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**Right to Food:  
Theory and Practice in the Context of Nepal**

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# Need of Legislation to Ensure Right to Food

The main duty of every government is to ensure the condition where every citizen can afford to feed themselves and their families. The right to food has been accepted as a basic human right and was recognized by Universal Declaration of Human Rights (UDHR); however, it is unfortunate that the larger global population of the world has not been able to enjoy this basic right.

Nepal is an agrarian-based economy. The agriculture is providing livelihood for three-fourth of the population. The low agricultural productivity and traditional methods of farming have left many districts food deficient. Nepal's dependency on imported food grains has significantly increased over the past few years because food production has gone down. Nepal's agriculture represents the largest sector of the economy and contributes almost 82% of the export, however, the agricultural production has been in relative decline since early 80's and the share of agricultural in the Gross Domestic Product (GDP) has fallen sharply in the recent years.

Food and Agriculture Organization (FAO) report states that in excess of 850 million people in the world suffer from hunger and that the Millennium Development Goal of reducing that number by 2015 will not be met without stronger commitment. In our context the various data show that about six million of Nepal's population are undernourished. Half of the children under the age of five are suffering from malnutrition. These all situation have been caused due to the insufficient consumption of food, vulnerability to natural disaster, limited excess of food in the market due to poverty, constrains in food supply among other reasons.

As we know that the right to food is the basic fundamental human right which is directly related to the right to life. This right has been recognized by Universal Declaration of Human Rights as part of the right to an adequate standard of living. The right to adequate food is also enshrined in international human rights treaties such as International Covenant on Economic, Social and Cultural Rights 1966. It has also been recognized in specific international instruments such as the Convention on the Rights of the Child 1989, Convention on the Elimination of all forms of Discrimination Against Women 1979 and the Convention on the Rights of Persons with Disabilities 2007. Nepal is a State party to all the major international human rights treaties and moreover the human right to food for the citizens is also provided in the Interim Constitution 2007.

Dalits, indigenous people and other marginalised groups are still landless and living in extreme poverty and malnutrition. The disparity in the society needs to be reduced while equitable distribution of the welfare scheme should be ensured in the country. Oliver De Schutter, United Nations Special Rapporteur on the right to food argues that "people are hungry not because there is too little food: they are hungry because they are marginalized economically and powerless politically. Protecting the right to food through adequate institution and monitoring mechanisms should therefore be a key part of any strategy against hunger."

Right to food is already justiciable in a number of countries and there is a fundamental principle in international human rights law whereby everyone has the right to an appropriate "effective remedy" when his/her right or rights have been violated. The development of national development policies and programs in Nepal is the mandate of Nepal's National Planning Commission (NPC). The NPC must approve any related policy framework before development program can be implemented. People's right to food in Nepal has been grossly violated in the absence of adequate legislation and policies. It is necessary to raise the awareness on the right to food and legislative action is needed to ensure that the law of the land adequately reflects the right to food and the obligation of all branches of the State to uphold it.



# Right to Food: Translating Justiciability Theory into Practice in Nepal

## 1. Background

The right to food has been accepted as a basic human right. However, the large global population has not been able to enjoy this basic right. The number of undernourished persons in the world in 2011-2013 was predicted to be 842 million constituting 12 percent of the

undernourished.<sup>2</sup> Millions of Nepali people, thus, have remained outside the ring regarding the enjoyment of basic human right to food.

2014 marks 10 years since the adoption of the “FAO Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Secu-

in the Interim Constitution of Nepal, 2007<sup>4</sup> and the debate is very intense in its faith in the upcoming Constitution; and on the other, around 25.16 percent population of the country live below poverty level.<sup>5</sup> Still more than 60 percent of children in Humla and Bajhang are malnourished.<sup>6</sup> So, without addressing the right to food of those poverty stricken people, graduation of Nepal from least developed to developing country by 2022<sup>7</sup> does not seem attainable. In such context, present article has discussed on definitional and dimensional aspects of the right to food, its normative framework in international law and how it can be judicially protected in Nepali context.

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*Nepal has recognized the right to food as fundamental rights in the Interim Constitution of Nepal, 2007 and the debate is very intense in its faith in the upcoming Constitution; and on the other, around 25.16 percent population of the country live below poverty level. Still more than 60 percent of children in Humla and Bajhang are malnourished.*

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world population.<sup>1</sup> 16 percent of total population (nearly 5 million) of Nepal in that period remained

“rity” (FAO Voluntary Guidelines) by consensus in 2004.<sup>3</sup> On the one hand, Nepal has recognized the right to food as fundamental rights

## 2. Defining Right to Food

Right to food was recognized in Universal Declaration of Human Rights (UDHR), 1948.

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\* This article is based on the writer’s previous unpublished work *Justiciability of Right to Food with Reference to Nepal* for the completion of LLM in Constitutional Law and International Law, Nepal Law Campus, Faculty of Law, Tribhuvan University (TU), Nepal. Practicing Lawyer and university teacher of Law/English, Mr Shrestha holds second LLM in International Human Rights Law from University of Essex, UK and MA in English Literature from TU, Nepal. Advocate Shrestha has worked as Human Rights Officer at National Human Rights Commission, Nepal; Legal Consultant to different human rights organizations; and as Research Assistant to UN Special Rapporteur.

1. FAO <<http://www.fao.org/hunger/en/>> accessed on August 30, 2014  
2. ibid  
3. FAO <<http://www.fao.org/righttofood/news-and-events/2014-right-to-food-guidelines10/en/>> accessed on Aug 30, 2014. It is called Right to Food Guidelines in short.  
4. article 18 (3)  
5. National Planning Commission Secretariat, Central Bureau of Statistics, *Poverty in Nepal: Nepal Living Standard Survey* (2011), 13  
6. UNDP, *Nepal Human Development Report 2014*, 22  
7. National Planning Commission, Nepal <[www.npc.gov.np](http://www.npc.gov.np)> accessed on September 3, 2014

After nearly two decades, it was enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966. Former UN Special Rapporteur on Right to Food (SRRF) has developed comprehensive definition of the right to food as:

[T]o have regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear.<sup>8</sup>

For enjoying the right to food, one has to be able to live a dignified life that is free of any sort of fears.<sup>9</sup> The Committee on Economic, Social and Cultural Rights (ESCR Committee) elaborates that the right to food includes three main components—availability, accessibility, and adequacy of food for individual all the time in sustainable manner consistent with the cultural acceptability of consumer.<sup>10</sup> Sustainability is equally necessary as that of availability, accessibility and adequacy<sup>11</sup> for realization of this right.

In order to ensure food availability, it first requires that food security be achieved at national level. The Universal Declaration on the Eradication of Hunger and Malnutrition Conference declares as “Every man, woman and child has the inalienable right to be free from hunger and malnutrition in order to develop fully and maintain their physical and mental faculties.”<sup>12</sup> Menezes defines food security as “the guarantee that everyone has permanent access to good quality food in sufficient quantities, based on healthy eating habits and without adversely affecting access to neither other essential needs nor the future food system, which should be implemented on sustainable bases.”<sup>13</sup> Food security means there should not be scarcity of food and people

that are still vulnerable to food insecurity. Adequacy requires that appropriate attention be paid to the nutritional dimensions of the right to food. And the food systems must be sustainable. Satisfying current needs should not be at the expense of the country’s ability to meet future needs.

Human rights related to food have three dimensions— food sovereignty, food security and right to food<sup>14</sup>. Food sovereignty is political concept; food security is a technical aspect and right to food is considered as a legal concept<sup>15</sup>. ‘Food sovereignty’, a rather young terminology, which “is a political concept”<sup>16</sup>, originally coined by members of Via Campesina in 1996 to refer to a policy framework advocated by a number of farmers, indigenous peoples and oth-

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should not lose lives because of this situation.

Food accessibility needs to be addressed through policies aimed at the areas and populations

ers, namely the claimed “right of peoples to define their own food, agriculture, livestock and fisheries systems”<sup>17</sup>, in contrast to having food largely subject to internation-

8. Report by the Special Rapporteur on the right to food, Mr. Jean Ziegler, submitted in accordance with Commission on Human Rights resolution 2000/10; UN Doc. E/CN.4/2001/53, para 14; See also UN Doc and A/56/210. Jean Ziegler, Christophe Golay, Claire Mahon and Sally-Anne Way. *The Fight for the Right to Food: Lesson Learnt (International Relations and Development Series*, (Palgrave, 2011) p 15.
9. See ‘The Four Freedoms’ speech by F.D. Roosevelt, delivered on 6 January 1941 to the United States Congress.
10. The Committee on Economic, Social and Cultural Rights in its General Comment No. 12 para 8 to 13
11. Olivier De Schutter. Concluding Observations and Conclusions of the Mission to the People’s Republic of China of Special Rapporteur on Right to Food, 2010 <[www2.ohchr.org/english/issues/food/index.htm](http://www2.ohchr.org/english/issues/food/index.htm)> accessed on Dec. 10, 2011
12. Adopted on 16 November 1974 by the World Food Conference convened under General Assembly resolution 3180 (XXVIII) of 17 December 1973; and endorsed by General Assembly resolution 3348 (XXIX) of 17 December 1974 <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/EradicationOfHungerAndMalnutrition.aspx>> accessed on September 12, 2014
13. Francisco Menezes, ‘Food Sovereignty: A vital requirement for food security in the context of globalization’ (2001) *Development* 44 (4) 30
14. Constituent Assembly of Nepal, *Preliminary Report and Concept Notes of the Constituent Assembly, Committee on Fundamental Rights and Directive Principles of the State* (2010) 292
15. *ibid*
16. *ibid*
17. Via Campesina, November 11-17, 1996 in Rome, Italy <<http://www.voiceoftheturtle.org/library/1996%20Declaration%20of%20Food%20Sovereignty.pdf>> accessed on November 11, 2011



al market forces.

Food sovereignty entails the sustainable care and use of natural resources.<sup>18</sup> It reaffirms that “food is first and foremost a source of nutrition and only secondarily an item of trade.”<sup>19</sup> Thus, food sovereignty primarily perceives food as the sovereign good for survival only then as the commodity.

To sum up, right to food is the right of every person to have continuous access to the resource necessary to produce, earn or purchase enough food ensuring good health and well-being and living a dignified life. For that the food must be available, accessible, ade-

quate and culturally acceptable and it should be in sustainable manner. prevent individuals from accessing food. The obligation to respect the right to food “is effectively a negative obligation, as it entails limits on the exercise of State power that might threaten people’s existing access to food.”<sup>20</sup> Violations of the obligation to respect would occur by the arbitrariness of the government such as eviction of the people who are primarily dependent on their land from it.

The obligation to protect the right to food requires that States ensure enterprises and private individuals do not deprive individuals of their right to access adequate food<sup>21</sup>. Maastricht

fulfill is the requirement that most closely approximates the obligation provided in the ICESCR.<sup>23</sup> The State party has to take steps up to the maximum of their available resources, with a view to progressively ensuring the full realization of the right to food for everyone through all appropriate means, including, in particular the adoption of legislative measures.

### ***B. Beyond Progressive Realization***

Recognition of right to food obliges the States to take steps, to the maximum of its available resources, to progressively realize the full enjoyment of right of every person to adequate food. It is not possible to meet the claim at once as the State may not have sufficient resources. The State keeps on fulfilling according to the available resources<sup>24</sup>. As the ESCR Committee asserts that State has an obligation “to move as expeditiously and effectively as possible towards that goal”<sup>25</sup> and that the steps taken by the State should be “deliberate, concrete and targeted as clearly as possible”<sup>26</sup> for fulfilling the obligations recognized in the Covenant, States are required to take deliberate and concrete steps utilizing its full capacity. Even when the available resources are demonstrably inadequate, State has to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.

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*The obligation to protect the right to food requires that states ensure enterprises and private individuals do not deprive individuals of their right to access adequate food. Maastricht Guidelines provides that State failure to control the behaviour of non-state actors results into the deprivation of socio-economic rights. This obligation requires that states implement a legislative and institutional framework and a legal system which are appropriate for the protection of the right to food.*

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quate and culturally acceptable and it should be in sustainable manner.

### ***A. Obligations to Respect, Protect and Fulfill***

The obligation to respect the right to food is essentially an obligation to refrain from action. It implies the obligation of States to refrain from taking measures that

Guidelines provides that State failure to control the behaviour of non-state actors results into the deprivation of socio-economic rights.<sup>22</sup> This obligation requires that States implement a legislative and institutional frameworks and legal systems which are appropriate for the protection of the right to food.

Finally, the obligation to

18. *ibid*

19. *ibid*

20. UN Economic and Social Council, *The right to food. Report by the Special Rapporteur for the right to food, Jean Ziegler* (March 16, 2006) <<http://www.righttofood.org/new/PDF/ECN4200644.pdf>> last accessed on February 12, 2011

21. ESCR Committee, General Comment No. 12, paragraphs 15, 27

22. Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights, para 18.

23. article 2 (1)

24. Arun Ray, *National Human Rights Commission of India* Vol. I. ( Khama Publishers. 2004) 50-51

25. General Comment No 3 para 9, The nature of States parties, obligations (Fifth session, 1999), UN Doc. E/1991/23/annex III at 86 (1991)

26. *ibid*, paras 2

States require ensuring the fundamental right of everyone to be free from hunger. According to article 11 (2) of the ICESCR, the State parties recognize to take more immediate and urgent steps to ensure the fundamental right to freedom from hunger and malnutrition.<sup>27</sup> Thus, the obligation to ensure right to be free from hunger takes immediate effect and is not subject to the standard of progressive realization all the time.

When the States do not have adequate resources, their effort must be made as best as they can with certain time limit and set benchmarks. Besides, resource constraints, right to food is a negative right; for that participation in decision making and non-discrimination for allocation of State resources are equally necessary. Thus, right to food is not necessarily the matter of progressive realization all the time.

### 3. Normative Framework of Right to Food

Rights without legal remedies do not ensure environment that is conducive for its exercise. The formulation of legal instruments in national and international level provides a legal framework for its fulfillment providing State obligations and mechanisms for accountability.

#### A. International Instruments

Despite the fact that right to food has been accepted since time immemorial in different ways, this right was explicitly covered in

international human rights law only through the UDHR, 1948. The UDHR proclaims:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food [ ... ] in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.<sup>28</sup>

Thus, the UDHR has ensured the right of the individuals to live in a dignified way both during normal situation and in situa-

of an adequate standard of living and as fundamental right to freedom from hunger. With Optional Protocol to the ICESCR entering into force<sup>30</sup> the ESCR Committee will have the capacity to exercise a central role in protecting the right to food at international level.

Underlying the concerns that in situations of poverty, women have the least access to food and resources, the Convention on Elimination of all Forms of Discrimination against Women (CEDAW), 1979 establishes the right of women to adequate nutrition during pregnancy and lacta-

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tion beyond their control. The ICESCR developed these concepts more comprehensively stressing the right of every individual to adequate food specifying the fundamental right of everyone to be free from hunger almost two decades later of formal recognition of right to food in UDHR.<sup>29</sup> Right to food incorporates multiple layers of duties of State like social security, good governance, and employment opportunity. The ICESCR recognizes the normative content of the right to adequate food as part

tion.<sup>31</sup> Similarly, the International Convention on the Rights of the Child (CRC), 1989 recognizes the right of every child to standard of living adequate for the child's physical, mental, spiritual, moral and social development.<sup>32</sup> Thus, State party has the responsibility of providing nutritious food and care for wellbeing of women and children.

To save the lives of refugees from the lack of food States are required to provide same treatment to lawful refugees in their territory

27. ESCR Committee General Comment No. 12 para 1

28. article 25(1)

29. article 11

30. Entered into force from May 5, 2013, <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&cmdsg\\_no=IV-3-a&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&cmdsg_no=IV-3-a&chapter=4&lang=en)> accessed on September 1, 2014

31. article 12

32. article 27(1)

as is accorded to their own nationals, with regard to rationing.<sup>33</sup> Thus, rights of the refugees to food have been respected and protected.

International Humanitarian Law (IHL) ensures right to food during the armed conflict. IHL prohibits the “starvation of civilians as a means of combat”<sup>34</sup> by means of destruction of objects indispensable for the civilian population, such as foodstuffs, means of production and distribution system. State parties to an armed conflict must allow humanitarian and impartial relief operations such as providing food to civilian popu-

food to ensure the right of every one to be free from hunger and malnutrition.<sup>37</sup> It also has urged developed countries to take effective and urgent action to provide with sustainable technical and financial assistance.<sup>38</sup> The Declaration, though having no binding obligation creates the common responsibility of entire international community to ensure availability of adequate food stuffs.

The World Declaration on Nutrition, 1992 recognizes access to nutritionally adequate and safe food as a right of each individual<sup>39</sup>. Instruments that most particularly

to establish appropriate safety nets for those who are unable to do so. It calls all FAO member States to actively support the progressive realization of the right to food at the national level by framing policy and legislation in line with the international norms of right to food.

### ***B. Nepali Policy in Recognizing Right to Food***

Better realization of right to food is possible when effective laws are adopted to ensure right to food as claim right. There may be specific and separate legislations or some sector-wise laws to ensure the different aspects of the right to food. Nepal does not have specific legislation to progressively realize the right to food. With the promulgation of Interim Constitution of Nepal, 2007, right to food has become the burgeoning issue in the human rights discourse.

The Constitution has guaranteed Nepali citizens the right to live a dignified life as a fundamental right.<sup>42</sup> The Constitution has not only provided right to life but also to live a life with dignity. In *Munn v. Illinois*, American Court has interpreted the term ‘life’ something more than mere animal existence.<sup>43</sup> In *Francis Coralie v. Union Territory of Delhi* as well, the Indian judiciary also has interpreted as “the right to life includes the

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lation.<sup>35</sup> Thus, IHL has provided that people should be free from hunger and starvation.

Besides conventions, there are many declarations and guidelines that also have contributed in recognizing right to food. Universal Declaration on the Eradication of Hunger and Malnutrition, 1974<sup>36</sup> explicitly recognizes State responsibility to work together for higher production and more equitable and efficient distribution of

contributed to understanding and interpreting the meaning of right to food include the 1996 Rome Declaration on World Food Security<sup>40</sup> and its Plan of Action and the Declaration of the World Food Summit Five-Years-Later in 2002.

FAO Food Guidelines<sup>41</sup> provide practical guidance to States and recommend actions to be undertaken in order to build an enabling environment for people to feed themselves in dignity and

33. The International Convention on Protection of Refugees, 1951, article 20; and Related Protocol, 1967

34. The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), article 14

35. IV Geneva Convention on the Protection of Civilian Population in Times of War, 1949 Art 55 and Additional Protocol I of the Geneva Conventions; Articles 70 and 71

36. See footnote 14

37. *ibid*

38. *ibid*, Clause 7

39. FAO <http://www.fao.org/docrep/U9920t/u9920t0a.htm> accessed on September 10, 2014

40. Rome Declaration on World Food Security, Nov 13-17, 1996 <<http://www.fao.org/docrep/003/w3613e/w3613e00.htm>> accessed on September 10, 2014

41. FAO <<http://www.fao.org/nr/tenure/voluntary-guidelines/en/>> accessed on September 8, 2014

42. The Interim Constitution of Nepal, 2007, article 12 (1)

43. Mahendra P. Singh. *VN Shukla's Constitution of India*. Delhi: Eastern Book Company. 2010, p. 192



right to live with human dignity.”<sup>44</sup> Thus, living a life without dignity may be equal to mere animal existence.

The Constitution, for the first time in Nepal, has guaranteed right to food sovereignty.<sup>45</sup> The Supreme Court of Nepal has also acknowledged right to food as a part of fundamental right guaranteed as right to food sovereignty in the Constitution.<sup>46</sup> The Constitution has also enshrined the right to employment and social security<sup>47</sup> which create enabling environment for the enjoyment of the right to adequate food. However, the Constitution has made these rights subject to the legislations. Despite this, the long journey towards recognizing right to food as fundamental rights has been materialized in Nepal with the enactment of the Interim Constitution of Nepal, 2007.

In operation, Nepal has adopted policy and programme for translating right to food. In its policy and plan of the current fiscal year 2014/15, Nepal has adopted from policies and programs numbers 15 to 24 to ensure right to food of the marginalized groups.<sup>48</sup> Thus, Nepal has not only recognized right to food constitutionally, but also has initiated to implement it into annual programme.

### *C. Emerging Jurisprudence on Justiciability of Right to Food*

The term ‘justiciability’ has been used as ability to claim before an independent and impartial body when a violation has occurred or is likely to occur. Judicial claim for violation of right to food has still been in question to some extent in comparison to the civil and political rights. According to the Vienna Declaration and Programme of Action (VDPA), 1993, all human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a

ever, with the emergence of jurisprudence of justiciability of ESC rights, the argument that the difference between the civil and political rights and ESC rights is of degree not of nature has become stronger. Courtis argues that “ESC rights are in *toto* not suitable subjects for judicial enforcement is a misguided idea”<sup>50</sup>. Thus, jurists and scholars have found grounds for justiciability of right to food along with other socio-economic rights.

The ICCPR requires State parties to “develop the possibilities of judicial remedy”<sup>51</sup>, but Langford points out that there is no equiva-

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fair and equal manner, on the same footing, and with the same emphasis.<sup>49</sup> Thus, there requires the equal treatment of all human rights despite the differences of the States in political ideology or on other grounds.

Traditionally, justiciability of socio-economic rights has been neglected in legal course. How-

ever, with the emergence of jurisprudence of justiciability of ESC rights, the argument that the difference between the civil and political rights and ESC rights is of degree not of nature has become stronger. Courtis argues that “ESC rights are in *toto* not suitable subjects for judicial enforcement is a misguided idea”<sup>50</sup>. Thus, jurists and scholars have found grounds for justiciability of right to food along with other socio-economic rights. The ICCPR requires State parties to “develop the possibilities of judicial remedy”<sup>51</sup>, but Langford points out that there is no equivalent provision in the ICESCR.<sup>52</sup> The lacking of this provision in the ICESCR “seems to have encouraged many governments and commentators to assume that traditional legal remedies such as court actions are either inappropriate or at best impracticable for the vindications of ESR.”<sup>53</sup> However, the Human Rights Council (HRC) is

44. *ibid*

45. article 18 (iii)

46. *Pro Public v. Government of Nepal*, Writ No. 065-WO-149, Supreme Court of Nepal

47. article 18

48. Policy and Programme of the Government of Nepal, 2014/15, Prog no 15-24 < [http://www.mof.gov.np/uploads/document/file/Niti%20tatha%20Karyekaram%20Nepali\\_20140629101522\\_20140724070007.pdf](http://www.mof.gov.np/uploads/document/file/Niti%20tatha%20Karyekaram%20Nepali_20140629101522_20140724070007.pdf) accessed on September 12, 2014

49. Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna on June 25, 1993 <[www.ohchr.org](http://www.ohchr.org)> accessed on September 4, 2014

50. Christian Courtis, ‘Justiciability of Right to Food’ (2007) 11, *Max Planck United Nations Year Book of Law*, 317-337

51. article 2(3)(b)

52. Malcolm Langford, ‘The Justiciability of Social Rights: From Practice to Theory’ *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*. Malcolm Langford (Ed) (CUP 2008)

53. Henry J. Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context : Law, Politics, Morals; Text and Materials* (OUP, 2007 3 edn) 313

Langford (2008) 7

close to addressing this historical imbalance.<sup>54</sup> Thus, this historical imbalance of lacking judicial remedy on violation of ESC rights has been bridged by the introduction of Human Rights Council. Moreover, with the coming of Optional Protocol to the ICESCR, the question of justiciability of socio-economic rights, including the right to food does not have strong legal basis.

#### ***D. Judicial Enforcement of Right to Food in Nepal***

Whether there is explicit recognition of right to food in the national legislation or not, the courts or regional bodies or the

access to justice in Nepal with the promulgation of Interim Constitution of Nepal, 2007 and the substantive interpretation by the Supreme Court of Nepal. Hence, it is no longer acceptable to aver that justiciability is not possible in cases of violations of the right to food.

Thus, in spite of being new right, the right to food is a justiciable right in Nepal. In this article, only three leading cases which have explicitly spelled the right to food have been discussed.

The case Adv. Madhav K Basnet v. Rt. Hon. PM Girija P Koirala and others<sup>55</sup> has become the first case brought before the

to ensure regular supply of food in food deficit area. It has at least accepted ensuring the progressive realization of food to the people as the obligation of the State. Moreover, the Court entertained the case and proved that right to food is justiciable.

In another case, Adv. Prakash Mani Sharma v. Office of Prime Minister and Council of Ministers and Others<sup>56</sup>, the writ petitioner sought justice on the part of people who live in food deficient regions. The writ was basically related with the food availability, storage and distribution. In that case, the Court has recognized the right to food sovereignty guaranteed by the Interim Constitution. Thus, for the first time in judicial history of Nepal, the Court explicitly recognized right to food and obligation of the State which was not materialized in the first case of Adv. Madhav Basnet.

The Court rendered in its final verdict that it is not only the duty of the State just to provide security to human lives, but also let not to occur hunger and starvation in its territory to save its people. The State has to adopt any feasible steps till its last resort to feed its people.<sup>57</sup> The Supreme Court has made quite broader interpretation of right to food.

In Bhajuuddin Miya v. Office of the Prime Minister, Council of Ministers and Others case<sup>58</sup>, the local people, including the applicant residing in the surrounding of Koshi Tappu Wildlife Reserve whose crops were destroyed by the

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*Nepali judiciary has developed substantial jurisprudence of right to food though not so many cases related to right to food has been adjudicated. Based on the Nepali experience, the right to food in Nepal is relatively new issue. However, this right has been applicable in both judicial and quasi-judicial bodies.*

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UN treaty bodies can have broader interpretation to the right to food. Such case laws help in developing the specific legislation.

Nepali judiciary has developed substantial jurisprudence of right to food though not so many cases related to right to food has been adjudicated. Based on the Nepali experience, the right to food in Nepal is relatively new issue. However, this right has been applicable in both judicial and quasi-judicial bodies. Victims of violations of the right to food have been granted

Supreme Court on right to food. The writ petitioner raised the issue of extreme hunger and food deficit in Karnali zone of Nepal and demanded an order be issued to the government of Nepal to supply adequate foodstuff.

The Court repealed the case on the basis of the government initiative to supply food. By this case, though the Court has not upheld the right to food as fundamental right, it has been established that if government has resource and means, government is responsible

54. *ibid*

55. Adv. Madhav Basnet v Rt. Honorable PM Girija Prasad Koirala, Writ No 3341 of 2055, Decision Date 2055/06/27 BS, *Supreme Court Judgment on Constitutional Issues*, 2047-2057 Part I, Narendra Prasad Pathak and Narendra Prasad Khanal (Ed) (Pairabi Books 2058 BS) pp 516-18

56. Writ No -- WO - 0388, Nepal Kanoon Patrika Vol 51, 2066 Asoj, Issue 6, p. 961-978

57. Ne Ka Pa, 2068 Baishakh, Volume 53, Issue 1, Decision No 8540, pp 97-112

58. Writ No -- WO - 0388. Nepal Kanoon Patrika Vol 51, 2066 Asoj, Issue 6, p. 961-978

protected animals had filed writ petition seeking compensation of sugarcane harvest destroyed by the wild animals of the reserve.

Responding to the writ petition, the Supreme Court ordered the authorities to ensure food sovereignty of people when their food is destroyed by the wild animals. The Court directed the government to set up a permanent mechanism in this regard. The Court further observed that the State has to create the suitable economic environment by adopting adequate legislature, policy and other provisions not to deprive the citizens from food sovereignty and to enjoy this fundamental right. The Court stressed that the State has to make the provision of required compensation to protect the fundamental rights of the people to be free from hunger, i.e. right to food and rights related to profession and employment.

Thus, from the journey of Constitution of 1990 to 2007, there has been a substantive change in recognition of right to food judicially. The right to food has not only been elevated as a fundamental right, but also given new dimension of right to food sovereignty.

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#### **4. Conclusion**

Right to food could not get equal footing in the development of concept of rights despite concepts on right to food were developed in the ICESCR comprehensively. With the adoption of VDPA, 1993 it has been constantly reminded that human rights are universal, indivisible and interdependent and interrelated. This has urged the international community to treat all human rights on the same footing. So is the case with the right to food as well.

Efforts of developing the contents of human rights to food are relatively recent. So, it can be assumed that there will be further efforts in having clarity on the content of right to food through the scholarly debate and interpretation of the courts in the coming years.

There are certain State obligations to be realized immediately such as non-discrimination and life-saving during the hard times such as natural calamities and other crisis situations.

Though the right to food in Nepal is relatively new issue; it has been accepted as a fundamental right. When right to food was not clearly spelled out in the Constitution of 1990, Nepali judiciary did not recognize it as fundamental right though it made it admissible in the Court which made the litigation weaker. With the constitutional recognition of right to food, the Supreme Court of Nepal has made substantive interpretation of this right. Thus, right to food has been established as a justiciable right in Nepal.



Dr. Hari Dahal\*

## Realizing the Right to Food in Nepal

Adequate food is not a matter of charity but a basic human right. In other words, the right to food is a birth-right of the people. But how to realize this fundamental human right is a matter of great concern in today's world of plenty. It is said that there is enough food for all, or could be produced enough to feed all, but one billion people or one sixth of the world's population still suffer from hunger and malnutrition and the irony is that this number is growing each year. The right to food is not primarily the right to be fed after an emergency. It is the right, for all human beings, to have legal frameworks and strategies in place that further the realization of the right to adequate food, as human rights recognized under international law. By directing the adoption of these policies, the right to food is a compass to ensure that policies are geared towards eradicating hunger and malnutrition. Right to food is human rights-based approach to food security and is defined by La Via Campesina, the international movement of peasants, small- and medium-sized producers, landless,

rural women, indigenous people, rural youth and agricultural workers, as the people's right to have safe, nutritious and culturally-appropriate food in sufficient quantity and quality to sustain a healthy life with full human dignity. The right to food is realized when every man, women and child, alone or in community with others, has physical and economic access at all times to adequate or means for its procurement. The State must respect, protect and fulfill the right to food. This clearly means that the State should proactively engage in activities which assure economic and physical access to adequate food.

Nepal in the later years has been increasingly becoming vulnerable to food insecurity and needs to work towards realizing the right to food in a way to guarantee food sovereignty in the country. Although the Interim Constitution has placed food sovereignty as a provision to accomplish people's right to food, the State does not seem to be aware of how to put this right into practice. Nepal has ratified the International Covenant on Economic,

Social and Cultural Rights (1966), Universal Declaration of Human Rights (1948) and other treaties and instruments that recognize the right to food, which places both legal and moral obligation on the government to ensure freedom from hunger. Similarly, by adopting the Right to Food Guidelines of FAO governing council in 2004, member States are now in a better position in implementing the right to food, thus helping bridge the gap between legal recognition and effective realization of the right to food. The Voluntary Guidelines support the progressive realization of the right to adequate food in the context of national food security.

### Need of Right to Food Commission

The first step to realize the right to food is to initiate the formation of a high-level powerful central body such as Right to Food Commission. The development of national development policies and programs in Nepal is the mandate of Nepal's National Planning Commission (NPC). The NPC must approve any related policy framework before development

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programming can be implemented. People's right to food in Nepal has been grossly violated in the absence of adequate legislation and policies. In such situation, people neither have knowledge about the restoration of their violated rights nor can victims claim remuneration or legal remedy in case of violation of their rights to food. Nevertheless, despite of high level of hunger in Nepal, the UNDP has noted that "Food security ever constituted a major plank of policy-making" in the country.

The Ministry of Agriculture and Cooperatives mandated for food production and mainly making food available in Nepal is not bestowed with the responsibility to work for the right to food. There is not a single sectorial organization either to take care of this right. Without political will and adhering national and international laws, implementing the right and adopting concrete policies and programs is not possible. There are steps to realize the right to food such as identifying people affected by hunger by conducting a thorough assessment, formulating a sound food security strategy, allocating obligations and responsibilities to concerned stakeholders, creating legal framework for the right and monitoring progress to achieve the goals.

Nepal is passing through an unprecedented socio-political transition with dramatic and rapid political shifts following the decade long conflict between the government and Maoist insurgency that ended in 2006 with a ceasefire agreement. The key mandate was to draft new constitution by May 28, 2010, but the political parties were unable to build consensus on several issues. The draft-

ing of constitution is still uncertain and in such weakened condition of government and "rule of law", the human rights violation and the development agendas are the least priority. The Interim Constitution has also provisioned the right to food sovereignty of every citizen as a fundamental right under Article 18(3). As long as there is no framework law regulating the right to food, this could be as excuse for its justiciability. Nepal does not have an explicit policy or strategies on food security or the right to food, however, there are several policies, plans and programs that are relevant to the right to adequate

and maintain their own capacity to produce food in their own territory. Food sovereignty essentially defines the policy package that would be needed so that policies of agrarian reform and rural development might truly reduce poverty, protect the environment, and enhance broad based, inclusive economic development. The most fundamental pillars of food sovereignty include the recognition and enforcement of the right to food and the right to land. Farmers must have access to productive land, technology, market, credit and research and extension services. National and international programs and

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food. This includes the Government of Nepal's efforts to reduce poverty and hunger. Unfortunately, these policies have not been implemented properly. Altogether, the lack of political will, and the weak infrastructure have contributed this failure.

### **Agrarian Reform**

Food sovereignty and thus the right to food cannot be established without having a massive agrarian reform on the existing traditional agricultural practices in the country. Food sovereignty is about the right of peoples to define their own food system. It is the right of people to develop

policies, therefore, should not disrupt and destroy local productive capacities of people and peasant families. Food aid should only be provided in emergency situations with a clear exit strategy so as to avoid the creation of dependency. It is possible that the creation of dependency can bring the same situation as in Ethiopia. There is a joke told in Ethiopia that encapsulates the country's struggle with food aid dependency. There is a saying in Ethiopia that "It is not the rains in Ethiopia you need to worry about, but whether it rains in America or Canada does matters". That means they have completely become dependent on aid.



Thus to avoid such situation in our country, the government, therefore, has to enable right to food by adopting measures that ensure people the right to produce food or enhance capacity to be able to buy sufficient food in the market price. The government must not allow its people to remain at the mercy of free and subsidized food for a long time. This is against the spirit of the right to food, which ultimately reduces the pride and dignity of people.

Although Nepal's poverty reduction strategy includes food security, the integration of the right to food concept into the de-

velopment plan however is a new notion. Realization of the right to food agenda cannot be achieved by a single actor. The government is committed to strengthening governance and food right issues in its policies, programs and legal framework but stakeholders and civil society organizations must come forward to forge strong partnerships. As the major movers and shakers, civil society organizations have to play a big role in the realization of the right to food, which is supposed to be a pre-condition to achieving national food security in the country.

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### **Role of Civil Society**

Civil society is an all-encompassing term and includes organized and non-organized non-state and non-government actors. These could be special interest

groups. Such as farmer association, faith-based group or simply individuals living in the same area and are thus interested in the development of this location. FAO is convinced that true and meaningful participation of civil society in planning, implementation and monitoring of public policies leads to better results. This however requires that civil society is empowered and well-trained, has access to information, is able to voice its concerns freely and is allowed to inform about malpractices when they occur. A growing number of countries of the world have decentralized a decision making from national to sub-national level. Every region in a country may have different needs and priorities. Public officers, based in a specific region, are familiar with the context of the area and are thus better placed to identify the most appropriate measures to target the most vulnerable and food insecure. Civil society in turn has better chance to interact with public officials and participate in decision-making processes. Local governments are easily accessible which facilitate participation in decision-making by civil society, NGO's and private sectors. Thus civil society can play a crucial role in putting pressure on all spheres of government, as well as assist vulnerable groups to empower themselves to claim their rights and improve their access to recourse mechanisms, including the courts. For example

in India, The People's Union for Civil Liberties (PUCL) filed a case regarding the right to food in Rajasthan. Similarly, the civil society organizations in Brazil have played an essential role in promoting the human right to food. One of the most important initiatives was the creation of the Brazilian Food and Nutrition Security Forum in 1998. This is a network of organizations, social movements, individuals and institutions now comprising over 100 organizations with representation in all of the country's state.

It is necessary to establish instruments that allow State authorities, civil society and international organizations to monitor how State's policies comply with its obligation to realize the right to food. This includes monitoring whether the State has taken immediate steps to respect, protect and fulfill the right, and whether policies contribute to the progressive realization of right to food. A national law on the right to food should be instituted to improve the protection of the right to food and improve justiciability. More resources should be made available for addressing poverty, hunger and malnutrition and the agrarian reform should be implemented more rapidly. It is the responsibility of the government of the country to take necessary measures to recognize the right of everyone to an adequate standard of living (Food) for themselves and their families. Nepal is a State party of ICESCR and must fulfill the right to food of its people and being the State party of the covenant it has to take appropriate steps to ensure the realization of this right.



# Gender Dimension of Right to Food: Practice in Nepal

## 1. Introduction

Women have certain specific characteristics different from men biologically on the one hand and they have been mostly treated differently often in a discriminating way on the other; a separate concept of human rights of women has been developed. In regards to women's autonomy to exercise right to food as well, general treatment of the right to food did not seem adequate; hence their rights and access to food need to be analysed.

The food consumption in many cultures of world has been remained discriminatory between men and women; so is the case of Nepali society. Discrimination against women still exists despite the adoption of laws with the aim of achieving gender equality. As human rights are interdependent to each other, without the capacity of women to enjoy all human rights, they have not been in a position to enjoy right to food and vice versa.

This article provides an analysis of right to food from gender perspective in practice in Nepali society. The discussion is focused in the context of the set goals in Millennium Development (Goals 1 and 3) aiming to "eradicate extreme poverty and hunger"<sup>1</sup> and to "promote gender equality and empower women"<sup>2</sup> as well as in the context of exercise of rights provided by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979 and International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966.

## 2. Right to Food in National and International Instruments

### A. General Instruments and State Practice

Right to food not only includes bare necessity for survival rather all nutritional elements to live a healthy and active life in a respectful way. The right to food emphasises on condition ensuring

physical and mental development. United Nations Special Rapporteur on the Right to Food defined right to food as:

[T]o have regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear.<sup>3</sup>

Long before the UN Special Rapporteur provided this definition on right to food, the Universal Declaration of Human Rights (UDHR), 1948 recognized right to food as: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food"<sup>4</sup>. The UDHR has recognized the right to food in the context of being able to enjoy an adequate standard of living.

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1. MDG 1, <<http://www.un.org/millenniumgoals/poverty.shtml>> accessed on September 14, 2014
2. MDG 3, <<http://www.un.org/millenniumgoals/gender.shtml>> accessed on September 14, 2014
3. Report by the Special Rapporteur on the right to food, Mr. Jean Ziegler, UN Doc. E/CN.4/2001/53, para 14
4. article 25

The ICESCR recognizes the right to adequate food as an essential part of the right to an adequate standard of living.<sup>5</sup> The Covenant also explicitly recognizes “the fundamental right of everyone to be free from hunger”<sup>6</sup>.

The CEDAW prohibits discrimination against women, including in the field of employment, health care and in other areas of economic and social life. Underlying the concerns that in situations of poverty, women have the least access to food and resources, the CEDAW establishes the right of women to adequate nutrition during pregnancy and lactation<sup>7</sup> and

has obligation to be abided by the provision of these Convention.

Women’s right to food is not limited only to their own right rather to their children’s as well. The International Convention on the Rights of the Child (CRC), 1989 recognizes the right of every child to standard of living adequate for the child’s physical, mental, spiritual, moral and social development.<sup>9</sup> States Parties are required, in case of need, to “provide material assistance and support programs, particularly with regard to nutrition”<sup>10</sup>. Moreover, the States need to take appropriate measures to combat diseases and

The International Covenant on Civil and Political Rights (ICCPR) 1966 has linked the right to life to right to food while interpreting right to life. The right to be free from hunger is closely related to right to life as spelled out for instance in article 3 of the UDHR, article 6 of the ICCPR and article 6 of the Convention on the Rights of the Child (CRC).<sup>12</sup> Thus, the right to food gets broader interpretation recalling the responsibilities of the governments to ensure this right to their people particularly to women and children.

Nepal also has incorporated right to food in its constitution. The Interim Constitution of Nepal, 2007 has provided the right to food sovereignty to Nepali people.<sup>13</sup> The Supreme Court of Nepal has interpreted this right to food sovereignty as right to food.<sup>14</sup> The Constitution has also enshrined the right to employment and social security<sup>15</sup> which create enabling environment for the enjoyment of the right to adequate food. Similarly, Nepal has started adopting policy and program to ensure right to food of the marginalized groups.<sup>16</sup> Thus, Nepal has been taking step towards ensuring its people’s right to food through national laws and policies.

### **B) Rights of Women and Girls**

As human rights of a person are inalienable so is the case

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requires States to take measures to ensure that women, notably in rural areas, also have access among other, to resources, services and economic opportunities<sup>8</sup>.

As a State party to the ICESCR and to the CEDAW, Nepal

malnutrition, including through the provision of nutritious food and drinking water<sup>11</sup>. Thus, Nepal being the State party to the CRC has the responsibility of providing nutritious food to children.

5. art 11 (1)

6. art 11 (2)

7. art 12

8. art 14

9. art 27(1)

10. art 27(3)

11. art 24 (2)(C)

12. FAO, Women and Right to Food: International Law and State Practice (2008), p 9-10

13. art. 18 (iii)

14. Pro Public v. Government of Nepal, Writ No. 065-WO-149, Supreme Court of Nepal

15. Interim Constitution of Nepal, 2007, Art. 18

16. Policy and Programme of the Government of Nepal, 2014/15, Prog no 15-24 <[http://www.mof.gov.np/uploads/document/file/Niti%20tatha%20Karyekaram%20Nepali\\_20140629101522\\_20140724070007.pdf](http://www.mof.gov.np/uploads/document/file/Niti%20tatha%20Karyekaram%20Nepali_20140629101522_20140724070007.pdf)> accessed on September 12, 2014

with the rights of women and girls. World governments have expressed their commitment through the Vienna Declaration and Programme of Action, 1993 for promoting the rights of women and creating the situation for the exercise of all human rights of women that “The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on the grounds of sex are priority objectives of the international community.”<sup>17</sup> Without active and meaningful representation of women both in family and social life with no discrimination of any types, they cannot enjoy the rights enshrined in the international human rights instruments to which States have expressed their commitment.

After the adoption of the UDHR to consensus of Vienna Declaration, still women and girls were not in the equal footing of men and boys respectively in enjoying the basic human rights such as to be free from hunger, access to basic health facilities and not to be discriminated on the basis of sex. In such scenario, the world governments met together and set 8 goals to be achieved by 2015 called the Millennium Development Goals (MDG)<sup>18</sup>. The MDGs goal no 1 and 3 were “*to eradicate extreme poverty and hunger;*” “*to promote gender equality and*

*empower women*”<sup>19</sup> respectively. States agreed in translating the human rights to be free from hunger and promote gender equality that they had adopted through UDHR in 1948 after a half century later again through MDGs .

To promote gender equality and capacitate women to claim and enjoy their rights, their participation in policy making level is very crucial. Increase in women’s participation in legislatures, local bodies and public institutions that exercise power in regulating the work of the executive are necessary besides enabling women’s capacity to claim their rights. Beijing Declaration and Platform for Action urged the governments to “ensure that these institutions [national institutions] pay adequate attention to problems involving the violation of the human rights of women.”<sup>20</sup> Thus, by enabling women to participate in the political process along with ensuring the violation of their rights is properly addressed, the structural discrimination against women can be overcome.

The efforts to ensure equality of women have been the main agenda of the human rights movement. Many international human rights treaties have been established aiming to protect the rights of women and girls. However, the achievement in transforming these rights into reality has become very slow. “Across the Asia Pacific and around the world, women and girls

are at particular risk of gender-based violence and harassment.”<sup>21</sup> As “property and inheritance laws, as well as government policies, can entrench poverty among women and girls”<sup>22</sup>, such international treaties has to be adopted in domestic level with more honesty. “Advancing the human rights of women and girls is not something that will happen on its own accord. Nor will a “business as usual” approach deliver any genuine progress towards gender equality.”<sup>23</sup> To forming gender equal society and ensuring women’s rights further efforts seem essential which ultimately contributes to their right to food as well.

### 3. Prevalence of Hunger: Women’s Right to Food

Global population is afflicted by poverty; only its proportion varies depending on whether they are in developed nation or developing one. The ESCR Committee defines poverty as “a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living.”<sup>24</sup> Poverty has direct association with nations’ economic phenomenon and poorer countries suffer much from it. “No nation is immune and, as usual, it is the poorest countries –and the poorest people – that are suffering the most. The number of hungry

17. Vienna Declaration and Programme of Action, part I, para.18 <<http://www.ohchr.org/en/professionalinterest/pages/vienna.aspx>> accessed 8 Sep 2014

18. <<http://www.un.org/millenniumgoals/beyond2015-overview.shtml>> accessed on September 8, 2014

19. Ibid

20. Beijing Declaration and Platform for Action, s. 232(e) <[www.un.org/womenwatch/daw/beijing/platform/](http://www.un.org/womenwatch/daw/beijing/platform/)> accessed on September 8, 2014

21. Protecting and Promoting the Human Rights of Women and Girls: The Role of National Human Rights Institutions is a publication of the Asia Pacific Forum of National Human Rights Institutions (APF)

22. Ibid

23. Ibid

24. “Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights” UN Doc. E/C.12/2001/10; para 8

people increased between 1995–97 and 2004–06 in all regions except Latin America and the Caribbean.”<sup>25</sup> When the poverty prevails, it causes malnutrition/undernourishment and the worst sufferers are the poorer countries.

When the MDGs were set, large fraction of world population were chronically undernourished. The Food and Agriculture Organization of the United Nations (FAO) estimated “in 2000, 826 million people were chronically and seriously undernourished whereas most of the victims live in Asia.”<sup>26</sup> Women are highly vulnerable to such undernourishment among the world population suffering from malnutrition.

World Declaration on Nutrition, 1992 stressed the situation of women and children afflicted by malnutrition “More than 2000 million people, mostly women and children, are deficient in one or more micronutrients; babies continue to be born mentally retarded as a result of iodine deficiency; children go blind and die of vitamin.”<sup>27</sup> Millions of women’s right to food is not only confined to their own well-being but also to their infants. Due to the prevalence of poverty women’s right to food is largely ignored.

### ***A. Prevalence of Hunger in Nepal***

Prevalence of hunger is inseparable when poverty exists. Nepal, being one of the poorer

countries in the world, many Nepali people do not have access to adequate standard of living. Poverty rate has been decreased in ten years period by 16.6 percent in Nepal which is a positive indicator. The proportion of population below national poverty rate reduced from 42 percent in 1990 to 25.4 percent in 2010.<sup>28</sup> However, still one fourth of its population living under poverty reflects that the nation is suffering from poverty viciously.

Poverty, hunger and undernourishment are interrelated to each other. “The proportions of undernourishment percent in Nepal were 21, 24 and 15 percent and numbers of undernourished millions were 4.0, 5.3 and 4.0 in the years 1990–92, 1995–97 and 2003–05 respectively.”<sup>29</sup> Thus, though Nepal has made progress in reducing the number of undernourished population, still larger portion of population is deprived of nutritious food.

The vast majority of people suffering from hunger and malnutrition are poor and marginalized<sup>30</sup>. In Nepal, among nearly the one quarter of its population living under poverty, women are much vulnerable to violations of their right to food being poorer among poor and marginalised group. They are affected by macro and micro-nutrient deficiencies.

Women in Nepal are not enjoying equal status in work com-

pared to men. National Women Commission stresses this situation that women are engaged in non-skilled work rather than in better paid profession in comparison to men.<sup>31</sup> “Though women’s contribution to agricultural production is above 60 percent the total land holdings are only 8 percent. Also most women workers, over 70 percent, are confined to self-employed, unpaid and low wage informal activities.”<sup>32</sup> As women are not paid for their work, their contribution in monetary value does not get counted and they do not have decisive role in regards to food necessity.

Social pattern plays pivotal role in determining roles of men and women in family and society. As based on patriarchy, Nepal has discriminatory gender role between male and female in many spheres of life as well as in their right to food and nutrition. The violation of women’s right to food has negative impacts on women’s and children’s health. It is not just the case in Nepal rather many of the poorer south Asian countries face the same situation. Example of Bangladesh shows that gender disparity between boys and girls has resulted into more underweight and stunted girl children than boy children:

This is largely due to patterns of discrimination against women and girls, given the custom that women eat last, which means

25. FAO, The State of Food Insecurity in the World, 2009

26. The right to food Report by the Special Rapporteur on the right to food, Mr. Jean Ziegler, submitted in accordance with Commission on Human Rights resolution 2000/10 ( E/CN.4/2001/53)

27. Para 3,

28. Nepal Millennium Development Goal Progress Report 2013 <<http://www.npc.gov.np>> accessed on September 1, 2014

29. FAO, Nepal Food Security Indicators, 2006 <[http://www.fao.org/fileadmin/templates/ess/documents/food\\_security\\_statistics/country\\_profiles/eng/Nepal\\_E.pdf](http://www.fao.org/fileadmin/templates/ess/documents/food_security_statistics/country_profiles/eng/Nepal_E.pdf)> accessed on August 10, 2014

30. The Right to Adequate Food, Fact Sheet 34

31. Nepal’s Implementation Status of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Independent Report prepared by the National Women’s Commission of Nepal to supplement the Combined 4th and 5th Periodic Report Submitted to the CEDAW Committee by the Government of Nepal 26 June 2011

32. Ibid



that they often eat least. The implication of gender discrimination are broad, given the essential role that women play in food production and in assuring the nutrition of maternal malnutrition have impacts on society as a whole, as underweight mothers are more likely to give birth to underweight babies.<sup>33</sup>

Women and children are prone to suffering from nutrition deficiency and not able to enjoy their right to food in many developing countries though mainly women are involved in food production. In this context, it is worth analysing the right to food from gender lens in Nepal, where the nation is in the process of drafting new constitution ensuring the rights of many disadvantaged, marginalised groups.

### ***B. Social Structure: The Gendered Food System***

Gender discrimination is deeply rooted in Nepali society. Gender is social construction whereas sex is biological one as Simone de Beauvoir observes that “one is not born, but rather becomes a woman”.<sup>34</sup> She opines:

Gender differences in the society make the man superior through his role as the bread winner. It gives him a position of power in the society and family. Gender differences are set in hierarchal opposition such that men are superior and women are subordinate.<sup>35</sup>

Men remain on the top in hierarchy enjoying the dominant role in almost all sectors whereas women remain at the bottom as an outsider. Social norms have produced the stereotypical gender role marginalising their rights. For women, as an outsider, their access to resource and control over it get curtailed affecting their right to food and nutrition even in household level.

The CEDAW Committee expresses its sincere concern on the discriminatory food distribution practice between male and female and boy and girl children within the Nepali family in its concluding observation:

[T]he Committee remains concerned about the overall living conditions of women in situation of poverty, especially rural women and women heads of household, and their lack of access to land, adequate food, safe drinking water and fuel for cooking and heat. The Committee is also concerned about discrimination against girl children and women in food distribution within the household.<sup>36</sup>

Society is still practising discriminatory treatment in food distribution within the family. States have to adopt affirmative action to ensure the right to food of vulnerable groups. Protecting the right to food for all in a non-discriminatory manner implies giving particular attention to women, leading to what is known as posi-

tive discrimination/ affirmative action.<sup>37</sup> It is mostly ardent when they have specific situation such as pregnancy and lactation.

The assistance provided to the food deficient family also discriminates women. The research carried out by the Rights and Democracy in 2007 shows that “Food distribution does not target women or women-headed households and therefore presents particular challenges to pregnant and breast-feeding women, widows, and the children who are dependent on them for food.”<sup>38</sup> Women or women headed family not being focused shows violation of women’s rights to food.

When women are household head, it has positive correlation in reducing the poverty. The National Life Standard Survey (NLSS), 2011<sup>39</sup> shows that the poverty is lower in the female headed household than in the male headed household. Hence, the programmes of capacity enhancement of women can result into better outcome.

### ***C. Education, Empowerment and Access to Food***

Education plays an important role in bringing positive change in overall aspect of human life, and education to women is important in particular. Catherine Bertini, head of UN World Health Food Programme, highlights that by investing in women’s education it is possible to “increase economic

33. Jean Ziegler, Christophe Golay, Claire Mahon and Sally-Anne Way. *The Fight for the Right to Food: Lesson Learnt*(International Relations and Development Series. Palgrave Macmillan, 2011, p 156

34. *Basic Concept: Sex and Gender, Masculinity and Femininity, Patriarchy.* <[http://www.mu.ac.in/myweb\\_test/TYBA%20study%20material/Gender%20&%20Soc..pdf](http://www.mu.ac.in/myweb_test/TYBA%20study%20material/Gender%20&%20Soc..pdf)> accessed on September 8, 2014

35. Ibid

36. Concluding observations of the Committee on the Elimination of Discrimination against Women Nepal; UN Doc. CEDAW/C/NPL/CO/4-5; July 29, 2011

37. FAO, 2008. See foot note 13

38. International Centre for Human Rights and Democracy (Rights and Democracy), *The Human Right to Food in Nepal: Report of an International Fact Finding Mission*(Montreal, Qubec, 2007), p 52

39. Central Bureau of Statistics, *Poverty in Nepal: NLSS III, 2011*, p13

growth, decrease infant mortality, increase agricultural yields, improve maternal health, improve children's health and nutrition, increase the number of children- girls and boys – in school, slowdown population growth".<sup>40</sup> It shows enhancement of life of women can be achieved through their education. Education is seen "as an agent to empower women by widening their knowledge and skills."<sup>41</sup> Thus, education is considered as one significant indicator in measuring empowerment of women.

Though Nepal has made important progress in education in the last decade, there is still a significant illiteracy gap between men and women. According to the III NLSS (2010-2011), Nepal has an adult literacy rate of 56.6 per cent<sup>42</sup>, with a huge variation between males and females. The literacy rate in Nepal is 71.6 per cent for men and 44.5 per cent for women, with women still lagging behind men by more than 27 percentage points. According to the Education for All Global Monitoring Report 2011, out of 7.6 million adult illiterates in Nepal, 67 per cent are female.<sup>43</sup>

Women's low literacy rate hinders their economic participa-

tion; they are confined with non-economic burden in household. It results into their low access to and control over resources: "Women's confinement in household and marginal access to resources resulting in relatively poor alternatives outside their current partnership as well as in distribution of resources."<sup>44</sup> When women's access to resources is limited it affects their right to food to large extent. "Women face additional discrimination in terms of equitable access to available food. They are commonly the last ones to eat and the first to go without food in times of shortage".<sup>45</sup> Women's right to food must be ensured through different programmes and initiations from government in coordination with the concern stakeholders.

Power sharing between men and women is essential for freedom from hunger as de Schutter stresses: "Sharing power with women is a shortcut to reducing hunger and malnutrition, and is the single most effective step to realizing the right to food."<sup>46</sup> Materialising women's right to food enshrined in national and international instruments empowerment is essential as "empowerment enhances an individual's or group's capacity to make choices and transform that

choice into desired actions and outcomes".<sup>47</sup> Compared to non-working women, working women are more independent and autonomous and capacitated to translate their choices into desired action and outcomes.

The ESCR Committee opines that "the greater empowerment of women in particular is an essential precondition for the eradication of global poverty."<sup>48</sup> FAO research shows that involvement of more number of women in agriculture with qualitative training "would contribute to the right to food in terms of improving agricultural production and economic empowerment."<sup>49</sup> And the economic empowerment ultimately contributes in their capacity enhancement and more access to food.

Increasing trend of Nepali women's participation in education, politics, entrepreneurship and so on is a good indication of empowerment. In Nepal, the formation of first Constituent Assembly (CA) election was encouraging as it was constituted with one third of the women members.<sup>50</sup> But this trend could not be sustainable as the second CA was not as much inclusive and participatory as the first CA was.<sup>51</sup> Though, the repre-

40. quoted in Roshani Shrestha, "Empowering Dalit Women Through Income: A Study in Pokhara". *Citizens, Society and State: Crafting an Inclusive Future for Nepal*. Mandala Book Point in association with Social Inclusion Research Fund (SIRF) and SEARCH Nepal, 2014

41. Jayaweera, Swarna. Women, Education and Empowerment in Asia, *Gender and Education*, 1997. Vol. 9. No.4,

42. Bureau of Statistics.

43. Ibid; see also <[http://www.unesco.org/new/en/kathmandu/about-this-office/single-view/news/unesco\\_celebrates\\_international\\_literacy\\_day\\_in\\_nepal/#.VBMqHfmSz00](http://www.unesco.org/new/en/kathmandu/about-this-office/single-view/news/unesco_celebrates_international_literacy_day_in_nepal/#.VBMqHfmSz00)> accessed on September 2, 2014.

44. Shelly, Lundberg. "Gender and Decision Making", a lecture note(2005). quoted in Roshani Shrestha, "Empowering Dalit Women Through Income: A Study in Pokhara". *Citizens, Society and State: Crafting an Inclusive Future for Nepal*. Mandala Book Point in association with SIRF and SEARCH Nepal, 2014

45. Right and Democracy. *Human Rights to Food in Nepal*. Report of International Fact Finding Mission, Kathmandu, 2007.

46. UN Special Rapporteur on the Right to Food, Olivier De Schutter <[http://www.fian.org/fr/news/article/detail/promising\\_steps\\_toward\\_recognition\\_of\\_womens\\_right\\_to\\_food/](http://www.fian.org/fr/news/article/detail/promising_steps_toward_recognition_of_womens_right_to_food/)> accessed on August 20, 2014

47. Alsop, Ruth and Nina Heinsohn. Measuring Empowerment in Practice: Structuring Analysis and Framing Indicators. World Bank Policy Research Working Paper 3510 < [http:// elibrary.worldbank.org/docserver/download/3510.pdf](http://elibrary.worldbank.org/docserver/download/3510.pdf)> accessed on August 28, 2014.

48. para 5, See foot note 21

49. Gender in Agriculture Sourcebook: "Investing in Women as Drivers of Agricultural Growth." 2009. World Bank, FAO, IFAD <<http://www.ifad.org/gender/pub/sourcebook/flyer.pdf>> accessed on September 2, 2014.

50. Tejman Shrestha, "Journey of Nepalese Women from Exclusion to Inclusion: Myth or Reality?" *INFORMAL*, 2009

51. [http:// www <election.gov.np/election/np>](http://www.election.gov.np/election/np) accessed on September 1, 2014

sentation percentage has decreased, with the representation of women in the CA, the political participation of women is more meaningful and contributing in their position to assert for their rights. More participation of women make them more empowered that leads to less gender discrimination and enjoy the rights enshrined in national and international instruments. When women can enjoy their rights, their right to food gets less violated.

#### **4. Growing Rays of Hope from the Judiciary**

The judiciary in Nepal is gradually putting efforts in ensuring gender equality and forming a just society so is the case in ensuring women's right to food. A few decisions from the Supreme Court of Nepal can be taken as landmark decisions in this regards.

In *Madhav K. Basnet v. PM Girija Pd. Koirala and others*<sup>52</sup> case, the litigant raised the issue of extreme hunger and food deficit in Karnali zone of Nepal. Supply of adequate foodstuffs for the people in hunger in the region was sought through the judicial intervention. The Court repealed the case on the basis of the government response that it had taken proper initiatives to supply food based on its capacity of available resources. By this case, it has been established that government is responsible to ensure regular supply of food in food deficit area based on its capacity and resources.

In *Raju Chapagain v The Government of Nepal* case, the Supreme Court of Nepal has shown especial concern to children's right to nutrition. The case had drawn

the concern of the Court in production and monitoring of Milk Substitution Act (Control of Sale and Distribution Act) as the government had not taken any effective step for the substitution to mother's milk even after the issuance of the Act. The Court stressed on the importance of breast-feeding to child as the best source of nutrition and no alternate to it. The Court made the State and concern party legally responsible as per the national and international standard of health of child and mother for protecting children from malnutrition.

In *Prakash Mani Sharma v Council of Ministry and others* case, the Supreme Court's decision can be taken as a landmark decision from gender equality perspective. The existing legal provision of Civil Code was declared discriminatory as the married daughters were denied right to the parental property based on their marital status which was not compatible with the spirit of the CEDAW Convention. The translation of this verdict is yet to be seen, however, this verdict has been received as a cornerstone to provide better environment for Nepali women in realising their right to property which can have positive impact in ensuring their right to food as well.

#### **5. Conclusion**

Women's right to food has been explicitly spelled out in the ICESCR, CEDAW and CRC Conventions. For translating their rights into real life, adoption of policy and programme in national level and implementation of such policy and programme is a must. Nepal has taken initiations in ma-

terializing the commitments it has made in the international instruments. Incorporation of right to food sovereignty in the Interim Constitution of Nepal 2007, commitment of the State to ensure the access of poor and marginalized communities in food and resources for survival, policy adoption in annual state policies are some positive indicators.

In Nepali context, women's right to food is largely influenced by the discriminatory socio-cultural practice. Along with the socio-cultural practice, prevalence of poverty has become another key factor contributing negatively in their right to food. Empowering women through education, enhancing their access to and control over resources and participation in policy making bodies are crucial in enjoying their rights guaranteed in national and international instruments.

Considering the specific characteristic of women, the CEDAW has provided certain rights to women. Nepal has not only ratified the major human rights conventions and made its commitments through many declarations such as the MDGs, but also has taken some initiatives in domestic level. The incorporation of women's rights in the constitution and adoption of policies in this regards are encouraging initiatives to ensure their right to food as well as to end gender discrimination. However, as expressed its commitment in the CEDAW, ICESCR and MDGs, its initiations are not adequate to address the existing situation. Hence, from gender lens women's right to food remain largely unaddressed.

52. Writ No 3341 of 2055



Shree Ram Adhikari\*

# Unrealized Food Sovereignty and Right to Food

## 1. Background

The jurisprudence of the human rights explains various rights and freedom for the people. Generally, those freedoms and rights are categorized as civil and political rights and economic, social and cultural rights. Both civil and political rights and economic, social and cultural rights are the integral component of Bill of Rights which also includes Universal Declaration of Human Rights, 1948. Both the rights have crucial meaning for the human being to live their life with dignity, freedom, equality and full enjoyment of human rights. The rights and the freedom explained in civil and political rights and economic, social and cultural right are formally codified in the treaty which are known as International Covenant on Civil and Political Rights (ICCPR 1966) and International Covenant on Economic, Social and Cultural Rights (ICESCR 1966). Some of the rights explained in the ICCPR and ICESCR are frequently used in daily life of the human beings. However, a human being use and enjoy so many rights in their entire

life but among them, at first human being needs shelter, food and cloths. These rights are directly related to the right to life. So, right to food is considered as the first right meaning all human beings are to live with dignity, free from hunger, food insecurity and malnutrition. The right to food is protected under the international human rights law, humanitarian law and different national laws also.

The right to food activists always advocate right to food as the first right of human beings. Different media and reports have suggested that the wrong policy and inappropriate protecting measures are the major origin for the deprivation of right to food. The starvation or violation of right to food is not only a problem of Nepal. A report published by UN Food and Agriculture Organization (FAO) stated that more than 85 million of people of this world are suffering from starvation. Lack of proper policy, programs, inequitable distribution of food, and non-implementation of the existing laws, policy, provision of the ICESCR-1966 and provision of

the Constitution are the major challenges for the Government of Nepal to meet the objective of the MDGs regarding eradicating hunger before the end of the year 2015. Until and unless the government of Nepal peruses the rapid policy to ensure the right to food in the country, meeting the objective relating to hunger of the MDGs seems unlikely. Every year most of the people from the far and mid-western region of Nepal suffer from lack of food and food insecurity which shows that Government of Nepal is not fulfilling its international obligation to respect, protect and fulfill the rights of the people.

## 2. Right to food

Generally, adequate food and its regular consumption are considered as right to food. But in the context of the human rights it has been interpreted broadly. The ICESCR-1966 recognized right to food is as highest attainable rights, including right to be free from hunger.<sup>1</sup> Similarly, Universal Declaration of Human Rights 1948 also ensured the right to food

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1. Article 11 of the International Covenant on Economic, Social and Cultural Rights 1966

as a universal human rights.<sup>2</sup> Nepal became a State party to ICESCR on May 14, 1991. The ICESCR-1966 Article 11 accepted adequate food, housing and clothing for any person and his/her family, standard living and freedom from hunger as the right of everyone. While pursuant to Article 11.2, it has recognized more immediate and urgent steps may be needed to ensure “the fundamental right to freedom from hunger and malnutrition”.

The human rights to adequate food are of crucial importance for the enjoyment of all rights.<sup>3</sup> It applies to everyone; thus the reference in Article 11.1 to “himself and his family” does not imply any limitation upon the applicability of this right to individuals or to female-headed households.

The Committee of the ICESCR which is formally known as UN Committee on Economic, Social and Cultural Rights (CESCR) has made interpretation of the Article 11 of the Covenant. It has interpreted this article in its General Comment<sup>4</sup> No. 12 (6) and explained that the right to adequate food is realized when every man, woman and child, alone or in community, have physical and economic access at all times to adequate food or its procurement.<sup>5</sup>

The Committee has made wider interpretation of the Article

11 of the ICESCR, 1966, which helps State to formulate the policy and to enact the law according to the UN human rights standard. The General Comment No. 12 also made directives to the State party to be more accountable to protect the right to food and clearly explored the obligation of the State including the monitoring obligation in different level.<sup>6</sup> If we try to explore the gist of the General Comment No. 12, the interpretation of the Committee on Article 11 of the ICESCR, 1966 and the report of the Special Rapporteur

- Dietary Needs of Food
- Food Free from Adverse Substances

Some of the right to food activists use four *A principles*, i.e. Availability, Adequacy, Accessibility and Acceptability of Food, which applies to right to health and education as well<sup>7</sup>. But this principle is incomplete if we analyze and study the General Comment No. 12 closely and the reports of the UN Special Rapporteurs because within human rights there are few rights which shall prevail at any time such as right to food.

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*The human rights to adequate food are of crucial importance for the enjoyment of all rights. It applies to everyone; thus the reference in Article 11.1 to “himself and his family” does not imply any limitation upon the applicability of this right to individuals or to female-headed households.*

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on right to food, the following important aspects or the elements of the right to food is deduced:

- Availability of Food
- Adequacy of Food
- Accessibility of Food (Physical and Economical)
- Acceptability of Food (Cultural or Consumable)
- Affordability of Food (Financial)
- Regular, Permanent & Unrestricted Access to Food

The right to food normally prevails even during the time of state emergency meaning it is non-derogable. The right to food exists, prevails and is effective during the time of any such incident where Geneva Conventions are applied, especially during the time of war and insurgency. Hence, the right to food is inalienable right. But such important right is in shadow in Nepal's context. The Government of Nepal is not showing its willingness to

2. Article 25 of the Universal Declaration of Human Rights 1948

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

3. General Comment No. 12 of the Committee of the CESCR. The Committee is very rightly pointed out that right to adequate food is of crucial importance for the enjoyment of all rights. That mean if state is failure to protect, respect, and fulfillment of the right to food the citizen of that state is not able to enjoy other human rights. To provide full enjoyment to human rights at first state must have to importantly ensure and protect the right to food of the everyone.

4. Each of the treaty bodies publishes its interpretation of the provisions of its respective human rights treaty in the form of “general comments” or “general recommendations”. For more information: <http://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx> (Page visited on 12 July 2014)

5. The General Comment No. 12(6) of the UN Committee on the Economic, Social and Cultural Right. For more information: <http://www.refworld.org/docid/4538838c11.html> (Page visited on 12 July 2014)

6. *Asbjorn Eide*, The Right to Adequate Food and to Free From Hunger, Update Study on the Right to Food, 1999 (E/CN.4/sub.2/1992/12)

7. *Shree Ram Adhikari and others*, Protection and Promotion of ESCR : Training Resource Toolkit, FOHRID (2009);p 32



fulfill its obligation to provide sufficient food to its people, and State has been unsuccessful in increasing the production of food and its supply in far and mid-western region of Nepal.

Violation of right to food is a global issue and most of the Asian and African countries are facing challenges to ensure this right. As of March 10, 2014, UN Special Rapporteur<sup>8</sup> on Right to Food, Mr. Olivier De Schutter presented his final report at Human Rights Council before his six year tenure expired.<sup>9</sup> He had emphasized that

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*The types of food sovereignty that is guaranteed in Article 18(3) of the Interim Constitution of Nepal 2007 is not clear because no law has been enacted according to this Article. The food sovereignty in other word advocates the control over the resources by the peasant and seeks their role and participation in distribution, production, decision and policy making level.*

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“the world’s food systems should be radically and democratically redesigned”.<sup>10</sup> This clearly means that the world’s food supply, distribution and other system relating to food is not satisfactory and it needs to be radically and democratically redesigned to abolish and eradicate hunger from the world.

### 3. Food Sovereignty

The right to food and food sovereignty are two different issues. The right to food is directly related to the human rights whereas food sovereignty has not been explained in any UN human rights instru-

ments. Generally, food sovereignty depends upon the political system, political ideology and the agrarian policy of the State. To achieve the food sovereignty, the State generally peruses the program, policy and laws according to their political manifesto and ideology. The right to food sovereignty is achievable only when there is unrestricted access and people have capacity to afford food. The types of food sovereignty that is guaranteed in Article 18(3) of the Interim Constitution of Nepal 2007 is not clear because no law has been enacted accord-

ing to this Article. The food sovereignty in other word advocates the control over the resources by the peasant and seeks their role and participation in distribution, production, decision and policy making level. However, right to food openly makes the State responsible to ensure the rights, stop violation and also raises obligation to take appropriate action or steps to ensure that its people are free from hunger. There are two schools of thoughts related to right to food. Countries which have capitalism as economic system have adopted

the policy of right to food whereas countries which follow socialism are in favor of right to food sovereignty. The UN human rights instruments and organization, including FAO and UN Office of the High Commissioner for Human Rights (OHCHR) have raised their voices to ensure and protect right to food.

The concept of food sovereignty emerged in 1992. But the concept of right to food emerged since the establishment of the Food and Agricultural Organization (FAO) in 1945 and later in 1948 UDHR formally guaranteed the right to food. The concept of the food sovereignty was propounded by an organization of peasant formally called as Via Campesina. The Via Campesina is an international movement coalition of over 148 organizations, advocating family-farm-based sustainable agriculture. The organization Via Campesina founded in 1992 had propounded the seven principles of the food sovereignty.<sup>11</sup>

#### A. Food: A Basic Human Right

Everyone must have access to safe, nutritious and culturally appropriate food in sufficient quantity and quality to sustain a healthy life with full human dignity. Each nation should declare that access to food is a constitutional right and guarantee the development of the primary sector to ensure the concrete realization of this fundamental right.

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8. The special procedures of the Human Rights Council are independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective. The system of Special Procedures is a central element of the United Nations human rights machinery and covers all human rights: civil, cultural, economic, political, and social. As of 1 October 2013 there are 37 thematic and 14 country mandates. For more information: <http://www.ohchr.org/en/HRBodies/SP/Pages/Welcomepage.aspx> (Page visited on 12 July 2014)

9. The full text of his report is available at [http://www.srfood.org/images/stories/pdf/officialreports/20140310\\_finalreport\\_en.pdf](http://www.srfood.org/images/stories/pdf/officialreports/20140310_finalreport_en.pdf)

10. For more information <http://www.srfood.org/en/final-report-to-un-human-rights-council> (accessed on July 12, 2014)

11. For more information: <http://danedocs.countyofdane.com/webdocs/PDF/foodCouncil/foodSovereigntyPrinciples.pdf> (accessed on July 12, 2014)

## B. Agrarian Reform

A genuine agrarian reform is necessary which gives landless and farming people – especially women – ownership and control over the land they work and returns territories to indigenous peoples. The right to land must be free of discrimination on the basis of gender, religion, race, social class or ideology; the land belongs to those who work it.

## C. Protecting Natural Resources

Food Sovereignty entails the sustainable care and use of natural resources, especially land, water, seeds and livestock breeds. The people who work on land must have the right to practice sustainable management of natural resources and to conserve biodiversity free of restrictive intellectual property rights. This can only be done from a sound economic basis with security of tenure, healthy soils and reduced use of agro-chemicals.

## D. Reorganizing Food Trade

Food is first and foremost a source of nutrition and only secondarily an item of trade. National agricultural policies must prioritize production for domestic consumption and food self-sufficiency. Food imports must not displace local production nor depress prices.

## E. Ending the Globalization of Hunger

Food Sovereignty is undermined by multilateral institutions and by speculative capital. The growing control of multinational corporations over agricultural policies has been facilitated by the economic policies of multilateral orga-

nizations such as the WTO, World Bank and the IMF. Regulation and taxation of speculative capital and a strictly enforced Code of Conduct for TNCs is therefore needed.

## F. Social Peace

Everyone has the right to be free from violence. Food must not be used as a weapon. Increasing levels of poverty and marginalization in the countryside, along with the growing oppression of ethnic minorities and indigenous populations, aggravate situations of injustice and hopelessness. The ongoing displacement, forced urbanization, repression and increas-

ing incidence of racism of smallholder farmers cannot be tolerated.

## G. Democratic Control

Smallholder farmers must have direct input into formulating agricultural policies at all levels. The United Nations and related organizations will have to undergo a process of democratization to enable this to become a reality. Everyone has the right to honest, accurate information and democratic decision-making. These rights form the basis of good governance, accountability and equal participation in economic, political and social life, free from all forms

of discrimination. Rural women, in particular, must be granted direct and active decision making on food and rural issues. The Interim Constitution of Nepal 2007 has guaranteed the right to food sovereignty instead of right to food. There was a strong pressure from the Communist parties of Nepal to include right to food sovereignty in the Constitution.

## 4. Right to Food & Food Sovereignty in Nepal

For the first time in Constitutional history of Nepal, the Interim Constitution 2007 stated

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*For the first time in Constitutional history of Nepal, the Interim Constitution 2007 stated that “every citizen shall have the right to food sovereignty, as provided by law”. This was the first initiation of the Government of Nepal to address the food right related issues in the Constitution. However, this Constitutional provision is not sufficient to ensure and protect the citizen’s right to food.*

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that “every citizen shall have the right to food sovereignty, as provided by law”.<sup>12</sup> This was the first initiation of the Government of Nepal to address the right to food related issues in the Constitution. However, this Constitutional provision is not sufficient to ensure and protect the citizen’s right to food. This provision is under the fundamental rights chapter of the Constitution which has not been enforced in context of Nepali people. The fundamental right is the right which prevails automatically and no additional laws are needed to activate any fundamental rights. This is a simple Constitutional

12. Article 18(3) of the Interim Constitution of Nepal 2007

jurisprudence. That is why the Interim Constitution provided an extra-ordinary power to the Supreme Court in its Article 107<sup>13</sup>, if there is unreasonable restriction on the enjoyment of the fundamental rights conferred by the Interim Constitution. Many constitutions in their fundamental right mention about the provision such as *according to law or as provided by the law*. The objectives of those provisions are to provide punishment, fines and compensation to the victim or to criminalize any illegal act of the person. Specially, in civil and political rights, such provision is required to take legislative mea-

helps to promote the interest of the marginalized communities, peasants and laborers living below poverty line, including economically and socially backward indigenous tribes, Madhesi, Dalits, by making reservation for ascertain period of time with regard to education, health, housing, food sovereignty and employment.<sup>14</sup> The policy clearly directs the State that it must pursue the policy for the peasant who are living below poverty line and policy for the economically and socially backward community which includes the food sovereignty and housing too. However, no particular policy has been drafted

is protecting the Government stating that no question shall be raised in the Court regarding the implementation of the State Policy and Responsibility. From this Constitutional provision, Government is escaping from its duty and responsibility to ensure the right to food sovereignty.<sup>16</sup>

In Nepal, Civil and Political Rights have always been in priority either from the government side, the NGOs or the National Institution (National Human Rights Commission of Nepal). The Economic, Social and Cultural rights are in shadow and the most important right, i.e. right to food has been neglected. It is to everyone's knowledge that the general income of the Nepali people in rural or in urban areas is not enough to buy food for all year round. Similarly, there is always food scarcity and non-access or unaffordability of the food in far and mid-west part of the Nepal. No agencies seem to take responsibility on this issue.

In Nepal, transitional justice, conflict and other civil and political rights have always been a matter of discussion. It has been agreed universally that all rights have equal weight and importance but in Nepali context, civil and political rights are given priority. Developing countries like Nepal should urgently address the economic, social and cultural rights issues for its development and eradication of poverty by fulfilling the objective set out by the Millennium Development Goal

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*The State Policy of the Interim Constitution stated that "State shall pursue a policy which helps to promote the interest of the marginalized communities, peasants and laborers living below poverty line, including economically and socially backward indigenous tribes, Madhesi, Dalits, by making reservation for ascertain period of time with regard to education, health, housing, food sovereignty and employment.*

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asures for the punishment or compensation. According to Article 18(3) of the Interim Constitution no law has been enacted to ensure the right to food sovereignty. This indicates that there is neither any right to food nor the right to food sovereignty due to the absence of law as envisioned in the Interim Constitution.

The State Policy of the Interim Constitution stated that "State shall pursue a policy which

so far, which directly deal with the right to food sovereignty.

Similarly, in the State Responsibility, the Interim Constitution states that "to pursue a policy of establishing the rights of all citizens to education, health, housing, employment and food sovereignty".<sup>15</sup> The State has been unsuccessful in adopting such policy since it has not taken its responsibility as per the Constitution. Contrarily, the Constitution

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13. Article 107 of the Interim Constitution of Nepal 2007 Jurisdiction of the Supreme Court : (1) Any Nepali citizen may file a petition in the Supreme Court to have any law or any part thereof declared void on the ground of inconsistency with this Constitution because it imposes an unreasonable restriction on the enjoyment of the fundamental rights conferred by this constitution or on any other ground, and extraordinary power shall rest with the Supreme Court to declare that law as void either *ab initio* or from the date of its decision if it appears that the law in question is inconsistent with the Constitution.

14. Article 35 (10) of the Interim Constitution of Nepal 2007

15. Article 33 (h) of the Interim Constitution of Nepal 2007

16. Article 36(1) of the Interim Constitution 2007 "No question shall be raised in any court as to whether the matters contained in this Part have been implemented or not."

(MDGs). Still, the economic, social and cultural rights are considered as non-justiciable rights and most of the constitutional provisions are not human rights friendly in relation to economic, social and cultural rights.

Until the people of Nepal realize, exercise or enjoy the economic, social and cultural rights, more specifically right to food, there is no meaning of enjoying the civil and political rights<sup>17</sup>. The Supreme Court of Nepal also agreed that "among all the economic, social and cultural rights, the right to employment is important and it is also important for the successful utilization of civil and political rights, so its importance cannot be undermined by putting it in a class by gradually implementing them according to state's resources and means"<sup>18</sup>. For the successful realization of the civil and political rights, the economic, social and cultural rights must come under this right because the right to food is a critical issue. The Supreme Court of Nepal has realized the value of economic, social and cultural rights; however, the government has not recognized it yet. The Government must recognize and realize the right to food for all the Nepali people.

Most of the court orders, directives and mandamus are still pending and no proper action has been taken by the Government yet to fulfill its Constitutional, judicial and legal obligation to ensure the right to food. The recommendations made by the Treaty Body Committee CESCR to the Government of Nepal have not being

honestly implemented. The cases and issues relating to the right to food have never been discussed at high level government platform.

The UN Committee on Economic, Social and Cultural Rights had not made any proper and absolute recommendations to the Government of Nepal in the year 2001 on its first Concluding Observation. Later in the year 2007, the Committee had made strong recommendation to the Government which were not implemented effectively. The Committee in the year 2007 recommended the Government to take necessary steps on food security,

The Government has almost failed to take any appropriate policy and planning measures to ensure the right to food and protection mechanism.

In Nepal, there is a constitutional safe guard for the right to food sovereignty. The Government has also internalized its plans and policies with the MDGs, the WFP is also supporting for the eradication of hunger, Nepal is a State party to ICESCR-1966 and recently the Government has also adopted the National Human Rights Action Plan. These provisions and efforts had been admired by all. Though, the situation is not

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*The UN Committee on Economic, Social and Cultural Rights had not made any proper and absolute recommendations to the Government of Nepal in the year 2001 on its first Concluding Observation. Later in the year 2007, the Committee had made strong recommendation to the Government which were not implemented effectively.*

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address the food scarcity problem of the marginalized and oppressed community and properly implement the General Comment No. 12 of the Committee.

In the year 2009, few districts, including Jajarkot faced the epidemic of diarrhea which had taken more than 400 lives. Food (rice, lentils) supplied in those area 'by different organizations were suspected to be of substandard. The sample of the food was tested in Government Lab and National Human Rights Commission of Nepal."<sup>19</sup>

satisfactory and the resource might be a challenge for the Government, but transferring the skills of modern farming and agriculture is not so challenging. Similarly, if Government could introduce modern farming techniques in mid and far western region of Nepal, people do not have to be dependent on others for food. We need sustainable and self-dependent food policy in Nepal.

The National Human Rights Action Plan has made us more optimistic because it can make the Government more responsible and accountable for the

17. Shree Ram Adhikari, Right to Food and Food Sovereignty, PRACHI (Year 17, No. 70) INSEC (2011) P. 18

18. Prem Babadur Khadaka v. Nepal Government of Nepal, WN 064/0719 (2008)

19. Further information : Monitoring/Investigation Report on the Death of General Public due to Diarrhea/Cholera and Distribution of Food items in the Mid & Far Western Districts including Jajarkot (October 2009) available at [www.nhrcnepal.org/nhrc\\_new/doc/newsletter/Jajarkot\\_Epidemic-Investigation-Eng.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/Jajarkot_Epidemic-Investigation-Eng.pdf)



protection and promotion of right to food in Nepal. The plan also establishes the effective monitoring mechanism to check the implementation of the plan. The Plan includes food security and sovereignty as major subject. One of the major objectives of the plan is Food Security (Clean food and sovereignty, production of healthy agriculture goods and its sale, distribution and consumer rights).<sup>20</sup> The plan also states about the programs for the districts from mountain and himalaya region to

*v. Government of Nepal* issued the writ saying that the right to freedom cannot be realised unless the right to food is achieved.<sup>21</sup> There is constitution and many laws relating to food but there is no law or legislative provision that directly ensures the people's right to food in Nepal. As Nepal is a State party to ICESCR, 1966 and once Nepal ratifies any treaty, it shall prevail as national law.<sup>22</sup> So there is only this treaty which is the main source of right to food to claim in Nepal.

The major agriculture prod-

standard each Nepali needs 191 kilogram of food each year<sup>24</sup>.

Food crisis in far and mid-western regions, including the people under poverty in urban areas causes violation of the right to food. This shows that the Government is not serious to protect the right to food of the Nepali people.

## 6. Challenges and Conclusion

The production of the food must be as per the necessities and requirement of the country. For this any country has to adopt proper policy and plans, program and legislative measure so that people can eat sufficient food with their own local production. Today, the government policy looks like it is promoting the imports of the food and cloths. This is the wrong policy of the government. The government has to adopt the policy which makes its people self-dependent, at least in the context of food. The policy relating to agriculture must encourage self-dependency on the imported and donated foods. Food aid is making people more dependable on the imported food. As a substitute of this, the government has to adopt the policy to make people self-dependent on food with proper skills, knowledge and techniques of the modern agriculture and farming. Recently, media and NGOs reported that food aid destroyed the local market and farming<sup>25</sup>. Every year the government is increasing its annual budget and revenue collection is also increasing. But in the same

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*The civil and political rights and other economic, social and cultural rights are necessary for the human beings but those rights shall be enjoyable only when human have sufficient food to survive. The freedoms which are guaranteed by the national and international human rights instruments are not possible for full enjoyment and exercise if there is violation of the right to food.*

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provide quality food in cheap price which is accessible.

The civil and political rights and other economic, social and cultural rights are necessary for the human beings but those rights shall be enjoyable only when human have sufficient food to survive. The freedoms which are guaranteed by the national and international human rights instruments are not possible for full enjoyment and exercise if there is violation of the right to food. The Supreme Court of Nepal in the case of *Prakash Mani Sharma*

ucts of Nepal are rice, maize, millet, wheat and barley. The total food grain production of Nepal is insufficient for the Nepali people. So each and every year it has been importing thousands of tons of food from India. The country imported maize worth Rs 4.85 billion (219,761 tonnes) from India alone shipping maize valued at Rs 4.81 billion. Imports of paddy amounted to Rs 4.75 billion (254,465 tonnes).<sup>23</sup> If we divide the total production of the food to each Nepali, then each Nepali will get 186 kilograms of food but according to

20. Fourth Human Rights Action Plan, (2014-2019) Government of Nepal, Office of the Prime Minister and Council of Minister (2014 August) P. 58

21. *Prakashmani Sharma v. Government of Nepal* (WN. 0149/065) quoted by Prof. Geeta Pathak in *Breaking the Generation Theory of Human Rights*, Kathmandu School of Law Review (Vol.3, 2013) at P.2

22. *Ibid* 41

23. [http://www.ekantipur.com/the-kathmandu-post/2014/05/20/related\\_articles/nepal-imported-agro-products-worth-rs-99.34-billion-last-fy/263035.html](http://www.ekantipur.com/the-kathmandu-post/2014/05/20/related_articles/nepal-imported-agro-products-worth-rs-99.34-billion-last-fy/263035.html)

24. Estimated Food Security Situation of Nepal, 2012-13, Ministry of Agriculture and Cooperative, Nepal

25. *The Human Rights to Food in Nepal*, Droits et Democratie Rights and Democracy 2007, Canada available at: [www.dd.rd.ca](http://www.dd.rd.ca)



ratio the production of the food has not increased. Still many districts which do have not sufficient food especially in far and mid-western region of Nepal are suffering from food deficiency. Though, Nepal Food Corporation (NFC) never distributed food sufficiently in food deficit districts and transportation system also causes hindrance to NFC. The NFC activities on food security and distribution have not been evaluated and monitored by any organizations. Only few NGOs have carried out monitoring of distribution in relation to right to food and non-discrimination.

Nepali people who are deprived from their liberty, freedom and other forms of civil and political rights are getting compensation from the government and perpetrator are bought to legal action as well. However, there is no constitutional and legal protection which provides compensation to Nepali people regarding the violation of economic, social and cultural rights.

The new Constituent Assembly is drafting new constitution of Nepal. The new constitution must have a provision to guarantee the right to food. The fundamental rights never need additional laws to enjoy and exercise the rights. The fundamental rights

with "right to food" must be entitled with the access and justice for the people if any violation occurs. The laws and acts must be motivational for the peasant, backward and marginalized community and should acknowledge their rights and ownership over the food. The government has to implement the recommendation made by the Committee of the Economic, Social and Cultural rights and it must ratify the Optional Protocol to the Covenant on Economic, Social and Cultural Rights 2008. The government must adopt the specific and special policy and program to address the food deficiency

instruments according to the requirements. The Government must work in parallel with the Maastricht Guidelines<sup>26</sup> on violations of Economic, Social and Cultural Rights 1997 and The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights. The international instruments shall be the major guideline and road map for the government to work more professionally and actively for the protection and promotion of the right to food in Nepal.

Only production of food cannot fulfill the demands of Ne-

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*Only production of food cannot fulfill the demands of Nepal; there should be distribution of food and accessibility, affordability and availability of food for Nepali people. The government must treat its people on the principles of right-based approach instead of treating them in welfare or charity-based approach in the matter and issues of food.*

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and hunger problem of the far and mid-western region of the Nepal.

In the year 2004, the FAO launched the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security. The government must also use such international

pal; there should be distribution of food and accessibility, affordability and availability of food for Nepali people. The government must treat its people on the principles of right-based approach instead of treating them in welfare or charity-based approach in the matter and issues of food.

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26. [http://www1.umn.edu/humanrts/instree/Maastrichtguidelines\\_.html](http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html)



Prakash Bhattarai\*

# Flaws in Nepal's Peace Process: Causes, Consequences and Plausible Solutions

## Introduction

November 2014 will mark the eight years of the formal signing off the Comprehensive Peace Agreement (CPA) between the then CPN (Maoist) and the Government of Nepal. Eight years are equivalent to the two terms of office of the US President, nearly the two terms of office of the Indian and Chinese Prime Ministers, and it also nearly covers the two five years planning period of the government of Nepal. Eight years are also almost equivalent to the secondary school completion period of a child born in Nepal. In that sense, eight years can be considered as a reasonably long timeframe within which Nepal could construct thousands of kilometers of black-topped roads, at least half a dozen mega hydro-power projects, at least half a dozen cricket and football stadiums with international standard, and many more developmental and infrastructure projects of national pride. These eight years could also be utilized for strengthening our local government by holding its elec-

tions twice; generating employment and livelihood opportunities for minimizing the flow of Nepali youth in gulf countries; strengthening and improving health and education facilities and community safety and security provisions for making Nepal a livable place for all segments of people.

Instead of all possible achievements mentioned above, Nepal, even eight years after the implementation of the CPA, is struggling hard to write its new constitution, make its peace process durable, and take the country out of the quagmire of deep-rooted political transition. Why the CPA implementation process is stalled despite a number of efforts made by the political actors, international community, civil society, and also from the citizens' level? What can be some of the possible strategies for completing the remaining tasks of the peace process? This reflection-based article is an attempt to provide a holistic analysis of the status of Nepal's peace process from a scholar-practitioner point of view.

## Existing Context of the Peace Process

I argue that the peace agreement implementation process of Nepal has been incomplete not just because of one single factor, rather a combination of multiple factors. In a nutshell, presence of a complex and immature peace agreement, lack of proactive involvement of key political actors in completing the remaining tasks of the peace process, a mismatch between the political transformation process and the political management capacity of leaders, lack of clear national vision among the political actors on how to deal with the stalled agendas of the peace process, and incapability of political leaders to address the concerns and demands of various local interest groups and external interventions are key reasons for the incomplete peace process. Likewise, the lack of simultaneous negotiations among the conflicting parties on the highly contested issues, centralized decision-making process of the political parties, intra-party political rifts, and leadership crisis in driving the agenda of peace

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process have been observed as additional factors behind obstructing the peace process. Moreover, the role of external third parties and their distinct opinions regarding the modality of the peace process, and the lost civil society momentum in the post-agreement period are found to be rest of the factors behind the imperfections in Nepal's peace process. In this article, I have explained why and how all above mentioned factors have been responsible for the poor implementation of the peace agreement.

### **Immature Peace Agreement**

Eventually it has been proven that the CPA of Nepal is a complex and immature peace agreement. The conflicting parties have made so many promises in the peace agreement without considering and assessing their own delivering capacity and feasible timeframe for its complete implementation. Because of the complex and immature nature of the peace agreement, political actors have spent a significant amount of time and energy in redefining and renegotiating the several provisions of the peace agreement, and still not reaching to a final agreement in many controversial issues of the peace process, such as the governing structure of the State and issues of federalism. This is mainly due to the fact that conflicting parties did not spend a significant amount of time while crafting the peace agreement (peace agreement was signed within seven months of their preliminary negotiations). However, international practices demonstrate that it takes a longer time to negotiate before they reach to a final peace agreement.

As mentioned before, the key political actors have lost their

enthusiasm in the later phase of the peace agreement implementation process. Thus there is no proactive involvement of high-level political leaders to complete the remaining tasks of the peace process. Over the past few years, particularly after the completion of the army integration process and the election of the first Constituent Assembly (CA), peace process are found to be an administrative process rather than an active political process. Political actors these days are not involved in real hard negotiations (at least it is not widely observed by the public) to sort out some of the highly contested issues of the peace process. However, situation was totally opposite few years back. Thus, it can be argued that no real political efforts are taken by the conflicting

securing peace and democracy in the country, People's Movement of 2006 against the Monarchy, abolishment of Monarchy in 2008, formal end of a decade long armed conflict, and the historic election of the CA in 2008, all these political events took place within three years period. However, due to the lack of effective political management capacity of leaders, they have failed to tackle the challenges experienced in the new political environment, particularly after the abolishment of the Monarchy. End of consensus politics, power struggle for controlling over the government, changes in power equations among political parties after each election of the CA, external interventions, emergence and proliferation of new interest groups, and the

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*End of consensus politics, power struggle for controlling over the government, changes in power equations among political parties after each election of the CA, external interventions, emergence and proliferation of new interest groups, and the lost civil society momentum to act as a strong watchdog of the political processes, are all major factors in this regard.*

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parties to make the peace process politically alive and active until it reaches the final stage of its implementation.

A mismatch between the political transformation process and the political management capacity of leaders has also significantly contributed to affecting the smooth implementation of the remaining provisions of the peace agreement. Nepal experienced a rapid political transformation between the period of 2005 and 2008. Signing of the 12-point agreement between the Seven party Alliance (SPA) and the CPN (Maoist) for

lost civil society momentum to act as a strong watchdog of the political processes, are all major factors in this regard.

### **Lack of Visionary Leader**

The lack of clear and common national vision among the political actors on how to deal with the stalled agendas of the peace process is found to be another crucial factor behind the sluggish peace process of Nepal. They are also found incapable of sequencing the negotiation processes as well as engaging in the simultaneous negotiations in finding solutions to

the unresolved and unimplemented agendas of the peace agreement. Thus, in some moment, particularly in the period of 2008-2012, the whole nation focused its efforts on one or two issues of the peace process, such as the involvement in the constitution making process and the management of arms and armies. Whereas, they failed to pay a sincere attention towards other issues, such as the formation of the Truth and Reconciliation Commission (TRC), post-conflict reconstruction, providing justice to the conflict victims, robust socio-economic reforms and so on. As a result, these issues remained either unimplemented or poorly implemented for a long time.

Incapability of political leaders was also seen in the case

the dynamics and direction of the peace process. This also resulted in a clash of interests in the name of establishing the supremacy of their post-conflict reconstruction model. Political actors, in this regard, could not take any concrete action for managing and controlling the unnecessary interventions; rather they desired to listen to everybody, thus it created a crowd of actors and agendas in the peace process. For example, constitution writing, being a highly politicized (at the national level) and externally intervened political process, political actors could not work in tandem with the national vision and thus it got messed up.

The lack of adequate negotiation model between the conflicting parties has remained an-

which issue of the peace process. In addition, there is also the lack of simultaneous dialogues and negotiations among the political leaders; rather they often desired to solve one issue before moving to find solutions to another issue. Thus every leader has been involved in negotiating the same issue at different levels. This tendency has minimized the urgency of other issues in the peace process. Why it took so long time to pass the TRC bill? Why the political actors still needs to negotiate on the issue of federalism and governing structure of the State? Why social, economic, and cultural rights related provisions of the peace agreement are not implemented? This is all happening because of the lack of simultaneous negotiations.

Centralized decision-making process of the political parties is found to be another crucial factor behind the stalled peace process. Often decisions are taken by the head of each major political party in consultation with some hand-counted leaders close to him. Other second layers of political leadership are not found to be so useful in taking some major decisions related to peace process. When the key leaders took ill or were busy in their own parties' activities, there was no such strong culture of transferring power and authority to other leaders who could make decisions on behalf of their political party. In other words, there is no clear division of labor among leaders within each political party, thus it is the top-rank leader who needs to take final decisions in all agendas relating to the peace process, and this remains one of the hindrances for conducting simultaneous negotiations in various agendas.

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of dealing with the concerns and demands of various local interest groups and external interveners. Over the past six years, new generations of interest groups have emerged in Nepal, in the name of ethnicity, religion, and on issues around regionalism. However, political actors could not come up with some solid strategies on how to deal with these groups politically; rather they ended up supporting/backing such groups for their own political benefits. Likewise, there have been external interventions which have shaped

other factor behind the incomplete peace process. Often conflicting parties adopted a random negotiation model for finding solutions to the unresolved issues of the peace process, where they had no concrete rules for institutionalizing the outcomes of their discussions. They also had a lack of clarity on which rank of leaders are negotiating with each other in resolving which issues of the peace process. In other words, there is a lack of division of work among leaders, which could clarify who is negotiating with whom in finding solutions to

Intra-party political rifts has been noted as another crucial factor behind the smooth running of the peace process. Most of the major political parties suffered from this problem, thus high rank political leaders who were supposed to be involved in addressing the problems related to peace process, are now spending a significant amount of time in managing their internal conflicts and securing their own positions in the party. Intra-party political rifts have also contributed to divide the interests of leaders regarding the modality of the constitution and overall direction of the peace process.

Leadership crisis have been noted as another obstacle to the success of the peace process. Up until 2011, Nepal's peace process was led by former Prime Minister Girija Prasad Koirala. After his demise three years back, none of the political leaders are able to take his position to drive the remaining agendas of the peace process. The acceptance of UCPN (Maoist) leader Prachanda has also decreased after the landslide defeat of his party in the last CA election. Thus, sudden changes that have occurred in the political front (power equation) with old guards being replaced by the new ones This has also made things complicated in achieving desired progress in the national political process. However, no such acceptable leaders have been observed in the national political domain who could drive the agenda of the peace process. In the past few years, the notion of collective leadership was somehow practiced by major political parties with the formation of a High Level Political Mechanism (HLPM) to resolve the disputed agenda of the peace process. How-

ever, legitimacy of this mechanism in taking major decisions relating to the peace process is questioned when there is already a presence of an elected CA body to take those decisions.

### **Differing Opinions**

External third parties and their distinct opinions regarding the modality of the peace process are also found to be another impeding factor in the peace process. An important reason for this is that many third parties have held distinct opinions regarding the political context, as some actors advocated a fast-track solution, whereas others favored a

However, by 2010-2011 no unified voice was heard among external third parties on extending UNMIN's presence in Nepal. The lack of a consolidated voice among third parties on the formation of a Truth and Reconciliation Commission (TRC), the modality of the federal state, and uncoordinated support and advice during the constitution writing process are additional examples of this.

There are a number of reasons for the lack of third-party coordination in the post-agreement period. First and foremost, the post-agreement environment was an opportunity for many third parties to analyze the political context

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*An important reason for this is that many third parties have held distinct opinions regarding the political context, as some actors advocated a fast-track solution, whereas others favored a sustainable but slow-track solution. These differences of opinion among interveners were the result of many different factors, including a lack of shared understanding of the conflict context and shifting priorities in a changing political environment.*

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sustainable but slow-track solution. These differences of opinion among interveners were the result of many different factors, including a lack of shared understanding of the conflict context and shifting priorities in a changing political environment. An example is differing responses to the welcoming of the UN Political Mission in Nepal (UNMIN) and its later termination. In 2007 most third parties, including India, welcomed UNMIN's presence in Nepal to support post-war peace initiatives, particularly the monitoring of the ceasefire, the CA election, and the management of arms and armies.

from the viewpoint of their own interests, and to predict future scenarios in a broader perspective, whereas during the conflict they had to analyze the situation from a narrower perspective, focusing on how to deal with armed violence and how to bring the conflicting parties to the negotiation table. Second, the accessibility of third parties to both high-ranking political party leaders and rebel leaders also contributed significantly to their lack of coordination. Easy access to leaders of conflicting parties in the post-agreement period gave third parties the opportunity to express their concerns and interests



## “Constitutional Guarantee of Right to Food and its Enforcement is Necessary”

Various issues of rights and freedom have been discussed within the jurisdiction of human rights. United Nation has adopted various treaties to ensure Civil and Political Rights, Economic, Social and Cultural rights worldwide. Human Rights has been listed in the Universal Declaration of Human Rights adopted in 1948. Champions of right to food have advocated it as the first right of individuals.

In another words, right to food is the right of the common people to have unhindered and easy access to adequate food on daily basis. The International Covenant on Economic, Social and Cultural Rights 1966 has recognized the right to adequate standard of living, including right to be free from hunger. Article 25.1 of the Universal Declaration of Human Rights 1948 has also ensured right to food.

Clothes, shelter and food are the basic human rights of people. These rights must be fulfilled by the State. Right to food with nutrition has been accepted as right to food. Facts related to gross violation of right to food of the common people due to food crisis and lack of government policies regarding food have come out occasionally. While discussing about the right to food, the issue of food sovereignty cannot be viewed separately. In 1966, the farmer's association of 148 nations (Via Campensina) forwarded the seven principles by presenting the concept of food sovereignty. The association gave major importance to agrarian reforms, protection of natural resources, re-building of food entrepreneurship, eradication of global hunger, social peace and democratic control by forwarding the right to food as basic human rights. The Interim Constitution of Nepal 2007 has guaranteed human rights as fundamental rights of the people.

Before saying that the State has not ensured right to food, the issues regarding agriculture and land management should be advocated with importance. Ministry of Agriculture and Co-operatives is the line ministry responsible for food security. However, the policies are prepared by the National Planning Commission. Therefore, coordination between these two agencies is necessary. Only proper management of land, the policy regarding modern and commercial agricultural production can guarantee the right to food. *Ramesh Prasad Timalsina* collected views of right to food activists for “INFORMAL”. Excerpts:



**Birendra Adhikari**

The class deprived from right to food are workers and poor who cannot feed themselves and are not able to ensure their food secu-

urity. There is malnutrition. Especially these groups are known to be deprived from right to food and without food security. In legal term, the right to food has been included in the constitution. If other laws are made it will be the issue of protection and prosperity of right to food. The critical issue at present is that the right to food sovereignty has been provided in the Interim Constitution of Nepal but it states that this will be enforced only after making laws. However, we are saying that the right to food must be ensured constitutionally. It cannot be said that it will be enforced only after making laws. This

is the legal hurdle in achieving the right to food while there are technical difficulties as well. We are not independent in terms of food production. Even for buckwheat and millet, we have to rely on other countries. We are in such a situation that even fruits, meat and vegetables are being imported from foreign land. Everything is being imported. We have very little commodity that can be exported. Not even 5% is exported as compared to imported goods. This indicates that in coming 8-10 years we are going to suffer from more poverty due to food. The growth



in economy due to remittance is temporary. To have a full stomach and nutritious diet, we need to promote agriculture, industries and employment which will make the country's production sustainable. We believe that the country can only develop if all its people, including post-partum women, children can eat to their fullest and have nutritious diet. But the situation is different and adverse. The government's attention must be focused on this issue.



**Chitra Raj Timalina**

It is more necessary to know about 'duty to food' rather than right to food. People need to work first before demanding for right to food. We need to advocate for unconditional guarantee of right to food of senior citizens, people with disabilities and children. Those people, who do not work, spend their time without doing any productive work should not ask for their right to food. The farmers themselves are not able to consume the food they produce. They are compelled to sell their produce in wholesale price and buy the same in retail price. That is why the right to food must be implemented firstly on the farmers. The government must bring micro finance program targeting small farmers

rather than big ones. Only then it will be easier to translate right to food into practice.



**Budhi Ram Tharu**

The issue on right to food has been discussed aplenty since long in Nepal. It is normal that even now this issue is the subject of discussion. It is necessary to view right to food beyond the food security as the food security includes only technical aspects. There are four pillars of food security - availability, adequacy, accessibility and acceptability. We all know that the production is very less in our country. We have been importing produces from other countries since 25/26 years. The first thing necessary is to increase production or productivity. The production has been affected due to the lack of manure, seeds and proper irrigation. So we need to focus on what measures can be adopted to increase the productivity. Firstly, it is necessary to reform the technical aspects. Secondly, policy-level decisions at political level are needed. Government must somehow create an environment of relief to small farmers and ensure their food security and right to food. The ill practice of wasting food is on the rise these days. We can see this in big restaurants and hotels or in receptions. These wastes can be reduced with proper management to ease food avail-

ability. If employment and skill are imparted to the citizens, mainly youths and other people can generate income which will ease the food import.



**Khom Prasad Ghimire**

Food is indispensable to a human life. To have easy access to food is the right of an individual. Fruits and vegetables are specially needed food materials in everyday life. Special care should be given from the production to distribution of fruits and vegetables. Safe, quality and pure goods should be brought to the consumers. Farmers and entrepreneurs should be engaged in creating such environment. Nowadays, the use of pesticides in fruits and vegetables is rampant. This has curtailed the people's right to consume pure food. It is necessary to focus on how to produce pure and edible foods in the context of increasing use of pesticides. It is high time everyone focused on organic production of food. Right to food is not only the people's right to consume, it is related to the right to life. This is an issue related to health. Some plans of the government have come up. However, their implementation needs to be taken to the people's level.

directly to the key stakeholders in the peace process. This was not the case during the period of violent conflict.

Finally, a lost civil society momentum in the post-agreement period remained another crucial factor behind obstructing the peace process. There was an active civil society role particularly during the time of conflict and during the time of People's Movement 2006. The momentum somehow continued even before the first CA election. However, they have lost their momentum particularly after that, thus they are not able to put a significant amount of pressure over the conflicting parties in this particular period. There are a number of reasons behind a lost civil society momentum. Firstly, in a new political environment, particularly after the election of the CA in 2008, they heavily relied on political parties to institutionalize the political changes achieved through years of struggles. Secondly, their movement driven spirit for peace and democracy, which were observed between the period of 2005 to early 2008, was converted into running the projects and programs, thus they lost their ability to establish them as an alternative political force. Likewise, civil society organizations are marginalized by the conflicting parties in the post-agreement, partly because the lack of clear vision and direction of their interventions, and, partly their potential to support the peace process is ignored.

### **Towards Successful Implementation of Nepal's Peace Process**

Since Nepal's peace process suffered from multiple problems, it requires multiple solutions to complete the remaining tasks of the peace process. First and fore-

most, it is a responsibility of conflicting parties to find ways to keep the process alive and active until it reaches to the final stage of implementation. If conflicting parties are unable to find solutions from their own efforts, then it becomes the responsibility of local and external third parties to provide necessary mediation, facilitation, and implementation support to the success of the peace process. Similar principle applies even in the case of Nepal, where the signatories of the CPA need to be principle bearer in making the peace agreement implementation process active and alive. However, the roles of local and external third parties are also quite crucial in different stages of the peace agreement implementation process. In this section, I present some of the possible tasks that various actors can perform to complete the remaining task of the Nepal's peace process.

In the light of current political dynamics of the country, the notion of collective leadership seems quite relevant for completing the remaining task of the peace process. There is a lack of an acceptable and visionary leadership in driving the agendas of the peace process. Thus, political leaders of Nepal from inside and outside of the CA body should develop a consensus, which facilitates them to nominate a group of leaders as key figure in taking final decisions with regard to the highly contested issues of the peace process. Mechanisms like HLPM should be revived with the inclusion of leaders out of the CA body. However, this mechanism should have very clear guidelines regarding its modality, jurisdictions, decision-making processes, and dispute resolution methods. Most importantly, HLPM should not bypass the core

role of government and the CA body; rather it should function as a facilitating mechanism to find solutions to the stalled agendas of the peace process.

Another crucial problem with peace process in Nepal is that the critical issue of inclusivity has not been properly addressed. Thus inclusivity should be accepted as an important agenda of the peace process, and it needs to be seen at different levels. First, there are some forces such as the CPN-Maoist, which is currently outside the CA body and not actively participating in the negotiations with other political parties. Thus, political parties, who are currently part of the CA body need to make sure that those who are not representing in the CA body are also included in the constitution making process, and are also consulted frequently in other peace process agendas of their concerns. Secondly, major political actors also need to make sure that civil society organizations are also included in the high-level peace process. There was an active civil society role during the time of conflict and they were frequently consulted and asked their supports by the conflicting parties. Their previous roles need to continue to complete the remaining tasks of the peace process. Thirdly, inclusion of interest groups in the dialogues and negotiation processes can be an important strategy for the durability of the peace process. However, political leaders needs to have an adequate strategy on how, when, and who of them should be included. Finally, there should be an inclusion of victims' agendas in the peace process, as current peace building programs in Nepal have come in for widespread criticism for not benefiting the people

mostly affected by violence.

It is also quite crucial to make the local peace infrastructure functional and effective to the support of the peace process. The existing peace infrastructure, comprising the Ministry of Peace and Reconstruction (MoPR), Local Peace Committees (LPCs) formed in the districts and VDC level, and peace working group formed under MoPR are not functioning properly, mainly because of the over politicization and a lack of proper policy direction. Government should take adequate step to make them functional and resourceful to support the peace process.

Spoiler Management is one of the highly critical issues in the peace processes around the world and it cannot be an exception in the context of Nepal. Spoiler can be any individuals or group of people who attempt to obstruct the peace process for their interests. Conflicting parties should be judicious in identifying them and taking adequate actions against the spoilers who attempt to obstruct various aspects of the peace process. If spoilers are within each conflicting side, then, local and external third parties should take a proactive role in making the high command of conflicting parties aware of such individuals and groups. However, when the external interventions play such role in the peace process, then things gets complicated.

Another primary concern often raised in relation to the current peace process is the impact of foreign aid. To what extent foreign aid has created negative and positive impact on the peace process of Nepal? Is the foreign aid that Nepal received in the post-agreement period has been spent on supporting the peace process? How foreign aid should be spent

in making some positive impacts on completing the remaining tasks of the peace process? Are donors who are providing money and the government and I/NGOs who are spending foreign aid money doing their job in a right way? A critical reflection and an evaluation on this issue are also quite important for directing the foreign aid to the best support of the peace process.

Mandate-based institutionalized third party intervention is another important aspect of the peace process. However, third-party interventions in Nepal are primarily ad hoc, informal and improvised, largely lacking institutionalization. Some of the institutionalized practices are also seen, such as the formation of Nepal Peace Trust Fund. Likewise, some mandate based third-party interventions, such as the role of UNMIN and OHCHR in Nepal can be taken as a reference. Mandate-based third-party intervention can be an important strategy, as mandates compel them to work collectively and put their cultural and political differences aside. Mandate-based intervention structures are helpful because they bind third parties to intervene in a conflict with a particular approach and in particular areas. Healthy lines of communication between the conflicting parties is also crucial for establishing mandate-based intervention structures, as this helps them to talk openly about which third parties to accept for what intervention actions.

The notion of simultaneous negotiation is quite important to the success of the peace process. International community and local civil society need to ensure that conflicting parties are not just focusing their negotiation efforts in solving one particular issue of the

peace process one at a time, rather they are doing multiple negotiations at multiple levels for finding some concrete solutions to each controversial issue they encounter. Division of labor among leaders in each political party is quite essential for convening negotiations at multiple levels, and leaders involved in such negotiations should get full authority to take concrete decisions, so they do not have to wait their high command to have final words to say in each negotiated issues.

Coordinated third-party supports in addressing the remaining tasks of the peace process are found to be quite relevant. Previous experience has demonstrated that third-party coordination on issues around violence reduction, human rights protection, and integration and rehabilitation of ex-combatants, have become highly successful during the time of conflict and even in the post-agreement period. Third-party coordination on developing the peace and development strategy, joint contribution of the donor community to the Nepal Peace Trust Fund, and adoption of the Basic Operating Guidelines-2003 are other successful third-party coordination. Drawing lessons from these successful coordination practices of Nepal, they can further develop a 'culture of coordination' based on the joint analysis of the post-agreement context, and provide a collective third-party support to the peace process.

Finally, considering the immense contribution of the civil society to peace process in the past, they should act as watchdog of the current peace process, and make leaders alert that there is a group of individuals and organizations who are closely witnessing the entire process.



## “Right to food is established forever once there is food sovereignty”

For this issue of **INFORMAL** which focuses on Right to Food, Ramesh Timalsina interviewed **Prem Dangal**, who is a member of the National Planning Commission of Nepal and also holds a PhD in Food Sovereignty. Excerpts of the interview:

### ○ **What is Right to Food?**

"Food security" should be added with Right to food and Right to food sovereignty. These three issues are different from each other. Food security means management of enough food for the people at all time. The natural calamities like flood, landslide, drought, incessant rainfall might take place and State must store food for such situations in terms of security. This is food security. In terms of right, people are legally entitled to right to food. This means there is there is an environment for legal protection of rights. Or, issue of right to food has been raised with the belief that such condition should be created.

### ○ **Then, what is food sovereignty?**

Food sovereignty is related to food production, resources for production, labour for production and other factors like water, land, resources and price regarding production. All these are about the issues of rights of farmers and their

ownership. Within this framework, politically we call it self-sufficient sovereignty. Similarly, in terms of production, agriculture provision, economic provision and agriculture constitutes by combination of right to land, right to natural resources, biological diversity and right to water. Only after the availability of these things, the food is produced. Hence, issue of sovereignty has been raised in terms of ownership of producers on these things and in terms of rights.

### ○ **That means the issue of food sovereignty comes a bit late, isn't it?**

No, Right to food is established forever once there is food sovereignty. That is why this issue cannot be neglected. This also ensures food security. This should be

understood as a form of our development dimension. If work is done through the framework of the food sovereignty, the right to food and food security can be achieved by reforming the agricultural sector.

### ○ **It is said that more than 30 districts still face food crisis. What does a civilian have to do to achieve right to food?**

The question that you have raised is about availability rather than right to food. There are almost 27 to 30 districts having minimum food stock. It is unfortunate that even the district of Terai region such as Saptari, Siraha, Dhanusha, Mahottari, Rautahat and Chitwan which have a fertile land have least amount of food. If we compare average food with last year, about 8 lakh metric ton have

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*In terms of right, people are legally entitled to right to food. This means there is there is an environment for legal protection of rights. Or, issue of right to food has been raised with the belief that such condition should be created.*

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*The government must give subsidy to the farmers especially on production to motivate them. The agricultural development strategy going to be introduced by the commission has plans to address these issues. We have planned for a self-reliant agriculture and reduction of poverty, creation of employment, increment in financial activities and achieving food and nutrition security. It needs a lot of investment.*

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been saved this year. We see that its distribution is not being done in an effective manner and still we are importing food despite this saving. On one hand we say that we are self-reliant on food and we also see food stock; however, the distribution tells a different story. Due to the lack of proper distribution mechanism a problem has erupted.

○ **Does that mean we lack in management of production and distribution?**

We need to concentrate on policy of using land in terms of production. We need to be sure about what food suits the land best and where to plant rice and where to plant tea? From which place can we produce more fruits? Which place is appropriate for animal husbandry? And then only move ahead by asserting this. That is why we need to implement a land use policy to increase productivity by announcing some region as "Pocket Area". If we could move ahead by managing from the production, we can definitely solve the issue of food.

○ **What have you been doing personally or through commission for the Right to Food especially after being appointed as a member of National Planning Commission of Nepal?**

13<sup>th</sup> 3-years plan is active right now. We are now working according to the current plan and especially this plan talks about how to be self-reliant on food and how to make agriculture self-dependent. Self-dependent agriculture simply means producing all food one needs by themselves. We are now importing grains, vegetables, meat products and fruits from other countries. In such situation we need to be serious about food security and its availability. The first thing is we need to increase productivity, and after that the production needs to be distributed through public distribution system so that they get distributed to people and community who have been deprived of food. Irrigation is the most important factor in increasing agriculture. If the land is irrigated properly throughout the year, it gives higher productivity. The third is market. The farmer produces the food but they do not get proper price in the market. That is why this issue must be addressed first. The farmers must get the price for the proper food through co-operatives. The government must give subsidy to the farmers especially on production to motivate them. The agricultural development strategy going to be

introduced by the commission has plans to address these issues. We have planned for a self-reliant agriculture and reduction of poverty, creation of employment, increment in financial activities and achieving food and nutrition security. It needs a lot of investment.

○ **When can a person feel that his Right to Food has been ensured? Will such situation come in our country?**

That situation will definitely come. We need to implement the commitment which we have expressed in international platforms. Nepali people in democratic republic must not lose their life to hunger, malnutrition. People should not be deprived of education. No body should die of lack of health treatment. The State should think in such way. This means State must reform its economy through economic and social transformation. We need to move towards this direction once the political issues get some kind of outlet. If this is accomplished, we will not only realize or enjoy right to food but will also be ahead in food security and there will also be food sovereignty.

○ **Despite strong legislations and policies, implementation is weak. Why?**

It needs to be properly monitored. The officials responsible for implementing policies should be made accountable. The monitoring agencies must also work in timely manner and coordinate. There should be coordination among these agencies. Only after that the implementation part will be strengthened.



# Child Sexual Abuse: Concept, Prevalence, Effects and Counter Measures

## 1. Concept of Child Sexual Abuse

Child sexual abuse (CSA) or child molestation is a form of child abuse in which an adult or older adolescent uses a child for sexual stimulation. Forms of child sexual abuse include asking or pressuring a child to engage in sexual activities (regardless of the outcome), indecent exposure (of the genitals, female nipples, etc.) to a child with intent to gratify their own sexual desires or to intimidate or groom the child, physical sexual contact with a child, or using a child to produce child pornography.

Under the law, *child sexual abuse* is an umbrella term describing criminal and civil offenses in which an adult engages in sexual activity with a minor or exploits a minor for the purpose of sexual gratification. The American Psychiatric Association states that "children cannot consent to sexual activity with adults", and condemns any such action by an adult: "An adult who engages in sexual activity with a child is performing a criminal and immoral act which never can be considered normal or socially acceptable behavior."

Child sexual abuse can occur in a variety of settings, including home, school, or work (in places where child labor is common). Child marriage is one of the main forms of child sexual abuse; UNICEF has stated that child marriage "represents perhaps the most prevalent form of sexual abuse and exploitation of girls". The effects of child sexual abuse can include depression, post-traumatic stress disorder, anxiety, complex post-traumatic stress disorder, propensity to further victimization in adulthood, and physical injury to the child, among other problems. Sexual abuse by a family member is a form of incest, and can result in more serious and long-term psychological trauma, especially in the case of parental incest.

## 2. Prevalence of Child Sexual Abuse

The global prevalence of child sexual abuse has been estimated at 19.7% for females and 7.9% for males, according to a 2009 study published in *Clinical Psychology Review* that examined 65 studies from 22 countries. Using the available data, the highest prevalence rate of child sexual

abuse geographically was found in Africa (34.4%), primarily because of high rates in South Africa; Europe showed the lowest prevalence rate (9.2%); America and Asia had prevalence rates between 10.1% and 23.9%. In the past, other research has concluded similarly that in North America, for example, approximately 15% to 25% of women and 5% to 15% of men were sexually abused when they were children. Most sexual abuse offenders are acquainted with their victims; approximately 30% are relatives of the child, most often brothers, fathers, uncles or cousins; around 60% are other acquaintances, such as "friends" of the family, babysitters, or neighbors; strangers are the offenders in approximately 10% of child sexual abuse cases. Most child sexual abuse is committed by men; studies show that women commit 14% to 40% of offenses reported against boys and 6% of offenses reported against girls.

Studies by David Finkelhor, Director of the Crimes against Children Research Center, USA show that:

- 1 in 5 girls and 1 in 20 boys is a victim of child sexual abuse;
- Self-report studies show that 20% of adult females and

\* The author is Section Officer at the Office of the Attorney General of Nepal



- 5-10% of adult males recall a childhood sexual assault or sexual abuse incident;
- During a one-year period in the U.S., 16% of youth ages 14 to 17 had been sexually victimized;
- Over the course of their lifetime, 28% of U.S. youth ages 14 to 17 had been sexually victimized;
- Children are most vulnerable to CSA between the ages of 7 and 13.

Child sexual abuse can take place within the family, by a parent, step-parent, sibling or other relative; or outside the home, for example, by a friend, neighbor, child care person, teacher, or stranger. When sexual abuse has occurred, a child can develop a variety of distressing feelings, thoughts and behaviors. No child is psychologically prepared to cope with repeated sexual stimulation. Even a two or three year old, who cannot know the sexual activity is wrong, will develop problems resulting from the inability to cope with the overstimulation.

The child of five or older who knows and cares for the abuser becomes trapped between loyalty for the person, and the sense that the sexual activities are terribly wrong. If the child tries to break away from the sexual relationship, the abuser may threaten the child with violence or loss of love. When sexual abuse occurs within the family, the child may fear the anger, jealousy or shame of other family members, or be afraid the family will break up if the secret is told. A child who is the victim of prolonged sexual abuse usually develops low self-esteem, a feeling of worthlessness and an abnormal or distorted view of sex. The child may become withdrawn and mis-

trustful of adults, and can become suicidal.

Some children who have been sexually abused have difficulty relating to others except on sexual terms. Some sexually abused children become child abusers or prostitutes, or have other serious problems when they reach adulthood. Child sexual abuse has been reported up to 80,000 times a year, in the United States alone, but the number of unreported instances is far greater, because the children are afraid to tell anyone what has happened, and the legal procedure for validating an episode is difficult. The problem should be identified, the abuse stopped, and the child should receive professional help.

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### **3. Effects of Child Sexual Abuse**

Often there are no obvious external signs of child sexual abuse. Some signs can only be detected on physical exam by a physician. Sexually abused children may also develop the following symptoms:

- Unusual interest in or avoidance of all things of a sexual nature
- Sleep problems or nightmares
- Depression or withdrawal from friends or family

- Seductiveness
- Statements that their bodies are dirty or damaged, or fear that there is something wrong with them in the genital area
- Refusal to go to school or playground
- Delinquency/behavioral
- Unnecessary secretiveness
- Aspects of sexual molestation in drawings, games, fantasies
- Unusual aggressiveness, or
- Suicidal tendency

### **4. National Provisions for Combating Child Sexual Abuse**

Nepal has the following constitutional, legal and policy level safeguards against Child Sexual Abuse:

#### ***A) Constitutional Provisions***

The Interim Constitution of Nepal, 2007 provides for the following measures for the advancement and protection of vulnerable groups of people, including children:

#### ***Article 13: Right to Equality***

The State shall not discriminate against citizens among citizens on grounds of religion, race, caste, tribe, sex, origin, language or ideological conviction or any of these.

Provided that nothing shall be deemed to prevent the making of special provisions by law for

the protection, empowerment or advancement of women, *Dalits*, indigenous peoples (*Adibasi, Janajati*), *Madhesi* or farmers, workers, economically, socially or culturally backward classes or children, the aged and the disabled or those who are physically or mentally incapacitated.

#### **Article 22: Rights of the Child**

Every child shall have the right to his or her identity and name. Every child shall have the right to nurture, basic health and social security. Every child shall have the right against physical, mental or any other form of exploitation. Such exploitative act shall be punishable by law; and any

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*Every child shall have the right to his or her identity and name. Every child shall have the right to nurture, basic health and social security. Every child shall have the right against physical, mental or any other form of exploitation. Such exploitative act shall be punishable by law; and any child so treated shall be given such compensation as may be determined by law.*

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child so treated shall be given such compensation as may be determined by law.

The helpless, orphan, mentally retarded, conflict victim, displaced, vulnerable and street children shall have the right to get special facilities from the State for their well-ascertained future. No minor shall be employed to work in any factory, mine or engaged in any similar other hazardous work or used in army, police or conflict.

#### **Article 35(9): Policies of the State**

The State shall pursue a policy of making special provision of social security for the protection and progress of the single women, orphans, children, the helpless, the aged, the disabled, incapacitated

persons, and tribes on the verge of extinction.

#### **B) Legal Provisions**

Nepal also has an array of legal provisions for safeguarding children against potential abuse and also for fostering their overall development.

i) General Code, 1963 (Muluki Ain, 2020),

#### **Chapter on Intention of Sex**

No. 1: If a person, without the consent of a woman, touches or attempts to touch her sensitive organ, puts off her inner clothes (under garments), takes her to an unusually lonely place, makes her touch or catch (hold) his sexual organ or uses vulgar or other similar

words or indications or shows her such drawing or picture or teases or harasses her for the purpose of sexual intercourse, or treats her with any unusual behavior or holds her with intention of having sexual intercourse, he shall be deemed to have done sexual harassment, and the who commits such an offence shall be liable to the punishment of imprisonment for a term not exceeding One year and a fine of up to 10 thousand rupees. The victim of such an offence shall be entitled to a reasonable compensation from the offender.

The above censure applies in case of victim being a girl child also.

#### **Chapter on Rape**

No. 3: A person who com-

mits rape shall be liable to the imprisonment as mentioned hereunder:

Imprisonment for a term ranging from Ten years to Fifteen years if the minor girl is below Ten years of age.

Imprisonment for a term ranging from Eight years to Twelve years if the minor girl is above Ten or more years of age but below Fourteen years of age.

Imprisonment for a term ranging from Six years to Ten years if the minor girl is of Fourteen years of age or above below Sixteen years of age.

Imprisonment for a term ranging from Five years to Eight years if the woman is of Sixteen years of age or above but below Twenty years of age.

No. 4: Every person who knowingly accompanies a gang and grabs a woman for rape or helps in committing the rape shall be liable to imprisonment for a term not exceeding Three years. In the case of a girl under Sixteen years of age, such a person shall be liable to the double of such punishment.

No. 9(A): A person who commits or causes to be committed sodomy (any kinds of unnatural sexual intercourse) with a minor, it shall be considered to be an offence of rape and the offender shall be liable to an additional punishment of imprisonment for a term not exceeding one year as referred to in Number 3 of this Chapter, and the court shall make an order to provide appropriate compensation to such a minor from the offender, upon considering the age and grievance suffered by the minor.

ii) Children's Act, 1992

#### **Section 16: Children not to be involved in immoral profession**

1) No person shall involve or use

- a Child in immoral profession.
- 2) No photograph of a Child shall be taken or allowed to be taken, nor shall such photograph be distributed or exhibited for the purpose of engaging a Child in immoral profession.
  - 3) No publication, exhibition or distribution of photograph or personal events or descriptions of a Child tarnishing the character of such Child shall be made.
  - 4) No Child shall be involved in the sale or distribution or smuggling of intoxicating substances, narcotic drugs or any other drugs

### **Section 53: Punishment**

Whoever commits any offence in contravention to subsection (1), (2) or (3) of Section 16 or abets others to commit such offence or attempts to do so, he shall be liable to a punishment with a fine up to 10 thousand rupees or with imprisonment for a term which may extend to one year or with both and the photographs taken with an aim to engage the Child in an immoral profession and all the publications printed with an aim to publish may be seized by the order of the Court. The person engaging a Child in the business in contravention to sub-section (4) of Section 16 shall be punished with imprisonment for a term which may extend to five years in addition to the punishment to be imposed pursuant to existing laws.

In case character of a Child is hurt or adverse effect is caused in his health or his physical organ is damaged due to the reason that any person has caused the Child to engage in any prohibited act pursuant to Section 16, the officer

hearing the case may cause to pay a reasonable amount of compensation in proportion to such damage to the Child from such person in addition to the punishment to be imposed pursuant to sub-section (1) or (4).

### **C) Policy Level Provisions**

Protection of children from all types of violence and abuse has begun to feature prominently of late in the various national plans and policies, such as:

#### **iii) Approach Paper to the 13th Plan (2013-16)**

*Sectoral Development Policies: Children and Adolescents*

#### **Objectives**

- To protect and promote the overall rights of children.

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*The person engaging a Child in the business in contravention to sub-section (4) of Section 16 shall be punished with imprisonment for a term which may extend to five years in addition to the punishment to be imposed pursuant to existing laws.*

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- To eradicate all forms of violence and abuse against children and adolescents.
- To eradicate all forms of child labour.

#### **Strategies**

- Ensure the rights of children by controlling all forms of exploitation, abuse, discrimination, and exclusion of children and adolescents.
- Ensure that children are provided with antenatal and post-natal care and adequate nutrition.
- Conduct programs for the physical, mental and emotional development of children.

#### **Expected Outcomes**

The rights of children will

be better ensured, and all forms of exploitation, abuse, and discrimination against children and adolescents will have been mitigated.

#### **iv) National Policy on Children, 2009 (2012)**

The following provisions from the Policy are relevant in course of preventing child sexual abuse:

- To protect the children from all forms of physical and mental violence, damages or abuse, abandonment, exploitation or sexual abuse.
- To reinforce juvenile justice system.
- To deem the sexual exploitation and abuses against children as a grievous crime. To arrange that

the electronic service providers such as internet, email and mobile phone, impart information in a manner not resulting in child sexual abuse.

- To deem all forms of physical and mental abuse against children as crime and to prevent such abuses.
- To adopt additional measures effective for prevention of child trade and trafficking for whatever purposes.
- To reform laws as required for protecting the rights of children who are victims of trade, trafficking, sexual and financial exploitation.
- To devise the laws needful for safeguarding children from all

forms of abuse and to enforce them effectively.

- To raise awareness and sensitization programs in an elaborate scale against child sexual abuse, physical and mental abuse.
- To include the matters of child rights, sexual education, sexual exploitation and abuse in the school level curriculum and educate accordingly.

*v) National Action Plan for Children (2061/62-2071/72) (2005-2015)*

National Action Plan for Children, the first of its kind exhaustive strategy on development, protection and empowerment of children developed by the government, includes the following measures for thwarting child sexual abuse and safeguarding them from other hazards:

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*To safeguard children from all forms of sexual abuse, exploitation, trade, trafficking and kidnapping by reforming the existing laws, enhancing their enforcement and raising awareness among those all concerned.*

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- To frame appropriate laws and policies for protecting children from all forms of abuse, exploitation, violence and for developing a safe environment to them.
- To safeguard children from all forms of sexual abuse, exploitation, trade, trafficking and kidnapping by reforming the existing laws, enhancing their enforcement and raising awareness among those all concerned.
- To render proper services for aiding in the guarantee of security, refreshment and social rehabilitation for the children freed from trade and sexual exploitation.

## **5. International Instruments against Child Sexual Abuse**

A sizeable number of international instruments are in place for combating violence, discrimination and each type of abuse against children. The international as well as regional conventions, notably, have acknowledged vulnerability and defenselessness of children in the hands of their adult handlers and have accordingly made for legal and institutional arrangements to curb the same. Major manifestations of international law in this arena are as follows:

### **A) Convention on the Rights of Child, 1989**

#### **Article 2:**

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination

of any kind, irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

#### **Article 3:**

1. In all actions concerning chil-

dren, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform to the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

### **B) Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 2000**

#### **Article 1:**

States Parties shall prohibit the sale of children, child prostitution and child pornography as provided for by the present Protocol.

#### **Article 2:**

For the purposes of the present Protocol:

- (a) Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration;

- (b) Child prostitution means the use of a child in sexual activities for remuneration or any other form of consideration;
- (c) Child pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.

**Article 3:**

1. Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether such offences are committed domestically or transnationally or on an individual or organized basis:
  - (a) In the context of sale of children as defined in article 2:
    - (i) Offering, delivering or accepting, by whatever means, a child for the purpose of:
      - a. Sexual exploitation of the child;
      - b. Transfer of organs of the child for profit;
      - c. Engagement of the child in forced labour;
    - (ii) Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption;
  - (b) Offering, obtaining, procuring or providing a child for child prostitution, as defined in article 2;
  - (c) Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in article 2.
2. Subject to the provisions of the national law of a State Party,

the same shall apply to an attempt to commit any of the said acts and to complicity or participation in any of the said acts.

3. Each State Party shall make such offences punishable by appropriate penalties that take into account their grave nature.
4. Subject to the provisions of its national law, each State Party shall take measures, where appropriate, to establish the liability of legal persons for offences established in paragraph 1 of the present article. Subject to the legal principles of the State Party, such liability of legal persons may be criminal, civil or administrative.

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*The state parties to the convention shall take effective measures to ensure that trafficking in any form is an offence under their respective criminal law and shall make such an offence punishable by appropriate penalties which take into account its grave nature.*

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5. States Parties shall take all appropriate legal and administrative measures to ensure that all persons involved in the adoption of a child act in conformity with applicable international legal instruments.

**C) SAARC Convention on preventing and combating the trafficking in women and children for prostitution, 2002**

**Article 2: Scope of the Convention**

The purpose of this Convention is to promote cooperation amongst member states so that they may effectively deal with the various aspects of prevention, interdiction and suppression of trafficking in women and children; the repatriation and rehabilitation

of victims of trafficking and prevent the use of women and children in international prostitution networks, particularly where the countries of the SAARC region are the countries of origin, transit and destination.

**Article 3: Offences**

1. The state parties to the convention shall take effective measures to ensure that trafficking in any form is an offence under their respective criminal law and shall make such an offence punishable by appropriate penalties which take into account its grave nature.
2. The state parties to the convention, in their respective

territories, shall provide for punishment of any person who keeps, maintains or manages or knowingly finances or takes part in the financing of a place used for the purpose of trafficking and knowingly lets or rents a building or other place or any part thereof for the purpose of trafficking.

3. Any attempt or abetment to commit any crime mentioned in paras 1 and 2 above or their financing shall also be punishable.

**Article 5: Judicial Proceedings**

In trying offences under this Convention, judicial authorities in Member States shall ensure that the confidentiality of the child and women victims is maintained and



that they are provided appropriate counseling and legal assistance.

## 6. Some State Specific Laws against Child Sexual Abuse

In this section, key features of domestic laws in force of select countries that have been devised for criminalizing child sexual abuse and protecting children from the threat will be discussed. This review allows us to make cross country comparative studies as well as out to single out the peculiarities, strengths and drawbacks of each unit of legislation.

### i) United States of America

US laws have typically demarcated sexual abuse into the following categories on the basis of gravity of offence and nature of the victim:

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*Under federal law, offenders convicted of sexually abusing a child face fines and imprisonment. Furthermore, an offender may face harsher penalties if the crime occurred in aggravated circumstances, which include, for example, the offender used force or threats, inflicted serious bodily injury or death, or kidnapped a child in the process of committing child sexual abuse.*

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- Aggravated sexual abuse
- Sexual abuse
- Sexual abuse of a minor or ward
- Abusive sexual contact

Except in limited circumstances, federal laws typically do not apply to child sexual abuse matters that take place wholly inside a single state. These matters are therefore generally handled by state or local authorities and prosecuted under state laws. However, if the sexual abuse of a child occurred on federal lands, the offense may be prosecuted under federal

law. Federal lands include areas such as military bases, Indian territories, and other government-owned lands or properties.

Under federal law, offenders convicted of sexually abusing a child face fines and imprisonment. Furthermore, an offender may face harsher penalties if the crime occurred in aggravated circumstances, which include, for example, the offender used force or threats, inflicted serious bodily injury or death, or kidnapped a child in the process of committing child sexual abuse.

Child sexual abuse has been recognized specifically as a type of child maltreatment in U.S. federal law since the initial Congressional hearings on child abuse in 1973. Child sexual abuse is illegal in ev-

ery state, as well as under federal law. Among the states, the specifics of child sexual abuse laws vary, but certain features of these laws are common to all states.

The U.S. Supreme Court ruled in *Kansas v. Hendricks* that a predatory sex offender can be civilly committed upon release from prison. The Supreme Court ruled in *Stogner v. California* that California's ex post facto law, a retroactive extension of the statute of limitations for sexual offenses committed against minors, is unconstitutional.

The case requires law enforcement to release information about sex offenders. It is a modification of the Jacob Wetterling Crimes against Children and Sexually Violent Offender Registration Act, which specifies that information about both sexual offenders and individuals committing crimes against children, must be released.

The other salient features of US laws against child sexual abuse include:

### Minors' inability to consent

Between adults, most sexual activity does not constitute a criminal offense, unless one of the adults does not consent to the activity. In contrast, minors are unable to give consent under the law. Indeed, the term "minor" refers to a person who has not yet reached *majority*, the age at which one may give consent in any legal matter (for example, a minor cannot make a valid contract).

### Penalties for child sexual abuse

Penalties for child sexual abuse in the US laws vary with the specific offenses for which the perpetrator has been convicted. Criminal penalties may include imprisonment, fines, registration as a sex offender, and restrictions on probation and parole. Civil penalties may include liability for damages, injunctions, involuntary commitment, and, for perpetrators related to their victims, loss of custody or parental rights.

### Tolling

In a legal sense, it refers to suspending or taking away the effect of something, such as a statute of limitations. For example, some state legislatures have enacted statutes specifically tolling the statute of limitations for victims of child-

hood sexual abuse. In addition, some states have allowed claims of repressed memories to toll the statute of limitations under a discovery rule or insanity provision. The provision of tolling is available in other western countries also, besides USA.

## ii) India

The Protection of Children from Sexual Offences Act, 2012 regarding child sexual abuse has been passed by the both the houses of the Indian Parliament in May 2012. The Act came into force from 14 November 2012. It recognizes forms of penetration other than peno-vaginal penetration and criminalizes acts of immodesty against children too. The legislators tried to draft a gender-neutral Act, but failed, using the pronoun 'he' in the description of various offenses. With respect to pornography, the Act criminalizes even watching or collection of pornographic content involving children. The Act makes abetment of child sexual abuse an offense. It also provides for various procedural reforms making the tiring process of trial in India considerably easier for children. The Act has been criticized as its provisions seem to criminalize consensual sexual intercourse between two people below the age of 18.

### Highlights of the Protection of Children from Sexual Offences Act 2012:

- The Act defines a child as any person below the age of 18 years and provides protection to all children under the age of 18 years from the offences of sexual assault, sexual harassment and pornography.
- This is the first time that an Act has listed aspects of touch as well as non touch behaviour

(eg: photographing a child in an obscene manner) under the ambit of sexual offences.

- The Act incorporates child friendly procedures for reporting, recording of evidence, investigation and trial of offences
- The attempt to commit an offence under the Act has also been made liable for punishment for up to half the punishment prescribed for the commission of the offence.
- The Act also provides for punishment for abetment of the offence, which is the same as for the commission of the offence. This would cover trafficking of children for sexual purposes.
- For the more heinous offences of Penetrative Sexual Assault, Aggravated Penetrative Sexual Assault, Sexual Assault and Aggravated Sexual Assault, the burden of proof is shifted on the accused.
- The media has been barred from disclosing the identity of the child without the permission of the Special Court.

The Act also provides for the establishment of Special Courts for trial of offences under the Act, keeping the best interest of the child as of paramount importance at every stage of the judicial process. The Act incorporates child friendly procedures for reporting, recording of evidence, investigation and trial of offences. These include:

- Recording the statement of the child at the residence of the child or at the place of his choice, preferably by a woman police officer not below the rank of sub-inspector
- No child to be detained in the police station in the night for any reason.

- Police officer to not be in uniform while recording the statement of the child.
- The statement of the child to be recorded as spoken by the child.
- Assistance of an interpreter or translator or an expert as per the need of the child.
- Assistance of special educator or any person familiar with the manner of communication of the child in case child is disabled.
- Medical examination of the child to be conducted in the presence of the parent of the child or any other person in whom the child has trust or confidence.
- In case the victim is a girl child, the medical examination shall be conducted by a woman doctor.
- Frequent breaks for the child during trial.
- Child not to be called repeatedly to testify.
- No aggressive questioning or character assassination of the child.
- In-camera trial of cases

## iii) South Africa

The South African law on sexual offences is codified in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, which came into full force from 2008. Chapter 3 of the act deals with sexual offences against children. The act criminalizes:

- acts of sexual penetration with a child (statutory rape)
- other sexual acts with a child (statutory sexual assault)
- exploitation of children in prostitution
- sexual grooming of children

- showing pornography to children
- using children in child pornography
- compelling children to witness sexual acts
- indecent exposure to children

The Act is expected to help intensify South Africa's efforts to fight sexual crimes against all persons and, especially, sexual offences being committed against vulnerable groups, including women, children and people with intellectual disability. Another development coming with the Act is the enactment of new, expanded or amended sexual offences against children and persons with intellectual disability, including offences relating to sexual exploitation or grooming, exposure to or display of child pornography or pornography to children and the creation of child pornography.

Some of these offences are similar to offences in respect of adults but it specifically aims to address the particular vulnerability of these groups. It also criminalizes the compelling or causing the witnessing of certain sexual conduct and certain parts of the human anatomy.

The Act has positive implications for the care and protection of children – both those who are victims and “perpetrators” of sexual offences, such as:

- The expanded definition of rape is a definite step forward. The legal definition of rape prior to the passing of the Act was discriminatory and resulted particularly in the neglect of male children as victims of penetrative sexual crimes. The expanded definition thus affords both male and female children equal consideration in the adjudica-

tion of sexual crimes committed against them;

- An expansion of the list of possible sexual crimes against children ensures that a broader range of sexually exploitive acts against children are able to be prosecuted;
- A very comprehensive section criminalizing every aspect of child prostitution;
- Provision for a National Policy Framework in order to improve and coordinate the criminal justice system response to sexual offending. This will be developed by an Inter-sector Committee whose membership is constituted by senior personnel from the government departments that deal with the management of sexual offences;
- National directives for police, health professionals and prosecutors with regard to the management of sexual offences.
- The Act also establishes a National Register for Sex Offenders which records people convicted of sexual offences against children and the mentally disabled.

#### iv) Canada

Canada's Criminal Code, 1892 (with amendments) contains a number of offenses related to the sexual exploitation of or the trafficking in children. The most important of these offenses can be summarized as follows:

**Sexual interference:** Touching a child under the age of fourteen for a sexual purpose is punishable with a maximum sentence of ten years' imprisonment and a minimum sentence of fourteen days.

**Invitation to sexual touching:** Inviting a child under the age of fourteen to engage in sexual touch-

ing carries the same penalties as sexual interference.

**Sexual exploitation:** The offense of sexual exploitation extends the offenses of sexual interference and invitation to sexual touching to persons who are in a position of trust or authority over a child between the ages of fourteen and eighteen. The maximum and minimum sentences for sexual exploitation are the same as for sexual interference and sexual touching.

**Child pornography:** Any person who makes, prints, publishes, or possesses child pornography for publication is liable to a maximum sentence of ten years' imprisonment and a minimum sentence of ninety days' imprisonment. Any person who transmits, distributes, sells, imports, or advertises child pornography or possesses child pornography for one of those purposes is liable to the same maximum and minimum punishments. Any person who possesses child pornography is liable to a maximum sentence of five years' imprisonment and a minimum of fourteen days' imprisonment. Any person who knowingly accesses child pornography is liable to the same maximum and minimum punishments.

#### v) Japan

Act on Punishment of Activities Relating to Child Prostitution and Child Pornography, and the Protection of Children, 1999 of Japan prohibits child prostitution, providing child pornography for others and preparation of it, and child trafficking for child prostitution purposes. Child prostitution means the act of performing sexual intercourse or other sexual acts (*i.e.*, an act similar to sexual intercourse, or an act for the purpose

of satisfying one's sexual curiosity, including touching genital organs or other body parts on a child or of making a child touch one's genital organs or other body parts) in return for giving or promising to give remuneration to the child, by the person who acts as an intermediary in sexual acts with the child, the protector of the child (parents, a guardian, or anyone is taking actual care of the child), or a person who has placed the child under his control.

A person who commits child prostitution is punished with imprisonment for up to five years or a fine not in excess of one million yen. The same punishment is applied for a person who acts as an intermediary in child prostitution or who solicits another person to commit child prostitution for the purpose of intermediating in child prostitution. The provisions penalizing child pornography are also deficient and do not fulfill the international law standards, since they do not penalize the possession, import, export, sale, or offer of child pornographic material. Nor is the distribution of such material through the Internet or other virtual means of communication penalized.

A person who acts as an intermediary in child prostitution or a person who solicits another person to commit child prostitution for the purpose of intermediating as his business is punished with imprisonment for up to seven years and a fine not exceeding five million yen.

A person who distributes, sells, or lends, as a business, child pornography is punished with imprisonment for up to three years or a fine not exceeding three million yen. A person who produces,

possesses, transports, imports to or exports from Japan child pornography for the purpose of conducting any of the acts mentioned in the preceding sentence shall be punished with the same penalty. A person who distributes child pornography for an unlimited audience or many people, or displays it in public, including the Internet, is punished with imprisonment for up to five years and/or a fine not exceeding five million yen.

A person who buys or sells a child for the purpose of making the child be a party to sexual intercourse or other sexual acts, or for the purpose of producing child pornography by depicting a child in certain poses is punished with imprisonment between one and ten years. A Japanese national who, for any of such purposes, transports a child, who has been abducted, kidnapped, sold, or bought in a foreign country, out of that country is punished with imprisonment for two years or more.

#### **vi) People' Republic of China**

The existing child protection laws of China are not powerful enough to ensure punishment to perpetrators or deter potential offenders. Often, police don't investigate minor child abuse cases because people generally believe that parents and teachers do have the right to physically punish a child. So police intervene only if children suffer from serious physical injuries. In such cases, the law enforcement agencies often apply the Law of the People's Republic of China on Administrative Penalties for Public Security (or Law on Public Security). According to the law, a person could be detained for up to 15 days and fined a maximum of 1,000 yuan for intentionally causing physical harm

to a child. But the clause is rarely invoked in a child abuse case.

The other two important child protection laws are the Law of the People's Republic of China on Protection of Minors (or Law on Protection of Minors) and the Criminal Law of the People's Republic of China (or Criminal Law). Although many clauses of the Law on Protection of Minors are devoted to protecting children's rights, it is by nature a soft law that does not advocate strict punishment, and thus plays a limited role in deterring child abuse. The most powerful weapon against child abuse could be the Criminal Law, but it is not designed to deal with such cases. The Criminal Law only deals with the "crime of abuse", not the "crime of child abuse", and even the clauses on the crime of abuse have four inherent loopholes when it comes to deterring child abuse.

First, the law merely covers crime in the family. Non-family members such as schoolteachers and daycare center employees are thus beyond the purview of the law. Second, only if an incident is "extremely serious" can an abuse be treated as a crime under the law. Third, since the law sees a crime as a matter of private prosecution, the victim himself or herself has to file a case before a court of law to seek justice. Moreover, there are no public or private organizations competent enough to file a case on behalf of an abused child. The result: the "crime of child abuse" is rarely applied in child abuse cases. And fourth, the punishment for child abuse is often very light. The offender gets away with just two years' imprisonment for even the severest of child abuse. Worse, even if the victim is tortured to death, the perpetrator can at best be im-

prisoned for seven years.

Thus, it is high time that China effectively addresses the concerns of child abuse and/or sexual abuse through stronger laws and equally willful implementation.

### **7. Problems in Combating Child Sexual Abuse in Nepal**

Though Nepal has relevant laws and policies in place, its fight against child sexual abuse is marred by several lacunae and pitfalls within the system. Major of the impediments in this connection may be outlined as follows:

- Lack of a concrete and express definition of child sexual abuse.
- Lack of special family courts/dedicated juvenile Benches.
- Gender-biased, myopic laws on child sexual abuse; identify only the girl child as the potential victim and men only as the potential offenders.
- General Code, 1963 includes only penile penetration to qualify for the offence of rape, ignores penetration by other objects or forcing self penetration.
- Government's failure to abide by the strictures of Supreme Court for framing and reforming the laws needful for checking child sexual abuse.
- Absence of child help-desks in courts and quasi judicial bodies such as the District Administration Office.
- Barring difference in consent and quantum of punishment, there seems no difference in the laws distinguishing child and adult sexual abuse.
- Absence of 'Offenders against Children' roster maintenance system.
- Lack of psychosocial counseling, social rehabilitation for

both child victims and offenders.

- Lack of proper restitution and reparation measures for the victim child.
- Poverty and incapacity of the parents coming in the way for justice to the child.
- Continuous hearing system in courts on children related cases still not assuming full swing.
- Poor protection of privacy in case of both child victims and offenders.
- Lack of institutional infrastructure as envisaged by the Children's Act, 1992 thereby failing the honest implementation of Act.
- State agencies working in children's interests such as District and Central level Children Welfare Committees running in half gear due to paucity of funds and logistics.
- No separate law dedicated for routing child sexual abuse. Provisions mixed in general criminal laws by assigning a separate section.
- Insufficient observance of juvenile justice system in litigations and court procedures as regards children's disputes.
- Sometimes, children being used as cronies by their adult handlers to frame other innocent adults in fake charges of sexual abuse.
- Poor supervision and regulation of children's welfare homes, reform centres, etc. leading to in-house sexual abuse and corruption of children in some cases.

### **8. Measures for Effectively Curb-ing Child Sexual Abuse in Nepal**

In the light of above hurdles, it seems worthwhile to adopt the following measures so as to effectively curb child sexual abuse

and create a safe haven for children to their overall well being:

- Provision of clear and unambiguous definition of child sexual abuse not susceptible to multiple interpretations.
- Formation of special family courts/dedicated juvenile Benches.
- Enactment of gender neutral child sexual abuse laws which shall be open to consider both boys and girls as potential victims as well as abusers.
- Forced self penetration or penetration of any other object besides penis to be deemed as an act of child sexual abuse.
- Compliance of the government in carrying out the orders of Supreme Court for providing legal cover against child sexual abuse, discrimination and violence.
- Erection of child help-desks in courts and quasi judicial bodies such as the District Administration Office.
- Framing of a separate and exclusive Act that would specifically address child sexual abuse, keeping it away from the adult justice delivery system.
- Maintenance of 'Offenders against Children' roster by the concerned police unit.
- Delivery of psychosocial counseling, social rehabilitation for both child victims and offenders.
- Impartment of proper restitution and reparation measures for the victim child.
- Continuous hearing system in courts on children related cases to be spread nationwide.
- Adequate and effective protection of privacy in case of both child victims and offenders.
- Formation of institutional infrastructure as envisaged by the



Children's Act, 1992 for fructifying the child friendly provisions of Act.

- State agencies working in children's interests such as District and Central level Children Welfare Committees to be equipped with sufficient funds, training, logistics and manpower.
- Sincere observance of juvenile justice system in litigations and court procedures as regards children's disputes.
- Stringent inspection and regulation of children's welfare homes, reform centres, etc. to fend off in-house sexual abuse and corruption of children.

## 9. Conclusion

Child sexual abuse has evolved as one of the biggest threats to the physical safety and emotional wellbeing of children worldwide. The prevalence of child sexual abuse is difficult to determine because it is often not reported; experts agree that the incidence is far greater than what is reported to authorities. Children who do not live with both parents as well as children living in homes marked by parental discord, divorce, or domestic violence, have a higher risk of being sexually abused.

Child sexual abuse is not solely restricted to physical contact; such abuse could include noncontact abuse, such as exposure, voyeurism, and child pornography. Of the several variants in which child sexual abuse may manifest, child pornography is the fastest growing, reaching to people and places seldom imagined before. It ignites the emotional drive to engage in premature sexual encounters, with children being the soft targets.

As for Nepal, the incidents of child sex abuse are well below the horrific scales of West. Still, it should be a concern for everyone that this menace is already showing an upward trend here and would not recede until strong and resolute interventions are effectuated. The fact that most of the instances of child sexual abuse go unreported and unnoticed as the children are too afraid to speak out or as the perpetrator would be close relative of the victim, makes the job harder to locate and stamp out this malaise. Hence, for making our country a safe haven for

- Convention on the Rights of Child, 1989
- Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 2000
- SAARC Convention on preventing and combating the trafficking in women and children for prostitution, 2002

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- <http://www.nlm.nih.gov> (Accessed on September 8, 2014)

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children free from the evils of child sexual abuse, it is high time that we put appropriate legal, policy and institutional arrangements in place besides honestly implementing the existing ones. Only then, the dawning of an era of safe children and happy families may be witnessed in Nepal.

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Bibesika Bhurtel\*

# Women Right to Food: South Asian Context

## 1. Background

Women in the globalized age are not limited to the domestic chores only. Rather, they have broadened their horizons. In the industrialized economy or agro-based economy, the modern day women constitute a major work force. However, women's work remains as secondary and undervalued in many areas. Moreover, women are the invisible farmers contributing to grow food consumed worldwide. They receive low wage, or are even unpaid compared to the men. In the rural economy, women carry double work burden as they work for the domestic chores and support their garden farming, small scale to large scale agriculture farming as well. Women are also the breadwinners in the family, but often, they are the last to enjoy human rights to adequate food.

## 2. Women in Economic Spheres in South Asia

"Poverty has a woman's face

and of 1.3 billion people living in poverty, 70 percent are women," states UNDP. Women are discriminated globally. In the developing nations, though the trends have been changing slowly, girls still do not go to school, they get less food or less nutritious food compared to the boys. They are married in early age and turn to motherhood soon. Due to limitation in gaining capacities, women are involved in informal sectors like unpaid works. They are engaged in domestic farming but do not have ownership. There is structural discrimination in the society against women that nurtures feminization of poverty.

Women have been facing discrimination in various sectors, including work, wage, food, health, education, distribution, consumption etc. In family life, women overwhelmingly carry the workload, although in some countries the gap has narrowed significantly.<sup>1</sup> According to the Human Development Report

2014, the female Human Development Index (HDI)<sup>2</sup> value averages about 8 percent lower than the male HDI value worldwide. Among regions, the largest gap is in South Asia (17 percent). The gap is smallest (3 percent) in the very high human development regions. Women also lag behind men in labour market participation (51 percent compared to 77 percent). The studies and reports compared among South Asian countries Nepal, Pakistan, Afghanistan, India, Bangladesh, Bhutan, Maldives and Srilanka show that women are lower in the HDI values compared to men. HDI values are in a way reflection of the poverty also.

Globally, more than 90% of women are working outside the household work as agricultural labor, and the highest rate is in south Asia.<sup>3</sup> In South Asia, women are predominantly engaged in the agricultural sector (55 percent), while services comprise only about 28 percent of female employment. Industry does not represent an

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1. <http://unstats.un.org/unsd/demographic/products/Worldswomen/wwpop2010.htm>

2. The HDI is a summary measure for assessing long-term progress in three basic dimensions of human development: a long and healthy life, access to knowledge and a decent standard of living. Just as in the 2013 HDR, a long and healthy life is measured by life expectancy. Access to knowledge is measured by:

i) mean years of education among the adult population, which is the average number of years of education received in a life-time by people aged 25 years and older; and  
ii) expected years of schooling for children of school-entry age, which is the total number of years of schooling a child of school-entry age can expect to receive if prevailing patterns of age-specific enrolment rates stay the same throughout the child's life. Standard of living is measured by Gross National Income (GNI) per capita expressed in constant 2011 international dollars converted using purchasing power parity (PPP) rates.

3. Women and Children: The double Dividend of Gender Equality, UNICEF, 2006

**Table 1 : Reflecting women in employment, agriculture employment and land holding**

Country	Population of women	Economically active population of women (%)	% of economically active women in agricultural sector	% of women in agricultural labor force	Total number of land holders	Women land holders
India	572 596 000 (2008)	28 (2008)	63	32 (2008)	119621000	12987000 (10.9%)
Bangladesh	49 % out of 142.6 million (2007)	53.6 (2007) of total labor force	-	45.6 (2007)	28165700	797378 (2.8%)
Nepal	51.5 % of 27.47 million (2012)	92.48 (2010)	-	65 (2010)	3364139	271507 (8.1%)
Sri Lanka	50.59 out of 20.010 million (2007)	39.2 (2007)	-	38 (2007)	-	-
Pakistan	48.5 out of 157.93 million (2005)	18.7 (2007)	59	27.5 (2007)	-	-

Source: <http://www.fao.org/gender/landrights/home/report/en/>

important sector for women's employment in this region.

Women spend much more time doing housework, community and/or volunteer work than men do.<sup>4</sup> According to the data of the Food and Agriculture Organization (FAO), in Bangladesh, 70 percent of rural women work as unpaid family laborers. Women also engage in forestry, fisheries and livestock production and contribute to household income through wage labor, though earning 71 percent of what men do. In Nepal, women are responsible for 70 percent of the livestock production, carrying out activities like food preparation, feeding, cleaning sheds and preparing milk products. In Sri Lanka, 56 percent of the women work as unpaid family workers. Therefore, the rise of female participation in low return, urban, informal sector activities is also considered evidence of the feminization of poverty.

Land is the source of production in the agricultural countries. Land holding increases women's access to credits and loans to increase productivity and for food security (According to FAO reports from 1996-2007, among the south Asian Countries in Bangladesh, Nepal and India, agricultural holding headed by women are 2.8 percent, 8.1 percent and 10.9 percent respectively). This is relatively low to make women food secure.

The World Food Programme mentions 10 facts<sup>5</sup> on women and hunger and narrates why it is important to empower women. These facts includes:

- In developing countries, 79 percent of economically active women spend their working hours producing food through agriculture. Women are 43 percent of the farming work force.
- Yields for women farmers are 20-30 percent lower than for

men. This is because women have less access to improved seeds, fertilizers and equipment.

- Giving women farmers more resources could bring the number of hungry people in the world down by 100 - 150 million people.
- Surveys in a wide range of countries have shown that 85 - 90 percent of the time spent on household food preparation is women's time.
- In some countries, tradition dictates that women eat last, after all the male members and children have been fed.
- When a crisis hits, women are generally the first to sacrifice their food consumption, in order to protect the food consumption of their families.
- Malnourished mothers are more likely to give birth to underweight babies. Underweight babies are 20 percent more

4. <http://unstats.un.org/unsd/demographic/products/Worldswomen/FactSheet2010.pdf>

5. <http://www.wfp.org/our-work/preventing-hunger/focus-women/women-hunger-facts>

**Table 2: Gender Development Index (GDI) in South Asia<sup>1</sup>**

(The figure in the table reflects that GNI per Capita of women is less compared to man)<sup>2</sup>

Country and HDI Rank	Life expectancy at birth		Expected years of schooling		Mean years of schooling		GNI per capita		HDI values		F-M ratio
	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	GDI Value
<b>Low HDI</b>											
Nepal (145)	69.6	67.3	12.5	12.2	2.4	4.2	1,857	2,554	0.514	0.564	0.912
Pakistan (146)	67.5	65.7	6.9	8.4	3.3	6.1	1077	7439	0.447	0.596	0.750
Afghanistan (169)	62.2	59.7	7.2	11.3	1.2	5.1	0503	3265	0.330	0.549	0.602
<b>Medium HDI</b>											
India (135)	68.3	64.7	11.3	11.8	3.2	5.6	2277	7833	0.519	0.627	0.828
Bangladesh (142)	71.5	69.9	10.3	9.7	4.6	5.6	1928	3480	0.528	0.582	0.908
Bhutan (136)											
Maldives (103)	79.0	76.9	12.8	12.5	5.4	6.2	7504	12608	0.673	0.718	0.936
<b>High HDI</b>											
Sri Lanka (73)	77.4	71.2	13.9	13.4	10.7	9.4	5,078	13,616	0.720	0.749	0.961

1. The Gender Development Index (GDI) is based on the sex disaggregated Human Development Index, defined as a ratio of the female to the male HDI. The GDI measures gender inequalities in achievement in three basic dimensions of human development—health (measured by female and male life expectancy at birth), education (measured by female and male expected years of schooling for children and mean years for adults aged 25 years and older); and command over economic resources (measured by female and male estimated GNI per capita)

2. Data Source compiled from Human Development Report 2014, UNDP

likely to die before the age of five.

- Around half of all pregnant women in developing countries are anaemic. This causes around 110,000 deaths during child birth each year.
- Research confirms that, in the hands of women, an increase in family income improves children's health and nutrition.
- Education is key. One study showed that women's education contributed 43% of the reduction in child malnutrition over time, while food availability accounted for 26%.

### 3. Women's right to food: Relative study in South Asian Context

According to the World

Food Program, 805 million people in the world were chronically undernourished in 2012-2014. The vast majority of chronically hungry people (791 million) live in developing countries, where 13.5 percent of the population is underfed. Asia has the largest number of hungry people (526 million) but Sub-Saharan Africa has the highest prevalence (23.8 percent of population).

In South Asia, women have similar kind of status. Malnutrition is a problem of staggering dimensions in South Asia. More than half of all worlds' malnourished preschool children live in this region. Women here are more malnourished than anywhere else.<sup>6</sup>

In a family, women are the chefs, servers and last eaters. It is a cultural practice that women eat after serving all the family members. Though the context has changed to some extent, but it is still prevalent. Women are anemic due to undernourishment during pregnancy, which affects the unborn child also. As per Global Hunger Index, Nepal and India stands in alarming hunger situation while Bangladesh and Pakistan remains in serious hunger situation.<sup>7</sup> Hence, where women undergo structural violence and are vulnerable, they could not be far from the given context in these countries.

South Asian countries have high disparities in women's access

6. Nutrition and Food Security Issues in the South Asian Context, by Yogesh Vaidya in Food Security in the Global Age: South Asian Dilemma, SAWTEE ,2001.

7. [http://en.wikipedia.org/wiki/Global\\_Hunger\\_Index](http://en.wikipedia.org/wiki/Global_Hunger_Index) . The Global Hunger Index is composed of the proportion of the undernourished as a percentage of the population, the prevalence of underweight children under the age of five and the mortality rate of children under the age of five (calculated average, in percentages).

**Table 3 : Comparative Data of food security, micronutrients and malnutrition in South Asian countries**

		Bangladesh	Nepal	India	Afghanistan	Bhutan	Maldives	Pakistan	Srilanka
Food Security Indicator	% population below 1 \$ per day	43.3	24.8	32.7	NA	10.2	1.5	21.0	4.1
	% population below minimum level of dietary energy consumption	16.8	18.0	17.5	36.9	NA	5.6	19.9	24.0
Vitamin and Mineral Deficiencies Indicator	% anemic children below 5 years	68.0	48.4	74.3	37.9	80.6	81.5	50.9	29.9
	% of anemic pregnant woman	39.0	42.4	49.7	NA	NA	55.4	39.1	29.3
Malnutrition based on Body Mass Index	% malnutrition in woman as per BMI	NA			NA	NA	NA		
	BMI <sup>1</sup> < 17.0	-	-	15.8				15.4	6.4
	BMI < 18.5	-	24.4	35.6				31.6	16.2
	BMI 18.5-24.9	-	-	-					
	BMI >= 25.0	-	8.6	12.6				17.5	31.2
	BMI >= 30.0	-	0.9	2.8				5.2	7.2

Source: <http://www.who.int/nutrition/nlis/en/> and <http://www.who.int/research/en/>

to right to adequate food. The table 3 presents the status of women relating it to overall population that earn below 1 \$ per day- population that are void of enjoying minimum level of dietary consumption, anemic children and women. The cultural discrimination against women put women and girls at disadvantage in terms of food. But, beyond that there are other reasons like women involvement in informal sectors and mostly as unpaid care workers. As long as women are economically unsafe and not empowered, their rights to food is a distant reality.

Household studies show that mothers tend to act as shock absorbers for their children. If the daily bread runs short, the children's

food situation at first remains the same, whereas the mother's immediately worsens. Whether or not women themselves till the fields or decide on income expenditure, the provision of food is their main priority. Whereas men particularly like buying consumer durables, the family food situation improves considerably when women have more money available. They are the food securers par excellence.<sup>8</sup> Women's dietary needs during pregnancy are often hindered by cultural practices, discrimination and even natural calamities. For example, in 2014, in Banke district of Nepal, pregnant women (42 in Betehani VDC, 43 in Bankatti and 56 in Kamdi VDC) could not get enough food when affected by the

flood. They are undergoing health problems.<sup>9</sup>

In the remote parts of Nepal like Bajura district, women undergo delivery even on the way as they migrate from hill to the plain areas during winter. In such cases, they travel for four-five days during pregnancy, deliver on the way, and have no access to food let alone nutritious food. In some cases, their newborn infants die after birth. They explain it happens due to poverty.<sup>10</sup>

A report published by FIAN Nepal states that the Gandharva women of Jajarbutta VDC, Surkhet district in Nepal have been affected by food insecurity and malnutrition. The report states the precarious condition of

8. *ibid*

9. [http://epaper.ekantipur.com/kantipur/showtext\\_ajax.aspx?boxid=164656750&parentid=42729&issuedate=292014](http://epaper.ekantipur.com/kantipur/showtext_ajax.aspx?boxid=164656750&parentid=42729&issuedate=292014)

10. A different Nepal, Article by Prakash Singh, My Republica published in 2014-08-22



landless Gandharva women aged 22–45 earning livelihood by selling sand and stones collected from the river. They earn NRs 100 per day, which is very minimal amount of living for a day. They eat soup made up of rice, flour and water. Intake of food without nutritious elements has made women suffer during their pregnancy

Biologically, women have specific dietary needs compared to man due to their reproductive health. The Human Rights Council Resolution 7/14 on Right to Food explains that women are often disproportionately affected by hunger, food insecurity and poverty, largely as a result of gender inequality and their lack of enjoyment of social, economic, civil and

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*The Human Rights Council Resolution 7/14 on Right to Food explains that women are often disproportionately affected by hunger, food insecurity and poverty, largely as a result of gender inequality and their lack of enjoyment of social, economic, civil and political rights and power.*

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political rights and power. In many countries, girls are twice as likely as boys to die from malnutrition and preventable childhood disease, and it is estimated that almost twice as many women as men suffer from malnutrition.

Infringement of the right to adequate food of women of child-bearing age, including adolescent girls, could lead to life-threatening complications during pregnancy or delivery. Malnutrition of pregnant and breastfeeding women can also result in the malnutrition, as well as physical and mental impairment, of their children.<sup>11</sup> According to the WHO, Maternal under nutrition, characterized by a short

stature and a low body mass index, and anemia caused by iron deficiency, can lead to adverse pregnancy outcomes, contributing to at least 20 percent of maternal deaths.

The Human Development Report 2014 states the number of malnourished children averages 60 percent higher in countries where women do not have the right to own land and 85 percent higher in countries where women lack any access to credit. Therefore, Right to adequate food comply with women's access to income and resources to guarantee the right to be fed and also feed their children.

When women in developing countries own property or add to the family's income, or when they have access to development

assistance, money is more likely to be spent on food, medical care and housing.<sup>12</sup> Women in Nepal do the lion's share of agricultural work, and it's common for them to continue working in the fields throughout pregnancy. But this can seriously affect their health, and that of their unborn child.<sup>13</sup> If women farmers had the same access to resources as men, the number of hungry in the world could be reduced by up to 150 million. However, the customary laws and practices have barred women to enjoy property rights though they have been guaranteed through national legislations. The data shows that in about half the countries in

Asia, women are disadvantaged by statutory and customary laws with respect to inheritance and property rights. Elements of gender inequality with regard to inheritance rights persist in 25 of the 42 Asian countries. For example, In India, aside from the legal constraints hampering women's access to land, socio-cultural factors, such as the practice of female seclusion or purdah, prevent women from claiming their rights to land.

## 5. Conclusion

Poverty interlinks with Right to food in terms of low income, illiteracy, hunger, lack of access to sources (natural resources, land), powerlessness, and vulnerability. While discussing on Right to Food, women are more vulnerable and are in deprivation compared to man. Women suffer from hunger and malnutrition relatively more compared to man. Though women comprise a major agriculture work force in developing countries, few women have access to land and more women are food insecure. Customary laws and cultural practices have barred women to their access to property. Women hold minimal land in the South Asian countries. Seemingly, women involvement in the formal employment sector is low.

Women's access to adequate food depends on their economic empowerment, reduction in gender inequalities and eradication of discrimination in types of work they do. Women empowerment, their access to better education, work with equal payments can increase women's access to food while women's access to land holdings is another way to increase food production so that the world would be food secure for all, including men and women.

11. United Nations, The Right to Adequate Food, Fact Sheet no 34, page 15

12. Trust the Mothers by Deepa Shanadi, <http://now.tufts.edu/articles/trust-mothers>

13. Seven Months Pregnant and Working in the Field, by Sonia Narang, <http://www.bbc.com/news/magazine-26154092>



# Nepal: Missing Its Members\*

Informal Sector Service Centre\*\*

## 1. General Overview

**E**lections to the second Constituent Assembly were held in a peaceful manner in November 2013 by the government led by Chief Justice Khil Raj Regmi. There were criticisms of “absence of separation of powers” when his government took charge following a consensus between the political parties last year. While his government was lauded for successfully conducting elections by most sides, the Unified Communist Party of Nepal (Maoists) alleged that vote-rigging resulted in their defeat.

The year saw little human rights progress. In January 2014, the Supreme Court rejected by mandamus the Truth and Reconciliation Ordinance adopted by the President calling for the formation of Commission on Truth and Reconciliation and Commission of Inquiry into Disappearance in line with international standards. Even the elected Legislature-Parliament continued with its effort to grant amnesty to perpetrators of grave human rights violations. It passed the Commission on Inquiry of

Disappeared Persons and Truth and Reconciliation (IDPTRC) Act on 25 April 2014 which was approved by the President on 11 May 2014. While discussions were held with various stakeholders by the previous Legislature-Parliament in order to bring laws regarding formation of transitional justice mechanism, this time the final text of the TRC Act was made public only after the presidential approval which received flak from the civil society, victims and rights activists. Some provisions of the TRC Act having provision of amnesty even to serious crimes and authority of TRC to grant amnesty without approval of the victim along with other provisions on impunity have been again challenged by the victims’ group in the court.<sup>1</sup> Political parties seemed little interested in ending impunity by addressing grave violations of human rights committed during the decade-long armed conflict.

The National Human Rights Commission remained without Commissioners after their six-year tenure expired on September 15, 2013. Though Commission-

ers were appointed in other constitutional bodies like the Election Commission of Nepal and Commission of Investigation of Abuse of Authority (CIAA) through an ordinance on removing constitutional difficulties, the government did not use the same provision to appoint new Commissioners to the NHRC. The Commission continued to operate under the powers formally delegated to the Acting Secretary as Secretary Bishal Khanal completed his five-year term at the Commission in February 2013. The government did not heed the Commissioners’ repeated request to appoint new members in the NHRC before their term expired. This demonstrated a lack of interest on the part of the government for the protection and promotion of human rights in the country. After a long delay, only on October 20, the commissioners were appointed in NHRC. Chief Justice Ram Kumar Prasad Sah administered the oath of office and secrecy to the newly-appointed Chairperson of the NHRC Anup Raj Sharma while Sharma administered

\* Country report of Nepal extracted from the 2014 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia, FORUM-ASIA, 2014, p123-134

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1. [http://www.myrepublica.com/portal/index.php?action=news\\_details&news\\_id=76279](http://www.myrepublica.com/portal/index.php?action=news_details&news_id=76279)

the oath to members of the Commission Prakash Chandra Wasti, Sudeep Pathak, Govinda Sharma and Mohana Ansari.

Incidents of violation against women increased this year. Human rights defenders<sup>2</sup> were subjected to physical abuse, intimidation, arrest, and mistreatment. There has been no investigation into the claim of extra-judicial killings in Tarai. NHRC was charged to have remained docile to investigate such claims by some Tarai-based NGOs and others. However, the NHRC said that security and peace threats in Tarai have always been in its priority. Saying that out of its nine offices nationwide, five were in the Tarai region which look into the violation of rights of the people in that area, the NHRC officials said that teams from central office were also sent to investigate human rights violations in that region.<sup>3</sup>

The Commission involved itself in urging the concerned governmental and non-governmental agencies to stop the activities that violate the human rights of the citizens. It also expressed its concerns over the issues of security, transitional justice, equality, violence prior to elections, etc.

The National Human Rights Commission has retained "A" status in its accreditation with the International Coordination Committee of the National Human Rights Institutions (ICC). The ICC Sub-Committee on Accreditation (SCA) has deferred the Special Review of the National Human Rights Commission of

Nepal (NHRCN) to its second session in October 2014, before the appointment of the commissioners, owing to the absence of the Chairperson and Commissioners. The SCA noted that, in accordance with Article 16.3 of the ICC Statute, it will be required to make a final determination regarding the accreditation status of the NHRCN at its next session.<sup>4</sup>

## 2. Independence

The National Human Rights Commission (NHRC) of Nepal was established in 2000 as per the Human Rights Commission Act 1997. The Interim Constitution of Nepal of 2007 upgraded it as a constitutional body making a new Act necessary to meet the new status. Part 15, Article 131 of the Constitution notes that there shall be a National Human Rights Commission in Nepal consisting of one retired Supreme Court justice as the chairperson and four others from amongst persons who have provided outstanding contribution, being actively involved in the field of protection and promotion of human rights or social work.

The term of the Commissioners whose tenure expired on September 2013 was marred by disputes among the Commissioners. The Commissioners of NHRC are appointed by the Constitutional Council. Though there is no relevant legislation or guideline calling for the application and appointment of commissioners, the Constitutional Council called for application to prepare a roster of

eligible candidates for the posts.<sup>5</sup> The Constitutional Council recommends to Parliament the names of the Commissioners. NHRC commissioners are appointed for six years. Their condition of services is equal to the judges of the Supreme Court. They are appointed by the head of the state under the recommendation of the Constitutional Council. Their appointment would be confirmed after the parliamentary hearing. There is always a high risk of the appointment process being politicised in the current transition phase as the Commission is also part of Truth and Reconciliation Commission and Commission of Inquiry into Disappeared Persons which are yet to be formed. Such practice is perceived to adversely affect the functional independence of NHRC Nepal. The Secretary of the Commission is appointed by the government upon the recommendation of NHRC.

The tenure of the then Chief Commissioner and the commissioners came to an end on September 2013. The Council of Ministers chaired by the Supreme Court Justice Khil Raj Regmi which was mandated to hold elections did not make any efforts for appointing commissioners. There was no functioning parliament at that time which could hold a hearing and public consultations for new Commissioners' appointment. However, there have been no efforts to appoint Commissioners despite the new parliament in place following elections. Consequently, there is no presence of members

2. Rights of a total of 126 human rights defenders were violated in 2013, among them one lost his life. Nepal Human Rights Yearbook 2014. INSEC. pp. 101-111.

3. NHRC response to the draft ANNI report 2014 prepared by INSEC at a meeting held in NHRC on 4 August 2014

4. <http://nhri.ohchr.org/EN/Contact/NHRIs/Documents/Chart%20of%20the%20Status%20of%20NHRIs%20%2823%20May%202014%29.pdf>

5. Notice published by Secretariat of Constitutional Council in Gorkhapatra Daily, 5 April 2014, p. 8

<b>Establishment of NHRI</b>	
Established by Law/Constitution/Presidential Decree	Human Rights Commission Act 1997, replaced by National Human Rights Commission Act 2012. The NHRC was upgraded to a constitutional body by the Interim Constitution of Nepal 2007
Mandate	The NHRC has a broad mandate. It is mandated to monitor prisons and implementation status of laws, investigate, conduct investigations, research, review existing state of human rights, receive and review complaints that are lodged at the commission. This mandate of the Commission also provides room for victims to lodge complaints against human rights violations that occurred even during Nepal's decade-long conflict.
<b>Selection and appointment</b>	
Is the selection process formalised in a clear, transparent and participatory process in relevant legislation, regulations or binding administrative guidelines?	There is no relevant legislation, regulation or administrative guidelines to ensure that selection process is clear, transparent and participatory. Article 131 of the Interim Constitution does not stipulate an open call for application and appointment of members into the Commission.
Is the selection process under an independent and credible body which involves open and fair consultation with NGOs and civil society?	The President appoints the Chairperson and the members of the NHRC on the recommendation of the Constitutional Council. The decision on appointment is taken by the Executive branch of the government leaving space for political influence in the selection process. There is no stipulation for consultations with NGOs and civil society or for the possibility of public nominations.
Is the assessment of applicants based on pre-determined, objective and publicly available criteria?	There is no assessment of applicants based on pre-determined, objective and publicly available criteria. The Constitutional Council recommends the name of the Commissioners to the Parliament. The recommended Commissioners have to undergo parliamentary hearing, where they can be rejected by a two-third vote.
How diverse and representative is the decision making body? Is pluralism considered in the context of gender, ethnicity or minority status?	Article 131 (2) of the Interim Constitution requires that while appointing the chairperson and members of the NHRC, diversity, including, gender diversity, must be maintained.
<b>Terms of office</b>	
Term of appointment for members of the NHRI	6Year term. Number of terms of the members has not been stipulated in any law or legislation
Next turn-over of members	2019

of the NHRC in the recommendation committee formed by the government to expedite the formation of Truth and Reconciliation Commission and Commission of Inquiry into Disappearance.<sup>6</sup> Appointing a commissioner on time could have provided a space to advocate against amnesties for those

involved in crimes under international law. The vacant positions have affected the functioning of the commission as no recommendations have been forwarded to the government for action due to the absence of commissioners. The chief commissioner or the members can be removed from their

offices on the same ground and manner as has been set forth for removal of a Judge of the Supreme Court.<sup>7</sup> According to Article 105 (1), the removal of the chief commissioner or the members should be like the removal of a Judge of the Supreme Court. The constitutional provision for removal of the

6. <http://www.inseconline.org/index.php?type=news&cid=14166&dlang=en>

7. Article 131 (4) of the Interim Constitution of Nepal 2007

Supreme Court Judge is that either the Chief Justice submits his/her resignation to the Council of Ministers or a Judge submits his/her resignation to the Chief Justice or he/she attains the age of 65 or the Legislature-Parliament passes a resolution of impeachment or if he/she dies.

Under Article 105 (2), a proposal of impeachment may be presented before the Legislature-Parliament against the Chief Justice or any other Judges on the ground that they are unable to perform their duties for the reasons of incompetence, misbehaviour, failure to discharge the duties of his/her office in good faith, physical or mental condition, and if by a two-thirds majority of the total number of its members existing for the time being passes the resolution, he/she shall *ipso facto* be relieved from his/her office. Clause (3) of same Article says that the Chief Justice or the Judge, against whom impeachment proceedings are being initiated pursuant to clause (2) above, shall not perform the duties of his/her office until the proceedings are final. Section (33) of the NHRC Act which prohibits initiation of suit or legal proceedings against Commissioners for actions and decisions that are undertaken in good faith in their official capacity provides guarantee of functional immunity to the NHRC members.

The NHRC Bill was enacted by the Constituent Assembly in the capacity of the Legislature-

Parliament pursuant to Article 83 of the Interim Constitution of Nepal, 2007 in January 2012. Section 10 (5) of the NHRC Act which prevented the victims from lodging complaints by introducing a time limit of six months and Section 17 (10) which explicitly gave the Attorney General the power not to implement certain NHRC recommendations were declared null and void by the Supreme Court on 6 March 2013.

The Paris Principles require NHRIs to have financial independence as well. The NHRC Act prescribes the approval of the Finance Ministry for budgetary matters.<sup>8</sup> Instead of the department of the executive approving the budget of the NHRC, Parliament should approve the budget following debates on budget proposals to ensure broader support for the actions of the NHRC and its scrutiny. The Human Rights Committee, while adopting the concluding observations<sup>9</sup> on the second periodic report of Nepal expressed concern at the introduction of restrictions to the independent and effective functioning of the NHRC through the adoption of the National Human Rights Act in 2012. While noting the Supreme Court decision of 6 March 2013 which declared various provisions of the Act null and void, the Committee regretted the lack of progress in bringing the Act in line with the Paris Principles.

The NHRC is authorised to recommend changes in Nepa-

lese laws to make them compatible with international human rights standards.<sup>10</sup> It may recommend the government to make new laws or make amendments to the law that are not human rights friendly and also may recommend the government to ratify international human rights laws. It can also provide advice to the government if it seeks its opinion on becoming state party to any international or regional human rights treaty.

### 3. Effectiveness

Complaints-handling remains as the primary activity of the NHRC. The Act in Section 10 requires the complaint of the violation of the human rights or abetment, verbally or in any other manner. Then the Commission may start the preliminary investigation and if the violation of the human rights or its abetment is seen; then the Commission can request the concerned agency to stop such act.<sup>11</sup> Appointment of the investigating officer or team can be done if the preliminary investigation shows there has been violation of human rights or abetment. Such team is required to submit the report to the Commission, and if necessary the Commission shall seek expert service and collect evidence and go through the public hearings.<sup>12</sup> If the complaint is seen to be baseless then the Commission may keep the complaint on hold or dismiss it and it is to be notified within fifteen days.<sup>13</sup>

8. Section 20 (2).

9. The Human Rights Committee considered the second periodic report submitted by Nepal (CCPR/C/NPL/2) at its 3050th and 3051st meetings (CCPR/C/SR.3050 and CCPR/C/SR.3051), held on 18 and 19 March 2014. At its 3061st meeting (CCPR/C/SR.3061), held on 26 March 2014, it adopted the concluding observations.

10. Section 6 of the NHRC Act, 2012. [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/1220248844National+Human+Rights+Commission+Act.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/1220248844National+Human+Rights+Commission+Act.pdf)

11. Section 11.

12. Section 12.

13. Section 13.

Complaint handling and Compensation Determination Regulation, 2069 (2013) and Complaint Handling Guidelines, 2013 were adopted by the NHRC Nepal in January 2013.<sup>14</sup> The NHRC believed that adoption of these legal documents would ease the handling of complaints registered at the Commission. These documents are available in print.

In 2013 there were total of 219 cases registered in NHRC regarding the issues of killing, murder, abduction, kidnapping, torture, mistreatment, misbehaviour, illegal imprisonment or illegal custody, threats, judicial administration issues, seizing of property, economic, social and cultural rights violations, etc. In totality, cases relating to Human Rights, women rights, senior citizen rights, child rights, ethnic discrimination, political parties, their front organisations, strikes by ethnic groups, rally and demonstrations, protest programmes were monitored 165 times by NHRC and a total of 1346 registered cases were investigated. Final verdict has been given to 504 complaints registered, in which, legal action/bearing for losses/indemnity/ departmental action or interim relief and other recommendation were given to 102 cases, policy related recom-

mendation 5, notify 376 and of termination related 21. Similarly, 307 trainings and seminar has been conducted. Altogether, 13 reports have been published relating to Human Rights directives, national report on the situation of Nepali children and condition of human trafficking in Nepal. One press conference and 45 press reports and press notes has been published and conducted.<sup>15</sup>

A total of 219 complaints were received by NHRC during the period July 2012-July 2013. 29 complaints related to extra-judicial killing, 19 of killing by Maoists, 2 of death in explosion, 12 of torture, five of disappearance, three of abduction, four of arbitrary detention, two of administration of justice, six of internal displacement, four of economic, social and cultural rights violation and one each of related to right to property, right to education, child rights and rights of persons with disabilities.<sup>16</sup>

Over the issues related to killing, explosion, disappearance, displacement, torture, detainees' rights, child rights and the rights of persons with disabilities, NHRC decided to suspend, end and keep on hold 396 complaints. Recommendation has been made on 99 complaints after investigation. The

NHRC has also received complaints from LGBTI communities and migrant workers. It provided suggestions to state party reports and supplementary reports.<sup>17</sup>

NHRC also carried out promotional activities for the development of human rights culture. Interaction, workshops and discussion programs were organised among political parties, civil society, journalists, human rights activists, teachers, students and professional organisations over the issues of human rights.

In the fiscal year 2069/70 (July 2012-July 2013), the Commission registered 219 complaints of human rights violation at various departments.<sup>18</sup> The following chart displays the status of complaints received by the NHRC and recommendations made by it:

Complaints were received in various regional and sub-regional branch offices of NHRC. Monitoring visits were conducted by the commission on the issues of death of an inmate in Sindhuli prison, Strike, Custodial death of a detainee in Tanahu and Siraha districts, inhuman treatment and killing of women on charge of practicing witchcraft, detention centre, women rights, rights of the people with disabilities, health rights etc.

Fiscal Year	Complaints Received	Total Recommendations (including backlog cases)	Interim Recommendations or other proceeding	Decisions		
				Recommendation	Hold, Finality, Dismissal	Total (including backlog cases)
2012-2013	219	99	8	91	396	487

14. NHRC, Human Rights e-newsletter, Volume 9, Issue 1, January, 2013, p. 6 available at [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/NHRC%20Newsletter%20Jan%20Issue\\_12Feb\\_2013low.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/NHRC%20Newsletter%20Jan%20Issue_12Feb_2013low.pdf)

15. Bhattarai, Bed Prasad. Nepal Human Rights Yearbook 2014. INSEC. pp. 449-450

16. Thirteen Years of NHRC Recommendations on Complaints and Status of Implementation (2000-2013), p. 2

17. Ibid., p. 3

18. Thirteen Years of NHRC Recommendations on Complaints and Status of Implementation (2000-2013), p. 3

394 investigations were made by the Commission which were mostly related to the incidents of the 10 years long conflict.<sup>19</sup>

The Office of the Special Rapporteur on Trafficking of women and children (OSRT) was established in 2002 at the Commission. It submitted its first report on 2002 and now OSRT has recently published its national report on the Trafficking in Persons especially women and children.<sup>20</sup>

The Commission has also recommended the government to ratify the Convention on the Rights of the Migrant Workers and their families (CRMW) and to enter into MoU prior to sending any further work force to migrants receiving countries. The NHRC Commissioners concluded the observation and monitoring on the rights of migrant workers during their visit to South Korea and Malaysia. During the visit-cum-monitoring, the Team NHRC-N carried out basic research on how the migrant workers are being treated in the destination countries. Following this, the NHRC-N met and discussed with the counterpart NHRIs in South Korea and Malaysia to raise issues and challenges faced by Nepalese migrant workers in their respective countries.<sup>21</sup>

The Commission in the year 2013 expressed concern over the security of media persons and human rights defenders, ob-

struction caused to the judicial proceedings into the murder of a journalist, caste-based discrimination and untouchability, consumer rights, attack on dalit community, condition of mentally challenged persons, inhuman treatment meted out to a dalit woman, etc. The Commission provided comments on the TRC-related Ordinance 2013 as per the section 6 of the NHRC Act 2012 which provides that the NHRC shall provide advice to the Nepal Government for making laws whatsoever concerning human rights. The Commission observed in its comment that there are no clear provisions that debar amnesty to the persons involved in the serious violation of human rights and crime against humanity. It noted that such transitional justice mechanism is inclined more towards blanket amnesty rather than justice delivery to the victims.<sup>22</sup>

The then Commissioner Chairperson Justice Kedar Nath Upadhyay summoned the Inspector General of Nepal Police Kuber Singh Rana to the Commission to inquire about the media report published in connection with the latter's alleged instruction to subordinate police offices to not proceed with any war-time crimes. In the meeting, Upadhyay stressed that Truth and Reconciliation Commission (TRC) cannot be an alternative for the regular criminal

justice system.<sup>23</sup>

NHRC Nepal expressed serious concerns regarding violent clashes before the election to the second Constituent Assembly. It urged to the government, political parties and all the stakeholders to create an environment that ensures the Constituent Assembly election to take place in a free and fair manner. Issuing a joint press statement NHRC and UNICEF expressed concerns over potential misuse, manipulation and engagement of school going children by political parties in pre and post-election campaigns in the country. The two entities urged all parties to take all necessary measures to avoid exposing boys and girls under the age of 18 to political activities and party sponsored protest programs like closures.<sup>24</sup> NHRC Nepal, in its preliminary report on Constituent Assembly Election Monitoring, concluded that numerous obstructions were faced by the general citizens to participate in the election in peaceful, free and fair environment. The NHRC had deployed election monitoring teams in all seventy five districts of the country.

The NHRC made public books and reports on Implementation Status of the UPR Conclusions and Recommendations, Human Rights situation of Nepalese Migrant Worker Report (Observation and Monitoring Report, South Korea and Malaysia) 2013,

19. Ibid.

20. Trafficking in Persons especially women and children, National Report 2011, Prepared by OSRT on December 2012, NHRC Nepal available at [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/National%20Report%20on%20Trafficking%20in%20Persons%20Especially%20women%20and%20Children%20in%20Nepal%20-%202012.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/National%20Report%20on%20Trafficking%20in%20Persons%20Especially%20women%20and%20Children%20in%20Nepal%20-%202012.pdf).

21. NHRC, Human Rights e-newsletter, Volume 9, Issue 9, September, 2013, p.7 available at [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/e-NewsletterVol9-Iss9N.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/e-NewsletterVol9-Iss9N.pdf)

22. NHRC, Human Rights e-newsletter, Volume 9, Issue 3, March, 2013, pp. 1-5 available at [http://www.nhrcnepal.org/nhrc\\_news\\_details-9213.html](http://www.nhrcnepal.org/nhrc_news_details-9213.html)

23. NHRC, Human Rights e-newsletter, Volume 9, Issue 2, February, 2013, p.1 available at [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/e-NewsletterVol9-Iss2.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/e-NewsletterVol9-Iss2.pdf)

24. NHRC, Human Rights e-newsletter, Volume 9, Issue 9, September, 2013, p.6 available at [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/e-NewsletterVol9-Iss9N.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/e-NewsletterVol9-Iss9N.pdf)



Human Rights Manual for School Teacher, 2013 and Human Rights Manual for Security, 2013. Upon having the comprehensive consultation among the Government bodies, NGOs, civil society and other cornered stakeholders the report on the Implementation Status of the UPR Conclusions and Recommendations was made public.<sup>25</sup>

Various programmes including interactions, trainings, orientations, day celebrations, workshops, were organised by the Commission. The programmes were conducted on issues related to CERD, regional conference of HRDs, human rights reference manual for teachers, transitional justice, implementation status of Comprehensive Peace Accord, Juvenile Justice Procedural Rules-2006, right to health of women, senior citizens, corporal punishments, gender based violence, rights of indigenous and minority communities, food security in Karnali region, human rights education in informal education, right to fair trial, rights of indigenous people. Lawyers, professors, media persons, representatives of civil society, government bodies, and security agencies, among others participated in the programmes.

The Commission adopted NHRC Complaints Handling and Compensation Determination Regulation-2013, NHRC

Complaints Handling Guidelines and Communication Management Guideline.<sup>26</sup>

The Government is the source of finance for the Commission. The Secretary of the Commission can prepare the annual budgets that are required for the functioning of the Commission<sup>27</sup> but again the approval of the budget of the NHRC is done by the Ministry. Also it requires the approval of the government if it wishes to accept grants from external agencies.

Since the approval from the Ministry of Finance is required for the travel and investigation expenses, the shortcomings in resourcing is a negative aspect of the Commission.

#### **4. Engagement with other stakeholders**

##### **A. Civil Society**

Article 132 (2) (d) of the Interim Constitution and Section 20 of the NHRC Act stresses on coordination and collaboration with civil society organisations regarding awareness raising on human rights but does not make it mandatory. The NHRC has been carrying out advocacy and promotional activities for the protection and promotion of human rights. The NHRC has also adopted collaboration guideline to work with the civil society organisations. The

CSOs and the NHRC jointly organise programmes at the central as well as local level. The Commission involves the CSOs during any kind of consultations, programmes or the trainings. For instance, a two-day workshop on the 'Effective Use of Writ Jurisdiction in the Protection of Human Rights' was organised jointly by the Judges' Society Nepal and the National Human Rights Commission from 28 April 2013.<sup>28</sup> The Commission organized a workshop on mental illness with KOSHISH Nepal, an organisation working in the field of mental health.<sup>29</sup> The NHRC conducted programmes as part of their advocacy work to review of mental health policy.<sup>30</sup> Similarly, NHRC Sub Regional Office and INSEC jointly organized "Status of Consumer Rights and Responsibilities of the Stakeholders" in Gulmi district.<sup>31</sup> NHRC held a consultation with the civil society organizations to discuss strategies and preparation for the mid-term UPR report to Human Rights Council on the status of implementation of UPR recommendations by the government.<sup>32</sup>

The Commission made preparation for setting up its offices in all 75 districts of the country. The Commission dispatched a letter including the concept paper to the Office of Prime Minister and the Council of Ministers notifying

25. NHRC, Human Rights e-newsletter, Volume 9, Issue 12, December, 2013, p.9 available at [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/e-NewsletterVol9-Iss-12a.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/e-NewsletterVol9-Iss-12a.pdf)

26. NHRC, Human Rights e-newsletter, Volume 9, Issue 1, January, 2013, p.6 available at [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/NHRC%20Newsletter%20Jan%20Issue\\_12Feb\\_2013low.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/NHRC%20Newsletter%20Jan%20Issue_12Feb_2013low.pdf)

27. Section 28 (5) (b).

28. NHRC, Human Rights e-newsletter, Volume 9, Issue 4, April, 2013, p.1 available at [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/e-NewsletterVol9-Iss4-N.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/e-NewsletterVol9-Iss4-N.pdf)

29. NHRC, Human Rights e-newsletter, Volume 9, Issue 6, June, 2013, p.5 available at [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/e-NewsletterVol9-Iss6.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/e-NewsletterVol9-Iss6.pdf)

30. Ibid., p. 3

31. Ibid., p. 26

32. NHRC, Human Rights e-newsletter, Volume 9, Issue 8, August, 2013, p.1 available at [http://www.nhrcnepal.org/nhrc\\_new/doc/newsletter/e-NewsletterVol9-Iss8.pdf](http://www.nhrcnepal.org/nhrc_new/doc/newsletter/e-NewsletterVol9-Iss8.pdf)

about its endeavour to gradually set up the contact offices in all 75 districts.<sup>33</sup> There are 5 regional offices of the commission and 3 sub-regional offices. The strategic Plan of 2011-2014 has included a plan to add three more sub-regional offices within the period. Expanding its purview will help the Commission to raise awareness of human rights among people at local level and increase public access to the Commission regarding issues of human rights violations and abuses.

Pursuant to Section 20 (3) of NHRC Act, if any foreign organization wants to conduct programmes on the protection and promotion of human rights in Nepal, such an organisation shall have to seek consent of the Commission. The 6 March 2013 verdict of the Supreme Court also rejected the plea to scrap this provision stating that this provision expands the role of NHRC instead of reducing its role. The petitioners had claimed that the Act has violated the provision of such activities being overseen by the Social Welfare Council under the government.<sup>34</sup> The human rights community has reservation on this part of the verdict.

The NHRC has been complaining about lack of implementation of its recommendations. If it decides to take the support of the civil society to exert pressure on the government and other government authorities, then the government might implement its recommendations. The Commission is also highly concerned about the rights of the Human Rights Defenders.

Though there is no formal desk on the Human Rights Defenders at NHRC; the Commission has expressed its concern over the rights and duties of the human rights defenders. The Human Rights Defenders Directive, 2069 in Section 11 provides for the role of the responsibility of the NHRC for strengthening the role of defenders and making them accountable and transparent.<sup>35</sup>

### **B. Relationship with the Executive, Legislature, Judiciary, and other specialised institutions in the Country**

The Commission can initiate itself the investigation/inquiries to instances of violation or abatement of violation of human rights of any person or group pursuant to article 132(2) (a) of the Interim Constitution of Nepal. NHRC also has the right of full cooperation of the public authorities and generally that happens in practice too. NHRC can visit any place without any prior notice where some kind of violation is occurring or has the potential of occurring.

Constitutionally and legally, NHRC has free access to detention centres and other government institution. Nepal's Army Act of 2007 has barred NHRC from intervening in the jurisdiction of Army Act. Article 132 of the Interim Constitution of Nepal also mentions that the matters falling within the jurisdiction of Army Court cannot be reviewed by the NHRC. The restrictive clause on this article, however, states "Provided that nothing shall bar the institution of, actions on any matters

of the violations of human rights or humanitarian laws". The NHRC carried out an investigation into the death of one Maina Sunar following torture at the army barracks in Kavre even during the conflict.<sup>36</sup>

Pursuant to Article 133 (1) of the Constitution, the Commission is required to submit its Annual Report to the President and the President through the Prime Minister shall submit the report to the Legislature-Parliament. Article 132 (2) confers the right to the Commission to forward its recommendation to the concerned authority to take departmental action against who is responsible for human rights violation, and if necessary, it can make recommendation to lodge a petition in the court, and exercise the same power as the court<sup>37</sup> to appear before the commission for recording their statement and information or examining them, receiving and examining the evidence, ordering for the production of physical proof. It may also order compensation for victims of human rights violations.

On 6 March 2013, the Supreme Court declared Sections 17(10) (non-implementation) and 10(5) (six month time limit) of the National Human Rights Commission Act, 2012 null and void. The judgment means the Attorney General now must follow NHRC recommendations as per Section 17(5) of the Act, if the NHRC recommends legal action against alleged human rights violators. The legislation has not yet been amended to reflect this ruling, and particularly given the government's history of non-compliance

33. Ibid., p. 26

34. <http://www.ekantipur.com/the-kathmandu-post/2012/04/01/top-story/writ-in-sc-challenging-provisions-in-nhrc-act/233317.html>

35. Directive no. 11, Human Rights Defender Directive, 2012

36. Ibid, p. 3

37. Article 133(3) of the Interim Constitution of Nepal 2007.

with NHRC recommendations this should be done as a priority.<sup>38</sup>

## 5. Conclusion and Recommendations

Lack of the financial and administrative autonomy has affected the functional independence of the commission. Adequate funding and autonomous management of the financing is utmost requirement for the Commission. The non-implementation of the recommendations made by the concerned agencies is another biggest challenge of the Commission in ensuring rule of law and fighting against the culture of impunity. Strong cooperation and collaboration with rights based organisations to pressure the government in implementation of the recommendations is necessary. Delay in the appointment of NHRC commissioners hampered the formation of TRC, which subsequently affected transitional justice process in Nepal. The TRC act requires a member designated by the NHRC Chairperson/commissioners. With the appointment of the commissioners, it can be hoped that this team would be able to contribute better than the previous one. The newly-appointed Chairperson has made some promises on implementation of its recommendations, a big concern so far for the human rights community.

### To the Government of Nepal

1. Remove any limitations to the jurisdiction of the NHRC Nepal and ensure that it is able to investigate all allegations of violations by all branches of the State and all types of actors, including armed forces on all sides of the conflict. Clarify the ambiguous provisions on jurisdiction in relation to the Army.
2. The NHRC Nepal should be provided with adequate resources, financial, material and human, as well as with the necessary autonomy to propose and manage their own budgets and recruit their own staff, including the position of Secretary. Ensure that such procedures are clearly stated and secured in the regulatory framework.
3. Ensure the effective participation of the NHRC Nepal in the truth and reconciliation process and ensure that any mechanism for transitional justice must conform to international standards.
4. Ensure that the NHRC Nepal has clear powers to refer cases for prosecution directly to the AG's office either through an amendment to the NHRC Act or through a policy directive.
5. Amend law in accordance to the Supreme Court verdict of 6 March 2013 relating to the functional independence and

statute of limitations of complaint.

6. Fully implement recommendations of NHRC with seriousness.

### To the National Human Rights Commission of Nepal

1. Advise the new government and legislators on draft and existing legislation and submit recommendations to the Parliament to resolve human rights violations.
2. Monitor government compliance with human rights treaty obligations, including the International Covenant on Civil and Political Rights and ensure that recommendations from the Human Rights Committee and all other treaty bodies are implemented.
3. Analyse all existing and proposed legislation, in particular the TRC Act, and make recommendations regarding consistency with international human rights norms.
4. Involve and ensure meaningful civil society participation in the drafting process of the new Constitution to be in line with international human rights treaties that Nepal has ratified or is party to.
5. File litigation if government shows complete neglect to NHRC in cases pertaining to policy and principles.

38. [http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/NPL/INT\\_CCPR\\_CSS\\_NPL\\_16464\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/NPL/INT_CCPR_CSS_NPL_16464_E.pdf)



## *Right to Food in Nepal: A Study*

Right to food has been considered as a part of human rights; however, it has not been received much importance as civil and political rights for long time. If we observe we can see that the food right has not been given proper consideration globally.

The economic, social and cultural rights are fundamental to day-to-day operation of human life and are interdependent on each other. Taking this into consideration the United Nations General Assembly adopted International Covenant on Economic, Social and Cultural Rights on December 16, 1966 and opened it for signature, ratification and accession. It has already been 23 years since Nepal became a State party to this convention on May 14, 1966; however, there has been no proper implementation of these rights yet. The crucial provision of this convention - right to food and food sovereignty - has been included as a major provision in the Interim Constitution of Nepal, 2007 but lack of legal provision has resulted in its non-implementation. INSEC has published a book "Right to Food in Nepal: A study (*Nepalma Khadhya Adhikar: Ek Adhhyayan*)" in Nepali focusing on this issue.

"Right to Food in Nepal: A study" is a research based book. The book has been divided into ten

chapters under different titles.

The first chapter begins with an introduction providing definitions given by various intellectuals about right to food right followed by provisions related to food sovereignty as stated in the Universal Declaration of Human Rights 1948, Article 18 (3) of the Interim Constitution of Nepal 2007, International Covenant on Economic, Social and Cultural Rights 1966. The chapter concludes that if the responsible agencies and officials adhere to the national and international law, constitution, court verdicts and legal principles and adopt necessary procedures, the International Covenant on Economic, Social and Cultural Rights would be effectively implemented. The second chapter on justice delivery regarding right to food stresses that this right is an essential rights under economic, social and cultural rights along with the other provisions in the Universal Declaration of Human Rights. The chapter also provides information on how the food sovereignty has freed the food, agriculture, animal husbandry and fish farming from external intervention and made this rights inherent to the people. It also informs about making headways regarding using one's rights by taking into consideration food, nutrition, business,

*The economic, social and cultural rights are fundamental to day-to-day operation of human life and are interdependent on each other. Taking this into consideration the United Nations General Assembly adopted International Covenant on Economic, Social and Cultural Rights on December 16, 1966 and opened it for signature, ratification and accession.*

food subsidy, consumer protection policies in context of rural development. Furthermore, the chapter points out that food sovereignty is the right of the people to achieve the goal of obtaining sustainable development through household agriculture production and protection of the business. Chapter three analyses international documents related to food while chapter four provides a study on the prevalence of right to food and its dimensions.

The fifth chapter focuses on Right to Food and the Duty of the State. This chapter stresses that the State's duty and responsibility is not only to protect the life and property of its people, but also to adopt all possible measures not to create a situation of food crisis so that people can enjoy their right to food.

The sixth and seventh chapter presents comprehensive analysis of the situation of right to food in Nepal.

Chapter eight, under the title Jurisprudence related to Right to Food, provides description of different judicial practices on right to food in some of the countries like Switzerland, India and South Africa. The chapter notes right to food as right to a dignified life.

The ninth chapter, under the title "Food Rights in the context of Nepal and the State's Responsibility" observes the provision of food sovereignty as a fundamental right in the article 18(3) and article 36 of Interim Constitution of Nepal 2007 as a positive step. Similarly, it also mentions the article 35(10) of the Interim Constitution which proclaims that it will be the State's policy to provide food security to the socially and economically backward people.

Chapter ten includes the conclusion and recommendations

with several sub-headings regarding food sovereignty. The recommendations includes implementing of international laws related to human rights, building strong constitutional system, taking initiatives by Legislature Parliament, active participation of political parties, free and easy access to justice, development and expanding research, ensuring right to food in times of emergency, special care in food security of woman and children, among others.

The researcher's effort in verifying his statements through various examples including legal

provisions and court verdicts is commendable. The book gives a clear picture on Right to food. It includes legal provisions and orders along with various examples. Anyone going through this book will get a clear view regarding the basic concept of right to food, steps taken by the State regarding right to food, and national and international provisions related to right to food. Additionally, it gives plenty of information on the activities carried out by various institutions working for right to food.

*Reviewed by Hisila Maharjan*

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