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सदस्य, माननीय गोविन्द शर्मा पौड्याल
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आयोगको पूर्व स्वीकृतिबिना यस प्रकाशनका लेख र सामग्रीलाई बौद्धिक वा शैक्षिक प्रयोजनबाहेक व्यापारिक वा अन्य प्रयोजनका लागि पुन: उत्पादन एवम् मुद्रण तथा कुनै पनि माध्यमबाट प्रयोगमा ल्याउन पाइने छैन ।
बौद्धिक तथा शैक्षिक प्रयोजनार्थ स्रोत खुलाई आवश्यक अंशहरू साभार गरी प्रयोग गर्न सकिने छ ।

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

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

The Slow Train to Transitional Justice: Nepalese Context

-Ghanashyam Khadka

Abstract

A complete 4 years have passed since the formation of the TJ mechanism in Nepal but, the Truth and Reconciliation (TRC) and the Commission on Investigation of Enforced Disappeared Persons (CIEDP) have failed to make the desired impact. The government of Nepal has amended the TRC Act for the second time extending the term of the commissions for 2 more years with the promise of reconstructing them.

This research paper examines the strengths and the weakness of transitional justice process to address the demand of victims by analyzing empirical data collected through semi structured in depth interviews with stake holders such as victims, truth commissioners, lawyers, human rights activists and media persons. The result shows that the mechanism of transitional justice is frustratingly to slow to deliver justice to the victims. In order to accelerate the effect of the TJ mechanism this paper offer several recommends to the many stakeholders of the TJ such as the Government of Nepal, victims, civil society and international community.

Introduction

1.1 People's War in Nepal

In 1996, the leader of the then Communist Party of Nepal (CPN Maoists)[1] Dr Baburam Bhattarai submitted a 40-points demands[2] of political and social reformation to the Government of Nepal.[3] The demands included inclusive polity, re-negotiating Nepal's relationship with India and holding an election of Constitutional Assembly (CA) to draft a new constitution and to establish a federal republic state.[4] Due to an indifference response to their demands by the Government, the Maoists launched "People's War"- an armed insurgency" against the state. In its early days, the People's War was mainly

1 Hereafter, "Maoists"

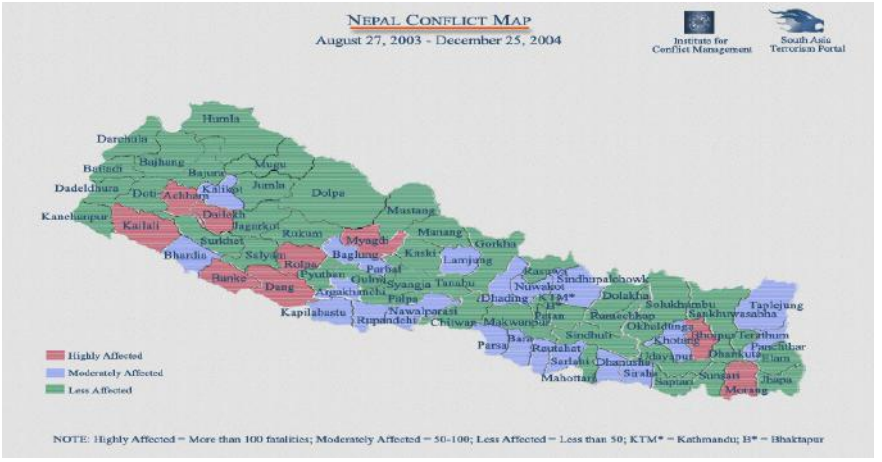
2 Please refere to *Appendix 1*.

3 Sher Bahadur Deuba was the prime minister of Nepal when the conflict began. Ironically, he came in the power fourth time after the promulgation of the Constitution 2015, with the support of Maoists.

4 Mahendra Lawoti, "Evolution and growth of the Maoist insurgency in Nepal." (2010)*The Maoist insurgency in Nepal: Revolution in the twenty-first century* 20: 1. P. 7

concentrated in the mid and far western districts of Nepal. Initially, the armed struggle of the Maoists was perceived as a minor break of rule and order as they lacked suitable weapons, big network and large number of militias.[5] Within a few years, the armed struggle engulfed the tiny Himalayan state which lies in the south Asia between India and China.[6] By the year 2002, the conflict spread to the point where the Government of Nepal lost its control over the security and administration in most part of the country except the two mountainous districts namely Manang and Mustang as shown in *Figure 1.1.* During the conflict, over 9,000 incidents of human rights violations were recorded in Nepal, which resulted in the deaths of at least 13,000 people, enforced disappearances of over 1,300 and tortures, abductions and rapes of many individuals.[7]

***Figure 1.1*: Map showing intensity of the Maoists conflict in Nepal (2003-2004)**



Source: South Asia Terrorism Portal (2017)[8]

However, the exact number of fatalities is yet to be known as several incidents, which took place in some of the most remote areas of Nepal went unreported.[9] Furthermore,

5 International Crisis Group. *Nepal's Maoists: Their Aims, Structure and Strategy*. (2005) *Asia Report no. 104*, P. 1

6 OHCHR, "The Nepal Conflict Report" (2012) P. 14. available at: http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/NepalConflictReport.aspx (Accessed: 18 June 2017)

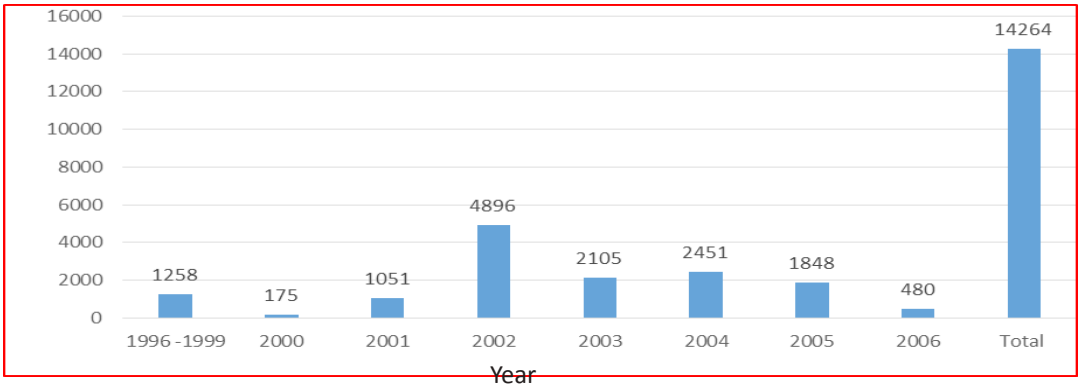
7 OHCHR, "The Nepal Conflict Report" (2012) P. 14. available at: http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/NepalConflictReport.aspx (Accessed: 18 June 2017)

8 Conflict Map of Nepal, "South Asia Terrorism Portal" 2017, Available at: http://www.satp.org/satporgtp/countries/nepal/database/conflictmap.htm. (accessed: 15 Aug. 2017)

9 Emma Sidebotham, Joanne Moffatt, and Kevin Jones. "Sexual violence in conflict: a global epidemic." *The Obstetrician & Gynaecologist* 18, no. 4 (2016): 247-250.

the total number of killings varies in the records of different institutions depending on their system of reporting. For example, United Nations Human Rights Office of the High Commissioner (OHCHR) reported over 13,000 fatalities in its Nepal Conflict Report, 2012.[10] The Institute of Conflict Management (ICM) indicated a total of 14, 264 fatalities between 1996 and 2006 as shown in *Table 1.1.*[11] *Whilst on 29 March 2011, the Government of Nepal released new data indicating of total of 17, 256 fatalities, which is by far the largest casualties reported till the date during the Maoists conflict.*[12] *The conflict affected almost every citizen of Nepal directly or indirectly, for which the decade (1996-2006) is also known as one of the most brutal and bloodiest periods in the modern history of the country. Before the outbreak of the insurgency, Nepal was declared as the "Zone of Peace" (ZoP) by King Birendra in the year 1975, which was supported and recognised by more than 130 countries.*[13]

***Figure 1.2*: Total recorded fatalities in Nepal's armed conflict (1996-2006)**



Source: Institute of Conflicts Management (2011)

As the Maoists gained more influence particularly in rural areas, they began to establish a parallel government, which they called *Jana Sarkar,* (the "people's government"),[14]

10 ibid
11 Archana Sharma, "Maoist Conflict: Social Impact on Nepal." (2016). *Sodh Vaichariki, 5:4: P. 26* Available at: http://shodhvaichariki.com/wp-content/uploads/2017/06/Archana-Sharma.pdf. (accessed: 6 August 2017)
12 Nepal Monitor, "Recording Nepal Conflict: Victims in Number" (2011), available at: http://www.nepalmonitor.com/2011/07/recording_nepal_conf.html (Accessed: 7 August 2017)
13 Uma Kant Sharma, "The Peace Zone Concept and its Utility in Nepalese Foreign Policy" (2004) *Nepal Journal of Political* Science, Vol. 7, p 44.
14 Kiyoko Ogura,. "Maoist People's Governments, 2001-05: The Power in Wartime'." (2008), *Local democracy in South Asia: Microprocesses of democratization in Nepal and its neighbours*: 175-231. P. 175

in an attempt to establish their "people's state"[15] replacing the "old state".[16] In addition, the Maoists also formed their own courts, the "people's court" which began hearing local cases such as land disputes, financial transactions, family feuds and alcohol-related cases.[17] This resulted in Maoists creating a parallel state within the state with its own army, a government and courts. The existence of the two parallel states created political frictions between the Government of Nepal and the Maoists rebels, which led to terror and violence in Nepal. This eventually provided a political momentum to dethrone a 240 years old monarchy from Nepal.[18]

1.2 Historical Background of the Conflict

Nepal is a country which has highly stratified society.[19] The origin of the modern Nepal can be traced back to 1769, when the founder of the modern Kingdom of Nepal, King Prithvi Narayan Shah of Gorkha began the process of unification by waging war against small principalities and ultimately annexing them into his Gorkha Kingdom which subsequently became the state of modern Nepal.[20] After the unification, the Shah dynasty of Gorkha established an absolute monarchy and ruled Nepal until the rise of feudal oligarchy called the Ranas in 1846.[21] The Shah Dynasty suppressed tribal rulers, ethnic minorities and levied heavy taxes and lived with all the luxuries. This has resulted in resentments among ethnically marginalised communities in Nepal.

Jung Bahadur Rana, the founder of the Rana dictatorship, curtailed all the power of Shah Kings and transferred it to the system of hereditary autocracy called the Rana Regime, which lasted for 104 years until 1951.[22] During the Rana autocracy, Nepal was a closed country and had little or no exposure to the outside world. Whilst, a few elite Ranas and their kinsmen enjoyed hegemony over the resources of the country, the general population lived below the absolute poverty line. During the Rana Regime, life

15 Maoists used to call *Jana Satta,* nearest translation of which in English is people's state.

16 The term Maoists used to the multiparty democratic regime under the ceremonial monarchy was *purano satta* which nearly means the "Old State".

17 Kiyoko Ogura, "Maoist People's Governments, 2001-05: The Power in Wartime'." *Local democracy in South Asia: Microprocesses of democratization in Nepal and its neighbours* (2008): 175-231. P. 181

18 Mara Malagodi, "The end of a national monarchy: Nepal's recent constitutional transition from Hindu kingdom to secular federal republic." (2011) *Studies in Ethnicity and Nationalism* 11, no. 2: 234-251. P. 236

19 David N. Gellner, "Caste, ethnicity and inequality in Nepal." *Economic and Political Weekly* (2007): 1823-1828.

20 Ludwig F. Stiller, *The rise of the house of Gorkha*. (1973). Human Resources Development Research Center.

21 John Whelpton,. *Kings, soldiers, and priests: Nepalese politics and the rise of Jang Bahadur Rana, 1830-1857*. (1991) South Asia Books.

22 Adrian Sever, *Nepal under the Ranas*. (1993) South Asia Books.

expectancy was 40 years, literacy rate was 3 percent, only 3 miles of road existed in the capital and there was no supply of electricity.[23] Whilst cars were carried by porters from India to be used by the rulers in the capital![24]

Though the Ranas had suppressed all the signs of political activities, Nepalese people united against the tyranny of the Rana regime and formed political parties such as Nepali Congress (centre-right) and Communist Party of Nepal (far- left).[25] Both parties launched a joint pro-democracy movement which ended rule of the Ranas in 1951.

After the end of the Rana regime, the king held a general election in 1959, which resulted in the formation of the first elected democratic government in Nepalese history. However, the elected government could not last long as the then king Mahendra took all the power in his hands by carrying out a coup in December 1960 banning all the political parties just as the Rana did.[26] King Mahendra started the party-less "Panchayat" system, which lasted for more than three decades until it was overthrown in 1991 by people's popular democratic uprising as shown in *Figure 1.3*.[27]

Figure 1.3: People's movement 1990 in Kathmandu

Source: from the *History of Nepal, Shreeya Kasa*.

Similar to the Rana's rule, the Panchayat system governed Nepal through an autocratic

23 Mahesh Chandra Regmi, *A study in Nepali economic history, 1768-1846*. Vol. 14. Mañjuśrī Publishing House, 1971.
24 ibid
25 ibid
26 Leo E. Rose. "Nepal's Experiment with" traditional Democracy"." *Pacific Affairs* 36, no. 1 (1963): 16-31.
27 Rishikesh Shah, *Modern Nepal: a political history, 1769-1955*. (2003), Manohar Publishers.

regime with fewer civil and political rights granted to the citizens. And, the country was almost closed to the outside world especially to the west, although some relationship continued to remain with two of Nepal's neighbors namely India and China particularly for trade and defence.[28]

As Nepal ushered into a new era of multiparty democracy, people had much hope and aspirations for a good governance, inclusive polity and wide-ranging socio-economic development. However, those aspirations failed to be realised as the system was unable to address many fundamental problems of Nepalese society such as poverty, corruption, inequality and many forms of caste-based discriminations. Albeit Nepal made some progress in economic development, those were mainly concentrated in urban areas and a widespread of abject poverty continued to remain in the country especially in rural areas.[29] Citing these inequalities, some scholars such as Nickson et al. warned that the possibility of armed conflict was increasing in Nepal.[30] Just as speculated, a fraction of Communist Party of Nepal decided to launch an armed insurgency against the state in 1996 that lasted for a decade until 2006.[31]

1.3 The Comprehensive Peace Accord (CPA)

Whilst the conflict was spreading throughout the country, Nepal witnessed a tragic historical incident on 1 June 2001 which is dubbed as the royal massacre where many members of the royal family including the king, queen and prince were brutally murdered.[32] Following the incident, the brother of the deceased king, Prince Gyanendra (later, the king Gyanendra) ascended the throne. Just as his father Mahendra did, King Gyanendra also carried out a royal coup on 1 February 2005.[33] The newly restored royal

28 Martin Hoftun, William Raeper and John Whelpton, *People. Politics and Ideology: Democracy and Social Change in Nepal* (Kathmandu, Mandala Book Point, 1999).
29 Nepal South Asia Centre, *Nepal Human Development Report 1998* (Nepal South Asia Centre, Kathmandu, 1998).
30 R. Andrew Nickson, "Democratisation and the growth of communism in Nepal: A Peruvian scenario in the making?." (1992) *Journal of Commonwealth & Comparative Politics* 30, no. 3: 358-386., and Stephen L. Mikesell, "The Paradoxical Support of Nepal's Left for Comrade Gonzalo", in Deepak Thapa ed., *Understanding the Maoist Movement of Nepal* (Kathmandu, Martin Chautari, 2003).
31 Arjun Karki and David Seddon, "The People's War in Historical Context", in: Arjun Karki and David Seddon, eds., The *People's War in Nepal; Left Perspectives* (Delhi, Adroit Publishers, 2003), pp.12-18; Deepak Thapa and Bandita Sijapati, *A Kingdom Under Siege: Nepal's Maoist Insurgency, 1996 to 2003* (Kathmandu, The Print House, 2003).
32 Jonathan Gregson. *Massacre at the Palace: The Doomed Royal Dynasty of Nepal*. (2002) Miramax Books.
33 Thomas Bell, "King of Nepal carries out "bloodless" coup" 2 February 2005. *The Telegraph.* Available at: http://www.telegraph.co.uk/news/worldnews/asia/nepal/1482616/King-of-Nepal-carries-out-a-bloodless-coup.html (Accessed: 7 August 2017)

regime banned political parties, and imprisoned their leaders.[34] However, the royal coup provided an impetus for the Maoists and the seven main political parties to join forces for a popular uprising which successfully resulted in the signing of the Comprehensive Peace Accord between them on 21 November 2006 [35] formally ending the armed conflict in Nepal.[36] The agreement had envisioned to restore peace in the country by restructuring the state to resolve the underlying causes of the conflict.[37] It also promised the victims of the armed conflict to provide justice within two years from the date of the promulgation of the Interim Constitution in 2007.[38] The Constitution later on, included the provision to form the Truth and Reconciliation Commission (TRC) and Commission on Investigation of Enforced Disappeared Persons (CIEDP).[39] A detailed description of the constitutional framework and the establishment of the both commissions of transitional justice is discussed later in *Chapter Four*.

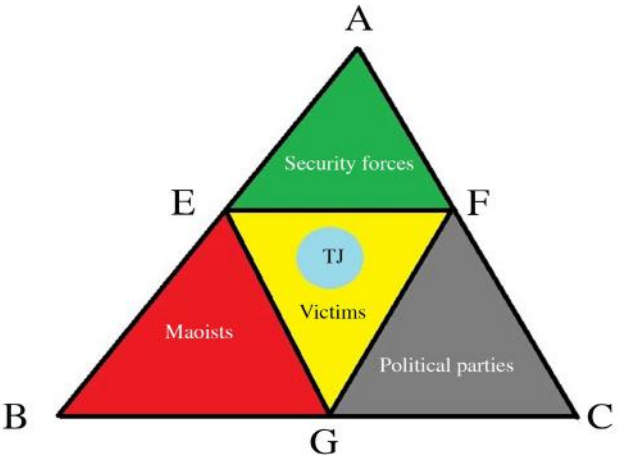
1.4 Dynamics of Transitional Justice in Nepal

As with many conflicts around the world, a number of parties were involved in the conflict of Nepal as well, which encompassed the Maoists (revolutionary force), the ruling class (political parties and the monarch) and security forces (law enforcement agencies such as national army, national police and Army Police Force). Each of the parties involved in the conflict are represented by various triangles in the dynamic model of Nepalese conflict presented in *Figure 1.4* The triangle EBG represents the Maoists, whilst the other two triangles namely the AEF and the GFC represent the security forces and the ruling parties respectively.[40] As mentioned above, the Maoists waged a brutal revolutionary war against the state, which involved attacks on the security forces, confiscation of private property belonging to the wealthy landlords, and assaults on the local political parties. In the centre of the conflict remained the innocent civilians

34 ibid
35 Einsiedel von, Sebastian, David M. Malone, and Suman Pradhan, eds. *Nepal in transition: from people's war to fragile peace*. Cambridge University Press, 2012. P. 156
36 The Government of Nepal, *"Compherensive Peace Agreement"*, 22 November 2006, Available at: http://peacemaker.un.org/sites/peacemaker.un.org/files/NP_061122_Comprehensive%20Peace%20Agreement%20between%20the%20Government%20and%20the%20CPN%20%28Maoist%29.pdf. (Accessed: 7 August 2017)
37 Nepal, Comprehensive Peace Accord, 21 December 2006. Available at: http://www.un.org.np/node/10498 (Accessed: 7 August, 2017
38 ibid
39 Interim Constitution of Nepal, 2007
40 It is worth mentioning that in addition to the army and the police, the state formed a special security wing called the armed police force to curb down the Maoist movement.

(represented by the yellow triangle EFG in *Figure1.4*) who became the victims of the crimes perpetrated by the parties involved in the conflict namely the Maoists and the security forces. Justice, the core objective of the TRC, is represented by the middle circle in *Figure 1.4*

Figure 1.4: **Dimensions of transitional justice mechanism in Nepal**



The friction between these three parties developed conflict as the Maoists were fighting against the state to bring communism and the political parties were representing the Westminster model of parliamentary system. The security forces were following the command of the state run by those parties to protect the regime. In a bid to weaken each other, many violent incidents of murder, torture, abduction and rape were committed as shown later in *Figure 3.2* in the *Chapter Three*.

The need of empirical study

The TRC and the CIEDP formed 5 years ago under the principles of International Human Rights Laws (IHRLs) and International Humanitarian Laws (IHLs) are supposed to investigate into the cases of grave violence of human rights. However, both of the commissions have not been able to investigate even a single case till date.[41] More than 73,000 complaints of human rights violations have been officially registered at the

41 International Commission of Jurist, "Nepal's Transitional Justice Process: Challenges and Future Strategy" August 2017. P. 7 Available at: https://www.icj.org/wp-content/uploads/2017/08/Nepal-TJus-Process-Advocacy-2017-ENG.pdf. (Accessed: 8 August 2017)

Commissions until now, which has not been investigated.[42] This means the long-awaited transitional justice process is not effective.[43]

Evidence from conflicts around the world demonstrate that failure of the transitional justice process further agonises victims and possibilities of future conflict remains real.[44] Justice cannot be fully realised without the initiation and successful prosecution of the perpetrators, which explicitly depends on the discovery of the truth that creates individual accountability for the crimes committed during the conflict. In order to achieve these, a full investigation needs to be carried out, which is yet to start. In order to fully address this issue, this research uses a qualitative approach to explore the complexity of the transitional justice mechanism in Nepal.

It is hoped that the findings of this research will not only identify the underlying causes of the failure of the transitional justice mechanism in Nepal, but also make some policy recommendations for preventing its collapse and minimise potential future conflict.

2. The Justice

The notion of justice and its various aspects have become a topic of discussion amongst academics, policy makers and legal professionals alike for a long time and this issue has become particularly conspicuous since the last half of a century or so.[45] Highlighting the importance of justice, John Rawls[46] contends that "…Justice is the first virtue of social institutions, as truth is of systems of thought…"

A diverse range of views exist in the ways in which justice is conceptualised, interpreted and applied, which are briefly reviewed as a part of this research. Socrates concurs about justice with Plato in his seminal book *Republic*.

Ever since Plato theorised the idea of justice, it has become a recurrent theme within philosophy and social thinking.[47] Socrates used to describe justice as righteousness,[48] whereas his disciple Plato perceived justice as the means of attaining happiness.[49]

42 International Commission of Jurist, "Nepal's transitional justice process: Challenges and future strategies", August 2017.
43 ibid
44 Jon Elster, *Closing the books: Transitional justice in historical perspective*. Cambridge University Press, 2004.
45 Alexander Laban Hinton, *Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence* (2011), New Jersey: Rutgers University Press. P. 4
46 John Rawls, *A theory of justice*. (2009) Harvard university press. p. 3
47 Robert C. Solomon & Mark C. Murphy. "What is justice?: classic and contemporary readings." (1999). p. 3
48 ibid. p. 21
49 Hans Kelsen, *What is Justice?: Justice, Law, and Politics in the Mirror of Science: Collected Essays*. (2000)The Lawbook

Aspects of justice such as its conceptualisation, and delivery mechanisms may differ from person to person and society to society with individual and cultural values playing a significant role in the process of its evolution.[50] To an ordinary person, 'justice' often means punishment to the perpetrators whilst for an accused one it means a fair hearing.[51] Furthermore, to a lawyer or a judge, justice means the application of the rule of law whereas to a philosopher, it may be about morality and fairness.[52]

As such, there are a multitude of discourses including liberal, socialist, liberal democratic, communitarian, feminist and postmodern, which have been proposed and developed in different times in the pursuit of social justice.[53] Whatever may be conceptualisation of justice, the welfare of the victims and the pursuit of justice for them remains at the heart of the justice in general and transitional justice in particular as shown in the *Figure 2.1*.

For the proponents of liberal values, justice ultimately refers to the full realisation of liberty whilst the socialists consider equality as the ultimate realisation of justice.[54] The liberal democratic ideology combines both liberty and equality in its conceptualisation of justice whereas communitarians view justice as the equality between equal entities and equality between crime and punishment as well.[55]

With a similar token, feminist discourse interprets justice as the equality between male and female while postmodernism discards all the set beliefs and theories as a hindrance to justice.[56] Like John Rawls, many scholars believe that justice is fairness in society.[57]

Exchange, Ltd., p. 2

50 Marilyn Warren, "What is Justice?" 20 August 2014, Newman Lecture, Mannix College. p 2. Available at: http://www.austlii.edu.au/au/journals/VicJSchol/2014/12.pdf. (Accessed: 4 July 2017)

51 ibid

52 ibid

53 James p. Sterba, *Justice: Alternative Political Perspectives,* 3r Edi, (1999). Wadsworth Publishing Company. P. 2-21

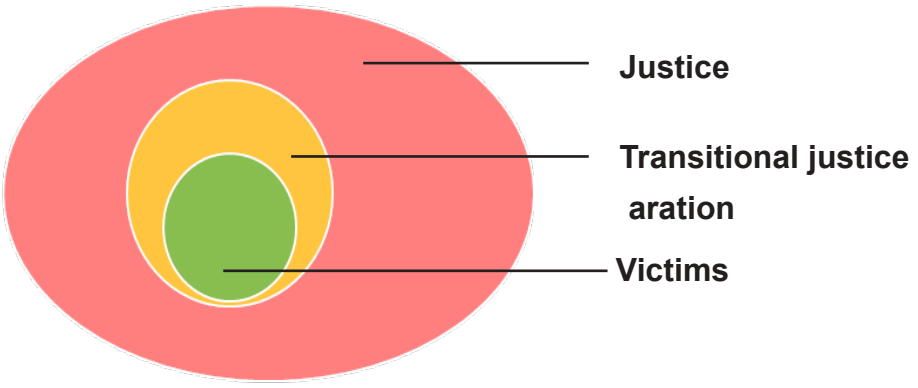
54 ibid

55 ibid

56 ibid

57 John Rawls, "Justice as fairness: political not metaphysical." (1985). *Philosophy & Public Affairs*: 223-251. p 223

***Figure 2.1*: The relationship between victims, justice and transitional justice**



Source: Author's conceptualisation

2.1 The transitional Justice

The foundation of transitional justice can be traced back to the atrocities of the First World War where the wrongdoers of the defeated countries were held accountable and tried, which is known in history as "Nuremberg Trials".[58] The etymological meaning of the phrase "transitional justice" suggests it to be justice in transition. To this end, the need for transitional justice is advocated to achieve three primary objectives including facing the past, discovering the full truth and come out of the past trauma as the German psychiatrists and philosopher Karl Jasper argues: [59]

> *"…Our only chance for salvation lies in total frankness and honesty… this path alone may save our soul from the life of a pariah…"*

Against the backdrop of the Nuremberg Trial,[60] Jasper urged the necessity of transitional justice to be fully implemented even against his own fellow citizens in terms of confronting past crimes and providing justice to the victims. After the end of the Second World War, Karl Jasper further emphasised a particular method to deal with collective suffering, violation of human rights and brutality of history, which formed the basis for

58 Ruti G. Teitel, "Transitional justice genealogy." (2003). *Harv. Hum. Rts. J.* 16: 69. P. 71
59 Pierre Hazan, *Judging War, Judging History: Behind Truth and Reconciliation* (2010). Stanford: Stanford University Press, P. 19.
60 Anna Macdonald, supra note

the development of the theory of transitional justice.[61]

The post-Cold War era witnessed a series of often protracted civil wars and intense revolutions seeking to overthrow dictatorial regimes and replace them with democracies. The process of democratisation and overthrowing of autocratic regimes went through many brutalities around the world, particularly in Latin America and eastern Europe where many crimes were committed, investigation of which led to the second wave of the transitional justice.[62] The third phase of transitional justice emerged by the beginning of 21st century which is associated with "contemporary condition of persistence conflict" both within and between countries and communities in many parts of the world.[63]

As the concept of transitional justice gradually developed, it has evolved as a mechanism that includes various aspects such as finding the truth, persecution of the perpetrators, reparation to the victims and reconciliation between victims and the perpetrators.[64] Since the early 1990, a huge effort from the international community to promote transitional justice has accounted for a significant global investment which has reached over a billion dollar.[65] One of the outcomes of the investments which resulted in the United Nations adopting a set of "common basis in international norms and standards" in 2004 to make transitional justice mechanism more successful across the globe.[66]

Though transitional justice mechanism is still in developing stage, it mainly came into prominence during late 1980s and the early 1990s as a response to a growing political changes in many countries of Latin America and Eastern Europe.[67] This approach came into practice as an attempt to confront past crimes committed by former regimes without harming newly established democracy in such post-conflict countries.[68] It is argued that

61Anna Macdonald, "From the ground up: what does the evidence tell us about local experiences of transitional justice." (2015). *Transitional Justice Review* 1, no. 3. p. 3
62 ibid
63 ibid
64 Alexander Laban Hinton, *Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence* (2011), New Jersey: Rutgers University Press, , 4.
65 Harvey Weinstein, "Editorial Note: The Myth of Closure, the Illusion of Reconciliation: Final Thoughts on Five Years as Co-Editor-in-Chief," (2011), International Journal of Transitional Justice, 5.1: P. 1
66 Kofi Annan, "The rule of law and transitional justice in conflict and post-conflict societies." *UN doc. S/2004/616* 23 (2004): 80-82.
67 International Center for Transitional Justice, "What is Justice?" 2009. P. 1. Available at: https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf. Accessed: 10 June 2017
68 idid

transitional justice, security and development are interlinked.[69]

To prevent the reoccurrence of violence in the future, the transitional justice mechanism ensures not only individual responsibility of war crimes and human rights violation, but also offers an opportunity for institutional reforms in terms of bringing out the truth, reconciliation, and reparation to the victims.[70] However, a growing body of evidence suggests that prosecuting perpetrators has been extremely difficult.[71] For example, despite many recommendations by the TRC, only a few of the perpetrators of the atrocities could be prosecuted in South Africa and many accused perpetrators enjoyed impunity in Timor-Leste.[72] The review of the literature demonstrate increasing calls for the implementation of the principles of transitional justice to be applied in post-conflict countries to deal with the past atrocities.[73]

2.2 Truth and Reconciliation Commissions (TRC)

The TRC is one of the major components of transitional justice. Finding truth of the past and providing environment for the conflicting parties to formally accept the atrocities committed in the past by them constitutes some of the responsibilities of truth commissions[74] which directly feed into various aspects of the transitional justice mechanism such as creating individual accountability for the violation of human rights, reparation to the victims and institutional reforms. Furthermore, promotion of reconciliation in the society to prevent potential violence is another major task of the truth commissions. Generally, such commissions are proposed and founded by the states and are supposed to be politically neutral. As such, they are temporary bodies, which are explicitly focused in investigating past incidents of human rights violation within a specific period. These commissions come to the end of their tenure after they publish their report with recommendations to the state.[75]

As mentioned in the introduction chapter, this section of the paper reviews some examples of the transitional justice mechanisms from around the world. The National Commission on the Disappeared in Argentina, which was set up in 1983 was the first

69 World Bank, World Development Report 2011: Conflict, Security and Development (Washington DC: World Bank, 2011), 166.
70 Paige Arthur, "How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice," (2009) Human Rights Quarterly 31:2
71 Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*. 2010, *2nd ed.* Routledge, 2010. P. 8
72 ibid
73 Leslie Vinjamuri, "Deterrence, Democracy, and the Pursuit of International Justice," Ethics & International Affairs 24.2 (2010): 191–211.
74 ibid, 20
75 ibid

widely known truth commission in the world.[76] Following Argentinean example, the National Commission on Truth and Reconciliation was established in Chile in 1990 and the Commission on the Truth in El Salvador was set up in 1992.[77] Recorded evidence suggest that around 60 truth commissions have been formed globally till the date.[78] Of the many truth commissions formed around the world, only a few such as those in South Africa (1995-2002), Guatemala (1997-1999), Peru (2001-2003), Timor-Leste (2002-2005) and in Morocco (2004-2006) are considered successful as they come with full-fledged report prepared on the basis of the findings of intensive investigation of the past crimes.[79] Based on the recommendations of these commissions, individual accountability on past abuses were established through the successful prosecutions of some prominent leaders found guilty of the abuse of human rights. Additionally, reconciliation in society was promoted by bringing the full truth of the atrocities.[80] And, victims were assisted with reparation. Whilst many other many commissions failed to carry out investigations and publish reports owing to various reasons such as access to limited resources, state interference and lack of expertise within the commissions amongst other.[81]

2.3 Reconciliation

Reconciliation is another major aspect of the transitional justice process to reduce the risks of potential future violence by "breaking the cycle of revenge and hatred between former enemies and seeking reconciliation between two or more opposite groups in the society to promote peace".[82] A number of policy measure such as reforms in army, police, state administration and judiciary are reported to address the issues of reconciliation.[83] In fact, most of the commissions have recommended of institutional reforms such as the ones mentioned above as the part of reconciliation process.[84] As it gives strength to the stability of democratic regime, reconciliation has drawn major attention in the expanding field of transitional justice.[85]

76 ibid, 10
77 Mark Ensalaco, "Truth commissions for Chile and El Salvador: A report and assessment." (1994) *Hum. Rts. Q.* 16: 656.
78 Jina Moore, "Can countries heal after atrocities?" (2010). *Truth Commissions. Issues in Peace and Conflict Studies: Selections From CQ Researcher*: 317. p. 318
79 Priscilla B. Hayner, supra note at 27-44.
80 ibid
81 ibid at 45-74
82 ibid at 182
83 ibid
84 ibid
85 David Bloomfield, Barnes Terri, and Huyse Lucien, eds. *Reconciliation after violent conflict: A handbook*. International

Truth commissions of South Africa is considered as one of the successful models of transitional justice mechanism in the world in terms of fostering reconciliation in post-conflict society. In addition to successfully leading transition of South Africa from apartheid regime to democracy, Nelson Mandela was very much interested with reconciliation because he was of the opinion that it was the only way to heal and prosper as a nation.[86] To this effect, the Government of South Africa implemented "The Promotion of National Unity Act 1995" with an explicit aim of formally initiating reconciliation in the country. Similarly, Guatemala, Nicaragua and Namibia also enacted laws to foster reconciliation.[87] Many other countries such as Peru, El Salvador, Sierra Leone, Fiji, Canada, Australia, and so on have also emphasised the need of reconciliation to bring the conflict to a full closure.

As the context of conflict and transitional justice varies from country to country so does the meaning of reconciliation as well. Reconciliation in South Africa, for an example, is "forgiving where forgiveness is necessary - but not forgetting." [88] In Fiji reconciliation is all about "promoting racial harmony and social cohesion through social, cultural, educational and other activities at all levels within the indigenous Fijian community and between various racial groups".[89] In Angola, it means "living together peacefully within the communities even after conflicts".[90]

Transitional justice process may have to go through reconciliation in two levels namely; national and individual.[91] National reconciliation is considered to be an absolutely necessary for the long-term stability, peace and prosperity of a country recovering from conflicts. To this end, the commissions mainly focus on the promotion of national and political reconciliation during the period of political transition. National reconciliations are likely to be achieved through truth commissions as they are mainly based on the principles of co-existence of different ideologies within the countries. There is a growing

Idea, 2003.

86 Jeremy Sarkin, and Daly Erin. "Too many questions, too few answers: Reconciliation in transitional societies." (2003) *Colum. Hum. Rts. L. Rev.* 35: 661.

87 ibid

88 Nelson Mandela, "We should forgive but not forget" 3 July 1999, The Guardian. Available at: https://www.theguardian.com/world/1999/jul/03/guardianreview.books7. (Accessed: 20 June 2017)

89 Jeremy Sarkin, and Daly Erin. "Too many questions, too few answers: Reconciliation in transitional societies." (2003) *Colum. Hum. Rts. L. Rev.* 35: 661. at 667

90 ibid

91 ibid

body of literature which suggest that political reconciliation can be achieved relatively easily, achieving reconciliation at individual level is not only complex but also really difficult to achieve mainly because of the fact that individual experiences of the pain and suffering during the conflict.[92] Furthermore, forgiving, healing and reconciling in individual level is very subjective and it varies from person to person.

In South Africa, the reconciliation was promoted through public hearing of the past truth between perpetrators and victims with the huge banner in the stage behind the commissioners that read, "Truth: the Road to Reconciliation. The victims could forgive the perpetrators after hearing full truth about the past crimes.[93] Though it is still debatable whether the commission of South Africa achieve reconciliation fully, it apparently created the common consensus that apartheid was wrong and there was a systematic abuse against majority Black population by the minority White Africans.[94] Acceptance of this fact from the people of apartheid regime promoted the environment of reconciliation in a gradual way.[95]

Reconciliation in the Chilean society is a quite different from the reconciliation of South Africa. After the end of dictatorship under General Augusto Pinochet, reconciliation between the supporter and the protesters of the regime was achieved but they still held their views and did not let it come between them.[96] In Timor-Leste, reconciliation between perpetrators and victims was facilitated by commissions where many accused of past crimes were assisted to reintegrate back in society.[97] But the idea of reconciliation was opposed in Argentina and the commission formed in Sri Lanka recommended justice in court instead of reconciliation.[98]

2.4 The Trials

Trial is the only alternative for the perpetrators of heinous crimes to whom forgiveness or amnesty cannot be given. In other word, prosecution of the human rights abusers is essential where reconciliation is not possible. Many people have viewed prosecution

92 Priscilla B. Hayner, *supra note* at 183
93 ibid
94 ibid
95 ibid
96 ibid at 186
97 Patrick Burgess, "A new approach to restorative justice–East Timor's Community Reconciliation Processes." (2006). *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice*: 176-205.
98 Priscilla B. Hayner, *supra note* at 188

as the ultimate objective of the transitional justice mechanisms. Addressing a long prevailing impunity through prosecution also helps prevent the recurrence of violence in the future. It is a form of retributive justice which involves three dimensions viz, "the victims, the offenders and the community in a search for solutions, which promote repair, reconciliation and reassurance."[99] For transitional justice mechanism to be fully successful, creation of individual accountability for the violations of human rights, trial and prosecution remain critical.[100] Furthermore, the Rome Statute of the International Criminal Court forbids amnesty in the crimes against humanity such as murder, rape, enforced disappearance, torture and other inhuman act of similar characters.[101] Therefore retributive justice through the court is one of the most prominent demands in transitional societies.[102] However, prosecution is one of the most difficult parts of the transitional justice process as the dictators of former regimes leave a limited scope to bring criminal case against them.[103]

As such the international cases of trails in the transitional justice process gives a mixed picture as evidenced by many examples from around the conflict affected countries in the world. Moreover, on some occasions transition comes with political compromise which includes immunity from prosecution to the authorities of past who orchestrated violence and committed crimes during the conflict period.[104] This makes justice more difficult to achieve. That is why only a few are prosecuted and even the obvious abusers are not convicted.[105] Corruptions in Judiciary, incompetent and politically motivated judges and lack of resources contribute to uncertainty of successful prosecution.[106]

In South Africa, the TRC was empowered to grant amnesty even to those who were implicated in serious violation of human rights such as rape and murder.[107] The

99 Howard Zehr, "Justice paradigm shift? Values and visions in the reform process." (1995) *Conflict Resolution Quarterly* 12, no. 3: 207-216. P. 181

100 Charles Villa-Vicencio, "Transitional justice, restoration, and prosecution." *Handbook of Restorative Justice: A Global Perspective (London Routledge 2006)* (2007): 387. P. 390

101 UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: http://www.refworld.org/docid/3ae6b3a84.html [accessed 28 July 2017]

102 Priscilla B. Hayner, *supra note* at 8

103 ibid

104 ibid

105 ibid at 9

106 ibid

107 ibid at 29

commission collected testimony from more than 21,000 victims and witnesses, and received 7,116 applications of which 2,500 were granted amnesty as they fully accepted their involvement and proved that the crimes were politically motivated.[108] The power of Commission's constitutionality to grant amnesty was challenged by victims in the South African Constitutional Court but the Court decided in favour of the Commission.[109] Only a few perpetrators including former president P.W. Botha were prosecuted in South Africa.[110] Rate of prosecution was even lower in the transitional history of other countries. Out of 626 massacres documented by commission, only 3 were prosecuted in Guatemala[111], former president Alberto Fujimori was sentenced to 25 years, but majority of perpetrators got acquittals in Peru.[112] The evidence suggests that no one was prosecuted in Timor-Leste where 102,800 Timorese were killed as a result of the Indonesian occupation for 24 years.[113] Similarly, most of the recommendations of the commission were not implemented and not a single perpetrator was tried in Morocco.[114]

Some cases of transitional justice are relatively successful in higher number of trials and convictions. For example, in Argentina, neither amnesty nor reconciliation was accepted where at least 1,400 alleged perpetrators were tried and 68 had been convicted by the end of 2009.[115]

2.5 Reparation to the Victims

As transitional justice is victim-centric, reparation is one of the major tasks of truth commissions. Therefore, most of the commissions recommend reparations. As per the recommendation of the National Commission on Truth and Reconciliation (1990-91) the government of Chile in 1997 started sending monthly cheques to 4,886 victims.[116] The amount of lifetime pension was dependent on the number of family members of the victims. If there was only single person in victim's family, the victim would get $345.

108Jeremy Sarkin. *Carrots and sticks: The truth and reconciliation commission and the South African amnesty process*. Intersentia nv, 2004. P. 113
109 John Dugard,. "Is the Truth and Reconciliation Process Compatible with International Law-An Unanswered Question-Azapo v. President of the Republic of South Africa 1996." (1997) *S. Afr. J. on Hum. Rts.* 13: 258.
110 ibid
111 Human rights watch, *World Report 2010, January 20, New York.*
112 Priscilla B. Hayner, *supra note* at 39
113 ibid at 41
114 ibid at 44
115 ibid at 47
116 ibid at 167

And, the surviving spouse, children, parents and parents of victims would get up to $482 per month, which was divided between them.[117] Total reparation costs amounted to about $16 million annually for the Government of Chile.[118] Furthermore, victims' children were provided free education up to the age of 35 in addition to providing money to the victims. The case of reparation in Chile is often cited as one of the successful examples in the world.

Unlike monthly pension in Chile, Argentina gave a lump sum of $220,000 to each conflict victim as reparation.[119] In Morocco, over 9,000 victims received a total $85 million as reparation and they were provided psychological and medical support too.[120] Rather than giving to individual reparation, 1,400 out of 5,000 affected communities were chosen for infrastructural development in Peru which covered up to $33,000 in each community group.[121] In response to this piecemeal approach to reparation, many dissatisfied victims brought cases in Inter-American Court where each applicant was awarded up to $200, 000. This amount would be more than the annual budget of Peru if all the 69, 000 "direct victims" received the reparation amount.[122] In Sierra Leone, after the failure of the government to provide reparation, UN mobilized $3 million from its peace building fund and gave $100 each to 22,000 victims out of 30,000 victims officially identified.[123]

In South Africa, the TRC recommended $21,000 to each of 25, 000 victims. But, after several years of the recommendation, the government gave only a single payment of $3, 000 each.[124] The recommendations of the TRC for reparation to the victims have been completely ignored in many countries. For example, in Haiti, the TRC recommended to create a separate body to collect funds from the UN member states, government and individual donation for the reparation to the victims.[125] But, neither the Haitian government

117 ibid
118 ibid
119 Law no 24, 411, Argentina, December 7.
120 International Center for Transitional Justice, Truth and Fact Sheet, 2009
121 Priscilla B. Hayner, *supra note* at 175
122 ibid
123 Mohamad Suma and Cristian Correa, "Report and Proposals for the Implementation of Reparation in Sierra Leone", International center For Justice, December 9.
124 Audrey R. Chapman and Hugo van der Merwe, *Truth and Reconciliation in South Africa: did the TRUTH AND RECONCILATION COMMISSION Deliver?* (2008), Philadelphia: University of Pennsylvania Press. P, 285
125 Si, M Pa Rele, (If I don't Cry Out): *Report of the National Commission of the Truth and Justice, Haiti* (1996), 285

paid any particular attention to make institutional arraignments any to collect fund nor any UN member states donated money.[126] Similar, incidents were reported in El Salvador as well where the government completely ignored the recommendations of the TRC.

An extensive review of the literature above presented transitional justice in a linear way as if its three components namely truth, prosecution, and reparation and reconciliations automatically follow a sequential order. Whilst some studies indicate complexities in the process of delivery of the transitional justice, they do not always explicitly spell out the nature of those complexities. In particular, complexities associated with prosecutions of the perpetrators during the transitional justice process have not been explored critically. Using a case study of transitional justice mechanism of Nepal, this paper attempts to identify some of the factors particularly those related to the prosecution and justice to the victims.

3 Methodology

3.1 Rationale of the Research Methodology

The overarching objective of this research is to investigate the complexities associated with the delivery of transitional justice in general and prosecution in particular in the post-conflict Nepal. In doing so, this research considers two questions in particular, which are listed below:

1. Is the transitional justice mechanism too slow to make the desired impact in Nepal?
2. What can be done to correct the underlying weakness of the process?

The mechanism of the transitional justice is new to Nepal, which is still in the evolving process. As such, there is a dearth of research investigating the process and the progress of the Nepalese transitional justice mechanism in Nepal. Experience from around the world shows that the delivery of justice is a complex and lengthy process in the transitional period in post-conflict countries. This is mainly because different aspects such as truth, reconciliation, reparation and prosecution are neither linear nor sequential in order. The literature reviewed in the previous chapter provided a theoretical framework for the operationalisation of the concept of transitional justice in general and its relevance in Nepal in particular.

126 Priscilla B. Hayner, *supra note* at 177

The overarching aim of this research is to investigate current situation and contextual data on the delivery of transitional justice in post-conflict Nepal, for which it was necessary to understand the ways in which various parties in the conflict are involved. In order to fully understand this, investigation of historical *vis-a-vis* current institutional context within which those parties interacted with each other in terms of their understanding of the conflict, and perceptions of the transitional justice, the meanings and association they attach with it remained critical.[127] Since empirical data offers an important way to get answers to these questions, this research used a qualitative case study methodology involving key informants, which were selected using purposive sampling procedures. For this purpose, primary data were generated to understand the complexities of transitional justice process in Nepal. Altogether 16 key informant interviews were conducted with participants from a range of sectors such as the media, human rights lawyers, human rights activities, victims and chairmen of the commissions.

3.2 Case Studies

An in-depth study was needed as this research aims to answer 'whys' and 'hows' of the transitional justice and its negligible impact in the life of the people who were being significantly affected by the conflict in Nepal. For this, case study was considered the best way to go through as it helps to understand the multiple dynamics of a single setting.[128] The case study strategies have proved to be very helpful in this research to collect data in accordance with the objectives of dissertation, which were largely set by the research questions, which this paper aimed to investigate.

The objectives of the research and the questions associated with it require an exploration of the link between the incidents of human rights violations during the conflict and the ongoing process of transitional justice in Nepal.

The link and interactions between many variables such as evidence and opinions of the victims, perpetrators, activists, lawyers, state authorities, judges, media and politicians can be traced from the incidents that took place during the decade-long conflict in Nepal. Even to trace the link, case study was very essential. Furthermore, the approach of the

127 Fielding, N. G., and Hilary Thomas. "Qualitative interviewing." (2008): 123-144.
128 Kathleen M. Eisenhardt, "Building theories from case study research." (1989)*Academy of management review* 14.4: 532-550. P 534.

case study is more “holistic rather than dealing with an isolated factor,”[129] which helps to untie complex knots and bolts of the transitional justice process. As "there is no standard format in reporting case study"[130] interviews with key informants were conducted and the qualitative data was generated and analysed.

3.3 Selection of Respondents

Respondents for key informant interviews were selected from five different categories including the commissioners of the commissions, media, human rights lawyers, human rights activists and the victims of the conflict, which are connected with the transitional justice process of Nepal.

3.3.1 Victims

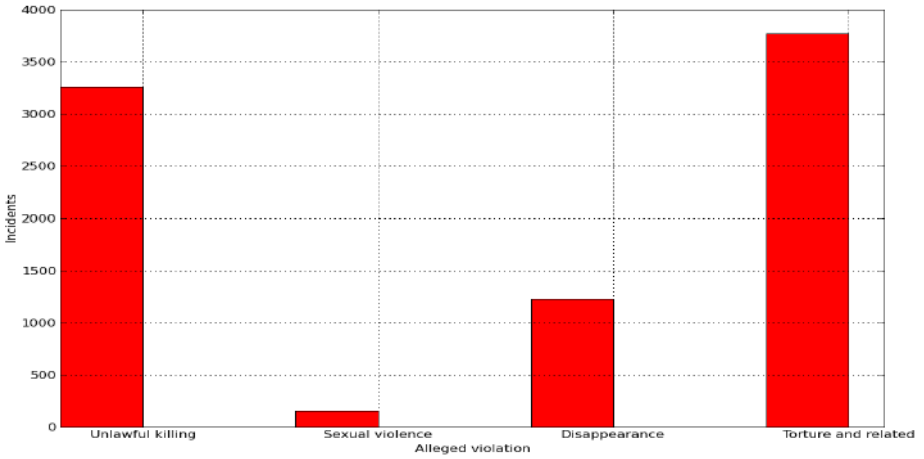
For the purpose of this study, those who have been identified as the victims by various human rights organisation including the United Nations are defined as victims. Victims remain at the core of the transitional justice process mainly because the entire process revolves around them. In the absence of victims, there is no need of the transitional justice mechanism. Violations of human rights constitute the existence of victims. And, the existence of the victims requires justice to be delivered to them.

The published statistics demonstrate that More than 13,000 people have been killed and around 13, 00 have been disappeared during a decade-long conflict in Nepal, although many estimate that these figures are much higher.[131]

Furthermore, several hundreds of incidents of kidnappings, arbitrary detentions, rape and torture are also recorded as shown in *Figure 3.2* below. As this paper is focused to find out the reason of failing process of transitional justice, it has been absolutely necessary to know the concern of victims. That is why they have been selected as the primary source of data generation.

129 Martyn Denscombe, *The good research guide: for small-scale social research projects* (2014). McGraw-Hill Education (UK), p. 36.
130 Sharan B. Merriam, *Case study research in education: A qualitative approach,* (1988). Jossey-Bass, P.193
131 OHCHR, "The Nepal Conflict Report" (2012) available at: http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/NepalConflictReport.aspx (Accessed: 18 June 2017)

Figure 3.2: **Total recorded incidents of alleged violation of human rights occurred from 1996-2006.**



Source: OHCHR (2012)

3.3.2 The Truth Commissioners

Currently, the entire process of the transitional justice is being handled through a mechanism of two commissions namely the TRC and the CEDP, which were formed in accordance with the provision of an act passed by the Parliament of Nepal.[132] The TRC has been given the mandate to investigate incidents of gross human rights violation such as murder, rape, torture and so on that happened during the conflict in Nepal.[133] And, the mandate of CIEDP is to investigate the cases of enforced disappearance.[134] These two commissions formed in 11 February 2015 for the term of two years with conditional provision of extension of one year. By the time both of the commissions completed their initial two years term, not a single case out of thousands had been investigated. As the commissions had not completed their respective tasks within the initial timeframe, the government of Nepal extended one year in 8 February 2017.[135] As the commissions

132 The Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2014, Available at: http://www.Truth and Reconcilation Commission.gov.np/document (Accessed: 17 June 17, 2017)

133 ibid

134 ibid

135 Dewan Rai, "TRUTH AND RECONCILATION COMMISSION, CIEDP Terms extended by one year", (2017) The Kathmandu Post, 10 February. Available at: http://kathmandupost.ekantipur.com/printedition/news/2017-02-10/Truth and

failed to complete their task even in the fourth year of extension, the Government extended the term of the both commissions my two years in 8 February 2019.[136] As the both commissions are responsible for completing transitional justice in Nepal, the view of the commissioners was of vitally important to fully understand the dynamics of the transitional justice in Nepal. Hence, they were also selected as the source of data collection.

3.3.3 Human Rights Lawyers

Transitional justice is retrospective legal process of restoring rule of law through political settlements, which paves the way to deal with the gross violation of human rights in the past.[137] Therefore, the concept of transitional justice requires the involvement of human rights lawyers from the beginning to the end of the process. Furthermore, human rights lawyers are the ones who tend to challenge impunity afforded by the state by bringing cases in national and international courts through the means of strategic litigation.[138] During and after the conflict many human rights lawyers have raised issues of impunity, filed cases against the perpetrators, provided voice to the "voiceless victims" and pressurised the Government of Nepal to form the mechanism of transitional justice. Moreover, even after the formation of the TRC and the CIEDP the community of human rights lawyer is actively engaged in monitoring the process of transitional justice. Considering this factor, human rights lawyers were also selected as part of the respondents for interviews. As the community of human rights lawyer is in close inspection of transitional justice of Nepal from the beginning, the data which are extracted from the interviews with them has helped pinpoint the weakness of the transitional justice mechanism.

3.3.4 The Media Persons

The role of media in the transitional justice process has been consider very significant as it can make considerable impact both negatively and positively depending on the context, journalists and professional efficiency of the media.[139] Generally, the role of

Reconcilation Commission-ciedp-terms-extended-by-one-year.html. (Accessed: 17 June, 2017)

136 The Himalayan Times, Prez certifies amendment bill; TRC, CIEDP term extended by a year, published on 8 February 2019, accessed in 20 Feb. 2019: https://thehimalayantimes.com/kathmandu/prez-certifies-amendment-bill-trc-ciedp-term-extended-by-a-year/

137 Christine Bell, "The Fabric of Transitional Justice: Binding Local and Global Political Settlements." (2016). p.

138 Helen Hershkoff, 'Public interest litigation: selected issues and examples'. *Washington, DC: The World Bank*. (2005).

139 Lisa J. Laplante, "Media and Transitional Justice: A Complex, Understudied Relationship" (13 may 2014), ICTJ, Available at: https://www.ictj.org/debate/article/media-and-transitional-justice-complex-understudied-relationship.

the media has been proved very important to address impunity and hold the perpetrators responsible.[140] In this regard, media in Nepal has given large coverage about the serious violation of human rights during the conflict and it has also been constantly raised issues pertaining to the transitional justice.[141] As the media is monitoring the process very closely, it was deemed necessary for its inclusion it as respondents in this research. There was presence of both national and international mainstream media including CNN, BBC and Reuters for the coverage of the issues of conflict and the transitional process in Nepal. A male and female respondents from two national media of Nepal were interviewed as a part of the research process. The Male respondents represent a national daily of Nepal Annapurna Post, which is a leading newspaper and female respondent represents national news agency run by the state. In order to know the perspective of both independent and the government-run media, their interviews have been very helpful in terms of generating rich qualitative data.

3.3.5 Human Rights Activists

As the members of civil society, human rights activists can make and do make significant difference to address the violation of human rights lawfully. Many NGOs with the support of INGOs have played role to document the violation of human rights and help victims bring cases in courts. As the activists of these NGOs are closely monitoring the ongoing process of transitional justice, they have been selected as the participant respondent of this research project.

3.4 Research Ethics

This section presents some ethical considerations employed in this research project, which are related to both practical and theoretical perspective. A reflection on research ethics are necessary to demonstrate the impartiality and value-free nature of the research.

3.4.1 Some Ethical Consideration

All the ethical aspects and the codes of conduct has been properly followed to carry out this research. In accordance with the guidelines of the British Sociological Association

(Accessed: 18 June 2017)

140 ibid

141 Media Mission to Nepal, "Safeguarding media rights and ending impunity in Nepal" (2012), may.1- 44. p 18 https://www.mediasupport.org/wp-content/uploads/2012/11/ims-international-media-mission-nepal-2012.pdf.,
(Accessed: 18 June 2017)

(BSA)[142] all the participants have been voluntarily asked to take part in the research which will not cause any harm to them. Assuring confidentiality, anonymity, privacy and other related ethical aspects, which is commonly referred to as "informed consent" has been clearly taken from every respondent. They have been informed about the objectives, anticipated benefit, as well as the nature of the research before the interview. It was made clear that all the information related to the participants including their name, address and the answer would be kept confidential unless they want to be disclosed. Participants were clearly told that no harm would occur whether they provide data or refuse to take part in the research. Furthermore, participants were made fully aware of their rights to leave the interview or decline to give answers of any question if they wished to do so.

All the Interviews were conducted using email and telephone. This methodology of collecting data helps researcher save time and resources.[143] Before conducting interviews, semi-structured questionnaires were sent via email to each of the participants and asked whether they understand the question. This helped removing the ambiguity or misunderstanding of the questions. Furthermore, to make feel participants more comfortable, casual and informal conversation was used before the beginning of every interview.

3.5 Key informants

A series of purposive interviews were conducted with a total of 18 key informants from various stakeholders. Among them two were commissioners of the two commissions, three were human rights lawyers, two were human rights activists, two were journalists and rest were victims. Ten interviewees were male and eight were female. Most of them were selected for interview on the basis of my understanding and approach of their professional work in the field. A few victims were accessed adopting snowball sampling as a part of the research.

3.6 Analysing Qualitative Data

Firstly, all the qualitative data obtained from the interviews were transcribed and translated into English from Nepali language in which most of the interviews were conducted. All

142 British Sociological Association. *Statement of ethical practice for the British Sociological Association*. (2002)
143 Roger W. Shuy, "In-person versus telephone interviewing." *Inside interviewing: New lenses, new concerns* (2003): 175-193.

the transcripts were thoroughly studied multiple times in order to abstract and categorise significant data. The data were then coded using a thematic coding method, which is desirable particularly when sample size is small.[144] Furthermore, thematic coding is applied in the research where data cannot be generalised because of the uniqueness of incidents and people but still needed to obtain rich contextual qualitative data.[145] This research is focused on investigation of the multiple aspects of the ongoing process of transitional justice in Nepal such as the truth associated with gross violations of human rights, identification of perpetrators, holding the perpetrators responsible by prosecuting them through competent courts, reparation to the victims, and reconciliation in society. It also aims to measure the progress of the transitional justice mechanism. In doing so, it explores the perspectives of the victims and find out the deeper understanding of the functionality and the efficiency of the transitional justice mechanism. A deductive approach was adopted to analyse qualitative data.

4. Legal Framework of the Transitional Justice in Nepal

4.1 Introduction

The founding stone of the transitional justice mechanism was first laid in the CPA, which was signed between the Maoists and the seven main political parties of Nepal in 2006.[146] Article 5.2.5 of the CPA incorporates the mutual consent of both parties to set up "a High-level Truth and Reconciliation Commission" in order to investigate the cases of serious human rights violations.[147] To this end, formation of the transitional justice mechanism was one of the most significant aspects of the peace process in Nepal. The remaining tasks of the peace process such as the election of Constitutional Assembly (CA), integration of the Maoist's "People's Liberation Army" into Nepal Army, promulgation of a new constitution and the restructuring of the nation to address the socioeconomic discrimination have been completed with a varying degree of success. This left the transitional justice as the only one remaining components of the peace process in Nepal.

4.2 Constitutional Provisions

The Interim Constitution 2007 ensured the establishment of the TRC according to the

144 Richard E. Boyatzis, *Transforming qualitative information: Thematic analysis and code development*. Sage, 1998. p 191
145 ibid
146 Nepal, Comprehensive Peace Accord 2006.
147 ibid

promise made in the CPA. Article 33 (S) of the Constitution stated the obligation of the state "to constitute a high-level TRC to investigate the facts regarding violations of human rights and crimes against humanity committed during the conflict period, and create an atmosphere of reconciliation in the society."[148] However, the Government of Nepal delayed setting up the TRC. Instead, the Peace and Reconstruction Ministry formed a task force, which initiated the process of collecting data on conflict victims and began to provide reparation to the identified victims through the newly launch mechanism of Interim Relief Program (IRP) in 2008.[149] Government's move of providing relief to 30, 000 conflict victims and rehabilitation support to 80, 000 internally displaced people was welcomed by victims and civil society with some reservations[150]mainly because this was considered as government's strategy to bypass the formation of the transitional justice mechanism. However, both national and international stakeholders raised serious concerns on the motives of the Government of Nepal to avoid bringing cases against the perpetrators of human rights violations. In responding increasing pressure of national and international concern, the Government proposed a Bill of TRC in the CA. Meanwhile the CA was dissolved as it failed to bring the new constitution within the given time. Before few days of the dissolution, then Prime Minister Baburam Bhattarai decided to withdraw the Truth and Reconciliation Bill from the CA. He then passed the draft of the TRC Act through the ordinance on 14 March 2013.[151] Civil society, victims and international community criticised the ordinance as it was brought without any consultation with them and had provisions to grant amnesty to the perpetrators.[152] Meanwhile, the Supreme Court (SC) of Nepal suspended the ordinance because of the amnesty provision.[153] The new CA formed by the second election passed new TRC Act from the Parliament on 25 April 2014.[154]

148 Interim Constitution of Nepal (2007), article 33(s).

149 Ruben Carranza, "Relief, reparations, and the root causes of conflict in Nepal." (2012) *New York: International Center for Transitional Justice*. p 7

150 ibid

151 International Justice Resource Center, "Truth and Reconciliation Commission for Nepal continues to face criticism" April 9 2013. Available at: http://www.ijrcenter.org/2013/04/09/flawed-truth-and-reconciliation-commission-for-nepal/ (Accessed: 21 June 2017)

152 ibid

153 BBC, "Nepal court blocks civil war truth commission" 1 April 2013. Available at: http://www.bbc.co.uk/news/world-asia-21996638 (Accessed 21 June 2017)

154 Kharel Pranab, "Parliament Passes TRUTH AND RECONCILATION COMMISSION Bill" 26 April 2014, *The Kathmandu Post.* Available at: http://kathmandupost.ekantipur.com/news/2014-04-26/parliament-passes-Truth and Reconcilation Commission-bill.html (Accessed: 21 June 2017)

4.3 Nepal's Obligation under International Laws

Nepal is a state party to many international human rights (IHRLs) and international humanitarian law (IHLs), which are complementary to each other and have reinforcement of common objective to protect life and dignity of human beings.[155] Out of the nine core human rights instruments, as shown in *Table 4.1*, Nepal was signatory state to six at the time of conflict.

Figure 4.1: **Core international human rights instruments to which Nepal is party**

Human Rights Convention	**Signature**	**Ratification [Accession (a)]**	**Entry into Force**
International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)	-	30 January 1971 a[1]	1 May 1971
Convention on the Rights of the Child (CRC)	26 January 1990	14 September 1990	14 October 1990
Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict	*8 September 2000*	*3 January 2007a*	*3 February 2007*
Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography	*8 September 2000*	*6 January 2006a*	*20 February 2006*
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	5 February 1991	22 April 1991	22 May 1991

155 The Nepal Conflict Report, p 17

Optional Protocol to CEDAW	*18 December 2001*	*15 June 2007*	*15 September 2007*
International Covenant on Civil and Political Rights (ICCPR)	-	14 May 1991a	14 August 1991
Optional Protocol to the ICCPR	-	*14 May 1991a*[2]	*14 August 1991*
Second Optional Protocol to the ICCPR, Aiming at the Abolition of the Death Penalty	-	*4 March 1998a*	*4 June 1998*
International Covenant on Economic, Social and Cultural Rights (ICESCR)	-	14 May 1991a	14 August 1991
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	-	14 May 1991a[3]	13 June 1991

Source: OHCHR (2014)

The ratification includes the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[156] Provisions enshrined in ICCPR such as right to life (Article 6), right to freedom from torture or cruelty, inhuman or degrading punishment or treatment enshrined in the Article 7, which is also written in the Article 2 and Article 16 in the CAT, right to liberty and security of the person (Article 9) and right to peaceful assembly (Article 21) are applicable to the incidents during the conflict. Similarly, rights to be free from sexual violence is protected by the CAT and the CEDAW and the rights of children to special protection in armed conflict, including a prohibition on their recruitment into the armed conflict is enshrined in the Article 39 of the CRC.[157] Violation of these rights during and after the time of conflict constituted serious crimes. Under these international law, Nepal

156 ibid
157 ibid

has an obligation to investigate into those cases of human rights violation and punish those found guilty.[158]

Certain rights such as right to life, prohibition on torture, prohibition on slavery, right to legal status, freedom of thought, conscience and religion and ban on imprisonment through inability to fulfil a contractual obligation cannot be derogated under any pretext. Nepal curtailed the right to assembly, movement, press, privacy and property when it declared state of emergency in November 2001 and February 2005.[159] Similarly, civil and political rights were also severely curtailed when King Gyanendra took control of the political power and reintroduced an absolute monarchy in 2005 as described in detail in *Section 1.3* of this paper in chapter one.

Additionally, international humanitarian law requires parties to the conflict to conduct in certain ways, which provide protection to the persons who did not take part in the hostilities in the past or no longer taking part in the hostilities currently.[160] Nepal has an obligation to comply with this provision as it has ratified four Geneva Convention in 1964.[161] Any harms such as killing, torture, mutation, detention, rape, enforced disappearance against persons not involved in the conflict triggers the individual responsibility of crime and state has to investigate over such incidents.[162] Furthermore, the Constitution of Nepal has given legally binding effect to these conventions. Article 51(b) (3) of the Constitution of Nepal 2015 has stated that the state will have an obligation in "implementing international treaties and agreements to which Nepal is a state party". With a similar token, Section 9(1) of the Nepal Treaty Act 1990 reads: "In case of the provisions of a treaty, to which Nepal or Government of Nepal is a party upon its ratification accession, acceptance or approval by the Parliament, inconsistent with the provisions of prevailing laws, the inconsistent provision of the law shall be void for the purpose of that treaty, and the provisions of the treaty shall be enforceable as good as Nepalese laws."

158 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,* General Assembly resolution 60/147, article 4.
159 The Nepal Conflict Report p. 63
160 Jean-Marie Henckaerts and Doswald-Beck Louise, *Customary international humanitarian law*. (2005) Vol. 1. Cambridge university press. p 7, 120, 590
161 The Nepal Conflict Report, p. 17
162 ibid

4.4 The TRC Act 2014

The Government of Nepal, which was newly formed through the fresh mandate of the second CA proposed another bill to form mechanism of the transitional justice. Unlike in the past, the Government this time consulted with the victims, experts as well as other stakeholders and proposed to form two separate commissions as per the suggestion received. However, the legislature parliament passed "The Enforced Disappearance Inquiry, Truth and Reconciliation Commission Act 2071 (2014)" on 25 April 2014 with the provision to grant blanket amnesty which was again opposed and criticised by stakeholders including OHCHR.[163] Amid the criticism, government formed the TRC and the CIEDP on 11 February 2015 for two years with a conditional provision of extension by one year.[164] On the other hand, in a response to a writ petition filed by 234 conflict victims the Supreme Court of Nepal struck down the provision of amnesty of the Act on February 26 2015 citing that amnesty cannot be granted to the perpetrators of serious violation of human rights under the international human rights laws to which Nepal is a party.[165]

In total, both of the commissions received altogether 73, 000 complaints from the victims[166] and completed their two years terms without any significant achievement. Three days before they were due to expire, the Government of Nepal extended their tenure twice by one year in 2018.[167] As the mechanism failed to complete their mandated task even in the fourth year, the Government has now extended their terms 2 more years and promised to reform the commission. While welcoming the decisions of to extend the term of the commissions with its reform the stake holders of the conflict including victims and international community has asked the Government of Nepal to make its plan transparent in order to comply the verdict of the Supreme Court and amend the

163 OHCHR Technical Note, " The Nepal Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2071 (2014)" – as Gazetted 21 May 2014

164 Bishnu Pathak, "Nepal's Enforced Disappearance Commission: Roles of International Community." (2015). *TRANSCEND Media Service*, p. 2

165 Ross Adkin, "Nepal Supreme Court rejects amnesty for war crimes" 27 February 2016, *Reuters.* Available at: http://www.reuters.com/article/us-nepal-rights-idUSKBN0LV0CG20150227 (Accessed 22 June 2017)

166 Phanindra Dahal, "Nepal to investigate civil war crimes" 26 August 2016, *BBC* Available at: http://www.bbc.co.uk/news/world-asia-37118106 (Accessed: 22 June 2017)

167 Dewan Rai, "TRC, CIEDP terms extended by one year" 10 February 2017, *The Kathmandu Post. Available at:* http://kathmandupost.ekantipur.com/printedition/news/2017-02-10/trc-ciedp-terms-extended-by-one-year.html (assessed: 12 August 2017)

provisions of the act in line with international standard. This provided an intellectual impetus and the policy context to consider the issue of transitional justice in Nepal as a matter of urgency, which this paper aims to investigate.

5. Measuring the Progress of TJ in Nepal

5.1. Overview

This chapter presents the results of the qualitative interviews conducted with five groups of respondents and examines whether the transitional justice is working in terms of achieving its three primary objectives:

a) Discovery of the truths of the atrocities committed during the conflict

b) Assurance of justice to the victims by creating individual accountability and prosecution to the perpetrators by addressing long prevailed impunity; and

c) Reparation to the victims and promotion of reconciliation in the society to move ahead from the trauma of the past.

d) Institutional reforms to guarantee non recurrence of violence in the future.

To achieve these measures the study has found several problems and the hindrance of the transitional justice process in Nepal which are:

5.2 Limit of Time and Resources

One of the major challenges of transitional justice in Nepal is the lack of time and resources for the two Commissions which have received about 73,000 complaints from the victims of the conflict.[168] The TRC alone has received about 58,052 complaints from victims directly. Apart from that, there are an estimated 12,000 complaints to be received from several national institutions such as police offices, Offices of District Attorney and National Human Rights Commission where victims had complained in an attempt to get justice in different time during and after the end of the conflict as the a commissioner of TRC in Nepal said:

> "*...There are numerous complaints about human rights violations in Nepal. God knows how we can investigate over 70,000 complaints with limited resources...*"

168 Based on the telephone intervies with prisedent of Truth and Reconcilation Commission Mr. Surya Kiran Guruna and CIEDP Mr. Lokendra Mallik on 6th of june 2017.

The number of complaints filed at the CIEDP is relatively small compared to the number of complaints received by the TRC as its Chairman said:

> *"...We had received* 3,093 *complaints from the family members of the victims of enforced disappearance altogether. Out of them,* 183 *has been identified as beyond the jurisdiction of the CIEDP and they have been suspended from further investigation...* 16 *complaints have been referred to the TRC as they were not related to the CIEDP... we have completed the primary investigation of more than 2100 cases. Sadly no accused has been summoned as we don't have law that criminalises the act of disappearances..."*

The commissioners of both the TRC and the CIEDP repeatedly mentioned that they received almost double the number of complaints than they had initially expected. This has added workload to the already struggling mechanism of the transitional justice in Nepal. Both of the commissioners attributed to a growing awareness amongst the victims to come forward to seek justice which increased the complaint to this extent. Furthermore, both the commissions conducted a wide range of interactions with the victims and encouraged them to file complaints if they have got genuine cases as the commissioners said:

> *"... No victim should feel intimidated and afraid to file complaints against the perpetrators. The commissions treats all the cases with utmost confidentiality.... we also told the victims that registration of formal complaints will form the basis for awarding reparation and without it no support financially or otherwise will be available..."*

Both commissions complained of not having enough staffs to carry out the full investigation. The statistics demonstrates that the CIEPD is resourced with a total of 75 whilst the TRC currently has about 100 staffs from the government, which is only half of their requirement as the number demanded by the TRC was 200 and CIEPD was 150.[169]

Furthermore, even the staffs funded by the government are not fully qualified to undertake the tasks as one of the respondents said:

> "*...Looks like we are fighting an unwinnable war with a semi-trained reserves ...*

169 The Truth and Reconciliation Commission Rules, 2072 (2016)

the task ahead of us is colossal whilst the resources available to us is meagre… you cannot imagine that the government took away some staffs during the local election…"

Furthermore, the Chairman of the CIEPD said:

"…Only a small proportion of the staff employed (about 15 percent) are of gazetted officers level who can assist the CIEPD in its investigation… rest of the staffs are of helper category such as peons, drivers and sweepers who cannot contribute effectively in our truth-seeking effort anymore…"

The commissions lack resources such as qualified manpower required to operate effectively in carrying out tasks related to the delivery of transitional justice. The effect of this has been mirrored in the work of commissions, which remained not only very slow but also not satisfactory.

5.3 Doubts on the Commissions

Almost all the respondent of this research expressed doubts on commissions' capacity to discover the truth as a respondent whose mother was killed by the Maoists during the conflict whilst working as a junior staff at a local health post in remote village of Doramba[170] said:

"…In the entire period of 30 months since the formation of commissions, not a single case has been investigated. It is highly unlikely that any investigation can take place in remaining six months…"

The mother of the respondent mentioned above was kidnapped and killed by the Maoists accusing her of being a spy for security services and passing information about the Maoists to the Nepal Army which resulted the 'Doramba incident'. Such incidents had a long-term implications on the victims and their family according to the respondent:

"…After a few hours of abduction they killed my mother by hanging her in the middle of the village…since the incident, our life has been ruined completely,

170 The Doramba incident had a longterm impact in the peace process of Nepal which took place at the time of the ceasefire and the Government and the Maoists were holding peace talks in Hapure village of Dang district in western Nepal. Meanwhile, Nepal Army took hostage and killed 21 Maoists militias who were gathering in a house for a meeting in 17 August 2003. Known as 'Doramba incident' the killing of the Maoists derailed the ongoing peace talk leading to the complete collapse of the ceasefire.

we became displaced from our own land and me and my brother could not progress in study and eventually dropped out of the school…"

Many respondents reported that there are thousands of victims every day in front of the office of the Truth and Reconciliation Commission in the capital city Kathmandu queuing up to fill complaint forms. One such victim sharing her painful experience of the trauma of having to wait for more than 12 years just to register a complaint against the culprits said:

"...I had hoped that not only the abductors of my father but also the perpetrators of every incident will be prosecuted. But, commission did not do anything except taking complaints. This is utterly frustrating…"

The commissioner of the TRC credited government's apathy for the slow progress:

"...Government took 14 months to pass the rule of the TRC without which we could not invite the victims to file for complaints ....on top of that the devastating mega Earthquake on 12 May 2015 damaged our office, which also caused a big trouble…"

The respondent said that the fourth year of the TRC was not enough for the thorough investigation of all the 70, 000 cases as he spoke:

"...It is good that the government has extended the term my two more year, I hope the reformed commissions at the end of the March will be able to carry out the remaining task…"

5.4 Lack of Legal Framework

In addition to the constraints highlighted above, majority of the respondents including the commissioners and the victims repeatedly mentioned a distinct lack of legal framework, which are necessary for moving forward the work related to implementing transitional justice mechanism in Nepal.

Torture, for example, is not yet criminalised in Nepal which is granting immunity to the perpetrators as one of the respondent mentioned:

"...Despite being signatory state of Convention against Torture and Other

Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Nepal has not made law to criminalise torture which is matter of shame' ..."

Lack of such rules has led to an inability of the commissions to hold the perpetrators accountable for crimes committed in the conflict era. As such, in absence of these laws, impunity continues to remain, which is increasing the suffering of the victims according to a respondent:

"... I was repeatedly raped and I feel worthless but I could not file a case.... where is law in this country? I am also a human being...I have emotions, I have rights and I need justice..."

The scope for applying existing legal framework to prosecute the perpetrators of the crimes committed during the conflict is further hindered by the fact that it was agreed that all the incidents and grievances are to be dealt with by the Truth and Reconciliation Commission, which is also reflected in the CPA and Interim Constitution of Nepal 2007.[171] This was also repeatedly mentioned by human rights lawyers who participated in the research as one of them mentioned:

"...Despite a jurisprudence of the Supreme Court of Nepal that the existing laws will come into effect if the government delays to form transitional justice mechanism. ...The government is deliberately delaying the process of making law and disobeying Supreme Court's order..."

5.4.1 Time Bound in Reporting Rape Case

The existing legal provisions of 35 days of time limit to report rape cases is creating major challenge to the TRC. Because of this, the TRC is not in the position to investigate into the incidents of rape that happened during period of insurgency.[172] This means the complete immunity for perpetrators of thousands of rape cases and sexual violence during conflict era of Nepal as a respondent showed his frustrations: [173]

"...This provision of 160 years old penal code of Nepal is preventing commission

171 The Interim constitution 2007, Article 33 (S) and The Comprehensive Peace Accord, article 5.2.5 and 8.5.
172 Human Rights Watch, *Silence and Forgotten: Survivors of Nepal's Conflict-Era Sexual Violence.* 23 September 2014. P. 3. Available at: https://www.hrw.org/report/2014/09/23/silenced-and-forgotten/survivors-nepals-conflict-era-sexual-violence (accessed: 2 August 2017)
173 ibid

to initiate investigation and interrogate accused perpetrators. We have asked government either to amend the law or make new law for the provision of transitional justice, but the government is not even responding…"

This provision of procedure has to be changed by either making new bill or amending it from the Parliament. This situation of lawlessness has deeply agonized the victims of sexual violence who were abducted and raped by both sides of conflict as another respondent mentioned:

"…Our pain and suffering has always been unnoticed… this is Nepal and only the God knows laws in Nepal…"

The respondent quoted above was a victim who was illegally detained in an army barrack in November 2003 and raped by officers of Nepal army when she was 16 years old. At the time of the incident, she was student of class 9 in a village of Dolkha district which lies in the mid-eastern part of Nepal.[174] While she was studying in her class room, a group of Maoists came in, forced whole class to join militia. After a few days in a jungle, a battalion of army caught her with friends and fellow Maoists. In the eyes of army she was a Maoist cadre. They did not believe that she was enforced to join Maoist as the respondent mentioned:

"…I was beaten severely and asked where about of other militias which I did know at all. Next day in army, camp me and my two friends were separated from other and locked in a dark room where army men used to come and do dirty things with us. My two classmates died because of excessive torture and gang rape and another is still missing…, I want to know why our lives have been destroyed, I want to know what crime did I do to deserve this suffering and I want to see all the criminals to be prosecuted…"

Despite much promises, many victims have lost trust and confidence in the transitional justice mechanism to deliver justice to them as another respondent said:

"…With a great hope of getting justice I had complained in the TRC office last year…..but now the officials in TRC say that there is no law to initiate investigation on the rape cases older than 35 days. That is why nothing has

174 Based in an interview with her in 13 July 2017

been done in regard of my complaint so far. Now, I've lost hope that I will get justice…"

5.4.2 Immunity for the Perpetrators of Torture

During the conflict, hundreds of people were tortured from both Maoists and security force of Nepal.[175] But, like in the case of rape and sexual violence, the TRC cannot initiate investigation against perpetrators because there is no law that criminalise torture in Nepal. However, the home ministry has tabled a draft bill on 'the Torture and Cruel, Inhuman or Degrading Treatment (Control) Bill, 2014' in the parliament, which has not been passed yet.[176] As the torture is generally committed by the security force, victim respondents said that their complaints against the perpetrators are refused to be registered citing the lack of law. Victims accuse Parliamentarian of delaying to pass the bill with vested intention as another respondent said:

"…Many abusers of human rights in conflict era are now members of parliament… they want to bury the past and move on because of their fear of being prosecuted. That is why they are delaying the draft of bill on torture…"

The respondent quoted above was brutally tortured in an army barrack between April and May 2005, during period of insurgency with an accusation of being a supporter of the Maoists. As there was no law in Nepal to criminalise torture, the respondent quoted above complained against the perpetrators in several European countries including in the United Kingdom where provisions of universal jurisdiction against human rights criminals exists. This resulted in the arrest of a serving army Colonel called Kumar Lama in London in January 2003.[177] However, the Colonel was acquitted by the court in London mainly due to an assurance of the Government of Nepal to deal with the said individual according to the norms of the transitional justice in Nepal. It is apparent that the case has been taken further by the Government of Nepal as the transitional

175 Sonal Singh, Khagendra Dahal, and Edward Mills. "Nepal's war on human rights: a summit higher than Everest." *International Journal for Equity in Health* 4, no. 1 (2005): 9.

176 International Commission of Jurists, *The Torture and Cruel, Inhuman or Degrading Treatment (Control) Bill, 2014: A Briefing Paper.* 2016, June. Available at: https://www.icj.org/wp-content/uploads/2016/06/Nepal-Torture-Bill-Advocacy-Analysis-Brief-2016-ENG.pdf. (accessed: 30 July 2017)

177 Mail Online, British police charge Nepali army colonel with two counts of torture during Himalayan nation's decade-long civil war 5 January 2013. Available at: http://www.dailymail.co.uk/news/article-2257488/Kumar-Lama-British-police-charge-Nepali-army-colonel-counts-torture-Himalayan-civil-war.html (Accessed: 30 July 2017)

mechanism has not worked as another respondent said:

> *"...The arrest of Lama gave alarming signal to the politicians and authorities of Nepal that if torture is not criminalised in Nepal, many of them will potentially face trials abroad. Therefore, to assure the international community the government played drama of making draft against torture and Parliament kept delaying it....'*

The respondents do not have any hope that the law against torture will be passed by the Parliament within remaining extended tenure of TRC as another respondent argued:

> *"...Even if the law is passed, there is too little time to investigate into the thousands of cases of torture..., That is why I am personally prepared to fight against impunity using international forums of human rights..."*

5.4.3 No Law against Enforced Disappearance

Data investigation demonstrated that the victims and their families continue to suffer emotionally and psychologically even after more than a decade of the end of conflict as a relative of a detainee who was tortured by the army recalls:

> *"...On a cold evening of 5 December 2005, I got news that my elder son who was arrested and detained by Bhairabnath Battalion of Nepal army. While I tried to find out the whereabouts of my son, a group of some army from the same battalion detained another son of mine on 14 December. Even since after that, I have not got any clue on the whereabouts of my sons..."*

The Bhairabnath Battalion is considered to be one of the most notorious places for making enforce disappearance of 49 detainees in conflict era.[178] The respondent quoted above tried his best to get the truth out by taking a number of measures including lodging complaints to the Home Ministry; writing to the to the Prime Minister and even sitting on a hunger strike with fellow family members of enforced disappeared people. But, all his effort went in vain and he was very tired and hopeless of seeking justice. Nonetheless, suddenly he had some hope last year when he came to know about the call of the CIEPD to submit complaints from family members of enforced disappearance as

178 Yadab Bastola, 'Unjust Silence' 30 August 2012, The Kathmandu Post. Available at: http://kathmandupost.ekantipur.com/news/2012-08-29/unjust-silence.html (Accessed: 12 July 2017)

he said:

> "*… Hearing this, I filled a complaint form and impatiently kept waiting for knowing the truth of my sons…but, no one has said anything so far. I go and frequently ask the authorities of the CIEPD whether they have started investigation or found any information regarding whereabouts of my sons…*"

The only answer he has been given every time from the people of the CIEPD is that the commissions have been waiting for laws first, which makes him even more frustrated as he further said:

> *"…They always say that there is no law to prosecute the perpetrators of enforced disappearance which I've been hearing since I lost my sons. If this is the case what is the point of having CIEPD, are they just buying time and deceiving us…?"*

This is not the question of the respondent quoted above only, in fact it represents the dissatisfaction of every relatives and family members of enforcedly disappeared persons.

The Chairman of the CIEPD mentioned:

> *"…Like in torture and cases of sexual violence, we do not have law that criminalises act of enforced disappearances which is hurting the feeling of victims' family…but we are helpless as we cannot initiate investigation into the complaints in absence of the law. We have been frequently asking government to provide the law but none is there to response us. It's like talking alone. This is really worrying…"*

A number of journalists also concurred with the commission this situation of lawlessness. This is indication that transitional justice mechanism is unlikely to deliver justice to the victims of the war era[179] a prominent human rights lawyer, who took part in this study said:

> *"…These two commissions formed to launch probe into cases of grave human rights violations in Nepal during the war-era have yet to begin their real tasks',' There is a saying "Justice delayed is justice denied". The same thing is*

179 The respondent is a senior journalist who has been closely watching and bringing issues of the transitional justice process of Nepal. He works in a daily news paper 'Annapurna Post' in Nepal.

happening in Nepal due to several factors…"

A human rights lawyer opined that the major hindrance to the process of transitional justice in Nepal is the 'lack of political will to give justice to victims from both the sides. Despite not being able to know the truth of their love one, family members of enforced disappeared persons are facing other legal hurdles as well according to the first commissioner:

"*…As it is not clear whether the missing person is dead or still alive, his spouse is uncertain whether she is widow or she still has her husband. Because of this dilemma hundreds of women are stuck in uncertainty…"*

Similar sentiments were echoed by the second commissioner who took part in this research:

"…, apart from that there is another problem which is related to the transfer of property to the spouse or children of the missing person. We have asked government to make interim provision in the case of enforced disappeared persons to ease transformation of property in their family members. That too is not being heard. This signifies that the government and political parties are not even paying attention towards the suffering of victims of conflict era…"'

5.5 The Reconstruction of the commissions

While both of the commissions are struggling to initiate their main job of investigating into the cases of human rights abuse, the Federal Parliament of Nepal has amended the provision of the TRC act that aims to address one of the key demand of the conflict victims to reconstruct the commissions. The Conflict Victims' Common Platform (CVCP) demanded the reconstruction of these two commissions with the declaration of their charter formed after a national consultation on 21 November 2018, the day the CPA completed 12 years. The second amendment of the act has continued the tenure of the commissions but ended the terms of the commissioners. In order the make the process credible the international community including the Amnesty International have urged the government to appoint fair and competent persons as the commissioners.

Other stakeholders have also raised similar concerns. For example, a former Attorney General of Nepal said:

> "…*Since there is no recognition of the transitional justice mechanisms by the UN and international community and neither it does meet the standards set by the Supreme Court of Nepal, the government has now an opportunity to correct the flawed process…"*

Similar sentiments were echoed by another human rights lawyer' as he argued:

> "…*In terms of their operation, the credibility of the commissions is under questions by the victims and their operation is generally under low standards if compared to successful transitional justice mechanism, the government should learned from the past experience and make the commissions by reconstructing it lawfully…"*

Apart from the reconstruction of the commission, the victims have demanded the amendment of the TRC act in line with the Supreme Court's order as one of the respondents said:

> *"...As the of the TRC Act 2014 had loop holes to grant amnesty to the perpetrators of crimes against humanity, 234 victims including me had lodged a writ petition in the Supreme Court of Nepal against those provisions… "*

As mentioned in the chapter 4, the Supreme Court had ordered the Government to amend the act in line with international standard by avoiding the provisions of granting amnesty to the perpetrators.[180] Since the government has not complied the order of the Court, the victim mentioned above still holds the view that the mandate of TRC and CIEDP is not legitimate as he further said:

> "…*Unless the act is not amended in line with the verdict of the Supreme Court,*

180 Based on the interview with Mr. Adhikari. The Supreme Court of Nepal on 26 February 2015 had issued a verdict ruling out the discretionary power of the TRUTH AND RECONCILATION COMMISSION and the CIEDP to grant amnesty to the abuser of human rights in conflict era. The bench of three justices had also ordered to amend the TR act 2014 to include the provision that ensures 'no reconciliation without the consent of victims'. For more, see : 1. Global Legal Mirror, "Nepal: Supreme Court Strikes Down Amnesty Provision in Truth and Reconciliation Law" 17 March 2015. Available at: http://www.loc.gov/law/foreign-news/article/nepal-supreme-court-strikes-down-amnesty-provision-in-truth-and-reconciliation-law/ (accessed: 2 August 2017) 2. Rosa Adkin, "Nepal Supreme Court Rejects Amnesty for War Crimes" 27 February 2015. Available at: http://www.reuters.com/article/us-nepal-rights-idUSKBN0LV0CG20150227. (Accessed: 2 August 2017)

we don't acknowledge the legitimacy of the commissions even if they are reconstructed…"

Of many prominent cases of violation of human rights during the Maoist led conflict in Nepal, the case of a teacher named Muktinath Adhikari in Lamjung district in western Nepal captured the shocking nature of the brutality against innocent civilians. Above mentioned respondent is the son of same Muktinath Adhikari who was abducted and hanged openly in a village of Lamjung district by a group of Maoist on 16th January 2002.

"*…After the incident we have been displaced and I have been fighting for … to ensure the discovery of full truth and the prosecution to the perpetrators, we had asked government to have the representation of victims in every process of transitional justice such as making law, forming commissions and conducting investigation. But, we have been excluded in every steps and the provision of amnesty was inserted despite our protest…"*

Other respondents also said that both of the commissions lack legitimacy since they do not represent the victims and the act has not been amended as per the verdict of the Supreme Court contributing to the legitimacy of the commissions:

"…Both of these commissions have not been able to do much because of the controversies surrounding the Act under which they were constituted, the nomination process and the credential of the commissioners themselves…"

Such sentiments were also expressed by another respondent [181] as she argued:

"…UN and other major international organizations have refused to work with the commissions. Although, victims wanted to give commissions the chance to prove, they have raised serious doubts…"

Above mentioned respondent, a prominent human rights activist in Nepal, has initiated investigation of hundreds of war crime in Nepal as a member of civil society.[182] With this experience of human rights advocacy of more than two decades, the acceptability of two

181 Based on the interview with Mandira Sharma in 30 June 2017.
182 Joanna Jolly, "Nepal: Getting Away With Murder' 17 March 2013, BBC Radio. Available at: http://www.bbc.co.uk/programmes/p0165qf0/p0165q07. (accesed: 4 August 2017)

commissions in her opinion is very low as she argued:

> *"...Apart from collecting complaints from victims (which they did mobilizing the local peace committee), Commissions have hardly been able to do much… They won't be able to do much unless the some of the fundamental issues are addressed, such as the amendment of the Act as per the decision of the Supreme Court and creating the environment of getting supports of everyone including the intentional community…"*

Respondents also raised the concerns about the impartiality and independency of commissioners pointing out that main political parties had tacit understanding to appoint their 'faithful' one as the members of the commission.[183] Almost every respondent expressed their concern over the political affinity of the commissioners which is reflected in their actions and have been subject of media coverage many times.[184] Because of the provision of amnesty in the act which are not in compliance with Nepal's 'international legal obligation', the United Nation has also already expressed its concerns and rejected to provide any support the two commissions.[185] Apart from that the UN has also raised concern on the operation of the two commissions which could not reflect the independency and impartiality.[186]

5.6 Victim's Dissatisfaction in Reparation and Rehabilitation

Apart from the discovery of truth and prosecution to the perpetrators another dimension of the transitional justice is rehabilitation to the victims which too is not satisfactory in the experience of respondents. A number of victims of the conflicts reported their dissatisfactions with the transitional justice mechanism implemented and the work of the commissions as one of them argued"[187]

183 Human Rights Watch, "Nepal: Joint Letter Regarding Formation of The Truth and Reconciliation Commission and the Commission on the Enforced Disappearances, 18 December 2014. Available at: https://www.hrw.org/news/2014/12/18/nepal-joint-letter-regarding-formation-truth-and-reconciliation-commission-and (Accessed: 4 August 2017)
184 Lekhanath Pandey, "Political affinity reflected in the TRUTH AND RECONCILATION COMMISSION members' work" 14 February 2016, *The Himalayan Times.* Available at: https://thehimalayantimes.com/nepal/political-affinity-reflected-Truth and Reconcilation Commission-members-work/ (accessed: 4 August 2017)
185 OHCHR, Nepal: OHCHR position on UN support to the Commission on Investigation of Disappeared Persons and the Truth and Reconciliation Commission: 16 February 2016. Available at: http://www.ohchr.org/Documents/Countries/NP/Nepal_UN%20osition_supportTRUTH AND RECONCILATION COMMISSION_COIDP_Feb2016.pdf. (Accessed: 3 August 2017)
186 ibid
187 Based on the interview of Hari Kumar on 24 June 2017

"…'I've lost everything that I had. 'I've been looking forward to go back to my home again, and waiting to see the perpetrators to be prosecuted. But, neither I've got my property nor the culprits have been prosecuted. This is utter injustice which makes me frustrated, agonized and angry too…"

Similarly, another respondent from Basantapur village of Makawanpur district which lies in southern belt of Nepal, whose property was seized by Maoists militia said:

"…Everything changed suddenly, they came one night and pointed gun in my forehead and asked me to hand over all the property including my only house if I wanted to live. I did accordingly and left home with entire family on that same night. Since then I have been living like a refugee in my own country…"

The above-quoted respondent tried hard to get back his property and go back home to start the life again and filed complaints in many places including the National Human Rights Commission (NHRC). But, his every attempt went in vain as he further said:

"…This time I really had hope when TRC called complaints from victims…but, this time too my hope turned into despair…"

There is a growing body of evidence that a significantly large number of conflict victims whose properties were seized in an accusation of being 'feudal' in conflict era are internally displaced since decades and the reparation to them is extremely low.[188] A respondent echoed similar sentiments:

"…Plight of internally displaced people has not been dealt seriously as most of the attention of transitional justice process is drawn towards the crime that involves physical harm such as murder, torture, rape and enforced disappearances' the seizure of property is also a serious crime which needs to be addressed with equal attention…"

Refereeing to the cases of seizure of property as the commissioner of the TRC'[189] said:

"*…We are aware that there are thousands of people who have lost their property in war time… we will investigate into each case of the seizure and recommend*

188 Eliane Scheibler, "A case for distributive justice: reparations for victims of an armed conflict in developing countries." (2012) *N. A. D. E. L. MAS-Cycle.*

189 Based on the telephone interview with Gurung on 15 July 2017

reasonable reparation to the victims…"

Section 23 of the Truth and Reconciliation Commission Act [190] has described reparation as "compensation, restitution or rehabilitation or any other appropriate arrangement to the victim" and section 24 of the act provides process for returning seized property and recommending compensation for the actual loss of incurred due to the confiscation.[191] The UN has expressed its reservation over this definition as it has not explicitly mentioned that "victims have the rights to reparation." According to the UN, apart from restitution, compensation and rehabilitation, "the full and effective reparation" also includes satisfaction of victims and guarantees of peace[192] which is not reflected in the TRC Act in Nepal. So far, not a single victim respondent have felt the "satisfaction" and said that they have received very little in the comparison of what they have lost in the conflict era. The Ministry of Peace and Reconstruction (MoFR) launched the Interim Relief Program (IRP) to the conflict victims of Nepal from 2008-2012[193] which gave 100, 000 Nepalese rupees (NPR) (which was equivalent to $1, 400 in 2008) to the nearest beneficiary of those killed in conflict.[194] Apart from that IPR offered NPR 25, 000 each to the widows of killed or wives of enforced disappearances, scholarship to their children and reimbursement of medical expense to those who were seriously injured or suffered any physical pain as the result of conflict.[195] Over 30, 000 people categorised as "conflict victims" and 80, 000 internally displaced persons as per the data collected through multi-agency task force formed by the government of Nepal received interim relief.[196]

Some of the victims who have "special political link" have got more from the state than offered by the IPR[197] and many of the victims such as women who were raped or subjected to sexual violence could not receive any as they could not even report against

190 The Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2014, Available at: http://www.Truth and Reconcilation Commission.gov.np/document (Accessed: 17 June 17, 2017)
191 ibid
192 UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,* General Assembly resolution 60/147, article 4.

193 Ruben Carranza, "Relief, reparation and root cause of conflict in Nepal", (2012). *International Center For Justice.* p. 7
194 ibid, at 9
195 ibid
196 ibid p. 7
197 Based on the interview of Mandira Sharma, 30 June 2017

the abuse because of 35 days of reporting limitation in the law.[198]

A prominent human rights lawyer said:

> *"...Some victims have been co-opted by the political parties; they are offered positions and power... However, some are in difficult situation as they suffered both physical and psychological consequences of the conflicts..."*

Thus, the result demonstrates that the mechanism of transitional justice is facing number of obstructions in Nepal.

6. Conclusions

The issue of transitional justice continues to be an important but unfinished component of the peace process in Nepal. Whilst there is a considerable demand from the victims and civil society for a full implementation of the transitional justice mechanism, a clear reluctance exists amongst political parties to operationalise it. Results from the data analysis indicated that the delivery of the transitional justice to the conflict victims continues to be a fading flower.

This research has identified a number of factors contributing to the delay in the delivery of transitional justice in Nepal. The TRC and the CIEPD lacked time for a thorough investigation into the cases of human rights violation. Similarly, there is also a lack of legal framework to criminalise serious violation of human rights such as torture, enforced disappearance and rape. Furthermore, the provision of the TRC Act that grants amnesty to the perpetrators has not yet been amended as per the verdict of the Supreme Court. Citing this legal limbo, international communities such as the UN which provided significant support in the peace process has clearly express its unwillingness to continue lending its support to the transitional justice mechanism in Nepal. A combination of the above mention factors demonstrate that the transitional justice has not been able to make desired impact in Nepal. Therefore, due consideration should be given to resolving the factors contributing to the delay in the transitional justice to bring the peace process in Nepal to a logical conclusion.

7. Recommendations

198 Seira Tamang, Chiran Manandhar and Dipti Sherchan, "We Can't Forget: Truth and Memory of Post-Conflict Nepal" (2017), *International Center for Transitional Justice and Martin Chautari. P. 23*

The Government has extended the terms of TJ commissions by two more years with the provision of its reconstruction. To avoid the much feared anticipation that the TJ process would fail, Nepal has now an opportunity to deliver justice to the victims. Based on the findings of this research, the following recommendation are made to fully realise the transitional justice in Nepal. As the government is about to reconstruct the commissions, the appointment of competent, impartial and credible persons as the commissioners through a transparent manner is essential. Another main obstruction that the transitional justice process facing in Nepal is the lack of laws to criminalize cases of torture and enforced disappearances. In absence of these laws, the TRC and the CIEPD can't create individual accountability of crimes committed during the conflict. Considering the urgency, it is recommended to the Government and the legislative Parliament of Nepal to make and pass the laws to criminalise all the act of tortures and enforced disappearances without any delay.

Apart from that, victims of rapes and other forms of sexual violence during the conflict are not being able to report against the perpetrators because of 35 days of time limitation. This legal barrier has prevented them to receive reparation and other support from the Government such as reimbursement of medical expense and scholarship to their children. In order to redress this problem, it is also recommended to the Government and the legislative Parliament to either amend the existing law or make a new law.

Members of civil society such as NGOs, media and human rights activists are important part of transitional justice. Without their support victims remain voiceless. At the time when transitional justice is in the brink of failure, the role of civil society is very significant. Therefore, NGOs are recommended to watch every activities of commissions and provide forums for public discussion inviting press as well to create pressure on stake holders.

Likewise, media persons are recommended to continue to highlight issues of the transitional justice regularly to highlight various obstructions facing by the TRC and the CIEPD. They are also recommended to highlight the political unwillingness to investigate into cases of human rights abuse. Lawyers and human rights activists are recommended to carry out strategic litigation by bringing cases of war crimes in the

court which would challenge impunity.

Active role of victim in this crucial time is very important and needed one. They are recommended to launch protests and raise voice to prevent the failure of the transitional justice. They are encouraged to file case in domestic courts and approach other international forums such as UN Human Rights Council and UN HR Committees. It is recommended to international community such as UN, Amnesty International and International Centre for Transitional Justice (ICTJ) to pressurise the Government of Nepal to take measures to prevent miscarriage of transitional justice.

Failure of the transitional justice process is not and should not be considered as the end of justice. Regular criminal justice system of Nepal that is in existence with full competency should start hearing cases of human rights violation committed during the period of insurgency. Therefore, it is recommended to the Judiciary of Nepal to redress the impunity by taking cases from the victims.

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नेपालको संविधान र आर्थिक, सामाजिक तथा साँस्कृतिक अधिकार एक विधिशास्त्रीय विश्लेषण

– बलराम राउत

सार संक्षेप

आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारहरूको कार्यान्वयनको जिम्मा राज्यको हो भन्ने कुरा नेपालको संविधानको धारा ४७ बाट प्रष्ट हुन्छ । उक्त अधिकारहरूको कार्यान्वयनमा राज्यले ढिलासुस्ती गरेको अवस्थामा सर्वोच्च अदालतले त्यसलाई देखेको नदेखे झै गर्न नहुने भन्ने कुरा संविधानको धारा ४६ मा संवैधानिक उपचारको हकको व्यवस्था रहेको देखिन्छ अर्थात आर्थिक, सामाजिक तथा साँस्कृतिक अधिकार नीतिगत कुरा हुन । यसको अर्थ यो होइन कि यसलाई अदालतमा प्रश्न उठाउनै पाइदैन जुन कुरा सर्वोच्च अदालतबाट भएका माथिका फैसलाहरूबाट पनि थाहा पाउन सकिन्छ । यति हुँदा हुँदै संवैधानिक व्यवस्थाहरू र अदालती फैसला प्रर्याप्त हुँदैन भन्ने कुरा माथिको प्रतिवेदनमा उल्लिखित कुराहरूबाट प्रष्ट हुन्छ । अदालतको फैसलाप्रति नेपाल सरकार त्यति संवेदनशील छैन भन्ने कुरा मीरा ढुंगानाको मुद्दाबाट प्रष्ट हुन्छ । यस मुद्दाको फैसलाबाट के देखिन्छ भने अदालतको आदेश कार्यान्वयन गर्न पनि अदालतले नै फेरि आदेश दिनु पर्ने अवस्था विद्यमान छ ।

१. परिचय

आर्थिक, सामाजिक, तथा साँस्कृतिक अधिकार मानव मात्रको नैसर्गिक अधिकार हुन् । यी अधिकारले उसलाई मर्यादित र सम्मानपूर्वक जीवन बाँच्ने आधार प्रदान गर्दछ । यस अधिकारको अभावमा मानव प्राणीको जीवन असंभव हुने देखिन्छ ।[1] त्यस्तै यी अधिकारको मानव जीवनमा रहेको महत्त्वको सम्बन्धमा विभिन्न विद्वानहरूले विभिन्न समयमा आ–आफ्नै किसिमले व्याख्या र विश्लेषण गरेका छन् । आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारअन्तर्गत खाद्यान्नको अधिकार, स्वास्थ्यको अधिकार, शिक्षाको अधिकार, आवासको अधिकार, सामाजिक सुरक्षाको अधिकार, सामाजिक न्यायको अधिकार,भाषाको अधिकार जस्ता महत्त्वपूर्ण अधिकार पर्दछन् । यी अधिकारलाई वितरण गर्दा केही खास समुदाय वा वर्ग विशेषका मानिसहरू जस्तै महिला, बालबालिका, अपाङ्गता, बृद्ध बृद्धाका लागि राज्यले सकारात्मक

1 Asbjorn Eide & Allan Rosas, Economic, Social and Cultural Rights: A Universal Challenge, in Asbjorn Eide et al., *Economic, Social and Cultural Rights: A Text Book*, 2nd ed., (Kluwer Law International: The Hague, 2001), p. 4.हेर्नुहोस, आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारका सम्बन्धमा नेपालको संविधानले व्यवस्था गरेका धाराहरु १६, १७, १८, २१, २४, २५, २६, ३०, ३१, ३२, ३३, ३४, ३५, ३७, ३८, ३९, ४०, ४१, ४२, ४३ र ४४।

विभेदका नीति अवलम्बन गरेको पाइन्छ[2]।

आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारले मानव जीवनमा महत्त्वपूर्ण स्थान राख्ने भएकाले नेपालको संविधानको भाग तीनमा यी अधिकारलाई मौलिक हकको रूपमा महत्त्वपूर्ण स्थान दिएको छ[3]। नागरिकहरूले यी अधिकार समान रूपमा उपभोग गर्न पाउनु पर्दछ[4] । तर नेपालमा आर्थिक, सामाजिक तथा साँस्कृतिक अधिकार नागरिक तथा राजनीतिक अधिकार भन्दा पछाडि परेको कुरा नेपालको न्याय प्रणालीको अध्ययन र अनुसन्धानबाट थाहा पाउन सकिन्छ । राज्यले यी अधिकारलाई त्यति महत्त्व नदिएको देखिन्छ[5]। त्यसैले होला संविधान सभाबाट जारी नेपालको संविधानले यी अधिकारलाई संविधानमा मौलिक हकको रूपमा नै स्थापित गरी सुरक्षाको प्रत्याभूति गरिदिएको छ[6]। संविधानमा कुनै अधिकारलाई मौलिक अधिकारको रूपमा व्यवस्था गर्दैमा नागरिकले ती अधिकारको उपभोग गर्न पाउँछन भन्ने निश्चित रूपले भन्न सकिँदैन[7]। हुनत उक्त मौलिक हकहरूको कार्यान्वयनका लागि नेपाल सरकारले तीन वर्षभित्र कानून बनाई सक्नुपर्दछ भन्ने बाध्यात्मक संवैधानिक व्यवस्था पनि गरेको छ[8]। साथै यी अधिकारको सुनिश्चिताको लागि संविधानको धारा ४६ मा संवैधानिक उपचारको व्यवस्था गरेको छ[9]। नेपाल आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारसम्वन्धी अन्तर्राष्ट्रिय अनुबन्ध १९६६ को पक्ष राष्ट्र पनि हो । नेपाल सन्धि ऐन २०४७ को दफा ९ (१) अनुसार यदि राष्ट्रिय र अन्तर्राष्ट्रिय कानून बाझिएको अवस्थामा अन्तर्राष्ट्रिय कानून लागू हुन्छ ।

संविधान र कानूनमा उक्त अधिकारहरू उल्लेख हुँदैमा नागरिकको आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारहरू सुनिश्चित हुन्छ ? यदि त्यसो हुन नसकेको अवस्थामा सर्वोच्च अदालतको भूमिका के हुने? यस्तो अवस्थामा सर्वोच्च अदालतले संविधानको धारा ४६[10] र धारा १३३[11] को अधिकार प्रयोग

2 Asbjorn Eide & Allan Rosas, Economic, Social and Cultural Rights: A Universal Challenge, in Asbjorn Eide et al., *Economic, Social and Cultural Rights: A Text Book*, 2nd ed., (Kluwer Law International: The Hague, 2001), p. 5; See also E. W. Vierdag, 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights', in *Netherlands Year Book of International Law*, Volume 9, (The Hague, The Netherlands: T. M. C. Asser Institute, 1978), pp. 61-105; Oliver De Schutter (ed.), *Economic, Social and Cultural Rights as Human Rights, (*UK and USA: An Elgar Research Collection, 2013

3 हेर्नुहोस, नेपालको संविधानको धाराहरू १७, २०, २१, २४, २५, २६, २९, ३०,३१, ३२, ३३, ३४, ३५, ३६, ३७, ३८, ३९, ४०, ४१, ४२, ४३ र ४४।

4 हेर्नुहोस, नेपालको संविधानको धाराहरू १६ र १८

5 Geeta Pathak, "Breaking the Generation Theory of Human Rights: Mapping the Scope of Justiciability of Economic, Social and Cultural Rights with Special Reference to the Constitutional Guarantees in Nepal", 3 *Kathmandu School of Law Review* (Kathmandu: Kathmandu School of Law, 2013), 27. See Hari Phyual and Prem Rai Chanda, 'Human Rights Jurisprudence Developed by the Supreme Court of Nepal: An Overview,' *NJA Law Journal,* Volume 4 Number 1, (Kathmandu: National Judicial Academy, 2010), p. 125.

6 हेर्नुहोस, नेपालको संविधानको भाग तीन(मौलिक हक

7 Asbjorn Eide, Economic, Social and Cultural Rights as Human Rights, in Asbjorn Eide et al. eds., *Economic, Social and Cultural Rights: A Text Book*, 2nd ed., (Kluwer Law International: The Hague), p. 17.

8 हेर्नुहोस, नेपालको संविधानको धारा ४७

9. हेर्नुहोस, नेपालको संविधानको धारा ४६

10 संवैधानिक उचारको हक (धारा ४६)(यस भागव्दारा प्रदत हकको प्रचलनका लागि धारा १३३ वा १४४ मा लेखिए वमिजिम संवैधानिक उचार पाउने हक हुनेछ ।

11 सर्वोच्च अदालतको अधिकार क्षेत्र (धारा १३३ (२)) (यस संविधानद्वारा प्रदत मौलिक हकको प्रचलनका लागि वा अर्को उपचारको व्यवस्था नभएको वा अर्को उपचारको व्यवस्था भए पनि त्यस्तो उपचार अर्याप्त वा प्रभावहीन देखिएको अन्य कुनै कानूनी हकको प्रचलनका लागि वा सार्वजनिक हक वा सरोकारको कुनै विवाद समावेश भएको कुनै विवाद ठुंगो लगाउने असधारण अधिकार सर्वोच्च अदालतलाई हुनेछ ।

गरी मौलिक हकलाई कार्यान्वयन गर्न नेपाल सरकारलाई आदेश दिन सक्छ वा सक्दैन? राज्यले आफ्नो कर्तव्य निर्वाह नगरेको अवस्थामा सर्वोच्च अदालतले संविधानको संरक्षकको नाताले संवैधानिक व्यवस्थाहरूको संरक्षण गर्नु पर्दछ र यो उसको कर्तव्य पनि हो[12]। तर हालसम्म आर्थिक, सामाजिक तथा साँस्कृतिक क्षेत्रमा सर्वोच्च अदालतले गरेको फैसलाबाट सर्वोच्च अदालत आफैं कता गइरहेको छ भन्ने कुरा ठम्याउन गाह्रो छ[13]। यिनै मुख्य प्रश्नहरूको उत्तर खोजी गर्नका लागि लेखकले आर्थिक, सामाजिक तथा साँस्कृति अधिकारसँग सम्बन्धित अन्तर्राष्ट्रिय तथा राष्ट्रिय कानूनहरू, सर्वोच्च अदालतले आर्थिक,सामाजिक तथा साँस्कृतिक अधिकारसँग सम्बन्धित रहेका महत्त्वपूर्ण फैसलाहरू र नेपाल सरकारको विभिन्न नीति-नियमहरूको अध्ययन र विश्लेषण गरी यो लेख तयार पारिएको छ । यसमा मुख्य गरी समावेश गरिएका विषयहरूमा आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारको सैद्धान्तिक व्याख्या र यसको विकास, यी अधिकारसँग सम्बन्धित नेपालको संवैधानिक व्यवस्थाहरू र यस विषयमा सर्वोच्च अदालतबाट व्याख्या भएका मुख्य मुख्य फैसलाहरू रहेका छन् ।

२. आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारको विकास र सैद्धान्तिक अवधारणाहरू

आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारको संरक्षण वा सुनिश्चितताको सम्बन्धमा विद्धानहरू बीच अनेक किसिमका बहस र छलफल भएको पाइन्छ जस्तै, यी अधिकारको सम्मान गर्ने, संरक्षण गर्ने र पूरा गर्ने दायित्व कसको हो ? यी अधिकारलाई नागरिक तथा राजनीतिक अधिकार जस्तै कार्यान्वयन गर्न सकिन्छ वा सकिँदैन? यी अधिकार राज्यका नीतिगत कुराहरूभित्र मात्र पर्दछन् वा न्यायिक निरूपण (Justiciability) का विषय पनि हुन ? यी अधिकारको कार्यान्वयनका लागि ठूलो धनराशी आवश्यक भएकाले केवल धनी राष्ट्रले मात्र गर्न सक्छन् किनभने यसका लागि ठूला धनराशीको आवश्यकता पर्दछ वा हरेक राज्यको उत्तिकै दायित्व हुन्छ ? राज्यका नागरिकहरू यी अधिकार कार्यान्वयनका लागि राज्यका ईच्छामा भर पर्नु पर्दछ वा राज्यले अनिवार्य रूपले कार्यान्वयन गर्नु पर्दछ ? यस्ता छलफल र बहसको सम्बन्धमा यस परिच्छेद्मा तलका उल्लिखित शीर्षकहरूमा विस्तृत रूपमा चर्चा गरिएको छ ।

२.१. मानव अधिकार र यसका पुस्ताहरू

मानव अधिकार सम्बन्धी विश्वव्यापी घोषणाको अवलम्वन पछि उक्त घोषणापत्रमा भएका व्यवस्थालाई बाध्यकारी कानूनको रूपमा व्यवस्था गर्न संयुक्त राष्ट्रसंघ,मानव अधिकार आयोगले अधिकार सम्बन्धी विद्येयकको मस्यौदा गर्ने क्रममा शुरूमा एउटै मस्यौदा गरी सम्पूर्ण अधिकारको (नागरिक, राजनीतिक, आर्थिक,सामाजिक तथा सांस्कृतिक) सम्वन्धमा व्यवस्था गर्ने भनी निर्णय गरेको भए पनि यस सम्वन्धमा संयुक्त राष्ट्रसंघका सदस्य राष्ट्रहरू बीच ठूलो विवाद उत्पन्न भयो र सदस्य राष्ट्हरू पूर्व र पश्चिममा विभाजन भयो । एउटा समूहको प्रतिनिधित्व संयुक्त राज्य अमेरिकाले गऱ्यो र अर्को समूहको प्रतिनिधित्व तत्कालीन सोभियत संघ, हालको रूसले गऱ्यो । संयुक्त राज्य अमेरिकाको समूहमा रहेका राष्ट्रहरूको

12. हेर्नुहोस, नेपालको संविधानको धारा १२८ (२)

13. हेर्नुहोस, यस लेखको खण्ड ४ को माधव वस्नेतको मुद्दा र प्रकशमणि शर्माको मुद्दा र Diwakar Bhatta, 'Application of International Human Rights Instruments to Nepali Law: A Comparative Analysis of Theory and Practice', NJA Law Journal, Volume 4 Number 1, (Kathmandu: National Judicial Academy, 2010), p. 85.

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मत के थियो भने नागरिक तथा राजनीतिक अधिकार र आर्थिक, सामाजिक तथा साँस्कृतिक अधिकार, दुई फरक, फरक प्रकृतिका अधिकार हुन् र यिनीहरूको सम्वन्धमा फरक, फरक कानूनमा फरक किसिमका कार्यान्वयनको दायित्व र अनुगमनको व्यवस्था हुनुपर्दछ भनी तर्क अगाडि सारेका थिए । त्यस्तै सोभियत संघको समूहमा रहेका राष्ट्रहरूको तर्क के थियो भने यी अधिकारको प्रकृतिमा कुनै किसिमको तात्विक भिन्नता रहेको छैन । त्यसैले यी सम्पूर्ण अधिकारलाई एउटै कानूनमा समेटनु पर्दछ । तर, जीत चांहि संयुक्त राज्य अमेरिकाको भयो र संयुक्त राष्ट्रसंघिय मानव अधिकार आयोगले आफ्नो निर्णय परिवर्तन गऱ्यो । यी अधिकारको व्यवस्था गर्नका लागि दुई फरक फरक मस्यौदाको निर्माण गर्ने निर्णय पनि गऱ्यो । संयुक्त राष्ट्रसंघबाट पारित पनि भयो[14]।

यिनै तर्क वितर्कका आधारमा, मानव अधिकारको विकासको क्रममा, मानव अधिकारलाई विभिन्न पुस्ताहरूमा (In Generations) वर्गीकरण गरेको पाइन्छ । यी पुस्ताहरूलाई करेल भास्कले सन् १९७९ मा पहिलो पटक तीन समूहमा वर्गीकरण गरेको पाइन्छ[15]जुन अध्ययनका लागि सजिलो र उपयुक्त पनि देखिन्छ । पहिलो पुस्ताअन्तर्गत नागरिक तथा राजनीतिक अधिकार,दोस्रो पुस्ताअन्तर्गत आर्थिक, सामाजिक तथा साँस्कृतिक अधिकार र तेस्रो पुस्ताअन्तर्गत एक्यवद्धता (Solidarity) वा समूहगत (Collective) अधिकार, स्वायत्तताको अधिकार (Right to Self-determination) र विकासको अधिकारलाई राखेको पाइन्छ, जस अन्तर्गत बाल अधिकार, महिला अधिकार र आदिवासी,जनजातिका अधिकार पर्दछन् । यसको अर्थ यो होइन कि यी अधिकार बीच तहगत (Hierarchy_ भिन्नता रहेको छ । यस दुविधालाई मानव अधिकार सम्वन्धी दोश्रो विश्व सम्मेलन[16]को भीयना घोषणा कार्यनीतिले अन्त्य गरिदिएको छ । यस सम्मेलनको घोषणापत्रले के प्रस्ट पारेको छ भने यी अधिकार एक अर्कासँग अर्न्तनिहित, अन्तरसम्बन्धित र अविभाज्य छन[17]। यी अधिकार विश्वव्यापी हुन्छन साथै यी अधिकार

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14 See General Assembly Resolution 421 (V) of 4 December 1950; General Assembly Resolution 543 (VI) of Febraury 1952. See also on this Question, *inter alia*, M. Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary, 1993, p. xx. The arguments for controversial decision are examined by A. Eide, 'Economic, Social and Cultural Rights', in Asbjorn Eide et al. eds. Economic, Social and Cultural Rights: A Text Book, 2nd Edition, (Kluwer Law International: The Hague, 2001), pp. 9-11.

15 See K. Drzewicki, 'The Right to work and Rights in work', A.sbjorn Eide, Catarina Krause and Allan Rosas eds. Economic, Social and Cultural Rights: A Text Book, Second Revised Edition, Kluwer Law International: The Hague; M. Nowak, "The Right to Education', Asbjorn Eide, Catarina Krause and Allan Rosas eds. Economic, Social and Cultural Rights: A Text Book, Second Revised Edition, Kluwer Law International: The Hague, 2001; Asbjorn Eide & Allan Rosas, Economic, Social and Cultural Rights: A Universal Challenge, in Asbjorn Eide et al. (eds.), *Economic, Social and Cultural Rights*, 2nd ed. (Kluwer Law International: The Hague, 2001), pp. 3-8; Asbjorn Eide, Economic, Social and Cultural Rights as Human Rights, in Asbjorn Eide et al. eds., *Economic, Social and Cultural Rights: A Text Book*, 2nd , (Kluwer Law International: The Hague), pp. 9-28; A. Rosas, 'The Right to Development', in Asbjorn Eide et al. eds., *Economic, Social and Cultural Rights: A Text Book*, 2nd , (Kluwer Law International: The Hague), pp. 119-132; Oliver De Schutter, 'Introducation', in Oliver De Schutter (ed.), *Economic, Social and Cultural Rights as Human Rights*, (UK and USA: An Elgar Research Collection, 2013), pp. xiii-lxi.

16 World Conference on Human Rights: Vienna Declaration and Programme of Action, UN doc. A/CONF. 157/23, Part I, 1993.
17 World Conference on Human Rights: Vienna Declaration and Programme of Action, UN doc. A/CONF. 157/23, Part I, 1993, para 5. See also Martin Scheinin, Economic, Social and Cultural Rights as Legal Rights, in Asbjorn Eide, Catarina Krause and Allan Rosas eds. Economic, Social and Cultural Rights: A Text Book, 2nd ed., (Kluwar Law International: The Hague, 2001), pp. 29-54.

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समानताको अधारमा लागू हुन्छन्[18] ।

२.२. आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारको सम्मान, संरक्षण र पूरा गर्ने दायित्व

नर्वेजियन विद्वान एसवर्न इडी,तथा मानव अधिकारकर्मी, आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारलाई महत्त्वपूर्ण स्थान दिने मध्येका एक हुन् । उनी आर्थिक,सामाजिक तथा साँस्कृतिक अधिकारलाई व्याख्या गर्ने क्रममा यी अधिकार कार्यान्वयनका लागि तीनवटा महत्त्वपूर्ण पक्षका बारेमा उजागर गर्ने पहिलो व्यक्तिका रूपमा चिनिन्छन् । यी अधिकारका तीन महत्त्वपूर्ण पक्षहरू अन्तर्गत व्यक्तिका अधिकारको सम्मान, संरक्षण गर्ने र कार्यान्वयन गर्ने दायित्व (Obligation to Respect, Obligation to Protect and Obligation to fulfil) पर्दछन्[19]। कसैले यस सिद्धान्तको विकास गर्ने श्रेय हेनरी सीउलाई पनि दिइएको पाइन्छ । जुन सयुक्त राज्य अमेरिकाको विदेश नीतिका सम्बन्धमा लेख्नु भएको किताबबाट प्रष्ट हुन्छ[20]।

इडीले यी अधिकारको सम्मान गर्ने, संरक्षण गर्ने र पूरा गर्ने पहिलो दायित्व राज्यको हुन्छ भनी उल्लेख गरेको पाइन्छ । राज्यले व्यक्तिको आर्थिक, सामाजिक, तथा साँस्कृतिक अधिकारको सम्मान गर्न सक्नुपर्दछ । अर्थात व्यक्तिका हक,अधिकारमाथि राज्यले कुनै किसिमले हस्तक्षेप गर्नु हुँदैन जस्तै स्वतन्त्र रूपले जागीर गर्न पाउनु, सम्पत्ति राख्न पाउनु र त्यसको उपभोग गर्न पाउनु पनि हो[21]।

व्यक्तिको आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारलाई सुरक्षा प्रदान गर्नु राज्यको दोस्रो दायित्व हो । अर्थात यी अधिकारहरू यदि तेस्रो व्यक्तिबाट हनन् भएको छ वा हनन् हुने अवस्थामा छ भने त्यसबाट सुरक्षा प्रदान गर्नु राज्यको दायित्व हो । जस्तैं कसैको घरमा कुनै व्यक्ति अनाधिकृत रूपमा प्रवेश गरेमा वा गर्ने अवस्थामा त्यस्तो व्यक्तिलाई सुरक्षा प्रदान गर्नु र कुनै किसिमको क्षति भएको छ भने क्षतिपूर्ति भराई दिनु, मजदूरलाई उसको मालिकबाट जागीरको सुरक्षा प्रदान गर्नु पर्ने जस्ता कर्तव्य राज्यको हो[22]। आर्थिक, सामाजिक तथा साँस्कृतिक अधिकार पूरा गर्न वा गराउनको लागि भूमिका खेल्नु राज्यको तेस्रो दायित्व हो । यी अधिकार पूरा गर्न गराउनका लागि राज्यले दुई किसिमले भूमिका खेल्न सक्छ । पहिलो, यी अधिकार पूरा गर्न गराउनका लागि अग्रसर हुनु (To facilitate), अर्थात स्वतःस्फूर्त रुपमा चाहिने कानूनहरू बनाएर यी अधिकारहरू कार्यान्वयन गर्ने गराउने तर्फ भूमिका खेल्नु पनि हो[23]। दोस्रो यी अधिकारमा केही खास वर्ग वा समुदाय विशेषका मानिसहरूको पहुँच सजिलो होस् भन्नका लागि उनीहरूका लागि विशेष किसिमका राहत वा सुविधा प्रदान गर्न (To Provide) विशेष कानूनको व्यवस्था

18 See Asbjorn Eide & Allan Rosas, Economic, Social and Cultural Rights: A Universal Challenge, in Asbjorn Eide et al. (eds.), *Economic, Social and Cultural Rights*, 2nd ed. (Kluwer Law International: The Hague, 2001), pp. 3-8.

19 Asbjorn Eide, Economic, Social and Cultural Rights as Human Rights, in Asbjorn Eide et al. eds., *Economic, Social and Cultural Rights: A Text Book*, 2nd ed., (Kluwer Law International: The Hague), pp. 23-28.

20 Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (Princeton: Princeton University Press, 1980).

21 Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999), para. 15. Report of the Committee on Economic, Social and Cultural Rights, UN doc. E/2000/22, pp. 102-110. See also Asbjorn Eide, Economic, Social and Cultural Rights as Human Rights, in Asbjorn Eide et al. eds., *Economic, Social and Cultural Rights: A Text Book*, 2nd ed., (Kluwer Law International: The Hague), pp. 23-28.

22 उही नोट नं. २१

23 उही नोट नं. २१ र हेर्नुहोस, धारा ४७, नेपालको संविधान

गर्नु[24] जस्तैं किसानलाई सस्तो दरमा मल वितरण गराउनु, माध्यमिक विद्यालय तहसम्म निःशुल्क शिक्षा प्रदान गर्नु गराउनु, घर बनाउन सस्तो दरमा ऋण उपलब्ध गराउनु, आदिवासी जनजाति, महिलाका लागि सरकारी जागीरमा उमेरमा छुट दिनु, महिला, बालबालिका र दलित समुदायलाई निःशुल्क स्वास्थ्य सेवा उपलब्ध गराउनु, भोकमरी वा खाद्यान्न अभाव भएको ठाउँमा खाद्यान्न वितरण गर्नु, महामारी फैलिएको क्षेत्रमा निःशुल्क औषधिको वितरण गर्नु आदि[25]।

२.३. आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारः नीतिगत वा न्यायिक

आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारको सम्बन्धमा मुख्य गरी उठाइएका प्रश्न के हो भने यी अधिकारको निरूपण नीतिगत तवरबाट मात्रै गर्न सकिन्छ । यसलाई न्यायिक निरूपणको विषय बनाइनु हुँदैन । नीतिगत निरुपण भनेको कुनै पनि समस्यालाई राजनीतिक तवरबाट समाधान गर्नु हो भने न्यायको रोहबाट कुनै पनि समस्याको समधान गर्नु भनेको न्यायिक निरूपण हो । नीति निर्माण गर्ने मुख्य निकाय जनताबाट निर्वाचित जनप्रतिनिधि हो । देशका जनताका लागि कस्ता खाले नीति नियम चाहिने हो त्यो जनप्रतिनिधिलाई मात्र थाहा हुन्छ र त्यसको कार्यान्वयन गर्ने काम मात्र न्यायिक निकायको हो । एकले अर्काको क्षेत्राधिकारमा हस्तक्षेप गर्नु हुदैन । यो बढी प्रजातन्त्रिक पनि हुन्छ र कार्यान्वयन गर्न सजिलो पनि हुन्छ[26]।

के पनि भन्ने गरिएको छ भने यदि आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारको निरूपण न्यायिक रोहबाट गर्ने उद्धेश्य भएको भए आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारसँग सम्बन्धित अन्तराष्ट्रिय अनुबन्ध १९६६ (पहिलो अनुवन्ध) को धारा २ (१) र नागरिक तथा राजनीतिक अधिकारसँग सम्बन्धित अन्तराष्ट्रिय अनुबन्ध १९६६ (दोस्रो अनुवन्ध)को धारा २ (१) को प्रावधान एउटै हुने थियो । यी फरक फरक कानूनी व्यवस्था गर्नुको पछाडिको कारण के हो? जबकी यि दुबै अनुबन्धहरूको धारा १ मा समान किसिमका व्यवस्था छ । पहिलो अनुबन्धको धारा २ (१) को व्यवस्था यस प्रकार रहेको छः

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including the adoption of legislative measures.

दोस्रो अनुबन्धको धारा २ (१) को व्यवस्था यस प्रकार रहेको छः

Each State Party to the present Covenant undertakes to respect and to ensure all individ-

24 उही नोट नं. २१ र . हेर्नुहोस, धाराहरू २१, ३८, ३९, ४०, ४१ र ४२, नेपालको संविधान

25 उही नोट नं. २१

26 See E. W. Vierdag, 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights', in *Netherlands Yearbook of International Law* (1978), Volume 9, The Hague, The Netherlands: T.M.C. Asser Institute, pp. 69-105; Matthew C.R. Craven, 'The Domestic Application of the International Covenant on Economic, Social and Cultural Rights', *Netherlands International Law Review* (1993), XL (3), pp. 367-404; Malcolm Langford, 'Domestic Adjudication and Economic, Social and Cultural Rights: A Socio-Legal Review', *Sur-International Journal of Human Rights* (2009), 6 (11), December, pp. 91-120; David Landau, The Reality of Social Rights Enforcement', *Harvard International Law Journal* (2012), 53 (1), Winter, pp. 189-247.

uals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

अर्थात पहिलो अनुबन्धको मनसाय पक्ष राष्ट्रले आफ्नो विवेक र उपलब्ध स्रोत र साधनका आधारमा कार्यान्वयन गर्दै जाने अवस्था देखिन्छ भने दोस्रो अनुबन्धको मनसाय पक्ष राष्ट्रले तत्कालै कार्यान्वयन गर्नु पर्ने अवस्था देखिन्छ । यस कसिमको अभिव्यक्ति र व्याख्या गर्नुको पछाडिको कारण के हो भने पहिलो अनुवन्धको प्रावधान प्रष्ट छैन र फरक फरक किसिमले अर्थ्याउन सकिने अवस्था छ । दोस्रो अनुवन्धले प्रयोग गरेको भाषा प्रष्ट र एकै खाले अर्थ दिने खालको छ । पहिलो अनुबन्धको सम्वन्धमा Philip Alston को भनाई विचारणीय देखिन्छ । जुन यस प्रकारको रहेको छ:

It is generally agreed that the major shortcoming of the existing international agreements for the promotion of respect for economic rights is the vagueness of many of the rights as formulated in the Covenant and the resulting lack in the clarity as to their normative implications[27].

त्यस्तै अर्को तर्क अनुगमनसँग सम्बन्धित देखिन्छ । के पनि भनिन्छ भने आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारसँग सम्बन्धित अन्तर्राष्ट्रिय अनुवन्ध १९६६ ले आफ्नो कार्यान्वयन पक्ष राष्ट्रले गरे नगरेको सम्वन्धमा अनुगमन गर्ने निकायको व्यवस्था नै गरेन जबकि नागारिक तथा राजनीतिक अधिकारसँग सम्बन्धित अन्तर्राष्ट्रिय अनुबन्धको धारा २८ मा अनुगमनको सम्वन्धमा व्यवस्था गरेको छ । पहिलो अनुवन्धको कार्यान्वयनको जिम्मा संयुक्त राष्ट्र संघको आर्थिक तथा सामाजिक परिषद्ले लिएको थियो र सन् १९८६ मा आर्थिक, सामाजिक तथा साँस्कृतिक समितिको गठन भएपछि मात्रै अनुगमनको जिम्मा यस समितिले सम्हाल्यो । यो कानूनी निकाय (Treaty Body) होइन । यो राजनीतिक समिति मात्रै हो । त्यसैले यी दुवै समितिबीच तात्विक भिन्नता रहेको छ[28]तर आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारहरू नीतिगत अधिकार मात्रै हुन भन्ने तर्कसंग आर्थिक, सामाजिक तथा साँस्कृतिक समिति (अवदेखि 'समिति') सहमत छैन । उक्त समितिले आफ्नो (सामान्य टिप्पणी न..९) मा यस्ता तर्कहरूलाई स्वेच्छाचारी भनी उल्लेख गरेको पाइन्छ । यी तर्कहरू मानव अधिकारको मुख्य सिद्धान्तहरू अविभाज्य र अन्तरसम्वन्धितसँग मेल खादैन भनी उल्लेख गरेको पाइन्छ । उनका शब्दहरूमा:

The adoption of rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect

27 Philip Alston, 'No Right to Complain About Being Poor: The Need for an Optional Protocol to the Economic Rights Covenant', in A. Eide and J. Helgesen (eds.), *The Future of Human Rights Protection in a Changing World*, (1991), p. 79-100 at 86, who mentions Articles 6 to 9 of the ICESCR as a notable exception.

28 See Oliver De Schutter, 'Introducation', in Oliver De Schutter (ed.), *Economic, Social and Cultural Rights as Human Rights*, (UK and USA: An Elgar Research Collection, 2013), p xvi. तर २००८ को Optional Protocol of International Covenant on Economic, Social and Cultural Rights ले आर्थिक, सामाजिक तथा साँस्कृतिक समितिलाई Individual Complaint लिने अधिकार दिइसकेको छ, जुन २०१३ देखि लागू पनि भइसकेको छ । त्यसैले यो समिति पनि Human Rights Committee जतिकै शक्तिशाली भएको छ ।

the rights of the most vulnerable and disadvantaged groups of the society.[29]

आर्थिक, सामाजिक तथा साँस्कृतिक अधिकार नीतिगत मात्रै हो । यसलाई अदालतभित्र उठाउनु हुँदैन वा यसलाई न्यायिक विषय बनाइनु हुँदैन भन्नुको पछाडिको अर्को तर्क के हो भने अदालतमा उक्त विषयहरूसँग सम्बन्धित विज्ञको कमी हुन्छ । जस्तै कस्तो किडनीका विरामीलाई निःशुल्क वा आपतकालीन सेवा उपलब्ध गराउने भन्ने कुरा नीतिगत कुरा हुन र यस किसिमका सेवाहरूका लागि विज्ञको धारणाको आवश्यकता पर्दछ । यदि सबै किसिमका किडनीका विरामीलाई निःशुल्क र आपतकालीन सेवा न्यायिक निकायको फैसलाहरूको माध्यमबाट उपलब्ध गराउन थाल्ने हो भने शिक्षा तथा आवास जस्ता अति आवश्यक सुविधाबाट राज्यका नागरिकहरू वञ्चित हुनु पर्ने अवस्था आउन सक्छ । त्यसैले यस किसिमका सेवाहरू विज्ञको राय, सल्लाह र सुझावबाट मात्रै उपलब्ध गराउनु पर्दछ तर यस्ता तर्कहरूको विपरीत साउथ अफ्रिका र भारतको सर्वोच्च अदालतहरूले आफ्ना विभिन्न फैसलाहरूको माध्यमबाट खण्डन गरिसकेको छ [30]। आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारको बारेमा निर्णय गर्नका लागि मात्रै विज्ञको आवश्यकता पर्दैन । नागरिक तथा राजनीतिक अधिकारको बारेमा निर्णय गर्नका लागि पनि विज्ञको धारणाको आवश्यकता पर्दछ[31]। जस्तैं कारागार निर्माणका लागि अदालतले आदेश दिँदा आर्थिक पक्ष र विज्ञता दुवैको आवश्यकता नपर्ने होइन । त्यस्तै स्वच्छ सुनुवाईका लागि निःशुल्क कानूनी सहायता, भाषा अनुवादक, बहिराको लागि सांकेतिक भाषाको व्यवस्था र अन्धाका लागि ब्रेल लिपि भएका अध्ययन सामग्रीको व्यवस्था गर्नका लागि अदालतले आदेश दिन्छ भने यस्ता आदेशहरू खाली नागरिक र राजनीतिक अधिकारसँग मात्रै सीमित रहँदैन । यसको सम्बन्ध आर्थिक, सामाजिक र साँस्कृतिक अधिकारसँग जोडिन पुग्छ । त्यसैले विज्ञको आवश्यकता दुवै

29 General Comment No. 9 (1998), para. 10. Report of the Committee on Economic, Social and Cultural Rights, UN Doc. E/1999/22.

30 Economic, social and cultural rights may also receive constitutional protection through an expansive interpretation of certain civil and political rights such as the right to life or security of the person. The best example of this type of protection can be found in Indian constitutional jurisprudence where the 'Directive Principles of State Policy' in Part IV of the Constitution have been interpreted to enlarge the scope of the Fundamental Rights' in Part III. The Indian Supreme Court has held that the Directive Principles are of essential importance in interpreting the content of fundamental rights. Thus the right not to be deprived of life in Article 21 has been interpreted to include the right to a livelihood (*Tellis & Others v. Bombay Municipal Corporation and others*, (1987) LRC (Const) 351 (the so-called 'pavement-dwellers' case). Articles 39 (a) and 41 oblige the state of direct its policy towards securing the right to an adequate means of livelihood and the right to work), the basic necessities of life such as adequate nutrition, clothing, reading facilities (*Francie Coralie Mullin v. The Administrator*, Union Territory of Delhi, (1981) 2 SCR 516 at 529), the rights to shelter (*Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan & Others*, (1997) AIR SC 152), health (*Paschim Banga Khet Mazdoot Samity v. State of West Bengal*, (1996) AIR SC 2426 (Right to emergency medical treatment), and education (*Jain v. State of Karnataka*, (1992) 3 SCC 666; *Krishan v. State of Andhra Pradesh & Other*, (1993) 4 LRC 234.

31 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC), at paras. 76-78 (first certification judgment). Before the final Constitution (Act 108 of 1996) could come into effect, the Constitutional Court was required to certify that the text complied with a set of 34 'Constitutional Principles' appended to the interim Constitution (Schedule 4, Act 200 of 1993). These principles were wide-ranging and included a stipulation that the final Constitution protect 'all universally accepted fundamental rights, freedoms and civil liberties' by entrenched and justiciable provisions certification judgment. The Constitutional Court declined to certify the final Constitution in the first certification judgment. An amended text of the Constitution was certified on 4 December 1996. *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1(CC) (second certification judgment). The 'final ' Constitution came into force on 4 February 1997.

पुस्ताका अधिकारका लागि आवश्यकता पर्दछ । त्यसैले कुन अधिकार नीतिगत र कुन अधिकार न्यायिक निरूपणका विषय हुन भन्ने कुरा निरपेक्ष नभई सापेक्षिक विषय हुन ।

२.४. आर्थिक, सामाजिक तथा साँस्कृतिक अधिकार कार्यान्वयनका लागि ठूलो धनराशीको आवश्यकता

आर्थिक, सामाजिक तथा साँस्कृतिक अधिकार कार्यान्वयनका लागि ठूलो धनराशीको आवश्यकता पर्दछ वा पर्दैन भन्ने विवादको पक्ष र विपक्षमा पनि उत्तिकै तर्कहरू अगाडि सारेको पाइन्छ । भनिन्छ यी अधिकारको कार्यान्वयन गर्न त्यति सजिलो छैन जति नागरिक तथा राजनीतिक अधिकारको कार्यान्वयन गर्न सजिलो छ । यसको पछाडिको पहिलो तर्क के हो भने नागरिक तथा राजनीतिक अधिकार कार्यान्वयन गर्न अर्थको आवश्यकता पर्दैन । खाली आवश्यक कानून निर्माण गरे पुग्छ तर आर्थिक, सामाजिक तथा साँस्कृतिक अधिकार कार्यान्वयन गर्न ठूलो धनराशीको आवश्यकता पर्दछ । के भनिन्छ भने खाने पानी, स्वास्थ्य, शिक्षा, आवास जस्ता कुराहरूको व्यवस्था गर्न ठूलो रकम नभईकन हुँदैन तर, यसको अर्थ यो होइन कि नागरिक तथा राजनीतिक अधिकारहरूको कार्यान्वयन गर्न धनको आवश्यकता नै पर्दैन । एउटा कारागार निर्माण गर्न कति रकमको आवश्यकता पर्दछ । फौजदारी न्याय प्रशासनलाई चुस्त र दुरूस्त पार्न कति रकम खर्च पर्दछ भन्ने जस्ता प्रश्नहरू पनि उत्तिकै विचारणीय रहेको देखिन्छ[32]।

आर्थिक, सामाजिक तथा साँस्कृतिक अधिकार सही ढङ्गले उपलब्ध नहुनुको पछाडिको कारण खाली धनको कमी वा राज्यको गरीबी मात्रै होइन । यसको पछाडिको कारण सही ढंगले नीति निर्माण नहुनु हो या त्यसको सही ढंगले कार्यान्वयन नहुनु पनि हो । यस सम्वन्धमा कयौं राष्ट्रहरूको उदाहरण दिन सकिन्छ जस्तैं चीन र भारतलाई लिन सकिन्छ । यी दुबै राष्ट्र आर्थिक रूपले फड्को मार्ने मध्येका हुन । धनको कमी छैन । तर आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारको उल्लंघन गर्नेमा यिनीहरूको नाम अगाडि देखिन्छ । यी दुबै देशको सुरक्षा बजेट हरेक वर्ष बढदै गइरहेको छ । तर, बालबालिकाहरू शिक्षा पाउनबाट बञ्चित देखिन्छन् । यसका लागि राजनेताहरूको प्रतिबद्धताको पनि उत्तिकै आवश्यकता पर्दछ । यसमा उनीहरू पछाडि परेको देखिन्छ[33]।

राष्ट्रसंघीय विकास कार्यक्रम (UNDP) को अनुसन्धान प्रतिवेदनबाट पनि के देखिन्छ भने यदि राज्यले लिएको आर्थिक नीति सही भएन भने यी अधिकारको कार्यान्वयन सही ढंगले हुन सक्दैन [34]।

त्यस्तै राज्यले लिएको कर नीति पनि उत्तिकै महत्त्वपूर्ण हुन्छ । जस्तैं गुआटेमालाले अपनाएको कर नीतिको कारण धनीले कम कर तिर्नु पर्ने अवस्था रहेको पाइयो भने गरीबले बढी कर तिर्नु पर्ने कुरा एउटा अनुसन्धान प्रतिवेदनले देखाएको छ । यसकारण त्यहाँ एउटा यस्तो समूह पनि छ जसका घरै पिच्छे हेलिकप्टर रहेकोछ भने अर्को समूह यस्तो पनि छ जो अति आवश्यक सेवाबाट बञ्चित रहेका छन् । यस्तै अवस्था ब्राजिलको पनि रहेको यूएन प्रतिवेदकले आफ्नो प्रतिवेदनमा उल्लेख गरेको पाइन्छ[35]।

32 हेर्नुहोस् यसै लेखको खण्ड २.३.

33 See Jean Dreze, 'Democracy and the Right to Food', in P. Altson & M. Robinson (eds.), *Human Rights and Development: Towards Mutual Reinforcement* (2005), p. 45; Myron Weiner, Child Labour in Developing Countries: The Indian Case, 2 *International Journal of Children's Rights,* 121 (1994).

34 See the UN Development Programme, Human Development Report (1994), p. 4.

35 See the Report of the Special Rapporteur on the right to food, Oliver De Schutter, Mission to Brazil, UN

आर्थिक, सामाजिक तथा साँस्कृतिक समितिले पनि सामान्य टिप्पणी नं.३ मा राज्यले लिएको आर्थिक नीतिले यी अधिकार माथि ठूलो प्रभाव पार्ने सम्बन्धमा उल्लेख गरेको पाइन्छ । जस्तै राज्यले संविधान र कानूनको सही तरिकाले पालन गर्दैन भने भ्रष्टाचार र आर्थिक अनियमितता बढदै जान्छ र रकमको सही ठाउँमा सदुपयोग हुन पाउँदैन[36]। त्यसैले आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारको पहुँच बढाउन राज्यले लिएको आर्थिक नीतिले महत्त्वपूर्ण भूमिका खेल्छ ।

२.५. आर्थिक, सामाजिक तथा साँस्कृतिक अधिकार र राज्यको दायित्व

आर्थिक, सामाजिक तथा साँस्कृतिक अधिकार कार्यान्वयन गर्ने दायित्व राज्यको प्रमुख दायित्व मध्येको एक हो । यी अधिकारलाई नीतिगत विषय वा साधन स्रोतको कमी देखाएर राज्यका नागरिकहरूको अधिकारलाई वञ्चित गर्न पाइदैन । खाली फरक के हो भने राज्य पिच्छे परिस्थितिहरू फरक फरक हुन सक्छन् । तर, यस दायित्वबाट राज्य पञ्छिन मिल्दैन[37]। त्यसैले आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारसँग सम्बन्धित अनुवन्ध १९६६ को पक्ष राष्ट्रले यी अधिकार जहिले ईच्छा लाग्छ उहिले कार्यान्वयन गर्छु, आवश्यक कानून नबनाई बस्छु वा यी अधिकार लागू गर्न राज्य बाधित छैन भनी बस्न पाउँदैन । यी अधिकारअन्तर्गत केही यस्ता अधिकार छन जुन स्वत: कार्यान्वयन हुने (Self-executing)अधिकारको रूपमा आर्थिक, सामाजिक तथा साँस्कृतिक समितिले स्थापित गरेको छ । यी अधिकारअन्तर्गत महिला र पुरूषबीचको समानता, समान कामको लागि समान ज्याला र समान किसिमको व्यवहार ट्रेड युनियनको अधिकार, बालबालिका र युवकहरूका हकमा संरक्षण र सहयोगको लागि विशेष कानूनको व्यवस्था, अनिवार्य र नि:शुल्क शिक्षा, आफ्नो धर्म र स्वतन्त्रताको आधारमा शिक्षा रोज्न पाउने अधिकार, वैज्ञानिक, अनुसन्धानात्मक र सृजनात्मक गतिविधिका लागि स्वतन्त्रता जस्ता अधिकार पर्दछन । यसको साथै समितिले पक्ष राष्ट्रहरूलाई उसको दायित्वको बारेमा सजग पनि गराएको छ । उसकै शब्दहरूमा:

It is especially important to avoid any priori assumption that norms (in the ICESCR) should be considered to be non-self –executing. In fact, many of them are stated in terms which are at least as clear and specific as those in other human rights treaties, the provisions of which are regularly deemed by courts to be self-executing.[38]

Doc.A/HRC/13/33/Add.6 (16 Feb. 2009), para. 36; Rights or Privileges? Fiscal Commitment to the Rights to Health, Education and Food in Guatemala, Center for Economic and Social Rights and the Central American Institute for Fiscal Studies (2009).

36 Committee on Economic, Social and Cultural Rights, General Comment No. 3 (1990) UN doc. E/1991/23, Annex III. See also Asbjorn Eide, Economic, Social and Cultural Rights as Human Rights, in Asbjorn Eide et al. eds., *Economic, Social and Cultural Rights: A Text Book*, 2nd ed., (Kluwer Law International: The Hague, 2001), pp. 27-28.

37Articles 3, 7 (a) (i), 8, 10 (3), 13 (2) (a), (3) and (4) and 15 (3) of the International Covenant on Economic, Social and Cultural Rights. See General Comment No. 3, (1990) para. 9. Report of the Committee on Economic, Social and Cultural Rights, UN Doc. E/1991/23, pp. 83-87.

38 General Comment No. 9 (1998) on the domestic application of the International Covenant on Economic, Social and Cultural Rights, para. 11. Report of the Committee on Economic, Social and Cultural Rights, UN Doc. E/1999/22, pp. 117-121. हेर्नुहोस् फ्रान्सको संविधानक धारा ५५ र नेपाल सन्धि ऐन २०४७ को दफा ९ (१) र यसै लेखको खण्ड २.२ र २.३

३. नेपालको संविधानमा आर्थिक, सामाजिक तथा साँस्कृतिक अधिकार

नेपालमा मानव अधिकारको विकास सन १९९० को दशकदेखि शुरू भएको पाइन्छ । यसमा नेपाल अधिराज्यको संविधान, २०४७ को ठूलो भूमिका रहेको छ । नेपाल अधिराज्यको संविधान २०४७ ले पहिलो पटक मानव अधिकारका मूल्य र मान्यताहरूलाई सही रूपमा अँगीकार गरेको देखिन्छ । यस संविधानले अँगीकार गरेको मानव अधिकारको सिद्धान्तको आधारमा नै नेपाल त्यस पछिका दिनहरूमा विभिन्न मानव अधिकारसँग सम्बन्धित अन्तर्राष्ट्रिय सन्धि सम्झौताहरूको पक्ष राष्ट्र बन्दै गएको पाइन्छ। जसअन्तर्गत वील अफ राइट्स[39] प्रमुख सन्धिहरू मध्येका एक हो । सन १९९० भन्दा पहिले नेपाल मानव अधिकारका नौ ठूला महासन्धिहरू [40] मध्ये एउटा सन्धिको[41] मात्र पक्ष राष्ट्र थियो । त्यस्तै मानव अधिकार र अन्तर्राष्ट्रिय कानूनहरूको महत्त्वलाई बुझ्दै नेपाल सरकारले नेपाल सन्धि ऐन, २०४७ को दफा ९ (१) अर्न्तगत मानव अधिकार र अन्तर्राष्ट्रिय कानूनहरूलाई राष्ट्रिय कानूनभन्दा उपल्लो दर्जा दिएको छ । यस हिसाबले १९९० को आधा दशकलाई मानव अधिकारको 'स्वर्णिम युगको' रूपमा उल्लेख गर्न सकिन्छ । त्यसपछिका दिनहरूमा संविधानले लिएको उद्देश्य र त्यसको कार्यान्वयनमा कतै पनि तालमेल खाएको देखिएन । यी अधिकारहरूको कार्यान्वयनमा राज्यको खासै ध्यान गएको देखिएन । यस कारण आर्थिक, सामाजिक, तथा साँस्कृतिक अधिकार संस्थागत हुनै सकेन । राष्ट्रका नागरिकहरू संविधानका मुख्य धाराबाट अलग्गिन थाले । संविधानको फितलो कार्यान्वयनको कारण राज्यका नागरिकहरूलाई एकताको कडीमा बाध्नै सकेन । नागरिकहरूमा चरम सन्तुष्टि बढ्न थाल्यो । देशमा द्वन्द्वको अवस्थाको सिर्जना भयो र देश एक दशक लामो द्वन्द्व र विद्रोहमा फस्यो । यसले आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारको अवस्था झन बिग्रिदै गयो । के सम्म पनि भन्ने गरेको पाइन्छ भने नेपालमा द्वन्द्वको प्रमुख कारण आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारको घोर उल्लंघन नै थियो[42]।

एक दशक लामो द्वन्द्व र विद्रोह पश्चात् नेपालका सात राजनीतिक दल र नेपाल कम्युनिष्ट पार्टी (माओवादी) बीच भएको बाह्र बुँदे समझदारीपत्र र नेपाल सरकार र नेपाल कम्युनिष्ट पार्टी (माओवादी)

39 Bill of Rights includes International Covenant on Civil and Political Rights 1966, International Covenant on Economic, Social and Cultural Rights 1966 and Optional Protocol of International Covenant on Civil and Political Rights.

40 Nepal has ratified seven core fundamental human rights laws out of nine. Those seven are: International Covenant on Civil and Political Rights, 1966; International Covenant on Economic, Social and Cultural Rights, 1966; Convention on the Elimination of All Forms of Discrimination against Women, 1979; Convention on the Rights of the Child, 1984; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; International Convention on the Elimination of All Forms of Racial Discrimination 1965; and Convention on the Rights of Persons with Disabilities, 2006.Those which have not been ratified are International Convention for the Protection of All Persons from Enforced Disappearance, 2006 and International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families, 1990.

41 International Convention on the Elimination of All Forms of Racial Discrimination 1965 (Ratified by Nepal on 30 January 1971).

42 Kalyan Shrestha and Dr Anand Mohan Bhattarai, 'Role of Judiciary in the Enforcement of Economic, Social and Cultural Rights: Experience from Nepal', in Inke Boerefijn et al. eds., *Human Rights and Conflict*, (Cambridge: Intersentia, 2011). See also International IDEA, *Creating the New Constitution: A Guide for Nepali Citizens* (Stockholm: International IDEA, 2008), p. 100; and International IDEA, *Nepal in Transition: A Study on the State of Democracy* (Stockholm: International IDEA, 2008), p. 73-90; Vincent Calderhead, Enforceability of Economic, Social and Cultural Rights under the Draft Constitution, in Bipin Adhikari (ed.), *Nepal: Design Options for the New Constitution*, (Kathmandu: Nepal Constitution Foundation and Others, 2010), p. 297-305.

बीच भएको विस्तृत शान्ति सम्झौताले द्वन्द्वका प्रमुख कारणहरू मध्ये आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारको घोर उल्लंघन पनि एक थियो भन्ने कुरालाई स्वीकार गरेको पाइन्छ[43]। यस सत्य तथ्यलाई स्वीकार गर्दै नेपालको अन्तरिम संविधान, २०६३ जारी गरियो र नेपाल अधिराज्यको संविधान २०४७ लाई खारेज गरियो। अन्तरिम संविधान जारी भए पनि यस संविधानप्रति मधेशी जनताले चरम असन्तुष्टि जनाए र संविधानका प्रतिहरू पनि जलायो र सडक आन्दोलनमा गए[44]। उनीहरूको मागलाई सम्बोधन गर्न तत्कालीन गिरीजाप्रसाद कोइरालाको सरकार मधेशी आन्दोलनकारीसँग सम्झौता गरी संविधान संशोधन गर्न तयार भयो। केही हदसम्म संविधानमा संशोधन गरी समवेशी बनाउने काम पनि भयो र बाँकी सरोकारका कुरा संविधान सभाले नयाँ संविधान मार्फत संम्बोधन गर्ने आश्वासन पनि दिइयो तर मधेशी दलका नेताहरूले आफूहरूलाई दोस्रो संविधान सभाले[45]उपेक्षा गरेको र संविधान सभाबाट आफ्नो मागहरू सम्बोधन नहुने देखेपछि संविधान सभा बहिष्कार गरी सडकमा तेस्रो पटक आन्दोलन गर्न थाले[46]। संविधान सभाबाट जारी हुने संविधान अस्वीकार गर्ने भनी विरोध गरिरहे। यति हुँदा हुँदै पनि संविधान सभाबाट नेपालको संविधान, २०७२ साल आश्विन ३ गते जारी भयो।

नेपालको संविधानमा, पहिलेको संविधानहरूको[47]तुलनामा, आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारको सम्वन्धमा भएका व्यवस्थाहरू पक्कै पनि बृहत र व्यापक रहेको छ। खासगरी आर्थिक, सामाजिक र साँस्कृतिक अधिकारमध्ये कतिपय अधिकार पहिलेका संविधानहरूमा निर्देशक सिद्धान्त र नीतिहरूअन्तर्गत व्यवस्थित थिए। भाग ३ मा मौलिक हकको रूपमा प्रमुख स्थान दिएको छ। यसले आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारको महत्त्वलाई जोड दिएको छ। नेपालको संविधानमा उल्लिखित आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारमा सम्मानपूर्वक बाँच्न पाउने हक(धारा १६ (१)), स्वतन्त्रताको हक (धारा १७ (२)), समानताको हक (धारा १८), छुवाछूत तथा जातीय भेदभाव विरूद्धको हक (धारा २४), सम्पत्तिको हक (धारा २५), धार्मिक स्वतन्त्रताको हक (धारा २६), स्वच्छ वातावरणको हक (धारा ३०),शिक्षा सम्बन्धी हक (धारा ३१), भाषा तथा संस्कृतिको हक (धारा ३२), रोजगारीको हक (धारा ३३), श्रमको हक (धारा ३४), स्वास्थ्य सम्बन्धी हक (धारा ३५), खाद्यसम्बन्धी हक (धारा ३६),आवासको हक (धारा ३७), महिलाको हक (धारा ३८), बालबालिकाको हक (धारा ३९), दलितको हक (धारा ४०), ज्येष्ठ नागरिकको हक (धारा ४१), सामाजिक न्यायको हक (धारा ४२), सामाजिक सुरक्षाको हक (धारा ४३) र उपभोक्ताको हक (धारा ४४) रहेका छन्।

यी माथिका अधिकारलाई संविधानको भाग ४ मा व्यवस्थित, 'राज्यका निर्देशक सिद्धान्तहरू, नीतिहरू

43 नेपाल सरकार र नेपाल कम्युनिष्ट पार्टी (माओवादी) बीच भएको विस्तृत शान्ति सम्झौता २०६३,शान्ति समिति, शान्ति सचिवालय, सिंहदरवार, पृ. ५(८।

44 सन २००७ र २००८ मा एक वर्षको भित्र मधेशीहरू दुई पटक सडक आन्दोलनमा गयो। यसलाई पहिलो मधेश आन्दोलन र दोस्रो मधेश आन्दोलन पनि भनिन्छ।

45 पहिलो संविधान सभाले संविधान नै नबनाई चार वर्षपछि सर्वोच्च अदालतको आदेशले बिघटन भयो।

46 यसलाई तेस्रो मधेश आन्दोलन भनिन्छ। यो आन्दोलन २०७२ साल श्रावणमा शुरू भई लगभग लगभग ६ महिनासम्म चलेको थियो।

47 नेपालको अन्तरिम संविधान २००७, नेपाल अधिराज्यको संविधान २०१५, नेपालको संविधान २०१९, नेपाल अधिराज्यको संविधान २०४७ र नेपालको अन्तरिम संविधान २०६३

र दायित्वहरू' ले झन बृहत र व्यापक बनाई दिएको छ[48]।

यी अधिकारको कार्यान्वयन गर्ने जिम्मेवारी संविधानले राज्यलाई दिएको छ । राज्यले आवश्यक कानूनहरू बनाई उक्त अधिकारको कार्यान्वयन गर्नु पर्नेछ । कार्यान्वयन कसरी हुने भन्ने सम्बन्धमा संविधानको धाराहरू ४६[49] र ४७[50] मा व्यवस्था भएको । यी अधिकारको कार्यान्वयनका लागि नेपाल सरकारले नेपालका महान्यायाधिवक्ताको संयोजकत्वमा'संविधान कार्यान्वयन सम्बन्धी विधेयक तर्जुमाको सहजीकरण समिति' गठन गरेको छ । यस समितको सदस्यहरूमा कानून आयोगको अध्यक्ष र उपाध्यक्ष, पूर्व कानून सचिव, प्रधानमन्त्री कार्यालयका कानून सचिव,सम्बन्धित मन्त्रालयका सचिवहरू र अन्य विज्ञहरू रहेका छन । कानून तथा न्याय मन्त्रालयका प्रवक्ताका अनुसार ३१ वटा मौलिक हकहरू कार्यान्वयनका लागि तत्काल कानूनहरू निर्माण गर्नु पर्ने आवश्यकता देखिन्छ । तत्कालै चाहिने कानूनहरूमा आर्थिक रूपले विपन्न, आशक्त र असहाय अवस्थामा रहेका व्यक्तिहरूका लागि, एकल महिला, अपाङगता भएका व्यक्तिहरू, बालबालिका, आफ्नो हेरचाह गर्न नसक्ने तथा लोपोन्मूख जातका नागरिकहरूलाई सामाजिक सुरक्षा दिनका लागि, घर नभएका दलितको आवासको व्यवस्था गर्नका लागि, अपराध पीडितलाई क्षतिपूर्तिको व्यवस्था गर्नका लागि, प्रत्येक नागरिकलाई रोजगारीको हकको व्यवस्था गर्नका लागि, उपभोक्तालाई गुणस्तरीय सेवा उपलब्ध गराउनका लागि, धर्म परिवर्तनको सम्बन्धमा र प्रजनन स्वास्थ्यसम्बन्धी हकका लागि कानून बनाउनु पर्ने रहेका छन् ।

धारा ४७ ले भाग तीनमा उल्लिखित मौलिक हकहरूको कार्यान्वयन गर्न चाहिने कानूनहरू तीन वर्षभित्र ल्याइसक्नु पर्ने भनी उल्लेख गरेको छ । जसको पहिलो खुडकिलोको रूपमा नेपाल सरकार, नेपालको संविधानको धारा ४७ कार्यान्वयन गर्न र गराउन नेपालको संघीय संसदमा २१ वटा विधेयकहरू पेश गरेको थियो । जस अन्तर्गत पेश भएका २१ वटा विधेयकहरू मध्ये नेपाल सरकार अहिले १६ वटा विद्येयकहरू पास गराउन सफल भएको देखिन्छ र बाँकी विधेयकहरू विभिन्न समितिहरूमा दफावार छलफलको क्रममा रहेका छन ।

के संविधानले अधिकारको सुनिश्चित गर्दैमा नागरिकहरूले अधिकारको सजिलै उपभोग गर्न पाउँछन् ? यसको उत्तर त्यति सजिलो छैन[51]। अधिकारको उपभोग राज्यले कार्यान्वयन गर्नका लागि चालेका कदममा निर्भर हुन्छ, तर हालसम्म राज्यले चालेका कदम र गतिविधिबाट सन्तुष्ट हुने अवस्था देखिदैन [52]।

48 हेर्नुहोस् नेपालको संविधानको धाराहरू ४९, ५०, ५१, ५२ र ५३

49 संवैधानिक उपचारको हक (धारा ४६) : यस भागव्दरा प्रदत हकको प्रचलनका लागि धारा १३३ वा १४४ मा लेखिए बमोजिम सवैधानिक उपचार पाउने हक हुनेछ। सर्वोच्च अदालतको अधिकार क्षेत्र(धारा १३३ (२)) (यस संविधानव्दारा प्रदत मौलिक हकको प्रचलनका लागि वा अर्को उपचारको व्यवस्था नभएको वा अर्को उपचारको व्यवस्था भए पनि त्यस्तो उपचार अपर्याप्त वा प्रभावहीन देखिएको अन्य कुनै कानूनी हकको प्रचलनका लागि वा सार्वजनिक हक वा सरोकारको कुनै विवाद समावेश भएको कुने विवाद टुंगो लगाउने असधारण अधिकार सर्वोच्च अदालतलाई हुनेछ। त्यस्तै धारा १४४ ले उच्च अदालतको क्षेत्राधिकारको सम्बन्धमा उल्लेख गरेको छ ।

50 मौलिक हकको कार्यान्वयन: यस भागव्दार प्रदत हकहरूको कार्यान्वयनका लागि आवश्यकाता अनुसार राज्यले यो संविधान प्रारम्भ भएको तीन बर्षभित्र कानूनी व्यवस्था गर्नेछ ।

51 Asbjorn Eide, 'Economic, Social and Cultural Rights as Human Rights', in Asbjorn Eide et al. (eds), *Economic, Social and Cultural Rights (* 2nd edn, Kluwer Law International 2001), p. 17.

52 Kalyan Shrestha and Dr Anand Mohan Bhattarai, 'Role of Judiciary in the Enforcement of Economic, Social

धारा ४७ कार्यान्वयन गर्न ल्याएका कानूनहरूको कार्यान्वयनको अवस्था के कस्तो रहने हो भन्ने कुराको सम्बन्धमा जान्न अझै केही दिन कुर्नु पर्ने देखिन्छ जहाँ नेपालको सर्वोच्च अदालतले आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारको सम्मान गर्न, संरक्षण गर्न र पूरा गर्न खेलेको भूमिकाको सम्वन्धमा प्रश्न छ त्यसका लागि केही महत्त्वपूर्ण फैसलाहरू अध्ययन र विश्लेषण हुनु आवश्यक देखिन्छ ।

४. आर्थिक, सामाजिक तथा साँस्कृतिक अधिकार र सर्वोच्च अदालत

नेपालको सर्वोच्च अदालत अभिलेख अदालत हो[53]। यसको आदेश वा निर्णय नेपालको सम्पूर्ण व्यक्तिहरूले पालन गर्नुपर्दछ[54]। नेपालको सर्वोच्च अदालतले आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारको लागू गर्ने गराउने क्रममा जारी गरेको आदेशलाई मुख्य गरी तीन समूहमा वर्गीकरण गर्न सकिन्छ । पहिलो, न्यायिक पुनरावलोकन गर्ने क्रममा असाधारण अधिकार प्रयोग गरी सम्वन्धित कानून वा सो कानूनका कुनै दफा वा कुनै शब्द संविधानसँग बाझिएको घोषणा गरी लागू भएको मितिदेखि वा फैसला भएको मितिदेखि खारेज हुने भनी आदेश गर्ने गरेको पाइन्छ । दोस्रो, संविधानमा व्यवस्थित मौलिक हकहरूको कार्यान्वयनका लागि संवैधानिक उपचार दिने क्रममा विभिन्न किसिमका निर्देशनात्मक आदेशहरू जारी गर्ने गरेको पाइन्छ । तेस्रो, परमादेश लगायतका अन्य आदेशहरू जारी गर्ने गरेको पाइछ । यी तीनै समूह अन्तर्गत पर्ने आदेशहरू या त सार्वजनिक सरोकारका विवादहरू अन्तर्गत परेका निवेदनका आधारमा जारी भएका आदेशहरू हुन या व्यक्तिको मौलिक हक उल्लंघन भएको भनी परेका निवेदनको आधारमा जारी भएका आदेशहरू हुन । यी आदेशहरू अन्तर्गत सम्वन्धित अधिकारहरू समयमा कार्यान्वयन होस् भन्नका लागि सम्वन्धित विज्ञहरू सामेल भएको समिति गठन गर्ने र गराउने, उक्त समितिले दिएको सुझावहरू अनुसार तोकिएको समयभित्र कानून बनाई लागू गर्ने वा संशोधन गराउने, कानून नबन्दासम्म अन्तरिम कालका लागि कानूनकै रूपमा निर्देशन जारी गर्ने जस्ता आदेशहरू रहेका छन । यसका साथै फैसलाको माध्यमबाट तत्कालीन उपचारका लागि पीडित पक्षलाई क्षतिपूर्ति दिलाउने/भराउने न्यायिक पर्यवेक्षणका लागि अनुगमन समिति गठन गरी सुपरिवेक्षण गर्न लगाउने, म्यादै तोकी कार्यान्वयनको अवस्था जान्नका लागि प्रगति विवरण आफू समक्ष पेश गर्न लगाउने जस्ता आदेशहरू सर्वोच्च अदालतले जारी गरी नागरिकका अधिकार संरक्षण गर्नमा महत्त्वपूर्ण भूमिका खेलेको पाइन्छ । यी आदेशहरू अन्तर्गत मुख्य गरी यस खण्डमा केही विशेष अधिकारहरू, जस्तै खाद्यको हक, स्वास्थ्यको हक, शिक्षाको हक, स्वच्छ पानी र वातावरणको हक, आवासको हक, सामाजिक न्याय र सामाजिक सुरक्षाको हक र भाषा र साँस्कृतिको हकसँग सम्वन्धित फैसलाहरू पाठकका वर्गको अध्ययनका लागि समावेश गरिएको छ ।

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and Cultural Rights: Experience from Nepal', in Inke Boerefijn et al. eds., *Human Rights and Conflict*, (Cambridge: Intersentia, 2011). See also International IDEA, *Creating the New Constitution: A Guide for Nepali Citizens* (Stockholm: International IDEA, 2008), p. 100; and International IDEA, *Nepal in Transition: A Study on the State of Democracy* (Stockholm: International IDEA, 2008), p. 73-90; Vincent Calderhead, Enforceability of Economic, Social and Cultural Rights under the Draft Constitution, in Bipin Adhikari (ed.), *Nepal: Design Options for the New Constitution*, (Kathmandu: Nepal Constitution Foundation and Others, 2010), p. 297-305. साथ साथै यसै लेखको खण्ड ५ पनि हेर्नुहोस् ।

53. हेर्नुहोस् नेपालको संविधानको धारा १२८ (२)

54 उही, धारा १२८ (४)

४.१ खाद्यको हक

खाद्यसम्बन्धी अधिकार मानव प्राणीका लागि एउटा अति महत्त्वपूर्ण र नभई नहुने अधिकार हो । यसको अभावमा मानव जीवन असंभव र अकल्पनीय छ । तर, सर्वोच्च अदालतले शुरूका दिनमा यस अधिकारप्रति त्यति संवेदनशीलता देखाउन सकेन । त्यसको उदाहरण हो -माधव बस्नेतको मुद्दा[55]। यस मुद्दामा रिट निवेदकले नेपालको मध्य पश्चिमका केही पहाडी जिल्लाहरूमा[56] खाद्यान्नको अभावमा भोकमरी फैलिएको, खाद्यान्नको अभावमा मानिसहरू पलायन र विस्थापित भइरहेकोले तत्काल खाद्यान्न आपूर्तिको लागि नेपाल सरकारको नाममा परमादेशको आदेश जारी गर्नका लागि रिट निवेदन दर्ता गराएका थिए । सर्वोच्च अदालतले नेपाल सरकारको पक्ष लिँदै नेपाल सरकारले विभिन्न माध्यमबाट खाद्यान्न आपूर्ति गरिरहेको, खाद्यान्नको अभाव नहोस् भन्नका लागि भरपूर प्रयास गरिरहेको, विश्व खाद्य संगठन र अन्य गैरसरकारी संस्थाका माध्यमबाट खाद्यान्नको अभाव नहोस् भन्नका लागि निरन्तर प्रयासरत् रहेको । उक्त क्षेत्रको खाद्य संस्थानहरूमा पर्याप्त खाद्यान्न रहेको भनी परमादेशको आदेश जारी गर्न मानेन । सर्वोच्च अदालतले प्रकाशमणि शर्मा[57]भएको मुद्दामा माथिल्लो फैसलामा गरेको त्रुटिलाई सच्याउदै र खाद्यसम्बन्धी अधिकारको महत्त्वलाई दर्शाउँदै फरक किसिमले फैसला गरेको छ । जुन सराहनीय पनि छ । यस मुद्दामा सर्वोच्च अदालतले उल्लेख के गरेको छ भने 'खाद्यान्न अभाव क्षेत्रमा उपलब्ध गराउने सरकारको कर्तव्य हुँदा भविष्यमा खाद्यान्नको अभाव वा संकटको अवस्था उत्पन्न हुन नदिन समयमै उचित व्यवस्था गर्न र भविष्यमा यस्तो अवस्था आइपरे हवाई वा सतही जुसुकै मार्गद्वारा पनि समयमै खाद्यान्न आपूर्ति र उपलब्ध गराई नागरिकहरूलाई भोकामरीबाट बचाउन आवश्यक व्यवस्था गर्नु, भनी विपक्षीको नाउँमा आदेश जारी गरेको छ । त्यस्तै बज्जुद्दिन मियाँ[58] भएको मुद्दामा रिट निवेदकहरू कोशी टप्पु वन्य जन्तु आरक्ष वरिपरि बसोवास भएका व्यक्तिहरू हुन । उनीहरूले लगाएको बालीनाली आरक्षका जनावरहरूले नष्ट गरिदिने भएकोले उनीहरूको खाद्यको अधिकार उल्लंघन भएकोले उनीहरूलाई भोकमारीबाट बचाउने दायित्व राज्यको हो भनी क्षतिपूर्ति दिनुपर्ने भनी यस मुद्दामा सर्वोच्च अदालतले परमादेशको आदेश जारी गरेको छ । क्षतिपूर्तिको सही आँकलन गर्न एउटा स्थायी समिति गठन गरी समितिले दिएको प्रतिवेदनमा उल्लिखित सुझावको आधारमा क्षतिपूर्ति वितरण गर्नु भनी आदेश दिएको पाइन्छ । यसले नागरिकलाई भोकमरीबाट बचाउने दायित्व राज्यको हो भन्ने कुरालाई पनि स्थापित गरिदिएको छ ।

केही महिनाअगाडि सर्वोच्च अदालतले, खाद्यान्नको अधिकारको सम्वन्धमा, भूपेन्द्रबहादुर समेत[59]भएको रिट निवेदनको माध्यमबाट अर्को महत्त्वपूर्ण फैसला गरेको छ, जुन विधिशास्त्रीय दृष्टिकोणले अति महत्त्वपूर्ण देखिन्छ । यसमा रिट निवेदकको दावी के थियो भने नेपालमा कार्यरत् संयुक्त राष्ट्र संघका

55 रिट नं ३३४१ (२०५५), निर्णय मिति २०५५।६।२७।

56 जुम्ला, मुगु, कालिकोट, डोल्पा, बझा, बाजुरा र दर्चुला

57 प्रकाशमणि शर्मा वि. प्र. मं तथा मं. प. को कार्यालय समेत, रिट नं ०१४९ (२०६५), निर्णय मिति २०६७।२।५।

58 बज्जुदिल मियाँ वि. नेपाल सकार, रिट नं. ०३३८ (२०६४), निर्णय मिति २०६५।११।५२।

59 भूपेन्द्रबहादुर थिङ समेत वि. प्र. म. तथा मं.प. को कार्यालय, निर्णय मिति २०७४ माघ १९ , फैसला गर्ने न्यायधिशहरू: माननीय दीपक कुमार कार्की र माननीय डा. आनन्दमोहन भट्टराई

विशिष्टकृत निकाय विश्व खाद्य संगठन, सेभ द चिल्ड्रेन र नेपाल रेडक्रश सोसाइटी समेत भई नेपालका विभिन्न पहाडी जिल्लाहरूमा वितरण गरिरहेको खाद्यान्न (चामल) नेपाल खाद्यान्न प्रविधि र गुणस्तर मापदण्ड विभागले तोकेको स्तर भन्दा कमसल, सडेगलेका र कुहिएको छ । यस्ता किसिमका गतिविधिबाट नेपाली नागरिकको खाद्यान्नको अधिकार सुरक्षित नभई उल्टो उल्लंघन भइरहेको छ । त्यसैले नेपाल सरकारलाई उक्त गतिविधि तत्काल रोक्न लगाउन र उक्त जिल्लाहरूमा खाद्यान्नको आपूर्ति तत्काल गर्न गराउनका लागि परमादेशको आदेश जारी होस् भनी रिट दर्ता गराएका थिए । उक्त निवेदनको आधारमा सर्वोच्च अदालतले आदेश जारी गरेको छ ।

२०६६ सालमा जाजरकोट जिल्लामा भोकमरी र महामारी फैलिएको बेला र वि. सं. २०७२ मा महाभूकम्प गएको बेला विश्व खाद्य संगठन, सेभ द चिल्ड्रेन र नेपाल रेडक्रश सोसाइटीले निश्चित मापदण्ड भन्दा कमस्तरको कुहिएको चामल वितरण गरेको; गोरखाको लारपाकमा वितरण भएको चामलको सम्बन्धमा नेपाली संचार माध्यमले महत्त्वका साथ उठाएको पाइएको; जब यो विवादले अति गम्भीर रूप लिन थाल्यो । त्यसपछि संसदीय अनुगमन समिति घटनास्थलमा अनुगमनका लागि पुगेको, तर विश्व खाद्य संगठन, सेभ द चिल्ड्रेन र नेपाल रेडक्रश सोसाइटीले चामल भण्डारण गरिएको ठाँउलाई निरीक्षण गर्ने अनुमति दिएन; नेपाल सरकारले समस्यालाई गम्भीरतापूर्वक नलिएकोले यो रिट दर्ता हुन आएको हो । प्रधानमन्त्री कार्यालयको आदेशमा खाद्यान्न प्रविधि र गुणस्तर मापदण्ड विभागले चामलको परीक्षण गर्दा तोकिएको मापदण्डभन्दा कमसल पाइएकोले जमीनमा पुरियो । वाणिज्य र आपूर्ति मन्त्रालयलाई काभेपलाञ्चोकका यस्ता संघसंस्थालाई कारवाही गर्न पत्र पठाइयो । प्रधानमन्त्रीको कार्यालयको प्रतिउत्तर पत्रबाट के थाहा हुन्छ भने चामल कुहिएको, गन्ध आइरहेको खान लायक नभएकोले चामल पुरिएको हो । सर्वोच्च अदालतले अगाडि उल्लेख गरेको छ कि एकातर्फ खाद्यान्नको अभावमा जनताले कष्ट भोगी रहेको छ भने अर्कोतर्फ राष्ट्रिय विपदको वेलामा कुहिएको चामल वितरण भइरहेको कुराले यस अदालतको गम्भीर रूपले ध्यान आकर्षित गरेको छ । यस्ता गतिविधिबाट जनताको खाद्य अधिकार उल्लंघन भएको ठहर्छ, जुन उसको मौलिक हक हो । आफ्नो आदेशमा अदालतले उल्लेख गर्दै भनेको छ कि दातृ निकायबाट वितरण हुने चामलको सम्बन्धमा नेपाल सरकारको धारणा बाहिर आउनु पर्दछ । संयुक्त राष्ट्रसंघ विश्व खाद्य संगठन जस्ता दातृ निकायले भोकमरीलाई शून्यमा झार्न गरेको प्रयासमाथि कुनै प्रश्न चिन्ह खडा गरेको होइन । तर, उनीहरूले सञ्चालन गरेको कर्यक्रम पक्कै पनि सन्तोषजनक छैन । खाद्य वितरण गर्ने चाहे नेपाल सरकार होस् वा यसमा आबद्ध दातृ निकाय, कसैलाई पनि जनताको जीउ ज्यानसँग खेलवाड गर्ने स्वतन्त्रता छैन साथै सम्बन्धित सबै अपराधीलाई कारवाही गर्नु र पीडितलाई क्षतिपूर्ति दिई अबदेखि यस्तो गल्ति नदोहरियोस् भन्ने चेतावनी पनि दिएको छ । एउटा संप्रभु राष्ट्रको नाताले अन्तर्राष्ट्रिय समुदायमा यस सम्बन्धमा कुरा उठाउन र यस्ता गैरजिम्मेवार संगठनको गतिविधिलाई निरूत्साहित गर्न नेपाल सरकारको ध्यान आकर्षित गरेको छ । भोकमरी रोक्न र खाद्य सुरक्षाका लागि देशका प्रत्येक जिल्लाहरूमा खाद्यान्न वितरण भण्डारणको व्यवस्था गर्न, कृषियोग्य भूमिलाई अनुत्पादक भूमिमा परिवर्तन हुनबाट रोक्न र भूमिको उत्पादकत्व बढाउन नीति तथा कार्यक्रम समेत ल्याउन आदेश दिएको छ ।

४.२ स्वास्थ्यको हक

विभिन्न अधिकारहरू मध्ये स्वास्थ्यको अधिकार पनि आधारभूत र अति महत्त्वपूर्ण अधिकार हो । यस अधिकारअन्तर्गत सर्वोच्च अदालतबाट प्रतिपादन भएका केही सिद्धान्तहरू यहाँ उल्लेख गरिएको छ । ज्योति बानिया वि. प्रधानमन्त्री तथा मन्त्रिपरिषदको कार्यालय समेत[60] भएको मुद्दामा स्वास्थ्य र औषधि(बीचको महत्त्वपूर्ण सम्वन्ध हुन्छ भन्ने कुरालाई उजागर गरेको छ । यस मुद्दामा सर्वोच्च अदालतले, २०६० साउन ८ गते मा तत्कालीन सरकार र नेपाल औषधि व्यवसायी संघवीच भएको भनिएको सम्झौताले औषधि व्यवसायी संघको एकाधिकार सिर्जना गर्छ गर्दैन? उक्त सम्झौता आवश्यक छ छैन? यदि सम्झौताले एकाधिकार प्रदान गर्छ भने त्यसको विकल्प के हुन सक्छ ? अन्तरिम संविधानको धारा १६ ले नागरिकलाई प्रदान गरेको स्वास्थ्यसम्वन्धी मौलिक हकलाई ध्यानमा राखी राय सुझावसहितको प्रतिवेदन पेश गर्न नेपाल मेडिकल काउन्सिलबाट मनोनीत वरिष्ठ चिकित्सकको संयोजकत्वमा आदेशमा उल्लेख भए बमोजिम एक विशेषज्ञ समिति गठन गर्नु, विशेषज्ञ समितिले आफ्नो राय सहितको प्रतिवेदन विपक्षी स्वास्थ्य मन्त्रालय र प्रधानमन्त्री तथा मन्त्रिपरिषदको कार्यालयमा पेश गर्नु र स्वास्थ्य मन्त्रालयले त्यसको एक प्रति यस अदालतको अनुगमन महाशाखामा उपलब्ध गराउनु, आदेश प्राप्त भएको एक महिनाभित्र विशेषज्ञको समिति गठन गर्नु र समितिले छ महिनाभित्र अध्ययन सम्पन्न गरी प्रतिवेदन बुझाउनु भनी निर्देशनात्मक आदेश र समितिले प्रतिवेदन बुझाएपछि नेपाल सरकारले सो समितिको प्रतिवेदन कार्यान्वयन गर्नु गराउनू भनी परमादेशको आदेश समेत जारी गरेको छ ।

त्यस्तै अर्को मुद्दामा सर्वोच्च अदालतले निर्देशनात्मक आदेश जारी गर्दै के भनेको छ भने, "नेपाल सरकारले बेला बेलामा उत्पन्न हुने यस प्रकारको epidemic लाई cope गरी विरामीलाई औषधि उपचार गरी ज्यान बचाउन बेलैमा अस्पतालमा पर्याप्त औषधि भण्डारण गर्ने र दरवन्दीअनुसारको डाक्टर नर्स र अन्य स्वास्थ्यकर्मीहरूको पदपूर्ति गरिराख्ने व्यवस्था गर्नुको साथै अवस्था अनुसार आवश्यक परे काठमाडौँबाट विशेषज्ञहरूको टोली पठाउने लगायतका के कस्तो व्यवस्था गर्नु पर्दछ"।[61]

लक्ष्मी खरेल वि. प्र. मं तथा मं. प. को कार्यालय समेत[62] भएको रिटमा अपाङगता र स्वास्थ्य संस्थाबीच रहेको सम्वन्धको वारेमा प्रष्ट पारेको छ । "आउँदो आ. ब. देखि अपाङग महिलाहरूको स्वास्थ्यलाई विशेष ध्यान दिई अपाङगता भएका व्यक्तिहरूका लागि अस्पताल, सार्वजनिक यातायात लगायत सम्पूर्ण सार्वजनिक स्थानमा अपाङ्गहरूको सरल र सहज पहुँच हुन सक्ने गरी नीति, कार्यक्रम बनाई रकम छुट्याई संविधान र महासन्धि क्रमशः लागू गर्नु र बनाइने नीति र कार्यक्रमहरू यस अदालतलाई पनि उपलब्ध गराउनू" भनी स्वास्थ्य तथा जनसंख्या र महिला, बालबालिका तथा समाज कल्याण मन्त्रालयका नाममा निर्देशनात्मक आदेश जारी गरेको छ प्रकाशमणी शर्मा समेत[६३] भएको रिटको माध्यमबाट सर्वोच्च अदालतले स्वास्थ्यको अधिकारलाई महत्त्व दिँदै थुनामा रहेकी आमा र बच्चाको स्वास्थ्यको

60 रिट नं ३३१६(०६०), निर्णय २०६४।१२।६

61 अधिवक्ता कमल नियोल विरुद्ध स्वास्थ्य मन्त्रालय समेत, रिट नं. ००६२(२०६६), निर्णय २)६७ .६.२!

62 रिट नं. ०७४८(०६५), निर्णय २०६७।४।१२

63 प्रकाशमणी शर्मा समेत विरुद्द प्रधानमन्त्री तथा मन्त्रिपरिषद्को कार्यालय समेत, रिट नं. ००२८ र२०६३, निर्णय मिति २०६५।०२२।३।

सम्वन्धमा, थुना वा कैदमा रहेको महिलाको गर्भावस्थामा हेरचाह, बच्चा जन्मिने अवस्थामा स्वास्थ्यको सुरक्षा, बच्चाको पोषण र स्वास्थ्यसम्बन्धी कुराहरूलाई विशेष रूपमा उठाएको र निवेदनसाथ पेश भएको राष्ट्रिय मानव अधिकार आयोगद्वारा विभिन्न समयमा गरिएको कारागार अनुगमनको आधारमा तयार पारिएको प्रतिवेदन, २०६२ को परिच्छेद् ३ मा कारागारहरूको क्षमता भन्दा बढी बन्दी राखिएको, भवन पुरानो भै जीर्ण अवस्थामा रहेको, केही कारागारमा कम्पाउण्डको अभाव रहेको, चिसो भूँईमा सुत्नु पर्ने बाध्यता रहेको, विरामी बन्दीलाई राख्ने छुट्टै ठाउँको अभाव रहेको जस्ता भौतिक पूर्वाधारका सम्बन्धमा विभिन्न तथ्यलाई औल्याइएको अधारमा समेत ती यावत कुराहरूलाई मध्यनजर राखी हाम्रा कारागारहरूमा महिलाहरूको गर्भावास्थाको हेरचाह, बच्चा जन्मिने अवस्थाको स्वास्थ्यको सुरक्षा, बच्चाको पोषण जस्तो स्वास्थ्य सम्बन्धी व्यवस्था अपर्याप्त रहेको भन्ने देखिदा र ती कुराहरू पर्याप्त रुपमा पूरा हुनु पर्ने, गर्भवती महिला बन्दीहरू र स्तनपान गर्ने बच्चाहरूको स्वास्थ्य, पोषण र संरक्षण लगायत उपयुक्त सुबिधाको व्यवस्था मिलाउन नीति तथा कार्यक्रम बनाई लागू गर्नु भनी विपक्षीहरूका नाममा निर्देशनात्मक आदेश जारी गरेको छ ।

स्वास्थ्यको हकको बारेमा सर्वोच्च अदालतले माथिका फैसलाहरू बाहेक अन्य मुद्दाहरूमा पनि व्याख्या गरेको पाइन्छ[64]।

४.३. शुद्ध पानी र स्वच्छ वातावरणको अधिकार

नेपालको अन्तरिम संविधान होस् वा नेपालको संविधान होस् कुनै पनि संविधानमा पानीको हकको सम्वन्धमा विशेष व्यवस्था गरेको पाइदैन । तर सर्वोच्च अदालतले आफ्नो फैसलाको माध्यबाट या त शुद्ध पानीको अधिकारको सम्वन्धमा होस् या स्वच्छ वातावारणको अधिकारको सम्वन्धमा होस्, प्रत्यक्ष वा अप्रत्यक्ष रूपमा, विभिन्न फैसलाहरूको माध्यमबाट यस अधिकारलाई स्थापित गर्न खोजेको देखिन्छ । त्यस मध्ये केही यहाँ उल्लेख गरिएको छ । शुद्ध पिउने पानी व्यक्तिको नैसर्गिक अधिकार हो भन्ने सिद्धान्तलाई सर्वोच्च अदालतले प्रकाशमणि शर्माको[६५] रिटको माध्यमबाट स्थापित गरेको छ । यसमा सर्वोच्च अदालतले "नागरिकको बाँच्न पाउने अधिकार र जनस्वास्थ्यका विषयमा गम्भीर भै आर्सेनिक प्रदूषणरहित खानेपानी व्यवस्था गर्ने कार्यमा प्रभावकारिता ल्याउनुको साथै राष्ट्रिय एवं स्थानीय स्तरमा जनचेतनामूलक कार्यक्रम सञ्चालन गर्नू" भनी फैसला गरेको छ र त्यसको साथै विपक्षी नेपाल सरकार

64 स्वास्थ्यको अधिकारसंग सम्वन्धित अन्य फैसलहरूको लागि हेर्नुहोस् अधिवक्ता सुदर्शन सुवेदी वि. प्रधानमन्त्री तथा मन्त्रिपरिषद्को कार्यालय, रिट नं. ०१८८(०६८), निर्णय मिति २०६९।४।३०स प्रकाशमणी शर्मा समेत विरुद्द प्रधानमन्त्री तथा मन्त्रिपरिषद्को कार्यालय समेत, रिट नं ०२१८ (०६३) निर्णय मिति २०६९८१२स राजुप्रसाद चापागाई वि. स्वास्थ्य मन्त्रालय, रिट नं. २६२१(२०५९), निर्णय मिति २०६१।७।२०स प्रकाशमणि शर्मा वि. वातावरण, विज्ञान तथा प्रविधि मन्त्रालय समेत, रिट नं. ३८२२(०६२), नि.मि. २०६३।९।३।२स अमृता थापा समेत वि. प्रधानमन्त्री तथा मन्त्रिपरिषदको कार्यालय समेत, रिट नं. ०१३९(२०६४), निर्णय मिति २०६५।१।४स अधिवक्ता ऋषिराम घिमिरे वि. प्रधानमन्त्री तथा मन्त्रिपरिषदको कार्यालय, रिट नं ०२८७(२०६३), निर्णय मिति २०६६।१।३०स अधिवक्ता प्रकाशमणि शर्मा समेत वि. प्रधानमन्त्री तथा मन्त्रिपरषदको कार्यालय समेते, रिट नं. ०२३०(२०६४), निर्णय मिति २०६५।२।२२स सहदेव गौतम वि. मन्त्रिपरिषदको कार्यालय समेत, रिट नं. १००२ (२०६५), निर्णय मिति २०६७।३।२४स प्रकाशमणि शर्मा वि. नेपाल सरकार, रिट नं. ००२८(०६३), निर्णय मिति २०६५।३।५स लक्ष्मीदेवी धित्ता समेत वि. प्र.मं. तथा मं. प.को कार्यालय समेत, रिट नं. ०७५७ (०६३), निर्णय मिति २०६६।२।६स राजु चापागाई वि. प्र.मं तथा मं.प.को कार्यालय समेत, रिट नं. ०१२ ९(०६३), निर्णय मिति २०६५।६।३०स डिल बहादुर विश्वकर्मा विरुद्द मन्त्रिपरिषद् कार्यालय, रिट नं. ३३०३(२०६१)स निर्णय मिति २०६२।१।१९स उपभोक्ता हीत संरक्षाण मञ्च नेपालको तफर्बाट ज्योति बानिया, रिट ०३८३ (०६८), मिति २०७० पौष १४ गते अन्तरीम आदेश जारीस डा.दिनेश विक्रम शाह, रिट नं. ०५१८र२०६३, निर्णय मिति २०६६।०७।२९।

65 प्रकाशमणि शर्मा समेत वि. प्रधानमन्त्री तथा मन्त्रीपरिषदकको कार्यालय समेत, रिट नं. ३२६२ (२०६२, निर्णय मिति २०६४।६।१५

आवास तथा भौतिक योजना मन्त्रालय र सूचना तथा संचार मन्त्रालयका नाममा परमादेशको आदेश जारी गरेको छ। त्यस्तै अर्को मुद्दामा स्वच्छ खानेपानी वितरणका लागि आवश्यक व्यवस्था गर्नका लागि परमादेशको आदेश जारी गरेको छ[66]।

अर्को रिट निवेदनमा खाने पानी लगायत शुद्ध वातावरण उपभोग गर्न पाउने मानिसको नैसर्गिक अधिकार भएको र पोखरावासीहरू शुद्ध खानेपानी उपभोग गर्ने अधिकारबाट बञ्चित हुनुका अतिरिक्त अन्तर्राष्ट्रिय सन्धि सम्झौता र संविधानद्वारा प्रत्याभूत मानव अधिकार एवं मौलिक अधिकार समेतको उल्लंघन भएकोले शुद्ध पानी वितरणसम्बन्धी व्यवस्था मिलाउने सम्बन्धमा निवेदकले उठाएका कुराहरू मानवीय स्वास्थ्यसँग प्रत्यक्ष र अभिन्न रुपमा गाँसिएको गम्भीर र संवेदनशील विषय भएको हुँदा र यस सम्बन्धमा योजनाहरू समेत कार्यान्वयन गर्ने अवस्थामा रहेको भन्ने लिखित जवाफ समेत देखिदा अब त्यस्ता योजनाहरू मानवीय स्वास्थ्यलाई ध्यानमा राखी क्रियाशील रही यथाशीघ्र सम्पन्न गर्ने तर्फ सक्रिय रहनु भनी विपक्षीहरूको नाममा निर्देशनात्मक आदेश जारी भएको छ[67]। अर्को फैसलामा सर्वोच्च अदालतले निर्देशनात्मक आदेश जारी गर्दै के उल्लेख गरेको के छ भने "प्रदूषणरहित पानी वितरण गर्ने गरेको प्रणालीगत सुनिश्चितता, भरपर्दो संयन्त्रको व्यवस्था गरिएको भन्ने तथ्य पेश गर्न सकेको नदेखिँदा उक्त खानेपानीका मुहानमा ढल मिसिने प्रक्रियालाई नियन्त्रण गरी गुणस्तरयुक्त पानी आपूर्ति गर्न जे जस्तो आवश्यक प्राविधिक एवं वातावरणीय प्रवन्ध गर्नुपर्ने हो सो को यथाशीघ्र कार्यान्वयन गरी शुद्ध स्वच्छ तथा गुणस्तरयुक्त पानीको आपूर्तिको व्यवस्था मिलाउनू"[68]।

शुद्ध पानी र स्वच्छ वातावरणको अधिकारको सम्बन्धमा सर्वोच्च अदालतले माथिका फैसलाहरू बाहेक अन्य मुद्दाहरूमा पनि व्याख्या गरेको पाइन्छ[69]।

४.४. आवासको हक

आवासको हक पनि मौलिक हकहरू मध्येको एक हो। सर्वोच्च अदालतबाट यस अधिकारको सम्वन्धमा धेरै बोलेको पाइदैन, जबकि यो अधिकार नेपालमा सबभन्दा बढी उल्लंघन हुने अधिकार मध्येको एक हो। यस सम्वन्धमा एउटा मुद्दामा सर्वोच्च अदालत यसरी व्याख्या गरेको पाइन्छ। जनताको मानव अधिकारको रुपमा आवाससम्बन्धी हकलाई हृदयगम गरी व्यापक रुपमा बैज्ञानिक ढंगले आवास नीति

66 प्रकाशमणि शर्मा समेत वि. नेपाल खानेपानी समेत, रिट नं. २२३७ (२०४७), निर्णय मिति २०५८।३।२६

67 भोजराज ऐर समेत वि. भौतिक योजना तथा निर्माण मन्त्रालय, रिट नं. ३०६६ (०६३), निर्णय मिति २०६६।२।२७

68 सुदर्शन थपलिया विरुद्ध भौतिक योजना तथा निर्माण मन्त्रालय समेत, रिट नं. ०६९४ (२०६५), निर्णय मिति २०६७।१२।१७।

69 हेर्नुहोस सूर्यप्रसाद ढुंगेल वि. गोदावरी मार्वल, रिट नं. ३५ (२०४९), निर्णय मिति २०५२।७।१४स राजेन्द्र पराजुली समेत वि. नेपाल सरकार मन्त्रीपरिषद सचिवालय समत, रिट नं. ३२५९ (०५३), निर्णय मिति २०५४।७।२स भरतमणि गौतम वि. नेपाल सरकार, रिट नं. ३१४१(०५४), निर्णय मिति २०५६।३।२९स भोजराज ऐर समेत वि. नेपाल सरकार, जलश्रोत मन्त्रालय समेत, रिट नं. ३३०५ (०५६), निर्णय मिति २०५८।४।१२स प्रकाशमणि शर्मा समेत वि. नेपाल सरकार मन्त्रिपरिषद सचिवालय समेत, रिट नं. ३०१७(२०५२), निर्णय मिति २०५६।२।३१स भरतमणि गौतम वि. नेपाल सरकार मन्त्रिपरिषद सचिवालय समेत, रिट नं. ३०५४ (०५४), निर्णय मिति २०५६।३।२९स प्रकाशमणि शर्मा वि. नेपाल सरकार मन्त्रिपरिषद सचिवालय समेत, रिट नं. ३४४० (२०५७), निर्णय मिति २०५८।९।२स प्रकाशमणि शर्मा समेत वि. नेपाल सरकार प्रधानमन्त्रि तथा मन्त्रिपरिषदको कार्यालय समेत, रिट नं. ३४४७ (०६०), निर्णय मिति २०६६।९।१स शत्रुधन प्रसाद गप्ता समेत वि. एभरेष्ट पेपर मिल्स प्रा. लि., रिट नं. ३४८० (२०५९), निर्णय मिति २०६१।४।१२। स भोजराज ऐर समेत वि. मन्त्रिपरिषदको कार्यालय समेत, रिट नं. ९९ (२०६१), निर्णय मिति २०६५।१२।२२स विनोदकुमार भट्टराई विरुद्ध प्र.मं. तथा मं.प. को कार्यालय समेत, रिट नं. ०३१८ (२०६८), निर्णय मिति २०६९।२।२४

तयार गर्नुपर्ने र त्यस्तो नीतिमा निश्चित मापदण्ड समेत समावेश गरी घर बहालसम्बन्धी विशेष कानून बनाउने र उपरोक्त आवास नीति कार्यान्वयन गर्ने तर्फ यो आदेश प्राप्त भएको मितिले एक वर्षभित्र प्रारम्भ गर्नु भनी आदेश जारी भएको छ [70]।

४.५. शिक्षाको हक

शिक्षालाई आँखाको ज्योति भनिन्छ । त्यसैले होला सर्वोच्च अदालतले आफ्नो फैसलाका माध्यमबाट यसको महत्त्वलाई उजागर गरेको पाइन्छ । ती महत्त्वपूर्ण फैसलाहरू मध्ये केही सन्दर्भका लागि यहाँ उल्लेख गरिएको छ ।

सुदर्शन सुवेदी भएको मुद्दामा सर्वोच्च अदालतले अन्धा, अपाङ्ग, बहिरा तथा सुस्त मनस्थिति भएका व्यक्तिलाई सार्वजनिक विद्यालय, महाविद्यालय र तालिम केन्द्रमा निशुःल्क भर्ना लिई अन्य कुनै पनि शुल्क नलिनु भन्ने निर्देशनात्मक आदेश जारी गरेको छ[71]। त्यस्तै डिलबहादुर विश्वकर्माको[72] निवेदनमाथि फैसला गर्दै सर्वोच्च अदालतले के उल्लेख गरेको छ भने "तीनधारा संस्कृत छात्रावास सम्बन्धी विनियम, २०४८ को विनिमय १४.८.६ को खण्ड (ख) मा उक्त छात्रावास प्रवेश गर्नको लागि ब्रतवन्ध गरेको र २४ वर्ष ननाघेको वटुक हुनुपर्ने व्यवस्था नेपाल अधिराज्यको संविधान, २०४७ को धारा ११ तथा महेन्द्र संस्कृत विश्वविद्यालय ऐन, २०४३ को दफा १२ सँग समेत बाझिएको देखिएकोले तीनधारा संस्कृत छात्रावास सम्बन्धी विनियम २०४८ को विवादित विनियम १४.८.६ (ख) को व्यवस्था संविधानको धारा ८८ को उपधारा १ अनुसार आजका मितिले अमान्य हुने" र साथै "तीनधारा संस्कृत छात्रावासमा प्रवेशको लागि नेपाल अधिराज्यको संविधान, २०४७ को धारा ११ को उपधारा २ मा व्यवस्थित समानताकोहकसम्बन्धी व्यवस्थाको प्रतिकूल नहुने गरी आवश्यक कानूनी व्यवस्था गर्नू" भनी विपक्षी महेन्द्र संस्कृत विश्व विद्यालयको नाममा निर्देशनात्मक आदेश जारी गऱ्यो । यस्तै विषयवस्तु भएको एउटा अर्को मुद्दामा सर्वोच्च अदालतले के फैसला गरेको छ भने, "नेपाल वेद विद्धाश्रमबाट संचालन हुने शैक्षिक कार्यक्रमहरूमा जातजातिको आधारमा भेदभाव नगरी समानताको सिद्धान्त र आवश्यक योग्यताको आधारमा स्वच्छ तरिकाले छनौट गरी प्रवेश दिनु एवं नेपाल वेद विद्याश्रममा विद्यार्थीको हितलाई सम्बोधन गर्ने गरी निश्चित नीति, नियम तर्जुमा गरी सेवालाई व्यापक र संस्थागत गर्न जो चाहिने आवश्यक व्यवस्था गर्नू" भनी पशुपति क्षेत्र विकाश कोष र शिक्षा मन्त्रालयका नाममा निर्देशनात्मक आदेश जारी गरेको छ[73]।

अर्को फैसलाको माध्यमबाट सर्वोच्च अदालतले प्र.मं.तथा मं.प. कार्यालय र शिक्षा मन्त्रालयका नाममा परमादेशको आदेश जारी गर्दै के भनेको छ भने, "चालू शैक्षिक सत्रभित्र सांकेतिक भाषाको माध्यमद्वारा शिक्षामा अवसर पाउने विद्यालय वा महाविद्यालय किटान गरी उक्त भाषामा प्रशिक्षित दोभाषे वा शिक्षकहरूको व्यवस्था गर्नु, त्यहाँ प्रयोग हुने पाठ्यसामाग्रीहरू सांकेतिक भाषामा अनुवाद गर्ने प्रक्रिया

70 राजीव वास्तोला समेत विरुध्द प्रधानमन्त्री तथा मन्त्रिपरिषद्को कार्यालय समेत, रिट नं. ००५१ (२०६६), निर्णय २०६७।१०।६

71 सुदर्शन सुवेदी वि. मन्त्रिपरिषद सचिवालय, रिट नं. ३५८६ (२०५७), निर्णय मिति २०६०।६।२८

72 डिलबहादुर विश्वकर्मा वि. मन्त्रिपरिषद सचिवालय, रिट नं. ४४ (२०६२), निर्णय मिति २०६२।१०।६

73 अधिवक्ता मोहन साशंकर वि. नेपाल सरकार, रिट नं. ३४१६(०६३), निर्णय मिति २०६६।३।३

शुरु गरी त्यहाँका विद्यार्थीहरूलाई आवश्यक पाठ्यसामग्रीहरू याथाशीघ्र उपलब्ध गराउनु, सांकेतिक भाषामा शिक्षण गर्न सक्ने जनशक्तिको तालिमको व्यवस्था अविलम्ब शुरु गर्नु"[74]। नेपालको अन्तरिम संविधानको, २०६३ को धारा १७ (२) को निःशुल्क शिक्षा सम्बन्धी मौलिक हक र आर्थिक, सामाजिक र सांस्कृतिक अधिकार सम्बन्धि, १९६६ को धारा १३ (२) (ख) को व्यवस्था अनुसार निजी लगानी र व्यवस्थापनबाट संचालित विद्यालय बाहेक सरकारी तथा सामुदायिक विद्यालयहरूमा माध्यमिक विद्यालय तहसम्म निःशुल्क शिक्षाको व्यवस्था गर्नू र सोको लागि आवश्यक पर्ने तत्सम्बन्धी कानून समेत बनाउनू भनी आदेश भएको पाइन्छ"[75]।

शिक्षाको हकको बारेमा सर्वोच्च अदालतले माथिका फैसलाहरू बाहेक अन्य मुद्दाहरूमा पनि व्याख्या गरेको पाइन्छ[76]।

४.६. सामाजिक न्याय र सामाजिक सुरक्षाको अधिकार

सामाजिक न्याय र सामाजिक सुरक्षाको अधिकार आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारको अभिन्न अंग हो । त्यसैले नेपालको संविधानको विभिन्न धाराहरूमा यी अधिकारले मौलिक हकको स्थान प्राप्त गरेको छ भने राज्यका नीतिअन्तर्गत पनि उत्तिकै महत्त्वपूर्ण स्थान पाएको छ । त्यस्तै सर्वोच्च अदालतले पनि यी अधिकारको सम्वन्धमा धेरै मुद्दाहरूमा व्याख्या गरिसकेको छ । "जेष्ठ नागरिकहरूको हक, हित संरक्षण र सम्वर्द्धनका लागि संसदको यसै अधिवेशनबाट कानून बनाई लागू गर्नू" भनी सर्वोच्च अदालतले परमादेशको आदेश जारी गरेको छ[77]। यस्तै अर्को निवेदनको आधारमा सर्वोच्च अदालतले के आदेश गरेको छ भने जेष्ठ नागरिक सम्बन्धी ऐन, २०६६ को दफा ९ (२) को कानूनी व्यवस्था कार्यान्वयन हुन नसकी जेष्ठ नागरिक सम्बन्धी ऐनको, २०६३ को दफा ९ (२) निष्प्रयोजित भई जेष्ठ नागरिकहरूले सम्मानपूर्वक बाँच्न पाउने संवैधानिक हक तथा कानूनद्वारा तोकिएको छुट र सुविधा उपभोग गर्नबाट बन्चित हुनु परेको अवस्था विद्यमान देखिएको हुँदा जेष्ठ नागरिक सम्बन्धी ऐन, २०६३ को दफा ९ (२) को व्यवस्थालाई सर्वजनिक सूचना प्रकाशित गरी यथाशीघ्र चाँडो कार्यान्वयन गर्न आवश्यक नीति, नियम र अनुगमन संयन्त्र बनाई लागू गर्नू" भनी परमादेशको आदेश जारी गरेको छ[78]।

त्यस्तै अर्को मुद्दामा सर्वोच्च अदालतले एकल महिलाको सम्बन्धमा महत्त्वपूर्ण आदेश गरेको छ । यसमा उल्लेख भएअनुसार राज्यको स्रोत र साधनले भ्याएसम्म एकल महिलाको आयस्रोत, रोजगारी, निजको श्रीसम्पत्ति, पतिको पेन्सन वा आफ्नो पेन्सन आदि विविध पक्षलाई विचार गरी एक निश्चित मापदण्ड

74 प्रकाशमणि शर्मा समेत वि. प्र. मं. तथा मं. प. को कार्यालय समेत, रिट नं. ०२८३ (०६३), निर्णय २०६५।१।४

75 लेखनाथ न्यौपाने वि. शिक्षमन्त्रलाय समेत, रिट नं. ११५२ (२०६३), निर्णय मिति २०६७।११।९

76 शिक्षा अधिकारहरूसंग सम्वन्धित अन्य मुद्दाहरूको लागि हेर्नुहोस,ध्रुवप्रसाद चौलागाई वि. शिक्षा मन्त्रालय, रिट नं. ००२८ (२०६७), निर्णय मिति २०६८।४।२६स सन्तोष यादव समेत विरुद्द सामान्य प्रशासन मन्त्रालय, रिट नं. ०४९०(०७०स अमृता थापा समेत वि। प्रधानमन्त्री तथा मन्त्रीपरिषदको कार्यालय समेत, रिट नं. ०१३९ (०६४), निर्णय २०६५।१।४स ईश्वरी खड्का समेत विरुद्द शिक्षा मन्त्रालय, रिट नं. ०५०१ (०६४), निर्णय मिति २०६७।१०।२३।

77 चन्द्रकान्त ज्ञावली समेत वि. प्रधानमन्त्री तथा मन्त्रीपरिषदको कार्यालय समेत, रिट नं. ३३४२ (०६०) ३३४२(।६)), निर्णय मिति २०६३।१।२४

78 अधिवक्ता राजाराम श्रेष्ठ समेत वि. प्र. मं. तथा मं.प. को कार्यालय समेत, रिट नं. ०१०९ (०६७), निर्णय मिति २०६७।१२।२४

निर्धारण गरी ६० वर्ष भन्दा कम उमेरका एकल महिलालाई पनि सामाजिक सुरक्षाअन्तर्गत दिइने भत्ता उपलब्ध गराउनेतर्फ ध्यानाकर्षण गराउने गरी नेपाल सरकार, प्रधानमन्त्री तथा मन्त्रिपरिषद्को कार्यालय लगायत विपक्षीहरूका नाममा निर्देशनात्मक आदेश जारी गरेको छ साथै यस्ता एकल महिलाको वास्तविक तथ्यांङ्क संकलन गरी उनीहरूको उमेर, जनसंख्या, आर्थिक, सामाजिक एवं शैक्षिक अवस्था र वास्तविक तथ्यांङ्कको यकीन गर्दै उनीहरूको उत्थान र विकासको लागि आवश्यक कार्यक्रम र नीति बनाउन सहजता प्रदान गर्ने उद्देश्यले आउने राष्ट्रिय जनगणनामा उपरोक्तबमोजिमको तथ्यांङ्क विभागका नाउँमा समेत निर्देशनात्मक आदेश जारी गरिएको छ[79]।

देशभरिका दृष्टीबिहीन अपाङ्गहरूको छुट्टै लागत लिई खाद्य, आवास, स्वास्थ्य,शैक्षिक,प्रतिष्ठान, सुरक्षा, ब्रेललिपिमा पाठ्यपुस्तक, सीपमूलक तालिम, सूचना तथा सञ्चार सहितका एकीकृत सामाजिक सुरक्षाको प्याकेज सहितका नीति निर्माण अतिरिक्त दृष्टिबिहीन संरक्षण केन्द्रको पूर्वाधार विकास गरी दृष्टिबिहीन अपाङ्गहरूका लागि कल्याणकारी व्यवस्था कार्यान्वयन गर्नू गराउनू । सो अपाङ्ग संरक्षण तथा कल्याण ऐनको प्रभावकारी कार्यान्वयन गर्नू, गराउनू र अपाङ्ग सेवा कार्ययोजना २०६० को राष्ट्रिय नीतिलाई थप परिमार्जन तथा समसामयिक बनाई कार्यान्यन गर्नु गराउनु भनी परमादेशको आदेश जारी भएको छ[80]।यस्तै बाबुकृष्ण महर्जनको[81]मुद्दामा सर्वोच्च अदालतले, अपाङ्ग संरक्षण तथा कल्याण ऐन, २०३९ ले व्यवस्था गरे बमोजिम अपाङ्गहरूलाई दिनु पर्ने सुविधा क्रमिक रुपले प्रदान गर्न यसै आ.ब. भित्र प्राथमिकताको आधारमा कार्यक्रम बनाई आगामी आ. ब. देखि ऐनको उद्देश्य अनुसारको सेवा, सुविधा प्रदान गर्न शुरु गर्नु भनी परमादेशको आदेश जारी गरेको छ ।

सामाजिक न्याय र सामाजिक सुरक्षाको अधिकारको सम्वन्धमा सर्वोच्च अदालतले माथिका फैसलाहरू बाहेक अन्य मुद्दाहरूमा पनि व्याख्या गरेको पाइन्छ[82]।

४.७. रोजगारीको अधिकार

नेपालको अन्तरिम संविधान, २०६३ को धारा १८(१) र आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारसम्बन्धी अन्तर्राष्ट्रिय अनुबन्ध १९६६ को धारा ६ बमोजिम रोजगारीको अधिकारको पूर्ण सुनिश्चितता हुने गरी अन्य कुराका अतिरिक्त देहायका कुराहरू समेत समेट्ने गरी रोजगारीको हक कार्यान्वयन गर्न आवश्यक पर्ने विधेयक यो आदेश प्रप्त भएको मितिले एक वर्षभित्र व्यवस्थापिका संसद समक्ष पेश गर्ने भनी प्रधानमन्त्री तथा मन्त्रिपरिषदको कार्यालय समेतका नाममा परमादेशका आदेश जारी भएको छ[83]।

४.८. भाषा र संस्कृतिको अधिकार

भाषा र संस्कृतिको संरक्षण र प्रवर्द्धनको सम्वन्धमा सर्वोच्च अदालतबाट त्यति धेरै व्याख्या भएको

79 अधिवक्ता कविता पाण्डे वि. प्रधानमन्त्री तथा मन्त्रिपरिषदको कार्यालय समेत, रिट नं. ०३३७ (२०६५), निर्णय २०६६।११।२६

80 दीपक भट्टराई समेत वि. प्रधानमन्त्री तथा मन्त्रिपरिषदको कार्यालय समेत, रिट नं. १३१० (२०६६), निर्णय मिति २०६७।१०।७

81 रिट नं. ३६६६ (०६१), निर्णय २०६१।१०।५

82 प्रकाशमणि शर्मा, रिट नं. ३५६४ (०६३), निर्णय मिति २०६४।१।२५स सुदर्शन सुवेदी वि. प्रधानमन्त्री तथा मन्त्रिपरिषदको कार्यालय समेत, रिट नं. ०१८८ (०६८), निर्णय मिति २०६९।४।३०

83 प्रेमबहादुर खड्का समेत वि. प्रधानमन्त्री तथा मन्त्रिपरिषदको कार्यालय समेत, रिट नं. ०७१९ (०६४), निर्णय मिति २०६५।९।२३

पाइदैंन र जे जति भएका छन् ती निराश पार्ने खालका छन् । सर्वोच्च अदातबाट १९९० पछि भएको पहिलो फैसला हो लालबहादुरको[84] यो मुद्दा भाषाको विवाद सम्वन्धमा थियो । रिट निवेदक लालबहादुर थापाले काठमाडौँ महानगरपालिकाले कार्यालयको कामकाजको भाषा नेवारी र जिल्ला विकास समिति, धनुषा र राजविराज नगरपालिका, राजविराजले कार्यालयको कामकाजको भाषा मैथिली हुने भनी गरेको निर्णय नेपाल अधिराज्यको संविधान २०४७ सँग बाझिएकोले उक्त निर्णयहरू बदर गरी पाऊँ भनी दर्ता गराएको निवेदनको माग दावीअनुसार सर्वोच्च अदालतले उक्त निर्णयहरू संविधानसँग बाझिएको भनी बदर गरिदियो । उक्त फैसलाबाट असन्तुष्ट काठमाडौँ निवासी, धनुषा निवासी र राजविराज निवासीहरू उक्त निर्णय भएको दिनलाई कालो दिवसको रूपमा मनाउँदै आइरहेका छन् । त्यस्तै अर्को विवादमा आएको फैसला हो पोशाकको सम्बन्धमा, यसमा रिट निवेदकले, "विभूषण नियमावलीको नियम ३८ले दिएको अधिकार भनी नेपाल सरकार मन्त्रिपरिषदको निर्णय अनुसार खण्ड ६०, संख्या १९ भाग ५ को राजपत्रमा २०६७ कार्तिक ७ गते प्रकाशित नेपाल सरकार गृहमन्त्रालयको सूचनामा तोकिएको नेपाली पोशाक र सोको द्रष्टव्य गरिएको नेपाली पोशाकको परिभाषा संविधानले आत्मसात् गरेको मूल्य मान्यताको समेत विपरीत देखिएकोले उक्त राजपत्रमा उल्लिखित नेपाली पोशाक भनी गरिएको व्यवस्था तथा सोसँग सम्बन्धित द्रष्टव्य समेत उत्प्रेषणको आदेशले बदर गरी पाऊँ भनी सुनील रञ्जनले रिट निवेदन दर्ता गराएका थिए तर सर्वोच्च अदालतले हकदैयाको अभाव देखाई रिट निवेदन खारेज गरिदिएको थियो[85]।

५. नेपालमा आर्थिक, सामाजिक र साँस्कृतिक अधिकारसँग सम्वन्धित अदालती आदेशहरू र कार्यान्वयनको अवस्था

नेपाल सरकार, प्रधानमन्त्री तथा मन्त्रिपरिषदको कार्यालयबाट प्रकाशित प्रतिवेदन[86] अनुसार २०४७ देखि २०७२ माघ मसान्तसम्ममा उक्त कार्यालयमा ३१४ वटा सर्वोच्च अदालतका आदेशहरू कार्यान्वयनका लागि प्राप्त भएको भनी उक्त प्रतिवदेनमा उल्लेख छ । त्यसमध्ये कार्यान्वयन भइसकेको परमादेशका आदेशहरूको संख्या ३४, कार्यान्वयनको अवस्थामा रहेका परमादेश आदेशहरूको संख्या ७१, कार्यान्वयन भइसकेका निर्देशनात्मक आदेशहरूको संख्या ६८ र कार्यान्वयनको अवस्थामा रहेका निर्देशनात्मक आदेशहरूको संख्या ३१४ रहेका छन् । यस प्रतिवेदन अनुसार सर्वोच्च अदालतबाट जारी आदेशहरू मध्ये कति नागरिक तथा राजनीतिक अधिकारहरूसँग सम्वन्धित छन् र कति आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारसँग सम्वन्धित छन भन्ने कुरा प्रष्ट छैन् । यस प्रतिवेदनबाट के प्रष्ट हुन्छ भने सर्वोच्च अदालतबाट जारी भएका आदेशहरू मध्ये कार्यान्वयन भइसकेको आदेशहरूका प्रतिशत भने ३२. ४८ (जम्मा १०२ वटा आदेशहरू) र कार्यान्वयनको अवस्थामा रहेको आदेशहरूको प्रतिशत ६५.५२ (जम्मा २१२ वटा आदेशहरू) रहेको छ । उक्त प्रतिवेदनमा सर्वोच्च अदालतको आदेशहरू कार्यान्वयन

84 लालबहादुर थापा वि. काठमाण्डौं महानगरपालिका समेत, Writ No 2931 (1997), Date of decision 1999/06/01.

85 सुनिल रञ्जन सिंह, रिट नं. ००२० (२०६७), निर्णय मिति २०६८।०५।०१।

86 सर्वोच्च अदालतबाट सार्वजनिक सरोकारको विवादमा जारी आदेश कार्यान्वयन प्रगति प्रतिवेदन(आ.व. २०७२(०७३, नेपाल सरकार, प्रधानमन्त्रि तथा मन्त्रिपरिषदको कार्यालय, कानून तथा मानव अधाकर प्रवर्धन महाशाखा, सिंहदरबार, काठमाण्डौं, २०७३

नहुनुका पछाडिका कारणहरू यस प्रकार उल्लेख गरेको पाइन्छ:[87]

- कतिपय फैसला कार्यान्वयन गर्न स्रोत र साधनको विनियोजन र परिचालन गर्नु पर्ने भएकोले स्रोत र साधनको न्यायोचित विन्यासमा देखिएका कमी कमजोरीका कारणबाट समेत फैसला कार्यान्वयनमा शिथिलता रहेको अवस्था छ ।
- कतिपय सार्वजनिक हित र सरोकार रहेका विषयमा भएका आदेश र फैसलाको कार्यान्वयन गर्न कानून निर्माण गर्नुपर्ने वा विषयको गाम्भीर्यताको कारण तत्काल कार्यान्वयन हुन नसक्ने प्रकृतिको भएका कारण वा फैसला कार्यान्वयन गर्न मोटो बजेटको व्यवस्था गर्नु पर्ने अवस्थामा समेत आदेश वा फैसलाको कार्यन्वयनमा नेपाल सरकार वा सम्बन्धित निकायबाट पहल हुँदाहुँदै पनि कार्यान्वयनमा ढिलाई हुन गएको अवस्था रहेको छ ।
- कतिपय फैसला वा आदेशबमोजिम गर्नुपर्ने काम कारवाहीसँग सम्बन्धित निकायका नाममा आदेश जारी नभई अन्य निकायका नाममा आदेश जारी हुँदा कार्यान्वयनमा यदाकदा अन्योलको अवस्था समेत सिर्जना हुने गरेको छ ।
- सम्मानीत अदालतबाट जारी भएका आदेश वा फैसला कार्यान्वयन गर्न सम्बद्ध निकायहरूले आफ्नो जिम्मेवारी र प्रमुख कार्यभित्र नराखी फैसला कार्यान्वयनलाई अनावश्यक बोझ वा समस्याको रुपमा लिएको अवस्था समेत छ ।

६.निष्कर्ष:

आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारहरूको कार्यान्वयनको जिम्मा राज्यको हो भन्ने कुरा नेपालको संविधानको धारा ४७ बाट प्रष्ट हुन्छ । उक्त अधिकारहरूको कार्यान्वयनमा राज्यले ढिलासुस्ती गरेको अवस्थामा सर्वोच्च अदालतले त्यसलाई देखेको नदेखे झै गर्न नहुने भन्ने कुरा संविधानको धारा ४६ मा संवैधानिक उपचारको हकको व्यवस्था रहेको देखिन्छ अर्थात आर्थिक, सामाजिक तथा साँस्कृतिक अधिकार नीतिगत कुरा हुन । यसको अर्थ यो होइन कि यसलाई अदालतमा प्रश्न उठाउनै पाइदैन जुन कुरा सर्वोच्च अदालतबाट भएका माथिका फैसलाहरूबाट पनि थाहा पाउन सकिन्छ । यति हुँदा हुँदै संवैधानिक व्यवस्थाहरू र अदालती फैसला प्रर्याप्त हुँदैन भन्ने कुरा माथिको प्रतिवेदनमा उल्लिखित कुराहरूबाट प्रष्ट हुन्छ । अदालतको फैसलाप्रति नेपाल सरकार त्यति संवेदनशील छैन भन्ने कुरा मीरा ढुंगानाको मुद्दाबाट प्रष्ट हुन्छ । यस मुद्दाको फैसलाबाट के देखिन्छ भने अदालतको आदेश कार्यान्वयन गर्न पनि अदालतले नै फेरि आदेश दिनु पर्ने अवस्था विद्यमान छ । यसलाई प्रभावकारी बनाउनका लागि नेपाल सरकार, अदालत, सरोकारवाला निकायहरू र नागरिक समाजको भूमिका उत्तिकै महत्त्वपूर्ण देखिन्छ । साथै यसका लागि हामीले विगतका दिनहरूबाट पाठ सिक्दै अगाडि बढनु पर्ने देखिन्छ । आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारलाई बढी प्रभावकारी बनाउनका लागि वृहत रूपमा वकालतको रणनीति बनाई नागरिक समाज र समुदायको परिचालन गर्नु पर्दछ । अदालतमा मुद्दा

87 उही, पृष्ठ ६

दायर गर्नु भन्दा पहिले उपर्युक्त विषय र प्रक्रियाको चयनको सम्वन्धमा पनि उत्तिकै ध्यान दिनु पर्दछ। अदालतमा मुद्दा सफल हुनका लागि कानून, तथ्यगत र उपचारात्मक तर्क विद्यमान हुनु पनि अति आवश्यक हुन्छ। अदालती फैसला कार्यान्वयन नहुनुको कारण स्रोत र विज्ञको कमी पनि हो। यसमाथि ध्यान जानु पनि उत्तिकै आवश्यक हुन्छ।

यति हुँदा हुँदै आर्थिक, सामाजिक तथा साँस्कृतिक अधिकार अदालती विषय होइन भन्ने कुरा अब पुरानो भइसकेको छ। यी अधिकार कार्यान्वयन गर्न ठूलो धनराशीको आवश्यकता पर्दछ भन्ने कुरा पनि निरपेक्ष होइन। यसका पछाडि कैयन कारणहरू रहेका छन्, जस्तैं राज्यले भएका नीति नियमको सही कार्यान्वयन नगर्नु, गलत कर नीति लागू गर्नु, वार्षिक बजेटमा छुट्याइएको रकम अनुत्पादक क्षेत्रमा खर्च गर्नु र विभेदकारी नीतिको अवलम्बन गर्नु, राज नेताहरूमा प्रतिवद्धताको कमी हुनु, भ्रष्टाचारलाई बढवा मिल्नु आदि छन्। नेपालमा आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारको कार्यान्वयन अति कमजोर हुनुका पछाडिका कारणहरू र चुनौतीहरू पनि यिनै हुन्। त्यसैले भविष्यमा यी चुनौतीहरू माथि ध्यान जानु पनि आवश्यक रहेको देखिन्छ।

अनुरोध

राष्ट्रिय मानव अधिकार आयोगले गराएको प्राज्ञिक अनुसन्धानको पूर्ण प्रतिवेदन केन्द्रीय कार्यालयको मानव अधिकार स्रोत केन्द्रमा रहन्छ। इच्छुक महानुभावहरूले त्याहाँ सम्पर्क राखी अध्ययन गर्न सक्नुहुनेछ।

Problems and Potentials of Religious Peacebuilding in Nepal

-Shobhakar Budhathoki

Abstract

Religion can play instrumental role in peacebuilding and justice. It contributes for creating tolerant society and helps to reduce tension among the communities arisen due to communal and religious differences. Similarly, religious leaders can help to resolve conflict in the society by playing the role of facilitator and mediator. However, the religion can be used as a tool to accomplish political agenda, which could escalate violence. Therefore, this article discusses about the importance of religious institutions and inter-faith community leaders while creating peaceful, tolerant and harmonious society. It also attempts to identify potential areas of tension in the name of religion, and analyzes the relation between religion, religious institutions and inter-faith community leaders in terms of building peace and ending violence. While exploring the issues of religion and peace, it attempts to identify role of inter-faith community leaders towards stopping escalation of violence and promoting peace as well as approaches for collaboration through inter-faith leaders for tolerant and harmonious society.

Introduction

Throughout human history, religion has played a pivotal role in the shaping and reshaping of social norms and values. These norms and values contribute to the foundation of political systems, welfare services, economic policies, laws, and sometimes war. Even hard line secularists or non-believers acknowledge that religious institutions and the morality set forth in religious texts permeate state structures and social norms with both positive and negative ramifications depending on the leading interpretation of religious values. However, historically religion, as a way to identify one's self, define our morality, and give meaning to our lives has easily fallen prey to misinterpretation, selective reasoning, and absolutism thereby lending itself to become a tool for the mobilization of violence, inequality, and fear.

But with so much prejudice, hatred, and violence based on religious zealousness, can religion become a tool for peacebuilding? At the heart of nearly all religions is "love" and by extension compassion. This basic moral premise illustrates the potential for religious validation of peacebuilding. Looking at religion from an institutional perspective, the structures and "divine" power or connectedness of the leadership offers a ready-made moral authority with the ability to mobilize masses for peace. Religious leaders and institutions

have access and the ear of local communities, respected leaders are uniquely positioned to promote resolution and reconciliation, and people will be increasingly compelled to follow through with agreements made to end or prevent conflict if they feel that is divine will.

Unfortunately, not all religious leaders advocate for the downtrodden or find justification for and preach violence. There are often religious traditions or superstitions that are either antiquated or misrepresentations of a poorly understood moral guide. We know that religions are often hijacked for the purpose of economic or political gain, but where there is power to destruct there is also power to heal. Religion is can and must be used for societal change and to create or encourage communities that respect human dignity, and promotes peace and justice. In this regard, religion can serve the betterment of society and each religious community that believes and practices a faith based on principles of peace, love, harmony,happiness, devotion and salvation will serve all persons.[1]

Nepal is abundant with examples of how religion impacts society and can influence public life. Since the inception of its statehood, religion has made tremendous contributions for societal and developmental changes in the country.

Traditions, religious texts, religious leaders, and practitioners alike have influenced family life, villages, cities, and the state. Just as in every corner of the world, in Nepal religious values have played a central role in disciplining people and punishing wrongdoers, and continues to inform, although not as significantly as in many religiously conservative societies, the formulation of laws and enforcement. Until the mid-twentieth century, the elite rulers or family dynasties used these religious values or scriptures to conceptualize their decisions during their so-called judicial hearings for their subjects and enforced their decisions as part of punishment against to those who supposedly violated societal code.

In the case of Nepal, the Hindu religious code has had the most influence on its history, statehood, and societal traditions. Nepal is profoundly diverse with more than 100 languages and ethnicities, and a plethora of traditions and practices throughout the small nation. So too is the diversity of the landscape, climate, demography, and increasingly religious beliefs. Sandwiched between two giants of power, India and China, Nepal has been able to maintain relative independence and established a legal code that although not comprehensive, aspires to protect diversity, identity, religions, and expression. As Nepal has moved from a kingdom in which the monarchy was "divinely" ordained and the King purported to be the reincarnation of Lord *Vishnu*, political transitions have simultaneously unleashed a move toward a secular state while usurping religious authority or communal tensions for the

1 Gautam, Damodar. "The Sanatan Dharma (Eternal Peace): Beliefs in Nepal". Conference Paper on International Dialogue between Islam and Oriental Religions, New Delhi, India. February 20 – 21, 2010. pg. 3

purpose of political gain. However, with support and encouragement from Nepali elders and civil society, the religious diversity of the nation could become a powerhouse for change and peaceful coexistence.

Religion and Politics in Nepal

In terms of religion, Nepal is a multi-religious country with each religion consisting of multiple denominations or sects. Its inhabitants are majority Hindus, followed by Buddhists, Muslims, Christians, Jains, and Sikhs. According to the 2011 Central Bureau of Statistics of Government of Nepal, the religious diversity of the country is as follows: Hinduism (81.3%), Buddhism (9.0%), Islam (4.4%), Kirat (3.1), Christianity (1.4%), Prakriti (0.5%), and Bon, Jainism, Bahai and Sikhism, all remain at less than 0.5% of the total population.[2] This diversity of religion brings with it numerous opportunities for building mutual collaboration and cooperation towards acceptance and recognition and respect of each faith. The religious diversity of Nepal could be a treasure for the country if practiced side by side, but it may also pose threats towards maintaining tolerance and could create hostilities as a result of disregard or hatred created if religion is abused by leaders.

According to Article (18) of 1948 Universal Declaration of Human Rights "everyone has the right to freedom of thought, conscience and religion." This provision basically allows individuals to change his religion or belief.[3] Nepal's legal codes aspire to reflect this principle; Article 26(1) of the 2015 Federal Constitution of Nepal states that "every person who has faith in religion shall have the right to profess, practice and protect his or her own religion according to his o he conviction." However, the constitution further elaborates that no person shall be allowed to convert another person from one religion to another.[4] It means religion can be practiced by individuals without any form of fear in accordance with the principles of freedom of expression and religion, and it should not be interfered with at any cost. According to the law, religion in Nepal is a matter for individuals, and each citizen should be entitled to practice religious freedom.

While this protection of religious freedom is documented in the Constitution, and the nation was declared secular, religion has continued to seep into the politics and governance of the country. While there are arguments that secularism is not a prerequisite for a democratic country[5], in a nation as diverse as Nepal advancing one religion over others by allowing it innate access to governance seems to invite resentment and the opportunity for oppression

2 "National Population and Housing Survey (National Report)." Volume 01, NPHC 2011. Central Bureau of Statistics: November 2012 http://cbs.gov.np/wp-content/uploads/2012/11/National%20Report.pdf pg. 4

3 "Universal Declaration of Human Rights." Article 18 http://www.un.org/en/documents/udhr/index.shtml

4 "The Constitution of Nepal 2072 (2015." Article (26)

5 Kuru, Ahmet T. "A research Note on Islam, Democracy, and Secularism." http://www-rohan.sdsu.edu/~akuru/docs/Kuru_IT_09.pdf pg. 31 - 32

potentially leading to upheaval, violence, or rebellion. But Nepal's history makes secularism and equal protection of religions challenging.

Nepal has been officially Hindu Kingdom since the unification of the country by King Prithvi Narayan Shah in 1768, which was further entrenched into governance by the 1854 Civil Code that imposed a "Hindu" caste system and discriminatory practices based on class.[6] The 1962 Constitution introduced by the autocratic *panchayat* regime officially declared the country a Hindu Kingdom, and barred common people from changing religious beliefs. In 1990, after the restoration of democracy, the concept of religious freedom was widely accepted through 1990 constitution, but the status quo of punishing converts to non-Hindu religions, particularly Christians, continued until the all of the Monarchy in May 2006 through people's movement.

As a result of fear of prosecution, the presence of Christians in Nepal was very minimal until the end of *Panchayat* regime in 1990, but the number has rapidly increased in recent years. The absolute former monarch was presented as form of Lord *Vishnu*, which ruled the country in the name of the Hindu religion for about 250 years. Intentionally, the former monarchs used Hinduism as a way to incorporate non-changeable provisions in the preamble of 1962 constitution that was introduced by replacing the 1960 relatively democratic constitution.[7]

Whether people agreed or not, Hinduism was made the formal religion of Nepal and traditions and practices of the religion were imposed through state mechanisms. As a result, other religious beliefs were basically unrecognized and are enjoying relatively better position since the demise of the monarchy, but continue to face inadequate recognition or respect from the state.

Although Hinduism has been the prevalent and state religion since the unification of Nepal by Kind Prithvi Narayan Shah of Gorakha, other minority religions, including Buddhism and Islam have been practiced for hundreds of years, with Buddhism and Hinduism sharing many similarities. Some theologians claim that Buddha was born into a Hindu family, and with the subsequent co-existence and widely accepted shared practices of both they have been living side by side without any tension. However, former monarchs used both religions to their own advantage to retain power, and also used some Muslim individuals by providing executive or similar positions to win the heart of those communities without formally recognizing the religion itself.

The majority of the Muslim communities reside in the southern plains along the border with

6 Timsina, Monica Timsina. "They're More Violent." The Kathmandu Post. http://www.ekantipur.com/the-kathmandu-post/2010/08/01/oped/theyre-more-violent/211098/

7 "The Constitution of Nepal 1962." Article 3(1) http://www.constitutionnet.org/files/Constitution%201962.pdf

India. Interestingly, Islam was never targeted by Hindu rulers or elites during the period of autocratic regime. Although Islam was not heartily welcomed or accepted in Nepalese society and they were treated as second class citizens, whether due to their quiet existence, non-confrontational stance with the Hindu rulers, or purely involvement in the business sector, the rulers of Nepal did not feel compelled to confront Islam in Nepal.

However, the conservative Hindus and Hindu elites have always felt threatened from Christianity. They believe that Christians are invading the space of Hindus by spending huge resources for conversion, as well as imposing Christianity through providing financial and other types of material support. There are even some political parties, particularly Rastriya Prajatantra Party- Nepal which maintains its close relations with the former monarch, and are campaigning to revive the Hindu state identity in Nepal.[8] Conservative Hindus, including *Sadhus* (saffron dressed people) believe that expanding Christianity is another form of intervention of the western world in national sovereignty, aiming to diminish the existence of Hinduism. It is true that there are missionaries active in Nepal, but it is hard to believe that all the conversions are happening only due to financial or material lure. There are numerous other reasons that people are encouraged to convert their belief or religion. Whether the truth about the conversion is accepted or not, this remains one of the major issues positioning Hindus against Christians.

During the period of monarchy's absolute regime in different time period of history, all state mechanisms had no choice but to accept Hindu traditions in public life as well within the institutional structures as illustrated by the military's naming of units as Hindu Gods and Goddesses. Hindu temples were built within the premises of security agencies in which these temples are yet to be relocated and the priests were officially hired to conduct daily worships. Even though other minorities were not officially barred from entering into these security agencies, they were not allowed to practice their own religion freely. These arrangements were not included in official policy, but were enforced through direct orders from "higher authorities" to fulfill the desire of the Monarchy. Not surprisingly, the official calendar was developed based on Hindu tradition and culture, and enforced accordingly. Only festivities of Hindus were recognized as public Holidays until the year of 2006.

Religion must be separated from politics so as not to discriminate or impede on universally held rights. As former U.S. President Thomas Jefferson said, "religious institutions that use government power in support of themselves and force their views on persons of other faiths, or of no faith, undermine all our civil rights."[9] Unfortunately, the Hindu religion has

8 "Nepal: Kamal Thapa's signature campaign for Hindu State revival." The Telegraph
http://www.telegraphnepal.com/headline/2013-03-17/nepal:-kamal-thapas-signature-campaign-for-hindu-state-revival
9 "Thomas Jefferson on Politics & Government: Freedom of Religion."

remained the center of political power in Nepal and has been used to protect the regime by imposing certain beliefs as part of the country's codes, which was even accepted by the multi-party democratic regime during the period of 1990 - 2002. However, Hindu supremacy in Nepali politics was officially eliminated after the collapse of former King's arbitrary regime through a people's movement that reinstated parliament, and announced through proclamation on May 18 that the country is secular for the first time in Nepal's history. The document states that "Nepal shall be a secular state."[10] The move was highly welcomed by the people who support liberal values and view religion as an individual's choice and not the state, as well as respect of all individuals, ideology and faith. Minority religious communities were particularly overwhelmed by the announcement of parliament. Similarly, the 2015 Constitution of Nepal has specifically mentioned the country to be secular and multi-religious.

Even though Nepal is secular and multi-religious on paper, the country's practices are still under heavy domination of Hinduism. However, in efforts to protect all of its citizens, the nation's leaders at the time of the Constitution understood and therefore legitimized the recognition of all religions and ethnic groups in terms of legal protection. In action, the government declares at least one official 'holiday' of each religion and ethnic group, but Hindus continue to have an overwhelming number of holidays that comprise more than two thirds of the public holidays on the official calendar

Despite state's declaration of secularism and multi-religious country, there are numerous voices in favor or against it. Those in support of a secular and multi-religious country are mostly from religious minorities or ethnic communities with their own religion or set of traditions that vary from mainstream Hinduism. Secularism is primarily opposed by conservative political forces loyal to the former monarch and conservative Hindu institutions. These groups argue that in theory they will accept the existence of other religions or religious communities, but they absolutely demand the revival of the decision that declared secularism and insist that the country must be declared a Hindu nation. The fear among minorities of revoking the laws and provisions that award them religious freedom and equal protections. Bombing at a Catholic church in the capitol of Kathmandu) and use of Hindu national identity as a platform for political uprising to reinstate the monarchy present the potential for chaos and confrontation.

Potential Areas of Tension

Many countries with multi-religious identities have been facing threats and potential violence

http://www.famguardian.org/Subjects/Politics/ThomasJefferson/jeff1650.htm

10 "Proclamation of the House of Representative (May 18, 2006)." http://un.org.np/unmin-archive/downloads/keydocs/2006-05-18-Proclaimation_of_HOR.pdf pg. 5

in post-conflict situations. In South Asia, almost every country has religious minorities, and these societies are going through turbulence time and again due to religious discrimination, prejudice, and violence. Some of these are people who for generations have lived with harmony and peace for a variety of reasons from political control to shared and equal distribution of resources, but now seem to be pitted against each other due to politicization of religion, political interference, unequal legal protection, extremism, or economic disparity. Each and every countries in this region are suffering one way or other from religious tension or violence such as Tamil Hindu vs Sinhala Buddhist in Sri Lanka, Hindu vs Muslim in India and the recent one Buddhist vs Muslim in Burma (Myanmar), etc. Oppression, religious politics, economic and legal inequality all lend itself to conflict and increasingly hard line, conservative or fundamentalist and extreme religious adherences, often pitting neighbor against neighbor. In fact, much of religious violence and/or extremism can be attributed to economic, social and political factors that eventually become religious in nature leading to a conflict of belief versus belief.[11]

In addition to the politics of religion in Nepal as a tool to gain or retain power, communal level religious violence has also occurred. Nepal has gone through religious and communal riots time and again in the past twenty years including some of the most notable cases: Hindu-Muslim riots in October 1992, November- December 1994, October 1995 and May 1997 in Nepalgunj; and Hindu-Muslim riots in Kapilwastu and Dang in September 2007; attack of a mosque in Biratnagar in March 2008; and the bomb blast in a Catholic Church in Kathmandu Valley.[12] Similarly, religious leaders have been assassinated including the killing of President of World Hindu Federation Nepal Chapter Narayan Prasad Pokhrel in Rupandehi in 2005, a Japanese Monk Yutaka Nabatame in Lumbini in 1997, Father John Prakash in 2007 in Morang and President of Hindu Youth Association Kashinath Tiwari in Birgunj in 2010. Although the precise reason behind these assassinations remains uncertain, speculation can be made through circumstantial evidence and unpublished investigation reports that these cases have occurred purely for criminal reason, and any forms of religious hatred or disagreement is yet to be found. The attack of Assumption Church in Lalitpur in 2009 and the Mosque in Morang in 2010 was attributed to the called Hindu extremist group Nepal Defence Army Nepal, whose leaders are under judicial scrutiny for their involvement in criminal activities.

All of these instances can be looked at through the perspective of criminal activities but the targeting of individuals or groups whether based on purely criminal attack of individuals who

11 Perumalil, Augustine. "Does Religion Promote Violence." http://them.polylog.org/5/fpa-en.htm#s1
12 Timsina, Monica Timsina. "They're More Violent." The Kathmandu Post. http://www.ekantipur.com/the-kathmandu-post/2010/08/01/oped/theyre-more-violent/211098/

happen to be affiliated with a religion or based on religion, the result is a sense of persecution, victimization, and anger with the potential for retaliation and a cycle of violence that could last generations as Nepal continues to witness in the deadly clashes between Muslims and Hindus in her neighbor India. India's fast-growing hardliner Hindu and Pakistan's rapidly taking extremist path by Muslim groups can easily cross the border into Nepal, taking their religious conflict onto new soil and fostering seeds of hatred in multi-religious communities that once lived peacefully together. India and Nepal's historical "sisterhood" has led many Indian Hindu nationalists, gurus, and sadhus to devote resources to revive Nepal as a Hindu nation.

Clashes between Hindus and Christians are more frequently recorded in Nepal, as conversion to Christianity is newly legal and heavily on the rise, causing fear and resentment among nationalists who view Christianity as a western invasion and among Hindus who view Christianity as a threat to the Nepali way of life. While the Hindu-Muslim differences are often based on the location of a Mosque or Temple and exchanged insults of two groups, while not equal in number, have been living together in Nepal for centuries and share common national traditions, the conflict between Hindus and Christian stem from the conversion of Hindus through perceived utilization of resources (or buying converts). As Monika Timisina says, the "the new inter-religious violence has seen use of bombs, guns and bullets."[13] In the meantime, growing communal differences (ethnic, political, or economic) may instigate religious tension by being able to group and dehumanize the "other" based on belief. Therefore, it is extremely important to address both religious co-existence and social and economic issues simultaneously in order to prevent violence.

Religion, Peace and Religious Institutions

Although Hinduism has had tremendous influence over governance during the history of Nepal, religious institutions now have a limited presence or influence over governance. We continue to see the influence of Hinduism in areas such as the calendar of Nepal, or in the appointment of priests to the main Hindu Holy Temple *Pashupatinath* and even most people now view this as government interference in religion, influence outside of pro-monarch and pro-Hindu political groups is limited to the communal level rather than central decision-making. Unfortunately, criminal groups and some political parties have seen the benefit of courting or using religion as a way to divide societies and create a basis for their own personal gain. Despite attempts of various groups to cash in on religious diversity or tension for political or monetary gain, civil society and the government have primarily been unable to appreciate the potential role religious institutions, and there are thousands considering the

13 Timsina, Monica. "They're More Violent." The Kathmandu Post. http://www.ekantipur.com/the-kathmandu-post/2010/08/01/oped/theyre-more-violent/211098/

numerous sects and following of different gurus' preaching, could play as tools to reduce violence, increase social and economic development or promote peacebuilding

During the 10-year armed conflict that began in 1996, the religious sector was adversely affected. Since the country was ruled through Hindu domination, the rebels, the Communist Party of Maoists currently as known as United Communist Party of Nepal (UCPN – Maoists), deliberately attacked a few religious sites, school teachers teaching in Sanskrit Schools and vandalized a Sanskrit School aiming to disseminate the message that they were against Hindu domination in curricula or Hindu religion in public life thereby rejecting the existence of the monarchy. During that time, religious leaders and institutions neither tried to work to reduce violence, nor did they attempt to ensure their role in the peace process. Their presence and role was disregarded from political actors due to their seemingly passive nature during the conflict and peace process. Even religious institutions, like the government and civil society, has underestimated their ability and potential to be key stakeholders in nation-building and social and political transformation.

With moral authority comes great responsibility, and religious leaders and institutions are uniquely placed at the local level in Nepal to affect change. One effort to create a religiously diverse and unified front was the formation toward the end of the conflict of the "Inter-Religious Council" in 2004 in Kathmandu. The Inter-Religious Council includes representatives from the major practicing faiths in Nepal, including Hindu, Muslim, Buddhist, Christian, Bahai, Jain, etc. At the end of the conflict and during the peace process, their albeit timid voice went unnoticed, limiting their influence at the central level of decision-making. The post-conflict period has not been particularly exciting for the religious community in terms of their role in peacebuilding and the nation-building process. They were not officially represented in the constitution-making process and although they have been more active since the end of the monarchy, they continue to exert very little influence or impact on policy-making. However, efforts at the central, regional, and local levels by the United States Institute of Peace and its select civil society organizations and the, the religious communities and institutions have the opportunity to document a collective agenda, form working relations, and positively influence economic and social justice working for now from the bottom up and eventually having a long-term impact for a tolerant and peaceful society.

Possible Areas of Involvement

Religion, having influence over societal and moral norms and drawing from an emotional attachment of the individual to its teachings, is uniquely placed to teach tolerance, harmony, and peace. Having significant influence over their followers can allow religious institutions

and leaders to use that influence for social and political transformation, prevent or resolve conflict, set examples for peaceful coexistence and understanding, and encourage dialogue and joint-problem solving. While leaders and institutions could also play a harmful role encouraging violence or retribution, civil society can assist as an intermediary among religious leaders to develop these potential change agents. In Nepal, efforts, however limited, are underway to begin many of these processes.

Promote Tolerance

In post-conflict situations there is generally an influx of criminal activity and sections of society may feel particularly vulnerable. Law enforcement agencies may find themselves struggling to establish the rule of law thereby ensuring civilian security and promotion of human rights. In such an environment, social or religious harmony can be destabilized from those groups who do not agree with change or aim to take advantage of such a vulnerable environment. Such elements also try to create religious tension because it can easily destabilize country providing further room for such groups to operate. Increasing tolerance is often a precondition for stability, lawfulness and a legally ordered society. To do this, religious leaders or priests are best positioned to explain to ordinary people and their own followers through religious teachings or instructions about the importance of social and religious harmony, which can significantly contribute to a resistance to violence. In Nepal, religious-based schools are flourishing allowing religious teachers' access to promote child-education on tolerance and co-existence. In order to promote tolerance, religious leaders in Nepal first need to be introduced to each other and learn about each other's values and beliefs, as well as the benefits of promoting tolerance. Nepal's civil society and religious leaders already working on these issues are most appropriate to initiate such an introduction.

Resolve Religious Disputes

Because of the moral authority religious leaders hold amongst their followers or congregants, they are in a position to resolve disputes or conflicts and gain the trust of the public and adherence to agreements. In Nepal, many religious leaders do not have an education or training beyond the texts or teachings of their own religion. Therefore, a concerted effort on behalf of both national and international civil society to train and work with religious leaders is imperative. Once religious leaders have received opportunities to work together, learn other religions views and concerns, as well as trainings in facilitation or conflict resolution, coupled with the trust they already have among their followers and knowledge of their own community's needs and resources, they will be able to resolve potential disputes. Most religious disputes at the local or regional level in Nepal stem from misunderstandings,

misinformation, or unequal distribution of resources. If religious leaders have relationships with other religious leaders their ability to communicate concerns and reach an understanding, which can then be conveyed to their own community, can be used to dispel false information or promote understanding. By quickly resolving these disputes or potential problems between religions, it closes the door to outside groups such as criminal elements or groups looking for political gain to capitalize on rifts between religious groups.

Contribute to Social and Economic Justice

The armed conflict in Nepal held roots in economic and social inequalities that, although improved, continue to afflict millions in the country. To prevent future conflict, efforts to ensure economic and social justice are underway in many sectors. However, religious communities in Nepal have an automatic forum to provide education, welfare and assistance, and other social services. Most religions hold a believe system that includes elements of social and economic justice and therefore have an inherent obligation to pursue these goals. Encouraging or even providing child and adult education, patronage of development programs, and information on accessing state resources and services can easily fit within most religious teachings and place a "divine" emphasis on programs that benefit the nation.

Provide Policy Input

Religious communities are always a worthwhile resource while formulating policies or developing legislation related to social transformation and religious tolerance. First, local religious leaders usually have an intimate knowledge of the needs and concerns of their community. Second, part of their responsibility as a leader is to convey information, while usually religious in nature they can use similar tools to act as the bridge between the local and policy level. Third, if religious leaders and communities have been involved in informing policy ownership over implementation of that policy increases and the state will receive less resistance to implementation. Fourth, the moral authority that a religious leader could give to promoting a policy implementation that s/he feels represents the needs and aspirations of their community creates a moral obligation among followers to contribute to that implementation process. As Nepal once again heads toward an election to select a body of people that are empowered to draft a new constitution, religious leaders and institutions need to begin meeting together to identify shared interests and agendas in order to present a stronger voice to decision-makers ensuring the protection of religious rights.

Approaches for Collaboration

Inter-faith issues must be handled properly, effectively and professionally. Without incorporating inter-faith issues in Nepal's national policies, this profoundly religious society

cannot move in a positive direction in the post-conflict period to ensure dignity, freedom and the respect of each individual and ultimately aims to build a society that is stable, lawful and peaceful. To achieve this goal, there must be adequate collaboration and coordination among religious communities thereby developing a positive attitude for change and transformation. Inter-religious collaboration also sets an example of joint problem solving for society as a whole, leading to a belief that working together is a necessity and dialogue morally acceptable, while violence and intolerance is counterproductive and violates religious values. Education, working groups, and dialogues between religions are stepping stones to a peaceful multi-religious nation.

Inter-faith Education

Education is the foundation for all changes, In Nepal, education regarding understanding different religions is limited at best. School curricula that includes information on multiple religions and diversity contributes to a generational change in perceptions of identity groups other than one's own, and increases tolerance and respect for other systems of belief. In this context, the education system of country should be ready to incorporate the basic understanding of various religious values particularly focusing on tolerance, peace, harmony, respect, ethical values and social transformation. These qualities create a citizenry that, already diverse, can co-exist with decreased violence and an increased ability to function responsibly according to the rule of law.

Inter-faith Dialogue

Inter-faith dialogues[14] can change the dynamics of society, and create an environment for a peaceful and just society by establishing a mechanism for communicating concerns and goals, and working together to tackle problems. Such dialogues can break the silence that have long existed in Nepal between members of religious communities and provides a safe space to express concerns and grievances. Such open dialogue can help to reduce tension and differences, and increase trust by promoting harmonious relations and friendly relationships. Such dialogues can also be a platform for religious groups and other stakeholders to closely work together to resolve any crises that may have arisen that could potentially instigate violence. As these dialogues become second nature for religious leaders or representatives of various religions, it sets an example to others in their community that dialogue can lead to success and achievements that benefit everyone. The involvement of state agencies and their participation in dialogues can greatly improve the ability to relay concerns and information to authorities and vice versa, increasing the impact of the dialogues and any joint decisions.

14 Budhathoki, Shobhakar (ed.) "Religious Tolerance, Peacebuilding and Rule of Law: Dialogue Handbook for Religious Institutions, Religious Leaders-Followers and Civil Society (Nepali)." United States Institute of Peace. March 2013. Pg. 9 - 12

These types of dialogues are widely recognized by the United Nations in terms of promoting tolerance related to religion or belief.[15]

Inter-faith Commission

As a country in which not only most mainstream religious communities reside, but also hundreds of local and ethnically-based religious traditions and practices, Nepal's government should establish an entity specifically commissioned to address religious issues and liaise with religious communities to share or gather information. Even though religion is a personal and private matter, because there has been violence carried out in the name of religion in Nepal, the state needs to demonstrate their seriousness in listening to and protecting the rights of all religions. Especially during this time of transition and democratic formation, religious communities cannot be ignored, nor their value to nation-building be diminished. Therefore, an independent *Inter-faith Commission* could serve as an appropriate entity to regulate religious disputes and other forms of religious issues, as well as assist religious communities in efforts to promote tolerance, and social and economic justice. Such a commission would include official representation from the government to ensure access to the decision-making process. The primary challenge in a state such as Nepal is the mechanism for ensuring adequate religious representation without neglecting a religious group or creating a body that is too large to be effective. The Inter-Religious forums and elders within religious groups would need to develop a system of relaying information back to religious groups and ensure that each group feels represented. This system may best work in the form of conferences of religious groups that elect representatives for a district conference, again electing representatives for the regional level, again for the national level of the Inter-faith Commission. Such a herculean effort would require assistance from national civil society and initially donor nations.

Inter-Religious Forums

Inter-Religious Forums are a public level space in which the Inter-Religious Dialogues, trainings or other initiatives can take place to build confidence among religious actors, build relations and understanding, and provide a safe place to discuss sometimes difficult issues. These forums would prove most successful if initiated by local civil society in collaboration with religious leaders in the area. While not necessarily holding in official capacity, these unofficial working groups are the basis for promoting tolerance, encouraging cooperation, and sharing information. In Nepal, at least ten Inter-faith groups are actively engaged in high-risk districts in terms of religious tension or possible violence. These groups

15 "Human Rights Council Resolution on Elimination of All Forms of Intolerance and of Discrimination based on Religion of Belief." Resolution 6/37.

were established mostly with the support of the United States Institute of Peace's (USIP) Strengthening Security and Rule of Law Program in Nepal in collaboration with local civil society partners. All religions in the district are represented and have been working closely together to address local problems and disseminate the message of tolerance and respect. These forums have also provided an opportunity to discuss shared concerns such as security, criminal versus civil law, and specific instances of religious violence with state agencies including the Nepal Police and District Administration Office. They are functioning under the mentorship of USIP's Kathmandu Office and with the support of USIP's civil society partners. In June 2012 these groups came together for a national conference and issued a national declaration that they are committed to the promotion of peace, tolerance, the rule of law, and civilian security.[16] This has been a model for resolving conflict that may arise in the name of religious belief and faith.

Conclusion

Religion, although often used in violent pursuits for power, is uniquely positioned to mobilize the masses for the purpose of promoting tolerance, non-violence, dialogue, and social and economic justice. In a state such as Nepal in which religious diversity are on the rise, including religious institutions and leaders in nation-building is essential for a successful and long-term peace. By activating a process in which civil society, government, and religious communities work together to encourage education, development, and dialogue, and establish a platform for religious communities to be heard at the policy level, the ability of extremist groups, criminal elements, or political groups vying for power to hijack religious beliefs to create instability or division as a means to their own end is significantly diminished. The opportunities to build Nepal, a nation transitioning out of conflict and developing its democratic future, into a state that values its diversity, protects religious rights, and promotes peaceful resolution of religious conflict are abundant.

16 Budhathoki, Shobhakar (ed.) "Religious Tolerance, Peacebuilding and Rule of Law: Dialogue Handbook for Religious Institutions, Religious Leaders-Followers and Civil Society (Nepali)." United States Institute of Peace. March 2013. Pg. 15 - 16

जातीय छुवाछुत अन्त्यका लागि धार्मिक क्षेत्रको भूमिका

- केशवप्रसाद चौलागाईं

सार संक्षेप

निश्चल पानीको कुवा वा तलाउमा एउटै सूर्य विभिन्न रुपमा प्रतिविम्बित भए झैं परब्रह्म परमेश्वर पनि जब प्रत्येक वस्तुमा त्यसरी नै प्रतिविम्बित हुनुहुन्छ भने अब यो ब्राह्मण या यो अछुत, यो माथिल्लो या यो तल्लो जात भन्ने भेद बुद्धि कहाँबाट आयो ? के गंगाको पानी या सडकको खाडलमा जमेको पानीमा प्रतिविम्बित सूर्य एउटै होइन ? त्यसमा कुनै फरक छ ? त्यस्तै ब्राह्मण र अछुतबीच पनि भिन्नताको आधार के देख्छौ ? गाग्रो माटाको या सुनको जे सुकै होस् जब दुबैमा राखिएको पानी एउटै हो भने गाग्रो फरक हुँदैमा पानीको गुण फरक आउँछ ? जसले त्रिगुण (सत्व, रज, तम) रुपी अज्ञान अन्धकारद्वारा विभिन्न झै भासमान भइरहेको यो शुद्ध अनन्त ब्रह्म नै हुँ भन्ने निश्चयका साथ आफूलाई नित्य त्यसमा आरुण भएको पाउँछ, त्यो ब्राह्मण, अछुत वा चाण्डाल जे भए पनि उपदेशक र महान् गुरु हो । अद्वैत वेदान्तको आधारमा सबै प्राणीहरूका ईश्वरीय प्रभाव र उपस्थितिलाई बुझ्न सकिने हुँदा जातीय छुवाछुतको कुनै स्थान देखिन्न । विगत धार्मिक इतिहासलाई हेर्दा पनि कर्मका आधारमा ऋषि भएमा प्रशस्त उदाहरणरु भेटिन्छन् । राजा विश्वमित्र कर्मले ब्रह्मर्षि विश्वामित्र भए, त्यस्तै दासीपुत्र नारद देवर्षी भए, राजा जनक कर्मले राजर्षि भए । जन्मदा सबै शूद्र नै हुन्छन्, कर्मद्वारा पछि ब्राह्मण हुन्छन् । वेद पढ्नेहरू ब्राह्मण भए र ब्रह्मलाई मान्नेहरू पनि ब्राह्मण कहलिन्छन्

परिचय

आज एक्काइसौं शताब्दीमा पनि जातीय छुवाछुतको विभेद देखिनु र भोगिनुपर्ने अवस्थाबाट उन्मुक्तिका लागि धार्मिक क्षेत्रले निभाउनुपर्ने भूमिका महत्त्वपूर्ण देखिन्छ । समाज विकासको क्रमसँगै शास्त्रको आडमा चलेको छुवाछुत प्रथालाई शास्त्र विधान विपरीत प्रमाणित गर्दै आस्तिकजन, पण्डित, पुरोहित र पूजारीहरूलाई उत्प्रेरित गराउनु सबैको कर्तव्य देखिन्छ । समाजमा पुजिँदै आएको, मानिँदै आइरहेका विद्वानजनहरूलाई छुवाछुतजस्तो अमानवीय व्यवहार हटाउन सहयोगी बनाउन सकियोस् भनी वैदिक साहित्य र अभ्यासमा पाइने सकारात्मक दृष्टान्तहरूलाई अगाडि सार्दै समानता र

न्यायको मार्ग निश्चित गराउने कोसिस गरिएको छ । विश्वमा देखिएको द्वन्द्व र हिंसाको स्थिति र नेपालमै पनि भोग्नुपरिरहेको द्वन्द्वको स्थितिको एउटा कारण सामाजिक विभेद पनि रहेकाले शान्तिका लागि पनि समानता र न्यायमा आधारित समाजको आवश्यकता पर्दछ "IF YOU WANT PEACE, YOU MUST WORK FOR JUSTICE" भन्ने महत्त्वपूर्ण कथनले पनि शान्तिको आधार न्यायलाई ठहऱ्याउँदछ । सानो-ठूलो, उच-नीच, धनी-गरीब जस्ता असमातालाई हटाउँदै सबै नेपालीहरूमा खुसियाली देख्न छुवाछुत प्रथाको पूर्ण उन्मूलन गर्न सबै धर्मप्रेमी विद्वान तथा अगुवाहरूको भूमिका महत्त्वपूर्ण भएकाले त्यसतर्फ ध्यान केन्द्रित गराउँदै सकारात्मक परिणामको प्राप्ति नै यस प्रयासको उद्देश्य रहेको छ । नेपालको संविधान, २०७२ को प्रस्तावनामै जातीय छुवाछुतको अन्त्य गरी समतामूलक समाजको निर्माण गर्ने उद्देश्य लिएकाले धार्मिक क्षेत्रको प्रयास महत्त्वपूर्ण हुने निश्चित छ ।

'न वै राज्यं न राजसिन्न न दण्डो न च दण्डिकः धर्म नैव प्रजाः सर्वे रक्षन्तिस्म परम्परम्'।[1]

अर्थात् राज्यको, राजाको, कानूनको र कानूनको रखवालाको उत्पत्ति र व्यवस्था हुनुभन्दा पहिले धर्मको आधारमा सबैको रक्षा र सञ्चालन हुन्थ्यो भन्ने उक्तिले समाज व्यवस्था र धर्मको प्रधानता स्पष्ट हुन आउँदछ । धर्मको आधारमा समाज सञ्चालन हुन्थ्यो भन्ने कुराले धर्मको परिभाषा र महत्त्वलाई बुझ्नुपर्ने हुन्छ ।

'धारणार्द्धर्ममित्याहु धर्मोधारयते प्रजाः यतस्याद्धारणसंयुक्त सधर्मः इति निश्चय ।'[2]

अर्थात् वस्तु वा प्राणीहरूले धारण गरेको गुण र धेरैजनाले समान रुपले धारण गरेको कुरा नै धर्म हो । आगोको गुण उष्णता, ताप हो भने पानीको शीतलता । त्यस्तै दया, परोपकार, सेवा धर्मको रुपमा स्वीकारिएको सत्य हुन् । जात-जाति, उचःनीचको प्रसंग यहाँ आएको देखिन्न ।

'चातुर्यवर्ण मया सृष्टि गुण कर्मविभागशः तस्य कर्तारमपि मां विद्धयकर्तारमव्यम् ।'[3]

गीतामा भगवान् श्रीकृष्णले गुण र कर्मका आधारमा चार वर्गमा मानिसहरूलाई विभाजन गरी सृष्टिलाई सञ्चालन गरेको कुरा बताउनुले जातीयताको आधारमा विभाजन गरिएको होइन भन्ने प्रमाणित हुन्छ । ब्रह्माजीले सृष्टि गरेपश्चात् सृष्टि सञ्चालन गर्न आवश्यक शूरवीरता, ज्ञान, अर्थ र श्रमको आवश्यकतालाई जनाउन गरिएको व्याख्या र व्यवस्थालाई अन्ततः जातीय छुवाछुतको अवस्थामा पुऱ्याएको देखिन्छ ।

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1 महाभारत

2 चाणक्यनीति

3 भागवत गीता ४/१३

'ब्राह्मर्णेस्य मुखमासीद्बाहु राजन्यः कृतः । उरु तदस्य यद्वैश्यः पद्भ्यां शुद्रो आजायत ।'[4]

सृष्टिबेलाको विराटपुरुषको व्याख्या गर्दा मुख (ब्रह्मज्ञान), पाखुरा, (सुरवीर, सुरक्षा), तिघ्रा वितरण गर्ने वैश्य र गोडाश्रम गर्ने शुद्र अर्थ लगाएर बुझाउन खोजिएकोलाई कालान्तरमा अपव्याख्या गर्दै जातीय छुवाछुतको अवस्थामा पुऱ्याएको देखिन्छ ।

'परोक्षवादो वेदोयं वालानामनुशासनम् । कर्म मोक्षाय कर्माणि विद्यन्ते ध्यगद्रं यथा ।'[5]

यसरी बालकहरूलाई बुझाउन र अनुशासनमा ल्याउन विभिन्न दृष्टान्तहरू परोक्ष रुपमा गरिन्छ । त्यसैगरी मोक्ष प्राप्तिका लागि कर्म विधानहरू पनि क्रमैसँग निश्चित गरिन्छ । यसो गर्ने क्रममा कालान्तरमा अपव्याख्याहरू हुँदै गएको विवेचनाहरूबाट देखिन्छ ।

प्रज्ञानं ब्रह्म [6] प्रज्ञान स्वरुप परमात्मा नै ब्रह्म हो । **अयमात्मा ब्रह्म**[7] : यो आत्मा नै ब्रह्म हो । **तत्वमसि**[8] : तिमी नै ब्रह्म हौ । **अहं ब्रह्मास्मि**[9]: म नै ब्रह्म हुँ भन्ने उपनिषद्हरूको ज्ञानले जातीय छुवाछुत वा विभेदलाई कुनै स्थान दिएको छैन । तर सृष्टिको चरण र अवस्थालाई बुझाउन वृहदारणोपनिषद्मा ब्रह्मसर्ग, क्षत्रीयसर्ग, वैश्यसर्ग र शुद्रसर्गको व्याख्या गरिएको छ । ब्रह्माजीले ब्रह्म, क्षेत्रीय र वैश्य कर्मको रचना गरिसक्दा पनि विभूतियुक्ति कर्म गर्नमा समर्थन नभएपछि शुद्र कर्मको सृष्टि गरेको पाइन्छ ।

स नैव व्यभवत्स शौद वर्णमसृजत पूषणमियं वै पूषेय् हीदँ सर्व पुष्यति यदिदं किञ्च । [10]

अर्थात् फेरि पनि त्यो ब्रह्म विभूतियुक्ति कम गर्नमा समर्थ भएन । उसले शुद्ध वर्णको रचना गरे । पुषा नै शुद्र वर्ण हुन् । यी पृथ्वी नै पुषा हुन् । पृथ्वीले जस्तो सेवा अरु कसैले दिन सक्दैन किनकि यिनैबाट संसारको पोषण हुन्छ । यहाँ शुद्रको महानता र प्रमुख भूमिका सृष्टिका लागि देखिन्छ । शुद्रलाई तल्लो जातिको रुपमा व्याख्या हुनु कति गलत रहेछ भन्ने स्पष्ट हुन्छ । जातीय छुवाछुत र विभेदका विरुद्ध सर्वप्रथम स्वयं भगवान् शिवले आदि गुरु शंकराचार्यको आँखा खोलिदिनुभएको पाइन्छ । आदि गुरु शंकराचार्य काशीमा स्नान गरी विश्वनाथको दर्शन गर्न जाने क्रममा बाटोमा चार वटा कुकुरलाई डोऱ्याउँदै चण्डाल आइरहेको देखेर शंकराचार्यले पर हट्न भन्दा वेदान्तका रचयिता शंकराचार्यलाई चाण्डालले **'अन्न्मयादन्नमयमथवा चैतन्यमेव चैतन्यात । यतिवर दूरीकर्तुं वाञ्छसि किं**

4 ऋगवेद १०/९०/१२

5 भागवत ११-३-४

6 एतरेयोपनिषद् ३-१-३

7 माण्डकोपनिषद् १/

8 छान्दोग्योपनिषद् ६/८/७

9 वृद्धारण्योपनिषद् १//१०

10]बृद्यारोहणपनिषद् १/४/१३

ब्रुहि गच्छ गच्छेति' भन्दै प्रतिप्रश्न गरे । अर्थात् हे यतिराज मलाई भन्नुहोस् के तपाईं मलाई एउटा अछुत सम्झेर पर हट उता जा भन्दै आफूबाट टाढा अलग राख्न चाहनुहुन्छ ? के अन्नद्वारा बनेको एउटा शरीरले अन्नद्वारा नै बनेको अर्को शरीरलाई वा एउटा चैतन्यले अर्को चैतन्यलाई ? कुनबाट कुनलाई हटाउनु वा अलग गर्न खोज्दै पर हट, उता जा भन्दै हुनुहुन्छ तपाईं ? हे यति श्रेष्ठ मलाई यो बताउनुहोस् । चाण्डालको मुखबाट यस्तो प्रश्न सुन्ने बित्तिकै शंकराचार्यले यी सामान्य मान्छे होइनन् भन्ने लख काटिसकेका थिए । त्यत्तिकैमा पुनः अर्को पनि प्रश्न चाण्डालले गर्दछन् :

प्रत्याग्वस्तुनि निस्तरङ्गसहजानन्दावभोधाम्वुधौ

विप्रोऽयं श्वपचोऽयमित्यापि महान्कोऽयं विभेदभ्रमः ।

कि गङ्गाम्बुनि विम्बितेऽम्बरमणौ चाण्डालबीथीपयः

पुरे बाऽन्तरमस्ति काञ्चनघटीमृत्कुम्भयोर्वाऽम्बरे ॥

मलाई जवाफ दिनुहोस् हरेक निश्चल पानीको कुवा वा तलाउमा एउटै सूर्य विभिन्न रुपमा प्रतिविम्बित भए झैं परब्रह्म परमेश्वर पनि जब प्रत्येक वस्तुमा त्यसरी नै प्रतिविम्बित हुनुहुन्छ भने अब यो ब्राह्मण या यो अछुत, यो माथिल्लो या यो तल्लो जात भन्ने भेद बुद्धि कहाँबाट आयो ? के गंगाको पानी या सडकको खाडलमा जमेको पानीमा प्रतिविम्बित सूर्य एउटै होइन ? त्यसमा कुनै फरक छ ? त्यस्तै ब्राह्मण र अछुतबीच पनि भिन्नताको आधार के देख्छौ ? गाग्रो माटाको या सुनको जे सुकै होस् जब दुबैमा राखिएको पानी एउटै हो भने गाग्रो फरक हुँदैमा पानीको गुण फरक आउँछ ? यस्तो प्रश्न गराइले यी साक्षात भगवान् शंकर नै हुन् भनी चिन्दै शंकराचार्यले दण्डवत गरेर अरुलाई पनि ज्ञान होस् भनी मनिषापञ्चकम्'को रचना गरी अद्वैत वेदान्त दर्शनलाई प्रष्ट पार्नुभयो । यो घटना र रचनाले जातीय छुवाछुत रहेको कुरा प्रष्टयाउनुको साथै गलत रहेको कुरा पनि बुझाउन विद्वान्, पुरोहित पण्डितहरूलाई पनि सहज हुने हुँदा पूर्ण अंश राखिएको छ ।

मनिषापञ्चकम्

जाग्रत्स्वप्नसुषुप्तिषु स्फुटतरा या संविदुज्जृम्भते

या ब्रह्मादिपिपीलिकान्ततनुषुप्रोता जगत्साक्षिणी ।

सैवाहं न च दृश्यवस्तिवति दृढप्रज्ञापि यञ्यास्ति चे ।

च्चाण्डालोऽस्तु स तु द्विजोऽस्तु गुरुरित्येषा मनीषा मम । (१)

जसले जाग्रत, स्वप्न, सुषुप्ति यी तीनै अवस्थाका साक्षी स्वस्प परमात्मालाई ब्रह्मादेखि लिएर कमिला

पर्यन्तका यावत जीवका हृदयमा र त्यही परमात्मा आफूमा पनि रहेको निश्चयात्मक बुद्धिले देख्दछ, मलाई लाग्छ, त्यही नै व्यक्ति, चाहे त्यो द्विज वा अति चाण्डाल किन नहोस् महागुरु वा उपदेशक हा

ब्रह्मैवाहमिदं जगच्च सकलं चिन्मात्रविस्तारितं

सर्वं चैतदविद्यया त्रिगुणयाऽशेषं मया कल्पितम् ।

इत्थं यस्य दृढा मतिः सुखतरे नित्ये परे निर्मले

च्चाण्डालोऽस्तु स तु द्विजोऽस्तु गुरुरित्येषा मनीषा मम । (२)

जसले त्रिगुण (सत्व, रज, तम) रुपी अज्ञान अन्धकारद्वारा विभिन्न झै भासमान भइरहेको यो शुद्ध अनन्त ब्रह्म नै हुँ भन्ने निश्चयका साथ आफूलाई नित्य त्यसमा आरुण भएको पाउँछ, त्यो ब्राह्मण, अछुत वा चाण्डाल जे भए पनि उपदेशक र महान् गुरु हो ।

'शश्नन्नश्वरमेव विश्वमखिलं निश्चित्य बाचा गुरो

र्नित्यं ब्रह्म निरन्तरं विमृशता निर्व्याजशान्तात्मना ।

भुतं भाति च दुष्कृतं प्रदहता सविन्मये पावके

प्रारब्धाय समर्पितं स्ववपुरित्येषा मनीषा मम । (३)

यो सम्पूर्ण ब्रह्माण्ड क्षणिक एवं नाशवान वस्तु हो, मानव देह परमात्मा परमेश्वरसँग नित्य तदाकार वृत्ति बनाइराख्नका लागि दिइएको हो भन्ने गुरु वाक्यप्रति मलाई शंकारहित तवरले पूर्ण विश्वास भएकाले मानव भएर जन्मदाको मेरो क्लेश (पाप) त्यो ज्ञानरुपी अग्निले डढाएर भष्म पारिदियो ।

'या तिर्यङ्नरदेवताभिरहमित्यन्तः स्फुटा गृहयते

यद्भासा हृदयाक्षदेहविषया भान्ति स्वतोऽचेतनाः ।

तां भास्यैः पिहिताकर्मण्डलनिभां स्फूर्तिं सदा भावय

न्योगि निवृतमानसो हि गुरुरित्येषा मनीषा मम ॥ (४)

जसरी अज्ञानरुपी अन्धकारले गर्दा (एउटा साधारणमा) सूर्यको प्रकाशलाई बादलद्वारा ढाकिएको भन्ठान्छ (जो वास्तवमा ढाकिएको हुँदैन) त्यसरी नै जसले परमपिता परमेश्वर, जो हाम्रा समस्त क्रियाकलापहरूका नियमक हुनुहुन्छ, उहाँको सत्चित, आनन्दरुपी गुण आफूभित्र पूर्णरुपमा समाहित भएको छर्लंग देख्छ, त्यही नै सच्चा योगी हो भन्ने मेरो बुद्धिले ठम्याउँछ । (४)

यत्सोख्याम्बुधिलेशलेशत इमे शक्रदयो निवृता

यच्चित्ते नितरां प्रशान्तकलने लब्ध्वा मुनिर्निर्वृतः

यस्मिन्निसुखाम्बुधौ गलितधीर्ब्रह्मैव न ब्रह्मविद्

य कश्चित्स सुरेन्द्रवन्दितपदो नुनं मनीषा ममो ।(५)

इन्द्रलगायतका देवगणहरूद्वारा पूजीत परमपिता परमेश्वरमाथि चित्त स्थिर रहनाले जसले आफूमा अविचल प्रशान्तिको आस्वादन गरिरहेको हुन्छ, त्यसले केबल ब्रह्मलाई मात्र बुझेको हुँदैन, ऊ स्वयं नै त्यो ब्रह्मको स्थितिमा प्राप्त भइसकेको हुन्छ । यो कुरामा म पूर्ण विश्वस्त बनेको छु भनिएको पनि छ :

ब्रह्मवित् ब्रह्मैव भवति

दासस्तेऽहं देहदृष्टयाऽस्मि शंभो

जातस्तेंऽशो जीवदृष्टया त्रिदृष्टे

सर्वस्याऽऽत्मन्नात्मदृष्टया त्वमेवे

त्येवं मे धीनिश्चिता सर्वशास्त्रै :॥

हे भगवान् एक शरीरधारीका हिसाबले म हजुरको सेबक हुँ । जीवका रुपमा हे त्रि-नेत्र । म हजुरकै अंग हुँ । आत्माको रुपमा हजुर म भित्र र अरु प्रत्येक जीवमा पनि निवास गर्नु हुन्न । म आफ्नो नि(श्चयात्मक बुद्धि तथा विभिन्न शास्त्रहरूको अध्ययन समेतको आधारमा यो निष्कर्षमा आइपुगेको छु ।

अद्वैत वेदान्तको आधारमा सबै प्राणीहरूका ईश्वरीय प्रभाव र उपस्थितिलाई बुझ्न सकिने हुँदा जातीय छुवाछुतको कुनै स्थान देखिन्न । विगत धार्मिक इतिहासलाई हेर्दा पनि कर्मका आधारमा ऋषि भएमा प्रशस्त उदाहरणरु भेटिन्छन् ।

'विश्वामित्र वशिष्ठश्च मातंग नारदादयः ।

कर्म विशेष सं प्राप्ता न च उच्चतं जातितः ।

राजा विश्वमित्र कर्मले ब्रह्मर्षि विश्वामित्र भए, त्यस्तै दासीपुत्र नारद देवर्षी भए, राजा जनक कर्मले राजर्षि भए ।

जन्मना जायते शूद्र कर्मणा द्विज उच्यते

वेद पाठित भवेद विप्रः ब्रह्म जानति ब्राह्मण ।

जन्मदा सबै शूद्र नै हुन्छन्, कर्मद्वारा पछि ब्राह्मण हुन्छन् । वेद पढ्नेहरू ब्राह्मण भए र ब्रह्मलाई मान्नेहरू पनि ब्राह्मण कहलिन्छन् भन्ने उक्ति पनि यस उदाहरणबाट स्पष्ट हुन्छ ।

हिन्दूधर्ममा पछिल्ला समयमा पनि सुधारका धेरै प्रयासहरू भएको पाइन्छ । तन्त्रपरम्परा ज्योतिष परम्परामा छुवाछुतको प्रभाव देखिन्न भन्ने आर्य समाज लगायत धेरै धर्म सम्प्रदायले पनि छुवाछुत प्रथा विरुद्ध अभियान नै सञ्चालन गरेको पाइन्छ । नेपालका धेरै मन्दिरहरूमा आज पनि दलित तथा गैर ब्रह्मण पूजारीहरू रहेको पाइन्छ । प्रसिद्ध गुह्येश्वरी मन्दिर, ललितपुर महालक्ष्मी स्थान, बटुक भैरव मन्दिर, नुवाकोटको भगवती मन्दिरमा नेवार जातिका पूजारी रहेका छन् भने प्रसिद्ध मनकामना मन्दिरमा मगर जातिका पूजारीले पूजाआजा गरिरहेको कुरा जातीय छुवाछुत उन्मूलनमा लागि गरिएका राम्रा अभ्यास हुन् । नेपालमा जयस्थिति मल्लका पालादेखि औपचारिक रुपमा जातीय छुवाछुत प्रथाको प्रचलन राणा प्रधानमन्त्री जंगबहादुर राणाद्वारा लागू गरिएको मुलुकी ऐन वि.सं. १९१० पश्चात् कठोर बनेको देखिन्छ । राजा महेन्द्रद्वारा जाति प्रथा उन्मूलन गरिएको नयाँ मुलुकी ऐन र अभ्यासले समानता र न्यायतर्फ समाजलाई अगाडि बढाउन खोजेको देखिन्छ ।

'युगे युगे च ये धर्मास्तत्र तत्र च ये द्विजाः ।

तेषां निन्दा न कर्तव्या युगरुपा द्विते द्विजाः ।[11]

अर्थात् प्रत्येक युगको आ-आफ्नो युग धर्म, विधान र नियम हुन्छ । त्यस्तै नियामक द्विजहरू हुन्छन् । यिनैका विधान र नियमअनुसार युगद्रष्टा मानेर चारै युग आजसम्म चलिआएको पाइन्छ । आजको आधुनिक समावेशी लोकतन्त्रको अवस्थामा सबैले आफ्नो सम्मान र सहभागितालाई दृष्टिगत गर्दै स्वराज्य र मेलमिलापलाई आत्मसात् गर्दै सबैले आफ्नो ठान्ने राज्यको स्थापना नै जातीय मुक्तिको आधार हो ।

'आ यद् वामीयचक्षसा मित्र वयं च सुरयः व्यचिष्ठे बहुपाड्ढये यतेमही स्वराज्ये'[12] विस्तृत र बहुमतद्वारा जसको पालन हुन्छ, त्यस्तो स्वराज्य शासनमा जनताको भलाइका लागि लागिरहौं भन्ने ऋग्वेदको वचनले समावेशिता, लोकतन्त्र र राष्ट्रियतालाई समेट्दै समानतामूलक समाजको परिकल्पना गरेको छ । शान्ति, न्याय र मिलापका लागि अन्तर्सांस्कृतिक सहिष्णुतालाई बढाउँदै जातीय छुवाछुतविहीन समाजको निर्माणमा जुट्नु नै आजको आवश्यकता हो ।

जातीय छुवाछुत उन्मूलनमा संयुक्त राष्ट्रसंघको घोषणापत्र १९४८[13]

मानव अधिकारको विश्वव्यापी घोषणपत्र सन् १९४८ पश्चात् सबैलाई विभेद उन्मूलनमा साझा

11 पारासर स्मृति १/३३

12 ऋगवेद ५/६६/६

13 विश्वव्यापी घोषणापत्र को धारा २

विश्व अवधारणा र व्यवस्था प्रारम्भ भए पश्चात हरेक देशमा त्यसको सकारात्मक पहल प्रारम्भ भएको छ ।"जाति,वर्ण, लिङ्ग,भाषा,धर्म,राजनीतिक वा अन्य विचारधारा,राष्ट्रिय वा सामाजिक उत्पत्ति,सम्पत्ति, जन्म वा अन्य कुनै हैसियत जस्ता कुनै पनि आधारमा कुनै पनि किसिमको भेदभाव नगरिने सिद्धान्त स्वीकार गरेको छ "साथै"सबै व्यक्तिहरू कानूनको दृष्टिमा समान र कुनै पनि भेदभाव विना कानूनको समान संरक्षणका हकदार छन् । सबै व्यक्तिहरूलाई यस घोषणा पत्रको उल्लंघन गरी गरिएको कुनै पनि प्रकारको भेदभाव विरुद्ध वा त्यस्तो भेदभावको दुरुत्साहन विरुद्ध समान संरक्षण पाउने हक हुनेछ [14] भनिएबाट विश्वभरि नै जातीय छुवाछुत तथा विभेद उन्मूलनका लागि कानूनी र नैतिक बल पुगेको छ ।सबै धार्मिक गुरु संघ संस्थाहरूले अन्तराष्ट्रिय प्रावधानहरूको जानकारी राख्दै न्यायपूर्ण समाजको निर्माणमा जुट्नुमा नै आफ्नो धर्म देख्नु पर्दछ ।

आार्थिक सामाजिक तथा सांस्कृतिक अधिकारसम्बन्धी अर्न्तर्राष्ट्रय प्रतिज्ञापत्र,१९६६- विश्वमा देखिएका विभेदहरूलाई अझ सशक्त ढंगले उन्मूलन गर्न यस प्रतिज्ञापत्रले आजसम्म पनि विश्वको ध्यान आर्कषण गरिरहेकोछ । " प्रस्तुत प्रतिज्ञापत्रका पक्ष राष्ट्रहरू उक्त पत्रमा उल्लिखित अधिकारहरू जाति, वर्ण, लिङ्ग, भाषा, धर्म, राजनीतिक वा अन्य विचार, राष्ट्रिय वा सामाजिक उत्पत्ति,सम्पत्ति, जन्म वा अन्य हैसियतका आधारमा कुनै पनि प्रकारको भेदभाव बिना उपभोग गरिने कुराको प्रत्याभूति दिने प्रतिज्ञा गर्दछन् ।[15] अन्तर्राष्ट्रिय महासन्धिहरूको पक्ष राष्ट्र भएकोले नेपालले पनि संबिधान र कानूनमा जातीय छुवाछुत लगायतका विभेदहरूलाई हटाउँने व्यवस्था गरेको जानकारी धार्मिक क्षेत्रलाई गराउनु पर्दछ ।

जातीय भेदभाव तथा छुवाछुतको परिभाषा:[16]

१. कसैले कुनै पनि व्यक्तिलाई प्रथा,परम्परा,धर्म,संस्कृति,रीतिरिवाज,जातजाति,वंश समुदाय वा पेशाका आधारमा यस दफा बमोजिमको कुनै काम गरे वा गराएमा जातीय भेदभाव वा छुवाछुत गरेको मानिनेछ ।

२ कसैले कुनै पनि व्यक्तिलाई प्रथा,परम्परा,धर्म, संस्कृति, रीतिरिवाज, जातजाति, वंश, समुदाय वा पेशाका आधारमा जातीय भेदभाव तथा छुवाछुत गरी सार्वजनिक वा निजी स्थानमा देहायको कुनै पनि कार्य गर्न गराउन हुँदैन :-

(क) प्रवेश गर्न,उपस्थित हुन वा भाग लिन,निषेध गर्न वा कुनै किसिमले रोक,नियन्त्रण वा प्रतिबन्ध लगाउने वा

14 विश्वव्यापी घोषणापत्रको धारा ७

15 आर्थिक,सामाजिक तथा सांस्कृतिक अधिकारसम्बन्धी अन्तराष्ट्रिय प्रतिज्ञापत्रको धारा

16 जातीय भेदभाव तथा छुवाछुत ऐन २०६८ को दफा ४

(ख) व्यक्तिगत वा सामूहिक रुपमा सार्वजनिक स्थान वा समारोहबाट निष्काशन, सामाजिक बहिष्कार वा कुनै प्रकारको भेदभाव गर्ने वा त्यस्तो कार्यमा प्रतिबन्ध लगाउने वा अन्य कुनै किसिमको असहिष्णु व्यवहार प्रर्दशन गर्ने ।

(ग) कसैले कुनै पनि व्यक्तिलाई जातजाति,बंश,समुदाय वा पेशाका आधारमा सार्वजनिक सेवाको प्रयोग गर्न वा उपयोग गर्नबाट बंञ्चित गर्न हुँदैन ।

(घ) कसैले कुनै पनि व्यक्तिलाई जातजाति,बंश,समुदाय वा पेशाका आधारमा सार्वजनिक समारोह आयोजना गर्न वा सार्वजनिक रुपमा आयोजना हुने कुनै कार्य गर्नबाट बंञ्चित गर्न हुँदैन ।

(ङ) कसैले पनि जातीय छुवाछुत वा भेदभाव हुने कार्य गर्न कसैलाई भड्काउने,उक्साउने वा त्यस्तो कार्य गर्न दुरत्साहन हुने कुनै कार्य गर्न वा त्यस्तो कुनै क्रियाकलापमा जाना-जानी सहभागी हुनु हुँदैन ।

(च) कसैले कुनै पनि व्यक्तिलाई जातजाति,बंश,समुदाय वा पेशाका आधारमा कुनै पनि पेशा वा व्यवसाय गर्न प्रतिबन्ध वा रोक लगाउने वा कुनै पनि व्यक्तिलाई कुनै पेशा व्यवसाय गर्न बाध्य पार्न हुँदैन ।

(छ) कसैले कुनै पनि व्यक्तिलाई जातजाति,बंश,समुदाय वा पेशाका आधारमा कुनै धार्मिक कार्य गर्नबाट बंञ्चित गर्न वा गराउन हुँदैन ।

(ज) कसैले कुनै पनि व्यक्तिलाई जातजाति,बंश,समुदाय वा पेशाका आधारमा कुनै बस्तु सेवा वा सुबिधा उत्पादन,बिक्री वा वितरण गर्नबाट रोक्न वा रोक लगाउन हुँदैन ।

(झ) कसैले कुनै बस्तु, सेवा वा सुविधा उत्पादन,बिक्री वा वितरण गर्दा त्यस्तो बस्तु,सेवा वा सुविधा कुनै खास जात वा जातिको व्यक्तिलाई मात्र बिक्री वितरण गर्ने गरी उत्पादन,बिक्री वा वितरण गर्न वा गराउन हुँदैन ।

(ञ) कसैले जात वा जातिका आधारमा परिवारका कुनै सदस्यलाई बहिष्कार गर्ने घरभित्र प्रवेश गर्न नदिने वा घर वा गाउँबाट निकाल्ने वा निस्काशन हुन बाध्य तुल्याउने कार्य गर्न वा गराउन हुँदैन ।

(ट) कसैले प्रचलित कानून बमोजिम उमेर पुगेका बर-वधुबाट मञ्जूर भएको अन्तर्जातीय विवाह गर्नबाट कुनै पनि व्यक्तिलाई जात,जाति,वंश वा समुदायका आधारमा रोक लगाउन, त्यस्तो विवाहबाट जन्मिएका सन्तानको न्वारन नगराउन वा भइसकेको विवाह विच्छेद गराउन कुनै किसिमले कर गर्न वा गर्न लगाउन हुँदैन ।

(ठ) कसैले श्रव्य-दृश्य सामग्री, लेख-रचना,चित्र,आकार,कार्टुन,पोष्ट,पुस्तक वा साहित्यको प्रशारण,प्रकाशन वा प्रदर्शन गरेर वा अन्य कुनै तरिकाले कुनै जात, जाति वा उत्पत्तिका व्यक्तिको उचनीच दर्शाउने,जात,जातिका आधारमा हुने सामाजिक विभेदलाई न्यायोचित ठहऱ्याउने वा जातीय सर्वोच्चता वा धृणामा आधारित विचारको प्रचार-प्रसार गर्ने, अपमानजनक शब्दको प्रयोग गर्ने वा आचरण, हाउभाउ वा व्यवहारबाट त्यस्तो सङकेत गर्ने वा जातीय विभेदलाई कुनै पनि किसिमले अभिवृद्धि गर्ने किसिमबाट उक्साउन वा दुरुत्साहन गर्न वा गराउन हुँदैन ।

(ड) कसैले जातजाति वर्ण वा समुदायका आधारमा कुनै पनि व्यक्तिलाई कुनै प्रकारको श्रममा लगाउन इन्कार गर्ने वा श्रमबाट निष्काशन गर्ने वा पारिश्रमिकमा भेदभाव गर्न वा गराउन हुदैन । साथै त्यसै ऐनमा सजायको पनि व्यवस्था देहाय बामोजिम उल्लेख गरिएको छ :-

१. कसैले देहायको कसूर गरेमा देहायबमोजिम सजाय हुनेछ:-(क) दफा ४ को उपदफा (२)(३)(४)(५)(६) वा (७) बमोजिमको कसूर गर्ने व्यक्तिलाई तीन महिनादेखि तीन वर्षसम्म कैद वा एक हजार रुपैयादेखि पच्चीस हजार रुपैयाँसम्म जरीवाना वा दुवै सजाय ।(ख)दफा ४ को उपदफा (९)(१०)(११)(१२)वा(१३) बमोजिमको कसूर गर्ने व्यक्तिलाई एक महिना वा दुवै सजाय । (ग) जातीय भेदभाव वा छुवाछुत गर्न मद्दत गर्ने,दुरुत्साहन गर्ने,उक्साउन वा त्यस्तो कार्य गर्न उद्योग गर्ने व्यक्तिलाई मुख्य कसूरदारलाई हुने सजायको आधा सजाय ।

२. सार्वजनिक पद धारण गरेको व्यक्तिले उपदफा १ बमोजिमको कसूर गरेमा निजलाई सो उपदफामा उल्लिखित सजायमा पचास प्रतिशत थप सजाय हुनेछ । बाह्य क्षेत्राधिकारमा समेत ऐन लागू हुने- यो ऐन नेपाल भर मात्र नभै नेपाल बाहिर बसी नेपाली नागरिकबिरुद्ध यस ऐनबमोजिमको कसूर गर्ने नेपाली नागरिकलाई समेत लागू हुन्छ ।

मुद्दा सरकारवादी हुने:- यस ऐनअन्तर्गतको मुद्दा सरकारवादी हुने र सरकारी मुद्दा सम्बन्धी ऐन, २०४९को अनुसुची १ मा समावेश भएको मानिने व्यवस्था गरिएको छ । तर्सथ जातीय छुवाछुत कसूरको अनुसन्धान प्रहरीले गर्ने र सरकारी वकीलले अभियोजन गर्न कार्य गर्दछ । यो ऐनअन्तर्गतको मुद्दाको कारवाही र किनारा गर्दा संक्षिप्त कार्यविधि ऐन,२०५८ बमोजिमको कार्यविधि अपनाउनु पर्ने ।

उजूरीसम्बन्धी विशेष व्यवस्था:- यस ऐनअनुरुप जातीय भेदभावको कसूर कसैले गरेको वा गर्न लागेको थाहा पाउने व्यक्तिले नजिकको प्रहरी कार्यालयमा उजूर गर्न सक्दछ । यस्तो कसूर नेपालबाहिर गरेमा उजूरीकर्ता बसोबास गरेको वा प्रतिवादी रहेको जिल्लाको नजिकको प्रहरी कार्यालयमा उजूर गर्नुपर्ने व्यवस्था गरेको छ । यस्तो उजूरी सम्बन्धित प्रहरी कार्यालयले दर्ता नगरेमा वा प्रचलित

कानूनबमोजिम आवश्यक कारवाही नगरेमा सम्बन्धित व्यक्तिले सो कुराको उजूरी राष्ट्रिय दलित आयोग वा स्थानीय निकायमा समेत गर्न सक्ने बिशेष व्यवस्था गरिएको छ । प्राप्त उजूरी राष्ट्रिय दलित आयोग वा स्थानीय निकायले सम्बन्धित प्रहरी कार्यालयमा लेखी पठाउन सक्ने र यसरी लेखी आएमा सम्बन्धित प्रहरी कार्यालयले सो सम्बन्धमा आवश्यक जाँचबुझ गरी त्यस्तो उजूरी उपर प्रचलित कानूनबमोजिम आवश्यक कारवाही अगाडि बढाउनु पर्ने जिम्मेवारी तोकिएको छ । साथै ऐनको दफा छ मा, "यस मुद्दाको अनुसन्धानमा अनुसन्धानकर्ताले जातीय भेदभाव वा छुवाछुतबाट पीडित व्यक्तिको हक अधिकार वा उत्थान सम्बन्धित कार्यमा संलग्न रहेका स्थानीय अगुवा, नागरिक समाज संघ संस्थाको प्रतिनिधिको सहयोग लिन सक्ने" भन्ने व्यवस्थाले नागरिक समाजसँगको सहकार्य र सहयोगको वातावरण बनाई न्याय प्रदान गर्ने अठोट गरेको पाइन्छ ।

धार्मिक समुदायबाट कानूनको जानकारी राख्दै व्यवहार गर्न नमान्दा कारवाहीको भागिदार हुन सक्ने हुँदा कानूनी जानकारी महत्त्वपूर्ण रहेको छ । मुलुकी ऐनलाई विस्थापित गर्दे अस्तित्वमा आएको मुलुकी अपराध (संहिता) ऐन,२०७४ दफा १६६(१) मा यस्तो व्यवस्था गरेको पाइन्छ, "कसैले कसैलाई प्रथा, परम्परा, धर्म, संस्कृति, रितिरिवाज, जात, जाति, समुदाय, पेशा, व्यवसाय, शारीरिक अवस्था वा सामाजिक सम्प्रदायको उत्पत्तिको आधारमा छुवाछुत वा अन्य कुनै किसिमको भेदभाव गर्न वा सार्वजनिक स्थलमा उपस्थित हुन वा कुनै सार्वजनिक प्रकृतिको धार्मिकस्थलमा प्रवेश गर्न रोक्न वा सार्वजनिक प्रयोगमा रहेको पानी, पधेरो प्रयोग गर्न बञ्चित गर्न वा अन्य कुनै निजी वा सार्वजनिक उपयोग वा सुविधामा प्रयोग गर्नबाट बञ्चित गर्नु हुदैन ।

(२) उपदफा(१) बमोजिमको कसूर गर्ने वा गराउने व्यक्तिलाई तीन वर्षसम्म कैद वा तीस हजार रुपैयाँसम्म जरीवाना वा दुवै सजाय हुनेछ र राष्ट्रसेवकले यस दफामा लेखिएको कसूर गरेमा थप तीन महिनासम्म कैद सजाय हुनेछ ।

संविधान र कानूनमा गरिएको व्यवस्थाले मात्र प्राचीनकालदेखि अभ्यासमा रहेको र छिमेकी भारतमा समेत कठोरतम देखिएको छुवाछुतलाई हटाउन नसकिने हुने हुँदा जनसाधारण र असल अभ्यासका साथै प्रभावकारी उपायहरूको पनि खोजी गरिनुपर्दछ । धार्मिक प्रभाव रहेको नेपालमा धार्मिक कारणले नै पारेको समस्या धार्मिक पहलबाटै उन्मूलन गर्न सशक्त भई लाग्नु पर्दछ । यसै प्रसङ्गमा पुन धार्मिक तथा शास्त्रीय आधारलाई प्रकाश र अभ्यासमा ल्याउँदा निम्न तथ्यहरू महत्वपूर्ण देखिन्छन् :-

गणेशपुराण र जातीय समानता:

सनातन हिन्दु धर्मावलम्वीहरूले प्रथम पुज्य भगवान गणेशलाई पूर्ण आस्था गर्नुका साथै उहाँको महिमा बताउने 'गणेश पुराण' पनि श्रवण गर्दछन् । हरेक पुराणको महाभारतखण्डले त्यस पुराणको

महत्त्वलाई संक्षिप्तमा वर्णन गरेझै गणेशपुराणको महात्म्यमा पनि दलित/शुद्रहरूलाई बीचमा राखेर पुराण भन्नु भन्ने निर्देश दिएको पाइन्छ । **"शुद्रोऽपि मध्ये संस्थाप्य ब्राह्मणान श्रृणुयादिदम् । कमेण लभते वर्णान् वैश्यक्षत्रद्विजाह्वयान्"। नित्यनैमित्तकर्मभ्यश्च्यूतो यः श्रृणुयादिदम् ।' कर्मसाद्गुण्यमाप्नोति गणेशस्य प्रसादत**[17] अर्थात शुद्र जातिको मानिसले पनि माझमा ब्राह्मणलाई राखी श्री गणेशपुराणको श्रवण गरोस् । यसो गर्दा त्यसले क्रमैसँग वैश्य,क्षत्रीय,एंव ब्राह्मणवर्णमा जन्म लिने सौभाग्य प्राप्त गर्दछ । नित्य कर्म र नैमित्तिक कर्मबाट चुकेका मानिसले यदि श्री गणेशपुराण श्रवण गर्दछ भने त्यसले श्री गणेशको कृपाद्वारा उत्तम फल भोग गर्न पाउँदछ । यस प्रकार शुद्रजातिलाई गणेश पुराण श्रवण गराउने शास्त्रीय अधिकारको उपयोग भएको पाइँदैन यस कुरालाई विद्वान ब्राहमणहरूबाट सुधार्दै सामाजिक रुपानतरणमा अघि बढ्नु पर्दछ ।

दलित र सिद्ध साधनाः

हिन्दु तथा बौद्धपरम्परामा सिद्ध तथा तपस्वीहरूको महत्त्व रहेको पाइनाले सिद्धमहापुरुषहरू दलित समुदायबाटै पनि आएको पाइन्छ ।नेपालमा पनि ब्राहमण कुल बाहेकका क्षेत्री कुलका योगी नरहरिनाथ,राई- किरात कुलका स्वामी प्रपन्नाचार्यहरू आफ्नो विद्वता र तपस्याको कारण ब्राहमणहरूमा पनि पुजनीय थिए । जीवित अवस्थामानै रहनु भएका रामानुज मिसन ट्रष्ट चेन्नई भारतका प्रमुख स्वामी चतुर्वेदीज्यू दलित कूलका सिद्ध तथा विद्वानका रुपमा सारा वैष्णव समुदायमा मान्य बन्नु भएको छ । नेपालमा पनि महालक्ष्मी, गुहेश्वरी र बटुक भैरबस्थान दलित पुजारीहरूमा कारण पनि सिद्धिस्थलका रुपमा परिचित छन । दलित बर्गका प्रतिनिधिहरूले साधना गर्दे सिद्ध बनी छुवाछुतलाई निर्मूल पार्न ठूलो योगदान पुऱ्याउन सक्ने हुँदा उपयुक्त साधनाका बारे उल्लेख गर्दछु ।

गणेश सहस्रनाम साधनाः

सकृत्पादेन संसिद्धः स्त्रीशुद्रपतितैरपि । सहस्रनामात्रोऽयं जपितब्यःशुभाप्तये । स्त्री, शुद्र र पतीतहरूलाई पनि सहस्रनाम रुप साधनाबाट शुभ हुने बताएर साधनाको अनुमति शास्त्रले दिएकाले सहस्रनाकको साधना उपयुक्त देखिन्छ ।

श्री महागणपतिसहस्रनामस्तोत्रम्

व्यासउवाच

कथंनाम्नां सहस्रं तं गणेश उपदिष्टवान् ।

शिवदं तन्ममाचक्ष्य लोकानुग्रहतत्पर ॥१॥

उल्लिखित महागणपतिका केही सह्रस नाम स्तोत्रम्मा भन्न खोजिएको अनुवाद प्रसङ्गमा ! बैदिक

17 गणेशपुराणको माहात्माखण्डय पञ्चम अध्याय श्लोक १७ र १८

सनातन धार्मिक साधना मार्फत यस लोक र परलोक सुधार्ने क्रममा भगवान गणेशको साधना उत्तम मानिएकोले गणेश पुराणको श्रवण,गणेश अर्थवशिर्ष परायणको साथै गणेश सह्रस नामको साधना गर्ने प्रचलन रहिआएको छ । संक्षिप्त गणेश पुरायण-गणेश सह्रसनाम महिमामा शुद्रहरूलाई पनि सुन्न र साधना गर्ने अनुमति दिएको पाईनुले पनि जातीय विभेदको कुरा उल्लेख गरेको देखिदैन । यही साधना विधिको आधारमा गुरुवर्गले शुद्र कहलिएका दलितहरूलाई साधना गराउन तथा स्वयम् दलितहरूले साधना गर्दै आत्मउन्नति र समान ब्यवहार स्थापित गर्न सहज बन्ने छ भन्नेबाट पनि सबै वर्ग समान हुन भन्ने पाइनु साथै कुनै पनि प्रकारको विभेद देखिदैन ।

सुझावहरू

१. दलित समुदायलाई पनि शास्त्र अध्ययन तथा श्रवण गराउन, पण्डित-पुरोहित तथा धार्मिक गुरुहरूले कार्यक्रमहरूको आयोजना गर्ने ।

२. दलित पुजारीहरू रहेको महत्त्वपूर्ण हिन्दू मन्दिरहरूमा नियमित सत्संगहरूको आयोजना दलित समुदायहरूको सहभागितामा गराउने ।

३. छुवाछुत प्रथा नरहेको हिन्दू धार्मिक सम्प्रदायहरूसँगको सहकार्यलाई योजनाबद्ध ढंगले नियमित रुपमा अगाडि बढाउने । (आर्य समाज-तन्त्र समाज, नाथ सम्प्रदाय-आत्मज्ञान प्रचार संघ-अन्तधार्मिक परिषद् नेपाल आदिसँग)

४. छुवाछुत प्रथालाई बेवास्ता गर्ने कन्यापूजन कार्यक्रमहरूलाई पण्डित-पुरोहितहरूको सक्रियतामा शक्तिपीठहरूमा आयोजना गर्ने ।

५. 'सकृत्पाठे संसिद्धिः स्त्रीशुद्रपतितैरापि ।
सहस्रनाममन्त्रोऽयं जपितव्यः शुभाप्तये ॥ गणेश सहस्रामको फलश्रुतिअनुरुपको स्त्री शुद्ध र पतीतहरूले पनि सुन्न पाउनुपर्ने तथा सुनेर पुण्य हुने कुरालाई हृदयंगम गराउँदै पूजारी-पण्डितहरूमा सचेतना ल्याउनुपर्ने ।

६. सामाजिक तथा जातीय अन्तर्घुलनको लागि धार्मिक गुरुहरूको अगुवाईमा कार्यक्रमहरूको आयोजना गर्नुपर्ने ।

७. राष्ट्रिय र अन्तर्राष्ट्रिय कानूनहरूले मात्र जातीय छुवाछुत र विभेद समाप्त नहुने हुँदा धार्मिक-सांस्कृतिक जागरण र असल अभ्यासलाई पत्रपत्रिका, पुस्तक लगायतका माध्यमद्वारा निरन्तर प्रचारप्रसार गरिनुपर्ने ।

८. धार्मिक गुरु र विद्वत समुदायको समाजमा रहेको प्रभावलाई तिथि पर्वका बेला कार्यक्रमहरूको आयोजना गरी छुवाछुतविरुद्धको अभियानलाई तीव्रता दिनुपर्ने ।

९. जातीय, धार्मिक र सांस्कृतिक सामिप्यता ल्याउन खस-आर्य समुदायभित्रको समुदायको रुपमा दलित समुदायलाई समावेश गर्ने अभिमान सञ्चालन गर्नुपर्ने ।

This article is based on survey carreid out by Development and Research (P) Ltd. which is supported by SPSP project of NHRC .

Human Rights Situation of Persons with Mental/Psychosocial Disability in Nepal

Edited and Illustrated by
Nava Raj Sapkota /Arjun Bishokarma

Abstract

The right to health is fundamental right to live with dignity. To materialize this, Nepal ratifying many international instruments has also adopted the mental health policy in 1997. The Constitution of Nepal (2015) recognizes the right to health as a fundamental right. This research scrutinizes and analyzes the human rights situation of the persons with mental/psychosocial disability thoroughly from human rights perspective with regard to the ratification of the Convention on the Rights of the Persons with Disability (CRPD) 2006. The survey revealed that stigmatic, deniable and affronting perception towards the persons with mental/psychosocial disability have been reflected by verbal, physical and sexual abuses. Their basic rights have been violated in many forms including deprivation of food, medication, proper clothing, deprivation of specialized health care facility and discrimination. They have been denied endowing public opportunities, accessibility and information, and made forced abandonment of the job that has adverse impact in their dignified life. They have been deprived of their voting rights. Furthermore, only 41 percent respondents reported to have perceived the right to health. Significantly remarkable respondents are unknown about their special rights and policies. Filing complaints against violation of rights is out of their access. In terms of the right to respect, right to fulfill and right to dignified life the situation is in grave. Thus, it is the prime time for the concerned authority including NHRCN to take all sorts of initiation and build up quantum strategies to ensure all the rights of the persons with mental disability.

1. Background

Health is indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to live a life in dignity. The realization of the right to health may be pursued through numerous, complementary approaches including the formulation of health policies, or the implementation of health programmes developed by the World Health Organization (WHO), or the adoption of specific legal instruments. Furthermore, the right to health

includes certain components which are legally enforceable.[1]

Mental health problem is a serious public health concern globally. It is reported that four out of five people with severe mental illness in Low- and Middle-Income Countries (LMIC) receive no effective treatment currently. There is an urgent need to address this enormous treatment gap[2]. When it comes to illness that concerns the mind, even the young, educated and privileged in the country's most urban and modern city find it hard to accept. Therefore, the stigma against mental illness makes a forceful presence even among them. Some striking factors make the stigma against mental health particularly grave in a country like Nepal. Mental/psychosocial disability has been observed as a serious problem in the society with respect to the growing complexities related to social, economic and cultural aspects. It has become a cause of various forms of discriminations resulting in some grave impacts on the concerned persons.

Mental disability can be defined as an inability to behave in accordance with the age and situation and delay in intellectual growth due to the problems arising in relation to the implementation of intellectual activities caused by the problems in the brain and other parts as well as in awareness, orientation, alertness, memory and language. Mental disabilities are categorized in two broad phenomena: medically diagnosed ones and societally diagnosed ones. The medically diagnosed mental disabilities are categorized as: a) Intellectual disability/Mental retardation, b) Mental illness, c) Autism and d) Psychosocial disability. It is also necessary to take into consideration that Nepal has entered into Federal structure after the promulgation of the Constitution of Nepal (2015) which also demands for the adoption of all necessary measures to ensure all sorts of rights of vulnerable groups within which the rights of the persons with disability are urgent need because of its increment in the multiplying phase[3].

International and National Policies regarding Right to Health

The right to health is recognized in numerous international instruments. Article 25.1 of the Universal Declaration of Human Rights affirms: "Everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services". The International Covenant on Economic, Social and Cultural Rights provides the most comprehensive article on the

1 CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), para 1,
2 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4331482/
3 Human Rights Situation of Persons with Disability, National Report, part-2, NHRC, 2017

right to health in international human rights law. In accordance with article 12.1 of the Covenant, States parties recognize "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health", while article 12.2 enumerates, by way of illustration, a number of "steps to be taken by the States parties ... to achieve the full realization of this right". Additionally, the right to health is recognized, inter alia, in article 5 (e) (iv) of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, in articles 11.1 (f) and 12 of the Convention on the Elimination of All Forms of Discrimination against Women of 1979 and in article 24 of the Convention on the Rights of the Child of 1989. Similarly, the right to health has been proclaimed by the Commission on Human Rights, as well as in the Vienna Declaration and Programme of Action of 1993 and other international instruments.[4]

In Nepal, mental health policy was adopted in 1997, but implementation of the policy framework is yet to begin. Only one hospital with specificity of mental illness is available throughout the country for a total of 0.20 beds per 100,000 populations[5]. Mental health services are concentrated in the big cities.[6] More frighteningly, World Health Organization (WHO)'s 2012 global suicide survey ranked Nepal in the seventh position for suicide cases, depression being the major suicide trigger. Only 0.22 psychiatrists and 0.06 psychologists are available per 100,000 people, and budget allocation is a nominal one percent of the total health budget[7]. Although the mental hospital has at least one psychotropic medicine of each therapeutic class (anti-psychotic, antidepressant, mood stabilizer, anxiolytic, and antiepileptic medicines) available in the facility, there is no provision of separate forensic in-patient units. As reported by Psychiatrists Association of Nepal (PAN), there were 147 registered psychiatrists by 2017.

Equally, the international standards of right to health provides that functioning public health and health-care facilities, goods and services, as well as programmes have to be available in sufficient quantity within the State party. The precise nature of the facilities, goods and services will vary depending on numerous factors, including the State party's developmental level. They will include, however, the underlying determinants of health, such as safe and potable drinking water and adequate sanitation facilities, hospitals,

4 CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) para 2,

5 Mainstreaming Mental Health: Context, Challenges and Critical Pathways. Paper presented as Interchange, HERD June 14, 2016, Walker, I. and Sudeep P. (2016).

6 Mental Health Care in Nepal: Current Situation and Challenges for Development of a District Mental Health Care Plan. Health.9: 3., Luitel, NP. Mark JD. (2015).

7 http://kathmandupost.ekantipur.com/news/2017-09-24/talking-about-mental-illness.html

clinics and other health-related buildings, trained medical and professional personnel receiving domestically competitive salaries, and essential drugs, as defined by the WHO Action Programme on Essential Drugs.[8]

Furthermore, the availability of the psychiatric doctors in the hospitals of Nepal is equally precarious. Eighty percent bed for psychiatric patients are located in or near the capital city. Specialist mental health services were found to be limited to Zonal or District hospitals. It is estimated that there are only about 440 in-patient beds for persons with mental illness across the whole country, (combining both governmental, 112 and private hospital facilities, 327); which amounts to 1.5 beds per 100,000 population. No separate in-patient service is available for children with mental illness. The number of beds for mental health patients per 100,000 populations was less than one; now it has been increased to 1.5 per 100,000 populations. Only 2% of medical and nursing training is dedicated to mental health. There is lack of psychotropic medicines in the PHC and district hospitals[9].

The Constitution of Nepal 2015 recognizes the right to health as a fundamental right of Nepalese citizens. Mental health is important to lead a dignified life as a person needs to be physically, mentally and socially healthy to enjoy the rights like right to development, right to employment and right to life. All these rights are correlated with the basic fundamental rights including right to life, right to freedom, equality and dignity. The Constitution of Nepal 2015, in its part 3 (Fundamental Rights and Duties), article 35 related to right to health clearly states that every citizen shall have the right to free basic health care from the State, and no one shall be deprived of emergency health service. Similarly, the article 42 (3) of the Constitution provides that the citizens with disabilities shall have the right to live with dignity and honour, with the identity of their diversity, and have equal access to public services and facilities.

Nepal Health Sector Strategy (2014-2020 annex 1) has ensured providing OPD and emergency service on mental health. The National Human Rights Commission (NHRC) in cooperation with civil society organizations has been advocating for result oriented implementation of the policies provisioned by the Constitution. Though the Ministry of Health is a legal body to implement the policy, the NHRC as the prime human rights body includes in its strategic plan (2015-2020) and strategic action plan (3.3.1) about the

8 CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), para 12 (a).
9 Mental Health Atlas 2011. Department of Mental Health and Substance Abuse: World Health Organization (WHO) (2011).

rights of the persons with mental/psychosocial disabilities as a priority issue. The general comments of the Committee on the Rights of Persons with Disabilities (CRPD) require that the State parties are obliged to submit regular reports to the Committee on how the rights are being implemented. The Committee shall examine each report and make such suggestions and general recommendations on the report as it may consider appropriate and shall forward these to the State Party concerned[10]. As such, NHRC prioritizes to work closely in promoting and protecting human rights of mentally disabled people reaching out to the grass roots through awareness and advocacy targeting service providers, duty bearers, civil society organizations and victims focusing on monitoring, outreach and the promotion of the rights of the people with mental/psychosocial disabilities recording the voice of the voiceless people to enjoy their dignified life. However, authentic baseline over it is still lacking.

To assess the human rights situation of the persons with mental/psychosocial disability, a survey has been conducted recently aiming to set a baseline for promoting and protecting their human rights in Nepal. It examined and identified the current gaps, health care seeking and service utilization patterns, disability status and impact of mental disorders including mental health care facilities, resources and State's planning in strengthening mental and psychosocial health service from human rights perspective primarily focusing on following indicators:

- Public perception towards persons with mental/psychosocial disability,
- Self-awareness level, healthcare to persons with mental/psychosocial disability and behavior of service providers towards persons with mental/psychosocial disability,
- Existing policy, mechanisms, and measures related to persons with mental/psychosocial disability, and
- Complaining mechanism against violation of the rights of mentally/psychosocially disabled persons.

2. Methodology and Analytical Framework

The study applied concurrent mixed methods blending quantitative and qualitative data research approaches for data collection in the field. The individual questionnaire survey was conducted for quantitative data while Focus Group Discussion (FGD), Key

10 https://www.ohchr.org/en/hrbodies/crpd/Pages/CRPDIndex.aspx.

Informant Interview (KII) and Case Studies were conducted in capturing qualitative data on thematic issues for the study reaching out in nine districts namely, Morang, Dhanusa, Makawanpur, Lalitpur, Rasuwa, Kaski, Rupandehi, Surkhet and Kailali that commensurately covered three ecological zones, seven provinces disaggregating gender and caste ethnic communities dividing the population of the selected districts into urban and rural strata.

Moreover, the survey applied, two-stage cluster sampling method to gather quantitative information of the households through the structured household survey questionnaire covering a total of 384 samples across the nine districts with systematic random sampling method. The diagnosed mental/psychosocial disability cases were listed collecting information from district hospitals, health institutions working in the field of mental and psychosocial disabilities. The sample size[11] of the survey was further divided into in each district by Probability Proportional to Size (PPS) method with the population census data generated from the Center Bureau of Statistics (CBS, 2011). Finally, researchers approached the households in coordination with the respective Rural/Municipalities and wards offices to collect the information through the selected respondents[12].

Additionally, a total of 10 Focus Group Discussions (FGDs) were conducted on the issues of rights of persons with mental/psychosocial disability bringing together the representatives of human rights organizations, human rights defenders and clinical psychiatrists; representatives from local law enforcement, Rural/Municipal judicial committee, Office of Women and Child Development; representatives of national and local NGOs working in the field of psychosocial disability, family members of the persons with mental/psychosocial disability and persons suffered from mental illness in the past. Equally, a total of 20 Key Informant Interviews (KIIs) were conducted with local law enforcement and service providing agencies as well as representatives from local and national governmental agencies, representatives of National Federation of Disabled Nepal (NFD-N), KOSHISH Nepal and NHRRC officials by developing guidelines in generating special case studies. The individual survey information was collected in the tablets and database was prepared in KOBO toolbox.

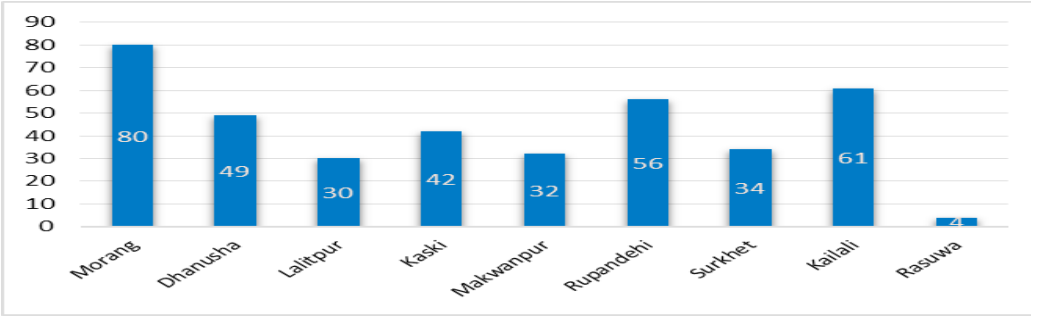
11 *Sample size (n) = $[(1.96)^2 PQ] / d^2$ where P = 1 – Q stands for population proportion and d is marginal error at 95% level of confidence and n is sample size.*

12 *The person with mental disabilities or his/her household head or any family member who can give the detail information regarding the respondent or caretaker of respondents.*

other legal health related legal policies and the Committee on the Rights of Persons with Disabilities' General comment No. 6 (2018) on equality and nondiscrimination, and CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12).

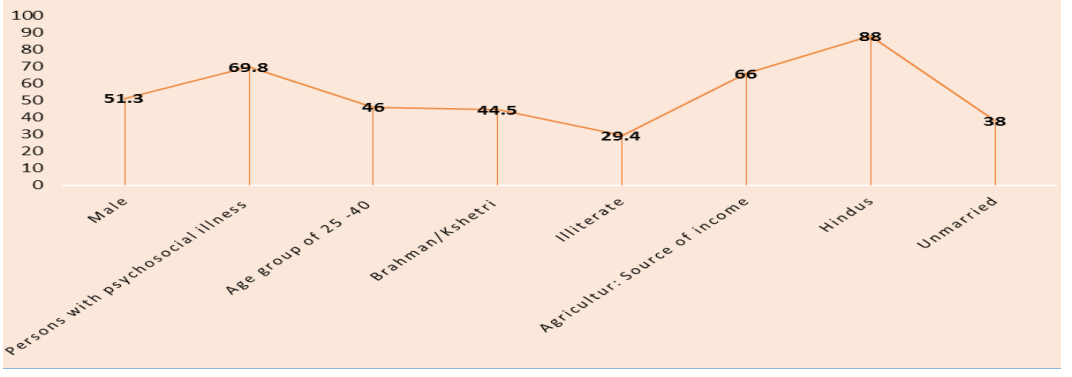
Nature of the respondents

Figure 1: Distribution of sample size by districts



The sex ratio of men (51.3%) respondent was slightly higher than women (48.7%) with the largest group of respondents belonging to the age group of 25 -40 (46%) followed by 32.29 percent from the age group under 25 and 27.6 percent from the age group of 40-60. Meanwhile, above two-thirds (69.8%) were the persons who had psychosocial illness in the past and the rest 30 percent respondents were their care takers. Nearly half

Figure 2: Nature of the respondents by percentage



(44.5%) represented from Brahman/Kshetri groups while only six percent represented

religious minorities. Furthermore, slightly over a quarter of respondents (29.4%) were illiterate and 18 percent had 10+2 or higher level of education whereas a large majority (88%) were the Hindus. The majority of the respondents were (51.3%) from nuclear family with family size 5.8 and the main source of income of majority (66%) respondents was agriculture.

3. Findings and Analysis

a. Public Perception towards Persons with Mental/Psychosocial Disability

The perception of the people over psychosocial/mental disability is stigmatic, deniable and affronting as a large number of persons with psychosocial disability are verbally, physically and sexually abused. Nearly three quarters (71.9%) respondents expressed that they were verbally or physically abused. Women (74.3%) were found to have been abused higher than men (69.5%); noteworthily two percent of the respondents reported that they were even sexually abused.

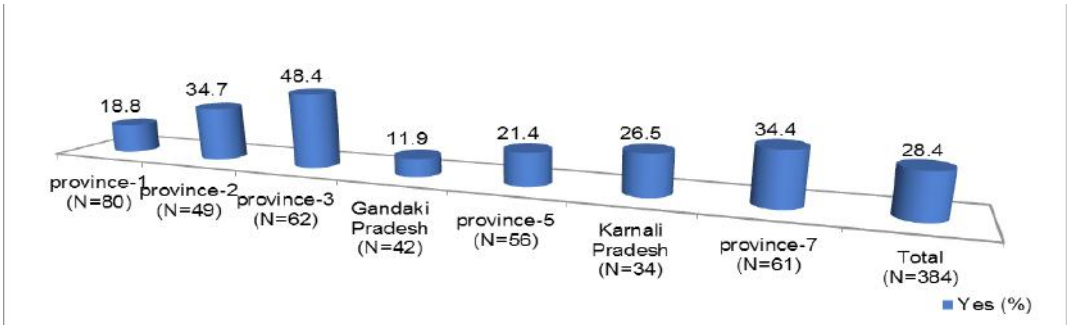
Ill behavior over such persons is still rampant in the country as they are enchained or confined to a room. Among fifteen percent of respondents were confined in a room or chained during their illness; the rate ranks higher in Gandaki Province (24%). Likewise, the ratio of the men (19.3%) confined or chained is higher compared to women (11.2%). Seven percent of them accepted that they were even deprived of food, medication and clothing in the family. Simultaneously, above a quarter (28.4%) of the respondents reported that they are being treated differently in the society even after the treatment of mental and psychosocial illness. Almost equal to three quarters (73.4%) have been affronted of as lunatic, followed by insult or verbal abuse (61.5%) and mental torture (21.1%). This totally shows State's failure to comply the General Comments of Committee on the Rights of Persons with Disabilities in which it clearly states that the persistent use of such paradigms fails to acknowledge persons with disabilities as full subjects of rights and as rights holders. In addition, the Committee to the Rights of Persons with Disabilities notes that the efforts by States parties to overcome attitudinal barriers to disability have been insufficient. Examples include enduring and humiliating stereotypes, and stigma of and prejudices against persons with disabilities as being a burden on society. In response, it is critical that persons with disabilities, through their representative organizations, play a central role in the development of legal and policy reforms.[13]

13 Committee on the Rights of Persons with Disabilities General comment No. 6 (2018) on equality and nondiscrimination,

To achieve de facto equality in terms of the Convention, States parties must ensure that there is no discrimination on the grounds of disability in connection to work and employment.[14] Article 5 (1) interacts with article 24 and requires States parties to remove all types of discriminatory barriers, including legal and social barriers, to inclusive education [15] aiming to equal access to mainstream school with inclusive and quality education. However, because of their illness about almost one fifth (18.8%) were denied in public opportunities especially opportunity of education (54.2%) followed by health (40.3%), occupation (38.9%) and engagement in social institution (30.6%). In the meantime, only about a quarter (23.5%) of the respondents dropped of school/college after having mental illness, while above two fifths (41.1%) left school between grades of 6-10.

Psychosocial problem has been a cause of enforced abandonment of the job. Above three quarters (77.5%) decided themselves to quit the job because of psycho-social disability while 13 percent were forced by their office and 10 percent were compelled by their family.

Figure 3: Distribution of respondents (percentage) behaved differently in society after treatment of psycho-social illness



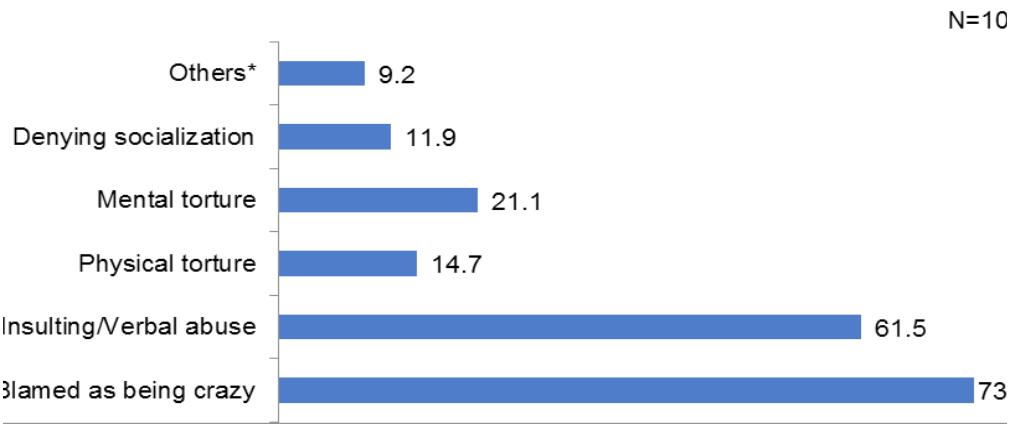
Persons with disabilities can be disproportionately affected by violence, abuse and other cruel and degrading punishment, which can take the form of restraint or segregation as well as violent assault. The Committee is concerned about the following acts of torture or cruel, inhuman or degrading treatment or punishment; violence; and the forced treatment of persons with disabilities inside and outside of mental health facilities. States parties must take all appropriate measures, to provide protection from and prevent all forms of exploitation, violence and abuse against persons with disabilities. Forced corrective

para 1.
14 Ibid para 67.
15 Ibid para 63

disability treatments should be prohibited.[16]

However, accusation and mal-behavior has victimized them remarkably. The survey rated that nearly three quarters (73.4%) of persons with mental disability faced accusation as being crazy followed by nearly two-thirds (61.5%) insult/verbal abuse and one-fifth (21.1%) mental torture, physical torture (14.7%), denying socialization (11.9%) and others (9.2%). They were misbehaved calling as mad or not allowed to go out of the compound, discriminated, isolated and made to sit away including rejection to talk. Regarding the relationship of the persons with mental disability with their friends and families, 90 percent had cordial relation while rest had dysfunctional relationship. There was no change in relationship with families (44.3%) and friends (43.8%) of the respondents after the symptoms of mental illness while above one

Figure 4: Types of behavior faced by persons with mental disability fifth of the



Note: The values are more than 100 due to multiple options

respondents had either irritable or aggressive responses to friends and families after the onset of mental illness.

In term of civil and political rights, the survey found that all grades of mental disability have been deprived of their voting right due to this act. As such, the survey challenged the obligation to comply the comments of the Committees as it speaks that "Exclusion from electoral processes and other forms of participation in political life are frequent examples of disability-based discrimination. They are often closely

16 Committee on the Rights of Persons with Disabilities: General comment No. 6 (2018) on equality and nondiscrimination, para 56.

linked to denial or restriction of legal capacity. States parties should aim to:

(a) Reform laws, policies and regulations that systematically exclude persons with disabilities from voting and/or standing as candidates in elections; (b) Ensure that the electoral process is accessible to all persons with disabilities, including before, during and after elections; (c) Provide reasonable accommodation to individual persons with disabilities and support measures based on the individual requirements of persons with disabilities to participate in political and public life; (d) Support and engage with representative organizations of persons with disabilities in political participation process at the national, regional and international levels, including by consulting with such organizations in matters that concern persons with disabilities directly; (e) Create information systems and legislation that allow for the continuous political participation of persons with disabilities, including between elections. [17]"

b. **Self-awareness level, healthcare to persons with mental/psychosocial disability and behavior of service providers towards persons with mental disability**

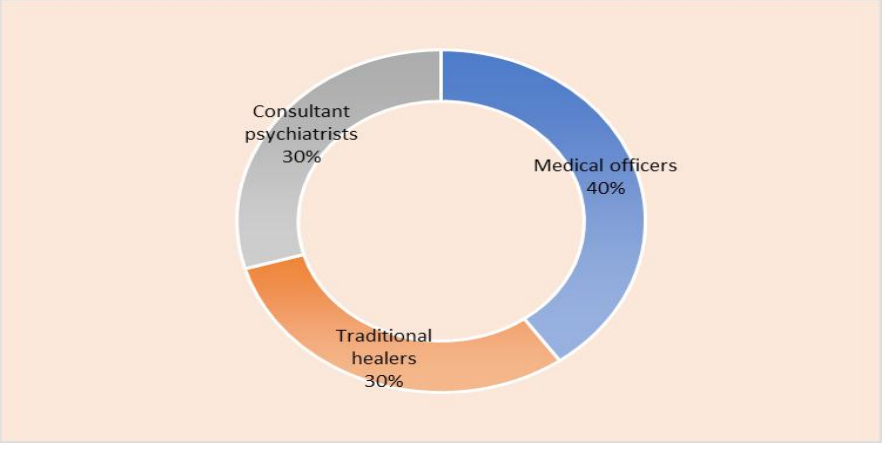


Figure 5: Trend of patients visiting for treatment

Self-awareness level of the persons with mental/psychosocial disability is higher as above three-quarter respondents (76.8%) expressed that they knew they were suffering from mental illness. They realized that they had psychosocial problem because majority (51%) demonstrated extreme mood change, excessive fear or worries or guilt (49.2%), sadness (32.6%), significant tiredness, low energy level, insomnia (31.5%) as the

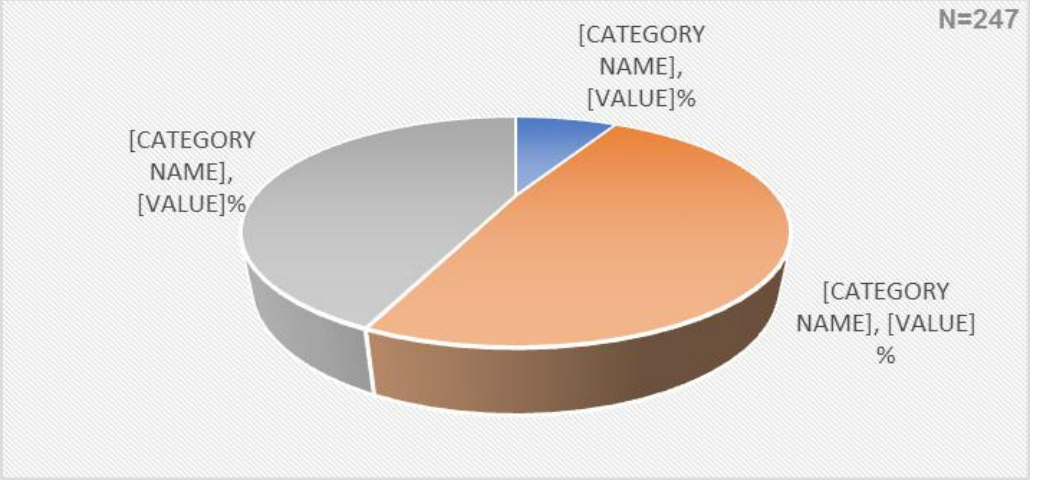
17 Committee on the Rights of Persons with Disabilities General comment No. 6 (2018) on equality and non-discrimination, para 70.

symptom. In terms of the causes of mental disability, more than one third (36.7%) did not know anything, however, the number of people rating stress (34.1%), psychoactive substance use (6.8%), head injuries/ trauma/loss of consciousness (5.7%), genetic (4.2%) and others (12%) is significantly noteworthy.

The data revealed that 37 percent respondents shared psycho-social problems with their mother and 22.9 percent shared with their spouse. One-third (36.5%) respondents reported to have sought for treatment with trained medical officers, 27.6 percent by traditional healers and 26.8% consultant psychiatrists. The access of health care of such people is even difficult.

Physical accessibility including health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities and persons with HIV/AIDS. Accessibility also implies that medical services and underlying determinants of health, such as safe and potable water and adequate sanitation facilities, are within safe physical

Figure 6: Distribution of respondents by access to service related to mental disability



reach, including in rural areas. Accessibility further includes adequate access to buildings for persons with disabilities.[18] The article 35 (3) of the Constitution of Nepal provides that every citizen shall have equal access to health services.

18 CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), para 12 (b),

The respondents reported that to get the health care facilities they need to spend even more than eight hours. Nearly half (48.6%) of the respondents were found visiting to regional hospitals for their treatment whereas only eight percent visited district hospitals. Remaining 43 percent respondents were found visiting to tertiary hospitals for their treatment. In case of follow up and regular visit with doctors, two fifth (39.3%) respondents preferred occasional visit to doctors followed by home therapy (30.7%), rehabilitation center (13.3%), hospital admission (13%) and foreign country (3.6%).

Pre-admission counselling to the patients is not in easy access to the persons with mental disability as nearly one fifth (17.2%) respondents reported to have been admitted to hospitals reluctantly. The trend of enforced treatment has changed as 82.8 percent respondents reported that they were not admitted against their free will. Similarly, over one-third (35.4%) respondents mentioned that the doctor provided medicine consulting with the patient followed by caretakers (32.5%) and both (33%). However, majority of the respondents (51.6%) did not get any counseling before prescribing medicines to them.

Right to health is guaranteed as fundamental right by the Constitution of Nepal. However, they had no opportunities to visit specialized doctors as medical doctors or physicians do not refer such persons to the psychiatric doctor for further investigation and diagnosis in most of the cases. Whatsoever, above three-quarters (77.9%) had their illness treated on OPD basis and the rest on in-patient basis. Among those who received in-patient treatment, more than half (50.6%) were admitted in the hospital for less than two weeks. Similarly, majority (55.5%) respondents were prescribed medicine only, 4.4 percent received treatment with the help of psychotherapy and 39 percent were treated by both methods while two percent were treated through electroconvulsive therapy. Above two-thirds (69%) of the respondents had regular follow up for treatment. Similarly, above four-fifth (81.3%) respondents were found satisfied with the service providers from where they received treatment. Eighty nine percent respondents were satisfied with the behaviors of doctors and staff engaged in their treatment.

Such status dichotomies with obligations to respect including a State's obligation to refrain from prohibiting or impeding traditional preventive care, healing practices and medicines, from marketing unsafe drugs and from applying coercive medical treatments, unless on an exceptional basis for the treatment of mental illness or the prevention and control of communicable diseases. Such exceptional cases should be subject to

specific and restrictive conditions, respecting best practices and applicable international standards, including the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care. [19]

c. Existing policy, mechanisms and measures related to persons with mental disability and the access

Nepal is a state party to many of the international conventions related to human rights. Many of them, such as right to health are enshrined in the Constitution but only 41 percent respondents reported to have perceived about the right to health. Though, above

Figure 7: Distribution of respondents by satisfaction with the behavior of doctors and staff involved in treatment

two-thirds (67.9%) had heard about right to health in Province 5, only less than one third (29.4%) had heard about it in Karnali Province. Apparently, more men (46.7%) know about right to health than women (35.5%) but such understanding is mostly spread in urban areas as more than 43.9 percent urban respondents reported that they had heard about the right to health whereas only 17.5 percent reported it in rural areas. This understanding is equally higher among respondents from Brahman/Kshetri groups (52.6%) followed by religious minorities (33.3%), disadvantaged Janajati (32.7%) and the least with relatively advantaged Janajati (30.3%).

This demonstrates the lack of the information accessibility among the persons with mental disability as information accessibility includes the right to seek, receive and impart information and ideas concerning health issues. However, accessibility of information should not impair the right to have personal health data treated with confidentiality.[20]

19 CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), para 34

20 CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) (b)

Similarly article 35 (2) of the Constitution of Nepal provides every person shall have the right to get information about his or her medical treatment. Likewise, under articles 5 and 25 of the CRPD Convention, States parties must prohibit and prevent discriminatory denial of health services to persons with disabilities and to provide gender sensitive health services, including sexual and reproductive health rights. States parties must also address forms of discrimination that violate the right of persons with disabilities that impede their right to health through violations of the right to receive health care on the basis of free and informed consent, or that make facilities or information inaccessible.[21]

The survey reported that nearly two thirds (64.8%) respondents were aware about the right of mentally disabled persons to cast vote whereas 63.3 percent were aware of about their right to education, 56 percent about the right of women and children, 52.3 percent about the right to work, 48.4 percent about the right of accessibility to public places and 46.9 percent about the right against discrimination. Furthermore, only a quarter (25%) respondents considered the right of sexual minorities as important rights.

Regarding distribution of respondents knowing that Nepal has enacted law relating to rights of persons with disability is very few (11.2%) whereas 13 percent urban respondents were aware of about the provision of laws to address the rights of persons with mental/psychosocial disability in Nepal but not a single respondent was aware of it from rural area. Congruently, higher percentage of men (15.2%) respondents were aware of the provision of rights of persons with mental disability in comparison to women (7%).

The Constitution of Nepal provides special rights to the persons with psychosocial disability. However, only eleven percent respondents were aware of the special provisions for the rights of persons with mental disability in the Constitution of Nepal. As human rights are connected with the dignified life of a person, the respondents have realized that their human rights have been violated. A total of 16 percent of the respondents or family members felt violation of human rights disaggregating into religious minorities (24%) and Dalit (22%) who felt violation of human rights. Similarly, in the urban area, realization on violation of human right is higher compared to the rural area but their access to justice is very limited as only two percent had filed cases against it.

To recognize disability and provide special opportunity there is a policy to provide identity cards to the persons with disability. In spite of huge cry over it, only 21 percent respondents reported their knowledge that they are provided disability identity card by the Government. Majority (78.2%) of respondents stated district women and children office provides disability identity card, whereas only 13 percent said it would be provided

21 Committee on the Rights of Persons with Disabilities General comment No. 6 (2018) on equality and nondiscrimination, para 66.

by village/ municipality. Nine percent respondents claimed that it would be provided by CDO office that clarifies their access over getting identity card too.

Filing complaints against violation of their rights of persons with mental disability need to be ease in access. Suo motto complaint registration can win the confidence of people, but the survey reported NHRC's limited observation and monitoring with regard to the protection and promotion of human rights of persons with mental disability. During the earthquake emergency period of 2015, many organizations worked on psycho-social counseling throughout Rasuwa district, even Karuna Foundation and CMC Nepal are working for counseling in limited areas currently but none of the people noticed NHRC's presences in Rasuwa that illustrates difficulty for access to report or complain against violation of the rights of persons with mental disability too. Almost all of the FGD participants from Kailali, Surkhet, Dhanusa, Makawanpur, Rasuwa districts indicated the same difficulty. Neighbours, relatives, classmates and even family members also frequently and verbally abused mentally/psychosocially disabled person saying them as *mad, psycho, Jangli, Purba Janmako Pap, Khusket* that concludes pathetic condition of human rights situation of the persons with mental/psychosocial disability in terms of their rights to respect, right to fulfill their basic needs and right to live a dignified life. It is justified from the fact that three quarters of the selected respondents expressed that they were verbally and physically abused.

4. Conclusion

In the context of the ratification of the Convention on the Rights of the Persons with Disability (CRPD), human rights situation of the persons with mental/psychosocial disability in terms of the right to respect, right to fulfill and right to dignified life was found to be very poor in Nepal. This vulnerable situation is reflected by the fact that three quarters of the selected ones in this study expressed that they were verbally and physically abused. Although few of them were found in a grave situation of human rights violation such as confined in a room or chained, this is a serious issue in a democratic Nepal where 31 civil, political, social, economic and cultural rights have been enshrined in the Constitution as the fundamental rights and specific laws relating to them have been framed and are being framed.

This study shows that the basic rights of the persons with mental disability were violated in many forms such as being deprived of food, medication, and proper clothing as per the season or weather, being behaved differently in the society even after the treatment of mental illness and use of shunning epithet as crazy or mad or lunatic followed by different kinds of insult, verbal abuse and mental torture. The data revealed that persons

with mental/psychosocial disability live in a pathetic situation.

The persons with mental disability complained of not having proper mental health care facility in their locality. Overall, treatment situation of the persons with mental disability was also found challenging in Nepal. Foremost, many doctors are not specialists to treat and thus they provide them with sleeping tablets as a way to make their anguish silent. Many cases of mental illness are not diagnosed properly to care them well. Instead, hospitals, community and even family members were found tagging them as "problematic' for other patients or people for their normal treatment. These findings indicate that persons with mental disability are not even treated as human beings in Nepal. Changing the focus of specialist mental health workers (psychiatrists and psychologists) from only service delivery to designing and managing mental health services; building clinical capacity of the primary health care (PHC) workers and providing supervision and quality assurance of mental health services may help in scaling up mental health services in LMICs. Little is known, however, about the mental health policy and services context for these strategies are in fragile-state settings including Nepal.

Persons with mental/psychosocial disability were found denied in public opportunities because of their illness. They openly refuted the governmental and non-governmental organizations for making the conditions of eligibility as "not having mental problem" in their laws, policies, and regulations. Many of them were found quitting jobs, schools, and similar public positions due to oppressions, insulting behavior and verbal abuse, as well as lack of friendly infrastructures. Mere formulation of policies and development of law cannot provide justice to the victims as many of persons with mental disability were found unaware about the special laws in Nepal provisioned for the rights of persons with mental disability. Knowledge about obtaining disability identity card from the government authority was also found to be poor.

The overall findings from quantitative and qualitative data revealed that the people belonging to the city area are familiar that Nepal is a state party to CRPD, 2006. After being a party to this convention, the special law, **"**Act Relating to Rights of People with Disability, 2017**"** also came in order to ensure civil, political, economic, social and cultural right of such people. However, the particular law has not been completely successful to safeguard the dignified life of persons with mental disability. It is necessary to recognize that the persons with mental disability are vulnerable as reported by this study. They are unable to exercise their rights independently with due respect. The human rights protection mechanism could not be fully ensured as many other national laws like Part 5 Section 506 of the Civil Code 2017, Act Relating to Voter's Roll and the

laws related to economic rights still have marginalized them as second grade citizens and human beings of Nepal by using discriminatory terminologies.

Thus, it is the prime time for the concerned authority including NHRC to take all sorts of initiation and build up strategies to ensure all the rights of the persons with mental disability. The right to health, the right to dignified life, the right to access to all resources available at local level without any discrimination should be entitled not as mercy but as fundamental rights of the persons with mental disability.

5. Recommendations

The survey makes following recommendations to the concerned authorities to ensure and improvise human rights situation of persons with mental/psychosocial disability:

a. Recommendations to the Concerned Stakeholders

1. Massive human rights education should be imparted to the common people by the governmental and non-governmental sectors for eliminating humiliating behaviors like verbal and physical abuse including confining persons with mental/psychosocial disability in a room or chaining them, depriving them from food, medication and clothing.
2. Disability friendly environment for the persons with mental disability should be created so as to address their social, economic and cultural problems and needs. For this, peer group education and learning programmes can be the initiatives.
3. Public opportunities for the persons with mental disability should be guaranteed by developing inclusive policies. Access[22] and assurance in public opportunities for the persons with mental disability should be guaranteed for the assurance of their personal integrity and dignified life.[23]
4. Discriminatory legal provisions against them need to be identified, revised and removed to ensure their names in the voter's roll and be a candidate in the elections. NHRC has the space to identify these discriminatory provisions in the laws and lobby for necessary amendments so as to make them disability friendly including to the persons with mental/ psychosocial disability. Policy/strategy for medical service should be effective for persons with mental disability including general health care.
5. The discriminatory words such as "incompetent" and "half competent" (*Ardhasachham*) in the Part 5, Section 506 of the Civil Code 2017 need to be amended. It would be better to replace by disability friendly words instead of

22 General Comment No.1, Committee on the Rights of Persons with Disabilities, 2014.
23 NHRC's Report submitted to the United Nation's Human Rights Committee, 15th August 2017.

"incompetent" which directly relates to the persons with mental/psychosocial disability and clarify in context to psycho-social disability. The Government must ensure elimination of the discriminatory words in all the concerned legislative measures and as per article 12, CRPD, 2006[24].

6. Newly enacted Civil and Criminal Codes have to be enforced and 17 different Acts will be repealed in such a condition. It is urgent for NHRC to review laws relating to the protection and promotion of the rights of the persons with mental disability.
7. The Acts relating to property rights and other economic rights including right to open a bank account needs to be amended to make them friendly to persons with mental disability. Separate Act, bylaw as mental Separate Act, bylaw as mental or psychosocial disability law is the demand of the stakeholders which can ensure their civil, political, economic, social and cultural rights. The law should include their rescue, treatment and rehabilitation, and ensure their social integration mechanism.
8. Coordination should be strategized and excelled between central, federal and local governments on issues relating to services and facilities for the persons with mental disability. Directive and coordination committees need to be established at all levels of the government.[25]
9. Addressing the identified gaps, particularly for the integration of mental health into the existing health care system is essential. It would be easier to the Provincial Government to coordinate on mental health activities and issues with the central and local levels, if a separate mental health unit was established. Each local government should deploy one Psychosocial Counselor and Community Psychological Service Worker (CPSW) in each ward/community to prioritize the counseling first for both patients with mental/psychosocial disability and their family members.
10. Municipal laws need to be in compliance with the CRPD. The local government should establish at least one rehabilitation center for persons with mental disability in each district in collaboration with non-governmental and private sectors. In addition to this, NHRC should monitor the human rights situation of those rehabilitated people regularly at the local level.
11. The election law should be made disability friendly and in compatible with CRPD - 2006 to the recovered persons with psycho-social disability.

24 General Comment No.1, Committee on the Rights of Persons with Disabilities, 2014.
25 Human Rights Situation of persons with disability, NHRC, Country Report, 2018

12. The Political Parties' policies and provisions need to be friendly to all people. For example, they have to remove the unfriendly terms in their legislations and guarantee eligibility for the persons with mental disability to take the membership of their parties.

b. For the NHRC, Nepal

1. Measures and steps such as identifying persons with psychosocial disability and monitoring their situation are to be taken to guarantee the rights of the persons with mental disability.
2. These actions need to concentrate on their right to respect, right to fulfill and right to live dignified life equally to other citizens. Effective presence of NHRC at local level in each district is essential so that the concerned people feel comfortable and may have easy access to complain against the violation of the rights of the persons with mental disability.
3. The presence of NHRC is necessary to monitor the cases of domestic violence with the persons with mental disability. Certain strategies should be developed to materialize the family obligation particularly relating to ensuring the rights of persons with mental disability. Annual review of cases reported at NHRC and other partner organizations working mainly for the rights of the persons with mental disability should be made.
4. Regular counseling services need to be introduced in the NHRC system and the counselor should be made available in case of the special complaints made by the persons with psycho social disability.

c. For Health Facility Providers

1. Early intervention by the government is essential for ensuring their right to health. Free /nominal/ institutional mechanism and policy can be applied for checkup to diagnose at the early stage.[26]
2. Proper treatment mechanism such as a special ward with specialists should to be established in the local, provincial and federal level health facilities for the persons with mental disability.Distributions of pain killers, sleeping tablets without proper diagnosis must be stopped for the sake of their dignified healthy life. Since identifying the proper causes of mental disability remains the major problem, the need of special wards is justified.
3. Awareness and regular counseling systems need to be introduced as preventive mechanism for post pregnancy depression.

26 Article, 35, Rights relating to Persons with Disability Act, 2018

यौनिक तथा लैङ्गिक अल्पसंख्यकको अधिकार र अवस्था

- डा. टीकाराम पोखरेल

सार संक्षेप

यौनिक तथा लैङ्गिक अल्पसंख्यकहरूको प्रश्नमा राष्ट्रिय तथा अन्तर्राष्ट्रिय कानूनी तथा संवैधानिक दस्तावेजहरूमा केही सकारात्मक व्यवस्था गरिएका भए तापनि व्यवहारिक रुपमा चाहिँ समाजमा यौनिक तथा लैङ्गिक अल्पसंख्यकहरू आफ्नो अधिकारबाट बञ्चित हुनु परेको स्थिति विद्यमान छ। यो अवस्थामा सुधार ल्याउन कानूनी र व्यवहारिक रुपमा यौनिक तथा लैङ्गिक अल्पसंख्यकहरूको मानव अधिकारको सुनिश्चितताका लागि आवश्यक व्यवस्था गरिनु पर्दछ । यस समुदायमाथि भैरहेको र हुनसक्ने मानव अधिकारको उल्लंघनको घटनामाथि उचित क्षतिपूर्तिको व्यवस्था गर्न आवश्यक कानूनहरू निर्माण गरिनुपर्दछ । सर्वोच्च अदालतको निर्णय पूर्ण रुपमा कार्यान्वयन नभएको अवस्था देखिँदा यसलाई पूर्ण रुपमा कार्यान्वयन गरिनुपर्दछ । र सबैभन्दा महत्त्वपूर्ण कुरा समाजको उनीहरू प्रति हेर्ने पक्षपातपूर्ण दृष्टिकोणमा परिवर्तन हुनुपर्दछ । आफ्नो पहिचान खुलाएर मर्यादित रुपमा समाजमा रहन सक्ने वातावरण सिर्जना गरिनुपर्दछ ।

१. विषय प्रवेश :

मानिसका महिला र पुरुष गरी दुईवटा मात्र लिङ्गीय भेद हुन्छन् भन्ने परम्परागत र संकुचित मान्यताभन्दा भिन्न यौनिक तथा लैङ्गिक अवस्थालाई तेस्रोलिङ्गी भनेर बुझ्ने गरिन्छ। कतिपयले तेस्रो लिङ्गी शब्द हिन्दू दर्शनमा रहेको कामशुत्रमा पुरुष प्रकृति, स्त्री प्रकृति र तृतीय प्रकृति रहेको कारणले प्रयोग गरेको शब्द हो भन्ने स्पष्टीकरण दिन्छन् ।[1] यद्यपि यी सबै बहसका विषय हुन् । पौराणिक, ऐतिहासिक वा परम्परागत रुपमा जे जस्तो बुझाई र व्याख्या भए पनि समसामयिक समयमा बोलिचालीमा यस्तो अवस्थालाई बोल्ने सहजताका लागि तेस्रोलिङ्गी भन्ने गरिन्छ । तर तेस्रोलिङ्गी भन्ने शब्दले पनि महिला र पुरुष भन्दा फरक लिङ्ग भएका सबैलाई समेट्न नसक्ने हुँदा अहिले यस प्रकारको लैङ्गिक अवस्थालाई व्यापकता दिँदै यौनिक तथा लैङ्गिक अल्पसंख्यक भनेर सम्वोधन गर्ने गरिएको छ। यौनिक तथा लैङ्गिक अल्पसंख्यकभित्र महिला समलिङ्गी, पुरुष समलिङ्गी, पुरुष र महिला

1 https://rukshananewa.wordpress.com/home/tesrolingi/

दुवैतर्फ आकर्षित हुने व्यक्ति, तेस्रो लिङ्गी, लिङ्ग परिवर्तित व्यक्ति र अन्तरलिङ्गी (LGBTI) सबै पर्दछन् । यकीन तथ्यांक नभए पनि अहिले विश्वभर यस्ता यौनिक तथा लैङ्गिक अल्पसंख्यकहरूको संख्या समग्र जनसंख्याको १० प्रतिशत रहेको छ भन्ने कुरा विभिन्न प्रतिवेदनहरूमा उल्लेख भएको पाइन्छ । विलियम भन्ने संस्थाले गरेको अनुसन्धान प्रतिवेदनका अनुसार नेपालमा मात्र ९ लाखको हाराहारीमा तेस्रोलिङ्गी समुदायको संख्या रहेको छ ।[२] नेपालको जनगणना २०६८ लाई आधार मान्ने हो यो संख्या नेपालको सम्पूर्ण जनसंख्याको ३.५ प्रतिशत जति हो । तर, हाम्रो समाजमा यो समूह विभिन्न कारणले गर्दा खुलेर आफूलाई तेस्रो लिङ्गीको पहिचान दिन नसकिरहेको अवस्थामा यो समुदाय योभन्दा धेरै ठूलो संख्यामा रहेको भन्न सकिन्छ ।

तेस्रो लिङ्गीभित्रका विभिन्न स्वरुपहरूप्रति आममानिसको बुझाईमा अन्यौलता छ । बुझाइको सजिलोको लागि महिलाको महिलासँगै आकर्षण हुनुलाई महिला समलिङ्गी (लेसवियन) भनिन्छ । त्यसैगरी पुरुषको पुरुषप्रतिको आकर्षणलाई पुरुष समलिङ्गी (गे) भनिन्छ । महिला समलिङ्गीको जैविक लिङ्ग महिलाको र पुरुष समलिङ्गीको जैविक लिङ्ग पुरुषको नै हुने तर आकर्षण र अनुभूति महिलाको महिलाप्रति र पुरुषको पुरुषप्रति हुने भएकाले यो समूहलाई 'होमोसेक्सुअल' पनि भनिन्छ । तेस्रो लिङ्गीको अर्को भेद द्विलिङ्गी (बाईसेक्सुअल) हो । द्विलिङ्गी शारीरिक तथा भावनात्मक रूपले महिला र पुरुष दुवैसित बराबर आकर्षित हुन्छन् । द्विलिङ्गी पुरुष पनि हुन सक्दछन् र महिला पनि हुन सक्दछन् ।

परम्परागत रूपमा महिला र पुरुषको अपेक्षा गरिएको भन्दा फरक लिङ्गीलाई तेस्रोलिङ्गी (पुरुष तेस्रोलिङ्गी र महिला तेस्रोलिङ्गी) भनिन्छ । पुरुष तेस्रोलिङ्गी जन्मँदा केटा तर पछि हुर्कंदै जाँदा केटीको रूपमा रहेका हुन्छन् । उनीहरूको जैविक लिङ्ग पुरुषको हुन्छ भने सामाजिक लिङ्ग महिलाको हुन्छ, तर आकर्षण पुरुषप्रति हुन्छ । त्यसैगरी महिला तेस्रोलिङ्गी जन्मँदा केटी तर हुर्कंदै जाँदा केटाको रूपमा रहेका हुन्छन् । यिनीहरूको जैविक लिङ्ग महिलाको हुन्छ भने सामाजिक लिङ्ग पुरुषको हुन्छ, तर आकर्षण महिलाप्रति नै हुन्छ ।

जो व्यक्ति जन्मँदा यौन अङ्गका हिसाबले सामाजिक अपेक्षाअनुरूप बालक वा बालिका छुट्टिंदैनन्, जसलाई अन्तरलिङ्गी (इन्टरसेक्स) भनिन्छ । यस्ता व्यक्ति जसमा पुरुष र महिला दुवैको जैविक लिङ्ग विद्यमान हुन्छ । समग्रमा यी पाँच प्रकारका भेदलाई छोटकारी अङ्ग्रेजीमा एलजिबिटीआई (LGBTI) र नेपालीमा तेस्रोलिङ्गी भनिन्छ।[३]

२. जैविकता

परम्परागत आँखामा तेस्रो लिङ्गी भनेको एक प्रकारको अभिसाप, रोग वा अप्राकृतिक उपज हो भन्ने

2 http://www.khasokhas.com/232

3 http://eadarsha.com/?article, रमेश पन्त, माघ ६, २०७०

बुझाइ छ । सृष्टिको दुनियाँमा कुनै समय यस्तो थियो कि, महिला र पुरुष बाहेक अर्को लिङ्ग हुनै सक्तैन भन्ने कट्टरवादीहरूले तेस्रोलिङ्गी हुँ भन्नेहरूलाई विकृत मानसिकताको उपजको संज्ञा दिने गर्दथे । खुलमखुला विरोध नगरे पनि अझै पनि कुनै गफमा विकृत मानसिकता भन्ने संकुचित बुझाइ बाँकी नै छ । यद्यपि सार्वजनिक रुपमा भने पछिल्लो समयमा आएर यो मान्यतामा विस्तारै परिवर्तन हुँदैछ । विश्व स्वास्थ्य संगठनले सन् १९७२ मा यो कुनै रोग नभएको भन्दै यौनिक तथा लैङ्गिक दृष्टिले तेस्रो लिङ्गीहरू महिला र पुरुषभन्दा भिन्न यौनिक तथा लैङ्गिक अस्तित्व भएका व्यक्ति हुन् भन्ने कुरालाई मान्यता दियो । यसपछि विश्वभरि नै यसको बहसमा निकै व्यापकता आयो ।

कुनै व्यक्तिको यौन आकर्षण कतातिर हुन्छ भन्ने कुरा जैविक कुरा हो । यो लिङ्गको शारीरिक बनौटका आधारमा मात्र नभई भावनात्मक र मानसिक रुपमा समेत निर्धारण हुने विषय हो । यसलाई चाहेर पनि परिवर्तन गर्न सकिन्न । जसरी विपरीत लिङ्गी (महिला र पुरुष) हरूको यौनिक आकर्षण समलिङ्गीहरूसँग हुन सक्तैन त्यसैगरी समलिङ्गी/तेस्रोलिङ्गीहरूको यौनिक आकर्षण पनि विपरीत लिङ्गीहरूसँग हुँदैन । यो प्राकृतिक नियम हो । तर, यो प्राकृतिक नियमलाई अप्राकृतिक ठानिदिँदा नै तेस्रो लिङ्गीका अधिकारको प्रश्नमा धेरै समस्याहरू देखिएका छन् ।

समलिङ्गी तेस्रोलिङ्गी मानव जातिमा मात्र नभएर पशुपंक्षी र देवता गणमा पनि पाइएको छ । वैदिक तथा पौराणिक कालदेखि नै तेस्रो लिङ्गीहरूको अस्तित्व रहेको देखिन्छ । भगवान् शिवलाई नै अर्द्धनारीश्वर भनिएको छ । रामायणमा राम वनवास जाने बेलामा आधा बाटोमा पुगेपछि रामलाई पुऱ्याउन हिँडेका सबै नरनारीहरूलाई रामले फर्कन आदेश दिई आफू वनवास गएका, चौध वर्ष वनवास सकेर राम सोही बाटो फर्की आउँदा केही मानिसहरू नफर्की बाटैमा बसिरहेका, रामले नफर्कनुको कारण सोध्दा नफर्की रामलाई पर्खेर बसेकाहरूले रामले नरनारीलाई मात्र फर्कन भनेको तर आफूहरू नर र नारी दुवै नभएकाले फर्कने आज्ञा नपाएको ठानी रामलाई पर्खी बसिरहेको भनेका थिए भन्ने वर्णन भेटिन्छ ।

श्यामली देवी कृष्णको रूपमा, भगवती देवी पुरुषको लुगा लगाउने रूपमा, चैतन्य महाप्रभु राधा र कृष्णको रूपमा, अवलोकितेश्वर महिला र पुरुषको रूपमा रहेको पौराणिक ग्रन्थहरूमा वर्णन पाइन्छ । आयोप्पा, शिव र विष्णुका छोरा थिए । भगीरथ महाराज दुईवटा आमाबाट जन्मेका जसले गंगा र सागरलाई पचाउन सक्ने क्षमता थियो । ब्रह्मा विष्णुको नाभीबाट उत्पत्ति भएको मानिन्छ । चण्डीचामुण्डा जसलाई जुम्ल्याहा देवी वा युद्धकी देवी भनिन्छ, यिनी पुरुष जस्तै थिइन् । इराभन देवता विष्णुका श्रीमान् थिए । कार्तिकेय शिव र अग्नीका छोरा थिए । गणेश देवतालाई पार्वतीले मात्र जन्म दिएकी थिइन् । हिन्दूग्रन्थ कामसूत्रमा पनि समलिङ्गी विवाह हुने कुरा उल्लेख छ । संस्कृत शब्दकोषमा २० प्रकारका तेस्रोलिङ्गी हुन्छन् भन्ने वर्णन गरेको पाइन्छ । यसरी पौराणिक सन्दर्भहरूमा

पनि महिला र पुरुष बाहेक फरक लिंगको अस्तित्व भेटिन्छ । समलिङ्गी तेस्रोलिङ्गी रहर नभएर यो नितान्त प्राकृतिक कुरा हो । तसर्थ प्रकृतिलाई सबैले स्वीकार गर्नुपर्दछ र अपनाउनुपर्दछ ।

समलैङ्गीकिता कुनै रोग वा विमारी होइन, तर विगतको एउटा कालखण्डमा त्रासलाग्दो कुरा के थियो भने धेरै मानसिक स्वास्थ्यका डाक्टर पहिला समलिङ्गी आकर्षणको अनुभूति हुनुलाई मानसिक रोग भन्दथे । सन् १९७० मा अमेरिकन साइकोलोजी एसोसिएनले आफूहरूले समलिंगी आकर्षणलाई मानसिक रोग भनेर ठूलो भूल गरेको स्वीकार गर्दै समलैङ्गीकता कुनै रोग नभएको कुरा स्वीकार गरे । साथै मानसिक रोगको तालिकाबाट पनि यसलाई हटाए । अमेरिकी मनोरोग चिकित्सा संघ तथा विश्व स्वास्थ्य संगठनले लामो तर्क एवं वादविवादपछि समलिङ्गी कामुकतालाई मानसिक विकृतिको सूचीबाट हटाएर स्वाभाविक यौन सम्बन्ध र प्राकृतिक मानिसकेको भए पनि कतिपय परम्परावादी र यथास्थितिवादी दर्शन, ज्ञान एवं संस्कारबाट प्रेरित व्यक्तिहरूले पुरातन मान्यतालाई छाड्न सकेका छैनन् । उनीहरूले समलिङ्गी कामुकता, सम्बन्ध र प्रदर्शनलाई अप्राकृतिक, मानसिक विकृति तथा विचलनका रूपमा प्रचार गरिरहेका छन् । उनीहरूले समलिङ्गी कामुकतालाई विकृत विचलन मात्र होइन, अप्राकृतिक पनि मान्दछन् । सामाजिक आँखाले हेर्दा सामान्यतयाः यौनिकता र यौन आकर्षणमा पुरुषका लागि महिला र महिलाका लागि पुरुष आकर्षणको केन्द्रबिन्दु हुन्छन् । समाजमा धार्मिक, सांस्कृतिक एवं जैविक आधारमा महिला र पुरुषबीच मात्र यौनिक र वैवाहिक सम्बन्ध हुनसक्छ भन्ने मान्यता स्थापित गरिएकाले समलिङ्गी मान्यताले स्थान पाउन नसकेको हो । यो बिलकुल गलत धारणा हो ।

समलिंगी तेस्रो लिंगी कसरी जन्मन पुग्दछन् भन्ने पनि बहसको विषय छ । कतिपयको धारणा अनुसार गर्भवती अवस्थामा आमाले ध्यान नदिँदा तेस्रो लिङ्गको बच्चा जन्मन सक्छ भन्ने भनाइ छ । गर्भवती महिलालाई गर्भवती भएको तीन महिनामा रुघाखोकी ज्वरो आइरहेको छ र कुनै बढी औषधी वा टाक्सिक फुड जस्तैः- केमिकली ट्रिटेड वा पेस्टिसाइड्स फ्रूट प्रयोग गरेको छ भने, गर्भवतीको पहिलो तीन महिनामा कुनै प्रकारको दुर्घटना वा रोगी भई शिशुलाई असर परेमा र जेनेटिक डिसअर्डरका कारणले पनि शिशुको लिङ्ग निर्धारणमा असर पर्न जान्छ । टाइडियोपैथिक वा अज्ञात ट्रान्सजेण्डर बच्चा जन्मिनुमा अधिकांश इडियोपैथिक हुने गर्छन् । समय रहुन्जेल यिनीहरूको कारणको बारेमा थाहा पाउन सकिन्न । त्यस्तै यदि गर्भवती महिलाले डाक्टरको सल्लाह विना नै आफैँले गर्भपतनको लागि घरेलु औषधि प्रयोग गरेमा तर गर्भपतन हुन नसकी बच्चा जन्मको खण्डमा पनि तेस्रोलिङ्गी प्रकृतिका बच्चा जन्मिन सक्दछन् भन्ने चिकित्सकहरूको तर्क छ ।

३. यौनिक तथा लैङ्गिक तथा अल्पसंख्यक

हाम्रो नेपाली समाजमा विगत् केही दशकदेखि नै यौनिक तथा लैङ्गिक अल्पसंख्यकका अधिकारको

अभियान थालनी हुँदा पनि समाजमा यसबारे राम्रो जानकारी एकदम थोरैलाई मात्र छ । समाजमा यौनिक तथा लैङ्गिक अल्पसंख्यकका बारे थुप्रै भ्रम र गलत अवधारणाहरू रहेका छन् तेस्रो लिङ्गी, यौनिक तथा लैङ्गिक अल्पसंख्यक, यौन अभिमुखीकरण जस्ता फरक शब्दहरूले पनि हामीलाई अन्यौलमा पार्दछ ।

हाम्रो समाजमा Sex र Gender लाई एउटै हो जस्तो चित्रण गरे पनि वास्तवमा यी दुई शब्दमा भिन्नता छ । मानिसको यौन अङ्ग वा प्रजनन अङ्गबाट छुट्टिने लिङ्गलाई जैविक लिङ्ग (Sex or Biological sex) भनिन्छ भने कुनै व्यक्तिको पुरुषत्वदेखि नारीत्वको अनुभवमा हुने भिन्नतालाई सामाजिक लिङ्ग (Gender) भनिन्छ । जैविक लिङ्ग (Sex) र सामाजिक लिङ्ग (Gender) एउटै होइन । जैविक लिङ्ग मान्छेको शारीरिक गुण हो भने सामाजिक लिङ्ग मानसिक गुण हो । जैविक लिङ्गको निर्धारण यौन अङ्गबाट हुन्छ भने सामाजिक लिङ्गको निर्धारण व्यवहार, हाउभाउ र मानसिकताले निर्धारण हुन्छ । जैविक लिङ्ग chromosome बाट बुझिन्छ भने सामाजिक लिङ्ग दिमागबाट बुझिन्छ ।[४]

कुनै पनि व्यक्ति किशोरावस्थामा पुग्दा उसले अरू व्यक्ति प्रति आकर्षण महसूस गर्छ । यो आकर्षण रोम्यान्टिक, यौनिक, शारीरिक र भावनात्मक हुन्छ । जब मानिस १३/१४ वर्ष माथि हुकँदै जान्छ तब उसको शरीरमा परिवर्तन आउन थाल्छ । यो उमेरमा आकर्षणको दरो अनुभूति पनि शुरु हुन थाल्छ । यिनै सशक्त यौन आकर्षणका अनुभूतिहरूले मानिसलाई शारीरिक सम्बन्ध राख्ने इच्छा पनि जगाउँछ । यसलाई नै यौन अभिमुखीकरण भनिन्छ ।[५] जो व्यक्ति जैविक लिङ्गका आधारमा अल्पसङ्ख्यक छन्, जो व्यक्ति सामाजिक लिङ्गका आधारमा अल्पसङ्ख्यक छन् र जो व्यक्ति यौन अभिमुखीकरणका आधारमा अल्पसङ्ख्यक छन् उनीहरूलाई समूहगत रूपमा "यौनिक तथा लैङ्गिक अल्पसंङ्ख्यक" भनिन्छ ।

४. सामाजिक अवस्था

व्यक्तिको यौन अङ्गअनुसार देखा पर्ने भिन्नतालाई लिङ्ग र लिङ्गको आधारमा समाजले निर्धारण गरेको सामाजिक भूमिकालाई लैङ्गिकता भनी परिभाषित गर्ने गरिएको छ । लैङ्गिक पहिचानको दृष्टिकोणबाट मूलधारको रूपमा रहेका महिला र पुरुषभन्दा अलग तेस्रो लिङ्गी पहिचान भएका व्यक्तिहरू समेत समाजमा अल्पसंङ्ख्यक रूपमा रहेका हुन्छन् । तेस्रो लिङ्गीहरूलाई समाजका कतिपय वर्गले अतिआधुनिकताको विकृत उपज पनि ठान्ने गरेका छन् । तर, यो अतिआधुनिकताको उपज वा विकृति होइन । बरु सबै व्यक्ति विपरीत लिङ्गी नै हुन्छन् भन्ने मान्यता राख्नु लिङ्गवादको विपरीत हो ।

4 https://rukshananewa.wordpress.com/home/lgbti-short/

5 ibid (ऐजन)

विपरीत लिङ्गवाद कटु सत्य होइन, कटु सत्य के हो भने हाम्रो समाजमा विपरीत लिङ्गीको अतिरिक्त महिला समलिङ्गी, पुरुष समलिङ्गी, दुई लिङ्गी, तेस्रो लिङ्गी र अन्तर लिङ्गी पनि हुन्छन् ।

समाजमा तेस्रो लिङ्गीहरूको संख्या उल्लेख्य भए पनि उनीहरू समाजको रुढीवादी सोचको शिकार हुने त्रासले खुल्न सक्तैनन् । नेपालमा ९ लाख भन्ने गरिए पनि २०७४ मंसिर १० र २१ गतेको निर्वाचनमा १६७ जना तेस्रो लिङ्गीहरू आफ्नो पहिचान खुलाएर मतदान प्रक्रियामा सहभागी भएका थिए । कुल मतदाता एक करोड ५४ लाख २७ हजार ९३४ रहेकामा मुलुकभर १६७ तेस्रो लिङ्गी निर्वाचनको मत प्रक्रियामा सहभागी हुनु भनेको पहिचान खुल्न नसकेका कारण देखिएको न्यून संख्या हो । तेस्रो लिंगी खुलाएर नागरिकता लिएको आधारमा आयोगले १६७ जना तेस्रो लिङ्गीको तथ्यांक निकालेको हो । अरु तेस्रो लिङ्गीहरूले नखुलेरै महिला वा पुरुषको पहिचानमा मत हालेको सोझै अनुमान गर्न सकिन्छ । त्यसैगरी केही व्यक्ति तेस्रो लिङ्गीको पहिचान खुलेर नै समानुपातिकतर्फ उम्मेदवार बने पनि तिनीहरूले संसदमा प्रतिनिधित्व गर्न सकेको देखिएको छैन । यसरी हेर्दा राजनीतिको मूलधारबाट पनि तेस्रो लिंगी समुदाय बाहिर रहेको देखिन्छ ।

आज समाजले मात्र होइन कतिपय तेस्रो लिङ्गीहरूलाई त स्वयम् आफ्नै परिवारले समेत सहज रुपमा स्वीकार गर्न नसकेको अवस्था छ । परिवारमा कुनै तेस्रो लिङ्गी सदस्य भयो भने समाजमा आफ्नो समेत मानमर्दन हुने ठानी परिवारका अन्य सदस्यहरूबाट नै त्यस्ता आफ्ना सन्तानलाई तेस्रो लिङ्गीका रुपमा समाजका अगाडि खुल्न नदिने मात्र होइन कि जबर्जस्ती महिला/पुरुषसँग विवाह गर्न बाध्य पारिन्छ । समाज र साथीभाइहरूबाट चाहिँ छक्का, हिँजडा, नपुंसक जस्ता शब्द प्रयोग गरेर तेस्रो लिङ्गी माथि घृणाको वर्षा गरिन्छ । यिनीहरूको संगत गऱ्यो भने आफू पनि त्यस्तै भइन्छ भन्ने मानसिकताबाट ग्रसित भएर कतिपय सभ्य भनाउँदा व्यक्तिहरू समेत तेस्रो लिङ्गीहरूको संगत गर्न चाहँदैनन् । समाजको यस्तो हेराइले गर्दा तेस्रो लिङ्गीहरू सामाजिक गतिविधिको सहभागिताबाट बञ्चित हुनु परिरहेको अवस्था छ ।

५. अन्तर्राष्ट्रिय प्रावधान/सिद्धान्त र प्रयासहरू

यौनिक तथा लैङ्गिक अल्पसंख्यकहरूको अधिकारको प्रश्नमा अहिले विश्वभरि नै व्यापक रुपमा बहसको विस्तार भैरहेको छ । जकार्ता (योग्याकार्ता) सिद्धान्त, २००६ यौनिक तथा लैङ्गिक अल्पसंख्यकहरूको अधिकार, तथा बहस र विस्तारमा महत्त्वपूर्ण पाइलो हो । उक्त सिद्धान्तमा यौनिक तथा लैङ्गिक अल्पसंख्यकहरूको व्यक्तिगत सुरक्षाको अधिकार, आवतजावत स्वतन्त्रता, सांस्कृतिक, सामजिक र पारिवारिक रुपमा सहभागिताको अधिकार, क्षतिपूर्ति तथा जवाफदेहीताको अधिकारलगायतका प्रावधानहरूको व्यवस्था गरिएको छ । यसैगरी मानव अधिकारको विश्वव्यापी घोषणापत्र, १९४८ ले लिङ्गका आधारमा कुनै पनि व्यक्तिलाई भेदभाव नगरी हरेक व्यक्तिलाई घोषणापत्रमा उल्लिखित सबै

अधिकार र स्वतन्त्रता प्राप्त हुनेछ भनी उल्लेख गरेको छ ।

(क) योग्यकार्ता सिद्धान्त

विश्व मानव अधिकार आन्दोलन र विकासमा मानव अधिकारको विश्वव्यापी घोषणापत्र १९४८ को जुन स्थान रहेका छ, LGBTI अधिकारका प्रश्नमा योग्यकार्ता सिद्धान्त (Yogyakara Principles) लाई यो समुदायले त्यही रुपमा लिएको पाइन्छ । सन् २००६ को नोभेम्बरमा इण्डोनेशियाको योग्यकार्तामा जारी भएका योग्यकार्ता सिद्धान्त यौन अभिमुखीकरण र लैङ्गिक पहिचानका सम्बन्धमा अन्तर्राष्ट्रिय मानव अधिकार कानूनको प्रयोगसम्बन्धी सिद्धान्तहरूको फेहरिस्त हो । योग्यकार्ता सिद्धान्तले यौन अभिमुखीकरण र लैङ्गिक पहिचानको मुद्दालाई लिएर वृहत्तर अन्तर्राष्ट्रिय मानव अधिकारका मापदण्ड र तिनको प्रयोगका विषयलाई सम्बोधन गर्दछ । यी सिद्धान्तले बाध्यकारी अन्तर्राष्ट्रिय कानूनी मापदण्डहरू प्रति दृढता जनाउँदछ जसलाई सबै राज्यहरूले पालन गर्नु पर्दछ । संयुक्त राष्ट्र संघले यसको प्रबर्द्धन र कार्यान्वयनमा महत्त्वपूर्ण भूमिका खेलिरहेको छ । यो सिद्धान्तमा यौन अभिमुखीकरण र लैङ्गिक पहिचानका आधारमा हुने मानव अधिकार हनन्का कुराहरू प्रस्तावनामा नै उल्लेख गरी कानूनी संरचनाका कुराहरू उल्लेख गरिएको छ ।[६]

योग्यकार्ता सिद्धान्तका मुलभूत प्रावधानहरू:

- कानूनका सामु मान्यता, गैर-भेदभाव र मानव अधिकारको विश्वव्यापी अधिकारको उपभोग : सिद्धान्त १ देखि ३ सम्म
- मानव तथा व्यक्तिगत सुरक्षाको अधिकार : सिद्धान्त ४ देखि ११
- आर्थिक, सामाजिक तथा साँस्कृतिक अधिकारहरू : सिद्धान्त १२ देखि १८ सम्म
- अभिव्यक्ति, विचार र संगठनको अधिकार: १९ देखि २१ सम्म
- आवत जावत र शरणको स्वतन्त्रता : सिद्धान्त २२ र २३
- साँस्कृतिक र पारिवारिक जीवनमा सहभागिताको अधिकार : २४ देखि २६ सम्म
- मानव अधिकार रक्षकका अधिकार : सिद्धान्त २७
- क्षतिपूर्ति तथा जवाफदेहिताको अधिकार : सिद्धान्त २८ र २९

(ख) यौनिक तथा लैङ्गिक अल्पसंख्यकका प्रश्नमा विश्व परिदृश्यमा भएका अन्य प्रयासहरू

योग्यकर्ता सिद्धान्तको घोषणा अगाडि र पछाडि विश्व परिदृश्यमा यौनिक तथा लैङ्गिक अल्पसंख्यकहरूको

6 मानव अधिकार तथा कानूनी शिक्षा तालिम पुस्तिका, ब्लु डाइमण्ड सोसाइटी, पेज १६ र १७

अधिकारका प्रश्नमा थुप्रै कामहरू भएका छन् । त्यस्ता केही प्रयासहरू निम्न छन् :-

- यौनिक तथा लैङ्गिक अल्पसंख्यक (LGBTI) का मानव अधिकार व्याख्या गर्ने क्रममा संयुक्त राष्ट्र संघको मानव अधिकार आयोग (UN Human Rights Committee) मा सन् १९९४ मा टुनेन विरुद्ध अष्ट्रेलियाको मुद्दामा भएको फैसलाले महत्त्वपूर्ण भूमिका खेलेको पाइन्छ ।

- सन् १९९४ देखि सयुक्त राष्ट्र संघको मानव अधिकार समिति (हाल परिषद्) ले नियमित रुपमा विभिन्न राष्ट्रहरूलाई यौन अभिमुखीकरण र लैङ्गिक पहिचानका आधारमा हुने भेदभावका सम्बन्धमा भएका कानून र नीतिहरू बारे प्रश्न राख्दै आएको छ ।

- महिला विरुद्ध हुने भेदभाव उन्मूलन सम्बन्धी समिति लगायतका अन्य सन्धिजनित अंगहरूले पनि विभिन्न राष्ट्रहरूलाई यौनिक अभिमुखीकरण र लैङ्गिक पहिचानका आधारमा हुने विभेदलाई लिएर सरकारहरूलाई प्रश्न गर्दै आएका छन् । मानव अधिकार समितिले योङ विरुद्ध अष्ट्रेलिया (Young vs Australia), र एक्स विरुद्ध कोलम्बिया (X vs Colombia) को मुद्दामा यौन अभिमुखीकरणको आधारमा भेदभाव गर्नु नागरिक तथा राजनीतिक अधिकार विषयक अन्तर्राष्ट्रिय अनुवन्धको उल्लंघन हो भन्ने सिद्धान्तलाई समर्थन गर्ने गरी फैसला गरेको छ । यी फैसलाहरूमा समलिङ्गी जोडीहरूलाई पनि विपरीत लिङ्गी जोडी सरह समान अधिकारहरू प्रदान गरिनु पर्दछ भनिएको छ ।

- मानव अधिकार आयोग अन्तर्गत विशेष कार्यविधि जातिवाद र रंगभेदलाई लिएर सन् १९६० को दशकमा नै स्थापना गरिएको थियो । यो कार्यविधिमा गैरन्यायिक, आम र स्वेच्छाचारी हत्यासम्बन्धी विशेष समाधिक्षक (Special Rapporteur) बाट सन् २००१ मा बुझाएको प्रतिवेदनमा पहिलो पटक यौन अल्पसंख्यक सदस्यको गैरन्यायिक हत्यासम्बन्धी जानकारी प्रतिवेदनमा समावेश गरिँदा केही सदस्यहरूले यो विषय समेटेकोमा विरोध गरे र सो कुरा उल्लिखित भाषा हटाउन दवाव दिए । तर त्यही वर्ष जब यस्ता हिंसाहरू तिनका कार्यादेश भित्र आए, तब ६ वटा विषयगत विशेष समाधिक्षकहरूले LGBTI व्यक्तिहरू विरुद्धका मानव अधिकार उल्लंघनसम्बन्धी जानकारी प्राप्त गर्न र त्यसबारे विचार गर्ने चाहना प्रकट गरे र सन् २००२ देखि LGBTI का मुद्दाहरूमा चासो राख्ने अधिकार (Authority) ले निरन्तरता पाई LGBTI अधिकारका लागि संयुक्त राष्ट्रसंघको "राजनीतिक" अंगमा पहिलो पटक यो विषयले स्थान पायो ।

- केही वर्षअघि दिल्लीको हाइकोर्टले 'दुई पुरुष वा दुई महिला यदि आपसी सहमतिमा बन्द

कोठाभित्र यौन सम्बन्ध राख्छन् भने त्यसलाई अपराध मान्नुहुँदैन' भन्ने फैसला गर्दै समलिङ्गी तेस्रोलिङ्गी सेक्स सम्बन्धी कानून परिवर्तन गर्न आदेश दिएको थियो । तर अदालतको यो फैसलालाई चुनौती दिँदै दिल्ली कमिसन फर प्रोटेक्सन अफ चाइल्ड राइट्सले 'समलैङ्गिक सम्बन्ध राख्नु प्रकृतिको खिलाफ छ र यसलाई अपराधको संज्ञा दिनुपर्दछ' भन्ने दाबी गऱ्यो । यसमा निर्णय सुनाउँदै सन् २०१३ मा देल्ली उच्च अदालतले १८६० को कानून अन्तर्गत वयस्क समलिंगी बीच हुने यौन सम्बन्धलाई अपराधीकरण घोषणा गरेको थियो । यसैबीच सवोच्च आदलतमा चलेको बहसमा 'अप्राकृतिक सेक्सको परिभाषा के हो ? र, कसले यसको परिभाषा तय गर्छ ? समलिङ्गी सेक्स स्वाभाविक हो या प्रकृतिको विरुद्ध? भन्ने बहस चल्यो । बहसको अन्त्य गर्दै सन् २०१६ मा सर्वोच्च अदालतले बयस्कहरू बीच हुने समलिंगी यौन सम्बन्धलाई अपराधीकरण गर्ने पुरानो औपनिवेशिक समयको कानूनलाई पुनराबलोकन गर्न आदेश दिएको छ ।[७] भारतीय अपराध संहिताको दफा ३७७ मा रहेको समलिंगी सम्बन्धलाई अपराधीकरण गर्ने कानूनी व्यबस्थालाई सर्वोच्चको यस फैसलाले असंवैधानिक भनी पुनरावलोकन गर्न आदेश दिएको छ र यस फैसला अनुसार अब भारतमा समलिंगी यौन सम्बन्धलाई कानूनी मान्यता प्राप्त भएको छ । यद्यपि भारत नेपाल लगायत थुप्रै देशमा समलिङ्गी विवाह समाजिक रुपमा विवादको विषय बनेको छ ।

- सन् २०१५ मा अमेरिकाको सर्वोच्च अदालतले देशभर समलिङ्गी विवाहलाई कानूनी मान्यता दिएको छ । विश्वका विभिन्न देशहरू जस्तो दक्षिण अफ्रिका, फिजी, पर्चुगल, ईक्वेडर, बोलिभिया लगायत अन्य देशहरूले आ-आफ्नो देशका संविधान, कानूनमा यौन अभिमुखीकरण तथा लैङ्गिक पहिचानको आधारमा विभेद गर्न नहुने भनी LGBTI का अधिकारहरू सुनिश्चित गरेका छन् ।[८]

६. राष्ट्रिय कानून

अन्तर्राष्ट्रिय रुपमा तेस्रो लिंगीहरूको अधिकारको विषयमा बहस चलेपछि नेपालले पनि कानूनी दस्तावेजहरूमा यो विषयलाई समेट्ने प्रयासको थालनी गरेको छ । नेपालको संविधान (२०७२) को धारा १२ नागरिकता सम्बन्धी व्यवस्थामा वंशजको अधारमा लैङ्गिक पहिचान सहितको नेपालको नागरिकता पाउन सक्ने कुरा उल्लेख छ ।[९] संविधानकै मौलिक हक अन्तर्गत पर्ने समानताको हकको धारा १८ (२) मा लिङ्गका आधारमा कसैलाई भेदभाव गरिने छैन भन्ने कुरा उल्लेख छ । यसैगरी

7 https://timesofindia.indiatimes.com/india/gay-sex-is-not-a-crime-says-supreme-court-in-historic-judgement/articleshow/65695172.cms

8 मानव अधिकार तथा कानूनी शिक्षा तालिम पुस्तिका, ब्लु डाइमण्ड सोसाइटी, पेज १७ र १८

9 नेपालको संविधान (२०७२) नागरिकताको धारा १२

धारा १८ (३) मा लैंगिक तथा यौनिक अल्पसंख्यकका लागि कानून बमोजिम विशेष व्यवस्था गर्न सकिने कुरा उल्लेख छ । यसैगरी सामाजिक न्यायको हकको धारा ४२ (१) मा यौनिक तथा लैङ्गिक अल्पसंख्यकलाई समानुपातिक समावेशी सिद्धान्तका आधारमा राज्यका निकायमा सहभागिताको हक हुने कुरा सुनिश्चित गरिएको छ ।[१०] संविधानमा व्यवस्था भएका मौलिक हकहरू अन्य महिला र पुरुषले झैँ यौनिक तथा लैङ्गिक अल्पसंख्यकले समेत विना अवरोध उपभोग गर्न पाउने व्यवस्था छँदैछ ।

राज्यका निर्देशक सिद्धान्तअन्तर्गत धारा ५० (१) मा मानव अधिकारको मूल्य मान्यता, लैङ्गिक समानता, समानुपातिक समावेशीकरण, सहभागिता, सामाजिक न्याय राज्यको राजनीतिक उद्देश्य हुने कुरा उल्लेख छ । धारा ५० (२) मा कुनै पनि आधारमा हुने विभेद, शोषण र अन्यायको अन्त्य गर्ने कुरा उल्लेख छ भने राज्यका नीति अन्तर्गतको धारा ५१ (ग) (५) मा समाजमा विद्यमान धर्म, प्रथा, परम्परा, रीति तथा संस्कारका नाममा हुने सबै प्रकारका विभेद, असमानता र शोषणको अन्त्य गर्ने कुरा उल्लेख छ ।[११]यसरी नेपालको संवैधानिक व्यवस्था हेर्दा अहिले संविधानमा तेस्रो लिङ्गीको पहिचान, समनाता र संलग्नताको व्यवस्था छ । तर, विडम्बना यस सम्बन्धी पर्याप्त कानून अझै बनेको छैनन् । यसैगरी सर्वोच्च अदालतले २०७३ माघ १० गते गरेको परमादेश (070-wo-0287) मा नागरिकतामा लिङ्गको महलमा महिला र पुरुषको सट्टा अन्य जनाई नागरिकता लिन दिन सक्ने र विगतमा महिला वा पुरुष उल्लेख भैसकेका नागरिकतामा समेत संशोधन गर्न सकिने फैसला गरेको छ ।[१२]

तर अदालतको फैसलापछि बनेका पछिल्ला कानून हेर्ने हो भने तेस्रो लिङ्गीका प्रश्नमा कानूनहरू त्यति उदार देखिँदैनन् । मुलुकी अपराधसंहिता, २०७४ मा लिङ्गको आधारमा भेदभाव नगर्ने[१३] र लिङ्गको आधारमा लिङ्ग पहिचान गरी गर्भपतन गराउन नपाउने[१४] व्यवस्था छ । यद्यपि यो संहिताले तेस्रो लिङ्गीका सम्बन्धमा धेरै व्यवस्था गरेको पाइँदैन र उदार पनि देखिँदैन । मुलुकी देवानी संहिता, २०७४ मा प्रत्येक नागरिक कानूनको दृष्टिमा समान हुने र कुनै पनि नागरिकलाई कानूनको संरक्षणबाट बञ्चित नगरिने[१५] लिङ्गको आधारमा भेदभाव गर्न नपाइने[१६] कुराको सुनिश्चितता गरिएको छ । यौनिक तथा लैङ्गिक अल्पसंख्यकहरूको सशक्तीकरण र विकासका लागि कानूनबमोजिम

10 नेपालको संविधान (२०७२) मौलिक हकको धारा १८ र ४२

11 नेपालको संविधान (२०७२), राज्यका निर्देशक सिद्धान्त र नीतिहरू धारा ५० र ५१

12 मिति २०७३ माघ १० गते गरेको परमादेश (070-wo-0287) फैसला

13 मुलुकी अपराध (संहिता) ऐन, २०७४, दफा १६०

14 मुलुकी अपराध (संहिता) ऐन, २०७४, दफा १८८ को उपदफा ७

15 मुलुकी देवानी (संहिता) ऐन, २०७४, दफा १७

16 मुलुकी देवानी (संहिता) ऐन, २०७४, दफा १८

विशेष व्यवस्था गरिएकोमा भेदभाव गरेको नमानिने[१७] भन्ने कुरालाई प्रष्टसँग राखिएको छ । यस्ता केही सकारात्मक व्यवस्था भए पनि देवानी संहिताको विवाह सम्बन्धी व्यवस्था तेस्रो लिङ्गीको प्रश्नमा त्यति उदार देखिँदैन । यो संहिताले कुनै महिला र पुरुषले गरेको विवाहलाई मात्र विवाह मानेको छ ।[१८] तर सोही संहितामा प्रत्येक व्यक्तिलाई कानूनको अधीनमा रही विवाह गर्ने, परिवार कायम गर्ने तथा पारिवारिक जीवनयापन गर्ने स्वतन्त्रता हुनेछ[१९] भन्ने कुरा उल्लेख हुनुले तेस्रो लिङ्गी बीच विवाह हुने वा नहुने भन्ने सम्बधमा स्पष्ट देखिँदैन । यसैगरी महिला र पुरुष बीच विवाह भएमा मात्र पति पत्नी मानिने[२०] सम्बन्ध विच्छेद भएको महिलाको मृत्यु भएमा सम्पत्ति छोराछोरीले पाउने[२१] (तेस्रो लिङ्गीले नपाउने संभावना रहेको) जस्ता व्यवस्थाहरू मानव अधिकारमैत्री छैनन् । समलिंगी विवाहको प्रश्नमा कानून अनुदार छ । यता कानूनमा समलिंगी विवाह सम्बन्धमा स्पष्ट व्यवस्था नभए पनि डडेल्धुराको परशुराम नगरपालिकाले समलिंगी विवाह दर्ता गरेको भन्ने समाचार प्रकाशित भएको छ । राज्यका निकायहरूमा नै यस्ता विरोधाभाषपूर्ण व्यवहार र कानूनले गर्दा समलिंगी विवाह सम्बन्धमा राज्यका निकायहरू अन्यौलमा नै रहेको देखिन्छ ।[२२]

निलहीरा समाजले निकालेको एक तथ्यांक अनुसार २०६४ सालदेखि हालसम्म १७० जनाले महिला पुरुष बाहेक अन्य समूह खुलाई नागरिकता लिएका छन् । यो अन्य समूह भनेको तेस्रो लिङ्गी समूह हो । गत संविधानसभाको निर्वाचनका लागि संकलन गरिएको मतदाता नामावलीमा १६७ जना यौनिक तथा लैङ्गिक अल्पसंख्यक समुदायका नागरिकको नाम मतदाता सूचीमा सूचीकृत गरिएको थियो । [२३] यसरी एकातिर संविधान र राज्यका कतिपय निकायहरूले महिला र पुरुष बाहेक अर्को लिङ्ग पनि छ भनेर स्वीकार गर्ने अर्कातर्फ कानूनहरू निर्माण गर्दा नागरिक भनेका महिला र पुरुष मात्र हुन्छन् भन्ने परिकल्पना गर्नु आफैँमा विरोधाभाष देखिन्छ ।

(क) सर्वोच्च अदालतको २०६४ साल पौष ६ को फैसला

तेस्रो लिङ्गीहरूको प्रश्नमा नेपालको सर्वोच्च अदालतले २०६४ साल पौष ६ गते गरेको फैसलालाई नेपालमा मात्र नभएर विश्वकै समलिङ्गी/तेस्रोलिङ्गीहरूको अधिकारको इतिहासमा कोशेढुंगा मानिन्छ । सो फैसलामा सर्वोच्च अदालतले तेस्रो लिङ्गीहरूलाई आफ्नो पहिचान अनुसार नागरिकता दिनू भनी

17 मुलुकी देवानी (संहिता) ऐन, २०७४, दफा १९
18 मुलुकी देवानी (संहिता) ऐन, २०७४, दफा ६७
19 मुलुकी देवानी (संहिता) ऐन, २०७४, दफा ६९
20 मुलुकी देवानी (संहिता) ऐन, २०७४, दफा ८५
21 मुलुकी देवानी (संहिता) ऐन, २०७४, दफा १०३
22 १५ साउन, २०७४, अन्नपूर्ण पोष्ट
23 ३१ असार , २०७५, नेपाल समाचारपत्र

सरकारका नाममा परमादेश जारी गरेको छ । यसैगरी सर्वोच्चको सो परमादेशमा समलिङ्गीहरूको वैवाहिक सम्बन्धमा मानव अधिकार सम्बन्धी दस्तावेज, विश्वमा विकास भएका यससम्बन्धी नवीन मान्यताहरू, समलिङ्गी विवाहलाई मान्यता प्रदान गर्ने देशहरूको अनुभव र त्यसले समाजमा पार्ने प्रभावका बारेमा अध्ययन गर्न आवश्यक भएकाले एक समिति गठन गरी सोही समितिले दिएको रायसुझावको आधारमा कानूनी व्यवस्था गर्नु भनिएको छ । यसरी अदालतले युगान्तकारी निर्णय गरिसक्दा पनि तेस्रो लिङ्गीहरूले आफ्नो वास्तविक पहिचान अनुसार नागरिकता नपाउनु चाहिँ बिडम्बनापूर्ण नै देखिन्छ । सर्वोच्च अदालतले मिति २०६४ साल पौष ६ गते गरेको आदेश (फैसला) यौनिक तथा लैंगिक अल्पसंख्यकका अधिकारका सम्बन्धमा अति महत्त्वपूर्ण छन् । यसको सारसंक्षेप निम्न रहेको छ :-[२४]

- संविधानमा महिला र पुरुष भन्ने उल्लेख नभई लिङ्ग भन्ने शब्द मात्र उल्लेख भएमा यसले महिला पुरुष लगायत तेस्रो लिङ्गीलाई समेत समेट्न सक्ने ।
- संविधानमा महिला र पुरुष दुई लिङ्ग मात्र उल्लेख हुँदैमा संविधानका मौलिक हकहरू वा अन्य कानूनी हकहरू वा नेपालले हस्ताक्षर गरेको मानव अधिकार सम्बन्धी विभिन्न महासन्धि वा मानव अधिकारहरू महिला र पुरुषले मात्र उपभोग गर्न पाउँछन् भन्ने अर्थ गर्न मिल्दैन ।
- महिला र पुरुष वाहेकका तेस्रो प्रकारको लैङ्गिक पहिचान र यौन अभिमुखीकरण भएको व्यक्ति पनि नेपाली नागरिक एवम् प्राकृतिक व्यक्ति भएको कारण उनीहरूले पनि आफ्नै पहिचानमा संविधान, कानून र मानव अधिकार सम्बन्धी सन्धि, महासन्धिहरूले दिएका सम्पूर्ण हकहरू उपभोग गर्न पाउनुपर्दछ । त्यस्तो हकको उपभोग गर्न पाउने वातावरण सिर्जना गर्ने र सो अनुसारको कानूनी व्यवस्था गर्ने दायित्व राज्यको हो । फरक लैङ्गिक पहिचान र यौन अभिमुखीकरण भएको कारण ती हकहरू उपभोग गर्न नपाउने वा महिला वा पुरुष भएमात्र ती हकहरू उपभोग गर्न पाउने भन्ने अर्थ गर्न मिल्दैन ।
- LGBTI हरूले आफ्नो पहिचानको अधिकार (Right to have one's own identity) को आधारमा विना भेदभाव आफ्नै पहिचान सहित नेपाल कानूनले दिएको हकहरू अरु सरह निर्वाध रुपमा उपभोग गर्न पाउनुपर्ने देखिन्छ ।
- वर्तमान सम्पत्तिसम्बन्धी कानून, नागरिकता लगायत व्यक्तिगत पहिचानसम्बन्धी कानून, विवाहसम्बन्धी कानून लगायतका विभिन्न कानूनहरू पुरुष एवम् महिला केन्द्रित (Male

24 संवत् २०६४ सालको रिट नं ९१७, निर्णय नं. ७९५८, ने.का.प. २०६५, अङ्क ४

and Female Sex Specific) रहेका देखिन्छन् । यस्ता कानूनले महिला र पुरुष वाहेक अन्य व्यक्तिको कुनै अस्तित्व नै मानेको देखिदैन । आफ्नै पहिचान कायम राखी मौलिक हक र स्वतन्त्रताको उपभोग गर्न नपाउने कानूनलाई भेदभावकारी कानून मान्नु पर्दछ ।

- संविधानले दिएको स्वतन्त्रता प्रत्येक व्यक्तिलाई हो । व्यक्ति भन्नाले प्रत्येक प्राकृतिक व्यक्ति (Natural person) लाई जनाउँछ । LGBTI पनि प्राकृतिक व्यक्ति (Natural person) भएको कारण उनीहरूले समाजमा ती सबै स्वतन्त्रताहरूको उपयोग गरी सम्मानपूर्वक बाँच्न पाउनु पर्दछ ।
- स्वतन्त्रता सबै नागरिक, सबै व्यक्तिलाई समानताको आधारमा Right to have one's own Identity को रुपमा प्राप्त हुन्छ । तर भेदभावकारी वा स्वेच्छाचारी कानून बनाउँदैमा भने यस्तो स्वतन्त्रता अपहरण हुन सक्दैन ।
- LGBTI अल्पसंख्यक भए पनि नेपाली नागरिक भएको कारण आफ्नै पहिचानमा ती हकहरू उपभोग गर्न पाउने उनीहरूको मौलिक अधिकार हो । राज्यले बनाउने नीतिहरूबाट आफ्नै पहिचानमा लाभान्वित हुन पाउने उनीहरूको हक हो ।
- कानूनको अगाडि व्यक्तिको रुपमा मान्यता प्राप्त भएपछि अरु कुनै कारणले व्यक्तिका मौलिक मानव अधिकार उपभोगमा संकुचन हुन सक्दैन । स्वतन्त्र सहमतिबाट विवाह गर्ने, परिवार आरम्भ गर्ने, गोपनीयतामा हस्तक्षेप नगरिने, जाति, वर्ण, भाषा, धर्म, राजनीतिक वा अन्य विचार, राष्ट्रिय वा सामाजिक उत्पति, जन्म वा अन्य हैसियतका आधारमा कुनै प्रकारको भेदभाव नगरिने भनी उल्लिखित अभिसन्धिले प्रत्याभूत गरेका अधिकारको समानरुपमा उपभोग गर्न पाउने हक LGBTI हरू लाई पनि स्वभाविक रुपमा प्राप्त छ ।
- LGBTI हरूमा अरु स्वभाव सामान्य हुन्छ । केवल sexuality मा मात्र पुरुष या महिला जस्तो विपरीत लिङ्गीप्रति आकर्षित नहुने, पोशाक पहिरन आदि भिन्न खालको लगाउने कारणले मात्र ती व्यक्तिहरू मौलिक हक उपभोग गर्नबाट वञ्चित हुनु हुँदैन ।
- पुरुष वा महिलाको लिङ्गीय पहिचान (जनेन्द्रीय) भएका कारण यी व्यक्तिहरू महिला वा पुरुष मानिए । यसरी महिला र पुरुष भनी स्पष्ट पहिचान भएका व्यक्तिहरूलाई चाही मौलिक हक उपभोग गर्नमा कुनै बाधा देखिदैन । तर, लैङ्गिक पहिचानका दृष्टिले स्पष्ट रुपमा महिला र पुरुष भनी चिनिएका वाहेकका तेस्रो लिङ्गीहरूलाई चाही मौलिक हक उपभोग गर्नमा बाधा पर्ने खालका संवैधानिक तथा कानूनी व्यवस्था हुनु उपयुक्त हुँदैन ।
- यस्ता व्यक्तिहरूले हाम्रो संविधानको मौलिक हक र नेपालले हस्ताक्षर गरी नेपाल कानून

सरह लागू भएका मानव अधिकारसम्बन्धी विभिन्न महासन्धिहरूले दिएको अधिकार आफ्नै पहिचानमा उपयोग गर्न नपाउने कानूनी व्यवस्था छ भने त्यस्तो व्यवस्थालाई स्वेच्छाचारी (Arbitrary), आधारहीन (Unreasonable) र भेदभावयुक्त (Discriminatory) मान्नु पर्ने हुन्छ र त्यस्तो कानून कार्यान्वयन गर्ने राज्यको कार्य पनि Arbitrary, Unreasonable र Discriminatory नै मान्नु पर्दछ ।

- महिला र पुरुष बाहेक अन्य तेस्रो लिङ्गी लगायतका व्यक्तिहरूलाई यौन अभिमुखीकरण (Sexual Orientation) का आधारमा भेदभाव गर्न मिल्दैन । राज्यले महिला र पुरुष बाहेकका तेस्रो लिङ्गी प्राकृतिक व्यक्ति नागरिकहरूको अस्तित्वलाई स्वीकार गरी उनीहरूलाई पनि संविधानको मौलिक हकहरूबाट वञ्चित गर्न सक्दैन ।

(ख) सर्वोच्च अदालतको २०७३ साल माघ १० गतेको दोस्रो फैसला

तेस्रो लिङ्गीहरूको नागरिकताको प्रश्नमा नेपालको सर्वोच्च अदालतले २०७४ सालमा दोस्रो फैसला गऱ्यो । जसको सारसंक्षेप निम्न बमोजिम छ :-[२५]

- कुनै पनि व्यक्तिले आफ्नो पहिचानसहितको आत्मसम्मानपूर्वक बाँच्न पाउनु निजको आधार भूत मानव अधिकारको विषय हो । यस्तो अवस्थामा फरक लैङ्गिक पहिचान र यौन अभिमुखीकरण भएका व्यक्तिहरूले पनि आफ्नो स्वतन्त्र पहिचानसहित आत्मसम्मानपूर्वक बाँच्न पाउनु निजको मानव अधिकार तथा संवैधानिक हक हुने ।

- कुनै पनि व्यक्तिले आफ्नो स्वअनुभूति अनुसारको लैङ्गिक पहिचान हासिल गर्नँ निजको नितान्त वैयक्तिक आत्मनिर्णयको अधिकारअन्तर्गतको विषय हो । यसमा अरू व्यक्ति समाज राज्य वा कानूनले जैविक लिङ्ग के हो भनी निर्धारण गर्नँ सान्दर्भिक हुँदैन । मानिसको स्वतन्त्रता प्रतिष्ठा र आत्मसम्मानमा चोट पुऱ्याउने खालका कुनै पनि व्यवस्थाहरू मानव अधिकारको दृष्टिकोणबाट समेत मान्य हुन नसक्ने ।

- संविधान, नेपाल नागरिकता ऐन, २०६३, नेपाल नागरिकता नियमावली, २०६३ तथा यौनिक तथा लैङ्गिक अल्पसंख्यक समुदायका व्यक्तिहरूलाई लिङ्गको महलमा अन्य जनाई नागरिकता जारी गर्नेसम्बन्धी निर्देशिका, २०६९ समेतले तेस्रो लिङ्गीको अस्तित्वलाई स्वीकार गरी त्यस्ता समुदायको हक अधिकारप्रति प्रतिबद्धता जनाई सकेको अवस्थामा आफ्नो यौनिक पहिचान नै थाहा नभएको अवस्थामा जैविक अंगको आधारमा प्राप्त गरेको नागरिकता

25 सुनिलबाबु पन्तसमेत विरूद्ध नेपाल सरकार, प्रधानमन्त्री तथा मन्त्रिपरिषद्को कार्यालय, सिंहदरबार काठमाडौं समेत (ने. का.प. २०७४ अंक ९)

प्रमाणपत्र संशोधन गरी आफ्नो वास्तविक लैङ्गिक पहिचानसहितको नागरिकता प्रमाणपत्रमा संशोधन गर्न मिल्दैन भन्नु लैङ्गिक अल्पसंख्यक समुदायका व्यक्तिहरूको अस्तित्व स्वीकार गर्नबाट इन्कार गर्नं समान हुने ।

- लैङ्गिक अल्पसंख्यक समुदायहरू आफ्नो वास्तविक पहिचानभन्दा फरक परिचयपत्रका साथ रहन पर्दा आत्मसम्मानमा चोट पुग्नुका साथै सामुदायिक अपनत्वलाई समेत कमजोर तुल्याउने हुन्छ । आफ्नो अनुभूतिभन्दा फरक रूपमा आफ्नो परिचय लुकाई त्रासपूर्ण तथा अदृश्य जीवन जीउन बाध्य पार्नं यौनिक अल्पसंख्यकहरूको मानव अधिकारको उल्लङ्घनसमेत हुन जाने ।
- कतिपय अवस्थामा आफ्नो लैङ्गिक पहिचान ढिलो गरी मात्र थाहा पाउने र व्यक्त गर्न सक्ने हुँदा यस्तो अवस्थामा पहिले शारीरिक जैविक अंगको आधारमा पाएको नागरिकता प्रमाणपत्रमा संशोधन गर्न पाउने अधिकार कानूनतः सुरक्षित गर्नुपर्ने ।

७. अधिकारको प्रश्न

संयुक्त राष्ट्र संघले यौनिक तथा लैङ्गिक अल्पसंख्यकका अधिकारहरू भनी छुट्टै कुनै विशिष्ट अधिकार हरूको दस्तावेज घोषणा गरेको पाइँदैन । तथापि योग्यकर्ता सिद्धान्तलाई नै यो समुदायको महत्त्वपूर्ण अन्तर्राष्ट्रिय दस्तावेजको रुपमा स्वीकार गरिसकिएको छ । मानव अधिकारको आधारभूत सिद्धान्त, मूल्य मान्यताहरूको विकासक्रम र मानिसका आधारभूत मानव अधिकारको संरक्षण र संबर्द्धन गर्दै जाने अभियानमा समाजमा उपेक्षित, अपहेलित, बहिष्कृत रुपमा रहेका अल्पसंख्यक यौनिक तथा लैङ्गिक अल्पसंख्यक समुदायका अधिकारहरू पनि संरक्षण र संबर्द्धन गरिनुपर्दछ भन्ने कुरामा अब कुनै दुविधा रहनु हुँदैन । उनीहरू पनि मानव हुन् र मानिसका सर्वाङ्गिण विकासका लागि स्थापित र विकसित मानव अधिकार यौनिक तथा लैङ्गिक अल्पसंख्यक व्यक्तिहरूका हकमा पनि लागू हुन्छ र हुनुपर्दछ भन्ने मान्यताको विकास पछिल्लो समयमा भएको छ । सोही अनुरुप मानव अधिकारको घोषणापत्र, महासन्धि, अभिसन्धि तथा अन्य विकसित दस्तावेजहरूमा यौनिक तथा लैङ्गिक अल्पसंख्यक व्यक्तिहरूको हक अधिकारलाई मान्यता दिँदै उनीहरूलाई पनि समेटेर मानव अधिकारको व्याख्या गर्न थालिएको छ । यौनिक तथा लैङ्गिक अल्पसंख्यक अधिकारका विषयहरू ज्वलन्त बनेर उठेका हुन् । त्यसैले अब यौनिक तथा लैङ्गिक अल्पसंख्यकका अधिकारहरू पनि मानव अधिकारकै अवधारणा र प्रयोगमा खोजिनु पर्दछ । मानव अधिकारको विश्वव्यापी घोषणापत्र, १९४८ ले मानव परिवारका सबै सदस्यहरूमा अन्तर्रनिहीत मर्यादा तथा सम्मानलाई अहरणीय अधिकारको रुपमा मान्यता दिँदै स्वतन्त्रता र न्याय, शान्तिको आधार भएको कुरा उल्लेख गरको छ । मानव अधिकारहरू विश्वव्यापी, नसैर्गिक, अहरणीय, अन्तरसम्बन्धित तथा स्वतन्त्र हुन्छन् । यसै पृष्ठभूमिमा हर्ने हो भने हरेक

व्यक्तिका आफ्ना यौन अभिमुखीकरण र लैङ्गिक पहिचान हन्छन् । यी पहिचान र अभिमुखीकरणलाई हरेकले सामाजिक कुराको जानकारी हुँदाहुँदै प्रस्तुत गरिरहेका हुन्छन् ।

जब कुनै व्यक्तिका यौन अभिमुखीकरण तथा लैङ्गिक पहिचान ऊ बसेको समाज तथा उसका संस्कृतिको परम्परागत रुपले स्थापित मूल्य मान्यता र स्तरसँग बेमल हुन्छ तब उक्त व्यक्तिलाई बारम्बार भेदभाव र शोषणको वैधानिक निशाना बनाउने गरेको पाइन्छ । यौन अभिमुखीकरण तथा लैङ्गिक पहिचानका कारणबाट संसारमा लाखौं व्यक्तिहरू कारवाही, जेल सजाय, यातना, हिंसा र भेदभावको सामना गर्नु परिरहेको छ । यस्ता शोषण तथा भेदभावको वेवास्ता र इन्कार गर्ने जस्ता केहीका क्रियाकलापालाई मानव अधिकारको आधारभूत सिद्धान्तको बर्खिलाप भएको भनी बुझ्नुपर्दछ । किनकि, मानव अधिकारको विश्वव्यापी घोषणापत्रले उल्लेख गरेबमोजिम सबै मानिसहलाई यौन अभिमुखीकरण, लैङ्गिक पहिचान र तथा लैङ्गिक प्रस्तुति साथसाथै लिङ्ग, जातजाति, राष्ट्रियता भाषा लगायतका कुनै पनि आधारमा भेदभाव नगरी मानव अधिकारको प्राप्ति तथा हकदार बनाइनु पर्दछ । अतः यौनिक तथा लैङ्गिक अल्पसंख्यकका अधिकारहरू कुनै छुट्टै विशिष्ट खालको अधिकार नभई मानव अधिकारकै सँगालोभित्र दाबी गरिने अधिकारहरू हुन् ।[२६] त्यसैले उनीहरूलाई पनि समान व्यवहार गर्न सिक्नु पर्दछ र यौनिक तथा लैङ्गिक अल्पसङ्ख्यकहरूका अधिकार, समानता र सामाजिक भूमिकामा सुधार एवम् समानता ल्याउन सम्पूर्ण सभ्य मानवहरू ऐक्यबद्ध हुनुपर्दछ ।

पुरुषले पुरुषलाई र महिलाले महिलालाई मन पराएर सेक्स पार्टनरका रूपमा चयन गर्ने चलनलाई सम वा तेस्रोलिङ्गी भनेर बुझ्ने गरिएको छ । समलिङ्गी यौनिक तथा लैङ्गिक अल्पसंख्यक समुदायभित्र वा बाहिर कानूनतः सेक्स वा आफूखुशी विवाह गर्न पाउने कानून नेपालमा पनि छैन । नेपालको कानून र समाजले समलिङ्गी सेक्सलाई अप्राकृतिक नभने पनि यसलाई सहज रुपमा स्वीकार गरेको अवस्था छैन । यस्ता कानूनी व्यवस्थाले मानव अधिकारको मूल्य मान्यता र योग्यकार्ता सिद्धान्तको मर्मलाई आत्मसात गर्न नसकेको देखिन्छ । त्यसैले समानताको हक माग गर्दै सर्वोच्चमा परेको रिटको सुनुवाई गर्दै समलिङ्गी समुदायको पक्षमा २१ डिसेम्बर २००७ मा सर्वोच्चले सरकारलाई दिएको आदेशमा 'विभेदविरुद्धको कानूनलाई सकारात्मक बनाऊ र समलिङ्गी विवादबारे अध्ययन गरी प्रतिवेदन बुझाऊ' भनी आदेश दिएको बुझ्न सकिन्छ ।

समाजका हरेक सदस्यले बुझ्नुपर्ने कुरा यो छ कि, प्रकृतिको नियमलाई रोकेर रोकिँदैन । तेस्रालिङ्गी भनेका प्राकृतिका उपज हुन् । प्रकृतिको उपजलाई चुनौती दिनु स्वयम् हामी प्रकृतिका उपजहरूका लागि सुहाउने कुरा पनि होइन । जसरी यौनिक तथा लैङ्गिक रुपमा महिला र पुरुषको एउटै नभएर छुट्टा छुट्टै अस्तित्व छ त्यसैगरी तेस्रो लिङ्गीहरूको पनि छुट्टै यौनिक तथा लैङ्गिक अस्तित्व छ ।

26 मानव अधिकार तथा कानूनी शिक्षा तालिम पुस्तिका, ब्लु डाइमण्ड सोसाइटी, पेज ४२

यो प्रकृतिप्रदत्त अस्तित्वको अधिकारलाई कुनै पनि बहानामा खोसिनु हुन्न । यो वस्तुगत यथार्थ हुँदाहुँदै पनि नेपालमा अझै पनि तेस्रो लिङ्गीहरूको अधिकारको हनन हुन पुगेको छ । उनीहरू हेयपूर्ण व्यवहारका शिकार भएका छन्, यातना, दुर्व्यवहार, यौनहिंसा, बलात्कार, गैरकानूनी थुनाबाट पीडित भएका छन् । सामाजिक गतिविधिमा सहभागिता तथा पैत्रिक सम्पत्तिबाट बञ्चित भएको मात्र होइन स्वयम् अभिभावकको मायाबाट समेत विमुख हुनु परिरहेको छ । शैक्षिक संस्थाहरूले पनि लिङ्ग पहिचान हुने गरी सहज रुपमा स्वीकार नगरेको अवस्था छ । उनीहरूले आफ्नो लिङ्ग खुलाएर शैक्षिक प्रमाणपत्र पाउँदैनन् । रोजगारी पाउनबाट बञ्चित हुनुपर्ने, रोजगारी पाए पनि समान ज्यालाबाट बञ्चित हुनुपर्ने अवस्था छ । अपवाद बाहेक राजनीतिमा पनि तेस्रो लिङ्गीहरूको उल्लेख्य उपलब्धि पाइँदैन । मूलतः तेस्रो लिङ्गीका अधिकांश समस्याहरू समाजको उनीहरूप्रति हेर्ने संकुचित दृष्टिकोण र कानूनी रुपमा उनीहरूको पहिचान अनुसार मान्यता नपाएको कारणबाट सिर्जित देखिन्छन् ।

८. राज्यको दायित्व

राष्ट्रिय तथा अन्तर्राष्ट्रिय कानूनी तथा संवैधानिक दस्तावेजहरूमा केही सकारात्मक व्यवस्था गरिएका भए पनि व्यवहारिक रुपमा चाहिँ समाजमा यौनिक तथा लैङ्गिक अल्पसंख्यकहरू आफ्नो अधिकारबाट बञ्चित हुनु परेको स्थिति विद्यमान छ । यो अवस्थामा सुधार ल्याउन कानूनी तथा व्यवहारिक दुवै रुपमा यौनिक तथा लैङ्गिक अल्पसंख्यकहरूको मानव अधिकारको सुनिश्चितताका लागि आवश्यक व्यवस्था गरिनु पर्दछ । यस समुदायमाथि भैरहेको र हुनसक्ने मानव अधिकारको उल्लंघनको घटनामाथि उचित क्षतिपूर्तिको व्यवस्था गर्न आवश्यक कानूनहरू निर्माण गरिनुपर्दछ । सर्वोच्च अदालतको निर्णय पूर्ण रुपमा कार्यान्वयन नभएको अवस्था देखिँदा यसलाई पूर्ण रुपमा कार्यान्वयन गरिनुपर्दछ । र, सबैभन्दा महत्त्वपूर्ण कुरा समाजको उनीहरू प्रति हेर्ने पक्षपातपूर्ण दृष्टिकोणमा परिवर्तन हुनुपर्दछ र आफ्नो पहिचान खुलाएर मर्यादित रुपमा समाजमा रहन सक्ने वातावरण सिर्जना गरिनुपर्दछ । राज्यका यस्ता थुप्रै दायित्वहरू छन् तर नेपालको कानूनले राज्यको दायित्व स्पष्ट उल्लेख गरेको अवस्था छैन । योग्यकर्ता सिद्धान्तले भने राज्यको दायित्वलाई निम्न बमोजिम उल्लेख गरेको छ :-[२७]

क) यौन अभिमुखीकरण वा लैङ्गिक पहिचानसँग सम्बन्धित मानव अधिकारको उल्लंघनका घटनाहरूको उत्तरदायित्व सुनिश्चित गर्न अनुगमन संयत्रका साथै न्यायोचित, सुलभ र प्रभावकारी फौजदारी, नागरिक, प्रशासनिक तथा अन्य प्रक्रियाहरू स्थापना गर्नेछ ।

(ख) वास्तविक वा ग्रहण गरिएको यौन अभिमुखीकरणका आधारमा पीडितलाई लगाइएका सम्पूर्ण आपराधिक आरोपको शीघ्रातीशीघ्र र गहनताका साथ अनुसन्धान गरी प्रमाणहरू

27 जकार्ता सिद्धान्तको सिद्धान्त २९

फेला परेको हदसम्म कानून बमोजिम त्यस्ता जिम्मेवार व्यक्तिलाई मुद्दा चलाइएको र कारवाही गरिएको कुरा सुनिश्चित गर्नेछ ।

(ग) यौन अभिमुखीकरण वा लैङ्गिक पहिचानको आधारमा हुने भेदभावको अन्त्य सुनिश्चित गर्नका लागि कानून र नीति निर्माण र कार्यान्वयनको अनुगमन गर्ने स्वतन्त्र एवम् प्रभावकारी संस्था तथा प्रक्रियाहरूको स्थापना गर्नेछ ।

(घ) यौन अभिमुखीकरण वा लैङ्गिक पहिचानका आधारमा भएको मानव अधिकार उल्लघंनका घटनाप्रति कुनै पनि व्यक्तिलाई जिम्मवेार तुल्याउन, वाधा पुऱ्याउने कुनै पनि वाधा अड्काउलाई हटाउनेछ ।

९. निष्कर्ष

वर्षौदेखि महिला र पुरुषमा आधारित विभेदकारी सामाजिक संरचनाको कारण यौनिक तथा लैङ्गिक अल्पसंख्यक समुदाय घर, परिवार, समाज र राज्यद्वारा विभेदको शिकार हुनु परेको अवस्था छ । फरकखालको यौन अभिमुखीकरण र लैङ्गिक पहिचान भएका कारण यौनिक तथा लैङ्गिक अल्पसंख्यकहरू माथि विभिन्न प्रकारका अमानवीय व्यवहार, हत्या, हिंसा, बलात्कार जस्ता घटनाहरू दिन प्रतिदिन हुँदै आइरहेका छन् । आफ्नो लैङ्गिक पहिचान अनुसारको नागरिकता नभएको कारण तेस्रो लिङ्गीहरूलाई विभिन्न प्रकारको आरोप लगाई थुन्ने, शारीरिक तथा मानसिक यातना दिने, विभिन्न कार्यालयहरूमा प्रवेश गर्न नदिने जस्ता व्यवहार हुँदै आएका छन् ।

सर्वोच्च अदालतको तेस्रो लिङ्गी समुदायलाई आफ्नो पहिचान अनुसारको नागरिकता दिनु भनी गरेको निर्देशनात्मक आदेश पश्चात् पनि तेस्रो लिङ्गीलाई आफ्नो पहिचान अनुसारको नागरिकता दिलाउने कुरामा सरकारले सहज वातावरण बनाउन सकेको छैन । यौनिक तथा लैङ्गिक अल्पसंख्यक समुदाय अल्पसंख्यक भित्रको पनि अति सीमान्तकृत समुदाय भएका कारण यस समुदायका हक अधिकारलाई थप सुनिश्चित गर्नुपर्दछ । अन्य अल्पसंख्यक जस्तै यौनिक तथा लैङ्गिक अल्पसंख्यकहरूलाई विशेष आरक्षण, कोटा र विशेष अधिकारसहित उनीहरूको मानव अधिकार सुनिश्चित गर्नुपर्दछ । सरकारका नीति निर्माण तथा कार्यक्रमहरूमा यौनिक तथा लैङ्गिक अल्पसंख्यकहरूको प्रतिनिधित्व गराई राज्यका हरेक निकायमा यो समुदायलाई समान सहभागिता गराइनु पर्दछ ।

नेपालमा समलिङ्गी विवाहसम्बन्धी कानून छैन । त्यसैले अधिकांश समलिङ्गी विवाह गरेकाहरू लुकी छिपी बस्न बाध्य छन् । 'सेक्स पार्टनरका रूपमा सँगै बस्दै आएका महिला र महिला वा पुरुष र पुरुष साथीलाई नेपालको कानूनले विवाह गर्ने स्पष्ट स्वीकृति दिएको छैन, तर अहिले समलिङ्गी विवाहहरू भने भै नै रहेका छन् । करीब एक सय जति जोडीले औपचारिक र अनौपचारिक विवाह गरिसकेका

भन्ने कुरा तेस्रो लिङ्गी अधिकारको क्षेत्रमा काम गर्ने अधिकारकर्मीहरूले बताइरहेका छन् ।

दक्षिण अफ्रिका, फिजी, फ्रान्स, अमेरिकालगायत ११/१२ राष्ट्रले समलिङ्गी तेस्रोलिङ्गीलाई पूर्ण मान्यता दिइसकेका छन् । दक्षिण एशियामा नेपालले मात्र समलिङ्गी तेस्रोलिङ्गीलाई मान्यता दिएको छ । तर समलिङ्गी सम्बन्धलाई लिएर प्रहरी छापा र केरकार भने भैरहेको छ । उनीहरूका मुख्य समस्या भनेको नागरिकताको समस्या, प्रमाणपत्रको समस्या, शौचालय प्रयोगको समस्या, आत्मसम्मानको समस्या, समाजमा खुल्ने वातावरणको समस्या, ईच्छाविपरीत परिवारले बलजफ्ती विवाह गरिदिने समस्या प्रमुख छन् । यी समस्या सम्बोधन गर्न सकिने समस्या भएकाले राज्यले थोरै ईच्छा शक्ति देखाउनुपर्दछ ।

नेपालमा समलिङ्गी तेस्रो लिङ्गीका प्रश्नमा पछिल्लो समय केही थप ज्वलन्त बहसहरू पनि चलेका छन् । तेस्रो लिङ्गी भन्नु कति ठीक कति वेठीक हो ? के लिङ्ग पनि पहिलो, दोस्रो, तेस्रो, चौथो वा अन्य भन्ने हुन्छ ? पारलिङ्गी भने के हुन्छ ? के संविधानमा भएका व्यवस्थाहरू जस्तैः- नागरिकता, मौलिक हक, राज्यका निर्देशक सिद्धान्त र नीतिहरू, समावेशी आयोग सम्बन्धी व्यवस्था र कानूनमा भएका व्यवस्थाहरू पर्याप्त छन् छैनन् ? समलिङ्गी विवाहलाई कानूनी मान्यता दिँदा के फरक पर्दछ ? यौनिक तथा लैङ्गिक अल्पसंख्यकका बारेमा संविधानमा केही व्यवस्था भए पनि सो बमोजिम कानूनहरू किन बनिरहेका छैनन् ? किन भन्ने बहसहरू चलेका छन् । यी बहसहरूलाई निक्यौंलमा पुऱ्याउनु पनि त्यत्तिकै आवश्यक छ ।

राज्यबाट प्राप्त हुने कुनै पनि सुविधा सहुलियत तथा मानव अधिकारबाट वञ्चित यौनिक तथा लैङ्गिक अल्पसंख्यकहरूलाई राज्यका हरेक निकायमा समान अवसर उपलब्ध गराएर सम्मानपूर्ण जीवन जिउन पाउने वातावरण सिर्जना गर्नु व्यक्ति, परिवार, समाज तथा राष्ट्रको कर्तव्य हो । अधिकारको पूर्ण पत्याभूति हुन नसके पनि पछिल्लो समय यौनिक तथा लैङ्गिक अल्पसंख्यकहरूको मुद्दा विभिन्न वाधा अड्चन पार गरी सडकदेखि सदनसम्म पुग्न सफल भएको छ । यो खुसीको कुरा हो । आसा गरौँ, एक दिन उनीहरूका सबै अधिकारको प्रत्याभूति हुनेछ ।

१०. अबको बाटो

यौनिक तथा लैङ्गिक अल्पसंख्यकहरूको अधिकार सुनिश्चित गरी उनीहरूले मर्यादित जीवन यापन गर्ने वातावरण निर्माण गर्न राज्य, सरकार, नागरिक समाज, अधिकारकर्मी तथा संघसंस्थाहरूले निम्बबमोजिम कदम चाल्नुपर्दछ :-

- हरेक व्यक्तिका आआफ्नै यौन अभिमुखीकरण र लैङ्गिक पहिचान हुने हुँदा यौनिक तथा लैङ्गिक अल्पसंख्यकहरूको छुट्टै अस्तित्व (स्वपहिचान) लाई स्वीकार गर्नुपर्दछ ।

- यौनिक तथा लैङ्गिक अल्पसंख्यकहरूलाई विकृत मानसिकताको उपज भन्ने संकुचित बुझाइलाई पूर्ण रुपमा परिवर्तन गरी यो प्राकृतिक कुरा हो भन्ने कुरालाई समाजले सहज रुपमा स्वीकार गर्नुपर्दछ ।
- विपरीत लिङ्गवाद कटु सत्य होइन, कटु सत्य त समाजमा विपरीत लिङ्गीको अतिरिक्त महिला समलिङ्गी, पुरुष समलिङ्गी, दुई लिङ्गी, तेस्रो लिङ्गी र अन्तर लिङ्गी पनि हुन्छन् भन्ने कुरास्थापित हुनुपर्दछ ।
- राजनीतिमा मात्र नभएर सामाजिक जीवनका हरेक गतिविधिमा यौनिक तथा लैङ्गिक अल्पसंखयक समुदायको सहभागिता सुनिश्चित गरिनुपर्दछ ।
- मानव अधिकारको विश्वव्यापी घोषणापत्रमा उल्लिखित सबै अधिकार तथा योग्यकनर्ता सिद्धान्तले उल्लेख गरेका राज्यका दायित्वहरूलाई राज्यले अक्षरश पालना गर्नुपर्दछ ।
- नेपालको संविधान (२०७२) मा उल्लेख भएबमोजिम वंशजको अधारमा लैङ्गिक पहिचान सहितको नेपालको नागरिकता पाउने, लिङ्गका आधारमा कसैलाई भेदभाव नगरिने, लैंगिक तथा यौनिक अल्पसंख्यकका लागि कानून बमोजिम विशेष व्यवस्था गर्न सकिने, यौनिक तथा लैङ्गिक अल्पसंख्यकलाई समानुपातिक समावेशी सिद्धान्तका आधारमा राज्यका निकायमा सहभागिताको हक हुने जस्ता व्यवस्थाहरू व्यवहारमै कार्यान्वयन हुनु आवश्यक छ ।
- मुलुकी अपराधसंहिता, २०७४ मा उल्लेख भएका लिङ्गको आधारमा भेदभाव गर्न नपाइने, लिङ्ग पहिचान गरी गर्भपतन गराउन नपाउने व्यवस्थाको कार्यान्वयन हुनु आवश्यक छ ।
- मुलुकी देवानी संहिता, २०७४ मा उल्लेख गरिएका प्रत्येक नागरिक कानूनको दृष्टिमा समान हुने, कुनै पनि नागरिकलाई कानूनको संरक्षणबाट बञ्चित नगरिने, लिङ्गको आधारमा भेदभाव गर्न नपाइने, यौनिक तथा लैङ्गिक अल्पसंख्यकहरूको सशक्तीकरण र विकासका लागि कानूनबमोजिम विशेष व्यवस्था गरिएकोमा भेदभाव गरेको नमानिने जस्ता कानूनी व्यवस्थाको व्यवहारिक कार्यान्वयन हुनुपर्दछ ।
- यौनिक तथा लैङ्गिक अल्पसंख्यकहरूको अधिकारको प्रश्नमा सर्वोच्च अदालतले समय समयमा गरेका सबै फैसलाको कार्यान्वयन हुनुपर्दछ ।
- समलिंगी विवाहलाई मान्यता दिनुका साथै यौनिक तथा लैङ्गिक अल्पसंख्यकहरूका सम्बन्धमा भएका अन्तर्राष्ट्रिय कानूनी व्यवस्था र जकार्ता सिद्धान्तले उल्लेख गरेका अधिकारहरूको प्रत्याभूति हुने गरी राज्यले थप कानूनहरू निर्माण गरिनु पर्दछ ।
- यौनिक तथा लैङ्गिक अल्पसंख्यकका अधिकारहरू कुनै छुट्टै विशिष्ट खालको अधिकार नभई मानव अधिकारकै सँगालोभित्र दाबी गरिने अधिकारहरू भएको हुँदा यौनिक तथा लैङ्गिक अल्पसंख्यकका अधिकारहरू पनि मानव अधिकारकै अवधारणा र प्रयोगमा खोजिनु पर्दछ

भन्ने कुरालाई आत्मसात गर्नुपर्दछ ।

- यौनिक तथा लैङ्गिक अल्पसंख्यकहरू माथि हुने हेयपूर्ण व्यवहार, यातना, दुर्व्यवहार, यौनहिंसा, बलात्कार, गैरकानूनी थुना, सामाजिक गतिविधिबाट बञ्जित, पैत्रिक सम्पत्तिबाट बञ्चित, अभिभावकको मायाबाट विमुख, आफ्नो लिङ्ग खुलाएर शैक्षिक प्रमाणपत्र नपाउनु, रोजगारी पाउनबाट बञ्चित हुनुपर्ने, रोजगारी पाए पनि समान ज्यालाबाट बञ्चित हुनुपर्ने, नागरिकताको समस्या, प्रमाणपत्रको समस्या, शौचालय प्रयोगको समस्या, आत्मसम्मानको समस्या, समाजमा खुल्ने वातावरणको समस्या, इच्छाविपरीत परिवारले बलजफ्ती विवाह गरिदिने समस्याबाट यो समुदायलाई मुक्त गर्नुपर्दछ ।
- यौनिक तथा लैङ्गिक अल्पसंख्यक समुदाय अल्पसंख्यक भित्रको पनि अति सीमान्तकृत समुदाय भएका कारण यस समुदायका हक अधिकारलाई थप सुनिश्चित गर्दै यौनिक तथा लैङ्गिक अल्पसंख्यकहरूलाई विशेष आरक्षण कोटा र विशेष अधिकार सहित उनीहरूको मानव अधिकार सुनिश्चित गर्नुपर्दछ ।
- नेपाल सरकार, राष्ट्रिय मानव अधिकार अयोग, राष्ट्रिय समावेशी आयोगहरूले आफ्ना कार्यक्रमहरू बनाउँदा यौनिक तथा लैङ्गिक अल्पसंख्यक समुदाय लक्षित कार्यक्रमहरू निर्माण गर्नुपर्दछ ।
- नागरिक समाजले यौनिक तथा लैङ्गिक अल्पसंख्यकको अधिकारको बहसलाई अझ तीव्र पार्नुपर्दछ ।

लेखकहरूसँग अनुरोध

१. संवाहकका लागि लेख पठाउँदा नेपाली भाषामा प्रीति र अंग्रेजीमा Times New Romen वा Calibri फन्टमा टाइप भए हामीलाई सुविधा हुने थियो ।
२.लेखसँग बढीमा १०/१२ हरफमा त्यसको सार संक्षेप पनि हुनु पर्नेछ ।
३.लेख मानव अधिकारका कुनै पनि पक्षसँग सम्बन्धित हुनुपर्नेछ ।
४.लेख कम्तीमा पाँच हजार शब्दको हुनुपर्नेछ ।
५.लेख नेपाली वा अंग्रेजी भाषामा अनुसन्धानमूलक रुपमा लेखिएको हुनुपर्नेछ ।
६.संवाहकका लेखकलाई हामी प्राज्ञिक अनुसन्धानको प्रयोजनको लागि सूचीकृत गर्दछौं ।
७.लेख मौलिक हुनुपर्नेछ ।
८.लेखकको फोटोको साथै आफ्नो - (क) शैक्षिक योग्यता, (ख) हाल कार्यरत् क्षेत्र (संक्षिप्तमा), (ग) विशेष अनुभव, (घ) इमेल र (ङ) फोन नं. पनि पठाउनु हुन अनुरोध गर्दछौं । तर, लेखकले यीमध्ये कुनै कुरा प्रकाशित गर्न नरुचाउनु भएमा त्यसलाई खाली छाडिदिनु भए पनि हुनेछ ।
९.लेख पठाउने ठेगाना निम्नानुसार छ :-

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फ्याक्स मार्फत: ९७७-१-५५४७९७३,
हुलाक मार्फत: पो.ब.न. ९१८२, काठमाडौं, नेपाल
कार्यालय: राष्ट्रिय मानव अधिकार आयोग, हरिहर भवन, ललितपुर, नेपाल

आयोगका केही नयाँ प्रकाशनहरू

१. वार्षिक प्रतिवेदन, आ. व. २०७०/७१, २०७१/७२, २०७२/७३, २०७३/७४

२. विद्यालय शिक्षकहरूका लागि मानव अधिकार स्रोत पुस्तिका, २०७१

३. रणनीतिक योजना (२०१५-२०२०), २०७१, दोस्रो संस्करण २०७३, तेस्रो संस्करण २०७४

४. राष्ट्रिय मानव अधिकार आयोगको आर्थिक प्रशासनसम्बन्धी नियमावली, २०७१

५. भूकम्प (२०७२) प्रारम्भिक अनुगमन प्रतिवेदन, २०७२

६. नेपालको संविधान घोषणाअघि र पछि भएका आन्दोलनको क्रममा मानव अधिकारको अवस्था अनुगमन प्रतिवेदन, २०७२

७. राष्ट्रिय मानव अधिकार आयोगका कर्मचारीको सेवा, शर्त र सुविधासम्बन्धी नियमावली, २०७२, दोस्रो संस्करण २०७४, तेस्रो संस्करण २०७४

८. संवाहक, अङ्क-१, २०७२, अङ्क-२, २०७३, अङ्क-३, २०७३, अङ्क-४, २०७४, अङ्क-५, २०७४, अङ्क-६, २०७४, अङ्क-७, २०७४, अङ्क-८, २०७५

९. भूकम्प र मानव अधिकार, २०७३

१०. Human Rights Situation during the Agitation before and After

११. Promulgation of the Constitution of Nepal, Monitoring Report 2015

१२. राष्ट्रिय मानव अधिकार आयोगबाट भएका केही महत्वपूर्ण निर्णयहरू, २०७३

१३. Preliminary report on monitoring on Earthquake Report, 2072

१४. The NHRI Nepal joint submission for the second universal periodic review of Nepal, 2072

१५. Trafficking in Persons National Report 2013-15, 2072

१६. Selected Decision of The NHRC, Nepal vol. 1

१७. मानव अधिकार सम्वन्धी महत्वपुर्ण निर्णयहरु बर्ष १ अंक २

१८. Annual Progress Report 2072-73

१९. भूकम्प प्रभावितहरुको मानव अधिकारको अवस्था बारेमा तेस्रो अनुगमन प्रतिवेदन २०७४

२०. Trafficking in Persons National Report 2015/16

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(१) राजुप्रसाद चापागाई (+अङ्क-४)

(२) विष्णुप्रसाद तिमिल्सेना (+अङ्क-५)

(३) बिनोदकुमार वि.क. (+अङ्क- ४)

(४) डा. शङ्करकुमार श्रेष्ठ

(५) ओमप्रकाश अर्याल (+अङ्क-७)

(६) डा. हरिहर वस्ती

(७) डा. रंजीतभक्त प्रधानाङ्ग

(८) डा. श्रीप्रकाश उप्रेती (+अङ्क-७)

(९) डा. लोकनाथ भुषाल

(१०) विशाल खनाल

(११) माधव रेग्मी (+अङ्क-३)

(१२) पुष्पा पोखरेल (+अङ्क-४)

(१३) जायश्वर चापागाइ

(१४) मोहना अन्सारी

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(१५) ललितबहादुर बस्नेत

(१६) तेजमान श्रेष्ठ (+अङ्क-६)

(१७) माधवकुमार बस्नेत

(१८) सूर्यबहादुर देउजा

(१९) महेश शर्मा पौडेल (+अङ्क- ३, ५ र ८)

(२०) डा. गोविन्द सुवेदी

(२१) टेकनारायण कुंवर (+अङ्क-५)

(२२) सलिना काफ्ले (+अङ्क-६)

(२३) उदयन रेग्मी

(२४) डा. चन्द्रकान्त ज्ञवाली (+अङ्क-४)

(२५) सोम लुइंटेल (+अङ्क- ७)

(२६) लोकेन्द्र पनेरु (+ अंङ्क ८)

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(२७) मोहन बन्जाडे

(२८) संजीवराज रेग्मी (+ अंङ्क ८)

(२९) गोविन्द शर्मा वन्दी

(३०) कृष्णजीवी घिमिरे (+अङ्क- ७)

(३१) श्रीराम अधिकारी

(३२) डा. टीकाराम पोखरेल (+अङ्क-११)

(३३) डा. अश्वस्थामा खरेल (+अङ्क- ६)

(३४) शोभाकर बुढाथोकी (+अङ्क-११)

(३५) रेवतीराज त्रिपाठी (+अङ्क-९)

(३६) नवराज थपलिया

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(३८) रामकान्त तिवारी (+अङ्क- ६)

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(३९) सुदर्शन रेग्मी

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(४१) कैलाशकुमार शिवाकोटी (+ अङ्क ८)

(४२) डा. महेन्द्रजंग शाह

(४३) शारदा तिमिल्सेना

(४४) शिवप्रसाद पौडेल

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(४६) सोम निरौला

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(४७) राष्ट्रिय जेष्ठ नागरिक महासंघ

(४८) लिप्तबहादुर थापा

(४९) भक्त विश्वकर्मा

(५०) ऋषिकेश वाग्ले (+अङ्क-९)

(५१) डा. हरिवंश त्रिपाठी

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(५२) डा. नारायणप्रसाद घिमिरे

(५३) कोषराज न्यौपाने

(५४) वीरबहादुर बुढा मगर

(५५) श्यामबाबु काफ्ले (+अङ्क-७)

(५६) बुद्धिनारायण श्रेष्ठ

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(५८) सूर्यप्रसाद पराजुली (+अङ्क-९)

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(५९) बेद भट्टराई

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(६०) प्रा.डा. श्रीरामप्रसाद उपाध्याय

(६१) नवराज सापकोटा (+अङ्क-११)

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(६२) बसन्त अधिकारी

(६३) इन्दु तुलाधर

(६४) शिवप्रसाद पौडेल

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(६५) बलराम राउत

(६६) केशवप्रसाद चौलागाईं

(६७) अर्जुन विश्वकर्मा

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