, 2000, P.1

5 Section 2(f), National Human Rights Commission Act, 2068(2012)

6 **Steven L. B. Jensen**, ‘Putting to rest the Three Generations Theory of human rights’, Open Global Rights, November 15 2017, available at <https://www.openglobalrights.org/putting-to-rest-the-three-generations-theory-of-human-rights/>, assessed on 20th April 2024

7 The proponents of Karl Vasek's theory supposes that the first generation rights i.e. civil and political rights are the initial form of natural rights. This rights developed during the English Revolution of the 17th Century and the French and American Revolution of the 18th Century. The key theme underlying these rights is liberty. These rights largely limit government interference, and which many claim are compromised at the expense of socioeconomic rights.

8 According to support of Generation Theory, the Second-generation rights began to earn a greater prominence in the twentieth century, especially post World War II. The rights rely on socialist assumptions and the underlying theme is **equality** which is in contrast to first-generation rights and the notion of liberty.

### c. The collective or solidarity rights as the third generation of rights.<sup>9</sup>

The third generation human rights include the right to development, the right to environmental protection, the right to self-determination, the right to peace etc.

Several analysts claim that a fourth generation of human rights is emerging, which would include rights that cannot be included in the third generation, especially in relation to recognize the rights in the field of digital technologies.<sup>10</sup> This consists of right to digital security, right to equally access computing, right to access to one's own digital data (*habeus data*) and others.

### Unlearning ESCR as Second Generation Right

Mainly, ESCR are rights claims about basic material interests.<sup>11</sup> ESCR are rights requiring government intervention and sacrifice, rather than a negative right that implicates government inaction. They often deal with the allocation and distribution of resources, a power generally reserved for the legislature.<sup>12</sup> These (as recognized in the Universal Declaration of Human Rights, 1948) include the right to social security, the right to work, the right to rest and leisure, the right to an adequate standard of living, the right to education, and the right to participate in the cultural life of the community, among others.<sup>13</sup>

Despite being of equal importance as of the Civil and Political Rights, they have been mistakenly regarded as "second-generation" rights meaning they are not justiciable and enforceable. The above illustrated Karl Vasak's theory of vertical division of human rights has surrounded the ESCR by controversies both of ideological and technical nature.<sup>14</sup> There are numerous misconceptions established out of such division such as ESCR are merely general interest of people, so that would be impossible for a single individual to assert or enforce them. It is also claimed that ESCR involve questions of resources allocation and public policy that should not be dealt with by court as this would imply a huge financial burden for States.<sup>15</sup> Judicial remedies are not possible to immediately execute the ESCR as they are the concern of progressive realization or futuristic in nature.

9 The *Pundit of Generations Theory* believes that the third generation of rights emerged post-1945 and are referred to as **solidarity rights**. This is for the simple reason that these rights are concerned with social groups and society on the whole rather than an individual. They are therefore seen as collective rights. The underlying theme of the third-generation rights is **fraternity**.

10 Hanna L. Kokhan and others, 'Human Rights of the Fourt Generation in a Single Educational Area', *Journal of Interdisciplinary Study*, Volume 1, Special Edition, p.58, available at [filipe, +G^0D+04-2020+\(E\).pdf](#), assessed on 19th April 2024

11 Singh, Sabrina, "Realizing Economic and Social Rights in Nepal: The Impact of a Progressive Constitution and an Experimental Supreme Court", *Harvard Human Rights Journal*, Vol.33, 2020, Harvard Law School, p.276

12 Litinski, Rotem, "Economic Rights: Are they Justiciable, and Should They Be?", *American Bar Association*, 2019, available at [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/economic-justice/economic-rights--are-they-justiciable--and-should-they-be-/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/economic-justice/economic-rights--are-they-justiciable--and-should-they-be-/), accessed on 5 December 2021

13 Universal Declaration of Human Rights, Articles 22–26.

14 Asbjorn Eide, Caterina Krause and Allan Rosas, 'Economic, Social and Cultural Rights', *Martinus Nijhoff Publishers*, London, 2001, p.5

15 Geeta Pathak Sangroula, 'Breaking the Generation Theory of Human Rights: Mapping the Scope of Justiciability of Economic, Social and Cultural Rights with Special Reference to the Constitutional Guarantees in Nepal', *Kathmandu School of Law Review*, Volume 3, Special Issue, May 2013, p. 10

Based on the above justifications, ESCR were pushed to the margins of the international human rights agenda, on the grounds that they were too vague to be "justiciable". However, Developments over the past few decades have shown that this is a myth. These obligations have been elaborated in greater detail by courts, international human rights bodies and other experts, and enshrined in some way in most countries' constitutions.<sup>16</sup> The pro-human right intellectuals and commentator have objected the Karl Vasak's proposition to be misleading. In this backdrop, the justiciability of socio-economic rights has been the subject of considerable jurisprudential and political debate all over the world. For This article shall now delve into the rationale for decoding the problematic idea of Karl Vasak. The major rationale breaking the regime of wrongly constructed generation theory of human rights have been precisely elaborated below:-

- a. The Preamble of the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966) recognizes, inter alia, that economic, social and cultural rights derive from the "inherent dignity of the human person" and that "the ideal of free human beings enjoying freedom of fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as civil and political rights."<sup>17</sup> The Covenant further obligates States to take steps towards the full realization of these rights. This is sufficient to demolish the Karl Vasak's theory which attempts to assert that the so-called generation human rights are only for 'read and write' or say it, a decorative human rights arrangement.
- b. ESCR have become part and parcel of international human rights law, not only at the universal but also at the regional level. They are contained in the European Social Charter, in the Additional Protocol to the American Convention on Human Rights in the Area of ESCR, ASEAN Human Rights Declaration, and in the African Charter on Human and People's Rights. These regional human rights mechanism provides more localized, flexible and relative arrangements for realizing the ESCR.
- c. Notably, the World Conference on Human Rights, which was held by the United Nations in Vienna, Austria on 14 to 25 June 1993 has opposed the differences in between civil and political rights and economic, social and cultural rights in its deliberation called, the Vienna Declaration and Programme of Action. The declaration strongly proclaimed that all human rights are universal, indivisible, interdependent and interrelated!<sup>18</sup> It further stated that the international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems,

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16 'Economic, Social and Cultural Rights Standards,' Note on decoding Justice', Center for Economic and Social Rights, available at [https://cesr.org/sites/default/files/2022/Interrogate\\_2\\_-\\_ESCR\\_Standards.pdf](https://cesr.org/sites/default/files/2022/Interrogate_2_-_ESCR_Standards.pdf), assessed on 20th April 2024

17 International Covenant on Economic, Social and Cultural Rights, 16 December 1966, New York City

18 Paragraph 5, The Vienna Declaration and Programme of Action, 25 June 1993, Vienna, Austria, available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action>, assessed on 19th April 2024

to promote and protect all human rights and fundamental freedoms.<sup>19</sup> That is why, the universality and justiciability of the every so-called types of human rights is beyond question. The theorization of dividing the rights in an order of rank is irrational and contrary to the general principles of human rights.

- d. The Vasak's categorization of tagging the right to development as third generation has been misleading as the Declaration on the Right to Development, 1986 has clearly addressed the right too development as a basic human rights. The declaration encapsulates that the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.<sup>20</sup>
- e. It is to be noted that no human rights are purely negative or positive but amalgamation of both. Even the enforcement of civil and political rights requires resource expenditure, and as such, these rights are equally positive. For instance, the right to a fair trial can only be attained by the maintenance of an expensive court system. The security management and administration is costly, for example military expenses, than many ESC related rights. The cost of election, especially for parliamentary, elections require huge amount of money, may in fact be extremely expensive, while there are many social issues, for example, preventive measures against untouchability and all other forms of discrimination can be implemented at very low cost.<sup>21</sup> Therefore, the Vasak's categorization is abruptly misleading the very truth of progressive notion of human rights.
- f. Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights<sup>22</sup> states on possibility of realization of ESCR through effective use of resources available. It has been further advanced by the 'Maastricht Guidelines' that provides a practical guideline in understanding the violation of ESCR and the responses required.<sup>23</sup> Subscribing the fact that as human rights and fundamental freedoms are indivisible and interdependent, equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights. Also,

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19 Ibid

20 Article 1, United Nations Declaration on the Right to Development, 1986, United Nations Millennium Declaration, General Assembly Resolution No. 55/2

21 Geeta Pathak Sangroula, 'Breaking the Generation Theory of Human Rights: Mapping the Scope of Justiciability of Economic, Social and Cultural Rights with Special Reference to the Constitutional Guarantees in Nepal', Kathmandu School of Law Review, Volume 3, Special Issue, May 2013, p. 14-15

22 The Limburg Principles manifest that economic, social and cultural rights are an integral part of international human rights law. They are the subject of specific treaty obligations in various international instruments, notably the International Covenant on Economic, Social and Cultural Rights.

23 Geeta Pathak Sangroula, 'Breaking the Generation Theory of Human Rights: Mapping the Scope of Justiciability of Economic, Social and Cultural Rights with Special Reference to the Constitutional Guarantees in Nepal', Kathmandu School of Law Review, Volume 3, Special Issue, May 2013, p. 19

*Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women, 1994* <sup>24</sup>noted that the universal human rights are wrongly perceived as confined to civil and political rights and not extending to economic and social rights, which may be of more importance to women. Thus, these three principles provide practical explanation to the justiciability of so-called second generation human rights as like the civil and political rights.

- g. Committee on Economic, Social and Cultural Rights (CESCR), the treaty body formed for monitoring and supervision of the provisions of the ICESCR, has also called for justiciability in case of violation of ESCR at several instances. <sup>25</sup> It can be found that a good number of articles in the Covenant are capable of immediate implementation. Following the adoption of optional protocol to ICESCR, the committee is now endowed with receiving individual complains for violation of rights granted by the treaty in case of exhaustion of domestic remedies. <sup>26</sup>Furthermore, the committee has provided overarching guidance through its general comments on how to effectively implement ESCR at the national level. This guidance emphasizes the importance of enacting robust laws and setting up effective mechanisms for implementation.
- h. The so-called generation theory is nothing more than the result of the politicization of rights. As the twin human rights covenant was adopted during the time cold war when the world was suffering ideological polarization in 1966, two covenants were adopted separately. It can be argued that in case there were not such geo-political tension in the global landscape, Vasak could not have thought of demarcating the equally important human rights into several categories. Hereby, it can be claimed that the division is not based on any logical deduction, rather it is the reflection of political divide of cold war era.

## Navigating ESCR in Nepalese Law

Nepal is a state party to many key human rights treaties. Nepal ratified the ICESCR on 14 May 1991. As State Party, Nepal has the obligation to respect, protect, and fulfill all human rights enumerated in the treaty. It has to take executive, legislative, judicial, and other measures for effective implementation of the ICESCR as per Nepal's 1991 Treaty Act that explicitly provides for the enforcement of a Convention or treaty to which Nepal is a party notwithstanding contravening

24 It has stressed that civil and political rights and economic and social rights are integral and complementary parts of one coherent system of global human rights.( see paragraph 2)

25 Dr. Katie Boyle, 'Models of Incorporation and Justiciability for Economic, Social and Cultural Rights', November 2018, available at [cottishhumanrights.com/media/1809/models\\_of\\_incorporation\\_escr\\_vfinal\\_nov18.pdf](http://cottishhumanrights.com/media/1809/models_of_incorporation_escr_vfinal_nov18.pdf), assessed on 19th April 2024

26 Article 2 of the optional protocol to ICESCR mentions that Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party.



domestic legal standards.<sup>27</sup> It should be therefore clarified that the provisions of ESCR apply as good as domestic statutes by virtue of our treaty obligation.

## ESCR in the Constitution of Nepal

Importantly, both the Interim Constitution of 2007 and the subsequent Constitution of 2015, which principally rests on the 'socialism-oriented' philosophy has adopted certain socio-economic rights as fundamental rights. The new Constitution of Nepal has significantly widened the scope of human rights protections through strengthening the guarantee of economic, social and cultural rights (ESCR).<sup>28</sup> Designation of these rights as fundamental is a break from previous Nepali constitutions as well as from constitutions of neighboring jurisdictions like India and Bangladesh, where many of these rights have the status of Directive Principles of State Policy, intended to act as a guide to the executive in governing the country but that do not have the same status as enforceable rights.

According to Hari Phuyal, a justice at Nepal's Supreme Court, "The Constitution of Nepal stands out as the most progressive constitution in terms of the fulfilment of ESCR".<sup>29</sup> He adds that the constitution of Nepal classifies and considers these important ESCR under the chapter of fundamental rights, all of which are subject to enforceability and justiciability. The constitution gives the Supreme Court with the power to issue appropriate orders or writs for the enforcement of fundamental rights.<sup>30</sup> This shows the Nepalese constitution has incorporated the ESCR without any distinction against the conventional-cum-western Euro-centric formalistic psyche pertaining to non-enforcement of ESCR.

It will be very fascinating to learn that the Constitution directly incorporates wording from the International Covenant on Economic, Social, and Cultural Rights (ICESCR). For example, the Constitution mirrors Art. 13(2) (a) of the ICESCR, which states that "primary education shall be compulsory and available free to all," by stating in Art. 31(2) that "every citizen shall have the right to compulsory and free basic education." The other ESCR incorporated in the Constitution of Nepal include the right to social justice<sup>31</sup>, social security<sup>32</sup>, clean environment<sup>33</sup>, housing<sup>34</sup>,

27 Section 9 of the Act provides that "in case any provision of a treaty to which the Nepal has become a party following its ratification, accession, acceptance or approval by the parliament, contradicts with the provisions of current laws, the latter shall be held invalid to the extent of such contradiction for the purpose of that treaty, and the provisions of the treaty shall be applicable in that connection as law of Nepal". The Act also provides for domesticating the provisions of international instruments into national situation.

28 Chapagai, Raju, 'Walk the talk', The Kathmandu Post, Kathmandu, 10 December 2018

29 Phuyal, Hari, 'Economic, Social and Cultural Rights in the Constitution of Nepal', A Treaties on the Constitution of Nepal" 2015, Kathmandu University School of Law, First edition, 2020, p.307

30 Article 47, 133 & 144, Constitution of Nepal

31 Ibid, Article 42

32 Ibid, Article 43

33 Ibid, Article 30

34 Ibid, Article 37

labor<sup>35</sup>, language and culture<sup>36</sup>, employment<sup>37</sup> as well as rights relating to health<sup>38</sup> and food.<sup>39</sup> The Nepalese experience of domesticating the ESCR clearly float the message that the ESCR are enforceable if state is honestly willing to manage its resources for the cause of better and prosperous human rights.

In accordance with the obligation set forth in Article 47<sup>40</sup> of the Constitution of Nepal, the Federal Parliament has made several laws relating to ESCRs. The most significant of these ESCR laws are as follows:-

- a) The Labor Act, 2074
- b) The Act Relating to Right to Housing, 2075
- c) The Act Relating to Food and Food Sovereignty, 2075
- d) The Compulsory and Free Education Act, 2075
- e) The Public Health Service Act, 2075
- f) The Consumer Protection Act, 2075
- g) The Social Security Act, 2075
- h) The Act Relating to Safe Motherhood and Reproductive Health Rights, 2075
- i) The Right to Employment Act, 2075

*Aside from the aforementioned Acts, the Government has implemented various programs such as Social Security Scheme, Prime Minister Employment Program, and other programs to achieve the ESCR guaranteed under Nepal's Constitution.*<sup>41</sup>

### Judicial Trends in Favor of ESCR

Though it is stated traditionally that the litigation of ESCR in courts is impossible, the Nepal's Supreme Court's approach to socio-economic rights adjudication can be characterized as robust and experimental. The Supreme Court has passed several landmark judgments based on the international instruments relating ESCR in numerous cases.

For instance, the Constitution of Kingdom of Nepal 1990 had not expressly included the right to food under fundamental rights, but in the case of mass starvation filed by *Madhav Kumar Basnet* and *Prakash Mani Sharma*<sup>42</sup> the Supreme Court recognized the state's obligation to provide food

35 Ibid, Article 54

36 Ibid, Article 32

37 Ibid, Article 33

38 Ibid, Article 35

39 Ibid, Article 36

40 Article 47 of the constitution stipulates that the state shall, as required, make legal provisions for implementation of rights within three years of the commencement of this constitution.

41 Manda, Chandan, ' Prime Minister Employment Programme has so far proved to be a let-down for jobless citizens', The Kathmandu Post, Kathmandu, 9 August 2020

42 Prakash Mani Sharma et al v. Office of Prime Minister and others, NKP 2067, Volume 1 Decision No. 8540

supply to its people, and the case opened a whole new avenue for raising the issues of ESC rights. In both writs, the court has cited the Article 11(1) of ECSR that reads as:-

*The states parties to the present covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions. The states parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.*

Another example is the case of *Sudarshan Subedi and Others*<sup>43</sup>, where disability rights public interest litigation groups brought a claim for social security allowance, housing and effective implementation of existing laws. The Court issued a mandamus requiring the Government to provide sustenance allowance to be effective within three months, to designate at least one social welfare official in every district to be effective within six months and to inform the Supreme Court on the implementation status within seven months.

The case of *Laxmi Devi Dhikta et.al.*,<sup>44</sup> described as ‘a milestone in Nepal's jurisprudential development’ for recognizing poor women's right to access abortion, offers a window into understanding the implementation of socio-economic rights in the Nepali context. In this case the court referred to Article 10(2), Article 12(1) and Article 12(2) of ICESCR.

Article 10 of ICESCR was specifically referred in this case to give identity to third gender in the very landmark case of *Sunilbabu Panta*<sup>45</sup>. The Court ordered the Government of Nepal to make the necessary arrangements, including making new laws or amending existing laws, to ensure that people of different gender identities and sexual orientations could enjoy their rights without discrimination. The Court further ordered that the new Constitution adopted by the Constituent Assembly should guarantee non-discrimination on the ground of gender identity and sexual orientation.

In the case of *Kamal Niyol*<sup>46</sup>, the court stressed on realizing the human right to ‘highest attainable standard of Physical and Mental health’ under ICESCR. The court internalized the provision of ICESCR by stating that it is the legal and constitutional duty of the government of Nepal as a party nation to control epidemics and provide treatment services to patients. The court ordered to make necessary preparedness by managing health professionals and necessary medicine in the hospitals to cope with the situation of epidemics.

In this way, we can see how the Nepalese court has taken a proactive approach, or demonstrated judicial activism, in implementing the ESCR concept. The Apex court has rightly realized that ESCR is important for successful utilization of civil and political rights, it needs appreciations.

43 Sudarshan Subedi and Others v Government of Nepal, NKP 2066, Volume 1, Decision No. 8053

44 Laxmi Dhikta et.al. v. Government of Nepal, NKP 2067, Volume 9, Decision No.8464

45 Sunilbabu Panta v. Nepal Government, NKP 2065, Volume 4, Decision No. 7958

46 Advocate Kamal Niyol v. Nepal Government, NKP 2068, Volume 7, Decision No. 8647

### Concluding Words

Even 70 years after the adoption of historic UDHR, the position ESCR remains controversial. Commonly referred to as the second generation of human rights, ESCR are regularly assimilated with the notion of positive rights and thus labeled as too resource intensive and too vague to be justiciable.<sup>47</sup> After South Africa, Nepal is the latest country to question this traditional and conservative, or Euro-American focused, mindset.

Nepal's constitutional provisions, at least on paper, some of the most progressive and ambitious in the world. The constitutional recognition of a significant number of ESCRs as human rights, combined with a timeline to adopt laws necessary to implement them, though is highly appreciated, nationally and internationally. Likewise, the Supreme Court of Nepal time and again has also given the verdict in the issue of ESCR.

Schedule 5 and 8 in the constitution indicate the most of the implementation of the ESCR falls within the jurisdiction of provinces and local level, while policy and budget are largely falls under the domain of federal government. However, the state's anti-federalism attitude has been damaging to the constitution's objective in enforcing such rights due to the government's lethargic attempt to execute federalism principles.

In Nepal, the government has not increased budgetary resources for ESCR implementation. Many regulations have yet to be implemented, and the implementation mechanisms outlined in the Act have yet to be established. Likewise, Non-implementation of court judgments continues to be a major concern for the judiciary, especially when the courts themselves are hesitant to follow their own rulings.

Having constitutional provisions and other statutory provisions I don't feel hesitate to explore the reality that, there is no satisfactory practice of ESCR in Nepal. To put in in another way, ESCR are only limited in the black letters of law and in the verdicts of the court. Laws and verdicts of the court without the action and social effect is meaningless.



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47 Trilsch, Mirja A. (2012), "Justiciability of Economic, Social and Cultural Rights in Domestic Law", University Press, Vol.29, p.505

## 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 begins 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 टिप्पणीको प्रयोग गर्दा पृष्ठको अन्त्यमा गर्न अनुरोध छ । सो सिधा रेखामुनि अङ्कित गर्न पनि अनुरोध छ ।  
जस्तै : डा. विजय सिंह सिजापतिको पुस्तकमा<sup>१</sup> 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 डिस्ट्रिब्युटर्स, 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 डेशन वा प्रत्यूष वन्त (सम्पा.), नेपालको सन्दर्भमा समाजशास्त्रीय चिन्तन, (ललितपुर: 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

१ 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 प्रसारण तथा प्रकाशन लिमिटेड, २०७५)

९) पत्रिकाको सम्पादकीय लेख:

माटेको स्पन्दन बुभुने कवि सम्पादकीय, गोरखापत्र, (१२० (१०७), २०७७ भदौ ४), पृ.५ ।

१०) पत्रिकाको लेख :

तारा वाग्ले, 'पर्यटन उकास '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, पुष्प) 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 अप्रकाशित 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) इन्टरनेटबाट लिइएका लेख :

राष्ट्रिय मानव अधिकार आयोग, राष्ट्रिय मानव अधिकार आयोगबाट भएका मानव अधिकारसम्बन्धी महत्वपूर्ण 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](https://www.nhrcnepal.org/nhrc_new/doc/newsletter/Importation_Nirnayharu_NHRCNepal_2077_compressed.pdf) बाट पुनःप्राप्ति



यदि कुनै लेखको Digital Object Identifier (DOI) (डिजिटल अब्जेक्ट आइडेन्टिफायर) 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, मिर्मिरे 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 लगतै नभइ अझ पछि पुनः सन्दर्भाङ्कन गर्ने परेमा पूर्ववत्को प्रयोग गर्न अनुरोध छ ।

उदाहरण :

१) प्रा. कृष्ण पोखरेल, राजनीतिशास्त्रको सिद्धान्त, (काठमाडौं : एम.के पब्लिशर्स एण्ड डिष्ट्रीब्यूटर्स, २०७२), पृ.७३ ।

ऐ.ऐ । (लगतै सन्दर्भाङ्कन गर्नु परेमा)

Ibid (पूर्ववत्) वा (ऐ) प्रा. कृष्ण पोखरेल । (लगतै नभइ अझ पछि पुनः सन्दर्भाङ्कन गर्नु परेमा)

२) जगन्नाथ अधिकारी, खाद्य सुरक्षा : विश्वव्यापीकरणको सन्दर्भमा, मेरी डेशेन वा प्रत्युष वन्त (सम्पा.), नेपालको सन्दर्भमा समाजशास्त्रीय चिन्तन, (ललितपुर: 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 कानूनका विषयमा यसको प्रयोग गरिन्छ तर मुद्दा, ऐन र सविधानजस्ता विषयहरूको पुनः सान्दर्भाङ्कन 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 सन्दर्भाङ्कन 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 छ:

- परिचय वा पृष्ठभूमि (Introduction or Background)
- अनुसन्धानात्मक लेखको उद्देश्य (Research Objectives)
- विधि (Methodology)
- महत्त्वपूर्ण खोजहरू (Important Findings)
- निष्कर्ष (Conclusion)

## आयोगका केही प्रकाशनहरू

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## मानव अधिकार चिन्तक तथा लेखक समूहमा अहिलेसम्म आबद्ध

### 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 चापागाई
- (१४) मोहना अन्सारी

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- (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 कापले (+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 प्रसाई
- (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 कापले (+अङ्क ७, १३)
- (५६) बुद्धिनारायण श्रेष्ठ
- (५७) घनश्याम खड्का (+अङ्क ११)
- (५८) सूर्यप्रसाद पराजुली (+अङ्क ९)

## अङ्क-७

(५९) वेद 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

जेष्ठ नागरिक विशेषाङ्क-२०७५ (रा.मा.अ.आ)

## अङ्क-११

(६५) बलराम राउत

(६६) केशवप्रसाद चौलागाईं

(६७) अर्जुन विश्वकर्मा

## अङ्क-१२

(६८) मीना गुरुङ

(६९) विनोदकुमार विश्वकर्मा

(७०) डा. हरिवश 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 गुरुङ

(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

(९९) रघुनाथ अधिकारी (निलमशेखर)

(१००) श्यामबाबु काफ्ले

(१०१) राजेश भ्ना अहिराज

(१०२) महेन्द्र विष्ट

(१०३) डा. लेखनाथ पौडेल

(१०४) डा. हेमन्तराज दाहाल

## अङ्क-१७

(१०५) किरण बराम

(१०६) समिक्षा पौडेल

(१०७) अच्युतमणि न्यौपाने

## अङ्क-१८

(१०८) डा. कृष्णचन्द्र शर्मा

(१०९) विजयप्रसाद मिश्र

(११०) यज्ञप्रसाद अधिकारी

(१११) वासुदेव बजगाईं

(११२) कृष्णाजीवी घिमिरे

(११३) डा. श्रीजनाकुमारी भण्डारी

(११४) मोहन काफ्ले

(११५) दिपेन्द्रबहादुर सिंह

(११६) राजेन्द्रबहादुर सिंह

(११७) डा. वीरेन्द्रराज पोखरेल

(११८) अक्षेया दुवाडी

## अङ्क-१९ (विपद् र मानव अधिकार विशेषाङ्क)

(११९) डा. समीरकुमार अधिकारी

(१२०) रोशनकुमार भ्ना

(१२१) डा. घनश्याम गुरुङ

(१२२) आरती खड्गी

(१२३) डा. गोविन्द सुवेदी

(१२४) डा. धरमराज उप्रेती

(१२५) टीकेश्वरी जोशी

- (१२६) डा. सुबोध ढकाल  
(१२७) टेक ताम्राकार  
(१२८) दिनेशप्रसाद घिमिरे

अङ्क २०

- (१२९) डा. गिरिधारी शर्मा पौडेल  
(१३०) रवीन्द्र भट्टराई  
(१३१) अजयशंकर भ्ना "रूपेश"  
(१३२) कैलाशकुमार सिवाकोटी  
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(१३४) विशाल खनाल  
(१३५) कर्णबहादुर थापा  
(१३६) विजयप्रसाद जयसवाल  
(१३७) सविनबहादुर जूवा

अङ्क २१

- (१३८) विनोदकुमार विश्वकर्मा 'विमल'  
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- (१४०) प्रेमराज सिलवाल  
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(१४२) रोशनकुमार भ्ना  
(१४३) भोला भट्टराई  
(१४४) दुर्गा पोखरेल  
(१४५) डा. महेन्द्रजंग शाह

अङ्क २२

- (१४६) टेकनारायण कुँवर  
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(१४८) बुद्धनारायण साहनी केवट  
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