

INFORMAL

Vol. 25, No. 3, October-December 2008



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Formal–Informal

'Sustaining peace will also require efforts to heal the wounds of the conflict. That means clarifying the fate of those who disappeared and compensating victims. It means enabling the return of displaced persons to their homes. And it means undertaking an honest and inevitably painful acknowledgement of the truth of past human rights violations, and to end impunity.'

Ban Ki Moon

Secretary-General, United Nations
Addressing the Constituent Assembly of Nepal



'Poverty and inequality often exacerbate abuse, neglect and discrimination, denying millions the enjoyment of their civil, cultural, economic, political and social rights, and ultimately, their right to development. Our efforts to fight poverty and to achieve the Millennium Development Goals must be firmly grounded in the universal values and principles enshrined in the Universal Declaration on Human Rights and international human rights instruments.'

Navi Pillay

United Nations High Commissioner for Human Rights
statement issued on the occasion of International Day for the Eradication of Poverty



'I will not compromise with any individual, any party or nation on democracy, human rights, freedom of expression and press freedom.'

Girija Prasad Koirala

Former Prime Minister and President of NC
Talking to journalists at a tea reception organized by NC



'Impunity is a major obstacle in building a society where the rule of law is respected. The Government must live up to its promise to defend human rights, provide justice to victims of human rights abuses, and prosecute those who have broken the law.'

Dr Andrew Hall

British Ambassador to Nepal
In an interview with Global Nepali magazine



'Compensation should be paid by the party, which seized the properties of general people, not the government'

Madhav Kumar Nepal

Former General Secretary, CPN-UML
Talking to journalists in Nepalgunj



Translate Commitments into Reality

As the world is marking the 60th anniversary of the Universal Declaration of Human Rights on December 10, Nepal is celebrating the day with grim prospect of human rights and unfulfilled commitments towards human rights.

The country, which witnessed dramatic political transformation following the success of April movement of 2006, failed to realize the respect of human rights and rule of law. Though, the political parties have time and again expressed oral commitments to abide by the national and international human rights instruments, they failed to transform it into reality. Nepal has established itself as the nation with maximum number of ratifications of conventions in the South Asian region by ratifying 22 human rights conventions including six big treaties of the UN. Though few legal mechanisms have been established in order to transform its commitments into practice these mechanisms failed to incorporate the main spirit of these conventions, so, the time is now for the government of Nepal to translate its commitments into reality. Right to Information Act, 2007, Human Trafficking and Migration (Control) Act, 2007, Foreign Employment Act, 2007, Act Against Abduction Cases, ratification of ILO Convention 169 related to Indigenous People's Rights, Apex Court Verdict on Gender Minorities, etc. are much more remarkable legal reformations following the success of the April movement of 2006. The interim constitution of Nepal also granted constitutional status to the National Human Rights Commission but the implementation of the recommendations made by the Commission is very poor.

The government has not ratified optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2000, International Convention for the Protection of All Persons from Enforced Disappearance, 2006, Convention on the Rights of Persons with Disabilities and its Optional Protocol, 2006, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990, among others despite its repeated commitments to the international communities to do so.

In point eight of the 12-point understanding reached in New Delhi between the then agitating seven political parties and the Maoists prior to the April movement, both the sides expressed commitment to fully respect the norms and values of human rights and press freedom and move ahead accordingly. Similarly, point seven of the Comprehensive Peace Agreement signed by the government and the Maoists on November 21, 2006 states, "Both parties express their commitment towards universal declaration of human rights 1948 and international humanitarian law and basic principle and values of human rights." Other provisions of the CPA like publishing the status of the whereabouts of the disappeared persons within 60 days of the signing of the CPA; returning all the properties captured during the conflict period have not been implemented. The government could not even implement the verdict of the Apex Court related to disappearance.

The provision of fundamental rights was incorporated in the constitution of 2019 BS, which was promulgated following king Mahendra's seizure of political power after sacking the democratically elected government led by BP Koirala, but there was also the provision of putting restriction on those rights in the name of public interest. Similarly, deposed King Gyanendra had made rhetoric of human rights and rule of law but that period also saw worse situation of human rights in the country. Therefore, the new government led by Maoists, once labeled as terrorist, should learn lessons from the past and work accordingly to translate its commitment into practice. The government could do so by improving law and order situation in the country and ratifying internal instruments essential for the protection and promotion of human rights.

Letters to the Editor

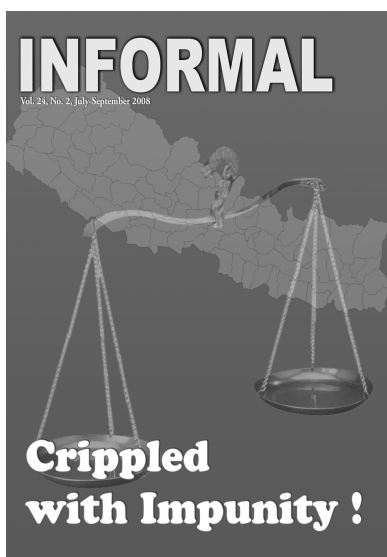
Dear Editor,

I have gone through July-September issue of quarterly publication INFORMAL. I found the magazine very good and useful to all the people who want to know about human rights and various issues related with human rights. I like the write up Addressing Disappearances: Supreme Court Ruling, Government's Failure and Victims' Expectations written by advocate Govinda Bandi. The write up gives detailed information of disappearances in Nepal and the government's passivity to address the issue. It is a matter of regret that the government of republic Nepal has also not paid proper attention towards the issue of disappearances. The magazine forced us to conclude that the political parties that came to the power following sacrifice made by Nepali people during the April movement of 2006 is not serious about the people's interest and just moving towards partisan interest.

Ramesh Chhetri
Kirtipur, Kathmandu

Dear Editor

It's my pleasure to go through your quarterly publication INFORMAL. The publication is a good reference for all people, who want to know about different issues of human rights. It's very sad to know that the government of the republic Nepal formed following the election of the Constituent Assembly did nothing towards ending impunity in the country and providing justice to the conflict hit people. It's really sad that except some people none of the vic-



tims of the grave human rights violation of mid-western region received compensation from the state as stated in the article "Getting Justice: A Far Cry for Conflict Victims". Restoration of sustainable peace is not possible without giving justice to these people. The way of making INFORMAL interactive by incorporating views of experts under Vox-Pop column is really good. Except some articles, most of the articles are just academic ones but as you have large network of people across the country, it would be better if you could give

the situation at the field level.

Archana Sharma
Kapan, Kathmandu

Dear Editor,

I have an opportunity to go through your quarterly newspaper INFORMAL (July-September 2008). All the articles published in the magazine are very thoughtful and very relevant. The magazine is like an eye-opener about the current trend of impunity of the country and the government's failure to address it. It would also be better if you had incorporated the views of political parties and the government in the issue of impunity and their failure to abide by the commitments made in the past. The government and political parties may have their opinion in the issue and it would be easier for the readers to understand their view-point as well. I would like to suggest you to make the magazine a platform of sharing conflicting ideas, rather than giving one sided views, so that it would be easier for the readers to understand the reality.

Prakash Ghimire
Bhrikutinagar, Nepalgunj

Dear readers,

How do you find this edition of INFORMAL? Please send us feedback about the contents of this magazine. Please also write on what type of content you prefer to read in the INFORMAL. Please send your valuable suggestions/ comments to us at informal@insec.org.np. Your valuable suggestions will be the best guidelines for us.

Role of INSEC for Protection of Human Rights and Promotion of UDHR



» Krishna Prasad Subedi «

"Great minds discuss ideas; Average minds discuss events; Small minds discuss people."

- Eleanor Roosevelt

As the world is commemorating the 60th anniversary of the Universal Declaration of Human Rights (UDHR) this year, the question that remains unanswered is have the people been able to enjoy these rights as enshrined in the UDHR? Nepal is commemorating this day with most of the people unaware about their rights and the government being reluctant for the protection and promotion of people's rights.

As we are now on the threshold of the 60th anniversary of UDHR, a proclamation adopted by UN on 10 December 1948, the purpose of this article, at this juncture, is to analyse and assess the achievement of the UDHR in the field of universal respect for human rights for all. In the same way, an evaluation of the role played by INSEC, a leading human rights NGO of Nepal, along with the state-centred conceptual framework of human rights. The 60th birthday of UDHR is an opportune time to review accumulating working experiences of HROs with the change in human rights universe with especial reference to Nepal.

In the 60 years of history, UDHR, no doubt, has come to be regarded as the single most important

document crafted in the 20th century and has been known as a weapon of safeguarding the dignity and liberty of the human race throughout the world. 48 member states of UN out of 56 (8 absentees: six the then Soviet block, Saudi Arabia and South Africa) have formally accepted the document at the time of commencement, which has been recognized and acknowledged as a living historical international instrument not only to save people's lives but indispensable and inalienable dignity. In the same way, UDHR is considered an extension of UN Charter and it has a few articles that refer to human rights and fundamental freedoms. UDHR, though not a treaty, is often referred to in resolutions of UN General Assembly. UDHR, including preamble followed by 30 articles, has been recognized and respected by the world day-by-day. According to the Guinness Book of World Records, UDHR is the document most translated-indeed in the world as it is translated and disseminated into more than 360 languages and dialects ranging from *Abkhaz* to *Zulu* to educate the people across the world.

Though the constitution of Nepal 2019 BS, promulgated following King Mahendra's seizure of state power, also included some rights under fundamental rights but there was the provision of putting restrictions into these rights in the name of public interest in Article 17 of the

same constitution. The provision of Article 17 made these rights limited only in the papers. Though basic rights of the people like right to freedom of expression and opinion were banned during the period, the government authorities used to express verbal commitments about human rights during some speeches. There

According to the Guinness Book of World Records, UDHR is the document most translated-indeed in the world as it is translated and disseminated into more than 360 languages and dialects ranging from Abkhaz to Zulu to educate the people across the world.

was no space for non-governmental organizations in Nepal before referendum in 2036 BS. Human rights campaign and making people aware about their rights and UDHR was just a distant dream during the period, despite the government's commitment for the protection and promotion of human rights.

INSEC, a leading human rights organization of the country, founded in 1989 with a vision of social justice and human rights, has

been tirelessly involved in campaigning for human rights and for the promotion of UDHR throughout the country. UDHR was translated in 13 different local languages in 1998, on the occasion of 50th year of the declaration of UDHR and 10th year of INSEC establishment. Importantly, during this process, INSEC initiated

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human rights.***

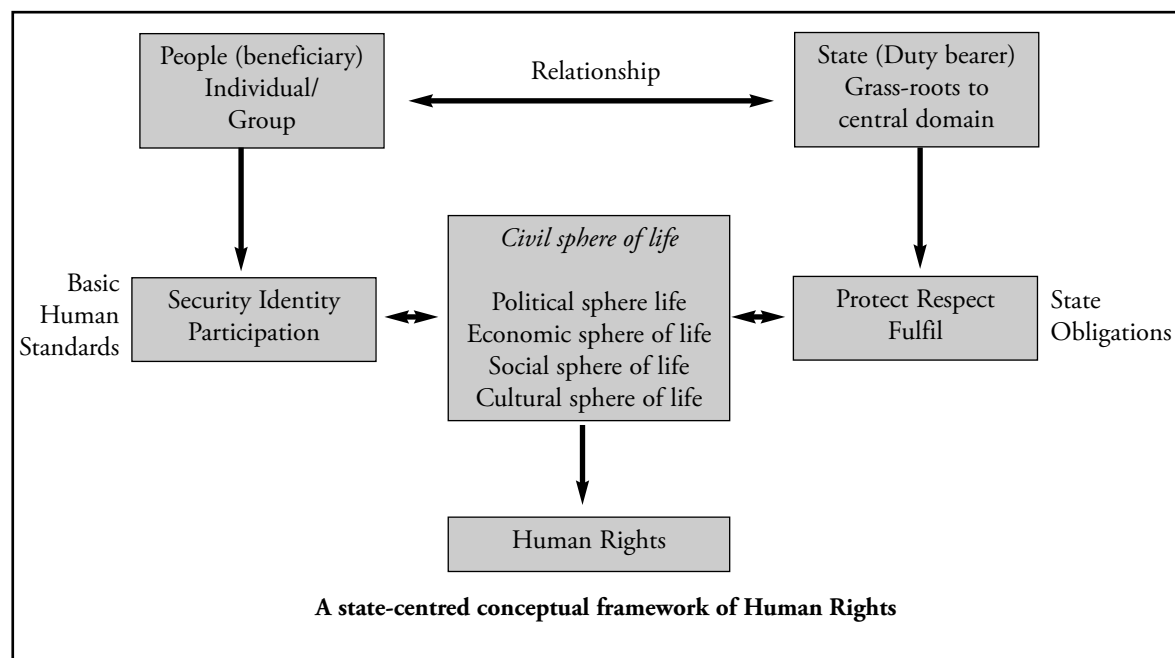
intensive interactive discussions with people of different ethnic background in the country and hundreds of copies of the UDHR translated into different languages were distributed to them. In addition, INSEC has also been launching several projects/programmes on the banner of human rights education for the pro-

tection and promotion of human rights since last two decades. One of the programmes among them is to educate grass-roots people with special focus to illiterates on human rights and contemporary issues. Human Rights Education Radio Program is being aired for 15 years through Radio Nepal - a national media and now through 13 local FM Radio Stations. Likewise, dozens of publications especially focused on UDHR and international instruments, mostly in Nepali languages, are also published and disseminated throughout the country. Similarly, INSEC along with several others human rights NGOs in Nepal has been actively participating to encourage and make people at the grass-root level aware that they have rights to know their human rights.

The role of HR NGOs has also been crucial at the international level prior to the establishment of UN. NGOs played a key role in incorporation of human rights provisions in the Charter of the UN. Similarly, ECOSOC (Economic and Social Council) authorized the consultative status to the NGOs as early as 1946, even before the adoption of

UDHR. According to David Pitts, Managing Editor of the story of the effort to draft and adopt the UDHR, "government played a key role in the drafting of the charter, but, not so well known, so also did non-governmental human rights organization-over 1300 of them, according to one source. Similarly he argues- although the UN Charter gave human rights a new international legal status, it did not specially include an international bill of human rights, which on any advocates wanted. That task was assigned to the Commission on Human Rights."

Despite these efforts of all HR NGOs as protector and promoter of human rights in Nepal, now it is the time to revise the conceptual framework of human rights in the changing paradigm. The UN charter, UDHR and the subsequent international instruments of UN clearly establish not only the interstate relationship, but equally emphasize the relationship of individuals/groups with their respective state and its mechanism. So, human rights, a special kind of rights, are defined as a relation between person/groups (beneficiary) and state (duty holder),



where state has certain obligations of protection, respect and fulfilments of basic human standards of its individual/groups. For detail, see the diagram given below:

The International Bill of Rights (UDHR, ICCPR and ICESR) and other subsequent human rights treaties hold state as solely responsible and accountable for human rights protection. Similarly, the language in the treaties has been assigned in such a way that the state has the primary responsibility for protecting and promoting human rights. Likewise, states are called upon to refrain from violating the rights of individuals and people by taking appropriate measures

violator of human rights. Let us see an example of domestic violence against women. In almost all the countries of the world, the most vulnerable place for women is their home and neighbouring place. Majority of attacks against women take place at their home. Most of these atrocities, significant challenges for the protection of women rights are committed by the non-state-actors; i.e. by individual or groups. According to the OMTC (World Organization against Torture), women are not subjected to torture by the state, but the vast majority of the violations against women is committed by private individuals and

human rights and fundamental freedom”.

Now several HR NGOs in Nepal have become successful to secure remarkable position both in domestic and regional sphere. For example, INSEC since its establishment 19 years back has been able to establish itself from a marginal entity into one of the important actors for mobilizing human rights campaign and to pressurize the government against not only the atrocities, but also for the formulation of new policies and laws for the cause of

Considering the important role of the non-state actor, in March 1999, the UN General Assembly adopted Resolution 53/144, which stipulates that “individual, groups, institutions and non-governmental organizations have an role to play and a responsibility in safeguarding democracy, promoting human rights and fundamental freedom”.



etc. Human rights and states' obligations are the two sides of a coin and a breach of the state obligations is called human rights violation. If the perpetrator is a state, we human rights activists unanimously conclude that it is the violation of human rights. But in the case of non-state-actor (individual or groups of people), we may argue that it is an act of crime rather than violation of human rights, so this conceptual framework is regarded as state centred approach, as mentioned above. We are advocating that the state has sole responsibility to protect human rights. Not only the state, even a single individual can also be a protector, a promoter, or a

groups usually family members and community members. In this perspective, we should start to think accordingly for the protection of human rights from grassroots to international arena. So, a new thinking in the changing situation should be required beyond the state centred approach for the effective protection of human rights. Considering the important role of the non-state actor, in March 1999, the UN General Assembly adopted Resolution 53/144, which stipulates that “individual, groups, institutions and non-governmental organizations have an role to play and a responsibility in safeguarding democracy, promoting

human rights. Such successes were achieved, thanks to the joint campaign along with several HR NGOs for the formulation of law, establishment of National Human Rights Commissions and to provide minimum wages for the agriculture labours etc. INSEC played important role in making Kamaiyas, Haliyas and other marginalized groups aware about their rights resulting into abolition of such inhuman systems.

From the very beginning, INSEC started its campaign to make grass-root people aware about their rights. For example, INSEC started its work by making informal sector workers of Kathmandu valley aware about their rights and also worked to make Kamaiyas (bonded labours), who were compelled to live miserable life for decades, aware about their rights. Even during the period of decade long violent conflict, INSEC always stood in favour of people and cautioned the state security forces and the Maoists on the international humanitarian laws and human rights. Three campaigners of INSEC lost their lives while working in favour of people during the period of armed conflict. INSEC always took chal-

lenges as opportunities to work for the protection of people's rights. INSEC and other HROs of the country played important role for the establishment of National Human Rights Commission (NHRC), a national human rights watchdog, and again in the appointment of Commissioners at the NHRC after the Commissioners appointed by king Gyanendra resigned from their posts following the success of April movement of 2006. During the direct rule of king Gyanendra, INSEC organized series of interactions with security forces about human rights during the period of state of emergency for the protection and promotion of people's rights during difficult period of king's direct rule. Presently,

INSEC is also working to pressurize the Constituent Assembly members to write a new constitution in the stipulated time and make the constitution human rights friendly. The challenge before INSEC and other HROs of Nepal is to incorporate the principles of human rights in the new constitution and guarantee people's rights in it.

The challenge before HR NGOs of Nepal in the changing political sphere, especially in the changing political scenario of Nepal after the historical April movement 2006, is to re-plan the working modalities, as based above on the state-centre approach, in order to cope with

the new emerging ethnic based armed conflicts. Similarly, HROs should work jointly not only as a watchdog but also propose solution in the issues of state restructuring, mentioned in the interim constitution of Nepal. Attempts should also be made to lobby for identifying common agendas for all Nepalese. Only organizing mass rally, issuing press statements without proposing solution to the problems might not work effectively to cope with the prevailing political turmoil.

The role played by HR NGOs of Nepal including INSEC for pro-active monitoring of human rights situation and excessive use of force by the security personnel in the April movement of 2006 was appreciated at the national and international level. Importantly, the role played by HR NGOs at that time, probably, was historical not only in Nepal but was an exemplary effort and lesson to be learned by human rights organizations across the world. Similarly, it is time again for HR NGO's involvement as an important player by incorporating comprehensive and systematic planning as a product of joint efforts of HR NGOs, anticipated by public and politicians, for developing common agendas with vital solutions to address current political turmoil. Though the adoption of UDHR has made a journey of six decades, Nepal is yet to do a lot in this field. The challenge before HROs is on making people aware about their rights and making concerned authorities accountable to their duties. The task could be completed only through joint effort of all HROs working in the field of human rights and social justice.

[Subedi has been working as Chief of Human Rights Education Department, INSEC Central Office, and can be reached at krishnas@insec.org.np]

□

मानवअधिकार विश्वव्यापी घोषणापत्र

(नेपाली, मैथिली, भोजपुरी, थारु, तामाङ, नेपाल, मगर, राई / बान्तवा, गुरुङ, लिम्बु र शेर्पा भाषा)



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फोन ४२७८७७० फ्याक्स ४२७०५५१

Compilation of Universal Declaration of Human Rights published in different local languages of Nepal. INSEC has translated it in 13 different local languages.

Economic, Social and Cultural Rights in the context of Nepal: Towards Anthropology of ESC Rights



» Bidhya Nath Bhurtel «

A rights-based approach is a relatively recent and burgeoning perspective that mainly culminated from the Universal Declaration of Human Rights (UDHR) adopted by the United Nations immediately after the Second World War in 1948 and the several international human rights instruments that later evolved from it. Perhaps, at present no other perspective has been so obsessive with far reaching reverberations than a rights approach, both in academics and activism. The human rights approach currently is used, and sometimes overtly abused, to interpret virtually all aspects of human endeavors, from development, policy, management and administration to social well being and practicing cultural rites and rituals. Hence, the model of rights is today hegemonic imbued with emancipatory aura and has historically specific ways of conceptualizing concepts of entitlements and obligations¹.

Like every other perspectives that earnestly aim to improve the lives of individuals, citizens of particular nation states or of the world as a whole, the concept of human rights is inherently a social construct with a modest intention of ameliorating human sufferings. And every social construct is shaped by social and cultural orientation of the people who

formulate them or are shaped by human experiences which can be local, regional, national or even intra-national. While there is no denying that the notion of human rights, by definition is universal and hence for all humans regardless of their origin, race, colour and sex living in all corners of the globe, it does connote and assume that rights are exclusively for humans. Having said this, a couple of questions might arise in our minds. First, the conceptualization of the human rights approach had its first seeds sown in the western world, which was the result of the human sufferings and experiences in that part of the world. Therefore, though the universality of the rights notion has been globally accepted, how 'universal' is the meaning of and means of securing rights really is? Secondly, since we share the planet with many other life forms, is it really fair to consider human development that can sometimes only be brought about at the cost of other living beings?

When we look at the philosophical logic behind the 'inherency' of the rights itself, the only logic I can think of is that all life forms need to survive and live a healthy live once they are born. This fundamental need is apparently translated into their 'right' to live and this translation could have developed into rights dis-

course, perhaps to legitimize such logic. The humans perhaps have interpreted this into their right to live healthy and full lives without sufferings. It can also be interpreted holistically as the will of the humans to live their lives according to their own choices, with freedom and dignity and in an environment that allows full use of their capabilities. This, no doubt, has positive implications for

While there is no denying that the notion of human rights, by definition is universal and hence for all humans regardless of their origin, race, colour and sex living in all corners of the globe, it does connote and assume that rights are exclusively for humans.

the human race as a whole, especially the innocent, voiceless and underprivileged among the humans. The aspect of equality that the principles of human rights imply is one of the factors for its acceptance by all humans. Hence, no other social construct is so unanimously and un-skeptically accepted as the human rights concept since the underlying inten-

1. Cowan, Dembour and Wilson (ed.). *Culture and Rights: Anthropological Perspectives* (2001).

tion is clearly the well being of the human race as a whole. However, it would be an underestimation to state that finding common theoretical frame that defines ways to find happiness among all peoples is simply challenging. In this regard, the human rights approach has made a decent start but needs more concrete contextual refinements in specifying measures to work towards attainment of the rights.

The purpose of this writing is not to problematize the very notion of human rights through its deconstruction but to shortly demonstrate

The revolution of the United States in 1776 that led to the adoption of the United States Declaration of Independence and the French revolution of 1789 that adopted the Declaration of the Rights of Man and of the Citizen were influential in establishing certain legal rights

that there is space for more critical analysis of the concept itself. Though it is evident that a rigorous discussion on the notion of human rights is a possibility, the intention here is to briefly analyze the state of the Economic, Social and Cultural (ECS) rights, understood in the way defined by the established institution-the United Nations- and attempt to open up a new avenue of thinking and analyzing the ESC rights in the Nepalese context.

A brief history of the emergence of human rights thoughts and principles

Whether in ancient or mod-

ern history of the world, the notions of rights have culminated from acute and violent wars that have resulted in loss of lives and property through extreme bloodshed. More often than not, the realization that the wars that have had vested economic and political interests and have killed many innocent people in acquiring such interests, has been the key concern or point of extreme remorse mainly for those who have actually succeeded in fulfilling their interests. Such realization has been converted into agreements and treaties in order to spare themselves of witnessing further sufferings of humans. These very agreements and treaties have discrete traces of human rights principles. The Cyrus Cylinder issued by the Cyrus the Great of the Persian Empire in 539 BC, the Edicts of Ashoka issued by the Ashoka the Great in the Indian Sub-continent between 272-231 BC, the Constitution of Medina of 622 AD drafted by Muhammad are all examples of the instruments that clearly had human rights elements in them, though they were not explicitly leveled as 'human rights'². In a more recent history, the interpretations of human rights have come about both as a result of violent wars, such as the two world wars, and less violent conflicts such as the trade union and labor movements, anti-colonial movements and women movements. The revolution of the United States in 1776 that led to the adoption of the United States Declaration of Independence and the French revolution of 1789 that adopted the Declaration of the Rights of Man and of the Citizen were influential in establishing certain legal rights³.

The establishment of the League of Nations in 1919 and then the United Nations after the Second World War were instrumental in

institutionalizing the concepts of the human rights in order to minimize huge losses of life and gross abuses of human rights. The United Nations has played an important role in international human rights law since its creation. Following the World Wars the United Nations and its members developed much of the human rights discourse and the bodies of law which now make up international humanitarian law and international human rights law⁴.

ESC Rights defined and endorsed by the UN

The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted by the UN in 1966 and which came into force in 1976, in an effort to formulate a legally binding human rights instrument out of the UDHR. Upon signing of this covenant, a state has the obligation to work towards the realization of the full range of human rights covered in the treaty. A state has the obligation to allocate the maximum resources possible to ensuring economic, social and cultural rights of its citizens. By signing the ICESCR, governments have accepted the obligations to progressively realize these rights within their maximum available resources⁵. The ICESCR also recognizes different levels of economic development and identifies the important role of international cooperation/development to the realization of economic, social and cultural rights. In addition, the ICESCR also requires that all people have the following rights without discrimination⁶.

- ▶ The right to work and to just and favourable conditions of work, and to form trade unions
- ▶ The right to social security

2. <http://www.en.wikipedia.org/>

3. Ibid

4. Ibid

5. Article 2.1, the ICESCR

6. Advocacy Kit produced by the Campaign for international justice for ESCR, available at <http://www.opicescr-coalition.org/>

- ▶ The rights to protection of the family
- ▶ The rights to an adequate standard of living, including food, housing and clothing,
- ▶ The rights to health
- ▶ The rights to education (including compulsory primary education)
- ▶ The rights to culture and science

In order to consolidate the establishment of these rights in the Covenant, the Committee on Economic, Social and Cultural Rights (the CESCR) has issued a series of 'general comments' that pertain to specific issues under the ESC rights. The ESC rights encompass a broad spectrum of indicators that are used to assess human well being. It comprises of physical discernible and quantifiable aspects such as economic assets, including means of production to non-conceivable and qualitative aspects such as norms, values, beliefs, attitudes, languages, identities, customs which all conventionally come under a broader term 'culture' and aspects pertaining to social relationships which can be termed 'social' entities. Hence for these reasons, many of the analysis on the state of enjoyment of ESC rights are non-exhaustive and can only be issue and context based that delineate the trends or indicative situations.

ESCR in Nepal

The state of ESC rights in Nepal, interpreted on the basis of the human rights instruments defined by the United Nations does not appear much promising. Of course, having ratified the convention formulated by the UN, the state is obliged to act according to what it considers the factors that ensure social, economic and cultural well being of the people of Nepal. These factors include the points such as just and favorable conditions of work, social security, family protection, adequate standard of

living, health, education and culture and science listed in the above paragraphs. In the following paragraphs, I attempt to discuss what the terms and phrases used to describe the elements of ESC rights mean in our context and suggest that we need a more thorough and careful thinking on the extent to which these terms have been adequately used as indicators for assessing enjoyment of various rights by the people of Nepal.

Right to Adequate Standard of Living

The very first terminology that is used to describe the state of the people of Nepal is abject poverty. The Nepal Living Standard Survey (2004) states that about 31 percent of Nepali live below the poverty line, earning less than one US \$ a day⁷. The Human Development Index puts Nepal in 136th position in the world and under one of the 50 least developed countries in the world⁸. With this description, it entails that the state has failed in its obligation to respect, protect and fulfill its obligations to ensure adequate standard of living for its citizens. While I do not doubt the sophisticated statistical methods that helped them arrive to these figures, the basis of calculations is generally econocentric to start with. For instance, the production of food in a predominantly rural agro-based economy is fundamentally for subsistence. This subsistence economy has been well supported by social institutions like *parma*, *pareli*, *aincho*, *paincho* that have been practiced by rural people for centuries. These institutions are basically about exchange of labor and goods produced at local level. The one dollar demarcation for measuring poverty is hence one dimensional that has overlooked social factors such as communal cooperation that is quite common in all parts of the country. In this regard,

additional dimension can be added to assess the well-being of people of Nepal instead of the standard of living defined economically.

Until recently, the market-led state of affairs was almost unheard of in these rural communities and people rarely died of acute hunger. With extension of capitalism and globalization under the name of neo-liberal

The ESC rights encompass a broad spectrum of indicators that are used to assess human well being. It comprises of physical discernible and quantifiable aspects such as economic assets, including means of production to non-conceivable and qualitative aspects such as norms, values, beliefs, attitudes, languages, identities, customs which all conventionally come under a broader term 'culture' and aspects pertaining to social relationships which can be termed 'social' entities.

economy, these traditional institutions are in a verge of a total collapse. Perhaps, with the dying of these indigenous institutions of resource management (such as *Dhukutis* in Thakalis, *kipot* of the Rai/Limbus in Eastern hills) community conflict management (such as *badghar* in Tharus of western Nepal) and so on, that assured the rural communities some socio-economic security, the

7. GoN.2006. Economic Survey: Fiscal Year 2005/2006, Kathmandu: Ministry of Finance

8. UNDP. 2005. Human Development Report 2005, New York: United Nations Development Programme

monetary calculations of poverty is becoming more realistic. Whatever the case, the needs of people of Nepal, especially the majority of them living in remote rural settings, are both economic and social. In this sense, they need a certain environment in which they can lead the lives of their choices. This environment needs to be provided to these people and their well being should be assessed holistically on the basis of the

The state of Nepal has formulated policies against discrimination on caste-ground against dalits under the name of untouchability and the reinstated House of Representatives (HoR) unanimously declared Nepal as an touchability-free country on 5 June 2006. However, there is an immense gap between policy and practice and there is a long way to go in order to eliminate this gap.

factors that create this particular 'environment'. While the poverty and human development indexes clearly demonstrate that the state of Nepal has failed in its obligations under the ICESCR, more indicators could be included in assessing the well-being of the people in Nepal and then the extent to which the state has played its role in ensuring it could have been analyzed to give a more comprehensive picture.

Like the indigenous institu-

tions of management, community based social security and family protection institutions existed in Nepal prior to the formation of the state institutions and mechanisms. As a part of its obligation under ICESCR or even without the obligations under it, whether such indigenous systems and mechanisms should have been protected and/or promoted is another point for discussion. Going even further, with the history of the existence of such communal systems present for a long time, whether the issue of social security and family protection was even a matter of serious concern or not for the rights of the people of Nepal is questionable.

Right to Equality

Another terminology that has even deeper connotations and manifestations is the rampant discrimination of people on caste, gender, ethnicity, religion and regional grounds. Among them caste-based discrimination is the most vicious cycle of dehumanization in the Nepalese context⁹. All thoughts and concepts on human rights implicitly and/or explicitly rejects discriminations and promote equality before law among all human beings regardless of their race, gender, color and places of origin. The state of Nepal has scored positively in 'progressively realizing' its obligations under the ICESCR to do away with such discriminations. The state of Nepal has formulated policies against discrimination on caste-ground against dalits under the name of untouchability and the reinstated House of Representatives (HoR) unanimously declared Nepal as an touchability-free country on 5 June 2006¹⁰. However, there is an immense gap between policy and practice and there is a long way to go in order to eliminate this gap.

A bit less obvious than the

caste-based discriminations but with not less implications is the biasness against women. This discrimination accrues from the deep-rooted patriarchal values that legitimized the domination of women by men. The systematic exclusion of various ethnic minorities is another factor that has resulted in widespread discriminations. In case of Nepal all these forms of discriminations have historic roots that overlap among one another and are fundamentally associated with the emergence and consolidation of vertical hierarchy based on the caste system and its concomitant norms and values. At various times in history, such discriminations were institutionalized by the state. In the medieval period, around the fourteenth century, the Mallas dominated the Kathmandu Valley and it was the Malla kings who revived the caste system and fatalistic hierarchy manifested in 'purity' of people according to the caste they are ascribed to. In other parts surrounding the Kathmandu Valley, in the areas like the khas area in the far-west and other petty kingdoms, the orthodox Hindu values were in practice. With the unification of Nepal by king Prithvi Narayan Shah of Gorkha, the rigid and fatalistic nature of the society had diluted since the Gorkhas live by ancient principles that allowed large measure of egalitarianism and personal initiatives for achievement¹¹. With the seizure of the power by the Ranas, who were actually the Khasas from the west, in 1847 and who went on to rule the country for more than a century, the society became even more rigidly divided on the basis of caste and the feudalistic values flourished ubiquitously. One of the marking points in legitimization of the vertical hierarchy on the basis of orthodox Hinduism was the old legal code compiled in 1853 AD, commonly

9. A Civil Society Report, April 2007: Status and Trends; Economic, Social and Cultural Rights in Nepal. Prepared by Sub-Committee of HRTMCC on ESCR

10. Ibid, pg 11

11. Ibid, pg. 26

known as the *Muluki Ain* (Civil Code). The code reflects the greatest concern of the rulers of Nepal for controlling the social behaviour of the people of all strata of society through Hindu norms and values derived from ancient law books, such as the *nitismriti*¹². The severity of punishment for breaches of the law began from the top i.e. from the Brahmins who were spared from capital punishment not so much out of compunction but from a desire to save the perpetrator from the sin of killing a Brahman. Hence, in the traditional society, caste of a person provided him/her the greatest social security and loss of a person's caste status could completely unhinge him/her from a meaningful material or spiritual life¹³. The differences in the ways of treating males and females were parallel with the caste hierarchy since the conventional Hindu values instilled patriarchal orientation in conjunction with the caste system. Thus in orthodox Hindu societies of the medieval and early modern Nepal, these two hierarchies dictated the every day lives of the people. The status of indigenous ethnic groups of people was somewhat 'adjusted' into the mainstream caste hierarchy who, in most cases, had the luxury to practice their tradition more freely. However, these ethnic minorities mostly were 'ruled' by the higher caste Kshetriyas and Brahmins and did not really had control over most of the resources even in their vicinity.

It has been widely accepted, therefore, that dalits or the 'untouchables' who fell into the lowest strata in the caste hierarchy have been the most under privileged people and so have been the women. With or without reference to any human rights instruments and purely on humanitarian grounds, in Nepal these groups of people have been the most deprived of opportunities, material or

spiritual gains. This fact has been well established in the national constitution as well as the ICESCR, which enunciates the need for immediate remedial actions from the government of Nepal. The formation of Dalit and Women commissions is progressive action in this regard. However, their mandates, authorities and functions have been ambiguous. The mechanism of implementation and monitoring of their actions are vague and it's functioning barely noticeable. As it is evident from the above paragraphs, the caste and gender based discriminations have its roots in the whole process of Nepalization that started from the ancient times. Hence, this phenomenon has gotten inside people's psyche and has guided common people to behave according to such a mindset. Policies formulated with the motive of cheap political popularity does not mean anything unless the leaders or the policy makers themselves show the way in doing away with such psychological orientation. In sum, it is hence clear that the traditional practice of aggrandization of higher castes and rulers merely due to their ascribed statuses at the cost of demeaning the people who toil hard and carry the bulk of the physical work on their shoulders has been absolutely regressive in assuring well-being of major sections of the population in Nepal. Even only on humanitarian grounds the whole practice institutionalized under different names has been overtly exploitative and discriminatory. There is little doubt that this state of affairs needs correction. In this sense, the ICESCR has provided a strong basis with international reckoning for the state of Nepal to act now.

Right to Education and Health

The United Nations has issued eight clear goals under the

MDGs for its member states to work on and achieve by the year 2015. Four of the eight goals are directly related with education and health, which are achieving primary education for all, reducing child mortality, improving maternal health and combating HIV/AIDs, malaria and other diseases¹⁴. Though these goals have not been linked directly with the ICESCR by the UN, these goals can be used as the indicators for assessing the state's actions towards progressive realization of ESC rights of its people.

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the extent to which these goals have been achieved or will be achieved but to delve into the aspects of education and health that need consideration in our context when we discuss about majority of people being in good health or being educated. Education, broadly speaking, is systematic collection, analysis, documentation, sharing of data, information, skills so that lives of people are more organized, comfortable and in a position to fully utilize their capabilities and potentials. Being literate is important in documenting and expressing one's learning that can be through a wide

12. Sharma, Prayaga Raj. Caste, Social Mobility and Sanskritization in the Tribal Hindu Society: A Study of Nepal's Old Legal Code

13. Ibid

14. Millennium Development Goals (MDGs). The United Nations Millennium Declaration, September 2000

range of activities ranging from studying complex documents to mere observation of every day lives. In the context of Nepal, the knowledge gathered heuristically is manifested in their use in everyday lives. Many instances of indigenous knowledge (IK) being brought into use to facilitate their life ways are common observations in remote rural parts of Nepal. The scientific advancement of the west is an achievement in itself for the whole world that opens a boundless opportunities for learning. However, it is equally important to be

ers in addition to the decline it has caused in soil fertility and in the environment as a whole. Hence, the rights to education need to consider not only being literate but the kind of education needed. In the same fashion, when dealing with health rights, the right to choose the health care practice could be a start. Health is a more direct concern for physical and mental well-being of everyone. In remote parts of Nepal, traditional healing practices, use of traditional life science such as Ayurveda has already been in use for ages. Hence, in addition to tested methods of health care, the traditional belief systems concerning their health might need greater consideration.

Right to Culture

Though the ICESCR clearly spells out that people have right to culture, the terms 'right' and 'culture' have the most uneasy relationship. Academic discussions on the interpretation between rights discourse and culture is a common undertaking among the anthropologists of the present era. These discussions go further than the provision under the covenant that states that people have right to practice or get engaged in the 'culture' of their choice.

Today, there are three major conjunctions between 'rights' and 'culture' in academic debates. Among them the first is rights *to* culture, as endorsed by ICESCR and other human rights international instruments, the second is rights *versus* culture, which explores the antagonistic relation between the two and the third is rights *as* culture, which views rights as cultural phenomenon¹⁵. The right to culture is the most common interpretation and has been discussed in above paragraph. The rights versus culture school of thinking views rights and culture as binary

opposites and is a severe critic of the human rights discourse itself. According to this line of thinking, the human rights discourse is animated by a fundamental tension between, on the one hand, the desire to establish the universal, on the other, the awareness of the cultural differences, which seem to negate the possibility of finding a common ground on which to base such rights¹⁶. This debate, which has apparently reached an impasse, persuades us to choose between competing claims of universalism and cultural relativism¹⁷. The rights as culture thinking attempts to see rights as aspects of culture with specific relations with the social life. This perspective was brought out by Anthropologists who, at present, have moved a step ahead by considering culture as a heuristic analytical abstraction or the means to better understand rights processes¹⁸.

Conclusions

In the above paragraphs, attempts have been made to explore alternative methods of thinking about the rights. While the rights discourse has obsessed many academicians, professions and activists all round the globe, finding common conceptual foundations for working together is still very challenging. The UN human rights instruments have no doubt have reached milestones in defining universal principles for betterment of lives of humans. The ICESCR for instance, has established definite standards towards which the state parties are obliged to work towards. However, there are aspects of the rights such as their universality and inherency that can be looked in a multi-dimensional manner.

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selective of the theories generated in the western world so that it can be utilized to improve the life styles of the people of rural people articulated in their own terms. In the present context, a recognition and systematic recording of the rural indigenous agricultural technologies could be a starting point to help agricultural production. We are all too aware of the devastating results in production caused by the use of chemical fertiliz-

15. Cowan, Dembour and Wilson (ed.). *Culture and Rights: Anthropological Perspectives* (2001)

16. Ibid

17. See also the articles, *Following the Movement of a Pendulum: Between Universalism and Relativism* by Marie-Benedicte Dembour and *From Group Rights to Individual Rights and Back: Nepalese Struggles over Culture and Equality*

Government's Apathy towards People's Right to Food and Pain of Karnali



»Pratibedan Baidya«

With the new government of the republican Nepal led by the Maoists in place, the plights of thousands of people of Mid and Far Western Region, who have to suffer from food crisis every year, still remains unheard. Though discussions are on about achieving double digit growth rate and also making monthly income of every Nepali to rupees 12,000, the people of these region have been compelled to dream of better future with empty stomach and their only request to the government is-supply food on time so that we do not have to suffer every year.

Though food crisis is not a new phenomenon for people of remote districts of Mid and Far Western regions, the government's passivity to supply food on time in these districts has been a major factor of repeated food crisis in these districts. As the food produced in these regions can feed the population only for three to six months and for the rest they have to depend either on the food supplied by Nepal Food Cooperation or food assistance provided by various development agencies. Lack of road facilities and high transportation cost and poverty in the districts are also some factors behind it. For example, it costs over 100 rupees to transport one kilogram of food to Dolpa, a remote district of Karnali region, and the economic condition of the people is very poor, so, they can not afford to buy necessary food. Very high transportation

cost also hinders sufficient quantities of food from being transported to these food deficit districts. Rural poverty is a key factor affecting food security in rural Mid-Western and rural Far-Western regions, with poverty incidence at 46.4 percent and 45.6 percent, respectively, according to estimates by CBS, WFP and World Bank

Marginal farm households in the hills and terai represent the largest vulnerable group, followed by rural service castes, agricultural labourers in the terai, marginal farm households in the mountains, porters and poor urban households. Within these livelihood classes, women, children, indigenous peoples and members of the lower caste groups (Dalit and Janajatis) are among the most food insecure. Long-term food security in Nepal remains problematic. Agricultural production has not gained pace with the growth in population, and average yields are low compared to neighboring countries. The government's investment in agriculture is very low, leading to food crisis. Though there is an urgent need for investment in seed research and supply, and in the expansion of irrigation facilities, the government has not found time and resources to concentrate in these things leading to food crisis in the country every year.

According to the UN food agency, World Food Organization, about 2.5 million Nepali of 12 districts of Mid and Far Western regions

need immediate food assistance this year and 3.9 million others are at risk of becoming food insecure due to soaring food prices. The Supreme Court of Nepal had given a landmark verdict on 25 September and issued

Though food crisis is not a new phenomenon for people of remote districts of Mid and Far Western regions, the government's passivity to supply food on time in these districts has been a major factor of repeated food crisis in these districts. As the food produced in these regions can feed the population only for three to six months and for the rest they have to depend either on the food supplied by Nepal Food Cooperation or food assistance provided by various development agencies.

an order to the Government to supply food to 12 districts of Mid and Far Western regions, which are suffering from food crisis, but the government lacks the resource to address the issue as the government has been concen-

Establish Effective Accountability Mechanisms for Human Rights

The human rights situation of the country did not improve significantly even after the end of decade long Maoist insurgency. As the country is gearing up to celebrate 60th anniversary of the Universal Declaration of Human Rights with much fanfare on 10 December, we asked different experts about how they assess the human rights situation of the country and what should be done to improve human rights situation of the country. Excerpts:

Shobhakar Budhathoki, Human Rights Defender/Conflict Analyst

Even after the signing of the 2006 peace agreement, human rights continue to deteriorate. Ordinary civilians, especially those in rural areas, face ongoing threats to basic human rights. Institutionalization of impunity and lack of effective remedy to address the trauma of victims further encourage perpetrators to be involved in inhuman acts and violation of the rule of law. Practices of the state awarding immunity have also fueled non-state actors, particularly splinter groups and terai-based armed groups to commit serious human rights abuses and criminal acts without consequence.

The government needs to act quickly to introduce legal mechanisms to address increasing impunity, as well as bring perpetrators into a judicial process. This includes those continuing to operate illegally, as well as those who violated human rights and humanitarian laws during the period of the conflict and democratic movement. These steps can be initiated through the implementation of the recommendations of government-formed inquiry commissions, including the Mallik and Rayamajhi commissions. However, independent commissions as laid out in the peace agreement that address past human rights abuses, such as the disappearance and truth commissions, should be formed through a consultative and inclusive process.

Similarly, independent, impartial and competent national institutions, particularly legislative and judiciary bodies and the National Human Rights Commission are essential elements to conduct activities related to ending impunity and ongoing non-compliance of international commitments and constitutional arrangements. Civil society can play an important role in efforts of establishing accountability mechanisms, such as providing recommendations to the state and serving as unofficial ombudsman, to ensure access to justice. While the country is drafting a new constitution, the principles upon which the country will function, it must recognize the importance of universally accepted norms of human rights, rule of law, and democracy in the constitution and during the constitution-making process. Such constitutional guarantees will eventually enhance a human rights culture and accountable state institutions.



Dr. Bhimarjun Acharya, Constitutional Expert

The human rights situation of the country is not satisfactory and is deteriorating. The situation is deteriorating due to non compliance of the state actors as per the principle of human rights. The state actors are involved in violation of human rights. The state has the responsibility of protecting the rights of the people and as per the classical definition of human rights, state is the only violator of human rights. There has been rise in human rights violations from non-state actors as well, thanks to the armed conflict in terai.

The government and all state actors should abide by the rule of law. If all



the state actors work for the protection and promotion of human rights, the human rights situation will improve. All the state actors should comply with the principles of human rights and law enforcing bodies should work actively. The state should act toughly to maintain rule of law in the country and discourage the tendency of human rights violations.

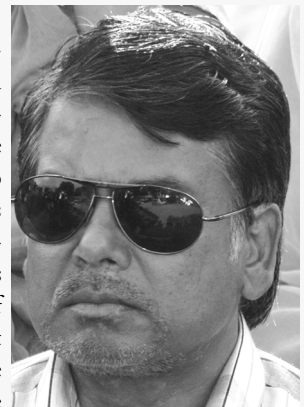
Bishowkant Mainali, President, Nepal Bar Association

As per the evaluation of Nepal Bar Association, the human rights situation of the country is very poor. Both the state actors and non-state actors have been involved in human rights violations and human rights abuses. The human rights situation of the country can not be improved without the formation of competent government. The role of civil society is not sufficient to improve the human rights situation of the country. There is a conflict in the character of the party and the government. As the political parties did not have the culture of abiding by the rule of law, the same character is reflected in the government. If the law abiding culture is not developed in the political parties and the government, human rights situation of the country will not improve. If the government and the political parties of the coalition government do not abide by the law and the agreements they signed in the past, the human rights situation will not improve, so, the system of abiding by the rule of law should be developed to improve the human rights situation of the country.



Charan Prasain, Human Rights Activist

Nepal is considered as one of the countries in the world having active and effective human rights and civil society groups functioning since 1990. Since then political and social leaders have been also actively participating in the human right related activities. However, after the restoration of democracy, the aspiration of people to witness the improving situation of human rights remained unattained. Moreover, politicians, who led the governments, intended to forget the hardships and issues related to human rights while they were out of power. Now a day's political banners are being misused to commit crimes. Rule of law is in a verge of being non-functional. The culture of impunity is deepening. Safety and security of the citizens is in a collapsing stage. The incidents of killings, torture in police custody, abductions and extortions are increasing. State is not taking accountability in these issues. On the contrary, justice is replaced by money in the name of compensation. Environment of uncertainty prevails in almost all sections of the society.



In this context, there are enormous challenges to work on to improve the human rights situation in Nepal. However, followings measures could be considered to improve human rights situation in the country;

Reaffirm, respect and implement the commitment expressed in the Comprehensive Peace Accord (CPA). It should be the first and foremost duty of the government to implement it. The issues relating to human rights and the victims should be addressed immediately. Since the signing of the CPA, almost all political agendas are being implemented but issues related to human rights and providing justices to the victims are overlooked. The call of the day in Nepal is the effective enforcement of rule law and ending the culture of impunity. Political party cadres should refrain from all kinds of criminal acts. Rebuilding thrust between the people and the government is essential. Human rights should not be limited to lip services. Strong mechanism of its implementation should be ensured. Adherences to international norms and values must be obligatory. Human rights should be the yardstick to assess government performance. Success or failure of governments should be judged on their human rights records. State should work hard to foster the culture of human rights in the country. Nepal, without fail, should be the party to International Criminal Court (ICC) to end the prospective gross violations of human rights including crime against humanity, genocide and war crimes and abolish the culture of impunity. The reinstated Interim parliament has already directed the government to ratify ICC. The civil society and human rights groups are constantly putting pressure for its ratification but till date government has turn deaf to initiate the process. Finally, our immediate focus should be in the making of new Constitution of Nepal that ensures human rights to all and owned up by each and every citizen of the country.

trating on power games rather than providing immediate relief to the people suffering from food crisis. According to the government statistics, the country has surplus food

According to Statistics of the Agriculture and Co-operative Ministry of the GoN, a total of 5195211 metric-tons of food was produced in Nepal in the year 2007/08, but the total need of the food is 5172844 metric-tons. Quiet contrary to the government's claim of food security, a study conducted by World Food Programme and Nepal Development Research Institute said that 3.9 million people of rural areas of the country face food insecurity and also recommended the government to immediately supply food to these people. The report also presented alarming picture by saying that of the food insecure people, 67 thousand people need immediate emergency food support.

production by 22367 metric-tons in the year of 2007/08, but the people of rural areas had to suffer a lot. According to Statistics of the Agriculture and Co-operative Ministry of the GoN, a total of 5195211 metric-tons of food was

produced in Nepal in the year 2007/08, but the total need of the food is 5172844 metric-tons. Quiet contrary to the government's claim of food security, a study conducted by World Food Programme and Nepal Development Research Institute said that 3.9 million people of rural areas of the country face food insecurity and also recommended the government to immediately supply food to these people. The report also presented alarming picture by saying that of the food insecure people, 67 thousand people need immediate emergency food support. The government statistics shows that there was food deficit in the country only in the year 2005/06 and 2006/07, but people at the remote areas of the country have been facing food crisis every year.

Nepal's worst food deficit districts are Mugu, Humla, Kalikot, Jumla and Dolpa of remote Karnali region, where most Nepalese live on less than US \$1 per day. These districts have been facing food shortages since many decades. Food production from farming in these districts barely lasts six months each year. But, now the situation has become much worse with significantly less food being produced, recent assessments show. The region suffered the worst drought in 40 years from February to March this year. According to 2004 UN Human Development Report on Nepal, Nepal has one of the world's highest rates of chronic malnutrition: affecting nearly 63 percent of Nepalese children.

The Universal Declaration of Human Rights (UDHR) recognizes the right to food. Article 25 (1) of the UDHR states, "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." Similarly, Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which Nepal is a party recognizes "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions". The Interim Constitution of Nepal 2006 guarantees Right to Food as Fundamental rights. Article 18 (3) of the Interim Constitution says, "Every citizen shall have the right to food sovereignty as provided for in the law." As the country is passing through a transitional period it lacks capacity to address the issue of food crisis.

Various Non-Governmental Organizations and human rights organizations time and again have drawn the attention of the government about the deepening food crisis but the latter has failed to address the issue. Issuing a joint press release on 8 August, 24 various organizations active in Mid and Far Western Region appealed the government to

Situation of Food Security in Nepal			
			in metric-tons
Year	Food Production	Needed Food	Surplus/Deficit
2001/2002	4543049	4463027	80022
2002/2003	4641466	4565820	75646
2003/2004	4884371	4671344	213027
2004/2005	4942553	4779710	162843
2005/2006	4869439	4890993	-21554
2006/2007	4815284	4995194	-179910
2007/2008	5195211	5172844	22367
Source : Ministry of Agriculture and Cooperative			

immediately supply food to remote famine hit districts of Mid and Far Western Region. The release also stated that many people of these districts have been displaced, thanks to the food scarcity. The release also stated that failure at the part of the government to supply food on time in these districts is responsible for making the situation worse. Similarly, issuing a press release on 15 October on the occasion of the World Food Day, INSEC, a leading human rights organization of Nepal, also appealed the government to immediately supply foods to food crisis affected districts. INSEC appealed the government to establish an effective mechanisms and structures in line with the policy and programme of the government of Nepal, implement the provisions of the International Covenant on the Economic, Social and Cultural Rights and the Concluding Observations of the Committee on the Economic, Social and Cultural Rights and also immediately implement the verdict of the Supreme Court issued on 25 September. A report on the state of famine and food crisis in Mid-western region prepared by a joint task force consisting of Sub-Committee on Economic Social and Cultural Rights (ESCR) under Human Rights Treaties Monitoring Coordination Committee (HRTMCC), Right to Food Network-Nepal (RtFN) coordinated and hosted by Rural Reconstruction Nepal (RRN), National Human Rights Commission and UN Office of the High Commissioner for Human Rights based on the field visit to the key affected districts in Mid-west region by hunger and food insecurity held wrong development policy of the government responsible for the deepening food crisis of the Mid and Far Western Regions. The report also stated that unequal distribution of food is also a cause of famine in these

districts.

Every year the government has to supply food to most of the hunger hit districts of Karnali region and other districts of Far Western Region as the food produced in these districts are not sufficient for more than six months and most of the districts of the region are yet to be linked with road. Many people of these two regions have to be displaced to India just to earn their livelihood, thanks to the deepening food crisis. "We did not have anything to eat, we went to forest for some days in search of some

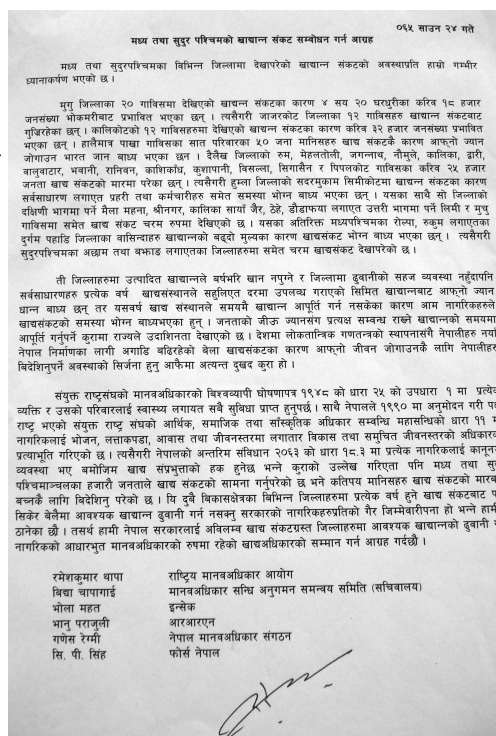
Karnali Highway was expanded up to village level as the region is very rich in terms of natural resources. The Kathmandu Post daily on its July 7, 2008 edition of newspaper reported that hundreds of women had gathered at the District Development Committee (DDC) Bajura and threatened to commit suicide consuming poison en masse if they were not provided food at the earliest, which is enough to understand the situation of food crisis in the district.

Due to lack of regular transportation facilities, people of remote districts of Mid and Far Western regions have to depend on the food supplied by the government. As there is no effective supply mechanism, people have to suffer as the food to be supplied in these famine hit districts remains in storehouse. The flights of Nepal Airline Corporation (NAC), the only flag carrier of the country, is not regular and the private sector airlines also could not prefer to fly in these areas as these routes are not lucrative from economic point of view. In this context, every year the country has to face food crisis. So, rather than making some cosmetic changes, the government has to seek some long term solution of the deepening food crisis. Rather than making hue and cry when the problem emerges, the government should make permanent mechanism for food supply in these areas before the crisis starts. The development agencies also rather than providing emergency food need to invest for increasing the food pro-

edible things but could not get, so, we were compelled to go to India just to save our lives," said Nava Raj Khatri of Kalikot district of Mid-Western region of the country, rolling tears from his eyes. Khatri was heading to India just to solve the problem of hand to mouth. Assistant Chief District Officer of Kalikot, one of the worst famine affected District of Karnali, opines that the problem of food crisis could be resolved if the

duction. People have high hopes from the new government so if the government fails to respect the right to food, basic right of the people, it could lead another form of conflict in the country. Therefore, the government should act properly on time before it is too late.

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A press statement issued by various organizations working in Mid and Far Western Region urging the government to immediately supply food in various districts of Mid and Far Western Region, which are facing food scarcity.



Interview

Respect for Human Rights Must Transcend Politics

Kul Chandra Gautam has served as the highest-ranking Nepali in the UN System for over three decades. Mr. Gautam is a former Assistant Secretary-

General of the United Nations, and Deputy Executive Director of UNICEF. He has extensive experience in socio-economic development, humanitarian assistance, human rights and international diplomacy. In his long and distinguished career with the United Nations, spanning over three decades, Mr. Gautam had extensive dealings with senior levels of donor governments, development agencies, NGOs and the corporate sector in policy dialogue, advocacy and resource mobilization.

During the decade-long Maoist insurgency of the country, he worked hard informally to secure the support of the UN and other key players to promote peace and reconciliation in Nepal. He spoke strongly against violence, impunity and violation of human rights by all parties in the conflict. As the world is celebrating 60th anniversary of the Universal Declaration of Human Rights, Editor of *INFORMAL*, **Pratibedan Baidya**, spoke with Gautam about the Human Rights Situation of the country. Follows excerpts of the Interview:

Q. As we are celebrating the 60th anniversary of UDHR, do you think that Nepali people have been able to enjoy the rights as enshrined in the UDHR ?

The answer to this question is both yes, and no. Compared to the dark days prior to the 2006 Jana Andolan, the human rights situation in Nepal has improved considerably. But compared to our people's expectations and the norms of UDHR, we still have a very long way to go.

Let us recall that when the Universal Declaration of Human Rights was adopted in 1948, Nepal was not yet a member of the United Nations. The concept of human rights and civil liberties were hardly known in Nepal. There were many human wrongs but few human rights. The legal code of the time justified caste discrimination, untouchability, unequal treatment of women and men. The only rights that people had

were those granted to them through the benevolence of the Rana rulers.

Compared to those days, even the Panchayat period was an improvement. Statutorily the Panchayat era constitution and Nepal's New Legal Code (Naya Muluki Ain) recognized the principle of human rights, and formally abolished quite a few discriminatory laws and practices.

The Constitution of 1990 was a huge improvement in terms of human rights. It recognized the fundamental rights of citizens and instituted an independent National Human Rights Commission to safeguard those rights.

Although there were many teething problems of a new democracy, development and human rights were beginning to take roots in Nepal's countryside in the 1990s. But then the violent Maoist rebellion catapulted Nepal in an unexpected

direction. The royal palace massacre, followed by King Gyanendra's creeping coup d'état and dictatorial powers led to serious deterioration of human rights.

Both the Maoists and the royalist government committed wanton violation of human rights – the former in the name of revolution and the latter in the name of counter-terrorism.

The worst time for human rights in Nepal's recent history was perhaps during King Gyanendra's direct rule when under the TADA act, people were arbitrarily arrested, many political leaders and activists were incarcerated, the media was muzzled, innocent civilians suspected of being anti-royal regime or Maoist-sympathizers were killed and kidnapped often during fake encounters; and vigilante groups burned whole villages in Terai.

The Maoists too committed

terrible atrocities, including abduction of large numbers of school children, forcible recruitment in their "People's Liberation Army", wanton extortion through intimidation, and even killing of journalists, destruction of civilian infrastructure, and rough "justice" dispensed through their "people's courts".

Fortunately, those dark days are over, and people can now breathe a sigh of relief.

Q. How do you analyze the current human rights scenario of the country ?

Following the 2006 jana andolan, many previously neglected issues of human rights have come to the fore. Historically marginalized, deprived and discriminated groups, such as Dalits, Janajatis, Madhesis and women have started asserting for their rights.

The current Interim Constitution of Nepal reflects the spirit of the Universal Declaration of Human Rights. To ensure that rights are not only enshrined in the Constitution but implemented in practice, the Constitution includes a number of affirmative actions for better representation of previously under-represented groups in Nepal's governance structures, such as the Constituent Assembly.

While Nepal's new Interim Constitution reflects the spirit of UDHR, in practice, there is a huge gap in its implementation.

In terms of *civil and political rights*, the culture of violence and impunity that was institutionalized during the decade-long conflict continues even to this day. Youth groups affiliated with political parties, especially the Maoist YCL, continue to take law into their own hands. Even after the establishment of a government under the leadership of CPN-Maoist, various trade unions and activists affiliated with the ruling party continue to threaten newspapers, media houses, factories and businesses.

Supposedly, to counter this, activists of other political parties are resorting to similar measures leading to a sense of insecurity on the part of the general public.

Independence of judiciary is a key feature of democracy and rule of law. Although under a lot of stress, the Supreme Court of Nepal has largely remained independent. For example, in response to *habeas corpus* petitions, it has released virtually all persons held under preventive detentions.

In terms of economic and social rights, widespread and degrading poverty is probably the biggest violation of human rights in Nepal. People had high expectations that following the abolition of monarchy and advent of genuine democracy, there would be rapid progress in their livelihoods.

But lower level courts are weak, poorly resourced, subject to corruption and intimidation by local authorities. In such situation, human rights cannot be protected when people feel that the rule of law is not honoured, when even law enforcement officials feel insecure, and the judiciary feels it cannot act independently and fearlessly.

People feel insecure because none of the perpetrators of serious human rights abuses in the past – both Maoist and the state security forces – have been brought to justice, and an atmosphere of impunity persists.

In terms of *economic and social rights*, widespread and degrading poverty is probably the biggest violation of human rights in Nepal. People had high expectations that following the abolition of monarchy and advent of genuine democracy, there would be rapid progress in their livelihoods. Regrettably, there has not been any dramatic progress in tackling the issues of unemployment, food insecurity, and rapid expansion of basic services.

In fact, the newly elected government continues to be embroiled in political issues and has not managed to give due attention to issues of post-conflict reconstruction and development. For the vast majority of Nepalis, a sense of fulfillment of their human rights will come about only when there is a noticeable improvement in their economic well-being.

Violation of child rights: One of the inexcusable violations of human rights in Nepal, is now even though the civil war has ended, and the Maoists are actually heading Nepal's new government, large number of child soldiers verified as such by the UN Mission to Nepal (UNMIN), are still being held in cantonments with adult combatants.

One would have thought that such children would be among the first beneficiary of the "peace dividend". And although UNICEF and many donors are ready to help with the required funds already in hand, the child soldiers of Nepal have not yet been released and rehabilitated under various pretexts.

As both the Secretary-General of the UN, and his Special Representative on Children and Armed Conflicts, urged during their recent visits to Nepal, I really hope that the government of Nepal will release all minors from cantonments immediately without any further ifs and buts.

Q. UN OHCHR has been working in Nepal since last few years. How

do you analyze the performance of OHCHR and how long should it continue in Nepal ?

UN OHCHR came to Nepal at a time when human rights violations – both by the then royal government and the Maoists – were at their peak. OHCHR's presence, its nationwide monitoring of the human rights situation, and its reports and recommendations for improving human rights have been very timely and helpful.

To some extent, OHCHR's presence and monitoring has had a deterrent effect in restraining the behaviour of Nepal's parties to the conflict from their wanton disregard of people's human rights. Its reports have given the people of Nepal a more objective picture of the human rights situation not coloured by the self-serving prejudices of the parties to the conflict.

In that sense, I believe that OHCHR office in Nepal has done a good job, and I feel its continued presence is beneficial for Nepal.

It is unrealistic to expect that OHCHR's presence alone would dramatically improve the human rights situation in Nepal or in any other country. OHCHR is an advisory and monitoring body. It does not have the mandate or resources to enforce its recommendations made to the government and other parties. It is the duty of Nepalis to follow OHCHR's recommendations.

Regrettably, we Nepalis have a tendency to ignore or dismiss OHCHR's recommendations when they are not to our liking. Thus the Nepal Army and the government did not really heed OHCHR's admonition when it presented a hard-hitting report on the massive violations of human rights, including cases of torture, inhuman and degrading treatment and disappearance of detainees perpetrated by RNA's Bhairabnath battalion in the heart of Kathmandu.

Similarly, when OHCHR pointed out serious violations of

human rights by the YCL, the CPN-Maoist dismissed it, with some senior Maoist leaders even insinuating that OHCHR was biased and following a pro-American agenda.

When OHCHR issued a statement criticizing excessive use of force by Nepali police against peaceful Tibetan demonstrators, all Nepali leaders hid their heads and ignored or dismissed it with flimsy diplomatic arguments.

Basic human rights are universal and must be above political considerations. Unfortunately, in

It is unrealistic to expect that OHCHR's presence alone would dramatically improve the human rights situation in Nepal or in any other country. OHCHR is an advisory and monitoring body. It does not have the mandate or resources to enforce its recommendations made to the government and other parties. It is the duty of Nepalis to follow OHCHR's recommendations.

Nepal, politics still trumps and triumphs over human rights. We will not be a true and mature democracy until we learn to respect fundamental human rights as non-negotiable obligations of our State and of all citizens.

Q. How do you evaluate the role played by civil society and human rights organizations for the protec-

tion and promotion of human rights ?

Nepal saw the establishment of many human rights organizations following the advent of multi-party democracy after the first *Jana Andolan* of 1990. These organizations have been very helpful in highlighting breaches of human rights, non-implementation of laws meant to end disparities and discrimination, and in particular pointing out the many subtle ways in which historically deprived and marginalized groups of our society continue to be exploited and excluded.

During the decade long conflict, many civil society organizations and human rights activists were daring enough to point out excesses committed by both the government and the rebels. Some of these organizations and their leaders even tried to be helpful in conflict resolution and reconciliation.

A major drawback of many human rights NGOs is that they are seen to be aligned with one or the other political parties, which tarnishes their credibility. Quite a few of these NGOs are heavily dependent on funding by foreign donors, and to some extent their agenda caters to fashionable global priorities rather than to the pressing needs of Nepal.

To their credit, most human rights NGOs have been able to rise above party affiliation and donor dependence, and have done a commendable job of educating people, exposing human rights abuses and defending their victims.

On balance, I believe that the work of human rights NGOs in Nepal is very positive. I would encourage them to strive to be even more courageous, less partisan and more grass-roots based. Vigilance by civil society is needed for the protection of human rights everywhere, including in Nepal.

[How do you find the Interview ?

**Please send your comment to
informal@insec.org.np]**

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Better protection of Human Rights through Public Interest Litigation:

An International Approach and Nepalese Context



►► Batkhishig Badarch ◀◀

1. Why PIL?

Since its adoption in 1948, the Universal Declaration of Human Rights is celebrating its 60th anniversary this year. During this period, new progresses and changes have appeared in the field of human rights protection and promotion mechanisms. All countries in a globalizing contemporary world are seeking for implementing human rights and democracy, and developing social justice. UDHR, which has 60 years of a long history, and a number of the international human rights treaties and conventions, in addition, national laws are serving as a legal guarantee in favor of enforcing human rights.

Nevertheless, human rights, democracy and social justice, which have been considered as a value of humankind will be impotent without real implementation of those international and national human rights laws. Therefore, the United Nations High Commissioner for Human Rights observed in 1995 “there is no shortage of international human rights standards nor unfortunately is there a shortage of situations demanding improvement of respect

for human rights. Our basic challenge is to implement human rights standards and make human rights meaningful in people’s lives.”¹

According to the ratified international treaties and national laws, the state concerned shall be responsible before the citizens for the creation of economic, social, legal and other guarantees ensuring human rights and social justice, to fight against violations of human rights and freedoms and to restore infringed rights. However, in most cases of violations of human rights, including, when it involved in mass and particular groups such as disadvantaged people, protection and promotion of human rights shall be certainly required more effective human rights protection tools. A *court*, which has been considered as a guarantee of human rights, freedom, dignity and justice and, *public lawyers, bar associations and non governmental organizations* (NGO), which serve public as a legal aid when their legal rights has been infringed, are key actors to protect human rights and promote access to justice.² Specially, as we are talking to protect the rights of disadvantaged-women, the poor, and ethnic

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1. Mr Jose Ayala Lasso, Further Promotion And Encouragement Of Human Rights And Fundamental Freedoms, Including The Question Of The Programme Of Methods Of Work Of The Commission Follow-Up To The World Conference On Human Rights, UN Economic and Social Council, Commission on Human Rights 52 Session, 1995, E/CN.4/1996/50/Add.1 at para 9.

2. Access to justice, Practice notes, UNDP, 2004, p 7

and religious minorities, which have been their rights violated constantly and massively, a term 'Public Interest' is involved in it.

Public Interest refers to the well-being of unspecified groups in a given society. The concrete forms of public interest include interest in case of consumers' rights, environment

in the "public interest" and has been violated. The litigation, therefore, includes litigation for private interest and that for others' interest.³ In another words, 'Overall protection of human rights', or 'litigation of public interest-Public Interest Litigation' means positive circumstance protecting human rights and restoring infringed rights shall be created by the Public Interest Litigation.

PIL is litigation aimed to promoting social welfare, as opposed to protecting or promoting the material or economic rights of individuals or groups. It is thus litigation that focuses on the "public interest". It means PIL addresses to protect the rights of public; it does not serve to the purpose of protection of individual's rights. The goal of such litigation is to accomplish more than simply resolving a legal dispute between two private parties; the goal is to influence and impact the development of the law in order to achieve social justice and to benefit the wider public.

Successful Public Interest Litigation brings a wide range of positive impacts to the society: PIL can influence to create *law reform*, in which a way of supporting the rule of law, quoting human rights standards (e.g. PIL urges courts to apply existing favorable laws that are either underutilized or not used at all), identifying gaps in the domestic law, changing laws or policies that violate constitutional provisions, international human rights instruments and regional human rights standards, documenting institutionalized injustice and educating the judiciary and legal profession. As well as, measures of *policy reform*, e.g. fostering political discussion and change in culture of civil service, compelling government

authorities to take necessary action and promotion of government accountability are possible to undertake in the result of successful PIL. A *social change*, e.g. raising awareness of right to information and its potential in public and empowerment of marginalized groups are the main goal of such kinds of litigation. The utilization of PIL ensures that there is "access to justice", and so it promotes the democratic concept of equality of all citizens before the law.⁴

2. Public Interest Litigation and protection of human rights: In the international level

Public Interest Litigations, in the modern sense, originated in the United States in the 1960s, when, amid challenges to many social systems in the wake of drastic social changes such as the Civil Rights Movement and the Vietnam War, many public interest groups were formed, which were represented by lawyers and jurisconsults avid for social reforms, worked to protect the environment and safeguard rights of consumers, women, the colored people and minors, as well as many other public interests, and called for new and fairer social systems. The litigations submitted for these objectives were called Public Interest Litigations.⁵

Article 29.2 of UDHR says 'In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society'. This article demonstrates that the

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protection, public services and administrative incompetence. Preservation of public interest should fall under the category of Public Interest Litigation, whether or not the litigants' own interest is included

3. Article on 'Public Interest Litigation and the development of human rights', Zhang Wanhong and Ding Peng, China, www.chinahumanrights.org

4. 'Strategic Litigation: Bringing Lawsuits in the Public Interest,' Chapter Three in "Pursuing the Public Interest," Public Interest Law Institute at pages 106 to 109; <http://siteresources.worldbank.org/INTRANETSOCIALDEVELOPMENT/Resources/Gloppen.rev.3.pdf> and Hershkoff, Helen, "Public Interest Litigation: Selected Issues and Examples": <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/PublicInterestLitigation%5B1%5D.pdf>

5. Article on 'Public Interest Litigation and the development of human rights', Zhang Wanhong and Ding Peng, China, www.chinahumanrights.org

rights of individuals are restricted by others' rights and general welfare (public interest) is considered as a priority. Any provision of UDHR is a fundamental and pertinent to other international human rights treaties and conventions and all member States. Thus, not only international conventions and treaties such as International Covenant on Civil and Political Rights (article 12.3), International Covenant on Economic, Social and Cultural Rights (article 4), also national legislations, for example, the Constitution of Mongolia has also included the articles to respect public interest and general welfare. Even if there is no code of public interest law in the United States, there are numerous references to the public interest in the legislation and jurisprudence of the United States and other countries⁶.

In the courts of India, Pakistan, Bangladesh, the Philippines, Tanzania, Uganda, South Africa, Australia, Israel and Nigeria, in international tribunals and before regional commissions, law and litigation are important mechanisms for enforcing human rights, extending public participation, improving economic conditions, encouraging grassroots empowerment, reforming laws and legal systems, and fostering government accountability -- aspects of what some commentators loosely refer to as "rule of law" values.

In a consideration of PIL by legal system of the countries, in the countries following the common legal system, the public interest/test case is important because, if successful, it sets a precedent in promoting human rights; health; gender and racial equality; environmental protection and other issues. When appeals courts hand down rulings on such matters, the lower courts are bound to follow the judgments in cases that

present the same issues. PIL in America and India is the most experienced and has a long history; it was able to create more positive precedents on the field of human rights. A good example of these kinds of litigation can be found in the American case of *Brown v Board of Education*. In this case, the United States Supreme Court decided that the racial segregation of public schools contravened the Constitution, as it deprived the minority black children of equal opportunities in education. The Court ordered that the schools become racially integrated. It was remarkable and historic victory on PIL in the field of human rights.

In civil law systems, public interest/test cases, while not constituting binding precedent as that concept is understood in common law systems, still carry important weight in shaping judicial determinations. The omnipresent possibility of appeal does much to influence judges' decision-making, and courts strive for uniformity in interpreting codes and statutory provisions. In making clear the concrete forms of PIL in some countries which have civil law system, such as France, Japan and Mongolia, the PIL is usually a means of relief to the plaintiff whose rights and interests have been harmed by the administrative organizations' decisions and who pleads for a court's review to check the legality of such decisions and nullify unlawful decisions. In another words, the above-mentioned characteristics are being involved in the classification of 'Administrative Public Interest Litigation' and 'Civil Public Interest Litigation'⁷.

A number of PIL organizations and public interest litigators are working worldwide and its covering area in public interest litigation on human rights and good governance are still expanding, in practice, PIL is

conducting in the field of human rights, the judiciary, environment, public accountability and issues and controversies⁸.

3. Protection of public interest in Nepal

Although Nepal has no separate documents on public interest, we can see several terms related to 'public interest' or public welfare. Nepal is probably the only country in the world, which has a constitution that explicitly provides space for PIL.⁹ Article 107 (2) of the Interim

A number of PIL organizations and public interest litigators are working worldwide and its covering area in public interest litigation on human rights and good governance are still expanding, in practice, PIL is conducting in the field of human rights, the judiciary, environment, public accountability and issues and controversies

Constitution of Nepal 2007 and article 88 of Constitution of the Kingdom of Nepal 1990 mention that, 'The Supreme court shall, for the enforcement of the fundamental rights conferred by this Constitution, for the enforcement of any other legal right for which no other remedy has been provided or for which the remedy even though provided appears to be inadequate or ineffective, or for the settlement of any constitutional or legal question involved in any dispute of *public interest* or concern, have the extraordinary power to issue

6. Who defines public interest? Edwin Rekosh, PILI, 2005, page

7. Article on 'Public Interest Litigation and the development of human rights', Zhang Wanhong and Ding Peng, China, www.chinahumanrights.org

8. Public Interest Litigation: Potential and Problems, International Environmental Law Research Center, 2000, <http://www.ielrc.org/content/a0003.pdf>

9. Article on 'Public Interest Litigation and protection of human rights in Nepal', Dr. Ram Krishna Timalsena, www.inseconline.org

necessary and appropriate orders to enforce such rights or settle the dispute'. Most importantly, article 107 (2) of the Constitution has conferred power to the Supreme Court to resolve Public Interest Litigations in which legal and constitutional questions are involved. In fact, it is the

enshrined in the Constitution are found to have been violated.¹⁰

Article 19(2) of the Constitution also says 'The State shall not, except in the *public interest*, requisition, acquire, or create any encumbrance on the property of any person; and article 12 (3) mentions that 'Every citizen shall have the following freedoms: (e) freedom to move and reside in any part of Nepal. Provided that, (4) nothing in sub-clause (e) shall be deemed to prevent the making of laws which are in the *interest of the general public*, or which are made to impose reasonable restrictions on any act which may jeopardize the harmonious relations subsisting among the peoples of various castes, tribes, religion or communities'. These articles of the Constitution also have been involved to the article 29.2 of the UDHR, which has promoted public interest.

Nepal has a common law system and its Constitution has entitled to the court to resolve public interest cases. Therefore, public interest/test case is important for Nepal. According to some sources during the past 12 years, the Supreme Court has entertained various PIL cases and issued different kinds of orders in various areas, most notably in environmental, gender, juvenile and social justice.¹¹ In 2007, the Supreme Court issued several directive orders regarding human rights through PIL jurisdiction, namely, women's rights, child rights, rights of persons with disabilities, minority rights etc.¹²

Though the exercise of PIL jurisdiction in Nepal is in its initial stages, the Supreme Court has been delivering important judgments concerning public interest protection. For instance, in a case involving pol-

lution of the Bishnumati River, the Court said: "Environmental protection and a pollution free environment are related to the right to life. Thus, if any citizen comes to the Apex Court with a matter of public interest or importance concerning the environment, it is the obligation of this Court under Article 88(2) (13) of the Constitution of Nepal to provide a reasonable and effective remedy on the basis of judicial activism." Article 88 sets the stage for Public Interest Litigation to play a vital role in nurturing the rule of law and Nepal's young democracy.¹⁴

But the execution of court orders in PIL is not very encouraging. There are many examples of such non-compliance of Court orders. If the trend of disobeying court orders continues, the whole endeavor of PIL will be rendered meaningless.¹⁵ In Nepal, governmental failure to comply with the law is widespread and infectious. Though the Supreme Court has been able to issue 100 directives regarding policy making and reform, thirty directives on public interest and twenty seven directives in other disputes after the announcement of the Constitution of the Kingdom of Nepal 1990, the implementation level of these directives is not satisfactory. Among the directives issued by Supreme Court, only twenty directives have been implemented, twenty five directives were not implemented and twenty six directives are on the way to implementation.¹⁶

According to the Interim Constitution, the Supreme Court enjoys extraordinary powers to provide remedy to violation of human rights which has been considered to be the fundamental rights of the peo-

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most distinctive feature of the present Constitution. In other countries such provision is not available in the constitution itself. Under Article 107 (2), any Nepali citizen may file a case of PIL to the court for decision and directions. The Supreme Court has powers to issue orders or decrees if the fundamental rights and freedoms

10. Ibid,

11. Ibid,

12. Human Rights Yearbook, 2008, INSEC, pages 68-73

13. Article 107 (2) of new Interim Constitution

14. Article on 'Public Interest Litigation and protection of human rights in Nepal', Dr. Ram Krishna Timal, www.inseconline.org

15. Ibid,

16. Human Rights Yearbook, 2008, INSEC, page 75

ple and public concern disputes, if necessary. On the other hand, any citizen can move to court seeking remedy against violation of his fundamental rights or issues of public concern. In this case, in order to enjoy the rights of litigation, not only PIL organizations and human rights organizations have been working in the field of protection of human rights through PIL jurisdiction. There are not a few successful examples regarding protection of human rights through PIL judiciary by independent advocates and non lawyers such as from former prime minister, president of Nepal Bar Association and UN agencies to journalist, teachers and students of law school. For example, in the result of a case filed by advocates Sapana Pradhan and others, the Supreme Court issued show cause notice to the government in order to know why married daughters should not be given share of parental property.¹⁷

Also, some specific activities of human rights NGOs are contributing to protect human rights through public interest concern. One good example on it is Human Right Yearbook of INSEC which is published every year. Sometimes the events recorded in the Human Rights Yearbook have been used to support victims for legal action by the judiciary.¹⁸ Maoist victim filed a case at the Supreme Court in 2006 and mentioned that the incident about violation of human rights is recorded in the Nepal Human Rights Yearbook 1996-2007.

4. Improving effectiveness of protection of human rights through PIL

There are many countries which have a big success both in the field of protection of human rights through PIL and were able to access justice in its result. It is important to

use PIL for protection of human rights and access to justice more effectively and creatively. Although we are able to undertake successful PIL and win a case, the result of the PIL will be fruitless if the real implementation of those positive judgments is not encouraged. This challenge regarding the implementation of judgment of PIL cases is still facing in Nepal, which has not a little experience in PIL. Human rights organizations, therefore, have been urging to develop a strong decision execution mechanism at the earliest.¹⁹

'PIL in Nepal has become publicity interest litigation, not Public Interest Litigation'. Therefore, in the information-world, which respects human rights and freedom, it is appropriate in Nepal, which has young democracy if publicity on human rights and public interest concerns is free of prohibition. The constitution of Nepal has entitled to any citizen complain to the court seeking remedy regarding issues of public concern. It is great opportunity for protecting human rights by using PIL and human rights and public interest organizations and activists should effectively use this legal positive provision.

In conclusion, first, an effective utilization of PIL to protect and promote human rights must be our priority. NGOs and human rights activists can and should make more effective use of the law as an instrument for achieving social purposes, and this will contribute to the development of a more vibrant public sphere and protection of human rights. In addition, public interest and human rights legal educators must continue to bring theory and practice closer together in an effort to improve the critical reasoning of current and future judges and other legal professionals. In conjunction with

that effort, there is a need to develop unified guidelines for PIL as well. As well as, public awareness raising on human rights and public interest concern, and developed decision execution mechanism must be emphasized. Finally, bar associations, courts, state bodies, and NGOs must explore new ways of collaborating to ensure adequate legal aid on public interest concern, bringing us closer to the ideal of

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equal access to justice for all. Finally, PIL is one important tool to ensure human rights guarantee; legal and political reform and social change.

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17. Ibid, page 68

18. INSEC, Annual Report, 2007,

19. Human Rights Yearbook, 2003, INSEC, page 33

Implementation of Rights Enshrined in the UDHR in the Context of Nepal

»Tejman Shrestha«

There is nothing inhumane like being indifference towards others.

G. B. Shaw

Introduction

It took almost eighteen years for the birth of the International Covenant on Economic, Social and Cultural Rights (ICESCR) after the United

Economic, social and cultural rights provide the conditions necessary for prosperity and well-being of every human being.

How can we imagine that a person, who lacks even his two times meal a day, exercises his civil and political rights? So, we can't create a just society without implementation of economic, social and cultural rights.

Nations General Assembly Resolution had adopted and proclaimed the Universal Declaration of Human Rights (UDHR) on 10 December 1948. Though the Covenant has already received the

status of international law, the debate on full realization of the ESC rights is still ongoing. Nepal also ratified the convention on 14 May 1991 along with the International Covenant on Civil and Political Rights and its First Optional Protocol.

It is not difficult to assume that a needy man is not free to enjoy his civil and political rights. According to Asbjørn Eide, freedom from want has been seen from the very beginning as an essential component of the fundamental freedoms that human rights seek to secure¹. A state can't be said human rights friendly if it fails to provide mere necessities to its needy citizens. If the state fails to use its resources to uplift the life standard of its people and maintain social justice, no sustainable peace can be maintained. Though violation of civil and political rights, on the surface, seems to be responsible for conflict, violation of ESC rights equally contributes to add hatred against others resulting into violence.

Implementation of Rights: Most Pressing Issue

Civil and political rights are considered to be expressed in very precise language, imposing merely negative obligations, which do not require resources for their implementation, and therefore can be applied

immediately. On the other hand, economic, social and cultural rights are considered to be expressed in vague terms, imposing only positive obligations. The rights under civil and political rights need resources for implementation. Let's take the example of the right to fair trial; the government has to make competent court, prosecutors, public defense attorneys, professional police, and regular updating to them by providing necessary trainings. Thus, it is a way of escaping by saying that it needs positive obligation to realise the ESC rights as enshrined in the Covenant.

Economic, social and cultural rights provide the conditions necessary for prosperity and well-being of every human being. How can we imagine that a person, who lacks even his two times meal a day, exercises his civil and political rights? So, we can't create a just society without implementation of economic, social and cultural rights. Millions of people are deprived of their basic needs, "not because the resources are unavailable to provide for these basic human rights, but because societies are badly governed, [. . .] or simply because there is a failure of understanding about how to go about the practical implementation of these rights"². So, implementation of economic, social and cultural rights is a most pressing

1. Adhikari, Bipin, (Ed) *Conflict, Human Rights and Peace: Challenges Before Nepal, Rishikesh Shaha Memorial Lectures* "The Right to Development and the Duty of States to Enforce Economic, Social and Cultural Rights", 2003, National Human Rights Commission of Nepal, Lalitpur.
2. Bertrand G. Ramcharan (Ed.) *Judicial Protection of Economic, Social and Cultural Rights, Cases and Materials*, available on www.brill.nl/product.asp?ID=24168, accessed on Nov 8, 2008

issue in the international human rights agenda.

Misinterpretation of Progressive Realization

Since all the state parties may not have all the resources to achieve the provisions of the Covenant, progressive realization has become the way-out with good faith. However, Eide argues that "the words 'achieve progressively' have often been misinterpreted to imply a weak or non-existent obligation by the states³." The understanding of treaties is achieved through the treaty body's issuance of General Comments and General Recommendations, though guiding principles, they are wisely recognized as authoritative guides to the treaties. The Committee on Economic, Social and Cultural Rights points out that while interpreting the term *progressive realization* "a full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time". However, it imposes an obligation to the state that it has mobilized its resources "as expeditiously and effectively as possible towards that goal"⁴ as enshrined in the Covenant.

Trends of Violation of Rights in the Nepalese Context

The violation of ESC rights remains less noticed than that of the civil and political rights. During the decade long armed conflict, over 13 thousands people lost their lives. But, the number of people losing lives due to lack of basic sanitation, primary health care and immunization and not being able to consume the necessary calories for the survival is, no doubt, much higher over the same period of time.

In Nepalese context, the most burning issue related to economic rights is of not returning the property captured by the Maoists during the armed conflict. According to reports,

Maoists had captured the properties of civilians in different parts of the country even after signing of the Comprehensive Peace Accord on 21 November, 2006. The government has announced that it will provide compensation and relief to the people, whose properties were captured by the Maoists and have not been returned yet, from the state's coffer. Another serious issue related with the capture and destroy of the property is lack of responsibility of the concerned authorities. However, in a positive note, some economic and social rights have been enshrined as fundamental rights in the Interim Constitution of Nepal, 2007 but the provision put in the article 'as provided for in the law' has made these rights only as legal rights not fundamental rights.

Freedom from Hunger

Food crisis worldwide has become an alarming phenomenon these days. In our country also, every year during the monsoon season, the food deficit districts of the Mid and Far Western regions suffer heavily from the famine. Article 11 of the Covenant, clearly mentions that freedom from hunger is fundamental human rights and it is the responsibility of the state to keep its citizens free from hunger. At the same time, it is the responsibility of the whole world as well to save the starving population from famine as the convention says that the state party may ask international community in this regard. The developed nations are responsible for skyrocketing price of the food-grains since they have begun to use it as alternative source of energy in the name of reducing the global warming to which they themselves are responsible on the one or the other way.

Social Justice and Poverty

International Labour Organization (ILO) has made clear vision that sustainable peace is impossible

without social justice. In Article 2 of the Philadelphia Declaration, it has been stated very clearly, "All human beings, irrespective of race, creed or sex, have the right to pursue both their material well being and their spiritual development in conditions of freedom and dignity of economic security and equal opportunity"⁵. So, all human beings have the privilege of pursuing material well being and spiritual development freely and

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in a dignified way. Poverty anywhere is a threat to prosperity everywhere. Any effort of attaining the goal of social justice is not possible without better use of the world's productive resources.

The Millennium Development Goal has accorded first priority to eradication of extreme poverty and hunger. Statistically, despite the decade long armed conflict of the country, the poverty percentage has decreased in Nepal, which is positive aspect. The national poverty in 2003/4 was nearly 31% according to

3. See supra note 2, p. no. 169

4. Office of Human Rights Studies and Social Development, *General Comments adopted by The Committee on Economic, Social and Cultural Rights*, p.15-23

5. Basu, Rumki. (2005 Rev. Edition). *The United Nations, Structure and Functions of an International Organization*, Sterling Publishers Private Limited, New Delhi, p. 240

the survey conducted by the National Planning Commission, which is nearly 11% less than the year in 1995/96⁶.

Caste Based Discrimination

The ill practice of untouchability is still in place in various parts of the country despite the provision in the constitution and other laws outlawing them. Unless comprehensive administrative measures are accompanied by social actions, we can't have satisfactory result. The tussle between so-called upper caste and lower-caste people regarding the inter-caste marriage and *dalits* not allowing to enter many Hindu temples are enough to show that just enshrining in the literature is not sufficient. They are not more than "cosmetic attempt"⁷

Trend of Complaining on Rights Violation

Within the fiscal year

2064/065, out of 1173 cases registered at NHRC only 88 cases were related with violation of ESC rights, which is just 7.5% of the total case registration⁸. Likewise, 53 cases of internally displaced persons were registered this year. When added, both occupy more than 12 percent of the total registered cases. The violation of ESC rights ranked in third position in terms of filed complain at the NHRC after killing and disappearance in this fiscal year. In the past, mostly the recommendations of the NHRC were related with civil and political rights but this year, out of 62, nine recommendations are related to the ESC rights. The trend shows that people are being aware about the ECS rights as well.

Conclusion

Since Nepal is in transitional phase after the end of decade long armed conflict, realization of ESC

rights really matters in transformation of the country. As discussed above, a needy man can't be a free man, hence the dreaming of full realization of all human rights without providing the mere necessities is not more than a day dreaming. Enshrining some economic and social rights as fundamental rights in the constitution and enactment of the related specific laws are positive aspects. However, just mentioning in the legal documents without the environment of enjoying is really a 'cosmetic attempt'. At the same time what we need is the honesty and dedication towards the nation and the people. After the 60 years of proclamation, Nepal has to walk long to materialize the provisions enshrined in the UDHR.

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6. Statistical Year Book of Nepal, 2007, Government of Nepal, Nepal Planning Commission Secretariat, Central Bureau of Statistics, Ramsha Path, Thapathali Kathmandu, Page no 447-450
7. Chapagain, Raju P. (Ed). *Nepal Bar Council Law Journal*, 2007; Tek Tamrakar, "Economic, Social and Cultural Rights: A Jurisprudential Perspective", 2008, Lalitpur.
8. National Human Rights Commission, Annual Report, 2064/065 BS, p. 73, 74

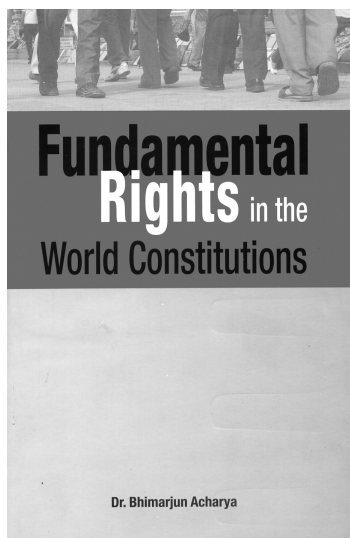
Human Rights Index					
Number of people murdered and abducted from 20 November 2007 to 20 November 2008 (Second year of signing of Comprehensive Peace Agreement)					
Perpetrator	Type of Incident		Perpetrator	Type of Incident	
	Murder	Abduction		Murder	Abduction
State	34		Terai Army	5	
Maoists	1	149	Nepal Defense Army	3	1
CPN-UML	1		Virus Killers	2	
YCL	3	77	Aakhil Terai Mukti Morcha		3
Youth Force	1	3	Terai Madhesh Mukti Morcha		2
Madheshi Tigers		3	Liberation Tamil Terai of Ilam	1	
Janatantrik Terai Mukti Morcha (Goit)	6	7	Terai Tigers Liberation Front	1	
Janatantrik Terai Mukti Morcha (Jwala Singh)	29	49	Unidentified	142	200
Janatantrik Terai Mukti Morcha (Rajan)	4	3	Others	16	
Janatantrik Terai Mukti Morcha (Ranabir)	1		Kirat Labour Organization		6
Samyukta Janatantrik Terai Mukti Morcha	3	10	Tharu Rastriya Mukti Morcha		2
Terai Mukti Sena	1		Loktantrik Limbuwan Rastriya Parishad		5
Madheshi Mukti Tigers	6	12	Rastriya Janamorcha		23
Terai Madhesh Mukti Morcha	1	2	VC Force		3
			Madheshi Tigers		3
			Liberation of Terai Ilam		1
			Madhesh Rastriya Ekta Party		1
			Kirat Janawadi Workers Party		1
			Total	261	563

A Journey of fundamental rights in world constitutions

At a time when the constituent assembly is mulling to draft a new constitution, advocate Dr. Bhimarjun Acharya has come up with a compilation of fundamental rights in the constitutions of various countries. A book "Fundamental Rights in the World Constitutions" is a collection of fundamental rights of the 135 countries out of 195 countries of the world. Dr. Acharya, who has been specializing in Constitutional Law, compiled these fundamental rights from constitutions of various countries. The book starts from chapter on Constitution of the Republic of Afganistan-2004 and ends on Constitution of the republic of Zimbabwe 1979.

In a bid to contribute for constitution drafting process, advocate Dr. Acharya has presented all the practices of fundamental rights in the constitution of these countries. The book makes it easier to have knowledge about the fundamental rights, which are in practice in various countries and incorporate essential rights in the constitution to be drafted from the Constituent Assembly. It is crystal clear that without fundamental rights, no one can enjoy the rights guaranteed in national and international laws, because fundamental rights are the inherent rights of individuals over the world not only in certain countries. So, comparative study of fundamental rights of various countries make members of the Constituent Assembly include these practices in new constitution.

The book has been divided into 135 chapters and each chapter



Fundamental Rights in the World Constitutions

Publisher: Pairavi Book House,
Kathmandu

Writer: Dr. Bhimarjun Acharya

Edition: 2008

Price: Rs. 999.00

carries the provision of fundamental rights in that particular country. In the context of South Asia, there are almost the same rights under the fundamental rights like right to equality, freedom of association, protection of property right, right to freedom of expression, right to privacy, freedom of movement, freedom of assembly, right to work, right to life and liberty, right to information, right to free education, freedom of religion and enforcement of fundamental rights etc. The book indicates there are not much difference between fun-

damental rights of South Asian countries and other countries. He has also presented the context of the country while presenting fundamental rights of the particular country, which will be useful for the readers while understanding the fundamental rights. He has also presented historical background of the development of constitution and inclusion of fundamental rights in the constitution of the particular country. As fundamental rights are the core features of every constitution, Acharya's effort is very relevant in the context of Nepal at a time when the Constituent Assembly is drafting new constitution.

Basically, the book states that fundamental rights can be slightly different in the context of respective countries according to its situation because each country has different status of socio-economic, geo-political, changing political situation, cultural issues and needs of people in the countries. Though, according to Constitution of Oceania, *'the only true and proper function of government is to protect its citizens from force and fraud. The government is to be strictly limited to providing that protection. This Constitution is the result of the collaboration of many who have seen the deterioration or destruction of societies based on other Constitutions.'*

The book captures fundamental rights of world in a simple presenting way. However, the scope of the book is very limited and the author could not make comparative study of fundamental rights in the context of Nepal. The book could be a powerful tool for drafting the new constitution if the writer had presented analytical view about the fundamental rights in various constitutions of the world and recommended the model suitable to Nepal.

Jivanta Wagle

Improve Law and Order Situation for Human Rights

There has not been any let up in violent activities and human rights violations even after the country entered into the republican era. Not only violent armed groups of terai, which have been engaged into violent criminal activities, in the name of politics, the high handedness of the Maoist affiliated Young Communist League and UML affiliated Youth Force remain continued. Despite the new government's commitment to improve the frail law and order situation of the country, the situation remained same. The law and order situation of the country is almost out of gear and security seemed almost collapsed. In this context, rather than working to maintain law and order situation and improve security and concentrate on the main mandate of drafting the new constitution, all the political parties have been engaged in the power game. Two youth wings of two largest ruling parties of the coalition government have been making mockery of the Home Minister's commitment not to spear anybody involved in taking law and order situation into their hands. The question that remains unanswered is why are the political parties that are in the driver's seat not able to check the misdeeds of their youth wing and maintain law and order situation of the country? The activities of these two youth wings have inspired other political parties to form such organizations, which is a threat to the human rights situation of the country.

The government's initiative

of holding talks with armed groups of terai has not been getting momentum as the government failed to prioritize the issue. For example, Minister for Peace and Reconstruction, who is the chief of the government's committee formed to hold talks with armed groups of terai, is also a member of Special Committee formed for Army Integration and the latter issue has sidelined the issue of talks with the armed groups. The series of human rights violations and violent activities will not stop unless the government distinguishes between criminal activities and political activities of the armed groups of terai and act accordingly as most of the groups do not have anything to do with politics and are involved in criminal activities. Though the armed groups of terai had announced ceasefire in October during the festive time, series of violence did not stop, which is enough to know the intention of these armed groups. The government, in the name of maintaining peace in the country, should not accept unrealistic demands of the terai groups. Their violent activities will not be justified in the veil of politics.

This year marks not only the 60th anniversary of the Universal Declaration of Human Rights, but also the 10th anniversary of the Declaration on Human Rights Defenders, but not only the general people, human rights defenders of Nepal are also in risk. A report of INSEC, which shows that at least 64 human rights defenders faced risk during the period of 16 July to 16

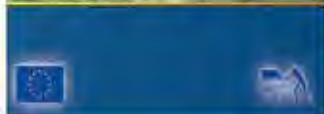
October for advocating in favor of people's rights, shows the volatile human rights situation of the country. The government failed to take necessary measures for the protection and promotion of human rights despite its commitment at the national and international level. The government is yet to ratify various international instruments aimed at protection and promotion of human rights and ending impunity. Failure of the government to ratify the Rome Statute of the ICC is a case in a point.

People in remote parts of the country are not even aware about their rights, so, violation of rights is a regular occurrence in these areas. In this backdrop, celebrating the day by holding various programmes in city areas will have no meaning, so, it is the time for translating the government's commitment for the protection and promotion of human rights into reality. The government should strictly maintain law and order situation of the country. People involved in violation of human rights should not be speared in the name of politics. National and international human rights organizations should also work to make people aware about their rights and for the protection and promotion of human rights. As the country is passing through a transitional phase, failure at the part of the government to maintain law and order and protect people's rights will lead to another form of conflict in the country, so the government should be serious in this regard.

Pratibedan Baidya

Livelihood at Risk

Findings from Mid-western Nepal



Land Holding Pattern

in Mid-western Nepal



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