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**Citizenship in the Name of Mother:
Gender Equality in Citizenship**

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Citizenship in the Name of Mother to Address Statelessness

Citizenship has always been a highly sensitive and most debated issue especially in social and political sphere of Nepal. Citizenship signifies a person's identity and nationality. A person who attains a country's citizenship becomes a bona-fide citizen with rights and responsibilities. A person without citizenship becomes stateless. Hence, it is every person's fundamental right to obtain citizenship.

The Interim Constitution of Nepal 2007 made a number of important changes to the provision of 1990 constitution allowing women to pass citizenship to their children in their name. Prior to this provision a child could gain Nepali citizenship by descent only if the father was a Nepali. Following a wave of protests, top level political leaders were appointed to settle out contestious constitutional issues on citizenship. The high level task force guarantees citizenship by descent only to children born to Nepali parents, thus creating more complexities. According to this, both father and mother's presence is compulsorily required at the time of registering a citizenship. Their absence would disqualify a child from obtaining citizenship. This clearly means that single mothers or fathers could not easily secure citizenship to their children. Even a child born outside Nepal with one Nepali and one foreign parent would be disqualified from citizenship if foreign parent does not wish to take Nepali citizenship.

Article 8, Clause 2(b) of Interim Constitution of Nepal provides that a child born to Nepali parents are eligible to attain citizenship by descent. Sub clause 7 of the same article states that if a child is born to Nepali woman married to a foreign national, he or she can obtain naturalized citizenship. This provision is clearly a result of the patriarchal mindset deeply rooted in Nepali society. In past, the Supreme Court had handed down a landmark decision of granting citizenship by descent to children if either the mother or father has citizenship by descent. This decision was issued in Sabina Damai's case who was not able to trace her father. The Interim Constitution does not state about the time frame in which a foreign national marrying a Nepali woman will be eligible to get naturalized citizenship. This also impedes women's right to livelihood to some extent.

If the citizenship is not obtained in the name of mother, there is a high chance of children being stateless. If the father refuses to accept that the child is his, the child can possibly become stateless. Statelessness is an extreme violation of human rights. It also has a particularly pernicious impact on children, which often infringes on their right to access to education and affordable healthcare. Hence, addressing this issue must be on top priority. The new constitution should do away with provisions that discriminate women. Citizenship is the basic right of every citizen and no forms of discrimination can be accepted. There are high chances of children becoming stateless who are born to women who have been victims of sexual violence. Children born to women who have been victims of rape, or who have given birth prior to getting married, or may become stateless, however, the current draft does not address their problem.

The denial of citizenship in the name of women reflects a dependent notion of nationality that is based on and conforms to a patriarchal hegemony. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) clearly states that nation should grant citizenship rights regardless of gender. It further states that "State parties shall grant women equal rights with men with respect to the nationality of their children."

Regardless of gender, the role of women as mother should not be forgotten while making decisions on citizenship. In any circumstances if child is born, he/she should be given citizenship by descent in the name of mother which will solve the issue of child being stateless. It is important that Nepali leaders critically examine the issue of citizenship through human rights lens.

Citizenship in the Name of Mother: Gender Equality in Citizenship

A vast population of Nepal has been denied citizenship. One study states that there are still 4.3 million people in the country without citizenship. The failure to provide citizenship makes the populace more vulnerable and outside the ambit of protection of the State.

Background

INSEC is active in safeguarding the rights of minority and marginalized groups with the aim to create a just society. The issue of citizenship is very important as it is the bedrock of identity and realization of other rights. A vast population of Nepal has been denied citizenship. One study states that there are still 4.3 million people in the country without citizenship. The failure to provide citizenship makes the populace more vulnerable and outside the ambit of protection of the State. The people without citizenship lack accessibility to the basic rights and obligation that the State should have towards them. They cannot enjoy the benefits provided by the State such as voting rights, ownership of property along with identity crisis. A major factor of deprivation is refusal of the State

to provide citizenship in the name of mother. Despite the constitutional guarantee to confer the citizenship in the name of mother or father, the State has denied this constitutional right to many people. In case of citizenship it is often seen that the Chief District Officers (CDOs) cite a circular of Home Ministry which states that the name of father is mandatory. This circular directly supersedes the constitutional provision.

The downright patriarchal mentality in few has foiled the effort towards providing women equality to confer the citizenship. This mentality is more or less inclined to subordinate women rather than full attainment of their equality. The fanatics of nationalism use an argument that the rights to women in conferring citizenship will undermine the sovereignty of Nepal. The major concern

expressed by those against it is because the porous border with India will create an influx of migrants that may permanently reside in Nepal. The assumption in itself is discriminatory and shows the roots of patriarchy that the society possesses when it comes to female emancipation. It is used as an argument or an excuse to curtail the rights of women.

Most of the people without citizenship are from disadvantaged groups. The society recognizes them but the State does not. The privileged and upper class uses their influence to get the citizenship through illegal paths but the marginalized cannot do this. They are the ones towards whom the State has more obligation to uplift and protect them. The discriminatory notion towards women has to be challenged and the dogmatic society has to be transformed. IN-

* This report is compiled by Prasiddha Pandey of INSEC

SEC, through various programs that aim to create equality in citizenship as a specific goal and creation of equal society in long run, has attempted to address this very issue.

INSEC'S Initiatives on Citizenship in the Name of Mother

INSEC conducted discussion programs in all five Development Regions of Nepal. The programs were held in Biratnagar, Janakpur, Pokhara, Nepalgunj and Dhangadi. The programs were conducted jointly with the six party coalitions. The participants were civil society members, students, political party members, human rights activist, journalist, lawyers and social workers. The output of the program was submitted to Honorable Speaker Subash Chandra Nembang.

The findings of the programs were very important and elaborate. Six party coalition was created to work on different issues. Citizenship has been a common issue and has been dealt in consensus. The coalition is unanimous in use of 'or' not 'and' provision. The provisions in citizenship were liberal in 2009 but the Constitution of 2047 (1990) had made a regressive provision. Later, a "mother or father" provision was used in Interim Constitution 2063 (2007) of Nepal. The new draft has "father and mother" provision which is more regressive than 2063 provision. The experience of the past in the Constituent Assembly (CA) has to be understood to know the genesis in use of 'and' in the draft. It was a compromise between groups wanting more strict provision versus liberal provisions.

Amendment in the Citi-

zenship Act 2063 (2006) had more restrictions than the original text and notion of constitution. It was a derogative personalized response towards the perceived threat of nationality in Tarai region and was more restrictive in nature. The discriminatory laws have to be changed to ensure substantive equality. The laws should be equality based.

The State must be clear and must decide whether to be liberal or conservative in the Citizenship issue. It should not be linked with nationality. Right based approach is must for this. This is the question of equality between men and women, not about the nationality. Living together is accepted as a liberty and legitimate practice according to Supreme Court but the guidelines is still not prepared. This will also come under scrutiny if father and mother provision is passed.

Inequality was kept intact in the laws without change being institutionalized. The local authorities do not register personal details like birth, death and marriage unless the person has citizenship. Citizenship seems to be a requirement for birth, opportunity and even death. Many are denied the right to vote for lack of citizenship. It should be recalled that the laws already allow a person to be naturalized through the operation of laws. The root problem is the patriarchal mindset of the society and senior leaders. Fundamental Rights should be based on non-discrimination and they should guarantee the right of women.

The questionnaire Committee in CA should have taken citizenship as one of the disputed issue of constitution. Instead it was

categorized as an issue upon which consensus was reached. The political leaders have to be faithful as lobby efforts are still needed.

If a mandatory provision to include the name of father and mother in the citizenship card is made, it will create problem for the mothers (or fathers) whose spouse have eloped or has gone missing.

The issue of citizenship has to be settled as soon as possible as the life of child is dynamic and the restriction in opportunities in such stage can create lifelong problem.

Program in Kathmandu

After the completion of programs in all five regions, INSEC conducted a program jointly with six party coalitions to disseminate the findings of all the programs conducted in the regions and also to create unified voice among stakeholders by engaging with civil society, political party members, journalist, lawyers and youth in a meaningful dialogue.

The program started with the realization that citizenship is the bedrock of identity and realization of other rights. All of us must show solidarity on the issue of the citizenship. The problem of Nepal stems out from the patriarchal society that is more inclined to subordinate women rather than full attainment of their equality. Citizenship in the name of mother cannot be provided in the present legal structure of Nepal. This has to be changed. The major concern expressed by those was because of the porous border with India which may create an influx of migrants that will marry and reside in Nepal. This is a concern but not an argument or an excuse to curtail the rights of women. Most of

the people without citizenship are from disadvantaged groups. The society recognizes them but the state does not. Circular of Home Ministry has made it difficult. If this is changed it will make the provision operative.

The panelist of the program had presented their views and then rest of the participants involved in dialogue on the need of citizenship and methods to achieve it. The panelist included Mr. Khimlal Devkota from UCPN (Maoist), Ms. Sapana Pradhan Malla from FWLD, Ms. Pushpa Bhusal from Nepali Congress, Jeetendra Sonal from TMLP, Ms. Bidhya Bhandari from CPN (UML) and Mr. Subodh Raj Pyakurel from INSEC.

Khimlal Devkota, UCPN (Maoist)

Six-party Coalition was created in order to work on different issues. Citizenship has been a common issue and has been dealt in consensus. The coalition is unanimous on use of 'or' not 'and' provision. The State must decide whether to be liberal or conservative in the issue of Citizenship. Right based approach is a must for this.

Our discussions have been different from our problems. The provisions in citizenship were liberal in 2009 but constitution of 2047 (1990) had made a regressive provision. After that, in constitution 2063 (2007), mother or father provision was used. The new draft has father and mother provision which is regressive than 2063 provision. The law discriminates between the daughter's husband and son's wife which is a serious issue.

Marriage with foreigners will be restricted if this provision

is kept intact which is contrary to the global realization of human rights and individual choices. This is the issue of equality between son and daughter not about nationality. Living together is accepted as a liberty and legitimate practice according to Supreme Court but the guidelines is still not prepared.

Sapana Pradhan Malla, FWLD

Equality is main concern in case of citizenship. This is the prerequisite for the political rights. It is also needed to enjoy other rights. It is a pathway for all other right.

Up to BS 2046 (1999), Nepal also acknowledged Jus Soli as a criterion for citizenship. After the promulgation of constitution in 2047 (1990), the rights of women were completely disregarded. The best possible way out is to use the language mother or father in the law.

Also in case of the naturalized citizenship, the guidelines have to be uniform and used properly. Naturalized citizens should not be discriminated on any basis. Once a person is citizen of the country they cannot be subjected to any discrimination.

Pushpa Bhusal, Nepali Congress

The experience of the past CA has to be understood to know the genesis in use of 'and' in the draft law. It was a compromise between groups that wanted more strict provision and those that wanted more liberal provisions.

Some groups took it as an important agenda. This was more pertinent after movement of 2006 that raised the issue of right and identity. This was identified as one of the more complex and important issue. The amendment was

a derogative personalized repose towards the perceived threat of nationality in Tarai region and was more restrictive in nature. Amendment in the Citizenship Act 2063 (2006) had more restrictions than the original text and notion of constitution.

In the past, Supreme Court in Chandra Kanta Gyawali Case laid out a verdict that the blood relation is correlated only with father and not mother. Similarly, in the case of Sabina Damai father should be Nepalese for the citizenship based on decent or else the citizenship should be changed into naturalized. Fundamental Rights should be based on non-discrimination and should guarantee the rights of women.

Jitendra Sonar, TMLP

The provision of father and mother should not be in the constitution. The aspiration of people is that the new constitution is supposed to remove all the discriminations. The local authorities do not register personal details like birth, death and marriage unless the person has citizenship. Citizenship seems to be a requirement for birth, opportunity and even death.

Many people are deprived of having voting rights for lack of citizenship. The present context in citizenship shows that the more Nepalese society develops, more restrictive it gets. The problem is with mentality. We have to hold respect to each person with social justice especially in an issue like citizenship.

Bidhya Bhandari, CPN (UML)

The provision in new constitution is not going to be regressive than the provision in Interim

Constitution 2063. Inclusiveness and equality is the bedrock of the new constitution. The mandate of the political parties is to create a human rights friendly constitution and political parties are determined to fulfill it.

The change in the draft is not happening due to the failure to create consensus in other issues at the same time. Once the consensus is reached, the citizenship provision ought to be changed.

The new constitution will have the provision of 'father or mother' to get the citizenship. I will discuss with Home Minister regarding circular to the District Administration on distributing citizenship in the name of either parent. The democratic constitution, ensuring the right of the citizenship will be brought with the support of absolute majority or maximum participation.

Discussion

Once the opinion and findings were shared, the participants shared their view.

Kaplana Dhamala, UCPN (Maoist)

Equality and democracy is completely disregarded in the provisions. It is against the value of democracy. The questionnaire Committee in CA should have taken citizenship as one of the disputed issue of the constitution. Instead it was categorized as a issue in which consensus was reached. The political leaders need to be faithful. If the nationality issue is problematic due to a foreigner taking the citizenship, then this should be countered through different strategy rather than denying the citizenship to Nepalese national.

Nirmala Yadav, Madhesi Jana Adhikar Forum

The senior leaders of each party suffer from patriarchal mentality and this is a major problem. The policy is blatantly against the concept of individual choice and freedom. It fails to address relationship a person may be having with a foreigner in the global world. Madhesi community is also the citizen of Nepal. However, the State is insensitive towards the problems of madhesis who suffer in the case of citizenship. The open border is a problem in many issues not only in case of citizenship. Proper surveillance and joint initiatives between Nepal and India is the solution, not regressive provision in citizenship.

Deepti Gurung, Citizenship in the Name of Mother Campaigner and Victim

If a mandatory provision to include the name of father and mother in the citizenship card is made, it creates problem for the mothers (or fathers) whose spouse have eloped or has gone missing. The irony of the situation is that if a mother leaves a child in road, the child gets the citizenship but if the child lives with mother such child is denied and may never get citizenship. The people with problem of not getting the citizenship are not coming out in society, because they do not feel that justice will ever be served, and they feel that they might get further victimized. The issue of citizenship needs to be settled as soon as possible as the life of child is dynamic and the restriction in opportunities in such age can create lifelong problem.

Arjun Sah, Citizenship in the Name of Mother Campaigner and Victim

The present provision of Interim Constitution is not operative. I filed a legal petition for issuing the citizenship in the name of mother. The verdict still remains pending. In another similar case which I filed regarding issuing the voters card in order to vote in CA election, the Supreme Court ruled in the favor of providing voters card without mandatory showing of citizenship.

Subin Lal Mulmi, FWLD

It seems that most of the stakeholders like civil society, media, and parties have agreed but the amendments are still not made. The question of 8.94 lakh single mother with minor child is a big concern and the next strategy of the campaign is also crucial.

Hem Raj Tated, Madhesi Jana Adhikar Forum (Loktantrik)

Madhesi aiding to recruit non Nepalese as a Nepalese through marriage to undermine the nationality of Nepal is a misconception that major parties have to get rid of.

Binita Pandey, CPN (UML)

The issue of concern is that it is not only men who are in favor for 'and' provision but women are also against it. This is because of patriarchal structure. UML is clear on citizenship and support of 'or' provision.

Charan Prasai, Human Rights Activist

The deprivation of citizenship card creates a complex problem and no one has to suffer

through it. The leaders have to express a written commitment.

**Prashu Ram Meghi Gurung,
CPN (UML)**

The end of inequality is a major concern and we are committed to make it a reality. The local level has to be sensitized as well.

**Suresh Mandal, Tarai Madesh
Loktantrik Party**

The problem for the poor and marginalized group is that they cannot go to the center to get the citizenship and due to their economic hardship and implication of not being able to work for the days to get the card. The government has to make an arrangement to provide them in their own place.

Raju Chapagain, JuRI Nepal

The problem is multi-dimensional and focus has to be shifted towards the root cause of the problem. A test and the threshold of non-discrimination have to be upheld in the case of citizenship as well.

Concluding Remarks

The speakers give the following concluding remarks in the program.

Sapana Pradhan Malla

It seems that the participants in the program are all for 'father or mother' provision in the constitution. This is based in the non-discrimination stance that the present civil society undertakes as cardinal principle. In order to achieve this, a strategic intervention is required. The main problem is the mindset and this needs to be changed. A positive trend of change in harmful practices and superstition is seen in Nepalese

society and this has to be carried on to have a positive result. The present goal must make impact in new constitution and must work for the amendment of laws accordingly.

Pushpa Bhushal

The provision has to be absolutely clear and unambiguous to save from any restriction in interpretation. The parties have to come together in the issue of citizenship. The solution has to be sought collectively.

Jitendra Sonar

The efforts have to be result oriented with short term and long term goal. The change in constitution is a short term goal with change in the restrictive circular.

Khimlal Devkota

The mentality that made constitution of 2047 discriminatory still persists. The goal is to make the provision more inclusive and non-discriminatory through amendment and adaptation of new laws. There has to be prompt action to change the laws. International commitment is also a major driving force in this issue. The father or mother provision is common agreement in the six party coalitions and seems like Nepali Congress and UML have also agreed in this issue.

There were 104 participants in the program. The first session was moderated by Mr. Subodh Raj Pyakurel, Chairperson INSEC and second session was moderated by Mr. Gauri Pradhan, Former NHRC commissioner.

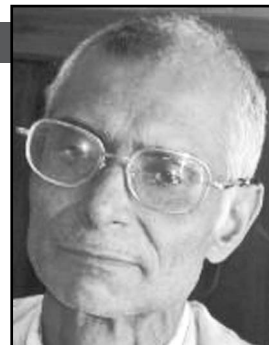
Conclusion

It is absolutely necessary to amend the laws and also make

sure that the upcoming constitution safeguards the rights of the people by making the procedure easy for granting the citizenship. The bias towards mothers has to be removed not only legally but also socially. The systemic gender apartheid that is seen in the subject of citizenship has to be changed promptly. The women of Nepal are still discriminated in various aspects. However, the most apparent and appalling issues are concerning citizenship. In present legal framework, it is easier for an unclaimed child to get the citizenship rather than the child with a mother.

The CA has prepared a draft that is more regressive than the present provision of the Interim Constitution. The unwillingness of the State to confer citizenship through mother is being justified as a move to safeguard nationality as foreigners would take up citizenship in mass and undermine Nepal's sovereignty. To present this statement it indicates the failure of Nepal to comprehend the issue of nationality, sovereignty and citizenship. To justify restriction towards women is the manifestation of the true intent of patriarchy in Nepalese bureaucracy and politics.

The programs that INSEC conducted showed that most of the civil society and political parties at least now do not follow the conservative ideology of patriarchal citizenship. However, the change is far from being achieved partly due to a perceived threat towards sovereignty of Nepal and presence of conservatives in policy and implementation status. The need of change is urgent and the action should also be immediate.



Second Constituent Assembly and Making Democratic Constitution: Way Out

The political transition period is getting prolonged severely affecting lives of Nepali, evoking severe hatred and hopelessness towards political system and parties. There are often complaints about the complete failure of political parties and Nepal facing crisis of leadership.

Background

Apathy, despair and confusion among Nepali political spheres and Nepali people are seen especially after Nepal's first Constituent Assembly (2009-2012) and second Constitution Assembly (2013) could not draft a constitution within the stipulated time. There has been added confusion and uncertainty in industries, business and economic sectors including peace and security situation as democratic constitution has not been promulgated in the country. The political transition period is getting prolonged severely affecting lives of Nepali, evoking severe hatred and hopelessness towards political system and parties. There are often complaints about

the complete failure of political parties and Nepal facing crisis of leadership. This has made mockery of Nepali democratic system. There has been serious doubt on present Constituent Assembly making a new constitution during its remaining tenure. In such serious political and constitutional condition, the discussion on a subject of what can be a future measure that the country should adopt has already started.

Present Situation inside Constituent Assembly

Various Tarai-based political parties led by UCPN-Maoist including 30 small political parties warned that the country could face another agitation if the major

political parties attempted to make constitution based on majority instead of reaching into consensus. UCPN-M Chairperson Prachanda through the 30-party front has been advocating for agitation saying that no conclusion could be reached through dialogue.

Madhes-based political parties and UCPN-M have attributed ego of the government to the delay in drafting of constitution. Terai-Madhes Democratic Party's President Mahanta Thakur said that the consensus could not be reached in making constitution due to the dominating attitude of the government. UCPN-M Chairperson Pushpa Kamal Dahal said that if the ruling coalition of Nepali Congress and UML are

* Professor Dr. Ram Kumar Dahal is former Head of Political Science Department, Central Department, TU Kirtipur

flexible in the issue of federalism, restructuring of the state and division of executive power, the constitution can be drafted.

The consensus between the ruling parties and UCPN-M led 30 parties could not be reached due to the blame game between each other and political dispute between them.

The opposition including Madhes-based and other small parties is alleging major political parties of suppressing them. They have been continuously warning that if the constitution is made based on majority instead of consensus, the country will face a serious consequence. However, the major political parties are denying these allegations and have expressed their wish to draft constitution through consensus. Arjun Narsingh KC, central member of Nepal Congress said that the universal democratic acceptance norms are system of reaching a conclusion through dialogue, disagreement and debate - which is not autocratic. He further said that the Madesh based parties are also coalition partners and there is no question of suppressing them.¹

Activities of Small Parties outside Constituent Assembly

The activities of small parties outside the Constituent Assembly have their own impact in the process of constitution making. The CPN-M party led by Netra Bikram Chand (Biplab) has been raising the issue of nationality and corruption and carrying out activities in the manner of an underground group. The constitution

making in such environment in itself is further challenging.

Responsibility of Leadership in Constitution Making

If the country gets a good leadership, the country can find way out of all things. But if the leadership cannot come out from their personal interest, the country might face serious consequences. Former Singapore Prime Minister Lee Kuan Yew had transformed the country as one of the prosperous and economic center in the world in 30 years after 1990 from a country considered as one of the poorest in Asia. The effort of Indian Prime Minister Narendra Modi is praiseworthy. In Nepal the leadership must come out of their personal interest and play an important role in making the constitution.

Responsibility of Civil Society

The civil society of Nepal is not completely successful in giving pressure to the second Constituent Assembly to make a democratic constitution immediately. The civilians have been advocating the need of separate agitation of civil society. The leadership has been advocating the monopolizing of country's resources and means as their right. It is high time for the civil society to exert pressure on the leaders for the immediate promulgation of constitution.

Responsibility of Foreign Powers

The neighboring countries India, China, European Union, UK, USA and other international

donor communities must play a positive role in constitution making in Nepal through Constituent Assembly. As a good and friendly neighbor, these countries must inspire Nepal to immediately make constitution and must take efforts to bring sustained peace and stability in the country. In this crisis, inciting any powers of Nepal for wrong purpose would not be appropriate. That is why the international community and neighbors must positively inspire the leaders to make constitution as soon as possible. Neighboring country China is not willing to take security risk through the formation of one identity based federalism or many federal states in its border. China is aware of possible security risks from western countries and supporters of Free Tibet by carrying out anti-China activities in those states. Nepal must address Chinese concern while making the constitution. Nepal should not neglect China's interest as it is our good neighbor and well-wisher. UCPN-M and Terai based political parties must make a compromise in advocating for single identity based federalism. India which has an open border of about 1800 km with Nepal has a serious concern about the possible anti-Indian activities that might be carried out from Nepali territory. The Constituent Assembly must be serious in this issue. The Madhesi-based political parties must compromise on their stands on these issues. It is the time for Nepali political parties to show some flexibility in constitution making considering

1. *Nayapatrika daily, March 24, 2015*

the interest of neighboring countries Nepal, India and international interest.

Effort of CA Chairperson in Constitution Making

Constituent Assembly Chairperson Subash Chandra Nembang told the political parties to make a draft incorporating main issues of constitution within four days or pass him that right. His statement created ripples in spheres of Nepali politics. Nembang's intention was to motivate the political parties in making constitution as soon as possible. However, the political parties turned against him.

Possibilities and Alternatives after failure of Constituent Assembly

Various political alternatives are being searched after the hope of making a constitution by the second Constituent Assembly diminished. The debate has already started on the issue that whether the army will take the power under the presidential rule. Nepal army had already shown its loyalty towards Nepali people and elected head of the state especially after the end of monarchy. The army had shown its high-level matureness by not getting deployed in People's movement of 2006. Nepal army has also played a positive and important role in conflict management by integrating Maoist combatant in their organization. That is why Nepal Army will never get involved in any dispute. The organization has always given its priority to protect the national image as it understands its internal, and the national and international context. This is the reason why the army

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does not want to get involved in the dispute by taking over. Hence, there are no chances of Army Coup in Nepal.

On other hand, some groups are actively being involved and advocating in resurrecting constitution of 1990. The debate on amending Interim Constitution of 2007 and formally announcing it as a new constitution is being discussed. At the same time the fear of reinstatement of monarchy is increasing. There are people complaining why millions are being spent for constitution drafting in Nepal instead of adopting constitution of countries like Switzerland, Czech Republic which have similar backgrounds to Nepal.

The Nepali leaders must learn a lot from the practice of country where a Constituent Assembly could not make a constitution. Nepal's leadership has been

often criticized on charge of being pro-Indian, pro-Chinese, pro-European and pro-US but not being in favor of Nepal. People are criticizing government and 601 CA members for not being responsible and able to make a people's friendly constitution on time. It is a shame that the political parties are giving priority on sharing of power belittling the serious issue of constitution making.

In this situation, the political parties must work together for the interest of the country, not for their own personal interest. It is the time for the leadership to exhibit some conscience and maturity. It is the time to prove that nation and people are higher than partisan interest. The leaders must stand above partisan interest by discouraging the political culture of dispute among factions within the parties.

The political parties must work together for the interest of the country, not for their own personal interest. It is the time for the leadership to exhibit some conscience and maturity. It is the time to prove that nation and people are higher than partisan interest.

Civil Society: Creating its Meaning in Nepal

"A culture can interact with the context of other cultures out of curiosity or to learn from their experience" and universalize its norms, knowledge and practices. They standardized the social and cultural code and minimized the vices and violence of society by the invocation of dharma, a notion that implies human beings have to perform their institutional duties designed to his or her position according to the social division and functional specialization of labor.

Introduction

Nepal has seen the rise of a number of civil society organizations recently following social and political movements of Nepali people. The ancient practice of civil society was to "live with the truth." It is no different from the notion of civil society the great Greek philosopher Socrates revealed. Like *Rishis* and *Munis* (sages and seers), he declined to abandon his pursuit of the truth in all matters and rather preferred death. Human courage, freedom and dignity are integral part of human life. Socrates called conventional wisdom into question

and encouraged youth to speak truth to power. To Socrates, "man is not yet a rational animal, a being endowed with the capacity of reason, but a thinking being whose thought is manifest in the manner of speech". One finds a convergence between the Eastern and the Western philosophical thought and action of civil society. This has provided Nepal an opportunity to harness the untapped potential of civil society in trust building and renew the capacity of Nepali society to self-organize and express.

The collective practices of associational thought in Nepal emerged many centuries ago when

Nepali people moved from the state of nature to culture. "A culture can interact with the context of other cultures out of curiosity or to learn from their experience" and universalize its norms, knowledge and practices. They standardized the social and cultural code and minimized the vices and violence of society by the invocation of *dharma*, a notion that implies human beings have to perform their institutional duties designed to his or her position according to the social division and functional specialization of labor. This is the beginning of the growth of civility and civic virtues in Nepal. As hu-

* Formerly worked in Peace and Livelihood Project of UNDP, Dahal is now associated with BD Trust and writes on youth, development, governance, civil society and peace in *The Telegraph Weekly* and *The Annapurna Post Daily*.

man beings have been considered highly conscious, they have greater duties to other species. There were higher and lower level of ideas and pure and impure action. Albert Camus says, "Ideologies, a contemporary phenomenon, limits itself to repudiating other people; they alone are the cheats". Nepal's heritage of discourse in public places remained essentially inclusive of all opinions and all actors.

Civil society's contextual meaning in Nepal is derived from two sources: one that promotes civilization and peaceful co-existence of diverse people, integrates various groups and nurtures cultural standardization. The other is the one that enlightens others by illuminating their *atma gyan* (inner vigilance) with education and positive action that fosters common good. The meaning making of civil society in Nepal is, therefore, rooted in the contextual discourse, narratives, the story of ideal practices and the application of ethics and morality in the private and the public lives furnished by sages and saints.

The recent resurrection of civil society as a "society of citizens" does not exactly fit with the local Nepali meaning which is engaged in sectoral social action and are less concerned with the education of both inner vigilance which gives the people consciousness to lead active life and *brahma gyan*—universal knowledge to emancipate them from blind faith. Citizens are bound by the territorially-defined political space which we call the state. Societies of civilized people think across all national political, economic and transnational spaces and are not confined by the politi-

cal barriers of state. They speak up against injustice and oppression occurring everywhere in the world. They give voice to the voiceless and encourage those subjected to silence by social, economic and political order. The social movements of Nepal springing from civil society in various phases of Nepali history have transformed the nature of politics. The division of civil society groups after change, however, left democratic process doddering.

Similarly, civil applies to science, such as civil science, or civil management, civil engineering or civil service pertaining public administration while citizen has disciplinary meaning rooted mainly in political science, political economy and philosophy. Civil transcends these boundaries. Socialization of people with civic, constitutional and universal normative values emancipates them from their over-fixation with identities such as age, gender, caste, class, ethnicity, language, region, religion, profession, etc, parochial lenses and bondage that undermines their potential to become virtuous human beings. Human rights culture, in this sense, is closely connected to civil society heritage of Nepal. Its scriptures, however, talk more about human liberation from constraining condition than about human rights. Likewise, civil society also changed their meaning from a pillar of pure advocacy of educational values to practical public action, organization building, social rationalization, abolition of evil practices and restoration of freedom, social justice and peace. Nepali civil society groups are also performing these functions and establishing their social utility for larger society.

Embracing New Emergence

Waves of intellectual thoughts coming from the outside world have penetrated the Nepali worldview and the meaning of civil society in Nepal and they are defined by a number of disciplinary paradigms, social associations, movements, networks and activities. One of the legacies it carries is: civil society is a group of non-violent, civil and cultured persons' initiatives aiming to foster freedom, social justice, cooperation and peace in society. The second element which is related to it is this: civil society groups avoid extremism, fundamentalism and orthodoxy and sustain themselves with the aspiration of people to improve their living conditions. The third meaning associated with them is: they have embraced long-term view of human survival and survival of all species and, therefore, imbibed strategies of the sustainability of nature. In this sense, they mark fundamental difference with both politics and business governed by short-term calculation of self-interest.

The notion of sustainable development has rediscovered Nepal's own tradition which considered human beings a part of nature and are entitled to preserve it, not colonize, conquer or dominate it. Nepali civic tradition seeks to balance between self-interest and self-indulgence which Gautam Buddha called it a "middle path." Now the sanity of human beings has found the limits of modernization and science. Respect to the integrity of all species is based on this belief.

Obviously, Nepali civil society groups stressed more on wisdom than knowledge although

pure knowledge which liberates human beings from the corrupting influence of human interest, ideology and power can contribute to its unique character. One can also see the fusion of the eastern and western traditions in the meaning of civil society in Nepal and consequently in their actions aiming to foster both positive and negative rights of citizens—positive in the sense of making the state duty-bound and negative in the sense of enabling them to act in their spheres without the encroachment of the state. An awareness of citizens about both sets of rights is essential functions of civil society in Nepal because it gives normative meaning to the rule of law. Rule without rights and rights without duties create possibility for both authoritarianism and anarchy. In both the cases, freedom of the poor is trampled.

Social Construction

Nepali civil society groups foster a notion of social construction by a number of processes. One by restoring damaged life induced by natural selection where only the strongest can survive. By infusing public morality civil society groups can support the weak and guarantee their liberty, property and pursuit of pleasure. The other is by continuous reform in human condition through public and universal education, reflection on human condition and cooperative actions. Education, that creates class in society and divides citizens, dehumanize the weaker parts of society and kills off the ability of human person to promote reciprocity, charity and philanthropic service. Nepali civil society groups are

rooted in *niskarm karma* (selfless service) to the needy beyond the ken of families and relatives. *Paropakar* is a Nepali term designed to serve others in great distress. It acts outside the circle of family and relatives and, therefore, created a name for itself.

Melmilap is another term crafted to encourage healing and reconciliation of those suffered during the armed conflict and in need of restoring relations by positive actions. To move Nepal from the state of multi-dimensional conflict to civil peace requires comprehensive reconciliation in Nepali society and peace building projects. *Shanti* is also deeply rooted in Nepal's culture of peace which is based on relational context and captures biological, sociological and cosmological spheres where entire human and non-human species are situated. Peace has inter-generational meaning as well, not just the subjective or disciplinary meaning translated into English as peace. Real peace largely rests on liberating human potential. Therefore, in the process of meaning making, civil society groups have to be re-contextualized, interpreted and utilized. When Gautam Buddha, the pioneer of peace and social development, sought to deconstruct the hierarchy of human beings he had in mind to remove structural injustice and all the rationalizations associated with cultural practices, knowledge and institutions that were inconsistent with humanity responsible to their action.

There are so many sources of civil enterprises, spirits and concepts in Nepal which this article cannot figure out here. It requires

a separate research. Civil society groups are based on public donations while the state is based on tax. One arises out of the goodwill of well-intentioned people the other is based on the state's necessity for survival and functioning. *Bhagvad Gita* suggests people ethical rights to rebel against unjust order and create a norm-based system rooted on common goal which resembles close to the notion of modern version of civil society.

It implies that civil society groups are based on the notion of both social reconstruction and social change. There is a clear purpose: the natural desire of human beings for power and wealth entails commitments to investment in social service and social development. The notion of *dana* (donation) is precisely established to uplift the oppressed and maintain social equilibrium and adaptation. This demonstrates that civil society did not only reflect outside material services but also illumination of inner vigilance. The great saying inner vigilance is the price of liberty finds its resonance in what Buddha said: *Apa Dipo Bhava*. This means Nepali mediation of life-experience builds reflective consciousness in human beings which is essential to change the textbooks and context and adapt to often changing circumstances. This enables social division of labor and statecraft to adapt to changing circumstances and time.

Co-creation of Future

Nepali civil society groups do not position themselves as either of the enemy of the state or the market. Nepali villages and towns have been encouraging pri-

vate sector engagement in social development—constructing schools, public inn, hospitals, temples and monasteries, water spouts, irrigation, libraries, cooperatives, mediation centers, human rights groups, etc. The Nepali state also did not escape from the social responsibility of caring the nature and people either. Even they are not seen hostile to political parties although civil society groups are consistently ignored and undermined by them. Today, pious people as a part of civil society are engaged in spiritual education in instilling the duty of citizens to donate other in dire need and collect funds for the promotion of social development. Duty to help the needy evokes the connections of people of all strata, collaboration of various organizations, associations, federations, unions, etc to pool their resources and co-create a shared future of Nepal which is prosperous, sovereign and peaceful.

King Janak and Buddha said that blissful experience can be found when human beings overcome their *Dukha* and attain *Sukha* in enlightenment. He defined the Wheel of Law, the eternal path of *nirvana* (enlightenment), a state where one is free from sorrow, suffering and miseries resulting from earthly temptations and trappings. The duty of civil society groups in Nepal is to abolish the vices of society such as domestic violence, trafficking of children and women, poverty, inequality, alienation and conflict through human rights and civic education and cooperative action and promote good citizens capable of learning right language, speech, proper conduct, positive actions

Mediation functions in Nepal are essential to bridge social, gender and development gaps across people and societies and seek social harmony based on justice and peace. Nepali civil society will acquire a new meaning in the current context of the country if they undertake meaningful activities and initiatives.

and attain sustainable base of communities.

Mediation functions in Nepal are essential to bridge social, gender and development gaps across people and societies and seek social harmony based on justice and peace. Nepali civil society will acquire a new meaning in the current context of the country if they undertake meaningful activities and initiatives. Their contribution lies in nurturing character building of Nepali citizens who are not only active and inquiring but also able to resolve the issues created by non-citizens, tribal, ego-inflating class, alienated mass and anomic forces facing a situation of normlessness.

Freedom from total conformism, necessity and false consciousness requires continuous education on enlightenment as it liberates them from subordination of all kinds undertaken by civil society and reduce the cost of anarchy fostered by transition of politics. In this sense, state-civil society interface in Nepal can set the tone for a participatory democracy where new constitution can act as a brake on the state's tendency to absorb the society and instinct of market to colonize civil society so as to commodify nature, culture, education and health. Civil society

groups grow with the general will of society to live in peaceful coexistence and defend the culture of human rights, human dignity and human security.

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Sujan Panta*

LGBTI Rights as Human Rights and Case of Nepal

The female homosexuals (lesbians), male homosexuals (gays), bisexuals, inter sexual as well as the people of the third gender are considered as minority people on the basis of sexual orientation and gender identity. Such people are also known as homosexuals and third gender or transgender people.

The meanings of sex and gender are widely contested in the hard and soft sciences, in the humanities, in legal theory, in women's and gender studies, and increasingly in popular discourse. Ultimately, the only thing we know for sure about what sex means, or what gender means, is what state actors, backed by the force of law, say those words mean.¹

It expects men and women to only be sexually attracted to the opposite sex. However, history from societies around the world shows that many people are not only men and women, many men and women are non-heterosexual; they are third genders and also ei-

ther bisexual or homosexual. There are probably hundreds of thousands of sexual and gender minority people in Nepal across every social class, caste, religion, background and profession.

The female homosexuals (lesbians), male homosexuals (gays), bisexuals, inter sexual as well as the people of the third gender are considered as minority people on the basis of sexual orientation and gender identity. Such people are also known as homosexuals and third gender or transgender people. They have been categorized under the five different groups. Those are known as lesbian, gay, bi-sexual, trans-gender and inter

sexual (LGBTI). Such identities of human beings are not hypothetical but a scientifically proved fact.

On 17 May 1990, the General Assembly of the World Health Organization (WHO) removed homosexuality from their list of mental disorders. This action served to end more than a century of medical homophobia.² The WHO has acknowledged the fact of the existence and birth of such types of people. By confirming the existence of such types of people, the report has also emphasized that it is a natural phenomenon instead of mental disorder.

Transgender and homo-

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1. Paisley Currah & Tara Mulqueen, *Securitizing Gender: Identity, Biometrics, and Transgender Bodies at the Airport*, 78 SOC. RESEARCH 557, 577 n.1 (2011).

2. Intl Day Against Homophobia available at <http://ilga.org/ilga/en/article/546> visited on 6 January 2014

sexual communities have existed in almost all parts of the world, with their own local identities, custom and rituals. They have been variously known as *Baklas* in Philippines, *Berdaches* among American Indian Tribes, and *Xaniths* in Oman, *Serrers* in Africa and *Hijras*, *Jogappas*, *Jogtas*, *Shiva Shakti* in south Asia, Even *Kothis* and *Hijras* are used to identify third gender in India, In Nepal word *Metis* is used to denote transgender from male to female.³

LGBTI in International Human Rights Law

No UN convention explicitly mentions sexual orientation as grounds for discrimination, or identifies LGBTI individuals as a particular social group with rights. Only by appealing to the UN conventions more broadly sexual and gender minorities have been able to use international conventions for protection of their individual rights.

The case for extending the same rights to lesbian, gay, bisexual and transgender (LGBT) persons as those enjoyed by everyone else is neither radical nor complicated. It rests on two fundamental principles that underpin international human rights law: equality and non-discrimination. The opening words of the Universal Declaration of Human Rights are unequivocal: "All human beings are born free and equal in dignity and rights."⁴

Concerns about these and related violations have been ex-

pressed repeatedly by United Nations human rights mechanisms since the early 1990s. These mechanisms include the treaty bodies established to monitor States' compliance with international human rights treaties, and the Special Rapporteurs and other Independent experts appointed by the former Commission on Human Rights and its successor the Human Rights Council to investigate and report on pressing human rights challenges. In 2011, the Human Rights Council adopted a resolution expressing "grave concern" at violence and discrimination against individuals based on their sexual orientation and gender identity. The need for action to end these violations is increasingly widely recognized, if not universally accepted.⁵

After decades during which the words "sexual orientation" and "gender identity" were rarely uttered in formal, intergovernmental meetings at the United Nations, a debate is unfolding at the Human Rights Council in Geneva on the rights of lesbian, gay, bisexual and transgender people. The discussions at the Council have focused political attention on discriminatory laws and practices at the national level and on the obligations of States under international human rights law to address these through legislative and other measures.⁶

In June 2011, the Council adopted resolution 17/19 – the first United Nations resolution on human rights, sexual orientation and

gender identity. The resolution was approved by a narrow margin but, significantly, received support from Council members from all regions. Its adoption paved the way for the first official United Nations report on the same subject, prepared by the Office of the High Commissioner for Human Rights.⁷

The High Commissioner's report presented evidence of a pattern of systematic violence and discrimination directed at people in all regions because of their sexual orientation and gender identity – from discrimination in employment, health care and education, to criminalization and targeted physical attacks, even killings. The report included a set of recommendations addressed to States designed to strengthen protection of the human rights of lesbian, gay, bisexual and transgender (LGBT) persons. The report's findings formed the basis of panel discussion that took place at the Council on 7 March 2012 – the first time United Nations intergovernmental body had held a formal debate on the issue.⁸ Reference to sexual and gender minorities are common. It is also fact that six of the eight principal human rights treaty bodies regularly refers to sexual orientations and gender identities. These includes the Committee on Civil and Political Rights, the committee on Economic, Social and Cultural Rights, the committee on Elimination of Discrimination Against Women, the committee on Elimination of Racial Dis-

3. Ibid

4. Ibid

5. Ibid

6. Ibid

7. Ibid

8. Ibid

crimination, the committee on the Rights of Child and the committee Against Torture.⁹

Second, both the concluding observations of the treaty bodies when reviewing States' periodic reports and the reports of the special procedures offer a clear picture of the range of violations faced by lesbian, gay, bisexual and transgender people. State-sponsored expressions of homophobia range from the criminalization of same-sex sexual activity to officially sanctioned discrimination in access to jobs, health care, education, and housing.¹⁰

Transgender persons are prevented from changing their gender on official documents. In many countries, LGBT individuals simply do not have the same protection and enjoyment of rights that are supposed to be universally guaranteed. For example, they are denied permission to form associations or organizations, they are prevented from holding parades or demonstrations, and even their speech is censored. Without the rights of freedom of association, assembly, and expression, they are rendered invisible. Official discrimination, in turn, signals to the wider public that LGBT people, or those perceived as being nonconforming in their sexual orientation, gender identity, or gender expression, are appropriate targets for abuse. At the hands of non-state actors, LGBT individuals are frequent victims of hate speech and

hate violence. And because police harassment and abuse is also common, victims often have nowhere to turn for help.¹¹

Third, rights are interrelated. A single act or event can produce multiple violations. A law that criminalizes same-sex sexual activity not only runs counter to the rights to privacy and non-discrimination contained in the International Covenant on Civil and Political Rights, it also drives vulnerable populations underground and prevents them from accessing treatment, thus undermining their right to health guaranteed in the International Covenant on Economic, Social and Rights. Arrest and detention of same-sex couples solely on grounds of their sexual orientation or private consensual sexual activity, is not only in breach of the nondiscrimination guarantee, it also breaches the guarantee on freedom from arbitrary detention. Restrictions on freedom of expression and peaceful assembly impact not only LGBT individuals and groups, but also the essential work of human rights defenders.¹²

Finally, although this picture is indeed bleak, it is also evident that the international human rights system promotes and protects the human rights of everyone, regardless of sexual orientation or gender identity. The treaty bodies and special procedures of the UN regularly and consistently urge States to reform penal legislation, to decriminalize consensual adult

sexual activity, to end police abuse, and to enact non-discrimination laws that protect everyone. Violations are documented and governments are called to account. The human rights mechanisms are thus deeply engaged in the project of universality – sending the strong message that all human rights are interdependent and universal. In the words of the UN High Commissioner for Human Rights, “The principle of universality admits no exception. Human rights truly are the birthright of all human beings.”¹³

LGBTI in International Human Rights Instrument

The legal obligations of States to safeguard the human rights of LGBT and intersex people are well established in international human rights law on the basis of the Universal Declaration of Human Rights and subsequently agreed international human rights treaties. Similarly International Covenant on Economic, Social and Cultural Rights Article 2(2) reads “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹⁴

Similarly International Covenant on the Elimination of All Forms of Racial Discrimina-

9. *Sexual orientation and gender identity in human rights law*, Reference to jurisprudence and doctrine of the United Nations Human Rights System, International commission of Jurist (ICJ) fourth updated edition, 2010 page 2

10. Ibid

11. Ibid

12. Ibid

13. Ibid

14. International Covenant on Economic, Social and Cultural Rights available at <http://www2.ohchr.org/english/law/cescr.htm> visited on January 20 2014

tion Article 1(1).reads “In this Convention, the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”¹⁵

All people, irrespective of sex, sexual orientation or gender identity, are entitled to enjoy the protections provided for by international human rights law, including in respect of rights to life, security of person and privacy, the right to be free from torture, arbitrary arrest and detention, the right to be free from discrimination and the right to freedom of expression, association and peaceful assembly.¹⁶

The protection of people on the basis of sexual orientation and gender identity does not require the creation of new rights or special rights for LGBT people. Rather, it requires enforcement of the universally applicable guarantee of nondiscrimination in the enjoyment of all rights.¹⁷

On 26 March 2007, a group of human rights experts launched the Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity (*the Yogyakarta Principles*). The Principles are intended as a coherent and comprehensive identification

of the obligation of States to respect, protect and fulfill the human rights of all persons regardless of their sexual orientation or gender identity. Since their launch the Principles have attracted considerable attention on the part of States, United Nations actors and civil society.¹⁸

Constitutional Recognition

In recent times recognizing LGBTI people’s right constitutionally is speeding up. Even in the draft prepared by Fundamental Rights Committee of the then Constituent Assembly of Nepal has recommended writing sexual orientation and gender identity as basis of equality. Unfortunately the then Constituent Assembly could not promulgate new constitution. Below are the constitutions of different countries which have guaranteed sexual orientation and often gender identity. From the view point of human rights and constitutional rights, there are several rights to exercise like Interim constitution 2063 of Nepal in Article 12 to 32 under the fundamental rights such as right to equality, right to life, right to freedom, and so on. Though no such words as sexual orientation and gender identity is incorporated in Interim Constitution of Nepal, it completely discards discrimination on grounds of gender and accepts universal applicability of human beings born free and equal.

Under Chapter two Bill of Rights South Africa has incorporated under Article 9 the right

to equality before the law and freedom from discrimination. Prohibited grounds of discrimination include race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth on article 9(3). Thus discrimination on the ground of sexual orientation has been constitutionally prohibited under South African Constitution. The constitution of Portugal amended in 2004 has incorporated sexual orientation as ground of equality under Article 13 Right to Equality. So, sexual orientation has been incorporated as principle in Portuguese constitution.

The word sexual orientation has been incorporated in constitution of Ecuador and it is probably the first constitution of the world which states gender identity as well. Further provisions of same sex marriage and recognition of same sex relation is constitutionally guaranteed in Ecuador. Article 14 of the constitution of Bolivia prohibits discrimination based on sex, gender identity, or sexual preference.

Currently there are 15 countries in the world that officially recognize same sex marriage. These countries include Netherlands (2001), Belgium (2003), Spain (2005), Canada (2005), South Africa (2006), Norway (2009), Sweden (2009), Portugal (2010), Iceland (2010), Argentina (2010), Denmark (2012), Uruguay (2013), New Zealand (2013),

15. International Covenant on the Elimination of All Forms of Racial Discrimination available at <http://www.ohchr.org/english/law/cerd.htm> visited on 12 January 2014

16. Supra 27 page 8

17. Ibid

18. *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles*, by Michael O’Flaherty and John Fisher, Human Rights Law Review [2008]. Oxford University Press.

View Point

“Citizenship is a Fight for Women’s Independent Existence”

With the ongoing discussions concerning citizenship provisions in the draft constitution, Ramesh Prasad Timalisina collected views of leaders of political parties and women rights activist regarding ‘Citizenship in the name of mother’. Excerpts:

**Khim Lal Devkota,
UCPN-M Leader**



Citizenship is directly linked with nationality. This issue has been put forward with a view that we must be very serious and strict regarding citizenship. Discussions have been held with the perspective that nationality will be diminished if we are flexible on this issue. When we held discussions through the Party Cooperation Mechanism to find out the crux of this matter, we did not find such views to be true. It is not that being strict or loose on issue of citizenship weakens or strengthens nationality.

No Nepali people should be deprived of citizenship. Women must be given a right of patrimony and patronym.

Let us implement the policy of non-discrimination between boy and girl in citizenship as well. The first citizenship act is “Citizenship Act 1952”. In this act, there is a provision of getting citizenship in the name of father or mother. After that, the constitution of 1962 has also provision of getting citizenship in the name of father or mother. The constitution of 1990 stated father and mother requiring father mandatory while getting citizenship. This means that one is entitled to citizenship only if his/her father is a Nepali citizen at the time of his birth. It does not talk about the nationality of mother. That is why the journey of citizenship has been regressive since 1990. The Interim Constitution of Nepal 2007 has also stated “Father or Mother” ; however its implementation has been dominated by the mentality of 1990 constitution. So, if we could move forward by amending the provision in constitution of 1990, an environment of issuing citizenship in the name of either mother or father can be created. It is necessary to move forward in this direction in the coming days.

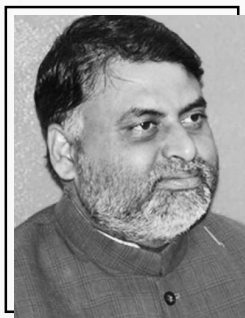
**Sapana Malla Pradhan,
Senior Advocate**



Citizenship is a fight for identity. It is also a fight women’s independent existence. Women are also a citizen and they are eligible for equal rights as citizens. Previously, only women fought for their right but now men are also with them. Women’s father, husband and son are with them in this fight. Men are in front-line to end discrimination in citizenship. None of the human rights document in the world has accepted the rule and behavior of inequality. All of them have followed the principle of equality. We are in third phase in the campaign of human rights movement. While reaching this phase, numbers of hu-

man rights laws have developed. The nationality is the right of every individual and the right to nationality has been recognized worldwide. Now it has also been recognized that the state must adopt the policy of non-discrimination and not accept statelessness. The guarantee of child and women rights has also been accepted. The European Convention of 1997 has clearly stated that the state should not discriminate its people on the basis of naturalized and citizenship by descent. We talk about making democratic constitution but at the same time we are making undemocratic drafts. We want an progressive policy. These are our present challenges. We are making a new constitution and at the same time we are trying to be strict in citizenship issue. This will take us in opposite direction. If we want to choose the way of progression, we need to adopt the policy of non-discrimination. There should not be discrimination in citizenship. The means to get citizenship either in the name of mother or father must be made easy.

Jitendra Sonar,
TMLP Leader



The constitution that we have envisaged is non-discriminatory. Not only in case of citizenship, but in any sector there should not be any discrimination. The discrimination in a sensitive issue like citizenship is absolutely unacceptable especially when we are envisaging a state and society without discrimination. Citizenship is not only to be a citizen, it is necessary to be born, to get married, to get opportunity and even to die. If we are not sensitive on this issue, this may show that we are enforcing instead of stopping discrimination. That is why, the process of getting citizenship must be made easily accessible. For this, instead of word "father and mother", "father or mother" will play a crucial role. At first, I would like to say that the word "and" must be replaced with "or". The word "or" will solve the problem. The second thing is mentality. The mentality may spoil the process even though the policy is effective. That is why it is necessary that the mentality of state must change. In Terai region, women (mother) normally do not care about citizenship. They feel the importance of citizenship only to achieve elderly allowance after reaching the age of 65. Otherwise they do not feel the importance of citizenship. The new law must have provision to give citizenship either in the name of mother or father. It is the responsibility of all political parties and leaders to provide citizenship to a eligible Nepali.

Pushpa Bhusal,
Nepal Congress Leader

The provision of "Manusmriti" makes woman dependable on



others. As soon as she is born, she is sheltered by her father, after marriage she is being taken care by her husband and in an elderly stage she is made dependent on her son. The issue of giving citizenship to one's children in the name of the mother is motivated by this. Giving citizenship in the name of father or mother was in practice since 60 years. This has not affected the issue of nationality. It is useless to link the issue of citizenship with nationality and intellectuals should not follow such rumors. Democracy in the 21st century does not accept discrimination. In my opinion, citizenship by descent is the right of a citizen. Naturalized citizenship is the responsibility of the state. The new constitution must not have discriminatory provisions in order to adopt principle of equality in the democratic, republic constitution by ending the past discriminations. The discrimination must end, be it in citizenship by descent or in naturalized citizenship. We must maintain equality according to the UDHR and international laws regarding women rights. We do not have any rights to make law against them.

France (2013) and England.¹⁹ The same sex marriage committee had submitted its reports to Nepal government and there are ample possibilities of Nepal being first Asian countries allowing same sex marriage legally.

Significance of Sunil Babu Pant et.al. writ 2007²⁰ and Subsequent Development

The Supreme Court (SC) ruling came following a writ petition submitted by Blue Diamond Society demanding that the rights of LGBTI individuals of Nepal enjoy equal protection and standing before the law. In response, the Court ordered the government of Nepal to ensure that all individuals have the right to live according to their own identity, and to correct those laws that discriminated against the rights of LGBTI individuals.

The Supreme Court acknowledges the growing ascendance of the notion that homosexuals and third gender people are not mentally ill or sexually perverts. Therefore, their rights should be protected and they should not be discriminated in the enjoyment of rights guaranteed by the constitution and human rights instruments. The Court holds that it is an appropriate time to think about decriminalizing and de-stigmatizing the same sex marriage as according to it. The Court takes the view that no one has the right to question how do two adults perform the sexual intercourse and whether this intercourse is natural

or unnatural and that ...the way the right to privacy is secured to two heterosexual individuals in sexual intercourse, it is equally secured to the people of third gender who have different gender identity and sexual orientation.

The court further holds that gender identity and sexual orientation of the third gender and homosexuals cannot be ignored by treating the sexual intercourse among them as unnatural. The court takes the view that selection of sexual partner or fixing of marital relation is a matter falling entirely within the ambit of the right to self-determination of such an individual. It also seems to be in favor of gradual internalization of international practices in regard to the enjoyment of the right of an individual in the context of changing global society and practices of respecting the rights of minority. It calls upon the state to create appropriate environment and make legal provisions to enable the LGBTI people enjoy fundamental rights and insert provisions in the new constitution to be drafted by the Constituent Assembly, guaranteeing non-discrimination on the ground of 'gender identity' and the 'sexual orientation' besides 'sex' in line with the Bill of Rights of the Constitution of South Africa. It issues a directive order to the Government of Nepal to form a Committee in order to undertake the study on overall issues in this regard and make the legal provisions after considering recommendation made by the said Committee.²¹

Thus the Supreme Court (SC) of Nepal ruled in support of legislation guaranteeing the rights of lesbian, gay, bisexual, transgender, and intersex (LGBTI) individuals, and identifying all sexual and gender minorities (SGMs) as "natural persons" under the law. The court decision declared that "the law shall be considered as discriminatory which does not allow the people to enjoy their fundamental rights and freedoms with their own identity" and ordered the government of Nepal to reform any legislation referring exclusively to men and women and not Third Gender.

Furthermore, the decision ordered the issuing of legal documents, including citizenship cards and passports, with an identity category for Third Gender, and confirmed the right to same-sex marriage under Nepal's legal framework. This affirmation included directions to form a seven-member committee whose task would be to explore the institutions regulating same sex marriage in other countries, and to subsequently recommend appropriate institutions for Nepal. This was a major breakthrough in the process of rights recognition for sexual minorities in Nepal, who have faced significant levels of discrimination and abuse in this conservative Himalayan country.

The legal and political environment has improved since 2007 as a result of the Supreme Court decision and hostility towards SGM and transgender people has decreased. Prior to 2007, the NGO

19. Gay marriage around the world: Gay marriage timeline available at <http://www.bbc.co.uk/news/world-21321731> visited on 15 January 2014

20. Decision of the Supreme Court on the Rights of Lesbian, Gay, Bisexual, Transsexual and Intersex (LGBTI) People, NJA law journal, National Judicial Academy, vol 2, no. 1, 2008, Editor Dr, Anad Mohan Bhattacharai, Page 281

21. Ibid, Page 282

Blue Diamond Society states there were numerous reports of SGM and transgender people being harassed by police, arbitrarily arrested using Nepal's public laws, held without a hearing and beaten and tortured by prison guards.

Nepal is an excellent model for activism and advocacy for LGBT rights, and the manner in which it has combined HIV interventions, mobilization for rights with grassroots protests against every instance of violence and discrimination, and in the manner it has leveraged both legal options along with social advocacy by usurping traditional cultural icons like festivals and queering it, its success in joining other civil society movements including for democracy, can provide a template for other activists in the region working for LGBT rights.

The government has also been making allocation in the national budget for LGBT welfare measures. While the amount of allocation may be small enough to be called symbolic, it is being increased every year and its import is not far to seek. It makes Nepal the only country in the region to officially acknowledge the rights of LGBT persons, and speak of their welfare as a state obligation.

Conclusion

Though no UN convention directly mentions about sexual orientation, but recent development within UN committees refers equal treatment of Sexual Orientation and Gender Identity (SOGI) rights. Major universal human rights conventions and declarations completely discard the discrimination on unequal treatment of all kind, such instruments in-

cludes Universal Declaration of Human Rights (UDHR), ICCPR, CEDAW and even UN charter. The UDHR adopted by United Nations recognizes that the dignity of all beings men and women, boys and girls should be upheld.

Protecting LGBT people from violence and discrimination does not require the creation of a new set of LGBT-specific rights, nor does it require the establishment of new international human rights standards. For all the heat and complexity of the political debate about LGBT equality at the United Nations, from a legal perspective the issue is straightforward. The obligations that States have to protect LGBT persons from violations of their human rights are already well established and are binding on all United Nations member states.

In recent years, many States have made a determined effort to strengthen human rights protection in each of these areas. An array of new laws has been adopted – including laws banning discrimination, penalizing homophobic hate crimes, granting recognition of same-sex relationships and making it easier for transgender individuals to obtain official documents that reflect their preferred gender.

There is no doubt that the rights guaranteed by sexual orientation and gender identity in international treaties and conventions are limited. In spite of this, debate about rights inclusion for LGBTI individuals is growing and has been successful in particular regions. Undoubtedly much work remains to be done to encourage the passage of stronger national legislation, but positive steps are already being taken in countries like Nepal

and South Africa, which may set a precedent for other countries to follow. One of the basic indicators about the status of the SGM community is the protection of their rights under national law.

Within South Asia some progress has been made toward providing stronger legal protection for LGBTI individuals. The Supreme Court of Nepal was the first to state the rights of sexual and gender minorities as equal citizens, and to demand that the government provide legislation giving third gender and homosexual individual's legal protection. While this is significant progress towards equal rights provision for LGBTI individuals, implementation remains a challenge, particularly in Nepal where unstable political situations make the implementation of law difficult.

There is no doubt that all Nepal citizens have equal standing in the eyes of the constitutional provisions of Nepal and rights enshrined by these provisions. It is the obligation of the State to treat all people equally as well as to guarantee all fundamental rights of the people. Nepal has been the State party to various international conventions and treaties after signing and ratifying them and according to section 9 of Nepal Treaties Act, 2047 (1991 AD), the provisions of international treaties and conventions, to which Nepal is a party, should be adopted as national law. Thus there are fundamental rights guaranteed by the constitution on one hand and the international human rights standards on the other hand, therefore, as a party to such conventions, Nepal is responsible to fulfill the obligations set by such conventions.

Nepal seems to be very proactive in the issues regarding sexual and gender minorities. But still LGBTI community is facing many problems enjoying rights enshrined in constitution and other international conventions and precedent set by SC, discrimination within family sphere, society and State at large.

Since Nepal is party to all these conventions, Nepal is obliged to adopt non-discriminations among its citizens. Interim Constitution of Nepal states that all citizens shall be equal before the law, provided that there shall not be discrimination among citizens on grounds of religion, race, caste, tribe, gender, origin, language or ideological conviction. Interim Constitution of Nepal 2007 on part 3 and 4 has incorporated the provision of Fundamental Rights (Articles 12 to 32) and Responsibility and Directive Principles and Policies of the State. Being the citizens of this country sexual and gender minorities (SGM) have sufficient rights to claim and exercise all fundamental or human rights incorporated therein. But their rights are still limited in many ways. Easy access to employment, education has been beyond the reach of LGBTI people and positive discrimination for minorities and backwards has not been subjected to LGBTI people.

Despite of protection in Constitution and precedent set by Supreme Court, their rights to identity and to live freely without discrimination looks good on papers and plans but still beyond reach of LGBTI community. An

ideal society requires an environment where each human individual can exercise his or her freedoms without fear and want. Sexual and gender minorities' rights are part of human rights and gender justice is integral to social justice. Sexual and gender minorities is definitely an inevitable complement of human society and a society without the existence of them cannot be imagined. The State has ignored them in many regards and not issuing third gender citizenships is one of the notable State isolation in case of third gender people. The State has not taken any initiative to solve their issues and problem. Despite of the fact that Ministry of Home Affairs has issued circular and amended Citizenship regulation to provide citizenships as others in gender column, LGBTI communities are getting difficulties getting citizenship as others in gender column. This has been one of the major setbacks in the golden LGBTI movement here in Nepal. The writ challenging easy access to citizenship for LGBTI as others is under consideration in Supreme Court of Nepal.

This clearly reflects that there is inconsistency in existing laws in countries. In one hand State has recognized them, taken

census of them and enrolled them as third gender in voters' list and even granted a unique citizenship as others in gender column while on other hand many unequal provisions remain which may be considered unfair and discriminatory to LGBTI people.

Rights of sexual and gender minorities are protected in human rights instruments and even some countries have recognized their rights in constitution and decisions of courts protecting their right on non-discrimination and equality ground; yet these people are struggling for tolerance, recognition and rights because their very existence is still rejected or denied and they suffer from social exclusion because of the State and society's prejudiced attitude towards them.

Nepal seems to be very proactive in the issues regarding sexual and gender minorities. But still LGBTI community is facing many problems enjoying rights enshrined in constitution and other international conventions and precedent set by SC, discrimination within family sphere, society and State at large. They are forced to marry with opposite sex and majority of them are not living life of dignity due to absence of same sex marriage law. The ongoing activism which aims at creating an inclusive Nepali State by including the categories of sexual orientation and gender identity in the law and nation development are keeping the struggles of LGBTI community for equality and non-discrimination alive.



“If the Government Shows Apathy in Implementing any Recommendations, We Will Publish the List”

The provision states to “listing” the name of human rights violators. We are preparing a working procedure and rule based on this legal provision. This rule does not require permission of other agencies. No one is above the law. We are authorized to make such rule.

For this issue of INFORMAL, Ramesh Timilsina interviewed Prakash Wasti Commissioner at National Human Rights Commission of Nepal (NHRC-Nepal) regarding publicizing the name of human rights violators in “Black List”. Excerpts of the interview:

□ ***The NHRC's recommendations are not implemented by the government. Will the names of human rights violators be put in black list?***

We have records of previous decisions. In those files, we have the names of such violators. We will remind and urge the government to implement all those recommendations, be it the case of compensation or prosecuting the case against the perpetrators. We already held discussions, including with the Attorney General on this issue. If there is any legal obstacle, let us amend the law. There is parliament and it is not

difficult to amend the law. There is a trend of avoiding the issue saying that amendment of law is hard. The chairperson and members of NHRC are all students of law. We have some experiences of solving legal difficulties. We are also thinking towards that way.

We cannot reverse the previous recommendations. The most important thing that we have is commitment to human rights. That is why we cannot think of anything except the implementation of these recommendations and decisions. We have gone through Acts related to National Human Rights Commission. In

one of the act, there is a provision of “listing”. The provision states to “listing” the name of human rights violators. We are preparing a working procedure and rule based on this legal provision. This rule does not require permission of other agencies. No one is above the law. We are authorized to make such rule. So if the government shows apathy in implementing any recommendations, we will publish the list. However, we will give chance to the accused violator to defend himself. We will inform them prior to publishing their name in black list and give them a chance to furnish any reasons for not making their names public.

Action will be taken against perpetrators in another country if no action is taken against them here. In some of the countries, NHRC's recommendation acknowledging that a civil servant is not a human rights violator is required before promoting a person in administrative field. We have forwarded the concept of training. We urge the human rights activists to join our call to not promote police, army and governmental employees before getting human rights training.

□ ***The situation is clear that NHRC recommendations, court orders are not implemented by the government. What are the reasons for not implementing the recommendations?***

The main reason of non-implementation of the recommendation is due to the government's unwillingness. The government or "power" is always blind. The "power" wants everyone to obey it and thinks it is above the law. The government may also have their own difficulties which we don't know. But if the government has commitment and is devoted to protect human rights, there are always solution seven to difficult problems. Let us make a law which does not go against the constitution. If the constitution is human rights friendly, there is no question that we cannot make a law according to it.

□ ***Will the names in black list be made public?***

We are conducting ground works. Working Procedure is being prepared. It might take some time. But we will definitely make the names in black list public. The work that has started should make

a long term effect. It has to be sustainable. This needs adequate discussion. We are not alone. There are human rights activists and experts in this field. We will ask for their opinions. We want to reflect a good image of the country across the world regarding human rights. The working procedure and laws that are going to be enacted must be a common property of all people active in this field, not only of NHRC. We are alert and active that all should feel ownership of such laws.

□ ***Are such practices seen in international level as well?***

Yes. A person who is in the black list shall not get visa for any other country. The jurisdiction for human rights violators is universal. Action will be taken against perpetrators in another country if they no action is taken against them here. In some of the countries, NHRC's recommendation acknowledging that a civil servant is not a human rights violator is required before promoting a person in administrative field. We have forwarded the concept of training. We urge the human rights activists to join our call to not promote

police, army and governmental employees before getting human rights training. We want the training to be mandatory before promotion. We are designing a course for it. Those after receiving human rights training will definitely behave in a human rights friendly manner which might reduce the violations of human rights in coming days. This will develop a culture of human rights in the country.

□ ***What kind of initiation the NHRC is taking to include human right issues in school curriculum?***

There is a small chapter included in the school curriculum. It was included following the joint initiation of human rights activists and NHRC. It is necessary to transform the course of study and extend it to grade 11 and 12. We have incorporated this into our strategic planning. We have been exerting pressure to include some chapters in college level course-book as well.

□ ***Can you stand the pressure and threat that will come to not make the names in black list public?***

The first thing is that I do not think the pressure will come. We work according to the law I do not think that any agency working as per the law would face such problem. Everyone is independent to put their views but they cannot put unnecessary pressure. Everyone has a right to express their views in a disciplined way. They can even protest it. We respect such right. We have already started our work. Till now we have not received any kind of pressure or threat. We are able to deal with such pressure. The unnecessary pressure cannot affect us.

Post-2015 Development Agenda in Nepal

The Millennium Development Goals (MDGs) were established by the UN in 2002 following the Millennium Summit of United Nations which produced United Nations Millennium Declaration in September, 2000. The declaration was adopted by the UN General Assembly on 8 September 2000. Based on the declarations, MDGs are eight international development goals that were set to be achieved by 2015 by all the 189 UN member states.

In 2015, the target date of Millennium Development Goals (MDGs) is going to end. A worldwide discussions and debate is going on to set the future development framework which is called 'Post 2015 Development Agenda' or 'Sustainable Development Goals (SDGs)'. At the international level, the process of Post 2015 Agenda has been led by the UN. Similarly, different national and international agencies have been taking their own initiation through consultations, meetings and campaigns and coming up with their own recommendations that could be incorporated in the country specific Post 15 agendas.

Another level of discussion focused on how to set the indicators of all the agendas and their efficiency, The UN High Level Panel on Post 2015 also has set some fundamental principles.

The Millennium Development Goals (MDGs) were established by the UN in 2002 following the Millennium Summit of United Nations which produced United Nations Millennium Declaration in September, 2000. The declaration was adopted by the UN General Assembly on 8 September 2000. Based on the declarations, MDGs are eight international development goals that were set to be achieved by

2015 by all the 189 UN member states. The eight MDGs commit to eradicate extreme poverty and hunger, to achieve universal primary education, to promote gender equality and empower women, to reduce mortality, to improve maternal health, to combat HIV/AIDS, malaria, and other diseases, to ensure environmental sustainability and to develop a global partnership for development. Each of the goals has specific indicators and dates (to be met by the end of 2015). The country governments, international agencies and civil society groups have worked to achieve these goals. National and international resources have also

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been allocated for this purpose. However, the focus of MDGs on a narrow and somewhat unbalanced set of goals failed to reflect the full ambition of the Millennium Declaration and its commitment to the Universal Declaration of Human Rights¹.

The government of Nepal has endorsed MDG Declaration and has incorporated these goals in its strategic frameworks/plans. The tenth plan (2002/03-2006/07), three year interim plans: (2006/07-2009/10) and (2010/11-2013/14) focused on the poverty reduction, development strategies and strategy to remove exclusion. The government has also published MDGs report in 2000, 2005, 2010 and 2013 which show the progress and the challenges on meeting MDGs and provide a solid foundation for assessing where the nation stands to meet MDG development.

National and International Debates/ Discussions

Much attention and time has been given and efforts have been taking place to set SDGs at the national and international level. After a series of discussions and negotiations, The UN Open Working Group (OWG) released its Zero Draft Goals comprised of 16 goals on June 2, 2014. The Zero draft Goals received worldwide reactions, Many comments were made on its goals, goals/ indicators and gaps. On July 19, OWG published its revised Sustainable Development Outcome entitled 'The

future We Want' which remained same in the total number of goals and its title. On September 10, 2014, The UN General Assembly (UNGA) adopted a consensus resolution declaring that OWG 's the Sustainable Development Outcome Document (published on July 19) shall be the main basis for integrating sustainable development goals into Post-2015 development agenda. Meanwhile, the general assembly recognizes that other inputs will also be considered in the intergovernmental negotiation process that was convened on September 16, 2014².

In Nepal, the government is the main responsible body to recommend and demand its country specific/needed agendas to be incorporated in the UN Post 15 development framework. On behalf of the government, National Planning Commission (NPC) at the center has been working on setting the post 15 agendas of Nepal to submit to the UN. However, the consultation and meetings for setting the agendas, objectives and goals have not reached the community level or even to the broader civil society groups as many of the civil society members and people are unaware and uninformed about it. Hence, the UN has already come up with its Zero draft outcome and resolution. For Nepal, a much less time remains to negotiate at UN on its country position on SDGs. But, the government of Nepal has still not declared its country position or strategy on post 2015 development agenda/ goals. With respect

to other stakeholders, National Women Commission (NWC) has become a bit visible on raising this issue from women's perspective whereas National Human Rights Commission (NHRC) remains silent in this regard. At the same time, some of the civil society organizations like Alliance for Social Dialogue (ASD), NGO Federation and other networks have been conducting regional and national level consultations on this issue.

Achievement and Challenges of MDGs

Nepal has made significant progress in the attainment of MDGs despite the long political instability coupled with the long absence of local elections, prolonged transition of peace and constitution drafting process and internal armed conflict. The 2013 MDG Report of the government shows that it has taken remarkable strides in meeting MDG indicators such as the reduction of poverty and hunger, increase in the school enrollment rate and decrease in the maternal mortality rate (MMR) rate. The progress is also noticeable in other indicators - women empowerment, environmental sustainability and global partnership for development.

At the same time, the Nepal MDG Report 2013 has clearly outlined the challenges in achieving MDGs over 13 years. The inequality and discrimination between male and female and the marginalization of Dalit and indigenous people are still

1. TST Issues Brief: Human Rights Including the right to development. URL: http://sustainabledevelopment.un.org/content/documents/2391TST%20Human%20Rights%20Issues%20Brief_FINAL.pdf Retrieved on 2 October 2014
2. TWN Info Service on UN Sustainable Development (Sept14/02). URL: <http://www.twinside.org.sg/title2/unsd/2014/unsd140902.htm> Retrieved on 2 October 2014

high in the country. The criticism on MDG goals has not remained untouched at the global level as well. MDG (Goal) 3 does focus explicitly on gender equality, progress is tracked through only three indicators which represent important aspects of gender equality (education, employment, political representation), but insufficient to achieve the overall goal as this leaves out crucial aspects of gender specific discrimination such as violence against women, gender-based wage discrimination, women's disproportionate share of unpaid care work, sexual and reproductive health and rights, women's limited assets and property ownership and unequal participation in decision making at all levels³.

Notwithstanding this fact, the Nepal report highlights important issues: good governance, addressing disparity and inequality, urbanization, remittance, labor migration and national development, productive employment, zero tolerance to gender based violence, equitable access to quality health care services and adaptation to climate change to be addressed in the upcoming millennium development goals in Nepal. The civil society has also taken initiatives to raise pertinent issues to be included in Post MDGs.

Justice and Governance-Key Components of Post 2015

With regard to the equality and discrimination, all thematic consultations have drawn attention to the fact that MDG's focus on

less ambitious "half way" targets and on average progress has meant that the poorest families, and most deprived and marginalized groups, including minorities, migrants and indigenous people have left behind, even if the goals may be met in the aggregate at the national or global level.⁴

Despite the government's commitment, a large number of women and marginalized community have not only been suffering from violence but also been deprived of justice. They have been facing challenges to get legal identity cards such as citizenship, birth registration certificate, marriage registration certificates and land ownership certificate. The violence affected women and marginalized community do not approach for legal process due to the lengthy and costly nature of the process. The practices of weak justice delivery institutions have impinged on people's right to justice. For instance, there have been no continuous hearings in VAW cases, no interim relief and justice for the sexually exploited women in conflict, few perpetrators prosecuted on rape cases. The 35 days statutory limitations in rape case, including discriminatory provisions on punishing the perpetrators and no free legal aid services to the victims has also hampered their access to justice. Similarly, the current citizenship laws are discriminatory on the basis of gender; in particular, it curtails women's right to convey citizenship to their children independently. Furthermore, there are

large numbers of cases reported on caste based discrimination. The government has not ensured the effective implementation of the existing laws, rules and regulations. For the last 14 years, there has been no local government, which is a prime local level institution to provide services in the community. Reactivation of local institutions is essential to provide basic services in the community and ensure justice. The women, dalits and marginalized community mostly suffer due to the weak implementation of law, vacuum of local institutions and socio-economic deprivation.

Caste-based discrimination remains a central feature of life and social interaction in Nepal. Dalits face a powerful combination of social discrimination and violence that enforces their second-class status. The perpetrators are rarely prosecuted. The reason for the Dalits' limited access to justice can be attributed to three main reasons: widespread lack of awareness of the laws, and ingrained social norms breeding indifference among the law enforcing authorities, who refuse to register police reports or investigate cases; the government's failure to prosecute individuals who practice untouchability; and the fear in the victims of untouchability who choose not to pursue justice due to lack of support. Thus, due to the lack of effective mechanism/ body to deal with crime of untouchability and the weak implementation of laws, the cases of untouchability and discrimination do not come out in public.

3. TST Issues Brief: Human Rights Including the right to development. URL: http://sustainabledevelopment.un.org/content/documents/2391TST%20Human%20Rights%20Issues%20Brief_FINAL.pdf
4. TST Issues Brief: Human Rights Including the right to development. URL: http://sustainabledevelopment.un.org/content/documents/2391TST%20Human%20Rights%20Issues%20Brief_FINAL.pdf Retrieved on 2 October 2014

As a member of the UN, Nepal has been working on Millennium Development Goals for the last 13 years. In 2013 it produced MDG progress report jointly with UNDP, Nepal. The report highlights some significant achievements of MDG by meeting some of its indicators. However, it largely ignores the situations of violence, justice and human rights violations which are deeply related with MDG targets. The recommendations and analysis of MDG progress report ignore the large number of population deprived of justice and suffering from violence though the reports does accept the high level of social exclusion in Nepal.

Data of Violence and Justice

The National Demographic Health Survey, 2011 shows women that have suffered from physical violence at some point since age 15 at 22%; women who have suffered from spousal or partner abuse at some point in time at 32% and the political participation of women at 30% in the current Constituent Assembly (CA), which is less than in the previous CA and constitutional mandate (33%).

Policies and Legal Provisions

Nepal is a signatory to all the major international human rights conventions, including the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD 1965) and the Convention on the Elimination of All forms of

Story One: A woman from Solukhumbu district does not have her citizenship certificate. “My husband is not in contact with me since 1996 and his whereabouts are not known. I have my son’s birth registration certificate and recommendation from VDC office to enroll my son to school. I was denied a recommendation for citizenship certificate stating that I had failed to produce a marriage registration certificate and citizenship of my husband.”

Story Two: A woman from Ayodhyapuri VDC, Chitwan district: “I approached Ayodhyapuri VDC office to transfer citizenship to my child but the VDC office told me that a recommendation for citizenship certificate for my son will only be issued if I come with my first husband who was with Nepal Army and abandoned me.”

Source: Analysis of Nepalese Citizenship Laws From a Gender Perspective: A report launched by National Women Commission (NWC) and Forum for Women Law and Development (FWLD) in February 2014.

Discrimination against Women (CEDAW). Nepal’s 2007 Interim Constitution, Muluki Ain or Country Code, of 1963 or the Declaration of the reinstated Parliament in May 2006, all of these have said that “No person shall, on the basis of caste, be discriminated against as untouchable” – or similar words. Interim Constitution has enshrined the principle of equality and justice which also recognizes the various rights of women, including rights to justice, reproductive rights and other human rights. It has also recognized equal right to property. Nepal has indeed passed and amended many legislations and provision of laws to improve the status of women that includes Gender Equality Act 2006, Human Trafficking and Transportation Control Act 2007, 12th Amendment of Country Code that criminalizes witchcraft and recognizes it as a crime against state, Domestic Violence Act 2008. Two major code that is Criminal Code and Civil

Code bills have been registered by the government that substitutes Country Code 1963. Various National Action plans on Human Rights, Trafficking, Gender Based Violence, UNSCR 1325 and 1820, and CEDAW has been formulated by the government to end violence and promote access to justice. The TRC law has been passed by the parliament for the purpose of ensuring the justice of conflict affected people.

The concluding observations of CEDAW urge the state party (Nepal government) to give priority to combating violence against women and girls and to adopt comprehensive measures to address such violence. The committee recommends developing a nationwide data collection program on cases of VAW, take immediate measures to abolish the statute limitations for the registration of cases of sexual violence to increase women’s access to justice. It also recommends providing equal and full citizenship right to

women. The committee further recommends for state's obligation and measures to other pertinent issues of women where justice and safety comes as a core in some recommendation and cross cutting in all.

Despite these policies and commitments the above data of violence and situation of justice shows that there is a gap in the policies and their implementation.

Way Forward

Drawing the lessons from MDG report, this is an opportunity for the government and the civil society to set Post 15 agendas of Nepal based on the ground reality of the country as one of the key challenges for the development is existing violence and injustice which are the issues of human rights violation as well. Until and unless the issues of violence and justice are incorporated as one of the key cross cutting feature of every development goal of Post 15 MDGs, any other efforts of the development will remain incomplete. This has been clearly proved from Nepal's MDG 2013 progress report coupled with progressive indicators of developments where millions of people fall victims of violence and injustice. Similarly, Goal 16 of the OWG document, entitled "Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels and Goal 3: ..." provides space for the Nepal government, advocates and civil soci-

ety to identify the country specific key issues and indicators of justice, safety and governance in line with human rights and development. It further encourages Nepal government to include these issues with specific measures in its national plan/ policies for its effective implementation. Thus, it is imperative for Nepal to bring its country specific agenda of governance, justice and safety in Post 15 MDG agenda which needs an advocacy at UN level with collaboration of civil society members and its stakeholders.

The national institutions such as National Women Commission, National Dalits Commission, and Nation Human Rights Commission have to be engaged during the consultation and preparation of the UN goal at the country level along with the engagement of civil society. As Nepal is the State party to seven major international human rights conventions, the development framework has to be based on the norms and values of human rights and justice. In the meantime, human rights standards require free, ac-

tive and meaningful participation in matter of public affairs, including planning. As such, the setting of goals for post 2015 agenda must occur through a participatory process in which all voices are heard, including civil society, human rights groups, women minorities, indigenous peoples and the voices of the most excluded and vulnerable groups⁵. To make the process of setting Post 15 agenda inclusive through the bottom up approach and to address the real issues, the following initiatives are essential in the beginning phase - i) consultation by government agencies with civil society and constitutional bodies (National Human Rights Institutions-NHRI); ii) broader consultation with civil society from community to the national level, iii) recommend the specific country based goal to the UN, which is practical and achievable, iv) build broader consensus on understanding of core issues of post 2015 and advocate at UN level to adopt the agenda of governance, justice and safety in Post 2015 development framework.

The national institutions such as National Women Commission, National Dalits Commission, and Nation Human Rights Commission have to be engaged during the consultation and preparation of the UN goal at the country level along with the engagement of civil society. As Nepal is the State party of Seven major international human rights conventions, the development framework has to be based on the norms and values of human rights and justice.

5. UN System Task Team on the Post -2015 UN Development Agenda (2012). URL: http://www.un.org/en/development/desa/policy/untaskteam_undf



Kunjana Shah*

Impunity in Nepal and Ratification of ICC

The World Conference on human rights held in Vienna in June 1993 deplored impunity. The conference urged to give a firm ground for rule of law the states should repeal the laws that guide those responsible in the serious violation of human rights such as torture.

Background

Impunity for gross human rights violations, crime against humanity, genocide and war crimes that underlines in an internal armed conflict cannot be a basis to achieve political solution. The denial of the rights to justice, truth, and reparation for the victims, their relatives, and society, contempt for the basic principles of the rule of law, or the continuation of the doctrines, policies, structures and practices which are the instrumentalities of such impunity can give rise to repetition in occurrence of such crimes all over again. Every armed conflict has been proved to be human disaster and whose real ending requires genuine solution addressing its root causes. Some crimes are so heinous that justice must be done, and ending impuni-

ty in the conflict and post-conflict periods is vital for restoring normalcy. It is also necessary to focus on the political economy of reconciliation, as well as the economics of the process because there is a real need to be cautious about introducing reconciliation processes “too quickly and in too imperfect way” and which on failure can close doors to further prosecutions, resulting impunity insured.

It is very crucial that in order to deter further occurrence of crime the perpetrators of gross human rights violations be brought to justice. Any appearance of impunity for the perpetrators could become a real obstacle to the process of finding a peaceful solution to the conflict through negotiation. Long lasting and sustainable peace cannot be achieved under

the foundation of impunity occurred through the indecisive action against the perpetrators of war crimes. The World Conference on human rights held in Vienna in June 1993 deplored impunity. The conference urged to give a firm ground for rule of law the states should repeal the laws that guide those responsible in the serious violation of human rights such as torture. The former Secretary General of UN Ban Ki Moon expressed that when a public institution fails to deliver justice or protect peoples’ rights, insecurity and conflict prevails.

This study is clearly a second strand research. Institutions like INSEC, TJRC, FOHRID, Advocacy Forum, UN, etc. have brought into knowledge every facts and evidences of the atroci-

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ties of insurgency period, and that of post-conflict judicial, administrative and political hindrances. It can be concluded Nepal has failed to comply with the obligations towards both the citizens and to the international community. We now seek no more evidences of systematic impunity flourishing and what is required is a genuine solution to it. Hence, this article strives to bring in light a solution that has been deemed most appropriate by experts in both national and international level. It is urged that accession to the International Criminal Court is the best approach for country like Nepal to fight against the systematic impunity – addressing both past atrocities, and prohibiting the recurrence.

There are many states which suffered severe atrocities of conflict and in post conflict the major efforts are often focused on reestablishing social security, reconstructing governance institutions and resumption, and reforming the justice system. Such efforts are fundamental for promoting the rule of law but they rarely suffice to grapple with the complex legacy of past abuses. Accordingly, unless the intricate issue of accountability for past atrocities is confronted, there runs the risk that new structures of law will be built upon unstable institution, consequently making the future more vulnerable and prone to bigger atrocity.

The sufferings of past cannot be undone but for a society recovering to move forward from a violent conflict it becomes very critical that the perpetrators of atrocities face some reckoning. Ensuring some appraisal of accountability not only may help victims come to terms with the past

but can also help demonstrate that, in future, such abuses will not be permitted to persist. The state has an obligation to provide guarantees of non-repetition for crimes under international law. Under this custom and in compliance with international obligations the state is obliged to adapt its every necessary governmental apparatus, legislation, and practices to ensure full and effective enjoyment of human rights. As a member state to the UN, Nepal should take effective measures to attain the goal to ensure respect and protection of human rights and basic freedom for all as set forth in the Article 55 of the UN Charter.

Ethical and Political Responsibility for Creating Peace

The UN Security Council in 4903rd meeting, 2004 reaffirmed the vital importance of the UN's role in post-conflict settlement. Council President Maria Soledad Alvear, Minister for Foreign Affairs of Chile, said in her introductory remarks the topic of post-conflict settlement "...lay at the intersection between ethical responsibility and political responsibility for creating international peace." Mr. Gunter Pleuger of Germany, endorsing the European Union position, said that although no post-conflict situation was equal to another and that there was no one-size-fits-all solution, but still it was also true that "it was not necessary to reinvent the wheel at every occasion, but there were a few standard parameters and model procedures that could usefully be defined and applied." He said, experiences in Sierra Leone and Timor-Leste had demonstrated the need to define clearly the way

in which courts and other mechanisms interacted and complemented each other. It was important to ensure that, taken together, they covered the whole spectrum of injustice committed during a conflict without leaving an "impunity gap". A second parameter must be that those bearing greatest responsibility for war crimes, genocide, crimes against humanity and other serious violations of human rights and humanitarian law "must not escape punishment". And thirdly, judicial and non-judicial mechanisms needed local acceptance and legitimacy through consultation and after being operational they should engage in ongoing outreach efforts.

Mark Lyall Grant of Rwanda, speaking in 7113rd meeting of the Security Council, expressed that once a country experienced civil strife, it was susceptible to a recurrence, in part because post-conflict institutions were often unable to effectively address law-and-order challenges. Fighting impunity mitigated conflict and created conditions conducive to peace and development. In Rwanda, the collapse of State institutions had been among the biggest challenges facing the country following the genocide. Transitional justice should be a key focal point in post-conflict situations, as that would initiate healing. Building the capacity of a country's justice system should be a priority in all post-conflict situations to avoid a recurrence. It is unacceptable to focus on the rule of law at the national level while ignoring it at the international level and that is why respect for the rule of law on the global stage should create the environment to attain it at the national level. More should be done to up-

hold international law through national systems by implementing international conventions and accessing to international courts. Xavier Lasso Mendoza of Ecuador also expressed that finding conflict's roots by looking only at internal factors was "absurd". There is a distinction between violence and conflict. While violence is an individual action, conflict entails political decisions. Staunching violence is a State responsibility, but there is also great importance to the rule of law at the international level.

Truth Commission Cannot Supersede Criminal Justice Mechanism

Impunity in Nepal is mainly related to the government, political level, political parties, law enforcement agencies as well as armed groups. Ending impunity is the responsibility of the government, ruling system, political leadership, law enforcement agencies and policy makers.

The government has contributed to escalate impunity by withdrawing criminal cases. The reliance of Nepal on amnesties is inconsistent with the international laws. The world community has shown their clear intention that "at least for the most heinous violations of human rights and international humanitarian law, a sweeping amnesty is impermissible". This is in particular true for amnesties that "prevent prosecution of individuals who may be criminally responsible for war crimes, genocide, crime against humanity, gross violations of human rights, or serious violations of international humanitarian law." Such amnesty violates victims' fundamental rights under

international law, and impedes the desired objective of peace. We should learn from the experiences of states like Sierra Leone where the existence of three blanket amnesty provisions hindered the peace process and had failed to accord peace during the eleven-year civil war.

Similarly dependence of Nepal on Truth Commissions is also inconsistent with both domestic and international law. The CPA and Interim Constitution obliges the Nepali government to set up the TRC but there is nothing that provides TRC exclusive powers to deal with international crimes and serious violations of human rights. The Supreme Court has also consented on the jurisprudence that the "transitional justice system does not supersede criminal justice mechanisms". While truth commissions may help to build and preserve certain social and political aspects during specific periods of a society's history, they do not fulfill or replace the state's obligation to establish the truth through judicial proceedings and launch criminal investigations to determine the corresponding liabilities. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions concluded that "a commission is not a substitute for a criminal prosecution". A state's obligation or the court's action to establish the truth through judicial proceedings, conduct judicial investigations and to impose criminal penalties on the perpetrators cannot be superseded or exonerated through truth commissions and other extrajudicial mechanisms for elucidating gross human rights violations and crimes under international law.

Fedrico Andreu-Guzman describes that some international bodies have put forward that administrative sanctions like Vetting procedures are also insufficient, and basically aims to prevent further perpetuations of human rights violations. But they are not "punitive per se" and should not be seen as a replacement for criminal prosecutions aimed at determining criminal responsibilities. The UNHRC in *Bautista de Arellana v. Colombia* rejected the notion that effective remedy could be attributed by disciplinary sanctions and judgments of an administrative tribunal, and that "purely disciplinary and administrative remedies were inadequate under the effective remedy provision of Article 2(3) of the ICCPR". It also put forward that "state parties are under a duty to thoroughly investigate violations of human rights and to criminally prosecute those found responsible".

The impunity and lack of rule of law in Nepal has crippled the national mechanisms for addressing human rights abuses. And this requires appropriation in management process to deal with past and envision better and sustainable future by collective ownership of the peace process and its implementation. The post-conflict transition management must address the root causes of the conflict. For which it requires attributive behavioural response of political parties, government and people.

Once and for all Approach

The International Centre for Transitional Justice (ICTJ) in account to the prolonged incidents of impunity in Burma forwarded that the prospect of justice for any-

one responsible for mass violations depends on international prosecutions or pressure from the international community, where also the utmost significance of ICC and recognition of universal jurisdiction for international crimes was highlighted. Nepal has signed and ratified significant number of international instruments of human rights but has not acceded to the Rome Statute of ICC. The initiative to ratify the Rome Statute of the ICC was taken in 2006 by the government and the House of Representatives also passed resolution recommending the ratification, but this stalled over time.

There are political differences regarding the ratification of Rome Statute. Several round of lobbying vis-à-vis legislative organs was held as another component of advocacy for ratification and several national level events were organized for pressuring government to accede to the Rome Statute. William R Pace, Convenor of the Coalition for the International Criminal Court, said the government is skeptic of ratifying the Statue due to lack of knowledge about the court's jurisdiction. "I sensed that many in Nepal have old-fashioned views that International laws have big powers. It's a serious misunderstanding." The government made excuses to abort the bill, though the past parliament had already directed for immediate ratification of the Rome Statute. Subodh Pyakurel, Chairperson of Informal Sector Service Center (INSEC) stated that the ratification of the Statue is important for the countries which are at post-conflict situations. Pace warns that failing to sign the treaty may repeat the cycle of violence. "ICC

is the most democratic tool to prevent future violence."

Ratification of the Rome Statute

Cambodia and Afghanistan ratified Rome Statute to prevent post-conflict violence. The necessity of accession to a court can be learnt from many other countries which feared reoccurrence of conflict. For example, in Sudan the strategic recommendation by experts for addressing post conflict prosecution was establishment of a hybrid court. And where there is failure to establish such court, or if the transitional legislative assembly fails to enact legislation for the hybrid court within the specified time period, the transitional government should be required to request the ICC to investigate and bring cases against those that bear greatest responsibility for international crimes committed in South Sudan since 15 December 2013.

It is strongly advised and advocated that criminal proceedings offer a number of benefits in a post-conflict society, including reestablishing public confidence in government institutions and the rule of law. It is indeed evident that the investigation and prosecution of perpetrators for human rights abuses can benefit countries emerging from conflict. For example, the International Criminal Tribunal for the former Yugoslavia indicted Yugoslavian President Slobodan Milosevic and four other top officials for multiple counts of alleged human rights abuses and war crimes, where not only terms of an international peace plan for Kosovo succeeded but also in this example, provisions relating to accountability did not interfere with peace and helped to establish a

foundation for emergence from conflict. Criminal prosecutions may face unique limitations as mechanisms of transitional justice but in post-conflict situations that involve mass conflict, the sheer number of potential criminals to process through the criminal justice system can overcome a delicate judicial system. Thus, in all cases of mass abuse, accountability through criminal prosecutions must be sought and the state seeking to hold responsible those who have violated human rights "must use pragmatism to temper an absolutist approach to criminal prosecutions".

The Supreme Court of Nepal has indeed acknowledged the duty to thoroughly investigate alleged abuses like in cases of murder victims Reena Rasaili and Subadhra Chaulagain, the court explicitly held that the State has a responsibility to investigate and prosecute cases involving human rights violations stating that "an act declared a crime by the law is a crime ... no matter who the perpetrator is or what the circumstances are." It accentuated that nothing should prevent the investigation into the alleged abuses because it will create a "mockery of the law and the natural rights of civilians." The court urged authorities to become "serious, proactive, and alert" for proper investigation but in practice, however, investigations into complaints were generally stalled or conducted haphazardly. In *Yasoda Sharma v. Nepal* the enforced disappearance of Surya Prasad Sharma was not investigated regardless of holdings from the Human Rights Council (HRC) that Nepal has an obligation to conduct thorough investigations

into alleged violations and to prosecute those held responsible. Police delayed their investigation into the alleged murder of Arjun Lama with possible involvement of former Minister Agni Sapkota. Such failure to adequately investigate affects Nepal's ability to prosecute those responsible for human rights violations.

Way Forward

The U.N. Secretary-General in 2004 (U.N. Doc. S/2004/616) stated that the multitude of challenges faced in post-conflict environments necessitates an approach that balances various goals, including the pursuit of accountability, the need for truth, the preservation of peace, and the building of democracy. In *Rajendra Dhakal v. Government of Nepal Ministry of Home Affairs* the Supreme Court stated "The State has the responsibility to address the incidents and realities of the degrading situation of human rights and violation of humanitarian law during the time of conflict in a serious and responsible manner for the purpose of promoting the peaceful transformation of the conflict." And thus, the best way to ensure these is to ratify the Rome Statute.

It is not that our government is unaware of the magnitude of accession to ICC or has been lingered with misinterpretations like William R Pace described, but it is the strategization of systematic impunity, where we have ourselves served by the perpetrators with representation to govern us. We require to empower and spread the citizen's task force against impunity, advocate for building capacity of human rights organizations, human rights defenders, civil

society and journalists, empower human rights defenders and lawyers on prosecution and litigation, work for policy and structural reform for protection of those who conduct advocacy against human rights violation including witness and victims, form litigation group and rapid response team to timely raise the issues of violation, to conduct advocacy and pleading, and to make the legal aid agencies more effective. Thus, we can then sensitize the political parties and exert pressure on the issue of prosecution and litigation against perpetrators to the government through accession of Rome Statute.

This strategy can be forwarded also by collective recommendations for the role that the International Criminal Court (ICC) could play in the peace process. By ratifying the Rome Statute, the transitional government could send a powerful signal to the people that it is committed to building a culture of respect for human rights and rule of law.

A follow up action plan for effective implementation of these strategies is necessary which includes filing contempt of court case against concerned authority for not implementing the court decisions on time; dissemination of information through media about non implementation of court decisions; setting up mechanism to monitor implementation status of the recommendations of National Human Rights Commission; legal and structural reform is necessary for implementation of Supreme Court decisions. The state should pay attention to strengthen decision implementation directorate, make separate legal provisions for decision implementation, and up-

date record of decisions waiting for implementation and to take action to resolve them within a set period of time, to make the decision implementation monitoring process effective and institutional coordination for decision implementation.

Some Necessary Legislative Reform

Nepali criminal law has not properly defined the crimes as stated in the international standards. There are scattered laws similar to the provisions and there are basic elements that have to be incorporated into national laws to enable States to exercise their obligations and to ensure that the national laws are consistent with international law.

Article 151 of the Interim Constitution 2007 regarding pardon and suspension of sentence passed by any courts is contrary to international standard and obligations, and should be suspended from the new constitution. The relevance of international treaties is not clearly emphasized in the Nepalese Treaties Act 1990. Nepal should acquiesce through the new constitution to the connotation of Article 12(3) of the Rome Statute. The provision of State Cases Act, 2049 where the government can withdraw from court the cases of even serious crimes and the Extradition Act, 2045 allowing government to restrain extradition (which may be crucial for international courts like ICC), should be amended. The principle of Criminal Responsibility is opposed in the Military Act, 2063, Police Act, 2012 and Armed Police Force Act, 2057 where incidents or acts which were committed by the orders or

commands of the senior officers or authorities do not qualify for criminal liabilities.

Experts have strongly recommended that prior to and after the ratification of the Rome Statute, it is ideal for Nepali government to have formed specialized working team and provided the authority to submit draft legislation which would ameliorate the national law to bring in the laws of Nepal in conformity with international standard.

Why ICC?

The ICC was established because, among other reasons, “the most serious crimes of concern to the international community as whole must not go unpunished.” It can be learned from the Africa where human rights advocates and victims commended the investigations and prosecutions by the ICC in Africa as a crucial step against impunity, in light of the concern that national legal systems in Africa were particularly weak, allowing ICC to assert jurisdiction under the principle of complementarity – not a substitute for national criminal courts but for the fact that national courts were unable or unwilling to bring perpetrators to justice. The former UN Secretary-General Kofi Annan has also said that the ICC “is a court of last resort.”

Nepal should take a strong stance in favor of accountability and respect for international law by encouraging and facilitating investigation, extradition, and prosecution of perpetrators of mass atrocity crimes. To do this, it needs to comply with the principle

of universal jurisdiction. Criminal prosecutions is beneficial to the extent that international criminal law covers violations of human rights and is pivoted on individual culpability, personal accountability and punishment, which will serve as the best deterrent and also that it may contribute to purging threatened leaders, deterring war criminals, reconciling countries, placing blame on individuals rather than on whole ethnic groups, and establishing the truth about wartime atrocities – all of which will promote long lasting and sustainable peace and security.

“Deterrence underlines the ICC’s prosecutorial strategy.” The ICC is “determined to put an end to impunity for the perpetrators of atrocities and thus to contribute to the prevention of such crimes.” These are evident from the incidents of surrender to court by the rebel leaders and prosecutions of the perpetrators of murder of AU peace keepers in Sudan, incidents of Darfur, the contributions of positive development in number of African countries like in Kenya – the peaceful election was held, weakening of dictatorship in Sierra Leone by indictment of Charles Taylor as also a crucial factor in bringing peace to Liberia. In Uganda, after the court issued arrest warrants for the leaders of the rebel group LRA the government of Sudan also signed an agreement to arrest them, which was important “because that is what forced the LRA to move from Sudan to Congo and practically stopped them from committing crimes in northern Uganda and South Sudan.”

Conclusion

The development of international legal regime under United Nations in the subsequent years necessitated the need to strengthen its pursuit of goals also in crime prevention and criminal justice. The Vienna Declaration pointed out that the challenges posed by crime and justice are at the very core of economic and social development and human security. Therefore, “continued and improved coordination and cooperation in the administration of justice and crime prevention” and in particular with judicial assistance between countries have become the crucial agenda in global society.

The fear of “deepening situation of impunity, political interference and weak criminal justice system and state institutions” in Nepal has heightened the inevitability of accession to Rome Statute. Crimes against humanity, genocide, war crimes, and torture have risen to the level of *jus cogens*. Thus the obligation to prosecute or extradite, provide legal assistance, eliminate statutory flaws, action against impunity are to be considered as *obligatio erga omnes*.

Impunity for such crime is “betrayal of our human solidarity with the victims of conflicts to whom we owe a duty of justice, remembrance, and compensation”. As the philosopher George Santayana inspired that if we cannot learn from the lessons of the past and stop the practice of impunity, we are condemned to repeat the same mistakes and to suffer their consequences.



A Decade after the Bloodshed: Who is Accountable ?

The brutal murder of the seven police officers at the hand of Maoists in the presence of several regional party leaders even though the former surrendered was covered up as a glorious tale of firefight.

“Is seven against a hundred still considered war?” reads the title of one of the stories documented in Kundan Aryal’s book chronicling the events surrounding the decade long Nepalese civil war that started in 1996. The article examines the death of seven police officers at the hands of more than a hundred strong Maoist attacking force during the early stages of the war. What was initially published as a battle between the two sides by both the police hierarchy and the Maoist rebels was found to be anything but after a small fact-finding mission conducted by an INSEC member who was also a local resident. The brutal murder of the seven police officers at the hand of Maoists in the presence of several regional party leaders even though the former surrendered was covered up as a glorious tale of firefight. Despite committing one of the gravest violations of International Human Rights Law

as well as the Geneva Conventions and the customary International Humanitarian Law, the perpetrators have walked away without any consequences.

Similar stories of human rights abuse is documented in this book in harrowing details. Published by the Democratic Freedom and Human Rights Institute, the events contained in the book demonstrate unequivocally the grave breaches of fundamental protections accorded to persons and civilians. The stories detail teachers being hung outside their schools, public executions and torture of persons accused to be informants by either side, enforced disappearances, indiscriminate roadside bombing of civilian vehicles, among many others.

One story details an attack by the Nepalese army on students celebrating Holi festival in Palpa district which resulted in three deaths. It recounts the army’s in-

discriminate shooting of a group of students who were walking home after a day-long celebration from the bus and their attempt to cover tracks after the event to escape criminality. Another similar event involved the deaths of nine farmers at the hands of the Nepalese army. The farmers at the time of their death, were separating grains from the rice harvest. The army was quick to announce the deaths as a result of crossfire, whereas the Maoists were quick to declare the dead as martyrs in the fight for liberation. Both sides used the tragedy of civilian murder to advance their own propaganda.

Some of the most harrowing events documented in this book render the readers unable to comprehend the brutality of the war and question one’s faith in humanity itself. The event of Harjung, Rolpa is gut wrenching; no matter how many times one reads the story. Angered by the multiple

back and forth previously with the security forces to get the village under their control, one night in April 1999, a group of around 25 armed Maoists attacked a house within it. Fearing potential Maoist pushback due to their stance against rebel activities within the village, close to forty villagers, including children, had been sleeping in the house at the time. Surrounding the house by all sides, the Maoist forces demanded everyone to step outside. Hearing their refusal, the surrounding forces began to torch the house. When one of the villagers attempted to put the fire out, he was gunned down. Three others burned to death as a result of the ensuing fire. When two others, including a 14-year old boy attempted to escape the house, they were gunned down as well. One villager was shot in the process of running away and the other was executed when he came out surrendering with both his hands raised up. Altogether, eight villagers died during the event. Seven were injured and were later taken to a hospital, one of whom died while receiving treatment. Two more were kidnapped by the Maoists. The cruelty of the event was such that it compelled the Maoist secretary at the time to condemn the attacks and announce internal investigations. The said investigation never transpired.

The month long abduction and subsequent killing of journalist Dekendra Raj Thapa at the hands of Maoist forces is another such gut wrenching story. He was beaten and tortured repeatedly for the entirety of a month and a half long abduction and in the aftermath of which, he was then buried alive in

The cruelty of the event was such that it compelled the Maoist secretary at the time to condemn the attacks and announce internal investigations. The said investigation never transpired.

Dailekh. Despite the leadership admitting the gravity of their actions during the aftermath of the event, the court case to seek justice for the family has been repeatedly quashed by the Maoist leadership which came into power following the signing of the Comprehensive Peace Agreement.

The author does not believe the purpose of this book is to blame one side or the other, or to even delve into their collective motivations for the atrocities committed. Nor does he wish to dig into the politics behind their actions, or whether the war itself was justified or not. Despite all this, the fact still remains: whether the security forces believed they were rooting out insurgency through their actions, or the Maoists believed they were fighting a just war to upend a political system that was not representing the concerns of those lowest in its social ladder, the brunt of the actions of both sides were singularly borne, repeatedly and mercilessly, by the common citizens who found themselves trapped underneath the brutality. Almost a decade has passed since the end of the war, but whatever minuscule hope of getting justice was envisioned by the victims and their families initially has evaporated with time. The dead lay defenseless and forgotten, and the country is moving forward without a moment's pause to consider the criminality of their perpetrators.

Former commissioner for the National Human Rights Commission of Nepal, Sushil Pyakurel, writes in the foreword about the side whose grievances have been continuously ignored in the aftermath of the war. That side which consists of the common Nepali people, powerless and vulnerable at all times, have been shunned by the political class whose only objective has been, seemingly, to cling onto the power at all costs. Will history be written without giving proper context to the grievances of these people? Are we to accept the murder of teachers, journalists, and farmers as just another instance of collateral damage?

Increasingly, it appears that the cries of the widows, and the children, and the fathers, and the mothers have been effectively pushed to the periphery and systematically muted. Aryal calls for justice. His collection of stories embody the sheer helplessness felt by the people whose entire lives have been upturned by the events surrounding the war. This is a justice worth fighting for, if not for the victims and their families, then for the collective conscience of all Nepali and for Nepal itself, because, were we to fail to do so, we would fail the nation itself and its very fabric of morality through which we feel proud to be called Nepali.

Reviewed by: Kushagra Pokharel

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